

CONSTITUTIONALISM AND THE OTHER: MULTICULTURALISM AND INDIGENEITY IN SELECTED LATIN AMERICAN COUNTRIES

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RESUMEN

El artículo analiza la evolución del reconocimiento de indigenismo y multiculturalismo en Constituciones de Latinoamérica, con el objetivo de aportar elementos que puedan informar la elaboración de constituciones en el futuro. La proposición más importante del artículo es que el reconocimiento del indigenismo en la elaboración de constituciones pasó de un momento de asimilación, por el reconocimiento de indigenismo hasta su posicionamiento como parte central de la composición política de muchos países. Este tipo de reconocimiento lleva en consideración la lucha de pueblos indígenas e los mueve de la periferia del constitucionalismo hasta convertirlos en parte integral del orden jurídico. Este tipo de reconocimiento puede igualmente servir a la elaboración de constituciones en otros contextos multiculturales, y promover un orden jurídico más unido, menos opresor.

Palabras clave: indigenismo; multiculturalismo; pueblos indígenas; Latinoamérica.

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ABSTRACT

The article inquires into the evolution of the recognition of indigeneity and multiculturalism in Latin American Constitutions, with the aim of providing elements to inform future constitutional design. The article's main claim is that the recognition of indigeneity in constitutional design has moved away from assimilation through the recognition of indigeneity to its placement as a central part of the polity of many countries. This type of recognition takes into account the struggles of indigenous peoples and moves them from the periphery of constitutionalism to an integral part of the legal order. This type of recognition can equally serve constitutional design in other multicultural contexts, and promote a more cohesive, less oppressive legal order.

Key words: indigeneity; multiculturalism; indigenous peoples; Latin America.

1. INTRODUCTION

«Cultural diversity» and «multiculturalism» have become two of the most appealing mottos of contemporary constitutionalism. As States increasingly realize that respect for cultural diversity does not run counter to national unity, and if anything actually reinforces it¹, strategies have been developed in modern constitutions to protect and safeguard cultural distinctiveness, opening way for the legal recognition of the multicultural character of modern national societies.

The recognition of multiculturalism at the Constitutional level can take many forms, which will vary according to each country's ethnic composition and political organization². Civil society inevitably plays a large role in bringing the debate to popular fora, as it is commonly the case that countries which do not recognize multiculturalism are dominated by one particular cultural group, and thus blind to the needs of recognizing «otherness»³, or, in a more Machiavelli-like version, simply unwilling to share power with other groups who are likely to alter the comfortable status quo in which these elites find themselves.

¹ See UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), *Human Development Report 2004 – Cultural Liberty in Today's Diverse World* 3-4 [hereinafter «UNDP, HUMAN DEVELOPMENT REPORT (2004)»].

² For a survey of European constitutional practice regarding minority protection, see Julie RINGELHEIM, «Minority Protection and Constitutional Recognition of Difference: Reflections on the Diversity of European Approaches», in *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* 33 (A. Verstichel, A. Alen. B. De Witte and P. Lemmens eds.) (2008).

³ I borrow this expression, and its uses towards indigenous peoples, from Paul KEAL, *European Conquest and the Rights of Indigenous Peoples – The Moral Backwardness of International Society* (Cambridge UP, 2003).

Latin America presents an ideal scenario for studying constitutional change with regard to multiculturalism. Home to a large percentage of the world's indigenous peoples, and overwhelmingly ruled by cultural, economic and political elites of European descent, many countries in the continent have been faced with new social movements created to defend indigenous interests that have been neglected for many centuries by colonial powers and subsequent political elites, in the name of sheer ignorance, of maintenance of power, or of nation-building (which was seen as requiring a uniform, unified people at its foundation).

One of the reasons for the late development of the multicultural question in Latin-American Constitutionalism is the fact that most of the countries in the continent experienced military dictatorships between the 1960s and the 1980s (with the notable exception of Costa Rica, which had abolished its military in 1948 after a civil war, and was thus not «victimized» by military governments). These military regimes, as a rule, advanced the idea of equalitarian societies, in which political divergence was to be quashed. As the advancement of indigenous causes involves political divergence, despite being in fact rooted in cultural differences, these movements have been largely ignored. The advancement of indigenous rights, therefore, was stalled in the continent for three decades, remaining stationary, or, at least in the Guatemalan case, taking a step back. The Guatemalan Constitution of 1945 recognized the multicultural composition of the Guatemalan society, and took steps towards granting autonomy to indigenous peoples. This constitution was revoked after the military *coup d'état*, however, in favor of one promoting a uniform society⁴.

This paper aims at discussing the constitutional recognition of indigenous peoples and multiculturalism in general in Latin America, and it will attempt to offer a typology that may generally serve constitutional design. More specifically, I will look at the different constitutional strategies adopted by several countries around the continent, and use them to attempt at formulating some elements of a general framework of multicultural constitutional design. This analysis will start from the notion that the recognition of indigenous rights in Latin America challenges the very model of nation-States implemented in the continent after the end of colonialism and that has been perpetuated for several centuries after that⁵.

⁴ See José Emilio ROLANDO ORDÓÑEZ CIFUENTES, *Las Demandas Constitucionales en Guatemala y México* [«The Constitutional Demands in Guatemala and Mexico»], in *Constitución y Derechos Indígenas* [«Constitution and Indigenous Rights»] 93, 93-94 (Jorge Alberto González Galván ed.) (Universidad Nacional Autónoma de México 2002).

⁵ See Bartolomé CLAVERO, *Los Derechos de los Pueblos Indígenas* [«The Rights of Indigenous Peoples»] (manuscript on file with the author).

The next section will discuss generally the «legal indicators» of multiculturalism (from an international and constitutional legal perspective) and the different stages of recognition of indigenous peoples in the continent, in the broader context of the reform of Latin American Constitutionalism. The following sections will pay more attention to the most important constitutional strategies regarding indigeneity (assimilationism and granting of autonomy). I will then lay down some concluding remarks on the subject.

2. LATIN AMERICAN CONSTITUTIONALISM AND THE DIFFERENT STAGES OF RECOGNITION

Constitutionalism in Latin America has been heavily influenced by the legal systems of the colonizer countries, Spain and Portugal, at least to the extent that the Constitution is still the apex of the legal system, and the legal systems of the then former colonies have to a large extent continued the legal systems of the colonizers. At the same time, though, the movements of independence represented an ideological break with the colonizing countries, as it is a normal step that the colonizers are repudiated as a means to affirm independence and justify the founding of a new, separate State. This break means that new influences have to be sought outside of the colonizers. In Latin America, this influence, at the Constitutional level, came from the United States of America, which had proclaimed independence and established its own State not long before its southern neighbors. There is also a great influence from the ideals of French Enlightenment and the French Revolution, which have also inspired U.S. Constitutionalism⁶.

There are five main trends of modern Latin American Constitutionalism: a propensity to the creation of constitutional tribunals designed after European models; the protection of new generations of rights; an increasing acceptance of international law; the creation of new procedural figures and institutions to protect fundamental rights (such as the «amparo» in Spanish-speaking countries, or the writ of security —«*mandado de segurança*»— in Brazil); and the strengthening of the role of the judiciary⁷.

⁶ See for instance Jose M.^a SERNA DE LA GARZA, *Constitutional Federalism in Latin America*, 30 CAL. W. INT'L L.J. 277 (2000); Robert S. BARKER, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. Pitt. L. Rev. 891, 896-901 (1988); and Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 Tex. Int'l L.J. 1 (2006). Miguel Schor argues for the need that Constitutions be «entrenched» in society in order to be effective. In that sense, the inclusion of indigeneity in Latin American Constitutions brings about precisely this necessary «entrenchment».

⁷ See Donna LEE VAN COTT, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* 15-16 (University of Pittsburgh Press 2000).

These trends, particularly the second through fourth, are important for the protection of multiculturalism, either of indigenous or minority source.

Much of the literature on multiculturalism distinguishes between minorities and indigenous peoples as topics of constitutional discourse and legal protection generally⁸. It is beyond the scope of this paper to re-discuss these differences, but it is important to highlight the core of the argument for differentiation, as well as arguments that may favor approximation of the two areas.

The argument about differentiation is primarily sustained by the fact that indigenous groups generally oppose the label of «minorities» for themselves, claiming in favor of this differentiation that, while minorities can be both indigenous to a certain territory or have come to a territory after the establishment of the State, indigenous peoples are necessarily pre-existing, and share a past of domination by European conquest⁹. While this concept is applicable to most indigenous peoples, it is a quite restrictive one, and the reason why China, for instance, has opposed recognizing the existence of indigenous peoples in its territory. If China was never subject to European conquest and rule (with the notable exceptions of Macau and Hong Kong), the populations within its territory that are culturally distinct from the mainstream groups cannot be considered indigenous peoples, and any protection afforded to indigenous peoples does not extend to these groups¹⁰.

Such a narrow understanding of indigenous peoples has been superseded by a more encompassing notion, with the aim of including Asian countries in the international debates on indigenous rights, and therefore in favor of indigenous groups. And this broadening should also be used to expand the applicable regime to indigenous peoples and minorities, as both regimes can benefit from one another to the extent that «minorities» and «indigenous peoples» are comparable categories.

There are naturally differences to be taken into account, and these are not necessarily connected to the «European domination» element. Rather, one can look for a distinction between indigenous peoples and minorities in the extent to which indigenous peoples interact with the dominant so-

⁸ See for instance Will KYMLICKA, *Multicultural Odysseys* 65-66 (2007).

⁹ See Paul KEAL, *European Conquest and the Rights of Indigenous Peoples – The Moral Backwardness of International Society* (Cambridge UP, 2003).

¹⁰ See Paul KEAL, *European Conquest and the Rights of Indigenous Peoples – The Moral Backwardness of International Society* 8 (Cambridge UP, 2003). China and other Asian countries have consistently abstained from voting on indigenous issues at the United Nations level because of this argument. For a full overview of such positions, see UN Doc. E/CN.4/1996/84; UN Doc. E/CN.4/1997/102; UN Doc. E/CN.4/1998/106; UN Doc. E/CN.4/1999/82; UN Doc. E/CN.4/2000/84; UN Doc. E/CN.4/2001/85; UN Doc. E/CN.4/2002/98; UN Doc. E/CN.4/2003/92; and UN Doc. E/CN.4/2004/81.

cial and political group, so as to say. In this sense, isolated communities, refusing contact with the world outside it, are a distinctive type of group that cannot be seen within minorities. To this extent, a differentiation is possible. Further, indigenous groups usually have claims to territory and the recognition of customary law which are seldom seen among the claims advanced by other types of minorities.

But besides being different, there is much more that is shared between the two areas than that pulls them apart. Most obviously, «indigenous peoples» and «minorities» are both terms that refer to ethnically / culturally distinct groups within a given society, and deserving of (special) legal protection. Despite opposition by indigenous groups at the conceptual level, the fact is that legal practice can benefit and has benefitted from approximation of the two categories. Indigenous peoples themselves reap benefits from being considered minorities in certain legal circles, particularly international human rights law. For instance, Article 27 of the International Covenant on Civil and Political Rights speaks only of the rights of «individuals belonging to minorities»¹¹, but this provision has been successfully invoked to also protect the rights of indigenous individuals in many countries¹².

Aside from this benefit at the international level¹³, to approximate these two categories offers the advantage of widening the scope of experi-

¹¹ *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force: 23 March 1976. Number of States parties as of January 2009: 164. «Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.»

¹² There are for instance several cases of the United Nations Human Rights Committee, decided under the Optional Protocol to the Covenant, giving the Committee the competence to hear individual complaints. See Human Rights Committee, Communication No. 942/2000, *Jarle Jonassen v. Norway*, UN Doc. CCPR/C/76/D/942/2000, 12 November 2002; Human Rights Committee, Communication No. 557/1993, *X v. Australia*, UN Doc. CCPR/C/57/D/557/1993, 1 August 1996; Human Rights Committee, Communication No. 431/1990, *O. Sara et al. v. Finland*, UN Doc. CCPR/C/50/D/431/1990, 24 March 1994; Human Rights Committee, Communication No. 359/1989, *R.L. et al. v. Canada*, UN Doc. CCPR/C/43/D/358/1989, 28 November 1990; Human Rights Committee, Communication No. 879/1999, *George Howard v. Canada*, UN Doc. CCPR/C/84/D/879/1999, 4 August 2005; Human Rights Committee, Communication No. 1023/2001, *Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee v. Finland*, UN Doc. CCPR/C/83/D/1023/2001, 15 April 2005; Human Rights Committee, Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, UN Doc. CCPR/C/58/D/671/1995, 22 November 1996; Human Rights Committee, Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, UN Doc. CCPR/C/52/D/511/1992, 8 November 1994; Human Rights Committee, Communication No. 197/1985, *Ivan Kitok v. Sweden*, UN Doc. CCPR/C/33/D/197/1985, 10 August 1988; Human Rights Committee, Communication No. 167/1984, *Lubicon Lake Band v. Canada*, UN Doc. CCPR/C/38/D/167/1984, 10 May 1990; and Human Rights Committee, Communication No. 24/1977, *Sandra Lovelace v. Canada*, UN Doc. CCPR/C/13/D/24/1977, 30 July 1981.

ences one can draw inspiration from when discussing legal and constitutional strategies for protecting their rights, and conversely increases the chances for existing experiences to inform debates on multicultural constitutional design.

Will Kymlicka discusses the foundations of what he characterizes as «liberal multiculturalism», and argues that, while there are common demands by indigenous groups and other minorities (referred to as «substate / national minorities»), there are also differences in the types of claims advanced. The common principles are the repudiation of the notion of the State being in possession of a single national group; the repudiation of assimilationist policies for the sake of nation-building policies; and the acknowledgment of historic injustice¹⁴. However, when comparing the policies adopted in response to these two different «varieties» of multiculturalism, as he presents them, there are some differences, most notably connected with land rights and customary law (for indigenous peoples) or recognition of international personality in some instances (for instance, to sit on international bodies) towards minorities¹⁵.

On the comparison between minority claims and indigenous claims in international law, see also Benedict KINGSBURY, «Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law», 34 *NYU Journal of International Law and Politics* 189 (1999).

¹³ These benefits cannot be fully transplanted from the international to the constitutional legal discourse, however. While the international (human rights) legal discourse is still primarily focused on the protection of «individuals belonging to» a minority / indigenous people, constitutions have long recognized the group status of indigenous peoples, and have therefore moved a step further in the recognition of indigenous rights as group rights.

¹⁴ Will KYMLICKA, *Multicultural Odysseys* 65-66 (2007).

¹⁵ *Id.*, at 67-71. More specifically, the policies Kymlicka mentions for indigenous peoples are the following: (a) recognition of land rights or title; (b) recognition of rights to self-government; (c) the upholding of historic treaties and / or the signing of new treaties; (d) the recognition of cultural rights, involving language and traditional economic practices such as hunting and fishing; (e) recognition of customary law; (f) guarantees of representation or consultation in the central government; (g) constitutional or legislative affirmation of the distinctive status of indigenous peoples; (h) support for or ratification of international instruments on indigenous rights; and (i) affirmative action programs for the members of indigenous communities. Kymlicka affirms that States that have adopted six or more of these policies can be considered to have «decisively shifted towards a multicultural approach», while States that have adopted three to five of these policies have made modest but significant shifts, and States adopting less than three of these policies have barely shifted in the direction of multiculturalism. When it comes to substate minorities, the following factors are considered: (a) federal or quasi-federal territorial autonomy; (b) official language status, either in the region or nationally; (c) guarantees of representation in the central government or on constitutional courts; (d) public funding of minority language schools / universities / media; (e) constitutional or parliamentary affirmation of «multinationalism»; and (f) the according of international personality for certain purposes, including for instance the right to sit on international bodies, or sign treaties, or have a separate Olympic Team. Even though the distinction between minorities

The land rights dimension of indigenous claims, generally absent from minority claims, deserves some extra attention. Disputes over land rights often offer two very distinctive interests on each side of the dispute: while indigenous peoples are more often than not concerned with the preservation of their identity, which is closely tied to rights over the land they ancestrally inhabit, those who challenge indigenous claims have in mind natural resources within indigenous territory. Therefore, it may be argued that indigeneity may still deserve a special / separate characterization on these grounds, as land rights disputes bring into play many interests that go beyond the recognition of multiculturalism (the exploitation of natural resources, property claims, development issues, and sustainability and environmental law generally as overarching concerns). While this peculiarity is very important, I still suggest that the approximation of these two categories is beneficial, as long as the (few) distinctions and the interests related to them, such as this one, are taken into account. Claims over natural resources have not prevented that indigenous cases be internationally treated as minority rights issues in the past¹⁶, and there is no compelling reason why this should be different in the future.

There are not, therefore, sufficient factors for not considering minority protection law when discussing the legal protection and recognition afforded to indigenous peoples, and vice-versa. This is especially true in the context of Latin American Constitutionalism, where minority regimes are almost non-existent, and all efforts towards the constitutional recognition of multiculturalism seem to focus on indigenous peoples. The contribution of Latin American Constitutionalism to multiculturalism has been documented precisely through the constitutional strategies aimed at protecting indigenous peoples¹⁷. Even in those countries where there are large minori-

and indigenous peoples seems intuitive, when one looks at the factors taken into consideration by Kymlicka when deciding whether a shift towards multiculturalism has taken place with regard to indigenous peoples or minorities, the distinction seems to blur in many aspects. For instance, the recognition of language rights, the affirmation of multiculturalism, the rights to self-government are common to both sets of groups. As we will see in the recent examples of Bolivia and Ecuador, official language status has also become an indigenous claim, and this can be argued to further approach the two categories. Further, the recognition of customary law may well fit into the concept of granting of federal or quasi-federal autonomy, as federalism implies the recognition of the capacity for instituting a relatively separate and autonomous legal order from that of the State, which is not unlike what recognizing customary indigenous law amounts to. Perhaps the core difference regarding this last feature is that the recognition of federal status applies territorially, whereas customary law applies according to personal status (that is, belonging to an indigenous group).

¹⁶ See *supra* note 12.

¹⁷ See for instance Donna LEE VAN COTT, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (University of Pittsburgh Press 2000) [reviewed by Kirsten Matou Carlson, «Notice: Premature Predictions of Multiculturalism?», 100 *Mich. L. Rev.* 1470 (2002)].

ties, these are legally treated as indigenous peoples. Examples of this are the communities of African origin in Colombia (*afrocolombianos*), Ecuador (*afroecuatorianos*), Brazil (*quilombolas*) and Honduras (*garifunas*), to name a few¹⁸. They are usually recognized as indigenous peoples, and legally treated as such in all aspects, including their land claims. They are not «formally» indigenous (to use the formal concept of indigenous peoples discussed above), as they were not the original inhabitants of the land, but they share a past of European domination, as the European colonizers were the ones forcibly who brought them to the continent.

Therefore, this paper will discuss indigenous peoples as if they were synonymous to minorities. This will be done with the aim of including communities of African origin (a step already undertaken by national constitutions and legislation)¹⁹, and also to extend the reach of this paper's analysis. After determining the groups and individuals to which this analysis refers, it is important to look at the different strategies for legal recognition and protection.

Several factors have to be weighed when considering the reasons why different levels of recognition are granted in different countries. Naturally, one of the core factors is the force and organization of indigenous grass-roots movements, and political momentum for reform (directly connected to the power of indigenous movements). But one must also take into account the representativeness of indigenous peoples in the population at large. Data published by the United Nations Development Program in 2004 indicates that the several Latin American countries have very different ethnic compositions regarding the percentage of the population that is indig-

¹⁸ Regarding afro-Colombian and *quilombola* communities, the work undertaken by the Bernard and Audre Rapoport Center for Human Rights and Justice at the University of Texas School of Law is noteworthy. The reports produced by field missions undertaken by the Center in both countries are available at <http://www.utexas.edu/law/academics/centers/humanrights/publications/> (last accessed January 13, 2009).

¹⁹ A remarkable example of this is the new Bolivian Constitution of January 2009. Its Article 32 states that: «Article 32. The Afro-Bolivian people enjoys, in all that it corresponds, the economic, social, political and cultural Rights recognized in the Constitution to the indigenous and original Peasant nations and peoples.» For a more detailed analysis of the new Bolivian Constitution and what it represents in terms of constitutional recognition of multiculturalism, see below notes 68-78 and accompanying text. The 2008 Ecuadorian Constitution is also remarkable: «Article 58. In order to strengthen their identity, culture, traditions and rights, the collective rights of the afro-Ecuadorian people are recognized as established in the Constitution, the law and the pacts, covenants, declarations and other international human rights instruments.» In the specific Brazilian context, it can be argued that the equivalence in treatment is not total, as *quilombola* communities are not deemed to be completely dissociated from the rest of society, and its individual members are not subject to the system of tutelage of the federal government. Nevertheless, in many instances land claims are treated roughly in the same way, applying rules on indigenous demarcation of lands to *quilombola* communities by analogy.

enous²⁰. These range from the majority of the population in countries such as Bolivia (71 %) and Guatemala (66 %) to minimal percentages in countries such as Brazil (0.4 %) and Uruguay (0.4 %)²¹. Even though the cases below will show that there is no necessary correlation between the percentage of indigenous population and the degree of development of constitutional multiculturalism, this is a factor to be taken into account, and it may play a role at the extremes of the curve.

There are several different degrees of recognition given to indigenous peoples in Latin American Constitutions. Some constitutions, like Uruguay's, make no mention whatsoever to indigenous peoples. Other Constitutions attempt to promote assimilationist policies (fortunately, the number of such Constitutions is decreasing in the continent). Others (the majority) promote forms of protection of cultural distinctiveness, either by exclusion and isolation of indigenous communities from «mainstream society», and others by incorporating them into the mainstream society and granting them special political participation rights, or differing degrees of legal autonomy and self-governance. I will analyze some types of constitutional protection in the following sections.

3. ASSIMILATIONISM

Assimilationist policies have been promoted in all of Latin America during the period of colonial domination by Spain or Portugal. Assimilationism has continued to be the predominant strategy in several countries during the early stages of their independent constitutionalism. This has been facilitated by the omission of the early rulers of newly-independent Latin-American States. A crude version of this argument is simply that the

²⁰ UNDP *Human Development Report* (2004), at 92 (Table 5.1). The countries listed, and the percentage of indigenous population, are the following: Bolivia (71 %), Guatemala (66 %), Peru (47 %), Ecuador (38 %), Honduras (15 %), Mexico (14 %), Panama (10 %), Chile (8 %), El Salvador (7 %), Nicaragua (5 %), Colombia (1.8 %), Paraguay (1.5 %), Argentina (1 %) Venezuela (0.9 %), Costa Rica (0.8 %), Brazil (0.4 %) and Uruguay (0.4 %).

²¹ This suggests a reason why there is no reference to indigenous peoples in the Uruguayan Constitution – if they are not a representative segment of society, not only in terms of capacity to become organized social movements, but also simply in absolute terms, then there is little reason why the Constitution should make reference to people who simply do not exist in a country. One might argue that the percentage is the same in Brazil and Uruguay and that, if Brazil constitutionally protects indigenous peoples, so should Uruguay. However, one must take into account not only the percentage, but also the absolute numbers. 0.4% of the Brazilian population amounts to over a million people, whereas the same percentage of the Uruguayan population amounts to only a few thousand. Nevertheless, my intent is not to offer a justification for Uruguay to not protect minorities in its territory, just to offer some reasons why such protection does not exist at the Constitutional level.

elites that succeeded the Spanish and Portuguese authorities in Latin American countries did little to alter the status quo, as more often than not they were already the privileged social segments during colonial times. Bluntly put, these elites simply did not care about multiculturalism, and were blind to the existence of elements of cultural diversity. This explains the initial inexistence of constitutional recognition of cultural diversity.

In addition to the passive lack of interest in promoting ways of life other than those of the dominating elite, there was also the active concern with achieving cultural homogeneity and unity, seen as necessary to form a unified polity, which would support and justify the effort of nation-building. This has led to the promotion of several assimilationist policies, which were backed by solemn constitutional statements about the «unity and indivisibility», as well as the «equality» of the people of the nation, promoting an «ethnically blind» constitutional structure²².

Assimilationism has received international legal recognition and support after the end of colonialism also by ILO Convention No. 107 «concerning the protection and integration» of indigenous «populations»²³, which openly supported the notion that indigenous and tribal «populations», as the Convention referred to them, were inevitably destined to disappear during the process of modernization of societies. This gruesome instrument was subsequently replaced by a more multiculturalism-oriented instrument, ILO Convention No. 169²⁴. Nevertheless, ILO Convention No. 169 has been

²² «Equality», incidentally, is the reason behind France's constitutional approach to cultural diversity, which essentially denies it. If the Republic is founded upon the tenets of liberty, equality and fraternity, «equality» necessarily implies that no one deserves special treatment, and that all are equal before the law. As French Enlightenment has had great influence on the revolutionary thinking that led to the movements of independence in several Latin American countries, and consequently also on early Latin American Constitutionalism, it is understandable why so many Constitutions refused to recognize the existence of indigenous peoples as a «separate class» of citizens. This formal philosophical construction of equality is the reason why France has a reservation to the ICCPR excluding the application of Article 27 (on minority protection) from its territory and even the territory of French possessions overseas (including several Pacific islands upon which indigenous peoples clearly reside). For more on the French approach to multiculturalism, see Cécile LABORDE, «The Culture(s) of the Republic: Nationalism and Multiculturalism in French Republican Thought», 29 *Political Theory* 716 (2001).

²³ INTERNATIONAL LABOR ORGANIZATION, *Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, Adopted on 26 June 1957 by the General Conference of the International Labour Organisation at its fortieth session. Entry into force: 2 June 1959. Number of parties as of January 2009: 18.

²⁴ INTERNATIONAL LABOR ORGANIZATION, *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. Entry into force: 5 September 1991. Number of parties as of January 2009: 20.

ratified by a relatively low number of States²⁵ and many States are still parties to ILO Convention No. 107 (not having ratified ILO Convention No. 169 or otherwise simply denounced ILO Convention No. 107)²⁶.

ILO Convention No. 107 proclaimed in its preamble that it «Consider[ed] it desirable [...] for humanitarian reasons [...] to promote continued action to improve the living and working conditions of these populations by simultaneous action in respect of all the factors which have hitherto prevented them from sharing fully in the progress of the national community [...]». This paternalistic model assumed that the cultural distinctiveness of indigenous populations was what prevented them from development, or at least from doing so within a certain conception of development. Article 2 of the Convention established the assimilationist practices to which States had to commit themselves²⁷, and it marks the distinctiveness of assimilationism as a policy towards indigenous peoples: more than simply ignoring their existence, assimilationism requires positive efforts from the State aimed at obliterating cultural distinctiveness and promoting a certain way of life that is connected to a certain view of development.

This was the model present in most Latin American countries until the end of the military governments in the region. The Constitutions of these

²⁵ One of the reasons for the relatively low number of ratifications is the instrument's relative «progressiveness» towards granting indigenous rights.

²⁶ According to the ILO, ILO Convention No. 107 is still in force for 18 States, including several with large indigenous populations: Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic and Tunisia. Only nine States have denounced the Convention, all Latin American States: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Paraguay and Peru. These nine countries are all parties to ILO No. 169, alongside Chile, Denmark, Dominica, Fiji, Guatemala, Honduras, Nepal, Netherlands, Norway, Spain and Venezuela.

²⁷ The full text of this provision is as follows: «Article 2. 1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries. 2. Such action shall include measures for (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population; (b) promoting the social, economic and cultural development of these populations and raising their standard of living; (c) creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations. 3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative. 4. Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.» The only provision that makes express reference to cultural and religious traditions is the following: «Article 4. In applying the provisions of this Convention relating to the integration of the populations concerned [...] (b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised; [...]» (emphasis added).

States often simply did not mention indigenous peoples, and this was more often than not coupled with active assimilationist policies.

Mexico has been one of the last countries to move away from assimilationism. There, assimilationism is attributable to the fact that indigenous individuals in Mexico have always been considered an integral part of the Mexican nation, within the tenet of equality before the law²⁸. In the effort to pursue nation-building, therefore, indigenous protection was simply wiped out, representing in fact a step back in Mexico and in most other Latin American countries who, in an effort to justify independent nationhood on the one hand and prevent excessive territorial fragmentation on the other, have pursued the idea of single national identity, which required an absolute and formalistic understanding of equality as a constitutional value.

The relevant reforms happened in the late 1990s, largely triggered by the Zapatista movement²⁹, and came alongside a long process of constitutional reforms in Mexico aimed at, among other objectives, promote indigenous rights and prepare the Mexican legal system for the NAFTA³⁰. One of the latest legal reforms pertaining indigenous rights in Mexico happened in 2001, and included provisions aimed at granting a certain degree of autonomy to indigenous peoples, moving Mexico to the category of «protection via recognition», to be explored below with regard to other national experiences³¹. And in 2003, Mexico adopted at the infra-constitu-

²⁸ See Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int'l L.* 299, 329 (1998); and Francisco LÓPEZ BÁRCENAS, «Territorios, Tierras y Recursos Naturales de los Pueblos Indígenas en México» [*Indigenous Peoples' Territories, Lands and Resources in Mexico*], in *Constitución y Derechos Indígenas* [*Constitution and Indigenous Rights*] 121 (Jorge Alberto González Galván ed.) (Universidad Nacional Autónoma de México 2002).

²⁹ On the Zapatista movement's contribution to constitutional reform and indigenous recognition in Mexico, see Gilberto LÓPEZ Y RIVAS, «Las Autonomías Indígenas» [*Indigenous Autonomies*], in *Constitución y Derechos Indígenas* [*Constitution and Indigenous Rights*] 113 (Jorge Alberto González Galván ed.) (Universidad Nacional Autónoma de México 2002). On the evolution of constitutional recognition of indigeneity in Mexico generally, see Diego VALADÉS, «Los Derechos de los Indígenas y la Renovación Constitucional en México» [*Indigenous Rights and Constitutional Renewal in Mexico*], in *Constitución y Derechos Indígenas* [*Constitution and Indigenous Rights*] 13 (Jorge Alberto González Galván ed.) (Universidad Nacional Autónoma de México 2002).

³⁰ See Jorge A. VARGAS, «Mexico's Legal Revolution: An Appraisal of Its Recent Constitutional Changes, 1988-1995», 25 *Ga. J. Int'l & Comp. L.* 497 (1996).

³¹ On this reform, see José Luis CUEVAS GAYOSSO, *La autonomía de los derechos de los pueblos indígenas en la constitución mexicana (reforma 2001). Análisis y propuestas para su ejercicio formal y real* [*The autonomy of the rights of indigenous peoples in the Mexican Constitution (2001 reform). Analysis and proposals for formal and actual effectiveness*], paper presented at the XIV Congreso Latinoamericano de Derecho Romano [*XIV Latin American Congress of Roman Law*], Universidade de Buenos Aires, 15 – 17 November 2004 (on file with the author).

tional level a General Law on Linguistic Rights of Indigenous Peoples, alongside a number corresponding state-level laws.

Fortunately, the assimilationist model is no longer adopted by Latin American Constitutions, and all those that refer to indigenous peoples and indigeneity grant (or attempt to grant) some form of protection, either through actively recognizing the autonomy of indigenous peoples, or by excluding indigenous peoples from the rest of society. This latter experience, while not constituting a category of its own, deserves some separate analysis, to which I turn next.

A) Protection Via Exclusion

In this type of constitutional scheme, there is no recognition of autonomy or delegation of any type of sovereignty to indigenous peoples. Rather, what is promoted is some sort of «tutelage by the State» over indigenous populations. This is a very paternalistic model, and may in some instances lead to similar results as assimilationist policies. To the extent that rights are a «reward for cultural sameness»³², there seems to be an incentive for indigenous individuals, if they are looking for more rights and generally a better legal status towards society at large, to be assimilated into that society.

This model is different from assimilationist since measures to integrate indigenous peoples into society and to impose certain values upon indigenous individuals are forbidden, or at least not actively pursued (which is the opposite of what happens in assimilationism). Much to the contrary, measures are actually taken to keep indigenous peoples away from the rest of society. In the cases where this contact happens, and happens to an extent that an indigenous person becomes assimilated, this person can legally receive a greater range of rights.

This is the type of policy adopted in Brazil. The Brazilian case presents some cultural / historical peculiarities, which may be common to some other Latin American countries, but certainly not many of them. When Portuguese colonizers came to Brazil and had their first encounters with indigenous peoples, they brought along several transmittable diseases for which indigenous peoples had no immunity whatsoever, thus causing hundreds of thousands (and even millions, depending on the source) of deaths. This is common to all encounters between indigenous populations

³² I am borrowing this term from Colin SAMSON, «Rights as the reward for simulated cultural sameness: the Innu in the Canadian colonial context», in *Human Rights and Culture: Anthropological Perspectives* 226 (Jane K. Cowan, Marie-Bénédicte Dembour and Richard Wilson eds.) (Cambridge UP, 2001).

and European colonizers. What is peculiar to the Brazilian case is the form through which colonization was initially pursued. Whereas in Spanish America the Spanish colonizers avoided miscegenation to a great extent, preferring to maintain themselves and their offspring 100% European, in Brazil miscegenation was encouraged as an official policy, not only as a means of settling colonizers, but also as a means of lowering the resistance of indigenous groups towards European influence. Polygamy was permissible in many of these tribes, and Portuguese colonizers took many wives, often from multiple tribes of origin, and had many children. It was very easy for them to take new wives, as they were seen as very honorable people by the indigenous tribes. However, their children could no longer be considered indigenous, and were rejected by the tribes of origin of their mothers, as they were half-European. Conversely, they were also not considered European. As a result, a huge class of non-indigenous persons was formed in Brazil, further diminishing the possibilities of perpetuation of indigenous groups.

This intermediary class is considered to be the very foundation of Brazilian society, but it is by no means indigenous, nor European. In any event, this integration had two separate effects: on the one hand, it diminished the indigenous population on absolute terms, through the spread of disease. On the other, it created a huge segment of semi-indigenous population, which then laid down the foundations for assimilationism. Also, the rejection of this initial strategy of colonization by indigenous groups has pushed them further and further into the forest. They became increasingly isolated and, as those with indigenous blood who remained in society were not considered indigenous by the tribes they descended from, nor considered themselves indigenous, this created a situation in which indigenous peoples are not perceived as capable of being integrated in society (since those integrated are not really Indians). From this reasoning, it is only natural that indigenous protection is granted having in mind isolated indigenous groups, and aiming at perpetuating their status of isolation³³.

The Brazilian Constitution mentions the recognition of indigenous social organization, customs, languages, beliefs and traditions³⁴. Prior Consti-

³³ This analysis of indigenous peoples during the formation of Brazilian society can be found in Darcy RIBEIRO, *O povo brasileiro* [«The Brazilian People»] (1995).

³⁴ The relevant provisions are the following: «Article 231. The social organization, customs, languages, beliefs and traditions of Indians are acknowledged, as well as the original titles over the lands they traditionally occupy, being the role of the Union to delimitate them, and to protect and make all their property respected. Paragraph 1. The lands traditionally occupied by Indians are those inhabited permanently, those used for economic activities, indispensable to the preservation of environmental resources necessary to the wellbeing and those necessary to their physical and cultural reproduction, according to their uses, customs and traditions. Paragraph 2. The lands traditionally occupied by Indians are destined to their per-

tutions only recognized land rights³⁵, but the 1988 Constitution recognizes the protection of indigenous identity as a whole. However, unlike the majority of other Latin American countries, where the constitutional provisions are self-standing and in many ways «self-executing», in the Brazilian case there is a pervasive infra-constitutional legislation related to indigenous rights, which in practice is implemented without regard to the Constitutional provisions. The Indian Rights Act («*Estatuto do Índio*») determines that indigenous individuals fall within the category of «incapable» persons («*incapazes*»), basically attributing them the same legal autonomy as that of a minor under 16 years of age, and considering them incapable of freely expressing their will³⁶, reflecting societal perceptions and prejudices regarding indigenous peoples³⁷. This status can change, and indig-

manent possession, being the Indians entitled to the exclusive use of the wealth from the land, the rivers and the lakes existing therein. Paragraph 3. The enjoyment of water resources, including energetic ones, the research and extraction of mineral resources within indigenous lands can only be undertaken when authorized by the National Congress, after the affected communities are heard, and the participation in the benefits of the extraction is secured in favor of these communities, in terms established by law. Paragraph 4. The lands referred to in this article cannot be sold or disposed of, and the rights upon them are not subject to a statute of limitations. Paragraph 5. The removal of indigenous groups from their lands is forbidden, unless so decided by the National Congress, in case of a catastrophe or epidemics that endangers the population, or for the protection of national sovereignty, after deliberation by the National Congress, being secured, in any case, the immediate return after the cessation of the risk. Paragraph 6. All acts that deal with the occupation, domain and possession of lands referred to in this article, or the exploitation of natural resources of the land, rivers and lakes existing therein are null and void, except for hypotheses of public interest of the Union, according to what is provided for in complementary legislation, not generating nullity and the extinction of the right to compensation or actions against the Union, except for those relating to improvements deriving from good faith occupation, according to law. [...]

Article 232. Indians, indigenous communities and organizations are legitimate parties to initiate lawsuits to defend their rights and interests, the Public Attorney [«*Ministério Público*»] being required to intervene in all phases of the procedure.»

³⁵ For a survey of these provisions, see Sérgio LEITÃO, «Os Direitos Constitucionais dos Povos Indígenas» [«Constitutional Rights of Indigenous Peoples»], in *Constitución y Derechos Indígenas* [«Constitution and Indigenous Rights»] 89, 89 (Jorge Alberto González Galván ed.) (Universidad Nacional Autónoma de México 2002).

³⁶ The Brazilian Civil Code of 1916 also expressly included indigenous individuals in this category, and it is most likely in order to reflect this piece of legislation that the Indian Act also considers them as legally incapable. The new Civil Code of 2002 refrains from making any such categorization of indigenous individuals, simply stating, in Article 5, single paragraph, that special legislation shall address the issue of legal capacity of indigenous persons. Article 5 refers to those considered only «relatively incapable», and it is thus somewhat telling of a movement towards greater emancipation of indigenous persons within Brazilian Law. One is only to hope that the full recognition of indigenous legal capacity will happen soon.

³⁷ See Lisa VALENTA, «Disconnect: The 1988 Brazilian Constitution, Customary International Law, and Indigenous Land Rights in Northern Brazil», 38 *Tex. Int'l L.J.* 643, 647 (2003).

enous persons can be given full legal capacity, as long as they demonstrate that they have successfully integrated into the national community³⁸.

Indigenous rights and interests in Brazil are managed by the National Indian Foundation («*Fundação Nacional do Índio*» – FUNAI), an organ established by the federal government³⁹ and that represents indigenous in-

³⁸ *Brazilian Indian Rights Act* [«Estatuto do Índio»], Statute 6.001, of 19 December 1973. The relevant provisions are the following: «Article 7. Indians and indigenous communities not yet integrated to the national communion are subject to the tutelage regime established in this Act. Paragraph 1. To the possible extent, the principles and rules of the ordinary law of tutelage are applicable to the tutelage regime established in this Act, independently, however, from the exercise of tutelage in what regards immovable property in legal mortgages, as well as [credit guarantees]. Paragraph 2. This tutelage is the duty of the Union, which will exercise it through the competent federal organ of assistance to savages.

Article 8. The acts practiced among Indians not yet integrated and any person foreign to the indigenous community are null, when there has been no assistance from the competent tutelage body. Single Paragraph. The rule in this article is not applicable in case the Indian reveals awareness and knowledge of the practiced act, as long as the action is not harmful to the Indian [...].

Article 9. Any Indian can request the competent judge to be freed from the tutelage system provided for in this Act, becoming totally capable to exercise legal acts, as long as the following requirements are met: I – minimum age of 21 years; II – knowledge of the Portuguese language; III – habilitation to the exercise of useful activity within the national communion; IV – reasonable understanding of the uses and customs of the national communion. Single Paragraph. The judge will decide after summary proceedings, and after the body of Indian tutelage and the Public Attorney have been heard, and the conceding judgment will be transcribed into the civil registry.

Article 10. Once the requirements of the preceding Article are met, and through a written request by the interested party, the assistance body will be able to grant the Indian, through a formal declaration, the condition of integrated, no longer subsisting any restriction to capacity, as long as, after being legally homologated, the act is inscribed in the civil registry.

Article 11. Through a decree of the President of the Republic, the emancipation of an indigenous community and its members can be declared, as to the tutelage regime established by law; as long as requested by the majority of the members of the group and certified, in investigation undertaken by the competent federal body, the community's full integration into the national communion. Single Paragraph. For the effects of this article, the fulfillment of the requirements listed in Article 9 will be required by the requesting parties.»

See also Siegfried WIESSNER, «Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis», 12 *Harv. Hum. Rts. J.* 57, 75 (1999).

³⁹ Statute 5.371, of 5 December 1967, authorizing the institution of the «National Indian Foundation». The relevant provision is the following: «Article 1. The Federal Government is hereby authorized to create a foundation, with its own patrimony and legal personality in private law, according to civil law, called 'National Indian Foundation', with the following goals: I – to establish the directives and guarantee the fulfillment of the indigenous policy, based upon the following principles: a) respect to the indigenous person and the tribal institutions and communities; b) guarantee to the permanent possession over lands they inhabit and the exclusive use rights over all the natural resources therein; c) the preservation of biological and cultural balance of the Indian, in its contact with national society; d) safeguard of the spontaneous assimilation of the Indian, so that its social-economic evolution is processed safe from abrupt

terests before the government, the judiciary and Brazilian society as a whole. This foundation has been heavily criticized for being composed primarily of bureaucrats and giving few opportunities for indigenous participation, and even of pursuing assimilationist objectives⁴⁰.

The discrepancy between the level of protection suggested at the constitutional level and the implementing legislation is perhaps the reason why the Brazilian case is in this uncomfortable intermediary position: while the Constitution promotes a model of recognition, the infra-constitutional legislation, which still guides bureaucrats responsible for designing and implementing governmental policies to this day, is aimed at a model of assimilation. New legislation on indigenous rights, moving away from this model and fully embracing recognition, has been proposed in August 2009 by the Ministry of Justice and is now under consideration by the Legislative chambers⁴¹.

Further, this discrepancy may be explained by looking at the origins of the Constitutional provision. The momentum for the recognition of indigenous identity during the constitution-drafting process was built not by civil society or an organized indigenous movement (to this day rather inexpressive in Brazil), but rather by international pressure coming from a condemnation of Brazil by the Inter-American Commission of Human Rights in the early 1980s in a case concerning the Yanomami indigenous group⁴². This case shed light on the lack of adequate protection to indigenous peoples in Brazil and, because the Constitution of 1988 was meant to represent a full break with the dictatorial past during which the acts were perpetrated against the Yanomami, the provision was drafted and included. However, as there was no civil society movement to follow-up

changes; II – to manage Indigenous Patrimony, so as to conserve, increase and enhance it; III – promote scientific assessments, analyses, studies and research about the Indian and the indigenous social groups; [...] V – to promote the appropriate basic education of the Indian aimed at his/her progressive integration in national society; VI – to raise, by the publicity instruments, the collective interest towards the indigenous cause; VII – to exercise political power in reserved areas and in matters concerning indigenous protection. Single Paragraph. The Foundation will exercise the powers of representation or legal assistance inherent to the Indian's tutelage regime, in the form established by ordinary civil legislation or special legislation.»

⁴⁰ See Siegfried WIESSNER, «Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis», 12 *Harv. Hum. Rts. J.* 57, 75 (1999).

⁴¹ See MINISTRY OF JUSTICE, NATIONAL COMMISSION OF INDIGENOUS POLICY, *Indigenous Peoples Statute – Proposal of the National Commission of Indigenous Policy*, available at <http://www.funai.gov.br/ultimas/noticias/2_semestre_2009/agosto/imagens/Estatuto.pdf> (last accessed December 2, 2009).

⁴² IACHR, Case 7.615, March 5, 1985, available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (last accessed February 3, 2009). For a commentary to this case, see Gail GOODWIN GOMEZ, «Indigenous Rights and the Case of the Yanomami Indians in Brazil», in *The Human Rights of Indigenous Peoples* 185 (Cynthia Price Cohen ed.) (1998).

on the implementation, the Indian Rights Act, enacted under a previous Constitution, was never amended to reflect the changes aspired to by the new Constitution. Implementation fell upon the hands of a bureaucracy that had already been established under the old Act, and this bureaucracy did not seem very interested in expanding protection to reflect constitutional changes. The lack of bottom-up pressure, then, at the very least helps —if it does not completely— explain the failure of the Brazilian Constitution in achieving more than protection via exclusion⁴³.

This model resembles in many ways the colonial idea of establishment of «an official policy of benevolent guardianship»⁴⁴ towards indigenous peoples, which has been adopted once the colonizers realized that indigenous peoples could not «live alone as free subjects of the King», and needed to be looked after and kept within certain boundaries⁴⁵. It then reinstates the Nation-State, rather than challenge it, being a less than ideal model of promoting multiculturalism. As a matter of fact, multiculturalism is not promoted, or at least not a model of multiculturalism in which the culturally distinct segments of a polity interact with one another. While it is the choice of certain communities to remain isolated from mainstream society, in this model the choice is not open to communities, but rather made for them by a paternalistic State.

The legal capacity of indigenous individuals (or lack thereof, to be more precise) is then the determining factor of this model, distinguishing it from others. Some aspects of exclusion, such as territorial exclusion, are also part of this model, but are not exclusive to it, at least in principle. The delimitation of indigenous reservations is a quintessential feature of the protection regimes, and common to both.

This model helps perpetuate a state of affairs reminiscent of the colonial model, under which the way of life of autochthonous communities is preserved at the cost of depriving these communities from any benefits enjoyed by the rest of society⁴⁶. According to the relevant legislation, indigenous individuals are given two alternatives: either they integrate into Brazil's mainstream society, or they remain in isolation⁴⁷. The Law is not

⁴³ Discussing the importance of civil society in the advancement of indigenous claims in Chile and the United States, see Kevin J. WORTHEN, «The Role of Indigenous Groups in Constitutional Democracies: A Lesson from Chile and the United States», in *The Human Rights of Indigenous Peoples* 235 (Cynthia Price Cohen ed.) (1998).

⁴⁴ I borrow this expression from Guillermo Floris MARGADANT, «Official Mexican Attitudes toward the Indians: An Historical Essay», 54 *Tul. L. Rev.* 964, 968 (1980).

⁴⁵ For an explanation of this model, see Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int'l L.* 299, 301 (1998).

⁴⁶ See Angel R. OQUENDO, «Indigeneity and the State: Comparative Critiques: Indigenous Self-Determination in Latin America», 17 *Fla. J. Int'l L.* 625, 626 (2005).

⁴⁷ *Brazilian Indian Rights Act* [«Estatuto do Índio»], Statute 6.001, of 19 December 1973, Articles 2 and 4. «Article 2. It is the duty of the Union, the States and the Municipalities, as

prepared to accommodate indigenous peoples who wish to remain indigenous and still interact with the rest of society. This model is therefore insufficient. Regardless of the efforts by the Brazilian government in mitigating this exclusion, this is what happens in practice. It is necessary to find alternatives through which communities have their rights to both equality and difference respected⁴⁸. This is the goal of countries which have implemented the model I call «protection via recognition».

4. PROTECTION VIA RECOGNITION

The protection via recognition is the model increasingly adopted by new Latin American Constitutions. This model draws on the contemporary constructions of the principle of self-determination as applied to indigenous peoples, in the sense of granting recognition attached to some degree of self-governance⁴⁹. It creates what has been called «systems of de-

well as the organs of the respective indirect administrations, within the limits of their competences, in order to protect indigenous communities and preserve their rights: I – to extend to Indians the benefits of common legislation, whenever its application is possible; II – to give assistance to Indians and indigenous communities still not integrated into the national communion; III – to respect, by giving the Indians means for their development, the peculiarities inherent to their condition; IV – to secure to Indians the possibility of freely choosing their ways of life and subsistence; V – to guarantee to Indians the voluntary permanence in their habitat, giving them the resources for their development and progress; VI – to respect, in the process of integration of the Indian to the national communion, the cohesion of indigenous communities, their cultural values, traditions, uses and customs; VII – to execute whenever possible with the collaboration of Indians, the programs and projects aimed at benefiting indigenous communities; VIII – to use the cooperation of initiative and the personal qualities of the Indian, having in mind the improvement of their life conditions and their integration into the development process; IX – to guarantee to Indians and indigenous communities, in the terms of the Constitution, the permanent possession of the lands they inhabit, recognizing the right to the exclusive usufruct of the natural wealth and all the utilities existing in those lands; X – to guarantee to Indians the full exercise of civil and political rights guaranteed to them by legislation.

Article 4. Indians are considered: I – Isolated – When they live in unknown groups or of which there are few and vague reports through random contacts with elements of the national communion; II – In the way towards integration – When, in intermittent or permanent contact with foreign groups, they conserve a larger or smaller part of their native life conditions, but accept some practices and ways of existence common to the other sectors of the national communion, of which they depend more and more for their own subsistence; III – Integrated – When incorporated into the national communion and recognized in the full exercise of their civil rights, even if they keep uses, customs and traditions characteristic of their culture.»

⁴⁸ See Angel R. OQUENDO, «Indigeneity and the State: Comparative Critiques: Indigenous Self-Determination in Latin America», 17 *Fla. J. Int'l L.* 625, 626 (2005).

⁴⁹ For an analysis of the right to self-determination as applied to minorities and indigenous peoples, see Patrick MACKLEM, «The Wrong Vocabulary of Right: Minority Rights and the Boundaries of Political Community», *University of Toronto Legal Studies Series Research Paper* No.

viated citizenship», as it confers a special status to indigenous peoples different from what conferred to individuals generally⁵⁰.

This recognition can happen in two different ways, which do not necessarily exclude each other. On the one side, there can be «exclusionary recognition», in the sense of granting exceptions to the application of the general legal system to indigenous peoples, usually via the recognition of customary law or even the possibility of creating alternative, parallel systems for the administration of justice within indigenous communities. Better said, «exclusionary recognition» consists of recognizing the faculty of indigenous peoples to form (and sometimes even enforce) their own legal systems⁵¹.

Besides this more «conventional» form of exclusionary recognition, other strategies can be labeled as such, including the delegation of governmental authority to existing indigenous entities, through the creation of (semi-)autonomous territorial units for indigenous peoples. This strategy is not found in Latin America, however, but rather in the United States and Canada, so I will abstain from exploring it⁵².

The other possibility is «inclusionary recognition», or the granting of special incentives or rights to enhance indigenous participation in public decision-and law-making, either by quotas in legislative bodies, city councils and other equivalent bodies, or simply by re-drawing the boundaries of electoral districts so as to give indigenous peoples the opportunity to elect their own representatives even for head executive offices⁵³. This gradually empowers indigenous peoples and gives more voice to indigenous concerns. A particularly successful example of this is Bolivia, where gradual electoral reforms have paved the way for greater indigenous partici-

XX-05 (December 2005); and Patrick MACKLEM, «Militant Democracy, Legal Pluralism and the Paradox of Self-Determination», *University of Toronto Legal Studies Research Paper* No. 05-03.

⁵⁰ Donna LEE VAN COTT, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* 10 (University of Pittsburgh Press 2000).

⁵¹ See Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int’l L.* 299, 324-327 (1998); and Bartolomé CLAVERO, «Derechos Indígenas y Constituciones Latinoamericanas» [«Indigenous Rights and Latin-American Constitutions»], in *Pueblos Indígenas y Derechos Humanos* [«Indigenous peoples and human rights»] 313, 329-334 (2006).

⁵² For a rather thorough exploration of this perspective, see Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int’l L.* 299, 315-317 (1998).

⁵³ See Raquel YRIGOYEN FAJARDO, «Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas y el constitucionalismo andino» [«Paths of the recognition of legal pluralismo and indigenous law in the Andean indigenous policies and constitutionalism»], in *Pueblos Indígenas y Derechos Humanos* [«Indigenous peoples and human rights»] 537, 557 (2006); and Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int’l L.* 299, 319-324 (1998).

pation in political life, culminating with the election of Evo Morales, the first indigenous President in the country's history.

This strategy of re-drawing of electoral boundaries so as to create units in which indigenous peoples constitute the majority of voters has been undertaken in Nicaragua⁵⁴. This creates a rather interesting type of governance, as it does not limit the political action to indigenous peoples, but rather creates means through which indigenous elected officials will also rule over non-indigenous peoples, thus forcing the dialogue between indigenous and non-indigenous segments of society. It is, however, of possibly limited utility as a model for other countries, as it is being implemented in a zone traditionally already isolated from the rest of the country, geographically and culturally⁵⁵.

Despite its obvious advantages, inclusionary recognition is not necessarily always the best strategy for the protection of indigenous rights, at least if one takes into account the instances in which indigenous peoples prefer to remain isolated and apart from mainstream society, as a means to preserve their distinctive cultural identity and way of life⁵⁶. At least to the extent it is not imposed upon indigenous peoples, and they are given the choice about whether or not to take part in the life of the larger polity, these concerns may be dismissed.

Another possibility, closely related to the abstract concept of federalism, is the idea of creating national subunits for indigenous peoples, granting these units legal autonomy⁵⁷. This is a blend of inclusionary and exclu-

⁵⁴ The relevant provisions are the following: «Article 8. The people of Nicaragua is multi-ethnic and an integral part of the Central-American nation.

Article 90. The Communities of the Atlantic Coast have the right to the free expression and preservation of their languages, art and culture. The development of their culture and values enriches the national culture. The State shall create special programs for the exercise of these rights.

Article 180. The Communities of the Atlantic Coast have the right to live and develop according to the forms of social organization that correspond to their historical and cultural traditions. The State shall guarantee to these communities the enjoyment of their natural resources, the effectiveness of their forms of communal property and the free election of their authorities and representatives.»

⁵⁵ See Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int'l L.* 299, 319-324 (1998).

⁵⁶ See Kirsten MATOU CARLSON, «Notice: Premature Predictions of Multiculturalism?», 100 *Mich. L. Rev.* 1470, 1482 (2002).

⁵⁷ See Bartolomé CLAVERO, «Derechos Indígenas y Constituciones Latinoamericanas» [«Indigenous Rights and Latin-American Constitutions»], in *Pueblos Indígenas y Derechos Humanos* [«Indigenous peoples and human rights»] 313, 329-334 (2006); and Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int'l L.* 299, 317-319 (1998). The 2008 Ecuadorian Constitution is noteworthy in this respect: «Article 60. The ancestral, indigenous, afro-Ecuadorian and Montubio peoples may constitute

sionary recognition, because it creates a separate region for indigenous peoples to exercise self-government according to their customs and traditions, but at the same time creates a sort of «external accountability», in the sense that this subunit will necessarily have relations with the central government and the other governmental subunits within the country.

In this type of recognition, these subunits have to take the form designated by the government before they are entitled to exercise any type of powers delegated to them. This model is adopted in Chile, where the 1993 Indian Law allows great flexibility in the structure adopted by these units, having the right to freely choose their forms of leadership and governance⁵⁸.

Colombia has also implemented a recognition constitutional model, and, like in Bolivia and Ecuador, there is an important rhetorical and philosophical clash in the language used by the Constitution, which simultaneously speaks of the «unity of the nation» and its «multi-ethnic composition»⁵⁹. This creates a tension between the aims of cultural unity and cultural diversity⁶⁰. According to the Colombian Constitutional Assembly (which drafted the 1991 Constitution), indigenous rights form a «bloc of constitutionality», meaning that they form an integral and vital part of the constitutional system of Colombia⁶¹.

This tension between cultural unity and diversity has also been addressed by the Colombian Constitutional Court in a series of cases. These judgments have not always favored multicultural solutions, and went from a lack of recognition of the group character of indigenous rights through centralism in the rejection of indigenous territorial claims to a rather radical recognition of collective autonomy, oscillating between paternalistic grants of autonomy to just affirmations of territorial autonomy⁶². The Co-

territorial circumscriptions for the preservation of their culture. The law shall regulate their conformation. To the communities are recognized their collective land ownership as an ancestral form of territorial organization.»

⁵⁸ See Kevin J. WORTHEN, «The Grand Experiment: Evaluating Indian Law in the “New World”», 5 *Tulsa J. Comp. & Int'l L.* 299, 318 (1998).

⁵⁹ In the 2008 Ecuadorian Constitution: «Article 56. The indigenous communities, peoples and nationalities, the Afro-Ecuadorian peoples, the Montubio people and the communities are part of the Ecuadorian State, single and indivisible.»

⁶⁰ See Daniel BONILLA, «Indigeneity and the State: Comparative Perspectives: The Principle of Political Unity and Cultural Minorities' Self-Government», 17 *Fla. J. Int'l L.* 525, 525 (2005).

⁶¹ See Frank SEMPÉR, «Los derechos de los pueblos indígenas de Colombia en la jurisprudencia de la Corte Constitucional» [«The rights of Colombia's indigenous peoples in the jurisprudence of the Constitutional Court»], *Anuario de Derecho Constitucional Latinoamericano 2006* [«2006 Yearbook of Latin American Constitutional Law»] 761, 763.

⁶² For a thorough examination of these precedents, see Daniel BONILLA, «Indigeneity and the State: Comparative Perspectives: The Principle of Political Unity and Cultural Minorities' Self-Government», 17 *Fla. J. Int'l L.* 525, 536-579 (2005).

lombian Constitution also recognizes indigenous systems for the administration of justice, and enforces its decisions, but it retains the powers to review these decisions for compatibility with fundamental rights⁶³.

Bolivia's model, already mentioned above in connection with the election of Evo Morales, is a very successful example of protection through inclusionary (political) recognition in Latin America. Article 171 of the previous Bolivian Constitution already recognized the identity, values, customs and institutions of indigenous peoples⁶⁴. Identity gained a wide meaning, being looked at as a holistic concept allowing a collective entity to identify itself as such, and its members as belonging to it⁶⁵.

Constitutional reforms in Mexico have also introduced a model aimed at recognition. Albeit timid, these Constitutional provisions, with the support of a well-organized indigenous movement, have the potential to positively affect Mexican legal practice, as they recognize for the first time the multi-cultural composition of Mexican society, and the legal personality of indigenous communities as rights bearers separate from their individual members⁶⁶. Infra-constitutional legislation on linguistic rights and

⁶³ See Frank SEMPER, «Los derechos de los pueblos indígenas de Colombia en la jurisprudencia de la Corte Constitucional» [*The rights of Colombia's indigenous peoples in the jurisprudence of the Constitutional Court*], *Anuario de Derecho Constitucional Latinoamericano* 2006 [*2006 Yearbook of Latin American Constitutional Law*] 761, 777; and Esther SÁNCHEZ BOTERO, «Los Derechos Indígenas en las Constituciones de Colombia y Ecuador» [*Indigenous Rights in the Constitutions of Colombia and Ecuador*], in *Constitución y Derechos Indígenas* [*Constitution and Indigenous Rights*] 68, 81-84 (Jorge Alberto González Galván ed.) (Universidad Nacional Autónoma de México 2002).

⁶⁴ A translation from the text reads: «Article 171. The social, economic and cultural rights of indigenous peoples inhabiting the national territory are recognized, respected and protected within the law, especially those relative to communities' original communal lands, guaranteeing the sustainable use and enjoyment of natural resources, the communities' identity, values, languages, customs and institutions. II. The State recognizes the legal personality of indigenous and peasant communities and the peasant associations and unions. III. The natural authorities of indigenous and peasant communities may exercise administrative functions and apply their own norms as alternative dispute resolution, according to their customs and procedures, as long as they are not contrary to this Constitution or law. The law shall make these functions compatible with the attributions of the Powers of the State.»

⁶⁵ See Javier Ernesto MUÑOZ PEREYRA, *Los Derechos Indígenas y los Derechos de Propiedad Intelectual: Bolivia* [*Indigenous Rights and Intellectual Property Rights: Bolivia*], paper presented at the UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva, October 30 – November 1, 2000. See also José Antonio RIBERA S., «Los pueblos indígenas y las comunidades campesinas en el sistema constitucional boliviano. Pasado, presente y perspectivas al futuro» [*Indigenous peoples and peasant communities in the Bolivian constitutional system. Past, present and future perspectives*], *Anuario de Derecho Constitucional Latinoamericano* 2005 [*2005 Yearbook of Latin American Constitutional Law*] 195.

⁶⁶ The relevant provisions are the following: «Article 4. The Mexican nation has a pluricultural composition supported originally by its indigenous peoples. The law shall protect and

state-level statutes have also played a role in giving actual effect to these constitutional mandates.

Ecuador also applies a recognition model, and its 2008 Constitution presents very interesting features. Generally, Ecuador's recognition model focuses more on an exclusionary strategy, by giving great importance to the autonomy of traditional indigenous legal systems for the administration of justice. Through a constitutional reform in 1998, Ecuador for the first time granted constitutional status to indigenous peoples as rights-bearers⁶⁷. In the Ecuadorian system prior to the new 2008 Constitution, the recognition of legal pluralism requires the recognition of: the status of indigenous peoples as rights-bearers; the authorities of indigenous peoples; the existence of indigenous rules and procedures to solve internal conflicts and elect their own authorities; and the faculty to decide any disputes arising within each indigenous community and enforce such decisions according to the community's own rules and procedures⁶⁸.

promote the development of their languages, cultures, uses, customs, resources and specific forms of social organization, and shall guarantee to their members the effective access to the jurisdiction of the State. In agricultural proceedings to which indigenous persons are parties, their legal practices and customs shall be taken into account as provided by law.

Article 27. [...] VII. The legal personality of the nuclei of communal populations is recognized, and their property over land is protected, both for human settlement and productive activities. The law shall protect the integrity of the lands of indigenous peoples. [...].

⁶⁷ The relevant provision of the previous Ecuadorian Constitution is the following: «Article 191. The exercise of judicial power shall be the duty of the bodies of the Judiciary. Jurisdictional unity shall be established. According to law there shall be peace judges, charged with the resolution in equity of individual, community or neighbor disputes. Arbitration, mediation and other alternative dispute resolution mechanisms shall be recognized, according to law. The authorities of indigenous peoples shall exercise judicial functions, applying norms and procedures appropriate to the resolution of internal disputes according to their customs or customary law, as long as they are not contrary to the Constitution and the laws. A separate act shall bring these attributions and those of the national judicial system into compatibility.» The equivalent provision in the 2008 Ecuadorian Constitution is the following: «Article 171. The authorities of the indigenous communities, peoples and nationalities shall exercise jurisdictional functions, based upon their ancestral traditions and their own law, within their territories, guaranteeing the participation and decision of women. The authorities shall apply norms and procedures specific to the settlement of their internal disputes, and that are not contrary to the Constitution and the human rights recognized in international instruments. The State shall guarantee that the decisions of the indigenous jurisdiction are respected by public authorities and institutions. Such decisions will be subject to a constitutionality check. The law shall establish the mechanisms of coordination and cooperation between the indigenous and ordinary jurisdictions.»

⁶⁸ See Raúl LLASAG FERNÁNDEZ, «Jurisdicción y competencia en el derecho indígena o consuetudinario» [«Jurisdiction and competence in indigenous or customary law»], *Anuario de Derecho Constitucional Latinoamericano* 2006 [«2006 Yearbook of Latin American Constitutional Law»] 749, 752. See also Agustín GRIJALVA, «The Status of Traditional Indian Justice in Ecuador», 2 *Tribal L.J.* 1 (2001-2002); and Esther SANCHEZ BOTERO, «Los Derechos Indígenas en las Constituciones de Colombia y Ecuador [«Indigenous Rights in the Constitutions

The new 2008 Constitution recognizes the diverse composition of the Ecuadorian State, and it goes on to affirm a series of collective rights to indigenous peoples, as well as the affirmation of several indigenous values as quintessential constitutional values⁶⁹.

A) From Receiving to Re-claiming Empowerment: The new Bolivian Constitution

But it is the new Bolivian Constitution, approved by a national referendum in January 2009, that represents the most revolutionary advance in the protection of indigenous rights in the Americas. Article 1 of the new Bolivian Constitution starts by proclaiming Bolivia a «Unitary Communitarian Social Plurinational State under the Rule of Law», and also affirming the «political, economic, legal, cultural and linguistic pluralism within the country's integrational process» as the very foundations of the Bolivian State⁷⁰. These provisions reflect the tension between unity and pluralism in many Latin American Constitutions that recognize indigenous rights.

But the new Bolivian Constitution goes a step further, by proclaiming several indigenous languages as official languages of the country alongside Spanish⁷¹, and also by proclaiming, among State values, essentially

of Colombia and Ecuador)], in *Constitución y Derechos Indígenas* [«*Constitution and Indigenous Rights*»] 68 (Jorge Alberto González Galván ed.) (Universidad Nacional Autónoma de México 2002).

⁶⁹ The relevant provision is the following: «Article 83. The following are duties and responsibilities of all Ecuadorians, without prejudice to other duties and responsibilities required by the Constitution and laws: [...] 2. *Ama killa, ama llulla, ama shwa. Do not be lazy, do not lie, do not steal.* [...] 10. To promote the unity and equality in Diversity and intercultural relations. [...] 14. To respect and recognize ethnic, national, social, generational, gender, sexual identity and orientation differences. [...]» (emphasis added)

⁷⁰ The full text of the provision is the following: «Article 1. Bolivia constitutes itself as a Unitary Communitarian Social Plurinational State under the Rule of Law, free, independent, sovereign, democratic, intercultural, decentralized and with autonomies. Bolivia is founded upon plurality and political, economic, legal, cultural and linguistic pluralism, within the country's integrational process.»

⁷¹ The relevant provision is: «Article 5. I. The official languages of the State are Spanish [*castellano*] and all the languages of the indigenous peoples and original peasant nations, which are aymara, arawana, baure, bésiro, canichana, cavineño, cayubaba, chácobo, chimán, ese ejja, guaraní, guarasu'we, guarayu, itonama, leco, machajuyai-kallawayá, machineri, maropa, mojeño-trinitario, mojeño-ignaciano, moré, mosetén, movima, pacawara, puquina, quechua, siriono, tacana, tapiete, toromona, uru-chipaya, weenhayek, yaminawa, yuki, yuracaré y zamuco. II. The plurinational Government and departmental governments must use at least two official languages. One of these must be Spanish, and the other will be decided taking into account the use, convenience, circumstances, needs and preferences of the population in its totality or the territory in question. The other autonomous governments must use the languages corresponding to its territories, and one of these must be Spanish.»

indigenous values, referred to by their indigenous names⁷². These provisions are truly revolutionary, because they move indigenous peoples away from the periphery of the constitutional order and put them at the very center of it⁷³. Indigenous peoples are no longer mere weaker parties to which recognition is granted by a «benevolent State»; rather, they are empowered subjects (who have been subject to colonial domination and deserve reparations for that) and a central part of the polity.

Several other provisions of the new Bolivian Constitution also help reinforce this view. In the part on fundamental rights, for example, there is the option for indigenous individuals to have their indigenous identity (the denomination of the indigenous people they are a part of) in all their official identification documents issued by the State⁷⁴, as well as the right of isolated peoples to remain in this condition⁷⁵. A chapter on culture proclaims cultural diversity as the foundation of the new Plurinational Communitarian State⁷⁶, as well as several provisions related to the preservation of indigenous cultural heritage, tangible and intangible⁷⁷.

⁷² The relevant provision is: «Article 8. I. The State assumes and promotes as ethical-moral principles of the plural society: ama qhilla, ama llulla, ama suwa (do not be weak, do not be a liar nor be a thief), suma qamaña (good living), ñandereko (harmonious living), teko kavi (good life), ivi maraei (land with no evil) and qhapaj ñan (noble way or life). II. The State is supported by the values of unity, equality, inclusion, dignity, freedom, solidarity, reciprocity, respect, complementarity, harmony, transparency, equilibrium, equality of opportunities, social and gender equity in the participation, common well-being, responsibility, social justice, distribution and redistribution of the products and social goods, to live well.»

⁷³ See Francisco LÓPEZ BÁRCENAS, «Autonomías indígenas en América: de la demanda de reconocimiento a su construcción» [«Indigenous autonomies in America: from the demand of recognition to its construction»], in *Pueblos Indígenas y Derechos Humanos* [«Indigenous peoples and human rights»] 423, 439 (2006) (indicating this to be an important element for the construction of real indigenous autonomy).

⁷⁴ The provision is the following: «Article 30. I. A peasant original indigenous people or nation is all human collectivity that shares cultural identity, language, historical tradition, institutions, territoriality and worldview, the existence of which is prior to the Spanish colonial invasion. II. Within the framework of State unity and according to this Constitution the peasant original indigenous peoples and nations have the following rights: [...] 3. That the cultural identity of each one of its members, if she or he so wishes, are registered alongside the Bolivian citizenship in the identity card, passport or other identity documents with legal validity. [...]»

⁷⁵ The provision is the following: «Article 31. I. The peasant original indigenous nations in danger of extinction, in situation of voluntary isolation and not contacted will be protected and respected in their individual and collective ways of life. II. The indigenous nations and peoples in isolation and not contacted have the right to remain in this condition, to the legal delimitation and consolidation of the territory they occupy and inhabit.»

⁷⁶ The provision is the following: «Article 98. I. Cultural diversity is the essential foundation of the Communitarian Plurinational State. Interculturality is the instrument for the harmonious and balanced cohesion and coexistence among all peoples and nations. Interculturality will respect differences and will happen in equality of conditions. II. The State will take as

There is also a particularly interesting chapter on the «original peasant indigenous jurisdiction». This chapter outlines the existence of parallel systems of administration of justice specific to indigenous peoples, declaring the validity of these systems of administration of justice as long as they comply with fundamental human rights protected by the Constitution⁷⁸. The jurisdiction of these parallel systems is triggered by several scenarios, all requiring a «particular bond» with an indigenous or peasant community⁷⁹. It is determined that the State will guarantee the enforcement of the judgments of these systems, if necessary, and that a «Jurisdictional

fortitude the existence of peasant original indigenous cultures, depositories of knowledge, wisdom, values, spirituality and worldviews. III. It is the fundamental responsibility of the State to preserve, develop, protect and diffuse the cultures existing in the country.»

⁷⁷ The relevant provisions are the following: «Article 99. I. The cultural heritage of the Bolivian people is inalienable, and no legal burdens can be imposed upon it. The economic resources generated by it will be regulated by statute, to address with priority its conservation, preservation and promotion. II. The State will guarantee the inventorying, protection, restoration, recovery, revitalization, enrichment, promotion and diffusion of its cultural heritage, according to the law. III. The natural, archaeological, paleontological, historical and documental wealth, as well as that deriving from religious rites and folklore, is the cultural heritage of the Bolivian people, according to the law.

Article 100. I. It is the heritage of the peasant original indigenous nations and peoples the worldviews, myths, oral history, dances, cultural practices, traditional knowledge and technologies. This heritage is part of the State's expression and identity. II. The State will protect the knowledge and wisdom through the registration of intellectual property that safeguards the intangible rights of peasant original indigenous nations and peoples as well as that of the intercultural and Afro-Bolivian communities.

Article 101. The manifestations of popular arts and industries, in its intangible component, will enjoy special protection by the State. Moreover, this protection will be extended to sites and activities declared to be cultural heritage of mankind, in its tangible or intangible components.

Article 102. The State will register and protect the intellectual property, individual and collective, of works of art and discoveries of authors, artists, composers, inventors and scientists, in the conditions determined by law.»

⁷⁸ The relevant provision is the following: «Article 190. I. The peasant original indigenous nations and peoples shall exercise their jurisdiction and competence functions through their own authorities, and will apply their own principles, cultural values, norms and procedures. II. The peasant original indigenous jurisdiction respects the right to life, the right to defense and other rights and guarantees established by this Constitution.»

⁷⁹ The relevant provision is the following: «Article 191. The peasant original indigenous jurisdiction is founded upon a particular bond of the persons members of a respective peasant original indigenous nation or people. II. The peasant original indigenous jurisdiction will be exercised in the following personal, material and territorial scopes: 1. The members of peasant original indigenous nations or peoples will be subject to this jurisdiction whenever they appear as claimants or respondents, complainants, accused or appellants. 2. This jurisdiction will analyze the peasant original indigenous matters in accordance to the provisions of a Jurisdictional Division Act. 3. This jurisdiction applies to the legal relations or facts that are initiated or the effects of which are produced within the jurisdiction of a peasant original indigenous people.»

Division Act» (*«Ley de Deslinde Jurisdiccional»*) will be enacted to determine the specificities of this relationship⁸⁰.

The example of the new Bolivian Constitution is truly remarkable, and, alongside other Constitutional experiences analyzed here, it is possible to offer some elements that must be considered when designing multicultural Constitutions. First of all, the recognition of the pluralistic composition of a given society is a welcome step forward, and an easy one for that matter, which can alleviate social tensions.

Secondly, some degree of cultural autonomy can be considered. «Cultural autonomy» must here be understood in a broader sense, encompassing all social practices. These should be preferably supported by the State, and, when the degree of cultural distinctiveness is great, the State should give the option of establishing parallel systems for the handling of social and legal disputes. The oversight of the State should be minimal, but present, particularly so as to guarantee that the normative core of the Constitution, including provisions on fundamental rights, are respected by these parallel systems.

Political autonomy, to a greater or lesser degree, is also an important tool, and one that promotes inclusiveness and the empowerment of normally marginalized groups. This inclusion has the power to mitigate tensions by simply offering an appropriate venue where conflicts can peacefully be acted out.

5. CONCLUDING REMARKS: RE-CREATING CONSTITUTIONAL ARCHITECTURE TO INCLUDE MULTICULTURALISM

The recognition of multiculturalism in multiethnic societies is fundamental, and the emergence of new constitutions offers a unique opportunity to undertake such recognition, as constitutions have the ability of placing multiculturalism at the highest level of the legal and political order, either as a matter of turning into a constitutional provision something that already happens in practice, or even using the constitution as a tool for positive transformation of a polity. Almost every society today is faced with the challenges of multiculturalism, and, as new constitutions are draf-

⁸⁰ The relevant provision is the following: «Article 192. I. All public authorities or persons will abide to the decisions of the peasant original indigenous jurisdiction. II. For the enforcement of decisions of the peasant original indigenous jurisdiction, its authorities may ask for the support of the competent State bodies. III. The State shall promote and strengthen the peasant original indigenous justice. The Jurisdictional Division Act shall determine the mechanisms of coordination and cooperation among the peasant original indigenous jurisdiction, ordinary jurisdiction, agricultural-environmental jurisdiction and all the constitutionally recognized jurisdictions.»

ted, they must take this phenomenon into account. Even societies where there are no «original» minority groups (either indigenous peoples of sub-state minorities) are still bound to confront demands for multiculturalism, due to immigration.

Constitutional recognition of indigeneity in Latin America moves along a spectrum, ranging from countries which do not recognize the existence of indigenous peoples as a separate portion of a country's population (Uruguay) to countries practicing very broad forms of recognition, either exclusionary or inclusionary (such as Bolivia). In between, there are assimilationist countries, in which there are subsisting policies to incorporate the indigenous population into the mainstream society (such as Mexico until the 1997 reforms) and countries which protect indigenous rights by excluding them from society (such as Brazil). In these two intermediary cases, the constitutional protection granted may lead to similar results in some cases, as an extra set of rights is granted in Brazilian law to indigenous persons who prove to have been assimilated. The percentage of indigenous peoples in a country's population is not related to the degree of protection, but in extreme cases, such as Uruguay's, it may help explain the total absence of indigenous protection at the Constitutional level.

Even though it sounds counter-intuitive, it seems that federal States in Latin America have more problems with recognizing indigenous rights than unitary States. This is a counter-intuitive statement because it would be expected that States that have traditionally dealt with the recognition of autonomy to different parts of the territory at the constitutional level would not find difficulties in granting autonomy on the basis of ethnicity, in addition to whatever reasons have led to the division of the territory in the federated entities. If one considers, however, the peculiarity of the Brazilian and Mexican models of federalism, it makes sense that the «federal experience» of these two countries has not necessarily played a role in elevating the status of indigenous peoples and granting them any type of legal autonomy in relation to the rest of society. The peculiarity of these two countries' federal models resides upon that federalism has not been implemented so as to give autonomy to politically distinct clusters of the population, but rather, particularly in the Brazilian case, simply as a means to enable governability of an exceedingly large country. Therefore, «artificial», «top-down» models of federalism contribute little to the advancement of plurality within constitutional systems.

«Top-down» constitutional recognition also seems to be less effective, at least when the constitutional provision granting recognition clashes with pre-existing infra-constitutional legislation that fails to be modified for compliance with new constitutional aspirations of multiculturalism. The Brazilian case is an example of this, and reminds also of the necessity of

enacting infra-constitutional legislation that creates the necessary tools to bring the Constitutional text into reality. It also serves, alongside the Mexican and Bolivian cases, as a reminder of the importance of organized civil society, of bottom-up pressure towards constitutional design more reflective of social reality, rather than the interests of certain segments of society. Civil society creates the means for the entrenchment of Constitutions that seems to be traditionally lacking in Latin America.

The «best formula» (if one can ever be obtained) for protecting multiculturalism is the one that promotes most inclusiveness. One that acknowledges the multiethnic roots of a polity and recognizes that, in all difference, a greater sense of nationhood binds these groups together. The new Bolivian Constitution is a remarkable example of a constitutional text protecting multiculturalism to the greatest possible extent, moving away from a semi-paternalistic recognition of indigenous peoples as weaker parties deserving of special protection to a recognition of indigenous peoples as empowered participants in the political process who, even though neglected in the past and still deserving of reparations for that, are nothing short of a central part of the polity. This is a model of recognition that may be applicable only to Bolivia, where indigenous peoples are actually the majority of the population, but it is nevertheless an inspiring example to be at least considered by future constitution drafters. Constitutions like this have the power to promote fundamental political transformations, and to lay the foundations for the construction of better, more peaceful societies.

One must take into account, however, not only inclusion, but also the prerogative that indigenous peoples must have at their disposal to voluntarily exclude themselves from any contact with the rest of society. To presume that they would always want to be fully included falls again in the trap of paternalism, this time from a different side, as it essentializes indigeneity (in this specific sense, essentializing indigenous peoples as willing to be part of the «settler-state») in an over-eagerness to protect it. To truly protect difference means to allow for difference to exist at the margins if it so chooses.

The continent as a whole has greatly advanced in the constitutional protection of multiculturalism, and may well serve as a model for constitution designers everywhere when it comes to these matters. From colonial oppression through post-colonial intentional lack of recognition, States have realized that national unity is more likely to be reached if, paradoxically, unity is officially recognized as non-existent. The motto «unity in diversity», written in the European Union's crest, seems to resonate well to this continent of European ancestry, but so distinctively diverse and culturally rich.

