

ARTÍCULO DE INVESTIGACIÓN

## Indigenous autonomy and justice for latin american Indigenous women

*Autonomía Indígena y Justicia para Mujeres Indígenas Latinoamericanas*

**RODRIGO CÉSPEDES**

*Max Planck Institute for Social Anthropology (Halle), Alemania*

**ABSTRACT** My paper deals with indigenous peoples' rights, focusing on Latin American case-law related to gender issues. Latin American Courts have faced cases related to sexual crimes or domestic violence among indigenous people and have to choose between giving pre-eminence to women's rights or indigenous autonomy. On deciding those cases, the tools provided by the proportionality test are paramount in order to analyse the case-law. The indigenous rights regimes (ILO-169, UNDRIP) may prevail or not against other human rights systems (which specially protect women or children) according to the facts of the case, but also according to domestic legal cultures modelled by the country's historical evolution.

**KEYWORDS** Indigenous peoples; women's rights; legal culture.

**RESUMEN** Este trabajo analiza los derechos de los pueblos indígenas, centrándose en la jurisprudencia latinoamericana relacionada con cuestiones de género. Los tribunales latinoamericanos han enfrentado casos relacionados con crímenes sexuales o violencia intra-familiar entre indígenas y tienen que decidir entre dar preeminencia a los derechos de las mujeres o la autonomía indígena. Al resolver estos casos, las herramientas proporcionadas por el test de proporcionalidad son esenciales para analizar la jurisprudencia. Los regímenes de derechos indígenas (ILO-169, UNDRIP) pueden prevalecer o no contra otros sistemas de derechos humanos (que protegen especialmente a las mujeres o los niños) de acuerdo con los hechos del caso, pero también de acuerdo con la cultura jurídica modeladas por la diversa evolución histórica de cada país.

**PALABRAS CLAVE** Indígenas; derechos de la mujer; cultura jurídica.

## **Introduction**

In the last 20 years there have been important achievements in the implementation of indigenous peoples' rights. However, there are still relevant challenges. The Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Indigenous and Tribal Peoples Convention, 1989 (ILO-169) regimes acknowledge indigenous people as right-holders of international individual and collective rights. That idea has triggered a legal revolution in the Americas: natives have started using international provisions in environmental, natural resources and criminal trials with relative success<sup>1</sup>.

Women's rights are expressly protected by the UNDRIP/ILO-169 and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). However, both regimes could collide and indigenous autonomy (indigenous tribunals, or the respect for native customary law as a source of law), granted by the UNDRIP/ILO-169, could negatively affect vulnerable people, such as women and children. There has been relevant case-law on sexual crimes and domestic violence, which has to balance different human rights regimes (ILO-169/UNDRIP, the United Nations Convention on the Rights of the Child [CRC] and CEDAW). In order to solve those conflicts of human rights regimes, courts have used, directly or indirectly, the proportionality test, a wide-spread tool in constitutional adjudication. This test is also a very useful legal tool in order to examine this particular kind of case-law. The generated jurisprudence is dissimilar in different Latin American countries since indigenous cultures have impacted diverse countries in a dissimilar way. The topic is interdisciplinary since the presence of anthropologists or ethnographers as expert witnesses has been fundamental in order to clarify those conflicts. At the same time, this collision of international regimes is a significant issue to attorneys, human rights activists, and scholars.

This paper intends to explore the adjudication of these kind of cases theoretical and practical implications by examining case-law from Chile, Colombia and Bolivia. I will argue that the proportionality test, described by Robert Alexy, has been an instrument in the adjudication of this sort of cases and also a useful analysis tool. At the same time, the relative impact of indigenous culture in each country may tip the balance of justice. Judges consider the relevance of indigenous culture in order to "weigh" the rights in conflict. As I will examine, every country's own history influences its legal culture, affecting the balance of interests in competition. Legal culture, in

1. I use the terms first peoples, first nations, aboriginal peoples, native peoples, autochthonous peoples as synonyms of indigenous peoples.

turn, is essential in order to understand how domestic courts adjudicate conflicting fundamental rights and why they give precedence of one over the other.

### **History and Legal Culture**

It is clear that knowing the past is vital to understand the present and foresee the future. Historical roots are diverse in every country and, as a consequence, their legal systems have developed in different ways<sup>2</sup>. Legal institutions and lawyers' minds are shaped by historical experience and shared culture; this accumulative process creates a "national character" of some kind. Then, evolutionary trends and the explanation of some judicial decision may be, in part, inferred from historical data. In fact, judges decide cases considering abstract legal principles and rules guided, in part, by their intuition, which is, to some extent, ruled by the "silently operating powers" (Von Savigny, 1831, p. 31) of domestic culture and tradition. Culture could be defined as "the shared knowledge and schemes created by a set of people for perceiving, interpreting, expressing, and responding to the social realities around them" (Lederach, 1995, p. 9). According to Glenn, tradition is composed of cultural data brought from the past into the present (Glenn, 2004, pp. 13-50). As said by Bell, legal culture is "a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts" (Bell, 1995, p. 70). Those definitions make clear that values, particularly the religious ones, could be part of a national legal framework and, consequently, a current domestic legal system cannot be fully understood without knowing the history that shapes the cultural tradition of particular states (Hobsbawm, 2012, pp. 1-14).

The relative importance of indigenous culture in diverse Latin American countries is one of those silent operating forces and has played a relevant role in recent developments in the area after the end of dictatorships. It is evident that, for example, Bolivia has a strong presence of indigenous peoples. Bolivia was one of the centres of the Inca Empire, a civilization that was extremely complex and sophisticated (Baudin, 1961, reprint 1991). At the same time, the percentage of indigenous population is high in comparison to other countries. The democratic forces shaped the Assembly 2009 Constitution, which converted Bolivia into the Plurinational State, describing it as a "plurinational communal and social unified state", which is a "profound reconfigura-

2. The same phenomenon can be appreciated in Europe. European countries, with different historical backgrounds, are part of the ECHR. Due to that, the ECtHR had developed the notion of margin of appreciation in order to keep under the same umbrella countries with different legal and cultural traditions, such as Spain and Turkey. Then, the Court has to unify the human rights standards and, at the same time, allow some legal diversity. Religion has had diverse influence in different states with varied results. It is natural that the ECtHR takes into account those variations and all of the dissimilar outcomes will be legitimate.

tion of the state itself” (Assies, 2011, pp. 93-116) by recognising the rights to internal self-determination of various indigenous peoples within a single state. In fact, the New Constitution established a quota of indigenous parliamentarians. At the same time, an indigenous-peasant judicial system was created, which hold the same legal status as ordinary justice (the members of the Plurinational Constitutional Court are chosen from both systems)<sup>3</sup>. Finally, the right to autonomy, indigenous self-government and their territorial entities and institutions were formally recognised. Theoretically, the Bolivian State, therefore, does not merely “acknowledge” indigenous rights but is constituted and defined by indigenous peoples (Yrigoyen, 2011, p. 149). Colombia grants wide autonomy to indigenous peoples too. According to Colombian Courts, treaties as the ILO-169 have constitutional rank (human rights international agreements are also the highest law of the land) and they accept a widespread degree of legal pluralism. The 1991 Constitution incorporated many of the indigenous peoples demands accumulated over decades. It opened special political arenas for them. For instance, Articles 171 and 176 provide special representation in the parliament. Article 356 guarantees indigenous peoples’ territorial and cultural rights. Previous to the Spanish conquest, the Muisca (also called *Chibchas*) Confederation dominated the area, which was one of the best-organised governments of diverse tribes on the Americas.

On the other hand, Chile for example, there is no recorded knowledge indicating the existence of an advanced indigenous civilization before the Conquest and the quantity of native population in its territory was not as relevant as which the Conquistadors found in the areas dominated by the Incas or the Aztecs. The current Chilean Constitution does not mention indigenous people at all. In 1988, General Pinochet lost a referendum and, consequently, the Constitution re-established a typical Western democracy, as it was until 1973. One of the modifications made human right treaties automatically part of the Chilean legal system. One of these treaties was the ILO-169, ratified in 2008. Even though the application of this international agreement has developed relevant case-law, Chilean Courts just recognise indigenous people as a vulnerable minority and their customs are only an incidental source of law, but they do not enjoy the right to internal self-determination.

All Latin American courts use the proportionality test in order to provide the bases of their decisions. Every time a court assesses a case, it has to balance the rights or interests in conflict. According to Alexy, judges decide those conflicts “weighing” the rights in competition (for example, freedom of expression versus privacy). Then, it is easy to assume that Chilean Courts and the Bolivian or Colombian ones would give relatively different “weight” to indigenous rights since they have diverse history

3. Articles 179.II, 190-192, 197.I and 199.II of the Bolivian Constitution.

and legal evolution. I will try to prove, with case-law, that domestic courts from diverse Latin-American states assign different “weight” to specific rights depending on their particular own legal culture or tradition, which has deep roots in their distinct history.

## **Proportionality Test and Legal Culture**

### *Human Rights Adjudication: Rules and Principles*

Courts have to balance several interests in order to adjudicate case law related to fundamental rights. The mechanics of that balance have been defined by Robert Alexy. He has described a system-based legal analysis, a holistic way of approaching the judicial adjudication (Kumm, 2004, pp. 574-596). According to his theory, fundamental rights (recognised by constitutions and/or human rights treaties) are hierarchically superior. They have the highest significance for people and society and have an “open texture”, which makes some degree of legal indeterminacy inevitable - using Hart’s terms (Hart, 1982, p. 124).

According to Alexy, fundamental rights have the structure of legal principles, in opposition to legal rules. Guido Alpa remarks that the terms “rules” and “principles” are terms commonly used in law. Legal principles are fundamental legal notions: general abstract norms applicable to many singular concrete instances which represent fundamental values. Instead, rules are concrete and detailed norms which regulate a determinate range of situations (Alpa, 1994, pp. 1-37). In order to understand the nature of fundamental rights it is essential to know Alexy’s particular distinction between rules and principles. In his view, rules could either apply or not, while principles can be fulfilled to varying degrees, because they are “optimisation requirements”. A rule is an accurate norm, such as the rule that establishes the difference between adults and children, whose age is normally set to 18 years old (Article 1 of the CRC, or the national rules which set a different one, those are also important for the age of consent as I will analyse later) or the rules that define who is indigenous. On the other hand, indigenous autonomy is a principle. It will receive only partial application because state regulations (rules on judicial review of indigenous courts by ordinary courts, the prohibition of torture) and other rights/principles (children’s progressive autonomy, due process of law, for example) or collective interests (such as public order) will have to be taken into consideration. Then, the “principle” indigenous autonomy could be restricted by rules or other principles/fundamental rights.

“Optimisation requirements”, such as principles, need that something is realised to the greatest extent possible given legal (other competing legal principles and rules) and factual possibilities (circumstances of the case proven by evidence). In simple words, indigenous autonomy is an elastic concept, which will be maximised by courts

if they do affect the core of other principles or if there are clear restrictive rules. Principles do not prescribe accurately what should be done; they just give a general orientation because they are “framework/norme cadre” norms. Alexy believes that fundamental rights are principles in the sense described above (Alexy, 2002b, p. 55). They are not clearly defined according to “bright-line” standards, which leave space for varying interpretation. According to Alexy, fundamental rights are legal principles, elastic norms or “ideal ought” that need to be “optimised” by a decision-maker. As it was said, principles are different from rules. The latter are norms which are more precise and give fewer margins of choices to the decision-maker (Alexy, 2002b, pp. 44-47). Then, adjudication and legal reasoning work differently for both kinds of norms. Rules are applied by means of subsumption (using logic criteria such as speciality, chronologic and hierarchy tests). Principles are applied by balancing (using algebraic/arithmetic criteria) (Alexy, 2003, pp. 433-449). Conflicts of rights-principles are “difficult” or hard cases, because there are not always bright-line rules (Sullivan, 1992, pp. 22-123. From a general point of view, including Europe (Sottiaux & Van Der Schyff, 2008, pp. 115-156)<sup>4</sup>.

Modern public law does not conceive rights as an absolute sphere of autonomy where the state cannot intervene. Limitations by public bodies exercising public power in order to protect collective interests, such as “public health”, are common (Loughlin, 2010, p. 369). Another limitation is the “rights of other people”: a conflict among two or more rights will be adjudicated by courts balancing competing principles (Alexy, 2002b, pp. 69-86-102). In a given case, according to Alexy, courts have to balance the different interest in conflict using the proportionality test. Proportionality is a tool for judging whether any potentially justified interference with a right is the minimum interference necessary to secure the legitimate goal of a state measure. As a result, proportionality assesses the level of interference in order to consider it legitimate or unlawful. Human rights agreements grant special rights to vulnerable groups such as indigenous peoples, women and children. In the case of conflict, courts have to balance those right regimes according to the proportionality test.

### *The Proportionality Test: Weighing and Balancing Rights in Conflict*

The set of tools preferred nowadays is the proportionality test in a “wide sense”, used and developed by the German Federal Constitutional Court and systematised by Alexy. This proportionality test in a wide sense will give precedence to some principle,

4. In the US, “bright-line rule test” is a clearly defined standard composed of objective factors, which leaves little room for varying interpretation. The purpose of a bright-line test is to produce predictable rulings. It is contrasted with the “balancing test”: cases where the judge has to “weigh” the importance of multiple “fuzzy” factors (“fine line” issues), which reduces objectivity and flexibility and increases legal indeterminacy. Adjudication in those cases tends to be more complicated and there is more room for judicial discretion and flexibility.

conditioned to the facts of the case (Alexy, 2002b, p. 47). It proceeds in three steps: suitability, necessity and proportionality in a narrow sense (Alexy, 2002b, p. 66). The first two, the suitability and the necessity tests, consider the application of right-principles (optimisation requirements) against what is *factually* possible (Alexy, 2002a, pp. 572-581). The third step is the proportionality test in a narrow sense, which considers the application of principles-optimisation requirements against what is *legally* possible. The “legally possible” situations are cases of fundamental rights adjudication, which consist of competing principles, which have to be weighed and balanced (Alexy, 2002b, pp. 65-66-80-81-188). Therefore, in a wide sense, the proportionality test considers the following elements: suitability, necessity and proportionality in a strict sense.

(a) Suitability: this step requires adequacy between means and public goals and - as with the necessity element - it is related to what is factually possible. It is related to the kind of measure taken and its appropriateness in order to achieve the aim. The State’s restrictions have to be adequate in order to protect that significant legal interest, such as children’s rights. Such suitability means that the measure has to be sufficient enough in order to achieve the goal. The restriction of rights will be valid if it endeavours to protect a legal interest or collective goods, relevant in the context of a democratic society. Legal texts normally provide notions or grounds that can limit a right, such as “public order”, “public morality”, “national security” or “protection of health”, all of them collective goods or public interests, which also have the structure of principles (Alexy, 2002b, pp. 69-86-102). In Hart’s words, those terms are an “open texture” and courts give them concrete meaning in every case they adjudicate (Hart, 1982, p. 124). It can be asked whether the general criminal law rules related to sexual crimes and domestic violence (which protects children and women) are an appropriate restriction to indigenous rights, which grants them some degree of autonomy.

(b) Necessity: this second step is also related to what is factually possible. It is also called the “minimum harm” principle; the restrictions have to be strictly indispensable for obtaining the legitimate goal. There has to be a link of causality between the restriction and the aim pursued. This requisite is a mandate to the public body which takes the decision. If there is a range of options, the state authority has to take the alternative that least affects the right in question. State measures must be used in the least intrusive way possible. In simple words, the decision-maker can only sacrifice part of a right to protect the core of another right. Courts should choose the means that render compatible two or more principles otherwise in conflict (Alexy, 2002b, p. 66). It may be asked whether the criminal law rules are minimum restrictions to indigenous rights in order to protect children’s or women’s rights.



(c) Proportionality in a strict sense: this is the last step of the “wide” test. Rights are optimising elements to be contrasted against other rights-principles, i.e. “the right of others” (Bomhoff, 2008, pp. 619-654) and considering what is legally possible. Some legal systems give more importance to some rights-principles over other ones, for example, the wide freedom of religion guaranteed in the US (Curry, 1986), which contrasts with the French more restrictive conception. In the case of conflicting principles-rights, the judge must consider “the greater the degree of non-satisfaction of, or the detriment to, one principle (right), the greater importance of satisfying the other (right-principle)” (Alexy, 2002b, p. 102). In the task of balancing the different interests involved in a controversy, the decision-maker has to prefer one of them and to do that he has to “weigh” them. Because constitutional rights are principles and not rules, the conflicts between them do not have an easy solution, subsuming (pure logic) is not available: the only choice is balancing in a legal-arithmetic way. The decision-maker has to consider the intensity of the intervention-restriction and the importance of the legal interest pursued: balance the benefit and the sacrifice. Alexy suggests that by contrasting both rights, the decision-maker has to verify if the rights are or will be “seriously, moderate or slightly” restricted or harmed according to the “weight formula”, an empirical assumption (Alexy, 2012/2013, pp. 465-477). Also, the importance of satisfying the second principle in conflict can be determined by reference to the same three-fold weight scale: light, moderate or serious (Alexy, 2002b, p. 402). This formula quantifies the concrete weight given to a right-principle in comparison with a colliding right-principle in a specific case-law. According to this formula, the judge has to assign a weight to the rights-principles in competition, calculate the intensity of interference of each other, the degree to which the opposite right-principle is not achieved (Alexy, 2003, pp. 433-449). The restriction of a right cannot mean that this right is obliterated; the *irreducible core* of that right cannot be reduced to nothing. The essential core of human rights is a minimum non-derogable, inviolable, inalienable nucleus of freedoms. When deciding a conflict, and when proceeding to the comparison of two interests, the right that will prevail is the one whose core is seriously affected. Put simply, the maximum realisation of one right has to coexist with the minimum restriction of the other one. One right prevails but the other one does not disappear. Consequently, courts will have to determine if some kind of rules, such as the age of consent, affect the very core of indigenous rights and the autonomy granted to them in order to accept, for example, their customs as a valid source of law.

According to Alexy, a court can limit a constitutional right by appealing to other fundamental rights if there is a justified reason and only if the measure is necessary in order to obtain a legitimate result. In conclusion, the proportionality test in a wide sense consists of verifying that the restrictions to rights have a legitimate goal and those limitations are appropriate, necessary and proportionate in order to obtain that



aim. The theory of adjudication on fundamental rights, according to Alexy, is in essence a theory of balancing (Alexy, 2003, pp. 433-449). The adjudication of the case where there are two or more rights-principles in conflict will be a derivative judicial rule that represents an integrated normative solution applicable to the factual context supported by the evidence. That ruling will establish a relation of preference among rights-principles which depends of the facts of the case (Alexy, 2002b, pp. 48-52).

The proportionality test offers a lucid and comprehensible rational framework, which clarifies the multiple variables in fundamental rights adjudication. Using these tools, decisions are justified logically and the elements that the judge considers are explicit in the rulings. His theory does not predetermine the legal answer to cases that involve collisions of rights-principles. It only gives analytical tools for articulating legal reasoning and, at the same time, rulings could be criticised on the basis of those very legal tools. Legal reasoning in those cases cannot achieve the precision of arithmetical operations. There is always legitimate discretion at every level of the legal system and with these tools courts can justify their interpretation and application of pre-existing legal material. Alexy demonstrates that there is not only a single correct answer to any constitutional rights issue because rights could be weighted in a dissimilar way. The proportionality test just provides a rational justification for rulings using legal bases. Different judges could weigh rights in a diverse way and, subsequently, the decision will be different but correct and justified in the legal sense. The scales of the weight formula and the values assigned to every right-principle in conflict are, in a high degree, almost intuitive (D'amato, 1983, pp. 1-55)<sup>5</sup>. There is no pre-established graduation of the relative importance of rights or its restrictions. The legal tradition of the country will be relevant and may tip the balance of justice. For that reason, different approaches can be found in Bolivian, Chilean and Colombian Courts. Alexy recognised that his test is just a useful tool in adjudication, but it does not give complete legal certainty. Of course, the facts of the case are also essential. I will examine the proportionality test using practical examples of conflicting human rights regimes examining the situation of women and children. The proportionality test could help us to better understand the courts' reasoning.

5. Alexy's framework is lucid, however it does not eliminate legal uncertainty. Judges do not decide cases formalistically. Law is not always consistent, complete and clear. Rather, the legal system is riddled with ambiguities, gaps, vague terms, and conflicting interpretation techniques. As a result, there is often no uniquely right answer to any hard case. Law is intrinsically uncertain and it is neither arithmetic nor mathematical logic. Then, judges' legal intuition, based on their experience, is relevant when assessing cases.

## Indigenous autonomy and women's rights

The relationship between indigenous autonomy and women's rights is a complex one, not always there is a clash between them. In some cases, the indigenous autonomy potentiates women's rights. In other cases, there will be conflict, and then Courts have to apply the proportionality test choosing the international human rights regime that will prevail, the ILO-169/UNDRIP or the CEDAW.

### *Potentialization of rights*

Colombia is the current epicentre of constitutional law. The Colombian Constitutional Court is one of the most original interpreters of constitutional law nowadays. It has exercised a considerable amount of judicial activism on economic and social rights, even altering the national budget. The Colombian Constitutional Court's jurisprudence on indigenous rights is also fairly avant-garde.

In T-778/2005<sup>6</sup>, the Constitutional Court had to decide a case in which an indigenous woman was elected in local balloting, but the poll was challenged because she did not have the minimum age required by statutory law to be a candidate. The Court ruled in her favour and dismissed the challenge. In the opinion of the Court, indigenous peoples have the collective right to cultural identity, which creates ethno-cultural diversity exceptions to general rules. In that specific indigenous culture to which the candidate belonged, the right to political participation can be granted at an earlier age if the woman has performed the customary rituals in order to exercise political participation in that indigenous community. In the Court's view, cultural-ethnic diversity is a principle acknowledged by the Constitution. Furthermore, the ILO-169 is part of the block of constitutionality<sup>7</sup> and reinforces what is said in the Constitution. Then, annulling the election due to a small legal technicality will be a violation of her political rights. The Court set the principle of indigenous autonomy and cultural diversity above statutory formalities. Subsequently, as a side effect, that supra-legal rank (that means above the rules set in the acts of parliament) of indigenous autonomy increases indigenous women's political rights. In that way, the ILO 169 regime is complementary to the CEDAW one. However, as it will be examined, this is not a common phenomenon.

6. *Ati Seygundiba Quigua Izquierdo contra Tribunal Administrativo de Cundinamarca Sección Primera Subsección A, Colombia*, T-778/2005 (27/07/2005), tutela, Colombian Constitutional Court.

7. *Bloc de constitutionnalité* is a concept coined by the Constitutional Council of France and means the set of higher legal norms which is used in order to control the constitutionality of legislation, *Decisión nr. 71-44 DC "Liberté d'association"*, 16/07/1971, *Conseil Constitutionnel*. This concept has spread among several countries, among them the Latin American ones.

### *Conflict between regimes*

The situation described above is not usual and normally judges have to give pre-eminence either to indigenous autonomy or to women's rights. I will analyse case-law related to sexual and domestic violence. In both areas, judges have to choose between which right prevails (victims' rights or indigenous autonomy). In order to do that, judges utilise the proportionality test and the indigenous ethos of the country will play a relevant role in adjudication.

The ILO-169 recognises natives as protected peoples and gives vast importance to aboriginal custom as a source of law which has been considered as an essential element in criminal and civil cases that involved environmental protection; sexual crimes; drug traffic, etc<sup>8</sup>. The ILO-169 considers indigenous custom as a source of law, especially as a way to mitigate criminal liability. Indigenous custom is related to cultural defences. Cultural defences are a sort of criminal defence which include a set of circumstances which justify or excuse the criminal behaviour. In all the cases, the defendants have displayed the conduct described and labelled as criminal by law. However, some conditions justify or excuse the behaviour; ergo, criminal punishment may not be applied. Those "conditions" are the values of individuals who are raised in indigenous, often minority cultures that may, at times, conflict with the values of the dominant, often majoritarian culture (which is embodied in the domestic criminal law) (Van Broeck, 2001, pp. 1-32). The conduct is justified when the behaviour displayed is legitimate even though it contradicts general law. One example of that is the possession of substances categorised as drugs by the law. In Chile, Aymara indigenous people have been acquitted for possession of coca leaves because they were exercising their freedom of religion, since those coca leaves are relevant in their customary rituals. What is more, that behaviour is legally justified by Article 27 of the ICCPR (Cespedes, 2017a) and Article 8 of the ILO-169 (Cespedes, 2017b). In other cases, the conduct is only excused, which means that the behaviour is illegitimate but it does not deserve criminal punishment because there are surrounding circumstances that explain the conduct. For example, there is another Chilean case about homicide, contra *Juana Catrilaf* (1953)<sup>9</sup> motivated by witchcraft. The victim allegedly practiced witchcraft and, according to the villagers and the defendant, had cursed the whole town. The Appeal Court of Valdivia confirmed the first instance ruling that absolved the defendant, a *Mapuche* native who murdered the "witch", because the community in which she lived was remote from modern civilisation and 'magical

8. Because of those features, an inter-disciplinary approach is vital in order to apply the law with fairness. Social sciences such as anthropology, ethnography and sociology provide a context in order to fully understand indigenous law.

9. *Contra Juana Catrilaf*, *Revista Derecho y Jurisprudencia* (Julio-Agosto/1955) 52.5-6, 85-102. Corte de Apelaciones de Valdivia. Confirma Consulta.

thinking’ was a collective belief in that community. According to the Court, the defendant was sincerely scared; in simple words, factual mistakes were a valid excuse in their cultural background. Anthropologists as expert witnesses were essential in order to validate her defence. They stated that witchcraft was common in Mapuche’s worldview and the accused behaved, from her standpoint and mental state, in self-defence. The Court stressed that the powers that allegedly the witch possessed, its source (a talisman) and the ritual of killing sorcerers were according to that ancestral tradition. Maybe a better and current example would be the *Maripil Case* (2012)<sup>10</sup>, in which two people were killed and 14 were injured in a ‘battle’ over some disputed land between two indigenous groups. There were ‘problems of coexistence’ between the two tribes, and one of them was known as ‘violent’ and previous threats were proven. The other clan was ‘afraid,’ so coordinated a ‘preventive attack’ (called *Malón* by the *mapuche*) against the other group. As a consequence, 18 natives were charged criminally. The Supreme Court ruled that there was criminal liability, but it had to be mitigated because those crimes occurred in the context of an “ancient solution of conflicts of coexistence in the Mapuche tradition”, which involves a violent eviction when members of the community do not live according to the standards of the tribe. I will analyse cultural defences in the context of sexual crimes and domestic violence perpetrated by Latin American indigenous people. It will be seen that different countries, with diverse legal culture, grant relatively dissimilar “weight” to different rights in conflict.

### *Sexual crimes*

Several aspects of sexual activity are regulated by law. In general, criminal laws may proscribe acts which are considered a sort of sexual abuse (rape, for example). At the same time some communities prohibit behaviour which is considered to be inappropriate and against the social norms, which is sometimes connected with taboos (for example, incest or homosexuality). Law regulates the age of consent and controls the censorship of obscene material as well. However, laws vary from one jurisdiction to another<sup>11</sup> and have varied over time<sup>12</sup>. In an indigenous context, age of consent has generated some legal problems.

10. *Contra Maripil Porteño y otros*, Corte Suprema, casación penal y sentencia de reemplazo, Rol 2683-2010.

11. One example may be the regulation of sexually explicit materials. In the UK, a Danish sex education textbook for school students was censored by the English courts. It reached the ECtHR and the Court supported the censorship on grounds of protecting public morals as a legitimate valid restriction to freedom of speech. The ECtHR considered that the standards were different in Denmark than the UK on matters of sexual education, and then the ban was under the margin of appreciation. *Handyside case* (1976), App. 5493/72, known as *The Little Red Schoolbook case*.

12. In Europe, the situation has dramatically changed over time. For example, in *WB v Germany*

The age of consent is the age at which a person is considered to be legally competent to consent to sexual acts<sup>13</sup>. Then, this is the minimum age of a person with whom another person is legally allowed to engage in sexual activity. The relevant aspect of the age of consent laws is that the person below the minimum age is regarded as the victim and, consequently, his/her sex partner may be regarded as the offender. Age of consent laws differ far and wide from jurisdiction to jurisdiction. However, most jurisdictions worldwide set the age of consent in the range of 14 to 18-years-old (Waites, 2005). Statutory law just reflects the majority consensus on the topic. That regulation may differ with the culture of some indigenous peoples. In the cases of Chile and Colombia, the age of consent is specifically set by their Criminal Codes, but indigenous people could have a more elastic way of setting it. For that reason, some cases have reached courts.

In Chile, a relevant judgment is the *Nanco case*<sup>14</sup>. A 40-year-old Mapuche committed statutory rape; his victim was a 13-year-old indigenous girl (the age of consent in Chile is 14). The expert witness established that ancient practice had legitimated sexual intercourse since the onset of menarche, thus *Mapuche* are not conscious of having committed a crime. The Court recognised that, culturally, those practices are allowed in isolated communities, but the accused lived close to urban centres and had access to radio and TV. Moreover, his personal history showed that he was aware of the values shared by the majority of the country. Then, the defendant was convicted. The ILO-169 played a relevant part in this discussion since it is quoted as the source of the cultural defence. However, that defence did not prosper. The defendants' personal history tipped the balance of justice. In other words, indigenous culture was

(1955), App. 104/55, the Commission ruled the criminalisation of sodomy as a legitimate restriction of personal freedom. Sixty years later, in *Oliari v Italy* (2015), App. 18766/11, the ECtHR established a positive obligation upon member states to provide legal recognition for same-sex couples.

13. It is normal that statutes set the age of criminal responsibility, the voting age, marriageable age, the drinking age, the driving age, etc. Sometimes Courts determine when maturity is reached for particular purposes. For example, in the UK, a child is able to consent to his/her own medical treatment, without the need for parental permission or knowledge (Gillick competence), *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL). A health departmental circular stated that the prescription of contraception was a matter for the doctor's discretion, and that they could be prescribed to children without parental consent. Mrs. Gillick claimed that prescribing contraception was illegal because it encouraged sexual intercourse with a minor and a violation of parents' rights. The House of Lords held the authority of parents to make decisions for their children is not absolute and diminishes with the child's evolving maturity. This idea is in line with the concept of progressive autonomy of the CRC. In the US, there is a similar term called "mature minor doctrine", according to it, a child may possess the maturity to choose or reject a particular health care treatment, sometimes without the knowledge or agreement of parents, and then, should be permitted to do so.

14. *Contra JV.N.Ñ.*, Judgment RUC 0400415571-3 (23 November 2005). Tribunal Penal Oral Temuco.

not powerful enough as a factor to explain and excuse the criminal behaviour. The victim's rights had more "weight" than indigenous tradition. As it was explained, Chile does not grant wide recognition to indigenous peoples since they represent a small part of the population. Maybe that was also an important factor that tipped the balance of justice.

In Colombia the situation is different as it can be seen in the '*Cesar*' and '*Catalina*' case<sup>15</sup>. Cesar (aged 26) was dating Catalina and she became pregnant (aged 13). Both were indigenous people. Under the law this was considered to be statutory rape because a 13-year-old girl is under the age of consent for sexual intercourse (the age of consent in Colombia is 14-years-old). First, the ordinary court presiding over the case ordered Cesar's arrest and detention in a regular jail (even though it recognised he was not a danger to society). Since in Cesar's opinion, his indigenous culture was not respected in jail, he challenged the decision. The Colombian Constitutional Court ruled that the first instance court had been incompetent, its ruling was null and void, and it had not respected indigenous culture. Even where an ordinary court is competent, it must respect indigenous culture. The Constitutional Court awarded jurisdiction to indigenous authorities and ordered them to consider the case making the universal value of the child's best interest the main priority. Situations like this are not uncommon among indigenous people and clearly it was not a matter of abuse having been committed. In fact, the case reached ordinary courts in an indirect way. The situation is similar to the Chilean case, but small differences can tip the balance of justice as well as the importance that diverse legal systems grant to indigenous autonomy.

### *Domestic violence*

In most countries, laws exist to protect the victim of domestic violence<sup>16</sup>. Domestic violence is punishable in dissimilar ways. One difference among societies is to what extent those conducts are punished. In fact, it could be considered as civil illicit, misdemeanour or crime. Even though when it is considered a crime, its featured punishment could be diverse. In Chile, a criminal domestic violence procedure cannot be closed by an economic compensation. On the other hand, in *Mapuche* law, every conflict can be solved with compensation. That has been a point of legal controversy. On a domestic violence case that involves indigenous people courts have to choose between protecting women as a vulnerable group or respect *Mapuche* customary law. Courts must adjudicate on two human rights protection regimes. An excellent

15. Judgment T-921/13 (5 December 2013), Constitutional Court of Colombia.

16. Of course, in any community, there are beliefs and attitudes that support domestic violence. Globally, the victims of domestic violence are overwhelmingly women.

example of this problem is the *Cheuquellán Reinao case*. A first instance criminal court accepted a compensatory agreement even though Chilean law forbids them in respect of domestic violence cases. The Court based its ruling on the ILO 169, which considers indigenous custom to be a source of law<sup>17</sup>. The Temuco Court of Appeal upheld the first instance ruling<sup>18</sup>, which gave preference to compensatory agreements above the clear statutory prohibition, an example of the Convention prevailing over domestic legislation. A disciplinary action was brought against the appeal court judges but the Supreme Court dismissed it<sup>19</sup>. Two out of the five appeal judges dissented, arguing that their colleagues had directly disobeyed Chilean law. Domestic violence is a social problem and there was a specific goal behind the addition of that rule: to correct gender inequalities within families. A particularly delicate balance has to be maintained in cases such as this. Recently, that same Appeal Court of Temuco has delivered rulings that contradicts what was decided in *Cheuquellán Reinao*<sup>20</sup>. Diverse interests in conflict could be balanced in different ways and facts and culture can tip the balance of justice.

### *Inheritance*

Inheritance is the passing on rights and obligations upon the death of a person (his/her estate or patrimony). Intestacy law refers to the laws that determines *who is entitled* to the property from the estate under the rules of inheritance and also regulates *the distribution of the estate* of a person who dies *without having in force a valid will*. Normally, property goes first to a spouse, then to children and their descendants; if there are no descendants, the rule sends you back up the family tree to the parents, the siblings, etc., and usually so on further to the more remote degrees of kinship. The laws of inheritance diverge among societies and have changed over time. In the Western world, those rules are neutral and tend to be apply with equality and non-discrimination. A person (testator) can regulate how his/her estate will be distributed after his/her death by a document called will or testament. The principle of complete freedom of disposition by testament is part of the common law systems, but it is not universal. Actually, total freedom is the exception rather than the rule in Civil law systems, which often set some restrictions on the possibilities of disposal. In fact, mandatory rules establish “forced heirship”, which is a feature of civil law systems (among

17. Judgment RUC 1100529076-9 (14 October 2011).

18. Judgment Rol No. 955-2011 (27 October 2011), Corte de Apelaciones de Temuco.

19. Judgment Rol No. 10635-2011 (4 January 2012).

20. Unfortunately, I have not found a Bolivian or Colombian case on the same matter. However, considering the autonomy granted to indigenous court and the rank granted to indigenous customs, solutions could be diverse.



them, Bolivia) which do not acknowledge complete freedom of testation. Forced heirship is a kind of testate partible inheritance whereby the estate of a deceased is separated in two: an indefeasible portion, the forced estate, passing to the deceased's next-of-kin, and a discretionary portion, which can be freely disposed of by will. Forced heirship then forbids disinheritance except for a few narrowly-defined grounds that a testator is obliged to prove. Most modern states employ egalitarian inheritance, without discrimination based on gender. However, some indigenous traditions have customs of patrilineal inheritance, where only males can inherit. Those customs can enter into conflict with equality as guaranteed in treaties and constitutions.

In the *Montoya Mamani case* (2014)<sup>21</sup>, the Bolivian Constitutional Court had to balance indigenous rights against general international human rights law. An indigenous person wrote a testament and last will including his brother's land. His brother had joined the military, did not work his land and, according of indigenous tradition, lost it because he did not work it, not fulfilling the social purpose of land. The testator's wife and kids inherited the land. The soldier brother reappeared and claimed his land. He convinced the indigenous community to put pressure on the widow. She was threat on getting the land back to the community if she did not give up 50% of her family's land to the testator's brother. She did that under pressure but after the retracted. After that, she was excluded from community meetings. It was argued that because she was a woman she did not have right to that land according to their indigenous tradition. The Bolivian Constitutional Court ruled the indigenous community's decision violated the claimant's fundamental rights. Land has a social role, and it was lost for its owner if it is not worked. What is more, women and children were vulnerable groups and needed extra protection. Even though indigenous custom is a source of law recognized by the Bolivian Constitution, it has its limits. Applying that custom could have affected the core of the claimant's rights.

## Conclusions

From the judgments analysed, it is clear that, in some cases, ILO-169 has increased women's freedoms; for instance, on issues related to political participation in Colombia. Instead, in more than a few areas there have been serious challenges to women's liberties and different human rights regimes conflict to each other. The ILO-169 and Latin American legislation contemplate indigenous custom as a source of law, particularly as a manner to diminish criminal liability. ILO-169 has been applied in recent Bolivian, Chilean and Colombian case-law, and the defendants have claimed "cultural defences", on occasion successfully or the indigenous tradition has been balanced

21. Sentencia constitucional Plurinacional 0323/2014.

by courts against other relevant interests. In those cases, victims' rights (women/children) are clearly less protected. Simultaneously, ILO-169 permits the existence of indigenous tribunals with jurisdiction to deal with some wrongdoings, jurisdiction that can affect women in a discriminatory way, such as the Bolivian case commented. In these areas, understanding indigenous cosmogonies is vital in order to assess the question put to trial and the following decision.

The proportionality test has been an instrument in adjudication, directly or indirectly, as is shown in the case-law analysed. At the same time, the dissimilar presence of indigenous population seems to have influenced domestic legal culture, which tips the balance of justice. Judges seem to tacitly consider the relevance of indigenous culture in each country in order to "weigh" the rights in conflict.

## References

- Alexy, Robert (2002a). "Balancing, Constitutional Review, and Representation." *International Journal of Constitutional Law*, 3 (4): 572-581. doi: <https://doi.org/10.1093/icon/moio40>.
- Alexy, Robert (2002b). *A Theory of Constitutional Rights*, Oxford: OUP.
- Alexy, Robert (2003). "On Balancing and Subsumption: a Structural Comparison." *Ratio Juris*, 16(4): 433-449. doi: <https://doi.org/10.1046/j.0952-1917.2003.00244.x>.
- Alexy, Robert (2012/2013). "The Construction of Constitutional Rights." *Revue française de droit constitutionnel*, 91, 465-477. doi: <https://doi.org/10.3917/rfdc.091.0465>.
- Alpa, Guido (1994). "General principles of Law." *Annual Survey of International & Comparative Law*, 1(1): 1-37. Recuperado de <http://digitalcommons.law.ggu.edu/annlsurvey/vol1/iss1/2>.
- Assies, Willem (2011). Bolivia's New Constitution and its Implications. In E. Morales and the Movimiento al Socialismo in Bolivia: The First Term in Context, 2005-2009, A. Pearce (Ed.) (pp. 93-116). London: Institute for the Study of the Americas.
- Baudin, Louis (1961, reprint 1991). *A Socialist Empire: The Incas of Peru*, Princeton: Van Nostrand Publishers.
- Bell, John (1995). "English Law and French Law-Not So Different?." *Current Legal Problems* 48.2. doi: [https://doi.org/10.1093/clp/48.Part\\_2.63](https://doi.org/10.1093/clp/48.Part_2.63).
- Bomhoff, Jacco (2008). The rights and freedoms of others: the ECHR and its peculiar category of conflicts between fundamental rights". En E. Brems (Ed.), *Conflicts between fundamental rights* (pp. 619-654). Antwerp/Oxford: Intersentia Publishers.

- Céspedes, Rodrigo (2017a). *Contra Huagama y Huagama*, Corte de Apelaciones de Antofagasta, Oxford Reports International Law in Domestic Courts ILDC 2775 (CL 2007).
- Céspedes, Rodrigo (2017b). *Velázquez Zambrana v Prosecutor Office of Arica*, Tribunal Penal Oral de Arica. Oxford Reports International Law in Domestic Courts ILDC 2578 (CL 2015).
- Curry, Thomas (1986). *The First Freedoms: Church and State in America to the Passage of the First Amendment*. New York: OUP.
- D'amato, Anthony (1983). "Legal uncertainty". *California Law Review*. 71, 1-55. Recuperado de <https://heinonline.org/HOL/P?h=hein.journals/calr71&i=13>.
- Glenn, Patrick (2004). *Legal Traditions of the World: Sustainable Diversity in Law*, 2nd Edition, Oxford: OUP, 13 and 50.
- Hart, Herbert (1982). *The Concept of Law*, Oxford: OUP, 124.
- Hobsbawm, Eric (2012). *The Invention of Tradition* (Eric Hobsbawm and Terence Ranger, Eds.), Oxford: CUP, 1-14.
- Kumm, Matthias (2004). "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on a Theory of Constitutional Rights". *International Journal for Constitutional Law*, 2(3): 574-596. Retrieved from <https://heinonline.org/HOL/P?h=hein.journals/injcl2&i=582>.
- Lederach, John Paul (1995). *Preparing for peace: Conflict transformation across cultures*, New York: Syracuse University Press.
- Loughlin, Martin (2010). *Foundations of Public Law*, Oxford: OUP, 369.
- Sottiaux, Stefan and Gerhard Van Der Schyff (2008). "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights", *Hastings International and Comparative Law Review*, 31(1): 115-156. Recuperado de <https://heinonline.org/HOL/P?h=hein.journals/hasint31&i=131>.
- Sullivan, Kathleen (1992). "The justices of rules and standards". *Harvard Law Review* 106(1): 22-123. Retrieved from <https://heinonline.org/HOL/P?h=hein.journals/hlr106&i=42>.
- Van Broeck, Jeroen (2001). "Cultural defence and culturally motivated crimes (cultural offences)". *European Journal of Crime, Criminal Law and Criminal Justice*, 9(1): 1-32. doi: <https://doi.org/10.1163/15718170120519282>.
- Von Savigny and Charles Frederick (1831). *The Vocation of Our Age for Legislation and Jurisprudence* (translation Abraham Hayward), London: Littlewood & Co. Old Bailey Publishers, 31.

Waites, Matthew (2005). *The age of consent: Young People, Sexuality and Citizenship*. New York: Palgrave Macmillan Publishers.

Yrigoyen, Raquel (2011). “El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización”. In C. Rodríguez (Ed.) *El Derecho en America Latina: Un mapa para el pensamiento jurídico del siglo XXI*, Editorial Siglo Veintiuno.

### **Sobre el autor**

RODRIGO CÉSPEDES was born in Chile and is a Research Fellow at the Max Planck Institute for Social Anthropology (Department of Law & Anthropology). His current research focuses on religious discrimination in school education in a number of countries and within the European human rights system. He is a qualified attorney at law and holds a PhD in Law from Lancaster University, UK. Previously, he was postdoctoral researcher at Manchester University (UK), where he conducted research on Latin American comparative law (in Chile, Argentina, Colombia, Bolivia, Costa Rica, and the Inter-American human rights system). In his own country he has taught Administrative Law, Environmental Law, and Introduction to the Law at Universidad Católica del Norte in Antofagasta, Chile. Over the course of his professional life he has researched and explored numerous topics ranging from jurisprudence to tax law. Correo Electrónico: [cespedes@eth.mpg.de](mailto:cespedes@eth.mpg.de)

## CUHSO

Fundada en 1984, la revista CUHSO es una de las publicaciones periódicas más antiguas en ciencias sociales y humanidades del sur de Chile. Con una periodicidad semestral, recibe todo el año trabajos inéditos de las distintas disciplinas de las ciencias sociales y las humanidades especializadas en el estudio y comprensión de la diversidad sociocultural, especialmente de las sociedades latinoamericanas y sus tensiones producto de la herencia colonial, la modernidad y la globalización. En este sentido, la revista valora tanto el rigor como la pluralidad teórica, epistemológica y metodológica de los trabajos.

EDITOR

Matthias Gloël

COORDINADORA EDITORIAL

Claudia Campos Letelier

CORRECTOR DE ESTILO Y DISEÑADOR

Ediciones Silsag

TRADUCTOR, CORRECTOR LENGUA INGLESA

Aurora Sambolin Santiago

SITIO WEB

[cuhso.uct.cl](http://cuhso.uct.cl)

E-MAIL

[cuhso@uct.cl](mailto:cuhso@uct.cl)

LICENCIA DE ESTE ARTÍCULO

Creative Commons Atribución Compartir Igual 4.0 Internacional