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Prospects for Self-Determination of Indigenous Peoples in Latin America: Questions of Law and Practice



Donna Lee Van Cott

The emergence of a pan-American indigenous peoples movement in the 1980s has challenged the notion sustained by elites (and scholars abroad) that the region is free of ethnic conflict. In fact, the indigenous organizations of Latin America have been at the forefront of international efforts to promote a claim to self-determination for indigenous peoples based on a literal interpretation of this right in international law. In March 1995, the United Nations Commission on Human Rights formed a working group to discuss a draft Declaration on the Rights of Indigenous Peoples (the Draft Declaration) prepared by the UN's Working Group on Indigenous Populations (the Working Group). That draft was adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in August 1994 and forwarded to the commission at its fifty-third meeting, in March 1995.¹ The Working Group, established in 1982, had been working on the draft since 1987 at annual sessions attended by hundreds of delegates representing indigenous organizations, their advocates, and member states of the UN. The indigenous delegates refused during those sessions to omit or to qualify an article in the Draft Declaration on the right to self-determination of indigenous peoples, over the objections of representatives of nation-states who asserted their countries' opposition to such claims due to the explicit and implicit secessionist implications of the term.

The international law implications of the self-determination clauses of the Draft Declaration are "substantively groundbreaking" in that they recognize the group rights of indigenous peoples and appear to support an expansion of the current definition in international law of *peoples*, from that of the permanent population of states, to include substate groups identifying themselves as *indigenous peoples*.² This proposed expansion was advocated by indigenous peoples and expressed in the proceedings at the 1993 Vienna Conference on Human Rights and at the yearly meetings of the Working Group.³ Yet its implications are ambiguous in two respects. First, there is no definition of indigenous peoples in the Draft Declaration that sets them apart from other ethnic, national, or linguistic minorities.

Second, it is unclear even from the statements of the chair and rapporteur of the Working Group, Erica-Irene A. Daes, whether the Draft Declaration merely removes a barrier of discrimination from indigenous peoples with respect to the right to self-determination, whether it substantively changes the nature of that right, or whether it creates a new class of legal entities—indigenous peoples—who may claim that right.⁴

International relations scholars should be watching the progress of the Draft Declaration. The UN's decision will likely not only ratify or rebuff indigenous claims to self-determination, but will also help to define the contested concept of self-determination in international law. It will also clarify two human rights concepts that Hurst Hannum predicts will become an increasing focus of human rights activists and theorists: "the right to participate effectively in the political and economic life of one's country and the right to protect one's identity."⁵

Regardless of the outcome at the UN, will Indians in Latin America achieve some sort of power sharing, autonomy, or self-government that fulfills their aspirations for self-determination? What forms will these new governing arrangements take? This article will begin with an explanation of what is meant by self-determination for indigenous peoples in the context of Latin American politics and what have been and are the practical barriers to exercising this definition of self-determination. Next, the prospects for the advancement of the self-determination claim will be explored theoretically, in terms of international law, and practically, as demonstrated by rulings and actions of international organizations. Finally, some possible alternatives for fulfilling Amerindian aspirations for self-determination will be suggested.

Indigenous Views of Self-Determination

Indigenous aspirations for self-determination are based in the historical context of their loss of territory and resources to colonial powers. Their dwindling lands are continuously encroached upon while, particularly in the late twentieth century, their "culture and their social and legal institutions and systems have been constantly under attack at all levels, through the media, the law and the public educational systems."⁶ Thus, they seek a level and definition of self-determination adequate to retain their current lands and resources and regain those taken from them illegally, in order to maintain an adequate land base for their survival as a people. They also seek recognition and respect for their languages; spiritual beliefs; and cultural, social, and legal institutions in order to govern and reproduce themselves as distinct peoples.⁷

In the Latin American context, when Indian activists express demands for greater self-determination, they refer to the exercise of greater autonomy

and control over a broad array of functions currently monopolized by the state. They also refer to recognition of indigenous nationalities, meaning recognition of each culturally distinct ethnic group as an autonomous political entity possessing a territory over which it maintains legal jurisdiction. While this need not be construed as a demand for a separate state, it is implicitly a rejection of the authority of the distant and often discriminatory Latin American state over a wide array of administrative matters.⁸ According to international legal scholar (and Apache Indian) James S. Anaya, most Indians perceive self-determination to be a pursuit of “spheres of autonomy over a range of policy and administrative matters, while at the same time enhancing their effective participation in all decisions affecting them left to the larger institutions of government.”⁹

Mexican Indians recently asserted: “Our lives and our resources are administered at a distance by non-Indians, which results in the fact that indigenous peoples do not have any possibility of exercising our sovereignty or self-determination. . . . The realization of a multinational state implies the recognition of internal self-determination of indigenous peoples and their achievement of autonomous regimes.”¹⁰ According to a United Nations Meeting of Experts studying existing schemes of indigenous self-government, the following represents the range of decisionmaking powers sought:

Subject to the freely expressed desire of the indigenous peoples concerned, autonomy and self-government include, *inter alia*, jurisdiction over or active and effective participation in decision-making on matters concerning their land, resources, environment, development, justice, education, information, communications, culture, religion, health, housing, social welfare, trade, traditional economic systems, including hunting, fishing, herding, trapping and gathering, and other economic and management activities, as well as the right to guaranteed financial arrangements and, where applicable, to levy taxes for financing these functions.¹¹

As Yael Tamir explains, the longing for national self-determination by indigenous peoples is a demand for recognition of their communal identity and to see aspects of this identity reflected in political institutions that are meaningful to them. Of equal importance to the acquisition of specific rights is the attainment of status and dignity.¹²

Economic Autonomy

Indigenous peoples desire greater control over their own economic development, which has historically been controlled by non-Indians—wealthy landowners, foreign capitalists, and government officials—who either ignore indigenous economic aspirations or impose their own model of development on indigenous communities. In recent years, this has meant policies that disfavor smallholder agricultural economies and dismantle

communal forms of property ownership, while promoting urban growth, low agricultural prices, and competitive market conditions for foreign investment and export agribusiness. Indigenous organizations are demanding that they be provided the education and management skills to design and manage externally financed development projects and the credit and technical support to realize their own economic aspirations.

The greatest conflict over economic forms of self-determination has arisen with respect to the control of natural resources and territories claimed by indigenous peoples and on which resource-based indigenous economies depend for survival. Indigenous forms of land tenure tend to be precarious in Latin America. Where Indian nations or communities have been granted “use of” certain properties, these arrangements greatly limit the extent to which Indians have the power to control exploitation of resources on these territories. Typically, subsoil and other resources have been exploited by the state, domestic and international corporations, and individual entrepreneurs, with little or no participation of the indigenous communities from whose territories these resources are extracted. Indians are demanding title to a greater share of fertile lands—that is, a continuation of agrarian reform and redistribution of lands—and a greater participation in the profits from the exploitation of natural resources in indigenous areas.

The modes of economic production of indigenous peoples—though they may be “uneconomic”—are protected under Article 27 of the UN Covenant on Civil and Political Rights, which protects the rights of minorities to enjoy their own culture. In upholding the rights of the Lubicon Lake Band in Canada, the UN Committee on Human Rights wrote that Article 27 protected “the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.”¹³ According to Nigel Rodley, the Draft Declaration is likely to confirm the necessity to protect indigenous economies through special structures, reserved territories, and spheres of autonomy.¹⁴

Political Autonomy

Indigenous organizations and communities also desire jurisdiction over territories densely populated by indigenous peoples, together with recognition of their traditional authorities and modes of organization alongside those of the national government. They want the authority to enforce their own customary laws, to the extent that these do not violate international standards of human rights.¹⁵ In some countries of Latin America, hybrid governments have been created that join Indian political units to a national structure of municipalities, districts, and national offices.

Various alternative government structures have been proposed to allow greater power for indigenous communities in zones of heavy indigenous

population. Mexican and Ecuadorian groups have called for special indigenous parliaments, while Indians in Colombia and Argentina, with small indigenous populations, and in Mexico, with about a one-quarter indigenous population, have called for special electoral seats in the national congress to be reserved for ethnic minorities. Colombian Indians won this right in the 1991 constitution. The Argentine congress recently passed a constitutional reform that recognized the legal status of indigenous communities as well as of communal land titles. Redistricting has also been proposed to create municipalities and districts with majority indigenous populations where indigenous leaders would have a better chance of replacing the nonindigenous officials who commonly run rural municipalities.

Cultural Autonomy

As in other parts of the world, cultural rights are most often associated with the right to use languages other than those of the dominant group in society—for local and customary use, but also for governmental, legal, and other official transactions. A great number of indigenous communities and organizations in Latin America are actively involved in designing and securing resources for educational programs that incorporate indigenous languages, customs, and spiritual beliefs. Aside from countering the discrimination against indigenous culture evident in official educational and cultural programs, indigenous communities hope to ensure the survival and flourishing of their native cultures and languages through these programs.¹⁶

While a minority of Indian militants demand the complete separation of indigenous zones from national authority, the vast majority wish to maintain ties to their country's government and to derive benefits from this association.¹⁷ Nevertheless, those who oppose Indian demands for greater autonomy tend publicly to associate these demands with separatist aspirations in order to inject nationalist emotions into the conflict. To distinguish between separatist or secessionist claims and the pursuit of greater autonomy, scholars generally distinguish between "external" and "internal" self-determination. While external self-determination refers to separatism or independent statehood, internal self-determination refers to more "meaningful participation in the political system."¹⁸

National Barriers to Self-Determination

Indians are overwhelmingly overrepresented among the poorest of the poor in virtually every country in the hemisphere (including the United States and Canada), with the percentage of Indian residents dramatically correlated with community poverty levels.¹⁹ Indigenous peoples are most adversely impacted by the development and hegemony of the international

economic system due to their traditional modes of economic development and historical economic and cultural marginalization. According to a study by Ted Gurr, Indians in Latin America suffer the greatest disparity in income and political power relative to the dominant society of any ethnic group in the world.²⁰ Indians in Latin America have poor access to educational opportunities, including training for technical and managerial skills, and lack capital and credit for investment. The small size of the common unit of agricultural production among Indian farmers is not conducive to the accumulation of additional capital or to competition in the international economy.

The domination of the international economy and the expansion of neoliberal reforms have displaced and will continue to displace indigenous farmers from the nonsubsistence agricultural economy. The current trend toward privatization of Indian communal lands and the removal of protections on indigenous lands will break up contiguous land holdings and dissolve communal modes of production and environmental protection, while concentrating land in the hands of a smaller class of mostly non-Indian local elites. Gurr cautions that the prospects of Indians reversing these global economic changes are slim, particularly in the contemporary context of economic crisis and reform in Latin America.²¹ The ability of Indian communities to generate self-sustaining economic projects and accumulate capital independent of the government often determines the viability of political autonomy arrangements. Where Indians are dependent on government or international resources, they are less able to sustain independent political units.²²

In addition to economic constraints, Indians face political constraints common to Latin American politics that impede their prospects for self-determination. The historic centralization of Latin American states, dating to the colonial era, has concentrated political power in the capital cities of the region, while Indians have been forced since the Conquest into the most remote jungle, coastal, and mountain areas in the periphery, where little political power is exerted. Though a trend toward decentralization of authority has emerged in Latin America in the 1990s, this trend has not generated enough power at the local and regional levels to create many opportunities for indigenous political participation, though it creates the potential for this to occur in the future.

The evolution of Latin American political party systems also disfavors indigenous leaders, because in many countries the major parties control most political offices at all levels. Candidates for national office are typically chosen by the parties in the capital cities and run on nationwide lists, whereby voters are able to elect parties but are not allowed to choose individual candidates who are responsible to them or to elect candidates with support in particular localities. Thus, indigenous leaders with support in their communities rarely have achieved national office, although, in the

few years since the quincentenary in 1992, some parties have included indigenous leaders on their lists in order to appeal to the ethnic vote. Frustration with the political party system in Mexico caused Indian leaders there to call for a constitutional reform that would allow Indians to run for office without being candidates of an official party.

There are other obstacles to greater political power for indigenous peoples that are derived from their cultural distance from the dominant population: the discrimination against Indians that pervades life in Latin America; the poor performance of Indians in state-sponsored schools and the lack of alternative schooling; and a tradition of indigenous community leadership that tends to rotate leadership among male members of the community rather than developing a class of professional leaders. Demands for greater acceptance of indigenous culture and languages have been impeded by the domination of most mass media by cultural messages that denigrate indigenous heritage. Another hurdle is the added expense of translating government and legal materials into the numerous indigenous languages spoken at a time when essential government educational, health, and sanitation services are being cut for lack of funds.

Since the Conquest, the hundreds of diverse Amerindian nationalities of Latin America have been lumped into one racial category by a conquering culture that did not see any meaningful differentiation among them. Discrimination and repression of indigenous peoples have not been based on their strongest level of identity—that of their *ethnie* (Mapuche, Shuar, Quechua, etc.)—but on their identification by others as *indios*, which is an artificial, aggregative category with weaker identification for indigenous peoples. The aggregative nature of indigenous identity in Latin America weakens the unity of the movement and is therefore also an obstacle to the exercise of self-determination, as the *self* in that term is not clearly defined. As Gurr notes, the “dynamics of ethnopolitical conflict are different for such fragmented or aggregative groups than they are for strong identity groups because fragmented groups are more likely to have competing leaders and movements, and they are more susceptible to divide-and-rule strategies carried out by the state”²³ or their indigenous clients.

Self-Determination for Latin American Indians and International Law

Since the early 1980s representatives of indigenous peoples have presented their demands for self-determination at the international level based on two key legal arguments. First, indigenous peoples claim personality in international law based on the lengthy history of treaties between European powers and indigenous nationalities. According to Miguel Alfonso Martínez,

special rapporteur for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, whatever may be the legal status of substate indigenous peoples today, at the time of the expansion of European powers into the Western Hemisphere, the historical record shows that the European parties did consider indigenous nations to be sovereign entities with the “inherent international personality and legal capacity [to negotiate and enter into] treaty relations, resulting from their status as subjects of international law in accordance with the legal doctrine of those times.”²⁴ Such status was based on the key criteria by which international law has recognized political entities as the subject of international law: “territory, a distinct, permanent population, capacity for international relations and easily identifiable forms of government.”²⁵ The former legal personality of indigenous tribes or nations is not in doubt. The dispute is over whether indigenous tribes have lost their status as sovereign. According to Martínez, in the late nineteenth and twentieth centuries, Canadian and U.S. Indian legal decisions progressively eroded the sovereign treaty rights of indigenous peoples, subordinating all indigenous rights to the jurisdiction of national law.²⁶

The second legal claim to self-determination of indigenous peoples is based on a literal interpretation of the 1966 International Covenants on Civil and Political Rights, and on Economic, Social, and Cultural Rights. Article 1 of both covenants states: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”²⁷ Implicit in this right, though selectively sanctioned by the international community, is a right to become an independent nation-state. The United Nations Draft Convention on the Rights of Indigenous Populations essentially reiterates Article 1, while adding special paragraphs related to indigenous forms of organization and the right not to participate in government:

Article 3: Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 19J: Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

The Draft Declaration also includes a clause (Article 45) that somewhat constrains the interpretation of the cited paragraphs: “Nothing in this Declaration may be interpreted as implying for any State group, or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.”²⁸

The application of a right to self-determination to Latin American Indians is questionable on several important grounds: a tradition in international law of a territorial rather than an ethnic or cultural definition of *peoples*; an affinity in international law for individual rather than less-defined and accepted collective rights;²⁹ the historical context of self-determination law, which is explicitly European and postcolonial; and a strong balancing principle of nonintervention in the internal matters of nation-states in UN legal instruments.

Whereas indigenous activists and their supporters define *peoples* in ethnic, linguistic, and cultural terms, the International Covenants on Civil and Political, and Economic, Social, and Cultural Rights avoided clearly defining the word. It has been the practice, however, of the international community to define a *people* as the permanent population of a state.³⁰ Similarly, the 1945 UN Charter defines self-determination as focusing on territory rather than on ethnicity.³¹ According to Anaya, a self-determination claim based on ethnographic criteria

overstates the value accorded ethnicity and historical community within the international system outside the highly charged political context of post World War I Europe. The right of self-determination affirmed in the decolonization context did not attach to groups by virtue of ethnic makeup or historical sovereignty. And the international community has not in recent times generally responded favorably to self-determination claims simply on the strength of ethnic cohesion or accounts of historical sovereignty.³²

This view is consistent with rulings in both the League of Nations and the International Court of Justice, both of which have repeatedly rejected claims for international legal personality by indigenous nations.³³ For example, the League of Nations ruled against the wishes of mostly Swedish Aaland islanders to join its former sovereign, Sweden, and in favor of the more recent territorial claim of Finland, which acquired the islands only as a result of Russian expansionism. Subsequent rulings have upheld the denial of demands by any substate groupings—no matter how constituted (ethnically, religiously, linguistically)—for self-determination.³⁴ In those cases where independent status has been recognized by the international community—the republics of the former Soviet Union and former Yugoslavia, and Eritrea—claims were made based on prior existence as independent politico-territorial entities, and by populations with the power to contest credibly the domination of a declining power.

Indian aspirations for self-determination are also hampered by the historical context of international law with respect to self-determination of peoples. The great powers determined the meaning of self-determination after World War I as part of the effort to dismantle prewar colonial empires

and to create states capable of counterbalancing the economic and strategic strength of Germany and the Soviet Union. By the 1940–1950s, self-determination was being strictly defined in terms of colonial peoples, and Latin American states were not considered to be colonial.³⁵

A claim by indigenous peoples to *external* self-determination faces two additional barriers: the inviolability of existing borders in international law; and the test of economic viability for emerging nation-states. The 1966 covenants cited by aspiring secessionists are balanced by the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, which “emphasized preservation of territorial integrity, stating that its affirmation of the right of self-determination should not be construed as ‘authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.’”³⁶ While the preservation of territorial integrity of states is balanced by language specifying its application to states “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour,” this qualification has been interpreted by states as applying to formal restrictions on political representation, rather than the informal geographic, economic, cultural, and social restrictions that impede indigenous representation in Latin America.³⁷ In particular, as noted above, the international community has chosen to defend the existing state borders of Latin America and Africa, despite their basis in colonial conquest.³⁸

The second obstacle, the economic viability of potential states, has been important since the classical period of liberal nationalism in the nineteenth century, when the ideal size of states was deemed to be the most efficient unit of government under capitalist production.³⁹ The economic viability argument is especially important to the case of Latin American indigenous peoples, since they are the most economically disadvantaged group in the hemisphere.

As noted above, the UN Commission on Human Rights is currently considering a Draft Declaration on Rights of Indigenous Peoples. Though activists supporting the self-determination clause claim that Indians do not mean secession when they speak of self-determination, they refused to allow any clarifying language to that effect to be included in the text, claiming that such qualifications would make Indians “second-class citizens” in the international community. These hard-liners continue to resist efforts by states wishing to clarify the self-determination clause as not permitting secession in order to increase the chances of the declaration being accepted by the General Assembly, claiming that this would prevent indigenous peoples from resorting to secession in the extreme cases in which the international community has sanctioned the emergence of new states.⁴⁰

On the contrary, failing to extend a right to self-determination to indigenous peoples by virtue of their indigeness—a cultural and ethnic attribute—merely upholds the current territorial definition of peoples. To the extent that a particular indigenous people may meet the territorial definition and put forward a claim based on territorial criteria, they will be judged by the international community according to the same standard as any other group putting forward a self-determination claim.

Hundreds of ethnically distinct peoples lack status as independent states. In very few cases has the international community favorably considered the claims of an ethnic nationality for statehood based solely on its cultural and ethnic distinctiveness or due to historical oppression. Proponents of the unqualified self-determination language are actually advocating the creation of new ethnically and culturally based standards that have repeatedly been rejected by the international community, and the application of such standards only to indigenous peoples; they advocate creating a class of people with superior rights over other peoples who, lacking “indigeness,” would not be eligible for self-determination based on cultural or ethnic criteria. Moreover, expanding the right to ethnic groups creates other inequities. Hurst Hannum asks, Why should ethnic groups have rights to protection that political or religious groups do not have? He concludes that self-determination of substate ethnic groups is inherently a political question to be resolved within states, rather than a question of international law that requires the intervention of the international community.⁴¹

Prospects for international organizations recognizing a right to self-determination for indigenous peoples are equally dim. To acknowledge the right to secession for any ethnic or national minority would, from the perspective of many of the world’s states, create incentives for hundreds of ethnic and national groups to agitate for special rights that may lead to conflict rather than conflict resolution. International institutions like the UN are composed of states, which are unlikely to support claims for greater autonomy and possibly secession of ethnic enclaves within their borders or irredentist actions on their frontiers. The United Nations Human Rights Committee has rejected the claims of tribal bands in Canada for self-determination under the Optional Protocol, which allows it to hear claims only from individuals, not from groups or peoples.⁴²

The advancement by indigenous peoples and their advocates of claims for political rights and cultural autonomy would be better served by pressing for stricter application of existing instruments proscribing genocide, slavery, and racial discrimination and protecting civil, political, economic, social, and cultural rights.⁴³ The UN has become increasingly involved in the monitoring and condemnation of gross human rights violations by its member states, and the current trend is toward increasing the capacity of

the United Nations Human Rights Commission and Security Council to intervene.⁴⁴ Aside from the interest of the United Nations in the human rights practices that states use against their own people, there is a growing consensus that violations of the rights of ethnic minorities can have a destabilizing effect on neighboring countries. The role of the UN in resolving the guerrilla war in Guatemala is a case in point, as this crisis has generated a population of more than forty thousand refugees across the border in Mexico, a country trying to resolve its own civil conflict in an area permeated by Guatemalan refugees and insurgents.

The UN is currently brokering talks between the Guatemalan government and the guerrillas, which resulted in an agreement on Indigenous Identity and Rights, signed on 31 March 1995 in Mexico City. In addition, the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA) was established by a UN General Assembly resolution in September 1994, following the signing in March of that year of the Comprehensive Agreement on Human Rights by the government and the rebels.⁴⁵ While Guatemala's indigenous organizations are not a party to the peace accords, the MINUGUA mission contains an indigenous peoples unit charged with maintaining close contacts with these groups and receiving their reports of violations of the human rights accord. The 245-strong international staff of the mission has unprecedented powers to work directly with national entities to strengthen the capacity of the national system for the protection of human rights. In cooperation with the United Nations Development Programme, the mission is developing long-term projects with the Guatemalan government to build administrative and technical capacity and to structurally reform the administration of justice.⁴⁶

In addition to intervention in violations of human rights, states' responsibilities under the Universal Declaration of Human Rights are particularly pertinent to ethnically diverse societies, which, according to Ramcharan, have "a special duty to develop constitutional principles, institutional arrangements, and the necessary processes for constantly guarding over and promoting the practical application of the principle of equality and nondiscrimination." Moreover, "the international community increasingly holds itself entitled to scrutinize the internal arrangements made by states for dealing with situations, such as those of minorities and indigenous populations."⁴⁷ The pursuit of "internal" self-determination claims via existing and expanding international institutions and human rights instruments would seem to be a more viable strategy than continued confrontation with a more rigid self-determination regime.

A showdown is inevitable in the UN over the self-determination clause of the Draft Declaration, as the United States, Brazil, and other countries in the Western Hemisphere have rejected the draft in its current form, singling out the ambiguity of the self-determination language as

particularly objectionable. While the UN would likely approve a declaration that upheld the rights of indigenous individuals to all the rights and responsibilities of other individuals, it is not likely to approve a declaration that creates special rights for indigenous peoples based on their ethnic or cultural distinctiveness or a history of oppression. The UN recently approved a declaration on minority rights⁴⁸ that stops far short of contemplating a right to self-determination or of acknowledging group rights. The indigenous rights community has failed to make its case as to why indigenous peoples deserve or require greater protections or privileges than other ethnic or national minorities.

At the Organization of American States (OAS), prospects for recognition of an Amerindian right to self-determination are unclear. The OAS has long resisted any sort of official standing for Indians. The legacy of political and social conflict over this issue in the region has made it an unpopular issue. A determination by the Inter-American Human Rights Commission (IAHRC) of the OAS, in a case brought by the Miskito Indians of Nicaragua, ruled against a right to self-determination, though the commission did encourage the Sandinista government to pursue a negotiated autonomy arrangement, which was ratified in 1987.⁴⁹ Nevertheless, since a new secretary-general took office in September 1994, the OAS has been able to move forward with a regional instrument to codify and protect indigenous rights. The OAS Draft American Declaration of Indigenous Rights was approved by the IAHRC in late 1995 and was sent to member-states and indigenous peoples organizations for comments. As president of Colombia, Secretary-General César Gaviria presided over a period of dramatic constitutional reform with respect to the rights of indigenous peoples and has used his personal prestige to promote indigenous rights and raise the issue of indigenous representation within the OAS.

The OAS Draft American Declaration of Indigenous Rights incorporates Article 3 and Article 19J of the UN Draft Declaration but adds more specific and qualified language to define and limit the right to self-determination:

Indigenous peoples, as a specific form of exercising their right of self-determination, have the right to autonomy or self-government in relation to internal and local matters, including culture, religion, education, information, communications media, health, housing, employment, social well-being, economic activities, administration of land and resources, environment, and exclusion of non-members, as well as the right to obtain resources and means to finance these autonomous functions.⁵⁰

In addition to this greater specificity, the difference between the OAS and the UN draft instruments is the inclusion of a definition of "peoples" that severely constrains the possible interpretation of the above language on self-determination: "In this declaration the use of the term "peoples" must

not be interpreted in the sense that it may have any implication whatsoever for rights that may be attached to this term in international law.”⁵¹

This disclaimer allows the instrument to use the term *peoples*—which is the one most accepted among the Indian rights community—while maintaining the definition in international law that confines the legal meaning of that term to the permanent population of a state. It is the same compromise made in the International Labour Organisation’s Convention 169 on the Rights of Indigenous and Tribal Peoples (1989), which uses almost identical language. The UN Draft Declaration does not include a definition of indigenous peoples, due to concerns by indigenous groups that they maintain the right of “self-identification.” As Corn tassel and Primeau argue, the failure of the Working Group to include a precise definition of the persons to whom the Draft Declaration applies opens the door to claims by any aggrieved nonstate group that wishes to identify itself as “indigenous” and may actually impair the credibility of the international indigenous rights movement.⁵²

Political Strategies for Indigenous Self-Determination

Given the weak legal basis of claims to self-determination of indigenous peoples in international law, what political solutions have been suggested? The countries of Latin America have already instituted a variety of arrangements to address Indian demands for autonomy. These arrangements include Panama’s *comarcas*, autonomous regions that have been governed by the Kuna and Emberá Indians since the 1930s, and the Atlantic Coast Autonomous Zones of Nicaragua, where the Miskito, Rama, and Sumu Indians live among people of Spanish, English, African, and mixed heritage. More common than these are the Indian reserves found in Brazil and Ecuador, on which indigenous peoples lack the explicit self-management powers and control of resources enjoyed by Nicaraguan and Panamanian Indians. A new type of arrangement that radically increases the autonomy of individual Indian communities has recently been instituted in Bolivia, Colombia, and some states of Mexico. These governments have recognized the authority of traditional Indian leaders and political structures and processes over a wide range of local matters. In the case of Bolivia, the government is also providing a share of government revenues so that local Indian communities can implement their own development and public service projects.⁵³

In a 1987 report commissioned by the UN Working Group on Indigenous Populations, special rapporteur José Martínez Cobo notes the variety of legal regimes with which governments have attempted to address the changing legal status of indigenous peoples. These tend to fall into two groups. The first creates a separate legal status for Indians to “protect”

them while excusing them from certain obligations, such as military service. This option has the effect of restricting the exercise of certain rights of citizenship—or even conferring a diminished legal capacity—until such time as the Indian in question shall “attain what is considered to be a necessary level of development which could place them on an equal footing with the rest of the population.”⁵⁴ The second tendency is for legal and constitutional guarantees of equal enjoyment of rights due to all citizens while enacting special provisions that address the historic economic, political, and social disadvantages experienced by indigenous groups.

In his review of a range of legal remedies to address discrimination, Martínez Cobo concludes that policies that stress pluralism, self-reliance, self-management, and ethnodevelopment “seem to provide for better opportunities and means for direct participation by indigenous populations in the formulation and implementation of the policies officially adopted by the State.”⁵⁵ This set of policies evolved historically from colonial-era policies that sought to subjugate and control Indian communities, to the early twentieth century “indigenist” policies of forced assimilation and integration, and finally to the current vogue of empowerment of indigenous communities. Yet, notwithstanding the progress Martínez Cobo notes in the development of indigenous policy, Indians themselves complain that no existing autonomy and self-government arrangements have been fully and satisfactorily implemented or respected by governments.⁵⁶

Theorists of ethnic conflict have offered a variety of solutions, ranging from bolstering liberal democratic institutions to creating elaborate overlapping governance structures, more commonly seen in the multiethnic states of Europe and Asia. Calls for greater pluralism and multiculturalism in Latin American society, and the consolidation and strengthening of democratic institutions and procedures to ensure greater representation of the desires of indigenous communities in Latin American politics, are increasingly becoming common rhetoric (if not wisdom). Hannum and Safran have noted the compatibility of pluralist democracy with peaceful and productive ethnic accommodation, as well as the converse truth: authoritarian states are unlikely to accommodate minority demands. Particularly where indigenous peoples constitute between one-third and more than one-half of the population—Bolivia, Guatemala, Peru, Ecuador—the achievement of more pluralistic, open, and accountable democratic processes and institutions would go a long way toward addressing the grievances of indigenous peoples.

Given the slowness with which pluralist democracies historically have evolved, and the weakness of democratic institutions throughout Latin America, simply waiting for democracy to mature in Latin America is unlikely to address indigenous concerns even in the medium term. Moreover, as Miguashca notes, Western ideals of liberal democracy—individualism, equal opportunity, representative elections—conflict with Indian notions

of democracy based on collective rights, equality of economic conditions, and direct participation in consensual decisionmaking.⁵⁷ It is important to understand that even pluralist democracy and equality of access to resources and opportunities will not address indigenous demands for self-determination. It is not unusual for national minorities to sacrifice civil and political rights to desires for recognition of national status. As David Easton notes, the desire to seek a separate identity and to govern one's own community is partly independent from any dissatisfaction an ethnic group or nationality may feel with a regime:

Even though greater representation is offered a separatist group and even though the authorities were to become increasingly responsive, there are conditions under which ethnic, linguistic, or national groups will nonetheless continue to seek separate identity through their own political community. Historically, this has usually occurred when the separatist group has reached the level of political consciousness and organization which links the maintenance and gratification of a sense of dignity and freedom inextricably to mastery over its own political destiny, at least insofar as this is ever possible under modern circumstances.⁵⁸

Federalism has been the most common solution for ethnic conflict where populations are concentrated in particular localities. Under federalism, municipal and regional districts are drawn such that the national ethnic minority constitutes a local majority. In fact, the Independent Front of Mexican Indians bases its program of constitutional reform on a modification of federalism that joins autonomous indigenous governments to the national government.⁵⁹ A federalist solution of some sort has a greater chance of working in Mexico than in other states of Latin America, since Mexico is one of a few countries in the region with a nominal federal system. While federalist solutions have been successful in some industrialized countries (such as Switzerland), the results have been less sanguine in developing countries. For example, Nigeria, India, the Soviet Union, Yugoslavia, and Czechoslovakia have tried and failed to resolve interethnic problems through federalism.

As Jean Laponce suggests, it is more difficult to apply federalist solutions when ethnic minorities are scattered geographically or interspersed with other ethnic groups.⁶⁰ Laponce describes various schemes of "personal federalism," originally proposed to deal with religious or national minorities in the Ottoman Empire, democratic Estonia, and the nineteenth-century Austro-Hungarian Empire and that are now being discussed to address claims to self-determination by Canada's non-Inuit, dispersed, and urbanized aboriginal population. Personal federalism creates two coexisting governing structures: one for territorially based matters—the Canadian governments and its provincial structures—and one that is organized on an ethnic basis, which deals with specifically ethnic questions, such as

language. Two difficulties emerge in the Canadian case: finding a way to graft the ethnic government structure onto Canada's highly decentralized territorial one, and dealing with the fact that Canada's Indian community is very divided on this issue. Due to the diversity of Canada's aboriginal population, most treaties and agreements between the Canadian government and Indians have been conducted at the tribal or band level.

Gidon Gottlieb proposes a new approach to conflicts between nations and nation-states that complements the personal federalism model: the extension of the international system to make room for nations—such as indigenous tribes or bands—alongside states. He proposes opening international organizations such as the UN, as well as distributing some of the territorial and juridical functions of states to nonstate nations and defining different territorial borders for distinct purposes. Under Gottlieb's plan, peoples organized on a nonterritorial basis (such as dispersed Indian ethnies in a particular region of Latin America) would be given rights by the international community similar to those of states, but only with respect to nonterritorial concerns.⁶¹ This approach creates different layers of citizenship and “new kinds of attachments or union among nations and peoples on the one hand, and between nations and states on the other.”⁶² Gottlieb's imaginative solution presents daunting challenges for international law. Governments attempting to implement similar schemes at the national level—meshing national and customary law in concurrent jurisdictions—have had poor results.⁶³ Moreover, Safran questions the feasibility of giving national status to nonterritorial entities based on past experiments with such “special” status: “Without a genuine territorial base, the requisite cultural institutions, and a credible ethnic cultural elite such a status was empty of positive content and often amounted to an invitation to practical discrimination.”⁶⁴

Horowitz defines sovereignty in terms of power sharing, which encompasses four processes: participation of representatives in government, varying degrees of autonomy over certain policy areas, proportionality of power and resources, and the employment of a minority veto. He notes nine factors that favor the success of power-sharing arrangements, singling out two as most important: the absence of a majority ethnic group and the absence of large socioeconomic differences among the ethnic groups. These criteria alone would tend to limit the prospects for Indians in Latin America of achieving meaningful power sharing. Experience shows that countries with small indigenous populations (relative to the total) will be more likely to grant indigenous populations both the “special” status they desire as distinct peoples and the benefits of full citizenship. The historical policies of Canada and the United States, as well as recent developments in Argentina, Colombia, and Panama, support this view. In countries with more than one-quarter indigenous population—Bolivia, Ecuador, Guatemala, Mexico, Peru—it has been more difficult for states to acknowledge the

existence of indigenous peoples as distinct nationalities with separate rights of any sort.

Whatever legislative or administrative arrangements are chosen, two points are critical. First, autonomous regions must be economically self-supporting in order to break the relationship of dependency between the indigenous community and the national government.⁶⁵ Second, such arrangements must be designed and implemented with the full and informed consent of the indigenous communities concerned “of both the procedure leading to the arrangement and its results.”⁶⁶ The fact that the new Guatemalan Accord on Indigenous Identity and Rights was negotiated between the (nonindigenous) rebels and the Guatemalan government—even though the agreement contains many of the provisions requested by the Maya population, as represented by its umbrella organization, COPMAGUA—presents a serious obstacle to its acceptance simply because the Maya themselves—long marginalized from political decisionmaking—were excluded formally from the negotiations.

The greatest challenge—one no state has achieved—is the simultaneous fulfillment through administrative arrangements of both national unity and cultural diversity. “Unity through diversity” is the motto of the current Bolivian government as well as of many indigenous organizations. Yet existing explanations of how this ideal would be achieved remain vague, as in this passage from the UN special rapporteur’s report: “The unity which is a legitimate concern of many States, particularly those which have most recently acceded to independence, can be achieved most fully and profoundly through a genuine diversity which respects differences between existing groups aspiring to a distinct identity within society as a whole. The desired unity will be achieved more fully if it is based on diversity, rather than on an imposed uniformity inconsistent with the genuine feelings of the population.”⁶⁷ Whatever “unity through diversity” may mean, it is something that cannot be achieved through administrative arrangements alone but entails a radical transformation in the collective self-consciousness of the entire population of a state.

One important debate must be resolved by indigenous communities themselves: whether or not to dissolve “protective measures,” some of which are centuries old. As Laponce notes, many Indians voted against greater self-determination for Indians in the 1992 Canadian constitutional referendum out of fear of losing financial benefits from government programs. In some countries, Indian land rights depend on colonial protections that treat Indians as minors. At what cost do Indians maintain specially funded programs and exemptions from taxes and military service?

Some compromises will have to be made by indigenous organizations if they are to achieve more harmonious relations with states in Latin America. Better relations could be achieved if indigenous organizations would repeatedly renounce any claim of a right to secede (external self-determination); such claims have inflamed tensions and confused the

issues. A strategy of reaching out to other marginalized groups in society—which has been successful for Indians in Colombia—would create more support for ethnic and cultural rights while calming fears of ethnic polarization and, possibly, violence. And indigenous leaders should bear in mind that the state only has the power to grant or recognize rights—the longing of indigenous peoples for dignity and identity will not be satisfied by the state.

Ironically, while the strong ethnic and cultural identification of indigenous groups in Latin America has mobilized and sustained their movement, a strong emphasis by some activists on cultural separateness and the superiority of Indian over Western culture inhibits the ability of some groups to participate in power-sharing arrangements, to improve their material conditions, and to expand their spheres of autonomy: to achieve, in practice, an indigenous vision of self-determination. 🌐

Notes

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