

# Different Values, Different Punishments

Barbara Oliveira describes some examples of traditional forms of justice practised by Latin American indigenous groups.

*“People say that we make justice with our own hands. Yes we do, but we know how to do it, and it is not only about killing for killing. There is the need to educate men and women in order to teach them how to live in the community. We do not do anything just for doing, everything that we do has a reason behind it” - Taita Nazario Caluna, traditional authority, Chibuleo- Ecuador.*

Before the Portuguese and Spanish came to Latin America, indigenous peoples lived there in accordance with their own culture, values and traditions. Since then, different policies from discrimination to assimilation have been employed towards these peoples. Despite this, indigenous peoples have managed to preserve some of their culture. The customary rules regulating community life and practices to solve conflicts and administer justice are an example of customs still being used, although they may be adapted as a result of external interference. With the growing acceptance that Latin American countries are in fact multicultural societies where indigenous peoples' rights should be recognised, attempts are being made to preserve and protect their culture and customs. Indigenous traditional laws are gradually being recognised as systems parallel to national judicial systems, resulting in what is often called 'legal pluralism'. This recognition started during the late 1980s and some Latin American countries, such as Colombia, Peru, Venezuela and Ecuador, have already recognised the indigenous systems at constitutional level. Other countries — Guatemala, Argentina and Mexico — are in the process of developing legislation to recognise indigenous systems.

Different names are given to the systems of customs and traditions used by indigenous peoples in solving their disputes, including disputes of a 'criminal' nature, and these descriptions are often challenged for one reason or another. Thus, some people do not accept 'crime' as a label for conduct which is punishable under indigenous law systems, or 'punishment' to describe sanctions imposed for unacceptable conduct. I will for the purpose of this article disregard these criticisms and make use of these labels to more easily describe these customs.

## Different groups, different cultures

Indigenous communities in Latin America are not homogeneous. Their number varies significantly in relation to the rest of the population. In Brazil and Colombia, for example, they are a small minority, while in Bolivia and Guatemala more than 50 per

cent of the population is indigenous. Indigenous groups live in environments as varied as the Amazon jungle (for example some groups in Brazil, Venezuela, Guyana, Colombia and Peru) or alongside the Andes in Ecuador, Peru, Bolivia and Colombia. They also can be found further south, in Argentina, being more concentrated in the Neuquén region. There is a diversity of customs and traditions, and consequently different means for dealing with conflicts and 'criminal' behaviours within the community.

Accurate generalisations are difficult to make, so this article will focus on forms of punishment and offences in different groups in order to give a broad picture of the approach taken by indigenous peoples of Latin America in controlling anti-social conduct. Some indigenous practices are radically different from practices in the criminal systems of 'Western' or 'developed' nations; others are more familiar. In the course of my research I was sometimes shocked and deeply disapproving of some practices, while admiring others. Good or bad practices? This is a subjective judgement, but it should not be based on lack of information or a discriminatory stereotype of indigenous peoples.

## Actors and places

The community takes an active part in the proceedings at different stages and at different levels. It contributes to the development and transmission of customs, which are of an oral nature. The community is also in a position to give advice on possible solutions; it is consulted during proceedings and present when punishment is given. There are great differences in this area between indigenous and Western criminal systems. While the Western system is complex and bureaucratic, the indigenous law system has a more simplistic nature. For example, for the Quichua communities of Ecuador there is no need to have a specific institutional system of authorities and staff; nor is there the need for exclusive places where justice is implemented. The place for the solution of conflicts, even 'criminal' conflicts, is the family. Proceedings take place inside the house of one of the parties – offender or victim – where parents, grandparents and godparents take active part in the dialogue and

discussion. Usually young children are present so they can learn and internalise the way a conflict should be solved. This could be compared to a 'court of first instance', and if no solution is reached, it should be brought before a 'court of second instance', composed of the assembly, the community and traditional authorities. The actual venue can range from the communal house, community authority's office, the office for the distribution of potable water, school or the community square.

The main actors in this system are the community and traditional authorities and elderly members. Community authorities do not receive financial remuneration for their services. According to the testimony of a traditional authority, the explanation is that "the services rendered are a sacrifice to the benefit of the whole community. We must have the desire to help our people; no financial interest must motivate our choice in taking this position, but only the desire to live well and without problems." For them, the best remuneration is

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represented by the recognition and respect of the community. There are no legal representatives. If an accused person needs assistance in the community of Jambaló (Colombia), assistance is given by another person who can speak the language, knows the customs and traditions, and is able to speak personally during the Assembly's meetings. In groups with minimal external influence, there are no police as, in their view, it is not necessary. In a Quichua community, a suspect is notified of the need to appear before the community authority by the community authority's assistant. If the suspect ignores this message, then his or her name is announced through the speakers of the community square. If the person still does not appear, a commission, formed by community members, is sent to the suspect's house in order to accompany him or her to the authorities. The security of detained persons, performed by the police in a Western context, is performed by alternative means in traditional indigenous communities: by the victim's family members.

Punishments are often the most debated area in discussions about indigenous law. The debate is mainly based on criticism of corporal punishments, where human rights advocates like myself have numerous arguments against this indigenous practice. But a different perspective is available if one looks beyond discussion of corporal punishments to their aim. The aims of punishments

are generally claimed to be education and correction. Two main features can support this claim: the community presence when punishment is given and the advisory component of punishments. Advice is generally given to the offender by older people on how he or she should behave in order to be in harmony with community values. Another educative feature is the signing of a declaration promising not to repeat the bad conduct. This is used in a similar way to a criminal record, but the signature of the offender is seen as a promise towards the whole community. Conduct that is not punishable in Western systems can be punishable in indigenous law systems, for example adultery, jealousy, lies, suicide and non-assistance in community affairs. On the other hand, while in Western systems death committed using witchcraft or magic ritual is considered to be murder, for indigenous peoples this can be considered as a legitimate form of social or self-defence. Adultery is considered to be a 'crime' because it means lack of respect towards spouse and children. For the Quichua, punishment is the detention of the offender in the community 'jail' for three to four days, where food is given only by the person's spouse. If food is given until the fourth day it means the couple have reconciled. The person is then released from detention and receives advice on proper conduct at home.

Corporal punishment can vary tremendously. It can take the form of hits or blows, called *fuate* in Colombia, bath with cold water or *ortiga* (a plant which causes irritation and itching) and *cepo*. The number of *fuate* varies depending on the gravity of offence and the imposing indigenous community. An example was the infliction of five hits to a member of the Vereda el Tablón community of Colombia for disrespect to authorities, while for Quichua communities the number of hits as punishment for stealing and murder depends on the number of authorities, each present authority giving one blow to the offender. An extreme case was a murder in an Embera-Chami community of Colombia, where the offender received about 60 blows with a *fuate* made of a large piece of wood with a rubber strip. This case was brought before the Constitutional Court of Colombia alleged to be torture or inhuman or degrading treatment. The same challenge was made against the imposition of the punishment called *cepo*. It is a method of punishment actually used by the Embera-Chami community of Colombia and previously used by the Uaçá of the Amazon Jungle. The person is held by his or her ankle to a large piece of wood. To have a clearer picture, a comparison can be made to a kind of an animal trap. The infliction of this punishment is measured by hours, and in the Embera-Chami group it usually varies from 12 to 24 hours of constant *cepo*. This punishment is often followed by compulsory work in the community.

One of the consequences of this punishment is swelling of the legs after the eighth day in the *cepo*. In the Uaçá group – Galibi-Moro – the imposition of this punishment was banned in 1996 and

substituted by cleaning tasks for the community. This change was in fact the result of a community assembly and not the result of an outside imposition.

The community presence during infliction of punishments is used as supporting argument in alleging that corporal punishment is degrading and/or inhuman. Indigenous communities reply that the aims of punishments are known to the whole community, which does not perceive them as humiliating or violating a person's dignity. This reply is supported by conduct in certain communities, for example the Vereda el Tablón community, where it is an offence to make jokes or laugh during the imposition of punishments. If a person does not comply with this rule, he or she receives the same punishment as the offender who is being punished.

Full-time detention is not common punishment because indigenous communities believe that a person in detention should continue having contact with the family, so that they can appreciate the importance of daily life with family members and consequently not want to lose it again.

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Fines and compensations are common punishments. For indigenous peoples there is no need for a separate civil claim to award compensation, because within the aim of restoration of harmony, the victim must be put in the same position they were in before the balance was disturbed. All fines paid should only be used for the benefit of community; compliance with this rule is supervised by the community assembly. The most drastic punishment is community banning. This can result in serious social and economic consequences where the offender has to move to another community where he or she will not have assets or a job. This punishment can be modified to banishment for a certain amount of time.

A particular characteristic of indigenous law, in certain communities such as the Jambaló in Colombia, is the existence of an extension of responsibility to the offender's family members. Its rationale is that the family nucleus has to know and control the members' behaviour. Consequently, when one family member commits an offence, the family is also held responsible because it did not act to prevent the commission of the offence.

Not every indigenous community in Latin America lives in accordance with immemorial customs and traditions. Changes have been made,

by their own initiative or as a form of adaptation to external interference. Ideally, the dominant cultures under which indigenous people live will approach traditional customs without prejudice and engage in dialogue where necessary to guarantee individual members their inherent human rights.

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#### References:

García, F. (2000), *Formas Indígenas de Administración de Justicia: tres estudios de caso de nacionalidad Quichua de la sierra y Amazonia Ecuatoriana*, paper presented at XII International Conference of Customary Law and Legal Pluralism, March 2000. Arica, Chile.

Perafán, C. and Azcarate, L. (1996), *Sistemas Jurídicos Tukano, Chami, Guambiano y Sikuani*, Instituto Colombiano de Antropología: Colombia. Sentencia Tutela - 349/96 of the Constitutional Court of Colombia.

Stavenhagen, R. and Iturralde, D. (eds.) (1990), *Entre la Ley y la Costumbre. El derecho consuetudinario indígena en América Latina*, Instituto Indigenista Interamericano and Instituto Interamericano de Derechos Humanos: Mexico.

Van Cott, D. (2000), 'A Political Analysis of Legal Pluralism in Bolivia and Colombia', *Journal of Latin American Studies* vol. 32. Cambridge University Press.