

**LEGAL PLURALISM AND INFORMAL
COMMUNITY JUSTICE ADMINISTRATION
IN LATIN AMERICA**

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INFORMAL INSTITUTIONS AND LATIN AMERICAN POLITICS

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Informal legal systems,² have developed and persisted within the vacuum of legal protection and the rule of state law that exists in Latin America—Guillermo O’Donnell’s famous “brown areas” (O’Donnell 1994). Large segments of Latin American geography and society have existed outside the reach of the law for centuries, and there has only been an effort to address this problem with adequate resources since the last decade. Informal legal systems are perhaps among the most necessary and constructive informal institutions in the region, given the extreme weakness of the formal institutions they replace or complement.

In this paper I survey diverse examples of informal systems of law and justice administration, focusing mainly on what is usually called “indigenous customary law” or “*usos y costumbres*.” Because of the subordinate connotations of both terms, indigenous peoples prefer “indigenous law” or “indigenous legal systems,” the terms that will be used in this paper. I describe how and why informal legal institutions originally emerged, and how they have changed over time. I next examine efforts in the last decade to legally recognize informal justice systems and to link their jurisdictions to that of the state. I discuss the reasons for this “formalization”, and the problems that have emerged in the efforts to establish “legal pluralism.”³ I show how the demand for recognition of indigenous customary law is an integral part of the defining claim of indigenous people’s movements for self-determination as distinct peoples. I argue that the increasingly successful mobilization of such movements occurred at a time when many Latin American states were searching for ways to extend the rule of public, authoritative law, geographically, and for more sectors of society, particularly in remote areas. In the concluding section I discuss important issues raised by the foregoing in light of the concerns of this gathering: How can we measure and compare these informal justice systems? How have informal justice systems contributed to the quality and accessibility of the rule of law? What impact do informal justice systems have on the efficiency, legitimacy, and accessibility of the formal justice system?

What are the implications of the foregoing for the quality of democracy, particularly in multiethnic countries? The paper has an Andean bias because I have done most of my research in the five Andean countries, but also because those countries are most advanced in recognizing the authority of informal legal systems.

SURVEY OF INFORMAL JUSTICE SYSTEMS

In this section I describe three forms of informal community justice systems: indigenous law, the *rondas campesinas* of northern Peru, and urban community law in Bolivia.

Indigenous Peoples' Law

Prior to the arrival of Europeans the peoples indigenous to the Americas⁴ established systems of political and juridical self-government. Thus, indigenous law has a special character with respect to state law: its existence and authority precedes the creation of the state (Gómez 2000: 5; Villoro 1997: 113). The imposition of colonial rule, however, had an enormous impact on these systems. In some cases they were destroyed. Elsewhere they were transformed and adapted to the subordination of indigenous authorities to colonial rule. Colonial administrators tolerated the normative, administrative, and jurisdictional activities of indigenous authorities to manage minor, internal matters confined to spheres that did not impinge on “divine and human law” (Yrigoyen 2000: 206). Indigenous authorities served as useful intermediaries between colonial authorities and the native population and an efficient means of indirect social control. Some indigenous legal systems originated in the colonial period. They were established as links between the community and colonial authorities, or were created and imposed by colonial authorities. Over time, Indians appropriated these systems, adapted them, and made them their own. The classic model of indigenous authority dating to this period is the *cargo*

system, which draws on indigenous and colonial models of public service, and remains prevalent in the Andes and Mesoamerica. In these systems community members, usually men, hold a series of *cargos* of increasing responsibility in the community. Once they have passed through all of them they become an elder or authority figure (Yrigoyen 2000: 203-204).

After independence, with few exceptions, such as Colombia and Guatemala,⁵ states influenced by Liberalism and positivism outlawed indigenous legal systems and enacted policies to forcibly assimilate indigenous peoples and to destroy legal distinctions among ethnic groups. Despite the formal ban, indigenous legal systems continued to operate where indigenous communities continued to exist. As a rule, the more remote the geographic location of indigenous cultures, the greater the autonomy and relative isolation in which such authority systems developed. In locations closer to state power structures, indigenous peoples incorporated more aspects of Western law and culture and were more likely to coordinate their justice systems with those of the state, particularly in cases involving outsiders or serious offenses. The modern versions of these systems, often called customary law, consist of “the uncodified concepts, beliefs and norms which, within a given community, define prejudicial actions or crimes; the selection of authorities and processes by which these should be resolved; and the sanctions or resolutions decided and applied” (Sieder 1998: 98).

In the mid-twentieth century some states recognized aspects of indigenous self-regulation—usually called *usos y costumbres* or *derecho consuetudinario* (customary law)—for certain, defined purposes, provided they did not conflict with state law. For example, the Peruvian state allowed some community administration of land conflicts during the agrarian reform of the 1960s. Ecuador’s 1937 Ley de Comunas, intended to regulate peasant communities and their legal rights and responsibilities, provided for the exercise of internal dispute resolution (García 2000: 15). Comuna authorities continue to perform functions derived from indigenous cultural traditions, as well

as those assigned by the Ecuadorian state. In some highland areas of Latin America, beginning in the 1960s indigenous authority systems were replaced or subordinated to campesino unions. In the last decade, however, many indigenous authority systems have been revived (Yrigoyen 2000: 204).

Indigenous legal systems have undergone significant transformations in the 20th century as they adjust to changing relations with outside actors as well as changes within their communities. The pace of change increased in the last two decades in response to the active recuperation of indigenous authority structures, which had been provoked by the emergence of strong regional and national indigenous peoples social movements in most Latin American countries in the mid-1970s and 1980s. For example, García observes that in the Quichua communities of La Compañía and San Francisco de Chibuleo (Ecuador), “internal regulations have been reformulated in the last ten years by the communal assemblies, particularly the chapter referring to sanctions and penalties arising from failure to fulfill community duties. Moreover, these are submitted to annual revision for their *actualización*” (my translation; García 2000: 15). In another Quichua community, García found that community authorities, together with representatives from the Catholic, evangelical and Mormon churches, had established a new justice institution—the Autonomous Social Justice Commission (Comisión de Justicia Social Autónoma)—that was neither a part of traditional Quichua culture nor contemplated in the 1937 Ley de Comunas (García 2000: 15). Thus, while non-specialists often receive an essentialized version of indigenous culture and legal systems that is static and purported to protect centuries-old traditions—a vision often propagated by indigenous leaders themselves as a strategy to defend their autonomy—contemporary indigenous systems are flexible and dynamic and many practices and norms are of recent vintage.

Where recognized at all, during the 20th century positivist state officials considered indigenous justice systems to be “customary law” and, as such, a subordinate, less authoritative form

of law. Positive law defines customary law as derived from social uses and ranks it subordinate to state law. The concept is derived from Roman law and “refers to the secular repetition of the same practices until they come to be ensconced in the collective conscience and accepted as obligatory norms” (Yrigoyen 2000: 198). Positivists view customary law as essentially static. But indigenous legal systems are constantly adapting to changing circumstances, including the recent criticism of some of their practices (Orellana 1998: 232; Sánchez Botero 2000: 224; Yrigoyen 2000: 198).

In recent years state law has had a profound influence on indigenous law. For example, Orellana (1998) finds Bolivian indigenous communities to be eager to learn more about state law and to obtain documents concerning legislation that affects them. When indigenous authorities and community members gain access to these laws they often prompt changes that replace traditional norms. Authorities are likely to use state procedures and remedies if they are not sure how to proceed, because their own law is incomplete or unclear, or if they are worried about the penalties for breaking state law. “This concern for the legality or illegality of the decisions taken by indigenous communities is part of the dynamic of change of this historical period” (my translation; Orellana 1998: 233). Orellana also observes an increasing tendency for indigenous authorities to write down their decisions and to register and codify their norms. The written *Acta* gives greater legitimacy to the proceedings and decisions (Orellana 1998: 233), while causing problems for Helmke and Levitsky’s definition of informal institution. The impact of state law and the extent of cooperation varies:

In remote areas or regions where State control is weak, indigenous peoples have a wider margin for self-regulation; while in areas closer to the centers of control, serious cases tend to be remitted more frequently to State judges and authorities. Indigenous authorities have learned to limit themselves in their functions in order to avoid the repression of State authorities. For example, in serious cases such as homicide, or when foreigners are involved, they remit the cases to State authorities in order to avoid being prosecuted themselves for complicity, usurpation of functions or other such crimes. (Yrigoyen 2001: 204.)

Indigenous authorities have learned to select from their own and state systems according to their needs, choosing the venue where they believe they will get the desired result.

According to Assies, the presence of the state is important to the development and effectiveness of indigenous customary law.

The fact of bringing a case to the state system may be considered as a sanction in itself, or it can function as a manner of preserving the internal peace. To invoke the possibility of involving the state system can serve in itself as a measure of pressure that pushes the parties toward reconciliation and thus, paradoxically, strengthens local autonomy. The act of recurring to the state system also may provoke the reproof of the community. Moreover, the presence of the state system circumscribes with full security the reach of local autonomy and explicates the self-limitation among the indigenous authorities. (My translation; Assies 2000: 87.)

Indigenous authorities may serve as the first instance of adjudication for grave matters, which may subsequently be referred to the state system (García 2000: 17; Gómez 2000: 13). They often bring the most serious offenses to state authorities because these are usually the result of conflicts that could not be reconciled within the community, or instances of repeated violations; these are punished severely, often with banishment, because they demonstrate a rejection of the indigenous society's norms and authorities. Going to outside authorities indicates that the community no longer seeks to reintegrate the offender (Gómez 2000: 15). It is also common for cases involving non-Indians to be referred to the state.

Helmke and Levitsky caution that informal institutions should not be conflated with culture (2002: 9), but this distinction is difficult to draw with respect to indigenous law. The scope of indigenous law reaches into all aspects of social life, civil and penal matters, religion, as well as public law concerning the governance of the community. Indigenous peoples view the distinction between culture and law as artificial, since legal and social life are fused in indigenous cultures (Assies 2001: 83-84). This difficulty is derived from the less institutionally differentiated nature of indigenous self-government, where authorities serve multiple purposes and public acts have legal, political, economic,

cultural and even spiritual significance. Of course, all legal systems are “both constitutive and reflective of culture” because law is “inextricably bound up with a wide range of social and cultural practices” (Sieder 1998: 107).

Functionalist explanations of informal institutions argue that they emerge to provide “efficient solutions to coordination and collective action problems that emerge when formal institutions fail” (Helmke and Levitsky 2002: 21). Although Helmke and Levitsky find functionalist explanations to be problematic, they are at least partially true in this case. Indigenous legal systems survived for two reasons: (1) because they help to perpetuate and to defend the autonomy of indigenous cultures, and (2) because state legal systems either are not efficient, not accessible, or not appropriate for their culture. Indigenous justice systems emphasize conflict resolution and restoring social harmony, which strengthens the community’s system of reciprocal assistance and mutual responsibility. They use indigenous languages and are socially, culturally, and geographically closer to the communities they serve. They are also faster, and less costly than the state system, since they don’t require lawyers and there are usually no costs (Yrigoyen 1999: 44-45). They have strong legitimacy in indigenous communities because they reflect community values and goals. Indigenous peoples typically reject state law because it is viewed as being too expensive or distant, too slow, overly formal, favoring the elite, requiring intermediaries, and because it is based on different values than those held by indigenous cultures (Ochoa García n.d.: 13). It must be emphasized, however, that although some anthropologists and indigenous movement leaders portray indigenous and campesino communities as harmonious, homogeneous, and unified collectivities, they are typically rent by internal conflicts (Jackson 2002: 120; Ramírez 2002: 157). As Jackson observes, we must resist the temptation to romanticize them:

Any indigenous community will be riddled with conflicts, some ongoing, others resolved but not forgotten, as well as factions, hierarchies, and decision-making mechanisms that

exclude and marginalize some members. It will, in short, display values and actions that are anything but fair, democratic, or egalitarian, as these concepts are defined and valorized in the West. . . . The romantic view of pueblos as cohesive and consensus-based totalities can be sustained only from a distance. (Jackson 2002: 120.)

Ramírez concurs that “community members often feel their voice is not heard, because the indigenous elite monopolizes the discussion . . .” (2002: 157).

The preference for indigenous justice varies depending on the relative quality and accessibility of non-indigenous systems. In the Quichua communities of Ecuador that he studied in the late 1990s, García found that the revived systems of indigenous justice administration had completely replaced the formal state system: lawyers and judges in cities near indigenous communities that had recently strengthened their own systems reported a “total absence of claims on the part of the indigenous in legal offices and courts in recent years” (my translation; García 2000: 15). Moreover, their superiority to state fora was not just based on their cultural appropriateness: García’s informants reported that it was common for mestizos as well as Indians from communities lacking such systems to take their disputes to the newly strengthened indigenous tribunals, particularly those disputes that the state is unable or unwilling to resolve. As the president of the Unión de Pueblos Chibuleos observed, “even when the problem is only among *mestizos*, they come here to resolve the problem and they leave peacefully (*tranquilos*)” (my translation; García 2000: 20). Elsewhere, non-Indians may conflate indigenous law with vigilantism, as popular frustration with the absence of protection from crime boils over into lynchings in rural areas. In Guatemala, summary execution of criminal suspects increased in the 1990s. But Sieder cautions us not to confuse the two. Lynchings result not from the exercise of traditional authority and norms, but from a “prevailing climate of impunity which means that criminals are almost never brought to account for their actions” as well as Guatemala’s legacy of authoritarianism and militarism (Sieder 1998: 105).

It is difficult to classify indigenous law using the typology of informal institutions developed by Helmke and Levitsky because its relationship to formal justice institutions changes depending on the geographic location of each indigenous community as well as relations with the state at any given time. An indigenous legal system may be complementary with respect to some issues (e.g., internal community organization) and competing with respect to others (e.g., penal law). Indigenous law may be substitutive in communities where state law is essentially non-existent, complementary where there is more coordination between indigenous and state authorities, and competing where indigenous authorities have hostile relations with formal institutions—particularly in countries where they are not yet formally recognized. Moreover, the category of “competing” is open to interpretation. Indigenous sanctions that may appear to violate state law—such as corporal punishment or forced community labor—may be interpreted as not competing, if the interpreter evaluates such practices in the context of indigenous culture. The Colombian Constitutional Court has found indigenous sanctions such as these to be constitutional because they preserve a constitutional right of higher rank than the law that they violate.

Two Community Justice Administration Systems

Helmke and Levitsky argue that inductive case studies are essential building blocks for developing theory with respect to informal institutions and advise the use of rigorous small- or medium- N comparisons. Toward that end I offer two brief case studies of informal justice institutions that are distinct from but related to the indigenous justice systems described above: the *rondas campesinas* of rural Peru; and *juntas vecinales* in urban El Alto and Cochabamba, Bolivia. These two cases were chosen because they allow us to observe the origin of informal institutions, something that is usually difficult to do. The *rondas* case is also particularly useful because it demonstrates marked

changes over time in the function of the *rondas*. These systems are compared with traditional indigenous systems in Table 1. The reader should keep in mind the impossibility of presenting the great variety of indigenous legal systems accurately in such a schematic format.

“Long live the ronderos/Blows to the traitors
Beat the crap out of them/Until they change their ways.”⁶

Rondas campesinas in Peru. *Rondas campesinas* were first formed in 1976 in the northern Peruvian department of Cajamarca in order to provide a means to prevent and sanction the theft of livestock, which was rampant, and which had increased due to an economic crisis that had pushed many peasant families to the edge (Starn 1999: 43). The agrarian reform of the early 1970s had destroyed rapidly the private *hacienda* authority structures that had prevailed in the *sierra*, without replacing them with a system of effective public authority. Criminals had corrupted police and judges, leaving *campesinos* to fend for themselves (Degregori and Mariños 2000: 392). In much of the northern *sierra* traditional cultural authority systems had long-since broken down. Thus, the *rondas* filled a vacuum of public and private power, providing their own collective security system as an alternative to the devastating loss of their livestock. In the three years that followed, hundreds of Cajamarca communities formed *rondas*. The model also was disseminated to the northern department of Piura, particularly after the El Niño of 1983 caused economic devastation that forced many peasants to steal in order to survive (Starn 1999: 43). By the late 1980s, *rondas* had formed in the departments of Amazonas, Lambayeque, and Ancash, and involved more than 3,400 villages and more than 400,000 *ronderos*, and covered more than 60,000 square miles of the northern Andes (Starn 1999: 4, 18).

The absence of traditional, culturally based authority structures, such as those persisting in the south, required the creation of a totally new informal justice institution. “It is hard to overemphasize what a novelty it was for villages to administer justice as they did through the

rondas in the late 1970s and 1980s” (Starn 1999: 109). The form they took was based not on ethnic traditions but on the hacienda guards that had been organized by landowners to protect their property in an earlier era, as well as the *ronderos*’ experience of military service (Degregori and Mariños 2000: 395, 403). These informal justice systems were not intended to take the place of the state. Rather, the *rondas* tried to link *campesino* communities to the state (Starn 1999: 60). Starn reports how *rondas* borrowed the symbols and artifacts they associated with state authority for their activities: an old table serves as a judges’ bench; “grimy legal statutes, dispersed papers and at times a Bible” are frequently placed on the table; decisions and proceedings are recorded in a book and notarized; leaders are chosen through a secret ballot, in imitation of the (at least ideal) state political system (Starn 1991: 48, cited in Degregori and Mariños 2000: 403). But the *rondas* were not just copies of formal justice systems: “villagers adopted and amended these models to forge a system of discipline and punishment that was much more than just a copy of anything that came before” (Starn 1999: 71). There was a great sense of ownership of the *rondas*, which were imbued with the cultural values of Peru’s northern, rural, peasant communities (Starn 1999: 149).

As they evolved, the patrols came to mean more to most villagers than just the basic yet limited function of protecting livelihood. A society ripped apart by mistrust, jealousy, robbery, fighting, misery, and corruption was being recomposed. Periodization of history in the hell of “before the ronda” and the redemption of “after the ronda” equated order with a politics of emancipation. (Starn 1999: 96).

The punishments imposed often were similar to those used in indigenous justice systems, such as bathing in freezing water at night, whipping, and other forms of physical punishment. These methods also were borrowed from the actions of police in their communities (Degregori and Mariños 2000: 406). Starn witnessed with horror the use of the “little bird”⁷ torture, which had been learned from the local police, along with other abusive methods considered to be effective in extracting confessions. Villagers perceived such methods as part of correct police procedure (Starn

1999: 87). Corporal punishment—particularly whippings and the use of stocks, taken from *hacienda* justice—was common in the first years of the *rondas* and was effective in dramatically reducing theft. Whipping became synonymous with the *rondas*, but was usually only used for serious or repeat offenses. To reduce the possibility of abuse of this sanction, a relative or friend of the transgressor does the whipping, which also reduces the likelihood of police intervention. An admonishment from the relative to live better in the future precedes the punishment, and afterwards the punished person thanks the whipper and the community (Starn 1999: 135).⁸ As the crime situation became less desperate, *rondas'* use of violence, at least in the northern villages studied by Starn, began to decrease (Starn 1999: 89; Ardito 2001: 14).

As crime diminished and the authority and prestige of the *rondas* increased, at the insistence of villagers, *rondas* became more active as conflict resolution mechanisms. *Ronda* assemblies were convened to administer justice in local criminal matters, as well as to reduce “bickering and infighting” (Starn 1999: 113). There were several reasons that the *rondas* were more effective at this. First, they had the local knowledge and resources to investigate the facts of a case, whereas local police and judges did not know the community and lacked the resources and interest to make on-site investigations. Second, justice was speedy in *ronda* assemblies, which were held on average once a month in the 1980s.⁹ The threat of conveying a transgressor to the police was usually enough to get them to accept the authority of the *ronda*, since it was preferable to languishing in jail for years before trial. Third, trials were typically free, although Starn heard of isolated cases of *ronda* presidents charging fees or demanding bribes. The state system required fees, notaries, travel expenses, and lawyers, as well as time away from economic activities. Finally, assemblies occurred in the disputants' own community; it was not necessary to travel to the foreign, intimidating environment of the city, where humiliation and abuse were common. As the *ronda* assemblies

became widely used in the northern sierra—each village hearing more than a 100 or so disputes each year—the local police and courts saw a dramatic reduction in their case load (Starn 1999: 123-138).

Ronda justice assemblies usually proceeded in this way. Three or four cases would be heard each night. Villagers—mostly men—would gather and sit or stand in a circle, with *ronda* authorities sitting at a table together within the circle. Unlike the courts they replaced, assemblies were intended to facilitate the participation of the community and all attendees were encouraged to speak. This was important in a culture where state authorities had imposed centuries of silence. The circle was meant to imply that no one was placed before or above anyone else. Proceedings began with the *ronda* president presenting a case. The main accusing witness and the accused then stated their positions. Next, anyone could jump in with an opinion. At first, the accused and the accuser take extreme and adamant positions; over time the crowd pressures them to be more conciliatory, ultimately demanding that they find agreement. Rather than imposing a verdict, the *ronda* president attempts to find the sense of the crowd and to suggest this as a solution. Presidents who tried to impose their will often were censured and not re-elected. Proceedings often continued until dawn, until a resolution could be found. In keeping with the Peruvian obsession with bureaucracy and documentation, northern *ronda* assemblies kept detailed written records of their activities, which were housed in community archives. Minutes always were taken, decisions written down and signed by all parties and witnesses to the assemblies. *Ronda* steering committees affixed their personal seals to each piece of paper (Starn 1999: 126-131).

I found no accounts of women serving in the *rondas* or in the assemblies. Women's role was to support the *rondas* by sanctioning those who refused to patrol and by feeding those who did. Thus, when *rondas* became community justice administrations, an all-male institution was erected

to judge the behavior of women. Of course this was no different from the state system. Starn observed that peasant men held discriminatory views of women and were likely to believe they were at fault. Wife beating was a common practice and considered to be justified if a woman failed to do her duty. In many cases, however, *ronda* assemblies supported women's complaints of domestic abuse and husbands were sanctioned, if the force used was deemed excessive or the wife's behavior undeserving of punishment (Starn 1999: 174).

The army used the *ronda* model in the late 1980s and early 1990s to organize southern *campesinos* against the Shining Path (Starn 1992: 90). By the mid-1980s, the southern Andes had become militarized. The first anti-Sendero campesino rebellions occurred in response to attacks on indigenous community authorities, particularly when these substituted young Senderistas for older authorities. By the early 1990s, Sendero was at war with a peasantry working with the armed forces. In 1991 the army distributed more than 10,000 Winchester shotguns to the new *rondas campesinas* (Starn 1998: 232). But these anti-insurgency *rondas* had a distinct origin and purpose from the ones described above.

Efforts to legalize the *rondas* began with the transition to democracy in 1980, but opposition from center-right parties without *ronda* affiliation (Acción Popular, Partido Popular Cristiano) thwarted the first attempts. By this time, APRA and Patria Roja had infiltrated many *rondas* and organized rival *ronda* federations. In 1986, Aprista President Alan García promulgated a Ley de Rondas Campesinas (24571), giving them legal standing to resist attacks from police and officials and the authority to protect individual and community property (Degregori and Mariños 2000: 404; Starn 1992: 105). As the *rondas* grew in strength and stature, the state attempted to control and coopt them. Legal projects to define and constrain the *rondas* followed, and continue to this day. But thus far legal recognition has been confined to protection of property and self-defense—the

rondas and their advocates are still pushing for legal recognition of their right to administer justice (Degregori and Mariños 2000: 404; personal communications, Raquel Yrigoyen 2002).

With the decline in guerrilla activity in the late 1990s and early 2000s, *rondas* again have adapted to the most pressing needs of the communities they serve. In some areas, they have fallen into disuse: nightly patrols have been suspended and assemblies are seldom held. This happened in Piura, where state justice administration had improved dramatically in the 1990s, and community leaders were tired of the unpaid, thankless job of running the *rondas* (Starn 1999: 264). In others, in addition to controlling crime, they act as political representatives before municipal authorities, and have become involved in important political issues, such as land titling (interviews, Cuzco, Peru, July 2002; Degregori and Mariños 2000: 409). In some areas they perform some of the roles assigned to municipal governments, usually without conflict from the latter (Degregori and Mariños 2000: 407). However, as Degregori and Mariños argue (2000: 407), the Peruvian state has failed to take advantage of the potential of the *rondas* to fill the huge gap in the availability of justice administration by formally linking them to the local police, to local government, or to the system of justices of the peace. Thus, the informality of the *rondas* continues to be an important part of their identity and, perhaps, their strongest source of legitimacy and autonomy.

“Somos como los padres de todo el barrio,
orientamos y proponemos de que haya reconciliaciones”

Junta Vecinal Authority of Alto Lima, El Alto

Bolivia's Juntas Vecinales. Although the majority of informal legal systems I have come across are rooted in rural, usually isolated, communities, in Bolivia migrants to the major cities of Cochabamba and El Alto (an enormous suburb of La Paz) have constructed their own justice systems at the margins of state law. Rapid migration in the last 20 years to both cities has resulted in extensive

squatter settlements that are unrecognized and unserved by the state. Rapid urbanization intensified in the 1980s due to the economic crisis caused by hyper-inflation and structural adjustment, which left tens of thousands of state miners unemployed. This section is based on a 1997 Bolivian government study of four urban barrios—two in El Alto and two in Cochabamba—that had developed their own informal legal systems within the figure of the *junta vecinal* (neighborhood junta) (Ministerio de Justicia 1999d).

The origins of the *juntas* are similar to that of the *rondas*. Communities formed them to address the lack of state authority with respect to urgent community needs. Whereas the *rondas* reduced theft, the *juntas* defend before the municipal government the communities' demands for property and access to urban infrastructure and public services to meet basic housing, health, education, and transportation needs. Thus, in both cases justice administration was a subsidiary, albeit important, function of the *ronda/junta* authorities. Both *rondas* and *juntas* had to struggle against cooptation by political parties to assert their cultural and political autonomy.

Whereas the *rondas* were invented anew in the absence of traditional ethnic authority structures, the *juntas* adapted contemporary rural Aymara and Quechua cultural and authority institutions. New migrants to El Alto and Cochabamba maintain ties to their sending communities, often maintaining rights to a plot of land and returning at least once a year to attend festivals and family events (Ministerio de Justicia 1997d: 27). Although there is variation among the urban barrios and even among the four cases studied, in many places barrios were essentially mono-ethnic and may even be composed predominantly of emigrants from one province. The incorporation of ethnic norms and authority structures is more likely for Aymara migrants, whose rural authority structures (*ayllus*) still survive. According to the researchers, the barrio of Alto Lima exhibits all the traits of Aymara culture fused with the labor union experience of many Aymara ex-miners. The urban justice system is

quite similar to the rural Aymara justice system, except that “the formal aspects are even more rigorous, perhaps a ‘natural’ tendency that circumstances impose in order to obtain a veneer of legality in an “illegal” environment . . .” (My translation; Ministerio de Justicia 1997d: 69). In the Quechua barrios around Cochabamba, customs are as likely to be adapted from *campesino* union norms and procedures, since most of the *ayllus* in the Cochabamba valley have been destroyed and the region has experienced a greater degree of *mestizaje* (cultural mixing) (Ministerio de Justicia 1997d: 28). These cultural systems were not transplanted in tact to the new urban environment, however. Instead, migrants recreated their social regulatory institutions in non-traditional forms. The forms may appear to be Western, but they have meanings specific to the culture of the migrants’ sending communities (Ministerio de Justicia 1997d: 56).

Compared to rural authorities, *juntas vecinales* are highly bureaucratized institutions. Authorities are differentiated and ranked, and their functions and duties are carefully written down in the by-laws of each junta. In the four cases studied, the number of junta authorities ranged from 12 to 23, each of whom had a particular title, such as secretary for education, or vice president. Selection of authorities is not based on age or knowledge of culture but, rather, on traits that increase their effectiveness in the urban environment, such as wealth, social status, education and literacy. Some of the leadership criteria explicitly or implicitly exclude women: both of the El Alto juntas require authorities to have served in the military, and all four require them to be heads of household. Authorities, particularly presidents and vice presidents, are usually the most influential, wealthiest men of the community (Ministerio de Justicia 1997d: 35-39).

Justice administration is the duty of the junta president and/or the secretary of conflicts, alternatively called the secretary of justice. The written duties of the latter are typically: to negotiate and find consensus with respect to disputes over boundaries of urban plots and buildings upon them;

to negotiate disputes over the use of land; to assist in drawing district limits; and to serve as intermediaries in disputes among neighbors or between them and another private or public entity. Most of these duties are actually illegal—juntas don't have the legal authority to settle property issues, which are the purview of municipal authorities. Nevertheless, the majority of disputes addressed by the secretary of conflicts and the junta president have to do with property disputes, which are also the main source of intra-community conflict in rural Aymara communities (Ministerio de Justicia 1997a: 23). Since most urban property claims are not based on legal rights, the informal juntas are the preferred venue (Ministerio de Justicia 1997d: 39, 43). Another important office is the secretary of gender issues. This is the only position of authority to which women may have access. The gender and conflict secretaries will sometimes work together on family disputes. Because family harmony is considered to be an important component of peace and tranquility within the barrio, juntas often intervene in such matters.¹⁰

Although the duties of junta authorities are explicit, the norms that they are to implement with respect to justice administration are not. The scope of junta authorities is practically limitless, encompassing disputes over private property, abuse of public authority, crime and delinquency, and domestic relations. The juntas' written internal rules incorporate the Westernized structures and procedures of rural *campesino* unions, but these are fused with Andean cultural norms (Ministerio de Justicia 1997d: 35). Detailed notes of meetings, resolutions of conflicts, sanctions and other business of the junta are carefully recorded in a *Libro de Actas*. This is also a feature of contemporary rural Andean justice systems. In both settings, if the authorities are aware that certain procedures or sanctions violate state law, they may omit them from the written record (Ministerio de Justicia 1997a: 29).

In all four of the juntas studied there are two parallel, linked conflict resolution fora: the disciplinary tribunal, composed of a few of the most honest and respected members of the community, and the direct action of the president and secretary of conflicts. The tribunal investigates complaints and offers a solution or mediates an accord among the disputing parties. The solution is then recorded in the *Libro de Actas*. In Villa Adela, El Alto, the Tribunal conducts the investigation and then hands its report to the General Assembly of neighbors, who discuss the issues raised and decide on a sanction. More frequently, however, people seek the direct intervention of the junta president or secretary of conflicts (Ministerio de Justicia 1997d: 60). The FEJUVE (Federation of Juntas Vecinales) of the municipality might be asked to review the decision in cases where the junta is unsure of itself (Ministerio de Justicia 1997d: 65).

The most common punishments are verbal warnings (public or private), economic restitution and/or fines, and temporary suspension of political rights. In the most serious cases or for repeated offenses—and this happens only rarely—a person might be expelled from the community. The investigators did not report any instances of physical punishment. Instead there is a marked preference for resolving the problem with a warning or non-punitive agreement, or to impose a fine. However, punishments expected to elicit state condemnation or retribution may not be recorded in the juntas' (or Aymara communities') written records. Thus, the incidence of corporal punishment may in fact be understated since the government's study is based on an examination of written records, supplemented by a few dozen interviews.

Procedures often incorporate Andean spirituality. In the Cochabamba barrio of Alto Sebastián Pagador it is common for the aggrieved party to consult a *yatiri* (a seer) to ascertain the truth of a matter, the person responsible (if unknown), or the appropriate sanction. The accused is then subject to a "hard questioning" (*interrogatorio duro*) in order to elicit a confession. Sanctioning takes place in

the rural fashion, before a crucifix and Bible, which are set upon a block of salt. The accused apologizes, promises not to make the mistake again, and asks forgiveness. In the sanctioning phase, which most evokes Andean culture, the eldest member of the community, with the greatest knowledge of the procedures, presides. As the Ministry of Justice anthropologists conclude: “This ritual seals the act with more validity than a written paper” (my translation; Ministerio de Justicia 1997d: 65). A fine is usually imposed and registered in the *Libro de Actas* (Ministerio de Justicia 1997d: 63-64). In El Alto aggrieved parties also may privately seek the advice of a *yatiri*, and junta authorities will invoke the norms of their ancestors as they begin the task of conflict resolution. Thus, “the system of investigation, solution and/or sanction of the conflicts, is mediated by their own mechanisms and rooted in a very clear ethnic past, although the entire system has been transmuted in Western codes and formalities” (my translation; Ministerio de Justicia 1997d: 68).

Relations between the juntas and the local police vary. In Villa Adela, El Alto, the junta has “fluid” relations with the police and these have improved in recent years (Ministerio Justicia 1997d: 58, 64). But in Alto Lima Primera Sección, El Alto, where there is no police presence despite the repeated entreaties of the junta, the junta carries out police functions itself, using a system of whistles that alert the community to a problem (Ministerio de Justicia 1997d: 58, 69). If one of the parties is not happy with the outcome, they will bring their dispute to the state authorities, but not before requesting permission of the junta. This is unlikely since state justice institutions are more costly and likely to be less helpful to culturally distinct migrants (Ministerio de Justicia 1997d: 71). Conversely, junta authorities may decline to handle serious problems, such as rape or murder, and refer them to the state (Ministerio de Justicia 1997d: 64).

Although the juntas’ justice administration function is not recognized in the constitutional language concerning indigenous customary law, *juntas vecinales* themselves gained “juridical

personality” through the 1994 Law of Popular Participation, which conferred collective participation rights to *campesino* communities, indigenous communities, and *juntas vecinales*. In 1993 there were an estimated 4,000-8,000 *juntas vecinales* throughout urban Bolivia (Van Cott 2000b: 169). These new rights, however, have to do with community planning and budgeting, rather than justice administration.

More than a system of justice administration or dispute resolution, the *juntas* provide a highly legitimate form of local government that “constitutes a coherent and fully representative expression of the interests of the entire community and their social forces” in which actions are “fundamentally oriented toward the common good” (Ministerio de Justicia 1997d: 75). In essence, where *juntas* have strong community participation and legitimacy, they are spaces for the construction of citizenship. But these qualities vary. In Alto Lima Primera Sección, El Alto, and Villa Alto Sebastián Pagador, Cochabamba, obedience to the authority of the *junta*, particularly its president, is balanced with an effort to seek consensus as far as possible because the *junta* is considered to be the instrument of the common good rather than the majority. Meetings on simple matters may run as long as six hours because they will continue until consensus is reached (Ministerio de Justicia 1997d: 76). However, in San Miguel, Cochabamba, a more acculturated minority is able to dominate the rest of the community through its control of the *junta*. In Villa Adela, El Alto, the *junta* is dominated by more well-off, more settled, more modernized members of the community, while more recent arrivals rely on extensive systems of *compadrazgo* as an alternative political and juridical space (Ministerio de Justicia 1997d: 77-78).

THE “FORMALIZATION” OF INFORMAL JUSTICE ADMINISTRATION

Writing in 1988, Stavenhagen found some mention of *usos y costumbres* in Latin American legislation, “but this was not defined in laws and codes, and in general [customary law] is ignored in the application of the laws” (my translation; Stavenhagen 1988: 99). The development of indigenous legal systems entered a new era in the 1990s, when Latin American constitutions began to formally recognize their public authority and legal jurisdiction. There are three main reasons for this formal recognition. First, states responded to intense pressure from indigenous organizations to recognize their collective rights as peoples, following decades of activism and political organization by indigenous peoples’ organizations (Assies, et al. 2000; Brysk 2000; Stavenhagen 1992; Van Cott 2000b; Yashar 1998). The demand for official recognition of indigenous law cannot be understood in isolation. It is an integral part of the articulating demand of all indigenous movements in the hemisphere: the demand for self-determination. That term encompasses the right to self-government and the autonomy to freely develop their political, legal, economic, social, and cultural institutions, while achieving full representation in the state political system.¹¹ As Sieder observes, “customary law can be understood as a counter-hegemonic strategy used by indigenous communities to protect their limited and conditional autonomy from the central state” (1998: 105). In the face of centuries of state *injustice* directed toward indigenous communities, the demand for autonomy in the administration of justice is particularly important (Sieder 1999: 111).

Second, states needed to extend the presence of the formal justice system throughout their territories, particularly in rural communities (see Murga Armas 1999: 330). In the 1980s, as indigenous movements were consolidating national and regional organizations, Latin American states and international organizations began to focus attention on serious deficiencies in the region’s justice systems. World Bank and other studies of justice administration in Latin America find that it is

inefficient and ineffectual, that there exist great delays and lags in the cases, limited access to justice, decisions of tribunals lack transparency and *previsibilidad* [the ability to anticipate the

outcome], a scarcity of financial, material and other resources, and the weakness of public confidence in the judicial system. (My translation; Malik and Martínez 1999: 827.)

In addition, corruption and impunity are endemic features of many justice systems in Latin America (Méndez, O'Donnell, and Pinheiro 1999). The quality of Latin American justice administration is so poor that even powerful economic interests are seeking alternatives in private arbitration fora. As Ochoa argues, “[t]he state has not been able to hide the crisis that exists with respect to justice and this very possibly was one of the decisive factors in the state’s agreement to recognize indigenous juridical orders” (Ochoa García n.d.: 13). In Colombia, the first country to constitutionally recognize indigenous legal jurisdiction in 1991, constitution-makers sought to extend public law and authority into the one-quarter of Colombian territory covered by indigenous reserves as a counter-weight to the control of guerrillas, paramilitaries and drug traffickers. Bolivian constitution-makers sought to extend the rule of law into vast rural areas unserved by police or courts (Van Cott 2000a, 2000b). Many of the projects to recognize indigenous law are sponsored by international organizations (UNDP, IDB, World Bank, United Nations) as part of a larger effort to improve the administration of justice in Latin America (Assies forthcoming; García 2000; Marés 1997: 174; Sieder 1998: 112).

Third, international norms for the treatment of minorities and indigenous peoples developed in the 1980s require states to recognition indigenous law. International Labour Organization Convention 169 (1989) requires states to allow indigenous communities to conserve their legal customs and institutions provided that they do not violate fundamental rights as defined by national or international law (Articles 8, 9).¹² Mexico (1990), Colombia (1991), Bolivia (1991), Costa Rica (1993), Paraguay (1993), Peru (1994), Honduras (1995), Guatemala (1996), Ecuador (1998), Argentina (1999), Brazil (2002), Dominica (2002), and Venezuela (2002) have ratified the convention, which requires that states adjust their national legislation in order to apply its norms, although the convention is automatically in effect without such legislation. This legal mandate, together with pressure from

indigenous organizations and their allies in national and internal fora, resulted in the codification of an unprecedented number of indigenous rights in Latin American constitutions during the 1990s (Assies, et al. 2000; Clavero 1997a; Gómez 1997a; Enrique Sánchez 1996; Van Cott 2000b; von Benda-Beckmann 1997: 24). Bolivia, Colombia, Ecuador, Mexico, Nicaragua, Paraguay, Peru, and Venezuela recognize the multicultural or multiethnic nature of societies in their constitutions. This recognition provides the normative framework for the recognition of legal pluralism. The states that have extended the most constitutional or statutory recognition to indigenous legal systems are the Andean countries—Bolivia, Colombia, Ecuador, Peru, and Venezuela—with Mexico also extending at least formal recognition in the 1990 and 2001 constitutional reforms. In addition, Guatemala, Nicaragua, Panama and Paraguay make some reference to customary law (Assies 2001: 83) (see Table 2).

Extending formal recognition to informal justice systems, and linking them to the state system, raises important normative and practical issues. To some extent, the value of informal justice systems is their informality—the fact that their authority derives from local, social values and meanings that have great authority, as well as the flexibility and dynamism that their uncodified status conveys (Sieder 1998: 107). Is this authority, flexibility, and dynamism lost if community authorities become agents of the state? Formal recognition has led in some cases to the writing down of indigenous customary law by experts hired by the state, or by indigenous peoples themselves.¹³ The former do so in order to provide standards for state judges to use in deciding cases concerning the limits of indigenous jurisdiction. The latter do so in order to protect their version of their law, or to emphasize aspects that they wish to make known to the state legal system, while de-emphasizing others. But recognition and codification may have negative effects. Codification tends to give the law a static nature that is not characteristic of indigenous law. The process itself ignores the fact that the claim

being recognized is not to a particular set of norms that are practiced faithfully but, rather, to “the recognition and unmaking of historical injustice and the legitimate power to regulate their own affairs” (von Benda-Beckmann 1997: 30). During the codification process internal debates emerge as certain aspects of the law are selected and become the “official version”, while others are not. For example, in Peru’s Amazon the Consejo Aguaruna-Huambisa codified its own law “and in the process established itself as the final instance of legal recourse within its self-proclaimed jurisdiction. That code contains a detailed list of the offenses and crimes and their corresponding punishments” (Assies 2001: 89). However, disputes among the Aguaruna resulted in the failure to adopt this “definitive” text. Codification by indigenous peoples may reflect an attempt to “sanitize” indigenous law for Western consumption. For example, in lowland Bolivia, the Guaraní of Alto y Bajo Izozog, wrote down their laws after a notorious case in which the community had burned to death a suspected witch, and state authorities had tried to punish “those responsible.” The incident led to criticism of Guaraní practices. The written version does not include this sanction as a punishment for witches, although anthropologists observe that the practice continues (interviews, Santa Cruz, Bolivia, René Orellana Halkyer, 18 July 1997; Isabelle Combes, 18 July 1997; Assies 2001: 90; Van Cott 2000a). Another result of recognition has been the resurrection of methods of community justice that had fallen into disuse. For example, in lower Putamayo, Colombia, Assies heard that the Inga had reintroduced the use of the *cepo* (stocks) in order to “prove their traditionality” (Assies forthcoming: 15). On the positive side, recognition has caused some indigenous organizations to seek “to strengthen their own justice system, including the concern for human rights, and to devise mechanisms to review controversial cases without resort to non-indigenous courts” (Assies forthcoming: 15). This happened in Colombia after an indigenous defendant had taken the indigenous authorities to court to prevent the imposition of corporal punishment (see below).

The Challenge of Coordination

All five Andean constitutions call for the creation of a law to either “compatibilize” or “coordinate” the potentially competing jurisdictions of state and indigenous laws, but this has proved difficult to achieve in practice given the complex and serious issues involved. These challenges are exacerbated by the general lack of knowledge or understanding of indigenous cultures and legal systems among Western scholars and judges. In this section some of the most important obstacles are discussed. These are divided into conflicts related to processes, to norms, and to sanctions.

Conflicts related to process. First, Western systems, in order to provide consistent administration of justice across society, are written down and based on precedent. Indigenous systems, in contrast, are far more flexible and dynamic. It is more important to indigenous communities to provide the appropriate resolution in a specific case—that is, one that will best restore harmony to the community—than to provide a justice “product” that is consistent over time and space. Second, procedures may violate Liberal-democratic standards of due process, such as the right to an attorney.¹⁴ Third, the vast majority of indigenous authorities are men, and women have a subordinate political and social role in most indigenous communities. Thus, most women are not judged by their “peers.” Recently indigenous women have questioned traditional rules that perpetuate this discrimination and their subordinate status (Sierra 1998). In Guatemala, women emboldened by their experience as war widows view state law as the tool for improving their status as women, particularly to resist domestic violence (Sieder 1999: 112).

Conflicts of norms. Indigenous and Western justice systems may compete because they are based on distinct sets of cultural meanings and values (Stavenhagen 1988: 102).¹⁵ First, there are transgressions in indigenous law that are not considered crimes in Western law—such as gossip,

witchcraft, and religious dissent, all of which are sanctioned because they may disrupt the social order. Second, indigenous law tends to prioritize the harmony of the community over the rights of individuals. Third, in Western law, religion plays a very limited role—such as the swearing in of witnesses on a Bible. In indigenous systems religious beliefs may be central to the judgment, investigation, and punishment of transgressions, since there is no distinction between religious and politico-judicial authority (Stavenhagen 1988: 101; Villanueva 1998: 405).¹⁶

The infusion of many indigenous legal systems with supernatural forces and superstitious beliefs raises difficult questions. Jane Collier (1998) describes a case that occurred in the community of Zinacantan, Chiapas, Mexico. According to local mythology, engineers “need human sacrifices in order to ensure the durability of their constructions. Highway bridges, in particular, are believed to require several human bodies or parts of bodies to withstand heavy traffic and floods” (Collier 1998: 203). Those who kill Indians and sell their bodies to the engineers are called *cortacabezas*. Collier describes the trial and sentencing of seven young men accused of being *cortacabezas*. Despite the fact that there was little evidence against the accused—one witness claimed that one of the seven men had threatened him—the seven were found guilty. They were required to admit their guilt and to pay the transportation costs for the authorities and witnesses attending the trial in the municipal capital—a total of approximately US\$270. They also had to spend an additional night in jail, after which they were freed with the warning that if anything bad happened in their community they would be held responsible. The proceedings were carefully written down, although the judges fudged the facts in order to avoid possible repercussions for their actions (Collier 1998: 210-211).¹⁷ Collier argues that the indigenous judges achieved their goal of protecting the accused against mob violence and calming fears in the community. The community was in a high state of tension because there recently had been a great deal of rain, which would require future roadwork and, thus, dead bodies. If the judges had

found the accused innocent, there likely would have been mob violence against the accused. In a previous case in the same area, a judge had freed the accused under similar circumstances, but had urged him to leave the area, because he could not be protected from people who considered him guilty (Collier 1998: 217).¹⁸ Nevertheless, from the Western-Liberal perspective the accused did not receive justice, since there was no evidence against most of them and they were convicted of actions that did not occur.

Finally, it is difficult for courts to determine what indigenous norms are, since many Western norms and procedures have been incorporated into indigenous cultures over the years. Are practices considered to be “indigenous” to the culture more “legitimate” and, hence, permissible, than those that have been borrowed?

Conflicts over punishment. Although there is wide variation, sanctions imposed by indigenous authorities typically involve some combination of brief confinement, mild forms of corporal punishment, compulsory community labor, and indemnification of the victim or their family. Expulsion from the community and death are considered to be the gravest punishments and are reserved for repeated instances of the most serious offenses after lighter sanctions have failed to moderate the transgressor’s behavior. As onerous as these sanctions may seem to us, Indians generally consider them to be preferable to confinement to a Western jail.¹⁹ Indeed, it is more common that the victim’s family tries to move the proceedings to state courts because indigenous sanctions are likely to be lighter. Some punishments may seem absurd to Westerners. Stavenhagen relates an example from Oaxaca, Mexico, where a man who killed another in a drunken brawl was ordered to marry the victim’s widow and take care of her and her children. Although the Mexican state tried to interfere, the community and the individuals involved rejected this interference and the sentence was honored (Stavenhagen 1988: 100).

The state most often intervenes when defendants or observers claim that the sanctions imposed violate the defendant's human or constitutional rights. Such accusations have been troubling to indigenous organizations. Most recognize the authority of international human rights conventions and, indeed, regularly make claims based on them (Assies forthcoming: 15). The accusations have generated internal debates within the communities, particularly with respect to the role of women in indigenous authority systems. In some cases practices that could not bear scrutiny have been altered.

As Assies observes,

the recognition of indigenous jurisdiction may well imply that indigenous authorities are held increasingly accountable for their actions, both by outsiders and inside their jurisdictions. Often emphasized features of indigenous justice systems are that they are predominantly oral, flexible and integral (somewhat like "total social facts"), that decisions are taken collectively and in a participatory manner, and that they are swiftly applied. Moreover it is often asserted that, rather than punishing, indigenous justice seeks compensation and reconciliation and the re-establishment of harmony. Such assertions do not have to be taken at face value and the features mentioned should be understood in the proper context of indigenous justice systems. The interesting point is the emergence of a discourse on Indian justice, which is shared by indigenous activists throughout Latin America. It should be understood as a counter-hegemonic discourse elaborated in an ongoing confrontation and critical dialogue with other social actors in the context of the by now celebrated "pursuit of alternative modernities." (Assies forthcoming: 16.)

A key obstacle to drafting coordinating legislation is that Western law is based on the Liberal tradition of individual rights, whereas indigenous peoples demand that customary law be recognized as a collective right, a right of peoples. It is difficult to find language that will satisfy both indigenous peoples and Western jurists and politicians (Sierra 1998: 25). An additional challenge is keeping constitutional and legislative language flexible and inclusive enough to be applied to diverse indigenous legal systems, since these may vary dramatically within a particular country. Indigenous peoples' representatives usually resist any limitation on the scope of their autonomy, such as the constitution and ordinary laws and judicial bodies like the Constitutional or Supreme Court. They view indigenous law and state law as inherently equal. This position elides the fact that indigenous

peoples are part of a larger political community that is governed by a constitution, and that, with very few exceptions, indigenous peoples choose to be a full participant in that larger political community. Three issues have been particularly thorny: (1) should indigenous jurisdiction be mandatory or optional, that is can parties to the dispute choose between indigenous and state courts? (2) what should be done when crimes or disputes involve non-Indians or Indians from distinct cultures? and (3) should indigenous jurisdiction be defined geographically? In practice, such issues have generally been negotiated on a case-by-case basis (see, *e.g.*, García 2000: 21).

Legislators in Bolivia, Ecuador, Peru and Venezuela have drafted legislation implementing indigenous jurisdiction (all still pending).²⁰ The Bolivian, Ecuadorian and Venezuelan projects see indigenous justice as mandatory, although in Bolivia non-Indians are exempt from indigenous law, even if they live within indigenous territories (art. 6). The Ecuadorian proposal, expressly includes non-Indians but includes stipulations for handling these cases (art. 13, 14). In addition, a person who denies membership in an indigenous community may have the human rights ombudsman resolve the issue. Non-indigenous *campesinos* have the option of bringing their conflicts to indigenous authorities, with prior approval. In Venezuela, all persons within indigenous territories are subject to indigenous jurisdiction, and indigenous authorities also have jurisdiction, if they choose to exercise it, over Indians outside indigenous territory. Similarly, in the Peruvian draft law, any person within the territorial jurisdiction of the *rondas campesinas*, or native or *campesino* communities, is subject to these authorities. The Bolivian language recognizing indigenous jurisdiction refers to “alternative resolution of conflicts,” which may, given the permeability of Bolivian institutions to international donors, reflect the “popularity of alternative conflict resolution mechanisms in the United States, and among multilateral development agencies that regard it as a sort of privatization of justice” (Assies forthcoming: 12; Clavero 1997: 91). In the case of appeals, both Ecuador and Bolivia see a role for the

Constitutional Court. In Ecuador, indigenous judges named by indigenous organizations must participate in appellate bodies. In the Venezuelan proposal, there is no appeal outside of indigenous authorities, except in cases where there are allegations of severe violations of human rights. In such cases, parties may exercise their constitutional right to protection but, as in Ecuador, a tribunal composed of indigenous authorities and state judges must review the matter. The Peruvian proposal states that the decisions of community authorities are final. In order to prevent abuses of human rights, as understood in Western culture, both the Ecuadorian and Bolivian bills propose training courses be held for indigenous authorities on this issue.

Non-legislative Means of Recognizing and Linking Informal Justice Institutions

In the absence of legislation specifying the relationship of indigenous to state law, states have developed other means of implementing the new constitutional recognition of indigenous law: through the development of jurisprudence, as cases are brought before the courts, and through the development of institutional relations between the state and indigenous justice systems.

Colombia's Constitutional Court has acted as a *de facto* legislator in the absence of implementing legislation. No other higher court has yet done this (Cabedo Mallol 1998: 7).²¹ Although often contradictory, taken together the Court's rulings have established a broad scope for the exercise of indigenous law. Because nearly all the issues that may be expected to arise have reached the Court in the last decade, Colombia provides an interesting model for states trying to implement legal pluralism. I discuss a few of the most important cases here.²² In Colombia, however, not all conflicts of jurisdiction are resolved by the courts. State institutions also may intervene to negotiate a compromise.²³

A 1994 case (Sentence T-254) established three important principles for interpreting special indigenous jurisdiction. First, cultural traditions are to be respected to the extent that those traditions have been preserved; that is, the less contact with and permeation by Western culture, the greater scope for cultural autonomy in the application of special indigenous jurisdiction. Second, indigenous authorities must not in their decisions or sanctions violate international human rights or fundamental constitutional rights of a higher rank than cultural diversity. Third, indigenous law ranks above ordinary legislation that does not protect fundamental constitutional rights, and above ordinary civil law (Van Cott 2000a: 217). The issue of conflicting views of due process was raised in a 1996 case (Sentence T-349) in which an indigenous defendant claimed his rights had been violated because he had not been allowed to use an attorney before community justice authorities, and because the authorities had sentenced him to confinement in a state jail, an unusual sentence for this community. The Court ruled against the claimant, arguing that use of an attorney was not a norm in this community's administration of justice. In that case the Court established an important rule: when limitations are necessary to defend constitutional rights of a higher rank, such limitations must have the minimum possible impact on indigenous autonomy and cultural integrity. The Court concluded that these "intangible rights" are confined to "the right to life, the prohibition on slavery and the prohibition of torture," because there is an "intercultural consensus" on this rights (translation by Assies, cited in Assies forthcoming: 4).

The most sensational indigenous jurisdiction case occurred in 1996-1997. Seven men were accused of being "intellectual authors" of the murder of the indigenous mayor of the mainly Páez town of Jambaló.²⁴ The Jambaló *cabildo* (community government) found the accused guilty and sentenced them to whippings with a leather whip, expelled them from the community, and stripped them of their political rights as Indians. The principal defendant, Francisco Gembuel, who received

the harshest sentence, took the case to the municipal criminal court in Santander de Quilichao. The court upheld Gembuel, ruling that “the *cabildo* had denied the defendants the opportunity to defend themselves, that the judges in the case were biased, that the whipping constituted torture and, thus, was illegal under international law” (Van Cott 2000a: 219). The Páez Cabildo Association of the North appealed to a higher court, which affirmed the lower court ruling. The *cabildo* association then took the case to the Constitutional Court, which ruled that the whipping, although incorporated from Spanish colonial culture, had become part of Páez culture, and that its use inflicted no permanent, serious harm (Sentence T-523/1997). Moreover, its object was not to cause pain or humiliation, but to purify the accused and, thus, facilitate his or her reintegration into the community (an argument that conflicts with the simultaneous expulsion of the accused in this case). Sánchez deems this ruling to be “truly paradigmatic from the hermeneutical point of view” because it recognized a broad scope of autonomy for indigenous authorities based on recognition of the existence of non-Western symbolic orders that give meaning to non-Western cultures (Sánchez Botero 2000: 232).

In response to the emergence of this indigenous-rights jurisprudence, and to the necessity of coordinating state and indigenous legal systems, an enormous literature has emerged in the last decade in the field of juridical anthropology.²⁵ One of the main repositories and generators of this literature is the Red Latinoamericana de Antropología Jurídica (RELAJU), created at a meeting in Quito, Ecuador, in 1997 (Castro Lucic and Sierra 1998: 10). In addition, two international seminars have been organized on the topic to address the problem of coordinating indigenous and state jurisdiction, resulting in the publication of two lengthy edited volumes (Alvarez and Vacaflor 1998; various authors 1999).

Another way of linking indigenous and state justice systems is through the creation of community justices of the peace that work with indigenous authorities while representing the state.

Such projects are underway in Guatemala and Peru. Peruvian justices of the peace “co-exist with 5,000 *campesino* communities, around 1,000 native communities and a similar number of *rondas campesinos*” (my translation; Ardito 2001: 1). In many cases, justices of the peace go beyond state law to incorporate cultural issues and local indigenous customs and norms in their procedures and decisions (Ardito 2001: 10). Justices of the peace may divide the work of justice administration with native authorities. For example, it is common for the former to deal with issues specifically addressed by state norms, while the latter resolve social conflicts or crimes not considered as such by state law. Elsewhere, traditional authorities may handle issues involving community members, while the justices handle issues involving at least one outsider. Where local authorities, such as *rondas campesinas*, are effective and autonomous, such as the northern department of Cajamarca, justices may play a mainly ceremonial or notarial function and relegate most of the administration of justice to the *rondas* and even participate in *ronda* activities. In some cases community authorities may refer cases to the justices of the peace while, in turn, justices may ask community authorities to act as guarantors of their decisions or sanctions—*e.g.*, making sure that the transgressor completes his community service—or to capture a community member to be brought before the judge.

In Guatemala, the United Nations is sponsoring a project to implement the new Code of Penal Procedure, article 552 *bis*. This norm provides a space within the newly created community justices of the peace for the use of indigenous *usos y costumbres*. These are to be created in districts where there is no official administrative authority. Although they add speed, orality, and proximity to the administration of justice, and represent the first time that judges are chosen from the community they serve, the community justices of the peace are not an organic part of Mayan social and political organization. Because the communities themselves did not select them, they lack legitimacy. They also constitute a challenge to existing traditional authorities and indigenous mayors, since these had

previously been the ones resolving local disputes, creating a separation of political and juridical powers that does not exist in indigenous culture (Murga Armas 1999: 326-341).

DISCUSSION

In this section I address some of the questions raised by Helmke and Levitsky: How can we measure and compare these informal justice systems? What impact do informal justice systems have on the efficiency, legitimacy, equity, and accessibility of the formal, state justice system? What are the implications of the foregoing for the quality of democracy, particularly in multiethnic countries?

The problem of measurement and comparison is the easiest. Numerous descriptive studies of individual justice systems were done in the 1990s that could serve as a basis for the comparison of norms, procedures, and sanctions. Additional research might be undertaken on the number of claims taken to traditional or informal authorities relative to the number taken to formal institutions, while noting the sorts of cases destined for each venue. A few anthropologists have done this at the micro level for a single system (e.g., Starn 1999; Ministerio de Justicia 1997a, 1997b, 1997d), but a systematic study of the topic could be done through extensive interviewing of indigenous authorities, community members, and local state justice officials and police in a variety of systems, within one country or across borders. This endeavor is facilitated by the tendency of many contemporary informal systems to carefully record their proceedings and decisions in written *actas*. In cases where the informal justice system is relatively new—such as the *rondas campesinas* or *juntas vecinales*—data may be gathered on the number and type of complaints or disputes brought to the police, local courts, or justices of the peace before and after the adoption of informal mechanisms, as Starn did in a few villages in Piura, Peru (1999). However, investigators must remember that there are cases that traditional authorities will wish to hide from the written and oral record.

Informal legal systems seem to mostly complement or substitute for state law. In fact, one of the motivations of constitution-makers who formally recognized indigenous and *campesino* law in Colombia, Bolivia, and Peru was to compensate for the deficiencies of the police and courts—to extend the efficiency, authority, and legitimacy of indigenous or *campesino* law into lawless areas where the state could not reach. In addition, informal justice institutions relieve the over-burdened and resource-deficient police and courts of cases that can be solved with fewer resources by informal authorities. Even better, informal systems serve a population that is least likely to have the financial resources or cultural security to bring their claims to formal fora. Thus, informal justice systems are a cost-efficient means of increasing the supply of justice in Latin American society for some of the populations that need it most. As noted earlier with respect to Ecuador, there even are instances where non-Indians seek justice from traditional authorities because of its greater efficiency, legitimacy, and lower cost.

Rather than viewing “complement” and “substitute” as two separate categories, my research on informal community justice systems suggests that these are better viewed as two poles of a continuum. At the “substitute” end, indigenous or *campesino* communities are geographically distant from formal institutions and are wholly responsible for justice administration and dispute resolution. At the “complement” end, indigenous or *campesino* communities work closely with police and courts to divide these responsibilities—such as the case of Peruvian justices of the peace working with the *rondas* described above. In between are most cases of informal justice institutions, which coordinate their work with state officials to the extent that it is necessary, given the presence of internal or external pressure and the availability of such services.

Instances of competition are decreasing in countries where recognition of informal systems is underway and indigenous and *campesino* communities are reshaping their own norms and procedures

to adjust to the new regime of legal pluralism. Thus, we see some degree of what Helmke and Levitsky call “institutional syncretism” or “mutual transformation” (Helmke and Levitsky 2002: 16). This is increasingly the case as informal proceedings are written down and indigenous authorities are more aware of state norms and anxious to, at least publicly, bring some of their norms and procedures into compliance with them. As researchers concluded with respect to Aymara rural justice systems in Bolivia,

The formalization of their procedures, particularly in the *Libro de Actas*, which presents a record of each of the cases resolved, as well as language employed by the traditional authorities to register the conflicts and their solutions, which tries to imitate the representatives of ordinary justice, suggests that traditional justice is consolidating itself and establishing links of *compatibilización* with state justice. (My translation; Ministerio de Justicia 1997a: 73.)

In some cases, formal justice systems, in turn, accommodate themselves to community customs, as police, courts, and indigenous authorities working together to capture suspects, detain them, investigate their offenses, and select the appropriate venue for the administration of justice. Of course, there are still authorities that are hostile to indigenous cultures and states that do not recognize indigenous law.

What are the implications of the foregoing for the quality of democracy, particularly in multiethnic countries? Latin American legal systems that recognize indigenous law better correspond to their heterogeneous social reality; they are less discriminatory, more flexible and, thus, more just (Yrigoyen 1999: 9). Moreover, improved access to appropriate legal protection helps to construct citizenship for society’s most excluded groups, particularly in systems like Guatemala’s that had been discriminatory and inaccessible (Sieder 1998: 98). O’Donnell acknowledges the same when he links “low-intensity citizenship” to the inability of the state to establish the rule of law (1994: 159). Where states are too weak to provide justice, formally recognized yet semi-autonomous informal systems can complement state efforts and, thereby, improve the quality of citizenship. Although formal recognition

seems to me to be necessary to avoid jurisdictional conflicts, it also seems necessary that the non-state systems retain a good deal of their “informality”. It is the *informality* of these systems that constitutes their autonomy and generates their authority. And it is their autonomy and authority that make them spaces of empowerment. Many legal pluralism scholars point to this notion when they cite Sally Falk Moore (1978, 1986), who writes about “semi-autonomous circles of power” or “semi-autonomous social fields,” and Laura Nader, who uses the term “sub-altern counter-publics” to refer to informal law in Africa and Mexico, respectively.²⁶ Citing this work, Assies (2001: 93), Sieder (1996: 34) Yrigoyen (1999: 41) view indigenous law as spaces of autonomy from which sub-altern groups can engage in an equitable inter-cultural dialogue with the state and the dominant culture. Some go further than this, arguing that indigenous systems and norms have, or will have, should they be given the appropriate recognition, a positive effect on state law. Sierra argues that indigenous peoples’ quest for autonomous spheres of self-government can serve as a model of decentralized democratization for Latin American societies (1998: 39). Chambers holds that recognizing cultural diversity and human rights provides a source of legitimacy to states that have lost the moral center that had been derived from constitutional invocations of God and Catholicism (Chambers 1997: 426-427).

Recognition of autonomous spheres of justice, particularly for populations that have been so abused by state authority and systems of injustice, may improve the quality of the rule of law and of democracy in Latin American societies. As Sieder argues, articulation between the systems may enable the indigenous emphasis on restitution and reconciliation to permeate state systems, which emphasize punishment (1999: 113). But legal pluralism advocates may overestimate the macro-societal benefit: First, because the deficiencies in democracy and the rule of law in Latin America are so vast that many other reforms are needed to achieve improvement; and second, because informal justice systems have many flaws that reflect the jealousies, power-imbalances, cruelty, and ignorance

that are common to all human groups. Connecting informal and formal systems, however, has provoked a constructive inter-cultural debate on the flaws of both systems and their increasing mutual accountability should draw attention to these flaws and the need to rectify them.

TABLE 1
(OUTRAGEOUSLY OVERSIMPLIFIED) COMPARISON OF
INFORMAL JUSTICE ADMINISTRATION SYSTEMS

	INDIGENOUS LAW	RONDAS CAMPESINAS	JUNTAS VECINALES
Reasons for original emergence	Regulate social life. Perpetuate culture. Relate to colonial authorities.	Protect against theft.	Replicate rural culture in urban space. Present collective demands to local public authorities. Mediate internal disputes, particularly over property.
Current purposes served	Preserve political and territorial autonomy. Complement or substitute for state justice system.	Deter and punish crime. Resolve internal conflicts. Provide more efficient, effective justice administration. Serve ad hoc community needs. Represent community to outsiders.	Same as above.
Scope of issues considered	Broad, including penal, domestic, religious issues, administrative law and dispute resolution.	Includes penal and domestic, and dispute resolution.	Most commonly disputes over access to land and public services. Also penal and domestic issues.
Typical sanctions imposed	Mild corporal punishment, brief detention, economic restitution, community labor. More serious offenses: expulsion, more severe corporal punishment, including death, or remit to state system.	Mild, ritual whipping, economic restitution, community service, brief detention. More serious offenses: expulsion or remit to state justice system. Death in rare cases.	Verbal warning, fines, loss of property or political rights. In the most serious cases, expulsion.
Authorities and organizational structures	Juridical authorities are fused with religious and political authorities, chosen through community customs. Little or no differentiation of responsibilities. Decisions usually reflect the consensus of the elder authorities of the community.	Village men elect ronda authorities. Decisions are usually made by consensus of community, with guidance of president.	Highly bureaucratized and hierarchical system of Western-style authorities, with differentiation of functions. Justice usually main responsibility of secretary of conflicts, junta president, and, when appropriate, gender secretary.
Gender discrimination	Usually dominated by men, with few exceptions. More women in authority in the last ten years.	Completely dominated by men.	Women's role is minimal and subordinate. Some juntas require prior military service, which excludes women, or literacy, which is likely to exclude them. Some serve as gender secretary.
Relationship to formal system	Varies widely depending on status of recognition by state. May complement, substitute or compete with state.	<i>De jure</i> subordination to police and local courts. <i>De facto</i> considerable autonomy, with varying levels of coordination with justices of the peace and police.	Judicial functions not recognized by the state. May coordinate with local police, if available. May refer matters to state. Varies widely.

TABLE 2
STATE RECOGNITION OF INDIGENOUS CUSTOMARY LAW IN LATIN AMERICA

COUNTRY/ RATIFIED ILO 169?	RECOGNITION OF INDIGENOUS LAW ¹	LIMITED BY
Argentina yes, 2000	Nothing in 1994 Constitution or Indigenous Law (Law 23,302 of 1985).	
Bolivia , yes, 1991	<i>1967 Constitution, reformed 1995, Article 171.</i> The natural authorities of the indigenous and campesino communities may exercise functions of administration and application of their own norms as an alternative solution in conflicts, in conformity with their customs and procedures, always providing that they are not contrary to the Constitution and the laws. The law will establish the coordination of this special jurisdiction with the judicial power.	Constitution and laws.
Brazil , yes, 2002	<i>1988 Constitution, and 1999 reforms, Title VIII, Chapter VIII, Article 231.</i> The Indians' social organization, customs, languages, beliefs and traditions are recognized, and the original rights over the lands that they traditionally occupy.	
Chile	<i>Law 19,253 of 1993, Article 54.</i> Custom shall be taken into account in judgments among Indians belonging to the same ethnic group, it shall constitute law, provided that it is not incompatible with the Political Constitution of the Republic. In penal law it shall be considered when it can serve as an antecedent for the application of an exemption or extenuating circumstance (<i>atenuante de responsabilidad</i>).	Constitution.
Colombia , yes, 1991	<i>1991 Constitution, Article 246.</i> The authorities among the native peoples may exercise judicial functions within their territorial areas in accordance with their own rules and procedures, which must not be contrary to the Constitution and laws of the Republic. The law shall establish the forms of coordination of this special jurisdiction with the national judicial system.	Constitution and laws, with some exceptions that remove limits.
Costa Rica , yes, 1993	None, apart from responsibilities under ILO 169.	
Ecuador , yes, 1998	<i>1998 Constitution, Article 191.</i> The authorities of the indigenous peoples may exercise functions of justice, applying their own norms and procedures for the solution of internal conflicts in conformity with their customs or customary law, provided that they are not contrary to the Constitution and the laws. The law shall make those functions compatible with the national judicial system.	Constitution and laws.
El Salvador	None	
Guatemala , yes, 1996	Pursuant to ratification of ILO 169. Language recognizing indigenous law was included in the constitutional reform rejected by referendum in 1999. <i>Proposed Article 203 of failed constitutional reform.</i> "The State recognizes indigenous customary law, understood as the norms, principles, values, procedures, traditions, and customs of the indigenous peoples, for the regulation of their internal life (<i>convivencia</i>); as well as the validity of their decisions, provided that subjection to it be voluntary and that it does not violate the fundamental rights defined by the national juridical system, the international treaties and conventions on human rights ratified by Guatemala; nor that they affect the interests of third parties." <i>1995 Accord on the Identity and Rights of the Indigenous Peoples, IV, E, 3.</i> "In order to strengthen the juridical security of the indigenous communities, the	

	<p>government promises to promote before the legislative organism, with the participation of the indigenous organizations, the development of legal norms recognizing the indigenous communities and the management of their internal issues in accord with their customary norms, provided that these are not incompatible with the fundamental rights defined by the national juridical system nor with internationally recognized human rights.” (Yrigoyen 1999: 67-68)</p>	
Honduras , yes, 1995	Pursuant to ratification of ILO 169.	
Mexico , yes, 1990	<p><i>2001 Indians Rights Bill, modifying Constitutional Article 2.</i> This Constitution recognizes and guarantees the right of the indigenous peoples and communities to self-determination and, in consequence, to the autonomy to:</p> <p>I. Decide the internal forms of social, economic, political, and cultural organization.</p> <p>II. To apply their own normative systems in the regulation and solution of their internal conflicts, subjecting these to the general principles of this Constitution, respecting individual guarantees, human rights, and in the manner relevant, the dignity and integrity of women. The law will establish the cases and procedures of validation for the corresponding judges or tribunals.</p>	
Nicaragua	<p><i>1987 Constitution, Article 89.</i> The communities of the Atlantic Coast have the right . . . to have their own forms of social organization and to administer their internal issues according to their traditions.</p> <p><i>1987 Autonomy Law, Article 18.</i> The Administration of Justice in the Autonomous Regions will be governed by special regulations that reflect the cultural particularities of the Communities of the Atlantic Coast, in conformity with Political Constitution of Nicaragua.</p>	
Panama	Recognized through ordinary legislation regulating the indigenous <i>comarcas</i> (indigenous autonomous reserves), especially Law 16 of 1953, creating the first Kuna <i>comarca</i> . For example, Law 10 of 1997 creates the Comarca Ngobe-Buglé, which includes a chapter on administration of justice. “For the administration of justice there will be created in the Comarca los juzgados, fiscalía y personerías, taking into account the cultural reality of the area” (COONAPIP 1999: 805).	
Paraguay , yes, 1993	<p><i>1992 Constitution, Article 63.</i> The right of indigenous peoples to preserve and develop their identity within their respective habitat is recognized and guaranteed. They have the right, as well, to freely apply their systems of political, social, economic, cultural, and religious organization, as well as the voluntary subjection to their customary norms for the regulation of their internal lifestyle (<i>convivencia</i>), provided that these do not violate the fundamental rights established in this Constitution. In jurisdictional disputes, indigenous customary law shall be taken into account.</p>	Constitution. Subjection is voluntary.
Peru , yes, 1994	<p><i>1993 Constitution, Article 149.</i> The authorities of the Campesino and Native Communities, with the support of the Rondas Campesinas, may exercise jurisdictional functions within their territorial ambit in conformity with the customary law, always that they do not violate the fundamental rights of the person. The law shall establish the forms of coordination between this special</p>	Fundamental rights of the person.

	jurisdiction and the Justices of the Peace, and other instances of Judicial Power.	
	<i>Codigo Procesal Penal, art. 552.</i> The oldest judge shall preside over the tribunal and will resolve [cases] in accordance with the <i>usos y costumbres</i> , equity, and the general principles of the Law whenever possible.	
Uruguay	None	
Venezuela, yes, 2002	<i>1999 Constitution, Article 260.</i> The legitimate authorities of the indigenous peoples may apply in their habitat instances of justice based in their ancestral traditions, and that only affect their own members, according to their own norms and procedures, provided that they are not contrary to the Constitution, to the law and to public order. The law shall determine the form of coordination between this special jurisdiction and the national system of justice.	The constitution, laws, and public order.

¹All constitutional and legislative language is my own translation from the original Spanish or Portuguese.

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NOTES

¹ I am deeply indebted to my generous colleagues Willem Assies and Raquel Yrigoyen for helping me to obtain documents, and to Fernando García and René Kuppe for conveying information on the status of relevant legislation. Interviews conducted in Bolivia, Colombia, Ecuador, Peru, and Venezuela were made possible by a Fulbright dissertation fellowship (1997), and two Professional Development Awards from the University of Tennessee (1999, 2001).

² By “legal system” I mean an institution with the recognized authority to administer justice, that possesses norms and the means for creating and changing them, authorities and the means for choosing them, dispute settlement procedures, sanctions, and systems to enforce them (Yrigoyen 2000: 202). Thus, I omit vigilantism, bossism, paramilitarism, and other forms of arbitrary, non-authoritative social control.

³ Legal pluralism is “the coexistence of different normative orders within one socio-political space” (von Benda-Beckmann 1997: 1).

⁴ Stavenhagen estimates that there are approximately 400 distinct indigenous groups in Latin America (1988: 96). The Inter-American Development Bank, based on 1993 Inter-American Indigenous Institute data, which is supplied by states and tends to undercount Indians, finds a total of 33 million Indians, constituting 7.7 percent of the total population of the region. Countries considered to be more than one-quarter indigenous are Bolivia, Ecuador, Guatemala, and Peru; Belize, Chile, Honduras, Mexico, Nicaragua, and Panama hover around the 10 percent mark (Deruyttere 1997: 1).

⁵ Indigenous law was more likely to survive under conservative regimes that maintained corporate property rights and paternalistic *fueros* for Indians. In Guatemala, between the colonial period and 1985, indigenous municipal authorities were authorized to settle internal disputes and to administer certain justice matters (Yrigoyen 1999: 43; Sieder 1998: 99). In Colombia, indigenous legal and political authority was codified in Law 89 of 1890, which recognized the legal status of the indigenous *resguardo* and *cabildo*, and the development of a special legal regime for Indians (Valencia 1997: 253).

⁶ Verse from a popular *ronda* song cited in Starn (1999: 84).

⁷ The accused is suspended in the air by his/her arms, which are tied behind the back.

⁸ Ronda violence must be evaluated in context. During the 1980s, when more than 20,000 Peruvians died in political violence, only 10 deaths were attributed to more than 3,000 *rondas* operating in an extensive territory. Starn compares the approximately 5,000 murders committed by police and the military in the south-central Andes during the 1980s to only 11 *ronda* murders committed between 1976 and 1992, despite the fact that there were more than half a million *ronderos* active during that period (Starn 1999: 88). There were good reasons for the lesser violence of the *rondas*. First, *rondas* were mainly sanctioning neighbors with whom they would have to co-exist. They didn’t want to incur hard feelings that would continue the cycle of violence. Second, until the late 1980s, *rondas* were considered to be illegal and *ronda* leaders were often jailed for instituting corporal punishments (Starn 1999: 89).

⁹ In three-quarters of the cases heard in Tunnel Six, Piura, a dispute was resolved in one night, while in the state system a matter took approximately 3-4 years.

¹⁰ Gender disputes mainly have to do with the mistreatment of women or the abandonment of the home by the woman or man (Ministerio de Justicia 1997d: 59). Physical abuse is a common trait of Andean marriages and a certain amount of domestic violence is expected and acceptable, as evinced

by the Quechua norm “(nos) amaremos, (nos) uniremos, (nos) pegaremos” (Ministerio de Justicia 1997d: 62). The gender secretary intervenes when domestic violence exceeds the norm.

¹¹ This quest for self-determination should not be construed as a desire to separate from the state. On the contrary, the majority of indigenous peoples seek fuller integration with the state but they wish to do so on their terms, while preserving their collective identity and rights (Villoro 1997: 119). Contemporary cases where a radical sector of indigenous movements or peoples have proposed complete separation from the state include the Mapuche movement in Chile and the Miskitu in Nicaragua. Both groups endured harsh state repression in the 1970s and 1980s.

¹² Article 8: (1) Al aplicar la legislación nacional a los pueblos interesados deberán tomarse debidamente en consideración sus costumbres o su derecho consuetudinario. (2) Dichos pueblos deberán tener el derecho de conservar sus costumbres e instituciones propias, siempre que éstas no sean incompatibles con los derechos fundamentales definidos por el sistema jurídico nacional ni con los derechos humanos internacionalmente reconocidos. Siempre que sea necesario, deberán establecerse procedimientos para solucionar los conflictos que puedan surgir en la aplicación de este principio. Article 9: (1) En la medida en que ello sea compatible con el sistema jurídico nacional y con los derechos humanos internacionalmente reconocidos, deberán respetarse los métodos a los que los pueblos interesados recurren tradicionalmente para la represión de los delitos cometidos por sus miembros.

¹³ The best examples of state-sponsored efforts are Colombia’s set of volumes on indigenous law prepared by César Perafán, et al. (1995, 1996, 1997), and Bolivia’s series of 10 pamphlets (Ministerio de Justicia 1997a-j).

¹⁴ The Colombian Constitutional Court interpreted “due process” as that which follows the norms of the community in question. “Otherwise, it would lead to a complete denial of indigenous forms of norm development and rituals of judgment, which is exactly what is to be preserved. Indigenous authorities may not act arbitrarily, but the Court was careful to stipulate that this does not imply that traditional norms should become completely static, given that ‘every culture is essentially dynamic’” (Assies forthcoming: 5).

¹⁵ The normative issues raised by legal pluralism are numerous and important, but there is no room to fully discuss them here. The reader is referred to Assies (forthcoming: 12-16); Clavero (1997: 91); Gómez (1997b: 297); Kymlicka (1995); Marés (1997b: 446); Sieder (1999: 113); Sierra (1998: 27); Stavenhagen (1998: 103); and Yrigoyen (2000: 216-218).

¹⁶ For example, in Guatemala, Mayan priests are involved in the investigation of crimes. They consult the Mayan calendar to find the transgressor’s date of birth, which will determine the conditions of their life and may explain why the crime was committed. This will be taken into account when a sentence is given. The object of the sanction is to heal the spirit of the transgressor and, to acquire support in this from the appropriate spirit (Yrigoyen 1999: 33-34).

¹⁷ Collier observes that the young men accused constituted a threat to the elder authorities of the community: they all did paid roadwork, a non-traditional occupation during which they were not supervised by community elders. Paid work provided them extra cash: “unexplained wealth” of dubious origin. Because their work often began before dawn and ended after dusk, they had to walk the roads at night, often together. These characteristics are typical of people accused of being *cortacabezas* (1998: 214).

¹⁸ Collier raises an issue that conflicts with reports from many juridical anthropologists, who claim that indigenous law emphasizes reconciliation rather than punishment, and that even finds the two to be incompatible (Collier 1998: 218). Collier argues, instead, that punishment is an important part of

the reconciliation process and, in fact, the two reinforce each other: “Not only does punishment allow reconciliation, but it is the court’s ability to punish wrongdoers that encourages people to take their cases to it. Should the court’s ability to punish be curtailed, those who feel they have been wronged are likely to look elsewhere for solutions to their problems. After all, angry people don’t come to court seeking ‘harmonious agreements.’ They come seeking ‘justice.’” (Collier 1998: 218.)

¹⁹ Compulsory community labor is a part of most indigenous cultures that dates to pre-colonial collective public works efforts. Understood within its cultural context it does not constitute “slavery” in the Western sense of that word. Similarly, corporal punishment is intended to be painful but almost always is of short duration and does not cause permanent harm. Understood within indigenous cultures it does not constitute “torture.”

²⁰ In Bolivia this is addressed in the Anteproyecto de Ley de Justicia de Los Pueblos Indígenas y Comunidades Indígenas-Campesinas, prepared by the Ministry of Justice and Human Rights during the Banzer administration (1997-2002). In Ecuador, the issue is addressed by the Proyecto de Ley de Desarrollo Constitucional del Artículo 191, inciso 4: Ley de Administración de Justicia de las Autoridades Indígenas (available on the website geocities.com/alertanet). This project was elaborated by a team of law professors, and the NGO ProJusticia, with support from the Inter-American Development Bank. In 2001 it was vetted with indigenous communities and organizations throughout the country. The Ecuadorian congress is still considering it (personal communication, Fernando García, Jan.6, 2002). In Venezuela, the issue is part of the pending Anteproyecto de Ley Orgánica de Pueblos y Comunidades Indígenas, presented to Congress in December 2001. It was prepared by the permanent Congressional Commission on Indigenous Peoples, whose members include Venezuela’s three indigenous senators (available on the website geocities.com/alertanet). The National Assembly approved the project on December 5, 2002, in the first reading, and it was sent back to the Commission for revisions recommended by indigenous organizations, legislators, and Ministers in the Venezuelan government (personal communication, René Kuppe, January 7, 2002). In Peru, the issue is addressed in Proyecto de Ley 3862, “Comunidad Campesina/Rondas, Ejercicio Función Jurisdiccional,” submitted on September 11, 2002, which “proposes to regulate the exercise of the jurisdictional function of the Campesino and Native Communities, and the Rondas Campesinas.” As of December 2002, it had been approved by the commissions on constitutional and indigenous issues. This project expands and supplements prior legislation regulating the internal functions of indigenous and native communities and *rondas campesinas*, as well as coordinating their work with that of justices of the peace. For comparative analyses of these proposed laws see Assies (forthcoming: 12-15); Yrigoyen (1999; 2000); and Assies and Guillén (2001).

²¹ Costa Rica has produced a small amount of jurisprudence. See Alvarez and Vacaflor (1998: 297-310), Chacón (1999: 105-154), and Piza Escalante (1999: 91-100). However, whereas in Costa Rica the Court recognizes the *private* nature of indigenous authorities (Chacón 1999: 129), in Colombia the Court views them as *public* authorities (see Van Cott 2000b).

²² See Van Cott (2000a) and Sánchez Botero (1998, 2000) for a more detailed treatment.

²³ Sánchez relates an enlightening example. The mother and maternal uncle of a girl who had been educated outside of her community instructed her to return to the community to be married following her first menstruation, as is the Wayúu custom. The girl filed a *tutela* (writ of protection) with a court “to protect her fundamental rights to education and free development of the person” (Sánchez Botero 2000: 228). The court did not impose a solution; instead, representatives of the girl and interested officials of the state Service for the Protection of the Minor negotiated with the community authorities. The “edifying solution” found in this case was that the girl would stay in school and decide in five

years whether she wished to return to the community, at which time her status would be reevaluated. An exchange of animals occurred to compensate the family for the loss of wealth that would have accrued from the girl's marriage. This solution restored the economic equilibrium of the tribe while protecting the minor from an early forced marriage (Sánchez Botero 1998: 229).

²⁴ The men publicly had linked the mayor to the paramilitaries, inspiring a front of the Ejército de Liberación Nacional guerrillas to murder him. The crime committed, thus, was not murder but, rather, a crime that is part of Páez law called "*tardecer*": committing an act that may have inspired a later outcome, notwithstanding the absence of any causal link. The defendants were not charged with *tardecer*; they were charged with the more serious crime of being "the intellectual authors" of the political assassination.

²⁵ For important unpublished works, see the website maintained by Peruvian juridical anthropologist Raquel Yrigoyen, Alertanet en Derecho y Sociedad, which posts papers, relevant legislation, and convenes on-line fora (geocities.com/alertanet), and web sites containing papers and proceedings from the conferences of the RELAJU (geocities.com/relaju). Useful comparative published works are: Yrigoyen (2000); Stavenhagen (1988); Stavenhagen and Iturralde (1990); Alvarez and Vacaflor (1998); Various Authors (1999); and the special issue of *América Indígena* (ene.-jun. 1998). The countries receiving the most attention are Colombia (Sánchez Botero 1998, 2000; Dirección General de Asuntos Indígenas; Assies 2001: forthcoming; Van Cott 2000a); Peru (Ardito 2001; Yrigoyen 2002); Guatemala (Yrigoyen 1999; Murgas Armas 1999; Malik and Martínez 1999; Sieder 1996, 1998, 1999) and Bolivia (Orellana 1998; Van Cott 2000a; Ministerio de Justicia y Derechos Humanos 1997a-j).

²⁶ Von Benda-Beckmann observes that Moore's concept of the "semi-autonomous social field . . . has become a favorite notion to locate the existence and possible significance of law or legal pluralism in empirical societies" (1997: 11).

TABLE 1
(OUTRAGEOUSLY OVERSIMPLIFIED) COMPARISON OF
INFORMAL JUSTICE ADMINISTRATION SYSTEMS

	INDIGENOUS LAW	RONDAS CAMPESINAS	JUNTAS VECINALES
Reasons for original emergence	Regulate social life. Perpetuate culture. Relate to colonial authorities.	Protect against theft.	Replicate rural culture in urban space. Present collective demands to local public authorities. Mediate internal disputes, particularly over property.
Current purposes served	Preserve political and territorial autonomy. Complement or substitute for state justice system.	Deter and punish crime. Resolve internal conflicts. Provide more efficient, effective justice administration. Serve ad hoc community needs. Represent community to outsiders.	Same as above.
Scope of issues considered	Broad, including penal, domestic, religious issues, administrative law and dispute resolution.	Includes penal and domestic, and dispute resolution.	Most commonly disputes over access to land and public services. Also penal and domestic issues.
Typical sanctions imposed	Mild corporal punishment, brief detention, economic restitution, community labor. More serious offenses: expulsion, more severe corporal punishment, including death, or remit to state system.	Mild, ritual whipping, economic restitution, community service, brief detention. More serious offenses: expulsion or remit to state justice system. Death in rare cases.	Verbal warning, fines, loss of property or political rights. In the most serious cases, expulsion.
Authorities and organizational structures	Judicial authorities are fused with religious and political authorities, chosen through community customs. Little or no differentiation of responsibilities. Decisions usually reflect the consensus of the elder authorities of the community.	Village men elect ronda authorities. Decisions are usually made by consensus of community, with guidance of president.	Highly bureaucratized and hierarchical system of Western-style authorities, with differentiation of functions. Justice usually main responsibility of secretary of conflicts, junta president, and, when appropriate, gender secretary.
Gender discrimination	Usually dominated by men, with few exceptions. More women in authority in the last ten years.	Completely dominated by men.	Women's role is minimal and subordinate. Some juntas require prior military service, which excludes women, or literacy, which is likely to exclude them. Some serve as gender secretary.
Relationship to formal system	Varies widely depending on status of recognition by state. May complement, substitute or compete with state.	<i>De jure</i> subordination to police and local courts. <i>De facto</i> considerable autonomy, with varying levels of coordination with justices of the peace and police.	Judicial functions not recognized by the state. May coordinate with local police, if available. May refer matters to state. Varies widely.

TABLE 2
STATE RECOGNITION OF INDIGENOUS CUSTOMARY LAW IN LATIN AMERICA

COUNTRY/ RATIFIED ILO 169?	RECOGNITION OF INDIGENOUS LAW ¹	LIMITED BY
Argentina yes, 2000	Nothing in 1994 Constitution or Indigenous Law (Law 23,302 of 1985).	
Bolivia , yes, 1991	<i>1967 Constitution, reformed 1995, Article 171.</i> The natural authorities of the indigenous and campesino communities may exercise functions of administration and application of their own norms as an alternative solution in conflicts, in conformity with their customs and procedures, always providing that they are not contrary to the Constitution and the laws. The law will establish the coordination of this special jurisdiction with the judicial power.	Constitution and laws.
Brazil , yes, 2002	<i>1988 Constitution, and 1999 reforms, Title VIII, Chapter VIII, Article 231.</i> The Indians' social organization, customs, languages, beliefs and traditions are recognized, and the original rights over the lands that they traditionally occupy.	
Chile	<i>Law 19,253 of 1993, Article 54.</i> Custom shall be taken into account in judgments among Indians belonging to the same ethnic group, it shall constitute law, provided that it is not incompatible with the Political Constitution of the Republic. In penal law it shall be considered when it can serve as an antecedent for the application of an exemption or extenuating circumstance (<i>atenuante de responsabilidad</i>).	Constitution.
Colombia , yes, 1991	<i>1991 Constitution, Article 246.</i> The authorities among the native peoples may exercise judicial functions within their territorial areas in accordance with their own rules and procedures, which must not be contrary to the Constitution and laws of the Republic. The law shall establish the forms of coordination of this special jurisdiction with the national judicial system.	Constitution and laws, with some exceptions that remove limits.
Costa Rica , yes, 1993	None, apart from responsibilities under ILO 169.	
Ecuador , yes, 1998	<i>1998 Constitution, Article 191.</i> The authorities of the indigenous peoples may exercise functions of justice, applying their own norms and procedures for the solution of internal conflicts in conformity with their customs or customary law, provided that they are not contrary to the Constitution and the laws. The law shall make those functions compatible with the national judicial system.	Constitution and laws.
El Salvador	None	
Guatemala , yes, 1996	Pursuant to ratification of ILO 169. Language recognizing indigenous law was included in the constitutional reform rejected by referendum in 1999. <i>Proposed Article 203 of failed constitutional reform.</i> "The State recognizes indigenous customary law, understood as the norms, principles, values, procedures, traditions, and customs of the indigenous peoples, for the regulation of their internal life (<i>convivencia</i>); as well as the validity of their decisions, provided that subjection to it be voluntary and that it does not violate the fundamental rights defined by the national juridical system, the international treaties and conventions on human rights ratified by Guatemala; nor that they affect the interests of third parties." <i>1995 Accord on the Identity and Rights of the Indigenous Peoples, IV, E, 3.</i> "In order to strengthen the juridical security of the indigenous communities, the	

	<p>government promises to promote before the legislative organism, with the participation of the indigenous organizations, the development of legal norms recognizing the indigenous communities and the management of their internal issues in accord with their customary norms, provided that these are not incompatible with the fundamental rights defined by the national juridical system nor with internationally recognized human rights.” (Yrigoyen 1999: 67-68)</p>	
Honduras , yes, 1995	Pursuant to ratification of ILO 169.	
Mexico , yes, 1990	<p><i>2001 Indians Rights Bill, modifying Constitutional Article 2.</i> This Constitution recognizes and guarantees the right of the indigenous peoples and communities to self-determination and, in consequence, to the autonomy to:</p> <p>I. Decide the internal forms of social, economic, political, and cultural organization.</p> <p>II. To apply their own normative systems in the regulation and solution of their internal conflicts, subjecting these to the general principles of this Constitution, respecting individual guarantees, human rights, and in the manner relevant, the dignity and integrity of women. The law will establish the cases and procedures of validation for the corresponding judges or tribunals.</p>	
Nicaragua	<p><i>1987 Constitution, Article 89.</i> The communities of the Atlantic Coast have the right . . . to have their own forms of social organization and to administer their internal issues according to their traditions.</p> <p><i>1987 Autonomy Law, Article 18.</i> The Administration of Justice in the Autonomous Regions will be governed by special regulations that reflect the cultural particularities of the Communities of the Atlantic Coast, in conformity with Political Constitution of Nicaragua.</p>	
Panama	Recognized through ordinary legislation regulating the indigenous <i>comarcas</i> (indigenous autonomous reserves), especially Law 16 of 1953, creating the first Kuna <i>comarca</i> . For example, Law 10 of 1997 creates the Comarca Ngobe-Buglé, which includes a chapter on administration of justice. “For the administration of justice there will be created in the Comarca los juzgados, fiscalía y personerías, taking into account the cultural reality of the area” (COONAPIP 1999: 805).	
Paraguay , yes, 1993	<p><i>1992 Constitution, Article 63.</i> The right of indigenous peoples to preserve and develop their identity within their respective habitat is recognized and guaranteed. They have the right, as well, to freely apply their systems of political, social, economic, cultural, and religious organization, as well as the voluntary subjection to their customary norms for the regulation of their internal lifestyle (<i>convivencia</i>), provided that these do not violate the fundamental rights established in this Constitution. In jurisdictional disputes, indigenous customary law shall be taken into account.</p>	Constitution. Subjection is voluntary.
Peru , yes, 1994	<p><i>1993 Constitution, Article 149.</i> The authorities of the Campesino and Native Communities, with the support of the Rondas Campesinas, may exercise jurisdictional functions within their territorial ambit in conformity with the customary law, always that they do not violate the fundamental rights of the person. The law shall establish the forms of coordination between this special</p>	Fundamental rights of the person.

	jurisdiction and the Justices of the Peace, and other instances of Judicial Power.	
	<i>Codigo Procesal Penal, art. 552.</i> The oldest judge shall preside over the tribunal and will resolve [cases] in accordance with the <i>usos y costumbres</i> , equity, and the general principles of the Law whenever possible.	
Uruguay	None	
Venezuela, yes, 2002	<i>1999 Constitution, Article 260.</i> The legitimate authorities of the indigenous peoples may apply in their habitat instances of justice based in their ancestral traditions, and that only affect their own members, according to their own norms and procedures, provided that they are not contrary to the Constitution, to the law and to public order. The law shall determine the form of coordination between this special jurisdiction and the national system of justice.	The constitution, laws, and public order.

¹All constitutional and legislative language is my own translation from the original Spanish or Portuguese.