

# Introduction

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Latin American societies have long been multicultural in their composition, yet until recently ethnic difference did not feature explicitly in the region's politics or legal and administrative arrangements. However, during the last decade of the twentieth century ethnicity became a key focus of political concern, as demands for reform of the state to accommodate indigenous peoples' demands gathered pace. This development was prompted by three interrelated factors. The first of these was the emergence of indigenous political movements onto the national and international political stage during the 1980s and 1990s. The second was a developing international jurisprudence, which increasingly characterised the rights of indigenous peoples as human rights. The third factor of signal importance was the constitutional reform process that took place in many Latin American countries during the last 15 years of the century, and which recognised – at least in principle – the multicultural and multi-ethnic nature of those societies. Ethnic claims were propelled centre-stage, at least in part, by the radical changes in economic and social relations engendered by the twin processes of economic and legal globalisation. These ongoing transformations also provide the context within which the politico-juridical recognition of difference across the continent is taking place. At the start of the twenty-first century, this new 'politics of difference' is profoundly challenging accepted notions of democracy, citizenship and development. This volume examines some of the key features of this unfolding process and explores the analytical and policy questions it raises.

Most estimates concur that indigenous people now number approximately 40 million people in Latin America – roughly 8 to 10 per cent of the region's overall population. The vast majority, some 85 per cent, is concentrated in Mesoamerica and the central Andes. In Bolivia and Guatemala indigenous people constitute over 50 per cent of the population, in Ecuador and Peru between 30 and 40 per cent, and in Mexico between 10 and 15 per cent (this last, at approximately 11 million individuals, is the numerically largest

indigenous population in Latin America). The question of precisely who is defined as indigenous remains a question of some controversy. Under international law, the broad criteria remain threefold: self-definition as a person belonging to an indigenous community, subordination to dominant society, and historical continuity with pre-colonial societies.<sup>1</sup> Indigenous identity, though evidently fluid and constantly changing, is linked to a prevailing sense of cultural difference and to discrimination by dominant society: in other words to a complex dynamic of self-identification and ascription.<sup>2</sup> In the majority of cases, poverty is a defining feature of indigenous identity – according to all social indicators indigenous people are among the poorest sectors of Latin American society and, in many cases, are getting poorer.<sup>3</sup>

Indigenous livelihoods remain dependent on access to land, albeit far from exclusively so. During the twentieth century indigenous people in Mesoamerica and the central Andes organised as peasants, or *campesinos*, to defend and secure land resources. They were mobilised by civilian and military elites in favour of nationalist modernising projects, guided by a developmentalist ethos, which varied from revolutionary to counterrevolutionary in intent, depending on the country in question. Where agrarian reforms were implemented, indigenous communal authority structures were reorganised around inalienable and collective land holdings, for example the *ejido* in Mexico after the 1930s, and the *comunidades campesinas* or *comunidades nativas* in Peru after the 1969 agrarian reform of the Velasco Alvarado government.<sup>4</sup> In effect these *agrarista* structures provided some protection for a subordinated communal autonomy and group rights to land, although in many cases these rights were weakly enforced. However, during the 1970s and 1980s land poverty increased as a consequence of population growth, sub-division and encroachment by commercial agriculture. This, together with civil conflict (in the cases of Peru and Guatemala), stimulated rural out-migration and the flight of many indigenous people to the cities. Less and less tied to a spatially located ‘indigenous community’, the vast majority of these migrants were integrated into an increasingly globalised market on highly disadvantageous terms. Huge numbers ceased to be rural inhabitants, forced instead by rural impoverishment to scrape a living within the informal sector of Latin America’s cities.

The decade of the 1980s witnessed an upsurge of ethnic organising and indigenous protagonism, as the transition from authoritarian rule across the continent allowed for new forms of protest and organisation.<sup>5</sup> Many democratising reforms – such as, for example, the enfranchisement of illiterates in Peru and Ecuador, which occurred in 1979 and 1980, respectively – directly incorporated indigenous people for the first time into national politics. In addition, since the 1970s the formation of indigenous grass-roots organisations was supported across the region by domestic and international NGOs and by the Catholic Church (Van Cott 1994; Brysk 2000). Following the transition to electoral democracy, specifically indigenous demands emerged

within a broader context of economic structural adjustment and democratic deficits across the continent (Yashar 1998). The rollback of state services and the exigencies of debt-servicing payments, which forced governments to ever-greater exploitation of natural resources, negatively affected indigenous peoples and propelled them into the national – and international – sphere. In addition, neoliberal economic policies prescribed by international donors advanced the reform of land markets through the promotion of individual titling and the abolition of collective entitlements previously afforded through agrarian reform legislation. Whether they lived in the countryside or the cities, indigenous people's economic – and thus social and cultural – vulnerability increased rapidly during the 1980s, contributing in turn to greater indigenous organising and protest. Domestic and international allies also played a vital role in promoting their demands: by the 1990s indigenous rights issues had become increasingly regionalised and transnationalised by various non-governmental and inter-governmental networks concerned with advancing indigenous platforms (Brysk 2000).

Indigenous activism also reflected profound changes in the international legal environment. Indigenous rights are now increasingly recognised by the international community as a form of human rights. Whilst some analysts continue to insist that human rights pertain exclusively to the individual, in recent years the idea has gained ground that certain collective rights are necessary for the full enjoyment of individual human rights (Donnelly 1989; Stavenhagen 2000). Indigenous activists have long fought to be recognised as 'peoples' under international law, a status that, it was hoped, would secure them the right to self-determination. However, international conventions and draft declarations referring to indigenous peoples have specified that the use of the term 'peoples' does not confer conventional rights of self-determination under international law; that is the right to separate statehood. Nonetheless, indigenous peoples' rights to internal – as opposed to external – self-determination, understood as rights to greater participation and autonomy *within* the nation-state, are clearly recognised. Autonomy regimes, comprising a combination of group rights, territorial ambit, indigenous institutions and specific politico-administrative competencies vis-à-vis the central state, are increasingly advanced as the most appropriate formulae.

Indigenous 'peoples' are now firmly established as subjects of rights in the international legal order.<sup>6</sup> As a consequence, the claims that individuals and groups can make against the state and the resources they have to contest its impositions have increased greatly. Undoubtedly the most important international instrument in this respect is the International Labour Organisation's (ILO) Convention 169, the only existing international legislation referring to indigenous rights. Once ratified, the Convention has the force of domestic law in signatory states. Its fundamental points are the following: indigenous people are defined according to the criteria of self-identification and signatory governments commit to ensure equality of social,

economic and cultural rights of all indigenous peoples within their jurisdiction. Indigenous peoples are to be guaranteed full participation in the formulation of all policies that affect them. Governments are to ensure respect for indigenous norms, practices, customary law and institutions. They are also bound to guarantee indigenous peoples' traditional lands and territories, and to ensure their right to be consulted about and participate in the formulation of development policies affecting their territories and subsoil resources. Lastly, governments must provide indigenous peoples with labour rights guarantees and adequate education and health provision. By the year 2000 ILO Convention 169 had been ratified by the majority of Latin American states, although it remained far from fully implemented in most cases.<sup>7</sup> Other international instruments were also of significant influence, although none is legally binding as yet (as ILO Convention 169 is). Most notable were the United Nations' draft Declaration on Indigenous Rights, drawn up in a lengthy consultative process during the 1990s, and the Organisation of American States (OAS) Draft Declaration, completed in 1998 (Stavenhagen 2000; Plant 1998a; Van Cott 2000a).<sup>8</sup>

As Donna Lee Van Cott has observed (2000a: 262), ILO Convention 169 had an enormous impact on the process of constitutional reform in Latin America. Since 1986 new constitutions, or amendments to existing charters have been passed in Bolivia (1994), Colombia (1991), Ecuador (1998), Mexico (1992), Nicaragua (1986), Paraguay (1992), Peru (1993) and Venezuela (1999) recognising the multi-ethnic and pluricultural nature of those societies.<sup>9</sup> Some of these reforms, though not all, explicitly acknowledged indigenous *peoples* as subjects of rights. For example, the revised constitutions of Colombia, Peru, Bolivia and Ecuador all recognise indigenous authorities, customary law and special indigenous jurisdictions. As Van Cott has signalled, such changes evidenced an 'emerging regional model of multicultural constitutionalism' (2000a: 17).

These reforms, although by their very nature declaratory, held out the promise of a new social pact involving a different relationship between indigenous peoples and the state. Potentially, at least, this constituted a radical break with the past. In Europe the legal existence of distinct ethnic and religious communities preceded the formation of the modern, liberal state and continued to exist alongside it, in the form of minority rights for certain populations, federalist arrangements and tolerance of pluralism during the nineteenth century. In Latin America, by contrast, dominant *criollo* elites took up the emancipatory discourse of liberalism during the nineteenth century, and used it to legally erase difference, associated with the corporatist colonial regime, which had afforded limited protections for 'subordinate' indigenous populations. Forging the post-colonial state involved homogenising the nation and the consolidation of an enduring political centralism. Society remained characterised by sharp racial, ethnic and class discrimination, yet the hegemonic discourse was of universal and undiffer-

entiated citizenship, shared national identity and equality before the law. This discursive egalitarianism, however, was sharply at odds with the political and economic vision of the nineteenth century liberal modernisers: liberalism was not a common emancipatory project and was in practice anything but 'difference blind'. Property and literacy qualifications on the franchise meant that indigenous people were effectively excluded from national politics. At the same time, the abolition of corporatist protections meant that many were despoiled of their historic lands to facilitate the expansion of agro-exports. As Rodolfo Stavenhagen discusses in his contribution to this volume, during the twentieth century the nationalist paradigms of modernisation and developmentalism advanced a vision of a homogenous, mono-ethnic, mestizo state, premised on the assimilation of indigenous identity. Indigenous people were seen as 'backward', a brake on development in need of modernisation and integration into wider society and the market. It was supposed that this would eventually lead to their disappearance, as indigenous groups became culturally and ethnically absorbed by mestizo society. By the 1990s this model was increasingly denounced as discriminatory and unacceptable. Instead, various sectors began to advocate a multicultural, pluralist and ethnically heterogeneous state, based on tolerance, respect for cultural differences and intercultural dialogue. Evidently ethnic claims are central to the redefinition and reconstitution of the state in Latin America. What is being advanced is, at least potentially, a radically new politico-legal order and conception of citizenship.

In a recent volume focusing on indigenous claims and reform of the state in Latin America, Willem Assies called for 'further study on the relations between new legislation and concrete practices' (2000: ix). The essays in this volume aim to contribute to this debate, exploring what recent constitutional and legal changes have meant in practice for indigenous peoples and their demands, the state and the prospects for democracy and social justice in Latin America. Much discussion of the recent successes of indigenous organisation has focused on the numerically minority indigenous populations, such as those in Nicaragua and Colombia, and lowland populations, who made significant gains in terms of territorial recognition during the 1990s, particularly in Bolivia, Brazil and Ecuador.<sup>10</sup> However, the contributors here focus particularly on Mesoamerica and the central Andes, the areas where the majority of indigenous people, historically defined as *campesino*, reside. In particular, they consider the ways in which new legal frameworks have been implemented, appropriated and contested on the ground, assessing the broader implications of these processes. The questions raised by recent developments are challenging and multiple, and can only be briefly signalled here, in the hope of encouraging further comparative and case-specific research. They fall into three broad areas or sets of issues, explored below: first, *representation and autonomy*; secondly, *legal pluralism and human rights*; and thirdly, *poverty and social justice*.

## Representation and autonomy

The politico-legal recognition of multiculturalism has profound implications for governance and democracy in Latin America. The recognition of different ethnic groups by the state implies, at least potentially, a new *national* project. Yet the tensions between the incorporation and participation of formerly excluded groups within the nation-state on new terms, on the one hand, and ethnic separatism, isolation and new forms of exclusion on the other are inherent in any such experiment. Although greater inter-ethnic compromise is the preferred outcome and stated objective of recent moves to reform in Latin America, increased inter-ethnic tensions cannot be ruled out, depending on how the process unfolds. One of the overriding concerns of indigenous activists in Latin America and their supporters is to democratise the state. Yet multi-ethnic states are not, in and of themselves, necessarily democratic. Multiculturalist reforms could contribute to the strengthening of the state and democratic deepening, or conversely to the weakening of the state and the strengthening of authoritarian forces. A key question that must therefore be posed to recent developments is the extent to which they contribute to an increase or a decrease in overall democratic accountability and guarantees.

Electoral democracy alone has plainly been unable to guarantee indigenous peoples' rights, or indeed the basic citizenship rights of the majority of the region's population. Following the transition from authoritarian rule, Latin American governments experienced a crisis of legitimacy as they introduced structural adjustment programmes and dismantled the corporatist and welfare arrangements that had undergirded the 'national-popular' state. The recognition of ethnic difference through the process of constitutional reform can be understood, in part, as a response to that legitimacy crisis. However, the challenge of 'deepening democracy' ultimately involves rethinking the existing terms of political participation. Alan Cairns has referred to the vertical and horizontal dimensions of citizenship, the former linking individuals to the state and the latter entailing the 'positive identification of citizens with each other as valued members of the same civic community' (1997: 4). Both dimensions are weak in Latin America, where acute socio-economic inequalities and *de facto* ethnic stratification have impeded the development of mutual understanding and cooperation. Indigenous peoples in particular, historically excluded, subjugated and stigmatised, often feel little solidarity and identification either with the rest of the population or with political parties and the state. Recognising the historic injustices against indigenous populations and taking measures to secure their greater equality *in practice* could advance a common civic identification, based on the principle of fair treatment of all citizens. However, it cannot be assumed, *prima facie*, that such an outcome would prevail. In a forceful recent critique of multiculturalist policies, Brian Barry has rejected the legal and political recognition of cultural differences, charging that 'a situation in which groups live in

parallel universes is not one well calculated to advance mutual understanding or encourage the cultivation of habits of cooperation and sentiments of trust' (Barry 2001: 88).<sup>11</sup> Such critiques of multiculturalist policies – which analyse practice in established Western democracies – are not easily transferable to debates concerning indigenous peoples' rights in the Latin American context.<sup>12</sup> However, they do raise a central question: to what extent do recent multicultural initiatives and reforms support or impede the development of a shared citizenship or civic identification in the countries of the region? Answering this question necessarily involves an empirically grounded examination of the policies themselves and the specific political and economic contexts in which they are implemented.

Different models of political participation have been advocated by indigenous activists during the last two decades, most involving some kind of autonomy regime at local or regional level. This is an unprecedented development. While the colonial state in Latin America recognised subordinate autonomies, the guiding ethos of the republican state was the negation of difference and the unity of political and legal jurisdiction. Even under federal constitutions – in Argentina, Brazil, Mexico and Venezuela – the power of the political centre over state governments has remained overwhelming until very recently. In contrast with other regions of the world, Latin America has little or no experience of political structures that grant autonomy to culturally distinct communities. At present, considerable controversy continues throughout the region regarding the units, competencies and mandates of the autonomy regimes proposed by indigenous movements. For indigenous activists, the notion of 'autonomy' generally implies a combination of land, resources and normative and administrative space, what has been referred to in some contexts as *'territorio étnico'*. Yet dispute persists between organisations over the precise nature of territorial autonomy, some advancing positions favouring community-based and municipal-based autonomy, others preferring regionally centred arrangements.<sup>13</sup> During the last decade, state recognition of indigenous autonomy has tended to be restricted to community or municipal level. However, as Willem Assies has noted '[c]laims to autonomy ... tend to go beyond the circumscribed community level that states now seem to be prepared to concede but to which "autonomy" has historically tended to be reduced' (2000: 12). Such was the experience, for example, of Chiapas between 1996 and 2001. The federal government manoeuvred to reduce the scope of indigenous autonomy set out in the 1996 San Andrés peace accords with the Ejército Zapatista de Liberación Nacional (EZLN), alleging that the original proposals would conflict with the existing federal model and the rights to property guaranteed by the Constitution. The state government of Chiapas subsequently advanced a number of initiatives aimed at limiting autonomy claims and undermining support for the EZLN.<sup>14</sup> An indigenous rights law was eventually approved by Congress in 2001 within the framework

of the peace negotiations. However, in contrast to the law drawn up by the consultative peace commission (Comisión de Concordia y Pacificación, COCOPA) on the basis of the 1996 agreements, this was a unilateral initiative of the executive that effectively restated the restrictive municipalisation approach to indigenous autonomy, falling far short of activists' demands.<sup>15</sup>

Securing the effective recognition of indigenous rights and greater social justice will entail more than localised autonomies – or, in effect, legal recognition of the *de facto* autonomy which already exists in many places as a consequence of marginalisation, official neglect and ethnic resistance. What it in fact requires is a new political arrangement, implying a profound redefinition of national political, administrative and legal space. Yet issues of participation and representation remain largely unresolved in those countries where indigenous people constitute a sizeable proportion or majority of the overall population. Consociational arrangements such as proportional representation for indigenous peoples in national congresses and senates have been ruled out by dominant elites, but little consensus exists on alternative mechanisms to articulate the local to the national.<sup>16</sup>

In some countries, most notably Bolivia after 1994, governments have combined constitutional recognition of multiculturalism with processes of political and fiscal decentralisation of the state, aimed in principle at securing greater local participation and governmental accountability. Decentralisation was favoured as a new development rubric during the 1990s and was supported by a wide range of international donors. It is a multi-faceted process, involving municipalisation – strengthening municipal government and granting it greater autonomy, the privatisation and decentralisation of service provision, and the much vaunted 'strengthening of civil society' and local participatory mechanisms. This last element often involved an increased role for NGOs in the provision of services that were previously the responsibility of the state. All of these processes strengthened the spaces and opportunities for indigenous movements. Yet recent experience has often shown that the discourse of 'participation' has not translated into effective oversight mechanisms in practice.<sup>17</sup> In some cases, decentralisation has mitigated against democratisation, reinforcing local power elites, clientelist politics and unequal access to power. In others, the increased penetration of the logic of political parties into rural areas has increased the fragmentation and division of indigenous authorities (see Calla 2000; Albó in this volume). In an important sense, contemporary policies such as the recognition of legal pluralism (see Sieder in this volume; Van Cott 2000b) and municipalisation have actually *extended* the territorial outreach of the state. In this manner they have increased its power, or the ability of local elites, to intervene in what in many areas were previously semi-autonomous indigenous spheres. This can be understood as a reorganisation of authority, territory and space according to a statist logic. Yet at the same time this is no unidirectional, top down process: national polities are also undoubtedly being rebuilt 'from the

bottom up' as local actors engage in a dialectic relationship with national level state reform.

While indigenous movements have been highly successful in articulating indigenous peoples' claims during the last two decades, political parties continue to dominate as the main form for pursuing and implementing them, particularly at regional and national level. The development of specifically indigenist parties and of alliances between indigenous movements and other non-indigenous political actors has been most consolidated in Bolivia, Colombia and Ecuador and was critical to ensuring constitutional recognition of indigenous rights in all three cases (Albó 1994; Van Cott 2000c). However, in the wake of constitutional recognition, indigenous peoples have been faced with the need to increase their political influence in order to pursue the promulgation and implementation of adequate secondary legislation. The dangers of the co-option of leaders and the fragmentation of indigenous movements in the post-constitutional phase of reform are high. In part this explains why many indigenous activists have rejected political parties altogether. Local indigenous representation independent of political parties has increased in recent years, for example through reforms such as that passed in 1995 by the state government of Oaxaca, Mexico, which allowed for the election of municipal authorities according to indigenous *usos y costumbres* (Hernández Navarro 1999). However, the dynamic between participation through different types of local autonomy and the national politics of representation is currently a key area of concern for indigenous activists. Linked to this, what makes certain alliances between indigenous movements and parties possible in some contexts at certain conjunctures and not in others should continue to be a central focus of enquiry.

## Legal pluralism and human rights

Since independence, official doctrine in Latin America has traditionally stressed the unitary nature of the law. However, in practice a situation of legal pluralism – the overlapping coexistence of different legal and regulatory orders – has prevailed across the continent (Santos 1995). In part this derives from the legacy of colonial rule, when a separate, subordinate legal system for indigenous subjects – *la República de Indios* – existed alongside the colonists' law. During the nineteenth and twentieth centuries, the lack of coverage of state judicial systems across huge swathes of national territory, combined with the cultural and social marginalisation of indigenous people, meant that indigenous communities continued to use their own local authorities, norms and practices to resolve disputes. While no neat division exists between 'state law' and 'indigenous law', indigenous people invariably resorting to both in order to resolve their conflicts, the official judicial system throughout the region discriminates against indigenous people and remains largely inaccessible in terms of cost, language and geographical and cultural

distance. ILO Convention 169 and many of the constitutional reforms passed in the 1990s recognised indigenous peoples' right to use their 'traditional' or 'customary' law. In effect, what this implies is the formal incorporation of indigenous authorities, norms and practices into the state legal system.

However, the course of recognition to date has been far from smooth. On the whole, governments have tended to incorporate indigenous communities' legal practices as a form of alternative dispute resolution mechanisms (ADR) within overall processes of judicial reform, but they have failed fully to recognise indigenous peoples' rights to their authorities, legal norms and practices as stipulated by ILO Convention 169.<sup>18</sup> Conflicts revolve around the appropriate limits to indigenous legal autonomy. ILO Convention 169 specifies that customary law should be respected when it does not conflict with universal human rights. Such a stipulation, or limiting clause, was incorporated into those constitutional amendments that recognised indigenous customary law in the 1990s. In addition, most states continue to insist that customary law should not conflict with national laws, such as the right to due process. In practice this means that governments reserve for themselves the right to decide which aspects of 'custom' are acceptable and which are not. Certain practices and procedures have been condemned as abuses of human rights, and in some cases indigenous authorities have been imprisoned for 'exceeding their functions' (Mexico and Peru are cases in point).<sup>19</sup> Yet precisely what constitutes a violation of human rights in such contexts is far from clear cut. Those state officials who make such judgements may have actively discriminated against indigenous people in the past and have little empathy with or understanding of cultural differences; for many Latin American jurists, 'custom' remains associated with barbarism. Officials may also have political reasons for suppressing certain indigenous authorities. Sticking strictly to definitions of 'due legal process' as set down in national legal systems invariably invalidates indigenous forms of conflict resolution. This is because these generally concentrate on reconciling the parties and re-establishing relations, rather than adhering to occidental norms of evidentiary proof, which arguably belong to a different conceptual framework (Speed and Collier 2000). Evidently the full recognition of indigenous peoples' right to customary law requires an intercultural interpretation of 'human rights'. Although human rights are, by definition, universal, there is no single and universally valid means of respecting them – 'due process', for example, is defined differently in different Western legal systems. Many different forms of respecting human rights exist according to different circumstances and cultural frames of understanding. Indigenous norms invariably involve a profound and complex conception of human dignity, even though – as in all communitarian systems – the ideal balance between the rights of the individual and their obligations to the community are weighted more heavily toward the latter.

Constitutional amendments passed to recognise indigenous customary law generally stated that the coordination between state law and customary law would be regulated by secondary legislation. However, such legislation was not promulgated during the 1990s and little intercultural legal dialogue has occurred in practice. Only in Colombia have decisions by the Constitutional Court regarding cases concerning alleged conflicts between indigenous justice and human rights established an emerging jurisprudence which attempts to develop a new balance between indigenous autonomy and human rights. In cases of alleged conflict between indigenous practices and universal human rights, the Court has attempted to understand and interpret the latter in their cultural context, and to reach judgments through intercultural negotiations and compromises. In broad terms, the human rights enforced by the Court are reserved for fundamental human rights – the right to life and protection against enslavement and torture. The Court established that other rights must be weighed against the right of ethnic groups to cultural self-preservation (Sánchez Botero 1998; Van Cott 2000b). In effect such an approach allows for the possibility of cultural mediation of core values and for different interpretations of certain acts. For example, public whipping as a sanction may be defined as an act of degradation or torture, but may equally be defined within the cultural community as an act of purification and reintegration to the community, which maintains respect for human worth and dignity (Sánchez Botero 1998). Respect for cultural difference then, ultimately entails interpreting actions and conduct in terms of culturally distinct systems of meaning. However, these advances have been easier to achieve in Colombia, where the indigenous population constitutes less than 3 per cent of the population. In countries such as Guatemala, where indigenous people constitute the majority, the question of deciding over competing jurisdictions and conflicts is inevitably more complicated.<sup>20</sup> Similarly, in contexts where indigenous peoples are highly urbanised and/or transnationalised through migration, discerning ‘culturally distinct systems of meaning’ becomes a highly complex and controversial task.

Even when dominant political and legal authorities are open to intercultural dialogue, the balance between guaranteeing the group rights of the collectivity and ensuring the individual human rights of its members is highly complex. This is because the legitimacy and nature of ‘customary law’ or ‘traditional dispute resolution practices’ is not only contested by non-indigenous authorities, but also often *within* indigenous communities themselves. In an increasingly globalised legal context, people on the ground make appeals to the idea of ‘human rights’ in order to contest what they consider to be discriminatory or authoritarian practices within their communities, and – increasingly – within their private, domestic space. Indigenous communities are not homogeneous, but – like any society – are divided by age, class, gender, wealth and so on. The ‘communal logic’ may be an expression of the superior bargaining power of those within the

community with the power to enforce their will. As Bithu Parekh and others have noted, 'far from being a transparent and univocal system of meaning claiming the spontaneous allegiance of its members, every culture is subject to contestation, and its dominant meaning tends to reflect the balance of power between its different groups' (2000: 79). Three issues are particularly contentious for the balance between communal rights and individual rights in this respect: gender equality, religious freedom and property rights.

Very real problems of gender equality and discrimination exist within indigenous communities, just as they do within society as a whole.<sup>21</sup> In some countries, lengthy debate has taken place within indigenous communities and organisations on this question. For example, in Mexico indigenous women organised in the Zapatista movement in Chiapas have reframed 'autonomy' claims to include demands for the personal and individual autonomy of women to make decisions about their own bodies, education, marriage partners, and so on (Eber 2001). Yet concerns have been raised that in other contexts, guaranteeing autonomy for communal legal structures and practices may continue to deny equal rights to justice for women. On the question of religious freedom and the right of the individual to apostasy, examined in this volume by Guillermo de la Peña, much controversy exists. The widespread process of conversion to Protestantism experienced across Latin America in the last decades has posed serious threats to indigenous communal cohesion. The refusal of certain individuals to carry out ritual duties considered necessary for community coexistence has led to much conflict and, in extreme cases, to forced expulsions. Widespread inter-communal religious conflict is not a prominent feature in Latin America and the right to freedom of religion is generally not denied within indigenous communities. However, tensions undoubtedly exist and might conceivably increase with the strengthening of communal autonomies. Lastly, with regard to property rights, the rollback of communal land entitlements associated with the agrarian reforms has raised the thorny issue of whether individuals within indigenous communities have the right to sell their land to outsiders. Many indigenous leaders assert their right to protect the integrity of the community by prohibiting the sale, mortgage or alienation of communal land. Such claims are supported by ILO Convention 169, yet they fly in the face of the current neoliberal economic logic. Advocates of liberal theories of multiculturalism have argued that as long as an individual has a right of exit from the cultural community, then certain restrictions on individual freedoms within the community are justifiable (Kymlicka 1995; Young 1990, 1995). This usually refers to situations where the exercise of those individual freedoms would threaten the cultural integrity of the group as a whole, such as sale of community land to outsiders. Differential treatment for historically discriminated and marginalised groups is thus viewed as necessary in order to give substance to the principle of equal citizenship. However, it is generally argued that the individual exiting the collective should be financially

compensated for the loss so entailed; for example, by receiving some restitution for their share of communal land. Evidently this is a highly contentious question, conflicts over which are likely to increase in future – particularly given the prevailing neoliberal orthodoxy, which encourages the individualisation of economic assets.

What is ultimately required in Latin America, as elsewhere, is a legal and political framework that appreciates the diversity between cultures, but also allows for diversity and difference *within* different cultural groups themselves. Ideally legal systems in multicultural societies should be informed by certain basic principles of justice, such as, for example, gender equality, while allowing for differences in cultural interpretation of socio-legal concepts, such as transgression, punishment, due process, and so on. An intermediary path must be found between dogmatic adherence to liberal principles of equality before the law followed to the last detail, and cultural relativist positions that exoticise and essentialise the indigenous ‘other’, arguing that they do not share conceptions of individual rights. (What such positions do in effect is deny the enjoyment of human rights to culturally distinct individuals.)<sup>22</sup> The evolution of appropriate principles of justice for a multicultural society requires an open, equal intercultural dialogue. Establishing the balance between general principles of law and the issues posed by individual cases demands a sensitive, intercultural approach that pays careful attention to the circumstances and context of each case. In short, the full recognition of indigenous legal norms and practices will involve a profound adjustment of legal thinking and practice in the continent and the tackling of deep-seated racist attitudes.

## Poverty and social justice

The relationship between the legal recognition of indigenous rights and the prospects for poverty alleviation and greater social justice is a key area of concern signalled in this volume, and is explored in greater detail in the chapters by Shelton Davis and Roger Plant. As the chapter by Nina Laurie, Robert Andolina and Sarah Radcliffe illustrates, tensions clearly exist between the neoliberal economic policies pursued in Latin America during the last two decades and the claims of indigenous peoples, particularly with regard to territorial and natural resources. However, the implications of recognising indigenous rights for development policies are far from self-evident. While the critique of neoliberal policies by the indigenous movement has been particularly vocal in recent years, controversy persists over which alternative national policies are the most appropriate to alleviate indigenous poverty. This is particularly the case given that indigenous people in Latin America are increasingly part of urban populations, dependent on highly globalised patterns of economic production and trade. In such a context, talk of

'indigenous models of development' may be of limited utility and arguably even counterproductive.

The constitutional recognition of multi-ethnicity during the 1990s opened up the possibility of greater indigenous participation in development programmes, albeit mostly at municipal level. However, in most cases, state recognition of multi-ethnicity has gone hand in hand with measures to strengthen economic deregulation and the opening up of land markets (the case of Bolivia since the 1996 INRA Law being the notable exception). That is to say, state recognition of indigenous claims as formulated to date has not fundamentally contradicted the neoliberal reform of the state. Neoliberal prescriptions for dynamising markets in land are premised on an individualist notion of ownership and stewardship. These invariably negate the logic of complex indigenous resource management strategies, which often combine collective logic and protection with individual usufruct rights. In practice recognition of collective land and resource management rights for indigenous peoples has tended to be limited to the lowland and Amazon regions (Assies 2000; Brysk 2000). The demarcation and titling of indigenous lands is more problematic in highland areas, particularly where indigenous people live side by side with non-indigenous as they do in much of the continent. And even in the lowlands the granting of rights to collective property has not necessarily implied recognition of indigenous peoples' right to exercise full politico-administrative authority; conflicts persist over rights to subsoil resources within titled indigenous territories.

In recent years, multilateral donors such as the World Bank have increasingly favoured an approach known as 'ethno-development', aimed at alleviating indigenous poverty at community and sub-regional level. Within this broad paradigm, proposals have been advanced by local NGOs and multilateral donors for integral development plans based on strengthening indigenous grass-roots organisation and knowledge and aimed at improving indigenous peoples' life chances.<sup>23</sup> Such schemes generally encompass subsistence production, basic infrastructure and the promotion of traditional and non-traditional commercial products. These development initiatives can have significant and positive local impacts. However, given their reliance on external donors and their failure to address the wider structural causes of poverty, it is open to question whether they can resolve the economic and social needs of the indigenous poor in countries where they constitute the majority or a sizeable proportion of the population. Fears have also been raised that the preferential targeting of development resources to indigenous groups may increase inter-ethnic tensions. Attempts to implement bilingual education policies, examined in this volume by Demetrio Cojtí for the case of Guatemala, have been particularly controversial throughout the region. Targeting resources at indigenous people inevitably raises the difficult issue of definition. International norms dictate that self-identification as indigenous provide the determining criteria. Yet, as Nina Laurie, Robert Andolina and

Sarah Radcliffe indicate in their examination of water reform policies in Bolivia, if economic and social resources are distributed according to ethnicity, this encourages a 'strategic essentialising', inevitably influencing which sectors of the poor define and present themselves as indigenous.

Few indigenous individuals and families today rely exclusively on subsistence agriculture, the land base for which was systematically eroded throughout the late twentieth century. Rather they have developed diverse and multiple economic survival strategies, including commerce, out-migration to urban areas or to rural areas to work on seasonal cash crop harvests, and transnational migration. In some areas a small indigenous elite is also making inroads to the professions and NGOs. Thus indigenous families straddle urban and rural economies in their search for economic survival. In both contexts, they still constitute a disproportionate percentage of the poor and extremely poor. In order to address indigenous marginalisation and poverty, alternative, nationally focused approaches to development are required, policies that address the poverty of urban as well as rural indigenous, and which are not simply posited on a notion of territorially bounded, rural indigenous communities (Plant 1998b). Yet controversy over appropriate macroeconomic policies persists. Some argue that indigenous poverty is due to the effects of economic globalisation and market penetration on indigenous communities, while others point to *lack* of access to the market as an underlying cause.<sup>24</sup> The central and unresolved question remains that of how to develop a multicultural state that can effectively tackle social exclusion.

The growing recognition of ethnicity and indigenous rights has opened up profound challenges for Latin American polities, economies and societies. Latin American states have never been liberal democracies, in the sense of ensuring a rule of law that secures rights and enforces obligations on all citizens. For this reason they have been described by many as 'low intensity democracies' (O'Donnell 1996), 'illiberal democracies' (Fakaria 1997), or some other variant of 'democracy with adjectives'. Nonetheless, the doctrine of liberalism is intimately bound up with the formation of Latin American nation-states and is deeply rooted in the region's historical trajectory. The model of the unitary, sovereign, liberal state remains a powerful symbol, a promise of modernity. Yet the challenges of adjusting political, economic and legal arrangements to the multicultural nature of Latin American societies imply potentially profound challenges to liberalism. Tenets such as individuals as the sole bearers of rights and obligations, the rule of law and equality of citizens, and the direct and unmediated relationship between the citizen and the state (and between citizen and market) are held up to question. Achieving a balance between communitarian and liberal conceptions of rights and obligations will inevitably be a complex and testing process, particularly in a context where the 'rights claiming' encouraged by globalisation is an ever more ubiquitous feature.

Whether the effective recognition of multicultural demands will constitute a reconstitution of the liberal state in Latin America, or whether it points towards its eventual replacement by another, non-liberal (ethno-nationalist?) variant remains an open question. At present, indigenous activists continue to call on the emancipatory claims of liberalism, but insist that a reformed liberalism should guarantee their collective rights, including their cultural and economic survival. The platform of indigenous movements, most notably in Mexico and Ecuador, represent national proposals for an inclusive, multicultural state respectful of individual and collective differences. The direction in which identity-based platforms develop in the future will depend, in large degree, on the ways in which they are accommodated or contested by dominant groups, within and beyond the frontiers of the nation-state. As Bhikhu Parekh has observed, '[w]hile acceptance of differences calls for changes in the legal arrangements of society, respect for them requires changes in its attitudes and ways of thought' (2000: 2). This will involve challenging deep-seated prejudices based on class and race, which continue to predominate in Latin American societies. The abandonment of the civilising mission by the holders of power, and its replacement by respect and understanding of different cultural forms, values and institutions may take generations to achieve. In addition, changes in the prevailing paradigm will not result from indigenous demands and government responses alone, but also from profound shifts in global and local political economies. Ultimately the challenge is to find ways of pluralising the state in Latin America at the same time as increasing its ability to act in pursuit of the collective interest. Cementing the basis of a new pact for common citizenship involves the twin dimensions of celebrating difference and heterogeneity, but also addressing indigenous poverty and social marginalisation. In this sense the politics of difference in the region cannot be separated from the politics of social justice.

In the following chapters the contributors to this volume explore the implementation of multicultural frameworks by Latin American states since 1986. Together they signal the gap between constitutional subscription to a multicultural society and its implementation, analyse the difficulties of delivering indigenous rights in practice and examine some of the dilemmas raised by implementing indigenous rights legislation.

In an introductory overview, Rodolfo Stavenhagen charts the changing relationship between nation-states and indigenous people in Latin America. He underlines continuities between the positivist state-building of the nineteenth century, which viewed indigenous people as backward and anti-modern, and the populist nationalism of the twentieth century, which posited their integration and assimilation through development. In the late twentieth century indigenous rights movements emerged as part of domestic and international human rights movements to challenge paternalistic approaches on the right and the left, challenging the model of nation-state which has existed

to date. However, Stavenhagen cautions that after initial gains via constitutional reform, 'the going will get rough from now on'. Conflicts between autonomous and centralist impulses and between individual and collective rights look set to continue and it is far from clear what kind of 'culture(s)', if any, Latin American states are to promote. Stavenhagen concludes that the fate of multiculturalist policies in the region depends on the broader alliances indigenous rights movements are able to build in the future.

This conclusion is reinforced in the chapter by Donna Lee Van Cott, which provides a detailed comparative analysis of the constitutional reforms to secure indigenous rights that took place in the Andean countries of Colombia, Bolivia and Ecuador during the 1990s. Van Cott examines why and how constitutional reforms were initially secured and what these different attempts to codify autonomy regimes have meant in practice. She argues that two factors were common to all three cases prior to the introduction of the reforms: the crisis of governmental legitimacy and governability and the political maturation of indigenous organisations. However, her analysis indicates that the extent and success of the different autonomy projects in Colombia, Bolivia and Ecuador subsequent to their respective constitutional reforms have depended crucially on the relative strength and leverage of indigenous organisations.

Taking up the issues of representation and autonomy, Xavier Albó examines the experience of indigenous campesino organisations in Bolivia before, during and subsequent to the constitutional and other reforms introduced by the government of Gonzalo Sánchez de Lozada (1993–97). This unique programme for state modernisation heralded recognition of the multicultural nature of Bolivian society and promoted greater participation by grass-roots organisations as part of an overall strategy of administrative decentralisation. Albó analyses the impact of the 1994 Law of Popular Participation (LPP), which effectively extended the outreach of the state and political parties to rural areas by creating or strengthening municipal government. He points to the complex trade-offs involved in increased participation by indigenous campesino organisations in local and national politics and rightly asks to what extent this has in fact benefited the grass-roots constituency of indigenous political leaders.

The trade-offs implied by greater participation of indigenous organisations in state modernisation are also addressed in the chapter by Demetrio Cojtí, which provides an insider's view of the challenges involved in securing multicultural reforms in Guatemala. Cojtí was a civil society delegate to the Parity Commission for Educational Reform (COPARE) and after January 2000 a governmental delegate to the Consultative Commission for Educational Reform (CCRE). Both commissions were created by the 1996 peace accords and charged with devising a reform to make education multicultural, bilingual and decentralised. While emphasising the achievements made to date, Cojtí's fine-grained analysis points to a number of factors that negatively affected

indigenous organisations' participation and signals the gap between the peace accords' discursive emphasis on civil society participation and practice on the ground.

The complex questions raised by state recognition of indigenous customary law about the balance between the rights of communities and the rights and obligations of the individuals that make them up are considered in the chapter by Guillermo de la Peña. Adopting an ethnographic approach to examine the issues involved in recognising ethnic citizenship in practice, he analyses the conflicts between 'traditionalists' and 'evangelicals' in the Sierra Huichol over what constitute reasonable obligations for community members. De la Peña locates the conflict within the broader context of transformations in social policy which have reshaped the relationship between indigenous people and the state in Mexico. As he points out, state recognition of cultural rights has provided a new idiom for claims to collective entitlement, in turn encouraging strategic essentialising by indigenous activists and groups, whose appeal to tradition and community resonates with neoliberal discourses on community solidarity and social capital. He concludes that the recognition of cultural rights implies the recognition of cultural communities and greater intercultural dialogue and tolerance to determine appropriate balances of rights and obligations.

Raquel Yrigoyen analyses the challenges of securing recognition of legal pluralism in Peru since the approval of the 1993 Constitution and the ratification of ILO Convention 169. A special indigenous jurisdiction was formally recognised in the new constitution, yet Yrigoyen shows how political authoritarianism, judicial conservatism and the counter-insurgency war against Sendero Luminoso made for contradictory dynamics on the ground. Focusing on relations between state authorities and *rondas campesinas*, she illustrates how formally recognised indigenous rights to customary law have been disregarded by the judiciary, who penalise the *rondas* for exceeding their functions and abusing human rights. Her chapter points to one of the central dilemmas inherent in recognising indigenous customary law – how to determine what constitutes an acceptable sanction or a violation of human rights, an issue also addressed in the chapters by de la Peña and Sieder.

Rachel Sieder's chapter compares state responses to indigenous demands for the recognition of legal pluralism in Chiapas, Mexico and Guatemala. Her focus is on how and why states take up multiculturalist discourses, contrasting Mexico, where the neoliberal state espoused the recognition of difference in the 1990s, with Guatemala, where elites rejected such constitutional reform in 1999. Through a comparative historical analysis, she emphasises the importance of changing patterns of state-indigenous interaction and points to the ways these shape both the opportunities for oppositional movements and the different ideological and political resources states can mobilise to contain, co-opt or absorb challenges from below. Sieder contrasts Mexico, where the official adoption of multiculturalist discourse can be understood

as an attempt to reimpose hegemony on challenges to traditions of inclusive authoritarianism, with Guatemala, where traditions of exclusive authoritarianism have precluded such a response by governing elites.

Roger Plant focuses on the economic and agrarian dimensions of the multicultural challenge in Latin America, considering the economic implications of differentiated citizenship and development approaches targeted at indigenous people. Questioning approaches based on an idea of separate indigenous space, he emphasises the fact that most of Latin America's indigenous people inhabit unequally shared territorial, legal and political spaces. Plant considers the experience of indigenous land titling to date and the problems encountered. He underlines the central tension in multicultural reforms between participation and autonomy and cautions against romantic, outdated views of localised, rural and self-sufficient indigenous economies. Instead he advocates a focus on tackling discrimination in land and labour markets and securing indigenous participation on equal terms in national and international economies.

Shelton Davis's chapter provides an overview of the World Bank's recent experience in addressing the socio-economic exclusion and poverty of indigenous people in Latin America and the Caribbean. Davis explains prevailing donor thinking, which views indigenous exclusion as a lost opportunity for development and advances a twin-track approach focused on improving human and social capital as a means to improve indigenous peoples' comparative advantage. Davis describes the new models of participatory development advanced by the World Bank in line with ILO Convention 169. Premised on respect for indigenous cultures, these aim to strengthen indigenous organisations and include indigenous people in project planning, implementation and evaluation. Davis concludes that such approaches can have a significant impact, but that they must take account of the political context in which they are implemented.

Nina Laurie, Robert Andolina and Sarah Radcliffe's chapter examines the implementation and outcomes of multicultural laws for the case of Bolivia. They emphasise the ways in which the identification and self-representation of people as indigenous is bound up with the logic of development projects and processes, and particularly with discourses of 'indigenous-ness' produced by transnational actors. Acute tensions exist between collective claims to entitlement and neoliberal policy prescriptions of private, individual ownership. However, as Laurie, Andolina and Radcliffe illustrate, donor conceptions of indigenous people as 'social capital' have favoured greater grass-roots participation in development planning, opening spaces to challenge neoliberal policy prescriptions. Yet they caution that the framing of claims to entitlement in terms of cultural identities and rights is constrained by national and international policy frameworks and can also exclude other marginalised groups not able to lay claim to indigenous identity.

## Notes

1. The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities defines indigenous peoples in the following terms: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, considered themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems'. Cited in Van Cott (2000b: 208).
2. William Assies argues for an understanding of indigenous identity that takes into account both 'strategic essentialising' by movements and 'forced redefinitions' by states, dominant elites and markets (Assies 2000: 4–6). For a useful discussion on indigenous identity construction see Koonings and Silva (1999).
3. See Psacharopoulos and Patrinos (1994), the chapter by Shelton Davis in this volume and Plant (1998b).
4. The conspicuous exception to this regional trend was Guatemala, where the *comités agrarios locales*, the organisational structures of the short-lived agrarian reform promoted by the Arbenz government, were forcibly dissolved following the 1954 coup.
5. This process has been well documented elsewhere. See for example Van Cott (1994).
6. For a detailed analysis of the evolution of international law with respect to indigenous peoples see Anaya (1996).
7. Argentina, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay and Peru had all ratified ILO Convention 169 by the end of 2000.
8. This is despite the fact that the OAS draft has been criticised by indigenous groups for insufficient participation of indigenous organisations in the drafting process and for not pressing claims for indigenous self-determination.
9. Proposals to reform Guatemala's 1985 Constitution on the basis of the 1996 peace agreements, which included an agreement referring to the rights and identity of indigenous peoples, were defeated in a national referendum in 1999 (see the chapter by Sieder in this volume).
10. Although they do not deal exclusively with lowland indigenous populations, Brysk (2000) and the edited volume by Assies (2000) provide full accounts of these processes.
11. The 'egalitarian liberalism' that Barry advocates also implies that 'any disadvantage for which the victim is not responsible establishes a prima facie claim to remedy or compensation' (2001: 114). Compensatory measures to redress inequality of opportunity are therefore acceptable, although Barry maintains a broadly assimilationist logic, arguing that such measures should exist only for as long as is necessary for the group in question to overcome their disadvantaged status.
12. Such questions of the 'transferability' of critiques of US multiculturalism to other contexts, particularly those where rights are claimed by indigenous groups, have been considered (though not for Latin America) in a recent essay by Will Kymlicka (2000).
13. In addition, disagreement persists over whether autonomous regions should be mono-ethnic or multi-ethnic, although multi-ethnic positions have generally

- predominated among all but the most geographically isolated groups. For an argument in favour of multi-ethnic regional autonomy see Díaz Polanco (1997).
14. In March 1999 the interim governor modified the Chiapas constitution to reduce self-determination to communal level and in July 1999 the Chiapas state government announced plans for remunicipalisation aimed at redividing Zapatista strongholds in order to lessen their influence (Mattiace 2001).
  15. The law sent by the governing PAN to the national Congress in March 2001 contained elements of the COCOPA draft law, but did not recognise the legal status of indigenous peoples, their rights to land, territory and extensive autonomy, nor their right to extra-municipal association. It remained subject to ratification by a majority of state congresses. For a recent analysis see Díaz Polanco (2001).
  16. Such a proposal was accepted in the 1991 constitutional reform in Colombia, a country where indigenous people constitute less than 3 per cent of the overall population. See Van Cott (2000b).
  17. See Calla (2000) for an incisive critique of the 1994 Law of Popular Participation in Bolivia.
  18. In this sense, incorporating indigenous dispute mechanisms into the lower rungs of the judicial system dovetails neatly with government and donor preferences for decentralising justice administration and promoting resolution of conflicts outside the framework of the courts.
  19. On Peru see Yrigoyen in this volume.
  20. Van Cott points to two variables accounting for the degree to which legal pluralism has been successfully implemented in Latin America: 'the extent to which multiple legal systems are able to operate without interference, and the extent to which conflicts among legal systems are managed institutionally' (2000b: 209). She notes that jurisdictional conflicts have not occurred in Bolivia, a country with a majority indigenous population. This she attributes largely to the minimal presence of state courts outside urban areas, the tendency to date of indigenous people to support customary law, and the state judiciary's reluctance to intervene in indigenous conflict resolution (2000b: 230–4).
  21. For a general discussion of gender inequality and group rights see Okin (1999).
  22. If we accept that the values underpinning the UN Declaration of Human Rights are universal, we must also appreciate that different societies may rely on different mechanisms to realise those universal values. As Bhikhu Parekh has observed, 'Some might prefer the language of rights and claims and rely on the state to enforce these. Others might find it too individualist, aggressive, legalistic and state-centred and prefer the language of duty, relying on social conditioning, and moral pressure to ensure that their members respect each other's dignity and refrain from harming each other's fundamental interests.' In other words, the latter might not object to those universal values, 'but think that these are best realized within a communitarian moral framework based on mutual concern, solidarity, loyalty to the wider society, and socially responsible individualism' (2000: 135, 137–8).
  23. See Palenzuela (1999) for a discussion of ethno-development in western Guatemala.
  24. An alternative approach focuses on tackling discrimination against indigenous people within land and labour markets; see Plant (1998b).

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