State Law and Indigenous Law:
Coordination or Subordination

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Here we propose to review the different forms of coordination between Indigenous law and state law in four countries of the region, namely Bolivia, Ecuador, Argentina and Chile, in order to observe how various legal pluralism arrangements are structured in the presence of challenges, such as changing relations of subordination and the consistency of the inclusion of indigenous peoples with human rights.

Legal monism is an ideological description of legal orders, in the sense that each political system has a single legal system for all its citizens. This principle has governed the construction of modern legal systems, corresponding to its uni-national and monocultural concept of self-representation, "establishing a single form of being, knowing and living that is molded from the European pattern and image" (Walsh 2010 : 9).

The political project of indigenous movements in the Americas, but also in other contexts (Australia, New Zealand, among others) has sought to address the long-term consequences of colonization, rebuilding institutions and demanding recognition from the international community and the states. An integral part of this "decolonizing" political movement is the recovery of indigenous legal institutions and their acceptance within constitutional systems (Van Cott 2000 and Yrigoyen 2006). Hence, the coordination between state law and Indigenous law constitutes a true test of initiation for the implementation of new forms of relations, other than oppression and assimilation, between indigenous peoples and states, as well as for the consistency of political systems which adopt them.
With so-called legal pluralism, democracies risk, on the one hand, the emergence of new conflicts regarding their legitimating principles, and on the other, that this pluralism is built as subordinate, subjugated and, therefore, as a domestication that assimilates Indigenous law as part of a functional interculturality into the State. To recognize legal pluralism, in any case, is to accept the conflict and the impossibility of convergence between these systems (Walsh 2010).

**On Indigenous Law**

Law is a fundamental aspect of collective identity and the singularization of the indigenous people as a people. The affirmation of Indigenous law implies building citizenship, responsibility and governance, thus contributing decisively to challenging internal and external subordination, to security and protection of lands and resources, as well as to external political relations with other indigenous peoples and the state. (Napoleon 2013: 230).

Indigenous law is a means of preservation and continuity of indigenous culture, and not just a means of regulating behavior. It is a localized form of law, linked to a particular community, tribe or indigenous nation or its members, or the particular area within which they reside. For the Confederation of Indigenous Nationalities of Ecuador - CONAIE, Indigenous law is:

- living, dynamic, unwritten law, which through its set of norms regulates the most diverse aspects and behaviors of community life. Unlike what happens with official law, Indigenous law is known by all the people, that is, there is a socialization in the knowledge of the legal system, a direct participation in the administration of justice, in the systems of rehabilitation, which guarantee a harmonious coexistence (CONAIE, 1992: 6).

Indigenous law helps to find practical answers to complex and pressing questions and contains important sources of authority. It establishes standards of conduct and generates criteria for making sound social judgments. Indigenous law helps to produce binding measures through persuasion and compulsion, addressing ethical redress and corrective actions when harm has
been done, and facilitating exchange and altruistic donation in a society. Indigenous peoples' legal systems also support the creation of inter-societal commitments to external bodies (Borrows 2016: 797-798).

Elements of Indigenous law may often appear to an external observer as non-legal rules, of a social or courteous nature, but these are integrated into a legal vision, where they constitute an undifferentiated repertoire. This repertoire ranges from standards of educated behavior to rules whose breach is taken very seriously (Comaroff & Roberts 1981). While state law is functional and organizationally differentiated from the rest of society, with an administrative apparatus and professional specialists, Indigenous law is immersed in the weakly differentiated social and cultural continuum, and therefore is not easily distinguishable from norms of daily or religious life, or even technical recommendations (Kraemer 2006).

Outside of the communities, indigenous traditions are largely invisible or even incomprehensible. As in no other legal order, Indigenous law can only be identified from an internal point of view (Friedland 2016), "written in our hearts", through various resources: i) resources that require profound knowledge and complete cultural immersion; ii) resources that require some kind of connection with the community; and (iii) publicly available resources (Fletcher 2006, Friedland 2016: 25 ff).

The processes of deliberation about law and legal reasoning about its application are often informal, decentralized and even implicit (Napoleon 2013). Indigenous law is transmitted orally, which makes it much more flexible and able to adapt to new circumstances. In terms of content, Indigenous law protects relationships between individuals, the collective and the natural environment.
At present, the possibility of imposing the norms of Indigenous law depends in part on the latent threat of the coercive apparatus of state law. However, indigenous systems have other means to ensure compliance, such as consensus and community participation in decision-making and dispute resolution. Furthermore, many indigenous peoples have regulated systems of infictions and sanctions that provide solutions in face of events that constitute most serious conflicts of coexistence (Borja 2009). These measures are often aimed at restoring community cohesion and integrating the offender into it.

A law which is unknown and oppressed by state order, such as Indigenous law, is damaged, and its governance capacity is severely affected. According to Val Napoleon, damage to conflict management systems and indigenous peoples' law has resulted in increasingly destructive conflicts, as many people no longer know how to handle them constructively (Napoleon 2013). States actively de-legitimized and disparaged indigenous peoples’ legal ontologies, their collective responses to violence, harm, and the group's security needs within their own societies (Napoleon & Friedland 2015). The ability to exercise collective coercion for their legal decisions was reduced, at best, to the "honest belief" that offenders would accept the decision (ibid.). But these decisions and their premises were discredited by state legal orders and their operators, who consider them irrational, pagan, savage, or superstitious. On the other hand, effective control capacity of the community is often limited due to lack of resources, government control, information requirements and state monopoly on legal processes. In addition, the limited spaces available within colonial states have led to distortions and dangers at practical, political, and intellectual levels. There are many risks of reductionism, over-generalizations and simplifications. In general, they fall upon the intelligibility, accessibility, equality, applicability and legitimacy of indigenous legal traditions (Borrows 2010: 138).
However, indigenous peoples' legal concepts and rules have resisted those processes, as some communities continue to use them in their practices. Some state judges continued to implement some forms of Indigenous law, such as healing, supervision, or separation, when doing so was possible and useful. According to Val Napoleón, "where there are spaces of freedom, however limited, to reason and practice with their own legal traditions, indigenous peoples have continued to do so" (Napoleon & Friedland 2015).

**Recognition: Facticity or Subordinate Validity of Indigenous Law**

In addition to the divergence in the modes of creation and the different structure of state and Indigenous law, these may differ in normative content, always in the same social space. In this way, problems of cohabitation, compatibility or coordination arise in practice (Melo 2013).

Faced with this, one question arises immediately: about the basis of validity of Indigenous law. Oscar Correas (1995) has warned about the Eurocentric character of the general theory of law, insofar as the criteria developed by it for the recognition of a normative system as legal, are historically linked to the European experience of the construction of a state form or ideal. It monopolizes the production and adjudication of law in a centralized power, while other forms of normativity, like regional, manorial or community laws, lose *ipso iure* all validity.

This view is in conflict with the reality of colonization in the Americas, since it has never been possible to enforce a central power that would totally destroy the political and juridical institutions of the indigenous peoples who survived (Correas 1995: 234). State domination in Latin America has always been irregular, heterogeneous and multiform, both in colonial times and in postcolonial republics (García Villegas 2002: 24). According to Correas (1995, 2011), there are no relevant theoretical objections to the recognition of the legality of indigenous normative systems, but rather ideological, which contrast with a social reality where there exist
hegemonic legal systems (state law) and subordinate legal systems (Indigenous law).

Chávez and García argue that the existence of fictions or myths that support the recognition rule followed and observed by members of an indigenous community, makes it possible to speak of the existence of indigenous legal systems, as well as legal pluralism within a juridical-political space (Chávez & García: 170). Community is a social space where the actors intuitively know the rules that allow them to coexist, generating a sense of identity and belonging from those rules: "if I follow the social guideline I am a member of the community and if I am a member of the community I follow the rule "(Chacón 2015: 59). For Vicente Cabedo, there is clearly a recognition by indigenous peoples of their own rules, the possibility of changing those norms over time, and their own institutions for their application (Cabelo 2004).

State recognition has often been accorded to indigenous customary law through provisions of national constitutions. According to Cuskelly (2011), by 2011, 115 countries had recognized customary law in their constitution to varying degrees. This allows Indigenous law to advance to higher levels of relationship with state law. However, the question remains open whether "coordination" between the two legal systems can overcome the subordination of Indigenous law to the hegemonic paradigms of the liberal rule of law (Sieder 2012: 23).

On the other hand, along with formal coordination mechanisms, informal mechanisms are important which relate to practices. They are generally local, not established by formal mechanisms, nor legally codified (Grijalva & Exeni: 702).

In order to understand the institutional arrangements of legal pluralism, together with a review of the different forms of recognition of Indigenous law, we will turn to Sagües' (2013) distinction between a) selection rules or delimitation of competencies - limits of competency between indigenous and state jurisdiction – b) articulation - forms of relationship between state
Coordination in Bolivia

The Constitution of the Plurinational Republic of Bolivia, in Article 190 I, contains a recognition of Indigenous law (Sagües 2013) in its "particular principles, cultural values, norms and procedures" and recognizes the jurisdiction of indigenous rural nations, through their authorities.

This provision is in harmony with the article 30.II.14, which states that indigenous nations enjoy the right: "14. To the exercise their political, juridical and economic systems according to their worldview". Article 304.I.8 of the Bolivian Constitution states that the exercise of indigenous jurisdiction is an exclusive competence of indigenous and rural autonomies. Together with this, it is established that indigenous rural jurisdiction is endowed with power of enforcement and all authorities and persons must abide by its decisions (Article 192. II).

In Bolivia, on December 29, 2010, the Law of Jurisdictional Boundaries (Nr. 73), is promulgated, which seeks to regulate the areas of indigenous jurisdiction, mechanisms for coordination and cooperation among the various jurisdictions, within the framework of legal pluralism.

Article 4 (a) of said Law contains the rule of articulation between the two justices, inasmuch as it incorporates as a first principle that of "Respect for the unity and integrity of the Plurinational State". Art. 3 of this Law establishes that indigenous rural jurisdiction enjoys the same hierarchy as ordinary jurisdiction, in harmony with the principle of art. 4.e) of the same Law: "Legal pluralism with hierarchical equality. Coexistence, cohabitation and independence of
different legal systems in equal hierarchy within the Plurinational State, are respected and guaranteed."

Article 14 states under "Coordination Mechanisms": a) systems of transparent access to information on facts and antecedents of persons; B) spaces for dialogue or other forms, for the implementation of human rights in resolutions; C) spaces for dialogue or other forms for the exchange of experiences on conflict resolution methods; D) other coordination mechanisms, which may emerge according to the application of this Law. Coordination and cooperation mechanisms will be developed in conditions of equity, equality, transparency, reciprocity, solidarity, participation and social control, quickness, opportunity and gratuity. The authorities of the different jurisdictions cannot refuse to comply with the duty of coordination and cooperation.

For some, this law is plagued by mistrust, fears and misgivings about indigenous justice, thus generating a *de facto* weakening of its legal authority to administer justice (Goitia 2012: 332; Sieder 2012: 27).

Indigenous rural jurisdiction is subject to constitutional control through two channels: a) through consultation with indigenous rural authorities (Article 202.8 Constitution) and; b) via conflict of competency between jurisdictions (Art. 202.11 Constitution). Conflicts of competency between jurisdictions of the Judicial Branch shall be resolved by the Plurinational Constitutional Court (Article 14 of the Judicial Branch Act).

As *rule of framing or delimitation of competencies*, Bolivian Constitution has personal, territorial and material limits: personal, inasmuch as application of indigenous jurisdiction to non-indigenous persons does not proceed, it applies only to members of the group; territorial, since indigenous jurisdiction applies to relations and legal facts that are realized or whose effects are produced within the jurisdiction of a indigenous rural people; in terms of material scope, it is
stated out that this jurisdiction deals with indigenous rural issues, according to the Law of Jurisdictional Boundaries (art 10). These elements are concurrent, that is, they must be present simultaneously and that if some of them are lacking, Indigenous Law cannot be applied.

The Bolivian Constitution establishes a rule of preference in favor of the constitutional rights of the State (Sagües 2013: 386). The rights to life, defense and other constitutional rights are limits that must be respected by indigenous jurisdiction. The exercise of indigenous rural jurisdiction generates for indigenous authorities the duty to respect fundamental rights, which must be interpreted in intercultural contexts and through guidelines of intercultural interpretation (Attard 2014: 50).

Intercultural interpretation of fundamental rights, which are at the same time the limits of indigenous jurisdiction, leads to the solution of a balance between indigenous rights and individual human rights. This means that Indigenous law and state law, when there are collisions of fundamental collective and individual rights, will come to be weighed on an equal footing.

It is in this context that, in many cases, judges will be obliged to carry out a deliberation of the collective rights of indigenous peoples and nations with the individual rights that, as has been said, according to art. 13.III of the CPE, have the same hierarchy; Deliberation in which they must analyze whether the measure adopted, if it limits a right, has a constitutionally legitimate purpose, and decide whether such a measure is appropriate, necessary and proportional. The three principles of deliberation judgments are: suitability, necessity and proportionality. Principles which, however, must be interpreted in a plural manner, considering again the principles, values, norms of indigenous peoples and nations (SCP 0572/2014 of 10 March 2014).

Constitutional ruling 1422/2012 establishes Living Well as a specific guideline for intercultural

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1 These matters are those historically and traditionally known through their own rules, procedures and knowledge, according to their freely chosen determination.
interpretation of fundamental rights:

"In effect, in the light of the principles of interculturality, complementarity and
decolonization, fundamental rights in force for members of indigenous rural nations or
peoples cannot follow the same guidelines of interpretation and cannot contain the same
configurative elements of the hard cores of fundamental rights in contexts different from
indigenous rural jurisdiction."

The aforementioned ruling determines an intercultural deliberation test, composed of 4 elements:

α) Axiomatic harmony: the decision, with regard to its aims and the means employed, must
ensure the materialization of supreme plural values such as equality, complementarity,
solidarity, reciprocity, harmony, inclusion, equality of conditions, common welfare among
others,

β) Decision according to the particular worldview: crosscheck that the decision taken by the
indigenous rural people or nation is in harmony and concordance with their worldview,

χ) Harmonic ritualisms with procedures, norms traditionally used according to the particular
worldview of each indigenous rural nation or people; and,

δ) Strict proportionality and necessity.

Yamile Hayes (2016: 268) cites the case Huarachi Mamani v. former authorities of the
Pulqui Community, a ruling of the Plurinational Constitutional Court 234/2016-S3, February 19,
2016, which determined that due process "has not the same components as due process in
indigenous rural terms, because it legitimately obeys different legal traditions, both
constitutionally recognized." This can never support that indigenous authorities, "in order to
apply community justice or the exercise of customary law, injure and, therefore, ignore rights
and guarantees recognized by the Political Constitution of the State and the International
Covenants and Conventions on Human Rights", as resolved by the Constitutional Court in ruling

However, one of the main objections to the way in which indigenous jurisdiction has
been regulated is the practice of lynching, many instances of which occurred in the context of
community justice. Between January 2005 and November 2011 there were 199 cases in Bolivia (Luna, 2016). Most of these occur in lower-class peri-urban and urban areas. In some cases, lynching is associated with traditional forms of self-control by members of the neighborhood councils of an urban area, but of rural origin; however, indigenous organizations argue that lynching is not a native practice of indigenous justice. The main cause of lynchings is the delegitimation of judicial and police institutions of the State.

**Coordination in Ecuador**

The Constitution of Ecuador from 2008 contains an acknowledgment of Indigenous law in its art. 171, establishing that indigenous jurisdiction by indigenous communities, peoples and nationalities will be exercised on the basis of "their ancestral traditions and their own law." Also, art. 24 of the Organic Code of Judicial Function (COFJ), contains the Principle of Interculturality. Servants of justice must observe this principle in their performance, and especially should consider the customs, practices, rules and procedures of individuals, groups and communities that use justice. It is also guaranteed that the decisions of indigenous jurisdiction are respected by public institutions and authorities.

Indigenous justice is not an instrument of the Judicial Function, but, instead, the Constitution recognizes its own particular jurisdictional functions. Although it performs important functions of mediation, it is a system of justice clearly differentiated from justice of peace.

As a framing rule, the Constitution of Ecuador establishes that indigenous jurisdiction will be exercised within its territorial scope, with a guarantee of participation and decision of women, and for the resolution of internal conflicts.

In the Draft of the Organic Law on Cooperation and Coordination Between Indigenous
Jurisdiction and Ordinary Jurisdiction – still not approved -, in its Chapter II, which refers to "Jurisdiction and Competency," it is stated that indigenous authorities will solve, in exercise of their jurisdictional authority and with observance of their law, all problems that exist within their territory, without any limitation, as established by the constitution (Articles 9, 10 and 11).

As for articulation rule, the same art. 171 states that "... The law shall establish mechanisms for coordination and cooperation between indigenous jurisdiction and ordinary jurisdiction." The articulation between indigenous and state law in Ecuador indicates a subordination, insofar as there is a constitutional control of the decisions of indigenous justice. For its part, the Organic Law on Jurisdictional Guarantees and Constitutional Control creates the extraordinary writ of protection against the decisions of indigenous justice (art 65), by virtue of which the person who is dissatisfied with the decision of the indigenous authority in office of jurisdictional functions, for violating constitutionally guaranteed rights or discriminating against women for being women, may turn to the Constitutional Court and challenge this decision within twenty days of having known it.

The COFJ establishes in article 253 that the justice of peace will not prevail over indigenous justice. Another mechanism of formal coordination is established with the Office of Public Defense. Article 286, numeral 6 of the COFJ guarantees specialized public defense of indigenous women, children and adolescents victims of violence, and in general of communities and indigenous peoples.

In the COFJ, an exclusive title, title VIII, on "Relations of Indigenous Justice with Ordinary Justice" is established. Article 344 of the COFJ obliges judges, prosecutors, defenders and other judicial officials, police officers and other public officials to act and take decisions by observing a set of principles of intercultural justice: cultural diversity (taking into account
Indigenous law), equality (understand Indigenous law), *non bis in idem* (what is decided by indigenous justice cannot be tried or reviewed by any state authority, except through constitutional control), principle of preference for indigenous jurisdiction (in case of doubt between indigenous and ordinary justice the first will be preferred), and intercultural interpretation of constitutional rights.

Unlike what happens in Bolivia, the person who decides this conflict of competence between ordinary and indigenous justice is the ordinary judge himself, although he is also immersed in the conflict, thus becoming a judge and a party. Article 161 of the Constitution submits the decisions of indigenous jurisdiction to constitutional control.

According to article 346 of the COFJ, the Council of the Judiciary will promote intercultural justice in three senses: the obligation of the Council of the Judiciary to designate human and economic resources for coordination and cooperation between the two systems; The Council is especially obliged to train judicial servants who operate in territories with indigenous populations; and to establish efficient cooperation and coordination mechanisms.

There are regulations, minutes and statutes generated by some indigenous communities, which determine procedures for dealing with ordinary justice (Pazmiño 2013: 72). As an informal coordination mechanism, for example, in some indigenous communities there is a kind of implicit agreement between the community and police to deliver to police certain types of offenders; in other communities, certain actors with prestige or social recognition as religious leaders or teachers can participate in conflict resolution (Pazmiño 2013: 71).

One of the main practical limitations is the tendency to assimilate indigenous justice with the justice of peace. This is the case when indigenous justice is practically limited in scope and competency, with the aim to reduce it to something equivalent to a justice of peace or restrict it
to resolving cases of "cattle theft" (Pazmiño 2013: 72). According to Pazmiño, "What in principle was conceived as a need for complementarity, may become a denial of the principle of legal pluralism and the equal hierarchy between different jurisdictions." (Pazmiño 2013: 74).

The indigenous parliamentarian and jurist Lourdes Tibán presented to the National Assembly in 2010 the "Draft of the Organic Law of Cooperation and Coordination Between Indigenous Jurisdiction and Ordinary Jurisdiction". Domestic opposition to the draft was significant with respect to the sanctions applied within indigenous justice and their relation to human rights. Indigenous representatives were concerned that Indigenous law was excessively limited by the state justice system (Sieder 2012).

In turn, the same art. 171 of the Constitution contains a rule of preference, which establishes that the exercise of indigenous jurisdiction cannot be contrary to the Constitution and to human rights recognized in international instruments. The COFJ adds as a specific limitation in its art. 343 that: "No particular or customary law can be claimed to justify or stop sanctioning the violation of women's rights." However, the text does not incorporate the violation of rights of children, what would have been desirable to mention together with women's rights.

Judges, prosecutors, defenders and other judicial officials, police officers and other public officials must observe the principle of intercultural interpretation. This implies that when people or indigenous communities appear in court, at the moment of their judicial action and decision, the rights at issue in the litigation will be interpreted interculturally, taking into account cultural elements related to customs, ancestral practices, norms, procedures particular to peoples, nationalities, communes and indigenous communities in question, in order to apply human and fundamental rights.

Although the subordination of Indigenous law to state justice has been questioned,
according to Garcia (2009), what is important is the possibility that opens for coordination and cooperation between indigenous and "ordinary" jurisdiction, thus enabling an intercultural interpretation of the law.

In the ruling in La Cocha II case, Nr. 113-14-SEP-CC, Constitutional Court case Nr. 0731-10-EP of July 30, 2014, a crucial decision is adopted. In this case, a member of the indigenous community La Cocha was murdered inside the indigenous parish of Zumbahua. The indigenous authorities of the community of La Cocha and Guantopolo, in exercise of jurisdictional powers, determined the criminal responsibility of five young members of the Guantopolo community for the murder. The accused voluntarily accepted the indigenous jurisdiction, which established penalties such as bathing with cold water and whipping with nettles, carrying earth and stones around the public square, expulsion from the community and economic fines.

However, state justice also sanctioned those responsible. The Constitutional Court ruled that the indigenous justice of the Kichwa Panzaleo people does not judge nor sanction the impairment to life, as a legally protected good, but resolves a conflict in the community to restore harmony to the community. Although it is established that sanctions do not violate human rights, only state criminal law is given the power to resolve cases that undermine the legally protected good of life, even if the suspects involved belong to indigenous peoples and nationalities or if the deeds were committed in the territory of a community. The competence of indigenous justice was limited to identifying and resolving internal conflicts that occur among its members within its territorial scope and that affect its community values.

It has been argued that there was strong pressure on the Ecuadorian Constitutional Court to set clear limits to indigenous jurisdiction in the face of high-profile cases in 2013 following
the massacre of the Tagaeri-Taromenane - indigenous people in voluntary isolation - and the abduction of two surviving girls at the hands of the Waorani indigenous people in the province of Orellana (Viaene & Fernández-Maldonado 2016: 90). With the ruling in La Cocha II, indigenous justice is limited by weakening its autonomy and undermining the right of communities to their own jurisdiction, inasmuch as it establishes a restriction not present in the Constitution or in the ILO Convention 169 with respect to Indigenous law.

**Coordination in Argentina**

Art. 75.17 of the Constitution of Argentina states that it is the responsibility of Congress to recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina, as well as to guarantee respect for their identity. This clause, in spite of attributing to Congress the power to recognize, is in itself an operational recognition, both as a declaration and an acknowledgement of a constitutional right for indigenous peoples.\(^2\)


The recognition of Indigenous law comes more strongly from the ILO Convention 169, but the dialogue of both provisions (Ramírez 2015: 258) opens the door to legal pluralism.

For its part, law 23,302 of 1985, declares the attention and support of aborigines and indigenous communities in the country to be an issue of national interest. The same goes for their

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\(^2\) Some have maintained the programmatic character of the provision, but Bidart Campos, Quiroga Lavié, Alterini, Corna and Vázquez, Gouvert and Rodriguez Duch, and Toricelli, support the thesis of full operability of the precept. Jurisprudence has also been expressed in favor of the operability of the provision. Note 10. Culasso & Ávila (2007).
defense and development, in order to achieve their full participation in the socio-economic and cultural processes of the nation, always respecting their own values and modalities. For its part, art. 18 of the new Civil and Commercial Code of the Nation establishes that recognized indigenous communities have the right to the possession and communal ownership of the lands they traditionally occupy, as well of those suitable and sufficient for human development as established by law, in accordance with the provisions of the Constitution.

The recognition of indigenous communities' particular methods of conflict resolution by Convention 169 does not establish a material limit to legal pluralism, since it affects not only civil matters but also criminal cases, always before state courts jurisdiction.

The Supreme Court of Justice of Rio Negro stated: "it is not necessary that there be any rule that expressly regulates or regiments art. 75 inc. 17 of the National Constitution, because in recognizing ethnic and cultural pre-existence, it has expressly guaranteed its legitimacy to act in any cause with its contribution in customary law ".

Various practices in criminal and civil jurisdiction have embraced Indigenous law, largely understood as a custom, rather than as an alternative system of law (Galati 2015: 249 ff.). Within this, there is a discussion whether it has a factual value - for example, as an excusing or exculpatory element of a criminal offense - or normative within the limits of the community. In criminal law, solutions are found, such as "possession of traditional lands and atypicality" (2007) in favor of Longo Víctor Intiman, or "putative justification" (1998) with the acquittal of the indigenous Raúl Puel in Neuquén in a ruling by the Superior Court of Justice, or the "prohibition error" in a case resolved by the federal justice of Misiones (Martínez, Expte 20/2006), with an indigenous Mbya who had entered the national territory clandestinely, with prohibited

3 Interlocutory decree Nr 216 in decrees "CO.DE.C.I. of the province of Río Negro s/protection decree, "November 3, 2004."
merchandise "(Moreira 2010: eleven).

As a rule of preference, there is Article 9.1 of the ILO Convention 169, which indicates that a recognition of indigenous conflict resolution systems is applicable to the extent of its compatibility with the national legal system and with internationally recognized human rights.

A relevant case, which has sparked many discussions on the relationship between customary law and human rights, was resolved by the Salta Court of Justice in 2006. That court adopted a resolution declaring the nullity of the prosecution of a man accused of sexually abusing the daughter of his concubine, 9 years old, both belonging to the Wichi people. The accused claimed a justification for such an act, derived from an ancestral custom of the community – “privignatico marriage” –, according to which a Wichi man who lives with a woman of the same ethnicity can also have relations with her daughter, as long as it is not his own daughter. The Court annulled the prosecution for lack of motivation, as no balanced assessment of the evidence, indicating the existence of ethno-cultural particularism according to the customs of the community and an indigenous people, had been carried out.

In 2007, the niyat Octorina Zamora and the Coordinator of the Wichí Community, Honat Le Les, requested the intervention of the National Institute Against Discrimination (INADI), before the decision of the court of Salta. The complainants argued that the argument put forward by the provincial court was an aberration for members of the Wichi community, since it did not express the morality of its people (Tarducci 2013: 9).

In the absence of recognition of an indigenous jurisdiction, there are no rules of framing or articulation.

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4 Court of Justice of Salta. Dossier CJS 28,526 / 06
Coordination in Chile

In Chile there is no constitutional clause that recognizes the indigenous peoples of the country. The normative framework for these peoples is provided by the Indigenous law, Law 19,253 of 1993, and the ILO Convention 169, ratified in 2008.

In recognition of Indigenous law, art. 54 of Law 19,253, establishes that the custom enforced in judgment among indigenous people belonging to the same ethnic group, shall constitute law, provided it is not incompatible with the Constitution. In particular, in criminal cases, custom is considered as antecedent for the application of exoneration or attenuation of responsibility.

Articles 8, 9 and 10 of ILO Convention 169 permit a broader interpretation of Law 19,253. Nevertheless, the Constitutional Court, when ruling on the constitutionality of Convention 169,\(^5\) indicated that the methods of conflict resolution of indigenous peoples in cases of crimes committed by their members were not compatible with the Chilean procedural system, as the Constitution attributes the settlement of disputes to ordinary courts. However, such incompatibility is not perpetual, since the Constitution or the law could create indigenous jurisdictions without contradicting state sovereignty.

The recognition of indigenous rights in Chile is extremely restrictive, having as a rule of preference a clear subordination to state law, within which Indigenous law is observed as a legal custom of limited scope within state courts.

Relevant cases where indigenous customary law has been recognized in Chile have referred to the right to water, where indigenous ancestral property derived from customary practices has been recognized, especially in the cases of the Atacameña Community of Toconce.

and the Chusmiza-Usmagama Community of 2008 (Bertini & Yañez 2013).

One of the areas where there has been more discussion about the collision of rights established in the ILO Convention 169 and other fundamental rights in Chile, has been the acceptance of reparation agreements in cases of domestic violence, invoking arts. 8 and 9 of the Convention.6

The sentence of the Court of Appeals of Temuco, on June 4, 2012, confirmed the sentence of the court of Collipulli stating that:

"In this sense, it is a public and notorious fact in this region that people of the Mapuche ethnic group have historically resolved their conflicts, including some of greater gravity than those that motivate this lawsuit, through negotiation, as it is typical of their culture to resolve conflicts in this way, which is why Convention 169 is fully applicable ... ":

In these rulings, the lack of specific confirmation of indigenous custom is questionable, since it would be necessary to confirm the facts that are considered as notorious and public. In these cases, it was not confirmed that the reparation agreement is identical to the conflict resolution mechanism of the Mapuche people, since the dynamics between the parties of the state judicial process and its officers, namely, defender, prosecutor and judge, are very different from those that Mapuche law, Az Mapu, demands in cases of violence within the community and the family. An alternative Mapuche mechanism for the resolution of these conflicts would require real and direct intervention by the community and its authorities in the solution of the case (Palma & Sandrini 2014).

In the absence of recognition of an indigenous jurisdiction, there are no rules of framing or articulation in Chile.

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6 To review some of the cases referred to, see Public Defender's Office (2013).
Conclusions

The most developed forms of recognition of Indigenous law and justice, in the cases of Bolivia and Ecuador, require complex forms of coordination. These forms of coordination, although they have reached important levels of formalization with the objectives of guaranteeing indigenous rights within the context of human rights, depend on the operation of legal-political cultures, where forms of subordination and inequality persist with respect to indigenous peoples.

Political systems with weaker recognitions, as in the case of Argentina and Chile, present forms of coordination more marked by the subordination of Indigenous Law to the state through the ordinary courts of justice. However, the application of the ILO Convention 169 has allowed for the development of intercultural jurisprudence that validates, within certain, more or less narrow, limits, Indigenous law.

The cases of Bolivia and Ecuador - to which Colombia and Peru can be added - represent in Latin America a model of revitalized indigenous law due to the recognition of a legal pluralism with its own Indigenous jurisdiction. The scope of the reconstruction of the legal institutions of indigenous peoples depends on, and at the same time requires, two parallel political processes: the development of internal self-determination of indigenous peoples and intercultural dialogue between indigenous and state institutions.

In other cases, where national projects give little or no place in the constitutional order to indigenous peoples as collective political subjects - as in the case of Argentina and Chile - Indigenous law is present as a residue difficult to understand for state legal systems in the form of indigenous custom.

Whether there is an Indigenous jurisdiction or whether Indigenous law is administered by the state, legal pluralism poses major challenges to the foundations of the liberal constitutional
state. These challenges have to do with the protection of the rights of women, children and other individuals, against traditional cultural practices or from problems caused by disintegration of indigenous institutions.

Indigenous law and the way in which the state recognizes and protects it, is an essential factor in the survival of indigenous forms of life and, consequently, in the construction of more equitable relationships vis-à-vis historically constructed contexts that represent a legacy of colonization, assimilation and destruction of indigenous peoples and their cultures.

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