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Archaeological Heritage Legislation and Indigenous Rights in Latin America: Trends and Challenges

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Abstract: The recognition of the rights of indigenous peoples has been on the political agenda in Latin America since the 1980s, although it has not always been reflected in the legal systems of the countries in the region. Most of them have passed laws that grant legal recognition to indigenous communities and have recognized their rights in the national constitutions. However, these rules do not always refer to some particular aspects of the indigenous culture, such as those related to their cultural heritage. In general, the archaeological remains are ruled by specific laws that do not consider, or vaguely mention, the indigenous peoples' rights and their participation in the decision-making process. As a result of the lack of consistency between the indigenous and cultural heritage laws in most countries, the participation of indigenous peoples in heritage management is still exceptional.

INTRODUCTION

The acknowledgment of the rights of indigenous peoples is absolutely fundamental in multicultural nations, such as those of Latin America, where different ethnic groups should be equally respected. The current indigenous peoples represent

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approximately 10% of the total population of the continent and include more than 400 ethnic groups.

From the second half of the 19th century onward, indigenous communities were no longer considered "Indian peoples" but citizens of the new nations.[1] In practice, these policies deprived the indigenous groups of their ethnic identity and their ancestral property rights to common land and, far from improving their living conditions, led to social exclusion. It is thus not surprising that some indigenous descendants tried to deny their condition, although some groups decided to fight for a fair treatment, and their claims, in some cases, ended up in violent episodes.

The dispossession of their cultural heritage was carried out by both the nation-states and the scientists. Since the beginning of the 20th century, several Latin American countries have passed archaeological heritage laws in order to establish the public domain of the nation-states over archaeological sites, while ethnographic and natural history museums were created to keep and display human remains and material culture of indigenous peoples.[2]

Archaeological remains have become gradually protected by National Monuments laws (e.g., Mexican Law of 1897, Argentinean Law 9080 of 1913, Peruvian Law 6634 of 1929, Colombian Law 103 of 1931). A number of institutes were also established in order to research and manage archaeological sites and collections (National Institute of Anthropology and History of Mexico, 1939; National Institute of Ethnology of Colombia, 1941; the National Institute of Tradition of Argentina, 1943; National Institute of Culture of Peru, 1971, etc.).

The return of democracy to the Latin American region in the 1980s caused a turning point in this process, since it created a new political atmosphere in which indigenous social and political movements started to strengthen in most countries.

In this article, the process of recognition of indigenous peoples' rights in Latin America is described, focusing on the legal framework. The relationship between archaeology, archaeological heritage, and the indigenous peoples' rights is also analyzed to further discuss its trends and challenges.

INTERNATIONAL FRAMEWORK

In international law, the issue of minority ethnic groups has been addressed from the point of view of human rights.

The process of recognition of the rights of indigenous peoples acquired momentum from the second half of the 20th century with the adoption of the Indigenous and Tribal Populations Convention, 1957 (No. 107) in the framework of the International Labour Organization (ILO).

At present, there are two main international legal instruments concerning indigenous peoples: the ILO Convention No. 169 concerning indigenous and tribal peoples in independent countries and the UN Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly in 2007.

Convention No. 169 and its predecessor, Convention No. 107, are the only ones specifically dealing with indigenous peoples' rights. Convention No. 169 is fundamentally concerned with nondiscrimination. It also covers indigenous peoples' rights to development, customary laws, lands, territories and resources, employment, education, and health.

The significant effect that the ILO Convention has had on the region is widely recognized. This is because it is legally binding and includes a whole range of rights, such as "to participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly" (Article 6). It also states that the values of indigenous peoples must be respected, including their social, cultural, religious, and spiritual needs (Article 5). At present, this convention has been ratified by most Latin American countries with the exception of Belize, Panama, Uruguay, Guyana, French Guiana, El Salvador, and Suriname.

The UN Declaration on the Rights of Indigenous Peoples, despite not being a formally binding treaty, is the most comprehensive instrument concerning the rights of indigenous peoples in international law.[3] It recognizes both individual and collective rights. Regarding indigenous cultural heritage, the Declaration recognizes the right of the peoples to control their archaeological sites, the right to the restitution of cultural, intellectual, religious, and spiritual heritage (Article 11), the right to the repatriation of their human remains and ceremonial objects (Article 12), and the right to protect intellectual property in their cultural heritage, traditional knowledge, and traditional cultural expressions (Article 31).

As it can be observed, the Declaration provides more protection to the rights of indigenous peoples than any other international instrument although it is not inconsistent with the spirit of international law. As it was stated by James Anaya,[4] "The United Nations Declaration reflects the existing international consensus regarding the individual and collective rights of indigenous peoples in a way that is coherent with, and expands upon, the provisions of ILO Convention No. 169, as well as with other developments, including the interpretations of other human rights instruments by international bodies and mechanisms."

It is also worth noting that at the time of its adoption, all the Latin American countries voted in its favor with the exception of Colombia. Bolivia also transformed this declaration into national law in November 2007.

The American Convention on Human Rights known as the Pact of San Jose, Costa Rica (1969) is another legal instrument used to protect indigenous peoples' rights in the region.[5] The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (ICHR) are in charge of its compliance, both organs belonging to the Organization of American States (OAS).

The ICHR has decided on several petitions about alleged violations of the human rights of indigenous peoples under the American Declaration on Human Rights and the American Convention on Human Rights, and it is applied to those states that have accepted the court's jurisdiction by ratifying the American Convention.

At present, 25 nation-states have ratified the Convention, mainly those from Central and South America.

The ICHR has played an important role in the application of this and other international instruments and has decided on a number of significant cases concerning the rights of indigenous peoples, especially to their traditional lands.[6] Its jurisprudence has influenced national courts of law and has served to justify the application of the UN Declaration in domestic cases. For example, the Argentinean Supreme Court of Law, following the criteria of ICHR, has stated:

> The culture of members of indigenous communities corresponds to a particular way of life of being, seeing and acting in the world, formed from its close relationship with their traditional lands and resources not only as their main means of subsistence, but also because they are part of their worldview, religiousness, and hence of their cultural identity. … The guarantee of the right to communal property of indigenous peoples must take into account that the land is closely related to their oral traditions and expressions, customs and languages, arts and rituals, knowledge and practices concerning nature, culinary arts, customary law, dress, philosophy and values. Depending on their environment, integration with nature and their history, members of indigenous communities transmit from generation to generation this intangible cultural heritage which is constantly recreated by the members of communities and indigenous groups.[7]

THE ISSUE OF DEFINING INDIGENOUS PEOPLES

There is not any authoritative definition of indigenous peoples under international law. However, Martínez Cobo[8] has proposed one which has been widely used. According to him,

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider 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.

Accordingly, the prevailing doctrine has identified some general criteria, including self-identification; historical continuity; distinctiveness; nondominance; and a determination to preserve, develop, and transmit their ancestral territories and identity. Some additional criteria were suggested at the United Nations Permanent Forum on Indigenous Peoples, such as a strong link to territories and surrounding natural resources; distinct social, economic, or political systems; and distinct language, culture, and beliefs.[9]

The ambiguity surrounding the definition of the term *indigenous* is also a problem in Latin America. In practice, a number of terms are being used as synonyms, such as aboriginal, native, original, and First Nations in legislation and official documents. Each of these terms has its own connotations and they are often inaccurate from the anthropological or historical point of view. This terminological confusion in addition to the lack of a formal legal definition generates problems in the interpretation of legal statements. The same difficulty arises with the terms *indigenous peoples* and *indigenous communities*, which are often used interchangeably in legal instruments.

Another key issue concerns the criteria for membership in an indigenous group, nation, or community. Ambiguities in the legal situation of indigenous peoples and communities are of particular concern to indigenous peoples in several Latin American countries. Economic and political difficulties as well as complicated procedures for acquiring legal personality often hinder formal constitution of many indigenous communities, which is essential if peoples are to be able to defend their rights in court or before the public administration.[10] For example, the National Institute of Indigenous Affairs (INAI) of Argentina only recognizes 15% of the indigenous communities. The legal personality granted at the provincial level is even worse, since most of them do not provide any specific legal status for indigenous communities.

DOMESTIC LEGAL SYSTEMS

In the last three decades, indigenous people's claims have gradually increased their impact on the political agenda of the countries in the region. Indigenous rights have become a matter of special consideration in many legal reforms carried out by new democratic governments. As a result, over the past decade, the rights of indigenous peoples are increasingly being formally incorporated into domestic legal systems.

However, this process was not uniform across the region. According to a study carried out by Cletus Barié,[11] Latin American constitutions can be divided into three groups. The first group, consisting of the constitutions of Belize, Chile, French Guiana, Suriname, and Uruguay, has not made any reference to native peoples, either because their legal traditions are essentially Anglo or because they have not been reformed in recent years. Besides, the indigenous population of these countries is characterized by their scarce visibility and their relatively recent formation as interest groups. In the case of Chile, it is worth mentioning that the ILO Convention No. 169 has been recently ratified, and there have been some attempts to reform the constitution that includes the indigenous peoples' rights. Nevertheless, the indigenous issue, especially the case of the Mapuche people, has become a major political challenge in this country that demands a new set of legal and administrative strategies.

The second group of constitutions, consisting of those of Costa Rica, El Salvador, Guyana, and Honduras, provides some specific protection to its ethnic minorities

although their legal framework is still incomplete or poorly articulated. The third group, formed by the constitutions of Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela made a wide recognition of indigenous rights. These countries have been declared as multiethnic and multicultural nations, explicitly recognizing the preexistence of indigenous peoples and giving them a new set of rights, including those related to their cultural identity.

The new constitution of Bolivia of 2009 has also recognized the right to autonomy and self-government for indigenous people, along with recognition of their territories and institutions.

These legal reforms cover important issues such as land and territorial rights, customary law, language, educational and cultural rights, as well as preexistence to the nation-state, autonomy, and self-government in some cases. Most of these constitutions direct government to design policies to guarantee the protection of indigenous communities, especially when development plans could affect them. However, despite these significant legal changes, violations to the human rights of indigenous peoples are frequently reported.[12]

CONTESTED ISSUES CONCERNING ARCHAEOLOGICAL HERITAGE

Most countries in the region have passed indigenous laws that grant legal recognition to indigenous communities. However, these rules do not deal with indigenous cultural heritage, which continues to be ruled by specific archaeological heritage laws that do not include the indigenous peoples' rights to participate in their management. In fact, most of heritage laws do not even mention indigenous peoples as potential groups of interest, assuming that archaeological remains do not have any link with current indigenous population.

At present, the efforts of indigenous peoples are mainly concentrated on land claims and on improving their living conditions. However, they have recently increased their demands on heritage issues, mainly in two topics: the control of the historical narrative exerted by archaeologists and, in some countries, the restitution of their ancestors' human remains.[13]

Alternative narratives about indigenous peoples are being written to replace the official history, and in some cases, such as in Ecuador or Bolivia, it is carried out as part of new indigenist policies promoted in those countries.[14]

Claims for the restitution of human remains held by museums have been particularly significant in Argentina and Uruguay. Their impact was mainly caused by the fact that the human remains involved in the first cases of repatriation belonged to indigenous chiefs with famous historical careers. The first two restitutions carried out in Argentina—the Tehuelche Chief Inakayal in 1994 and the Rankulche Chief Mariano Rosas in 2001—were ordered by special laws, since their remains were legally considered public domain of the nation-state. Afterward, Argentina

passed a general law that recognizes the right of communities to claim the repatriation of human remains held in museums.[15]

After a strong campaign carried out by indigenous descendants, Uruguay obtained the repatriation of the Charrúa Chief Vaimaca Pirú from the Musée de l'Homme of Paris, France. His remains were buried with honors in the National Pantheon in 2002.[16] There are also examples of restitutions of human remains that had been claimed by the *Tohono O'odham* people in México (1992).[17] In Chile, demands concerning indigenous human remains have also been raised by Atacameño,[18] Mapuche,[19] and Easter Island peoples.[20] The case of the Atacameño people is the most significant for being the first group who began claims with the Chilean authorities on a number of issues related to archaeological cultural heritage. They not only expressed their opposition to the excavation of archaeological cemeteries and the exhibition of human bodies, but also demanded archaeologists request permission prior to investigation and to provide information concerning the results. They have also claimed for their right to participate in the management of archaeological sites and the local museum.[21]

It is worth mentioning that in November 2013, the Ethnography Museum of Geneva returned to Chile four mummies (two of them belonging to the Chinchorro culture, one corresponding to the late pre-Hispanic period and another of a child from the time of Spanish contact). All of them came from the north of Chile and are currently in custody of the Museum of the University of Tarapacá. This is a case of a voluntary return of cultural property made by a private collector, who lives in Switzerland.

Indigenous people from Argentina have been the most active in claiming the restitution of human remains. While successful cases have increased in this country, some human remains have been voluntarily restituted from national museums to indigenous communities of other countries. Notably, the Ethnographic Museum of the University of Buenos Aires returned a preserved Maori tattooed head to Te Papa Museum (until its ethnic connections were established) in 2004,[22] and the La Plata Museum handed in the remains of two individuals to the Aché community of Paraguay in 2010.[23]

CONCLUDING REMARKS: TRENDS AND PERSPECTIVES

The new constitutionalism in Latin America and the recognition made by several nation-states as multiethnic and multicultural societies have considerably changed the legal status of the indigenous peoples. Their emergency as political subjects, who enjoy a new set of individual and collective rights, has completely changed the outlook of their ethnic claims. However, the broad acknowledgment of indigenous peoples' rights made by these pluralist constitutional reforms has been hampered by a number of reasons.

Many difficulties have arisen with the development of legislation and institutional implementation of these reforms. In fact, in most Latin American countries

there is still a gap between international principles regarding the human rights of indigenous people and domestic legislation. The lack of effectiveness of indigenous policies is therefore a critical issue. On the one hand, there is a delay in the adoption of statutory and secondary laws, and on the other, some of the new laws enacted are merely declarative, failing to provide mechanisms for their implementation. Another problem is the lack of consistency between indigenous legislation and various specific laws such as those on mining, agricultural promotion, water, fishing, forests, and so forth, whose application may affect the rights of indigenous communities.

Furthermore, the institutional structures of the public administration, characterized by bureaucratic proceedings, rigid regulatory practices, and lack of flexibility have also hampered the enforcement of indigenous rights.[24] Some corrupt practices as well as prejudicial treatments should neither be ruled out.

Last but not least is the role that the supreme national courts have had in the interpretation and application of domestic legislation and international human rights standards in cases concerning the human rights of indigenous peoples. Significant progress has been achieved in some countries, but in others, their rights have been poorly recognized in courts, underlying sometimes discriminatory attitudes.

It is worth noting that some indigenous peoples, especially those living in rural areas, are not adequately informed of their rights or do not have the means to claim for them. This is partly because of the lack of compulsory consultation mechanisms or because they are not transparent or sufficiently participatory. In fact, in many cases, the governments decide to undertake development projects or exploit natural resources ignoring the rights of the indigenous peoples and not taking into account the claims of the indigenous communities directly or indirectly affected.

The so-called implementation gap defined as the vacuum between existing legislation and administrative, legal, and political practice is evident in most countries and constitutes a serious problem that defies both international law and constitutional rights and guarantees. As it was clearly stated by Rodolfo Stavenhagen, "This divide between form and substance constitutes a violation of the human rights of indigenous people. To close the gap and narrow the divide is a challenge that must be addressed through a programme of action for the human rights of indigenous people in the future."[25]

One particular problem concerning cultural heritage is the lack of protection of traditional knowledge, since national legislation on intellectual property only considers individual rights. Some countries in the region are discussing draft legislation and new policies. In this regard, it is worth mentioning the Peruvian law enacted in 2002, which establishes a protection regime for the collective knowledge of indigenous peoples related to biological resources.

There are many cases in which legislation on indigenous issues is inconsistent with cultural heritage laws. In this context, the inadequacy of the consultation

and participation mechanisms available for indigenous communities is a critical issue.

The consultation and consent work as safeguards for all those rights of indigenous peoples that may be affected by external actors. It is necessary in order to protect the rights to property, lands, natural resources, and culture, including sacred places and objects. In this sense, the obligation of archaeologists to ensure that communities involved in their research have freely granted consent is currently included in the professional statements of ethics, and in some cases, it is also required by law, although it is not always easy to achieve in practice.

In Argentina, for example, several meetings have been held among museum representatives and archaeological associations to discuss the difficulties in the implementation of informed consent. Federal law requires prior consent from indigenous communities to any scientific research concerning their cultural heritage. In practice, several difficulties have arisen because of the lack of a consultation procedure and the problem of identifying the legally valid counterparty to which the consent should be requested. Researchers have drawn attention to the need to participate in discussions held by the national authority and indigenous representatives, as well as to develop guidelines for a professional protocol of informed consent, considering the characteristics of the cultural heritage and the research being done on them.

This case illustrates the need to create a climate of confidence with indigenous peoples that allows for a productive intercultural dialogue. This is particularly important in relation to indigenous peoples given their historic exclusion from decision-making processes and subsequent lack of trust in State institutions and researchers.

The dialogue built up among the Atacameño people, archaeologists, and authorities in Chile[26] constitutes a positive experience and an example of good practice that could be taken as a reference for other countries in the region.

To conclude, the emergence and rise of indigenous peoples as new political actors, favored by an international context, has allowed them to change their relationship with national governments and gain recognition in the legal arena. However, the divorce between political discourse and practice, and the lack of consistency between the indigenous and cultural heritage laws have hindered the participation of indigenous peoples in heritage management.

After intense debates, changes in professional ethics rules have begun to mobilize the academic community toward a more open dialogue and willingness to adapt their methods in order to respect the rights of indigenous peoples. At present, contested issues, such as historic continuity proved through cultural affiliation, repatriation, and informed consent are at the top of the agenda. In this context, the update of most cultural heritage laws and policies, the building of an intercultural dialogue to respect indigenous rights and the development of a truly collaborative archaeology are the major challenges.

ENDNOTES

1. See Halperín Donghi, *Historia contemporánea de América Latina and* Oslak, *Formación Histórica del Estado en América Latina: Elementos teórico-metodológicos para su estudio*.

2. For a discussion of this issue, see Patterson, "Archaeology, History, Indigenismo and the State in Peru and México"; Politis, The Socio-Politics of the Development of Archaeology in Hispanic South America; Politis and Pérez Gollán, "Latin American Archaeology"; Endere et al., "Arqueología y Comunidades Indígenas. Un Estudio Comparativo de la Legislación de Argentina y Brasil"; and Nastri and Menezes Ferreira, *Historias de la Arqueología Sudamericana*.

3. See Clavero, "Supremacismo Cultural, Constituciones de Estados y Declaración sobre los Derechos de los Pueblos Indígenas"; and Montes and Torres Cisneros, "La Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas."

4. See Anaya, "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People," 16.

5. See Harvey, "Instrumentos normativos internacionales y políticas culturales nacionales."

6. For example, I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Series C No. 79; I/A Court H.R., *Case Comunidad Indígena Yakye Axa v. Paraguay*, Judgment of 17 June 2005, Series C No. 125.

7. See CSJN, *Case Comunidad Indígena Eben Eizer v. Provincia de Salta, Fallos* 331: 2119, 2008.

8. Martínez Cobo, *Estudio del problema de la discriminación contra las poblaciones indígenas*.

9. See Stavenhagen, *Los Pueblos Indígenas y sus derechos,* 40; also Stavenhagen, *Derechos indígenas y derechos culturalesde los Pueblos Indígenas*.

10. See Stavenhagen, *Los Pueblos Indígenas y sus derechos,* 125.

11. See Barié, *Pueblos Indígenas y derechos constitucionales en América Latina*.

12. See Anaya, "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People"; and Stavenhagen, *Derechos indígenas y derechos culturales de los Pueblos Indígenas* and *Los Pueblos Indígenas y sus derechos.*

13. See Gnecco and Ayala, *Arqueología y Pueblos Indígenas en América Latina*, 12.

14. See Benavides, "Los ritos de la autenticidad; indígenas, pasado y el estado ecuatoriano."

15. See Endere, "The Reburial Issue in Argentina" and "The Return of Inakayal to Patagonia"; also Endere and Ayala Rocabado, "Normativa legal, recaudos éticos y práctica arqueológica."

16. See Martínez Barbosa, "One Hundred and Sixty Years of Exile"; also Verdesio, "El drama de la restitución de restos humanos y sus actores en Uruguay y Argentina."

17. See Vásquez León, *El Leviatán Arqueológico. Antropología de una Tradición Científica en México*, 98–99.

18. See Ayala Rocabado, *Políticas del pasado. Indígenas, arqueólogos y estado en Atacama*.

19. See Paillalef Carinao, "El mensaje de los Kuviche en el Llew-Llew."

20. See Selenfreund, "La Investigación Antropológica y Arqueológica en Rapa Nui y su Relación con la Comunidad."

21. See Ayala Rocabado, *Políticas del pasado. Indígenas, arqueólogos y estado en Atacama*; also Sepúlveda and Ayala Rocabado, "La exhibición de cuerpos humanos en los museos."

22. See Pérez Gollán and Pegoraro, "La repatriación de un *toi moko*."

23. See Arenas, "Ahora Damiana es Krygi."

24. See Anaya "Report of the Special Rapporteur. Study on Extractive Industries and Indigenous Peoples"; also Stavenhagen, *Los Pueblos Indígenas y sus derechos.*

25. See Stavenhagen, *Los Pueblos Indígenas y sus derechos,* 130–31.

26. Ayala Rocabado, *Políticas del pasado. Indígenas, arqueólogos y estado en Atacama*.

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