

THE RIGHT TO SELF-REGULATION LEGAL PLURALISM AND HUMAN RIGHTS IN PERU

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Introduction: Law, State and Society in Contemporary Peru

Peruvian society has been marked by centuries of authoritarian exercise of power, lack of social articulation, deep inequalities in the distribution of income and wealth, and ethnic and cultural fragmentation (DESCO 1986: 15). The legal system, despite having formally guaranteed human rights ever since the first Constitution of 1823, has tolerated these features. In many cases it has assisted in maintaining them, either by denying the existence of problems, or by acting as an instrument of powerful groups. The situation has deteriorated in the last 15 years, during which the economic crisis has made more evident the corruption of the judiciary. Politically the legal system has appeared impotent in the face of attacks by terrorist groups and violations of human rights by the security forces.

Most Peruvians consider the formal legal system an external imposition, and a troublesome, useless restriction on their personal lives. It has been shown elsewhere how, from completely different perspectives, liberal thinkers such as De Soto and socialists such as Matos Mar have arrived at the same conclusions (Ardito and Honores 1994: 3, referring to De Soto 1987; Matos Mar 1985). An important factor in this sense of alienation is the fact that most codes and laws have not been expressions of the *volonté générale*, but have been imported from European countries by the Limean élites without reference to the customs or values of Peruvians or to sociocultural differences between Peru and Europe. In consequence people have not internalised the notion that state norms might be positive, necessary or convenient. Norms are considered essentially coercive. There is no spontaneous compliance that could allow a form of self-administration to develop. (Cf. Galanter 1985: 545, arguing that it is only in the most repressive of dictatorships that law is obeyed as a result of the fear of sanctions.)

However, at the same time Peruvian society shows a significant degree of

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organisation in small social units. Instances are native and peasant communities, squatters' organisations, migrants' associations, unions, producers' groups, religious organisations, and professional associations. Sections of the population try to satisfy in these organisations the fundamental needs for survival, security and justice through mechanisms for making claims on the state, or satisfying them outside it. In some of these groups there are clear forms of self-regulation, with the emergence of rules of behaviour that evidence an internal core of values, and mechanisms of sanction and enforcement. Their exercise of coercive power shows the prevalence of legal pluralism in Peru.

Today there is an increasing realisation that the ineffectiveness of the judiciary is dangerous for the credibility of the state and the viability of the society. In the discussion of possible reformative measures a wide interest is displayed in these forms of self-regulation. The most recent development of note has been the enactment of article 149 of the 1993 Constitution, which provides:

The authorities of the Peasant and Native Communities, with the support of the *Rondas Campesinas*, may exercise jurisdictional functions within their territory, according to customary law, as far as they do not violate the fundamental human rights. The coordination of that special jurisdiction with the Justices of the Peace and other levels of the Judicial Power will be established by law. (Republic of Peru 1993)¹

The law referred to is currently under discussion.

In this paper I present a number of different instances of self-regulation in Peruvian society. Because of the limitations of the scope of previous research and of my own fieldwork, I focus on situations in which there is a clear and regular structure for the administration of justice, rather than on more informal or spontaneous social control mechanisms.

I concentrate furthermore on those legal mechanisms operated by underprivileged sectors. This is not to deny that the lack of legitimacy of the Peruvian state has driven the upper classes also to develop their own legal mechanisms. Thus business disputes are usually settled through methods of arbitration. The legal system of the state has been openly criticised by power groups which consider its exaggerated formalism to be anachronistic (De Soto 1987). Such groups are also affected by social prejudices: currently judges belong to lower and less educated sectors, and the upper sectors are unwilling to submit their cases to them. However, the upper sectors use special

¹ This and all other quotations have been translated by the author.

mechanisms only as an extra option for solving concrete problems. For the poorer sectors those mechanisms are fundamental to survival and the achievement of basic needs. Moreover, more significant problems for human rights arise in the legal mechanisms developed by these sectors. Individual consciousness is not so developed, and people are more likely to consider themselves no more than members of the larger unit. People tend to sacrifice such rights as freedom of expression or movement for the common benefit. Finally, the non-state legal mechanisms also show the fragility of the lives and rights of the poor: regrettably we find here cases of loss of property, exploitation, and in some cases physical punishment, even including death.

I consider in this paper whether self-regulation can be considered a right, and whether the existence of a single legal system may be taken to be an external imposition on the different sectors of the population. I seek to determine how individual human rights can be protected without an effective central mechanism of protection. I conclude that legal pluralism cannot be considered a conclusive solution to the problem of human rights, but rather an indicator of the complexity of the problem of their enforcement in a plurilegal society. The paper ends with a discussion of the different possibilities of such enforcement.

Some Expressions of Self-Regulation in Peru

The mechanisms I present come from realities which are geographically and culturally distant from each other. Self-regulation appears inside such various communities as highland villages, rainforest native communities and shanty towns, (Comisión Nacional de Derechos Humanos 1994: 12; Tamayo 1992: 70), which terms themselves express very heterogeneous phenomena.² Nonetheless, it is possible to underline certain common elements.

The variety of these mechanisms makes it difficult to find a common descriptive term. 'Customary law', the term used in the Peruvian Constitution and many international documents, usually refers to the persistence of certain norms for a relatively long period of time.³ However, many of these systems have emerged recently, and are in the process of creating new norms. They can hardly be

² For example, the 200,000 natives of the rain-forest are divided into 67 ethnic groups with different traditions and different acculturation processes and relationships to the dominant society.

³ This approach appears in the legal section of Comisión Nacional de Derechos Humanos 1994: 9.

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considered to be traditional. Use of the term 'indigenous law' would entail the exclusion of many organisations whose members are not indigenes. Use of the term 'unwritten' and 'informal legal systems' would also be inexact because most groups are now literate, and many record their rules and decisions in special books. Therefore I refer to 'non-state' legal mechanisms.

The Andean region

(a) The colonial and republican periods

The spinal column of Andean society consists of the 5,000 peasant communities. These, however, are not an aboriginal institution but a product of Spanish rule (Tamayo 1992: 84). The Viceroy Toledo in 1572 decreed that *Indios* (Indians) should be gathered into *reducciones* or *pueblos de indios* (reservations). His objects were to secure economic and political control over them and to evangelise them. In implementing the ordinance the Viceroy's officers did not generally respect the ancient *ayllus* (extended families), but they followed prehispanic criteria in ordering people to work their land in common and prohibiting them from selling it.

The colonial regime was based on the concept of two coexisting Republics, those of the Spaniards and of the Indians. Both were subjects of the King of Spain, but each had its own authorities and institutions. Because of their disadvantaged situation Indians in theory received special protection and legal privileges. Most of the institutions charged with protecting *indios* (*encomiendas*, *corregidores*, *repartimientos*, *doctrineros*) were responsible for their exploitation. However, it should be emphasised that the Spanish Crown had a special concern with justice and *buen gobierno* (good government). Therefore, in any *Audiencia* (Political and Judicial Council) there was a designated *Protector de Indios* (Indian Protector), who advanced claims on their behalf, and they enjoyed other privileges such as freedom from liability for legal fees. *Mestizos* and whites were excluded from entering Indian villages. Many of their cases were judged not by Spanish judges but by their own authorities, such as the ancient *curacas* (Indian chiefs) or the new *varayocs*, Indian mayors who were elected by the people.⁴

However, in the view of the liberal *criollo* élites that promoted Independence, this special regime was a residue of the feudal past. From the institution of the 'Cádiz Constitution' in 1812 the liberal position was that all distinctions between Indians

⁴ The *curacazgos* were dissolved after the Túpac Amaru rebellion in 1781.

and Spaniards should be abolished. In 1824, immediately after Independence Simón Bolívar dissolved the communities by authorising each *comunero* to sell at will the land in his possession. Taking advantage of this measure, many *hacendados* (ranchers), supported by lawyers and judges, occupied Indian communal lands on the legal pretext that Indians lacked titles of ownership of these lands.

The *criollos* at the same time acted on the assumption that the new state could achieve a degree of development comparable to that of Europe by importing European norms. The Civil and Criminal Codes and the Codes of Procedure enacted in this period are based on French, German and Swiss Codes. This development is similar to that in many new African and Asian states, which tried to achieve national unity through legal unity but imported norms from the former metropolis (Merry 1991). In my view the authoritarianism of the state in Latin America can be partially explained by the fact that the bureaucratic structures have been designed to compel people to obey norms which are alien to them.

As part of the same policy Peruvian elites also tried to promote the market economy, while showing little interest in modifying the underprivileged situation of Indians and other poor sectors (Piel 1982: 15). Trazegnies has remarked that modern law was introduced into Peru by an oligarchy in search of 'traditionalist modernisation' (Trazegnies 1987). Elements of feudal society coexisted with the imported modern law (Yrigoyen et al. 1993: 336). Formal changes were not accompanied by social changes and legal equality came without any attempt to achieve social equality. Indigenous legal practices were ignored on the ground that Indians could be expected to accept a 'civilised' lifestyle.

(b) The Comunidades Campesinas (Peasant Communities)

In the early years of the century there were a number of Indian revolts, and also growing criticism of the state by the *indigenista* intellectual movement. These factors led President Leguía to recognise in the 1920 Constitution the legal personality of indigenous communities (Republic of Peru 1920), and to establish a special protective system for their lands. The protective regime was completed by the 1933 Constitution which declared indigenous lands to be inalienable (Republic of Peru 1933; Winder 1978: 214). These developments did not relieve the poverty and oppression of the rural population. Peasants were, for example, still liable for forced labour on the *haciendas*.

The Criminal Code of 1924, art. 44 restricted the legal responsibility of Indians shown to have been corrupted by servitude or alcoholism (Republic of Peru 1924). Although today this provision may be considered ethnocentric, in 1924 it was a

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serious attempt to avoid penalising Indians who were already suffering from the status imposed upon them. For many years it was highly advanced by Latin American standards.

In 1968 the military government of General Velasco sought to carry out a series of structural transformations to Peruvian society. The old legal system of the state was denounced, and through a new use of law many reforms, including reform of the judiciary, were carried out with a view to giving law a different social character. However, the military government, considering that ethnic and cultural differences had caused many divisions in Peruvian society, reduced the degree of recognition given to these factors in the law. This proved a weakness in the law.

One year after the start of the Agrarian Reform and the reform of the judicial system, the government announced the abolition of the word *indio*, which was considered to have derogatory connotations. The government considered that the communal organisation of indigenous communities was one of the causes of their economic backwardness (Revilla and Price 1992: 142; Wray 1987: 247), and proposed to reform this. They were thenceforth to be called peasant communities. The *Estatuto de Comunidades Campesinas* (Peasant Communities Act) of 1970 shaped their organisation, giving them a resemblance to co-operatives, with General Assemblies, Vigilance Committees, and suchlike. The current Peasant Communities Act, No. 24656 of 1987, attempted a complete redefinition of the communities. Art. 4 of the law provided:

The peasant communities are organisations with public status, having legal existence and personality: they are formed by families who inhabit and control certain territories, bound by ancestral, social, cultural and economic links, expressed in communal ownership of the land, communal work, reciprocal help, democratic government and multisectoral activities. Their ends are the full realisation of the welfare of their members and the whole country. (Republic of Peru 1987)

Despite this state intervention peasants have found in the communities the means of continuing and ensuring the survival of their own cultural, political and legal practices. However, these appear to have been more fully conserved in those communities which have been relatively isolated, poor, and remote from the market system (Brandt 1987a).

A fundamental principle of peasant society is *ayni* (reciprocity). This implies the continuous exchange of goods and services between persons, groups, families and communities. Nobody can survive alone in a difficult environment. The quechua word used to mean 'poor', *huaccha*, means literally 'alone'. Peasants believe that

nobody can be really poor so long as they have friends or relatives (Gálvez 1987: 234). Everybody is willing to do favours in order to ensure for themselves the help they could need in the future, acting within a net of reciprocity similar to that reported by Malinowski (Tamayo 1992: 53). The same principle lay behind communal tasks (*wayka*, *minka* or *faena*): they also implied an individual interest (Tamayo 1992: 163; see also Gálvez 1987: 236-237; on similar practices in Mexico, see Comisión Nacional de Derechos Humanos 1994: 82). Those who do not fulfil their obligations within this system are considered to be only partially human. They are called *runa* (men) with tails (Revilla and Price 1992: 144, quoting Valderrama y Escalante), and are considered a threat to everybody.

Another fundamental principle is participation. Everyone participates in the General Assembly, which distributes the land, has the power to deprive a *comunero* of his land for misbehaviour, and to re-allocate the share of a *comunero* who dies (Revilla and Price 1992: 161, quoting Paerregard), and protects communal interests. All the *comuneros* carry out communal tasks and are expected to accept appointment to the different religious, political and transitional positions and contribute to charges. This general participation is theoretically also useful in avoiding the concentration of power. Political state authorities, such as *Agente Municipal*, *Alcalde*, *Teniente Gobernador* and Justice of the Peace, were sometimes expected to act according to communal decisions (Revilla and Price 1992: 139). However, there were conflicts of interest in some such cases, which were not resolved until Act 24656, which provided that the General Assembly would nominate the state agents (Revilla and Price 1992: 139).

The basic unit of the community is not the individual but the family (Gálvez 1987: 234). The statute confirms this by conferring the status of *comunero* on every head of family. But the law makes no distinctions between the members of a family, and consequently women and single people frequently participate (Revilla and Price 1992: 147). Those with the standing necessary to solve conflicts are spiritual relatives or godparents, especially those related to the parties through marriage. They give 'advice', but there is no appeal against their decisions, and they can even administer physical punishment (Gálvez 1987: 240). Only when a conflict has affected the social order of the entire community are the communal authorities and the General Assembly compelled to intervene (Revilla and Price 1992: 164; Gálvez 1987: 241). Each community has its own *Estatuto*, or its internal set of rules, with rights, obligations, wrongs, procedures and sanctions defined by its own customs.

(c) *The Rondas Campesinas*

In the highlands of Cajamarca (northern Peru) there are few peasant communities.

Most of the small farmers have remote Portuguese or Spanish ancestors. They have suffered from poverty and exclusion as much as other peasants, while lacking the traditional organisation which might have ameliorated their situation. In the 1970s they suffered severely from *abigeos* (cattle rustlers). The state authorities did not respond effectively: state officials were often in conspiracy with the *abigeos*, and when they did take legal action, it often foundered on legal technicalities. The solution found was to organise all males between the ages of 17 and 60 into *rondas*, or patrols. They detained thieves and, when they found that handing them over to the state authorities did not result in their punishment, tried and punished the thieves themselves.

As Yrigoyen has shown, vigilante organisations formed to protect individual security and property and public morals have been frequent phenomena in different social contexts (Yrigoyen 1993: 39).⁵ However, once the *ronderos* discovered their own efficacy in solving the problem of the *abigeos*, they passed from the search for security to a search for justice (Revilla and Price 1992: 192; this is the main thesis developed by Yrigoyen 1993). They had found that the official legal system frequently handled conflicts between peasants in ways which benefited neither party and merely increased antagonisms within the peasant community (Yrigoyen 1993: 44). The *Rondas*, unencumbered by existing statutes, history or tradition, developed a system of administration of justice according to the real needs of the peasants, which was sufficiently complex to handle a wide variety of disputes. According to the Provincial Federation of *Rondas Campesinas* of Cajamarca, they deal with cases of common robbery, recognition and support of abandoned children, separation of couples, boundaries, inheritance, illegal sales of land, debts, breaches of contract, witchcraft and others (Revilla and Price 1992: 192-193). They have even solved disputes between communities (Yrigoyen 1993: 46). Because of this volume and variety of business, they have developed their own objectives, functions, specialisms, organs and responsibilities (Brandt 1987a: 159).

The development has extended throughout rural Peru. The *rondas* have become organs of the community in districts where communities existed (Revilla and Price 1992: 140); they have become the means of social organisation in districts in which there were previously no communities. The General Assembly is the main organ, giving final decisions and creating specific norms considered necessary for the welfare of the community. The general consensus tends to result in

⁵ Stone (1979) refers to similar mechanisms among the miners of California during the gold rush. Vigilantes have frequently featured in the history of the USA, but they have only rarely represented groups who sought to transform their social situation.

compliance: the fiction of the social contract becomes real (Yrigoyen 1993: 44, 50). Secretaries and commissions can be appointed as needed. In some provinces there is even a Federation of *Rondas* that acts as a sort of appellate body (Brandt 1987a: 118).

The *rondas* have a rigid moral basis, which is related to the experience of many of their leaders in Catholic movements (Brandt 1987a: 116-119). This has given rise to a strong disciplinary aspect. Those who refuse to participate in the patrols (sometimes resident strangers, such as school teachers), and *ronderos* guilty of bad behaviour, are sanctioned. At the same time the *rondas* have reintroduced participation, reciprocity and democracy to the Peruvian countryside. Even right-wing intellectuals have considered them valuable examples of the building of democracy in rural areas (Expreso 1993: 31 May). As a result of this reputation the *rondas* were given legal recognition by the Peruvian Congress in Act 24571 in 1977.

However, the *rondas* have always had problems with local authorities, such as judges, police and lawyers, whose power was diminished by the rise of the *rondas*. There have been frequent accusations against them of usurpation of the functions of other lawful authorities, especially in cases where they have acted because these other authorities had been involved in illegal activities. Such accusations can have serious consequences, since, if their activity is characterised as unlawful, all their actions are transformed into offences, such as kidnapping, torture and forced labour. (See the dramatic cases of detainee *ronderos* in Starn 1993). Recently they have also been under pressure from the government, which has sought to dilute them into the armed patrols which assist the military in its fight against subversives. The government has given these patrols the name *rondas*, seeking to take the benefit of the legitimacy acquired by the popular *rondas*.

The widespread existence of *rondas* cannot guarantee that they all act in the communal interest. Some have acted as private gangs, others have been accused of protecting coca cultivation. In both cases the advice of the Catholic Church and other institutions has been helpful in revealing their true character. However, it must be recognised that this character comes not only from the peasant members, but also from those external agents and their educational work. Thus the Church not only educated public opinion on the character of the *rondas*, but has carried out extensive work in orientating the *ronderos*, organizing scores of workshops and promoting discussion of their role in the society.

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The Rain-Forest: Comunidades Nativas (Native Communities)

The aboriginal populations of the rain-forest earlier lived scattered in small nomadic bands. Authority was held only temporarily by individuals who were able to generate ethnic cohesion in situations where this was needed for the survival of the group (Brandt 1987a: 51-52). People followed certain moral norms with mythical origins (Brandt 1987a: 52-53; Urteaga 1993). However, those outside the group were not considered proper human beings - the denomination used by many groups for themselves means simply "the people" (Ardito 1993: 65). To attack and kill them was not condemned as wrong, but praised as proof of courage (Brandt 1987a: 53).

Within the group there was an acceptance of the killing of handicapped babies, on the ground that they would always be a burden for the group. Similar reasons supported the destruction of twins, females and new-born babies in a large family, and also old or very ill people (Ardito 1993, on the reports of Jesuit missionaries). In other cases the killing of a person was considered a break in the harmony of nature. The balance in human relations must be re-established by the death of the murderer or any member of his family, although the notion of revenge, with its condemnatory connotations, needs to be used with great caution here. The responsibility was seen as collective rather than individual. Group was consciously put above individuals, because individuals could not survive without the protection of the group. Deaths due to illness or accident were considered the supernatural action of an evil sorcerer, who had to be identified and killed. These practices could lead to series of killings. One striking instance of this is that a woman might use her own suicide as a weapon of last resort against her husband or another man. She knew that her relatives would try to avenge her death, killing the person who was responsible for her decision (Urteaga 1993: 49).

From the 1940s natives started to congregate around the schools of the Protestant and Catholic missions. The missionaries introduced a new element of hierarchy among them, based on the special status of school teachers and Protestant pastors. The missionaries fought against practices they considered inhuman (Brandt 1987a: 61; Ardito 1991). At that time the Criminal Code, art. 44, with a patronising and ethnocentric attitude, provided that the *salvajes* (savages) should not be sent to prison, but to penal colonies where they would undergo westernization.

In 1974 the Velasco Government by Act 20653 sought to promote the conditions of indigenous peoples in the rain-forest. However, the military were reluctant to recognise territorial rights to large land areas in undefended boundary zones in favour of people without a strong national consciousness. Instead they followed a policy of sedentarisation, usually based on mission schools, and gave legal recognition and title to land to the so-called native communities, following the structure

of peasant communities. New institutions were introduced, such as General Assemblies, periodic elections, and communal property. The natives had to accept this policy, as it offered their only means of obtaining protection from the invasions of companies and settlers.⁶ In principle only single villages are recognised, not ethnic groups. However, sets of communities belonging to the same ethnic groups have obtained legal recognition as federations.

Settlement created many new social problems. There were more possibilities of conflicts with neighbours, aggression, accusations of witchcraft, and adultery. Theft appeared because the growing contact with external society introduced economic differences (Brandt 1987a: 60). Natives could not obtain help from state authorities, who were geographically remote or showed little concern to assist. They started to decide disputes themselves, using article 19 of the Native Communities Act, which authorised native authorities to deal with minor torts and infractions within the community. However, they did not restrict themselves to these categories, which were based on a highly technical distinction, but settled all issues which affected communal harmony. Disputes ceased to be individual matters, because an authority had arisen which was above the units of society (Brandt 1987a: 96-97). Using the scheme of Pospisil (1967, 1971), it might be said that the institution of native communities meant the introduction of legal systems into the life of indigenes.

Many communities have abandoned traditional practices of retaliation so as to secure relative harmony in the village and avoid problems with the state authorities. The decisions of communal authorities have maintained the basic idea of restoring the balance through compensation, but they have substituted for violent counteraction legitimated claims to specific valuable goods. For example, a man who has sexual intercourse with a girl is required to give in compensation to her father a hunting dog or a gun (Brandt 1987a: 96). A common sanction taken from the state system is to put the culprit for some hours in a *calabozo* (cell) (Brandt 1987a: 92) - many communal leaders have done military service, where this is a frequent sanction. For more serious offences a person can be expelled. Some federations have even created a supracommunal court, which deals with all cases involving two communities or which are too serious to be settled within one community (Ballón 1989: 360-368).

⁶ In contradiction to this the government have followed in the steps of their predecessors in promoting the colonisation of the forest, which entails the invasion of indigenous lands. Paradoxically many groups of settlers have organised their villages according to the structure of native communities and asked to be recognised as peasant communities.

However, in some communities, especially the most remote, traditional practices such as violent self-redress, and the murder of children and of the very sick are still not uncommon (Ardito 1993). The intervention of missionaries and members of NGOs has reduced these practices, but they still continue underground to some extent.

*The Pueblos Jóvenes (Shanty Towns)*⁷

Since the early 1950s there has been increasing migration to Lima and other cities from the rural areas. Speculation in urban land is a serious problem in Peru, and, while attention has been given to agrarian reform, calls for urban land reform have been ignored. The acute shortage of available land has led to considerable squatting on unused land. The processes of invasion of land, initial defence against the police and subsequent negotiation with government have required collective action and a basic organisation. (For a study of the 'invasion contract', see De Soto 1987: 24.)

Government requires a minimum of land use planning before it is willing to recognise de facto possession of land. The squatters have to produce plans showing streets, common areas, parks, places of worship and suchlike. By the time this is done the organisation will already have distributed portions of land according to criteria such as the size of applicant families and good behaviour. They will also be receiving applications from newcomers for the allocation of abandoned *lotés* (plots of land) (Revilla and Price 1992: 202-203).

Furthermore, to deal with the primary needs of the new *asentamiento* (settlement) to light, basic housing conditions, street cleaning and security, communal organisation is indispensable. Again, conflicts between *vecinos* (neighbours) can be settled only by an internal organisation, since their poverty and the illegality of their presence prevent them from going to the state authorities. The organisation usually starts by dealing with claims to the possession of *lotés*, and progresses to deal with cases such as quarrels between couples, excessive noise, and the disposition of refuse (Revilla and Price 1992: 205). Eventually there emerges a system of social norms, rights, duties and interpersonal obligations which deals with the basic demands for justice and security. For security there is a system of urban patrols which usually functions until the shanty town obtains public lighting and theft tends to diminish (De Soto 1987: 28).

⁷ The term *Pueblos Jóvenes* (lit. young neighbourhoods) was given by the Velasco government to replace terms such as *barriadas* with derogatory connotations.

It seems that invariably when property in the *lotes* has been assured and the *vecinos* have obtained basic public services, the organisation tends to weaken, and people start living more private, and typically urban lives. Nevertheless, many transactions and economic activities concerned with manufacture, distribution and trade continue to be developed outside the strict regulations of the state. These activities, including the widespread use of false brands, violation of copyright, and distribution of manufactured products without guarantees, are in fact illegal but are described by the euphemism 'informal'. The current economic crisis has resulted in an increase in the volume of informal activities, and has reduced participation in traditional organisations to a secondary activity.

However, the crisis has also led to an increase in crime. In some localities there has been a revival of urban patrols, now called *rondas vecinales* (neighbourhood patrols), a term which seeks to associate them with the favourable public image of the *rondas campesinas*. In other localities it is now very difficult to revive traditional mechanisms of vigilance, even when people perceive the new and more serious threats to their security. Without effective protest from the state, there have been in the past decade several manifestations of popular anger against criminals, including lynchings in a sort of violent self-help.⁸ These cannot be considered law, because they are just spontaneous popular reactions, not particular decisions of specific authorities. However, they have functioned as an effective control mechanism.

A comparative analysis

The substantive norms of these non-state legal mechanisms vary considerably, but their conflict resolution processes, or adjectival law, display important common elements. These result from the small-scale nature of the societies in which they appear. The social and cultural distance between judge and parties is minimal: all decisions are taken publicly, with open participation by the community, using their own daily language (Revilla and Price 1992: 165). Relations are extremely complex when people spend their lives in the same village: behind a concrete

⁸ On lynching as a mechanism of social control, see Philips 1987: 373. De Soto maintains that rape of children has been another crime punished in these lynchings (De Soto 1987: 31.) The inability of the state to prevent such incidents arises partly because of the lack of an effective police presence in many districts. Because of limits on resources and the fear of terrorist attacks the Ministry of the Interior has reduced the number of police stations in peripheral areas of Lima. For example, in Villa El Salvador, a district with a population of more than 300,000, there is only one police station.

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dispute there can be many past wrongs and failures of duty (Collier 1976: 138-140). Even though a shanty town is not isolated from the outside society, many internal relationships are based on mutual dependence. Thus the economic crisis has led women to form many survival organisations such as communal kitchens. Some women may take care of the children while others go to work. Further, state and private aid donors may ask for a minimal local organisation as a condition of providing aid programmes and food. Problems in only one of these delicate fields can lead to an accumulation of tensions. In conflict resolution processes neither offence nor wrongdoer, neither claim nor disputant are considered in isolation, but the processes are directed to identifying and solving the real problems.

The main values of these societies coincide with those of the wider society: it is forbidden to kill, to rob, to interfere with the property of another. Admittedly in the most traditional environments the concepts of public and private are different. Actions considered criminal offences by the state are regarded as private problems, for which only the victim can take action by claiming compensation, and outcomes emerge from negotiation and mediation (cf. Silliman 1985: 298). However, it appears that these private procedures are declining in importance, and progressively more decisions are being taken by central communal authorities. This is no less the case even though the situation of the victim, which is frequently ignored in state criminal procedures, is given high attention in community procedures. It is the community that initiates the process, and the victim does not apply justice on her own.

Perhaps because people are aware of the values of the state and other foreign agencies, there is an increasing perception that certain forms of conduct infringe the collective moral values upon which the community is built, especially when they are repeated. Included in the category of offences are acts which state law considers private or simply negligible conduct: gossip, selfishness and quarrelsomeness can be considered serious offences (Brandt 1987a: 135). In particular, close attention is given to the family structure and sexual behaviour, because the family is considered the essential foundation of the social structure. Rules of morals, religion and good manners are also important. Thus adultery by a woman is often considered a very serious offence. Principles are frequently taken from the Catholic and Protestant religions, whose members are committed activists in many organisations. However, in certain instances there is a marked gap between the values of the people and their actual behaviour. Thus idleness is condemned in Andean communities, but to be very successful in one's work is also regarded with suspicion because it may involve appropriation of common goods by the individual (Tamayo 1992: 127). Adultery is punished severely in rain-forest ethnic groups, but occurs frequently, especially since the population has been gathered into communities. In some sectors of the society

drunkenness is condemned because it causes quarrels or contributes to the explosion of latent conflicts. However, drinking is a fundamental element in socialising, even in the course of communal work (Tamayo 1992: 151-154).

The objectives of these mechanisms are the reestablishment of harmony between disputants and within the community generally, the prevention of new conflicts, and the rehabilitation of wrongdoers. From the legal point of view of most indigenous people it is impossible to understand western legal systems which emphasise punishment and fail to link it to rehabilitation and the restoration of harmonious relationships (Brandt 1987a: 42). Thus decisions are oriented to the future. Paradoxically, in these so-called 'traditional' societies, the past is important only because it assists a determination of what the people involved in a case are likely to do, according to the kind of persons they are, in the future. The reasoning is opposed to the traditional western legal assumption that people are equal, abstracting real differences (Iturregui and Price 1982: 198). However, while it is considered crucial to consider the parties' previous acts and multiple relationships, it is often seen as unnecessary to know the precise facts. The parties may be well known in the community, and it may seem easy to deduce what each of them has done and what is the real, underlying problem. This approach may give effect to prejudices and stereotypes, especially concerning strangers and members of the weaker social classes. Indeed, it is precisely because of this that the majority tend to accept the decisions (Rosen 1980: 229-231). Often the group is judging not a concrete act, but a character.⁹

The logic of the disputing process is directed to achieving a compromise, avoiding the winner-takes-all logic of the state legal system. In a case where there is a clear offender, he must compensate the victim, and in the case where it is considered that the offender threatened the communal order, the group can draw from a range of sanctions. Some of these, such as *calabozo* and fines, are taken from the state mechanisms. Others are the inventions of the group, such as the imposition of communal tasks, or ridicule (Revilla and Price 1992: 181, 200, 211, 213). It is common for the *rondas campesinas* to compel *abigeos* to patrol with the *rondas* for some weeks 'until they have learned good behaviour'. Corporal punishment (caning or whipping) is frequent in the highlands.¹⁰

⁹ The pattern of decisions taken at the miners' meeting in Yukon gives rise to a similar reflection by Stone. In those societies the one public crime is often to be a bad character (Stone 1979: 88-89).

¹⁰ This is positively approved as part of the education of a person. It is reported that in one community there was a special religious ceremony in which the whips used by parents on their children were blessed, reinforcing parental authority and the

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A person who refuses to reach an agreement or to accept a sanction can be isolated or finally expelled. The sanction of death is generally considered to be excluded because it does not allow for the person to change their character or to recover social harmony (Brandt 1987a: 118-119). However, there have been cases in which it has been carried out.

The processes vary in the degree to which there is formal rationality, but as a rule the general aim of administering justice takes priority. People are conscious that the mechanical application of a rule can give rise to unfairness (Shapiro 1976: 433). However, decisions are not arbitrary. They are taken according to the collective consciousness and its prevailing ethical system. In the case of *rondas*, native communities and some shanty towns, there is a sustained endeavour to codify the legal practices of the group, in order to establish certainty as to which acts are offences (Gálvez 1987: 247). Final decisions of the Assembly are recorded in a special book, not to constitute binding precedents (because each case is regarded as having its own particular characteristics), but as a useful reference for the future.¹¹ The rules themselves remain unwritten, allowing for flexibility and change according to circumstances. This guarantees a permanent legitimacy, because the community exercises effective control over the people who take the final decisions (Revilla and Price 1992: 204).

These mechanisms have not only preserved internal harmony, but have facilitated public discussion of social problems. Political participation, democratic practices and responsibility for community welfare develop from the institutions of the administration of justice. In peasant communities even the land and other material goods belong to the community. A collective economy based not on free association, but on membership through birth can restrict individual consciousness (and see also Shapiro 1976: 433-434). However, the new legal practices give the members of the different organisations, especially the *rondas* and the *pueblos jóvenes*, a different idea of themselves, breaking with passivity and recognising the possibility of claiming their rights from the state. With this new perspective they can enter into new relationships with state and non-state agencies, defying even the patronage relations

importance of obedience. The day before a marriage, the bride was ritually whipped by the best woman and the bridegroom by the best man (Contreras Hernandez 1985: 80). Many highlanders who migrate to Lima ask their children's teachers to beat them.

¹¹ In her research among the Aguarunas Urteaga found that the language used for recording norms and sentences was usually Spanish, unless the text might contravene state norms (Urteaga 1993).

into which some leftist political parties and NGOs can fall.¹²

Implications for Claims of Rights of Self-Regulation

The particular circumstances of Peruvian history have produced such a degree of legal pluralism that many people are conscious of the widespread operation of popular justice, and question the legitimacy of the state legal system. For the state to deny these facts and reassert its formal claim to sovereignty would be a serious political mistake. Another possible approach which the state could adopt would be to characterise the present situation as anomalous and seek to rectify it by reforming judicial behaviour and translating elements of state law into the indigenous languages. However, it would be possible to adopt a different perspective and to ask whether these human groups do not have a right to regulate their own affairs, even in the case where the state is prepared to exercise its power in their interests. This section notes the grounds on which such a right may be claimed, and their applicability to Peruvian circumstances.

Indigenous peoples' rights

In recent debates in international fora there has been a growing emphasis on the rights of indigenous peoples. A widespread consensus holds that in many countries indigenous peoples are still suffering the effects of the occupation of their lands, the appropriation of their natural resources, the exploitation of their labour, and discrimination against them. However, one of the rights which they most insistently claim cannot be valued in material terms: they are struggling also to defend their identity.

The claim to self-regulation as an aspect of the protection of their identity marks off indigenous people from the rest of the population. Thus in certain debates in Peru emphasis has been placed on the opposition between western law, imported from Europe, and Andean or Amazonian customary law, still used by indigenous peoples (Mesa de Trabajo Sobre Pluralismo Cultural y Derechos Etnicos 1993: 1). Claims to self-regulation assert a continuity with the pre-colonial period (McLachlan 1988: 377). Self-regulation is a clear element of internal cohesion of the group. The practices which it entails are related to the fundamental demands of justice, morality

¹² This is very different from some of the analyses that have been made of informal or community justice in the USA, where those mechanisms seem to increase state control over society, and not to challenge powerful interests (Henry 1985: 308; as to this in Japan, see Rosch 1987: 244-245).

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and values which the group thinks worthy of respect. Indigenous groups have succeeded in preserving these despite external domination, forced, radical changes in their ways of living, the imposition of new laws, and an official ideology that seeks to delegitimize their traditions by depicting them as primitive. They have become deeply sceptical of the *asepsis* or "objectivity" claimed by the legal mechanisms of the state, having seen them used and misused to secure control over indigenous populations.

The claim to self-regulation is clearly related to the most vigorously asserted rights: those to land and to self-determination. Many native groups seek to enjoy the free possession and control of the territories where they live, or to recover those which they have lost. Control means in this case not only the free disposition of their natural resources or the power to exclude outsiders from their territories. The claims are to autonomous regimes. The most ambitious are claims to independence, but more frequently they are merely claims to the recognition by the state of traditional practices as legally binding. That means the right to give effect to indigenous norms without being accused of usurping the functions of state institutions, or being criminalised when the indigenous norms are contrary to state norms. Furthermore, respect for indigenous regulations entails also that indigenous peoples alone are to determine who are indigenes.

ILO Convention 169 attends to this claim in various articles (ILO 1989). Article 1.b recognises the existence of political institutions in indigenous groups. Article 8.2 recognises the right of indigenous peoples to maintain their own customs and institutions, and article 8.1 establishes the duty of the government to take account of customary law in the design of any policy relating to indigenous people, including by article 9.1 a duty to respect their methods of repressing offences and solving crimes. Finally, article 7.1 provides that the different rules that deal with indigenous problems are to be determined in negotiation with them.

The Convention, which was ratified by Peru in 1993, is clearly applicable to the members of the rain-forest communities of the country. However, an issue arises as to whether their legal practices are within the terms of the Convention. The restrictive meaning given to the term 'customary law' in the common legal language, as already mentioned, excludes many of the newly developed rules, principles and values adopted by indigenous peoples to meet the demands of new situations. The Convention seeks to solve this impasse by extending recognition to 'customs', a term with a wider connotation. This also opens the possibility of acceptance by positivist sections of the judiciary who are very reluctant to recognise customary law. In consequence many practices which might be classified as social control mechanisms rather than law are now included within the scope of the Convention. However, the word 'customs' maintains the exclusionary time reference. I suggest that it would be preferable for the ILO to reinterpret the term 'customary law' to provide for the

possibility of a group either maintaining its lifestyle or adapting it, while recognising that the final decision resides with them. An example may be found in the recognition by the Australian government of

the right of Aborigines to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly a European life style. (Australian Law Reform Commission 1986: xxxv [Terms of Reference], cited McLachlan 1988: 370)

There are other problems in applying these articles to Peruvian reality. The Convention seems to have been designed with reference to regions which suffered from Anglo-Saxon or similar processes of colonisation (cf. Tennant 1994: 13). These governments considered Aboriginal peoples as external to the state, entered treaties with them under international law, and avoided any unnecessary intercourse with them. In some geographical areas of those states, clear and isolated sectors of indigenous peoples, reduced in number, continue to exist, with lifestyles strikingly different from those of the dominant sectors.

Spanish colonisation in America, on the other hand, aimed to modify the internal core of indigenous populations: their religion, language, family structure, economic activities and residence patterns were to be affected. The Spanish generated a physical, social and cultural *mestizo* component, unknown in other regions (Trazegnies 1987:5), and which continued to grow after Independence. The independent governments established restrictions on the franchise similar to those in Europe, such as the requirements of literacy or a certain level of propertyholding, whereas the US gave citizenship to Native Americans only in 1924. In the former Spanish colonies Indians as an independent social group were expected to disappear, becoming integrated into the new *mestizo* society, although there were no legal exclusionary rules based on racial or ethnic elements.

Consequently in Peru the effects of claims based exclusively on indigenous rights would be problematic. Some studies estimate that 40% of the Peruvian population has indigenous origins (Cuanto, quoted by Yrigoyen 1993: 6). After centuries of interracial mixing and decades of social and geographical mobility, the differences between former aborigines and settlers have become blurred in the *rondas campesinas* and the *pueblos jóvenes*. It is possible to identify people as being of indigenous race only in the peasant communities of the highlands. But even there it cannot be said that there is an indigenous people. Before the Conquest there were several indigenous groups, dominated by the Incas. The Spanish treated the Indians as a single group, but did not make them into a uniform people. Among the Andean population there is no consciousness of belonging to an indigenous people. Most people would not accept

the designation of Indian. This is regarded as offensive, and references to a person's features as Indian are a common form of insult in Peru. Their claims are in essence economic, not ethnic. President Velasco recognised that for many people to be identified as a member of a non-western sector of the population would mean the loss of possibilities of social mobility, when he declared: "You are not an Indian any more; you are a peasant". So their social practices serve to preserve the internal harmony of the community, but are accustomed to make use of state agencies when necessary.

The right to culture

An alternative ground for a claim to self-regulation is the assertion that these popular legal mechanisms express the cultural identity of social groups (Ballón 1987, in Brandt 1987a: 28; Mesa de Trabajo Sobre Pluralismo Cultural y Derechos Etnicos 1993: 2). The right to culture is proclaimed in the International Covenant of Civil and Political Rights (ICCPR), art. 27, and the International Covenant of Economic, Social and Cultural Rights (ICESCR), art. 15.

However, neither of these documents explains the meaning of 'culture'. The classical definition in use when the documents were drafted identified culture with the enjoyment of the Western high arts (Quijano 1980; Bassand 1991: 37). Social values and legal practices were outside its scope. Today a more extended definition with a historical perspective is established, being used by ECOSOC and UNESCO (Heise et al. 1990: 7-11; UN Doc A/45/40). Culture is understood there to refer to a particular human group's acquired forms of behaviour, expression, thinking, speaking, feeling, preceiving and self-image. The implications are, first, that each human group has its own culture, and that pluricultural phenomena exist in many societies; and secondly, that cultures are permanently in processes of change and mutual influence. Cultures are on this view not sacred, complete entities derived from the past, but dynamic forces used by people to manage economic and social change (Heise et al. 1990).

It accords with the definition which takes this historical perspective, to see law as part of every culture, since research shows clearly that each human group possesses a common set of values and regulates its life according to them, establishing norms, rules and standards (Miyazawa 1987: 271, citing Singer 1968). These are in principle used to prevent, handle, neutralise or live with possible disputes (Hamilton and Sanders 1988: 301-302). Each individual feels that he or she has to observe certain norms, and that the group has certain expectations about his or her behaviour.

Historically many cultural conflicts have been expressed through law. The extension

of the legal system of one social sector to the rest of the society is a quite frequent cultural imposition (Brandt 1987b: 40-41). In such a case people with another culture feel that their disputes are judged according to alien cultural patterns with unfamiliar requirements and formalities. Their ideas about justice and other values are not recognised, protected or understood by the dominant system. On the other hand, self-regulation enables a cultural group to survive as such, and so protects the cultural identity of individual members, an identity which is not only manifested in external signs but includes elements of consciousness and the aspiration to be recognised as different (Fenet 1985: 50).

The right proclaimed in the ICCPR is restricted to minorities. The definition of a minority now has not a numerical but a social character. A numerical majority can be considered a minority if they lack effective power in proportion to their size, as for example in Guatemala (Stavenhagen 1991: 140). But reference to specific ethnic minorities in Peru generates problems similar to that raised by the concept of indigenes. Only the natives of the rain-forest can be considered an ethnic minority. The ICESCR, on the other hand, imposes an obligation on states to respect the right to participate in cultural life. It follows that states are obliged to respect those elements of culture which are expressed as legal mechanisms. In Peru this is clearly applicable to native and peasant communities.

However, the problem is even more complex, because the people who conform to the norms of the *pueblos jóvenes* and the *rondas*, and the new peasant communities in the rain-forest, do not belong to particular cultures with self-regulation as a feature. Indeed, the experience is new to them, and arises from their new needs. It can hardly be said that they are acting according to their particular cultures, despite the strong importance of this factor. People marginalised in relation to state decisions still make use selectively of state forms, procedures, norms and principles, seeking to overcome the difficulties of harmonising them with their own realities. It has to be admitted that these are not purely cultural phenomena. It is necessary to go beyond the truism that all human rights need to be interpreted and put into practice according to cultural particularities. Those international covenants which refer to human rights provide for their judicial enforcement, but writers such as Brandt (1987a: 69) assert clearly that this right is not included. It is probable that there is a danger of culture becoming too wide a category, and that law needs more specific provision.

Self-regulation as a right per se

In my view the right to self-regulation must be seen in terms of communities' own legal phenomena. Law cannot be reduced to a cultural practice. The importance of the ethical dimension has already been mentioned. Law is related to an *ought*

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perspective; it speaks not directly of reality, but of how reality should be. Therefore law does not consist only of the particular practices followed in a community. It is possible to speak of the law of a minority, or to assert that the object of law can be to transform the life of a society. There are many historical examples of the creation of new values and behaviour through law, including the cases of Peruvian peasant and native communities and *pueblos jóvenes*. Law thus has an instrumental function related to certain basic needs such as security, justice, personal integrity and property.

According to modern political theory it is the function of the state to attend to those needs through particular mechanisms. The reality is that, because of their particular social and political situations, many Third World states are still incapable of guaranteeing those rights. In Peru the legal system is slow, ineffective and expensive, and seldom arrives at a solution which respects the rights of the poor. People experience not only inefficiency but real discrimination against, and an unwillingness to listen to the common people (Gálvez 1987: 249). People feel compelled to develop these parallel mechanisms of social control to remedy the deficiencies of the state legal system rather than to try to recover their own cultural traditions. The development of their own systems of internal regulation provides the only possibility for their communities to enjoy such rights as security or justice. In this sense the claim to self-regulation can be justified on the basis that certain situations which in theory are restricted to emergencies in reality are very common. It is noteworthy that extended criminality has had the result that even many mayors from high- and middle-class neighbourhoods have set up a *serenazgo* or private police service, which has features of the regular police, but which is far more effective than they. The right to self-regulation should thus be seen as instrumental, in that it is a means of satisfying other rights which the state legal system ought, but fails to protect.

However, there is another element common to all these mechanisms: their members have a different understanding of security and justice from that of the state system. In small-scale societies there are fundamental requirements such as the maintenance of social harmony, respect for the internal morality of the group, the uncovering of the real problems behind disputes, and attention to the personal characteristics of the people involved. The individual is set in a particular network of multiple personal relationships, which gives him or her a particular social location. The state legal system is based on the opposite criteria. It deals with anonymous disputes between parties who mistrust each other. Internal motivations and personal conditions are classified as irrelevant so as to protect the privacy of the individual and to avoid bias on the part of the judge. Reasoning is directed not to finding a compromise but to declaring a winner, establishing fault and imposing punishment (Australian Law Reform Commission 1986: 8). The introduction of this form of reasoning into these communities can be disruptive. I would maintain that the particular relationships

developed in a small-scale society make it necessary for any such society to retain a certain degree of autonomy in solving its internal problems according to its own legal criteria and procedures.

The right to self-regulation involves a clear link between collective and individual rights. A norm is not a rule for an individual (this would be a habit). Norms need a collective consensus, recognised authorities, and sanctioning mechanisms. Therefore a claim to self-regulation must be a communal, not an individual claim.

A common criticism of self-regulation is that the legal mechanisms involved affect individuals' rights. This apparent opposition needs to be carefully considered. All legal systems restrict individuals' rights, but we are accustomed to the notion that the state alone imposes such restrictions. More important than these restrictions on the individual is the fact that legal mechanisms generally function to protect the individual, especially the individual who belongs to a poor sector of a society and has very few possibilities of being listened to by state agencies. The individual requires the group in order to obtain legal redress because it is in the group that the conflict is processed, and the group as such intervenes on the individual's behalf with agencies of the dominant society (Ardito and Honores 1993, 1994: 21). Therefore self-regulation is related to the individual's rights to justice, security, protection, property and suchlike. I would venture to suggest that for the members of these groups there is a further right, namely, to live in a harmonious and peaceful environment. In the case of indigenous peoples and other social sectors with a distinctive legal culture, the individual has the right that all those claims are enforced according to his or her own culture. This can only be achieved through those sectors' own legal systems.

The reluctance to recognise collective rights in international documents was broken by the ILO Convention. (The position of the Human Rights Committee is analysed in McGoldrick 1991.) In Peru collective rights such as those to land and autonomy have already been recognised in the legislation related to peasant and native communities and the *rondas campesinas*. It is accepted that these rights cannot be exercised individually, since any attempt to do this would lead to the dissolution of the group and detriment to all the individuals concerned. The state and the various organisations concerned all consider that individual participation in the community is a fundamental element in its recognition. In my view article 19 of the Native Communities Act, and article 149 of the 1993 Constitution (both mentioned above) do not merely confer a new function on communal authorities. Since these authorities are controlled by the communities, these legal developments enable them to exercise collective attributes.

Recognition of the collective rights of a particular group does not infringe the principle of equality, but rather attempts to compensate for real inequalities. For

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indigenous peoples such recognition is necessary even for their physical survival. However, I would claim that the right of self-regulation is not exclusive to them. It belongs also to groups considered to be voluntary, such as squatters and *rondas*, who cannot be properly provided for in the state system. It may be difficult to determine whether a certain group is voluntary, because there are always external circumstances which compel people to form or participate in these mechanisms. Many peasant communities were deliberately formed by the inhabitants of certain villages in order to obtain the recognition given by the Constitutions of 1920 and 1993 (DESCO 1986: 47). An individual sometimes has to choose between deferring to group pressure and leaving the local community (Merry 1982: 20). The latter course can threaten the individual's personal security and survival, but is never excluded, as can be seen from the facts that even some natives prefer life in the cities, and that native communities sometimes receive new members. Therefore, this right cannot be considered to be restricted to a particular caste.

Self-regulation as a social phenomenon has a twofold consequence for the enforcement of human rights. Beside the individual and the state - the two poles of classical human rights theory - there are many other sub-groups with responsibilities towards the individual. We cannot accept that only one system, that of the state, is bound by these principles while the others, sometimes more effective than the state system, remain untouched by them. But at the same time these groups allow for the existence of a balance in a society. They function as intermediate elements that protect the individual from the state, and they can be more successful than the state in protecting human rights.

Limits to Self-Regulation in the Context of Human Rights

Self-regulation and internal democracy

When collective rights are recognised the problem arises as to who precisely is to exercise them. Self-regulation and social control mechanisms are ultimately related to the power distribution inside the group. The myth that non-western societies were homogeneous and harmonious was broken by Malinowski. But frequently conflicts over power, prestige or scarce resources are hidden by various cultural mechanisms from the outside observer. Sometimes the external struggles of a group conceal unfairness or injustice in the administration of internal matters (Fenet 1985: 50). Sometimes a small group controls the community and its legal mechanisms. Thus, as Collier (1976) reports, in some Indian Mexican villages the ability to solve conflicts might enable a person to gain a powerful position. Some informal authorities or decisionmakers may stress the cultural particularity of their society in order to preserve their power. In other cases an important factor in the acquisition of power is

knowledge of the formal system (Ardito and Honores 1994: 12).

In Peru "modern" institutions such as the *rondas campesinas* and the *pueblos jóvenes* consciously adopt democratic values in their decision-making mechanisms and in their exercise of control over their own authorities. These voluntary organisations adhere to moral criteria in their operation and are relatively free from characteristics such as passivity and submissiveness which developed in the colonial era.

On the other hand, in some peasant communities small groups hold economic and political power and strongly influence decision-making (Mayer, quoted by Tamayo 1992: 195). In some communities and federations members of one family or clan occupy both communal and state positions, combining power gained from traditional prestige with that which emanates from their having closer contact than others with the external society (Brandt 1987a: 85). Weaker sections of the population, such as women, unmarried young men and strangers, have difficulty making their voices heard, because the small elites control even attitudes towards individuals' status. (Cf. Abel 1982).

Nevertheless, in describing these phenomena it is necessary to avoid the inappropriate use of western concepts, such as *caudillismo*, manipulation or authoritarianism (Tovar 1986: 103). Andean and Amazonian populations have developed social orders in which interdependence secures some internal homogeneity but where it is also necessary for the individual to display attitudes of humility in order to obtain the protection of the powerful - a feature even more obvious in the relationship with former *hacendados* and *patrones*. An internal system of unequal alliances such as these is the basis of the efficient functioning of some communities. Moreover, people are sometimes accustomed for pragmatic reasons to leave decisionmaking to those whom they consider to know better than themselves what to do, or who possess the power necessary to make their decisions effective (attitudes not unknown in some western democracies). This pragmatism may lead them even to tolerate a certain degree of corruption, if they realise that protest would ultimately prove futile.

It may be necessary to recognise that there are other ways of reaching decisions than those of western democracy. The communal democracy that the Velasco government sought to introduce is still essentially a foreign concept. The forcible introduction of some democratic procedures may disturb a traditional balance of forces without providing a real alternative. Legally and democratically elected authorities sometimes have no real power. People then seek justice from anyone who has power, whether a traditional authority, or a powerful member of the state executive, and the official authorities merely confirm or give formal legal value to the decisions reached (Revilla

and Price 1992: 160).

We may speculate that this will change as modern education, the expansion of the market, the development of transport, mass media, NGOs and religious groups, and other foreign influences generate individual autonomy (Wray 1987: 217). Moreover, people are gaining experience of more open participation in public affairs, as for example in general elections where the votes of women and young people are important. They may realise that established structures obstruct further participation as well as economic advance. On the other hand, if this awakening is restricted to certain individuals, we could face an even greater concentration of power.

Internal values and human rights

Certain sections of the Peruvian bar and judiciary still believe that non-state legal mechanisms are an ensemble of uncivilised or barbarian practices. Such criticism is largely based not on the experiences of self-regulation already mentioned, but on other social control mechanisms. The most serious instances of these appear in the rain-forest, where there are cases of infanticide, euthanasia and the murder of supposed sorcerers. There are also cases of lynching in some shanty towns. The inferior condition of women may have a universal character, not excluding western society (Hoebel, quoted Pospisil 1973: 554). It should be noted that many Peruvian women in those sectors believe that they have to tolerate male unfaithfulness, while in shanty towns, although many homes are run by mothers who have been abandoned by the fathers of their children, local administration continues to be in the hands of men. On the other hand, despite the fact that the *rondas campesinas* movement is essentially male, it has placed special emphasis on ending abuse by men of women and children. In most of the more destitute sections of the population we find a problem of lack of self-esteem. People have internalised the criteria of superiority and inferiority propounded by the dominant group (cf Heise et al. 1990: 18). There is often a conflict of values: many of these attitudes are criticised by people who lack the power to change them, for example women.

In the self-regulation mechanisms there is a clearer commitment to respect for moral principles, including human rights. In the *rondas*, shanty-towns and many peasant communities this has been encouraged by foreign agents such as the Catholic church and other religious groups. Many leaders in these communities have been former catechists and have received special education for adult laymen (Brandt 1987a: 119). However, social prejudices can survive and reappear in the decisions taken (Rosch 1987: 261). Sanctions such as corporal punishment and killing occur in isolated cases, and can be qualified as clear violations of fundamental human rights. Guarantees of

fair treatment for a detainee before trial are sometimes unknown.¹³ But it must be added that, if these practices are compared with corresponding practices of the state (where most detainees wait years before trial, while suffering torture and physical punishment), it is clear that those who operate self-regulatory processes are far from being the greatest violators of human rights in Peru.

Out of these practices, those affecting the condition of women have received the most international and national attention. There has been little concern with other cases. In some circles the merest mention of other cases is seen as politically incorrect and ethnically prejudiced. Here non-western societies are seen as providing the elements of a new form of human society, as promoting social harmony instead of individualism, solidarity instead of selfishness, integration with nature instead of the market economy, and firm, enduring personal relations instead of anonymous dealing (Ardito and Honores 1994: 11). Tennant shows the different manifestations of this kind of indigenist literature, related to the old perception of the noble savage (Tennant 1994: 7-11, 16-24). Any accurate fieldwork will show how much this ideal version is contradicted by reality.

It is difficult today to criticise these practices on moral grounds, because morality is believed to be relative. But the need to respect human rights is accepted to be a limit on public action, as ILO Convention 169, art. 8.2, and the Peruvian Constitution show. Some human rights activists feel themselves to be in a dilemma, since there is also a right to practise a culture. However, it does not seem justifiable to allow the cultural basis of these practices to paralyse human rights work. A culture should be seen not as a barrier but as the context within which respect for human rights must be installed. The state has the obligation to guarantee this respect inside its territory. It may be that non-state legal mechanisms have often appeared as a result of the failure of the state to fulfil its obligation efficiently, but they have not created a sphere outside the state where human rights need not be respected. The right to self-regulation has certain goals, such as security, justice, and the preservation of property. These are individual rights. If these goals are not achieved, or the legal mechanisms of self-regulation are used to exclude them, the right of self-regulation must be restricted. This is an instance of the common principle in human rights, that the limit of any right is the point at which it affects the rights of others (ICCPR, ICESCR, art. 5 which is common to both; Winston 1994: 15-16). In seeking to

¹³ *Ronderos* believe that the rehabilitation of a thief starts with the admission of his offence. To obtain a confession, they employ physical punishment. I once asked a *rondero* whether perhaps an innocent person might confess in order not to be beaten, and he was very surprised at the suggestion that the *ronda* might have made a mistake.

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support the alleged right of non-western societies to be different in this respect, some proponents may be seeking to conceal their own claim to a right to be indifferent to abuses in other societies, an attitude which is in the final analysis discriminatory (S. Abou, quoted by Le Roy 1994: 19; cf. the similar attitude to this - the other side of the recognition of legal pluralism in colonial territories - on the part of the former South African government, Heise et al. 1990: 42; Bennet 1991: 18-19). However, no section of Peruvian society has rejected the protection of human rights on the ground that these are western norms.

Some expressions of social control mechanisms are offences according to the criminal law. However, ILO Convention 169 provides that where, as here, the characterisation of an act as illegal is based on cultural premises alien to indigenous peoples, in determining the punishment the cultural background of the offender must be considered. In particular it recommends the avoidance of imprisonment (art. 10), which dissociates the offender from the group.

The new Peruvian Criminal Code provides that an individual can be exempted from criminal responsibility if his culture or customs have directed him to do the act in question (art. 15). Such acts have been said to amount to a culturally conditioned mistake, although this implies that there is only one value system. A preferable characterisation would be of cultural incompatibility. (For the most complete analysis of art. 15 see Francia 1993.) The article allows for distinctions between different cases, according to the degree of cultural isolation of the accused. It does not give a blanket exemption from criminal liability, so it does not enable rights to be deliberately infringed on the ground of cultural expression. There remain ambiguous cases. For example, it is unclear whether the article could apply to members of an organization which has been in existence for a mere six months. Could they be said to have their own culture or customs? Moreover, the article does not attend to the issue of a possible change in the practice, nor to the problem of the victims. Finally, it does not involve a recognition of legal pluralism or of the legal character of communal institutions (Francia 1993: 517). For these it exhibits toleration rather than acceptance.

Legal boundaries and common elements

The Criminal Code does not directly affect fields such as family law or contracts. In these matters different legal systems sometimes coexist without mutual interference, because of the isolation of the community or the particular character of certain cultural obligations. However, instances of overlap are becoming more frequent. People in such situations have to decide which norm to follow, looking to the advantages or effectiveness of each course of action, their sense of obligation

to the group, and the legitimacy of each system. In many peasant communities people can go to either communal or political authorities inside the community, while in more serious cases they can go to either the General Assembly or the judge. If they choose the last course the communal authorities follow the law, and merely give such reports as the judge requests (Gálvez 1987: 240). People never reject state tribunals absolutely: they alone can enforce certain rights, such as those against people external to the community. People merely try to use the most efficient mechanism for each case. However, the *rondas campesinas* are so effective that it would be very difficult to find any members of these groups who were interested in seeking the advice of the state authorities.

According to Galanter (1985: 544), in such circumstances there is a multiplicity not so much of actors, as of forums. People do not ascribe themselves to particular legal control mechanisms. They are not permanently bound by a culture, because so many new influences affect personal decisions, many of them not cultural (Miyazawa 1987: 271). People from different legal systems can agree, explicitly or not, which norms will regulate certain relationships between them.

However, in many cases such as those of criminal or accidental injuries, the relationship is involuntary or by chance. (For examples, see Trazegnies 1993a, 1993b: 29-30.) In determining which law is applicable, according to Trazegnies, it is best to resort to rules similar to those of private international law. However, the cases in question involve different semi-autonomous fields which coincide within one territory, not two different territories. Moreover, even when there is a marked distinction between two legal systems, there is continuous mutual influence. Indeed, Stavenhagen (1989) maintains that one sector will always be found to be a sub-product of the other. Moreover, what some foreign observers call indigenous culture is in many cases the product of a gradual and not very coherent integration of many elements with different origins.

Non-state legal mechanisms are constantly borrowing from state mechanisms not only legal concepts, but also real practices. Peasant communities who have suffered for centuries the misuse of state law are willing to adopt the methods of those who succeed in the state legal system, and to bribe judges and the police, forge evidence, and give false testimony (Gálvez 1987: 247). The *rondas campesinas*, in contrast, have consciously tried to provide their own legal alternative, to give direct effect to their notion of justice.

On the other hand, some state agencies are influenced in their decisions by popular values and prejudices. Political authorities such as *Gobernadores* and *Tenientes Gobernadores* and the police have had to exercise judicial functions as the only way to solve some of the problems brought to them (Brandt 1987a: 125-126). For this they have on occasion been criticised, but it must be recognised that their decisions

have been accepted.¹⁴ Especially noteworthy is the work of *Jueces de Paz no Letrados* (lay Justices of the Peace) who in deciding cases normally apply not only the law, but their common sense as it relates to the particular circumstances of each case. Their work shows the possibility of solving conflicts by applying values which are common to the involved sectors of society.

However, the possibility of conflict is always present. There can be serious problems even without state intervention.¹⁵ According to private international law a person may be required to obey the law of the place where he is. That was the position of the Australian Law Reform Commission (Kuppe 1994: 10). But in Peru there is usually no clear territorial division between different legal orders, and it would seem more satisfactory for the applicable law to be determined in the light of the characteristics of the person concerned. Alternatively private international law allows a person to retain his rights and obligations according to his own culture. It is submitted that the norms of private international law can be unduly abstract. It may be preferable to develop new criteria, such as one which looks for the system which is most likely to provide a lasting solution to a problem.

The New Role of the State

The limits of democracy inside many semi-autonomous social fields, practices that violate human rights, and the possibility of conflict between different self-regulating systems underline the need for an external authority. An approach to legal pluralism which rejects the state, by characterising it either as an instrument for the domination of the masses or as a system which is alien to the indigenous people, is neither practical nor sensible. A society needs a common legal system and state

¹⁴ An example of the tendency of the police to minimise complaints by women of violence by husbands, or of rape. Feminist movements strongly criticise these state agencies, but it must be pointed out that these decisions only reflect a pervasive cultural problem.

¹⁵ For example, in one case studied the peasants of a small village in the rainforest, most of them settlers from Cajamarca, had established a *ronda* to administer justice. A settler from an Andean community beat a native in a fight. The *ronda* sought to intervene to work out a compromise, but the settler said he was going to send his relatives to speak to the victim. Before he was able to do so, the family of the victim attacked the settler and destroyed his house.

law.¹⁶ State law provides a space for the exploration of social conflicts and the search for solutions (Kidder and Hostetler 1990: 896). State law can also serve to limit the exercise of power and to obtain concessions from the state (Brandt 1987b: 26). Moreover, the state may seek to promote other systems, as by recognising indigenous law or different systems of administration of justice by small groups such as *kibbutzim* and neighbourhood courts. Some states devolve important functions to the components of a federation or to other local structures.

What could threaten the unity and legitimacy of the state would be a claim to uniqueness of state law, because the ultimate consequence of this is a system isolated from the population, a structure parallel to, but out of contact with social life. This situation becomes even worse if self-regulation is considered a crime and people are sent to prison for seeking justice (Starn 1993: 1). This is not to say that for the state to achieve legitimacy every norm of state law must receive social acceptance. It is the acceptance of the system as such which generates legitimacy (Trazegnies 1987: 17).

However, to enjoy legitimacy the state must represent a core of fundamental values shared by the population. The problem in Peru is the absence of such a common set of values. Moreover, it would be very difficult to build such a set by searching out the values common to the internal legal systems, as has been attempted in some African countries (e.g. Nicholson 1973: 750), because of the past domination and division that has caused the fragmentation of Peruvian society. Nonetheless, it would be difficult and counterproductive to enforce any policy, even for the improvement of living conditions, while expressing indifference to existing concrete values, norms and patterns of behaviour. In promoting development, for example, the government needs to be conscious that the first step must be to generate interest in development.

¹⁶ I do not wish to claim that a society based on non-state legal mechanisms cannot develop successfully. Japanese economy and daily life are not based on the imported Western codes, rules or institutions, but on self-discipline, consciousness of duty, and a generalised dependence on the other's benevolence (Upham 1989: 879). Internal pressure from numerous groups seems effectively to prevent much crime and to rehabilitate the few offenders (Rosch 1987: 256). However, in Peru mechanisms which are effective in face-to-face groups lose their strength in the wider society. Peruvian society is not only heterogeneous, but is living through strong geographical and social mobilisation. Sometimes different groups see each other as adversaries to such an extent that there is no minimum consensus between them on basic rules or common values. Japanese social control mechanisms are rooted in an ancestral, pervasive culture. Most Peruvian mechanisms have developed from particular circumstances, and they tend to fade when the problems which gave rise to them are solved, or different solutions are found.

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In many cases this will require a deep sea change, because in many traditional cultures there is fear of change and risk-taking. However, it is only through dialogue that communal mechanisms can persist and help to smooth the change and to reduce anti-social attitudes.

With respect to self-regulation, Fenet argues that the state cannot act against the integrity of its own legal system by establishing islands of people who owe no duty to the national community (Fenet 1985: 64). He proposes a new relationship in which those legal systems which have hitherto been dominated or ignored are recognised and given subordinate status. In this way the state would pass from the traditional stance of exclusion to a hierarchical relationship (Fenet 1985: 36). The state could maintain its predominant position as the only structure in which the entire population had the possibility of participating, but it would have to provide a permanent dialogue with the different sectors of society.

Since recognition of self-regulation is not new, there has been experience of the practical problems. Some are likely to arise from the instinctive approach of the Western lawyer, which is to expect the state to codify communal practices. As already mentioned, state officials would have many difficulties interpreting and restating non-state procedures. To expect to perceive indigenous concepts through indigenous eyes is utopian, because the observer can never completely lose his own subjective perception (Holleman 1973: 585). The tendency to fit ill-understood concepts into Western categories and postulates is doomed to fail. Clearly this is likely to be the case when, as among Australian Aboriginal groups, legal knowledge is secret and restricted (McLachlan 1988: 372). It is common for legal reasoning in other societies to be completely different from that of the observer's society (Merry 1988: 871, 886). Even if the group itself prepares its own codes, the nature of its self-regulation is likely to mean that it is impossible to freeze its processes into a fixed moment, since decisions are always specific to the concrete situation. (Cf. on Khadi justice, Rosen 1980: 240. As in Japanese courts, decisions may be taken in the light of the real problem, rather than according to rules.) The codes that natives, peasants or *vecinos* have hitherto drafted consist of very open rules and are not designed to be applied mechanically, according to principles.

The Australian Law Reform Commission (1986) studied other possibilities in relation to Aboriginal law, some of which have been used in Peru. In incorporation by *delegation* certain matters are referred to communal law. This is similar to incorporation by *exclusion*, in which it is provided that state law is not to apply in certain matters. However, there can never be an absolute exclusion, not only because people cannot be totally isolated from the state, but also because everybody is entitled to receive the protection and rights provided by the state (Kuppe 1994: 6). In other

cases recognition implies that elements of communal self-regulation receive a new *interpretation*, according to the state legal system. For example, there may be recognition of intellectual property, and rights to royalties for mining activities in indigenous territories (Kuppe 1994: 4). The conclusion of the Commission was that the treatment of each particular legal area should be separately determined. The same would seem to apply to different self-regulation practices in Peru.

A difficulty is that official action usually deals only with the most formal or visible parts of processes (Moore 1973: 741). State intervention needs careful study, because it can have unexpected consequences if the invisible elements that determine certain decisions, or the specific social control mechanisms are not considered (Moore 1973: 722). The only possibility of achieving success is to act on the basis that any action taken is not the sole responsibility of the state, but requires dialogue with the groups involved in self-regulation practices.

Human rights are best promoted by transferring responsibility for them from positive state law to the social control mechanisms and self-regulation practices. In groups with their own cultural patterns human rights can achieve cultural legitimacy (An-Na'im 1992: 431). It must be insisted that in many cases these systems are closer to respecting human rights than the actual practices of the state. For example, western Latin American elites have found many difficulties in absorbing recent western achievements regarding equality, tolerance and democracy. Self-regulation mechanisms are especially effective in making people examine publicly different sanctions and possibilities and improve the system over time. Recognition of semi-autonomous social fields would help the development of real enforcement of human rights in sectors such as the army, corporations, political parties and the unions.

Aspects of human rights theory may become more complex in this context. It becomes evident that the individual has certain claims not only vis-à-vis the state, but also against the family, the group, and many other people or institutions. On the other hand, the promotion of human rights should be the responsibility not only of the state, but of all persons with social responsibility: parents, teachers, community leaders and others. A right to a fair trial or to property may be understood in a different way from that of the state system: for example, people may consider a trial as an opportunity to express in public their private problems and sufferings. People may be conscious of different sets of rights. Thus we have seen that many self-regulation practices are concerned with the right to live in a peaceful and harmonious environment. So the Japanese Civil Liberties Bureau has to deal with complaints that neighbours have been 'unfriendly' or 'impolite' (Rosch 1987). Another right might be that of the elderly to be cared for by their families (Galtung 1991: 152). Further, in most non-western societies people are willing to accept certain restrictions on some

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rights if as a result they receive collective benefits. Thus physical punishment is an accepted part of discipline in some Andean communities. They might point to the fact that in some societies with a limited awareness of human rights but a strong emphasis on duties and responsibilities, such as Japan and some Arab countries, the criminality level is low.

An approach to human rights issues which takes account of the existence of legal pluralism does not entail an expectation of an automatic compliance on the promulgation of a constitution or the ratification of an international covenant proclaiming respect for human rights. Not only is the normative structure of society highly complex, but the sudden introduction of legal guarantees does not necessarily have positive results for all (cf. Massell 1967). The recognition and specification of human rights are the results of unique and concrete social, political and cultural processes that cannot be mechanically replicated.

In Peru a dialogue might enable progress to be made towards the identification of rights about which a consensus is urgently needed. Such might be rights to life, health and physical integrity. Trazagnies (1987: 16) argues that we should attempt to find a minimum, not a maximum number of rights. The dialogue envisaged would allow us to distinguish between the basic needs of humans in any culture or society and the needs of a Western person in an anonymous environment.

The result of a dialogue, if the participating groups are not completely opposed to each other, should be the acknowledgement of agents to act as links between them. The communal authorities and the *jueces de paz* have often been effective and have shown that these problems can be solved. Conflicts between legal pluralism and human rights must not be hidden, but equally must not be thought insoluble. The possibility of judicial authorities at the lowest levels being chosen by the community offers an interesting possibility of smoothing conflicts and discovering specific solutions for concrete cases.

The most serious obstacle to such a dialogue is that Western legal sectors have difficulty in accepting the perceptions of those sectors traditionally considered to be uneducated (Le Roy 1994: 27). Even many of the lawyers who give legal advice to natives and peasants are marked by positivism, and cannot accept that those whom they serve have their own legal structures.¹⁷

¹⁷ Twining (1973: 573-574) mentions several limitations on lawyers' ability to understand this form of reality. Their training is monocultural and ethnocentric, oriented to the regulation of economically developed societies rather than the legal traditions of developing societies. Studies are focused on large bodies of laws

Conclusion

Peruvian elites have not abandoned the old tendency of their predecessors, of trying to promote the development of backward sectors through norms that are effective, if at all, only for the Western minority (cf Seidman 1970: 200-201). Some of the supporters of proposals for the transformation of Peru into a "modern" country do not hide their contempt for what they consider primitive traditions. The truth is that the application of a rule developed in a different cultural, social, economic or political context leads to different results. To impose legal uniformity can only be harmful for a heterogeneous and multicultural society, and will increase conflict. A legal order not based on consensus but on coercion relies ultimately on the use of violence (Burman 1990: 738). However, Peruvian society has yet to accept that it is heterogeneous and multicultural. It has this character not because there are different, defined social groups facing each other, but because inside any Peruvian there are elements of diverse cultural or historic origin.

The analysis of legal pluralism reveals that law is not an autonomous system of general rules regulating social behaviour, but that it is part of more inclusive patterns of social life (Galanter 1985: 537), that can also change the law, in that norms can be reinterpreted in diverse ways by each social group and sub-group (Moore 1973: 723). Semi-autonomous social fields create binding links among their members and with members of other social fields. However, I have shown the different practices of self-regulation in which we can clearly appreciate the main characteristics of the legal phenomenon, such as the ideas of duty, authority, obligation, universal application and sanction.

The common characteristic of these self-regulating groups is that they are not marginal, nor opposites to the state and the law, but groups which have decided to act by themselves because of the ineffectiveness of the state, and who try to enforce most of the fundamental rights proclaimed by the official legal system. They recognise the need to protect the internal harmony of the group, and seek to deal with situations which cause or could cause disruption in the community, whereas the state legal procedures would impair the internal communal structures. The cultural elements that impregnate indigenous groups and other social groups are also protected by the self-regulation mechanisms. For these groups the right to regulate themselves is the right to preserve all these individual and collective rights.

(such as Peruvian law, administrative law or criminal law), not small phenomena (Ardito and Honores 1994: 8).

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The extension of self-regulation mechanisms has been a solution to many concrete human rights problems. A serious application of article 149 of the Constitution would reduce the problems of legitimacy of the state, because the state legal system could then abstain from contentious intervention. Coordination between the state and communal authorities is fundamental to reducing friction. However, it must be recognised that certain self-regulation practices do violate human rights. The acceptance of diversity does not mean that a society can continue to be viable as an ensemble of atomised normative systems without any connection or common values. The role of the state in a multicultural society is delicate and responsible.

Legal mechanisms are a large field for the promotion of human rights. They need to be incorporated in the practice of the different sectors of social regulation, including not only the popular sectors but also the military, the upper classes and the factory (Moore 1973: 743-744). A human rights enforcement policy should take the achievements of these mechanisms as a basis, and try to establish a dialogue through which other approaches would be received and shared. The policy of promoting human rights through state law has been the most effective approach for meeting individual human needs. A dialogue with the other social sectors with self-regulation practices opens possibilities of looking to other demands: those for human duties, human responsibilities, collective responsibilities, and collective rights.

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