

# TRANSFORMATIVE JURICULTURAL PLURALISM: INDIGENOUS JUSTICE SYSTEMS IN LATIN AMERICA AND INTERNATIONAL HUMAN RIGHTS

Kimberly Inksater

## 1. Introduction

The philosophical underpinnings, norms and procedures that provide the basis for indigenous peoples' justice systems are distinct from those of positivist legal systems. This paper will consider some of the physical sanctions applied in some indigenous legal orders that raise concerns for their possible violation of international human rights norms. Examples of other practices that provoke strong reactions or outright rejection of the possibility of formal recognition of indigenous justice systems are: sanctions against community members with special needs who do not participate fully in communal life; limited participation of women in positions of authority; and lack of gender analysis in the resolution of cases of violence against women.

I will argue that these tensions between norms and practices in indigenous law and international and national human rights may be understood and possibly resolved within a legal pluralism framework that emphasizes the autonomy of indigenous law as well as cross-cultural juridical mechanisms.

In order to advance this argument I will propose an alternative approach to legal pluralism that seeks to transform the scenario where multiple legal cultures in a single state territory may collide. In the next section of the paper I will present the

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attributes of the prescriptive practice-based approach which I call ‘transformative juricultural pluralism’ (Bunn-Livingstone 2002).<sup>1</sup> This approach also seeks to address the limitations of other approaches to legal pluralism, particularly with regard to the definition of law and the interaction between legal orders existing within a state territory. My proposed approach seeks to promote the autonomy of indigenous law based on indigenous difference, including the right to self-determination. The approach has been developed on the basis of knowledge of indigenous justice systems in Latin America and therefore cannot be readily applied to other justice systems such as religious or ethnic-based systems existing in other countries or regions. I would suggest that would require further study.

To determine the elements of such an approach in the next section of the paper I will present a new approach to legal pluralism and also summarize the limitations of three current theoretical approaches to legal pluralism in responding to indigenous peoples’ justice systems. Subsequently, in the third section, I will present normative arguments that justify the new transformative juricultural approach as it relates to the right to self-determination of indigenous peoples, and specifically the right to maintain their indigenous law. The fourth section examines corporal sanctions applied in some indigenous justice systems, with particular emphasis from countries in the Americas where I have worked, in relation to the right to physical integrity and the tensions that arise when rights and distinct legal cultures co-exist. Finally, I will examine how legal pluralism, especially the model that I propose, can promote cross-cultural mechanisms to resolve these tensions between juridical cultures.

## 2. A New Definition of Legal Pluralism

### *a. Transformative Juricultural Pluralism*

I propose an approach to legal pluralism that I refer to as ‘transformative juricultural pluralism’ which draws upon the legal pluralism literature and the aspects of indigenous difference.

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<sup>1</sup> The term ‘juricultural pluralism’ is used by Bunn-Livingstone to incorporate cultural and juridical aspects of law to recognize that law is culturally defined.

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My approach is transformative in that it is prescriptive<sup>2</sup> and for that purpose adopts a forward-looking methodology that seeks to change the dominant status quo. I propose a methodology consistent with the category of legal pluralism I refer to as ‘critical postmodern’. This methodology is based on ‘emancipatory knowledge’ (Santos 1995: 27-37) which prioritizes subjective knowledge of local communities created through dialogue and ‘emancipatory practice’ (Kleinmans and Macdonald 1997: 46), which privileges the multiple narratives of legal subjects and their inherent capacity to influence and construct law. A new configuration of legal orders in a state territory guided by such an emancipatory methodology is consistent with indigenous peoples’ right to self-determination. The purpose is not to describe pluralistic scenarios but to transform them to achieve deep or radical plurality.

The term juricultural pluralism recognizes the diversity of subjective definitions of law but acknowledges the juridical element necessary for a normative order to be determined ‘law’. In his comprehensive attempt to examine the postmodern paradigmatic transition of law, Santos offers key elements in the definition of law and the reconfiguration of state law in a situation of legal plurality (Santos 1995: 114).<sup>3</sup> He defines law as:

... a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force (Santos 1995: 428-429).<sup>4</sup>

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<sup>2</sup> I propose a prescriptive rather than descriptive model. The descriptive approach is suggested by Griffiths (1986) and adopted by Bunn-Livingstone (2002).

<sup>3</sup> Santos prefers ‘plurality of legal orders’ to the term ‘legal pluralism’ and he also notes that legal plurality has always been the empirical reality. In recent work Santos uses the term ‘legal hybridization’ to explain the interaction between ‘traditional’ law and state or ‘modern’ law that results in “multicultural legal plurality” in a heterogeneous state such as Mozambique. (Santos 2006).

<sup>4</sup> In his second edition Santos expands his discussion of ‘justiciability’ and the importance of contextual analysis of dispute resolution norms and procedures (Santos 2002a: 100–104).

Santos' definition suggests there is a decidedly juridical meaning for a normative order to be considered 'law'. In transformative juricultural pluralism this objective juridical element is forged with the emancipatory epistemology in an effort both to recognize cultural subjectivity and to distinguish 'law' from other forms of social regulation.

The essential elements of transformative juricultural pluralism are: (i) respect for autonomy of laws demonstrated by non-interference by the state with decisions of local indigenous peoples' judicial authorities, (ii) respect for cultural difference and acknowledgement of one's own culture as 'incomplete',<sup>5</sup> and (iii) the existence of egalitarian mechanisms for cross-juricultural interaction and decision-making. This intercultural dialogue among judicial authorities would seek to define intercultural procedural and normative principles to be applied independently in state and indigenous legal orders (Van Cott 2000: 209).<sup>6</sup> These three elements will be assessed in relation to the tensions with human rights norms in the last section of the paper.

Transformative juricultural pluralism has been formulated in response to the current concepts of legal pluralism which exist in legal scholarship. Below, I will briefly review the theoretical currents in the scholarship on legal pluralism to determine the aspects of these approaches that need to be addressed in relation to the right of indigenous peoples to self-determination.

#### *b. Current models of Legal Pluralism*

My review of theoretical scholarship resulted in the identification of three major conceptual models of legal pluralism that can be characterized as state-centric pluralism,<sup>7</sup> socio-legal pluralism (Merry 1988) and critical postmodern legal

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<sup>5</sup> Santos uses this term to refer to a critical perspective that one's own culture is incomplete given that no one culture can claim to have the complete conception of human dignity (Santos 2002a).

<sup>6</sup> Van Cott suggests two criteria to measure the success of legal pluralist models:  
the extent to which multiple legal systems are able to operate without interference and the extent to which conflicts among legal systems are managed institutionally (Van Cott 2000; 209).

<sup>7</sup> Griffiths (1986) characterizes this as weak legal pluralism since it maintains a

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pluralism (Santos 1995, 2002a; Kleinhans and Macdonald 1997). Although the term legal pluralism is employed frequently, especially with regard to indigenous law in Latin America, it is not always accompanied by a full discussion of what meaning the author attributes to the term beyond a rejection of legal monism.<sup>8</sup> It is not possible here to review exhaustively the legal pluralism theory and framework, but I will briefly outline these three conceptual models.

Post-colonial state-centric legal pluralism is characterized by the recognition of plurality within the state legal order. Regardless of the term applied (classic, weak, internal or formal) this state-centric pluralism refers to different laws for different groups in society, subsumed within the framework of state law and often in a colonial or post-colonial context. This type of legal pluralism occurs when the state acknowledges or tolerates 'other' law such as 'customary law' of original peoples although it may restrict its application to personal matters with which the state was not or is not concerned (Van Cott 2000: 209. Also see Yrigoyen 1997, applying the term 'tolerant pluralism' in her categorization of pluralist models). State tolerance for 'other' legal cultures may be due to the state's unwillingness or inability to ensure state law reaches all areas of its territory, or the state may seek to incorporate non-state legal orders within the purview of the state for policy aims such as efficiency and legitimacy of the administration of justice (Sezgin 2004). Griffiths claims this is 'weak' legal pluralism because the state tolerates the social reality in its territory by formally recognizing a parallel legal order but without relinquishing the goal of legal centralism (Griffiths 1986; Davies 2005: 91-93).

Secondly, the 'socio-legal' approach to legal pluralism promotes a broader sociological definition of "plural normative orders in the same social field" or "normative heterogeneity" (Griffiths 1986: 38). Law is defined as the "self regulation of a semi-autonomous social field."<sup>9</sup> Griffiths searches for empirical

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state law centralism. Merry (1988) refers to state centric as classic legal pluralism. Hoekema (2009) calls this form of pluralism unitary formal legal pluralism. Woodman (1998) calls this state law pluralism.

<sup>8</sup> Monism is used interchangeably with the terms 'legal centralism' (Griffiths 1986) or 'singularity' (Davies 2005) to refer to the idea that state law, in positivist tradition, is coherent, unitary and universal in its neutral and acultural application. Proponents of legal pluralism attempt, in various ways, to respond to this monism.

<sup>9</sup> Both Merry (1988) and Griffiths (1986) adopt the term "semi-autonomous social field" from Moore (1978).

legal pluralism in a social field, not in a legal system or with a juridical approach.<sup>10</sup> This social science approach to legal pluralism has been closely linked to the anthropological study of ‘law’ by ‘western’ scholars in ‘non-western’ cultures.<sup>11</sup> The challenges of cross-cultural study highlight the need to assess one’s own conceptions of law and define a measurable area of study through a definition of law that is useful across cultures. This exercise in definition is complex since, as Clifford Geertz and others suggest, law is culturally constructed and culturally understood (Geertz 1983: 232; see also Rosen 2006 and Greenhouse 1998). The premise that law is within culture, not a separate or isolated system, obviates the need to contextualize any study of legal pluralism or to begin from a position of difference (Rosen 2006: 6). The limitation of this socio-legal approach is the breadth of its definition and consequently the lack of definition of what constitutes ‘law’. It is not helpful for defining how autonomous legal orders resolve tensions or difficult cases.

Finally, ‘critical postmodern legal pluralism’ is a “rather undeveloped approach,” (Davies 2005: 107) but it is the most recent area of theoretical debate on the topic. It is useful for its attention to the construction of knowledge and meaning by the subjects of law and also its challenge to the status quo or hegemonic legal discourse. The principles of critical legal pluralism advanced by Kleinhans and Macdonald are compatible with the autonomy and identity of distinct peoples. Their approach, apparently consistent with standpoint epistemology, advances a number of important methodological factors. First, subjects are the legal authority and actively influence ‘law.’ Second, it is acknowledged that legal subjects possess multiple identities and therefore perceive multiple legal orders (Kleinhans and Macdonald 1997: 40).<sup>12</sup> Third, critical legal pluralism recognizes subjects’ ability to construct law, or in other words, to transform what they believe is law through “empiricist practice” (Kleinhans and Macdonald 1997: 46).

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<sup>10</sup> Griffiths argues: “Legal pluralism is an attribute of a social field and not of ‘law’ or a ‘legal system’.” (Griffiths 1986: 38)

<sup>11</sup> This approach to the ‘ethnography of law’ is exemplified in Nader (1969), which includes chapters by the major anthropologists working in the ethnography of law: Paul Bohannan, Max Gluckman, Sally Falk Moore and Leopold Pospisil.

<sup>12</sup> The actual situation in Bolivia illustrates this point: rural indigenous people can identify with state or communal law and individuals who retain communal rights but live in urban centers add another layer of identity. See Urioste 2007: 37-39.

As mentioned above, the literature regarding indigenous law in Latin America retains elements of a state-centric approach to legal pluralism without prescriptive remedies that respect autonomous legal orders. In practice, there have been rudimentary formal efforts “to establish legal pluralism” (Van Cott 2003: 2) through constitutional recognition but this has not translated into the autonomous jurisdiction desired by indigenous peoples. The scholarship in legal pluralism has been criticized for its acceptance of the state as a static and fixed element of law without any critical political analysis (Santos 1995: 117). The academic studies regarding indigenous rights and legal pluralism in Latin America have not sufficiently criticized the role of the state or the definition of ‘law’. I would conclude, therefore, that in order to advance an innovative approach to legal pluralism, there is a need to include and critique the state and also define the parameters of law based on legal cultures operating in a designated scenario.

### 3. Justification for Transformative Juricultural Pluralism

There are various arguments to support my proposed approach to legal pluralism configurations involving indigenous justice systems. In this section three general arguments will be explored in order to provide the normative rationale for transformative juricultural pluralism.

#### *a. Difference as justification for autonomy*

Indigenous peoples’ quest for autonomy is grounded in their distinct identities that are commonly described in historical, cultural, territorial and sovereignty terms and that provide the basis for a definition of indigenous law. This distinctiveness is noted in order to differentiate the treatment that should be accorded indigenous peoples in state territories as compared to ethnic groups not considered ‘nations’ (Kymlicka 1995; Santos 1995: 319). ‘Indigenous difference’ is the basis for claims of increased autonomy (Macklem 2001). The factors of indigenous difference have been amply described by other authors (Wright 1992; Roux 1990; Casas 2004; Stavenhagen 2002) and will not be exhaustively reviewed here. Suffice it to say that historical, territorial and cultural difference justify the autonomy claims of indigenous peoples in contrast to ethnic minorities, and is broadly based on the historical fact that indigenous peoples occupied land prior to conquest and therefore prior to the formation of states.

Despite the oppression through conquest and assimilationist policies,<sup>13</sup> indigenous peoples have resisted colonial subordination. Their cultures, including legal orders, have survived, if not flourished in Bolivia and Colombia, among other countries. Indigenous rights have come to the forefront in national and international spheres since the 1980s (Albó 2002: 76-77), facilitated by the emergence of human rights movements (Stavenhagen 2002: 31) and a cosmopolitan process. This re-emergence has strengthened or permitted the open practice of indigenous law, whereas previously it may have been clandestine.<sup>14</sup>

Inherently connected to any consideration of indigenous difference in law are the concepts of self-determination, sovereignty and the recognition of cultural differences. The self-determination question has in fact been resolved in international law. In turn, the right to sovereignty is the expression of the right of self-determination, and most indigenous groups in the Americas seek to achieve some form of internal sovereignty (Van Cott 2000: 211).

Self-government is the essential expression of sovereignty. However, examples of genuine self-government in the Americas that include autonomy for indigenous law are few (Hoekema 2002: 75-77). Formulations and definitions of self-government vary along a continuum in tandem with the conceptions of self-determination (Kymlicka 1995: 181). While political autonomy and self-government may be aspirations of some indigenous nations I would argue that they are not necessary precursors to an autonomous model of legal pluralism.

Indigenous cultures, including indigenous justice systems, as expressions of that culture, can be sustained through the generous implementation of self-determination. An approach to legal pluralism in the Americas should therefore

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<sup>13</sup> In Latin America scholars note that in the colonial era the Spanish imposed structures, roles, religion and forced labour on indigenous peoples but through segregation permitted the continuance of indigenous structures. After independence from Spain in the Republican era the Latin American states developed assimilation policies in an effort to forcefully create nation-states based on a mestizo identity. (Stavenhagen 2002; Yrigoyen 2002: 157; Seider 2002: 187-193).

<sup>14</sup> Interview of Jorge Caballero, Advisor to the Regional Indigenous Council of Cauca Bogotá, Colombia (1 October 2005). Some publications note how the reclaiming of legal practices has strengthened indigenous identity (e.g. Tingana 2005: 25).

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ensure the autonomous administration of indigenous law by indigenous peoples. Transformative juricultural pluralism responds to this requirement by promoting non-interference by the state in a manner that a state-centric approach does not.

*b. Defining indigenous law*

*Multiple legal identities*

The distinctiveness of each indigenous culture, as well as the multiple legal identities involved in modern communities, result in a variety of conceptions of law. The review of current approaches to legal pluralism led me to conclude that a definition of law remains a necessary component of a pluralist proposal. I argue that law should be defined through a combination of subjective and objective elements, as is consistent with the critical postmodern approach to legal pluralism. The perspective of an indigenous group, defined by its nation or locality, should be privileged while at the same time the external scholar or observer has criteria for analysis in the consideration of norms, procedures, legitimate adjudicative authorities and sanctions.

This subjective construction of legal knowledge is consistent with the autonomy of indigenous law and the right to self-determination. Indigenous peoples have historically constructed their own law based on practice and the interweaving of legal cultures (see also Halkyer 2004).

The definition of an indigenous legal order requires an analysis of the local political, social, and spiritual context in broad terms as well as more specifically in terms of degree and nature of adjudicative principles, institutions, procedures and events in a socially and/or geographically defined community (Tingana 2005: 19). Generalizations that characterize indigenous justice systems as homogenous and isolated models are inaccurate and fail to recognize the distinct nature of the local context and the degree to which indigenous legal orders interact with state law. Despite this cautionary requirement, some authors have attempted to synthesize common elements that cut across most indigenous justice systems. For example, Albó asserts that indigenous law can generally be characterized as having several traits (Albó 2003: 89-90; also Pratt 1995: 43). Indigenous law is an accumulation of historical practices which have been locally defined and applied by the whole community and its designated authorities. It is holistically organized

rather than atomized into isolated subject areas. It has historically adhered to oral proceedings, although communities in Bolivia and Colombia have begun to keep written archives, and interaction with state law has resulted in the use of written resolutions in some communities (Fernández 2005: 152).

The main elements of Santos' definition of law, presented above, are also met by local indigenous law. The norms and procedures of indigenous legal orders are guided by the world visions of the particular culture (Fernández 2005: 2) thus providing legitimacy and institutionalism (Cueto 2003: 61) to the law. It is in this manner that Johnston explains the Great Law of Peace of the Six Nations Confederacy (Johnston 2003), and ACIN explains the Law of Origin of the Nasa people (ACIN n.d.). The procedural aspects of indigenous law are often blended with religious rituals<sup>15</sup> or at the least are rife with symbolism.<sup>16</sup> Specific legal norms, procedures and sanctions are locally established for the purpose of maintaining community equilibrium and protecting cultural values. Legal proceedings often form part of the predetermined responsibilities of political and spiritual authorities when disputes, brought to the attention of the authorities by the aggrieved party or his or her family, are adjudicated by these leaders. At times the final decision regarding a case is made directly by the General Assembly of the whole community (Albó 2003). Community leaders are assigned the power to sanction transgressions according to predetermined, and often symbolic, sanctions that may be of a compensatory or punitive nature.

I would argue that an approach to legal pluralism that promotes autonomy of indigenous law must consider a combination of a juridical definition with what indigenous peoples identify, in multiple ways, as their own law. While the subjective meaning of law may be prioritized, the juridical inquiry into dispute resolution expressly defines the boundaries of a legal culture.<sup>17</sup> I suggest this

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<sup>15</sup> See Fernández 2005, explaining that justice practices in the Andean region are not distinct from the religious or spiritual realm. For example, religious rituals are used within the investigative phase in communities in the Bolivian highlands. (Fernández 2005: 170)

<sup>16</sup> Thus the corporal sanction of lashing explained below is symbolic of lightning, a purifying force between lightness and darkness. See: *Gembuel Pechene v. Passu*, Colombia Constitutional Court, T-523/1997 (15 October 1997).

<sup>17</sup> "... [D]efining a culture is a question of defining boundaries" (Wallerstein 1991: 187, cited Santos 1995: 257). This combination approach is consistent with

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combined approach to define state and indigenous law because, in addition to indigenous legal orders, the state needs to appear in the scenario, albeit in a transformed role in a “radically plural society.”<sup>18</sup>

*Interlegality*

A more relevant legal pluralism also needs to look forward for precision and re-definition, not backward to a traditional or neo-colonial model. Indigenous legal orders have evolved by incorporating elements of colonial law and modern state law while at the same time retaining their distinctiveness.

The multiple conceptions of law also result in varying degrees of interaction or articulation between indigenous justice systems and the state legal system, but many authors agree that indigenous justice does not and cannot operate in an isolated manner (Anaya 2004; Santos 1995, 2006; Stavenhagen 2002). Santos has termed this interaction between types of law ‘interlegality’ (Santos 1995: 473).

It is important to note that the use of some aspects of state law by indigenous authorities does not imply the abdication of indigenous jurisdiction. Rather it may be evidence of the strategic use of the state system to advance the interests of the community.<sup>19</sup> Alternatively, I would suggest that lack of interaction may be

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Davies’ assertion that law is a cultural expression and must ground itself in a political or social force for its legitimacy because it is incapable of grounding itself (Davies 2005: 109-110).

<sup>18</sup> “If Law is essentially a cultural expression then the foundation for its legitimacy is a radically plural society” (Davies 2005: 109-110). So also Tapia describes radical pluralism in the political realm:

A radical pluralism, that is to say, from the roots and thought of as a general condition, cannot help be a criticism of the exploitation and exclusion and political domination. It appears to me that the objective of a radical pluralism can be thought of as a regulatory idea based in the self-development process of self-government along with other liberties. (Tapia 2002: 34, translated by the author.)

<sup>19</sup> See e.g. a case reported from Bolivia. There the indigenous authorities of a

evidence of the absence of the state, either physically or figuratively. In some communities in Bolivia and Colombia it may be the practice to refer the most serious types of criminal cases, such as murder, to the state justice system (Perafan Simmonds 2000: 261, 2001: 217), or to seek assistance with the enforcement of indigenous law sanctions. Interaction between state law and indigenous law is also a reflection of multiple identities operating in a pluralistic legal context.

Transformative juricultural pluralism, coherent with the critical postmodern approach to legal pluralism, places the state and indigenous justice systems on an equal plane and requires actors in both systems to transform their cross-juricultural relations.

*c. International Indigenous Peoples' Rights Norms*

Transformative juricultural pluralism is also consistent with international legal norms. In the twentieth century international law became a tool for indigenous peoples; especially in light of developments in human rights treaties after the Second World War. Self-determination provisions of various United Nations declarations and treaties promoted the independence of colonized countries<sup>20</sup> by recognizing the right to self-determination of peoples. Thus the International Covenant on Civil and Political Rights provided at art. 1:

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community found three men guilty of homicide and sanctioned them to pay a fine and two cows to the family of the victim as well as a fine to the communal authorities. The indigenous authorities went to the local prosecutor and police to seek state enforcement of the sanction. The state prosecutor detained one of the indigenous leaders for obstructing justice for failing to report the murder. (La Prensa 2006).

<sup>20</sup> See: Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7; Declaration Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), UN GAOR, 15<sup>th</sup> Sess., Supp. No. 16, UN Doc. A/4684 (1960); Declaration on Principles of International Law Concerning Friendly relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), UN GAOR, 25<sup>th</sup> Sess., Supp. No. 28, UN Doc. A/5217 (1970); ICCPR; International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 993 UNT.S. 3, 6 I.L.M. 368 (entered into force 3 January 1976) .

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All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The term ‘peoples’ was restrictively defined as entire populations of a territory colonized by a foreign power and excluded those peoples in a situation of internal colonization (Anaya 2004: 100). The subsequent debate centered on indigenous peoples’ struggle for inclusion in the definition of ‘peoples.’<sup>21</sup> Until recently, treaties or declarations on indigenous peoples’ rights have not recognized the right to self-determination because States Parties sought to avoid the implications of a comprehensive application of the principle of self-determination to protect their sovereignty and territorial integrity (Weissner 2003: 302).

In 2007 the General Assembly of the United Nations approved the United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration), representing a significant advance in recognizing the right to self-determination for indigenous peoples. The UN Declaration and the Draft American Declaration on the Rights of Indigenous Peoples (the Draft American Declaration) recognize indigenous peoples’ right to self-determination (UN Declaration, art. 3; Draft American Declaration, III; the latter limits self-determination to internal self-determination while the UN declaration does not specify), autonomy or self-government (UN Declaration, art. 3 bis; Draft American Declaration, art. XX), and their own juridical systems (UN Declaration, art. 33; Draft American Declaration, art. XX1; again the latter draft declaration is more limited by stating that indigenous law is part of the state legal system and can be applied to matters internal to the communities). While the UN Declaration limits indigenous laws to “juridical systems, or customs, in accordance with international human rights standards” (UN Declaration, art. 33), it makes no reference to the subordination of indigenous legal orders to national legal systems. The Draft American Declaration clearly subsumes indigenous legal institutions into and makes them subordinate to state law.<sup>22</sup> In terms of transformative juricultural pluralism, the UN Declaration

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<sup>21</sup> The criteria generally used to define “peoples” are a shared or unique history, ethnicity, culture, language, religion or spirituality, and a unique relation to land (Johnston 2003: 110; Weissner 2003: 372).

<sup>22</sup> Draft American Declaration, art. XXI, states:

- (1) Indigenous law shall be recognized as part of the legal system

offers greater scope for autonomy and egalitarian mechanisms for cross-cultural dialogue than the text of the Draft American Declaration.

Convention 169, adopted by the International Labour Organization in 1989 (ILO Convention 169), has been the only international instrument available to indigenous organizations and legal scholars supporting the recognition of indigenous law in the national sphere. It has been ratified by 17 countries of which 13, including Bolivia and Colombia, are in the Americas. While most Latin American countries have ratified and integrated the provisions of ILO Convention 169 into domestic constitutions it is of questionable usefulness as a basis for transformative juricultural pluralism. The Convention has received limited ratification internationally outside the Americas, it contains an arguably weak recognition of the right to an independent indigenous jurisdiction domestically, and it fails to recognize the right to self-determination of indigenous peoples.<sup>23</sup>

Yrigoyen argues that ILO Convention 169 does not subordinate indigenous jurisdiction to the state system (Yrigoyen 2003: 187). Admittedly article 8(2) grants a specific right to retain legal customs and institutions in the following terms:

These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with

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and of the States' framework for social and economic development.

(2) Indigenous peoples have the right to maintain and strengthen their legal systems for addressing internal matters in their communities, and to apply them in accordance with their own rules and procedures, including matters related to the resolution of conflicts within and between indigenous peoples, and to the preservation of peace and harmony.

<sup>23</sup> ILO Convention 169, art. 1(3) states:

The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law [emphasis in the original].

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internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

However, I would argue that the surrounding text is directed toward the consideration of indigenous customs *within* the state system. Thus article 8(1) provides: “In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws”. Thus there is a sense of ambiguity between the autonomous application of indigenous law and the state application of indigenous customs.

The duality or ambiguity continues in article 9(2), which provides: “The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases”. In article 9(1) the application of indigenous sanctions is considered:

To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected.

These provisions imply that state law may apply indigenous ‘customary law’ and that indigenous authorities may apply their own law within the limits of fundamental human rights norms. I would argue that these constitute minimalist autonomy provisions, and merely mandate States Parties to guarantee the ‘retention’ of ‘customary law’ within a state-centric approach to legal pluralism. In contrast, the UN Declaration provides for the active protection of indigenous law, stating in article 33 that indigenous peoples may promote, develop and maintain their juridical systems. However, Convention 169 does not limit the application of indigenous law in a broad manner, referring only to fundamental human rights as opposed to international human rights norms in general. I would argue that Convention 169 and the Draft American Declaration provide for a more limited respect for indigenous law within the state legal order and do not promote autonomy.

The instruments reviewed in this sub-section illustrate the tensions that arise from various interpretations of the right to autonomy, specifically with regard to indigenous law. Collective rights challenge the hegemony of state centralism and consequently, I would argue, States Parties to the latter two above-cited

instruments perceive a necessity to defend the dominance of state law and the myth of universalism by limiting indigenous law.

International human rights norms validate legal pluralism in general terms by recognizing indigenous peoples' right to maintain their legal institutions. Transformative juricultural pluralism challenges States Parties to move beyond a state-centric approach to a critical postmodern approach to resolve tensions in a manner that respects indigenous autonomy, cultural difference and egalitarian cross-juricultural interaction.

#### 4. Physical Integrity: Human Rights Limitation on Indigenous Law

This section will examine one area of tension with international human rights norms that sparks public debate in countries with indigenous legal jurisdictions such as Colombia and Bolivia.<sup>24</sup> Given that human rights are the express limit on indigenous legal jurisdiction in international law, as well as in some constitutional arrangements such as the new Constitution of Bolivia, the right to physical integrity will be considered in the context of corporal sanctions applied by some indigenous communities.

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<sup>24</sup> Given that this research has not included a field study I have had to rely on texts written in Bolivia and Colombia by academics, and work experience in those countries and in Guatemala. The arguments in this text have been enriched through discussions with individuals much more knowledgeable than I, including academics, rights activists and indigenous leaders. In Colombia, of particular help in the development of my understanding of indigenous law and legal pluralism have been: Edgar Ardila (Professor of Law, National University), Jorge Caballero (Advisor to the Regional Indigenous Council of Cauca), Edgar Londoño (Advisor to the Regional Indigenous Council of Tolima), Manuel Jilacue (Regional Indigenous Council of Tolima), Esther Sánchez Botero (Legal Anthropologist), Martín Tingana (Anthropologist, Member of the Coordinating Committee of the Law School of the Pastos) and the project team of the Community Justice School of the Community Justice Network.

*a. Right to Physical Integrity and the use of Corporal Sanctions*

*Death penalty*

The death penalty could be considered the most extreme case of the use of force by a justice system. Amnesty International estimates that more than two thirds of countries in the world have abolished it in law or in practice (Amnesty International n.d.).

The death penalty, applied in some indigenous communities in the region, is perhaps both the most controversial sanction and the most difficult to study because of its apparently limited or clandestine use in Bolivia, and arguably its disuse in Colombian indigenous communities. In Bolivia, the death penalty appears to have been imposed under indigenous law in the highland Aymara communities and also in the Guaraní community of Izozog in the lowlands. Historically, the death penalty was applied for major crimes by the Aymara and Quechua peoples in Bolivia for crimes considered serious such as murder, adultery, theft and malicious witchcraft (Fernandez 2005: 221). In the Aymara community of Sica Sica in Bolivia, given the threat of prosecution, traditional authorities only hinted to Fernandez that major crimes continued to be sanctioned with the death penalty (Fernandez 2005: 108). In the traditional territory of Laymi-Puraka sanctions such as the death penalty and banishment are being abandoned in favour of higher fines paid in currency, cattle or land (Fernandez 2005: 327). In the lowlands community of Izogog women accused of witchcraft have been banished from the Guaraní community under the threat of death if they return (Van Cott 2000: 229-230).

In Bolivia the new Constitution, in Article 190 (II), expressly states that the aboriginal or indigenous rural subsistence farmers' jurisdiction will respect the right to life as well as the right to a legal defense and other rights and guarantees in the Constitution.

The International Covenant on Civil and Political Rights (ICCPR), particularly Article 6, contains internal tensions that are difficult to reconcile. Sub-section (1) states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." In the next sub-section of Article 6 the death penalty is limited in its application by stating that it is to be applied only for the most serious crimes and by a final resolution of a competent court. The Interamerican Declaration on Human Rights (Pact of San

José), article 4 restricts the ability of states to reinstate the death penalty or broaden its application to crimes not subject to it at the time of States Parties' ratification of the treaty. Interestingly, the prohibition against torture, including corporal punishment, appears to have been addressed more forcefully by the Human Rights Committee than the death penalty. The Committee states, in its General Comment No. 20, that when the death penalty is carried out for the most serious crimes it "must be carried out in such a way as to cause the least possible physical and mental suffering" (UN Human Rights Committee 2006: para. 6). This is one of the tensions within the ICCPR resulting from the fact that the death penalty is not actually prohibited by article 6.

The justification for lynching and vengeance killing as sanctions applied within indigenous law conflates what are arguably homicides into a discussion of legal sanctions. I would argue that lynching and vengeance killings, regardless of the degree of social acceptability, do not constitute a legitimate legal sanction enforced by a judicial indigenous authority within international law.

#### *Corporal Sanctions*

The community studies conducted by researchers in Bolivia and Colombia show that, while corporal sanctions are still applied in some communities, the principal sanctions are now of an economic nature (Perafán 1995: 40; Flores Gonzales 2003: 132). Communities may resort to corporal sanctions for the most serious offences when compensation has not been sufficient to achieve the restorative objectives of rehabilitation and social harmony (Perafán et al. 2000; Fernández 2005: 108-109). Corporal sanctions are also applied as a general deterrent (Fernández 2005: 7). Deterrence is sought through the public application of corporal sanctions by either community authorities or family members in an effort to shame the individual and his or her social group and to serve as an example to the community (Perafán 1995: 40). Indigenous leaders and some academics assert that corporal sanctions are more humane than long-term imprisonment since they permit the individual to remain in the community for his or her rehabilitation (Perafán et al. 2000: 165; Calla Ortega 1999: 66-67). Arguably, analysis of the use of corporal sanctions needs to be considered within the communal context of the indigenous community. These physical sanctions, from a 'western' legal perspective, are considered prima facie violations of international human rights norms such as the right to life and the prohibition against torture and cruel and inhuman treatment.

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The general objective of sanctions in indigenous justice systems – whether corporal or not – is to restore equilibrium and harmony to social relations in the community and to rehabilitate the individual socially, spiritually and morally (CERES 1999: 93; Albó 2003: 90-95; Defensor del Pueblo 2003: 42). The practice of lashing and the use of stocks have been considered by the Constitutional Court of Colombia with specific reference to the international prohibition against torture, and cruel, inhuman and degrading treatment found in various instruments.<sup>25</sup> The Convention Against Torture (CAT) defines torture in Article 1 as:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

At first glance the use of legally defined corporal sanctions appears to be excluded from the scope of the definition; however the United Nations Human Rights Committee and Manfred Nowak, the previous Special Rapporteur on Torture, have stated that corporal punishment, even if prescribed in law, is contrary to this provision (Nowak 2005: paras. 5, 18-28<sup>26</sup>). The Special Rapporteur noted that the

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<sup>25</sup> *Gembuel Pechene v. Passu* (15 October 1997), Colombia Constitutional Court, T-523/1997; *González Wasorna v. Asamblea General de Cabildos Indígenas Región Chami y Cabildo Mayor Único* (8 August 1996), Colombia Constitutional Court, T-349/1996.

<sup>26</sup> Thus:

Lawful sanctions refer only to penal practices that are widely accepted as legitimate by the international community and are compatible with basic internationally accepted standards. (UN High Commission for Human Rights 2002: 33)

Human Rights Committee and the Committee Against Torture have declared that flogging amounts to cruel, inhuman or degrading punishment (Nowak 2005).

In *Errol Pryce v. Jamaica*<sup>27</sup> the Human Rights Committee expressed the view that, regardless of the crime committed by the accused, corporal punishment constitutes a violation of article 7 of the ICCPR.<sup>28</sup> However, these treaty bodies do not examine corporal punishment applied under indigenous peoples' justice systems or other para-statal or non-state actors because States Parties, such as Colombia and Bolivia, have not provided information on the indigenous legal jurisdictions.

The Inter-American Court on Human Rights also condemned the lawful sentencing of a prisoner to fifteen lashes with a knotted rope.<sup>29</sup> The Court held that, although lawfully prescribed, the sanction amounted to torture. Arguably, the cited cases of state-sanctioned flogging and the situations considered by the Committee against

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<sup>27</sup> CCPR/C/80/D/793/1998 (13 may 2004).

<sup>28</sup> In that case the complainant was flogged six times with a tamarind switch on the buttocks with his pants removed and with approximately 25 prison wardens observing. The Human Rights Committee, at paragraph 2.4, describes the administration of the punishment as related by the complainant in his affidavit:

... he was blindfolded and ordered to drop his pants and underpants. His feet were lifted and placed in slots in the floor in front of a barrel that was lying on its side. His arms were drawn forward so that his body was lying across the barrel. A warder placed the author's penis into a slot cut out in the side of the barrel. His wrists and ankles were strapped to the platform. He states that a doctor and about 25 prison warders were present during the whipping. According to the author, the doctor did not examine him afterwards.'

<sup>29</sup> In this case, the prisoner had undergone surgery two weeks prior to the administration of the corporal punishment and was made to lie naked in a spread eagle position while strapped onto a metal structure. He was flogged on his back and remained in the prison infirmary for two months following the punishment. *Caesar v. Trinidad y Tobago* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 123 at para. 72 (the reference to the 'knotted rope' being a description of a 'cat o' nine tails' rope).

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Torture<sup>30</sup> are more severe and humiliating as compared to the lashings described in the case studies in Bolivia and Colombia. For example, in the Colombia case described below, the Nasa peoples apply lashes on the back of the calf with the individual fully clothed.

The Colombian Constitutional Court found that lashing did not inflict severe pain or suffering, nor was the sanction humiliating to the offender given his cultural context and distinguished the lashings administered by the community from the sanction in *Tyrer v. United Kingdom* ((1978) 26 Eur.Ct.H.R. Ser. A).<sup>31</sup> In that case, the European Court of Human Rights found that the lashing of the complainant did not amount to torture or ‘inhuman treatment’ (para. 29) but it assessed the facts of the case in light of the prohibition against ‘degrading’ treatment. The Court suggested the most important criterion for the determination was the degree of humiliation experienced by the complainant (para. 30). The European Court also noted the assessment must be made on the circumstances of a case and, “in particular, on the nature and context of the punishment itself and the manner and method of its execution” (para. 30). The Court found that the lashes across the bare buttocks of the young offender by strangers reached the level of humiliation to be considered degrading treatment. I would argue that the degree of humiliation was of a more serious nature in the state-sanctioned punishments reviewed by the international tribunals than the lashings applied in indigenous communities in Bolivia and Colombia. In all the state-sanctioned cases, the complainants were either fully or partially naked, and made to lie over a table or were strapped onto a table or other device. The lashes, although not significant in

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<sup>30</sup> The Committee Against Torture has considered judicially sanctioned flogging and amputation of limbs in Saudi Arabia, finding both forms of punishment a violation of the Convention (UN Committee Against Torture 2002). The Committee states that the corporal punishment of flogging and amputation are not in conformity with the Convention, but does not describe cases of flogging. The use of flogging in Saudi Arabia may be distinguished from the case studies, cited here, by their severity and degree of humiliation, given that the prisoners are stripped naked and shackled at the hands and feet. Amnesty International gives examples of sentences of 4,750 and 1,500 lashes are applied at the rate of 50 lashes every 6 months over the duration of imprisonment (in the cases referred to imprisonment was 15 years) (Amnesty International 2002.)

<sup>31</sup> At para. 10 it is stated that the youth had to pull down his trousers and underpants and bend over a table for the lashes to be administered.

number, were applied on bare skin. Regardless, international human rights agencies have clearly stated that all corporal punishment by a state official is a violation of the prohibition, a norm claimed to be universal.<sup>32</sup>

*b. Physical Integrity Jurisprudence and Transformative Juricultural Pluralism*

I would suggest that the rights provisions, individual cases and observations of the UN bodies discussed above generate specific lines of inquiry that need to be considered in the context of transformative juricultural pluralism.

The first line of inquiry is critical to transformative juricultural pluralism. Is the prohibition against torture and cruel, degrading and inhuman treatment, and by deduction all forms of corporal punishment, actually universal?<sup>33</sup> Arguably, international human rights norms have been declared universal by the dominant discourse. An-Na'im examines the paradox of the universality question.

Human rights are by definition universal because they are the rights of human beings, everywhere, by virtue of their humanity, and without any distinction on such grounds as race, sex, religion, or national origin. But the quality of being a universal norm can only be achieved through a global consensus-building process, and neither assumed, nor imposed through the

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<sup>32</sup> *Caesar v. Trinidad y Tobago*, above, para. 70. However, the concept of universality of rights has been criticized for being a 'western' cultural construct in that human rights were universalized by the 'west' without a genuine cross cultural debate (Santos 1995: 337-342). Santos and others do not, however, argue for 'cultural relativism', claiming the universalism versus relativism duality is a false debate (Santos 1995: 339; Macklem 2001: 40-43).

<sup>33</sup> The same question could be posed regarding the death penalty. Arguably the prohibition against the death penalty is not universal. Amnesty International notes that in law 87 countries have abolished capital punishment for all crimes; 11 have abolished the death penalty for all but the most serious crimes 27 countries retain the penalty in law but not practice and 71 retain the use of the death penalty: Amnesty International, "Facts and Figures on the Death Penalty" (27 June 2006), online: <<http://web.amnesty.org/pages/deathpenalty-facts-eng>> .

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hegemony of universalizing claims from one relativist perspective  
or another (An-Na'im 2004: 101).

I would argue that, while the prohibition against torture is likely an intercultural norm in the sense of prohibiting the arbitrary and egregious use of force by state officials, corporal punishment in multiple forms remains a prescription for aberrant behaviour in many cultures, and its prohibition as degrading treatment, cannot simply be declared universal. In reality, state practice may negate the declarations of universalism by states or UN bodies.<sup>34</sup> Therefore, the suggestion that lawful sanctions must be practices widely accepted as legitimate by the international community warrants an exhaustive intercultural dialogue to determine the shared criteria of legitimacy (Santos 1995, Santos 2002b; Hoffe 2000. Hoffe claims that intercultural criminal law needs to be defined by shared moral principles rejecting a technical and codified approach to international human rights.)

Second, can the lashings applied in the case studies mentioned above be distinguished from the international cases cited? The European Court in *Tyrer* noted that all criminal sanctions involved some degree of humiliation (para. 29), so that to amount to degrading treatment “the humiliation or debasement involved must attain a particular level and must in any event be other than the usual element of humiliation ...” (para. 30). The Court went on to assess whether the lashings in that case resulted in severe physical or mental effects. Additionally and ambiguously, the Human Rights Committee has stated that the prohibition extends to corporal punishment that involves “excessive chastisement”, UN Human Rights Committee 2006: para. 5). I would argue that the lashings described in the case studies can be distinguished from the international cases reviewed. First, there does not appear to be a level of debasement or humiliation in the cases from indigenous communities that would trigger the ‘degrading’ prohibition.

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<sup>34</sup> The Supreme Court of Canada did not find unlawful a provision of the Criminal Code which permits parents and teachers to use force to correct children as long as it is reasonable given the circumstance (*Canadian Foundation for Children, Youth and the Law v. The Attorney General in Right of Canada* [2004] 1S.C.R. 76, 234 D.L.R. (4th) 257, 2004 SCC 4). It should also be noted that the concept of what is tolerable punishment evolves in time. In Canada for example, strapping and whipping was permitted as a form of discipline in prisons until 1972, when the relevant section of the Criminal Code was repealed. The strap, whip or paddle was applied on the bare back or buttocks (Colin Farrell n.d.).

Admittedly, the case studies do not include the subjective narrative of individuals who have received lashings, so the physical or mental effects are difficult to determine. Nor is the issue of non-conformity with corporal sanctions within the communities a topic of discussion in the case studies. Yet, the information on lashings could be interpreted as showing that they are less humiliating than those in the international cases. The information in the cases indicates that the lashings are generally applied by members of the governing bodies in the amount of one to three lashes per member to a person who is fully clothed.

Assuming a position of cultural ‘incompleteness,’ I would argue that it is extremely difficult for state legal authorities to assess whether such a sanction amounts to degrading treatment, including excessive chastisement, without entering into a cross-juricultural dialogue. Otherwise, one legal culture is unilaterally imposing its world view regarding legitimate sanctions without respect for cultural difference. I would proffer the opinion that these lashings do not amount to degrading treatment as they do not appear to meet the repugnancy threshold for either humiliation or pain and suffering. A full inquiry into the meaning of humiliation and its diverse interpretations across cultures is beyond the scope of this paper. I would propose that, within the cross-juricultural dialogue, the concept of ‘human dignity’ be debated from the position of cultural ‘incompleteness’ in order to achieve an intercultural understanding (Santos 2002b: 47, acknowledging that all cultures have distinct conceptions of human dignity).

Finally, can the tensions in international law between the right to self-determination and the rights protecting the physical integrity of individuals not be resolved within indigenous legal orders without interference by international and, consequently, state law? The lines of inquiry discussed above require both cross-juricultural dialogue and intra-juricultural reflection. An-Na’im argues for local self-regulation of human rights to counter the dependency perpetuated through the international regime’s focus on state law (An-Na’im 2003: 105-109). I would assert that the international right to self-determination must include the right to self-regulation, otherwise the universalism of rights discourse is perpetuated and autonomy becomes a hollow concept.

The Superior Indigenous Tribunal of Tolima in Colombia is an example of an internal review mechanism. It was established by the regional organization of local indigenous councils to strengthen local indigenous legal orders, liaise with state law officials, if necessary, and resolve inter-council jurisdictional conflicts that are brought to the Tribunal’s attention (Londoño Montoya and Romero Bossa 2005:

28-33). An analysis of indigenous law in Tolima recognizes that critical self-reflection strengthens the application of indigenous law in the communities. For example, the analysis demonstrates a particular concern for lack of enforcement by some local Council in cases of child support and other complaints brought to the attention of authorities by women (Londoño Montoya and Romero Bossa 2005: 18).

## 5. Towards Transformative Pluralism

In this section, I will reflect on the layers of tensions that have emerged between legal orders or cultures in the preceding sections. This reflection is grounded in the three main elements of transformative juricultural pluralism I elaborated at the outset. Three elements of the transformative approach ensure respect for the autonomy of indigenous law: non-interference by state law, respect for cultural difference based on cultural ‘incompleteness,’ and egalitarian measures for cross-juricultural dialogue.

### *a. Resolving Tensions in the International Realm*

Human rights agreements, developed after World War II, were the outcome of a political debate that resulted in a more individualistic approach. Convention 169 and now the UN Declaration on Indigenous Rights, to be finally considered by the UN General Assembly, challenge states to address the collective rights of indigenous peoples that have been ignored and denied in international human rights law. Since its inception, the human rights regime has challenged the status quo by gradually piercing state sovereignty, promoting a universal jurisdiction in the criminal realm (Sriram 2003), and redefining the subjects of international law.<sup>35</sup> The ‘success’ of human rights is tempered by the resistance of states to the full adoption of treaties and international dispute resolution mechanisms.

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<sup>35</sup> There has been a redefinition of the subjects of international law through a gradual introduction of non-state actors into international law, especially in the law of armed conflict and human rights. (See e.g. International Committee of the Red Cross, 1996; also Clapham 2006.)

Bunn-Livingstone analyzed declarations and reservations made by States Parties to international human rights conventions, in order to determine the degree of pluralism in international treaty law (Bunn-Livingstone 2002). She found that, despite widespread participation, the high number of reservations deposited upon ratification,<sup>36</sup> and justified by reference to domestic legal practices, was indicative of tension and juricultural pluralism. She found that the use of the term ‘universality’ by States Parties was a reference to universal participation and not uniform acceptance of norms. The ‘universality’ of human rights treaties, actually a sign of widespread participation, is contradicted by the significant number of reservations. The simple fact that the international system permits reservations to multilateral treaties suggests a tolerance for pluralism and national interpretation and application of international norms. The significant degree of state practice related to reservations demonstrates the empirical reality of pluralism and the mythical nature of universalism (Bunn-Livingstone 2002: 300-301).

Transformative juricultural pluralism, as applied to indigenous peoples’ rights, attempts to move beyond the universalism–cultural relativism debate by promoting respect for cultural difference and mechanisms for cross-juricultural dialogue. In the international realm the recent endorsement of the UN Declaration on the Rights of Indigenous People by all UN member states, including the four that had initially voted against the Declaration, provides a normative international framework for states and indigenous peoples. It is important to note that the distinct interpretations of the Declaration by states, including Canada, corroborate my argument herein that international human rights provide a normative framework for national cross-juricultural dialogue mechanisms to resolve collective and individual tensions, such as corporal sanctions, relevant to the context.

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<sup>36</sup> At the time of her study there were 910 reservations to 6 treaties (Convention on the Rights of the Child, International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Prevention and Punishment of the Crime of Genocide, Convention on the Elimination of All Forms of Discrimination Against Women). The percentage of States Parties making reservations to these conventions was generally more than 30% with the lowest number of reservations being made to the Genocide Convention. (Bunn-Livingstone 2002: 296.)

*b. Resolving Tensions in the National Realm*

*Balancing Collective with Individual Rights*

There is a broad tension emerging in the national sphere between the protection and promotion of cultural plurality and the individual rights guarantees that are in force within countries. The recognition of cultural plurality translates into collective protections for indigenous cultures which inherently provoke tensions with individual rights. This tension can be characterized by the collective/individual duality, although it may be inaccurate to label this tension as dichotomous. It could be more accurately analyzed along a continuum from extreme collective autonomy to extreme individualism.

A remedy for this tension between collective and individual rights could be found in an innovative juricultural constitutional arrangement that would recognize the right to self-determination expressed in the form of autonomy of indigenous legal orders without ignoring individual rights protected in national law. An example of such an arrangement can be found in the new Bolivia Constitution. Article 179 (11) recognizes that indigenous and 'ordinary' legal jurisdictions enjoy the same normative hierarchy. A recent law, Law 102 of 2010, demands all legal jurisdictions in the country, including indigenous systems, to respect the right to life and other rights expressly identified, including the equality rights of women, children and senior citizens.

Transformative juricultural pluralism promotes the plurality of legal cultures and their multilateral interaction through a juricultural dialogue mechanism to define shared procedural and substantive principles in an effort to find a balance along the collective/ individual continuum. Additionally, this balance also needs to be addressed by internal limits defined by communities. I would argue that emancipatory methodology, which privileges local subjective knowledge generation, demands respect for internal review processes. According to An-Na'im, an approach that empowers local communities to protect their own rights counters the dependency perpetuated by human rights protection mechanisms because "it respects and trusts the human agency of those communities" (An-Na'im 2004: 110-11). This approach to local empowerment is consistent with the emancipatory methodology of transformative juricultural pluralism and would, arguably, advance the decolonization of human rights practice.

*Juricultural Dialogue to Define Concepts and Limits*

Also in the national realm, a more specific tension between corporal sanctions applied in some indigenous communities and specific protections, such as the right to life and the prohibition against torture, is evident. Although cultural perspectives on sanctions vary, the international human rights provisions, treaty body observations and case law call upon States Parties to ensure conformity with the dominant and arguably ‘western’ human rights discourse. Indigenous legal cultures may appear to punish transgressors harshly, although, I would suggest, the punishments are simply different from ‘western’ sanctions. The communal way of life characteristic of most indigenous communities requires a high degree of cohesion among members to maintain communal and family interests. I have argued that the corporal sanctions applied in the indigenous communities studied do not amount to degrading treatment because they do not appear to cause intense pain or humiliation. Interviews in Colombia and Bolivia have confirmed this assessment. Lashings are used sparingly and media coverage of egregious lashings serves also to ensure lashings are mostly symbolic in nature. Also, a study of community justice in rural areas in Bolivia found that the criminal sanction causing the most concern among community members was long-term imprisonment in community jails when rehabilitation was deemed impossible (Calla 2008). I would argue that a determination of whether a sanction amounts to degrading treatment should be made in the local and national context through a process that is respectful of juricultural difference.

A cross-juricultural dialogue based on the combined approach to the definition of law which I argued for in the first section could address this specific tension between cultural understandings of human rights, human dignity and legitimate sanctions. The subjective perspective of the community is considered and the juridical aspects of community legal norms and sanctions are assessed in a dialectic process. The death penalty is an example where such a combined analysis would be helpful. Do the community subjects define the death penalty as a criminal sanction within their legal culture? The important issue here is whether the community members regard the death penalty as a conventional and legitimate sanction within their legal order. When does the acceptance of vengeance killing cross from being a social to being a legal norm? I would argue that these two questions can best be determined through the lens of the more juridical definition of law. The inquiry would then examine whether particular offences call for the sanction, what regular procedures are respected in the community and whether the

authorities tasked with adjudicating offences have applied the sanction following these regular procedures. The exploration of these specific tensions through cross-juricultural dialogue based on cultural 'incompleteness' is consistent with Santos' proposal for transforming human rights into a truly multicultural rather than a universalized 'western' concept (Santos 1995: 340-363, 2002b).

## 6. Conclusion

This paper has illustrated the tensions between legal cultures that are bound to surface in national and international spheres and that are characterized, at least empirically, by pluralism.

The tensions that emerged in the analysis of corporal sanctions and international rights protections cannot be conclusively resolved. The broad collective/individual dilemma and specific rights-based tensions will remain in both international and national spheres. However, the transformative juricultural pluralism I propose should help the management of the tensions in an innovative manner that respects juricultural difference. This approach counters the hegemony of dominant practice and discourse through attention to the autonomy of indigenous legal cultures and shared cross-juricultural meanings of law. In order to engage in a multicultural circumferential process, representatives of legal cultures need to commit to the concept of cultural 'incompleteness.' I argue that, taking the right to self-determination as established, indigenous peoples should internally review and limit their law without state intervention. This will not mean that the state is absent. Unlike other categories of legal pluralism examined at the outset, this approach challenges both state law and indigenous law to transform intra-legally and inter-legally. The transformative juricultural approach, specifically through the adoption of an emancipatory methodology and the three essential elements, offers a means to move beyond the weak pluralistic reality into an uncontrolled and complex radical pluralism.

Academics, human rights institutions, development agencies and judicial bodies can develop the elements of transformative juricultural pluralism in practice. The transformative juricultural approach calls on indigenous justice authorities and state or official justice authorities to create formal inter-juricultural dialogue mechanisms to resolve tensions or conflicts between jurisdictions. These may take the form of a mixed constitutional court or a specialized mixed tribunal to address the contradictions and tensions between justice systems and constitutional

guarantees. In Colombia the Judicial Council has promoted judicial education and communication between judicial authorities of the state and indigenous jurisdictions with the participation of anthropologists and human rights experts. In Guatemala, Colombia and Bolivia indigenous justice authorities and lawyers have confirmed to me that local dialogue between prosecutors, judges and indigenous authorities is practiced successfully on a case by case basis even when formal high court mechanisms or procedures have not been developed.

Finally, internal review mechanisms need to be promoted at the community or sub-national level so that the second element of transformative juricultural pluralism, respect for difference, is promoted within as well as between justice systems. The promotion of review tribunals and indigenous law schools by representative indigenous peoples' political organizations, such as the various indigenous law schools in Colombia and the Tolima Superior Indigenous Tribunal, helps strengthen human rights education and critical thought within indigenous communities.

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