The Protection of Indigenous Rights: the Implementation Challenge

Rodolfo Stavenhagen

Numerous countries on the American continent have in recent decades reformed their constitutions or enacted legislation related to indigenous peoples. Argentina, Bolivia (1994, 2010), Brazil (1989), Colombia (1991), Ecuador (2008), Guatemala (1984), Mexico (2001), Nicaragua, Panama, Paraguay, Peru (1993) and Venezuela (1999) have all carried out constitutional reforms in which some rights of indigenous peoples are recognized for the first time. In Canada the Constitution Act of 1982 also recognizes aboriginal and treaty rights, but other countries in the region have not done so. Chile adopted a law on indigenous peoples in 1993, but two attempts to modify the constitution (in 2001 and 2005) failed to pass in the national Congress. The Peace Accord on Indigenous Rights and Culture that was signed in Guatemala in 1995 did not become entrenched in the country's constitution, as was expected, because a popular referendum on this issue did not obtain the required majority.

These legislative reforms relate to numerous issues, such as rights to land and territory, to language, education and culture and, in some cases, to autonomy and self-government as well as customary law. One can speak of a new pluralist constitutionalism that signals the recognition of indigenous peoples as political subjects, a change in the identity of the nation-state which now sees itself as multicultural, the right to a collective indigenous identity and, in some cases, the recognition of legal pluralism. The institutional implementation, legislative and jurisprudential developments as well as the appropriation of these reforms by the indigenous peoples themselves has been unequal in the region.

In other parts of the world there have been more modest developments. Russia, Philippines, Cambodia have recently adopted laws regarding native peoples, Malaysia has a similar law on the books since 1954. Some Asian countries refer to

their ethnic minorities or tribal groups rather than to indigenous peoples. In Africa a few countries recognize indigenous peoples as such, like Ethiopia, Cameroon and Uganda, and more recently South Africa. The African Commission on Human and Peoples Rights has begun to take an interest in these issues and published a report in 2005 concerning indigenous peoples on the African continent.

Despite these important legislative measures and institutional reforms there is an “implementation gap” between legislation and daily realities. The full implementation of the progressive legislation regarding indigenous peoples that has been adopted in the last few decades still faces multiple problems and obstacles.

Indigenous peoples have learned over time, just as other marginalized and discriminated against groups have learned as well, that only through social struggle and democratic participation in the political process and the affairs of state, can they improve their citizenship rights. The new legislation has opened institutional spaces allowing indigenous organizations and social movements to participate increasingly in electoral politics according to the specific circumstances of the various countries. For example, in the September 2005 elections the recently created Maori Party won four seats in the New Zealand Parliament, as a result of Maori dissatisfaction with the Foreshore and Seabed Legislation enacted by Parliament in 2004. The indigenous Pachakutik party participated for a few months in a spurious government in Ecuador, and suffered an internal crisis as a result. In December 2005 Bolivia elected for the first time in its history an Aymara peasant leader as president of the country, by a large majority. With President Evo Morales Bolivia was “refounded” and declared to be a “multinational state” under the new constitution adopted by referendum in 2009

Despite these signs of change, the level of indigenous participation in the political life of their countries and their impact in the various areas in which they take part in general is still low, basically as a consequence of their longstanding social and

economic marginalization, which stands out clearly in the legislatures. In some parliaments, indigenous peoples have reserved seats(as in Colombia and Venezuela), in others distinct electoral rolls (New Zealand), yet mostly if they stand for national elections at all, it is within existing political party structures, where they are usually a minority and exercise only little influence on party platforms and agendas (Ex. Guatemala). Their particular concerns, even if they do carry a lone or fragmented voice in parliament, are thus usually diluted in the wider political process. That is also why they are usually under-represented in parliamentary committees that deal with issues of interest to indigenous peoples. Participants in an international seminar of indigenous parliamentarians consider that this is a major reason why indigenous peoples concerns are usually not taken into account in legislative processes.

Another issue of concern is the non implementation of international standards concerning indigenous rights at the domestic level. Sometimes domestic legislation is wanting even after a state has ratified an international convention. Public officials may ignore such legislation altogether and courts will not take it into account. Numerous reports indicate that countries that have signed and ratified ILO's Convention 169 are not actually applying it in concrete cases. Often there is also inconsistency between human rights legislation and sectoral laws relating, among others, to mining, water, forests or other natural resources. As the latter may often protect powerful special interests, the human rights of indigenous peoples are put on the back-burner.

Obstacles to implementation also arise within the domain of public administration when called upon to apply the human rights legislation concerning indigenous peoples. Sometimes the special departments that should be set up to carry out human rights policies are not established or do not have a clearly defined function. The lack of trained personnel is another problem, and very frequently even after they are established, these units do not receive the resources enabling them to

carry out their activities efficiently. Priorities for the allocation of resources seem to lie elsewhere.

Some countries have made progress in the recognition of the jurisdiction of indigenous customary law when it applies mainly to local matters, but in general the courts do not see a specific indigenous jurisdiction favorably. The tensions between the formal or ordinary law and indigenous jurisdictions may sometimes be resolved in favor of the rights of indigenous peoples but mostly they are not. I have a Special Rapporteur of the United Nations received numerous complaints about the human rights violations of indigenous persons within the justice system. Indigenous (mainly youth) have higher incarceration rates and appear more often in the criminal justice system than non-indigenous. Mexico has put in place a special program to liberate indigenous prisoners in the criminal justice system whose trials may have been tainted by bias, discrimination, corruption or simply legal sloppiness. In some countries native courts and indigenous jurisdictions are recognized and respected, and evaluations show that usually their results are satisfactory. In Peru local communities have set up “peasant patrols” to maintain order and justice and they have been so successful that a special law was adopted to allow them to function within the wider justice system. A similar system of “community police” operates in the indigenous communities of southern Mexico.

National and provincial level courts have not yet adapted fully to the requirements concerning the rights of indigenous peoples and communities. Some of their decisions may still be informed by the racist and discriminatory opinions handed down by earlier generations of judges, or else derived from legal scholarship that described indigenous as savages, primitives or barbarians. Recent decisions by supreme courts, courts of appeal or constitutional courts in some countries (for example Colombia and Canada) have opened the way towards a more equitable justice system. Others, however, seem to be mired in past approaches (such as the concept of terra nullius, the denial of the original sovereignty of indigenous peoples over their lands, territories and resources, the arbitrary vesting of

communally held indigenous lands in the state, the open or subtle affirmation of the racial and ethnic superiority of the descendants of the European colonists, the premise that the cultural assimilation of indigenous people into the dominant mold is not only inevitable but also desirable. Next to a pluralist constitutionalism, it is necessary in many countries to reform the judiciary if the rights of indigenous peoples are to become legally enforceable and respected.

Recent developments at the international level are equally important. The Inter-American Court of Human Rights has handed down a number of path-breaking decisions whereby the rights of indigenous communities are upheld against the state, in accordance with new interpretations of the American Convention of Human Rights. Trouble is that governments are reluctant to comply even when they recognize the jurisdiction of the Court (the case of *Awas Tingni* against Nicaragua for example). The Inter-American system, unfortunately, is not prepared to deal with non-compliance by member states effectively. The Inter-American Commission of Human Rights has encountered similar problems.

At the UN level, a number of treaty bodies, such as the Committee on Human Rights, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and others have in recent years taken up the issues raised by indigenous peoples and have, in some cases, made relevant recommendations to states against which complaints were duly filed. Being members in good standing of these UN bodies which they themselves created, some states parties to these Conventions are making efforts to maintain the human rights standards with regard to indigenous peoples and to act accordingly at the domestic level. Others, however, have chosen to disregard the work of these Committees, and unfortunately the UN does not possess mechanisms to enforce its own decisions. (An important case concerning the discriminatory effects of the Foreshore and Seabed Act in New Zealand that came before the CERD in 2005, and another on the land rights of the Western Shoshone in the USA are good examples of the difficulties involved).

Even more serious for its effects on the rights of indigenous peoples is the increasing use by some states of anti-terrorist legislation to dismantle the legitimate social movements that demand land rights, environmental rights or development rights, among others, by indigenous communities. This is not the only kind of legislation that tends to criminalize social movements, but it has the most threatening implications because of the severity of the accusations and the sentences that ensue. In some countries, the courts have been much more lenient than the public prosecutors on indigenous activists. A case in Chile in 2005, where some Mapuche leaders were spoken free of such fabricated charges by a district court illustrates these issues well. But new accusations under this arcane legislation have been addressed again against the Mapuche militants.

How to effect and ensure the adequate implementation of national and international human rights standards for the protection of the rights of indigenous peoples has become the new challenge that must be addressed in the coming years if we are to move from rhetoric to practice.

Many indigenous communities and human rights associations have learned their lessons over the last decade, and they are increasingly acceding to the judicial mechanisms of international organizations to demand justice against the human rights violations of which they are the victims. They are now involved in "strategic litigation" at both the domestic and the international levels, an activity that is becoming more and more important in the legal strategies of indigenous peoples.

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