

## **Incorporating Indigenous Legal Systems in the Curricula**

By:

Dean Edgardo López Herrera

Dean, Faculty of Juridical, Political and Social Sciences  
Universidad del Norte Santo Tomás de Aquino, Argentina

We can see the theme of indigenous legal systems from two points of view. The incorporation of indigenous legal studies to the curricula of our schools of law may consist of a course where students can learn all the norms related to preexistent original peoples existing in Argentina (bilingual education, language, multicultural recognition, right to their land, etc.). Or it can be viewed as a course where the indigenous legal systems will be studied with independence of the State legal system, for example indigenous justice, indigenous judges or simply the right of Indians to put into effect their consuetudinary law in the regulation and solution of their internal conflicts).

Our Constitution says in Section 75 sub paragraph 17: *"Congress is empowered: To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina To guarantee respect for the identity and the right to bilingual and intercultural education; to recognize the legal capacity of their communities, and the community possession and ownership of the lands they traditionally occupy; and to regulate the granting of other lands adequate and sufficient for human development; none of them shall be sold, transmitted or subject to liens or attachments. To guarantee their participation in issues related to their natural resources and in other interests affecting them. The provinces may jointly exercise these powers."*

Besides, Argentina has ratified by law 24.071 the Convention concerning Indigenous and Tribal Peoples in Independent Countries, of the General Conference of the International Labour Organisation. This Convention establishes in Section 31 that *"Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples."*

Finally the United Nations Declaration on the Rights of Indigenous Peoples, also says in Section 15 Article 15, that *"Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information."*

As we may see there are strong legal reasons to begin to study indigenous legal systems in Argentina.

The need to have indigenous studies in the curricula of our universities is centered in the first analysis. Is the study of the national Indian law, which will include the norms related to indigenous peoples, and will be able to study the internal indigenous justice and conflict solution among their members? In other countries of South America the situation is different, because their indigenous conscience is stronger. In those countries there are several courses of indigenous law, but in Argentina, as far as we know, only the School of Law of the University of Buenos Aires, has a specific course of indigenous law.

Indigenous law is a specific branch of the law that can't be denied with the advancement of human rights. There national and international laws, as well as judicial decisions, again nationals and internationals, that have into account this new law.

This need is strengthened because in some parts of Argentina, disputes are frequent and evident, particularly in the area of land claims. That's why the legal community needs judges, prosecutors, public defendants, litigating lawyers, with solid knowledge or indigenous law and profound experience in the way of living of original peoples. This aim will be achieved with the inclusion of the study of indigenous legal systems in the curricula of the schools of law of Argentina.

The question is whether indigenous legal systems constitute an autonomous branch of the law that will justify its inclusion in legal curricula. To predict that a branch is autonomous there's a three prong test that has to be met.

First the pretended new branch has to be scientific and didactically. It has to be a particular subject of investigation and teaching.

Second, it has to be juridically autonomous, that's means that the norms of the new discipline must present a whole system of particular features.

Third, it has to be legally autonomous. The laws relating to the new branch need to be in a separate body of law.

We believe that for the moment, in Argentina, indigenous law, has juridical autonomy, very different from the civil law system that is rooted in ancient Roman law. Legislative autonomy can't still be completely predicted, but each the everyday growing of norms related to indigenous legal systems, make us believe that we are not far from this goal.

The great debt is, for the moment, didactic autonomy. In our law schools, our programs of study include indigenous subjects, but they vary. In some schools it's a part of property law, because our constitution recognizes the right of original people to own the land that they ancestrally occupy. It's a right of property, but different of civil property. In other law schools the indigenous question is studied in constitutional law, because, as we have said, property of the land by Indian communities is a right guaranteed by the constitution. Finally in other law schools, it's a part of human rights studies, because indigenous rights are mentioned in many treaties that Argentina has subscribed. And we can also say that in some law schools, it can be a part of property law, constitutional law and human rights at the same time.

In the north or Argentina, where our University is located, there are still large communities of indigenous peoples, and in many cases conflicts arises. Those disputes are mainly cause because of the possession and property of the land, but some other cases are more demonstrative of the need for deeper knowledge of indigenous norms.

One example is the clash between Indian medicine and the rights of children. Some cases, that have been broadly shown in the media, have aroused when parents refuse to medical hospitalization of their children because they are already been treated by the tribe wise medical man. In some cases compulsory hospitalization has been ordered to prevent imminent danger of death.

Another example of the need of deeper knowledge of indigenous norms is a real case that happened in Salta, where still large Indian populations live. The father of a 13 year

old teenager girl was indicted of rape, because he had sex with her. He appealed the indicted to the Supreme Court of Salta, because he said he was following an ancient initiation ritual of the tribe. The Court overruled the indictment and sent it again to the judge ordering him to investigate if such a practice really existed. Once it was done, the judge indicted again the Indian father. This time, with new evidence on the contrary, the Supreme Court of Salta sustained the new indictment. The man is waiting his oral trial.

We hope and we will propose that in the future we will have indigenous law in the curricula of the north of Argentina, as a separated subject in our plan of studies.