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The Evolution of Indigenous Land rights in the Andes From Survival to Legal Recognition

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The title of this paper expresses two main themes which can be considered central to the purpose of this congress. Firstly, the evolution of the indigenous land tenure system in the Andean region (the effect of the imposition of different ideologies regarding the use of the land), and secondly, the implications of the survival and legal recognition of the traditional model of land occupation.

Geographically, this paper explores the land tenure system of the indigenous inhabitants of the highlands of the central Andes, which stretch from southern Peru to southwestern Bolivia. Since pre-Columbian times, these places have been home to the natives of Quechua and Aymara populations, inheritors of the pre-Hispanic Colla and Inca cultures. The Aymara occupy the northern side of the plateau (they are to be found prevalently in the Lake Titicaca basin and on the surrounding plains). The Quechua inhabit the southern side of the plateau and in areas of lower altitude, known as inter-Andean valleys.

Our interest in this area derives from the fact that it has, since pre-Columbian times, been home to the so-called *ayllus*: groups of extended families which have ensured the control and use of natural resources in accordance with traditional rules which we will be having a look at in just a moment.

A spiritual relationship with the land

Before we begin our journey into the history of the traditional Andean land tenure system, let us think for a minute about the special relationship between man and the land in this context.

The first thing that comes to mind when we consider the relationship between man and the land in the high Andes is the symbolic or mystical nature of the native's perception of the world. This notion presupposes a particularly close relationship with nature; a vision of the cosmos which has its roots in shamanism and means, in simple terms, that all physical activity is invariably bound up with the spiritual world.

Various studies have pointed out that this particular way of perceiving the world springs from the basic premise that land is a *gift* granted by the gods. Deities protect the territory, and it is their permission which must be entreated if the people are to make use of the natural resources it provides. Referring to the present-day situation in the Bolivian highlands, the French anthropologist Gilles Rivière declares: « To act upon the material world is possible only if there is a genuine community management of a complex of forces that emanate from the "gods", and "spirits"... » (Rivière, 1994, 97). Hence the special nature of the Andean land-man relationship: the earth is first and foremost both a natural and a spiritual entity. The relationship with the earth constitutes a modus vivendi, a way of being, a way of thinking and acting. « Mother Earth and the mountains must eat if they are to live; they can feel joy and sadness; they can fall sick... and so they need man to tend them. Man owes his existence to the earth of which he is a reflection » (Mamani, 1994, 261-262), and it is for this reason that the comunero (community member) who loses his land suffers a humiliating mutilation, and loses his dignity and his status as a « man of integrity ». He becomes a « wakcha », a Quechua word which means an orphan (Arguedas & Ortiz Rescaniere, 1967, 309). All this can be explained by the spiritual relation between man and the land, which in the Andes has its roots in a family relationship that ties members of the *ayllu* to the environment[1].

So in the Andean ontology (*kausay pacha*, living cosmos), a man's conception of the world is firmly based on the close bond he has with the land where he was born and where he lives; he feels part of that land. The sacred and spiritual ties which bind man to the earth can never be broken; they constitute a means of productivity and subsistence, he must live and eat here and here alone. The natural consequence of this is that in Andean cosmology one does not own the land; it is rather the opposite: man belongs to the land, which in its turn is part of him. These considerations lead us to conclude that we are dealing here with a *holistic* notion of the relationship with nature, since the whole land tenure system cannot be explained by its single parts alone, that is, we can not explain the existence of the man without the land, and vice versa[2].

1. In this context people and nature live as relatives; according to the Peruvian anthropologist Rengifo Vasquez, the extension of the members of the *ayllu* beyond the borders of human consanguinity springs from the Andean attribute of not separating man from nature. See Rengifo Vasquez, 1998, 91.

2. For the Italian philosopher Luciano Vasapollo, we are dealing here with the complex notion of the sacredness of the earth, a concept which is more far reaching than modern man can imagine. The land, being sacred, is not simply a material entity, as for example the soil is, it is more than that: the earth, the elements, the natural resources, the people who live on the land, the tasks they perform daily: all of these are part of a harmonious whole (Vasapollo, 2011, 51). For more on this see the many anthropological and sociological studies relating to indigenous peoples' spiritual view of the world: Brody, 2002; Surrallés & García Hierro, 2005; Grim, 2005.

This vision of the relationship with the environment contrasts strongly with the laical and materialistic notion of property upheld and enforced by Western countries. This explains why the contemporary Andean man must always find himself dealing simultaneously with two incompatible notions of property: one of them is a legacy of the Spanish conquest, as is the word property itself, which has no equivalent in the original Indian language. The other is the one we have just described, and originates in a close bond with those deities who are capable of drawing forth the fruits of the earth, who is herself a deity (Pease, 1986, 24). Festivals and ceremonies in honor of Mother Earth at seed times and harvest reflect the sacred bond between man and the earth in the Andean highlands (Mariscotti de Görlitz, 1978).

Evolution

Let us now look at the changes that took place in the man-land relationship over four historical periods: the Inca Empire, the Conquest and Spanish rule, the first republican period (nineteenth century) and finally the recognition policies of the twentieth century and current times. The common feature of all these various periods is the imposition of an external rule of land organization by a central state.

The Inca State

We are talking about a hundred-year period beginning in the mid fifteenth century (1430-1532). Here we are going to focus on the original form of social and territorial organization in the Andes: the *ayllu*.

What is meant by the term *ayllu*?

It is a Quechua word which represents the typical form of association of the highland Andean region based on a union of kinship (real or fictitious) and implemented in accordance with a form of agrarian communism (Larson, 2004, 30-33; Godoy, 1986, 723; Vellard, 1963, 119-123). To understand how it developed within the Inca Empire we need to say something about the way land was organized during this period.

Here the premise that we need to stress is that the Inca culture, and therefore its law, were never written down. What we know about the Inca

system is what the early Spanish chroniclers heard and saw and then put into their written accounts.

So from the testimony of the sixteenth and seventeenth century chroniclers, we know that the territory of the *Tahuantinsuyu* Empire was divided into three parts: the land of worship (also termed sun, or religious land – the « waq'a »), the land of the Inca (or the State land) and the lands of the common people, or community lands (Cobo, 1892, 247 ff.; Acosta, 1596, lib. VI, cap. XV). The community lands were those which – according to most Spanish chroniclers – belonged in joint *tenancy* or *usufruct* to the people.

In this system, each *ayllu* tried to maintain its economic independence by growing a variety of different crops and holding land at different ecological levels in the Andean mountains. This form of discontinuous land possession, typical of the Andes, is known as the *island* or *archipelago* system[3]. It is important to underline that this model of land occupation, which predates the Inca Empire, was recognized and supported by the Inca rule in order to ensure political control of the conquered territories.

How can we describe the Inca agrarian system?

Contemporary studies assert that it was a hierarchy of overlapping rights, evidence of the existence of different social groups. In this social structure we cannot talk in terms of property, but rather in terms of the various functions for which lands were destined, that is, for worship, for the maintenance of the State or to cover family needs.

Two main factors support this assertion: firstly the fact that the spiritual or religious relationship with the land rendered the native people one with the earth, a single entity bound up both with the cosmos and with the ancestors, this factor explains the principle of the non alienation of the land in Andean communities. Secondly the fact that the market in the modern sense did not exist, makes it impossible and indeed absurd to use post-industrial terminology such as the law of property to refer to the traditional native forms of appropriation.

This whole structure was to change with the arrival of the Spanish, who lost no time in redefining the agrarian structure of the Inca Empire and in introducing Western categories of land tenure.

3. It should be emphasized here that, as the anthropologist John Murra points out, the concept of market and trade did not exist in the Andean world. The fact that the *ayllus* used different ecological niches does not presuppose the setting up a series of little markets by the different ethnic groups at various altitudes, but rather the simultaneous access to different microclimates of the *ayllus*. This pattern of land occupation was achieved by distributing the population of the single ethnic group over a series of differing ecological levels grouping them together by kinship or by religious or military ties. It should be noted too that the most reliable chroniclers (such as Polo Ondegardo) have made no mention of markets or traders. So although archaeological discoveries have revealed the fact that material goods were transported, this should simply be considered the consequence of the travelling from place to place of households and ethnic groups.

Conquest: the Spanish rule

The Andean territories were conquered by the Spanish in the year 1532.

Under the new rule, the first task of the European observers was to assimilate the agrarian Inca system into their own view of the world. In the view of the European chroniclers of the sixteenth century the tripartite division of the land within the Inca Empire that we have just been looking at (worship, State and community) amounted to a sort of *systemization* of indigenous rural life. We must stress this, since the imposition of legal categories by the European jurists must be seen as the *first weapon of conquest* of the American people and their space. The anthropologist Nathan Wachtel and the historian Serge Gruzinski put it perfectly when they state in their introduction to an outstanding book on the American conquest that « The colonization of America was, from every point of view, a colonization of language » (Wachtel & Gruzinski, 1996, 195). The task entrusted to European jurists was therefore to construct the space of the Indian, using the concepts developed on the basis of the ancient Roman and canon law (Lupher, 2003; MacCormack, 2007).

One first significant redefinition of the traditional Andean land tenure system was penned by those of the early chroniclers who were closest to the Spanish Crown. They considered the land in possession of the *ayllus* as a mere usufruct or a precarious tenancy according to European legal notions[4].

For our purposes it is important to emphasize that we are dealing here with the imposition of a concept: the theory of property law. From now onwards, the native will take possession of the notions pertaining to this law, for he will have to speak the same language as his conqueror in order to defend his own interests. And here we have the paradox which is apparent in any colonial context: confronted with a conqueror who takes for granted that property rights do not exist among native peoples (a premise used of course to render legitimate the appropriation of land by the colonists), indigenous peoples everywhere have had to resort to

4. It must be said, however, that this doctrine was not promulgated by all colonial scholars. Further, according to the first visitors and observers of the Andean area, during the Inca Empire the conquered territories were merely controlled by the Inca King but not part of his domain. In fact, the first lawsuits (and claims) relating to the restitution of land to indigenous people, dating from the beginning of the sixteenth century, were based on the fact that the population had granted to the Inca emperor the sole right to collect taxes. They worked the land for him, but retained ownership of all the lands they had held prior to the Inca conquest. Consequently, according to this view, one might say that the true owner of the land was the « lineage » (the ethnic groups) but not the king himself. In support of this theory arose the authoritative voices of Bartolomé de las Casas, Francisco de Morales, the cleric to Cuzco Pedro de Quiroga, and the *Licenciado* Polo de Ondegardo. For details see: Platt, Bouysse Cassagne, Harris, 2006, 509; Smith, 1989, 45-47; Assadourian, 1994, 96 ff;

using the Western notion of property when defending their right to the land[5].

But to return to the point. What was the fate – from a legal point of view – of the lands belonging to the Inca Empire during the Spanish conquest? What was the fate of the *ayllus* under the Spanish rule?

As we know, the granting of territories in America to the sovereigns of Castile and Aragon was the result of a papal bull. The Alexander VI bull *Inter cetera* of May 3 1493 gave to Catholics kings and their successors the eminent domain of the American territories (Metzler, 1991, 71-75). Subsequently, the Spanish authorities entitled the first individual property rights by means of an innovative institution known as *merced* or *gracia real*. In addition on November 1st 1591, King Philip II in a royal decree declared himself successor of the Inca sovereign and owner of all the lands not assigned previously by him or his predecessors. In this way, the authorities distributed among the conquerors the lands which had in the past belonged to the Inca State and to the worship of the sun, leaving the « community » lands for the indigenous people.

Nevertheless, the indigenous land tenure system underwent a substantial transformation from the viceroyalty of Francisco Toledo (1569-1581) onwards. This occurred through the implementation of the Indian Reductions policy (Kermele, 2008; Málaga Medina, 1974; Rowe, 1957).

With this policy, the Spanish Crown established a formula for the grouping together of several *ayllus* with the purpose of assimilating indigenous populations into European culture and religion. These new villages, known as *Reducción* in the Andes, *Congregación* in New Spain, or *Resguardo*, in areas close to what is now Colombia, followed the administrative model of the Spanish *cabildos* (municipalities) and the territorial model of the Spanish villages or communities.

The primary aim of the Reductions policy was to civilize the native, but the strategy of concentrating the Indians close to the Spanish towns was design to make it more likely that they would work in the fields or in the mines, rendering the collecting of taxes from these workers more convenient. So the reduction policy, above and beyond its dogmatic justification, was intended primarily to alter the natives' traditional way of organizing their land, so as to be able to tax them more effectively. Its purpose then was primarily political and economic, and only secondly of acculturation (Gade & Escobar, 1982, 430; Málaga Medina, 1989, 12; Herzog, 2007, 509).

Two main effects of the Reductions policy are worthy of note here:

The immediate consequence was the destruction of the ecological niches (island or archipelago system) by means of which most *ayllus* had exercised control of the different ecological levels in the Andean valleys and mountains prior to the Spanish conquest (Murra, 1996, 66). Settling the population in one place, the Reductions ignored the ancient seasonal patterns of mobility. In most of the Andean region this system was completely destroyed (Platt, Boyusse Cassagne, Harris, 2006, 522; Herzog, 2007, 510; Murra, 1964, 438; Kubler, 1946, 335).

A second effect has to do with the law. From a technical and legal point of view the creation of indigenous towns rendered the traditional land tenure rights of the *ayllus* legitimate in the eyes of Western law. The Spaniards, in fact, recognized officially that indigenous people *had a right* to use reductions lands according to European legal doctrine.

Nonetheless, reductions received only right of possession, not a property right to the land, since in colonial times reductions were considered mere holders of usage or usufructuary rights. However, it should be added that this did not constitute a barrier to the acquisition of property rights using Spanish legal tools such as *merced*, donation, *composición*, or by simply buying land, as many reductions or *ayllus* did[6].

We should emphasize that the measures imposed by the Spanish Crown over the first century of colonization, permitted the incorporation of the Andean land into the Western property system, and this must be seen as the first step towards the creation of a market economy. The relationship between man and the land was going to become a more secular and more personal one. In the words of Grégoire Madjarian in his interesting book « L'invention de la propriété », this shift would lead to the desecration of the land, and its rich and complex significance would shrink to become a mere legal and individual abstraction (Madjarian, 1991, 123-124). Land, in simple terms, would become property[7].

5. In order to claim their rights over land, indigenous peoples' made extensive use of the Spanish system of justice. The Spanish courts functioned, in this sense, as an effective « weapon of the weak ». See: Stavig, 2000, 88; Guillet, 2005, 95-96; Munford, 2008, 5-40.

6. On the various ways that the comminities might aquaire a property in colonial times see Díaz Rementería, 1990. From a cultural perspective, it is a known fact that *reducciones*, albeit inadvertently, contained within themselves a mechanism for the redefining of indigenous cultural identity and for adaptation, which has helped traditional culture to survive up to the present day. However, it should be added that in some localities where reduction was imposed the Indians did not actually live in the localities assigned to them; these were simply places where the natives celebrated religious feasts, attended Mass or paid taxes. All this meant that concurrently with the reductions, the natives maintained smaller settlements where they continued to live scattered about just as they had done prior to the arrival of the Spaniards. See Stavig, 2000, 85; Cañedo-Argüelles Fábrega, 1995, 130.

7. The reductions policy must be seen as the first transplanting of the Spanish notion of property into native cultural « space ». The word « community » is an expression based on the notion of property which arrived in the Andes as a result of the colonial policy of reducing the indigenous settlements to conform to the model of the Spanish villages. For this reason, the « indigenous community » is quite simple a hybrid institution; it is the result of the transplanting of the communal organization of colonial Castile into the Andean world, but adapted and amalgamated with the pre-Hispanic *ayllu*. For details see: Mossbruker, 1987; Yambert, 1980; Rasnake, 1988. On the transplanting operation of the Spanish notion of community village into the Andean area see the fundamental study by Valdez de la Torre, 1921, 77 ff; Arguedas, 1968; Matos Mar, 182.

Independence and the indigenous lands

During colonial times the different categories of property imposed by the Spaniards remained intact for more than three centuries. The legal structure was composed of: 1) state property (*tierras realengas*) 2) private property (*haciendas* and *estancias*, small and medium-sized tenures of the Creoles, Spaniards and *Mestizos*), 3) collective and mixed forms of property such as the property of the Church (*censos* and *capellanías*), 4) collective town property (common land like the *ejido* and pastures that surround villages) and the 5) collective usage, usufruct or property (it varied) of the indigenous groups (in the form of *reducciones* or *pueblos* de *indios*)[8].

This structure was to change drastically during the first half of the nineteenth century with the advent of Latin American independence.

In fact, once political emancipation had been achieved, it became clear to the authorities in the new Latin American countries that certain colonial legal institutions needed to be brought up to date. This really implied the need for another revolution, a revolution that went to the very roots of private law. The law of property and the reform of the colonial agrarian structure were, as we can imagine, burning issues by that time.

The revolution movement was thus both political and agrarian, and in this latter sense sought to eliminate obstacles to the free disposal of property; to rescue, in short, the land from the « mortmain ». Nevertheless, it should be said that the Revolution was not interested in the great estates, because these were considered assets of « the individual »; the aim was to abolish all forms of collective property (such as Church property and agrarian colonial institutions) and specially the indigenous communities or *ayllus* whose lands were considered *mort* and therefore seen as obstacles to the development of the modern state.

The reason for this policy was quite simple. We know that the Republic introduced the principles of the French Revolution and those which stemmed from the debates of the Cortes of Cádiz. The adoption of the notion of freedom and equality led to the natives' becoming « modern citizens » on the European model. This change had wider implications; what had been, in colonial times, a policy of conservation of indigenous culture and identity, was now a homogenization process in keeping with the new republican values. In addition, Simón Bolívar, inspired by Locke, Hume and by the Declaration of the Rights of Man and Citizen, considered property, along with equality, freedom and security, to be one of the cardinal rights on which the new order should be founded. The Liberator believed in a property based on equity, justice and morality, a right that the State must safeguard in all situations where property was ethically justifiable

8. For a detailed analysis of the different forms of property in colonial times see Ots Capdequí, 1946; F. Chevalier, 1953; Mariluz Urquijo, 1978. For a general overview see also Mirow, 2004.

(Salcedo-Bastardo, 1983, 139). It is understandable, therefore, that the citizenship status of the Indio, projected into the economic field, could only be realized by doing away with the agrarian communal system, and adopting a system based on individual property in accordance with the European notions contained in the Civil code. The imposition of the new order in the indigenous space would see the birth of two concepts hitherto unknown there: the principal of citizenship and the notion of individual property.

In this scenario the survival of the collective forms of tenure, such as the Andean *ayllu*, appeared to be an anachronism that stood in the way of the time when Bolivia and Peru would take their place within the community of free nations (Platt, 1982, 88-89). In a system that did not recognize anything but the « individual », the traditional tenure systems of the indigenous communities represented a mere *relic*, to quote an expression from a famous paper by the Italian jurist Giacomo Venezian, an *anomaly*, as Paolo Grossi said referring to the effects of individualism in Europe in the second half of the nineteenth century. They were destined therefore to disappear.

Hence the justification of the progressive policy of legal attack against all the traditional forms of collective use of the land as we go on into the nineteenth century.

What forms did this assault take?

In Peru and Bolivia, but also in other countries such as Chile and Argentina, the attack came from three main sources of law: constitutions, civil codes and especially agrarian legislation.

The first type of legal attack is apparent in the constitutions of the time. The assault consisted of the omission (except for some incidental exceptions) of the words indian, *indio*, *indígena* and their forms of land tenure (*comunidad*, *reducciones*, *ayllus*). The words *comunidad indígena* simply did not appear in the constitutions of Peru and Bolivia during the nineteenth century[9].

A second form of attack on indigenous lands arose from the civil codes. Following the model of the Constitution of Cadiz (1812), the first Latin American constitutions, and the speeches that accompanied them, decreed that codes should be drawn up. As expected, the first ones were civil codes (1830-1845 Bolivia, Peru 1852)[10]. For the republican authorities private law represented the most effective legal tool for the control of the Nation; the private law reform would lead to the attainment of the desired internal order within the new states (Mirow, 2004, 98). But above and beyond that, here as in Europe, the political instrument necessary to overcome the legal particularism of the previous era was codification. The civil code was introduced both to strengthen national unity and to put an end to colonial

9. An indispensable analysis of the legal recognition of indigenous rights in Latin-American constitutionalism can be found in Clavero, 2006, 313-338.

10. See Guzmán Brito, 2000; Ramos Núñez, 1997; Schipani, 2010.

legal particularism, in accordance with an instrument very well known in Europe: *the ratio* (Tarello, 1976, 29; Tomás y Valiente, 1989, 85). Latin American civil codes, faithful to their French model, reaffirm the supremacy of possessive individualism, encourage the dividing up of collective forms of land tenure, establish a limited number of *rights in rem*, and limit the role of customary law. Given all this, it is not surprising that the space reserved for the traditional tenure forms of appropriation was nil. The civil code ignored the presence of the *indio* and particularly of the indigenous communities, because it took for granted their breaking up and transformation into private property.

The absence of any reference to the indigenous presence in the constitutions and civil codification prepared the ground for a third – and this time direct – form of attack on indigenous community lands. This was the trend of agrarian legislation.

From the second half of the nineteenth century on, a growing pressure on indigenous lands is apparent. Once the political boundaries of the new states had been defined, the authorities sought to achieve internal agricultural expansion at the expense of community lands. In Peru (and also in Bolivia before the declaration of independence in 1825) the new agricultural policy begins with the decree issued by Simón Bolívar in Trujillo on April 8th 1824. With this decree, natives were declared absolute owners of their possessions; the community lands were ordered to be divided into individual plots of a size sufficient to cover the needs of each member of the community and his family. The remaining land would be sold as state property. The aim of this legislation, then, was to transform the community lands into a series of small plots by giving individual property titles to each *indio* and his family[11].

But the most significant example of aggressive legislation regarding the reform of the Indian agrarian structure is that of Bolivia. During the second half of the nineteenth century, native Bolivians witnessed the introduction of number of laws designed to destroy and enclose their community's lands. The culminating point of this legislation is represented by the law of October 5th 1874, known as *Ley de exvinculación de tierras de comunidad*. Its article 7 consecrated the highest aspiration of the Liberal movement in Bolivia:

> « Once the title [of individual property] has been conferred to every native person, the law will not recognize communities. No individual or association of individuals may take the name of community or ayllu, or appear on their behalf before any authority ».

This is not the place to go into detail about the implementation of this agrarian legislation (which took place during the last decades of the nineteenth century); suffice it to say that the Bolivian case provides the most

11. On the subject of these decrees see Demélas & Vivier, 2003.

glaring example of the use of an extremely powerful legal weapon designed to destroy a community: the declaration of its non-existence in law.

What were the implications of this policy? What effect did it have?

First of all, what we have here is undeniably an example of the use of the rule of law to render licit the destruction of indigenous communities; in other words, we are talking about what Laura Nader and Ugo Mattei calls « legitimized plunder » (Mattei & Nader, 2008).

Secondly, in both countries, the implementation of possessive individualism involved the enlargement of the haciendas at the expense of the indigenous lands. The expansion of the hacienda system and the gross social injustice which resulted from this policy were to be the main concern of the social legislation and particularly of the first agrarian reforms of the twentieth century.

The twentieth century: first recognitions

The twentieth century provides a *new deal* in the relationship between indigenous communities and the State. From a legal point of view the new deal begins by including indigenous groups within the clauses of the constitutions.

It is important to underline here that this shift was not the result of the imposition of an external ideology, as had happened in the previous century; it was the consequence of different factors specific to the South American context. Three things played a crucial role: the beginning of social constitutionalism in the form outlined in the 1917 Mexican Constitution; the indigenous rebellions which took place in various parts of the Andean plateau early in the twentieth century; and a certain concern with indigenous affairs which was emerging in legal academic circles in the 1920s, a phenomenon associated with the legal movement known as legal indigenismo (Míguez Núñez, 2010). These three factors were destined to influence the programs of political parties and governments in Peru and Bolivia continuously during the first part of the twentieth century.

The era of legal recognition of the community, as a subject of law, began in Peru in the year 1920. That year, article 58 of the Peruvian Constitution declared that: « The nation recognizes the legal existence of indigenous communities and the law will declare the corresponding rights ».

In the following years there were enacted special decrees whose purpose was to give effect to the constitutional norm, by granting property right to the communities[12].

In 1933, the second Peruvian constitution of the twentieth century ameliorated the legal standing of the indigenous communities by devoting

12. For a general review of this legislation see Figallo Adrianzén, 2007; Robles Mendoza, 2002.

six articles to them (art. 207-212). Two of these in particular deserve a mention here: article 208 declared that the State would guarantee the integrity of community land and that a land registry would be set up. Article 209 declared community-owned land to be imprescriptible, indefeasible, and inalienable.

We should add here that a few years later, in 1936, the Peruvian Civil Code devoted five articles to the indigenous communities (art. 70-74).

At around the same time, the Bolivian Constitution of 1938 recognized the existence of indigenous communities but failed to make any reference to land or to the titling process (as also did the 1945 and 1947 constitutions). The recognition of Bolivian communities remained therefore purely theoretical (Rivera, 2005, 202).

Another important element in the relationship between indigenous communities and the State during the twentieth century was the bringing-in of the first agrarian reforms. In Bolivia in 1950, as much as 92 % of the cultivable land belonged to the haciendas (great estates of over 1 000 hectares), and this 92 % was in the hands of a mere 6 % of Bolivian landowners. This meant of course that 94 % of owners between them held a mere 8 % of the total cultivable land (Klein, 1971, 42). Similar situations were to be found in the coastal regions and in the sierra of Peru. As we have already seen, this scenario was the consequence of the implementation of liberal legislation in the agricultural sector from the second half of the nineteenth century. The first agrarian reform was brought in with the principal aim of putting an end to this situation.

With the first agrarian reforms (Bolivia 1952, Peru 1969) the Andean states sought to solve the problem of *latifundio* and also to do something about the underdevelopment of rural areas, by introducing new forms of association and exploitation, supported by the State or by international development agencies. Nevertheless, the reforming spirit continued to see in the community an obstacle to capitalist development. In this scenario the setting-up of cooperatives or farmers unions (known as *sindicatos*) in Bolivia was seen as the only viable alternative to the old communities. A similar trend can be seen in Peru with the creation of the Cooperatives of Agricultural Production (CAP) and the Agricultural Society of Social Interest (SAIS) both included in the *Special Statute of Rural Communities* of 1970, the core of the Peruvian agrarian reform.

Both countries, then, witnessed the same phenomenon: an attempt on the part of the authorities to transform communities into *cooperativas* or *sindicatos* with the aim of including them in the dynamics of the market economy. And here again, many communities were defeated by the new model, succumbing to state pressure and transforming themselves into farmers associations; others, especially those settled in more isolated places, remained loyal to the traditional model of land organization[13].

13. For more on the liberal and market-oriented character of agrarian reform in the Andes see: Malloy, 1970, 205; Cleaves & Scurrah, 1980, chapter 8; Assies, 2009, 299-300; Goodale, 2009, 48-49; Núñez Palomino, 1996, 55, 58; Seligmann, 1995, 60-62, 85-92. More recently see the reflections of Mayer, 2009.

A final point worthy of note in the context of the recognition and survival of the traditional model of land tenure during the twentieth century is the arrival of the policy of cultural and ethnic pluralism. This occurred in Peru during the 1980s, firstly with the enactment of the 1979 Constitution and later with a number of laws related to communities and rural areas. However, this process was abruptly interrupted with the entrance of the neoliberal ideology upheld by the government of Fujimori (1990-2000) and by his economics advisers such as Hernando de Soto. The 1993 Constitution and the Land Act (*Ley de Tierras*) of 1995 have forced communities into an open land market, with the natural consequence of the division of many of them (Núñez Palomino, 1996; Castillo, 1997; Id., 1992).

In Bolivia things were completely different. In that country, from the mid 1990s on, the multicultural policy has carried a lot of weight. In 1994, the 1967 Constitution underwent a substantial reform, modifying its first article to declare the Republic of Bolivia multiethnic and multicultural. Further, art. 171 recognizes, respects and protects the social, economic and cultural rights of indigenous peoples.

In 1996, Bolivia's second agrarian reform (Law INRA), was the fruit of this new policy. Significantly, this time the main aim of the reform was to return the land to indigenous communities, leaving it to them to decide how the land was to be used within the boundaries of the community area. By doing this, Bolivia has made great strides towards the recognition of the customary land tenure system without imposing any Western model of land organization, and leaving space for custom democracy[14].

This process continues today. During the first government of the Aymara president Evo Morales, the Bolivian State passed the law 3545 which attempted to redress the agrarian reform of 1996. In essence, this law seeks to effect a sort of juridical justice by guaranteeing that the old *ayllus* will have their ancestral lands restored to them. Moreover, the new Bolivian Constitution of February 7th 2009, passed after years of debate, reiterates the commitment of government to acknowledge the territorial autonomy and collective rights of the communities, with the specific aim of achieving a reconciliation between the old and the contemporary populations of Bolivia, within the context of an unprecedented democratic and cultural revolution.

We have covered a lot of ground here, but two points in particular must be stressed as we move towards our conclusion.

Firstly, it is interesting to note that indigenous communities have survived to the present day by adopting various different strategies. The impact of the ideologies that we have been looking at (*reduction* policy in

14. On the implications of this policy see Van Cott, 2000, 207-234; Goodale, 2009, 129-130; Assies, 2009, 306; Id., 1999, 145-158.

colonial times, individual property during the first republican era, cooperativism and syndicalism with the implementation of the first agrarian reforms, and multiculturalism in current times) has led to the enrichment of the legal mosaic at the disposal of the communities. Since colonial times, in fact, they have adhered or not to the different Western law models as their interests have dictated.

Secondly, it is important to emphasize too that recent legal events have caused the opening of a *new* legal window for the communities which still survive; this gives the natives the right to obtain the recognition of their original form of land organization without the imposition any Western legal view point. I think we can call this *full recognition* of customary land rights.

What does this recognition imply for the law of property?

Towards a new conception of property?

What we are contending here is that the full recognition just referred to, has changed or at the very least challenged the *classic* conception of property in the South American legal system. We are witnessing an amplification of the idea of what property is, or, to take an extreme view, we are seeing its deconstruction. Three main factors seem to have been responsible for this metamorphosis.

Property within the Inter-American Court of Human Rights

Since the year 2001, the Inter-American Court of Human Rights has affirmed that the « spiritual » relationship with the land is an essential part of the concept of « property » in indigenous communities. In its famous decision on the protection of Aboriginal land rights of the Awas Tingni Nicaraguan communities, the Court held that

> « The close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their culture, their spiritual life, their integrity and their economic survival. For indigenous communities, the relationship with the earth is not just a matter of possession and production but the material and spiritual element which they shall enjoy fully in order to preserve their cultural legacy and transmit it to future generations »[15].

15. See *C. Mayagna (Sumo) Awas Tingni Community Vs. Nicaragua*, Inter-Am. Ct. Hum. Rts. (Ser. C) Case No. 79, para. 149 (Judgment of Aug. 31, 2001). For a reflection on this case see Anaya & Grossman, 2002.

Since then, the spiritual conception of the relationship between man and the land among indigenous communities has been adopted as an inherent part of the concept of property in Inter-American decisions, in harmony with international law[16].

This decision has numerous implications. But the point which interests us is that the Inter-American Court has applied an evolutionary interpretation of human rights instruments to conclude that the possession of indigenous lands (with an inherently spiritual value) is sufficient to create legal rights of ownership under article 21 of the Inter-American Convention on Human Rights. What is important here is that we are talking about an international legal instrument that includes within the concept of property the spiritual dimension of the relationship between man and the land referred to at the beginning of this paper.

The new Latin American constitutionalism

The second important point regarding the shift in the legal conception of property arises from the New Latin American constitutionalism.

The Bolivian Constitution of 2009 offers an outstanding example of this. Its article 394 asserts that « *Communities may be entitled recognizing the complementarity between collective and individual rights and respecting territorial unity* ». In this clause the Bolivian legislator has abandoned the classical Western separation between individual and collective property, recognizing a more realistic notion of right to the land in traditional spaces, that is, a mixed tenure system comprising bundles of individual, family, and group rights and duties where natural resources are concerned.

Given the variety of ecological niches on the Andean zone, the complementarity or mixture of the different ways in which the land is used (individual or family-based in living areas, and collective in pasture and crop-rotation areas) has been the main characteristic of the traditional land use pattern of the communities that have survived up to our own times. This particular feature of the combination of land-use has been recognized by the new Bolivian Constitution. It should also be added that article 403 paragraph II includes among the elements of the indigenous territory the spiritual dimension, and that a similar pattern has been adopted by the Ecuadorian Constitution of 2008.

So in the new constitutionalism it is becoming clear that mixed forms of land tenure derived from the customary law have been recognized and that these reflect alternatives to the classic structure of property law which had spread throughout South America with private law codification.

16. See *C. Pueblo Saramaka Vs. Surinam*, Inter-Am. Ct. Hum Rts. (ser. C) Case n° 172, para. 82, 90 (Judgment of Set. 28 2007); and most recently *C. Comunidad Indígena Xákmok Kásek. Vs. Paraguay*, Inter-Am. Ct. Hum Rts. (ser. C) Case No. 214, para. 86, 112, 113 (Judgment of Aug. 24 2010). See also Brunner, 2008.

Legal academia circles

A third point related to the amplification of the concept of property has been the fact that legal academia has raised its voice in support of alternative models of appropriation that go beyond the traditional notion of property upheld by Western law.

In academic circles, various studies have affirmed that the abstract, and apparently universal, conception of property contained in the civil code has never really represented the variety of land relations in different societies. In Europe, the gap between the legal formula and the real situation where land is concerned has been pointed out in Paolo Grossi's classic work *Un altro modo di possedere*.

But it is not only legal historians who have found the term inadequate; anthropologists, legal anthropologists and comparativists, from the classical writings of Bronislaw Malinowski to the current work of Ruth Meinzen-Dick, from Jacques Vanderlinden to Etienne Le Roy, from Chris Hann to Raymond Verdier, have criticized the narrow view of property and established its inadequacy for many different societies because, as Raymond Verdier declares, « it fails to take into account the spiritual dimension of human relationships » (Verdier, 1986, 6)[17].

What can we conclude from all this?

First of all, we must stress the point that indigenous communities in the Andes have survived up to the present day. They have resisted the pressures of the West by employing a number of different strategies.

Secondly, we are witnessing today the first real reconciliation between indigenous rights and Western law; a consequence of the growing recognition of the spiritual and ancestral conception of the man-land relationship in formal law.

Thirdly, the decisions of the Inter American Court of Human Rights, the new Latin American constitutionalism, and the academic debate regarding the term property, make it very clear that the hitherto accepted idea of what constitutes property, in the context of the civil law tradition, has been demolished. A turning point has been reached.

Fourthly, in the face of this crisis, I see two alternatives. One would be a complete re-thinking of the basic tenets of property law based on an amplification of its content to include the spiritual dimension. A second alternative might be to abandon the word property altogether and to use some more flexible term such as land tenure or land rights.

17. See also Humphrey & Verdery, 2004, 11-12; Hann, 2007, 291.

And finally, there is a methodological issue involved here. How should we approach the study of land matters in multicultural areas? The historical and anthropological approach we have adopted in this presentation demonstrates that only by giving an empirical slant to the study of the law will we be able to discover *alternative legal cosmologies* such as that which emerges from the study of the land tenure system in the Andes[18].

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18. By alternative legal cosmology we mean the fact that the traditional Andean legal system is rooted in a holistic conception of the cosmos, rather than in the purely mechanical (ego or homocentric) world view, which has dominated the Western law since the rise of capitalism. In the holistic view, human beings and nature are part of the same organic cosmological system, and the laws that govern the relationship between man and land are fundamentally spiritual in nature. The expression was first used by the anthropologist Mark Goodale to explain the various forms that law has taken in certain rural areas of present-day Bolivia. See Goodale, 2009, 33-34. For more on indigenous peoples' alternative cosmologies see: Stewart-Harawira, 2005, 32-42; Alfred, 1999, 41-44. The value of native peoples' world-views as an inspiration for alternative earth-centered governance structures is underlined by Carolyn Merchant, in his *Radical Ecology: The Search for a Livable World*, Routledge, London & New York, 1992, 120 ff. See also Cullinan, 2011, 88-94.

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7

Urbaniser le village

Territoires, représentations de l'espace et appropriations au sud-est du Mexique

Akuavi Adonon VIVEROS

> « Les peuples autochtones ont le droit de conserver et de renforcer leurs liens spirituels particuliers avec les terres, territoires, eaux et zones maritimes côtières et autres ressources qu'ils possèdent ou occupent et utilisent traditionnellement, et d'assumer leurs responsabilités en la matière à l'égard des générations futures ».
>
> (Article 25 de la Déclaration des Nations Unies sur les Droits des Peuples Autochtones)

Lors de la création de la cité rurale *Nuevo Juan de Grijalva*, dans la municipalité d'Ostuacán, le gouverneur de l'État du Chiapas déclarait :

> « Dans les cités rurales durables, les habitants vivront dignement dans un endroit équipé d'écoles, d'hôpitaux, d'eau courante, d'égouts, de terrains de sport ; ils auront également accès aux projets productifs que le gouvernement a mis en place pour servir de base à l'économie des familles... » (Juan Sabines, gouverneur de l'État du Chiapas, Ostuacán, novembre 2008).

Sur la base des principes établis par le Rapport mondial sur le développement humain du PNUD (1994) et le Plan national de développement du Mexique (2007-2012), le gouvernement de l'État du Chiapas envisage la création d'un réseau de *cités rurales* en zones considérées de haute vulnérabilité sociale ou environnementale. C'est dans ce sens que cette politique foncière cherche à combattre et à limiter la dispersion des noyaux de peuplement, dispersion qui a été, de manière réitérée, associée à la marginalité et à la pauvreté affectant la région. Cette politique est matérialisée par le biais de la redistribution territoriale de la population, pour ne pas

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