

**NON-STATE JUSTICE SYSTEMS IN LATIN AMERICA**

**CASE STUDIES: PERU AND COLOMBIA**

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#### References

Annex A – Comments on Access to Justice in Sub-Saharan Africa – the role of traditional and informal justice systems (Penal Reform International, November 2000).

Annex B – General Bibliography

## I. INTRODUCTION

### A. TERMS OF REFERENCE

The Terms of Reference (TORs) state that non-state justice systems (NSJS) can either enhance or undermine access to justice for poor people. Accordingly, it calls for an evidenced-based report describing and analysing the variety of NSJS in Latin America and offering policy recommendations on how to engage with NSJS. The TORs define NSJS as “any system that applies norms/rules the source of which is (or purports to be) primarily non-state in origin.” This definition is meant to include both traditional and modern NSJS, but excludes alternative methods of dispute resolution employed in international commercial transactions.

### B. DEFINING NSJS

The concept NSJS raises some problems. The phrase ‘justice systems’ that qualifies the concept “non-state” suggests a level of specialisation that is rarely found among NSJS. Specialised systems for the administration of justice are closely linked to the emergence of modern state institutions. The administration of justice by institutions that are not part of the state does not have the systemic and specialised attributes implied by the concept NSJS. Firstly, because NSJS’s primary objective is not the administration of justice, but governance. And secondly, because NSJS do not administer justice through a specialised system of rules, but as part of a process where politics, law and other factors blend in ways that would be unthinkable in a state court.

Another difficulty is that the concept of NSJS appears to include only justice systems that are not part of the state. It presupposes a sharp distinction between state and non-state institutions involved in the administration of justice. In practice, however, such distinction is not always precise. For example, indigenous communities are from one perspective NSJS because they apply customary law, but from another perspective they could not be regarded so because they are recognised and regulated by the state. A strict definition of NSJS, however, would exclude these indigenous communities from the scope of this Report.

The TORs definition of NSJS in terms of the law they apply - primarily non-state in origin – also calls for some comment. Insofar as this definition calls attention to the existence of sources of law that are not state based, it is consistent with the practice of many NSJS, particularly those in rural areas. It is also an invitation to bring into the analysis the notion of legal pluralism. Yet, if the analysis were to focus exclusively on NSJS that apply, or purport

to apply, norms that are non-state in origin, the scope of the report would be very narrow. Firstly, because several state based institutions often apply non-state law either by design or by popular demand. This is the case of Justices of the Peace in Perú, who are called upon by the Code of Civil Procedure to apply local practices and customs. Moreover, as explained in Chapter 3, Justices of the Peace also often exceed their jurisdiction and thus, in practice, operate outside the framework of state justice. And secondly, because very often – especially in urban contexts – the norms applied by NSJS are not only consistent with state law, but are based on it. The fact that NSJS often mimic state institutions raises interesting policy issues regarding governance and justice in general. A narrow definition of NSJS in terms of the law that they apply would exclude reflection on these issues.

In this Report, I use a broad concept of NSJS so as to avoid these difficulties. While accepting that most NSJS apply norms that are non-state in origin, I include in the concept of NSJS any institution – whether or not recognised or even created by the state – that is staffed by lay people or, if staffed by lawyers, is not subject to the procedural requirements of formal courts. Thus, this Report examines the activities of indigenous communities and other rural organisations recognised or created by the state. It also includes Justices of the Peace who often apply local practices, but who are appointed by the state. This broad concept also makes it possible to bring into the discussion state initiatives, such as Casas de Justicia, that purport to bring justice services closer to communities in urban areas.

### C. METHODOLOGY

Work for this project included a review of primary and secondary sources on NSJS in Latin America. It also involved consultations with academic and non-academic experts on the topic.

The survey of the literature shows that there are a variety of institutions that fall within the definition of NSJS. The majority of these institutions are found in rural areas, but there are also some in urban areas. The main difficulty I encountered, however, was that most of the available studies on NSJS - with the notable exception of historical studies by legal anthropologists dealing mainly with Mexico (Nader, Nash, Collier, Moore) - are written by lawyers whose concern is primarily conceptual or normative. As a consequence, they do not provide enough data to discern the relative importance of specific NSJS within the country as a whole or within a particular region of the country (Sanchez, Ministerio de Justicia (Bolivia), Durand). Besides, because the concern of most of these studies is normative rather than empirical, they rarely offer detailed analysis of the practical work of NSJS or of their relationship with state institutions. More than a decade ago, Rodolfo Stavenhagen and Diego

Iturralde called attention to this problem and, together with other colleagues, attempted to fill in this vacuum (Stavenhagen and Iturralde). Unfortunately, neither academics nor NGOs concerned with the work of NSJS followed up the valuable work they started.

Work for this project included a visit to Perú and to Colombia. I chose these countries because of the relevance of their experience with NSJS and because of the good quality of the information available. Perú is a country with a large indigenous population and a long tradition of lay magistrates who operate mainly in the countryside. Indigenous communities in Perú are recognised by the state and allowed to apply their own customary laws. In addition, there are also other NSJS in rural Perú that have the potential of having, or have already had, a major impact on governance in the country. I chose Colombia because the central government, with the support of a bilateral donor, has launched a justice programme that mainly targets the urban poor. There is also in Colombia a cohesive group of NGOs and academics that are starting to do empirical work on NSJS in urban areas.

#### D. CASE STUDIES

This focus of this Report is on two main areas of NSJS activity: rural and urban. Within these two areas the study concentrates mainly on data from Perú (rural) and Colombia (urban). This approach makes it possible to examine in as much detail as possible the work of the NSJS. I have also followed this approach because it makes it possible to examine their activities within a wider context and thus avoid the temptation of regarding NSJS as purely legal institutions. Moreover this approach also helps to avoid the temptation of seeing NSJS as imperfect state courts that may soon evolve into a higher stage. As already explained, NSJS are not primarily, or exclusively, organs for the administration of justice. Thus, in order properly to understand them and the type of justice they administer, it is essential to assess them in their own terms. It is undoubtedly quite legitimate to expect that at least some NSJS may indeed evolve into more complex institutions. This expectation, however, should not preclude carrying out objective assessment of the strengths and weaknesses of specific NSJS, and in order to do this it is essential to examine them from a wider governance perspective.

Although the Report focuses mainly on the experience of two countries, where appropriate, it refers to the experience of other countries in the region. Moreover, the bibliography in Appendix B lists selected materials relevant to other countries in the region.

#### E. STRUCTURE OF THE REPORT

The following offers a schematic summary of the most salient feature of political and legal institutions in Latin America. The objective of this Chapter is to identify the virtues and weaknesses of these institutions with a view to formulating policy responses to NSJS. Chapters 3 and 4 contain the case studies on rural and urban NSJS respectively. Finally, Chapter 5 sets out the policy recommendations required by the TORs on how to engage with NSJS. Appendix A contains comments on the Report, Access to Justice in Sub-Saharan Africa, and Appendix B contains a short bibliography on some of the sources of NSJS in Latin America.



## II BACKGROUND

### A. IN GENERAL

There are a variety of NSJS in Latin America. In rural areas they are mainly found among indigenous communities and in urban areas they are found in the large shantytowns that surround most large cities. Yet, whether rural or urban, NSJS are often a response by local communities to the failure of the state to provide adequate structures of governance and justice. Whether or not this response is justified, NSJS are a sharp reminder of the shortcomings of the political and legal systems. This is so even in cases where ancient indigenous communities establish NSJS, since, invariably, states have been unable to formulate and implement coherent policies that fully recognise their existence.

The foregoing suggests that a proper understanding of the political and legal context in which they operate is necessary. Accordingly, the first two sections of this chapter offer an overview of political and legal structures in the region. The third section discusses the impact of these structures on NSJS and their bearing on the possibility of developing policies to engage with them.

Given the nature of the first two sections, a note of caution is in order. What follows are broad generalizations about the political and legal systems, and, as such, do not apply in the same way to all the countries in the region. They do, however, highlight common features that are crucially important to understanding institutional responses to NSJS, as well as civil society responses. This general background should also help to understand how and why NSJS come into existence and whether they may constitute alternatives or viable complements, to state justice systems.

### B. POLITICAL SYSTEMS

#### 1. Executive Dominance and Centralisation

Political systems in Latin America are generally driven by the Executive and are highly centralised. Today, given the prevalence of democratically elected governments, executive predominance takes the form of presidentialism. The prevalence of the Executive is both cause and consequence of an excessive centralisation of power. Paradoxically, however, executive dominance and centralisation are often inefficient. Although the highly centralised executives are often successful in undermining democratic initiatives at the local level, they

are generally unable effectively to reach remote areas or marginal groups. There is thus a governance deficit that frequently provides the opportunity for the emergence of grassroots organisations that become involved in the administration of justice.

## 2. Legislative Power

With a few exceptions – Costa Rica, Chile and Uruguay – the legislative branch in most Latin American countries is weak. Its weakness stems partly from the limitations of the party system, but is also a consequence of the predominance of the executive. The influence of the executive in the legislative process is manifested in two main ways: one formal and the other informal. The formal is embodied in the broad veto powers held by presidents; and the informal in the widespread abuse of regulatory powers by the Executive. This practice, known also as ‘decretismo’, underscores the power of the executive within the political system and often places the legislature in a subordinate role.

## 3. Sources of Law

Despite the weakness of the legislative branch, prevailing legal doctrine identifies the law made by the legislature as the main, if not the only source of legal obligations. The abundant regulatory output of the executive is not affected by this doctrine because executive decrees usually invoke a specific law to justify their legitimacy, although in practice decrees often exceed the authority of the law.

The emphasis placed by legal doctrine on legislation as a source of law has two consequences for an understanding of justice systems. First, it tends to place the ‘will of the legislature’ above the constitution, thus undermining the notion of constitutional supremacy and the role of constitutional courts. And secondly, it tends to play down the role of courts in the legal process. As a consequence, courts tend to be politically timid and rarely challenge executive action.

## C. COURTS

### 1. Separation of Powers

While most constitutions recognise judicial independence and acknowledge courts as one of the three main branches of the state, in practice, the court system does not fully enjoy the power and prerogatives acknowledged by the constitution. Judicial independence in most

countries is more an aspiration than a reality. Even in countries where courts have a long tradition of technical competence, basic human rights are often sacrificed to resolve political or economic crises declared by the executive – and often created by it.

The political branches of the state do not take courts seriously. This is reflected in the low priority they assign to judicial matters. It is also reflected in the poor working conditions of judicial personnel. The job of a judge is unattractive and often unstable. It is unattractive because judges enjoy virtually no social prestige, have low salaries and are overworked. Moreover, in many countries their position is unstable since politicians and senior members of the judiciary often manipulate appointments and promotions to secure short-term political or personal advantage.

## 2. Corporatism

This hostile institutional environment often breeds a negative response from the judiciary that, unfortunately, exacerbates their isolation. This response includes a pedantic concern with procedural niceties, a strong reliance on legal jargon and a deep suspicion of any attempt to allow persons without legal training to perform judicial functions. Unfortunately, this defensive response not only fails to close the gap between the judiciary and state institutions, but also alienates them from the poor.

### 3. Justice and Poverty

Given the overall weakness of political systems and the subordinate position of judiciaries, it is not surprising that in most countries courts do not enjoy popular legitimacy, especially among the poor in rural and urban areas. Courts in these areas are often in short supply and in the public imagination they are generally associated with repression, high levels of incarceration, discrimination and corruption. The reputation of courts among the poor is not enhanced by the chronic delays, costs and excessive formalism that characterise court procedures. Their standing with the public at large is also damaged by the fact that judges often lack the capacity, or are unwilling, to understand the impact that local conditions have in shaping legal processes.

#### D. CONSEQUENCES FOR NSJS

##### 1. In General

The foregoing might suggest that, given the features of the institutional context, most NSJS are doomed to fail and that any attempt to engage with them would be a waste of time. Indeed, if it is true that state power is so centralised, that the concept of law is excessively formalistic and that courts jealously guard their monopoly over judicial power, there seems to be little room left NSJS to operate, even as temporary governance devices in remote and marginal communities. Yet, despite the apparently negative features of the institutional framework, some recent legal and political developments suggest that an understanding of NSJS in the region is timely since at least some of them might be useful in the efforts to enhance access to justice, especially for the benefit of the urban and rural poor. The following paragraphs briefly discuss these developments.

##### 2. Democracy and Human Rights

Most countries in the region, including those with large indigenous population, have in recent years experienced political transitions that involve open elections and a commitment to democratisation. The process of democratisation, though still in progress, has had a dramatic impact on the approach to human rights by most governments in the region. In several countries this positive shift has been manifested by the establishment of a variety of specialised units, largely based on the model of the Ombudsman. While the efficacy of these units is mixed, in one way or another they are contributing to creating public awareness about the plight of the poorest and most marginal groups of the population, especially in rural areas

where most NSJS tend to operate. It is thus likely that those human rights units may contribute to bringing about a change of attitude among senior members of the political and legal elite, making them more tolerant towards NSJS. The work of Ombudsman's Office in Perú is perhaps a model for other countries in the region.

### 3. Multiculturalism and Legal Pluralism

Today, a significant number of constitutions in Latin America recognise indigenous peoples as distinct groups with specific constitutional rights (Argentina, Bolivia, Brazil, Colombia, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panama, Paraguay, Perú and Venezuela). Among these countries, some also recognise the existence of indigenous customary law (Bolivia, Colombia, Ecuador, Nicaragua, Panamá and Paraguay and Perú). Article 246 of the Constitution of Colombia provides as follows: "The authorities of indigenous peoples may exercise jurisdictional functions within their territories in accordance with their norms and procedures, provided they are not inconsistent with the Constitution and the laws of the Republic. The law shall regulate the way this special jurisdiction will relate to the national judicial system." Article 149 of the Peruvian constitution contains a similar provision recognising (indigenous) peasant communities and (indigenous) native communities have the right to exercise judicial functions in accordance with customary law (Peña, Cabedo and López). Although these constitutional provisions have not yet been fully implemented, thanks to them, NSJS today enjoy a level of legitimacy that until recently was unthinkable. This new approach offers a unique opportunity to offset the deep-rooted hostility of political and legal institutions towards NSJS.

### 4. Judicial Reform

The long-drawn process of judicial reform taking place in most countries in Latin America is another positive development. Although the reform process has concentrated mainly on state courts, with special emphasis on higher courts, the reform process has succeeded in persuading judges and lawyers that not all disputes can or should be, resolved by formal courts. The increasingly wider acceptability of the legitimacy of methods for the alternative resolution of disputes will undoubtedly make it easier to engage lawyers and politicians of the region in serious intellectual and policy debates on the contribution of NSJS to poverty eradication and access to justice.

## 5. Legal Culture

An interesting feature of states in Latin America is that, while political institutions have little regard for the principles of judicial independence, the prevailing legal culture is extremely formalistic, and lawyers and public notaries tend to dominate most activities in the public sphere. Yet, despite the exaggerated formalism of the prevailing legal culture, there has always been a huge gap between law in the books and social reality. Paradoxically, it is this feature of the prevailing legal culture that has made possible the existence of several NSJS. Indeed, had the letter of the law been rigorously applied, many NSJS would never have come into being and if they had, would not have lasted long.

### III. NSJS IN RURAL AREAS - PERU

#### A. INDIGENOUS COMMUNITIES

##### 1. In General

More than one-third of Perú's population of 20 million live in rural areas. The majority of rural inhabitants belong to one of 70 indigenous ethnic groups. In the Andean region, there are seven indigenous ethnic groups, of which the two largest are the Quechuas and Aymaras. In the Amazon, which comprises nearly one-third of Perú's territory, there are some 65 indigenous ethnic groups (Conapa).

Most of the rural indigenous population live in small communities: in the Andean region the communities are called *Comunidades Campesinas* and in the Amazon region, *Comunidades Nativas*. Members of indigenous communities are among the poorest in the country. A recent government survey found that out of a total of just over six thousand indigenous communities, only 26 were above the poverty line and more than half of the rest were living in extreme poverty or under conditions of misery (Vega, Jiménez).

The indigenous community is a social, economic and cultural unit of Andean peasants living within a defined territory. They trace their origins to the 'ayllus' that existed before Spain colonised the territory. The 'ayllus' have been defined as 'a number of unrelated extended families living together in a restricted area and following certain common rules of crop rotation under more or less informal leaders' (Rowe, p. 253). The ayllus were significantly transformed by the colonial regime, and today continue to be so by the state (Mallon, Plant and Hvalkof, Pozo).

The phrases 'comunidades campesinas' and 'comunidades nativas' are political and legal constructs that have a long contested history. In the 1920s, under the administration of President Leguía, indigenous peasant communities were officially recognised and registered (Pozo). In the 1960s, they were singled out as main beneficiaries of the agrarian reform. The expectations generated by this reform did not, however, materialise. In any event, in 1969, the phrase indigenous community was officially changed to Comunidad Campesina as it was thought that the word indigenous was offensive.

Though economically impoverished and neglected, comunidades campesinas and comunidades nativas are subject to an elaborate regulatory framework. The constitution

recognises that *comunidades campesinas* and *comunidades nativas* have the right to administer their own customary law, provided they do so within the limits of the constitution. Several laws regulate other aspects of the rights and duties of the communities, including the requirements for acquiring and losing the status of member of a community. The law also recognises that communities have a right to their communal land (Law 24656 (1987) and 22175 (1978)). The titling process, however, has been painfully slow. According to Plant and Hvalkof, today only one third of the *comunidades campesinas* have legal titles to their land ( p.15). In the Amazon region, the titling process is especially difficult because of the nature of the terrain. Moreover, in recent years, several *comunidades nativas* have found themselves in conflict with foreign investors and local entrepreneurs keen to exploit the resources in the area. This controversy has raised the political profile of *comunidades nativas* (Manríquez, Urteaga).

## 2. Calahuyo: A Comunidad Campesina

In order to understand the structure and functions of *comunidades campesinas* I will focus mainly on Calahuyo, a comunidad located in the Department of Puno, in the South-West of Perú near the border with Bolivia and close to Chile. Calahuyo is one of 86 small communities of Aymara-speaking peasants who live around the city of Huancané. Some of them speak Spanish and some of them speak Quechua, especially those involved in cattle trading. The population of Calahuyo estimated at 372 inhabitants, is regarded as average for communities in the region (Peña).

The area of Calahuyo is about 283 hectares. Land tenure consists of small family plots between 1 and 7 hectares and large communal spaces for grazing. Calahuyo is only 5 miles from the nearest urban centre, but in the absence of public transport, this is a long distance. The educational level of the inhabitants of Calahuyo is typical of other *comunidades campesinas*. Almost 60% of adults have either never attended school or have not completed their primary education. A significant majority of those who have never attended school are women. Only three adult members in Calahuyo – less than 2% - have completed secondary education.

### a. Governance Structures

The supreme political organ of the community, as provided by Law 24656 (1987), is the General Assembly which, in turn, elects the community officers: President, Secretary and Treasurer. Community authorities are elected every two years. Since all male members can



reasonably expect to occupy a position of authority, this rotation mechanism is a safeguard against the abuse of power. Apart from the elected officers, there is usually also a state appointed official, the *teniente gobernador*, who performs police functions on behalf of the central government.

Members of the comunidad establish their own rules to ensure that productive activities are carried out in an orderly manner and for the benefit of the whole community. Rules deal with a variety of communal activities including the use of land and water resources.

The constitution authorises comunidades campesinas and comunidades nativas to administer justice applying customary law, provided they respect fundamental human rights. In practice, however, indigenous communities were involved in the administration of justice and ran their own structures of governance long before Spain colonised their territory.

#### b. Views About the Official Justice System

The way the people in Calahuyo regard the official justice system is similar to that of communities in other parts of the world. They reject it on the grounds that it is expensive, slow and that judges and lawyers are more interested in prolonging rather than resolving disputes (Peña 182/5). The people in Calahuyo also distrust the official justice system because they see it as a fundamental challenge to their right of self-determination and self-government (Peña, pp.182/5, 321). The rejection of the official justice system is thus as much an issue of governance as is one of justice. Community control over dispute resolution is seen as necessary to express and reaffirm the community's identity.

Peasants in other rural communities hold similar views about the justice system. For example, a study carried out by a local NGO in Ayacucho reports that people there distrust the official system and believe that lawyers and local court personnel discriminate against them (Ipaz, pp. 17-19). Given that lawyers and judges rarely speak Quechua or Aymara, this allegation is not surprising. Distrust is aggravated by the legal requirement that, in localities where there are more than three registered lawyers, any petition or representation before a court has to be made by a lawyer.

#### c. Concept of Justice

The literature on legal anthropology shows that the concept of justice in indigenous communities is part of a worldview radically different from the Western tradition. It involves

a different way of conceptualising the relationship between the Supreme Being, the universe and the individual. The western tradition regards humankind as the centre of the universe. In indigenous cultures the individual is just one other being, who is expected to live in harmony with other creatures and Mother Earth (Monaghan and Just).

Studies on indigenous cultures in Latin American confirm that the latter alternative worldview is prevalent among indigenous people in the region (Florescano). There are, however, very few case studies that explore the content and implications of this worldview. In particular, I am not aware of any attempt to understand how, in the Peruvian context, indigenous communities have evolved through their encounters with the dominant society. In the absence of such a study, there is a tendency to regard indigenous communities as self contained and static institutions.

There is little doubt, however, as Peña's study shows, that the community in Calahuyo, as well as the communities in the Amazon area, hold worldviews that place special emphasis on harmony and equilibrium. In the context of dispute resolution this is important. Since the overriding objective of these communities is to restore equilibrium, the procedures they use are not based on the adversarial style of modern courtrooms. This non-adversarial approach also has implications for fact-finding and the nature of sanctions. Lawyers trained in modern law would probably find fact-finding by Calahuyo officials unsystematic and authoritarian. Yet, in order to understand why they are so, it is necessary to remember that restorative justice places strong emphasis on confession and an apology by the offender for harm inflicted on the victim or community.

The restorative concept of justice also explains indigenous communities' approach to punishment. Under systems of restorative justice, the admission of guilt, apology and atonement take priority. In practice, however, restorative justice often involves forms of punishment that are inconsistent with contemporary standards of human rights.

#### d. Conflict Resolution

In Calahuyo private family conflicts, such as marital disputes, separation of spouses, disputes over personal property and small money claims, are generally resolved by the extended family, parents, godfathers or by what is generally described as the council of elders. They are generally resolved through conciliation, applying the principles of social harmony and restorative justice (Peña, pp. 203/5). In these cases, either party may request that the settlement be recorded - in Spanish - in the community's official registry book. This formality

is not always followed, as often parties wish to avoid publicizing their problems. On the rare occasions that these disputes are left unsettled, they are referred to the political organs of the community.

The political organs of the community deal with conflicts and dispute of wider community interest. These include cases of rape, adultery, domestic violence, fights, physical injuries, failure to take part in communal duties and disputes involving the replacement of community authorities.

The procedure generally begins when the aggrieved party contacts a community representative who, in turn, sets out to establish the facts of the case. The method employed to establish the facts is rudimentary and often ruthless (Peña, p. 210). The main objective is to seek a confession, and the accused is often under considerable social pressure to do so.

After a confession is obtained, the matter is referred to the General Assembly where the defendant has a chance to address community members. As supreme political organ of the community, the General Assembly has the sole power to impose punishment. The flexibility of the Assembly in the selection of punishment varies, depending on the nature of the offence. Where the accused has committed a serious breach of community obligations the punishment is severe as the interests of the community are not negotiable (Peña, p.220). In cases involving less serious offences, the General Assembly applies more directly the principles of restorative justice and community harmony. These cases usually involve matrimonial disputes that are not resolved at the level of the family, cases of assault and disputes over property.

#### e. Punishment

Punishment generally involves reparation, either in the form of special community service and/or a fine. This sanction is often combined with the threat of more severe punishment in the event of non-compliance or repetition of the offence. One such threat is to refer the case to the authorities of the official justice system. In recent years, according to Peña, fines have become the most commonly used punishment. They are often heavy, especially in cases involving cattle theft (Peña, p. 227). More severe penalties, especially those that might be regarded as inconsistent with fundamental human rights, are rare, although they usually attract considerable media attention. This assessment is consistent with reports on indigenous communities in Bolivia (Ministerio de Justicia y Derechos Humanos (Bolivia), p. 66), Ecuador (García, Fernando) and Colombia (Sánchez).

In Calahuyo, Peña found only one recorded case in which the community applied the penalty of banishment. It was used as a last resort in a case against a member who had systematically failed to fulfil his communal duties. As Peña explains, to justify this decision, the authorities in Calahuyo relied on the Law on Comunidades Campesinas, which provides that membership of the community can be terminated when a person systematically fails to comply with community obligations, takes up permanent residence - or buys rural property - elsewhere (p. 223/4). The banishment order was contested through the ordinary courts, but because of delays – prompted perhaps by the reluctance of the local court to become involved in an intra-community feud –the case was abandoned.

### 3. Punishment in Other Rural Communities

In the Amazon region, women who marry non-community members, generally colonists employed in business ventures in the area, are severely punished. In Shintuya, a Comunidad Nativa in the Amazon, women who marry colonists are excluded from community activities, deprived of a plot of land to cultivate and denied access to community funds (del Alcazar). The objective is either to break the relationship with the colonist or to force the woman to leave the area. It must be noted that the community in Shintuya does not object to men marrying women who are not members of the community.

A case concerning two women from Shintuya who married outsiders was brought to the attention of the local office of the Ombudsman. The official held several meetings with community members. He found that while younger and older members agreed that the response of the community was harsh, the majority – including many women – strongly believed that the community had the right to exclude women who married outside the community. In their view, the marriage of women to outsiders is a serious threat to the existence of the community, for colonists, keen to acquire land rights in the area, might otherwise outnumber community members.

In the end, the Ombudsman decided against advising the women to seek protection from the courts. Almost certainly, the women would have succeeded in obtaining an injunction from the court, but it would have been of little use and the local police would have been unable to provide them with adequate protection.

A case of cruel punishment reportedly took place on 14 October 2000 in Mayapo, a Comunidad Nativa in the Amazon region (Pacheco). The case involved a 13 year-old boy

who, allegedly, had stolen a small amount of cash belonging to the community as well as other small items from individuals. The child was caught and he promptly confessed.

The punishment agreed by the community was to tie him to a tree infested with poisonous ants, known locally as 'black dogs'. A massive attack of these ants can cause death. The child was left there for ten minutes; he was then released and taken to his grandmother's. Although an antidote was available, the grandmother refused to administer it and the child died. She allowed the boy to die because, in her view, had he lived he would have continued to steal.

#### 4. Banishment in Colombia

The constitutionality of banishment orders has twice come before the Constitutional Court in Colombia (Sánchez, 211-222). In the first case, decided in 1994, involving a member convicted of theft at Paso Ancho, a community located in the Municipio de Ortega, the Court found the banishment order unconstitutional. Banishment was deemed disproportionate to the nature of the offence. The Court also took into account the fact that the sanction affected the lives of innocent members of the convicted man's family and, as such, it contradicted the constitutional principle prohibiting collective punishment.

In a more recent case, decided in 1997 and involving a more serious offence – conspiracy to murder – the Court upheld banishment orders, pointing out that the constitution only prohibits banishment from the territory of the Republic, not banishment from the territory of the community. Moreover, the Court pointed out that the banishment order in that case was consistent with the constitutional clause acknowledging cultural and ethnic diversity (Sánchez, p.328).

## B. RONDAS CAMPESINAS - NIGHT WATCH PATROLS

### 1. Introduction

Rondas Campesinas, or Night Watch Patrols, are the most successful, as well as controversial community organisations to emerge in rural Perú during the last 25 years. They sprung up in the mid-1970s in the Department of Cajamarca (Northern Perú) to deal with the problem of cattle rustling and theft generally. Such was their success in controlling crime that communities in several other Departments soon replicated their structure. The Rondas also attracted the attention of the state as successive governments attempted to use them in their struggle against rebel movements in the countryside. Yet, while one arm of the state tried to co-opt them, leaders of the Rondas accused of usurping the functions of the police and the judiciary faced criminal charges and, often, imprisonment (Yrigoyen, in Sieder 2002). These conflicting attitudes generated considerable controversy, fuelling a debate as to whether Rondas are authentic indigenous organisations. If the Rondas were to be regarded as authentic indigenous organizations, they would then qualify under the constitution as institutions entitled to administer justice.

### 2. Origins and Nature

The Department of Cajamarca, where the Rondas Campesinas first emerged, comprises mainly of independent commercial farmers who are mestizo and Spanish-speaking. The average size of their individual plots is 7 hectares (ASER, p.1). Some plots, however, are too small to provide subsistence. The larger plots extend up to 24 hectares (Gitlitz and Rojas, 165/7).

The Rondas were set up mainly to protect private property (Gitlitz and Rojas). They came into existence because the community had no confidence in the police or the judiciary being capable, or willing, to protect them from organised gangs involved in the theft of cattle and other violent crimes. Most local peasants in Cajamarca believed that the police and the local judiciary were involved in supporting these criminal activities. Indeed, according to a report by a local NGO, only 10% of criminal cases brought before local courts resulted in convictions (ASER, p.1). While some observers are cautious about whether the police was implicated in the theft of cattle, they do however believe that the police were slow and inefficient in responding to criminal activity. They also believe that more could have been done to control the routes used to move the cattle out of the area and the centres where stolen cattle was traded (Gitlitz and Rojas, p.174). Scholars who have studied the same problem in

other areas of Perú confirm that local elites, the police force and even schoolteachers are often directly involved in cattle rustling (Paponnet-Cantat, p. 213.)

The first Ronda was established at the hamlet of Cuyumalca, province of Chota (Gitilitz and Rojas, p.179). It originated mainly through the efforts of one individual - a prosperous peasant who was also *teniente-gobernador* (police) in the locality and, thus, the representative of the Executive branch. Support from the local police and other public authorities was forthcoming, largely because the agreement on which the first Ronda was established was ambiguous on the crucial point as to whether its members could carry arms. According to the interpretation of this agreement by local authorities, the Ronda had limited functions; mainly to report or hand over to the police anyone suspected of involvement in a criminal activity. They were not to carry arms. In practice, however, this agreement was not observed. Members of the Rondas do carry arms and also they are involved in the administration of justice - a matter not envisaged by the original agreement.

### 3. Structure

Rondas Campesinas follows a common pattern. The General Assembly, made up of peasants who own land in a particular hamlet, elects the members of the Ronda Committee. The Committee then divides the area into sectors. Each sector is organised by a delegate appointed by the Rondas. Males between 18 and 60 are required to serve on the Ronda patrols. Women generally do not take part in night watch patrols, although they support the work of the Rondas by providing food and other ancillary services.

The Rondas generally hand over suspects to the General Assembly not to the police. The General Assembly is entrusted with the task of deciding whether the suspect has committed a criminal offence, and, if so, what punishment should be administered. The scope of activities of the Rondas has expanded. Some Rondas are involved in welfare activities and in the development of public works in the community – such as building medical facilities and improving irrigation schemes. Rondas have also expanded their policing and judicial functions from the protection of property to include more general offences such as slander, damage to crops or animals, drunkenness, assault and domestic and family disputes.

By 1978, Rondas had largely succeeded in controlling theft in Cajamarca. Their success enhanced their legitimacy and prompted the establishment of Rondas Campesinas in other rural Departments. Thus, Rondas soon emerged in the Departments of Piura, San Martín, Amazonas, Junín and Ancash. By 1991, Rondas Campesinas had become the most popular

grassroots organisation in Perú. They covered nearly 3,500 hamlets in Northern Perú, over an area of 150,000 square kilometres (ASER p.5). In some Departments, notably Junín and Ancash, Comunidades Campesinas established them as part of their structure of governance. There thus developed two types of Rondas: the original Rondas, established by independent commercial farmers in Cajamarca, and those established by indigenous peasants as part of their traditional structures of governance.

#### 4. Administration of Justice

There is an important distinction between Rondas Campesinas established by independent farmers – as is the case in Cajamarca – and those established by indigenous communities. In the former case, the Rondas are not expressly allowed by the constitution to become directly involved in the administration of justice. In the latter case, the comunidad campesina performs jurisdictional functions.

Despite the lively political controversy that Rondas have attracted, there seems to be no empirical studies explaining how Rondas administer justice. The two scholars that have studied in some detail how they function are social scientists from the United States: John Gitlitz and Orin Starn.

Gitlitz's study (Gitlitz, Ponencia 13) confirms that Rondas Campesinas resort to corporal punishment and that their decisions often lack consistency. Orin Starn points out, however, that, although Rondas make use of corporal punishment, they do so in order to restore harmony in the community (Starn, p.135).

Gitlitz's offers an interesting account of the way Rondas in two different localities handled similar cases involving allegations of rape – a matter that under the Peruvian Criminal Code should, in any event, have been referred to state courts. In the first case, punishment was mild, in the second brutal.

The first case involved an assault against a female adolescent by a man who, though alcoholic, was well liked by community members. The parents of the victim, however, were not popular, especially her mother. The General Assembly found that attempted rape was a serious offence, but was initially divided as to how to proceed. Some argued that the case had to be referred to the state courts, while others disagreed, maintaining that the community should punish the accused. Ultimately, the latter view prevailed and the accused was required to pay a small sum to the victim's mother as compensation for her daughter's lost reputation.



The offender also had to perform six days of community work plus six extra night patrols. At no time did the Assembly seek the views of the victim.

The second case also involved an allegation of rape. A man having an affair with the wife of a neighbour was, on the day of the incident, rejected by the woman, who, aware that her husband was nearby, feared that they would be discovered. As the woman struggled to resist her lover, the husband came to the scene and referred the matter to the local Ronda. The case attracted enormous attention in the vicinity and after lengthy consultations, the Ronda Assembly decided that the man was guilty and should be subjected to 'mass discipline', a punishment that involves two lashes from each person present at the hearings. Since 250 neighbours had attended the hearings, the man stood to receive 500 lashes.

After the first 10 lashes, as it became clear the man would not survive the remaining 490 lashes, the President suspended the procedure to consult with the Assembly. He proposed that the punishment should be terminated as the man had already been adequately punished. The majority of the Assembly, however, disagreed, but conceded that 500 lashes were excessive. In the event the proposal accepted was that only married women present in the Assembly would be allowed to continue administering lashes. Altogether the man received 70 lashes.

#### 5. Rondas as NSJS

The difference in punishment in these rape cases raises worrying questions about the Rondas as institutions for the administration of justice. They also suggest that the justice of the Rondas is akin to popular justice than to traditional restorative justice of indigenous communities. The available information, however, is insufficient and does not allow any meaningful generalisations. To form a view about the Rondas as NSJS, more information is required about the way they operate and handle disputes.

Most observers suggest that local people overwhelmingly prefer to submit their disputes to the Rondas than to the official justice system (Starn, Yrigoyen, Gitlitz and Rojas). This view is corroborated by a survey of Rondas Campesinas in the Department of Piura, which found that the overwhelming majority of its people prefer to submit their disputes to the Rondas rather than to the official justice system (Starn, p. 291). The only exception is marital disputes, where 50% would opt for the official system.

#### 6. Women and Rondas

The prevailing view among observers is that the Rondas Campesinas are largely male dominated and hence their activities are coloured by this fact. Orin Starn (pp. 174/183) reports, however, that in some localities women have discovered ways of using the Rondas as a device to weaken and split patriarchal hegemony. Thus, for example, women often rely on the support of their brothers or fathers to bring matters of domestic violence to the attention of the General Assembly. The outcome of cases of domestic violence in one hamlet in Cajamarca suggests that the Rondas are making progress in tackling the issue of gender equality. According to Starn (p. 181), in 1986, out of eight cases of domestic violence brought to the attention of the General Assembly of Tunnel Six, a locality in Cajamarca, only 2 were dismissed. In four cases the man was required to agree, in writing, not to abuse his wife. In the remaining two cases, the Assembly decided that the men should be punished in accordance with local custom: a whipping. It is thus not surprising that local women find that men in their community are a little less bold when dealing with women. This leads Starn to speculate that if women were asked to choose between the official justice system and justice administered by the Rondas, they would choose the Rondas (Starn, p. 291).

#### 7. Victims of their Success

The success of the Rondas in controlling crime and their popularity in Cajamarca inevitably attracted the attention of national politicians. Initially, during the administration of Alan García (mid-1980s), the government tried, unsuccessfully, to politicise the Rondas. Its attempt, though, raised the Ronda's profile and brought about a proliferation of them (Gitilitz and Rojas, p.180). In 1986 the Congress enacted legislation that narrowly defined the role of the Rondas, describing them as peaceful, democratic and autonomous community organisations, but subordinating them entirely to the local police and judicial authorities. They were not given any jurisdictional or enforcement function. Two years later, the government, through a Decree enacted by the Ministry of the Interior, attempted to convert them into an arm of the national police. The available evidence suggests that no attempts were made seriously to enforce this Decree, which was largely ignored by the Rondas (CEAS).

During the Fujimori administration, the government once again attempted to intervene. This time the approach was more ruthless as the government attempted to enlist the Rondas in its campaign against Sender Luminoso. The government had promoted the establishment of Self-Defence Committees (Comités de Autodefensa) in some localities, as part of its war against Sendero. These were community organisations organised and armed by the military and aimed mainly at supporting the military campaign against terrorism (Degregori, et. al.). The Government and its supporters referred to these organisations as Rondas Campesinas, thus

creating considerable confusion and resentment among the members of the genuine, independent Rondas - mainly those from Cajamarca. But the government was determined to bring the Rondas within the framework of their military strategy. Thus, in 1993, it enacted a Decree requiring all Rondas to adopt the structure of the Self-Defence Committees. Evidence suggests that most of the Rondas resisted the implementation of this Decree, but were weakened by it (CEAS).

From a legal perspective, the most serious blow against the Rondas came about with the enactment of the 1993 Constitution. The much-quoted Article 149 of the Constitution acknowledges that *comunidades campesinas* and *comunidades nativas* have the right to administer justice, but does not give the same right to the Rondas Campesinas. It merely acknowledges that Rondas Campesinas may be established within indigenous communities. As a consequence, those Rondas Campesinas that are autonomous and not part of another Comunidad are not allowed to administer justice.

The Constitution thus created an interesting problem. While the Rondas have arguably been one of the most effective organs of local governance and successful in controlling crimes, many Members of Rondas have been imprisoned for usurping the functions of the police and the judiciary. This situation increased the solidarity of NGOs for the Rondas Campesinas, particularly those in the Department of Cajamarca, and has prompted them to lobby for the introduction of legislation explicitly acknowledging that Rondas have the power to administer justice.

During the past 18 months, the Congress has considered several draft bills on Rondas Campesinas. These bills generated interesting debate and exposed deep divisions among intellectuals and the NGO community. In constitutional terms, the debate revolves around whether the Rondas can be given the power to administer justice. Given the form of words used by Article 149 of the constitution, it is difficult to see how such power could be given to the Rondas. However, there is another more important debate going on. It is about whether independent Rondas Campesinas, such as those established in Cajamarca, are authentic indigenous organisations expressing the worldview of the indigenous culture of the Andes. An influential group of local NGOs and intellectuals claim that this is the case (ASER p.6/7, CEAS and Yrigoyen) – a view strongly rejected by another group of NGOs and activists with considerable experience in the struggle to secure access to justice in rural areas (Mesa de Pluralismo Jurídico).

The legislative debate concluded on 12 December 2002 when the Congress approved a new law on Rondas Campesinas. The law does not clearly settle the constitutional argument. While it does not explicitly give Rondas the power to administer justice, its wording is sufficiently ambiguous (in particular Articles 1 and 7) for both sides to claim victory and for the Rondas to continue to administer justice.

#### 8. Self-Regulation

An interesting development is the attempt at self-regulation initiated by a federation of Rondas from one of the provinces in Cajamarca (Central Unificada Provincial de Rondas Campesinas de la Provincia de Hualgayoc). In June 2001, the federation published a set of Regulations setting out the objectives, functions and structures of the Rondas. This is a long document consisting of some 77 Articles, most of which are divided into several sub-sections.

The chapter on the administration of justice provides that the Rondas have jurisdiction over public and private disputes. The first category is described as ‘agricultural matters concerning communal and individual property’; and the second is described as ‘family matters that may have a bearing on law and order within the community’. Under the regulations, there are three organs vested with judicial power: The Executive Committee and the Judicial Committee, both of which deal with cases in the first instance, and the General Assembly, the highest judicial and political organ, which hears appeals from the other two organs. It is interesting that the Regulations say nothing about the law that the Rondas can apply.

The Regulations are ambiguous on the crucial question as to how Ronda justice relates to the formal system. While they acknowledge that serious offences have to be referred to the formal justice system, they also provide that, prior to such referral, the General Assembly of the community has the obligation to investigate the matter (Article 60). Moreover, while the Regulations reaffirm that the Rondas will normally not challenge, or interfere with, the work of the judicial organs of the state, they also provide that the Rondas must remain vigilant and denounce corruption and malpractices by judges, prosecutors and the police.

The Regulations contain an interesting Article explaining why Ronda justice is better than state justice. It is because members of the Ronda are familiar with the types of disputes that arise from within their communities. Therefore, they are in a better position to resolve them. The state justice system, on the other hand, cannot resolve community disputes since, not only are they unfamiliar with the locality, they also have to rely on testimonies of witnesses who are either bribed or ignorant of the reality of the community.

It is not clear what will be the fate of these Regulations. Perhaps they will be taken into account when the government drafts the regulations for the recently approved law on Rondas Campesinas.

## C. RURAL CENTRES FOR THE ADMINISTRATION OF JUSTICE

### 1. In General

Rural Centres for the Administration of Justice or Nucleos Rurales de Administración de Justicia (hereafter Centres) were established in the Department of Ayacucho in 1997, in the aftermath of the war against Sendero Luminoso. Their objective is to help peasant communities in the locality reconstitute civil society by providing prompt and efficient access to justice. The Centre's experience is of special interest on two counts: first they came into being largely through the efforts of a local NGO – IPAZ; and second they provide a framework bringing together community leaders and state appointed officials. In this respect, the Centres can be seen both as a confederation of 'comunidades campesinas' and as an attempt to democratise governance structures in the locality. (IPAZ 2000 and

### 2. Background

The Department of Ayacucho, in the South of Perú, has a population of nearly 500,000; that is 2.3 % of the country's population. Nearly 80% of its inhabitants are classified as poor or extremely poor. The people of Ayacucho bore the brunt of the atrocities committed by Sendero Luminoso. They were also subjected to arbitrary and repressive measures by the military during their campaign against terrorism.

As a consequence of the violence, it is estimated that up to 150,000 people were displaced, of which half had to leave Ayacucho altogether. Violence disrupted productivity and seriously dislocated community and family life. Women were the worst affected. According to a survey of six communities, over 40% of women lost a family member during the war so that most of them became the sole breadwinners (IPAZ, p. 8) It is not surprising therefore that peasant communities in Ayacucho became increasingly isolated and distrustful of any form of public authority. The Centres established by IPAZ can thus be seen as an attempt to re-build trust in state authorities through popular participation in the administration of justice.

### 3. Composition

The Centres are established within the territorial jurisdiction of a rural municipality or Consejo Menor. Its members include one delegate from each of the peasant communities

within the municipality, a representative of the local women's association, the Mayor, the Justice of the Peace (if any), and the local police (teniente gobernador).

The first Centre was set up in the Ayacucho province of Huanta in 1997. By the beginning of 2000, eight more Centres were established, all of them in the Department of Ayacucho.

#### 4. Case Load

Between 1997 and 2000, 84 cases were brought to the Centres (IPAZ, Administración de Justicia). The cases fall within the following main categories:

Domestic violence	17
Assault	15
Theft	12
Family	10
Property	5
Others	25

IPAZ reports that the Centres resolved 70 % of these cases. The rest were referred to the official court system.

#### 5. A Dispute over Land - Laura v. Nemesia

There is no detailed information available about the cases decided by the Centres. In March 1999, however, I had the opportunity to visit Chaca in the province of Huanta, where I observed the Centre at work. The proceedings were conducted in Quechua, but a local anthropologist offered simultaneous interpretation. What followed is based on notes I made at the time.

Until 1982, Chaca was a privately owned hacienda. Under the agrarian reform some 2600 hectares were transferred to local peasant communities. Only 18% of this land is suitable for cultivation (mainly potatoes and cereals such as wheat and corn), 43 % is devoted to grazing and 38 % is inaccessible and economically unviable.

Cultivable land is allocated by the community to families and passed on to members of the same family after the death of the head of the family. Grazing land is communal property. Neither the land owned by the community nor family plots are registered.

Family plots were allocated before Sendero Luminoso began its activities in the region. When violence erupted, families were forced to move away from their plots and to form hamlets to protect themselves. As a consequence, some families were unable regularly to work on their plots and there emerged some confusion about the precise demarcation of their properties. Moreover, since many male heads of families were killed, or had been forced to escape from the area, some plots were temporarily abandoned.

The dispute between Laura and Nemesia concerned the precise demarcation of the family plots. It arose as a consequence of the confusion caused by the presence of Sendero Luminoso in the area. The disputed area was small, about half a hectare in total, but of significant economic value to the parties.

Laura claimed that Nemesia was illegally occupying her land. According to Laura, who had lost her husband, the land had belonged to her father, who had been forced to leave the area because of Sendero Luminoso's activities. Her father's plot had not been cultivated for a while, but she had recently begun to cultivate it.

Nemesia argued that that the disputed area belonged to her husband, also forced to flee the area. She had decided to reoccupy the plot because she needed money to support her family. In her speech, she told the members of the Centre's panel that, during her husband's absence, she had remained faithful and was working hard to raise her children. She also pointed out that she regularly fulfilled her obligations towards the community.

The members of the panel asked several questions to both parties, seeking mainly to establish whether they also cultivated land elsewhere. They also reminded the parties that they could not make claims to grazing areas or firewood that belonged to the community.

There then followed a short period of open discussion and deliberation among panel members. Some thought that the decisive factor was the length of time that each woman had occupied the disputed area. Others pointed out that loyalty to the community during the war against terrorism was a more relevant factor. Most agreed that consistent good citizenship was an important factor.

In the event, the panel decided that Nemesia should be allowed to continue cultivating the plot, but she was reminded that she was not allowed to take firewood or any other products from the adjacent plot cultivated by Laura. The panel also announced that, the following day



representatives from the Centre would inspect the site and demarcate the land, and when that procedure was completed, the parties would then sign a conciliation act.

The proceedings were brought to a close by the Centre's President, who congratulated both parties for bringing the dispute to the attention of the community authorities. In a brief, but moving speech he stressed the importance of resolving disputes peacefully since – as he put it - 'in this community all of us are poor and should learn to get along with each other'. He also reminded both parties of the importance of complying with the terms of the conciliation. Finally, he asked the women to embrace each other. After embracing each other, the women embraced the members of the panel and the members of the public present at the hearings.

## 6. Conflict Resolved

These proceedings and its outcome are interesting on several counts:

First, although Nemesia was a clear winner, the Centre's President described the outcome as a compromise in which both parties had decided to split the difference.

Second, given the paucity of information, it is impossible to be certain as to the fairness of the panel. Nemesia was much more articulate than Laura and was familiar with human rights terminology as she had recently attended a training session run by a local NGO. The main theme of her speech was loyalty to her husband and to the community. Perhaps this was a coded way of saying that the other woman had not been loyal to her estranged husband and had betrayed the community during the war against terrorism.

Third, neither the parties nor the members of the Panel made any reference to customary law, even though they were all members of a Quechua-speaking community. The events on which the parties based their claims were all relatively recent, and some of the interpretations they placed on these events were based on equitable principles that could have been equally effective had they been invoked before a state court.

Fourth, the room in which the proceedings took place was made to look like a formal tribunal. The Panel sat on a table directly facing the parties. The table, covered with an elegant green tablecloth, had as its decoration a small Peruvian flag. There was also a bookshelf in the room containing two or three legal codes. Members of the public sat a few feet behind the parties and were not allowed to intervene in the proceedings.

Fifth, although the proceedings were conducted in Quechua, one of the members of the Centre carefully recorded, in Spanish, the Panel's decision. Record keeping is important, serving both as a guarantee that the decision would be recognised and enforced by the Centre and the community, and as a document that would be recognised by the state - as two of the Panel members were state-appointed officers.

Sixth, the participation of state-appointed officials – especially a Justice of the Peace who, in theory, could have resolved the matter - suggests that the Centre had successfully managed to build its legitimacy. It also suggests that the objective sought by the Centres – to rebuild civil society and enhance democratic governance – is achievable.

## D. Justices Of The Peace

### 1. Background

Justices of the Peace or Jueces de Paz (hereafter, JPs) were established in 1823 by the first Peruvian constitution. They were then mainly instruments for landowners to maintain law and order (Lovatón). As the agrarian reform of the late 1960s disrupted prevailing power structures, JPs became more autonomous and more closely identified with their communities. Today JPs play a leading role in the administration of justice in the Peruvian countryside and, in sharp contrast to professional judges, enjoy widespread popular support.

JPs are lay magistrates who, until recently were appointed by the Supreme Court. Nowadays the community elects them. At present there are some 4,000 JPs, mostly in rural areas and in district capitals. There are also JPs in shantytowns in most cities except Lima. Given the demography of the country – 30% rural and 20% in small towns – the network of JPs provides justice services to nearly half the population. They are not salaried, but, in some areas, charge the parties for their services, based on the notion of reciprocity.

### 2. Jurisdiction

JPs act mainly as conciliators. They also have limited jurisdiction to adjudicate in matters such as debts, misdemeanours, alimony and certain cases of domestic violence. In practice, however, and as a result of demand by local communities, they often exceed their jurisdiction. JPs deal with matters informally and, under the Code of Civil Procedure, are expected to respect and to apply local culture and practices. Ironically, however, a dense network of laws and regulations regulates their functions. This complex, regulatory framework makes it difficult for JPs to know precisely the boundaries of their jurisdiction (Lovatón p.21).

Excessive regulation has not undermined the effectiveness, or popularity, of JPs in rural communities. A study of the Cusco area found that JPs enjoy enormous popular support because they are more accessible, more efficient and less expensive than ordinary courts (Comisión Andina de Juristas, p. 67). Their efficiency of JPs is remarkable. A study in a rural area of the Department of Ayacucho found that JPs resolved 55% of cases within one week (ibid. p. 143).

### 3. Selection

JPs are generally selected from among the best educated in their respective areas. They are often retired teachers, local merchants or community leaders. In the past the JP was usually an elder member of the community. Today JPs are younger. While in 1998 some 33% of JPs were 50 years of age or over, in 2002 the proportion of JPs over 50 is only 25% (Ardito and Lovatón, p. 9). Most JPs were men, but a recent survey shows an increase in women JPs. In 1998, 11% of JPs were women; in 2002 this figure had increased to 14% (Ardito and Lovatón, p. 6). The percentage of women JPs is greater in coastal areas than in the highlands and Amazonía.

Female JPs are usually better educated than their male counterparts. According to the above-mentioned survey, 41% of female JPs have completed higher education, compared to only 22% of their male counterparts. Moreover, 14% of female JPs are lawyers, compared to only 4% of male JPs. It must be noted, however, that in rural areas, where *machismo* is prevalent, women are sometimes only nominally JPs, since it is the husband, or father, who in fact performs the function.

JPs in rural areas are close to their communities and apply customary practices rather than formal law. In the relatively prosperous coastal areas where JPs are better educated, they are more formalistic and tend to apply state law (Ardito and Lovatón, p. 17). JPs speak the language of their community – hence their popularity. This is confirmed by a survey of JPs in the Department of Ayacucho, where 40% of the population only speaks Quechua. (Comisión Andina de Juristas, p. 138).

#### 4. Type of Cases

The most common disputes that come before JPs are misdemeanours (33%) and disputes over property (27%), followed by cases of domestic violence (14%) and disputes over alimony (13%) (Ardito and Lovatón, p.19). These findings, however, are inconsistent with JPs' perception of their workload. When asked which is the most frequent dispute, they answer that it is domestic violence. The discrepancy between the statistics and the JPs' perception may be explained either because domestic violence disputes are more difficult and time consuming than other disputes, or because the settlement of these disputes often goes unrecorded since the parties do not want the publicity involved in recording it.

#### 5. Human Rights and Customary Law

To the extent that JPs are called upon to apply local practices, their decisions are sometimes inconsistent with prevailing standards of human rights, in particular regarding gender equality. Ardito and Lovatón report that, in Amazonía, a JP decreed that a man with two wives should live 15 days with each woman (p.27). A female JP in Southern Perú, who had attended a human rights training session and was reluctant directly to administer corporal punishment on a man who had committed adultery, asked instead a relative of the convicted man to administer the punishment (28).

According to Ardito and Lovatón (p. 29), in cases such as the theft of cattle, local communities often press for more severe punishment than that provided by ordinary law. They also report that, on one occasion, a JP was removed from office for denouncing a colleague accused of excessive reliance on physical punishment. The removal from office was justified on the ground that the JP had defied customary practices by denouncing his colleague.

The fact that JPs are called upon to apply local practices often creates tension with principles of universal human rights. This tension is readily acknowledged by NGOs who support the work of JPs, but they expect that human rights training will slowly bring change JPs' attitudes. They do point out, however, that it is essential to take into account regional differences, as JPs responses to human rights training vary depending on local conditions.

6. A Regional Model

In recent years, policy-makers and intellectuals in Perú have become aware of the importance and potential of JPs in improving the justice system. The experience of the Peruvian JPs has also had an impact on other countries in the Andean region. Thus, the Peruvian experience has been a model for the establishment of JPs in Colombia, Ecuador, Bolivia and Venezuela.

The importance of this development has been acknowledged by the European Union, which has recently provided a small grant to fund an exchange of information about the work of lay judges in the region.

## E. CONCLUSION

There are several features of NSJS in rural Perú that are worth noting. Perhaps the most interesting is the extent to which the four NSJS described in this section operate in the shadow of the state. Given the remoteness of most rural communities, the presence of the state is somewhat paradoxical. This presence, though often clumsy and inefficient, is a reminder that most NSJS are in constant interaction with the political and legal systems.

State involvement with NSJS takes many forms. In the case of JPs and the ancient *comunidades campesinas* or *comunidades nativas*, it is contained in a labyrinth of regulations. In the case of *Rondas Campesinas*, it is exemplified by the government's continuous attempts to co-opt them so as to further its political or military objectives. *Ronda* leaders also encounter the power of the state when they face criminal prosecution for carrying out tasks assigned by their communities.

But state intervention takes many forms and is not always unwelcome. NSJS also seek recognition and protection to enhance their legitimacy at the local level and to ensure that their activities are acknowledged as valid by the official legal system. The complex interaction between NSJS and state institution underscores the fact that, although rural communities are discriminated against and excluded from most of the benefits of membership in the political system, they are nonetheless part of the political process and play a role within the prevailing power structure. Hence, any serious attempt by external agents to eliminate discrimination or exclusion is likely to be resisted by those who benefit from the status quo.

The interaction of NSJS with state institutions also has an impact on their political profile and influence. It is striking, for example, that despite their enormous historical and economic importance, relatively little is known about indigenous communities and their political role is negligible. Perhaps the *Rondas'* high political profile is a consequence of the continuous interest by governments in manipulating and using them to further their political objectives. But there are also other factors that may explain this imbalance. One such factor, for example, could be related to the historical construction of ethnicity in Perú (Mallon). Seen from this perspective, the political imbalance between *Rondas* and indigenous communities could well be seen as a continuation of historical patterns of discrimination against indigenous people.

The proliferation of NSJS is also worth noting since, on the surface, it appears to fragment community organisations and to undermine the objective of securing a stable alternative to the prevailing system of state justice. Rural Perú is indeed an ideal place for those who advocate

forum shopping (Penal Reform International). Thus, for example, if a member of a comunidad campesina in the Department of Ayacucho is involved in a dispute, she has a baffling number of alternatives. She can resort to the authorities of her own comunidad, to the local JP, to a Rural Centre for the administration of Justice or to the state courts. Legal experts will have different views as to whether this abundance of choice is good. My concern here is with the political significance of this vast choice.

An obvious explanation is that the proliferation of NSJS reflects the community's attempts to compensate for the weaknesses and inadequacies of state institutions. The enormous success of Rondas Campesinas in Cajamarca in controlling crime and its impact as a model, both to the government and other grassroots organisations, supports this interpretation. If this is so, then an adequate understanding of NSJS cannot concentrate exclusively on their activities in the area of conflict resolution, but must look at their wider role, which is primarily concerned with governance.

In any event, it is paradoxical that, while politicians and intellectuals neglect the traditionally important indigenous communities, supporters of the Rondas Campesinas attempt to boost their legitimacy by claiming that they are recreating their authentic indigenous roots. The reason why the political debate has taken this direction is due to the fact that, under the constitution, only indigenous communities - comunidades campesinas and comunidades nativas - have the right to administer justice applying their own customary law. This constitutional provision has had the effect of provoking an interminable debate regarding whether members of Rondas Campesinas are genuine representatives of an ancient indigenous culture. This esoteric debate has, unfortunately, steered public attention away from the important political role of Rondas Campesinas and other rural grassroots organisations.

The complicated and long-winded debate as to whether Rondas or other rural community organisation have authentic indigenous roots is not, however, combined with a serious attempt to understand the type of law that rural NSJS apply. The conception that most local observers have about customary law is often crude and not based on empirical evidence. This is disappointing since, apart from a few accounts of cases decided by indigenous communities, the type of law applied by most of the NSJS discussed in this Report seems to be more akin to folk law than to any form of ancient indigenous law. This observation is only speculative, as it is not backed by systematic empirical research. This issue, however, is crucially important and requires urgent clarification. A systematic attempt to clarify this issue would require detailed understanding of how governance structures operate in rural communities, how they relate to state institutions and, in particular, how they interact with the



official legal system. Clarification of these points is essential in order to assess the complex interaction between NSJS and state institutions and, thus, to be in a position to propose policy alternatives.

#### IV. JUSTICE AND THE URBAN POOR - COLOMBIA

##### A. INTRODUCTION

The urban poor in Latin America generally live in large shantytowns on the outskirts of the major cities. In each country they are known by a different name –favelas in Brazil, barrios in Venezuela and Colombia, pueblos jóvenes in Perú, poblaciones callampas in Chile and villas miseria in Argentina. However, they all symbolise the shortcomings of economic and political development in the region. Shantytown dwellers are generally migrants from the countryside in search of economic opportunities or personal security - as is the case in Colombia and Perú. Shantytowns, however, offer neither peace nor prosperity. Moreover, they are generally regarded by politicians and leading members of civil society as the root cause of all the evils that affect their daily lives: crime, violence, personal insecurity, drug addiction and youth gangs. Given this simplistic analysis, it is not surprising that the official response towards them is one of repression and neglect.

##### B. BACKGROUND

Policymakers in Latin America have not always neglected the urban poor. The most interesting attempt at empowering them took place in the 1960s in Chile. It is important to bear this experience in mind, because, although it dramatically failed to achieve its objectives, it was a politically and intellectually coherent attempt to empower and incorporate the urban poor within the political and legal systems (Cleaves). It promoted the establishment of neighbourhood organisations that would identify the problems of shantytown dwellers and resolve them with the assistance of local and central government agencies. Initially, this policy was enormously popular, and overnight hundreds of community-based organisations sprung up in every squatter settlement in the country. This enthusiastic popular response was not, however, matched by the political and legal systems' capacity to cope with the pressure. While the government tried to use the new grassroots organisations to further its programmatic objectives, opposition parties infiltrated and radicalised them. There thus developed a seemingly unstoppable process of political mobilisation which is often seen as one of the factors leading to the collapse of the political system in the early 1970s

Access to justice for the urban poor was among the many casualties of the Chilean debacle. As communities in squatter settlements set up their own organisations, they were soon called upon to deal with problems of law and order and to resolve local disputes. Unfortunately, attempts by these grassroots organisations to provide access to justice for their members were

politically discredited as the elites regarded them as undesirable by-products of the general process of mobilisation. Access to justice initiatives in favour of the urban poor were thus characterised as subversive and part of a master plan to destabilise the political system and undermine the rule of law.

Although today political conditions in Latin America have greatly changed, state institutions still have a deep-seated distrust of any policy that seeks to empower the urban poor or recognise as legitimate any mechanism for the administration of justice that is not tightly controlled by the state. Hence, not surprisingly, the official political and legal systems' response to the plight of the urban poor is still characterised by neglect and repression.

### C. SHANTYTOWNS IN COLOMBIA

Against this bleak background, the experience of the urban poor in the barrios of Colombia offers interesting lessons, as well as a sparkle of hope. Ciudad Bolívar, a shantytown in Bogotá, with a population of half a million people, is, in many respects, typical of squatter settlements in the rest of Latin America. In Ciudad Bolívar nearly half of the households have no sewerage, a third have no access to fresh water and more than 80% of the roads are in poor condition. Illiteracy rates are close to 10% and 35% of young people don't attend school (Gómez, pp. 232).

A pervasive feature of squatter settlements is the vicious circle of illegality (Fernandes). Because these settlements often originate from land invasions, the settlers do not have legally recognised property rights. Moreover, since according to the law the settlements do not exist, the process of urbanisation cannot be properly carried out or is seriously delayed. As a consequence, basic amenities and services such as clean water, electricity and sewerage are not readily available and people are forced to find illegal alternatives. Likewise, other basic public services such as health, education and the police are generally unavailable. Conflicts and disputes arising within these settlements rarely reach the official state system and are either resolved by force or left unresolved. As a consequence, the level of violence in squatter settlements is often extremely high. In 1997, for example, the number of violent deaths in Ciudad Bolívar was nearly 500, a large proportion of which were homicides.

Information about daily life in shantytowns in Colombia is limited because conditions are unfavourable to empirical research. The available evidence suggests, however, that the experience of Colombia is worthy of note on two counts: firstly because both state and non-state institutions have attempted to develop strategies to enhance access to justice; and

secondly, because community organisations have in some instances made courageous attempts to compensate for the inadequacy – or even absence - of state institutions by creating structures of governance and providing mechanisms to resolve local disputes. What follows is based mainly on evidence taken from studies of barrios in Bogotá, but reference will also be made to experiences of urban settlements in Medellín, and, occasionally to the experience of other countries in the region. The following section examines the work of Casas de Justicia, a creative and challenging state/donor initiative that is focused mainly on enhancing access to justice for the poor in urban areas.

#### D. CASAS DE JUSTICIA

##### 1. In General

This is an initiative largely inspired and financed by USAID that aims to bring justice services closer to the poor. They are multi-agency information and service delivery centres operating mainly in urban shantytowns and in selected rural municipalities. Their objective is to offer a one-stop shop to justice and conciliation services in a locale that is accessible to poor people (USAID, USAID and Ministerio de Justicia, Colombia).

USAID has also promoted the establishment of Casas de Justicia in Guatemala (Hendrix), and the Inter-American Bank launched a similar programme in Perú called ‘Módulos Básicos de Justicia’.

##### 2. Casas de Justicia in Colombia

In Colombia, Casas de Justicia are today recognised as an important component of the Government’s justice reform programme. There are presently 21 Casas de Justicia, of which two are in Bogotá, two in Cali and one in each of the country’s major cities. It is expected that by 2005, there will be some 40 Casas de Justicia.

Casas de Justicia are generally staffed by officers from the following services:

Local Prosecutor (Fiscal)

Human Rights Officer (Procuraduría General)

National Ombudsman (Defensor Público)

Police Inspectors

Colombian Family Welfare Institute (Family Defender)

Colombian Institute of Forensic Medicine  
Superintendence of Notary Services  
Community Development Office –to guarantee good social and working relations with the community  
Legal Aid Office (run by law students)  
Conciliation Centre (alternative dispute resolution services).  
Social workers – counselling to individuals/couples/groups)  
Psychologists

The cases handled by Casas de Justicia involve mainly domestic violence, family law matters relating to child support and property disputes. According to statistics supplied by USAID Casas de Justicia have so far handled 1¼ million cases (USAID). Since these statistics are not broken down into smaller components they are unhelpful. A more useful account is found in an independent report published in 1999. According to this report, the most frequently used services are run by social workers on matters relating to family counselling and police inspectors (Corporación Excelencia en la Justicia). The report also points out that the major problem that Casas de Justicia encounter is lack of co-operation among officials from the various services, and that their success depends largely on the continuous financial support from local Municipalities.

### 3. Provisional Evaluation

The work of Casas de Justicia in Colombia has not yet been comprehensively evaluated. USAID officials (in Colombia) acknowledge that such an evaluation is necessary, but claim that they have no time to do it if they are to meet the target of 40 Casas by the year 2005. Despite the absence of a general evaluation, it is possible to identify both positive and negative outcomes of the Casas de Justicia initiative.

On the positive side, two points should be mentioned. Firstly, the impact that Casas de Justicia can have on the wider community. Although presently in Bogotá there are only two Casas de Justicia, their approach to conflict resolution has already become a model for communities in neighbouring shantytowns. Thus, for example, at Cazúa, a shantytown in Bogotá where there is no Casa de Justicia, the neighbours - inspired largely by the approach of the Casa de Justicia in Ciudad Bolívar - have begun to use conciliation as a method for resolving their disputes. The success of conciliation has been impressive. According to a recent report, 90% of cases submitted to conciliation were resolved, while the remaining 10% were referred to the official justice system (González).

The second positive aspect of the work of Casas de Justicia is that, because their personnel is a mix of lawyers and non-lawyers, their approach to issues of justice is broad, going well beyond conceiving it as a set of techniques for conflict resolution. In Supachua, for example, a Casa de Justicia with strong support from the Municipality of Bogotá has developed innovative solutions to community problems. In their discussions with victims of domestic violence, social workers at Supachua concluded that there was a linkage between male unemployment and the high levels of family disputes. They also discovered that businesses in the area were reluctant to employ local people since people from outside the area could be paid lower wages. In order to remedy this situation, they approached the local chamber of commerce and proposed setting up an informal affirmative action programme to give local people preferential treatment. I have no information as to whether the scheme was successfully implemented, or even whether the diagnosis of the problem was correct. The important point, however, is that, at Supachua, the Casa de Justicia, staffed as it is by lawyers and non-lawyers, was able to take a broad approach to a major problem affecting local residents and chose to tackle its root rather than concentrating exclusively on its symptoms.

Casas de Justicia have not, however, been an unqualified success. Some shantytown dwellers often regard them as yet another state-sponsored initiative, aimed at meddling in the affairs of the community rather than resolving urgent social and economic problems. In two barrios of Bogotá -Tibabuyes and Manuel Beltrán –some residents are hostile to Casas de Justicia and feel perfectly capable of resolving disputes on their own without interference from an external agency. Women in these barrios especially resent the ideology of conciliation promoted by Casas de Justicia because it reaffirms patriarchal patterns of domination. They claim, for example, that Casas de Justicia generally encourage female victims of domestic violence to continue living with their male partners who, for the sake of promoting harmony, are never punished (García, pp. 174/9, 184, 192/99). This critique suggests that Casas de Justicia personnel should be made aware of the limitations of the various methods for the resolution of disputes.

Casas de Justicia are also sometimes perceived by shantytown dwellers as a device for smuggling the repressive arm of the state into their communities. This is the case in Ciudad Bolívar, barrio Jerusalén, where a Casa de Justicia was established without a proper diagnosis being conducted and without community leaders consulted. The main objective of its promoters was to control outbreaks of violence and hence, the two most prominent officers were the Police Inspector and the Public Prosecutor. Thus, not surprisingly, local people launched a formal protest as they saw it as an example of yet another repressive intervention

by the state. This protest led the promoters of the Casa de Justicia to conclude that it was unrealistic to concentrate on controlling violence. Instead, they placed greater emphasis on the other services offered by Casas de Justicia (Gómez, p. 252).

Casas de Justicia are, undoubtedly, a novel and challenging attempt to enhance access to justice among the poor. I would thus urge donors to consider sponsoring a comprehensive evaluation of their work.

#### E. COMMUNITY ORGANISATIONS

Communities in the various barrios respond to their problems in different ways depending on a variety of circumstances, of which the most important is the question of land ownership. If the settlement is the outcome of a land invasion, as is often the case, the ensuing confrontation with the police and other state authorities generates considerable solidarity within the community and leads to the establishment of lively organisations that represent the interests of the community. In Bogotá such community organisations are generally called Juntas de Action Communal (hereafter JACs). During the initial stages JACs enjoy widespread support from community members as they have the role of both protecting the community from the efforts by the police to bring the occupation to an end, and lobbying state institutions for the provisions of essential services, such as water, electricity and sewerage. After the barrio is consolidated, and the confrontation with state authorities subsides, the role of JACs changes. In some cases, its profile within the community diminishes and the JAC itself may disappear. In other instances, JACs continue to play a role, representing the community before state institutions or resolving disputes among neighbours.

#### F. SELF-REGULATION

In the absence of state institutions, community organisations often take responsibility for enforcing law and order. The experience of Puente Aranda in the barrio Los Comuneros (Bogotá) shows that communities left on their own can take control over their public life, often replicating the norms and procedures of the official system (Cansel, pp. 161- 175). This finding is consistent with the findings of Boaventura de Santos in his celebrated study of Pasargada, a shantytown in Rio de Janeiro (Santos).

Puente Aranda was a small squatter settlement of about 1000 inhabitants formed in 1975 along a disused railway line. The community was cohesive and militant because eviction was a permanent threat. Initially, the state-owned railway attempted to evict them, but was

dissuaded from doing so by other state agencies. After the privatisation of the railways, however, the new owners eventually succeeded in obtaining a court order and the dwellers of Puente Aranda were evicted.

Law and order in Puente Aranda was secured by an elaborate system of regulation developed and enforced by the local JAC. Interestingly, however, the regulations resembled local Municipality bylaws. They set closing times for local shops, provided that public meetings could not take place after 11 PM and that work could not be carried out on the streets after 11 PM. The regulations also required members of the community to attend Assembly meetings, to participate in local events and pay a contribution to the community fund (Cansel. p.170).

The JAC at Puente Aranda also resolved property disputes –such as lease agreements - that could not be taken to ordinary courts because of the underlying illegality of tenure. It also played an important role in the conciliation of other disputes.

#### G. WOMEN'S SUPPORT GROUPS – A CHILD CARE CENTRE

Apart from JACs, other community organisations that tend play important roles in shantytowns are support groups usually established by women. These groups often raise awareness about community violence and develop strategies to reduce it. They also provide help for working mothers and unemployed youth.

An example of a community organisation set up by women is the case of a Child Care Centre in the barrio Jerusalén in Ciudad Bolívar, The initial objective of the Centre was to resolve a very concrete problem, but it soon expanded its remit to include training in human rights and conflict management. The Centre was created when a house in the barrio caught fire, and five children, left on their own while the mother was at work, died. This tragedy prompted a group of local women to establish a childcare centre to look after children while their parents were at work. The community welcomed this initiative, and, within a relatively short time, the centre was looking after 120 children between the ages of 7 and 14 (Gómez, p. 239).

Through their interaction with the children, the women became aware of the larger problems of child abuse and domestic violence in the community. They thus decided to invite parents to the Centre to discuss the problems of their children. Although most of the fathers ignored this request, the mothers did not. They welcomed the support and advice offered by the Centre. The Centre soon realised, however, that it did not have the skills or the financial resources to meet the demand for counselling. It thus approached a local NGO that the Centre training on



human relations, sexuality and general socio-political topics. The experience of the Child Care Centre was regarded a success: it improved the children's lot and enhanced the capacity of the community to resolve its problems (Gómez, p.241).

#### H. STATE INTERVENTION – A MIXED BLESSING

The community initially funded the Child Care Centre at Jerusalén, but due to its success it soon ran out of funds. Thus, a government agency, the Instituto Colombiano de Bienestar Social, was brought in to provide financial support, which enabled the Centre to continue its work. Yet, the Instituto's policy soon changed and the Centre was notified it could no longer take in children over the age of six if it was to be eligible for further funding. As a consequence, a large number of children care were thrown back on to the streets. The Instituto, undoubtedly, had important reasons to justify its policy shift. It is unlikely, however, that any of these reasons would have persuaded either the promoters of the Centre or the children's parents.

Another example of the often-negative impact of state intervention is also based on the experience of the barrio Jerusalén. With the support of a local NGO (Fundación Social) the community in Jerusalén established a unit they called El Colectivo to co-ordinate and resolve problems arising from the work of community organisations in the barrio (Gómez, 242). The experience of El Colectivo was successful and, as a consequence, it soon began to mediate and conciliate minor disputes among neighbours. Its success, however, was short-lived. Its decline began when the Municipality issued a directive stating that, in order to become eligible for municipal funding communities were required to establish special Centres for Community Participation. This directive brought about a division between the members of El Colectivo as some chose to cooperate and others refused. In the event, the Centres of Community Participation never received the promised funds owing to political and financial problems within the Municipality. During the time, solidarity within El Colectivo was eroded.

These two cases illustrate why leaders of community organisation have a love-hate relationship with state, as well as with other external agencies. On the one hand, they need their support to launch projects; on the other hand, the support they get is often insufficient, and almost always manipulative.

#### I. RESPONSES TO CRIME

##### 1. Lynching

An increasingly common response to crime among Latin America's urban poor is lynching. In recent years, there have been reported cases of lynching in a variety of countries including Argentina, Brazil, Ecuador, Guatemala, Haiti, Honduras and Mexico (Vilas). In Mexico alone, there have been over 100 cases of lynching since the mid-1980s (ibid). Although lynching occurs both in rural and urban areas, it tends to attract more political attention in urban areas. Lynching, as a form of collective violence, includes hanging, beating, stoning, shooting and burning.

A recent case of lynching in Mexico illustrates the dynamics of this brutal practice. The event took place on 5 December 2002 in Milpa Alta, a locality on the outskirts of Mexico City. The case involved an assault on a taxi driver by three youths. The victim managed to call for help, and other taxi drivers in the area managed to trap the thieves. When neighbours in the area realised what was happening, they rang the church bells, attracting the attention of nearly 300 residents. The mob then proceeded to beat up three youths. After three hours of beating, two of the men were dead and a third was seriously injured.

Local residents justified taking the law into their own hands, claiming that they were tired of the police doing nothing to stop criminals. The authorities, for their part, stated that the events had taken them by surprise since the area was not one plagued by crime or violence (Gascón). Other cases of lynching in different parts of Mexico show many of the characteristics of the one at Milpa Alta.

## 2. Social Cleansing

Social cleansing is a more deliberate and premeditated activity than lynching and is usually carried out by an armed group, not a mob. Social cleansing has also become depressingly familiar in Latin America. In some countries, such as Brazil, the targets are street children and it is often carried out by criminals hired by local businesses wishing to re-establish law and order so that they can trade in peace.

In some barrios in Bogotá, social cleansing is carried out by the security forces, sometimes with the active, or passive, support of community leaders (García). The operation has a sinister formality, eliminating known troublemakers, usually youths, only after a formal warning to their parents or guardians. The warning takes the form of an anonymous note, stating that the person targeted has three choices: shape up, leave the community or face

death. Targets of social cleansing are usually identified, either by members of JACs or by local merchants who are often the victims of harassment by local youths.

The case of Tibabuyes, a barrio on the southwest of Bogotá, is another example of complicity between security forces and community leaders. In this barrio, levels of poverty are extraordinarily high and social cohesion very low. Members of the local JAC, however, joined forces with the police to eradicate youth gangs through social cleansing. The operation greatly enhanced the legitimacy of the local JAC within the local community, but their members acknowledged that it had not resolved the problem of security and that youth gangs would probably soon reappear (García, p.177). Similar social cleansing methods have reportedly been used by the JAC in Comuneros, a barrio in the southwest of Bogotá (García, p.190).

### 3. Other Responses to Crime

Lynching and social cleansing are desperate responses by residents of communities torn by persistent crime and violence. They are, of course, not the only, or the most common, response. Certain types of crimes often prompt a community into taking collective action. This was the case in the barrio Comuneros where the activities of a serial rapist triggered action by various groups within the community. When the alleged culprit was found they tied him to a post and local residents were encouraged to beat, kick and drench him in cold water. After ten hours he was handed over to the local police.

Following from this event, the community organised a neighbourhood watch scheme that managed significantly to reduce criminal activity in the locality (García, p. 188). The mechanism they established involved an elaborate alarm system that enabled any member of the community to respond quickly in case of a criminal attack. The scheme, however, only lasted six months - as it was abandoned after repeated false alarms provoked by children playing in the neighbourhood.

#### J. COMMUNITY CENTRE FOR THE RESOLUTION OF CONFLICTS

In the materials discussed above, I have mentioned the work of the JACs and other community organisations involved in dispute resolution. However, there is virtually no recent, detailed analysis explaining how, in practice, they work. There is, however, some information about an institution established in the barrios Moravia and El Bosque, in the city of Medellín, which is locally known as Community Centre for the Resolution of Conflicts (hereafter

CCRCC). Although, in some respects, the experience of urban settlements in Medellín may be considered unusual because of the presence of guerrilla groups in the area, the barrios' response to violence and to the absence of channels to resolve dispute is not unusual (Roldán, Gómez).

The barrios Moravia and El Bosque, established in the 1960s, are located in a central part of town near the Municipal dump. Their inhabitants are primarily economic migrants and rural people displaced as a consequence of the armed confrontation in the region. By the late 1990s, the population of the two barrios was estimated at about 40,000, of whom 53% were under 18 years of age.

As ever, efforts by local authorities to evict the settlement generated solidarity among its inhabitants. Community spirit was reinforced by the settlement's proximity to the Municipal dump, which enabled local residents to form collaborative ventures. In the event, the dwellers of these two barrios soon led the recycling industry of Medellín.

During the first years of the settlement, community leaders, through their local JAC, were called upon to mediate or conciliate disputes involving property matters, access to public services, mainly water and sewerage, and, to a lesser extent, family matters. The role of the JAC in mediation and conciliation virtually disappeared as drugs, common crime and violence overwhelmed the barrios. In view of the inability of the state to maintain law and order, the neighbours of Moravia and El Bosque turned to a militia group linked to a guerrilla organisation operating in the country. The militia succeeded in establishing order and also became involved in dispute resolution. In the area of dispute resolution, however, their decisions met with little approval and were regarded as unfair and arbitrary.

By 1994, process of reconciliation began as the political groups to which the members of the militia were affiliated gave up the armed struggle. One of the outcomes of this reconciliation was the establishment of a Community Centre for the Resolution of Conflicts (CCRCC), created to revive the past experience of the community in dispute resolution.

During its first four years (1994-1998), the CCRCC handled a total of 3,287 cases. Nearly one third of the cases involved property. Disputes between neighbours accounted for a quarter of the total, and family disputes – domestic violence, alimony and matrimonial strife - accounted for another quarter. Other matters handled by the CCRCC were theft, assault, rape and labour disputes. Decisions of the CCRCC were meticulously recorded – not in legal terminology, but rather in the form of a moral exhortation to the parties (Gómez 263).

The success of this experience prompted some local NGOs to propose that the CCRCC should be legalised so that its decisions would be recognised by the official legal system. The advocates of legalisation also regarded this as essential to securing funding for its operations. Local residents, however, opposed the idea. In their view, legalisation would weaken, rather than strengthen, community institutions.

Reports on the work of the CCRCC agree that it strengthened solidarity within the community and enjoyed widespread legitimacy at the local level. Where neighbours had a choice they would usually refer their problems to the CCRCC, rather than to the municipality or the police, even though they both had offices in the vicinity.

## K. CONCLUSION

The materials discussed in this section illustrate the difficulty of examining NSJS in isolation from local residents' efforts to develop survival strategies to resist eviction, protect their families from local gangs or to prevent unwanted newcomers from joining the settlement. Given that state institutions are either part of the problem or are not capable, or willing, fully to assist them, shantytown residents have no alternative but to rely on collective action. Yet, as the discussion above illustrates, conditions for collective action are often unsuitable. Collective action is usually easier to organise during the early stages, when the level of confrontation with local authorities and the police is at its peak. After this stage, solidarity diminishes as the number of residents increases and become more heterogeneous, and the possibility of collective action decreases.

The features of collective action outlined above have two important consequences for the NSJS in shantytowns. Firstly, as the materials discussed in this section suggest, the establishment of mechanisms to resolve local disputes, although often necessary, is not always top priority for community organisations. Moreover, given the nature of the tasks that most community organisations perform, it is unlikely that leaders performing these tasks are also suited to participating in conciliation panels or managing other dispute resolution mechanisms. The skills required to mobilise the community against the police, or to lobby local authorities to secure water or electricity for the community, are different from those required to administer justice.

Secondly, the viability of NSJS is also affected by the fact that community action in shantytowns is unstable and fragile. NSJS are more likely to emerge during the early stages of a settlement when solidarity is at its peak. After this period, as solidarity diminishes and community organisations become less active, interest in conflict resolution at the local level diminishes. Thus, not surprisingly, NSJS tend to be as tenuous and unstable as any other community organisation.

Given the nature of collective action in shantytowns and the unstable features of their institutions, it is not surprising that local residents should have deep misgivings about intervention by external agencies in the affairs of the community. Support by local and central state agencies is often subject to conditionalities, seldom reliable and, given current economic policies, frequently meagre. Support by local NGOs – often acting on behalf of external donors – is also often resisted either because it has not been solicited or because it seeks to impose solutions that are unfamiliar, or inconsistent, with local expectations.

Information on NSJS in marginal urban areas of Latin America is scant. Yet, what information there is suggests an interesting paradox. Although conditions in shantytowns would indicate that NSJS tend towards models of mob justice, some of the evidence points to the opposite direction. The view that NSJS in shantytowns tend to be ruthless is consistent with the fact that their residents lack the sense of community and cohesion shown by settlements in rural areas. This view would seem to be confirmed by the fragility of NSJS in shantytowns, combined with the tendency of some groups to take justice in their own hands. Yet, because shantytown dwellers are in permanent interaction with the wider society suggests that both in form and in substance NSJS in shantytowns are more likely to replicate the rules and practices of the formal legal system than NSJS in remote rural areas. Given that community organisations in shantytowns often come into existence because of the inadequacy or absence of state institutions, the fact that NSJS are likely to replicate the formal system is not at all surprising. In the absence of more substantial empirical evidence, this point is merely speculative. Yet, if it were valid it could open up an interesting range of options for policy intervention in marginal urban areas.

## V. ENGAGING WITH NON-STATE JUSTICE SYSTEMS

### A. INTRODUCTION

The TORs call for specific recommendations to DFID country teams on how to engage with NSJS, based on lessons learned from the region. According to the TORs, these recommendations must contribute to the goal of poverty reduction, understood mainly as the elimination or alleviation of powerlessness, discrimination, victimization and vulnerability. In the justice sector DFID policy is to support interventions that empower poor people to use justice systems effectively to enforce and protect their rights. In framing the recommendations, the TORs also call for a multidisciplinary approach that should combine three dimensions: a legal dimension relating to legal processes and systems; a social dimension, relating to the distribution of political and economic power (inclusion and exclusion); and an institutional dimension relating aspects of governance and institutional reform.

The task set by the TORs, though difficult, is the correct approach to policy interventions relating to NSJS. All too often, studies on NSJS place a disproportionate emphasis on a single factor and as a consequence are either excessively prescriptive or excessively ideological. Studies that are prescriptive usually place emphasis on the legal dimension and treat NSJS as if they were imperfect versions of an ideal model of legality. Their policy recommendations are thus often based on the expectation that a perfect NSJS is one that closely resembles a formal court in a modern legal system. Studies that are too ideological tend to focus on cultural aspects and to attribute to NSJS qualities that they either do not have or, if they do, are greatly exaggerated. Policy recommendations of this type of studies are often based on vague and romantic conceptions of legal pluralism and self-determination. The requirement of the TORs simultaneously to take into account the legal, social and governance dimensions of NSJS should help to avoid the temptation of becoming either overly prescriptive or excessively ideological.

### B. LATIN AMERICAN RESPONSES TO NSJS

Any set of policy recommendations on how to engage with NSJS systems in Latin America has to take into account the policy and response of state institutions and civil society towards them. Responses to NSJS vary, depending on whether governments or local elites regard them as useful instruments of governance or as institutions that have an exclusive legal function. In general terms, where governments or local elites detect that NSJS have a role to play in the maintenance of law and order, they use every possible means to co-opt, reform, influence or repress them. The turbulent political history of indigenous communities and the Rondas Campesinas in Perú testifies to the interest that NSJS create among politicians, the military and local elites. On the other hand, when NSJS are regarded mainly as legal institutions, the response of governments, courts, the legal profession and civil society groups has, until recently, been one of rejection.

The legal profession or the judiciary does not easily accept that NSJS have a role to play within the legal system. Although the recent constitutional recognition of multiculturalism and legal pluralism has helped to change attitudes, there is still a long way to go before legal experts in the region accept the legitimacy of NSJS. Lawyers generally regard NSJS as a threat to their professional monopoly and as a challenge to the integrity of the rule of law. In Cajamarca, for example, while lawyers and judges are prepared to accept Rondas Campesinas as useful *cuida vacas* (cow minders), they are united in regarding members of the Rondas as usurpers of power and subjecting them to the criminal process.

The reluctance of formal courts in Latin America to accept the legitimacy of NSJS is neither surprising nor unexpected. Courts in Latin America, however, have a unique problem because, although most constitutions today recognise multiculturalism and legal pluralism, legislatures have failed to address the crucial question as to how indigenous or other non-state forms of law are related to state law. As a consequence, courts have no substantive legislative guidelines on how to respond to the activities or decisions of NSJS. Not surprisingly, in the case of Perú, the response of courts to NSJS has generally been hostile. The Constitutional Court in Colombia seems to be an exception to this general rule as evidenced by the decisions discussed in this Report. It must be noted, however, that the case law of the Colombian Court has not been entirely consistent and its authority within the political system is under severe pressure, partly because traditional lawyers regard the Court as far too willing to venture into political questions (Sánchez).

The activities of para-military and guerrilla groups are also important in shaping government and civil society responses to NSJS. These groups, currently operating in Colombia and until recently active in Perú, often make use of community NSJS or establish their own NSJS to



further their military and political objectives. Rebel groups in Chiapas have also relied on NSJS. Indeed, an important item in the negotiations between the rebel groups and the Government was the issue of administration of justice by local indigenous communities (Nash). The linkage that often exists between NSJS and para-military groups is often a factor that contributes to shaping – often negatively - official and unofficial responses to NSJS.

## C. PRELIMINARY CONSIDERATIONS

### 1. NSJS As Units of Analysis

The notion of NSJS describes a variety of diverse community institutions in rural and urban areas. As such, it is a convenient label by which to group institutions involved in dispute resolution. However, often these institutions have little else in common, and the case studies discussed in this Report offer a sample of this diversity. NSJS range from the traditional indigenous communities in rural Peru to the precarious contemporary mechanisms established by shantytown dwellers in Bogotá and other major cities in Latin America. Even in the Peruvian countryside, where conditions are fairly homogeneous, there are at least four different types of NSJS that function in different ways and have significantly different social and economic functions. This diversity underlines the limitations of the concept of NSJS and raises questions about the extent to which a single set of policy recommendations can offer helpful guidance on how to engage with such a disparate group of institutions. There is of course room for some general guidelines based on some common issues arising from the operation of NSJS. Yet such guidelines must be complemented by a detailed understanding of the political, economic and social factors underlying the emergence, viability and functions of the NSJS that are the target of the relevant policy intervention.

### 2. The Wider Governance Perspective

A proper understanding of NSJS requires a wider governance perspective. As the case studies in this Report suggest, any policy aimed at engaging with NSJS is bound to fail if it does not take into account the political role of these institutions and the fact that often they are not primarily or exclusively concerned with law – at least not with law as understood in modern legal systems. Whether the focus is on rural indigenous communities or on neighbourhood watch schemes in rural or urban areas, the factors that trigger NSJS into existence and sustain them are generally related to wider issues of governance. None of the NSJS discussed in this Report can be adequately understood unless they are placed within this wider governance framework. As the case studies show, NSJS have an important impact – positive or negative –

on governance within their immediate communities and even within their wider national community. In some cases, such as the case of the Rondas Campesinas and the Rural Centres for the Administration of Justice, this impact is intentional. In other cases, such as community organisations in urban areas, this impact is simply a consequence of the fact that NSJS are the only instruments capable of addressing the countless problems that local or central governments are unable, or unwilling, to resolve.

The wider governance perspective makes it possible to avoid the common mistake of regarding NSJS as exotic cultural artefacts of a bygone age. While it is undeniable that some NSJS are in fact manifestations of ancient cultural traditions that have long been ignored and quite often repressed, they are not relics of the past, but dynamic political actors that influence and respond to contemporary political developments, both local and global. The governance perspective makes it possible to take into account the contemporary political roles of NSJS without ignoring their important historical background.

The seemingly stable and static indigenous communities in the highlands of Perú, such as Calahuyo - described in this Report – are, however, in a permanent state of flux because of economic, political or even military reasons. The ever-present pressure for land, combined with the changing patterns of employment and migration of members of these small communities, inevitably affect the behaviour of the group and its relations with the wider world. Likewise, isolated communities in the Amazonía also have to respond to contemporary political pressures as they are forever exposed to clumsy government intervention and external commercial manipulation – mainly through land concessions that the Government gives to unscrupulous colonists.

NSJS are thus contemporary instruments of governance that - for better or worse – often reflect and reproduce the weaknesses and strength of governance in the wider community. Moreover, NSJS as instruments of governance often enable local communities in remote areas to respond collectively and politically to wider changes, both national and global. It is thus not surprising that indigenous communities in so many Latin American countries have effectively responded and often resisted international concessions for the exploitation of natural resources in their localities (Inter-American Court of Human Rights).

The wider governance perspective also enables the observer to avoid the mistake of regarding NSJS primarily as legal institutions. While there is no doubt that most NSJS perform important functions in the area of dispute resolution, they are not all equally capable of evolving into modern legal institutions; nor is it desirable that they should so evolve. There is,

however, among most observers of NSJS, a strong temptation to draw up legislation either because they wish to ensure that NSJS strictly adhere to constitutional standards or because they want to ensure that NSJS are formally given the power to perform judicial functions. Whether the objective of these efforts is to restrain or to empower, the assumption underlying these efforts is that NSJS can or should evolve into full-fledged modern legal institutions. It could well be that in some cases legislative regulation is the most appropriate response to NSJS. The proponents of NURAJs in rural Perú are keen to seek some form of legal recognition so as to ensure that their decisions are respected and enforced within the wider community. Likewise, in Medellín, NGOs that support the Community Centre for the Resolution of Conflicts also advocated legalisation as a necessary step to raise funds to maintain the organisation. These are good reasons why some form of legal recognition of NSJS may be desirable. Yet, before deciding whether legalisation is the best policy alternative, it is necessary to examine NSJS from a wider governance perspective. From this perspective, attempts at drawing up legislative frameworks to regulate NSJS may be either premature or undesirable.

### 3. Human Rights

There is no doubt – as some of the case studies in this Report show - that NSJS often employ procedures and forms of punishment inconsistent with basic principles of human rights and legality. If NSJS are regarded as merely legal institutions, then the obvious policy response would be either to improve the way they deliver justice or to refuse to engage with them altogether. The wider governance perspective, however, should enable observers to understand NSJS as social facts that have their own historical and political context.

It is not necessary to adhere to any form of moral relativism to realise that it is often impossible, unwise and even counter-productive to attempt to remedy at once all the human rights shortcomings of NSJS. It must also be borne in mind that many NSJS come into existence precisely because the official legal system tramples or ignores the rights of members of remote or marginal communities. In Perú, the Rondas Campesinas were a response to the corruption and inefficiency of local and national state officials and institutions.

Undoubtedly, the activities of NSJS often raise difficult moral and political dilemmas. Thus, for example, the decision of the Peruvian Ombudsman not to follow up the claim of two women expelled from their native communities because of their marriage to outsiders is certainly inconsistent with, if not repugnant to modern legal standards, yet, given the

circumstances, it is not easy to think of better or more practical alternatives. Likewise, although corporal punishment is today seen as inconsistent with basic principles of human rights, the response of the Constitutional Court in Colombia to the question as to whether it is allowed by the constitution shows the complexity of the problem and the difficulty of applying contemporary human rights standards to evaluate the activities of NSJS.

Since most NSJS are far from embodying ideal models of liberal legality, it seems quite natural in the first instance to focus on policies designed to improve the procedural or substantive law that they apply. Indeed, at one level, it seems self-evident that ideally all NSJS should comply with international minimum standards of human rights, that they should not become involved in any form of discrimination and that they should not resort to physical punishment. It is all too easy to prepare a list of policy recommendations (such as, for example, human rights' training courses) that could significantly improve the way NSJS operate. Moreover, apart from the fact that these policies are easy to identify, they are also attractive because they generally appear to be well focused and easy to evaluate. Yet, before deciding whether the standard list of human rights orientated policies are required, it is necessary carefully to understand the role of the particular NSJS within the political and legal system. It is at this point that lawyers urgently require the assistance of governance and other social science experts.

Training courses can undoubtedly bring about significant improvements to the way justice is delivered by some NSJS, as evidenced by human rights training of Peruvian Justices of the Peace. It is also undeniable that similar policy interventions in other areas of human rights can, in the long term, bring about considerable gains. Yet, resorting to human rights teaching without first attempting to understand why and how NSJS behave the way they do may be offensive, wasteful and even counter-productive. In order adequately to deal with human rights issues in the context of NSJS, it is necessary to understand that cultural perceptions may sometimes differ and thus what all sides in the cultural spectrum require is patient dialogue (Benhabib). On other occasions human rights violations occur because communities are driven to these forms of behaviour out of desperation, not because they are primitive, violent or evil. The solution to these problems is often found by tackling structural injustices in the wider community rather than by preaching human rights standards to those who are continuously denied basic rights by the economic and political systems.

## D. GENERAL RECOMMENDATIONS

### 1. More Research

During recent years NSJS have achieved a certain political and intellectual prominence in Latin America. Perú is currently debating a major constitutional amendment that will have a bearing on the way NSJS are regulated. Colombia is beginning to implement a law on lay magistrates modelled on the Peruvian experience. Other countries in the Andean region are also introducing legal reforms in this area of policy. Yet, what is striking about this process is the paucity of information about NSJS generally. Not only there is little information about how they work and the disputes that they handle, there is also little reliable statistical information regarding the areas where they operate and their regional variations. As a consequence, the intellectual and political debate on NSJS tends to be conceptual rather than empirical and, thus, dominated more by ideology than by a real understanding of the way remote and marginal communities deal with governance and resolve their disputes.

DFID and other donor agencies should encourage local Universities and NGOs to develop projects to carry out quantitative and qualitative research on NSJS in their countries.

### 2. Understanding legal pluralism and customary law

The concepts of legal pluralism and customary law figure prominently in current Latin American debates about NSJS generally and, in particular, in debates about constitutional and legal reform. These concepts are part of a range of related legal and political concepts developed by Anglo American legal anthropology to explain colonial and post-colonial states in Africa and Asia. In Latin America, however, because of its different colonial experience and legal culture, these concepts are not well known. As a consequence, in current debates they are often misunderstood or distorted.

Bilateral donor agencies can contribute to the resolution of this problem if they provide logistical and financial support to facilitate access to the relevant literature and to promote exchanges between experts from Africa, Asia and Europe and policy-makers, academics and NGOs from Latin American.

### 3. Evolving International Debate on NSJS

ILO Convention No. 169 on Indigenous and Tribal Peoples is without any doubt the single most important legal instrument informing the debate and policies on NSJS in Latin America. Interestingly, however, there has been no evaluation of the impact of this Convention in the region, nor has there been any attempt to ascertain how its provisions have been interpreted by courts and other institutions in the region. Moreover, apart from Convention No.169, the United Nations and the Organization of American States are currently considering adopting similar instruments. Their deliberations, however, have all the impact that ILO Convention No. 169 has had in shaping Latin American policies on NSJS.

A comprehensive evaluation of the impact of Convention No. 169 in Latin America would thus help Latin American countries frame their policies on NSJS and would also contribute to enlighten the debates within the UN and OAS.

#### 4. Links with Local Institutions

Given that most NSJS have functions that go beyond mere dispute resolution, any attempt to develop a policy towards them should include national and local agencies involved in areas of policy such as health, agriculture, education, labour and the police. The Rural Centres for the Administration of Justice in rural Perú represent a deliberate attempt to connect local state authorities with the community. Likewise, in Cajamarca, the support of the local police appears to have played a major role during the first years of the Rondas Campesinas. Municipalities can also play key roles in supporting NSJS, especially in urban areas. The experience of the Alcaldía (Municipality) of Bogotá offers valuable lessons, as it has been able to mobilise and establish durable partnerships among shantytown dwellers to improve the quality of life and reduce violence in their communities while simultaneously supporting NSJS initiatives.

#### 5. Local NGOs and Civil Society

Any form of engagement with NSJS is resource intensive and politically delicate. In contrast with judicial reform projects, where the counterparts of international donor agencies are generally Ministries of Justice or Supreme Courts and the implementation of projects is delegated to an executing agency, NSJS are fragmented, diverse and their members often lack the expertise to manage projects. Moreover, work with NSJS entails a level of involvement with local communities that could well be resented by local people and viewed with suspicion by local and national authorities. The establishment of links with local NGOs that have experience and are trusted by local communities is essential. Identifying and selecting these

NGOs is, however, not an easy task since local groups are often deeply involved in local political conflict. Great care should be taken to avoid becoming entangled in local political conflicts.

#### 6. Legal Education

Legal education in Latin America faithfully reflects aspects of the region's legal culture. As a consequence, it places almost exclusive emphasis on legislation as a source of law and on formally appointed judges as the sole interpreters of that law. Within this cultural framework there is no room for the notion of customary law and the idea that individuals who are not appointed by the state can administer justice. Although in recent year some Universities (Universidad Nacional in Colombia and Catholic University in Lima) and some NGOs (Centro de Excelencia en la Justicia in Colombia and Instituto de Defensa Legal in Lima) have done valuable work on various aspects of non-state justice systems, external donors can do much to help introduce into law school curricula notions of legal pluralism and alternative mechanisms for the resolution of disputes.

Intervention in the area of legal education would be timely since both the World Bank and the Inter-American Development Bank have purposely avoided involvement in this area. Their reluctance stems probably from the experience of USAID in the 1960s. This is unfortunate and shortsighted since, apart from the importance that legal education has for a proper understanding of NSJS, the current archaic system of legal education is acting as a brake on the adaptation of legal systems in Latin America to the process of globalisation.

#### 7. Legal Profession

Any engagement with institutions of legal education should be complemented with policies towards the legal profession. The general hostility of state institutions towards NSJS derives primarily from the fears and prejudices of members of the legal profession. It must be noted, however, that even lawyers sympathetic to policies and decisions of NSJS are sometimes unable properly to defend their interests because they are not familiar with local practices. Thus, for example, in Colombia lawyers representing an indigenous NSJS before the Constitutional Court in a case involving an attempt to build a highway through their communal land mistakenly concentrated on the financial aspects of the claim whereas the community was mainly interested in obtaining from the court a declaration acknowledging that the highway would destroy the community's cultural identity (Sánchez, pp. 285/6)

Although it would be unrealistic for external agencies to attempt to tackle all the fears and prejudices of members of the legal profession, they could, as a first step, target lawyers who support the work of NSJS. Workshops that disseminate information about experiences of NSJS in other countries would be extremely useful to lawyers working with local communities. It would also be useful if external agencies promote the establishment of a permanent forum where members of the community and interested lawyers could exchange views not only about law, but also about wider policy issues affecting NSJS.

8. Other Professionals

Lawyers are, of course, not the only professionals that need to improve their awareness about the activities of NSJS and the complexity of their own communities. Other professionals involved in work with the community have the same need. These professionals include social workers, teachers, police, health workers and members of local government structures.

9. Formal Courts

There is little doubt that the formal court system does not reach most rural areas and shantytowns in Latin America. People from these areas generally regard courts as hostile, expensive, inefficient and generally unfamiliar with and disinterested in their plight. Current efforts at judicial reform have not been systematic largely addressed macro-management problems of the judiciary. Any initiative that is likely to improve the understanding that courts have about the realities of their immediate community is worth serious consideration. This is obviously a complex process, but the following initiatives could be included:

- a. Evaluation of the various initiatives that involve bringing justice services closer to local communities. These would include, for example, Casas de Justicia in Colombia and Guatemala (USAID) and the Módulos Básicos de Justicia in Perú (IADB). These initiatives have a special interest because they often involve multi-agency co-operation in service delivery. Moreover, all these initiatives have components that have experimented with various forms of dispute resolution.
- b. Investigate ways in which judges and court personnel in rural areas could become more responsive to local needs and culture. Court assessors and judicial support mechanisms used in other regions might prove successful in some Latin American countries.



- c. Review whether, and if so how, the selection and appointment of judicial personnel in rural and marginal urban areas affect the perception that local people have about the formal judiciary.
- d. Conduct surveys on the availability of courts in the countryside or marginal urban areas. It could be that in some rural areas people find courts remote and inaccessible because there are not located within a reasonable distance.
- e. Monitor the activities of and, if requested, provide assistance to Constitutional Courts involved in the interpretation of concepts recently introduced into the constitutions such as legal pluralism, multiculturalism and customary law.

#### 10. Ombudsman Office

In the Latin American context, Ombudsman Offices are a relatively recent import. Although their level of success varies from country to country, they all, in different ways, provide a useful link between state institutions and local communities. The experience of the Ombudsman's Office in Perú (Defensoría del Pueblo) is of special interest since, informally, it has played a vital role supporting, monitoring and supervising the work of many NSJS in remote rural areas of the country. The experience of the Peruvian Ombudsman is worth close examination since it has managed to achieve a remarkable level of legitimacy despite an initially hostile political environment and a tradition of weak state institutions. The Peruvian experience could also be regarded as an alternative to the regulation of NSJS through elaborate legislation.

#### 11. Legal Reform

The inadequacy of existing legislation is often one of the reasons that prompt the establishment of NSJS. So-called people's law is often not the product of rebellion against the authority, but a self-preservation response to the fact that the prevailing legislation either does not address issues that concern local communities or does so inadequately. Thus, not surprisingly, NSJS often emerge as mechanisms to compensate for the shortcomings of the formal legal system. In some shantytowns in Brazil this is known as asphalt law.

The inadequacy of the formal legal system is most obvious in the case of illegal settlements in urban areas where – as explained in the Report in the case of Bogotá - conflicts over the interpretation of leases among neighbours cannot be resolved by ordinary courts because of the underlying illegality of the occupation.

It would thus be worth exploring the extent to which the legislature could address the real problems that rural or marginal urban communities face on a daily basis. The three most obvious areas to consider are criminal, property and family law.

12. Overcoming Linguistic Barriers

The recognition that some Latin American countries are multilingual is a relatively recent development. As the materials discussed in the main body of the Report show, language barrier is often a factor that explains why NSJS emerge, as well as being a factor that makes monitoring, supporting and even supervising the work of NSJS either impossible or frustrating (Bermúdez, Lozano).

The experience of some countries in Africa and Asia in overcoming language barriers would be valuable in some Latin American countries. Also, the experience of Perú, where local radio stations run by NGOs broadcast in Quechua or Aymara should also be of interest as these broadcasts not only help to disseminate information about political and legal issues of local concern, but also give communities a voice and thus contribute to their empowerment.

E. **SPECIFIC POLICY RECOMMENDATIONS: PERU AND COLOMBIA**

1. Justices of the Peace

As explained in Part 1 of this Report, Justices of the Peace (JPs) are the most successful and legitimate of all judicial institutions in Perú. As such, they have become the object of great interest among policy-makers in Perú and in other countries in the region.

While projects to study Peruvian JPs have already attracted considerable attention and funding from external sources, there are two areas where, in my view, there is room for DFID intervention:

- a. Evaluation of Training Courses: Various NGOs have conducted training courses for JPs, mainly in the area of human rights. Evidence suggests that, over the years, the behaviour of JPs, particularly in the area of gender, has undergone significant changes. What is not clear, however, is whether these changes are attributed to the training courses or to other local or national factors. An evaluation of the impact of these training courses could provide valuable lessons.

- b. Support of Regional JP-initiatives: The adoption by several countries of the Peruvian model of JPs offers opportunities to fund workshops, conferences and study tours aimed at key policy-makers and NGOs in the region. Although the EU supports a modest initiative in this area, there is plenty of room for further activity.

## 2. Indigenous Communities

The political, economic and cultural importance of indigenous communities (comunidades campesinas and comunidades nativas) in Peru is undeniable. They are also recognised by the constitution as having the right to enforce customary law. Yet, compared to other NSJS very little is known about the way indigenous communities function and use their powers. The neglect of indigenous communities by politicians and intellectuals is probably an indirect consequence of discrimination against these groups. In any event, given the importance of indigenous communities and their relevance to the study and design of policies on NSJS, it is essential that more research be done on these communities.

## 3. Rural Centres for the Administration of Justice

These NSJS, established in the Department of Ayacucho and known locally as NURAJs, are few in number, but have been very successful. When they were established they were strongly supported by the British Embassy in Lima. As explained in Part I of this Report, one of the reasons why they are significant is that they have successfully managed to provide a framework for local state authorities and members of the community to resolve political and legal issues. As such, NURAJs could well provide an interesting model for other countries. I strongly recommend that DFID commission an independent study on how NURAJs function today and, if appropriate, that it support local NGOs in their efforts to establish new units within the Department.

## 4. Rondas Campesinas

The Peruvian Congress has recently approved (12/12/02) a new law on Rondas Campesinas. The Government has to draft Regulations before this law is implemented and thereafter Rondas have six months to adapt their structures and practices to the provisions of the new law. This new law is bound to generate enormous controversy since it does not offer answers to many of the questions raised during the congressional debate, in particular the question as

to whether the Rondas should perform judicial functions. This controversy provides the opportunity to learn about Peruvian and Latin American attitudes to NSJS. It also offers opportunities for enriching the debate through various forms of technical assistance.

5. NSJS in the Barrios of Colombia

Given that the DFID is not active in Colombia it would be futile to make specific recommendations. It should be noted, however, that given the precarious nature of NSJS in the barrios of Bogotá, any form of direct intervention is likely to be extremely risky. On the other hand, as the materials in this Report suggest, support of community organisations, such as the women's support group discussed in Chapter 4 is probably the best way of tackling poverty and, eventually, contributing to improvements in access to justice.

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ANNEX A: Comments on Access to Justice in Sub-Saharan Africa – the role of traditional and informal justice systems (Penal Reform International, November 2000).

This Report is clearly written and contains information that will be useful for people already familiar with African legal systems and informal legal processes. The best chapter, by far, is Chapter 3. The Report also has many other strengths of which DFID and Penal Reform International are probably aware since it has been in public domain for quite sometime. My remarks will therefore concentrate on some of its weaknesses.

In my view, the Report has two main weaknesses. It has too much factual information and its analysis of the facts is superficial. The information contained in the Report is not placed within a clear analytical framework, nor does it provide any historical background. As a consequence, a reader unfamiliar with African history might be left with the impression that there are no significant difference in the legal and political processes in Mozambique, Uganda, Rwanda and South Africa.

In the absence of an analytical framework, the Report tends to be overly prescriptive. This prescriptive approach (see Introduction, especially pp. 2-3) is unhelpful and unrealistic. Unhelpful because the benchmarks identified (on discrimination, physical punishment, and the role of states in policing non-state justice systems) beg the historical question as to how these systems came into existence and why they endure. It is also unrealistic (and even slightly arrogant) because (p.3) while acknowledging that relying on the law to eliminate social practices may be futile, it asserts that what is needed is to tackle underlying beliefs. The reader is left to ponder how this objective is to be achieved and which enlightened group will bring such a radical change. While I am certain that it was not the intention of the authors to place prescription before analysis, the absence of a conceptual framework has the effect of distorting the important issues that are raised in the Introduction.

The absence of a clear analytical framework is also likely to confuse readers who are neither lawyers nor familiar with legal issues. The classification attempted in Chapter 2 is helpful but confusing. The main distinction - state and informal – is problematical and not clearly explained. Two further distinctions used in Chapter 2 are also confusing - the distinction between traditional and non-traditional and that between courts and forums. It seems that the authors of the Report have uncritically relied on some of the terminology employed in South Africa (forum, for example) to explain and describe justice systems in the rest of Africa.

Some specific comments:

Pp. 16-17 – The point of this section is unclear to me - there are too many facts and the analysis is muddled.

P. 28/9 – It would have been helpful if the section on customary law had discussed the relevance of the debate (important among experts on Africa) about the nature of customary law and its links to the various systems of domination in the region.

Pp. 39 ff –South Africa's street Committees: This section is dense and difficult to follow. The timing and sequence of events are unclear.

P49 – Resistance Committees in Uganda – This section is disappointingly short. The additional information (pp. 60/5) is too legalistic. Had the Report examined the evolving political context, its analysis of the legal work of the Committees and local council courts may have yielded useful insights. The statement (p.64) on the consequences of legal incorporation is interesting and should have been developed.

Chapter 6 – This is a good chapter, but it is not immediately clear why it is part of a Report on Africa.

Chapter 7 – I don't understand the point of this chapter. Perhaps it should have been an Appendix.

Chapter 9 – General Observations – I find the tone and contents of this Chapter somewhat prescriptive. The chapter follows closely the views of the South African Law Commission, yet these views are not subject to scrutiny in the body of the Report.

I wholeheartedly agree with the Report's conclusion that there is an urgent need for research into traditional and informal mechanisms. Unless more is known about how these mechanisms work in different countries, policy recommendations will continue to be based on prescriptions distilled from the experience of other countries. Given the long and unhappy experience that most African countries have had with legal imports, it is essential to develop policies based on a sound understanding of political and historical realities.

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## GENERAL RECOMMENDATIONS – ADDENDUM

### **Preliminary Remarks**

Some preliminary remarks are in order. First, it is helpful to bear in mind that precision is often determined by the nature of the subject matter. In the Report, I explain why I feel that the concept of non-state justice system (NSJS) is ‘imprecise’. And second, a pre-condition for precise recommendations for action is knowledge about the subject matter. In the case of Latin America, so little is known about NSJS that the most helpful and precise recommendation is research, research and more research.

It is also important to bear in mind the risks involved in any attempt to draft a very precise set of general policy recommendations. One only needs to look at the difficulties that multilateral agencies and bilateral donors have in designing a strategy and guidelines on ‘engaging with the formal justice system’ to realise how much more difficult and risky it is to attempt drafting precise guidelines in an area where the subject matter itself lacks precision.

### **Engaging with Political and Social Systems – Not Just NSJS**

In my Report I argue that NSJS should be regarded primarily from governance, rather than a legal, perspective. If this is accepted, it is important not to expect recommendations that are addressed exclusively, or even primarily, at NSJS.

In Latin America, two factors that policy-makers (state/NGO/or external donor) should not ignore when attempting to deal with NSJS is the excessive centralisation of political systems and the excessive formalism of legal systems. These features of the political and legal systems suggest from the start that political and legal elites are likely to have a hostile response towards NSJS. This is why most of my recommendations are addressed at state and other institutions.

Another factor, crucially important in Latin America, is the much-discussed transition to democracy. This is an important issue because the existence of NSJS in Latin America is often a symptom of a weakness of the political regime. Hence, any meaningful engagement is bound to have political consequences – positive or negative – that could go well beyond the immediate technical outcomes expected by an external agency. The best advice that one can offer is simply to be cautious and exercise good judgment. The variety of NSJS is such and

the way they link up to their immediate environment are also so different that I would not dare offer a list of do's and don'ts.

Nonetheless, awareness of the wider political significance of NSJS suggests that country offices interested in supporting the work of NSJS should endeavour simultaneously to gauge the views, among others, of the following officials and institutions:

Relevant Central Government Departments (Interior, Justice, Labour, Agriculture, Water Resources, etc.)

Courts

Parliamentarians

Local Authorities

Education

Legal Education establishments

Journalists

Local Bar Associations

Police

Social Workers

Human Rights Commissions or Ombudsman Offices, if any, and

NGOs.

### **Reform Fatigue**

Not everything in a political or legal system can be reformed at once. This platitude is worth repeating because in the field of judicial reform, external agencies do not seem to take it into account. Most Latin American countries are presently implementing such a large number of legal reform projects that caution must be exercised before launching any new project. The design of most of these projects is often faulty, and even where it isn't there is not an abundance of competent personnel (state officials or NGOs) available properly to implement them.

If it is true that political and legal elites tend to be hostile to NSJS and some are disillusioned by the lack of progress in the process of judicial reform, setting up a project on NSJS has to be done with extreme caution. It is absolutely essential that the political and legal terrain is carefully researched and that the project allows a long time to the process of consensus building and to disseminating information and promoting discussions about the virtues and weaknesses of NSJS. It is important to bear in mind that, from the point of view of local

elites, the alternative to a complex and complex NSJS project is a lorry loaded with computers or new buildings for provincial courts.

### **Evaluation**

Everybody agree that evaluation is important, but few like to do it. In the area of legal and judicial reform, bilateral and multilateral donors have been reluctant to carry out comprehensive evaluations of the process of legal and judicial reform. Such an evaluation should provide essential information for the design of worthwhile projects in the area of NSJS. It would enable field officers first to identify the capacity of the system to absorb another project and, most importantly, to identify the individuals and institutions within the formal system that could help make the project a success.

In any event, field officers would be wise to carry out their own assessment of the reform process since it should provide valuable insights as what can and cannot be achieved in a particular country.

### **Forum Shopping**

Some observers regard forum shopping – in which claimants can choose the type of court or mechanism for the resolution of disputes – as an important attribute of a healthy justice system. In this context, the availability of a forum other than an NSJS is seen as an essential constitutional safeguard.

I do not believe that it is possible to fashion such a general rule about forum shopping. A more cautious approach would be to look at each case on its own merits. I do think, however, that excessive choice in this area may be counterproductive. If NSJS are indeed mechanisms of local governance, then the possibility of opting out of their jurisdiction will tend to undermine them. This may not be a bad thing if the NSJS is unsatisfactory. Yet, if the NSJS is unsatisfactory, forum shopping may not be the best way of remedying its weaknesses. Forum shopping also tends to favour those who have more resources and are able to resort (travel?) to an alternative forum. In the area of international commercial litigation, those who benefit from forum shopping are usually the most powerful transnational companies and those who don't are firms that are locally based. Forum shopping may thus tend to reinforce the idea that NSJS is second-class justice for those who the legal system treats as second-class citizens.



## **Regulation and Self-Regulation**

In Latin America, where lawyers and politicians tend to regard legislation as the culmination, rather than the beginning, of the Reform process, there is an obsession with regulation. In the Report, I explain the pros and cons of regulations and conclude that premature regulation may be counterproductive. This is another area where it is not possible to offer precise advice since so much, as ever, depends on the context and the good judgment of the official who is assessing it.

Many regard self-regulation as a panacea. In this area of policy it tends to demonstrate that members of NSJS are as much in search of order, stability and predictability as are lawyers, courts and the government. In the Report, I mention cases of self-regulation that seem to confirm this view. However, self-regulation is often prompted by external agents – NGOs – and thus, it may not be a genuine reflection of the views of local communities.

## **NGOs**

Another panacea is the NGO. NGOs are varied and are often created by external agents to support their favourite projects. It is advisable that NGOs selected to work on NSJS projects have deep roots in their communities. Only thus project sustainability can be achieved.

## **Linkages - Judges and Court Officials**

It is important not to overlook the role of lower court judges. The literature on judicial reform tends to depict judges as corrupt, inefficient and hostile to the reform process. Most of the lower court judges that I have met in Latin America are committed individuals, who are receptive to change and interested in improving the justice systems in their countries. Their main complaint about the reform process is that their views are not heard or taken seriously by Supreme Courts, Ministries of Justice or experts from international agencies.

I would thus urge bilateral donors, wherever possible, to incorporate them into NSJS projects, as they have a crucial role to play in the efforts to link NSJS and state justice systems.