Oñati Socio-Legal Series (ISSN: 2079-5971)
Oñati International Institute for the Sociology of Law
Antigua Universidad s/n - Apdo. 28
20560 Oñati - Gipuzkoa (Spain)
opo@iisj.es / http://opo.iisj.net

Community-based justice or indigenous justice in international law: Analysis of Article 9 of ILO Convention 169

OÑATI SOCIO-LEGAL SERIES VOLUME 13, ISSUE 2 (2023), 608–625: INNOVACIÓN LEGISLATIVA EN TIEMPOS DE EXCEPCIONALIDAD
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL/0000-0000-0000-1371
RECEIVED 3 JUNE 2022, ACCEPTED 25 OCTOBER 2022, FIRST-ONLINE PUBLISHED 23 DECEMBER 2022, VERSION OF RECORD PUBLISHED 1 APRIL 2023

ANTONIO ALFONSO PEÑA JUMPA*

Abstract

This paper deals with communal justice or indigenous justice governed by Convention No. 169 of the International Labour Organization (ILO). Article 9 of the indicated Convention is analysed describing and commenting on the different aspects or assumptions it contains about communal or indigenous justice. Likewise, this content is analysed in the doctrine and in the author's field experience. The central question that guides the work is: How does the International Convention No. 169 of the International Labour Organization regulate communal or Indigenous justice? The answer is made through the verification of a hypothesis that raises the limits of the Article 9 of Convention 169 to understand and regulate communal or indigenous justice that is practiced in indigenous communities or peoples.

Key words

Justice; community-based justice; indigenous justice; communities; indigenous peoples

Resumen

El presente ensayo trata sobre la justicia comunal o justicia indígena regulado en el Convenio Nro. 169 de la Organización Internacional del Trabajo (OIT). Se analiza el artículo 9º del indicado Convenio describiendo y comentando los distintos aspectos o supuestos que contiene sobre el tema de la justicia comunal o indígena. Asimismo, se analiza dicho contenido en la doctrina y en la experiencia de campo del autor. La pregunta central que guía el trabajo es ¿Cómo regula el Convenio Internacional Nro. 169

I am grateful to the Faculty of Law of the Pontificia Universidad Católica del Perú (PUCP) and the Faculty of Law and Political Science of the Universidad Nacional Mayor de San Marcos (UNMSM).

* Professor at the Pontificia Universidad Católica del Perú and lecturer at the Universidad Nacional Mayor de San Marcos. Lima, Peru. Lawyer, Magister in Social Science and PhD in Laws. Email addresses: apena@pucp.edu.pe / apenaj@unmsm.edu.pe

de la Organización Internacional del Trabajo la Justicia Indígena o la Justicia Comunal? La respuesta se realiza a través de la comprobación de una hipótesis que plantea los límites del citado artículo 9 del Convenio 169 para comprender y regular la justicia comunal o indígena que se practica en las comunidades o pueblos originarios.

Palabras clave

Justicia; justicia comunal; justicia indígena; comunidades; pueblos indígenas

Table of contents

In memory of Manuel Calvo García.

1. Introduction

Community-based Justice or communal justice as a practice of the native peoples of America is regulated in international law. The main international instrument that regulates it is Convention 169 of the International Labour Organization. Article 9 of the Convention deals with the subject under the concept of Indigenous Justice or Justice of Indigenous Peoples, but in practice this concept has its content in what we call community-based justice or communal justice from the experience of the communities or indigenous peoples of the Andes and the Amazon of South America, as is the case of the Peruvian communities.

With this prior explanation, in the following pages it is our intention to answer the following question: How does the International Agreement No. 169 of the International Labour Organization regulate indigenous justice or community-based justice?

In this regard, we formulate the following hypothesis: International Convention No. 169 of the International Labour Organization that regulates the rights of native or indigenous peoples in independent countries has limitations to understand and regulate indigenous justice or communal justice of these peoples of the world. Starting from the experience of the peasant and native communities of Peru, or Peruvian indigenous peoples, we can affirm that these limitations regarding the concept of communal or indigenous justice are synthesized in three secondary hypotheses:

1. The indicated International Agreement does not have clear norms to recognize a communal or indigenous justice proper and full of the indigenous or native communities or peoples.
2. The same International Agreement lacks effective rules that prioritize communal or indigenous justice over the direct or indirect intervention of state authorities.
3. The current international regulation on communal or indigenous justice does not formally contemplate the possibility of a neutral, supra-state body that intervenes when communal or indigenous justice enters in conflict with the jurisdiction of the State authorities.

Next, we try to prove these hypotheses. The three secondary hypotheses will be developed within the analysis of Article 9 of International Convention No. 169 of the ILO.

The methodology applied in this article is one of reflection on sociology of law and normative logical analysis, including the analysis of the author's field information.

2. The concept of Community-based Justice or Indigenous Justice

The terms of community-based justice or communal justice, and indigenous justice, in turn, bring together two concepts: Justice and Community or Indigenous People. Both, with extensive content, which makes their definition difficult.

On the one hand, the concept of Justice has philosophical and practical content. In philosophical terms, Justice is an essential value of people. It consists of recognizing or

giving each one what is due.[1] This content starts from a premise: everyone has rights. And it is complemented by another premise: in a specific situation some people will have different rights. Justice consists of combining these two premises: recognizing or giving the right that corresponds to each person in the specific situation. In recent times this part of the concept of Justice has been related to memory and forgiveness. It is about seeking justice for those people who have historically been victims and who still live, they or their descendants, in a situation of lack of justice.[2]

In its practical sense, the concept of Justice consists of the art of resolving conflicts.[3] It is an art because there are no exact rules or protocols in decision-making in the face of conflict. As conflicts are diverse and complex, and since the people themselves involved with conflicts are diverse and complex, conflict resolution has many alternatives. The person who resolves conflicts not only knows the rights that are in conflict but must be a virtuoso to distribute or apply them into the specific case.

On the other hand, the concept of Community or Indigenous People has a sociological and anthropological content. In its sociological sense, the terms of Community and People are related to the concept of social group or society. The community is a social group insofar as it integrates two or more persons with a common interest. This social group can integrate hundreds, thousands, or millions of persons, making mega communities that very well coincide with the societies under organic solidarity (according to the definition of Emile Durkheim)[4] or complex societies of a big city. But these huge societies are community if they keep alive the common interest that integrates the persons or people who are part of it.

In its anthropological sense, in turn, the Community or Indigenous People consists of a human group with a sense of identity.[5] It is no longer a common interest, but a feeling

[1] This conception of Justice can be found from the Greek philosophers. See in this regard the work of Aristotle on Nicomachean Ethics (350 B.C.E., online) In his book 5, chapter IV, he deals with Justice in Contracts and explains how fairness is found in equality, or in proportionally giving what that corresponds to each part (see http://classics.mit.edu/Aristotle/nicomachaen.5.v.html).

[2] This last idea of the philosophical part of the concept of Justice is highlighted by Reyes Mate Rupérez, who, criticizing the universal nature of modern theories of justice, maintains: "Si queremos construir una teoría de la justicia digna de ese nombre, es decir, *universal*, tiene que ser una teoría que se haga cargo de todas las injusticias en el tiempo y en el espacio. Y para hacerse cargo de todas las injusticias en el tiempo, hace falta ver las desigualdades con ojos de la memoria" [If we want to build a theory of justice worthy of the name, that is, universal, it has to be a theory that takes care of all the injustices in time and space. And to take care of all the injustices in time, it is necessary to see the inequalities with the eyes of memory] (Mate Rupérez 2012, 103). Nota: Todas las traducciones del español al inglés son del autor.

[3] In this practical approach, another set of concepts such as access to justice, effective judicial protection, due process, among others, are combined. See in this regard the works of Mauro Cappelletti on access to justice; see Cappelletti and Garth 1983; Cappelletti, 1978.

[4] See Emile Durkheim and his conception of modern society in his original work *The Division of Labour*, first published in 1893 (2014).

[5] The concept of identity, and in particular the concept of cultural identity, is key in anthropological work, and it is important from sociology. In this regard, the definition of cultural identity that Professor Anthony Cohen (1982) approaches when he refers to Cultural Consciousness as the basis for understanding the differences of individuals and their sense of belonging is interesting. In the same sense, the concept of cultural identity can be appreciated in the work edited by Manuel Calvo (2002) when it is confronted with the concept of human rights.

(according to Weber's definition)[6] that integrates the people of a community. The community would then be defined by the feelings that in the past or present identifies the people who are part of it. Past feelings refer to the customs or affections that have marked or mark the union of the people who make up the community. The present feelings refer to the challenges, triumphs and problems that unite or confirm the historical ties of the people who are part of the community.

It should be explained that the concept of Indigenous People differs from that of Community. Indigenous People is a more precise concept with respect to native populations that denotes direct care for persons living in a situation of vulnerability. But, in the analysis or confrontation with the concept of Justice, when we apply the concept of community-based justice or indigenous justice, there is not much difference and, on the contrary, we find an advantage using Community. The concept of community-based justice or communal justice expresses a concept that springs from these native peoples and that has been maintained throughout history. Furthermore, the concept of community-based justice or communal justice is maintained in them, as intact, according to numerous studies that mention the term directly as indirectly,[7] and therefore there would be no problem in the simultaneous use of the term communal Justice with that of indigenous justice.[8]

In sum, returning to the concept of Communal Justice (or Indigenous Justice), we can confirm the following definition: Communal Justice is presented as that value and art of resolving conflicts that occurs between the members of a community (native people or first nation) in which they are integrated by a common interest or by past and present ties of identity.

3. Community based Justice or Indigenous Justice in ILO Convention 169

Convention 169 of the International Labour Organization (ILO) (hereinafter The Convention or Convention 169) regulates in part the concept of Community Justice (or Indigenous Justice). Its precise regulation can be read from Article 9 of the Convention:

[6] Max Weber develops the concept of Community or Community Relationship in relation to his theory of social action and, more specifically, that of social relationship. By Community Relationship he understands: "a social relationship when and to the extent that the attitude in social action [behaviour with a subjective sense of people with reference to other people] (…) is inspired by the subjective feeling (affective or traditional) of the participants of belonging in common to a constituted whole" (Weber 1922/2016, 171).

[7] See an extend bibliography on this point in Peña 2006, and see the concept used in DESCO 1977, Brandt 1987, Peña 1998, 2004, 2009, and Ansión *et al*. 2017, among others.

[8] The author differs from the use of the term "indigenous", since it goes back to the confusion of the population that the first Spaniards believed to discover when they arrived in America. Furthermore, in countries such as Peru, the term "Indian" has a pejorative use with content like that of "primitive", "inferior", "savage", among others. The origin of this pejorative use is found in the colonial and republican experience to this day, particularly in the Andean areas of Peru. Therefore, although the concept "indigenous people" has an international use, the author tries to use it only exceptionally or additionally. We try to use in its replacement more general terms which are also receiving reception in the international language: Native People, Original People, First Nation or, simply, Community.

> Article 9
>
> 1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
>
> 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

The cited article leads us down two paths for its analysis. In the first place, understand the general topic or matter that Communal or Indigenous Justice deals with. This is, to understand the penal matter that involves the methods that communities apply in their conflict resolution processes. Second, it refers to the effects in the application of the norm or in the practice of those methods of communal (or indigenous) justice. This is, to analyse the plans, circumstances, or dimensions of application of that general topic or matter of the communal (or indigenous) justice.

In addition, article 8 of the Convention also regulates part of communal (or indigenous) justice, but in the sense of community (or indigenous) LAW and considering the application of national (or State) law and international human rights:

> Article 8
>
> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
>
> 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
>
> 3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Particularly, paragraph 2 of article 8 regulates community (or indigenous) law in the sense that it must not be incompatible with fundamental rights defined by national legal system and with internationally recognized human rights. This means that this article is about law or the scope of community (or indigenous) law, not justice, but its content complements the reasoning on justice or conflict resolution processes in the communities.

Considering this previous explanation, we focus on article 9 of ILO Convention when we talk about community (or indigenous) justice. In this sense, we return to its content through the analysis of its two paths or principal aspects: the general theme or issue on justice that article 9 regulates for community or indigenous people, and the planes, circumstances, and dimensions of this general theme applied in their conflict resolution processes.

4. On the general issue that regulates article 9 of ILO Convention 169

The general theme that regulates article 9 of ILO Convention 169 corresponds to the issue of crimes. This involves two aspects to consider, one of procedure and the other of content.

The first procedural aspect that emerges from the international standard is on the scope of regulation of matters that require attention in International Law regarding the issue of Communal (or Indigenous) Justice. From this rule it can be understood that only the issue of crimes needs to be regulated in international law when it comes to Communal (or indigenous) Justice, excluding other issues or matters such as those related to what we know in international law as rights: civil rights, family rights, property rights, labour rights, commercial rights or others that do not include crimes.

According to this article 9, only conflicts related to crimes are of concern for an international regulation such as the one presented by ILO Convention 169. The other matters are understood to be within their scope or freedom of the communities or native peoples to treat or assume them in their resolution, as regulated in the same Convention in article 8.[9]

The second aspect, on the content, is central in the analysis of the Article 9. The analysis of the content of this rule leads us to ask ourselves what Convention 169 means by CRIME. In this regard, it is essential to distinguish between two concepts of crimes: a concept of crime that is established from the legislation and doctrine of the State, and a concept of crime that is practiced from society or, specifically, from the communities or native peoples themselves.

The concept of crime, from the State, appears regulated in the Penal Code of each State. In Latin American States there is a common concept of crime that has European influence. Thus, to cite the example of the Peruvian State, the crime is regulated in a general way in articles 11 and 12 of the Penal Code:

> Article 11.- Crimes and misdemeanours: basis of punishment.
>
> Intentional or culpable actions or omissions punishable by law are crimes and misdemeanours.
>
> Article 12.- Culpable and intentional crimes.
>
> The penalties established by law always apply to the agent of intentional infraction.
>
> The agent of culpable infraction is punishable in the cases expressly established by law. (Código Penal, 1991).[10]

According to these rules, the crime is an offense or infraction that has its origin in human conduct, which can be action or omission. This conduct, in turn, can be malicious (with intention) or culpable (without intention). But, in addition, for the conduct converted into a crime to be punishable or penalized by the criminal system or the State, it must be regulated by law (Typification in Criminal Law). Under this conception, crimes are prevented, investigated, and punished.

This conception has a European origin. As Professor Hurtado Pozo (2005, p. 367 ff.) refers, the concept of crime that is configured in Latin American Criminal Law, including

[9] See in this regard Article 8 of the Convention, particularly paragraph 2, in the part that regulates respect for the customs or traditions of native or indigenous peoples. Note that the principle that is regulated in paragraph 2 is the same as that we read in Article 9 of the Agreement, under analysis.

[10] Original text in Spanish: "Artículo 11.- Delitos y faltas: base de punibilidad. Son delitos y faltas las acciones u omisiones dolosas o culposas penadas por ley. Artículo 12.-Delitos dolosos y culposos. Las penas establecidas por la ley se aplican siempre al agente de infracción dolosa. El agente de infracción culposa es punible en los casos expresamente establecidos por la ley".

the Peruvian one, has European theories behind it. After narrating the origin and evolution of these theories regarding crime, Professor Hurtado Pozo explains how these originally European theories have shaped the concept of crime in the legal systems of countries such as Latin America (*ibidem*). A synthesis of this explanation, we can read in the following note:

> The theory of crime, in the sense that we study it, is the fruit, above all, of the doctrinal elaboration carried out by German jurists. Its influence extends, on the one hand, to a large part of the penal systems belonging to continental European law, except for the notable exception of France, and, on the other, to the penal systems of Latin American countries, arising from the independence movements of the Spanish and Portuguese colonization. In the case of Spanish-speaking countries, the reception of German conceptions has taken place through the intermediary of Spanish jurists and, in recent decades, also directly due to the progressive increase of Latin American jurists studying in Germany. (Hurtado Pozo 2005, p. 368)[11]

As pointed out by Professor Hurtado Pozo, it is the German theories that have finally guided the definition of crime in the Latin American Penal Codes. It is under this orientation that the concept of crime has been configured from the State, such as the one we have cited previously from the Peruvian Penal Code. But this definition is not the same in the society of these Latin American countries, and it is even more distant in the native or indigenous communities or peoples.

Indeed, from another perspective, the concept of crime that society, and specifically native communities or peoples, identifies and practices is different. Considering the explanation made by Professor Masaji Chiba (1987) on the dichotomy Indigenous Law vs. Transplanted law, it is possible to find not only a concept of crime but the concept of a whole law or a different legal system in the original or native peoples.[12] It is a dichotomy that just applies to non-Western societies, such as Latin American countries, being its contrast fundamental in the analysis of the state law of a country. Thus, according to Chiba:

> The contrast here is indigenous law, broadly defined as 'law originated in the native culture of a people' and narrowly defined as 'the law existing in the indigenous culture of a non-Western people prior to the transplantation of Western modern law', in contrast to Transplanted Law, broadly defined as 'law transplanted by a people from a foreign culture' and narrowly defined as 'the State law of a non-Western country transplanted from modern Western countries´. (Chiba 1987, 178–179)

According to Professor Masaji Chiba, it is appreciated that in the countries of the world with a colonial past, such as the case of Latin American countries, there is a strong

[11] Original text, in Spanish: "La teoría del delito, en el sentido que nosotros lo estudiamos, es el fruto, sobre todo, de la elaboración doctrinaria llevada a cabo por los juristas alemanes. Su influencia se extiende, por un lado, a gran parte de los sistemas penales pertenecientes al derecho europeo continental, salvo la excepción notable de Francia y, por otro, a los sistemas penales de los países latinoamericanos, surgidos de los movimientos de independencia de la colonización española y portuguesa. En el caso de los países hispanohablantes, la recepción de las concepciones alemanas ha tenido lugar por intermedio de los juristas españoles y, en las últimas décadas, también de manera directa debido al progresivo aumento de juristas latinoamericanos que realizan estudios en Alemania".

[12] In the same direction as Professor Chiba's works, there is research that has highlighted the subject under the conception of Legal Pluralism. See in this regard Moore 1978, Griffiths 1986, Merry 1988 and Wolkmer and Rubio 2018, among others.

contrast between native or indigenous law and European or Western law. European law was transplanted to the country whose origin was a native or indigenous law, producing a dichotomy or contradiction.

This dichotomy or contradiction shows that the Transplanted Law of modern European countries corresponds to a foreign law and culture with respect to the country of the native or indigenous people. Following this explanation, it is not difficult to appreciate that the Law of the native or indigenous people has been and continues to be different from modern Western Law, and within these differences the concept of crime is included.

Collecting field work with Andean and Amazonian communities of Peru (Peña 1998, 2004, 2006 and 2009), it is possible to notice that in the indigenous communities or peoples there is not literally the concept of crime. Within the Communal or Indigenous Justice of these peoples, two types of macro conflicts stand out: family conflicts and communal conflicts (see Peña 1998, p. 188 ff.). Family conflicts refer to lawsuits over family-type issues, matters, or interests, while communal conflicts refer to lawsuits over community-type issues, matters, or interests (Peña 1998, p. 188 ff.). The crimes can be in either of the two types of conflicts, but particularly in the types of conflicts identified as communal (Peña 1998, p. 188 ff.).

But the most curious thing is that the crime does not necessarily have to be classified or typified. A family conflict, such as a fight between family representatives over a question of boundaries of family land, can become a communal conflict and a crime if the fight takes place in the communal store, damaging the property of the community. Family conflict is conceived as scandalous and with damage to family assets, producing its transformation into a communal conflict and its prosecution as such, with sanctions that may be like the types of crimes sanctioned in the State penal system (see Peña 1998, p. 193 ff.).

With this field information, we allow ourselves to confirm that the regulation of the concept of Crime in countries with colonial antecedents or, more precisely, countries that have their origin in native or indigenous communities or peoples, is dichotomous, as stated by Professor Masaji Chiba. The concept of Regulated Crime in the State legal system has responded to a different legal culture than that of native or indigenous communities or peoples.

5. On the levels or dimensions of Article 9 application

Article 9 of ILO Convention 169 distinguishes two levels or dimensions of application of Community or Indigenous Justice. A first level is in reference to the conflict resolution mechanisms of the community or native people that intervene in their own conflicts. A second level refers to the intervention of state authorities in the face of conflicts that originate or involve members of the community or native people. Let's see both levels separately.

In the first level, when the community or indigenous people itself intervenes in the resolution of their own conflicts, Article 9, paragraph 1, of ILO Convention 169 establishes:

> Article 9
>
> To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. (Convention 169, 1989)

This means that Community or Indigenous Justice, when faced with the resolution of its own conflicts, has two limitations: its compatibility with the national legal system and its compatibility with internationally recognized human rights. These limitations can be seen from two points of view: a predominantly formal point of view and a predominantly material point of view.

Let's look at an example and analyse both points of view. The example that can lead us the most to an open confrontation of perspectives can be given by those practices carried out by communities or indigenous peoples of the South American Andes against cattle rustlers: in the case that a person outside the community or indigenous people steals livestock, their resolution bodies sanction them with physical punishment and if they repeat offenders or act in a gang, the sanction can go up to the death penalty.[13] If the person who steals the livestock is part of a family in the community itself, usually physical punishment is applied by the family of the "accused" and the own family is involved in the resolution of the conflict, seeking to avoid its recurrence.[14]

According to the predominantly formal point of view, the case would denote a situation of violation of human rights by the community or native people involved in the case, acting in a manner contrary to the legal system and international rules: physical punishments are understood as the crime of torture or the crime of injury, and the death penalty as a crime of qualified homicide or murder, given that the legal system of the State has abolished physical punishment as forms of sanctions or investigation, as well as the death penalty as a form of sanction except in very particular situations subject to rigorous procedures under the intervention of state authorities.[15]

From this formal point of view, the interpretation of Article 9, paragraph 1, will be literal and, applied to the case, will result in the native community or people violating the rule. Given the facts, it is up to the State itself to sanction not the case of cattle rustling that may be the cause of the problem, but the perpetrators, members of the native community or people who intervene by physically sanctioning the cattle rustling.[16]

---

[13] This is a general information compiled in field work in the Andean South (with reference to certain Peasant Communities), and in the Andean North (with reference to certain Peasant Patrols) of Peru (Field work from the 90s pending publication).

[14] On this last information, one can review the field work systematized in Peña 2004, specifically in chapter 6, page 223 ff.

[15] In this regard, we can cite the case of the Superior Court of Abancay, Apurimac, in the Central Andes of Peru (2009 ruling not disclosed) on a case of a community that killed cattle rustlers and decided to apply the criminal code against 3 community leaders punishing them for murder, to 15 years in prison. The case can be known in part by regional news, broadcast in the following video: Radio Enlace Nacional 2009.

[16] Similar issues can be seen at the level of the Supreme Court of Justice (at the national level) and at the level of the Constitutional Court of Peru (with jurisdiction throughout the State). For example, the Constitutional Court recently issued a ruling against the Rondas Campesinas [Peasant Patrols] of an Andean community in Jaén, Cajamarca, accepting habeas corpus from a person who denounced the Rondas Campesinas for having held a family member (literally confused with the crime of kidnapping), including physical punishment, before being tried (by the Rondas Campesinas). In this case, due to the time that has elapsed

Instead, according to a predominantly material point of view, the result would be different. Materially or evaluatively, the intervention of the community or indigenous people that physically penalizes a cattle rustler would be permissible if it responds to their daily or established practices and their needs. The community or the original people would be acting or following their own right and their own conception of crimes and sanctions, guaranteed by the right to cultural identity and their state of necessity, regulated in the same legal system of the State and in international treaties.[17]

According to this perspective, physical punishment is a characteristic of the values that identify native or indigenous communities or peoples, just as the death penalty is an extreme situation that they apply in the face of the threat of a danger that puts their own subsistence at risk. This means that it is not the intention and even less a trade or pleasure on the part of the native communities or peoples to commit torture or injury, nor is it qualified homicide or murder. It would be acting in accordance with "the social, cultural, religious and spiritual values and practices of these peoples", as regulated in Article 5 of ILO Convention 169, and in accordance with the criminal procedural standards on the state of necessity that are regulated in the form of criminal nonimputability.[18]

From this material point of view, the interpretation of Article 9, paragraph 1, should be done under systematic, sociological, and historical methods. The set of rules of Convention 169 and other international treaties, as well as the constitutional and legal rules of each country, must be systematically considered. Sociologically, the reality that identifies native or indigenous communities or peoples, who are closely identified with their livestock as a means of life (which protect them from cattle rustling), and at the same time without support or protection from the State, must be considered. Historically, in turn, it is necessary to consider the evolutionary process in the interpretation of the content of the rules in favour of the community or people, as well as the process of change that the same community or people also experiences (the actions or behaviours of the communities have a cause, and they will not always be like this).[19]

---

and given that the detained family member is already free, attention is only drawn to the Rondas Campesinas (see EXP. No. 04417-2016-PHC/TC).

[17] ILO Convention 169 regulates the right to identity of native or indigenous peoples in Article 5: "In applying the provisions of this Convention: (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected; (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected" (Convention 169, 1989).

[18] The rules of criminal non-imputability are multiple. To show its application, we only mention three examples: 1) when acting in defense of one's own legal rights or that of third parties; 2) When it is done by an irresistible physical force coming from a third party; 3) When one acts compelled by insurmountable fear of an equal or greater evil. These rules are regulated in the Penal Codes of the States (see, for example, Article 20 of the Penal Code of Peru, 1991). In the case of native or indigenous communities or peoples, their members do not know these rules, but they can put them into practice given the situation of insecurity and a state of need they feel in the face of cattle rustlers (since they do not have protection from the authorities of the State).

[19] An approach to this understanding of communal or indigenous law and justice, through these interpretation criteria, could be seen in the plenary agreement of the Supreme Court of Justice of Peru, in 2009 (see Corte Suprema de Justicia del Perú, Acuerdo plenario Nro. 1-2009). The plenary agreement develops a legal doctrine on the interpretation of article 149 of the Political Constitution of Peru, which has

On the other hand, in the second level, that of intervention of the state authorities in the face of conflicts that originate or that involve members of the native or indigenous community or people, Article 9, paragraph 2, provides margins for action to said authorities. The content of this part of the standard is closely related to the context of the previous analysis regarding the material point of view of the Article 9 in its 1st paragraph. Let's first look at the content of the standard in this second level:

> Article 9
>
> (…) The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases. (Convention 169, 1989)

The cited rule also leads us down two paths of analysis. A first path refers to cases in which members of a community or indigenous people commit criminal offenses in a place other than the territorial or social sphere of their community[20] and that rather corresponds to the jurisdictional sphere of magistrates or State authorities. A second path refers to the cases in which the magistrates or State authorities intervene in the face of supposed transgressions of criminal norms by a member of a community or indigenous people in the territorial or social sphere of this community or indigenous people.

The first path of analysis corresponds to those cases in which people who are members of native or indigenous communities or peoples migrate to cities or other areas where there is no link with their community or original people. In these cases, when the community member or migrant indigenous person commits a criminal offense in the jurisdictional scope of the magistrates or State authorities, these authorities are obliged to comply with the content of the rule of article 9, paragraph 2, in literal form. This means, in accordance with the rule, that the State authorities involved are obliged to consider the customs of said communities or peoples. This normative content coincides with Article 5, paragraphs a) and b) of the same ILO Convention 169, which establishes that "(…) (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected (…) which face them both as groups and as

a similar content to article 9 of the ILO Convention 169. Although there is a clear intention to understand and favor communal or indigenous justice (especially that which corresponds to the justice of the Rondas Campesinas), the limits based on the fundamental rights of the person from an official perspective of the State were not discussed. A similar approach was made known years ago by the Constitutional Court of Colombia, when in 1996, in a case on original or indigenous peoples, the court interpreted article 246 of the Colombian Constitution, which is similar to article 9 of the ILO Convention 169, establishing that it is possible for communities to apply physical punishment such as stocks and forced labor, according to their traditions, but that they must respect an intangible core of 3 rights: the right to life, the prohibition of torture and the prohibition of servitude and slavery (see in this regard Corte Constitucional de Colombia, Sentencia T-349/96, p. 9). In the specific case, the Constitutional Court adds an intangible right: the legality of the procedures, crimes, and penalties (*ibid.*).

[20] The territorial and social scope of a community or native people is a matter of discussion. Normally, a territorial area is understood as that officially recognized to a community or native people. However, the native people usually have presence and possession over a territory adjacent to their officially recognized territory. This presence and possession respond to the daily practices that have been maintained since immemorial time, before the presence of the same State where the community or native people are located. This daily and historical presence and possession of the members of a community or people is what we refer to as a social sphere or a social space.

individuals (…)" and "(…) (b) the integrity of the values, practices and institutions of these peoples shall be respected (...)" (Convention 169, 1989).

This means that if members of a community or native people are outside their territorial and social scope and have behaviours that coincide with a crime identified as such by the State authorities, these authorities must consider, at the time of judging and condemning, the values and social practices of the people involved. For this, it will be necessary for the magistrate or the competent authority to be able to obtain information to understand the cultural situation of the person involved. Thus, the competent authority will have to respect that the community or indigenous people express themselves in their language, and the same authority will have to resort to experts who advise both the community or native people, and the authority himself or herself.[21]

The second path of analysis, referred to the cases in which the magistrates or the State authorities intervene in the face of alleged transgressions of criminal norms by a member of a community or native people in the territorial or social sphere of this community or people, can manifest in two situations. The first of these is when magistrates or the State authorities intervene in a case of a person from the community or indigenous people involved in an offense that does not correspond to the violation of a fundamental human right[22] (for example, a case of a dispute with minor injuries); and the second of them is when magistrates or the State authorities intervene in an infraction in which the person of the community or native people is involved with a case of violation of a fundamental human right (for example, the case of sanction with physical punishment for cattle rustling that causes serious injury or death).

In both situations, it can be understood that jurisdiction does not correspond to the magistrate or the authority of the State. The first situation, when the offense does not imply the violation of a fundamental human right, the case falls under the jurisdiction of the community or native people, insofar as the social space is in their possession and the parties themselves request that it be the authority of your community or native people who decides. In this case, the first paragraph of Article 9 of the Convention governs.

The second situation, when the case involves the violation of a fundamental human right, the infraction opens the discussion that we were dealing with in the final part of the analysis of article 9, paragraph 1, when we cited the case of rustling and the possible physical punishment or death penalty caused by members of the community or native people. This discussion leads us through two interpretations: when the case is assumed from a formal point of view, and when the case is assumed from a material point of view.

If the case of alleged violation of a fundamental right is assumed from a formal point of view, it produces the conflict of two different rights: the right of the State and the right

[21] In these cases, the anthropological or socio-anthropological expertise, as well as the expertise carried out by members of the community or native people involved, are vital for training. In this regard, see, for example, the judgment of the Constitutional Court of Colombia cited above (1996) where anthropological expertise is included, and in the same sense consult Peña 2014 and Guevara *et al.* 2015.

[22] By fundamental human right we refer to those human rights that the constitutional law literature identifies as "essential" or related to the existence of the person (such as life or physical integrity) and that enjoy special protection from the State or a Political Constitution. See in this regard, for example, Gregorio Peces-Barba 2004.

of the community or native people, as explained from the dichotomy from Professor Masaji Chiba that we referred to at the beginning. When the conflict of two rights occurs, it is important to first define which kind of fundamental human rights are being transgressed: those that correspond to the law of the State, or those that correspond to the right of the community or native people.

In such a case, following the minimum standards of impartiality within the theory of Law, it corresponds to a neutral body, different from the state body, to resolve the conflict. An organ is required outside the magistrates or the authorities of the State, and outside the organs of the community or native people that intervene. This is due to a criterion of minimum neutrality that must identify the body that decides, considering respecting the practices and customs of the community or native people in accordance with the provisions of Article 9 of the Agreement.

On the other hand, if the case of alleged violation of a fundamental human right is assumed from a material point of view, the case remains in the competence of the community or native people. Given that the conception of their own values and social, cultural, religious, and spiritual practices of the native or Indigenous communities or peoples is accepted, the acceptance of their own fundamental human rights in the same native or indigenous community or people is also included. Hence, it is obtained as a result that the resolution bodies of the community or people are competent to continue in the resolution of the conflict.

The material refers to the substantive rights that the same ILO Convention 169 recognizes, or that other international and national standards may also recognize. These criteria would follow, as we have indicated, what is regulated in the same article 9 of the Convention, or, more specifically, the content of its article 5, which requires: "to recognize and protect the social, cultural, religious and spiritual values and practices of these peoples" or "respect the integrity of the values, practices and institutions of these peoples" (Convention 169, 1989).

6. Conclusions: Defining the meaning of Communal or Indigenous Justice.

What has been analysed in the preceding points, leads us through a balance that leads us to evaluate whether our initial hypothesis is fulfilled or not. We allow ourselves to quote our initial hypothesis again, to analyse its result.

The starting hypothesis in this article has been the following:

> International Convention No. 169 of the International Labour Organization that regulates the rights of native or indigenous peoples in independent countries has limitations to understand and regulate Indigenous Justice or Communal Justice of these peoples of the world. Starting from the experience of the peasant and native communities of Peru, or Peruvian indigenous peoples, we can affirm that these limitations regarding the concept of Communal or Indigenous Justice are synthesized in three secondary hypotheses:
>
> The indicated International Agreement does not have clear rules to recognize a communal or indigenous justice proper and full of the native or indigenous communities or peoples.
>
> The same International Agreement lacks effective rules that prioritize communal or indigenous justice over the direct or indirect intervention of state authorities.

> The current international regulation on communal or indigenous justice does not formally contemplate the possibility of a neutral, supra-state body that intervenes when communal or indigenous justice enters into conflict with the jurisdiction of the State authorities.

This main hypothesis and the cited secondary hypotheses are demonstrated according to the following:

Points 3, 4 and 5 previously developed show that, in effect, the content of the main hypothesis is demonstrated: ILO Convention No. 169 has limitations to regulate communal justice or indigenous justice of communities or native peoples in the world. The content of the main article that regulates said communal or indigenous justice, which corresponds to Article 9 of the Convention, lends itself to a debate based on its international, doctrinal logical-normative analysis and its confrontation with reality.

The secondary hypothesis 1), on the lack of clarity of the provisions of the Convention to recognize a proper and full communal or indigenous justice, is verified from the analysis of the general part of Article 9 of ILO Convention 169 and the analysis of its paragraph 1. In the general part, by regulating the issue of Crimes and by regulating the limit of the human rights of the State and international rules in paragraph 1 of Article 9, it is shown that there is a double interpretation or explanation: on the one hand, it is a particular conception of rights and Crime among native or indigenous communities or peoples, and, on the other hand, there is also from a material point of view another way of understanding human rights in these communities or peoples that contrasts with the formal point of view on human rights applied by State authorities.

Secondary hypothesis 2), on the lack of effective rules that give priority to community or indigenous justice over State justice, is verified from the analysis of the second part of paragraph 1 and the analysis of paragraph 2 of the Article 9 of the Convention. Following a formal point of view on the standard and based on the possibility of intervention by State authorities in cases involving members of native or indigenous communities or peoples, compliance with the recognition of their customs and values, including their concept of communal or indigenous justice, is questioned.

Finally, secondary hypothesis 3), on the absence of a formal international regulation that includes the possibility of intervention by a neutral organ of a supra-state order when the jurisdiction of the communal justice of a community or indigenous people enters conflict with the jurisdiction of the State authorities, is demonstrated in the analysis of the final part of paragraph 2, of article 9 of the Agreement. In this analysis we have supported the situation of confrontation of the law of the State with the right of indigenous communities or peoples regarding the alleged violation of fundamental human rights. When presenting the situation of conflicts of rights and legal systems, it is essential to go to a neutral body different from that of the magistrates or state authorities and different from the bodies of the community or native people involved.

In sum, the main hypothesis and the secondary hypotheses of our present work have allowed us to analyse and explore new ways of interpreting Article 9 of ILO Convention 169 which, in turn, lead us to reflect on a new definition of community-based justice or indigenous justice. Although there are no definitive answers on the content of the topics or points of discussion collected from the international standard under analysis, Article 9 of ILO Convention 169, we have managed to express various ideas and points of view

that may lead to a greater understanding of the limits of both communal or indigenous justice and the intervention of the magistrates and the State authorities themselves.

References

Ansión, J., *et al.*, 2017. *Justicia intercultural y Bienestar Emocional: reestableciendo vínculos*. Lima: Pontificia Universidad Católica del Perú.

Brandt, H., 1987. *Justicia Popular: Nativos y campesinos*. Lima: Fundación F. Nauman.

Calvo, M., ed., 2002. *Identidad cultural y derechos humanos*. Madrid: Dykinson.

Cappelletti, M., and Garth, B., eds., 1983. *El acceso a la justicia: Movimiento mundial para la efectividad de los derechos - Informe general*. Colegio de abogados del Departamento judicial de La Plata.

Cappelletti, M., ed., 1978. *Access to Justice.* Milan: Giuffré, European University Institute/Alphen aan den Rijn: Sijthoff.

Centro de Estudios y Promoción del Desarrollo (DESCO), 1977. *Justicia fuera del aparato formal. Estudio por convenio con la Comisión Reformadora Judicial*. Lima: DESCO.

Chiba, M., 1987. Three dichotomies of law in pluralism. *Tokai Law Review*, 1.

Código Penal [CP]. Artículos 11, 12 y 20. Published through Legislative Decree (Law) No. 635, of 8 April 1991 (Peru). Available from: http://www.cicad.oas.org/fortalecimiento_institucional/legislations/PDF/PE/decreto_legislativo_635_codigo_penal.pdf [Accessed 19 December 2022].

Cohen, A., 1982. *Belonging: Identity and Social Organization in British rural cultures*. Manchester University Press.

Convention 169 of The International Labor Organization, 1989. *Indigenous and Tribal Peoples Convention.* United Nations, International Labour Organization. Available from: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document [Accessed 19 December 2022].

Durkheim, E., 1960. *The Division of Labor in Society*. Trans.: G. Simpson. Glencoe: The Free Press.

Griffiths, J., 1986. What is Legal Pluralism. *Legal Pluralism & Unofficial Law*, 18(24).

Guevara, A., Verona, A., and Vergara, R., eds., 2015. *El peritaje antropológico. Entre la reflexión y la práctica*. Lima: PUCP, Centro de Investigación, Capacitación y Asesoría Jurídica del Departamento Académico de Derecho (CICAJ). Available from: http://files.pucp.edu.pe/departamento/derecho/cicaj/2015/05/14175213/libro-completo-peritaje.pdf [Accessed 19 December 2022].

Hurtado Pozo, J., 2005. *Manual de Derecho Penal. Parte General I.* 3rd ed. Lima: Grijley.

Mate Rupérez, R., 2012. La Memoria, Principio de la justicia. Ars Brevis, 18, 100–110. Available from: https://raco.cat/index.php/ArsBrevis/article/view/266830/354450 [Accessed 19 December 2022].

Merry, S., 1988. Legal Pluralism. *Law and Society Review*, 22(5).

Moore, S., 1978. *Law as a process. An anthropological approach*. London/Henley/Boston: Routledge & Kegan Paul.

Peces-Barba, G., 2004. *Lecciones de Derechos Fundamentales*. Madrid: Dykinson.

Peña, A., 1998. *Justicia Comunal en los Andes del Perú: el caso de Calahuyo*. Lima: PUCP.

Peña, A., 2004. *Poder judicial comunal aymara en el Sur Andino: Calahuyo, Titihue, Tiquirini-Toteria y Liga Agraria de Huancané*. Bogotá: ILSA.

Peña, A., 2006. *Communitarian Law and Justice based on Peoples Identity: The Aymara experience*. Thesis (PhD in Laws). Katholieke Universiteit Leuven.

Peña, A., 2009. *Multiculturalidad y Constitución. El caso de la Justicia Comunal en las Comunidades Aguarunas del Alto Marañón*. Lima: Centro de Estudios Constitucionales. Available from: https://www.tc.gob.pe/wp-content/uploads/2018/10/multiculturalidad_constitucion.pdf [Accessed 19 December 2022].

Peña, A., 2014. *Informe sobre peritaje antropológico y social elaborado para el Ministerio de Cultura*. Unpublished report. Lima: Ministerio de Cultura.

Radio Enlace Nacional, 2009. En Abancay, comuneros de Micaela Bastidas dan muerte a abigeos tras intento de robo [In Abancay, community members of Micaela Bastidas (community) kill rustlers after attempted robbery]. YouTube clip. *YouTube* [online], 30 March. Available from: https://www.youtube.com/watch?v=FfeLpx_xjjc [Accessed 23 October 2022].

Weber, M., 2016. *Economía y Sociedad*. Ciudad de México: Fondo de cultura Económica. (Originalmente publicado en 1922).

Wolkmer, A., y Rubio, D., 2018. *Pluralismo Jurídico: Fundamentos de una nueva cultura del Derecho*. Madrid: Dykinson.

Case law

Corte Constitucional de Colombia, 1996. Sentencia T-349/96. Derecho a la supervivencia cultural. Principio de diversidad étnico y cultural. Autonomía de comunidad indígena. Jurisdicción Indígena. *Ovidio González Wasorna vs. Asamblea General de Cabildos Indígenas región-Chamí y Cabildo Mayor Único (CRIR)*. Bogotá, 1996-08-08. Available from: https://www.corteconstitucional.gov.co/relatoria/1996/T-349-96.htm [Accessed 24 October 2022].

Corte Suprema de Justicia del Perú, 2009. Acuerdo plenario Nro. 1-2009/CJ-116. V Pleno Jurisdiccional de las Salas Permanente y Transitorias. Asunto: Rondas Campesinas y Derecho Penal. Lima, 2009-11-13. Available from: https://www.pj.gob.pe/wps/wcm/connect/06089c804075b990b629f699ab657107/ACUERDO_PLENARIO_01-2009-CJ-116_301209.pdf?MOD=AJPERES&CACHEID=06089c804075b990b629f699ab657107 [Accessed 24 October 2022].

Tribunal Constitucional del Peru, 2020. Pleno, Sentencia [Full Judgment] 468/2020. EXP. No. 04417-2016-PHC/TC Lambayeque José Santos Castillo Fernández, represented by Orfelinda Fernandez Castillo.