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BLE2016-2092

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ATINER CONFERENCE PAPER SERIES No: BLE2016-2092

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This paper should be cited as follows:

Pardo López, A. M. (2016). **"Strengthening of Indigenous Jurisdiction in the Context of Overcrowded and Inhuman Prison Conditions in Colombia",** Athens: ATINER'S Conference Paper Series, No: **BLE2016-2092.**

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URL Conference Papers Series: www.atiner.gr/papers.htm

ISSN: 2241-2891
02/01/2017

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Abstract

Colombia has approximately one thousand indigenous natives incarcerated in prison. This is a remarkable fact due to three situations: 1) Indigenous natives constitutionally have their jurisdiction and should not be judged by ordinary Jurisdiction; 2) The Colombian Constitutional Court has recently declared the imminent danger of physical and cultural extinction of indigenous natives due to multiple factors. One of these factors is that communities are forced to leave their territories due to war (forced displacement) and 3) In addition to forced displacement, imprisonment of an indigenous native involves his separation from his territory, people, and customs. This, in addition to the inhuman conditions that prevail in Colombian prisons, plays a key role in the loss of the cultural background of those incarcerated. Governmental responses to the noxious effects of incarceration on indigenous natives have been applied to the incorporation of the so-called 'differential approach'. This consists in imitating the normal life conditions of the natives imprisoned, in an attempt to avoid the cultural loss which results from incarceration. Unfortunately, the 'differential approach' is not only unaffordable but also impracticable, due to cultural impediments. In contrast to the official position, this article recommends strengthening the Indigenous Jurisdiction so that natives can serve penalties imposed by their own constitutionally- recognized justice, rather than normal judicial procedure.

Keywords: Incarceration, Indigenous Jurisdiction, inhuman conditions of prisons, differential approach, imprisonment, cultural extinction

Acknowledgment: My special thanks to Professor Marcela Gutiérrez who has guided all the research on this topic.

Introduction

In Colombia, there are about 1,400,000 indigenous natives who belong to eighty-seven different ethnic groups representing 3.3% of the national population. The Colombian Constitutional Court recently declared that all of these indigenous ethnic groups are under the threat of cultural and physical extinction due to multiple factors; mainly because of forced displacement. In addition, to forced displacement, poverty and the small size of these groups play a fundamental role in this risk. Indeed, thirty-two of the ethnic groups have a population of fewer than five hundred people.

In this context, every native represents an important piece of the culture to which he belongs regarding language, customs, and traditional practices. Forced displacement implies the separation of individuals from their territories and their communities, which results in the progressive but massive loss of their cultural identity. Imprisoned natives suffer the same consequences on account of estrangement from their normal environments.

The Colombian Constitution recognizes the autonomy of indigenous communities and orders their issues to be solved by their Indigenous Jurisdiction. As a consequence, judging criminal issues and posterior incarceration of natives by Ordinary Jurisdiction is, in certain cases, an irregularity that should be avoided to ensure adhering the law on the one hand, and on the other, to prevent convicts from losing their cultural identity.

The article is broadly divided into three sections. The first section illustrates the framework of Indigenous Jurisdiction in Colombia and explains why indigenous issues are judged under the Ordinary Jurisdiction. The second section discusses the prison situation in Colombia. The third section explains the differential approach, criticism of that position, and the proposals and recommendations for providing a truly pluralist solution.

The Indigenous Jurisdiction

Colombia is aware of its cultural diversity, and its constitution dictates that the indigenous natives can solve their criminal issues, with their own rules, under a special Jurisdiction that has been called the Indigenous Jurisdiction.[1]. This makes sense as long as the indigenous' traditional justice system applies other kinds of punishments when laws are broken. Generally, these sanctions have a restorative character, for example, requiring community work, helping the families of victims or assisting farmers on the land are common punishments handed to indigenous offenders. By contrast, punishment under the Ordinary Jurisdiction is usually incarceration.

[1]Article 246 of Colombian Constitution.

Nevertheless, for this special jurisdiction to operate some rules have to be followed[2]. In the first place, the issues that Indigenous Jurisdiction is meant to solve are those that occur between indigenous natives (personal factor) and inside their territory (territorial factor). In this way, if a native kills a non-indigenous person it is Ordinary Jurisdiction who is called to solve the case, and analogically, if a robbery is committed by an indigenous person outside his territory, it is the Ordinary Jurisdiction the one who will solve the case.[3]

In the second place, for the decision taken by the indigenous authorities to be legitimate and duly recognized by the Colombian State, it must respect certain limits, which are the due process, the legality of the sanction, and the proscription of torture, the death penalty, and inhuman, cruel, and degrading treatments. If the above principles are kept, Indigenous Jurisdiction can fully operate.

On numerous occasions, the issues that should be adjudicated by the indigenous authorities are judged by the Ordinary Jurisdiction. The rule is that if an issue that belongs to Indigenous Jurisdiction's competence fall into the hands of Ordinary Jurisdiction, the ordinary judge should remit the case to an indigenous authority; however, this is not observed. Therefore, when the territorial and personal factors are present, and an indigenous native is processed and judged before the Ordinary Jurisdiction, his special cultural features and conditions are neglected.

In this context, Indigenous Jurisdiction is ignored and natives are wrongly incarcerated. This is proven by the fact that there are roughly one thousand of them inside Colombian prisons. Most of these are imprisoned because their status was ignored and, therefore, their cases judged by Ordinary Jurisdiction instead of Indigenous Jurisdiction.

The Prison Situation in Colombia

Colombia has near to 174,000 prisoners and one the world's highest rates of incarceration per 100,000 inhabitants, that is, 252 inmates for every 100,000 inhabitants. Indeed, in a list of 221 countries, Colombia occupies the 50th place in terms of prison population rate. With regard to overpopulation, things are not different: Colombian prisons are overcrowded by 55%, which puts the

[2] These rules have been mostly developed by the Colombian Constitutional Court in decisions T- 728 of 2002. http://www.corteconstitucional.gov.co/relatoria/2002/T-728-02.htm and T-496 de 1996. http://www.corteconstitucional.gov.co/relatoria/1996/T-496-96.htm.

[3] However, if those matters occur among indigenous and inside their territories, it is Special Indigenous Jurisdiction who will apply its rules and decide the sanction. Anyway, if an indigenous native proves in his trial that the offense he committed outside his territory or against a non native person was committed because he could not have known that he was wrongdoing (due to his cultural background), the issue can still be sent to the Indigenous Jurisdiction. Nevertheless, this last hypothesis is very exceptional.

country in the 46th place in world terms and the 5th place among the South American countries.[4]

At least twenty of the Colombian prisons house twice their inmates' capacity. There is a lack of space inside prisons to such an extent that some of the inmates sleep on the floor or even inside the toilets. Mattresses and blankets are highly bartered inside prisons.

The health's situation is critical as well. Access to water is limited in a number of prisons. Water supply exists, in some cases, only some minutes a day, which in addition to the high temperatures of the villages in which many of the prisons are located and its deficient systems of ventilation, makes even more unbearable the situation inside them. [5]

Toilet facilities are generally insufficient, since there are only two or three toilets for hundreds of prisoners. Food is also inadequate and lacks the necessary qualities. Most of the prisoners report having suffered some kind of stomach illness while in prison. Moreover, in many of the prisons daily meals are given to inmates at hours that do not correspond to the regular times of society. For instance, they can be given breakfast at 8.00, lunch at 11.00 and supper at 16.00, which means a fast of sixteen hours. [6]

Medical attention is also inadequate. There are not enough health professionals such as doctors and nurses. Medicines are scarce and medical appointments are rarely given, and when they are there are too many obstacles for the prisoner to attend hospital (there is no car or guard to take them). Illnesses such as tuberculosis and AIDS are frequent inside Colombian prisons. Additionally, there is no certainty about future medical attention due to the fact that public health company to which prisoners were affiliated has recently been liquidated.

Against this background, the Constitutional Court[7] has declared three times an "unconstitutional state of affairs in Colombian prisons", ordering the government to take the necessary measures to alleviate the crisis. In the words of the Constitutional Court, there is a systematic and massive violation of human rights. Nevertheless, despite the State's efforts, prison population continues to grow and the prison crises remain unsolved.

Differential Approach, Criticism, and Recommendation

Given that indigenous natives belong to one of the groups that the State considers more vulnerable [8], the Penitentiary Code and the Constitutional Court order that the treatment towards indigenous natives inside prisons should

4Statistics retrieved from The World Prison Review. Highest to lowest (occupancy level) based on official capacity.

[5]These facts were registered by the Constitutional Court on decisions T-282 of 2014, T-1134 of 2004 and, long ago, in T- 596 of 1992, among others.

[6] Department of Protection of Citizens' Rights Ombudsman, 2016

[7] Decisions T- 153 of 1988, T-388 of 2013 and, T – 762 of 2015

[8] other groups i.e,. are women, handicapped, Afrocolombian and children.

be differentiated. There has to be a differential approach so that the particular features of indigenous natives can be considered for the sake of equality and plurality.

To be imprisoned is a hard punishment for everybody, especially in the conditions described above. For an indigenous native, to be imprisoned is twice as hard, once that life is turned upside down in prison. This is due to deprivation of the traditional lifestyle and milieu.

From this point of view, the differential approach applied to indigenous natives inside prisons has tried to fulfill or to remedy this extra suffering. Examples of this approach include permission for natives to keep their hair long, to sleep in hammocks, to wear their traditional clothes, or to chew the coca leaf.

This approach, nevertheless, cannot adhere to its objectives, due mainly to two factors. On the one hand, it is impossible to simulate all the features of traditional life, inside a prison; for instance, traditional medicine, with all its theatrical and musical content cannot be imported into prison and, special relationships and communications with nature are impracticable. On the other hand, even if the application of a differential approach were possible, it would be extremely expensive to arrange attendance by traditional doctors, provision of special food, implementation of native cooking procedures and, providing external personal able to converse in the native languages.

This is why instead of allocating resources on the application of this difficult differential approach, we recommend to allocate them on the strengthening of the Indigenous Jurisdiction, so that indigenous natives can be judged and sentenced under their rules and inside their territories, preventing with this measure the loss of cultural background which is natural to incarceration. Apart from being entirely legal, this would prevent the arrival of hundreds of indigenous individuals in prisons, relieving therefore, in some small but useful proportion, the severe overcrowding.

In view of the foregoing, there are two major components needed to make Indigenous Jurisdiction stronger. The first one is to enact a law to coordinate the work between both jurisdictions. Despite that the Constitution, which establishes the existence of Indigenous Jurisdiction, can be applied directly (without a law to develop its contents), if a law with that purpose existed, many of the issues that we have to carry on with would be solved. A law should oblige and establish the procedures, so the both jurisdictions collaborate better.

The second one is the training of ordinary and indigenous judges so that they know what to do and how to work collaboratively when an issue in which competence is not clear comes up. Judges must know the requirements that Indigenous Jurisdiction needs to operate and shall not ignore them when they appear. Neither the indigenous' condition nor the validity of their justice must be denied.

Conclusion

Indigenous Jurisdiction does not operate adequately due to a lack of coordination between indigenous and the general authorities. This inefficiency also has its roots in the lack of expertise of judicial authorities. Although Indigenous and Ordinary Systems of Justice are at the same level and have the same validity, the fact that many of the cases that should be judged by Indigenous Jurisdiction get judged by Ordinary Jurisdiction, demonstrate that there is not enough confidence towards Indigenous Justice.

Prison conditions in Colombia violate systematically and massively human rights. This is true to the extent that it has been officially declared to exist an "unconstitutional state of affairs" in Colombian penitentiary system.

While Indigenous Justice sanctions are restorative and do not imply enclosure, Ordinary Justice sanction is, by default, incarceration. For an indigenous native, incarceration means a double dose of suffering since it implies the separation from his culture, tradition, customs, language and community. This separation also entails the loss of cultural identity.

Instead of allocating resources on the strengthening of Indigenous Jurisdiction, so that indigenous people do not get to enter in the ordinary system and therefore to prison, the government has reacted allocating resources on the application of the so-called differential approach, which is, according to this article, wrong.

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