

Recognition and Inclusion of the Native Communities of Argentina

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The Present Situation

In Argentina today, multiple cultures and social realities coexist in a complex context in which the urban majorities ignore the existence of ancestral minorities who find themselves excluded from most of the basic rights.

This reality in which the social inequities between those who concentrate power and richness and those who lack almost everything are reflected in the differences between

the large cities and the remote areas and the domination derived from them that has in the situation of the Native people exacerbated expression.

The Native communities that inhabited these territories before Argentina's birth as a nation, especially on the northern region and in Patagonia, are not yet fully integrated as a part of the Republic. Within a wide range between those who have obtained title deeds for their land and are no longer besieged by landowners around them, and others who are still harassed and denied the basic rights, it is a fact that the Argentinian society and the nation itself still bears a huge debt to these communities.

In contrast with this reality, it is necessary to say that the Argentine Republic went through a general reform of the National Constitution in 1994, and within that renovation, on the 75th Article, Clause 17 referring to the attributions of the Congress, states: "The recognition of the ethnical and cultural pre-existence of the Native communities of Argentina. Granting the respect of their identity and their right to a bilingual and intercultural education; recognizing the juridical status of the communities and the position and communitarian property of the land that they have traditionally occupied; and rule the granting others that should be apt and sufficient for human development; none of which will be transferable or transmissible, nor will it be suitable for taxation or embargos. Assuring their participation on the management of their natural

resources and other interests that affect them. The Provinces may share the exercise these attributions."

This constitutional mandate comprehends and summarizes the provincial and national laws sanctioned that previously included international agreements signed by Argentina that rank as supreme law.

Therefore, there is no doubt that as a nation we define ourselves as multi-ethnic and multi-cultural, and hence we should generate policies that facilitate and promote self-determination and full integration.

The Problem

However, this paradigmatic legal change has not been sufficient to solve the ancestral problems between the majoritarian society and the Native communities. It is true that some significant improvements have been accomplished, and it wouldn't be fair to ignore the fact that most of the worst harassments and submissions are part of the past. But, nonetheless, the vast majority of Native communities, are still a part of the lowest and most neglected layer of the country.

The matter to solve, despite the fact that it is complex and traversing of multiple factors, requires no more and no less than complying with the Supreme Law mandate. That is the full integration of these communities to the body of the Nation; in a comprehensive way, that is with all the

rights and all the obligations of the republic; respecting their diversity and their own conception of the world, such as granted to them by the Constitution.

Not complying with such mandate, on the other hand, not only means that these citizens continue to live in inferior conditions than the rest of the inhabitants, but it is also the platform from where to argue, denaturalizing the spirit of the legislators, claiming that the Constitution sustains or validates extreme postures that collide with the fundamentals of the Republic. This problematic situation requires urgent attention, since more and more often, the conflict and antagonism grows in scale and threatens social peace.

In short, this irregular situation constitutes a critical problem, and as such, it requires a broad vision, ample and innovative to be able to tackle it integrally, to make justice for those whose rights are still subdued.

Additionally, it is required to establish clear rules, concrete and doable indicating "the how and the when," and within which parameters we will live together in the cultural diversity, based in mutual respect, and in peace and harmony amongst all members of this great Nation.

An Innovative and Efficient Idea to Tackle the Problem

In order to put the Native communities in equal terms with the rest of the Argentine population, the members of

those communities must be full actors and participate in the management of the territories where they live. Fully empowered with all the rights and obligations. To that extend it is not enough to recognize them as private associations, just as any other legal person or entity. It is necessary to recognize their existence as a portion of the state, embodying power within their physical location, respecting their self-determination, and their own way of seeing the world; and such ability requires considering them as public juridical entities, outside the governmental scope.

This innovative manner of incorporating the native people within the mosaic of the province and the Argentine nation is a giant step towards the solution of the problem of matter. By doing so, just as we recognize as parts of the mosaic of the republic, the provinces and within them the different categories, such as first-class municipalities, second- and third-class and even small villages, there is no objection to include these new category of public entities, even if they are not a part of the government structure. As we refer to a certain province or municipality, we would denominate each of the territories under this new category by their name, i.e. Mapuche Community, or Guaraní Community, or Kolla Community. It can be done, it can be accomplished, and it is by no means impossible. Furthermore, one of the most recognized specialists on Constitutional Law, and undoubtedly the foremost expert on the 1994 reform, Dr. Germán Bidart Campos,

expressed formal opinion saying this was the correct interpretation of the spirit of the Supreme Law. In order to study this proposal, in the year 2000 a forum of very well-known jurist experts, including Daniel Sabsay, Victor Bazán, and Juan Sola, meet in Junín de los Andes, Province of Neuquén. For three days, they debated and concluded that it was viable to enforce a law to make it possible for the Native communities to access the public (non-governmental) status.

The proposal materialized by means of a national law, stating the possibility of this alternative; inviting the provinces to adhere to this system. A provincial law could also establish the possibility of granting the native communities “public (non-governmental) status” and regulate the terms and conditions that will be necessary, under such status, to participate and share the management of the resources allocated to their territory.

If this inclusion of the Native communities as formal actors were granted, provided they comply with the requisites and are prepared to bare all the obligations, the constitutional mandate would be fulfilled. This process towards complete inclusion should obviously be optional for the communities. Bearing in mind the level of development and organization, each case will require they need to be especially tailored to progressive enforcement towards self-management.

The Main Issue: The Land

The core of the problem and the heart of the existence and subsistence of our Native communities is the possession and property of the land they occupy. From their essence to their economy and belonging, everything is closely tied to Mother Earth. Therefore, it is vital to find definitive and equitable solutions for each case, according to the spirit of the National Constitution.

In Argentina, the Native communities that share the national territory experience a wide range of situations regarding the specific possession of the land where they live. Some have consolidated title deeds and others are not even legally recognized and don't have a precise location. This diverse reality requires approaching the matter with determination and clear rules in order to arrive at definitive solutions to grant the beneficiaries of the rights enumerated on Article 75 Incise 17; only then, all the population of Argentina will be able to share the territory with juridical security and peaceful cohabitation.

In this regard, the national law No. 26.160 that declares the need to solve the land issues, was about to expire. However, acknowledging the fact that there is still a lot to do, the Congress has recently extended its enforcement. This is the platform from where clear boundaries, limits, and the extension of the rights recognized, must be defined.

The lack of agreements and the political use of the Native community's issues has been the reason why, despite the

fact that the reform of the legal framework took place more than 20 years ago, we have still not found the appropriate responses for the Native communities. Therefore, we are still in debt with them and, because of it, we fail in discouraging the abuses and absurd pretensions of those that are shielded behind these lack of definitions to impose their own vision, which by no means is what the Constitution states.

It is certainly a complex issue, but on every province where there are Native communities, there are individuals and organizations well versed and informed, who can help define the problematic situations and acknowledge the progress made so far. The time has come to put in common, to agree on basic definitions clear and concrete, we need to establish which are the terms and conditions under which communities can be recognized as legal entities as per the legal system. It will require criteria unification, and for that purpose a Federal Council that include the provinces, in order to establish uniform standards for all the territory; and to ensure that the question will not be opportunistically used for political reasons. Furthermore, these agreements are indispensable to avoid opposite responses at provincial and national level as it has been happening, and hence facilitating scenarios of confusion and contradictions that are used with political opportunism.

The national government has resolved cases, regardless of the opinion of the provincial government, and in such

environment, those who have in mind objectives far from the principles and intentions of the constitutional amenders, sow their extremist ideas.

Back to the proposed solution, it is true that each case has singular characteristics. However, for the most part, we foresee no great difficulties. In fact, in the Province of Neuquén for example, the majority of the officially recognized communities have communitarian title deeds of their land. In the case of Chorriaca, a small village included in the provincial mosaic, the Mapuche community owns the land and manages the village, both by their ancestral rules and as a part of the governmental structure.

Other type of logistical problems that are not related to the respect of the granted rights also exist in particular places, but these are juridical questions that require more complex solutions that will have to be analysed case by case. The conflicts where violent attitudes verify have a very different genesis. They raise from extremist positions that are not reconcilable with the spirit of the supreme law and carry the vices referred to, they are a small minority, yet, they are the ones that the media will cover and hence, what the public hears about.

Conclusion

Finally, it is worth insisting that establishing clear and uniform rules about which are the lands and territories

that should be recognized as communitarian property of the Native communities, as per the National Constitution; and what are time limits necessary to grant certainty to a claim.

Only then, unsustainable absurd positions will be disregarded, such as those extremist statements, claiming that their self-determination as Native communities situates them in a position to deny their belonging to the Argentine Republic. Therefore, it becomes urgent to clearly define these concepts to solve this ambush.

Once we are able to distinguish clearly, which Native Communities are the ones referred to by the Constitution when granting special rights in order to protect their culture and vision of the world; we will grow as a nation. Only then, can we go forward to the next step, i.e. the purpose of this article -- the recognition and inclusion, respecting self-determination, of the Native communities of Argentina.

Author bio

Germán Pollitzer, was born in Buenos Aires in 1952. He is a lawyer and has lived in the Argentina Patagonia since 1982. In 1979, together with other young fellows, he created Fundación Cruzada Patagónica, an NGO dedicated to education and integral development of the rural communities of the west side of Patagonia.

Dr. Pollitzer was a member of the Power of Justice of

Neuquén, until 2016, when he retired as General Auditor of the Province.

He was a W. K. Kellogg Foundation International Fellow, an Ashoka Fellow, and a Eisenhower Exchange Fellow, his quest on every case, the situation of the Native people. He was legal advisor to many Mapuche Communities in the Province of Neuquen and brought forward several of their claims for the communitarian title deeds of their land.

In 1989, he was elected as one of the "Ten Outstanding Young Men of Argentina" and in 1990, he was presented with the Forrest E. Linder Memorial Award. In 2001, he published a book called: "Legal Framework for the Indigenous Communities of Argentina." Dr. Pollitzer also delivered many training courses for several organizational and legal matters for different Native communities and he organized exchange visits between Mapuche young members of the Namuncura Tribe and Crow people from Montana, U.S.