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WITCHCRAFT AND LEGAL PLURALISM: THE CASE OF CELIMO MIQUIRUCAMA*

David S. Clark**

An’ all us other children, when the supper things is done,
We set around the kitchen fire an’ has the mostest fun
A-list’nin’ to the witch-tales ’at Annie tells about,
An’ the Gobble-uns ’at gits you Ef you
Don’t Watch Out!

James Whitcomb Riley, *Little Orphant Annie* (stanza 1, lines 7-14), *AFTERWHILES* 193 (1898).

The idea of legal pluralism as a proper goal of national legal systems is in ascendency today. This is true particularly in countries such

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as the United States with increasingly vocal indigenous minorities. The courts in Canada, Australia, and New Zealand, similarly, are adjudicating claims of their native minorities to land rights and for recognition of their own laws. And in much of Africa, Asia and Latin America, a significant—at times de facto—legal pluralism is encountered, involving one or more indigenous systems of customary law with the superimposition of a Western national legal system.

Legal pluralism is one aspect of cultural pluralism in a society. Its emphasis generally reflects dissatisfaction with the more pernicious government policies aimed at assimilation of ethnic groups into the dominant culture. In the United States, for instance, the current interest in legal pluralism is a reaction against the nineteenth century notion of manifest destiny which justified geographical expansion across the American continent, subduing the Indians (and Mexicans) along the way. Americans exhibited the belief that they were carrying out the will of Providence, for example, in dismantling in 1898 the Cherokee tribal courts which had served their people exceedingly well for almost ninety years.

The belief in and use of witchcraft is a distinguishing characteristic of certain cultural groups. Witchcraft exists widely in human society, today as well as in the past. Records of witchcraft go back to the dawn of history, and some archaeological evidence suggests it even precedes


   Indian tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government. Although no longer “possessed of the full attributes of sovereignty,” they remain a “separate people, with the power of regulating their internal and social relations.” They have power to make their own substantive law in internal matters, and to enforce that law in their own forums.

   Id. at 55-56 (citations omitted).


5. R. Strickland, Fire and the Spirits: Cherokee Law from Clan to Court 175-82 (1975). “As soon as the Cherokees adapted their culture so that they could survive as a people, whites stepped in and, through force of arms or legislation, destroyed what the Cherokees had accomplished. The pattern was repeated again and again.” Id. at 8.

6. It was reported, for example, that two self-professed witches from Dimmitt, Texas, were to stand trial in early 1980 on charges of murdering a young girl on Halloween night. The witches, members of the Church of Arianhu, one of five branches of the Church of Wicca, believe in magic and in a deity that cannot be understood. Developed from ancient European fertility cults, the church postulates that each person creates his own evil and Satanic force. The trial has been
written history. Faith in witchcraft provides a mystical medium through which important conflicts may be expressed and frequently resolved. For instance, the American Cherokee view law as the earthly representation of a divine spirit order. Consensus and harmony, rather than confrontation and dispute, are essential elements of the Cherokee world view. The inherent disharmonies in a social system, then, may be cloaked under an insistence that there is agreement about the values of society; those disturbances that do occur are attributed frequently to the wickedness of certain individuals.

The supernatural relates to law primarily as a support for primitive legal systems with their rudimentary mechanisms for resolving disputes. The supernatural is available as an instrument of judgment and execution where man's fallible devices to secure evidence are inadequate for the job of establishing the facts. Witch doctors or shamans have the mystical power to detect sorcerers and to combat their evil actions. The spirits know the truth. If properly requested, they will omnisciently judge and directly or indirectly punish a wrongdoer. On the other hand, witchcraft and sorcery frequently involve the misuse of supernatural powers. They may be regarded as a tort against the victim and his kinsmen, or as a criminal offense against society. In some cultures, the kinsmen of a witch's victim may kill the sorcerer after (or sometimes without) obtaining permission from the village or tribal au-


Recourse to the supernatural survives in American judicial procedure through the swearing in of each witness with the conditional curse:

I swear to tell the truth, the whole truth and nothing but the truth.
So help (smite) me God.

Professor Hoebel points out that our lawmakers falter in their belief. They buttress the curse with stiff penalties for perjury. "Oh, ye of little faith." E. Hoebel, supra, at 266.

To illustrate the relationship between law and witchcraft, I present the translation of a judicial opinion from the Supreme Court of Colombia which demonstrates the clash between distinct legal cultures. The formal network of Colombian legal norms reaches only certain elements of Colombian society. Because the distribution of legal resources (courts, lawyers, police, and bureaucrats) is allocated disproportionately to urban areas, the official Colombian legal system—along with its norms—has not penetrated into many rural parts of the nation. In addition to geographical distance, the social distance between the white elite, found mainly in the growing cities of the Colombian highlands, and the mestizo, Indian and black populations, with their separate ethnic heritages, would impede any attempt at cultural convergence.

The case reported here concerns the death of Francisco González, a witch among the Chocó Indians. The Chocó live in the dense tropical rain forest of northwest Colombia, which receives an average annual rainfall of 420 inches. They have their own distinct language and way of life, which includes minimal contact with the formal Colombian legal system. Since the time of the Spanish conquest, their relations with Spanish-speaking persons have most commonly been with missionaries. Beginning in the colonial period, the increasing black population of the savannas has pushed the Chocó upstream in their effort to avoid acculturation. Today, they number perhaps 10,000, still subsisting on slash-and-burn agriculture, supplemented by hunting with bow and arrow and with blowgun and poison darts. The Chocó Indians continue to avoid contact with outsiders, reserving special derogatory terms for the groups of blacks they encounter in the rain forests. In turn, the

12. E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES AND MAGIC AMONG THE AZANDE 388-89 (1937); M. GLUCKMAN, supra note 11, at 238; R. STRICKLAND, supra note 5, at 28-30, 39.

Perhaps the defendant Célimo Miquirucama was motivated by these circumstances. Take, for instance, the clan regulation of homicide among the traditional Cherokee. Homicide was considered an offense against the blood of the clan. The ghost of the murdered clansman could not pass from the earth until the homicide had been avenged. Thus, revenge was a sacred duty resting with members of the victim's clan. The members of the murderer's clan might, however, serve a self-policing function by executing the culpable person, thereby eliminating the risk that innocent clansmen would suffer blood revenge. This sanction was so strongly supported and enforced that the dangers of blood feud were reported to be minimal. Witchcraft was considered even more dangerous to society, and was dealt with as a capital crime. R. STRICKLAND, supra note 5, at 27-29.

blacks, as Colombians and as Christians, look down on the Indians as uncivilized.\textsuperscript{14}

The \textit{Miquirucama} case (the name of the Indian defendant) is a window by which to view Chocó society, although this perspective is distorted by the attitudes of the dominant Colombian legal culture. This distorted view is most clearly focused by the Court’s use of expert medical testimony on the issue of Miquirucama’s individual responsibility for the death of González.

There is, first, an implicit clash between the attitudes toward witchcraft of the Chocó who testify in this proceeding, and those of the participating Colombian legal professionals. There is also a gap between the attitudes expressed by the Court’s majority and dissent roughly reflecting outlooks reminiscent of the nineteenth versus the twentieth centuries. The majority approach, embodied in the legislation of 1890 and 1892,\textsuperscript{15} patronizes Indians in Colombia, and adopts the legal fiction used by the Spanish crown since the sixteenth century that Indians should be considered the juridical equivalent of minors. For the dissent, on the other hand, the Colombian Criminal Code of 1936 utilizes the modern territoriality principle\textsuperscript{16} for scope of coverage, along with the value of legal equality for all citizens. The Code thus implies that Indians, as citizens, are rational individuals capable of overcoming archaic institutions such as witchcraft.

\textsuperscript{14} American University, Foreign Area Studies Division, Area Handbook for Colombia 69-71 (1961).
\textsuperscript{15} See pp. 685-87 infra.
\textsuperscript{16} The territoriality principle, a choice of law rule usually associated with the development of feudalism in the ninth century and later the rise of the nation state, directs that the law applicable to a person should be determined by the territory in which he happens to be present. This is distinguished from the older personality principle, which still finds some support today, that the applicable law should be determined by the national group to which an individual belongs. It was a basic point of Roman policy, for instance, to permit non-Roman subjects to live according to their own laws. The barbarian kings continued this personality principle during the Middle Ages, until the increasing importance of trade demanded a more certain system. In the New World, the Inca applied the personality principle to the Indian groups they conquered, as the Spanish conquerors applied this principle to the Inca. In fact, most present and former colonies are legally pluralistic. There is, generally, an area for operation of the colonial government’s law, but the rest is left to indigenous law. J. Merryman & D. Clark, supra note 3, at 81-83, 87, 104-05, 109, 112, 116, 149; cf. Restatement (Second) of Conflict of Laws § 145(2)(c) (1971) (considers the domicil and nationality of the party as an important contact in determining which tort law to apply).
MIQUIRUCAMA, CÉLIMO
Supreme Court of Colombia (Penal Chamber)
May 14, 1970
134 Gaceta Judicial 303 (1970)

Dr. Justice José María Velasco Guerrero delivered
the opinion of the Court.

Having examined:

The Court proceeds to resolve the petition filed by the
Superior Court of Villavicencio's public prosecutor against
the July 1, 1969 decision of the lower court. By that decision,
Célimo Miquirucama—an Indian from Mistradó (Chocó),
son of Marco Miquirucama, thirty years old, a laborer, a resi-
dent of Mogotes (Granada), a widower, without documents
for personal identification—was sentenced for the security of
society to imprisonment in either a special farm colony or indus-
trial establishment for a minimum of 48 months. He was
found guilty of the September 29, 1967 homicide of Francisco
Javier González U., which occurred in a neighborhood
known as Mogotes within the police jurisdiction of
Canaguaro, municipality of Granada.

The witch, Francisco González U., late at night on Sep-
tember 29, 1967, was in Luis Angel Cardona's house located
in the neighborhood known as “Las Guayanas” or
“Mogotes,” State of Meta, preoccupied with praying for a sick
child. It must have been about 2:00 a.m. when Francisco
Javier González U. was praying for his patient. Soon the ex-
losion of a firearm was heard and González fell mortally
wounded. Those present were Abraham González García,
Luis Angel Cardona, Arvey González, Francisco Javier and
Flora Javier, children of the victim, who minutes later con-
firmed the death of their father. When the Municipal Judge
of Granada (Meta) initiated the investigation, it originally fo-
cused on Bernardo Marcial Murillo, because of charges
against him by José Arvey González, who asserted that the
accused confided in him his guilt on the day of the burial.
Marcial Murillo denied any guilt in the crime. Nevertheless,
Arvey González categorically maintained his testimony in the
confrontation with the accused on January 2, 1968. Before
the confrontation with the accused on this date, however,
Arvey González, without the least explanation, expanded his
testimony at the inquest on December 20, 1967, changing his
accusation toward Célimo Miquirucama as the murderer of
Francisco González. On this occasion he cited Emma Marcial Murillo, wife or companion of Celímo, as the source of his testimony. Miquirucama then confessed being the author of Francisco Javier González' death in his testimony at the inquest, but discounted the significance of his act by reasoning that "he was a sorcerer," and had already killed his four children and wife, Matilde Dibaquieza, with a shotgun. However, while Miquirucama was elaborating on his testimony before the Superior Court, he stated that his children drowned in the Cingara River in Ansermavieja. At this latter hearing he did not know how Francisco Javier González’ death occurred. He confessed at the previous inquest because of his fear of Luis Angel Cardona and José Arvey González, his supposed advisors. The Court ordered that Miquirucama be examined by the Department of Forensic Medicine. With this done, the medical experts described the accused as “illiterate with an extremely limited command of the language in understanding questions or giving answers. He is a primitive person, in a semisavage state.” (Signed: Dr. Antonio Segura Garzón, Chief of Forensic Medicine).

Concluding the investigative phase, the merits of the charge were evaluated and Miquirucama was called to answer in court for the crime of aggravated homicide. His conduct was regulated by the norms of article 29 of the Criminal Code. A procedural hearing terminated with the dismissal of charges against all others linked with the investigation. After the judgment and sentencing of Miquirucama, the Villavicencio Superior Court public prosecutor applied for a declaration of nullity based on article 37, section 1 of Decree 1358 (1964). The lower court pronounced sentence, ignoring the public prosecutor’s petitions, confirming the judgment in all respects.

**Considerations of the Court**

The decision of the court of appeal, and the argument of the assistant attorney general for criminal matters, repeat an argument previously put forth by Dr. Luis Zafra, former assistant attorney general. . . .

The criminal acts of the uncivilized Indian, argued Zafra, should be evaluated according to the general criminal rules, only taking into account that their status should not make them susceptible to ordinary sanctions. . . .

Reputable Colombian scholars likewise share these ideas, affirming that articles 4 and 432 of the present Criminal Code are sufficiently clear and definitive, annulling the prior doc-
trine concerning the special application of 1890 and 1892 laws. In addition, there are reasons of an anthropological and social nature which should impede the continuation of missionary practices. Their policy of paternalism is opposed to personality development in areas of material and spiritual endeavor. That which is needed is to take advantage of the crime's occasion to make the criminal feel a compulsion to conform to general social norms. The Indian should be treated like any other man whose attitudes might not be in conformity with commonly accepted norms of conduct.

Certain crimes committed by Indians may result from unconquerable ignorance, according to article 23, section 2. This may be one of the few situations where the application of the stated precept constitutes an exception to the presumption of the knowledge of law. But this presumption cannot be extended to exceedingly special situations such as the one before us, without creating a serious threat against deficient intellects. And the fault is not the action of individuals, but the inaction of the State.

In our country coexist highly culturally evolved persons alongside others who maintain intact prohibited taboos and magic animism. The transformations of these people will not be affected by mere contact nor by osmosis. Instead, adequate penetration of these traditional forces will be a task of more than just a few years. It belongs to the anthropologist and politician, more than to the jurist and the doctor.

In this sense, various international conferences have expressed agreement in seeking special treatment for uncivilized peoples and groups. After many years of anticipation, our Law 89 (1890), article 1, juridically realized the constant hopes of anthropologists, psychiatrists and psychologists. . . .

With this stated, it is now necessary to make clear that in the problem sub indice, the essence of the question is rooted in finding out if article 1 of Law 89 (1890) is applicable, which excludes the uncivilized Indian populations from the principle of juridical equality. Article 26 of the Constitution, furthermore, does not allow application of criminal sanctions except in conformity with the rules of procedure, and then only by virtue of sentences decreed by competent judges.

The Court will consider the applicability of Law 89 (1890), article 1, in light of article 58 of the Constitution: "Justice is a public service preempted by the Nation." . . .
This norm becomes significant in light of article 2 of Law 72 (1892), authorizing the executive to delegate to missionaries the competence to judge Indians in matters of a civil or criminal nature.

[The assistant attorney general argues] that modern doctrine advocates the return to the concept of culpability as the foundation of all suppressive systems, and the return to a uniform system of punishment. But so long as our rules are not modified, these advocated reasons are valid for the legislator, but not for the judge who finds in the written law the exclusive source for his decisions.

The standard is erroneous which defines the minor, by the very fact of being a minor, as a person dangerous to society. This is also so when the standard defines the savage as psychologically deficient, for the simple fact that their existential environments have not risen to a degree of progress which distinguishes civilized peoples. In this manner it is forgotten that subintelligence is irreversible; the exquisite rustic character known in savages, which gives them the ability to adapt to agricultural labor, presupposes that they are capable of evolving and placing themselves in conditions of assimilating a farm culture, the original cement in the evolution of peoples and a permanent activity of the already civilized. The difference between savages and civilized, educated man is rooted in the different degrees of their evolution, which makes savages strangers in a world contemporary to theirs, a world whose values obey a complex conceptual hierarchy, slowly and patiently sculpted by history and processed with the interaction and experience of diverse cultures. A modern order of values demands the existence of an ethical personality, which is incompatible with the savage condition with its rudimentary social content and the “undifferentiated self” of its people, characterized by a diverse complexity in the peculiar and diffuse form of sensing intuitively.

Primitive peoples are ruled in their personalities by the law pro toto. Each part corresponds essentially to the whole and determines it. There are no accessory parts in the primitive “self.” All parts of the corporal and spiritual “self” represent to a certain point the psychic totality. The name is not part of the person, but is instead the person itself. Dress, arrows, hair, the shadow, a nose—these are not attributes or parts of the person. They are confused with the “self” from which they are projected, magically, without setting one against the other. This very thing occurs with the diffuse and
undifferentiated “self” of the man and his surrounding world, in light of which his personality is strictly limited, for with it he is blended. The man, the jaguar, the goat, the fish—all are persons with different properties and aspects. The reason for this undifferentiated form of being in the primitive or savage “self” is derived from the non-existence of an ethical personality. Further, the Indian does not show a sense of the good or the bad. His concept of the individual is crude and is confused with the agreeable or prejudicial. His knowledge of the ideal or the moral do not form part of his conduct. (H. WERMER, SOCIOLOGÍA EVOLUTIVA.)

Existentially, the world of the savage does not coincide with the civilized world with which it is chronologically contemporaneous. . . . Sociologists would say that the modern and traditional coincide. Biologically, primitive man and civilized man coincide equally. But the former is not a social category. Because of this, although the two coexist in time within the ambit of nationality, they do not live together culturally and are governed by different rules. . . . Raúl Haya de la Torre notes with exceeding insight that to take a trip across time it is sufficient to journey from one corner of our American continent to the other. The distances widen when we think that in the last thirty years the civilized world has evolved geometrically, compared to preceding centuries. In the epoch of atomic fission, of genetic engineering, when molecular biology promises to revolutionize the behavior of animal groups, including man, the savage is our irreversible past—even more, the modern prehistoric. Our laws established for the contemporary world do not reach this past. The present Criminal Code does not contain juridical or mental categories to conform with the condition of these savages. Certainly it has categories for normal, civilized people. . . .

Law 89 (1890) in article 1, is definitive in its provisions. It establishes a special regimen for savages who commit crimes and, in general, it divides them into three large categories: savages, semisavages, and civilized. Only for the last category of persons is general legislation considered applicable. Its text forms a complete juridical proposition, clear in its literal tenor. . . . The Commission of Redactors of the 1936 [Criminal] Code ignored its existence. Perhaps they considered it in force and simply did not amend it since tribes existed in the condition of life to which the provisions of the statute refer. . . .

The Court insists that Indians, simply because they are
Indians, are not deficient or retarded mentally. However, they may be equivalent to minors by the legal fiction established in article 40 of Law 89 (1890). Experts agree that psychopaths, the mentally retarded, and minors, psychologically speaking, show common characteristics. The three possess a special personality, the dominant trait of which is an undifferentiated "self"—labile, lacking concentration, and not distinct from the surrounding world, into which it blends.

This special "self" is encountered in each one of these three states, but for different reasons. In the child the "self" is incipient, but in a state of development. In the Indian the characteristic of the "self" depends on the conditions of its environment. The causes are exogenous. In neither of these cases is there abnormality. In the mentally retarded, on the other hand, the "self" is arrested in its development. Its condition is irreversible in character. The schizophrenic's condition is rooted in the dissolution of his personality, which in a normal state would be formally delimited. (Schilder, Storch)

Medrano Ossio believes that "the psychological state of today's Indian renders it impossible to make him a responsible person as demanded by the rules presently in force. The native does not, with his limited conscience, reach a true understanding of the act that he commits, even if it is an abominable crime. . . . The life of the contemporary Indian develops on the margin of the white and mestizo civilization. The principle of equality before the law in which he finds himself placed, therefore, is absurd. He sums up: "In view of these realities, the Indian should be considered nonculpable for his crimes; the punishment, being ineffective, should be replaced by psychopedagogical, psychiatric, and other measures which might make the Indian an innocuous person, a person definitively incorporated into present civilized society."

Some Latin American criminal legislation, doctrinally inspired by the principles which formed the basis of our 1936 reform in order to remedy the problems created in their territory by the existence of aboriginal peoples, promulgated specific provisions for the idiosyncrasy of primitive man. This is the case with Venezuela. In the draft Code of 1967, article 16 states: "The Court shall be able to declare nonculpable an Indian who commits an act classified as punishable, taking into account his inability to comprehend the illicit nature of
his act or to conform with the legal standards of conduct.” . . .

Conclusions of the Court

Célimo Miquirucama was described by medical experts as an “illiterate with an extremely limited command of the language in understanding questions or giving answers.” This evidence, consequently, indicates with unquestionable precision that the accused is located in the second of three categories for Indians recognized by our legislation. He is a semisavage whose acts remain outside the control of the ordinary legislation of the Republic. Even so, the trial judge, and later the Superior Court of Villavicencio, subjected his conduct to the provisions of article 29 of the Criminal Code, and to the punishments dealt with in book I, title 2, chapter 2 of the same statute, condemning him to 48 months imprisonment in a farm colony. The lower courts relied upon medical testimony—folio 90 of the principal record—defining Miquirucama as a mental weakling, a victim, consequently of a serious psychiatric anomaly. By this application, they incurred a manifest error of fact in the evaluation of said evidence since the accused should be classified as what another medical expert called an illiterate semisavage. . . . In addition, the lower court judgment was vitiated by nullity—incompetence of jurisdiction—for failure to defer to article 1 of Law 89 (1890). . . .

This is not the first time the Court has considered operative provisions derived from laws prior to the promulgation of the present Criminal Code. . . . The Colombian criminal legislation is a complete whole. All of its provisions are not included in the same statute, or within special statutes. It is sufficient that the norms be considered operative in light of the correct juridical construction which determines their hierarchy and dominance. . . .

Since article 1 of Law 89 (1890) excludes Indians found in a semisavage condition from the normative control of ordinary legislation, and article 2 of Law 72 (1892) gives the executive power to delegate competence in civil and criminal matters into the hands of missionaries, these norms clearly conflict with the Constitution [articles 26 and 58]. Jurisdiction is solely within the power of the government. It is a deplorable consequence that Indians, in a savage and semisavage condition, whose acts are prohibited by the criminal
law, lack the control of sanctioning norms, and, for the same reason, competent judges.

It should not be too much to mention that jurisdiction must be clearly established by legislation. Judges are not permitted to enact or deduce it by analogy.

The petition is granted.

By merit of the expressed considerations, the Supreme Court—Chamber of Penal Cassation—administering justice in the name of the Republic and the Law,

Resolves:

First. The sentence announced by the Superior Court of Villavicencio, by which it imposed upon Célimo Miquirucama the punishment of imprisonment in a special farm colony or an industrial establishment for a minimum term of 48 months, because of his guilt for the crime of homicide perpetrated on the person of Francisco Javier González U., is invalidated.

Second. All that has occurred in the procedures against Célimo Miquirucama, from the hearing of October 3, 1967, the date when the Municipal Court of Granada (Meta) announced its finding, is declared null.

Third. The immediate release of the accused is ordered.

Publish, notify, copy, and insert this opinion in the Gaceta Judicial, and remand this case to the court of origin.

Justices Luis Carlos Pérez and Luis Enrique Romero Soto dissent.

First. We agree with the majority of the Penal Chamber that the principal issue to determine with regard to Indians found in a state of savagery is whether (1) the provisions of the Criminal Code or (2) article 1 of Law 89 (1890), which excepted these Indians from the principle of juridical equality, govern. Also we agree that the criterion of dangerousness or mental sickness applied to Indians or minors, because they are Indians or minors, is not correct. This is an erroneous thesis, as the Chamber observes, since it revives ideological theories contrary to the advances of law and anthropology. The dangerous nature of Indians was argued by some South American professors at unfortunate moments of their careers; . . . we have always believed in the adaptability of all human beings to overcome conditions of backwardness that are not precisely due to their caprice.

Second. We also agree with the majority of the Chamber
on various appraisals of primitive mentality endorsed by foreign writers. . . . The savage, according to these studies, has great gusto for knowledge of things that surround him, a fact which presumes intellectual capacities. The universe for him, just as much as for the rest of mankind, is an object of thought and a means for satisfying needs. . . . If we were to strengthen this line of authority, we would refer to a constellation of North American scientists who unanimously agree with the brilliant and harmonious exposition of Claude Lévi-Strauss.

Third. For us, the key issue in the petition is resolved by affirming that articles 4 and 432 in the Criminal Code tacitly repeal Law 89 (1890) and Law 72 (1892). As a result, the criminal law should operate against all inhabitants of the Republic, whether they be citizens or foreigners, transients or domiciliaries, city dwellers or frontiersmen. There can be no other conclusion derived from the principle of national sovereignty, supported by the principle of territoriality consecrated in article 4. This public norm gives the State the right of authority over all who may be found in its territory.

There are several obvious sources of misunderstanding between the Chocó and the Colombian legal authorities. Language is one major problem. Significant cultural differences provide an even greater barrier to communication. But probably the greatest source of misunderstanding derives from the divergent Chocó and Colombian notions of what the criminal legal process is all about. On the one hand, the Colombian authorities, under the rules of criminal procedure, are concerned with ascertaining the truth regarding an accused’s conduct, and thus his guilt or innocence. For the Chocó, on the other hand, it is likely that their perception of law is designed to produce a compromise. Verifiable facts are central to Colombian legal procedure, but probably secondary to Chocó purposes. The conflict between legal cultures is


[The aboriginal] legal system is different from that of the white man, and while the notions of “unlawfully” as that of something done in contravention to established law, and of “murder” as that of the unlawful killing of another human, may be part of [an aborigine’s] concept system, he may be at a loss to understand why in a given situation these concepts should be applied to some of his actions which, according to his idea of law, were neither unlawful nor murder.

*Id.* at 996.
The Colombian Supreme Court in *Miquirucama* appears aware of the undesirable result produced when the official legal system is used for Indian disputes. Steeped in the civil law tradition, the Colombian legal system has a long and notable history reaching back to the *Siete Partidas* of medieval Spain and ultimately to early Roman times. In contrast, many jurists trained in Colombian law schools see Indians as uncivilized savages, or at best, as individuals under the influence of primitive superstition.19

The Indian perspective toward the Colombian legal system and its procedures, similarly, impedes rapprochement. Professor Collier, in her excellent study of Zinacantecos in southern Mexico,20 implies that many Indian groups have only two explanations for homicide: the victim was a witch, as in this case, or the murderer was drunk. An Indian accused of murder, consequently, will give a predictable response. National authorities inevitably conclude that liquor and witchcraft superstitions are the principal causes of violence in Indian society.21 But Indian motives for violence are as complex as those in any community. The language for describing their behavior, especially to outsiders who are not familiar with Indian culture, appears simple. The local Indian dispute-resolution mechanisms, in seeking to understand the behavior of a murderer, delve deeper for the explanation. In the process these devices may ultimately provide a more satisfactory settlement for their community.22

The moral dilemma presented by *Miquirucama* is primarily a problem of individual responsibility: How can a legal system prevent injustice when the criminal code presumes intent or at least criminal negligence in the commission of a crime, even though the accused believes his aims are legitimate because he is ridding the world of an evil witch?23 Is it not unjust to impose a harsh penalty on a superstitious

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19. See the report on the common sport of Indian hunting in Colombia, similar to that in the historic American West, and the weak judicial response, in J. Merryman & D. Clark, *supra* note 3, at 178-79. See also J. Collier, *supra* note 10, at 43.
23. Although the desire to do good may be a moral excuse for crime, it is generally not a legal excuse. Nevertheless, English courts in the nineteenth century (although not today) tended to
Indian whose principal fault is lack of contact with a civilizing Western influence?  

In *Miquirucama*, the majority of the Colombian Supreme Court, through Justice Velasco, discusses feasible solutions to the problem of individual responsibility. First, the Court presents the argument of Luis Zafra, a former assistant attorney general, who believes that criminal acts of Indians should be evaluated according to the national criminal code, but that sanctions should vary for Indians, possibly based on the education or experience of the accused. This treatment might allow the use of doctrines analogous to provocation or diminished responsibility, where the circumstances reveal that the defendant could not be expected to control himself completely (according to national norms, although he might have acted consistently with tribal norms). Proof of these mitigating factors would then warrant classification to a lower degree of criminal homicide.

The standard of “adequate” provocation is obviously shaped by acquit parents who, for religious reasons, failed to summon medical aid to their sick children. In view of the New Testament authority for faith healing (James, 5: 14-15), Professor Williams points out that a nation professing Christianity might be expected to exempt from punishment a religious group which follows literally the word of God. There is always the possibility that the minority is right about faith healing. Thus, some medical opinion today supports the position that many cases of organic disease are directly caused by mental orientations. See G. Williams, supra note 21, at 748-50.

24. J. COLLIER, supra note 10, at 43; cf. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 621 (1949) (Justice Foster's reasoning for the Supreme Court of Newgarth absolves the cannibalistic spelunkers of murder on the ground that “a case may be removed morally from the force of a legal order, as well as geographically”). But see Regina v. Machekquonable, 28 Ont. 309 (1898), where the Canadian court refused to acquit the defendant Indian who shot and killed a Windigo (believed to be a cannibalistic evil spirit clothed in human flesh), but owing to mitigating circumstances permitted the verdict of manslaughter to stand. The threat of cannibalism was a matter of widespread concern to the Northern Ojibwa, and the Windigo killings were considered acts of maintaining social order. J. GOLDSTEIN, A DERSHOWITZ & R. SCHWARTZ, supra note 17, at 985-89.

25. See p. 685 supra.

26. This approach of reduced punishment is used in Australia. For example, Nadigi Tjapljiari, a Pintubi aborigine, speared his tribal wife for adultery, a legitimate response under tribal law. Tjapljiari was sentenced to 12 months in jail for manslaughter, but the judge also ruled that he must be released early if “prison does not agree with him.” A Pintubi witch doctor was being sought to gauge the psychological effect of incarceration on Tjapljiari. Wash. Post, Oct. 5, 1969, *reprinted in* J. GOLDSTEIN, A DERSHOWITZ & R. SCHWARTZ, supra note 17, at 998. Judge Kriewaldt, in referring to the aborigines in the Northern Territory of Australia, states:

I see no reason why, in proper cases, exceptions should not be made in the general application of laws, and in particular, I see no reason why certain classes in a community should not be tried for offenses in a manner different from that employed for the majority.

social convention, and a "reasonable person" test has been used in England and the United States. 27 If this test were based on a subjective standard, as the Model Penal Code partially recommends, then a "reasonable Indian" inquiry might lead to a more just accommodation between the dominant and minority cultures. 28 The doctrine of diminished capacity, likewise, recognizes that the impaired psychological condition of a defendant, though short of insanity, provides a mitigating rationale for classifying an intentional killing as manslaughter rather than murder. 29

Second, Justice Velasco appears to adopt the reasoning of the legal fiction in article 40, Law 89 (1890), treating Indians as minors for purposes of the criminal law. 30 This fiction then justifies the application of article 1 from that statute, excluding semisavages from the normative control of ordinary national legislation. The nineteenth century plan for Indians foresaw missionary jurisdiction over uncivilized Indians under Law 72 (1892), but this statute is unconstitutional under articles 26 and 58 of the Colombian Constitution. Hence, no competent court—that is, a court with jurisdiction to apply the 1936 Criminal Code—is available to try Miquirucama. He is released, therefore, to face the dictates of his community.

28. The Model Penal Code declares that the defense of provocation should be judged "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." There must be a "reasonable explanation," however, bringing the objective standard in through the back door. Model Penal Code § 210.3(1)(b) (Proposed Official Draft 1962). See Regina v. Muddarubba, Judgment of Feb. 2, 1956, Northern Territory (Australia) Supreme Court (unpublished), in J. Goldstein, A. Dershowitz & R. Schwartz, supra note 17, at 989-91, where the judge used a "reasonable Indian" test for provocation, finding that the Pitjintara tribe is a "separate community for purposes of considering the reaction of the average man."

The impression we have from known ethnographical work is that in many societies adult thought does not go beyond the level of "concrete" operations, and therefore does not reach that of propositional operations which develop between the ages of twelve and fifteen in our milieu.

Release of Miquirucama implies reliance upon the notion of excuse. The theory of excuse in criminal law concedes that an act is wrongful, but seeks to avoid attribution of the act to the defendant. The focus is thus on the actor's personal capacity to avoid either committing an intentional wrong or taking an undue risk. Insanity is the classic example of excuse. But here, the reasoning of the Miquirucama Court majority would appear to excuse an entire group of individuals.

Is the result of the majority tenable in the modern world? Should adults of ethnic minorities be treated as children or as "unconquerably ignorant"? Justices Perez and Romero, in dissent, say no. Citing recent anthropological research, they state their belief "in the adaptability of all human beings to overcome conditions of backwardness." Based on the desirability of the modern nation state and its territoriality principle, as well as the idea of juridical equality, Miquirucama should be treated as any other citizen and receive his punishment for the crime of homicide.

Does the majority or dissent present the better view? The equality principle has been expressed in the United States with growing frequency and even stridency throughout this century. But what would be the pragmatic consequence of "equal" treatment of Indians in national courts controlled by personnel schooled in the dominant legal culture? According to Bronislaw Malinowski:

There is hardly anything more pernicious, therefore, in the many European ways of interference with savage peoples, than the bitter animosity with which Missionary, Planter, and Official alike pursue the sorcerer. The rash, haphazard, unscientific application of our morals, laws, and customs to native societies, and the destruction of native law, quasi-legal machinery and instruments of power leads only to anarchy and moral atrophy and in the long run to the extinction of

31. See G. Fletcher, supra note 27, at 798-802, 817-18.
32. Consider, however, the recent case of Donald Lang. He has been accused of two murders in Illinois, but he cannot hear, speak, read or write. Because Lang is incapable of participating effectively in his own defense, state courts held that he cannot be tried for murder. Yet state mental-health officials report that Lang is not mentally retarded. His handicap is physical—aphasia—so there is nothing they can do. A Chicago judge ruled, consequently, that Lang could go free on bail. Newsweek, Nov. 7, 1977, at 89-90.
33. See p. 686 supra.
34. See p. 691 supra.
35. Id.
culture and race. Providing formal equality to an Indian defendant within the context of the white legal system, therefore, without Indian participation at all levels of decisionmaking, is likely to be a sham.

A compromise between the majority and dissent might save something of Indian legal culture, bow to the ideology of equal justice under law, and reduce the dilemma of individual responsibility. This might most effectively be accomplished through a system of tribal courts which apply Indian law. Indian culture should be respected and accommodated where possible. When the national law must intrude, particularly in the penal area, a single code of norms should apply to all citizens. The special circumstances of tribal Indians, however, should be accommodated in these instances through the use of a mitigation doctrine, analogous to diminished responsibility, when imposing sanctions. This is preferable to totally waiving sanctions for serious crimes under the doctrine of excuse, or under the reasoning of the Court in Miquirucama. The problem with excusing groups of Indians is twofold. First, the tribal system of social control may be inadequate to handle serious criminal matters, thereby unjustly endangering the safety of its members. Second, and possibly more important, the potential for indigenous cultures to adapt and survive in a sometimes hos-

37. B. MALINOWSKI, supra note 10, at 93.
38. See O. OLNEY & D. GETCHES, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT 7-13 (1978). As to American Indians:
Most Indian reservations are located in rural areas, far from federal and state courts. When county courts and justice courts are nearby, they are usually in border towns where hostility toward Indians may run high and sympathy for Indian values may be lacking.

Id. at 89. Judge Kriewaldt speaks in reference to the aborigines of Australia:
My belief that a jury is not qualified to decide on the guilt of an aborigine rests on this: The factor which makes a jury a good tribunal in the ordinary run of cases, the ability to discern whether a witness is speaking truly, vanishes when the jury is confronted with witnesses of whose thought-processes they are ignorant.

39. See O. OLNEY & D. GETCHES, supra note 38. For the successful experience of the Cherokees, see R. STRICKLAND, supra note 5, passim.
41. See p. 694 supra.
42. Certain Indian groups in Mexico, for instance, routinely send homicide cases to the state court system, although they retain most other disputes between Indians for their own courts. Hunt & Hunt, supra note 22, at 131-33. Compare the philosophical development of the Cherokee during the nineteenth century from clan revenge to public reform through the use of specific punishments. R. STRICKLAND, supra note 5, at 168-74.
tile Western environment demands partial acculturation toward that dominant culture.43

Legal pluralism need not be a one-way street. There is much to learn from indigenous cultures about the nature and function of law in society. The dangers of moral relativism44 in this context are fewer than those of manifest destiny. Accommodation is preferable to assimilation and extinction.45

43. Acculturation refers to the change induced in one culture by its encounter with another. P. FARB, MAN'S RISE TO CIVILIZATION: THE CULTURAL ASCENT OF THE INDIANS OF NORTH AMERICA 247, 251-52 (2d rev. ed. 1978); see R. STRICKLAND, supra note 5, at 183-89.  

44. Moral relativism takes the position that judgments as to whether acts are "moral" or "immoral" have no meaning except in the context of a particular culture. Critics of this view are wont to point to the holocaust of Nazi Germany; this, they argue, requires an absolute moral standard that transcends any one society. But absolutism has its own disadvantages as illustrated by the current debate over abortion in the United States. Which group, for instance, is to set the standard regarding feticide?

Professor Ely suggests an approach for avoiding the problem of Nazi Germany. Some government policies burden certain distinct groups in society more than other groups. This is inevitable. However, when the decisionmakers (legislators, administrators, judges) disproportionately represent favored groups (e.g., white males), a decision to burden other groups (e.g., blacks, Indians, females) will have its roots in a comparison between a "we" stereotype and a "they" stereotype. These roots are grounded frequently in assumptions of "we" superiority and "they" inferiority.

The danger is therefore greater in we-they situations that we will overestimate the validity of the proposed stereotypical classification by seizing upon the positive myths about our own class and the negative myths about theirs.

Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 933 n.85 (1973). In a society accepting moral relativism, we-they situations deserve greater scrutiny regarding their desirability than we-we situations (where decisionmakers burden their own class). Thus, Jews did not participate in decisions regarding the holocaust, nor did blacks formulate slavery policy, nor did American Indians develop the resettlement programs.

45. See generally P. FARB, supra note 43, at 273-76.