Indigenous Autonomy
In Mexico

*Ana Luisa Izquierdo**
*Manuel González Oropeza***

In Mexico attempts to recognize or grant either administrative or political autonomy meet with systematic resistance, despite their compatibility with the federal system and administrative decentralization. Public universities did not achieve autonomy until 1945; municipalities only attained their own legal status in 1983; and Mexico City's Federal District, the nation's capital, is still awaiting its political autonomy.

Indigenous communities have not fared much better than other Mexican institutions, which is why the recognition of indigenous communities' autonomy, internationally dealt with by the International Labor Organization's Convention 169, has been postponed domestically.

In the case of Chiapas, the legal and institutional arguments used to question the right for autonomous municipalities to exist in the Chiapas Highlands do not hold up to examination. The indigenous problem and their autonomy is not limited to this state, in conflict since 1994, but extends throughout Mexico since indigenous people make up 10 percent of the total national population.

On March 8, 1824, in a session of the federal Congress, Friar Servando Teresa de Mier proposed setting up a parliamentary

* Coordinator of the Center for Mayan Studies, UNAM Institute for Philological Research.
** Researcher at the UNAM Institute for Legal Studies.

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commission to analyze and recommend measures to "alleviate and promote the indigenous [communities]."[1] Five members of the Liberal Party[2] opposed this, arguing that from that time on, all inhabitants of the country were Mexican citizens, regardless of their condition or origins. They considered it necessary to strictly adhere to the liberal maxim that everyone is equal under the law, just as the Iguala Plan, the document declaring Mexico's birth as an independent nation, had proclaimed in 1821, "All the inhabitants of New Spain, including Africans and Indians, are citizens of this monarchy."[3]

This idea, born in the French Enlightenment, was included in Article 6 of the Universal Declaration of the Rights of Man and the Citizen in 1789, which reads, "The law must be the same for all since all citizens are equal in its eyes." Jean Jacques Rousseau considered the law an expression of sovereignty because it was a manifestation of the general will and that therefore it should include rules to regulate the legal system of the community as a whole.

With this theoretical basis, the new liberal order buried the *ancien régime* and helped enthrone equality before the law. However, at the same time, it drew attention away from a question it should not have, the situation of the indigenous peoples,

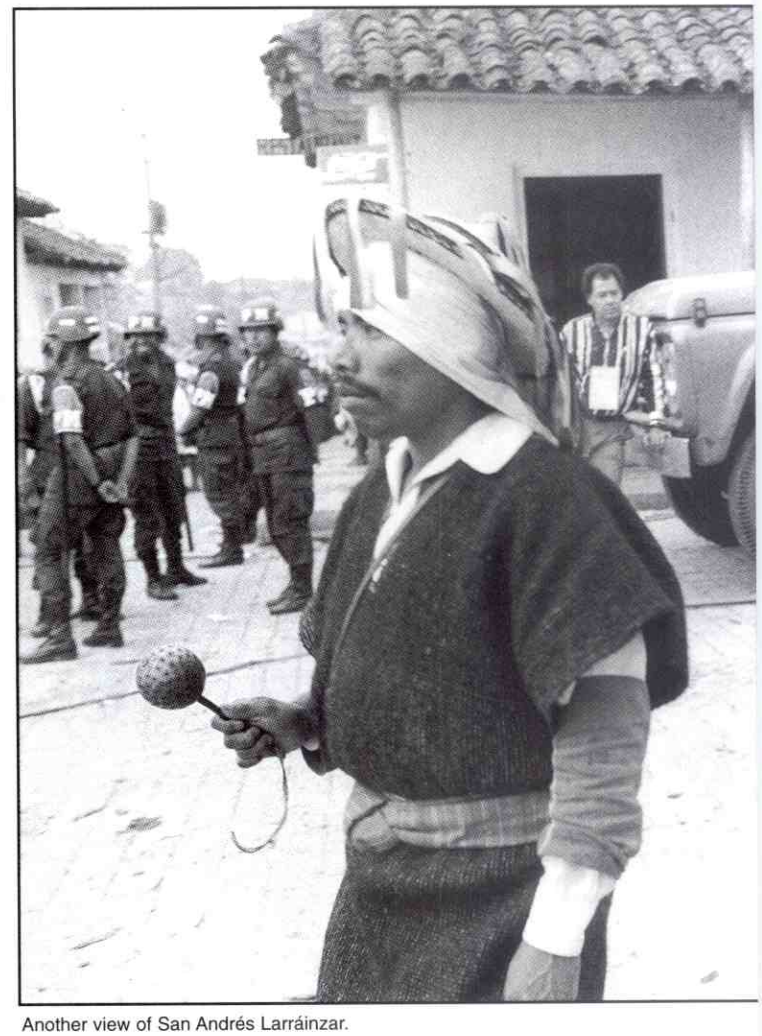
During the negotiations that led to the San Andrés Larráinzar Accords.

whose autonomy was recognized in the colonial period, although only formally, through the regimen of the Republic of the Indians.

Following the example of the Burgos Laws (1512 and 1516) which allowed natives of the Antilles to keep their own customs and have their own justice system, New Spain established the Republic of Indians in 1551.[4] It allowed for the establishment of autonomous municipal governments in indigenous towns.[5] "Even though at first they were an institution [designed] for subjection, through the education and development of the Indian peoples themselves, during the colonial period there were examples of successful Indian Republics that implied indigenous community self-government, as can be understood from the 1773 decision handed down by Governor Vicente González de Santianes from the province of Nuevo Santander, today the state of Tamaulipas."[6]

Vacillating national legislation on indigenous peoples offers a few examples that oscillate between the grotesque and the offensive. For example, Article 28, Fraction 6 of the Constitution of the state of The West (today Sonora and Sinaloa), passed November 2, 1825, dictates the suspension of political rights in the state for those who "have the custom of going about in a shameful state of undress, but this disposition will not go into effect for indigenous citizens until the year 1856."[7]

In the middle of the nineteenth century, Mexican liberals continued to be concerned with the condition of indigenous peoples.

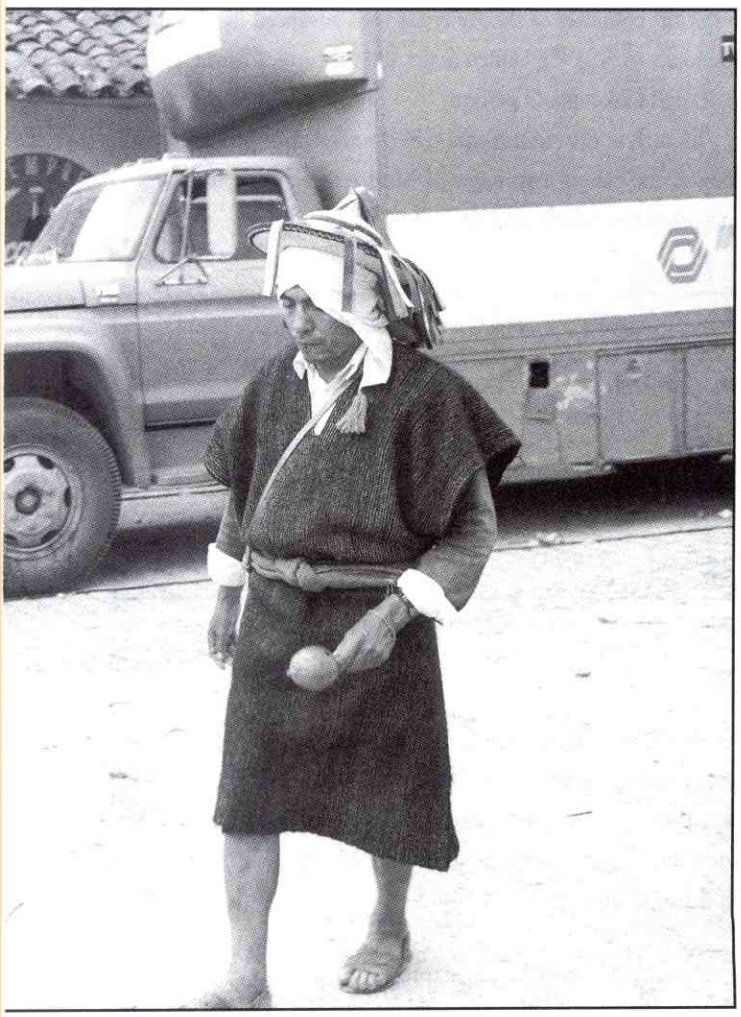


Another view of San Andrés Larráinzar.

In the July 6, 1856, session of the Special Constituent Congress, Ignacio Ramírez characterized Indians as "poor," "needy," and "peasants." This characterization of the social and economic condition of the ethnic groups continued for the rest of the century. In that era, posts were created like that of the Attorney General for the Poor (on the initiative of Ponciano Arriaga) during the Second Empire or the Protective Council for the Needy Classes.

The intention of achieving uniformity in the Mexican nation was an obstacle, then, to accepting the need to create specialized legislation on the situation of the indigenous communities.

Francisco Zarco foresaw a basic problem in this supposed legal equality. In the July 11, 1856, session of the Constituent Congress, as the delegates discussed Article 2 of the draft Constitution, Zarco stated that absolute equality before the law was not possible given that foreigners are not equal to Mexicans and citizens were not the same as simple nationals. Zarco was commenting on the wording of the article in question which said, "All the inhabitants of the republic, regardless of class or origin, have equal rights."[8]



Finally, these concerns were reconsidered and included in the Mexican Constitution of 1917, when the decision was made to break with the formalist rigidity of nineteenth-century law and establish what were called the social rights of workers and peasants in the highest law of the land, thereby recognizing the existence of inequalities among the Mexican population which require specialized laws and tribunals.

Norms in Other Countries with Indigenous Populations

In the United States and Canada, norms are established not only in legislation, but also in precedents set in their court system. In Latin America, the new constitutions and laws have attempted to adequately deal with the indigenous problems in their area of competence. Our impression is that Mexico, once the champion of social legislation and the federal system in the hemisphere and Latin America, is now painfully behind on both scores.

Refugees waiting in Chenalhó, Chiapas.

In 1831, the U.S. Supreme Court heard a case involving a Georgia law that, on delimiting the political and territorial division according to the interests of non-indigenous property owners, violated the peace treaty signed between the Cherokee Nation and the federal government. Even though in 1824, with the go-ahead from then-President Andrew Jackson and the federal Congress, this people had been stripped of its territory and confined to reservations, the community took local and federal authorities all the way to the Supreme Court based on the

Constitution's Article 6 which gives "treaties" more legal weight than any local law.

In this case, then-Chief Justice John Marshall found that the Cherokees and other Indian peoples enjoyed a political identity that gave them the capacity for self-government and differentiated them from the rest of U.S. society, with the right to enjoy their lands, thus setting a precedent that is still in effect.[9]

Later, the state of Georgia passed a law prohibiting the white population from residing inside Cherokee territory without permission from the government. The missionary Samuel Worcester opposed the local law, arguing that it was unconstitutional since it violated the Cherokees' territorial autonomy by extending the prohibition of residence to indigenous territory. In this case, Marshall found in favor of Worcester and overturned the local legislation.[10] At the same time the state government decided to pardon the missionary to avoid a conflict between local and federal powers. However, in 1838, after Marshall's death, the Cherokees were forced to abandon Georgia and relocate west of the Mississippi. The force of arms and time both worked against Cherokee aspirations, but the legal precedent of identity and self-government continues to stand.[11]

In 1992, Canada, for its part, celebrated treaties fully recognized by Section 35 of the Constitutional Law, whose application is strictly legal, which undoubtedly favor the indigenous peoples. They also take precedence over any local or federal legislation,[12] and fully recognize the rights over their lands and hunting and fishing therein.[13]

Canadian doctrine is based on "the fact that aboriginal peoples were initially independent, self-governed entities with full possession of their lands in what is currently Canada."[14]

In Central America, a recent case is that of Guatemala, where in addition to establishing municipal autonomy in Article 253 of the 1985 Constitution, Mayan social rights are recognized and consecrated in Articles 66 to 70. The document also guarantees the right to wear traditional apparel and the respect for their languages, customs and traditions.

The Colombian Constitution, for its part, protects both the languages (Article 10) and autonomy in indigenous territories (Articles 286 and 287).[15] These examples are sufficient to show that the recognition of indigenous communities' autonomy is part and parcel of multiethnic societies, regardless of their form of government.

Even in countries that have traditionally been centralist like Spain, which for a great part of their history have supported the idea of a single nation, the modern tendency is toward the recognition and constitutional guarantee of the right to autonomy for their nationalities and regions.

In this same way, Spain recognizes the languages of its autonomous communities, their right to self-government and to pass their own laws.

The Current Indigenous Situation in Mexico

In 1810, approximately 60 percent of the total population was indigenous; a century later the proportion had dropped to 37 percent. Today, it is only 10 percent. This is not a significant percentage if we compare it with the indigenous population of Bolivia (71 percent), Guatemala (66 percent), Peru (47 percent), Ecuador (43 percent), Belize (19 percent) and Honduras (15 percent).[16] However, Mexico's proportion is still larger than that of the majority of the countries of the Americas with advanced legislation on the topic, such as the United States (0.1 percent), Canada (1 percent) and Colombia (2 percent).

To analyze the current situation of indigenous people we will look at the case of two states of Mexico which have the largest indigenous population, Oaxaca and Chiapas.

Indigenous Population in Oaxaca and Chiapas

State	Total Population	Total Indigenous Population	Bilingual Indigenous Population	Monolingual Indigenous Population
Oaxaca	2,602,479	1,018,106	791,451	192,821
Chiapas	2,710,283	763,322	716,012	228,889

Source: "La población hablante de lengua indígena en México". *XI Censo General de Población y Vivienda*, 1990.

As the chart shows, the indigenous population that does not speak Spanish is greater in Chiapas than in Oaxaca, despite the fact that there are more indigenous people in the latter. This important figure confirms what two Mexican anthropologists said almost 50 years ago:

> The appropriate functioning of the free municipality was feasible only in culturally adapted indigenous communities; but in those

where the process of change had not really modified the old traditional models, this functioning was precarious or non-existent.[17]

This is one of the reasons that in Chiapas indigenous government is dominant and constitutional government continues to be superimposed on it. In these communities, the municipality has been counterposed to traditional custom and usage since their level of cultural adaptation (measured in this paper by the lack of knowledge of the Spanish language) is lower than those more culturally adapted societies where the Spanish language predominates, and therefore the relationship between the municipality and indigenous community forms of government is more stable. Oaxaca has 570 municipalities, the largest number of any state in Mexico.

Since the Constitution of Cádiz of 1812, municipal governments have been decentralizing factors of political power because, together with provincial congresses, they provided autonomy to the municipalities and provinces of the Spanish crown. However, we must recognize that in contemporary Mexico, municipalities are not autonomous, despite the revolutionary efforts of 1914 and the 1917 Constitution. Of course, this applies to all Mexican municipalities, whether they include indigenous communities or not.

The Mexican Constitution confers responsibilities on all municipalities which they share with the federal and state governments. However, they are not classified as similar government bodies. Article 115 of the Constitution stipulates that the municipality is free, but this classification must be viewed through the historical prism that includes an interest in suppressing the "political bosses" or intermediate officials who acted with great impunity between municipal and state governments. This was the function of political bosses during the *Porfiriato* (the regime of Porfirio Díaz, from 1876 to 1911).

The Mexican municipality is only the territorial basis for the states and is fraught with an infinite number of control mechanisms in the hands of state and federal governments. Their legal status was not even recognized until 1983; and even in 1994, they had no means of legal defense whatsoever at their disposal. In fact, even today they do not have the right to appeal to the higher courts or petition for stays. Forms of intervention by state governments have been varied[18] and very effective, particularly the right of state legislatures to declare city governments non-existent, dissolve them and name municipal councils in their place. Curiously enough, Chiapas is the state where this kind of intervention has been the most frequent, with the greatest number of invalidations of municipal governments nationwide.

In addition to their precarious political situation, municipalities often suffer from lack of funds. Only 3 percent of national tax earnings goes to the country's almost 2,300 municipalities. Most of this trifling sum (85 percent) goes to the 300 main municipalities and the rest is divided among 2,000 more.[19] This distribution pattern has been the same for 40 years.

In this context it would be appropriate to ask if the municipality is the ideal institution for solving the problem of autonomy for the indigenous peoples in Mexico. Despite their precariousness, Mexico's municipalities have been the cornerstone of the country's democracy. However, their structural and institutional design does not seem viable, not only for non-culturally-adapted indigenous communities, but for any community whatsoever.

However, many indigenous communities have been able to harmonize the functions of municipal government with their customs and traditions; others, like those in the Chiapas Highlands find state and national legal forms to be incompatible with their customs and traditions.

For this reason, the constitutional stipulation that Mexico is a multicultural society (Article 4) is insufficient, in a multiethnic society in which local governments and customs are sometimes incompatible with national ones.

Neither is it possible to think that a federal law will solve the centuries-old indigenous problem in all its complexity and diversity,[20] given that the federal government does not have the express ability to legislate alone on this question. Article 4 of the Constitution establishes a right, a guarantee, but not an exclusive one.

The situation of indigenous peoples is different in Oaxaca and Chiapas precisely because in the former, even before the amendments to the federal Constitution, the state government included its social diversity in Article 16 of the state Constitution and in several of its laws.[21] Although with difficulty, in Oaxaca steps have been taken to respect indigenous customs and traditions. For example, Article 12 of the state Constitution entrusts municipal authorities with the preservation of the tradition of *tequio*, or community labor, which could be interpreted as violating the freedom to work guaranteed by Article 5 of the federal Constitution.

Recently, the Oaxaca legislature enacted the Law of Indigenous Rights and Communities, which recognizes the autonomy of indigenous peoples, giving their customs legal status.[22] The form of municipal government has been modified by this recognition

and because Article 109 of the Political Institutions and Electoral Procedures Code of Oaxaca state stipulates that municipal elections in indigenous communities may be carried out according to their common law practices. The road to indigenous autonomy had already begun operationally in Oaxaca: in the 1995 elections, 412 of the 570 municipalities opted to elect their officials according to their traditions. We should emphasize that no political parties participated in these elections since the indigenous communities preferred to elect their representatives by consensus and not by choosing between partisan slates.[23]

In addition, Oaxaca's electoral legislation establishes some precepts which are the exception nationally speaking, for example: indigenous community decisions are not subject to any state approval or review, and political parties cannot register candidates if they have not been confirmed by the majority in the community.

On August 6, 1997, the state legislature of Quintana Roo enacted the Law on Indigenous Justice, which states that the indigenous problem also comes under the jurisdiction of the courts.

It is our opinion that any federal and state legislation that aims to regulate indigenous peoples' lives must be supplemented by the establishment of an indigenous justice system, with judges born in the communities and secretaries who are familiar with Mexican law to harmonize customs and usage with the national legal system. In addition, it would be impossible to include the enormous body of common law of more than 50 ethnic groups living in Mexico under a single federal law or different state statutes. Given the variety of circumstances, exceptions and conflicts that would arise in applying the law among indigenous peoples, an indigenous judiciary would have to be set up, such as the one in Quintana Roo, to create the institutions that the new resulting indigenous system of law would indicate as necessary.

CONCLUSION

The acceptance and recognition of indigenous autonomy is part of modern constitutional law in most countries of the Americas and is compatible with any form of government, both centralized and federal.

In Mexico, the municipality is not autonomous. Therefore, reforming it will not satisfy the legitimate aspirations for self-government expressed by indigenous peoples, recognized as valid by international law.

In general, the institutional relationship between federal governments and indigenous peoples has been formalized through conventions known in North America as "treaties." In this context, this kind of commitment —like the San Andrés Accords signed by the Mexican federal government and the indigenous representatives of the Zapatista National Liberation Army in 1996— is totally compatible with this new strain of indigenous law.

The indigenous problem is not limited to any single level of government, but common to several. The federal Congress should create enabling legislation for Article 4 of the federal Constitution, not only with the indigenous peoples of Chiapas in mind, but for all the indigenous peoples of Mexico. Each state would then have to create its own special local legislation for resident ethnic groups. The autonomous municipalities with indigenous governments, recognized by law, should move away from the rigid municipal government form of Spanish origin.

Also, the indigenous legal system should be established to harmonize federal and state legislation with customs and usage of the communities so justice can be administered by indigenous judges in indigenous territories.

Finally, national legislation should recognize customs and usage of indigenous peoples and guarantee their application in the territories where they live. VM

NOTES

[1] José Barragán, *Crónicas de la Constitución Federal de 1824*, vol. 2 (Mexico City: Comisión Nacional para la Conmemoración del 150 Aniversario de la República Federal y del Centenario de la Restauración del Senado, 1974), p. 113.

[2] Lorenzo de Zavala, Rafael Mangino, Manuel Crescencio Rejón, José M. Becerra and Miguel Guirdi y Alcocer.

[3] Felipe Tena Ramírez "El Plan de Iguala y los Tratados de Córdoba," *Derechos del Pueblo Mexicano. Historia Constitucional*, vol. 2 (Mexico City: Cámara de Diputados del Congreso de la Unión, 1985), p. 177.

[4] A Republic of Indians was a town created by the colonial authorities which brought together dispersed indigenous communities and which every year elected its mayors and councilmen. It was a recognition of self-government, supplemented by first level criminal jurisdiction within the territorial confines of the town. Gudrun H. Lohmeyes, "Gobiernos locales en los pueblos de indios, Chiapas, siglo XVI," Ph.D. diss., UNAM School of Philosophy and Letters, 1998, pp. 19 on.

[5] Genaro V. Vásquez, *Doctrinas y realidades en la legislación para los indios* (Mexico City: Departamento de Asuntos Indígenas, 1940), pp. 220 and on. Also, Woodrow Borah, *Justice by Insurance* (Berkeley: University of California Press, 1983), p. 21.

[6] Ibid.

[7] Mariano Galván Rivera, *Constituciones de la República Mexicana,* vol. 3 (Mexico City: Imprenta de Gobierno en Palacio, 1828, reprinted by Miguel Angel Porrúa, 1978).

[8] Francisco Zarco, *Historia del Congreso Extraordinario Constituyente (1856-1857)* (Mexico City: Colegio de México, 1956), p. 489.

[9] *Cherokee Nation v. Georgia* (1831).

[10] *Worcester v. Georgia* (1832).

[11] Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), pp. 27-33.

[12] *R. v. Sparrow* (1991).

[13] *Simon v. The Queen* (1982).

[14] Slattey, "The Constitutional Guarantee of Aboriginal and Treaty Rights," *Queen's Law Journal* 232, vol. 8 (1983), and Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992), p. 679.

[15] Néstor Raúl Correa, *De la organización territorial. Constitución Política de Colombia comentada por la Comisión Colombiana de Juristas,* vol. 11 (Bogotá, 1996), pp. 26-31.

[16] Gonzalo Aguirre Beltrán and Ricardo Pozas, "Instituciones indígenas en el México actual," *Métodos y resultados de la política indigenista en México* (Mexico City: Instituto Nacional Indigenista, 1954), p. 176.

[17] Aguirre Beltrán and Pozas, op. cit., p. 260.

[18] Since 1825, state constitutions have determined different forms of control of municipal governments, such as: a) establishing the governor as the direct head of the municipalities; b) state governors' fining municipal governments (Chiapas); c) giving state authorities the right to preside over city government sessions; d) giving the governor the right to carry out inspections; and e) giving the legislature the right to suspend, void or revoke municipal governments' mandates.

[19] Gilberto Rincón Gallardo, "Nuevo marco jurídico para la libertad municipal," *Quorum* year 3, no. 28 (July 1994), p. 39, and Carlos Martínez Assad, "The Municipality and Its Transition to Autonomy," *Voices of Mexico* no. 38 (January-March 1997), p. 15.

[20] Several authors have already pointed this out, among them Magdalena Gómez, "El derecho indígena en Oaxaca: las nuevas iniciativas constitucionales y legales," *Quorum* year 7, no. 60 (May-June 1998), p. 50.

[21] The healthiest federal model is the one which takes its lead from institutions first developed by the states; for example, Yucatán's appeals procedures (1841), social legislation and land distribution.

[22] Article 3 of this law defines autonomy for indigenous peoples as: "The expression of the free determination of indigenous peoples and communities, as part of the state of Oaxaca, compatible with the existing legal structure, to make their own decisions and institute their own practices in accordance with their world view, territory, land, natural resources, sociopolitical organization, administration of justice, education, language, health and culture."

[23] Instituto Estatal Electoral de Oaxaca, *Memoria de los procesos electorales de diputados y concejales* (Oaxaca, Oaxaca: Instituto Estatal Electoral de Oaxaca, 1996), p. 47.