Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 2, n. 7 (2012) – Investigaciones – Investigations – Ikerlanak
ISSN: 2079-5971

Legal pluralism and the continuing quest for legal certainty in Ecuador: A case study from the Andean Highlands

MARC SIMON THOMAS*

Simon Thomas, M., 2012. Legal pluralism and the continuing quest for legal certainty in Ecuador: A case study from the Andean Highlands. *Oñati Socio-legal Series* [online], 2 (7), 57-84. Available from: http://ssrn.com/abstract=2009450

Abstract

In 1998 Ecuador constitutionally recognised the use of customary law alongside national law, through which a situation of formal (*de jure*) legal pluralism came into being. However, rules that would define the personal, territorial and material jurisdiction of both forms of law have never been approved and no case law has yet been developed. There is still no general agreement regarding the proper scope to be granted indigenous authorities for the administration of customary law. The purpose of this article is to shed light on that ongoing challenge by focusing on its practical implications at the local level. Starting with an historical overview of how legal pluralism has been dealt with over the last 500 years, this article proceeds to examine the contemporary situation, including an interpretation of a recent homicide which occurred in the indigenous parish of Zumbahua. The indigenous proceedings in this case support this article's thesis that the absence of coordinating rules, and the resulting legal uncertainty, may be leading to increasingly punitive measures by indigenous authorities.

Key words

Legal pluralism; customary law; internal restrictions; Ecuador.

Resumen

En 1998 Ecuador reconoció constitucionalmente el uso del derecho consuetudinario a la par que la legislación nacional. Así, entró en vigor una situación de pluralismo legal formal (de jure). Sin embargo, nunca se ha aprobado la normativa que defina la jurisdicción personal, territorial y material de ambas formas de derecho, y todavía no se ha desarrollado jurisprudencia al respecto. Todavía no se ha llegado a un acuerdo general en lo que respecta al alcance adecuado, de forma que se garantice a las autoridades indígenas la administración del derecho

This article was originally presented at the workshop "Legal pluralism and democracy: When does legal pluralism enhance, and when does it erode legitimacy of and trust in democratic institutions", International Institute for the Sociology of Law, Oñati, Spain, June 9-11, 2011. I am grateful for the helpful comments on the original paper I received from the other participants of that workshop, particularly Manfred Hinz. I am also indebted to the two anonymous referees for their thoughtful comments on an earlier draft of this article. I owe special thanks to Robert Forstag for his editorial work. Of course, I assume personal responsibility for any remaining errors.

* LLM, MA, PhD candidate at the Centre for Latin American Research and Documentation CEDLA, Amsterdam, and at the University of Utrecht. Centre for Latin American Research and Documentation (CEDLA). Keizersgracht 395-397. 1016 EK Amsterdam. The Netherlands. m.a.simonthomas@cedla.nl or m.a.simonthomas@uu.nl.

consuetudinario. El propósito de este artículo es arrojar luz sobre esta situación, centrándose en sus implicaciones prácticas en el ámbito local. Empezando por un análisis histórico del pluralismo jurídico en los últimos 500 años, este artículo pasa a analizar la situación contemporánea, incluyendo la interpretación de un homicidio reciente ocurrido en la parroquia indígena de Zumbahua. Las medidas indígenas frente a este acto apoyan la tesis del artículo; la ausencia de normas coordinadas, y la inseguridad jurídica resultante podrían dar lugar a un aumento de medidas punitivas por parte de las autoridades indígenas.

Palabras clave

Pluralismo jurídico; derecho consuetudinario; restricciones internas; Ecuador.

Table of contents

1. Introduction

In 1998 Ecuador constitutionally recognised the use of customary law alongside national law,[1] through which a situation of formal (*de jure*) legal pluralism came into being. Legal pluralism, in this study, is understood as "the presence in a social field of more than one legal order" (Griffiths 1986, p. 1).[2] Rules that would define the personal, territorial and material spheres of both forms of law are absent. For this reason, there is still no general consensus regarding the circumstances that allow the application of customary law and those that require recourse to the national court system of Ecuador. This article is about how such legal uncertainty could lead to increased punitive measures by indigenous authorities against individuals, and about the kinds of actions that these authorities consider as lying within their own jurisdiction.

Beginning in the first half of the sixteenth century, the laws of the Spanish Crown became the laws of the territory now known as Ecuador. As part of this process, customary law was made subordinate to Spanish law, and this created a situation of legal pluralism. This situation did not change when Ecuador became an independent republic in 1830. It has only been since the promulgation of a new Constitution in 1998 that Ecuador has officially recognised indigenous jurisdiction and customary law. This constitutional recognition of legal pluralism, which was reinforced by Ecuador's ratification of ILO Convention 169,[3] constitutes a break with the past that is related to two principal causes: the indigenous peoples' mobilisation and their demand for more autonomy; and a decentralisation policy of the state as part of its adoption of a neoliberal model at the end of the last century. The consequent decentralisation of administrative affairs involves both a fragmentation and an extension of sovereignty,[4] which had previously been the exclusive prerogative of the state – although a similar "outsourcing" (Buur 2005; Hansen and Stepputat 2006) of sovereignty can be recognised in colonial times. The concrete form this outsourcing of sovereignty takes, "will be the outcome of the opening of certain spaces 'from above' and pressures 'from below'" (Assies, Van der Haar, Hoekema 2000, p. 302). As the use of customary law can be seen as a strategy of indigenous people to secure a certain degree of autonomy, Assies, Van der Haar, Hoekema (2000, p. 305) warned that "as such it involves a tendency of closure, reification and hardening of internal restrictions".[5] It is this warning that

[1] In this study, customary law is understood as a set of unwritten, flexible, local, and obligatory norms and practices for a specific community or group of people. Customary law not only prescribes how people should act, is also describes what to do in case of dissent. Customary law therefore governs as well as punishes.

[2] In the Ecuadorian context this means: the presence of customary law alongside national law. In accordance with Moore's "semi-autonomous social fields" (1978) legal pluralism is about the dialectical and mutually constitutive relationship between customary law and national law (Merry 1988, p. 880), taking into account that this relationship is not power-neutral. "Legal pluralism is [..] understood as a relation of dominance and of resistance" (Sieder 1997, p.10). Therefore, (the use of) customary law alongside national law can be considered as a form of resistance - i.e., a strategy of indigenous people to secure their autonomy against encroachment of the state (Collier 1995, Merry 1988, p. 878, Sieder 1998, pp. 105-106).

[3] Because it has been ratified, the ILO Convention 169 has the force of domestic law in Ecuador (Ecuador has a monist legal tradition that dictates that ratified international law is incorporated into national law). The convention states that the rights of indigenous peoples (with the tell-tale final "s") to land and natural resources are recognised as essential to their material and cultural survival. In addition, ILO 169 declares that indigenous peoples should be entitled to exercise control over their own institutions, within the framework of the states in which they live. It also requires states to respect customary law as long as the latter does not violate human rights.

[4] "Sovereignty" from an anthropological point of view has to do with *de facto* sovereignty. This not only includes the "ability to kill, punish, and discipline with impunity" (Hansen and Stepputat 2006, p. 295), but extends to the "monopoly to decide not only who is included and excluded from the political community, but also what order, security and normal life consists of, and what measures should be taken to restore them when these principles are threatened including, in the last resort, the power to decide matters of life or death" (Sieder 2011, p. 162).

[5] "Internal restriction" is a term introduced by Kymlicka, meaning "the claim of a group against its own members [..and] intended to protect the group from the destabilizing impact of *internal dissent*" (Kymlicka 1995, p. 35). Kymlicka has been criticised for the "liberal bias" (Momood 2007) in his

lies at the core of this article. As the "spaces from above" appear to be very limited in Ecuador, the contemporary pressures from below seem to tend to such a "hardening".

This process of legal transformation in Ecuador, and the consequent intensifying of punitive measures applied by indigenous authorities, forms the core of this article. The focus here is on how the contemporary situation of formal legal pluralism works in daily practice through an examination of the ways in which indigenous people living in the Ecuadorian Andes resolve their internal disputes. More specifically, the purpose of the present paper is to shed light on one of the challenges the Ecuadorian legal situation faces: the question of jurisdiction, which fundamentally has to do with the extent to which indigenous authorities can legitimately adjudicate internal conflicts. To explore this question, this article focuses on a recent homicide which occurred in the indigenous parish of Zumbahua. What happened in the wake of this murder provides an excellent illustration of the current state of affairs of legal pluralism in Ecuador.

This article is based on data gathered during three distinct periods of legal-anthropological fieldwork in Ecuador in 2007, 2009 and 2010 via participant observation, interviews and archival research. The fieldwork was mainly conducted in the parish of Zumbahua (Pujilí canton, Cotopaxi province), but some information was also gathered in the provincial capital Latacunga and in the national capital of Quito. This article is part of an ongoing four-year research project on disputes, legal pluralism and the Indian-State relationship in Ecuador. The first section of the present study provides an historical overview of legal pluralism in Ecuador, illustrating how such a legal situation came into being with the arrival of Spanish colonists, and how this phenomenon has manifested itself in different ways over the past five centuries. This historical overview shows that both the use of customary law and the recourse to national law can be seen as forms of resistance. Rural, indigenous people should not be depicted as helpless victims, but should instead be conceived as collectives with a limited but unmistakable agency. Within "semi-autonomous social fields" (Moore 1978), local leaders proved to be capable of keeping a close watch on the boundaries between customary law and national law. The first section ends with a description of how, at the end of the twentieth century, a situation of formal legal pluralism was created in the absence of any system of coordinating rules that would define the personal, territorial and material jurisdiction of both forms of law.

The second section continues with a brief theoretical exploration of three issues relating to such a situation of formal legal pluralism without coordinating rules: 1) decentralisation of *de facto* sovereignty, 2) the "challenge of coordination", and 3) customary law in relation to human rights. The penultimate section is empirical in nature. It focuses on a homicide in Zumbahua in 2010 that initially was resolved in accordance with customary law, but that afterward was adjudicated by the national administration of justice. This case highlights the challenge of coordination and, through a comparison with a similar case in the same region, in 2002, points to an apparent intensification of punitive measures by indigenous authorities. In the concluding section, this article argues that the lack of precise legal rules concerning the coordination between customary law and national law influences the application of customary law. The finding that indigenous authorities make use of customary law to safeguard their autonomy against encroachment of the state is by no means new. The novel element in the Ecuadorian context is that in a situation of formal legal pluralism with a lack of coordinating rules, this counter-hegemonic strategy continues to be used. Additionally, as this article hypothesises, this continuing

reasoning. Although Assies *et al.* (2000, p. 303-304) say they recognise that bias, they use the term "internal restriction" fairly uncritically. In order to refer to certain recent changes in the nature of customary law in the Ecuadorian highlands, I prefer to use the terminology "punitive measures applied by indigenous authorities".

quest for legal certainty is leading to a "hardening" of customary law (i.e., customary law is becoming more punitive).

2. Legal pluralism in Ecuador: an historical overview

Beginning with the Spanish colonisation of the Americas, the indigenous peoples of Latin America as a whole, and thus also of Ecuador, were socially, economically and politically subordinated to the Spanish and *mestizo* populations. The political responses to this subordination varied considerably. During Spanish rule, a segregationist model was used. Following independence, this was replaced by an assimilationist model, before being succeeded, beginning in the early twentieth century, by an integrationist model. It was not until the end of the twentieth century that the first steps were taken toward a pluralist model. The ways that customary law has been treated since the time of Spanish colonisation can be seen as a reflection of this general political treatment of indigenous people in Ecuador. The legacy of colonialism and the existence of "semi-autonomous social fields", in which indigenous authorities could administer justice, has meant that a situation of *de facto* legal pluralism has characterised the country for a long time. When the Constitution of 1998 became effective, however, a situation of *de jure* legal pluralism came into being.

2.1. From the colonial period until 1998

When the Spanish colonised the territory now known as Ecuador, they implemented special legislation that introduced the concept of two separate *Repúblicas* and then politically reorganised the peoples and lands of their newly conquered territories. First, the Spanish introduced special legislation that legally and administratively separated the people who lived in the countryside – whom they called "*indios*" (regardless of their racial origin) – from those who lived in cities and towns. Thus, a system of two socio-political classes – following the rigid class structure of the European medieval world – evolved: the *República de españoles* (i.e., the Spanish and their descendents who lived in the towns) and the *República de indios* (i.e., those who lived in the countryside, whether of indigenous or Spanish origin). Spanish administrators then organised the existing dispersed settlements of the *República de indios* into *reducciones* (a network of administrative units), in order to control the rural population and to secure a steady flow of taxes (Korovkin 2001, p. 40). In line with the strategy of indirect rule, these *reducciones* came under the control of local *curacas* (or *caciques*), members of the pre-existing hereditary indigenous elite. In addition to their role in securing tax revenues, these *curacas* retained the power to adjudicate certain matters (Korovkin 2001, p. 44), even though cases involving major offenses had to be handed over to the Spanish authorities. This delegation of the administration of justice of certain (minor) cases to the indigenous authorities is what the present paper refers to as the "outsourcing" of sovereignty. This outsourcing was limited to a sphere that did not contradict divine and human law, that did not affect the official religion (i.e., Catholicism), and that did not exercise an impact upon the colonial, economic, and political order (Mommsen 1992 cited in Tamanaha 2008, p. 13, Ouweneel and Hoekstra 1993, p. 112, Yrigoyen Fajardo 2000, p. 204). At the same time, the indigenous people had recourse to formal legislation in cases of disputes or conflicts, just like anyone else. And they sometimes exercised this right (Benton 2002 cited in Tamanaha 2008, pp. 17-18, Guerrero 1989, Stern 1982). Thus, even then, the possibility of "forum shopping" (Von Benda-Beckmann 1981) between customary law and Spanish law existed.

Beginning in 1830, when the nascent Republic of Ecuador aimed at formally sweeping away the "indigenous world", this colonial model of segregation was

replaced by an assimilationist model.[6] The colonial division into two *Repúblicas* was formally abolished, and a process of building a single unified nation (meaning one people, one culture, and one legal system) began (Assies *et al.* 2000, p. 305; Yrigoyen Fajardo 2000, pp. 206-207). But, as Hansen and Stepputat (2005, p. 21) have noted, the territorial sovereignty of the new nations in Latin America was poorly consolidated. In the first place, hierarchies that were characteristic of the colonial period remained intact, local elites held their power in many (rural) regions, and forms of colonial *indio* tribute remained (Crain 1990). As soon as Ecuador enacted its first organisational laws, it introduced the office of the *teniente político*, which, in effect, abolished customary law. Basically, this appointed political officer was charged with two duties; one political (protecting the state's interests) and one juridical (the adjudication of minor offences in indigenous communities). As a political officer, the *teniente político* served as an interpreter of national politics for indigenous persons while reporting on indigenous affairs to the state authorities (Baud 2007, p. 87). As juridical officials, these *tenientes políticos* had to enforce national legal regulations, but in practice they did not always follow the letter of the law. Nor did they always determine legal matters within the community. In this context, many rural indigenous communities in actual practice followed their own political traditions and customary law within their communities, where possible. Thus, a situation of *de facto* legal pluralism evolved. The situation of two *Repúblicas,* with its memories of a "colonial pact" (Platt 1982, p. 40) thus remained essentially unchanged.

The most important, albeit hidden, agenda of the *tenientes políticos* was to break the existing rural elite's power, in particular that of the *curacas*. They were spectacularly successful in pursuit of this goal, particularly with respect to the juridical authority attached to the position. By alternately applying formal law as well as customary norms and procedures (as circumstances dictated), *tenientes políticos* effectively managed to undermine the power of the *curacas* that had existed for centuries (Guerrero 1989, p. 336). The power of this nominally political officer concomitantly increased. "Free" indigenous communities in the countryside effectively came under the control of the *tenientes políticos*, who collaborated with hacienda owners and Catholic priests to advance their interests (Korovkin 2001, p. 45). With the end of the tributary system in 1857, the power of these three rural forces (informally referred to as the "holy trinity") increased even further.[7] Rural indigenous communities had no official administrative or territorial status (Korovkin 2001, p. 45), and thus had little access to the use of state resources to defend any threats to their interests that might arise. Within this power struggle, indigenous authorities succeeded in maintaining some degree of autonomy. Therefore, within these semi-autonomous social fields, customary law continued to be practiced.

Beginning in the early twentieth century, an integrationist model slowly gained ascendance. On haciendas, indigenous peasants were bound to systems of *concertaje* and *huasipungo*, whereby they agreed to work for the landlord in exchange for the use of small plots of land. The relationship between a landlord and his workers at the beginning of the twentieth century has been characterised as an asymmetrical dependence, in which the owner (the *patrón*) took care of his workers, who expressed their gratitude for his benevolence with their labour and

[6] In 1822, the territory now called "Ecuador" became independent as part of the *República de Gran Colombia*, which by 1830 disintegrated into three separate nations: Colombia, Venezuela, and Ecuador.

[7] Based on the exposition here, the reader might come away with the idea that, since independence, *tenientes políticos* exercised a formidable and unrestricted power in the countryside that could easily become abusive. While this was sometimes true in areas with a high concentration of "free" indigenous communities, it is safe to say that this was not the case in areas with large and powerful haciendas (like the Pujilí canton). As a metaphor, the image of the "holy trinity" is useful to paint a picture of power-holders in the Andean highlands as a whole. But locally, or even regionally, actual relations could differ. Sometimes *tenientes políticos* exercised a high degree of control, and sometimes, as Kaltmeier (2007) rightly stresses, in areas with a lot of large haciendas, *de facto* power was in the hands of those who owned and managed haciendas (i.e., *hacendados* and their *mayordomes*).

loyalty. Such a situation is described by Guerrero (1991), who also shows that, although workers were often repressed by the landlord, they at times offered a number of forms of resistance (Guerrero 1991, p. 335). A good example of the latter occurred at the Zumbahua hacienda, situated on the west Andean ridge, in the province of Cotopaxi. Becker (2007) describes conflicts between workers and the landlord of this hacienda that arose during the 1930s and 1940's. These disputes were essentially about working conditions and payment. With the nearest *teniente político* in the parish of Pilaló, five hours away on horseback (Becker 2007, p. 162), the indigenous workers on the Zumbahua hacienda managed to secure legal assistance from Gonzalo Oleas, a socialist lawyer based in Quito (Becker 2011a). With his support, they finally succeeded in having most of their demands met. They did so by resorting to national law.

The socialist lawyer from Quito can in that instance be seen as an exponent of the *indigenista* movement. Because of the persistent demands for land and other claims on the part of "free" agriculturists and rural workers on haciendas, a leftist and intellectual "political current arose in defence of the indigenous population in a more or less well-intentioned effort to give [indigenous] heritage a place in [politics]" (Baud 2009, p. 25). Among other things, the *indigenista* movement pressed for reforms concerning communal land tenure. The first such legislation that was enacted was the *Ley de Comunas* of 1937,[8] which extended legal recognition to indigenous communities (Becker 1999). In certain parts of the country (but not in others), rural indigenous people quickly embraced this community structure and formed more *comunas* (Becker 1999, p. 531). Afterward, there were two additional land reforms, in 1964 and 1973. These measures were designed, among other things, to standardise local organisation and, in the process, to transform rural indigenous people into Ecuadorian peasants. The 1964 land reform promised civil rights by attempting to reorganise material and political power relations in the countryside. After this legislation abolished the *huasipungo* system and granted property titles to some rural indigenous people, there was a virtual explosion in the number of *comunas* in certain areas (Becker 1999, p. 535). The 1973 land reform extended additional social rights to the peasantry. The significance of these measures were far reaching, especially in the Andean highlands. It provided some rural indigenous communities with secure land titles. It increased access to the state. And it marked the end of the "holy trinity" that governed the countryside (Yashar 2005, p. 92-95). The land reforms, combined with the state's continued weak control over the countryside, enabled indigenous communities to secure more local autonomy, thus sustaining and strengthening the application of customary law (Lyons 2001, p. 24, Yashar 2005, p. 95). At the same time, the integrationist model officially supported juridical monism, thus limiting the recognition of legal pluralism.

2.2. Constitutional changes

Thus, during the "long nineteenth century", as well as during most of the twentieth century, the situation of real legal pluralism remained unchanged. Recognition of both this *de facto* autonomy of the rural indigenous population, and of their customary law, became one of the demands of the new indigenous movements that emerged in the second half of the twentieth century. Although it initially focused on socioeconomic issues, this movement eventually emphasised its ethnic-cultural claims (Becker 2008). In the words of Pallares (2002), the emphasis shifted "from peasant struggles to Indian resistance". The indigenous struggle for equal rights began in earnest with the rise of the national indigenous movement CONAIE.[9]

[8] A *comuna* is a local peasant community that has more than 50 permanent residents and is governed by a *cabildo* (Yashar 2005, p. 89).

[9] The national indigenous movement CONAIE (Consejo de Coordinación de las Nacionalidades Indígenas de Ecuador – the Confederation of Indigenous Nationalities of Ecuador) was founded in 1986, but has its origin in significant regional federations: the ECUARUNARI (Ecuador Runacunapac Riccharimui, meaning

Several explanations have been proffered to explain the development of this stronger ethnic consciousness and concomitant indigenous activism. Yashar (2005) argues that contemporary "changes in citizenship regimes", accompanied by the development of a "political associational space" and pre-existing "transcommunity networks" politicised indigenous people. Van Cott (2005), on the other hand, sees the decisive factor in this transformation as the crisis of the traditional political parties and the new political space resulting from the decline of class identities and disparities. Other researchers, such as Baud (2009), Becker (2008) and Korovkin (2001), point instead to a long history of indigenous activism in order to explain its recent dramatic eruption in contemporary Ecuador.

What should be kept in mind in this connection is that the emergence of CONAIE onto the political stage is closely related to two other factors. The first of these is the development of international jurisprudence, which increasingly characterised the rights of indigenous peoples as human rights. In this respect, ILO Convention 169 is considered the most important international instrument. The second factor has to do with the constitutional reform processes that took place in several countries in Latin America during the last fifteen years of the twentieth century, and which recognised – at least in principle – the multicultural nature of the region. After years of protest, CONAIE entered national politics in 1996, and its appearance on the political scene was an important factor that eventually resulted in the promulgation of a new Constitution in 1998.

This new Constitution recognised indigenous authorities and their rights to apply their customary law in cases of internal conflicts.[10] The document's recognition of legal pluralism, along with the ratification of ILO Convention 169, which also occurred in 1998, represents a radical modification of the former tradition of *de jure* legal monism combined with *de facto* legal pluralism. Despite the fact that this new constitution was passed a number of years after similar reforms in Bolivia (1994), Colombia (1991), and Peru (1993), it can be justly said that it included more extensive formal recognition of customary law than most other Latin American countries (Andolina 2003, p. 724). However, in what seems like a vindication of the notion of "the dialectics of progress," this innovative legislation is enforced very inconsistently (Simon Thomas 2009, p. 39). Pursuant to article 191, section 4, last sentence, of the Constitution 1998 – which includes a call for a law that would make national law and customary law compatible – two serious initiatives have been taken.[11] However, neither of these attempts to harmonise the two systems succeeded. The first was vetoed by President Noboa in January 2003, and the second was declared unlawful by Congress that same month (García 2005, Simon Thomas 2009). In essence, these two failures did not necessarily represent crushing defeats in terms of the process of making the two systems compatible. Rules defining customary law's proper place in a situation of formal legal pluralism do not have to result from legislation. Such rules could also be based on jurisprudence or social norms.[12] However, no jurisprudence aimed at harmonising rules has yet evolved. During the past decade, several potentially relevant cases

"Indian Awakening" in Kichwa), the Confederación de los Pueblos de Nacionalidad Kichwa del Ecuador (Ecuadorian Kichwa Confederation), and the CONFENAIE (Confederación de Nacionalidades de la Amazonia Ecuatoriana – Confederation of Indigenous Nationalities of the Ecuadorian Amazon).

[10] Article 191 (section 4) of the 1998 Constitution reads as follows: "The authorities of the indigenous peoples shall exercise the functions of justice [and] apply their own norms and procedures for the solution of internal conflicts, in accordance with their customs or customary law, as long as they are not contrary to the Constitution and the laws. The law shall make such functions compatible with the national system [translation of Raquel Yrigoyen (2000, p. 220)].

[11] The *Ley de Compatibilización y de Distribución de Competencias en la Administración de Justicia* (Law on Coordination and Distribution of Jurisdiction in the Administration of Justice) was proposed in November 2002, and the *Ley de Ejercicio de los Derechos Colectivos de los Pueblos Indígenas* (Law Enabling the Exercise of the Collective Rights of Indigenous Peoples) was proposed in December 2002.

[12] The so-called conflict rules developed by the Constitutional Court in Colombia provide an excellent example of the use of jurisprudence to modify existing law. See Assies (2003) and Sánchez (2000) for a detailed discussion of the Colombian Constitutional Courts' verdicts.

were ruled upon. Yet these cases, while establishing important legal precedents in general terms, provided no harmonising rules.

The Constitution of 1998 was replaced ten years after it was promulgated. The Constitution of 2008 (or "the Montecristi Constitution", named after Montecristi, a town in the Manabí province, where the constituent assembly convened) not only recognised Ecuador as an intercultural and multinational (*plurinacional*) country. It also reaffirmed the rights that the indigenous nationalities had been accorded in 1998.[13] As regards formal legal pluralism, the new constitution includes a number of minor changes. For instance, article 76, section 7 states explicitly that nobody should be tried twice for the same alleged offence (this is called the *ne bis in idem* rule).[14] Echoing the 1998 document, the Montecristi Constitution calls for the development of mechanisms (e.g., additional law or jurisprudence) to be developed in order to allow for the co-existence of customary law and national law. However, no such harmonisation has yet occurred – either through the promulgation of new law or through jurisprudence. So, the formal recognition of legal pluralism appears to be a Pyrrhic victory for the indigenous population. It seems as if the Ecuadorian state formally "endorsed" customary law (for political reasons), while doing nothing to support it, and that it even tried in subtle ways to undermine it (Tamanaha 2008, p. 50).

2.3. The political context

As the preceding sections already suggest, the use of customary law in Ecuador cannot be interpreted without taking the political context into consideration. "*Todo es político"* ("everything is politics") in Ecuador, my informants assured me, and this includes the law. Although the legal system is officially separated from politics, people have very little confidence in it, since it is generally seen as a corrupt extension of political power (Conaghan 2008, p. 48). This raises the question of the influence this state of affairs has on the implementation of the situation of formal legal pluralism. The role of two key players will be mentioned: Ecuador's indigenous population and the Correa administration.

In the 1990's, as was shown before, Ecuador's politics was marked by the emergence of the indigenous movement CONAIE onto the political stage. In addition to the development of international jurisprudence and constitutional reforms across the region, CONAIE's emergence coincided with a political predilection for neoliberal reforms, including a decentralisation policy. One of the solutions to a number of crises the country confronted (Van Cott 2000) was found in a decentralisation policy, the overall aim of which was to reconstitute relations between the state and society, and thus meet the demands of CONAIE for more rights and autonomy. At the same time, the country had to contend with nine

[13] Article 171 of the 2008 Constitution reads as follows: "The authorities of indigenous communities, peoples, and nations, shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee of the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments.
The state shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to the monitoring of their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction." (http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html, accessed 11 Oct 2011).
In line with article 171 of the Montecristi Constitution, two new laws that touch on customary law and legal pluralism have been enacted, namely the Código Orgánico de la Función Judicial, and the Ley de Garantías Jurisdiccionales y Control Constitucional. For a detailed elaboration on the scope of these laws, see García (2010, p. 13-15).

[14] Ecuador has recognised this right not to be subjected to a new trial for the same alleged crime before (see for example article 8, section 4 of the American Convention on Human Rights, a treaty which was ratified by Ecuador on 12 August 1977), it is recognized by art. 5 of the Código de Procedimiento Penal, and it was recognized in art. 24(16) of the 1998 Constitution, but such a right has never been explicitly mentioned in the constitution related to customary law.

different presidents within 15 years. The sociologist Leon Zamosc (in: Clark and Becker 2007, p.1) therefore calls Ecuador "one of the most [...] unstable countries in Latin America". Setting aside for a moment the question of what caused this instability, it is safe to conclude that governmental accountability has been severely compromised (Conaghan 2008, p. 48) the past two decades. It is therefore understandable that indigenous authorities are sceptical regarding practical compliance with the 1998 formal recognition of legal pluralism.

A problem, however, is that it is nowadays not possible to conceive of indigenous people, or indigenous authorities, as a monolithic group that speaks with one voice. It is often presumed that CONAIE is the one and only indigenous movement in Ecuador, but as Lucero (2003, p. 32) rightly points out, CONAIE is hardly the first national indigenous organisation, and other organisations continue to advance different agendas. However, CONAIE is an important player in Ecuadorian politics. After emerging on the political stage through its successful advocacy of the promulgation of the Constitution of 1998, CONAIE became increasingly prominent in national politics. Its political branch, the Movimiento Unidad Plurinacional Pachakutik (MUPP, Pachakutik Movement for Multinational Unity) even obtained ministries in the administration of Lucio Gutiérrez (2003-2005). But soon after this development, the cooperation became strained and the ministers linked to CONAIE ended up leaving the government. This left CONAIE in a weakened position. Although CONAIE never has spoken on behalf of all Ecuadorian indigenous people, this weakened position led to more open and serious differences of opinion – on all kinds of topics and among different parts of the indigenous population. As will become clear when we turn to a discussion of the La Cocha-Guantópolo murder case, an illustration of such a difference of opinion concerns the issue of the proper jurisdiction to be granted indigenous authorities for the administration of customary law. Although the point of view of CONAIE and their regional branches seems to be clear, at a local level objections were raised regarding the proper use of customary law in that specific case.

Discord among indigenous people, however, is not the most important obstacle to implementation of the situation of formal legal pluralism. That designation can only apply to the Correa administration. Rafael Correa assumed the presidency in January 2007. As one of Latin America's leftist presidents, and enjoying broad popular support, Correa proposed holding elections for a constitutional assembly as soon as he was in office. His proposal won a massive 82 percent "yes" vote, and in September 2007 his Movement for a Proud and Sovereign Country (MPAIS) obtained 80 of the 130 seats in the constitutional assembly which eventually drafted the Montecristi Constitution of 2008. Correa's plebiscitary style of politics seems to be effective in enacting reforms. However, it remains to be seen if and how he is able to create enduring transformations (Conaghan 2008; Kennemore and Weeks 2011). Nowadays, Correa more and more seems to govern "over the heads" of Ecuador's population, causing a decline in his popularity in general. Specifically, his relationship with the indigenous movements has become fairly fragile (Becker 2011b). The political opportunities that he seemed to enjoy in the initial period of his presidency now seem elusive. As will be shown in the section on the La Cocha-Guantópolo murder case, this became clear in the most recent round of discussions on the personal, territorial and material applicability of customary law. Correa clearly is not a supporter of extending the juridical autonomy of indigenous authorities.

3. "Outsourcing" sovereignty and the challenge of legal pluralism

Seeing the contemporary situation of formal legal pluralism in a historical context (Tamanaha 2008, p. 2) helps us to understand that legal pluralism as such is a common – although often debated – historical condition in Ecuador. What can also be deduced from the political-historical overview in the previous section is that, at the end of the twentieth century, it became clear that the relatively weak control of

the Ecuadorian state over the countryside, in combination with the politically and legally subordinated position of rural indigenous people, became a problem. Some scholars, like Van Cott (2000), have convincingly shown that the Ecuadorian state was overly centralised and inefficient. Additionally, judiciaries throughout the nation were weak and politically compromised. Dealing with this weakness has thus been one of the principal challenges of the nation. The solution was found in a decentralisation policy. Administrative decentralisation was also encouraged by international development agencies. Neoliberals saw it as a strategy to reduce the role of the public sector and to enhance civil society (Wilson 2008). Others (including Correa and his supporters) viewed decentralisation as a strategy for democratisation that would contribute to the empowerment of the disenfranchised (Assies 2000, p. 10). The formal recognition of legal pluralism in Ecuador has to be seen in the light of this decentralisation policy. However, with the formal recognition of legal pluralism in the absence of coordinating rules, the Ecuadorian state in fact did nothing more than formalise *de facto* indigenous practices. Because the coordinating rules have not been developed, the real extent to which the indigenous authorities and the use of customary law have been recognised is still unclear.

This decentralisation of administrative affairs implies a fragmentation of juridical authority as well as an extension of *de facto* application of customary law. As was shown in the previous historical overview, the actual day-to-day governance of the country, including the ability to kill, punish, and discipline with impunity – in other words, *de facto* sovereignty (Hansen and Stepputat 2006, Sieder 2011) – had previously been divided among different authorities in rural areas. The presence of the state has in fact been very limited in these areas both during colonial times and following independence. As Hansen and Stepputat (2006, p. 295) point out: "Although effective legal sovereignty is always an unattainable ideal, it is particularly tenuous in many postcolonial societies where sovereign power historically was distributed among many forms of local authority". With the formal recognition of legal pluralism, this previously existing situation of *de facto* deferred sovereignty became legalised. This is a historical fact that is relevant to three critical issues which we will now briefly discuss.

First, decentralisation of legal jurisdiction in the absence of rules harmonising the differential application of national and customary law raises questions about the role of national law, especially in cases in which the different legal systems threaten to clash. In broader terms, it seems pertinent to ask whether decentralisation implies a restriction or an extension of the reach of state power. Addressing this question is beyond the scope of this article. Yet it is possible to offer a number of observations regarding the effects of administrative decentralisation. According to Van Cott (2008, p. 4) such processes can be characterised either by a "top-down" or "bottom-up" dynamic. In the former case, decentralisation is initiated and designed by the state. Local authorities are only given the power the state wants to grant them (De Benoist 1999). In the latter case, it is the local or regional level that determines when a given legal matter needs to be referred to the national courts for adjudication. Van Cott (2008, p. 4) argues that Ecuador employs a mixture of both approaches. I would add that, as regards the decentralisation of administrative affairs, local and regional indigenous populations typically take the lead. One could even argue that, given the longstanding lack of presence of formal juridical systems in the rural areas, as well as an increased indigenous protection of the ability to adjudicate legal conflicts, "decentralisation" is really not an appropriate label to describe the phenomenon. Instead, the principle of "subsidiarity" seems to be a more accurate term. Subsidiarity in this sense means that legal matters are being handled by the lowest-level authorities that can claim jurisdiction (De Benoist 1999). These authorities resolve the conflicts as much as they possibly can, and they accept responsibility for their own decisions and choices. The state only has a subsidiary function, stepping in to adjudicate disputes

that cannot be resolved at the local level. In this conceptualisation, it is thus the lower-level authority that delegates tasks and responsibilities to the state. However, as will be shown in the case study presented later in this article, the state always has the power to intervene in any given legal matter.

Secondly, the formal recognition of the situation of legal pluralism, but without any rules for harmonising its two components, raises questions regarding the extent to which indigenous authorities exercise jurisdiction. Especially in light of what has been said before regarding the decentralisation of juridical affairs, this is an issue that is highly relevant to the current reality in Ecuador.[15] The four most important challenges concerning coordination are related to processes, norms, sanctions and authorities (García 2010, Van Cott 2003).[16] In terms of processes, customary law has a major oral component, and is flexible and dynamic. In contrast, national (positive) law is written, consistent and based on precedent. Furthermore, customary law relates differently to the concept of due process; for instance, it does not provide the possibility of legal representation to accused parties, or the possibility of appeal. Second, both normative systems are based on distinct sets of cultural meanings and values. Some offences according to customary law, such as gossip or witchcraft, are not considered violations of national law. Customary law values the social collective – the harmony of the community – much more than national law does; national law instead emphasises individual rights. Third, customary law is to a large extent governed by the principle of reconciliation, and it tends to give compensation and restitution to the victim, instead of meting out punishment to him or her. Thus, for example, rituals that use stinging nettles and ice-cold water, and whipping are not seen as punishment in customary law systems, but rather as a means of "purifying" the offender so as to make him fit to re-enter society. In any case, such procedures are at odds with most national and international legal systems. Finally, there is the issue of which authority is qualified to exercise jurisdiction, in what situation, and where. Depending on the circumstances, customary law can be applied by a wide range of bodies, from older family members, shamans and village elders, to *cabildos* or tribunals. Several additional questions concerning the qualification of authorities arise: Should indigenous jurisdiction be mandatory or optional? In other words, does the possibility of forum shopping exist? Furthermore, what should be done when a conflict involves both indigenous and non-indigenous subjects? And finally, should indigenous jurisdiction be defined geographically? Ecuador continues to struggle with the challenges involved in developing coordinating rules that would answer these questions.

One specific item appears to be the most challenging of all, and that is the issue of customary law in relation to human rights; to what extent can, or should, customary law meet generally accepted human rights standards? The decentralisation of juridical affairs directly touches on this dilemma. A strictly juridical point of view is the rejection of collective rights, according to the principle that universal human rights only apply to individuals. Stavenhagen (2002) and others argue that the recognition of special group rights could be seen as a necessary condition for enjoying individual human rights. Such a notion is based on the contention that individual human rights cannot be fully enjoyed by subordinated groups like indigenous peoples. Some, like Kymlicka (1995), draw a distinction between external protections and "internal restrictions". They agree that, from a liberal point of view, collective rights in the sense of external protection can be accepted. By contrast, internal restrictions (i.e., those that involve a claim of a

[15] The current (legal, popular, and academic) interest in this challenge of coordination has been not only in recent legal proceedings and the Ecuadorian press, but was also a prominent topic of discussion at the Seventh International Congress of RELAJU (Red Latinoamericana de Antropología Jurídica) which convened 4-6 August 2010, in Lima, Perú.

[16] The fundamental question here concerns how to make two intrinsically different normative systems compatible. The four challenges mentioned here constitute aspects of this fundamental question.

group against its own members, intended to protect the group from internal dissent) cannot be justified. Problems arise, however, when the line between external protections and internal restrictions becomes blurred, or when a "liberal society is confronted with anti-liberal views which reveal that liberalism itself is but one of several possible perspectives" (Eriksen 2002, p. 148). And this is the case concerning human rights; human rights enact liberal norms that protect individual autonomy, liberty, bodily integrity, etc., while customary law has non-liberal orientations (Tamanaha 2008, p. 56). As Assies (2003) rightly comments, such difficulties result from the generality of Kymlicka's statement, which therefore is open to debate (for example, see Momood 2007, p. 29-30). If self-governing collectives are not granted any sanctioning capacity *vis-à-vis* their members, they hardly can sustain their self-government in practice (Assies, Van der Haar and Hoekema 2000, p. 303). Or, as Assies, Van der Haar and Hoekema (2000, p. 305) state, customary law "should be understood as a political recourse and as a part of a culture of resistance". These same authors then sound the – aforementioned – following warning: "As such it involves a tendency of closure, reification and hardening of internal restrictions".

The three issues that have been dealt with in the former sections are the question of who is in control when sovereignty is being "outsourced" (Buur 2005, Hansen and Stepputat 2006), the "challenge of coordination" (Van Cott 2003, p. 27), and concerns regarding human rights. These matters are closely related to one another. As will be shown in the next section, these are not only important topics of research. In addition, they are of significant practical importance on a local level.

4. The La Cocha-Guantópolo murder case

At 10:00 pm, on Wednesday 13 October 2010, a group of about forty indigenous inhabitants of the communities of La Cocha and Guantópolo entered the Sala de Audiencias (Court Room) of the Corte Constitucional (Constitutional Court) in Quito. At that time, twenty spectators – including me – were already waiting for the hearing of the full court to begin. It was only after everyone was seated (or provided standing space in the back of the courtroom) that the five judges arrived. Four different attorneys were heard, each of them pleading in defence of one of the parties involved in a homicide that occurred in May 2010 in the parish of Zumbahua. The first speaker was Raúl Illaquiche, who represented the family of the victim. The second speaker was Carlos Poveda, who represented the provincial indigenous organisation *Movimiento Indígena y Campesino de Cotopaxi*, or "MICC" (an affiliate of CONAIE) which defended the indigenous point of view regarding customary law. Poveda was followed by Alex Alajo, who spoke on behalf of the *cabildo* of the community of La Cocha. The *cabildo* was accused by the Court of Justice of Latacunga of exercising inappropriate jurisdiction in the case. Finally, the lawyer representing the five young men accused of the murder of Marco Olivo in Zumbahua on May 9, 2010, Bolívar Beltrán, arose and spoke. The five young men were, at the time of these proceedings, being held in a jail in Quito, waiting for the outcome of their trial by the national legal system, even though they have already been sentenced in accordance with customary law.

Although all four attorneys represent different parties – parties that in some respects are in conflict with one another in the present case – a striking consensus among them emerged from their oral arguments. In a variety of ways, they emphasised that the murder case concerned an internal conflict of people living in the parish of Zumbahua and therefore that the hearing of the case by local indigenous authorities had been appropriate. In support of this position, they cited the so-called *ne bis in idem* rule, which states that no legal action can be instituted twice for the same alleged offence. In line with that argument, they argued that the decision of the Court of Justice of Latacunga to take the five suspects into preventive custody was unlawful. They all referred to relevant articles in the Constitution, to international rules like ILO Convention 169 and the UN Declaration

on the Rights of Indigenous Peoples, and to national and international jurisprudence. They all demanded that the five suspects be released immediately, and that the charges against the indigenous authorities be dropped.

This plenary session of the Constitutional Court is illustrative of the current situation of formal legal pluralism in Ecuador. The La Cocha-Guantópolo murder case and the subsequent charges against the *cabildo* of La Cocha had been brought before the Constitutional Court in order to resolve the issue of whether customary law had been correctly applied. Almost five months after the homicide occurred and the five suspects had been adjudicated during indigenous proceedings in La Cocha, a turning point in the legal controversy regarding the legitimacy of the indigenous verdict was reached on that October day. Before drawing any conclusion, this article will explore in detail what actually happened on the early evening of 9 May 2010, in Zumbahua, and the subsequent activities of different law enforcement authorities – both national and indigenous. As will become clear, this case not only illustrates the current state of affairs regarding the relationship between state and indigenous legal authorities in Ecuador. In addition, it provides a good example of how the use of customary law currently tends to intensify punitive measures applied by indigenous authorities.

At a wedding party at one of the houses near the Central Plaza of the village of Zumbahua on 9 May 2010, a group of five young men got into an argument with a man who lived in Zumbahua. According to eyewitnesses, they did not get into a fight at the party. But when the corpse of the man from Zumbahua was found later that day in the park, the five young men were immediately suspected of involvement in his death. All five were from the neighbouring community of Guantópolo, and they had a reputation among the locals as "troublemakers". They all played in the same rock band, and according to the opinion of some, the five formed a street gang. Everybody knew that, as a group, they had recently been involved in fights. The next day, the five suspects were captured by local residents and handed over to the *cabildo* of La Cocha, another neighbouring community. This was an interesting aspect of the case, given that the community of Guantópolo has a *cabildo* of its own. But, those who captured the five young men probably either knew or suspected that at least one of them was related to a member of the *cabildo* of Guantópolo and therefore might receive preferential treatment in that community.[17] A second reason not to hand the five suspects over to the *cabildo* of Guantópolo, was that it had absolutely no experience with serious crimes such as homicide.[18] On the other hand, because of its exemplary handling of a murder case in 2002,[19] the *cabildo* of La Cocha was considered to be the most trustworthy authority in such a serious legal matter.[20]

After the five had been captured and handed over to the *cabildo* of La Cocha, this authority embarked upon an investigation of the case, which is the second of five stages in an indigenous legal proceeding.[21] The investigation and interrogation were concluded in less than two weeks. During this time, nobody except for the *cabildo* and a few other individuals knew where the five suspects were being held.

[17] An ex-*dirigente* of Guantópolo informed me directly that at least one of the suspects is related to a *cabildo* member (interview 1 November 2010).
[18] Interview with a member of the *cabildo* of La Cocha on 13 November 2010.
[19] See Simon Thomas (2009), for a detailed account of a murder case that stemmed from a killing that occurred in 2002. At that time, the local indigenous authorities involved also considered the homicide an "internal conflict" and therefore felt that they were capable of adjudicating these matters in accordance with customary law.
[20] Poveda (2010, p. 12) mentions that all parties involved agreed on handing the five suspects over to the *cabildo* of La Cocha.
[21] The first stage in an indigenous trial is called *willichina*, (i.e., the report of the crime by the victim or his relatives). The next stage, *tapuykuna*, refers to the investigation done by the *cabildo*. The third stage, the *chimbapurana,* is the public trial. The *kuana,* which means "good counsel", is an essential component of this stage. During the last stage of *killpichirina*, a final ruling is issued and the sentence is determined (Tibán and Ilaquiche 2004: 36-42).

Meanwhile, a rumour spread that one of the five "troublemakers", the leader of the gang, had had a longstanding, unresolved dispute with the victim. It was said that this individual, Orlando Quishpe[22] had, prior to the murder, been seen clearly threatening the victim.[23] Whether this rumour had any influence on what happened afterward remains unclear, but as a result of the interrogations, the five suspects confessed that they had gotten into a fight with the man who was later found dead. None of them, however, confessed to having killed him. Nonetheless, according to the *cabildo*, the confessions all pointed to Quishpe as the person who actually killed the victim, since he emerged as having had the greatest degree of involvement in the fight.

That is why the *Asamblea General* (i.e., several *cabildos* that collectively constituted a court) tried four of the suspects two weeks following the fatal incident, and then tried Orlando Quishpe separately the following week. The elements of all five sentences were equal. The same sentence was imposed on each of the five men: an obligation to make apologies, pay a fine of US$5000, expulsion from the community for two years, mandatory submission to a purification ritual and a whipping by members of the ruling *cabildos*. During the purification ritual – which, while undoubtedly painful, is not primarily intended as punishment –, the skin of the five men was rubbed with stinging nettles, before they were given a shower of ice-cold water. This "ritual cleansing" took half an hour, as was prescribed in the *acta* (i.e., the handwritten record of the indigenous legal proceedings). As was subsequently revealed in reports on Ecuadorian television,[24] the four convicted men were completely nude, and their bound wrists were tied to a rack which held them suspended above the ground. The following week, when Quishpe was submitted to the same procedure, he was beaten so hard that he subsequently required hospitalisation.

During the days that followed, the indigenous legal proceedings, and the punishment received by the five men, became the subject of an outcry in many quarters. The media, jurists and the government, and elements of the Ecuadorian public in general condemned the punishment as "barbaric". Strikingly, some dissatisfaction with the procedure as a whole was heard in the parish of Zumbahua as well. Several people I interviewed about this case voiced their disapproval of what they saw as the physical brutality of the treatment. Some residents of Guantópolo in particular expressed concern as to whether the indigenous legal proceedings had been correctly conducted throughout its various stages. Their concern with regard to due process especially focused on the interrogation practices of the *cabildo* of La Cocha. It was considered unusual that almost nobody knew exactly where the five suspects were being held throughout the proceedings and how they were being treated. Many were also angry about the force that had been used during the purification process and the whipping. It may have been this dissatisfaction that led the people of Guantópolo (among others) to convince the five young men to turn themselves in to the national authorities on 27 May 2010.

With this "surrender", the criminal investigation of the public prosecutor, and the proceedings conducted by the national courts, got underway. The criminal investigation began with a preliminary inquiry regarding the role of the indigenous authorities during the case. This resulted in the arrest of three members of the *cabildo* of La Cocha. With the assistance of two attorneys, Carlos Poveda and Raúl Ilaquiche, they were released within 24 hours, but the five young men had already

[22] Orlando Quishpe is his real name. I could have chosen to use a pseudonym in order to protect his anonymity, as is common in anthropological writing. However, Quishpe's identity has already been revealed on numerous occasions in local and national newspapers, on national television and on the internet. As a matter of fact, all the names of the people mentioned in this article are their real names, and for the same reason: their identities in association with the case under discussion are already a matter of public knowledge.
[23] Source: Caso 10-05-25013, Fiscalía Provincial de Cotopaxi.
[24] For instance on ECUAVISA, Teleamazonas, GAMA TV and on MICC TV.

been transferred from the jail in Latacunga to a prison in Quito. The five men and their supporters in Guantópolo were promised that the investigation would only last about two months. Later, after the Criminal Court of Justice in Latacunga declared itself incompetent to exercise jurisdiction as long as the Constitutional Court did not issue its opinion on the relevance of the indigenous legal proceedings that had been conducted, it became evident that the case would drag on much longer, much to the consternation of the accused and their supporters. This forced the *cabildo* of Guantópolo into "collaborating" with the *cabildo* of La Cocha, as well as the provincial indigenous organisation MICC, in seeking the release of the five young men. These events were what led to the appearance of the previously mentioned parties before the Constitutional Court on Wednesday 13 November, 2010, for the purpose of presenting a joint request for both the immediate release of the five men and the suspension of legal proceedings against the three members of the *cabildo* of La Cocha. Despite the pleas of the four attorneys, the Constitutional Court determined that it was not well-enough informed to issue a ruling. So, in December, 2010, it ordered that expert testimony be given on the use of customary law in this specific case; this in turn was supplied by the Colombian legal anthropologist Esther Sánchez Botero in January 2011. The following month, the Constitutional Court decided to review the case once again.[25]

This La Cocha-Guantópolo murder case invites comparison to an earlier, quite similar homicide in the same region: the La Cocha murder case of 2002 (Simon Thomas 2009). The indigenous authorities involved in that earlier case also considered the homicide in question to be an internal conflict and therefore they determined that it was appropriate that the case be adjudicated in accordance with customary law. In both cases, it was decided not to bring the accused to the *teniente político* based in the village of Zumbahua. At one point during the La Cocha murder case of 2002, the *cabildo* seriously considered the possibility of handing the three suspects over to the national legal authorities, but in the end decided not to do so (Simon Thomas 2009, pp. 62-63). Both indigenous trials were attended by representatives of the general public, and all parties concerned approved the use of customary law. Both sentences principally aimed at reconciliation, restoring harmony, and purification, rather than punishment. In addition, both of them referred – in their written *actas*, as well as in their oral statements – to applicable sections of the Constitution and to relevant international jurisprudence. Next, both cases were covered on national television, and both were the subject of a public outcry over the infliction of what was perceived as "barbaric" punishment. Finally, both indigenous cases almost immediately were followed by trials in accordance with national law. In both cases, the indigenous authorities, the judges and the public prosecutors involved all made explicit reference to the Constitution and to international rules. However, the national authorities did so for the purpose of arguing that indigenous customary law conflicts with national law and with individual human rights.

The two murder cases also differ from one another in some respects. The first difference concerns geography. The La Cocha case of 2002 was about a homicide in the community of La Cocha, and only involved inhabitants of that indigenous community. As explained before, the La Cocha-Guantópolo case of 2010 was about a murder committed in the village of Zumbahua, the accused were residents of Guantópolo, and the actual trial took place in La Cocha. According to the indigenous authorities involved, this should not be taken too seriously; after all, it all occurred in the same, indigenous parish of Zumbahua.[26] According to the public prosecutor of the case and several judges I interviewed, however, these circumstances are important. It is precisely because the homicide did not occur in an indigenous community, but in a village – one, it should be noted, with a *teniente político* – that

[25] Decision of 3 February 2011, in Case 0006-11-CN of the Constitutional Court.
[26] Zumbahua is both the name of a rural parish and the town that serves as its administrative and economic centre.

this case does not meet the definition of an "internal conflict". Secondly, the physical treatment of the suspects in the two cases was different. In 2002, the three convicts were forced to lie on the ground and stripped to their underwear, while they submitted to the purification of the stinging nettles and then whipped; afterwards they could walk away without severe injuries. In 2010, the suspects were hanged by their wrists, totally naked, and one of them required hospitalisation. Third, in the aftermath of the first indigenous trial, nobody involved complained about denial of due process, while in the second case, such complaints were heard, especially on the part of residents of Guantópolo. These latter two differences point to the apparent imposition of severe restrictions on freedom in the latter case.

A final set of differences can be found in the proceedings in the national courts that followed. In 2002 the Court of Justice did not prosecute the indigenous authorities, while in 2010 it did. In 2002 the three suspects were not arrested, while in 2010 they were. These differences in the two instances point to a stronger assertion of state authority in the latter case. The acts of the courts in 2002 can largely be described as ignorance of and/or unwillingness to submit to customary law, and to thus formally recognise legal pluralism (Simon Thomas 2009, p. 47). It is outside the scope of this article to provide a detailed description of the political view of those juridical acts, but as illustrated in the preceding section on the political context, this view can be seen as a reflection of these acts. In 2010, on the contrary, the position of the Correa administration seems far more clear. In a reaction to the indigenous trial in the La Cocha-Guantópolo case, President Correa proclaimed on national television that customary law is subordinate to national law and that,[27] in cases involving criminal acts, (indigenous) perpetrators should be adjudicated by national courts. Former Interior Minister Gustavo Jalkh contended that in cases of homicide, for example, customary law should not be applied (El Comercio 2010). Both of these statements contradict the Montecristi Constitution, article 171 of which states that, in cases of "internal conflicts", indigenous authorities are entitled to adjudicate in accordance with customary law, with no limitations imposed on jurisdiction. Nevertheless, the judiciary did not disagree with these political statements. Whether they were wrong or right in not doing so remains to be seen; this will largely depend on the ultimate ruling of the Constitutional Court on the issue of whether customary law was correctly applied.

5. By way of conclusion

What a comparison of the La Cocha-Guantópolo murder case in 2010 with a quite similar homicide in the same region in 2002 mainly illustrates is that punitive measures applied by local indigenous authorities in cases when customary law is employed seem to have grown harsher over time. In theory, the use of customary law in Ecuador is constitutionally recognised. However, coordinating rules that would define the personal, territorial and material jurisdiction of both customary law and national law have never been approved, and no case law has yet been developed. In practice, this has led to ambiguity in the application of officially sanctioned formal legal pluralism. In addition, both the indigenous authorities' position (legally and politically) regarding the interpretation of the formal recognition of legal pluralism, and that of the Correa administration, seem to be diverging. Keeping in mind the historically ascribed counter-hegemonic purposes of customary law, these poorly implemented, recent constitutional reforms, combined with increasing contemporary political tensions, seem to be the root cause of the increasingly punitive measures applied by indigenous authorities.

This article's overall aim was to shed light on how the current Ecuadoran situation of formal legal pluralism, which lacks coordinating rules with respect to the

[27] President Correa did so on 22 May, 2010. He has also called the events "a monstrosity", "a degrading spectacle", and he stated "For God's sake, this is torture, this is barbarity" (Caselli 2010).

differential application of national and customary law, plays out in daily practice. Its specific purpose was to provide insight into one of the challenges this legal pluralism faces, namely: What are the limits of indigenous authorities' jurisdiction? To summarise, the extent to which indigenous authorities hold jurisdiction to adjudicate internal conflicts is unclear. This has led to a state of affairs that Assies, Van der Haar and Hoekema (2000, p. 305) warned of: a "hardening of internal restrictions". Thus, this article's thesis is that, as a consequence of such legal uncertainty combined with political tensions, customary law in Ecuador – or at least in certain parts of Ecuador – continues to be used as a counter-hegemonic strategy, and is becoming more punitive.[28]

This article started with an historical overview of a period of almost five centuries during which one could speak of a situation in Ecuador of legal pluralism. What can be drawn from that section is that the use of customary law can be seen as a form of resistance (Collier 1995, Merry 1988, Sieder 1997, 1998). Instead of being helpless victims, rural indigenous people proved to be capable of guarding the boundaries of their semi-autonomous social fields. It was not until the late 1990's that a situation of *formal* legal pluralism came into being, but coordinating rules are still lacking. The constitutional changes at the end of the twentieth century, and the consequent decentralisation of administrative affairs, have been explained from a historical and socio-political point of view. In the brief theoretical section of this article, it was noted that this decentralisation of administrative affairs touches on three debates.

The first issue concerns the ability of the state to intervene in matters adjudicated by customary law. This article argues that, in most cases, it is the indigenous authorities who decide whether to defer to state officials or to formal courts as regards particular tasks and responsibilities. Thus, it makes more sense to instead speak of the principle of subsidiarity rather than in terms of decentralisation initiated by the state. Both the La Cocha murder case of 2002 and in the La Cocha-Guantópolo murder case of 2010 can be considered as an illustration of this argument. However, as was shown in both cases, the state does not hesitate to intervene when it deems necessary to do so. But I hesitate to consider this a sign of strength on the part of the state. Such intervention is rather, in my view, a reaction to the increasing use of customary law that is facilitated by the rather vague text of the Constitution. Even nowadays, the use of customary law can be seen as a counter-hegemonic strategy namely as a means to accomplish formal legal pluralism "in practice", instead of just "on the books". It seems that, when it comes to dealing regularly with real cases on a local level, most of the time the state is reduced to reacting, rather than taking the initiative.

In part, this is due to the absence of coordinating rules. The second issue the theoretical section of this article addressed concerned the extent to which indigenous authorities are authorised to administer justice touch on the current Ecuadoran legal situation in practical terms. Since it remains unclear exactly "what, where, when, and by whom" the use of customary law is legally recognised, conflicts about the scope of the Constitution are likely to remain unresolved. In order to defend their autonomy, indigenous authorities, supported by regional and national indigenous movements, will continue to challenge the state by interpreting the rules in a way that promotes their own agenda, and doing so in a highly public manner. As was made clear – in oral statements by the indigenous authorities in both murder cases and by the four attorneys during the hearing of the full Constitutional Court in the latter case – the use of customary law is seen as an important part of indigenous culture. Thus, its exercise will, in the future, likely be

[28] Whether or not this trend of customary law becoming more punitive is likely to spread across Latin America, goes beyond the scope of this article. However, given that Latin American governments have generally become more antagonistic to indigenous claims, this would be an interesting subject for further research.

defended in every possible way. However, the claims of customary law can at times clash with human rights – the third issue dealt with in this article.[29] As pointed out previously, whether "customary sanctions" are consistent with individual human rights, and whether such consistency is a requirement remains a subject of heated debate.

That brings me back to a comparison of the 2002 and 2010 murder cases. The most important differences between the two generally similar cases concern restrictions on individual freedom. Drawing a parallel between these two cases seems to suggest an intensification of punitive measures applied by indigenous authorities over time. In 2002, the *cabildo* of La Cocha decided after careful deliberation, and with the support of indigenous movements, that customary law could be applied. However, in was subsequently overruled by national law. So when it got a second chance in 2010, the *cabildo*s seized the opportunity. Its members deliberated just as carefully as they had eight years previously, and with a similar degree of assistance from concerned outsiders. What happened next played out in a way predicted by Assies *et al.* when they wrote that "the presentation of customary [law] as the core of an immutable identity should be understood as a political reaction and as a part of a culture of resistance." Subsequently, these same writers warned that this "involves a [...] hardening of internal restrictions" (Assies*,* Van der Haar and Hoekema 2000, p. 305).

The lack of legal definition combined with political tensions can be considered responsible for this state of affairs. What happened in La Cocha is similar to what has been described by Colloredo-Mansfeld (2009): when spaces "from above" are limited, pressures "from below" seem to intensify. In 2010, the *cabildo* of La Cocha (backed by CONAIE) used every possible means – metaphorically as well as literally – to show its strength. In an attempt to enforce the constitutional promise of coordinating rules, the struggle over jurisdiction tends to sharpen boundaries. Concomitantly, this struggle tends to intensify the use of indigenous customary law. Thus, one of the consequences of the contemporary legal void in Ecuador's situation of formal legal pluralism tends to be an intensifying of punitive measures applied by indigenous authorities.

Bibliography

Andolina, R., 2003. The sovereign and its shadow: Constituent assembly and indigenous movement in Ecuador. *Journal of Latin American Studies,* 35 (4), 721-750.

Assies, W., 2000. Indigenous peoples and reform of the state in Latin America. *In*: W. Assies, G. Van der Haar and A.J. Hoekema, edtrs. *The challenge of diversity: Indigenous peoples and reform of the state in Latin America.* Amsterdam: Thela Thesis, 3-22.

Assies, W., 2003. Indian justice in the Andes: Re-rooting or re-routing? *In*: T. Salman and A. Zoomers, edtrs. *Imagining the Andes: Shifting margins of a marginal world.* Amsterdam: Aksant, 167-186.

Assies, W., Van der Haar, G. and Hoekema, A.J., 2000. Diversity as a challenge: A note on the dilemmas of diversity. *In*: W. Assies, G. Van der Haar and A.J. Hoekema, edtrs. *The challenge of diversity: Indigenous peoples and reform of the state in Latin America.* Amsterdam: Thela Thesis, 295-315.

Baud, M., 2007. Liberalism, indigenismo, and social mobilization in late nineteenth-century Ecuador. *In*: A.K. Clark and M. Becker, edtrs. *Highland Indians and*

[29] This is not to say that customary law *always* clashes with human rights. For example, article 171 of the Montecristi Constitution guarantees indigenous women's participation and decision-making in indigenous governance and justice systems. As has been argued by García (2009, p. 146) and by Sieder and Sierra (2010), indigenous women, although they still encounter barriers in accessing customary law, indeed gradually obtain more rights according to human rights standards and discourses on gender.

the state in modern Ecuador. Pittsburgh: University of Pittsburgh Press, 72-88.

Baud, M., 2009. Indigenous politics and the state: The Andean highlands in the nineteenth and twentieth centuries. *In*: E.F. Fischer, edtr. *Indigenous peoples, civil society, and the neo-liberal state in Latin America.* New York and Oxford: Berghahn Books, 19-42.

Becker, M., 1999. Comunas and indigenous protest in Cayambe, Ecuador. *The Americas,* 55 (4), 531-559.

Becker, M., 2007. Indigenous struggles for land rights in twentieth-century Ecuador. *Agricultural History,* 81 (2), 159-181.

Becker, M., 2008. *Indians and leftists in the making of Ecuador's modern indigenous movements.* Durham & London: Duke University Press.

Becker, M., 2011a. 'Gonzalo Oleas, Defensor': Cultural intermediation in mid-twentieth-century Ecuador. *Journal of Latin American Studies,* 43, 237-265.

Becker, M., 2011b. Correa, indigenous movements, and the writing of a new constitution in Ecuador. *Latin American Perspectives,* 38 (1), 47-62.

Buur, L., 2005. The sovereign outsourced: Local justice and violence in Port Elizabeth. *In*: T.B. Hansen and F. Stepputat, edtrs. *Sovereign bodies: Citizens, migrants, and states in the postcolonial world.* Princeton and Oxford: Princeton University Press, 192-217.

Caselli, I., 2010. Ecuador's indigenous justice system on trial. *BBC Mobile News* [online], 27 July. Available from: http://www.bbc.co.uk/news/world-latin-america-10683003 [Accessed 19 January 2012].

Clark, A.K. and Becker, M., 2007. Indigenous peoples and state formation in modern Ecuador. *In*: A.K. Clark and M. Becker, edtrs. *Highland Indians and the state in modern Ecuador.* Pittsburgh: University of Pittsburgh Press, 1-21.

Collier, J., 1995. Problemas teórico-metodológicos en la antropología jurídica. *In*: V. Chenaut and M.T. Sierra, edtrs. *Pueblos indígenas ante el derecho.* México D.F.: CIESAS, 45-76.

Colloredo-Mansfeld, R., 2009. *Fighting like a community: Andean civil society in an era of Indian uprisings.* Chicago and London: University of Chicago Press.

Conaghan, C.M., 2008. Ecuador: Correa's plebiscitary presidency. *Journal of Democracy,* 19 (2), 46-60.

Crain, M., 1990. The social construction of national identity in highland Ecuador. *Anthropological Quarterly,* 63 (1), 43-59.

De Benoist, A., 1999. What is sovereignty? (translated by Julia Kostova). *Elements,* 96, 24-35.

El Comercio, 2010. La Constitución es clara respecto a la justicia indígena, según el ministro Jalkh. *El Comercio*, 5 May.

Eriksen, T.H., 2002 *Ethnicity and nationalism: Anthropological perspectives.* 2nd ed. London: Pluto Press.

García, F., 2005. El estado del arte del derecho indígena en Ecuador. *Revista IIDH,* 41, 151-170.

García, F., 2009. Estado del relacionamiento en Ecuador. *In*: E. Cóndor Chuquiruna, edtr. *Estado de la relación entre justicia indígena y justicia estatal en los países andinos: Estudio de casos en Colombia, Perú, Ecuador y Bolivia.* Lima: Comisión Andina de Juristas, 105-170.

García, F., 2010. Retos de la diversidad: El reconocimiento y aplicación de los sistemas de derecho indígenas Ecuatorianos. *Íconos,* 38, 9-16.

Griffiths, J., 1986.What is legal pluralism? *Journal of Legal Pluralism*, 24, 1-55.

Guerrero, A., 1989. Curagas y tenientes políticos: La ley de la costumbre y la ley del estado (Otavalo 1830-1875). *Revista Andina,* 7 (2), 321-365.

Guerrero, A., 1991. *La semántica de la dominación: El concertaje de indios.* Quito: Libri Mundi.

Hansen, T.B. and Stepputat, F., 2005. Introduction. *In*: T.B. Hansen and F. Stepputat, edtrs. *Sovereign bodies: Citizens, migrants, and states in the postcolonial world.* Princeton and Oxford: Princeton University Press, 1-36.

Hansen, T.B. and Stepputat, F., 2006. Sovereignty revisited. *Annual Review of Anthropology,* 35, 295-315.

Kaltmeier, O., 2007. La universidad terrateniente: Biopolítica, poder soberano y resistencia indígena-campesina en las haciendas de la universidad central en la provincia de Cotopaxi, 1930-1980. *Procesos Revista Ecuatoriana de Historia,* 26(II), 73-96.

Kennemore, A. and Weeks, G., 2011. Twenty-first century socialism? The elusive search for a post-neoliberal development model in Bolivia and Ecuador. *Bulletin of Latin American Research,* 30 (3), 267-281.

Korovkin, T., 2001. Reinventing the communal tradition: Civil society in rural Ecuador. *Latin American Research Review,* 36 (3), 37-67.

Kymlicka, W., 1995. *Multicultural citizenship: A liberal theory of minority rights.* Oxford: Clarendon Press.

Lucero, J. A., 2003. Locating the "Indian problem": Community, nationality, and contradiction in Ecuadorian indigenous politics. *Latin American Perspectives,* 30 (1), 23-48.

Lyons, B.J., 2001. Religion, authority, and identity: Intergenerational politics, ethnic resurgence, and respect in Chimborazo, Ecuador. *Latin American research review,* 36 (1), 7-48.

Merry, S.E., 1988. Legal pluralism. *Law & Society Review,* 22(5), 869-896.

Momood, T., 2007. *Multiculturalism.* Cambridge: Polity Press.

Moore, S.F., 1978. *Law as process: An anthropological approach.* London, Henley and Boston: Routledge & Kegan Pau.

Ouweneel, A. and Hoekstra, R., 1993. Corporatief indiaans grondgebied in vogelvlucht (Mexico, 1520-1920). *In*: A. Ouweneel, edtr. *Campesinos: Kleine boeren in Latijns-Amerika vanaf 1520.* Amsterdam: Thela Publishers, 97-137.

Pallares, A., 2002. *From peasant struggles to Indian resistance: The Ecuadorian Andes in the late twentieth century*. Norman: University of Oklahoma Press.

Platt, T., 1982. *Estado Boliviano y ayllu Andino: Tierra y tributo en el norte de Potosi.* Lima: Instituto de Estudios Peruanos.

Poveda, C., 2010. La Cocha: 2002-2010 retrocesos en un estado constitucional de derechos y justicia, social, democrático, soberano, independiente, unitario, intercultural, pluricultural y laico. *Novedades Jurídicas*, 49, 6-14.

Sánchez Botero, E., 2000. The tutela-system as a means of transforming the relations between the state and the indigenous peoples of Colombia. *In*: W. Assies, G. Van der Haar and A.J. Hoekema, edtrs. *The challenge of diversity: Indigenous peoples and reform of the state in Latin America.* Amsterdam: Thela Thesis, 223-241.

Sieder, R., 1997. *Customary law and democratic transition in Guatemala.* London: Institute of Latin American Studies.

Sieder, R., 1998. Customary law and local power in Guatemala. *In*: R. Sieder edtr. *Guatemala after the peace accords.* London: Institute of Latin American Studies, 97-115.

Sieder, R., 2011. Contested sovereignties: Indigenous law, violence and state effects in post war Guatemala. *Critique of Anthropology,* 31 (3), 161-184.

Sieder, R. and Sierra, M.T., 2010. *Indigenous women's access to justice in Latin America.* Report for Chr. Michelsen Institute (CMI), Bergen.

Simon Thomas, M., 2009. *Legal pluralism and interlegality in Ecuador: The La Cocha murder case.* Amsterdam: CEDLA.

Stavenhagen, R., 2002. Indigenous peoples and the state in Latin America. *In*: R. Sieder edtr. *Multiculturalism in Latin America: Indigenous rights, diversity and democracy.* Houndmills, Basingstoke and New York: Palgrave Macmillan, 24-44.

Stern, S., 1982. The social significance of judicial institutions in an exploitative society: Huamanga, Peru, 1570-1640. *In*: G.A. Collier, R.I. Rosaldo and J.D. Wirth, edtrs. *The Inca and Aztec states 1400 - 1800.* New York: Academic Press, 289-320.

Tamanaha, B.Z., 2008. Understanding legal pluralism. *Sydney Law Review*, 29, 1-63.

Tibán, L. and Ilaquiche, R., 2004. *Manual de administración de justicia indígena en el Ecuador.* Quito: NINA Comunicaciones.

Van Cott, D.L., 2000. *The friendly liquidation of the past: The politics of diversity in Latin America.* Pittsburgh: University of Pittsburgh Press.

Van Cott, D.L., 2003. Legal pluralism and informal community justice administration in Latin America, paper presented at the *Informal institutions and Latin American politics*, Notre Dame.

Van Cott, D.L., 2005. *From movements to parties in Latin America: The evolution of ethnic politics.* New York: Cambridge University Press.

Van Cott, D.L., 2008. *Radical democracy in the Andes.* Cambridge: Cambridge University Press.

Von Benda-Beckmann, K., 1981. Forum shopping and shopping forums: Dispute processing in a Minangkabau village in West Sumatra. *Journal of Legal Pluralism.* 19, 117-159.

Wilson, P.C., 2008. Neoliberalism, indigeneity and social engineering in Ecuador's Amazon. *Critique of Anthropology,* 28 (2), 127-144.

Yashar, D.J., 2005. *Contesting citizenship in Latin America: The rise of indigenous movements and the postliberal challenge.* Cambridge: Cambridge University Press.

Yrigoyen Fajardo, R.Z., 2000. The constitutional recognition of indigenous law in Andean countries. *In*: W. Assies, G. Van der Haar and A.J. Hoekema, edtrs. *The challenge of diversity: Indigenous peoples and reform of the state in Latin America.* Amsterdam: Thela Thesis, 83-96.

Some remarks on Marc Simon Thomas' paper, "Legal pluralism and democracy in Ecuador: A case study from the Andean highlands"[30]

MANFRED O. HINZ[*]

1. Introductory note

The empirical research done by the author over the years and his court observations are a particular attraction of the paper. In particular, the observations and their reflections provide for insights into the understanding of law and its interpretation by the various Ecuadorian actors and agents involved in the case of a homicide that happened recently.

2. The aim of the paper

Ecuador like most, if not all developing countries, in Africa, Asia and Latin America undergoes a process of change.

Taking note of the transformation in Ecuador, the author of the paper puts his main "focus on how the contemporary situation of formal legal pluralism works in daily practice through an examination of the ways in which indigenous people living in the Ecuadorian Andes resolve their internal disputes. More specifically, the purpose of the present paper is to shed light on one of the challenges the Ecuadorian legal situation faces: the question of jurisdiction, which fundamentally has to do with the extent to which indigenous authorities can legitimately adjudicate internal conflicts."[31]

3. Methodology

The author contextualises the observed court case by giving an account of the legal history, the history of legal pluralism in Latin America and in particular in Ecuador. The 2008 Constitution of Ecuador confirms legal pluralism in its Article 171, titled "indigenous justice" with the following words:

> The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee for the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments.
>
> The state shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to monitoring of their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction.

This "constitutional recognition of legal pluralism, reinforced by the ratification of the ILO Convention 169, which deals with indigenous rights, constitutes" so the author, "a break with the past."[32]

[30] The following remarks rely on my comments as discussant of the paper at the Oñati conference in June 2011, but were revised for publication in February 2012.

[*] Professor of law, Faculties of Law of the University of Namibia and the University of Bremen. The author is responsible for the Customary Law Ascertainment Project of the Human Rights and Documentation Centre in the Faculty of Law of the University of Namibia. He also assists the Government of South Sudan Sudan in its work on customary law. okavango@mweb.com.na.

[31] See p 4 of the paper.

[32] P. 3

Indeed, the ILO Convention 169 *Concerning Indigenous and Tribal Peoples in Independent Countries* of 1989 accepted in its article 8(2)(1) that indigenous peoples

> shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal systems and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

In generalising the intention of the ILO Convention, the UN Declaration on the Rights of Indigenous Peoples[33] confirms in its Article 4, what I have referred to in earlier writings, as *the right to one's own law* (Hinz 2006, p. 29ff)*:*

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions

Empirical research by the author forms the centre of the paper. The legal anthropological work of the author led to the observation of a homicide case that happened in 2010 and which is compared to a similar case that occurred in 2002.

4. The results

In his conclusion, the author holds that, despite the quoted constitutional clause on legal pluralism, the practical working of legal pluralism shows serious problems.[34] The author's first problem is what we can call an inconsistency with respect to the involvement of the state in cases, such as the two homicide cases in the author's research that, for the people involved, qualify for treatment under customary law. The author notes that, in most cases. the indigenous authorities decide who is do what: Therefore, it makes for the author more sense to define the relationship between state and indigenous communities as a relationship of subsidiarity and not of "decentralisation by the state".[35] To some extent, the author sees the reason for this in the lack of rules that regulate the relationship between the state and traditional authorities. This lack of rules is also – so the author – responsible for the uncertainty with respect to the application of human rights.

5. Comments

I wish to submit three comments for further discussions:

- The first will look at the author's plea for rules of conflict to regulate the relationship between the state and traditional authorities; (5.1)
- the second will suggest some arguments for the debate on human rights and customary law; (5.2) and
- the third will add a more theoretical note on the relationship between state and traditional authorities, principally described by the author as a relationship of *decentralisation*. (5.3)

The first two comments are amendment the paper by Marc Simon Thomas from a legal comparative view. The third comment comes from a theoretical perspective, the perspective of legal pluralism.

5.1) Experience from Africa inform us about a very broad discussion on the jurisdiction of customary courts, in particular customary courts presided over by traditionally appointed personnel.[36] It is widely held that the jurisdiction of

[33] GA Resolution 61/295 of 13 September 2007.
[34] P. 17ff.
[35] P. 18.
[36] Comparing various statutory enactments by African governments, we can distinguish between legal systems that abolish customary courts run by traditional authorities, but maintain the application of customary law by state-courts under state-appointed personnel and systems that maintain the

customary courts be limited to civil matters. However, practice shows that it is quite difficult to apply this limitation as customary courts do not follow the same jurisprudential separation of cases in civil or criminal as it is propagated by scholars of "modern" jurisprudence (Hinz 2003, pp. 175ff). What these scholars consider to be criminal, e.g. cases of theft or even cases of murder, are cases, which customary courts solve as cases between the wrongdoer and the victim, or cases between the family to whom the murderer belongs and the family that lost a member. Customary courts favour the granting of compensation to those who lost over the punishment under the authority and administration of the state, which usually claims the monopoly to punish. The Namibian Community Courts Act[37] is one of the few statutes that have accepted the approach of customary law, thus differing from general law and its seemingly clear separation between civil and criminal cases by determining the jurisdiction of customary courts without reference to the said separation.[38] Section 12 of the Act says:

> A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by the customary law, but only if
>
> (a) the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court; or
>
> (b) the person or persons to whom the matter relates are in the opinion of that community court closely connected with the customary law.

While the Act leaves it to the parties to decide to which court they want to bring their case, the quoted rule on jurisdiction (as the Act in general terms) does not assist in dealing with severe cases such as murder, which are claimed to belong to the state, but also – in view of the expected inter-family compensation – to the traditional authorities. Cases of this nature bear the risk of being tried by both sides leading to the constitutional question whether such a treatment violates the rule of *ne bis in idem*.[39]

Only in a few jurisdictions, we find rules of conflict that take note of the special interest of customary solutions, for which reconciliation between the parties concerned is of particular concern. One interesting example is the Criminal Procedure Act of Vanuatu, which say under the heading of "Promoting Reconciliation":[40]

> **118.** Notwithstanding the provisions of this Code or of any other law, the Supreme Court and the Magistrates' Court may in criminal causes promote reconciliation and encourage and facilitate the settlement in an amicable way, according to custom or otherwise, of any proceedings for an offence of a personal or private nature punishable by imprisonment for less than 7 years or by a fine only, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.

The heading of the next section is "Account to be Taken of Compensation by Custom". The section reads:

> **119.** Upon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet

application of customary law by courts under traditional authorities albeit with some influence of the state, e.g. with respect to the appointment of traditional authorities as judges. See to this and the following Hinz (2011a, pp. 83ff).

[37] Act No 10 of 2003.

[38] To this and the following see Hinz (2008, pp. 149ff).

[39] Cf Article 12 (2) of the Namibian Constitution of 1990, which says:

> No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law .... .

[40] Act of 2006 (Cap 136).

> been determined, may, if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose.

The law of one of the traditional communities in Namibia, the law of Kwangali, responded to the problem of potential double jeopardy in the case of murder by stating that[41]

> the [number of, MOH] heads of cattle [to be paid by the murderer, MOH] will be reduced proportional to the number of years served in prison.

5.2) The reference to human rights as we have it in Article 171 of the Constitution of Ecuador is similar to what we find in other constitutions, which respect the law of their traditional communities. The 1990 Constitution of Namibia says, e.g. in Sub-article 1 of Article 66:

> Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

Rules of conflict of this nature appear simple and straightforward. At least from the usually anticipated perspective of general law for which the framework of interpretation of human rights is the framework developed in the dominant streams of interpretation, i.e. the interpretation of the leading international and national courts.[42] The more recent debate about the universality of human rights, however, has prompted a change by promoting concepts, such as the *weak cultural relativism* or the *relativism with reason*.[43] Concepts of this nature do not only take note of the missing ownership by many from whom respect for human rights is expected, but also acknowledge the existence of differences in conceptualising human rights on the basis of their own socio-poliical and cultural traditions.[44]

What I want to say with this is that the debate about human rights and customary law has to recognise two sides, the side of the "modern" state, which is, within its obligations to human rights, expected to pay respect to different law-ways, and the side of the "tradition", which has, despite its obligations to the laws of the ancestors,[45] to take note of changes in the perception of life, the society and its place in the globalising world. This debate must remain a process, in other words, it can be guided by rules of conflicts as the quoted ones, but not be concluded.

5.3) One of the ground-breaking discoveries of the research on legal pluralism was that legal plurality exists irrespective of rules by the state regulating the plurality. Eugen Ehrlich (1967, pp. 43ff) found that the tribes of the Bukowina applied their *living law* although the law of the then Austrian Empire did not provide space for these laws. The research by legal anthropologists in the then colonies of Africa showed the same: The communities under colonial rule continued with their laws and their law-applying institutions despite the colonial legal order not giving legal space for this. This is important to recall when it comes today to the understanding of constitutional or other state-produced rules, which refer to legal pluralism or at least to phenomena jurisprudence would place under legal pluralism.

Looking at the quoted articles of the Ecuadorian or the Namibian Constitution, do they grant rights to legal pluralism, do they recognise legal pluralism or do they just confirm what has been in existence anyway? Hinz (2006) Indigenous communities in Africa, Asia, the Americas had indigenous jurisdiction before colonialism and before the post-colonial states emerged. Therefore, *confirming* legal

[41] Cf Section 1 of the Laws of of Kwangali (Hinz 1995, p. 47). The recently published version of the self-stated version of the Kwangali customary law (Hinz 2010) does not show this rule anymore.
[42] Or in other words: the jurisprudence, whose first point of reference is the concept of human rights emerging from the western enlightenment!
[43] Cf here Hinz (2009, pp. 3ff; 2011b, pp. 58ff). To the concepts of *weak cultural relativism* or *relativism with reason*, see Brown (2008, pp. 363ff).
[44] The just-quoted references (fn 43) explain these arguments further.
[45] Which have never been static!

pluralism in constitutional terms is not *granting* the right to legal pluralism, is not *decentralising* authority that otherwise would vest in the state: it means accepting a given as a collective human right.

That constitutional lawyers or constitution-makers will be against such an interpretation is not an argument against the position submitted here. Lawyer and law-makers who follow the view of state centralism will, indeed, opt for a Kelsenian approach for which all authority administered in a given state derives its power from the state as the origin and focal point of authority.

Putting law-applying authority into this perspective of legal pluralism is of utmost importance when it processes within the framework of legal pluralism are to be assessed. Talking of decentralisation would lead to an assessment that looks primarily at the decentralisor and the conditions set for the decentralisation. Talking about executing the right to one's own right recognises that the acceptance of the plurality of legal orders means to accept a process of balancing between the mentioned right and its implementation within the broader framework of the society.

Bibliography

Brown, M. F., 2008. Cultural relativism 2.0. *Current Anthropology*, 49.

Ehrlich, E., 1967. Das lebende Recht der Völker der Bukowina. In: E. Ehrlich. *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freirechtslehre*. Berlin: Duncker & Humblot.

Hinz, M. O., 1995, assisted by S. J.. *Developing customary law: Self-stated laws of Namibian Communities and customary law consultative meetings with traditional leasers*. Windhoek: Centre for Applied Social Sciences.

Hinz, M. O., 2003, assisted by J. Santos. *Customary law in Namibia: Development and perspective*. 8th ed. Windhoek: Centre for Applied Social Sciences.

Hinz, M. O., 2006. Legal pluralism in jurisprudential perspective. *In*: M. O. Hinz in collaboration with H. K. Patemann, edtrs. *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Berlin: Lit Verlag.

Hinz, M. O., 2008. Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice. *In*: N. Horn, A. Bösl, edtrs. *The independence of the judiciary in Namibia*. Windhoek: Macmillan Education Namibia.

Hinz, M. O., 2009. The universal in the Universal Declaration of Human Rights. Human rights in legal anthropological perspective and the need for anthropological jurisprudence. In: A. Bösl, J. Diescho, edtrs. *Human rights in Africa. Legal perspectives on their protection and promotion*. Windhoek: Macmillan Education Namibia.

Hinz, M. O., 2010, assisted by N. E. Namwoonde. *Customary Law Ascertained. Vol. 1. The customary law of the Owambo, Kavango and Caprivi communities of Namibia*. Windhoek: Namibia Scientific Society.

Hinz, M. O., 2011a. African customary law: Its place in la w and legal education. *Journal: Namibia Scientific Society*, 59.

Hinz, M. O., 2011b. Menschenrecht auf afrikanischem Prüfstand: Die Suche nach Gerechtigkeit und Frieden. In: *Jahrbuch der Juristischen Gesellschaft Bremen*. Bremen: Edition Temmen.

Oñati and Neuenkirchen im Sulinger Land
June 2011 / February 2012