The Process of Interlegality in a Situation of Formal Legal Pluralism: A Case Study from La Cocha, Ecuador[1]

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Introduction

Interlegality refers to the interpenetration between different normative orders, mostly between national law and customary law. Such a mixing or blending of normative orders requires a situation of legal pluralism. As opposed to legal monism, legal pluralism is the presence in a social field of more than one legal order (Griffiths 1986: 1). As we cannot speak of autonomous, clearly bounded, static normative orders, interlegality could be seen as a result of a situation of legal pluralism (De Sousa Santos 2002: 437).

Boaventura de Sousa Santos is considered as the founding father of the term interlegality. In his voluminous study *Toward a New Legal Common Sense* (2002), he describes interlegality thoroughly. However, despite De Sousa Santos' pioneering work, one could comment on his efforts for remaining descriptive, rather than being analytical or explanatory. At any rate, that is André Hoekema's opinion. He intended to fill this gap in his inaugural lecture *Rechtspluralisme en interlegaliteit* (2004).[2] In line with the concept of 'semi-autonomous social fields', he argues that the process of interlegality is influenced by dominant (top down) national law, as well as by local (bottom up) pressure. In his elaboration of the scientific basis of interlegality, a distinction is made between a situation of real, or factual (*de facto*) legal pluralism, and official, or formal (*de jure*) legal pluralism. In the latter case, so called 'internal conflict rules' will guide the process of interlegality, in order to provide more legal certainty.[3]

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1 This article is based on my master thesis *Brandnetels en boete: Rechtspluralisme en interlegaliteit in Ecuador* (Simon Thomas 2007). A full translation of that thesis will be published in the *Cuadernos del CEDLA* series, titled: *Legal pluralism and interlegality in Ecuador: The La Cocha murder case* (Simon Thomas forthcoming). I wish to thank Anita Böcker, Wibo van Rossum and one anonymous referee for their useful comments on an earlier version of this article.

2 Delivered on December 4, 2003, at the University of Amsterdam.

3 In his inaugural lecture, Hoekema (2004) uses the term '*internal* conflict rules'. In other publications Hoekema (2003; 2005) elaborates this phenomenon (of coordinating rules in case the boundaries of two different normative orders are unclear – see below), by using the more appropriate term 'conflict rules'. After all, what exactly does the adjective 'internal' add, when it is about a conflict between *two* normative orders. That is why I will use the term 'conflict rule'.

With regard to the process of interlegality, Hoekema states (2005: 15) that the conditions for this process change in a situation of formal legal pluralism. Two scenarios can occur: the conflict rules are being applied (I) or they are not (II). He argues that the former scenario (I) has its effects on the process of interlegality, but that in the latter scenario (II) this process remains unchanged in comparison to a situation of real legal pluralism. In this article I argue that a different scenario can occur as well. Based on a case from the indigenous community La Cocha in the Ecuadorian Andes, I will show what happens to the process of interlegality in a situation of formal legal pluralism but *without* escorting conflict rules (III). The case is about a homicide that happened in 2002. In accordance with customary law, local indigenous leaders punished three culprits with a purification ritual of stinging nettle and ice-cold water. However, in second instance, their verdict was overruled by the national judiciary and the culprits were convicted to imprisonment. This case provides a good illustration of Ecuador's contemporary legal state of affairs. Ecuador gave constitutional recognition to indigenous jurisdiction and customary law in 1998. Until today, no further legislation nor jurisprudence has been developed; that is why a conflict between national law and customary law – as the La Cocha murder case illustrates – could occur. Such a period I will call an 'interim'. It will be shown that during this interim in Ecuador – due to the active stand of local indigenous leaders in La Cocha – the process of interlegality changes indeed. Because such an interim and its effects on the process of interlegality are not considered by Hoekema, this could be seen as an adding to his argumentation.

This article is based on data I gathered during the qualitative research for my master thesis (Simon Thomas 2007). The fieldwork took place in Ecuador, from mid-June until mid-August 2007. My major strategy was that of a case-study. Besides participant observation, I used the techniques of (in)formal conversations and (semi)structured interviews, and I gathered and analyzed written texts, found in libraries, bookshops and archives as well. A dvd copy of a three-minutes commentary on the indigenous lawsuit in La Cocha, that was put at my disposal by the television channel ECUAVISA, provided useful pictures of what actually had happened in 2002.

The outline of this article is straightforward. Starting with a general overview of the theory on legal pluralism and more specifically on interlegality, it zooms in on the contextual relevant setting. The state of affairs of the Ecuadorian situation of formal legal pluralism will be illuminated, after which the case study of the homicide in La Cocha will be used as an example to analyze what happens to the process of interlegality. The last section provides a conclusion.

From Actual to Formal Legal Pluralism

Since the past decades, legal pluralism has been the main focus of legal anthropology. Earlier legal anthropologists, often working in a colonial situation, were concerned with law, norms, and regulation in 'primitive' society. Working first from a socio-cultural evolutionist perspective followed by a structural-

functionalist perspective, they studied the workings of local village societies as isolated phenomena. From the 1970s onwards, legal anthropologists increasingly came to realize that local law, like other domains of social life, could not be understood outside its wider context, and started focusing on the way socio-legal structures are shaped, mediated through human agency, in relation to each other. Building on the concept of 'semi-autonomous social fields' as developed by Sally Falk Moore (1978), legal anthropologists began to analyze the complex and ambiguous relationship between customary law on the one hand and national law and the wider society on the other.[4] Take for example Starr and Collier (1987, 1989), who stated that other normative orders (non-national law) of semi-autonomous social fields were the outcome of ongoing and often highly unequal struggles and negotiations in relation to more encompassing political structures. So, a general present-day perspective on legal pluralism allows us to speak of coexistence of two or more legal orders in the same social field, which should be understood as a 'plurality of continually evolving and interconnected processes in wider power relations' (Sieder 2002: 185 note 2: 201).

In the colonial and postcolonial era, real or factual (*de facto*) legal pluralism seems to have always been the case (Hoekema 2004: 6-7; Yrigoyen 2000: 197). In the Latin American region for instance, the Spanish Crown introduced its own, written legal system and tolerated customary law to a certain extent. This latitude was restricted after independence, but the use of customary law never totally disappeared. In these periods legal pluralism could be described as a construction in which a dominant legal system offered a limited playing field to an other normative system. This 'classic' vision of legal pluralism, therefore, is considered as an outcome of colonialism (Sieder 1997: 9-10; Sierra and Chenaut 2002: 119-121). According to a 'new' vision of legal pluralism (Merry 1988), law not only served as an instrument for dominance, but it also provided space for resistance. This means that customary law only can be analyzed by acknowledging its social and political context. The fact that customary law, despite severe hindrance, survived over centuries means nothing less than that it did enjoy, and still does, both legitimacy and effectiveness at the level where it operates. As a marker of identity, customary law survived because it shares cultural codes, common norms and values, and recognizes the need to resolve conflicts through negotiation and by reaching common ground. It stresses the reestablishment of harmony and the reintegration of offenders rather than the punitive and retributive spirit of national law (Assies 2000: 9).

This plays a role in postcolonial countries' tendency to formally recognize customary law. As soon as real or factual legal pluralism is being recognized legally, official or formal (*de jure*) legal pluralism comes into being. This for-

4 Sally Falk Moore argues that a small 'social field' is capable of 'generating rules and customs and symbols internally'. However, in doing so it is 'semi-autonomous': 'it is vulnerable to rules and decisions and other forces emanating form the larger world by which it is surrounded' (Moore 1978: 55). Add to this that the parties concerned in the 'field' hypothetically can mobilize national law, or can threaten to do so. This too has its impact on its internal capacity of making rules.

malization is usually understood as 'empowerment' of the indigenous peoples. In her article 'Recognising Indigenous Law and the Politics of State Formation in Mesoamerica', Sieder (2002: 199) states that: 'what indigenous people across Latin America claim today is not so much a return to 'traditional law', but rather the redress of historical injustices and the legitimate power to regulate their own affairs'. Hence, a claim for autonomy. Formal recognition can also be seen as a way for the elite to maintain their power and dominance. It is without doubt that any formal recognition of unwritten customary law, which is flexible in nature, will put pressure on some sort of codification (Assies 2001: 94). It is questionable to what extent the indigenous people are able to regulate that process. In line with Charles Hale's argument in his article 'Does multiculturalism menace?' (Hale 2002), a small package of customary norms and practices will be allowed by the state, but the major part will be rejected. That is why formal recognition of customary law bears the danger of enclosing it by national law. However, it is beyond doubt that customary law, whether formally recognized or not, and national law affect each other. This blending of elements of different normative orders is called 'interlegality'.

Interlegality According to Hoekema

According to Hoekema (2004: 23; 2005: 6-7), interlegality refers to the interpenetration between national law and customary law. This often seems to be a one-way penetration only, from the powerful top to the bottom, but the minorities are not just helpless victims. The blending of different views, principles, perceptions, definitions and norms might work the other way around as well; this is what he calls interlegality in reverse. Interlegality leads to a new, hybrid legal order. It is the mixing of foreign elements within the own legal system; a *bricolaje* (do-it-yourself handicraft) as María Teresa Sierra (2004: 34) calls it. This mixing occurs on two levels, it is a mixing in our actions as well as a mixing in our minds (De Sousa Santos 2002: 437). Consequently, interlegality is not just an accumulation of different elements, it rather produces something new. Interlegality can be analyzed in a situation of real legal pluralism, as well as in a situation of formal legal pluralism. As explained before, a situation of formal legal pluralism occurs when national law officially recognizes 'traditional authorities' and their rights to administer justice according to their 'own norms and procedures'. Usually this recognition is done constitutionally, and mostly in rather vague terms that leave space for a broad interpretation. That is why conflict rules – like further legislation or jurisprudence – are needed in order to provide more legal certainty. Interlegality can also be studied as a process (by analyzing *how* the interpenetration takes place) or as the result of that process (by analyzing *what* a normative order looks like at a certain time of its development).[5]

The phenomenon of interlegality, as a blending or cross-pollination of different normative orders is nothing new. On the contrary, in a context in

5 As its title suggests, this article deals with interlegality as a process.

which different normative orders exist, this is quite normal; after all, one cannot speak of autonomous legal systems. The real question is: how are the lines between two systems drawn? In case of customary law, this is done by the indigenous leaders. They mark the borders between 'us' (our legal system) and 'them' (the other legal system), by which they claim that the newly created system still, or even better, gives voice to their own values. This is an example of 'ethnic reorganization'. 'However, the indigenous leaders are not completely free in doing so. Moore's concept of 'semi-autonomous social fields' has already shown that they have to cope with internal pressure, as well as with external pressure. After all, the indigenous people involved can choose which legal system serves their interests best. This threat of 'forum shopping' forces indigenous leaders to some sort of flexibility (Hoekema 2004: 21-22).'

Formal recognition of customary law, however, does not say anything with regard to practical consequences. The question is how further legislation or jurisprudence develops (Assies 2003: 168), and how this affects the process of interlegality. The final juridical position of customary law is guided by conflict rules. And when it comes to the effects of that positioning, Hoekema (2004: 24-25) states that it is questionable how these conflict rules – if they are observed – affect the process of interlegality. 'If they are observed' needs some explanation. These conflict rules are mostly vague and thus leave space for interpretation. This could lead to a situation in which conflict rules are not applied (scenario II), and consequently, the process of interlegality remains unchanged in comparison to a situation of real legal pluralism. The opposite situation, when conflict rules are applied (scenario I), leads to one of two possible variants (Hoekema 2004: 25-26). Firstly, it could have a flywheel effect on the process of interlegality (scenario I, variant A). The blending of the two different normative orders becomes more obvious, and it can be expected that local leaders are more able to control that process than before. Secondly, formal legal pluralism in combination with conflict rules could mean a serious threat for the survival of customary law (scenario I, variant B). As an illustration to this threat, I would like to recall Assies' and Hale's earlier mentioned arguments.[6]

Within the scope of this article, two elements in Hoekema's argumentation are of major importance, namely: (1) the conflict rules, and (2) the suggestion that 'the process of interlegality remains unchanged' in case the conflict rules are not applied. To start with the first element, what precisely are conflict rules? Firstly, Hoekema (2004: 24) refers to Anthony Allot's 'internal meta rules'. Allot (1975: 154-156) described the case of an 'internal conflict', by which he meant that given the situation it was unclear which normative order was applicable. For instance, if it was not clear which rules were applicable, or which authority should be consulted. Theoretically, three types of conflicts can be defined: between customary law and national law, between customary law and human rights, and between customary law and public institutions like the

6 Both variants, the flywheel effect vis-à-vis the threat are almost perfectly illustrated by two examples provided by René Orellana Halkyer's study on the Raqaypampa and the Rinconada in Bolivia (Orellana Halkyer 2004).

police or the Public Ministry. Secondly, Hoekema (2005: 5) uses an analogy from international private rules.[7] Conflict rules provide the boundaries on the official validity of customary law. They are meant to define the scope and limits of indigenous jurisdiction, as well as the procedures to solve conflicts over that jurisdiction (Hoekema 2003: 190). However, I think it is important to emphasize that only when – or even better: as soon as – customary law is recognized officially, the possibility of a conflict between two formally recognized normative orders is created, and conflict rules become relevant.

By using an analogy from formal sources of law, conflict rules could result from jurisprudence,[8] national legislation, international treaties, or public administrative decisions. However, neither legislation, treaties, nor jurisprudence come into existence spontaneously; they have to be made. Lawmaking is the legislature's responsibility, and jurisprudence is developed by the judicature. Practice has shown that it is not only a theoretical hypothesis that political and juridical power holders could frustrate the development of conflict rules. This situation precedes the description of the possible effects conflict rules can have. Hoekema states – although without giving a concrete example – that when conflict rules are not applied (scenario II), 'the process of interlegality remains unchanged' in comparison to a situation of real legal pluralism. *Mutatis mutandis*, one could suggest that the same occurs when conflict rules have never been developed (scenario III). However, the next two sections of this article aim to demonstrate that such is not the case, at least not in Ecuador. As soon as customary law was recognized constitutionally, the effects on the process of interlegality were irreversible. Whether or not conflict rules had been developed did not seem to be of any relevance.

Legal Pluralism in Ecuador

From the colonial period on, customary law has coexisted along with national law in Ecuador. This real legal pluralism has been dealt with politically in different ways. During colonialism a segregationist model was used, which was replaced by an assimilationist model, and later by an integrationist model. In all these models, the indigenous people were subordinate to the Spanish and *mestizo* population. It was only until the end of the twentieth century, when led by the indigenous movement CONAIE,[9] that the first steps towards a situation of formal legal pluralism were made. As soon as customary law was recognized formally, the possibility of a conflict was created. In order to accompany the

7 Anthony Allot (1975: 154) did the same. In international private law, conflict rules determine which country's law is applicable to specific relations.

8 Jurisprudence, or case law, has two different meanings. Firstly, it has an abstract, general meaning: a judgement or verdict. Secondly, it has the meaning of formal rules which are established by the outcome of former cases, rather then by legislation. When used in this study, the terms refer to this second meaning.

9 CONAIE: Consejo de Coordinación de las Nacionalidades Indígenas del Ecuador – the Confederation of Indigenous Nationalities of Ecuador.

coexistence of two legal orders, and to deal with such conflicts, conflict rules had to be developed. It will be shown that neither national law, nor jurisprudence have provided such conflict rules in Ecuador so far.

At the time the Spanish Crown colonized Latin America, it introduced Spanish law straightaway. However, customary law kept on in practice. The Spanish Crown introduced special legislation that separated the indigenous people – '*indios*' as they were called – legally as well as administratively from the Spanish people. These legally separated worlds were called *Repúblicas*. In fact two classes – following the European medieval class-ridden society – were designed: *República de Españoles* (Spanish class) and the *República de Indios* (Indian class). It should be kept in mind that this was just a legal divide, not an ethnical one. Anyone who lived in this legally and administratively separated latter *República* was considered an 'indio'; it did not matter if he or she was *mestizo* or even if he or she was of Spanish descent. Within the *República de Indios*, some local cases of conflict management were left in the care of the *indios*, other cases had to be handed over to the Spanish authorities. The recognition of customary law was limited to a sphere that did not contradict the 'divine and human law' and did not affect the official religion or the colonial economic and political order either (Ouweneel and Hoekstra 1993: 112; Yrigoyen 2000: 204).[10]

This segregationist model was replaced by an assimilationist model from 1830 on, when the new independent Republic of Ecuador aimed at formally sweeping away the 'indigenous world'. Customary law became illegal because the state strongly supported legal monism. In this model the state represents 'one sole nation', meaning one people, one culture, and one normative system (Yrigoyen 2000: 206-207). However, customary law continued to be practised, so the situation of real legal pluralism kept on existing. Partly, this was the result of a weak state control, especially in remote areas, and partly this was because Indians still felt being marginalized. From that point of view, the use of customary law can be understood as a counter-hegemonic strategy, used to protect their limited and conditional autonomy (Merry 1988: 878; Sieder 1998: 105; Yrigoyen 2000: 204). From the decade of the 1920s, the integrationist model came into fashion. Because of strong demands for land and other claims, in combination with the emergence of the leftist, intellectual *indigenista* movement, politics became aware of, and became interested in, 'indigenous issues'. This all led to legal land reforms aimed at supporting communal land tenure,[11] and to some legal liberalizations, concerning 'traditional' clothing and

10 At the same time, the indigenous people could make use of the formal legislation. Spanish colonialism, which was characterised by a strong juridical formalism, assigned all inhabitants certain privileges. This formalistic view allowed indigenous people to use Spanish legislation in cases of disputes or conflicts just like anyone else, and so they did as the occasion arose (Baud 1993: 190). Even then, the possibility of 'forum shopping' existed.

11 The 1937 *Ley de Comunidades Indígenas y Montuvias* (usually abbreviated in *Ley de Comunas*) increased possibilities for (indigenous) communal land tenure. Land reforms of 1964 and 1973 enhanced this (Becker 1999; Yashar 2005: 85-151).

language. The land reforms also created a space in which indigenous communities could secure more local autonomy to sustain and strengthen customary law (Lyons 2001: 24; Yashar 2005: 95). Still, the integrationist model supported juridical monism, thus limiting the recognition of legal pluralism (Yrigoyen 2000: 208).

From a situation of real legal pluralism, the country legally transformed into a situation of formal legal pluralism mainly because of the involvement of the indigenous movement CONAIE. With the emergence of the CONAIE,[12] the indigenous struggle for equal rights really began. Despite political promises, still at the end of the 1980s practically nothing had changed. As a result, the CONAIE decided to stage serious protests. What began with hunger strikes and peaceful protest marches, culminated in June 1990 in a *Levantamiento Nacional Indígena* (Indian Uprising), with a ten days' violation of public order, the occupation of churches, and strategic roadblocks, and led in April 1992 – during the year of celebrations of 500 years 'discovery' of the continent by Columbus – to a two-week protest march of thousands of indigenous activists, both from the Amazon and from the highlands, to the country's capital Quito. In 1996 the CONAIE entered electoral politics,[13] and this resulted in May 1998 in a new Constitution, in which, among other things, customary law formally was recognized.

Almost at the same time, in April 1998, Ecuador ratified the ILO Convention 169.[14] The ILO Convention 169 is an important international declaration concerning indigenous peoples rights, because for a long time this was the only statutory document concerning the rights of indigenous peoples (with the tell-tale final 's') The convention states that rights for the indigenous peoples to land and natural resources are recognized as central for their material and cultural survival. In addition, indigenous peoples should be entitled to exercise control over, and manage their own institutions, ways of life and economic development in order to maintain and develop their identities, languages and religions, within the framework of the states in which they live. It obliges states to respect customary law as long as it does not contradict human rights. In practice, most states add to this that customary law should not contradict with national law.

Developments in Ecuador do not stand alone. Over the past two decades or so new constitutions have been proclaimed, and the ILO Convention 169 has

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12 This national indigenous movement was founded in 1986, but has its origin in significant regional federations: the ECUARUNARI (Ecuador Runacunapac Riccharimui; Confederación de los Pueblos de Nacionalidad Kichwa del Ecuador – 'awakening of the Ecuadorian Indian'; Confederation of the People of the Quichua Nationality) of the Andes, and the CONFENAIE (Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana – Confederation of Indigenous Nationalities of the Ecuadorian Amazon) of the Amazon.

13 CONAIE formed part of a national coalition, the MUPP-NP (Movimiento de Unidad Plurinacional Pachakutik Nuevo País – Pachakutik Party).

14 ILO Convention 169: the International Labour Organization's (ILO) Indigenous and Tribal Peoples Convention (No. 169 of 1989).

been ratified in a series of Latin American countries;[15] all of them acknowledging the cultural and ethnic diversity or the pluri-cultural and multi-ethnic character of Latin American states This development is undoubtedly related to a renewed vigour and increased visibility of indigenous peoples' movements. So, not only Ecuador, but most of the continent embraces step by step the situation of formal legal pluralism. However, the CONAIE has been considered as one of the most influential and strongest indigenous movements in Latin America. And, although it is doubtful whether it still is (Baud 2007), the constitutional changes it achieved are considered among the most sweeping in the region (Andolina 2003: 724). The relevant articles of this new Constitution read as follows:

> Article 1, section 1: Ecuador is a social State of law, sovereign, unitary, independent, democratic, pluri-cultural and multi-ethnic [translation Raquel Yrigoyen (2000: 220)].
>
> Article 83: The indigenous peoples, who call themselves nationalities from an ancestral race, blacks and afro-Ecuadorians, form part of the Ecuadorian state, which is unique and indivisible [translation MST].
>
> Article 84: The state recognizes and guarantees, with respect to the public order and to human rights, as an exception to this Constitution and other legislation, the following group rights: .. [translation MST].
>
> Article 191, section 4: The authorities of the indigenous peoples shall exercise the functions of justice [and, RY] 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 Raquel Yrigoyen (2000: 220)].

In pursuit of article 191, section 4, last sentence, of the Constitution, two serious initiatives have been taken to develop legislation to make customary law compatible with national law. However, neither of these attempts succeeded. In September 1998, almost directly after the new constitution became effective, the CONAIE started a project that aimed at coordinating and harmonizing differences between customary law internally, as well as between customary law and national law. This resulted in a bill called *Ley de Ejercicio de los Derechos Colectivos de los Pueblos Indígenas*, that was presented at the National Congress, which after lengthy negotiations decided to hand the final text over to the president. According to legislation-making rules, the president

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15 Constitutions have been proclaimed in: Argentina (1994), Bolivia (1994), Brazil (1988), Colombia (1991), Costa Rica (1977), Ecuador (1998), Guatemala (1985), Nicaragua (1986), Panama (1972 and 1983), Paraguay (1992), Peru (1993), Mexico (1992). Chili modified its *Ley Indígena* in 1993 (Assies 2000: 3, note 2).

Twelve Latin American countries have ratified the ILO Convention 169: Mexico (1990), Bolivia (1991), Colombia (1991), Costa Rica (1993), Paraguay (1993), Peru (1994), Guatemala (1996), Honduras (1995), Ecuador (1998) Argentine (2000), Brazil (2002) and Venezuela (2002) (Assies 2000: 3, note 3).

could either approve the bill's text completely, or he could partly or fully exercise his veto against it (García 2005: 155). Despite all the efforts taken, in less than three weeks time, Dr. Gustavo Noboa, president at that time, fully exercised his veto against CONAIE's bill. In his article 'El Estado del Arte del Derecho Indígena en Ecuador' (2005), Fernando García provides a detailed critic with respect to this veto's content. To put it shortly, the president's arguments not only were inconsistent with the constitution, they also clearly showed his ethnocentrism. Because of that veto, further development of a pluri-cultural and multi-ethnic state was frustrated considerably. After such a veto, the National Congress is only allowed to put this bill back on the legislative agenda after twelve months, with the approval of a minimal three-quarter majority. In practice, this meant the end of that bill.

A second bill, the *Ley de Compatibilización y de Distribución de Competencias en la Administración de Justicia*, developed by the Universidad Andina Simón Bolívar, was dealt with similarly.[16] After it had been presented to the National Congress, a special commission came up with a list of thirty shortcomings. As a result, this second bill was declared unlawful and consigned to the wastepaper basket.[17] Just like in the case of the veto of Noboa, this bill's treatment demonstrated the lack of legal space and political will to actively fulfil article 191, section 4, last sentence, of the Constitution (García 2005: 155-156). Or, in other words, this is an example of political power holders frustrating the development of conflict rules.

So, a tentative conclusion could be that legislation proved an unsuccessful way to design conflict rules in Ecuador's recently obtained situation of formal legal pluralism. As explained before, this has not to be a severe frustration for the process of making the two legal systems compatible. After all, conflict rules could result from jurisprudence as well. However, no jurisprudence in the sense of conflict rules has been developed yet in Ecuador. In the last decade three potentially relevant lawsuits passed sentence, but besides jurisprudence in a general way they provided no formal rules. The first relevant lawsuit to be mentioned should be the case of Arco versus FIPSE.[18] In April 1998, the Ecuadorian government permitted Arco Oriente Inc. to drill for oil in a specific part of the Amazon. Almost seventy percent of that area was inhabited by Shuar Indians, who were never consulted with regard to that permit. This led to legal action of the FIPSE against Arco, in which they lodged an appeal based on article 84 of the Constitution and on the ILO Convention 169. Initially, the Arco company refused to recognize the FIPSE as a subject of rights, but after a

16 A draft of this bill was published as well in *Justicia Indígena en el Ecuador* (Trujillo, 2001) as in *Justicia Indígena: Aportes para un debate* (Salgado, 2002). Both studies discuss and comment on the draft bill.

17 This bill has been commented upon by Willem Assies in 'Indian Justice in the Andes: Re-rooting or Re-routing?' (2003: 179-181) and by André Hoekema in 'A New Beginning of Law among Indigenous Peoples: Observations by a Legal Anthropologist' (2003: 213-216).

18 FIPSE: Federación Independiente del Pueblo Shuar del Ecuador – Independent Federation of the Ecuadorian Shuar People.

verdict on September 8, 1999, which was confirmed by the *Tribunal Constitutional* on March 16, 2000, they had to. In a special resolution,[19] the FIPSE was given permission to represent the indigenous population involved, as was in accordance with the ILO Convention 169.

A second lawsuit concerned the inhabitants of the Maca Chico community, who were accused of having stolen the image of *el Señor de Maca* (the saint Maca) from a Catholic church in the neighbouring parish Poaló. It all happened during Mardi Gras in 2004. True to tradition, indigenous community members from Maca Chico visited the church of the peasant community of Poaló, they lifted the image of the saint Maca and carried it to their own village. This had been done so for years; the image was supposed to be kept a couple of weeks, before being returned in procession to Poaló again. This time, however, things went differently. The people of Maca Chico refused to return the image of the saint Maca to the parish of Poaló. This culminated in a massive fight between the two villages, in which at least six people got seriously injured and which resulted in the death of a sixty-five year old Maca Chico inhabitant a couple of days later. Nevertheless, the image was not returned. That is why the people of Poaló went to court, accusing the Maca Chico people of theft. During trial numerous witnesses were heard and many historical sources were used. The latter evidence showed that, already since the eighteenth century, the indigenous people of Maca Chico had been asking for restoration. Finally, the judge decided that based on – among other considerations – article 84, section 4, of the Constitution, it was a fundamental right of this community to protect their cultural inheritance, and therefore he decided that the plea for theft was unfounded.

Although the Arco versus FIPSE case as well as the saint Maca case provided interesting jurisprudence, both cases had not been about a conflict between two legal systems, and therefore they did not provide any conflict rule. By contrast, a third lawsuit – the La Cocha murder case – did have the potential of providing such a conflict rule. Until now, it is the only lawsuit in which a judge legally recognized and confirmed a verdict of an indigenous authority, by using the appropriate constitutional regulations. However, as will be shown in the next section, because of interference of the Court of Justice, this precedent was not established.

The Case Study

It all started with a fight during a party that got out of hand. At the end of April 2002, in the La Cocha community, in the Zumbahua parish in Cotopaxi province, a crowd was gathered at one of the houses to celebrate a child's baptism. At half past ten in the evening, four men got into an argument. It was said that the argument was about some gossip. At first they seemed to make up, but as the evening progressed, and they began to drink heavily, their fight continued. Three of them attacked the fourth with a screwdriver, a pipe and a

19 *Resolución* 247-RA-00-IS, *Caso* 994-99-RA.

rock and kept on hitting until their victim became unconscious. Although the badly wounded man was brought to hospital immediately, he died within twenty-four hours from the effects of this beating.[20]

Obviously, the death of a fellow-citizen had its impact on the social harmony in La Cocha. That is why almost immediately the *cabildo* (village counsel) assembled to meet. Because they were convinced that this was a domestic affair, and therefore part of their jurisdiction, they decided to come into action. Their first activity was to run the three men in and to lock them up. Subsequently, the *cabildo* arranged a meeting with the other thirteen communities of the parish and decided that the three detainees should not be handed over to state authorities, but they would be adjudicated in conformity with customary law. They also decided that the widow had to be compensated for the loss of her husband. Having made those decisions, the *Asamblea General* (a meeting of several *cabildos* together) was called together, only fifteen days after the fatal fight at the party. At the La Cocha plaza, in the presence of almost five thousand Indians, the three accused were found guilty of murder. They got 'punished' in accordance with local customary law. Firstly they were given the advice never again to act like they had and they had to apologize in public. The next sanction was that they had to pay a penalty of six thousand dollars to the widow. Then they were whipped thirteen times, were purified with stinging nettle and ice-cold water, and finally they were expelled from the village for several years. According to the majority of all who were present justice had been done. Everything was put down in writing in a so-called *Acta*, and signed by all persons concerned. With that, the case was closed, and social harmony was restored (García 2005: 2-3; Tibán and Ilaquiche 2004: 60-68).

It is this particular *Acta* that provides some excellent examples of what interlegality is.[21] Firstly, the *Acta* is written – in Spanish. As Hoekema (2004: 18-24) already showed, such an *Acta* resembles a written sentencing of a formal court. When the fulfilment of this judgement is called into question, the parties involved will rather rely on what is written down than consult, for instance, the elders and their memory. Secondly, the *Acta* refers to the '*carácter penal*' (nature of a criminal act) of the conflict, which is remarkable. After all, criminal law as a subdivision of the administration of justice does not go together with the holistic character of customary law. Finally, the *Acta* makes explicit reference to the articles 1, 83, 84 and 191 of the Constitution. Furthermore, it also mentions '*los procedimientos del debido proceso*', which means the right to a fair trial or due process, by which the *Acta* implicitly refers

20 Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 18: testimony of one of the attendants at the party.

21 Source: handwritten *Acta compromiso de indemnización*, of which a copy was filed as exhibit 72-74 in the dossier of *Caso* 43-2002. A typed version of this *Acta* can be found in *Pluralismo jurídico y administración de justicia indígena en Ecuador: estudio de caso* (2004: 68-72) by Raúl Ilaquiche.

to the universal human rights. These are examples of interlegality in a situation of formal legal pluralism.

Mainly because of a nationwide broadcasted short commentary on the indigenous lawsuit in La Cocha, it became known nationally. Shame was cried over it by the broader public and the media.[22] This forced the public prosecutor of the Cotopaxi province to start a criminal prosecution. That same week, the public prosecutor started his own investigation. From the first moment on, it was perfectly clear that he would not take it lying down. So, he began to collect testimonies, he started to produce evidence, and he even decided to exhume the body to determine the exact cause of death. As soon as he was convinced that he had gathered enough evidence, he went to the criminal judge in the Cotopaxi province. This judge was impressed by the public prosecutor's preliminary work, and therefore he decided on a formal judicial inquiry. The preparatory court investigation file grew, and when, at the end of August, sufficient evidence had been produced, a meeting of the court was set on September 9, 2002. The three accused had to fear sixteen years of imprisonment. By chance, the judge involved was absent that particular day, so this case was taken over by his colleague. This second judge seemed to be much less convinced of the evidence and changed the approach. In his opinion, a constitutionally recognized indigenous authority had, with regard to their customary law, already pronounced judgement. Among other arguments, this judge based his conclusion on article 191 of the Constitution and on the ILO Convention 169. To the public prosecutor's utter amazement, the judge argued that, according to the *ne bis in idem* rule, he was not competent to adjudicate this particular criminal case. Therefore he declared the public prosecutor's investigation invalid.

A couple of days later, the public prosecutor wrote to the court that he would not accept the judge's verdict and that he would lodge an appeal at the Court of Justice of Cotopaxi. He also wrote that he considered it unacceptable that 'ancestral practices' were performed in a 'civilized' society.[23] In the meantime, the indigenous authorities of the Cotopaxi province were informed about this official protest of the public prosecutor and decided to get involved. In a letter to the Court of Justice they pleaded that the verdict should be upheld.[24] The indigenous authorities – just like the judge had done – referred to article 191, section 4, of the Constitution as well as to the ILO Convention 169, but they also referred to articles 1, 83 and 84 of the Constitution. Their letter can be seen as an elaboration of the implicit and explicit references in the *Acta* to the Constitution and the universal human rights. The handwritten *Acta* – which until then had not been published – was attached as piece of evidence to the letter. Nevertheless, their plea was of no avail, because on September 27,

22 See for instance two newspaper articles: 'La Cocha quiere aumentar el castigo en caso de muerte' (Comercio 2002a), and 'No hay confianza en la ley' (Comercio 2002b).

23 Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 64-65.

24 Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 66-71.

2002, the Court of Justice decided to follow the public prosecutor's appeal, and subsequently the Court of Justice referred the case back to the same court of first instance. By pointing out that in its view the first judge's verdict had not been based on proper procedural grounds, the Court of Justice showed that juridical power holders are capable of frustrating the development of conflict rules.

That is how the first judge received a second chance to adjudicate the La Cocha murder case. A month later, he declared the three accused guilty and he convicted them to imprisonment according to article 450 of the *Código Penal* (Criminal Code). On their part, the three accused and their lawyers, lodged an appeal at the Court of Justice against the judge's verdict. So, they all met again, but the lawyers' attempts were of no avail, because the Court of Justice confirmed its earlier decision.[25] At this court session also fifty police officers were present because '*los indios son un peligro*' ('Indians are dangerous'), as one of them explained (Tibán and Ilaquiche 2004: 67-68). At the end, the defence team decided to make no further efforts and let the case rest. However, the strong arm of the law did not succeed to imprison the three condemned men, because they never were caught and brought in, in a juridically proper way. Meanwhile, two of these men have returned to the parish of Zumbahua. They have rehabilitated themselves and nowadays they offer the widow and her children (economic) assistance, as was agreed at the indigenous lawsuit and recorded in the *Acta*.

One could conclude that the judge who declared the public prosecutor's investigation invalid on the basis of the *ne bis in idem* rule, provided unique jurisprudence from the perspective of developing conflict rules. He decided that the customary lawsuit formed part of the constitutional legal pluralism and that the preliminary investigation never should have taken place. Despite the public prosecutor's appeal, the Superior Court's decision, and the conviction of the three accused, jurisprudence was developed in an abstract, general way. Further, it could be argued that with the Superior Court's decision a conflict rule had been developed, namely: customary law is not to be applied in case of a homicide; in such a case one should apply the national law. But that is not what the Superior Court concluded. It just stated – in so many words – that local decisions must 'not contradict the Constitution and laws' (see article 191, section 4 of the Constitution).[26] If this is taking literally, the recognition of customary would only be rhetorical. And that could never have been the intention of article 191 of the Constitution, considering its section 4, last sentence. Conflict rules are meant to define the scope and limits of indigenous jurisdiction, as well as the procedures to solve conflicts over that jurisdiction. Because such a motivation lacked, I argue that no jurisprudence in the sense of conflict rules was developed. Without such conflict rules, it is not possible to

25 Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 88-90.

26 Actually, the reference to the Constitution was a minor part of the Court's complete motivation. The major part concerned references to the Code of Criminal Procedure, arguing that the first judge's verdict was a procedural mistake.

analyze which of Hoekema's scenarios applies to the Ecuadorian present-day legal situation: do these conflict rules provide more or better opportunities for the survival of customary law, or are they a threat to its survival. However, it is interesting to analyze the processes of interlegality given this specific situation of formal legal pluralism *without* accompanying conflict rules. The situation of lacking conflict rules did not prevent the indigenous leaders and their advisors to incorporate elements of national law into their own customary proceedings. Examples of the written *Acta* and the reference to the '*carácter penal*', date from the earlier time of real legal pluralism. However, the explicit and implicit reference to the Constitution and the universal human rights provide examples of incorporated elements of national law the present-day situation of formal legal pluralism.

Concluding Remarks

'This case leads me to just one conclusion: customary law conquered national law', concluded the judge who in first instance declared the public prosecutor's investigation invalid, in an interview I had with him. Because the indigenous lawsuit's aim was to restore social harmony in the La Cocha community, and since two of the three perpetrators finally have been rehabilitated, one could agree with the judge's conclusion. On the other hand, from a legal point of view, considering the contemporary state of formal legal pluralism in Ecuador, or more specifically, considering the development of conflict rules, this case rather seems a pyrrhic victory.

However, the tough process of transformation after the constitutional changes plus the La Cocha murder case, offer two interesting perspectives. Firstly, the pace of the transformation process in a fresh situation of formal legal pluralism is limited. This is common knowledge, but the pace is so slow, that neither legislation, nor jurisprudence have provided any conflict rules yet. Two initiatives on new legislation have been taken, but neither of them succeeded. Also, three potentially relevant lawsuits did not provide any conflict rules. This leads to what I will call an 'interim': a situation of formal legal pluralism, but *without* conflict rules. It is very likely that such an 'interim' will change over time, and that as soon as conflict rules *are* developed one of the two scenarios – the conflict rules are being applied (I) or they are not (II) – will occur. However, this specific period of an interim (scenario III) has not been addressed by Hoekema. Although this article only concerns Ecuador, I do think that in comparable situations a similar interim could occur. After all, the situation of formal legal pluralism is for instance created when a new constitution becomes effective. Such a constitution probably will not contain extended coordinating rules. Those accompanying conflict rules have to be developed, through legislation or through jurisprudence, but none of them come into existence spontaneously. That is why an interim is very likely to occur when a situation of formal legal pluralism comes into being.

Secondly, the La Cocha murder case shows that during such an interim, processes of interlegality continue, though differently from the preceding period. This too is a supplement to Hoekema's argumentation. In his elabor-

ation on the process of interlegality, Hoekema explains that in a situation in which conflict rules are applied (scenario I), two possible variants are conceivable. Firstly it could have a flywheel effect on the process of interlegality, or secondly, it could mean a serious threat for the survival of customary law. However, in a situation in which the conflict rules are not applied (scenario II), the process of interlegality remains unchanged in comparison to a situation of real legal pluralism. In line with these possible developments, the La Cocha murder case shows what happens to the process of interlegality during an interim. It proves that in the contemporary Ecuadorian situation of formal legal pluralism without conflict rules (scenario III), the process of interlegality is affected expressly by considerations of the Constitution and the ILO Convention 169. In other words, the process of interlegality puts pressure on national law to hurry up in developing conflict rules. And that is why this process differs from the preceding period of real legal pluralism.

These two observations lead to this article's conclusion that Hoekema's elaboration on the process of interlegality requires some adaptations. I suggest to reformulate it as follows. With the creation of a situation of formal legal pluralism, potential conflicts are created immediately. Most likely, conflict rules that should cope with these conflicts do not come into being quickly; after all, the pace of transformation is slow. In such an 'interim' the process of interlegality continues, whether or not unchanged in comparison to a situation of real legal pluralism. A change from the preceding period could be that bottom-up pressure is put on the development of conflict rules. As soon as these conflict rules exist, two scenarios could occur: conflict rules are being applied or they are not. If not, the process of interlegality remains unchanged in comparison to a situation of real legal pluralism. If they are applied, two variants are conceivable: it could have a flywheel effect on the process of interlegality, or it could mean a serious threat for the survival of customary law.

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