

The Effects of Formal Legal Pluralism on Indigenous Authorities in the Ecuadorian Highlands

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R E S U M E N

El artículo analiza las distintas formas en que el pluralismo legal formal en Ecuador es percibido y utilizado. Se enfoca en el vacío legal generado tras el reconocimiento constitucional del derecho consuetudinario en 1998 y la subsecuente ausencia de reglas de coordinación tendientes a definir la relación entre éste y el derecho nacional. A adoptarse una perspectiva de antropología legal sobre el *cabildo*, este artículo describe las variaciones en el tratamiento de distintos tipos de “conflictos internos”, dependiendo de la gravedad del caso y de las partes involucradas. Se sostiene que el reconocimiento constitucional del pluralismo legal puede funcionar a favor o en contra del empoderamiento político y legal de las autoridades indígenas locales. Mientras por un lado extendió la jurisdicción de autoridades locales, también causó tensiones políticas nacionales relacionadas con la interpretación de los artículos relevantes en la constitución y con los intentos de limitar la jurisdicción indígena. [Ecuador, derechos humanos, pueblos indígenas, derecho]

A B S T R A C T

This article analyzes the different ways that formal legal pluralism is perceived and utilized in Ecuador, where a legal void has resulted from a combination of the constitutional recognition of customary law in 1998 and the subsequent failure to develop coordinating rules that would define the relationship between customary law and national law. Adopting a legal anthropological perspective on the *cabildo* (village council), this article describes variations in the treatment of different types of “internal conflict,” depending on both the seriousness of the case and the parties involved. I argue that

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constitutional recognition of legal pluralism can work either in favor of or against the legal and political empowerment of indigenous local authorities. While it has encouraged local authorities to extend their jurisdiction, formalized legal pluralism has also led to national political tensions over the exact interpretation of relevant articles in the constitution and attempts to limit indigenous jurisdiction. [Ecuador, human rights, indigenous people, law]

IN 1998, ECUADOR ENSHRINED FORMAL legal pluralism in its Constitution, and this was reaffirmed in the succeeding Montecristi Constitution of 2008.¹ However, the proper scope to be granted indigenous authorities for the administration of customary law alongside state law has never been agreed on and remains a subject of heated debate. Rules that would define the personal, territorial, and material jurisdiction of both forms of law have never been approved. The meaning of the term “internal conflicts” (which is explicitly used in the Constitution) is particularly ambiguous.² It is within this legal void that the new boundaries of the legal autonomy of local indigenous authorities vis-à-vis the national judiciary are actively contested and negotiated. This article argues that formal recognition of legal pluralism can, in practice, work either in favor of or against the legal empowerment of indigenous authorities. We will see that because of the current situation of formal legal pluralism, *cabildos* (village councils) can now formally claim a certain degree of jurisdiction. Another important variable, which is highlighted in the present study, is that the capacity of cabildos to expand their jurisdiction is inversely related to the extent to which a given legal case becomes politically charged.

Within the context of this article, legal pluralism is defined as “the presence in a social field of more than one legal order” (Griffiths 1987:1), and the phenomenon can be described and analyzed in either situational or processual terms. In the Ecuadorian context, this means that the existence of customary law³ alongside national law is both a fact (i.e., an existing *situation*) and an ongoing process, in the context of the relationship between indigenous peoples and the state.⁴ Consequently, “legal empowerment” refers to the efforts of local indigenous authorities to extend their jurisdiction. Such efforts have resulted from the legal void created by the constitutional changes. Concomitantly, the Ecuadorian judicial and executive branches of government defend their own interests. In cases of minor offenses, since 1998 indigenous authorities appear to have more actual jurisdiction than before. In contrast, when more serious crimes are at stake, the Ecuadorian government appears to act in a way that undermines the legal pluralism that it is formally pledged to uphold. It might initially appear as if the seriousness of a given case determines whether customary law can be applied. Such a view, however, is

far too simplistic. In other words, if the seriousness of a case were the variable of overriding concern, it would have been easy to develop coordinating rules, stating which offenses or crimes described in the Penal Code indigenous authorities are allowed to adjudicate and which are beyond their jurisdiction. Given the fact that such rules have not yet been developed, as well as the political sensitivity of the issue of indigenous autonomy and the decentralization of administrative affairs, it is fair to suggest that the ongoing debate regarding the challenge of legal pluralism actually revolves around local sovereignty rather than the interpretation of the law.

The underlying assumption of this article is that the transfer of administrative affairs to indigenous authorities involves both a fragmentation and an extension of local sovereignty. Decentralization in Ecuador in the late twentieth century was carried out under the banner of neoliberalism—the latter constituting both an economic doctrine and a cultural project (Assies 2000; Wilson 2008; Zamosc 2007). The concept of “semi-autonomous social fields” (Moore 1978) enables us to draw the conclusion that the concrete form this transfer of administrative affairs to indigenous authorities takes will result from opportunities arising “from above” and pressures exerted “from below.” Initiation and imposition of decentralization by the state constitutes a top-down scenario, in which local authorities are only given the power the state wants to grant them. However, when decentralization emerges at the local or regional level, and the authorities at that level determine when a given legal matter needs to be referred to the national courts for adjudication, this is termed a bottom-up scenario. Van Cott (2008:4) argues that Ecuador employs a mixture of both approaches. That is to say, on the one hand, the World Bank invested heavily in the decentralization of administrative affairs (e.g., through the Ecuadorian judicial reform agency ProJusticia).⁵ On the other hand, it has been argued (Simon Thomas 2009:54) that, on a local and regional level, indigenous populations typically take the lead in making such determinations. It is this mixture of approaches that lies at the base of the current legal void.

The principle of subsidiarity would appear to apply here. In the present context, subsidiarity means that legal matters are typically addressed by the lowest level authorities that can claim jurisdiction (de Benoist 1999). Within such a scenario, the state only has a subsidiary function, stepping in to adjudicate disputes that cannot be resolved at the local level. In this framework, it is the lower level authority that delegates tasks and responsibilities to the state. However, as will be shown in one of the case studies presented in this article, as soon as local sovereignty becomes the subject of debate, the state (i.e., the judiciary, along with the government, both backed by national law) immediately moves to prevent an increase in indigenous authorities’ jurisdiction (Simon Thomas 2009:276). It is therefore fair to say that the boundaries between customary law and national law are “constituted by the interpretation—through conflicts and their settlements—of rules and practices”

by different actors (Lund 2008:6), but that local indigenous authorities play a central role.

For those familiar with contemporary struggles over local sovereignty in the Andean highlands, it will be clear that a *cabildo* is one of the most prominent actors involved. For this reason, the present article adopts the *cabildo*'s perspective to analyze the consequences of the constitutional recognition of legal pluralism in Ecuador. The *cabildos* date back to colonial times, when they attained substantial power in the countryside. During the long 19th century and the greater part of the 20th, the local power of *cabildos* decreased, while during the second half of the 20th century it again increased. This was in part due to several land reforms in the 1960s and 1970s that diminished the power of the "holy trinity" (as the rural power structure of hacienda owners, the Catholic Church, and the *teniente político*⁶ was popularly called) and helped indigenous authorities to regain some of their power. A space was created in which indigenous communities could secure more local authority (Cervone 2012) in order to sustain and reinforce customary law (Lyons 2001:24; Yashar 2005:95). Korovkin (2001:51–52) points to an increasing use of customary law in the case of internal conflicts by both *cabildos* and *asambleas generales* (general assemblies). This process was reinforced by the aforementioned neoliberal program that featured state-supported decentralization. Nowadays, *cabildos* are the primary indigenous authorities that are authorized to apply customary law.

In the present work, two case studies concerning internal disputes are analyzed. Both of them occurred in the parish of Zumbahua, Cotopaxi province, a parish mainly inhabited by indigenous people, with several communities governed by militant *cabildos*. The ethnographic fieldwork was mainly conducted in Zumbahua, but additional information was also gathered in Latacunga (the provincial capital) and Quito (the national capital). This fieldwork included participant observation, interviews, and archival research conducted in 2007, 2009, and 2010. The first case concerns a conflict over local power in the community of Tigua that was taken to a national court. In this particular case, the judge decided that the *cabildo* held jurisdiction. It is obvious that without constitutional recognition of indigenous authorities applying customary law, this decision could not have been taken. In other words, this case is an example of legal pluralism empowering the *cabildos*. In another case, one that concerned a homicide, an initial ruling by the *cabildo* of the community of La Cocha was overruled after a subsequent investigation by a national government prosecutor, and then brought to a provincial Court of Justice before finally ending up at the Constitutional Court. This case serves as an example of legal pluralism working against the legal empowerment of local authorities. Although both of these instances could be classified as "special cases," they represent a common general tendency (Simon Thomas 2012, 2009). Given the Correa administration's antagonism toward indigenous claims for more

autonomy in general (Martínez Novo 2014), the politically influenced outcome of the La Cocha murder case can be seen as the rule rather than the exception. Thus, in some (mostly minor) cases, local authorities succeed in extending their jurisdiction, while in other (often major) cases, they do not. And this, as will be shown, is not so much because the law dictates it should be so, but because of politically motivated court decisions.

The Juridical Role of *Cabildos*

As previously noted, the institution of the cabildo dates back to colonial times. The Spanish, in order to control the countryside, transformed existing extensive settlements into so-called *reducciones* (connected centers), under the rule of a cabildo. In line with the strategy of indirect rule, these cabildos comprised members of the ancient, hereditary indigenous elite who were referred to as *curacas*. In addition to their role in securing tax revenues, the curacas were given limited territorial jurisdiction (Korovkin 2001:44) that allowed them to adjudicate some local conflicts (while cases involving major offenses and infractions had to be handed over to the Spanish authorities). This recognition of customary law was limited to a sphere that did not violate the laws imposed by the Spanish, did not affect the official religion, and did not have a significant impact upon the colonial, economic, and political order (Yrigoyen Fajardo 2000:204).

The project of constructing a unified nation began in 1830—the year that Ecuador gained its independence. For example, as soon as the first organizational laws were promulgated, the figure of the *teniente político* was introduced. This appointed official was charged with two principal duties: one political (serving the state's interests) and the other juridical (the adjudication of minor offenses in indigenous communities). The most important, albeit hidden, agenda behind the creation of the office of *teniente político* was to break the local rural elite's power, in particular that of the *curacas* (Guerrero 1989), during the early days of the Republic. For more than a century, the power of these *tenientes políticos*, alongside that of hacienda owners and the Catholic Church, increased in the Andean highlands. This state of affairs changed slightly in favor of local rural leaders—and consequently in favor of cabildos too—in 1937, when the *Ley de Comunas* (Community Law) was enacted. This law allowed *comuna* (community) members to elect a cabildo in order to manage local affairs, and to hold property collectively. Passage of the Agrarian Reform laws in 1964 and 1973 introduced further important changes, and the number of *comunas* expanded. Nowadays, within a situation of formal legal pluralism, a cabildo is formally allowed to adjudicate in accordance with customary law. In its juridical role, a cabildo must compete with the *teniente político* and the lower courts.

This raises the following critical questions: When is a cabildo consulted, what for, and what means does it have to settle conflicts? Broadly speaking, when conflicts cannot be resolved in the private sphere, one turns to a cabildo. Basically, a cabildo deals with conflicts that concern only individual parties, such as family matters, conflicts between neighbors (e.g., disputes over land), and instances of petty theft. More serious offences or crimes are usually forwarded to the local *teniente político* or to a court, even though this is *not* yet prescribed in any coordinating rule. A cabildo applies customary law. This means that its actions are guided by the basic social values of reciprocity, solidarity, and collectivity shared among the inhabitants of a given locality. When a particular conflict has “civil law” characteristics, the cabildo seeks to resolve it by means of a consensus of members in a way that leads to reconciliation between the parties. On the other hand, when a conflict has “penal law” characteristics, most of the sentences imposed have elements of compensation or restitution. The main objective of the settlement of a dispute according to customary law is to restore harmony, thus creating a new equilibrium that embraces not only the individuals directly involved in the conflict, but also the entire community (Tibán and Ilaquiche 2004). The procedures for settling internal disputes according to customary law are flexible, and discrete stages are not always clearly discernible. In addition, as is typical of customary law, procedures can vary widely between different regions and communities.

A cabildo may impose a wide range of sentences, either separately or in combination (García 2002). For example, it can limit its sentences to admonition or advice. The cabildo can impose a fine or threaten to do so in cases of recidivism or violation of an agreement. Litigants can be ordered to pay fines to the victim or the community. The settlement can also concern an obligation to repair the damage done, to provide restitution for losses, or to compensate for damages or losses. The offender might also be ordered to work in the fields in place of the victim for a specified duration of time. Work on behalf of the community can also be imposed. One of the most severe punishments possible is temporary or permanent expulsion from the community (Brandt and Valdivia 2007:143). Finally, the convicted party must also admit his or her guilt and apologize before all those present at the time of sentencing (Simon Thomas 2009).

In the Zumbahua region, several kinds of physical punishment can also be imposed. Often, the primary objective of such measures is less to “punish” than to “spiritually cleanse” the offender. One such purification rite is known as the *ortigazo*, which involves striking the offender with branches of stinging nettles. It is believed that these plants are provided by *Pachamama* (Mother Earth), and that they extract “evil spirits” from the convicted person’s body. The lashing with the nettle branches is typically combined with a shower of ice-cold water. In combination, the lashing and shower are intended as the ultimate purification, resulting (according to indigenous authorities) in the immediate expulsion of evil

spirits. In severe cases, the offender can be whipped with a leather strip fastened to a wooden handle. These whippings are carried out by cabildo members or elders. Finally, cabildos also must decide upon the severity of particular punishments. There are a lot of contextual circumstances that are taken into account in order to determine a particular sentence, and the specific rulings vary among indigenous communities (Brandt and Valdivia 2007:124–128).

Two Case Studies: Tigua and La Cocha-Guantópolo

Having examined the juridical functioning of cabildos, I now turn to two case studies in the parish of Zumbahua, which functioned as a hacienda for centuries before becoming a civil parish in 1972 (following the Agrarian Reform laws). Historically, the inhabitants of the parish were subordinate in power to the hacienda owner under circumstances in which state authority was relatively absent. This changed in 1908, when the hacienda officially transferred to the government's Junta Central de Asistencia Pública (JCAP, Public Assistance Coordinating Body; Becker 2007). Power relations changed more dramatically in 1972 when the land was redistributed among the workers (Martínez Novo 2004; Weismantel 1988:68–69), and the state (via its laws and courts) gradually acquired a greater presence and accessibility in the region. This change in turn had an impact on the definition and resolution of internal conflicts, and—especially after the constitutional changes of 1998—on the application of customary law. Today, the parish consists of 11 comunas, including Tigua and La Cocha, each governed by its own cabildo.

The first case study occurred in 2007 in the community of Tigua, home of the famous Tigua style *art naïf* paintings (Colvin 2004), and well known for its enterprising and at times militant painters (Colloredo-Mansfeld 2009). The dispute in question arose during a meeting at the community building among two members of the prominent local Toaquiza family and seven other individuals. In legal terms, this case was initially framed by the Toaquizas and their lawyers in terms of defamation and intimidation, based on the allegation that they had been seriously insulted and threatened. Underlying these issues, however, was a much longer history involving status, power, and money within that community, relating to its history of commercializing its paintings (see also Colloredo-Mansfeld 2009 and Colvin 2004). Yet, as we will see, none of this wider context was taken into account at court. Because of the insults and the threats, the Toaquizas lodged a complaint with the judge of the Criminal Court in the provincial capital of Latacunga. They demanded that the seven people involved be prosecuted and punished to the maximum extent allowed by the Criminal Code. The judge accepted the case, and in accordance with the law, he initiated the usual proceedings.

The seven accused men wrote to the judge, emphasizing their indigenous rights, and referring to Article 191 of the 1998 Constitution, the UN Declaration

on the Rights of Indigenous Peoples (UNDRIP), and the International Labour Organization Convention No. 169 (ILO C 169). They denied everything that the Toaquizas alleged. Their letter also requested that everything that had happened be considered an “internal conflict.” The point they made in this regard was that the events had taken place among indigenous people, in an indigenous community that was part of an indigenous parish, and in the presence of an indigenous assembly. They therefore asked that the judge: (a) recuse himself; (b) consider the complaint inadmissible; and (c) declare all of the proceedings that had thus far taken place regarding the matter to be null and void. In other words, they stated that this was an internal indigenous matter that was outside the bounds of national law.

In rendering his verdict, the judge took into consideration all of the evidence that had been presented. He then indicated that he did not consider this case to be an internal indigenous affair and therefore refused to recuse himself or dismiss the case. Among other things, he argued that there had been no trial in the community and therefore that recourse on the part of the accusers to the national courts of law was appropriate. He declared that he never felt incapable of judging this case. He then acquitted four of the seven men and passed sentence on the other three: six-month prison terms plus a fine of US\$20. Soon after this verdict was issued, the seven accused men lodged an appeal. Once again referring to the relevant articles in the Constitution, UNDRIP, and ILO C 169, they argued that this event occurred among indigenous people and within an indigenous community, and that therefore it could not be adjudicated by a national judge. A few months later, a plenary session of the Court of Appeals in Latacunga issued a verdict that was brief and to the point. The three judges dismissed the appeal, upholding all of the elements of the previous ruling, including the conviction of the seven accused.

However, this was not the end of the case, which was appealed a second time by the seven men, this time to the National Court of Justice in Quito. Almost two years after the events in the Tigua community took place, this court issued a final ruling on the case—a ruling that reflected a radically different view of the situation of legal pluralism and the scope of customary law than that of the two provincial courts. In a verdict that ran to sixteen pages, the three judges of the court developed an interesting logic regarding the previous rulings in the case. They argued that when an issue occurred between indigenous people in an indigenous community, one of the first obligations of national judges was to decide whether they held jurisdiction to judge the case. The ruling declared that the insults had been uttered in an indigenous community, during the meeting of an indigenous assembly, at which indigenous people were present, and that therefore this internal conflict had to be resolved according to customary law. The ruling concluded that both of the previous courts had violated the law by claiming jurisdiction in the case. For that reason, the national court declared the whole case invalid, and ordered the two provincial courts to bear all the expenses of both the accused and the plaintiffs in

the previous criminal cases. With this verdict, which was issued some two years after the incident at the Tigua meeting hall, the case was finally closed.

The second case study is about an internal conflict that had initially been settled locally, but that was afterward subjected to the procedures of national law. The La Cocha-Guantópolo case concerned a homicide that took place in 2010 in the village of Zumbahua. After the body of a dead man was discovered, five suspects, all originating from the community of Guantópolo, were captured and handed over to the cabildo of La Cocha. The five men were brought to La Cocha (instead of Guantópolo, which has a cabildo of its own) on the grounds that they might have received preferential treatment in Guantópolo (because some of them were related to persons sitting on its cabildo). In addition, the cabildo of La Cocha was considered to be the most trustworthy local authority in such a serious legal matter because of its exemplary handling of an earlier murder case in 2002.⁷ The victim's family also wished to have the cabildo of La Cocha hear this case, since some members of that family openly expressed their preference for customary law over national law. After two weeks of investigation and interrogation, the cabildo, convening in an *asamblea general* with cabildos from neighboring communities, found the five men guilty and sentenced them following a public hearing in accordance with local customary law. The sentence imposed required the five men to make apologies and to pay a fine, and then submit to the aforementioned *ortigazo* and whipping by members of the ruling cabildos, after which they were formally expelled from the community. In the handwritten *acta* (book of minutes) that described everything that had taken place, it was emphasized that this case should be considered an internal conflict,⁸ and therefore that the cabildo of La Cocha held jurisdiction to hear the case. The *acta* established the cabildo's formal legal capacity to hear the case on the grounds of Article 171 of the Montecristi Constitution and Article 343 of the Organic Code of the Judiciary.

During the days that followed, this indigenous legal procedure became the subject of coverage in various media in Ecuador, leading to indignation on the part of many Ecuadorians, particularly among the government and jurists. Some condemned the punishment as "barbaric," while others suggested that the indigenous proceedings had disregarded the constitution. "Customary law can be applied in minor offenses, but not in crimes like homicide," declared the country's highest ranking public prosecutor in an *El Comercio* article on May 25, 2010. Because of these developments, the judge in Latacunga demanded custody of the five men involved, after which the provincial public prosecutor's office could start its criminal investigation. Soon, the five were arrested by police and taken by national law enforcement authorities to a prison in Quito. During the first weeks of the investigation, the judge wrote a letter to the Constitutional Court asking it to provide a ruling as to whether the decision made by the cabildo of La Cocha in this murder case should be upheld. A few weeks later, the Criminal Court of Justice

in Latacunga declared itself incapable of hearing the case as long as the Constitutional Court did not issue its opinion on the appropriateness of the indigenous legal proceedings that had been conducted (see also Simon Thomas 2012, 2009). These are all indications that the judiciary was having difficulties with interpreting Article 171 of the Montecristi Constitution.

The Constitutional Court, aware of the political sensitivity of this case, devoted several hearings to the issue. At one of these hearings, the attorneys for the indigenous parties (including the family of the victim and the five suspects) were heard. Although these parties in some respects were in conflict with one another, they all agreed that the use of customary law in this case was appropriate. In a variety of ways, each of the parties emphasized that the murder case concerned an internal conflict of people living in the parish of Zumbahua and that, therefore, the hearing of the case by local indigenous authorities had been appropriate. In support of this position, they cited the *ne bis in idem* principle (i.e., the “double jeopardy” rule). And in line with that argument, they claimed that the decision of the Court of Justice of Latacunga to take the five suspects into preventive custody was unlawful. They all cited relevant articles in the Montecristi Constitution, as well as international rules such as ILO C 169, UNDRIP, and national and international jurisprudence. They all demanded that the five suspects be released immediately, and that the charges against the indigenous authorities be dropped.

Despite the pleas of the attorneys, the Constitutional Court determined that it was not well enough informed to issue a ruling. Thus, in December 2010, it ordered that expert testimony be given on the use of customary law in this specific case. This testimony was supplied by the Colombian legal anthropologist Esther Sánchez Botero in January 2011.⁹ The following month, the Constitutional Court decided to review the case once again. In May 2011, the Criminal Court of Cotopaxi ruled that the five men, who had by then been imprisoned for a year, be set free. However, the investigation conducted by the criminal judge and the public prosecutor continued. It was not until July 30, 2014 that the Constitutional Court finally ruled on this case.¹⁰ This decision went against the legal empowerment of the *asamblea general* involved, as well as against the jurisdiction of indigenous authorities in general, stating that murder is always part of national law’s jurisdiction; it reversed the constitutional text by adding the condition that customary law can be applied only when “internal affairs” concern “local values.”

Analysis: The Challenges of Recognition

The two case studies, and especially their contrasting outcomes, raise some interesting questions regarding both the political–juridical context in which they took place and the application of *de facto* recognized legal pluralism. In other words,

what do these case studies teach us about the consequences of formal legal pluralism? During colonialism, a segregationist political model was employed in which the use of customary law—although not formally recognized—was to a certain extent tolerated, as long as it did not frustrate the interests of the Spanish Crown. Segregationism was replaced by an assimilationist model when Ecuador gained independence in 1830, and this in turn was replaced by an integrationist model in the early 1900s. Although these distinct political models treat customary law and its relationship with national law differently, they have in common their formal support of juridical monism, and thus a rejection of legal pluralism. The 1998 Constitution, and its successor, the Montecristi Constitution, can be considered as constituting a break with the former tradition of legal monism combined with *de facto* legal pluralism.

A detailed discussion of the radical constitutional changes introduced in Ecuador's 1998 and 2008 Constitutions would exceed the scope of the present article, but it is fair to say that, to a great extent, such changes resulted from the efforts of the national indigenous movement CONAIE (Confederación de Nacionalidades Indígenas del Ecuador) in the 1980s and 1990s. The political–juridical context of those years was characterized by a highly centralized and inefficient Ecuadorian state and a weak and politically compromised judiciary throughout the nation (Van Cott 2008). It was hoped that a decentralization policy would address some of these weaknesses. However, even today, the judiciary continues to lack independence from the executive branch. Administrative decentralization was also encouraged by international development agencies such as the World Bank, and neoliberals saw it as a strategy to reduce the role of the public sector and to enhance civil society (Wilson 2008). Others viewed decentralization as a strategy for democratization that would contribute to the empowerment of the disenfranchised (Assies 2000:10). The formal recognition of legal pluralism in Ecuador has to be seen in the light of this decentralization policy. Within that context, CONAIE emerged onto the political stage (Zamosc 2007), and recognition of *de facto* autonomy of the rural indigenous population (and therefore of their customary law) became one of its most important demands in the 1990s. The involvement of CONAIE in politics eventually resulted in the promulgation of a new Constitution in 1998. Not fully satisfied with the result, they pressed for a new Constituent Assembly, which took office in 2007, and which led to the Montecristi Constitution of 2008.

Following the formal recognition of legal pluralism, a highly charged debate began about the scope of customary law. From the start, it was unclear when, where, and which cases indigenous authorities were allowed to adjudicate. Actually, the issue of legal pluralism was put on the agenda just as the Constitution of 1998 gained the force of law. The constitution stated (while remaining vague about the scope of the recognition) that the law should develop rules that would make both

legal systems compatible. For example, those subject to indigenous law are referred to in the Constitution as “indigenous peoples,” without specifying who is—or is not—indigenous. The same could be said about the ‘authorities.’ A commonly shared opinion on this issue, however, is that cabildos definitely are such defined authorities. And then there is the troubling use of the term “internal conflicts.” Does this refer to the territorial dimension (where?), to the personal dimension (who?), or to the material dimension (what?) of the conflicts? According to the last sentence of Article 191 of the 1998 Constitution, rules that would make both legal systems compatible should be developed by secondary legislation. Although this promise was repeated in Article 171 of the Montecristi Constitution, no such coordinating rules have yet been developed (Simon Thomas 2009).¹¹ As a result, there is still no agreement on the proper scope to be granted to indigenous authorities for the administration of customary law, resulting in a situation of legal uncertainty (Simon Thomas 2012).

Comparison of the two case studies—both of which fall within the scope of criminal law—provides insight into what this legal uncertainty means in daily practice. The issues at the heart of each case (i.e., the question of whether someone had been threatened and intimidated or not, in the Tigua case, and the question of who was the murderer in the La Cocha-Guantópolo case) soon became overshadowed by how the incidents in question were labeled. Thus, in both instances, the main question revolved around whether or not the cases constituted internal conflicts and, if so, which authorities would be competent to hear those cases. In terms of legal empowerment, the current situation of formal legal pluralism, in the absence of coordinating rules, created a legal void that provided opportunities to extend the scope of customary law. In both instances, therefore, local authorities felt that there was an opportunity to extend their jurisdiction. If there had been clear rules coordinating the relative or simultaneous use of customary law versus state law, then their capacity would not have become an issue in the first place. Thus, when the question regarding the boundaries of two different legal systems becomes evident, an internal conflict can easily be transformed into a case where proper jurisdiction becomes the main point of contention. As such, this can be considered as an example of formal legal pluralism working in favor of the legal empowerment of indigenous authorities. However, speaking in terms of legal uncertainty, for the parties involved this means not only that the case will typically last longer, but also that its eventual outcome is highly unpredictable. For “ordinary” indigenous people in particular, this creates a paradox (Lund 2008) in which the recognition of legal pluralism means a recognition of their rights as indigenous peoples (for which they have been fighting for a long time), on the one hand, while said recognition increases their legal uncertainty, on the other.

The difference in the two cases resides in their outcome. In the Tigua case—in which the accused faced a maximum prison term of two months—the judges

in Latacunga did not have problems with the case *per se*. While the National Court of Justice in Quito ultimately overruled the Criminal Court, as well as the Court of Appeals in Latacunga, the question of whether the judges should or could have dealt with this case in the first place was never fundamentally questioned. So, the final ruling concluded that the events in the Tigua community should be labeled as an internal conflict and thus had to be resolved according to customary law. Obviously, this case had not been considered as politically sensitive, and ultimately the rules were interpreted in favor of the indigenous authorities' competence to hear the case. The outcome was just the opposite in the second case study.

In the La Cocha-Guantópolo case, there was clearly more at stake. To begin with, homicide is a serious offense, with offenders adjudicated by the Ecuadorian justice system facing a maximum prison term of 16 years. Second, this particular case raised hackles among many Ecuadorians across socioeconomic lines, and also quickly became a politically sensitive matter. Not only did the highest-ranking public prosecutor publicly weigh in on this case, but so did the Interior Minister, who declared in an *El Comercio* article on May 5, 2010, that in cases of homicide, customary law should not be applied. President Correa characterized the customary law administered at the La Cocha trial and sentencing in articles in *El Comercio* on May 23 and 24, 2010 and in *El Vistazo* on May 26, 2010 as “monstrous,” “barbaric,” and “a degrading spectacle” of “torture” (Caselli 2010). This position reflects a broader policy of the Correa government (2007–present), aimed at reducing the autonomy of indigenous movements and authorities, and the centralization of decision making (Martínez Novo 2014). So it should not come as a surprise that the Criminal Court in Latacunga made the best of a bad bargain when it declared itself unable to address the matter until the Constitutional Court gave its opinion on the proper use of customary law in this case. Because of the high public profile of the case, even the Constitutional Court, represented by its President, felt obliged to declare that it would “not yield to political pressure.” It took the Court so long to render a decision because of the political sensitivity of the case. With its final decision in July 2014, the Ecuadorian Constitutional Court took a serious step toward reducing the scope of indigenous authorities to administer customary law.

Conclusion

The way in which formal legal pluralism in the absence of coordinating rules manifests itself in actual practice varies on a case-by-case basis. The similarities between the Tigua case and the La Cocha-Guantópolo case are striking. With regard to the personal dimension, both cases concerned indigenous people. In terms

of the territorial dimension, both cases took place in an indigenous community, and a cabildo was turned to in order to settle the matter. So, regarding these two conditions, both cases can be labeled internal conflicts. In terms of the principle of subsidiarity, the cabildo of La Cocha resolved the murder case because it considered itself capable of doing so, and because it was willing to take responsibility for its actions. Regarding the same principle, the cabildo of Tigua delegated jurisdiction to the court in Latacunga. In both cases—at least initially—the indigenous authorities took the lead. They could not have done so if the constitution had not recognized their capacity to apply customary law in cases of internal conflicts. So, the formal recognition of legal pluralism to a certain extent worked in favor of the empowerment of these indigenous authorities.

The most important difference between the two cases concerns the material dimension of the two conflicts. The Tigua case dealt with a minor offense, while the La Cocha-Guantópolo case concerned a serious crime. This was initially the reason why, in the Tigua case, the judiciary had no difficulties with the constitutional recognition of legal pluralism and thus accepted the case, while the judiciary clearly did have such difficulties as regards the La Cocha-Guantópolo case. The underlying reason for the different outcomes, however, was not legal, but rather political in nature. Since the national Constitution is vague on the recognition of legal pluralism, and (at least according to my own field experience) courts in Ecuador mainly *apply* law (i.e., what the codes of law dictate) rather than make use of their power to *develop* case law through court rulings, the Criminal Court involved in the murder case had no other option than to delegate this case to the Constitutional Court. Coordinating rules have not yet been developed that define which offenses or crimes are allowed to be adjudicated by an indigenous authority and which are not. This is not so much because of any juridical difficulty in developing such rules, but rather because of the political sensitivity of the matters that lead to the most important clashes between national and indigenous law. In the absence of such rules, the political sensitivity of the La Cocha-Guantópolo case influenced its outcome. As soon as local sovereignty became the subject of the case, the Ecuadorian judiciary and executive branches of government moved to defend their own interests in order to prevent an expansion of indigenous authorities' jurisdiction. So in the end, the La Cocha-Guantópolo case provides an example of how the contemporary Ecuadorian situation of formal legal pluralism can work against the empowerment of a local indigenous authority in the Ecuadorian highlands.

Notes

¹The Montecristi Constitution was named for the town in Manabí province where the constitutional assembly convened.

²Article 171 of the Montecristi Constitution: “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 said procedures are not contrary to the Constitution, or to 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 mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction.” (Translation by Political Database of the Americas [PDBA] and author; emphasis added.) In its predecessor, the Constitution of 1998, it was article 191 (with almost identical text).

³Customary law is generally understood to mean a set of unwritten, flexible, local, and obligatory norms and practices of a particular community or group of people.

⁴There is an extensive literature concerning debates on the concept of legal pluralism, especially as regards the scope of the term “law” and the demarcation of legal pluralism’s proper sphere. Recently, such conceptual discussions seem to have lost some of their relevance, since the main focus of research in legal anthropology has shifted to the *interaction* between customary and national law. Treating customary law and national law as separate entities does not reflect how people experience legal pluralism in daily life. De Sousa Santos (2002:437) contends that the experienced reality of legal pluralism is that of “different legal spaces superimposed, interpenetrated, and mixed in [people’s] minds, as much as in [people’s] actions”, an experience that he labels “interlegality.” Others seem to reject the notion of legal pluralism altogether (because of its empirical shortcomings in the Latin American context) in favor of interlegality (Goodale 2009:33, 78–79). In my view, underscored in the present article, legal pluralism has different meanings at different sociogeographic levels.

⁵ProJusticia is an abbreviated name of the Unidad de Coordinación para la Reforma de la Administración de Justicia en el Ecuador (National Program for the Reform of the Administration of Justice in Ecuador).

⁶A *teniente político* is the lowest political official in the countryside.

⁷See García (2005), Tibán and Ilaquiche (2004), and Simon Thomas (2013) for extensive analyses of this La Cocha 2002 murder case.

⁸This, of course, can be questioned, and so it was by the Public Prosecutor. He argued that the murder took place in the *town* of Zumbahua (notably the least indigenous space in the parish) and not in one of the communities. According to him, the police or the *teniente político* should have been the first link in the juridical chain in this particular case.

⁹This expert testimony, titled “Peritaje en Antropología Jurídical: Presentado a la Honorable Corte Constitucional del Ecuador a Solicitud del Doctor Patricio Pazmiño Presidente,” was sent to me by Esther Sánchez Botero.

¹⁰The decision of the Constitutional Court (Sentencia No.113–14-SEP-CC, Caso No. 0731-10-EP, July 30, 2014) can be found at <http://www.corteconstitucional.gob.ec/images/stories/pdfs/Sentencias/0731-10-EP.pdf> (accessed January 27, 2015).

¹¹In 1998, two initiatives were undertaken. The Ley de Compatibilización y de Distribución de Competencias en la Administración de Justicia (Law on the Coordination and Distribution of Jurisdiction in the Administration of Justice), a bill sponsored by ProJusticia (Salgado Álvarez 2002; Trujillo 2001), was proposed in November 2002; the Ley de Ejercicio de los Derechos Colectivos de los Pueblos Indígenas (Law Enabling the Exercise of the Collective Rights of Indigenous Peoples), a bill sponsored by CONAIE, was proposed in December 2002. The first bill was declared unlawful by Congress and the second was vetoed by President Noboa (García 2005; Simon Thomas 2013).

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