INTERLEGALITY AT A *TENIENTE POLÍTICO*'S OFFICE

A Legal Anthropological Perspective

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Abstract

This socio-legal article will show that the daily practice of legal pluralism in Ecuador should not be seen as a dichotomy between two different legal systems, but rather as what de Sousa Santos calls a situation of "interlegality". As such, this article challenges the idea that customary law is solely used by indigenous people as a "counter-hegemonic strategy" to secure their autonomy against encroachment of the state, at least at a local level. Such a view does not explain the heterogeneity observed in actual legal practice in the Ecuadorian Highlands. Based on a case study at a local teniente político's *office, this article underscores that the actual practice of legal pluralism in the Ecuadorian Highlands is not one of clearly separated legal systems and corresponding authorities (i.e., national law and customary law), but rather that of "different legal spaces superimposed, interpenetrated, and mixed."*

Resumen

Este artículo socio-legal muestra que la práctica del pluralismo jurídico en la vida cotidiana no es una dicotomía entre dos sistemas legales, sino una situación de "interlegalidad" como de Sousa Santos define este término. Esto va en contra de la afirmación extendida de que el derecho indígena suele usarse como una "estrategia contrahegemónica" contra los abusos del Estado, en todo caso en el nivel local. La noción precedente no explica la heterogeneidad observada en la práctica legal actual en los Andes ecuatorianos. Basándose en estudio de caso en una oficina del teniente político local, este artículo acentúa que la práctica del pluralismo jurídico

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en los Andes ecuatorianos no separa claramente a los sistemas legales y a sus correspondientes autoridades (e.j. el derecho indígena y el derecho nacional), sino una de "diferentes espacios legales superpuestos, interpenetrados, y mixtos."

1. INTRODUCTION

Conceiving legal pluralism in terms of a dichotomy does not reflect how people experience the phenomenon in their daily lives. Too often, the study of legal pluralism falls into the trap of treating national and customary law as separate entities that merely exist in the same socio-legal space – as if no interaction takes place between them. Following de Sousa Santos,[1] this article argues that this is a far too simplistic approach, and will show that the daily practice of legal pluralism in Ecuador should not be seen as a dichotomy between two different legal systems, but rather as "interlegality". As such, this article refutes the idea that customary law is solely used by indigenous people as a "counter-hegemonic strategy" to secure their autonomy against encroachment of the state,[2] at least at a local level. Such a view does not explain the heterogeneity observed in the legal choices people actually make. Mainly based on a case study conducted at the offices of a *teniente político*, this article underscores that the actual practice of legal pluralism in the Ecuadorian Highlands is not one of clearly separated legal systems and corresponding authorities (i.e., national law and customary law), but rather that of "different legal spaces superimposed, interpenetrated, and mixed."[3]

In keeping with legal anthropological tradition, this article's main argument is based on an in-depth case study, a case I have called *Rosita v. Miguel*.[4] As an independent discipline, Legal Anthropology is holistic in nature, and it specifically focuses on rules *and* processes *within* a specific social, legal, economic and political context.[5] Its main activity is field-based ethnography. Socio-legal research, from a

1 B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (London, Butterworths LexisNexis, 2002).

2 R. Sieder, *Customary Law and Democratic Transition in Guatemala* (London, Institute of Latin America Studies, 1997), p. 10. See also on the use of customary law as a strategy of indigenous people, J. Collier, "Problemas teórico-metodológicos en la antropología juridical", in V. Chenaut and M.T. Sierra (eds.), *Pueblos Indígenas ante el Derecho* (Mexico, CIESAS, CEMCA, 1995); S.E. Merry, "Legal Pluralism", 22(5) *Law and Society Review* (1988), p. 878.

3 De Sousa Santos, *supra* n. 1, p. 437.

4 M. Simon Thomas, *The Challenge of Legal Pluralism: Local Dispute Settlement and the Indian-State Relationship in Ecuador* (PhD dissertation, 2013). The *Rosita v. Miguel* case was not labelled as such in reality; I made it up for readability purposes. The actual case I am referring to took place on 1 December 2010, and its recordings can be found at the *teniente político*'s office in Zumbahua in the handwritten file of minutes of that year. For reasons of confidentiality, "Rosita" and "Miguel" are not the real names of the man and woman involved in this case.

5 J.L. Comaroff and S. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago/London, University of Chicago Press, 1981); L. Nader and H.F. Todd Jr., *The Disputing Process: Law in Ten Societies* (New York, Colombia University Press, 1978).

legal anthropological perspective, involves a study and interpretation of the way people think about and make use of law in daily reality. While "socio-legal" aspects include formal juridical institutions and their social surroundings, they also encompass other activities related to the law, whether officially or unofficially. A legal anthropological approach thus looks not only at formal rules (i.e., national law) and informal, customary rules and practices (i.e., customary law), but specifically at the empirical encounters between these distinct normative systems.[6] In this article, the *Rosita v. Miguel* case (i.e., a case concerning marital infidelity, physical altercation and money) serves as an empirical vehicle for analysing the ambiguous juridical role of the *teniente político* (the lowest political official in rural areas), whose functioning is illustrative of interlegality.

The place where the research was conducted that constitutes the basis of this article is the parish of Zumbahua, Pujilí canton, Cotopaxi province, located in the west Andean ridge of the Ecuadorian Highlands. The article stems from my PhD research,[7] and is based on data collected during three distinct periods of legal-anthropological fieldwork in Ecuador in 2007, 2009 and 2010 by means of participant observation, interviews and archival research. I have utilized written material on legal cases I obtained access to at the courts and at the Public Prosecutor's office in Latacunga, the provincial capital and in the *libros de actas* (handwritten books of minutes) of the *teniente político* in Zumbahua and of several other communities. In order to get a picture of disputes and their settlements that are typical for the region, I examined hundreds of these files and interviewed numerous informants. As an ethnographic researcher, I have spent quite a lot of time in the *teniente político*'s office, where I personally witnessed several cases being settled. The details of the *Rosita v. Miguel* case have been collected through this kind of participant observation as well.

This article starts with a brief theoretical and legal-anthropological elaboration on the concepts of legal pluralism and interlegality, before providing a brief historical overview of how Ecuador has dealt with the situation of legal pluralism over the centuries. It then continues with a synopsis of the variety of conflicts and dispute resolution in the countryside. It is in this section that the argument against the idea of a "counter-hegemonic strategy" is made. Subsequently, the in-depth analysis of both the procedure and the final settlement of the *Rosita v. Miguel* case constitutes the basis of the main argument of this article. This section points to the use of several elements of customary law by the *teniente político* – who is actually a state official. The fact that most people present at that procedure seemed to have been oblivious to this reality is also a reflection of the blurring of two legal systems in daily practice. It is in fact this

6 J.M. Donovan, *Legal anthropology: An introduction* (Lanham, AltaMira Press, 2008); P. Just, "History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law", 26 *Law & Society Review* (1992), pp. 373–412; S.F. Moore, *Law and Anthropology: A Reader* (Malden, Oxford and Carlton, Blackwell Publishers, 2005); P. Sack and J. Aleck, *Law and Anthropology* (Aldershot, Dartmouth, 1992).

7 Simon Thomas, *supra* n. 4.

blurring of the lines between the two systems – a blurring reflected in both the actions and perceptions of common folk which suggests the usefulness of the concept of interlegality, as opposed to that of a dichotomous notion of legal pluralism, at least within the context of the Ecuadorian Highlands.

2. THEORETICAL FRAMEWORK

2.1. LEGAL PLURALISM

Legal pluralism, in this article, is defined as "the presence in a social field of more than one legal order".[8] An important quality of legal pluralism is that it enables "different legal mechanisms [to be] applicable to an identical situation."[9] Legal pluralism therefore requires the interaction, rather than the mere coexistence, of two or more different normative systems.[10] While holding a decentralist view of law, legal pluralists challenge the claim that national law is exclusive in nature, and this allows them to recognize the phenomenon of legal pluralism as legitimate, and to study interaction.

Legal pluralism can be described and analysed in both situational and process terms. In the Ecuadorian context, this means that the existence of customary law alongside national law is both a fact and an on-going process that has to be seen in the context of the relationship between indigenous people and the state. In accordance with Moore's "semi-autonomous social fields",[11] legal pluralism involves the dialectical and mutually constitutive relationship between customary law and national law,[12] considering that this relationship is not power-neutral. The use of customary law *alongside* national law is frequently portrayed as a vehicle of resistance – i.e., a strategy of indigenous people to use their "traditional" norms and practices to protect their autonomy against encroachment of the state.[13] In the words of Sieder: "legal pluralism is [...] understood as a relation of dominance and of resistance."[14] It is far from evident, however, if this is the case *wherever* legal pluralism is present. One of the arguments of this article is that this dichotomous conceptualization of legal pluralism as two distinct legal systems must be empirically verified rather than assumed *a priori*.

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8 J. Griffiths, "What is Legal Pluralism?", 24 *Journal of Legal Pluralism* (1986), p 1.

9 J. Vanderlinden, "Le pluralisme juridique: essay de synthèse", in J. Gillissen (ed.), *Le pluralisme Juridique* (Bruxelles: Editions de l'Université de Bruxelles, 1971), p. 20.

10 B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford, Clarendon Press, 1975).

11 S.F. Moore, *Law as Process: an Anthropological Approach* (London [etc.]: Routledge & Kegan Paul, 1978).

12 S.E. Merry, "Legal pluralism", 22 *Law & Society Review* (1988), p. 880.

13 I have placed the word "tradition" in quotation marks because the indigenous norms and practices, or customary law, are not traditional in the sense of being static.

14 R. Sieder, *Customary Law and Democratic Transition in Guatemala* (London, Institute of Latin American Studies, 1997), p. 10.

Customary 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. The limited sphere of such norms and practices make them different from national laws, which govern all inhabitants of a country. Customary law has the following characteristics:[15] 1) contrary to Western positive law, it is neither an autonomous sphere of action nor a speciality of some more broadly applied law. Instead, it regulates a wide range of spheres of social life: marriage, parenthood, inheritance, collective land tenure and conflict settlement, while also providing principles and mechanisms for social regulation and public order; 2) it has a major oral component; 3) it is strongly focused on reconciliation, and tends to place greater emphasis on compensation and restitution (monetary or otherwise) to the victim than on meting out punishment to offenders; 4) depending on the circumstances, customary law can be applied by a wide range of authorities, including family members, village elders, *cabildos* (village counsel) and tribunals; 5) it is flexible, evolving through daily practice; and finally, 6) customary law is neither uniform nor fixed. Norms and practices can even vary between neighbouring communities.

2.2. INTERLEGALITY

We have thus far seen that researchers have for the most part viewed legal pluralism as involving the coexistence of two different legal systems. Although the interaction between the two systems (with all its dynamics of a context containing unequal power relations, etc.) is generally recognized, the meaning of legal pluralism is rather fixed. By this I mean that, according to most of the literature, the interaction does not fundamentally influence the content of both systems. The coexistence of two different legal systems is depicted as a jurisprudential process, leaving little room for a description of what legal pluralism *does* in practice.[16] Thus, the question becomes how to theorize and analyse legal pluralism as it is understood in daily reality.

It is this daily reality that led de Sousa Santos to ask questions that refer to "the impact of legal plurality on the legal experiences, perceptions and consciousness of the individuals [...] living under conditions of legal plurality."[17] His answer can be found in the understanding of what he calls "interlegality", which essentially refers to a situation where there is a perception of two different legal systems mixed to such an extent that they have resulted in the creation of a new system. To paraphrase

15 This open-ended and non-cumulative enumeration is based on an extensive ethnographic literature on customary law in Latin America. See Simon Thomas, *supra* n. 4, p. 27, note 39, for an overview of that literature.

16 M. Goodale, *Dilemmas of Modernity: Bolivian Encounters with Law and Liberalism* (Stanford, Stanford University Press, 2009), p. 32; B. Oomen, *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (Oxford, James Currey, 2005), p. 25.

17 De Sousa Santos, *supra* n. 1, p. 97.

Hoekema,[18] interlegality is not just an accumulation of distinct elements, but instead constitutes a *new* hybrid legal order. According to de Sousa Santos, the experienced reality of legal pluralism is that of "different legal spaces superimposed, interpenetrated, and mixed in [people's] minds, as much as in [their] actions."[19] Interlegality is thus the "intersubjective, or phenomenological dimension of legal pluralism."[20]

De Sousa Santos is credited with creating the term,[21] since he first introduced it in 1987.[22] However, several distinguished legal anthropologists have taken up his conceptualization of how different forms of legality exist simultaneously and in interrelated forms. Sierra,[23] for example, agrees that customary law and national law should not be viewed as two separate and mutually exclusive legal systems, arguing instead that legal pluralism should be seen as heterogeneous and mutually constitutive. Referring to de Sousa Santos' notion of interlegality, Sierra shows that what people do in daily practice could be described as a *bricolage* (i.e., a do-it-yourself handicraft). Goldstein uses the term "legal *bricolage*",[24] depending on the context, the power relationships at stake and degree of access to authorities, indigenous people have recourse to different legal systems, and this leads to a mixing of norms and procedures in daily practice.[25] Additionally, Hoekema and his students[26] characterize interlegality as a process (i.e., the above-described "mixing" itself) and emphasize the mixed outcomes in which it results. Interlegality, according to Hoekema,[27] provides a new legal order, in that it constitutes an intermingling of

18 A.J. Hoekema, *Rechtspluralisme en interlegaliteit* (Amsterdam, Vossiuspers UvA, 2004), p. 23.

19 De Sousa Santos, *supra* n. 1, p. 437.

20 Ibid., p. 97.

21 Hoekema, *supra* n. 18, p. 23; M.A. Simon Thomas, *Legal Pluralism and Interlegality in Ecuador: The La Cocha Murder Case* (Amsterdam, Cuadernos del CEDLA, 2009), p. 5.

22 B. de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law", 14 *Journal of Law and Society* (1987).

23 M.T. Sierra, "Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla", 29 *Law & Society Review* (1995); M.T. Sierra "Introducción: Hacia una interpretación comprensiva de la relación entre justicia, derecho y género: los procesos interlegales en regiones indígenas", in M.T. Sierra (ed.), *Haciendo Justicia: Interlegalidad, derecho y género en regions indígenas* (Mexico, Centro de Investigación y Estudios Superiores en Antropología Social, CIESAS, 2004).

24 D.M. Goldstein, *Outlawed: Between Security and Rights in a Bolivian City* (Durham, Duke University Press, 2012), p. 30.

25 Sierra, *supra* n. 23 (2004), p. 43–44.

26 J.I. Herrera, *Unveiling the Face of Diversity: Interlegality and Legal Pluralismin the Mayan area of the Yucatan Peninsula* (Amsterdam: PhD dissertation, 2011); Hoekema, *supra* n. 18; A.J. Hoekema, "A New Beginning of Law Among Indigenous Peoples: Observations by a Legal Anthropologist", in F.J.M. Feldbrugge (ed.), *The Law's Beginnings* (Leiden/Boston: Martinus Nijhoff Publishers, 2003); A.J. Hoekema, "European Legal Encounters: Cases of Interlegality", 51 *Journal of Legal Pluralism* (2005); R. Orellana Halkyer, *Interlegalidad y Campos Jurídicos: Discurso y derecho en la configuración de órdenes semiautónomos en comunidades quechuas de Bolivia* (Cochabamba – Bolivia, Huella Editores, 2004).

27 Hoekema, *supra* n. 18, p. 18–24.

concrete norms, as well as an adoption of values which accompany these norms and endows them with meaning.

Others, like Goldstein,[28] Goodale,[29] and Cervone,[30] even seem to reject the notion of legal pluralism (because of its empirical shortcomings in the Latin American context) in favour of interlegality. I agree with them, insofar as the empirical reality at the local level is highly complex and nuanced. This being the case, the notion of interlegality proves to be very helpful in describing and interpreting legal pluralism's daily complexity. And that is what I believe de Sousa Santos meant in the first place when he characterized interlegality as the *phenomenological* dimension of legal pluralism.

3. THE ECUADORIAN CONTEXT: FROM REAL TO FORMAL LEGAL PLURALISM

A situation of *de facto*, or real, legal pluralism has existed in the Ecuadorian Highlands since colonial times. When the Spanish colonized the territory now known as Ecuador, they enacted special legislation that introduced the concept of two separate *Repúblicas*. In accordance with this concept, the Spanish introduced special legislation that legally and administratively divided the people who lived in the countryside – whom they called "*indios*" – from those who lived in cities and towns. In line with the strategy of indirect rule *cabildos*, the councils that governed the communities in the countryside, were composed of *curacas*, members of the ancient, hereditary indigenous elite. In addition to their role in securing tax revenues, these *curacas* were provided a limited territorial jurisdiction,[31] in which they were allowed to adjudicate certain local conflicts (while cases involving major offenses and infractions had to be handed over to the Spanish authorities). This informal 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 an important impact upon the colonial, economic and political order.[32] It was in this way that a situation of real legal pluralism came into being.

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28 Goldstein, *supra* n. 24, p. 33.

29 Goodale, *supra* n. 16, p. 33, 78–79.

30 E. Cervone, *Long Live Atahualpa: Indigenous Politics, Justice, and Democracy in the Northern Andes* (Durham: Duke University Press, 2012).

31 T. Korovkin, "Reinventing the Communal Tradition: Civil Society in Rural Ecuador", 36 *Latin American Research Review* (2001), p. 44.

32 A. Ouweneel and R. Hoekstra, "Corporatief Indiaans grondgebied in vogelvlucht (Mexico, 1520–1920)", in A. Ouweneel (ed.), *Campesinos: kleine boeren in Latijns-Amerika vanaf 1520* (Amsterdam, Thela Publishers, 1993), p. 112; R.Z. Yrigoyen Fajardo, "The Constitutional Recognition of Indigenous Law in Andean Countries", in W. Assies, G. Van der Haar and A.J. Hoekema (eds.), *The Challenge of Diversity: Indigenous Peoples and Reform of the State in Latin America* (Amsterdam, Thela Thesis, 2000), p. 204.

Within this context, indigenous people in the *República de Indios* (i.e., those who lived in the countryside) developed strategies to make use of the situation of *de facto* legal pluralism. Sometimes they resorted to their local customary law (if necessary, inventing or reinventing it) and sometimes they instead resorted to colonial law. Spanish colonialism, which was characterized by a strong juridical formalism, accorded certain rights to all inhabitants. Among other things, this meant that rural indigenous people could resort to Spanish law in cases of disputes, just like anyone else. And so they did, as the occasion arose.[33] As shown by Platt,[34] in what is now called Bolivia, indigenous leaders turned to the Spanish Crown with legal property titles by which they tried to defend their lands from dispossession. But the *indios* not only used their juridical rights to combat colonial exploitation. When they could, they also used such rights to settle internal disputes.[35] As Cervone rightly remarks,[36] there have been signs of interlegality (i.e., indigenous actors incorporating the discourse of "law") since the early days of colonialism.

The colonial model of segregation was replaced by an assimilationist model beginning in the 1830s, when Ecuador became an independent republic and sought to put an end to any kind of separately defined "indigenous" world. The colonial division into two *Repúblicas* was abolished, and a process of building a single unified nation (meaning one people, one culture and one normative system) began.[37] when Ecuador enacted its first organizational laws in 1830, it introduced the office of the *teniente político*, whose most important, albeit hidden, agenda was to break the existing local rural elite's power, in particular that of the *curacas*.[38] Besides their political responsibilities, *tenientes políticos* were assigned a juridical role of adjudicating minor offenses in indigenous communities. In some places, this turned out to be an effective strategy. However, in other places, hierarchies that were characteristic of the colonial period remained intact, and local elites held their power in many rural regions.[39] From a juridical perspective, this meant that legal pluralism came under pressure, but did not fade away. Thus, although one of the *de jure* results of the new office of the *teniente*

33 M. Baud, "Indiaans overleven in de Andes: 1530 – 1930", in A. Ouweneel (ed.), *Campesinos: kleine boeren in Latijns-Amerika (vanaf 1520)* (Amsterdam, Thela Publishers, 1993), p. 190.

34 T. Platt, *Estado boliviano y ayllu andino: Tierra y tributo en el norte de Potosi* (Lima, Instituto de Estudios Peruanos, 1982).

35 S.J. Stern, *Peru's Indian Peoples and the Challenge of Spanish Conquest: Huamanga to 1640* (Madison London, University of Wisconsin Press, 1982), p. 132.

36 Cervone, *supra* n. 30, p. 167.

37 W. Assies, G. Van der Haar and A.J. Hoekema, "Diversity as a Challenge: A Note on the Dilemmas of diversity", in W. Assies, G. Van der Haar and A.J. Hoekema (eds.), *The Challenge of Diversity: Indigenous Peoples and Reform of the State in Latin America* (Amsterdam, Thela Thesis, 2000), p. 305; Yrigoyen, *supra* n. 32, p. 206–207.

38 A. Guerrero, "Curagas y tenientes políticos: La ley de la costumbre y la ley del estado (Otavalo 1830–1875)", 7 *Revista Andina* (1989).

39 M. Crain, "The Social Construction of National Identity in Highland Ecuador", 63 *Anthropological Quarterly* (1990).

político was that customary law became illegal, many rural indigenous communities continued to practice customary law on a daily basis. Additionally, although *tenientes políticos* had to enforce national legal regulations, in practice they did not always follow the letter of the law.[40] For this reason, a situation of *de facto* legal pluralism prevailed.

A certain political indifference towards rural indigenous people that was typical of the assimilationist political model during the "long nineteenth century" seemed to change with Eloy Alfaro's Liberal Revolution in 1895. From then on, an integrationist political model gained ascendance, and some liberal, legal reforms with respect to the (labour) rights of rural indigenous people were introduced.[41] Of landmark importance in this respect was the 1937 Ley de Comunas,[42] and the corresponding Judicial Statute of Rural Communities,[43] which invited rural communities of more than fifty people to form small political-administrative units called "*comunas*", each with their own *cabildo*, thus providing the people of the countryside some formal autonomy. For example, from then on *cabildos* were legally allowed to manage local affairs, and to hold property collectively. The use of customary law, however, was still illegal, and the *teniente político* remained the lowest official in the formal juridical chain. This also did not change with the land reforms of 1964 and 1973.[44] So, despite slightly increasing political, civil and social rights for rural indigenous people, the twentieth century's integrationist model supported judicial monism, thus limiting any official regulation of legal pluralism. This did not change the fact that, in daily practice, customary law continued to be used in the countryside, both by indigenous authorities like *cabildos* and by state appointed *tenientes políticos*.

This formal Ecuadorian stance towards legal pluralism changed when the 1998 Constitution[45] recognised indigenous authorities and their right to apply their customary law in cases of internal conflicts. It is beyond the scope of this article to provide an in-depth explanation for this radical change, but it can be said that it was due in large part to the emergence of the national indigenous movement CONAIE.[46] Their demands for a recognition of the *de facto* autonomy of the rural indigenous population (and of their customary law) led the Ecuadorian State to constitutionally recognize legal pluralism. This constitutional recognition of customary law constituted

40 Simon Thomas, *supra* n. 4, p. 172.

41 Regulation of the Debt System (*Reglamentación del Concertaje*) (Ecuador), 12 April 1988; Reform of the Day Labourer Law (*Reforma de le Ley de Jornaleros*) (Ecuador), 1918.

42 Law on the Organization and Government of Communities (*La Ley de Organización y de Régimen de Comunas*) (Ecuador), 6 August 1937, Decreto No. 142.

43 Judicial Statute of Rural Communities (*Estatuto Jurídico de las Comunidades Campesinas*) (Ecuador), 7 December 1937, Decreto Supremo No. 23.

44 Land Reform Law (*Ley de Reforma Agraria y Colonización*) (Ecuador), 11 July 1964, Decreto No. 1480; Land Reform Law (*Ley de Reforma Agraria*) (Ecuador), 9 October 1973, Decreto No. 1172.

45 Constitution (Ecuador), 5 June 1998, R.O. 1.

46 Confederation of Indigenous Nationalities of Ecuador (*Confederación de Coordinación de las Nacionalidades Indígenas del Ecuador*, CONAIE).

a fundamental modification of the former paradigm of legal monism combined with real legal pluralism.

Article 83 of the 1998 Constitution introduced the indigenous population as (self-defined) "nationalities", and Article 84(7) promised a preservation and further development of some sort of indigenous autonomy, as part of a broader recognition and guarantee of several group rights. Additionally, Article 191(4) specifically concerns the use of customary law. Despite the fact that this Ecuadorian constitution was passed a number of years after similar reforms were enacted in neighbouring countries, many consider it more progressive.[47] However, it is also broadly formulated. For example, 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? Article 191(4) states in its last sentence that the law shall make these practices compatible with the national judicial system.[48] However, contrary to this regulation, neither permissive law nor coordinating rules were developed in the years following 1998.

The Constitution of 1998 was replaced ten years after it was promulgated. The Constitution of 2008[49] reaffirmed the rights that the indigenous population had been accorded previously. In Article 57 of the 2008 Constitution, indigenous communities are guaranteed several collective rights, such as the right "to keep and develop their own forms of peaceful coexistence and social organization, and to create and exercise authority in their legally recognized territories and ancestrally owned community lands" (Article 57(9)), and "to create, develop, apply and practice their own legal system or common law [...]" (Article 57(10)). Additionally, Article 167, which is about the power to administer justice by "other bodies [...] provided for by the Constitution", constitutes the basis for Article 171, which is specifically about the recognition of legal pluralism. In line with this article, two new laws that address customary law and legal pluralism were enacted in October 2009: the Organic Code on the Judiciary,[50] and the Law on Jurisdictional Guarantees and Constitutional Control.[51] Echoing the 1998 document, the 2008 Constitution calls in Article 171 for the development of mechanisms (e.g., additional law or jurisprudence) to be developed in order to allow for the co-existence of customary law and national law. However, no such harmonization has yet occurred – either through new law or new jurisprudence.

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47 R. Andolina, "The Sovereign and its Shadow: Constituent Assembly and Indigenous Movement in Ecuador", 35 *Journal of Latin American Studies* (2003), p. 724.

48 Constitution, *supra* n. 45, Art. 191(4), last sentence reads: "The law shall make such functions compatible with the national system." ("*La ley hará compatibles aquellas funciones con las del sistema judicial nacional.*").

49 Constitution (Ecuador), 20 October 2008, R.O. 449.

50 Organic Code on the Judiciary (*Código Orgánico de la Función Judicial*) (Ecuador), 9 March 2009, R.O. 544, Art. 2 is about the structure of the judiciary, and the powers and functions of its jurisdictional, administrative, auxiliary and autonomous bodies.

51 Law on Jurisdictional Guarantees and Constitutional Control (*Ley Organica de Garantías Jurisdiccionales y Control Constitucional*) (Ecuador), 21 September 2009, R.O. No. 52.

In sum, what the 1998 Constitution accorded was a *de jure* recognition to a centuries' old practice – a recognition that was subsequently reinforced by the 2008 Constitution. However, because this formal recognition of legal pluralism has not resulted in additional rules, the juridical applicability of the Constitutional changes is limited. Therefore, the daily practice of legal pluralism at a local level, as will be shown in the following sections, hardly seems to have been affected. This specifically proves to be the case with regard to the practices of *tenientes políticos*.

4. DISPUTE SETTLEMENT IN THE PARISH OF ZUMBAHUA

Now let us turn to the parish of Zumbahua, the locality where the research forming the basis of this article was conducted. Zumbahua functioned as a hacienda for centuries before becoming a civil parish in 1972. This meant that, historically, the inhabitants were subordinate in power to the *hacendado* (hacienda owner) under circumstances in which state authority was relatively absent. These circumstances had consequences for the ways the inhabitants perceived and navigated the "network of legality"[52] available to them. When an internal conflict had to be settled, they could turn to the *hacendado*, they could rely on their own leaders, and in exceptional cases they could even turn to national courts (taking in consideration that the latter were not within easy reach in terms of time and distance). However, power relations changed when the hacienda was abolished. The political landscape changed in favour of diversity and pluralism and the State (i.e., national law and its 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. Because social life in the parish can be depicted as a fragile balance between cohesion and conflict,[53] this section aims to provide a synopsis of the variety of conflicts and dispute resolution on the ground.

4.1. CONFLICTS

Most Zumbahuan "conflicts" or "problems" (both terms are used in local discussions of legal disputes) are just as common and varied as almost anywhere else. Even murders occasionally occur. Nevertheless, the bulk of the disputes is directly or indirectly related to the characteristics of life in an indigenous community and its contextual challenges: scarcity of land, poverty, excessive drinking, migration, etc. But whatever their cause, all disputes can be traced back to a violation of the standards of conduct or values within the parish. These values concern reciprocity, solidarity

52 Goodale, *supra* n. 16, p. 33.

53 Simon Thomas, *supra* n. 4.

and communal cohesiveness, and as such are also the guiding principles of local customary law.

When asked about possible conflicts, most of my informants refer to issues within their families. Some persons refer to "physical violence" or "aggression against women", but "conflicts within the family" is the expression that is most commonly heard. Many such crimes are never reported, and thus they sometimes do not appear in *actas* or other legal records. Nevertheless, they do occur frequently. "Family affairs", however, are not only about aggression against women. The term encompasses a far greater range of behaviour, including separation of couples, divorce and adultery (e.g., the *Rosita v. Miguel* case), the disobedience of children and theft among relatives. A typical kind of family conflict concerns broken marriage commitments and sexual aggression. The most common forms of sexual violence involve cases of rape, as well as cases of a young woman becoming pregnant by a boyfriend and the resulting paternity disputes. Most of these cases are handled within the community. Although parents, family elders or even *dirigentes* (local leaders) usually succeed in settling the dispute by negotiation or mediation,[54] some cases reach the formal legal system, and thus have to be settled at the Civil Court in Pujilí, the capital of the canton. In a formal lawsuit, these cases usually end up in a dispute over alimony.[55]

Problems concerning property, possession or ownership are the second most common source of disputes. Almost all of my informants in the parish of Zumbahua related stories of robberies that they knew of. Violation of the norms related to property concern theft of inanimate possessions or animals; disputes over land, borders or the settlement of individual or collective debts, or vandalism.[56] It seems obvious that there can be other sources of property disputes. For example, when people mention "robberies", they can be referring to petty theft, burglary or robbery. A "robbery" (*robo* in Spanish) can thus refer to the theft of a gas-tank,[57] or to a hold-up or pickpocketing of tourists.[58] And disputes over land might refer to a disagreement over property boundaries, but could also refer to a dispute over a right of way or over livestock destroying crops. In fact, any number of issues can result in a property dispute. One could say that the norms mentioned in the previous paragraph concern so-called "family norms" and that, with the introduction of problems concerning property, "community norms" are being dealt with.

Although not as frequently mentioned as family conflicts or robberies, violent crime is by no means absent in the parish of Zumbahua. There are numerous instances of fights and of physical or verbal attacks registered in the *Archivos de las denuncias*

54 Interview with a former *dirigente* on 28 October 2010.

55 See, for example, Juzgado de lo Civil (Pujíli), Judgment, 2009, Caso 2009-371 and Caso 2009-10/2009-377.

56 F. García, *Formas indígenas de administrar justicia* (Quito, FLACSO, 2002), p. 30.

57 *Teniente Político* (Zumbahua), Judgment, 2010, *Archivo de las denuncias en general*, 16 October.

58 Interview with police officer in Zumbahua, 28 October 2010.

en general of the *teniente político*.[59] Violent crime is also commonly reported to the *Fiscal Indígena*'s office (Public Prosecutor of Indigenous Affairs) in the provincial capital Latacunga. Most of my informants related violent crime to excessive drinking, especially at parties. Another common class of complaints involved merely the threat of violence.[60] Most cases of violent crime concern fistfights in which no weapons are used. In those instances in which weapons are used, they are usually what people come across during the fight: a rock, a screwdriver or a piece of wood. In a fight I witnessed during a wedding-party at the central Plaza in Zumbahua,[61] broken bottles were used. Such weapons often result in injuries requiring medical treatment and the resulting doctors' bills become the subject of litigation. If the parties to the dispute cannot resolve the disagreement by themselves, a *cabildo* or the *teniente político* has to decide who is responsible for paying the bills.[62] And if a dispute arises regarding the validity of injuries or doctor's bills, one can go to a *Fiscal Indígena* to obtain officially stamped medical certificates.[63]

The last group of norms that can be violated concern a wide range of mostly communal or public rights and obligations. A lot of these social norms directly touch upon the basic local social values of reciprocity, solidarity and communal cohesiveness. According to these values, one should accept one's responsibilities, refrain from fighting, not cause trouble, not destroy the natural environment, and not vandalize communal property. It is here that the contrast with national law is most obvious. For example, local norms hold that one should not gossip, slander or engage in witchcraft.[64] A lot of these norms consist of unwritten *costumbres* (customs), which are informal rules aimed at enforcing customary law. Written rules, on the other hand, consist of regulations enforced or fines imposed by local authorities. For example, the *Junta Parroquial* of Zumbahua has a written set of rules regarding the weekly Saturday market posted on the door of its office, next to a set of rules regulating the registration of teams for a local sporting event. The *cabildo* of Guantópolo has an extended list of obligations and agreements on various issues, from collective harvesting to participation in indigenous protest marches. Such rules are an example of what was referred to in Section 2.1. as the composite social, political and legal nature of customary law.

Finally, it is important to note that many incidents involve more than one of the previously mentioned elements. An illustrative example of coincidence of conflicts is

59 See, for example, *Teniente Político* (Zumbahua), Judgment, 2010, *Archivo de las denuncias en general*, 10 October; *Teniente Político* (Zumbahua), Judgment, 2010, *Archivo de las denuncias en general*, 6 November.

60 See, for example, *Teniente Político* (Zumbahua), Judgment, 2010, *Archivo de las denuncias en general*, 1 August.

61 Participant observation on 28 August 2010.

62 See, for example, *Cabildo* (Guantópolo), Judgment, 2002, *libro de actas*, 19 August.

63 Interview at the *Fiscal Indígena*'s office in Latacunga, 24 November 2010.

64 See, for example, *Teniente Político* (Zumbahua), Judgment, 2010, *Archivo de las denuncias en general*, 23 October.

provided by the next section's *Rosita v. Miguel* case, which is a case involving marital infidelity, physical altercation and money. Such multifaceted conflicts prove that the kinds of distinctions made in the above paragraphs, however useful they are as an analytical tool, can in fact prove to be rather arbitrary. So is the distinction between "family norms" and "community norms", and between severe cases and minor cases. Any combination of family conflicts, property disputes, violent crime and violation of community norms can occur. All these distinctions are arbitrary because the people of Zumbahua do not categorize their conflicts in such ways. Neither do they categorize conflicts in terms of customary law v. formal law.

In fact, if they make any distinction at all, it is on the basis of authorities that adjudicate (or might adjudicate) particular conflicts. As will be shown in the following chapters, authorities often categorize cases in terms of the kind of conflict, the parties involved, and where, when, and under what circumstances it transpired. All of this serves to make an important point: Conflicts in Zumbahua are difficult to classify in simple terms. This is one of the main reasons why a comparison with national law is so difficult. Local Zumbahuan conflicts or customary law, do not differentiate between civil law and criminal law or between serious crimes and less serious misdemeanours or infractions. As a matter of fact, in most cases it is not obvious whether the conflict in question can clearly be labelled "legal". All this is another way of saying that, from an empirical point of view, conflicts in Zumbahua cover a broad range of social life.

4.2. CONFLICT RESOLUTION

As is the case regarding the conflicts themselves, the authorities available to deal with them present a rather complex picture. Broadly speaking, inhabitants can turn to local or provincial authorities, some of them applying customary law, others national law and some "in between" authorities (applying a mixture of customary and formal law) can also be discerned. Often, boundaries between jurisdictions are not clearly defined.

4.2.1. Local authorities

If one studies legal pluralism in the Ecuadorian Highlands, one can hardly ignore the family's role as an authority. This is because a lot of disagreements, mostly family disputes, are settled *within* the family itself. This results in some people (some of my informants and some scholars[65] alike) considering the family as the lowest level authority. As shown above, the conflicts within a family concern a wide range of

[65] E.g., H.-J. Brandt and R.F. Valdivia, *Normas, valores y procedimientos en la justicia comunitaria*, Vol. 2 (Lima, Instituto de Defensa Legal (IDL), 2007); R. Illaquiche, *Pluralismo jurídico y administración de justicia indígena en Ecuador: estudio de caso* (Ecuador, Fundación Hanns Seidel, 2004).

issues, from insults between spouses, to alcohol abuse, to getting a divorce. Because the majority of such conflicts are sensitive issues, people in Zumbahua tend to settle them privately. Family authorities include parents, grandparents, family elders or even godparents. Both the nature of the disputes and the settlements reached are highly varied in nature. Thus, conflicts might involve a mutually acceptable agreement, a simple lecture from an adult to a minor or, in more serious cases, the imposition of punishments such as the lecture of an elder or even corporal punishment and/or "purifying" rituals, like the use of stinging nettles and cold water. It is only when an internal family dispute cannot be solved *within* the family, either because it involves an especially serious matter, or because it continually recurs that the parties involved turn to a communal authority like a *cabildo*. It is for this reason that a *cabildo* is generally considered more broadly to be the lowest level authority, at least when it comes to administering justice. To paraphrase García,[66] a family provides good advice, and the community judges sentences.

So, when conflicts cannot be resolved in the private sphere, or when problems are considered to be beyond the family's capacity to cope with them, one turns to a *cabildo*[67] or to an *asamblea general*.[68] Basically, a *cabildo* deals with conflicts that concern only individual parties, and an *asamblea general* handles conflicts that concern the community. Thus, a *cabildo* addresses family matters, conflicts between neighbours (e.g., disputes over land) and instances of petty theft. An *asamblea general*, on the other hand, adjudicates matters involving adultery, violence, more serious theft or the violation of social norms. The intervention of an *asamblea general* is also called upon in cases of recidivism. Thus, if an offender has already been indicted twice by a *cabildo*, the third offense will be adjudicated by an *asamblea general*. In instances involving the most serious crimes (e.g., murder), parish or provincial indigenous authorities can be called upon to assist.

A *cabildo* and an *asamblea general* apply customary law. When a particular conflict has "civil law" characteristics, resolution is to be found by means of a consensus of members aimed at a reconciliation between the parties. On the other hand, when a conflict has "criminal 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 maintain or restore harmony, thus creating a new equilibrium that embraces not only the individuals directly involved in the conflict, but the entire community. The procedures for settling internal disputes according to customary law are flexible, and different stages are not always

66 García, *supra* n. 56, p. 31–33.

67 A *cabildo* consists of a chairman, a deputy chairman, a secretary, a treasurer, a delegate and several ordinary members. Each officer is chosen for a term of two years.

68 An *asamblea general* is a body comprising both *cabildo* members and other community representatives. More specifically, when a *cabildo* is consulted, it is usually the chairman or the secretary who settles the conflict. In the case of an *asamblea general*, it is the *cabildo* in collaboration with the community that decides.

discernible. In addition, as is typical of customary law, procedures can vary widely among different regions and communities.

The indigenous authorities have a wide range of sentences that they can apply, either separately or in combination. For example, they can limit their sentences to nothing more than a warning or advice. Usually this is followed by promises of the offending parties involved never to repeat their offenses. They can instead impose a fine or threaten to do so in case of recidivism or the breaking of an agreement. Litigants can be ordered to pay fines to either the victim or to 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 replace the victim in the fields for a specified duration of time. Work on behalf of the community can also be imposed. One of the most severe punishments that can be imposed is temporary or permanent expulsion from the community. And finally, in almost every case that I studied, the convicted party also had to admit his or her fault, and to apologize before all those present at the time of sentencing. The authorities decide upon the form and intensity of particular punishments on a case-by-case basis, taking all relevant personal and contextual circumstances into account.

Besides asking a family member or going to a local indigenous authority, inhabitants of Zumbahua can also turn to the local *teniente político* or the police. The *teniente político*'s juridical functioning can be described as being a *juez de paz*.[69] He receives complaints directly from aggrieved citizens, or he is informed by *dirigentes* from neighbouring communities about citizen complaints. He is responsible for recording the reports of citizens who come to his office, and also for assigning cases beyond his own jurisdiction to the competent authorities. According to national law,[70] he is only allowed to hear minor civil cases or criminal cases. However, the *teniente político* in fact sometimes rules on cases that, strictly defined, lie outside his legal jurisdiction. He is required to apply national law but, as shown in the *Rosita v. Miguel* case, the *teniente político* of Zumbahua typically issues rulings in accordance with customary law. Therefore, most people in Zumbahua look upon him as an indigenous authority or local authority, rather than as a state official.

The *teniente político* is also head of the local police force, which in the parish of Zumbahua consists of three officers who work shifts of six to nine days, which should result in at least two officers always being on duty. However, my personal observation was that there was generally no more than one officer on duty at any given time.[71] The daily routine of the policemen consists of patrolling, responding to calls for assistance, providing security for local officials and functions, writing reports, and occasionally

69 This is a self-described role. Officially he is not a *juez de paz*. The position of a *juez de paz* is described in: Constitution, *supra* n. 45, Art. 189.

70 Organic Law of the Judiciary (*Ley Orgánica de la Función Judicial*), 9 March 2009, R.O. 544, Arts. 85–86.

71 This was explained to me by one of the *sargentos* (sergeants) as a result of holidays and other days off; interview on 28 October 2010.

moving criminals or suspects to the prison in Latacunga. Theoretically, the police are responsible for the prevention and detection of crime, the apprehension of criminals and the maintenance of public order.[72] In practice, the daily routine of the policemen in Zumbahua has less to do with fighting crime than it does with maintaining order. Another part of their job is to provide assistance to local authorities. Instances in which their assistance is requested, or which unfold during their patrols, concern a wide range of conflicts, such as family disputes, physical violence, robberies, traffic accidents, the discovery of a stolen car, the use of counterfeit money, drunk driving, driving without a license, etc. Overall, one could say that the daily routine of the local police force in the parish of Zumbahua is more reactive than proactive. Thus, when the police are informed of some disturbance (whether impending or in progress) it is typically via the *teniente político* or one of the local *dirigentes*. In cases of conflicts, parish residents do not turn directly to the police, and this considerably decreases its role in settling disputes.

4.2.2. Provincial authorities

Zumbahuan citizens who seek to resolve a civil matter in accordance with national law, must turn to a civil court. For the people living in the parish of Zumbahua, the closest civil court is the one in the town of Pujilí, the capital of the canton. The majority of the cases that the small Fifth Civil Court of Pujilí (*Juzgado Quinto de lo Civil de Pujilí*) deals with, concern family issues: typically disputes over alimony or paternity. Another frequent source of disputes concerns land, although the majority of land property cases concerned people living in (or near) Pujilí. This confirms what has been said previously: that a good many rural, communal quarrels between neighbours over land are settled by a *cabildo*. Still other cases concern disputes between individuals and their employers. Usually these latter cases have to do with absenteeism or payment issues.

Nowadays, the civil court deals with over 500 cases on a yearly basis. A plurality of cases, about 40%, concern people living in the town of Pujilí. The remaining 60% of the cases concern people living in communities or villages in the canton. Because the number of litigants residing in Pujilí is so vastly disproportionate to their weight in the parish as a whole, one could suggest that distance is an important factor in determining if one turns to the Civil Court in Pujilí. The judge himself did not confirm this. However, the practical hindrance of distance (in terms of time and costs) is a complaint that I often heard, and it seems to offer at least a partial explanation of why rural indigenous people do not turn to the national courts.

In criminal law cases, people depend on the Court of Justice in Latacunga. The majority of the criminal law cases are dealt with by one of the three Criminal Courts. Obviously, the Criminal Courts deal with all kinds of penal law cases. Thumbing

72 P.K. Manning, *Police work: The social Organization of Policing* (Cambridge, M.I.T. Press, 1977).

through the files, I could not escape the impression of receiving a summary of all crimes mentioned in the Penal Code: insults, threats, fights, sexual abuse, robberies and burglaries, illegal possession of firearms, counterfeiting, drug-related cases and even murder cases. Because the Criminal Courts do not have computerized records, and also because litigants are not required to state their place of residence, it is impossible to provide exact figures regarding how many cases heard by the court concern people living in the parish of Zumbahua. According to one of the judges I spoke to, less than 5% of the cases concern indigenous people. It is beyond the scope of this article, but it is fair to assume that here too the practical hindrance of distance plays a role. Another explanation might be found in the fact that, contrary to customary law, every complaint is narrowed down to a strict juridical case; and this circumstance places a greater emphasis on the role of lawyers and affords lesser opportunities to the parties involved to actively participate – the latter being an important aspect of customary law.

A final formal institution people can turn to is the *Fiscal Indígena*, also located in Latacunga. The main purpose of this entity is to provide indigenous people a place to go within the national legal system, but within a setting that respects indigenous norms and practices.[73] To illustrate, at the *Fiscalía Indígena* people can speak their own local indigenous language. Besides the increase of access to national justice, its purpose is also to provide indigenous people an alternative to dealing with local indigenous authorities or a *teniente político*.[74] As an official institution, it has to apply national law. However, in contrast to national judges, who are inclined to narrow a case down into strict juridical terms, a *Fiscal Indígena* typically takes a much broader view of a case, including a consideration of local norms and customs.[75] The difference between a *Fiscal Indígena* and a *teniente político* is that the former's competence is less limited (e.g., a *Fiscal Indígena* is not restricted to minor infractions, and is allowed to deal with more serious crimes as well).

4.3. WHOM TO TURN TO?

To summarize, both the kinds of conflicts and the authorities available to deal with them present a rather complex picture. Several indigenous authorities can be distinguished (i.e., the *cabildo* and the *asamblea general*). Several authorities applying national law can also be discerned (e.g., the Civil Court and the Criminal Court), and Zumbahuans also have recourse to "in-between" authorities (i.e., the *teniente político* or the *Fiscal Indígena*). Since the boundaries between jurisdictions are not always clearly defined, and because some authorities deal with a wide range of different

73 L. Tibán, *Jurisdicción Indígena en la Constitución Política del Ecuador* (Ecuador, Fundación Hanns Seidel, 2008).

74 "Indígenas tendrán su Fiscalía", *Hoy.com.ec*, 13 December 2007.

75 Tibán, *supra* n. 73.

conflicts, a one-to-one relationship between authorities and conflicts simply does not exist. Actually, it is only in cases of national law, with its specific rules written down in laws and regulations, that one can distinguish between civil and criminal law (and, within the latter category, between infractions and serious crimes), defining which court one has to turn to, and what procedure would be applicable. Within customary law, such strict rules do not exist. And, because Ecuador has formally embraced a situation of legal pluralism, but lacks coordinating rules, the personal, territorial and material jurisdiction of customary law in relation to national law is especially unclear.

In the absence of clear and firm rules, one might think that certain patterns of behaviour could be distinguished in terms of particular kinds of cases being brought before certain authorities. It will be shown that such is not the case.[76] During my initial review of the literature on legal pluralism, my first impression was that indigenous people almost always prefer local authorities who apply customary law instead of national courts who apply national law. The picture depicted by the scholarly literature provides insight as to why indigenous people prefer to turn to customary law.[77] Their reasons can be divided into two broad categories. The first of these can be termed a favourable bias toward customary law, which basically means that many indigenous persons consider customary law to be more efficient, legitimate and cost-effective than national law. The second category can conversely be termed an unfavourable bias toward national law, resulting from real and perceived difficulties of access to the national courts. However, some of the literature indicates that there are exceptions to the rule.[78] This fact suggests a more complicated reality. It is this second line of thought, which has been on the agenda of other scholars too, that is confirmed by more in-depth research – and which provides the building blocks for the argument that the use of customary law cannot be seen *a priori* as a "counter-hegemonic strategy".

There are many factors that influence people's decision-making behaviour in legal matters. As von Benda-Beckmann and von Benda-Beckmann argue,[79] "a complex set" of personal characteristics, self-interest, the particular features of the available systems or the authorities within those systems, the nature of the conflict, the relationship

76 See also M. Simon Thomas, "Forum Shopping: The Daily Practice of Legal Pluralism in Ecuador", in A. Ouweneel (ed.), *Andeans and Their Use of Cultural Resources: Space, Gender, Rights & Identity* (Amsterdam, Cuadernos del CEDLA, 2012); Simon Thomas, *supra* n. 4.

77 W. Assies, "La oficialización de lo no oficial: ¿(re)encuentro de dos mundos?", 11 *Alteridades* (2001); F. García, "Estado del relacionamiento en Ecuador", in E. Cóndor Chuquiruna (ed.), *Estado de la reación entre justicia ind'gena y justicia estatal en los países andinos: Estudio de casos en Colombia, Perú, Ecuador y Bolivia* (Lima, Comisión Andina de Juristas, 2009); Sieder, *supra* n. 14.

78 S. Berk-Seligson, "Access to Justice for the Kichwa of the Ecuadorian Sierra", in S. Berk-Seligson, W. Partridge and Y. Redero (eds.), *Indigenous and State Justice Systems in the Ecuadorian Sierra*, (Report to USAID Ecuador, 2006); G. Chávez and F. García, *El derecho a ser: diversidad, identidad y cambio. Etnografía jurídica indígena y afroecuatoriana* (Quito: FLACSO, 2004); García, *supra* n. 56.

79 F. von Benda-Beckmann and K. von Benda-Beckmann, "The Dynamics of Change and Continuity in Plural Legal Orders", 53 *Journal of Legal Pluralism* (2006), p. 25.

between the parties, and the interest of other parties concerned, are relevant factors. Additional considerations in this regard include power relations and other factors involving social dependency. This means, for example, that indigenous people do not always turn to indigenous law merely because it is part of their tradition.[80] Nor do they always reject national law for purely procedural reasons.[81] This does not mean that positive bias toward customary law and negative bias toward national law are of no importance at all. The point here is that specific reasons for people's choices in particular instances – reasons that go beyond pre-existing biases – *also* exist. For example, social pressure or local power relations can influence decision-making behaviour.

These findings are in line with a study by the Ecuadorian anthropologist Fernando García, research that was conducted as part of a larger project on the relationship between customary law and national law in four Andean countries.[82] García's[83] data offer a profound insight into indigenous people's legal decision-making processes. On the face of it, García's findings point to a limited knowledge of national law on the part of indigenous people. However, his respondents are very well aware of the fact that in some cases they are simply not able to avoid recourse to state law. This suggests that some indigenous persons are more knowledgeable about national law than is apparent at first glance, at least according to some of the informants. Even more telling is the fact that, if the respondents do express knowledge of state law, and if they are biased against it, they are opposed to the use of it because of how it is applied rather than because of any disagreement in principle with its content. In other words, they do not have that much difficulty with the rules as such, but are instead wary of state officials who are supposed to be professional and impartial, but who are, in the eyes of many indigenous persons, corrupt and biased.

An even more striking finding in the study of García[84] is the critical attitude displayed by many indigenous persons against their own traditional authorities. Thus, some informants complained (in a way that reflected their view of national law officials) about the indigenous authorities and the enforcement of indigenous law,

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80 M.T. Sierra, "Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla", 29 *Law & Society Review* (1995); H.L.J. Spiertz, "The Transformation of Traditional Law: A Tale of People's Participation in Irrigation Management on Bali", 20 *Landscape and Urban Planning* (1991).

81 Examples of such procedural reasons are: state law is expensive; its institutions are distant from the places where many indigenous inhabitants live; its procedures take a long time and are recorded in a Spanish that is filled with legal jargon that is often incomprehensible to indigenous persons who speak a different native language; and is administered by judges and lawyers suspected of being corrupt and biased, see Simon Thomas, *supra* n. 4, p. 165.

82 E. Cóndor Chuquiruna, "Estado de la reación entre justicia indígena y justicia estatal en los países andinos: Estudio de casos en Colombia, Perú, Ecuador y Bolivia" (Lima, Comisión Andina de Juristas, 2009).

83 García, *supra* n. 77.

84 García, *supra* n. 77.

rather than about the rules of customary law as such. Among the most commonly heard criticisms: the authorities are mostly older persons, the authorities put too much emphasis on parties' records rather than on the facts of individual cases, sometimes the authorities are biased, and sometimes the authorities misuse their power when they administer overly harsh punishment.[85]

Another circumstance in which indigenous people turn to national law is when customary law seems unable to provide adequate remedies in particular circumstances. A case of a female resident of Tigua, one of the areas in the parish of Zumbahua, who was beaten and robbed by fellow community members can serve as an illustration.[86] The woman, who was living in the Tigua-Chimbacucho community, presented a complaint against six members of the same community concerning severe injuries,[87] as well as the theft of a cellular phone, a hat and $500 in cash ($300 belonging to the community and $200 of her own). Interestingly, in a letter to the judge, she refers to earlier threats and assaults, which had been settled within the community with "Agreements of Mutual Respect". However, even though this agreement stipulated that any recidivism would result in a fine of $5,000, neither customary law nor the local authorities inspired fear in the six defendants. Consequently, the victim saw no other option than to resort to national law.

To summarize, in line with what von Benda-Beckmann and von Benda-Beckmann argue,[88] both insights of García[89] (i.e., that indigenous people do not have that much trouble with national laws *per se*, and are sometimes critical of local authorities), combined with cases in which customary law appears not to be adequate, paint a much more nuanced picture of the daily practice of indigenous decision-making behaviour than that which is discernible from a distance, and one very different from a clear bias *in favour* of customary law. Such a state of affairs leads to no other conclusion than that customary law is not solely used by indigenous people to secure their autonomy against encroachment of the state.

5. THE *ROSITA v. MIGUEL* CASE

It was on the chilly Wednesday morning of 1 December 2010, that I was fortunate to witness as a participant observer one of the most interesting cases at the *teniente político*'s office that took place during my fieldwork. When I arrived at 10:30 am, I was

85 See also M. Simon Thomas, "Legal Pluralism and the Continuing Quest for Legal Certainty in Ecuador: A Case Study from the Ecuadorian Andes", 2(7) *Oñati Socio-Legal Series*.

86 E.g., Third Criminal Court of Cotopaxi (*Juzgado Tercero de lo Penal de Cotopaxi*) (Latacunga), Judgment, 2009, Caso 2009-1216.

87 In a letter to the judge, the Tiguan woman (or rather, her lawyer) referred to article 463 of the Penal Code which penalizes such injuries with the maximum penalty of thirty days and a fine.

88 Von Benda-Beckmann and von Benda-Beckmann, *supra* n. 79.

89 García, *supra* n. 77.

quite surprised to see a number of large and small trucks parked in the street, and about a hundred indigenous people waiting outside. When I entered the office, it was full of people. When I took a seat at the desk that had been assigned to me, I noticed that the *teniente político* and his secretary were sitting behind the desk, and that a uniformed police officer was standing next to me, near the door to the storage room. I had never seen so many state officials in the office at the same time, and I therefore suspected that something important was going on. When I went over to the window, I noticed that the crowd had grown to more than 200 people. The crowd began to push closer to the outside door and window, and there was a palpable tension in the air. At that point, I knew this trial was going to be interesting.

The crowd consisted of members of the two extended families of Rosita and Miguel who had gathered in Zumbahua to follow the proceedings. For a moment, it seemed as if they all wanted to be inside the office, but with the help of the police officer who had repositioned himself at the entrance, the *teniente político* began to gently guide people out the door. Obviously, with an office of only about four square metres that contained nothing more than a desk and a couple of chairs, there is not much space for anyone other than the parties directly involved with the case. Clearing the building took a while, as most of those asked to leave initially refused to do so. When Rosita, Miguel and their closest relatives finally were separated from the rest of their families and other spectators, the trial finally got underway behind closed doors.

5.1. THE PROCEEDING

Six persons other than the *teniente político*, his secretary, the police officer and myself were present. These were Rosita, her husband and her daughter, Miguel and his wife and a male relative of theirs. Before the *teniente político* started talking, both Rosita and Miguel had handed over bills for doctor visits and receipts for medicine that had been purchased. What soon became clear to me was that the dispute that had to be settled in this trial had to do with marital infidelity (i.e., Rosita's husband had an affair with Miguel's wife), a physical altercation (between Rosita and Miguel over the affair) and money (the doctor's bills resulting from the injuries caused by that fight). The *teniente político* initially explained the proceeding, emphasizing that solving the matter was preferable to continuing to fight. He then called upon Miguel's wife, at which point a tiny and sad-looking woman stepped forward and, directly facing the *teniente político*, began to explain her side of the story.

As soon as Miguel's wife started talking, Rosita became hysterical. Screaming and crying at the same time, she slapped her rival in the face and delivered a forceful kick to her husband's shin. Within seconds, the four litigants were involved in a chaotic brawl. The police officer jumped in to restore order. It took him a few minutes to separate them and meanwhile the *teniente político* had stood up again. He opened the small window and called out to a number of *dirigentes* to come and help out. Thus, we ended up with four more people in the office, whose task it was to separate the four

spouses from one another. These four *dirigentes* helped convince the parties to stop fighting and to concentrate instead on resolving the problem. Rosita and her daughter especially seemed to question the *teniente politico*'s authority, but as one of the *dirigentes* explained, "There is no other authority", and so they had no choice other than to recognize his competence to try the case.

After separating the parties, the police officer had ordered that both Rosita's husband and Miguel's wife be locked up separately: Rosita's husband in the broom closet and Miguel's wife in the storage room. With the *dirigentes* present, it was now safe to release them and to continue the proceedings. For reasons of safety, the four *dirigentes* stood between the parties involved and the *teniente político.* Meanwhile, Rosita continued to cry loudly, but as soon as the *teniente político* started talking again, she stopped sobbing. Shaking his head in disapproval, he angrily questioned the propriety of continuing the procedure. One of the *dirigentes* then asked for permission to speak, and explained to the two couples that they had no option than trying to reach a settlement. Another *dirigente* added that "none of us is a saint" and that a settlement had to be reached. Without further ado, the parties calmed down and the *teniente político* was able to proceed.

During the more than two hours that the hearing lasted, everyone present had a chance to say a few words, some speaking in Spanish and others in Kichwa, the local language. Rosita and Miguel got a chance to explain their version of the fight, and to blame their spouses. Each of their spouses proceeded to play down what had happened; emphasizing that it had not meant anything. Rosita took the longest. Sometimes angry, sometimes sad, but always long-winded, she tried to convince the *teniente político* that Miguel should pay her medical expenses, and emphasized the fact that her husband had been unfaithful. Rosita's husband responded by offering apologies. Neither Miguel nor his wife said more than was strictly necessary. It seemed to me that Rosita used the forum provided by the trial to exact her revenge. But in fact it was the four *dirigentes* who stole the show. Skilled public speakers, they took the opportunity to repeatedly emphasize local values such as harmony, forgiveness and reconciliation. And the *teniente político* did basically nothing but facilitate the process and work toward a solution.

During the entire hearing, some people outside the office attempted to follow the proceedings by pushing their ears to the door and window. Those who succeeded in doing so conveyed updates to the rest of the crowd. At several points, we could hear the people outside shout their approval or disapproval of what had just been said inside. At a certain point, one of the *dirigentes* went outside while the trial proceeded in order to cool heated tempers. After the proceedings continued uninterrupted for almost two hours, the *teniente político* indicated that, in his opinion, enough had been said. He abruptly called an end to all discussion by declaring that minutes (an "*acta*") would be drawn up in which a ruling would be issued and sentences imposed. After some additional discussion, this suggestion was approved by the majority, with only Miguel's wife dissenting. When she persisted in her refusal, everybody turned against

her, even the *teniente político*. Although he was supposed to be impartial, he snapped at her: "You are the one that's the problem here!". This made it obvious yet again that not reaching an agreement was not an option. Finally, the *teniente político* instructed his secretary to type the *acta*. While the police officer dictated the names of everybody present, the secretary started typing. A final settlement of the dispute appeared to be imminent.

5.2. THE SETTLEMENT

Finally, three decisions to settle the dispute were made by the *teniente político*, in dialogue with the four *dirigentes*, and with approval of the two married couples. First, it was concluded that Miguel was responsible for starting the fight. Therefore, he had to pay Rosita's bills after deducting his own costs. To calculate the amount of money he would have to pay, both he and Rosita had to hand over the relevant bills. Rosita handed over three bills and Miguel just one. At one point, it seemed that the legitimacy of every bill was going to be disputed by both couples, but the *teniente político* quickly cut off that discussion by directing the parties to go to the *Fiscal Indígena* in Latacunga to get the bills certified if they refused to acknowledge their authenticity right then and there. This dictate promptly ended any further discussion. Rosita's expenses added up to $163,50 and Miguel's bill amounted to $20. So Miguel was ordered to give Rosita $143,50, an amount of cash that he did not have on hand. He was therefore allowed to leave the office for a couple of minutes to collect the needed money from his family members outside.

Meanwhile, the *teniente político*'s secretary had finished the *acta*. As soon as Miguel returned with the money, she read the text out loud. It stated that Rosita's husband and Miguel's wife agreed to not see or call each other in the near future. It also stated that, in the event that this agreement was violated, they would each be fined $5000. Everybody present in the small *teniente político*'s office mumbled or nodded their approval. Only one *dirigente* suggested an additional stipulation: that the two people involved promise not to turn to national law in case they should have a problem with the decision at some later point. Although some other *dirigentes* seemed to initially approve of that comment, it was quickly rejected by the police officer, who explained that such a statement was unnecessary considering the fact that the *teniente político* happens to be a state official, which meant that the legal case in question already had formal status. This reminder was recognized by everyone, and the original text of the *acta* was approved.

Both Rosita's husband and Miguel's wife (the latter grudgingly) signed the *acta*, as did the four *dirigentes* as witnesses, and finally it was stamped and signed by the *teniente político*. Now it was time for apologies. Rosita's husband was the first to apologize. He seemed quite relieved that the case was over, because while saying he was sorry, he tried to hug and kiss his wife. Rosita in turn seemed to relish her last moment in the spotlight, assuming the theatrical air of a woman scorned, but

signalling her acceptance of the apology with a nod of her head. Then Miguel's wife had to apologize to her husband. She did so while looking at the ground and in a very soft voice. Just as Rosita had done, Miguel accepted the apologies with a nod.

After the money was paid, the *acta* was signed, and the apologies were made, Rosita and her husband went outside. Accompanied by two of the *dirigentes*, they explained to their family members what had taken place inside the office and what had been agreed. Miguel and his wife stayed inside and the *teniente político* invited their family members into the office. He too, explained what had happened and what had been agreed. He emphasized the importance of the apologies exchanged between Rosita and her husband and Miguel and his wife and the reconciliation between the two couples. Everybody seemed to be satisfied with the settlement, as the crowd parted without incident. The conflict had been settled, violence prevented and harmony restored.

5.3. ANALYSIS

This account of the *Rosita v. Miguel* trial provides insight into the role of the *teniente político* of Zumbahua. Although not officially appointed as such, he functions like a *juez de paz*. In his juridical role, he hears cases involving domestic disputes, petty theft, traffic accidents, public drunkenness, property damage and other minor offenses that have disrupted social harmony – or that have threatened to do so. Whether he is dealing with simple civil cases or with penal cases involving minor infractions, his freedom of action is limited. As he explained to me, he is only competent to adjudicate cases that involve monetary amounts of $120 or less. Or in his own words: "[he is] competent to deal with the theft of a cell phone, but not of a computer."[90] And, above all, he has to apply national law. However, he does not always observe these rules. This naturally raises the question of what kinds of norms, rules and procedures he is applying. As will quickly become clear, in his daily routine, the *teniente político* falls back on customary law rather than on national law.

During the trial at the *teniente político*'s office, it became clear that infidelity preceded the fight which had caused a dispute over money. And the whole thing now had the potential to escalate into an outright war between the two families. It is obvious that this domestic dispute had not been successfully resolved within the sphere of the family. Neither the parties' own efforts or those of their families worked, and thus it was necessary to resort to a third party in search of mediation, arbitration or adjudication. In their search for a third party, Rosita, Miguel and their relatives apparently could not turn to an indigenous authority. Both couples live in Quilotoa, and this community does not have a *cabildo* capable of applying customary law in this specific case. So they had to look for an authority outside their community. They could have gone to the Court of Justice in Latacunga, but that would not have been very

90 Interview 14 November 2010.

practical. In addition to issues of cost, time and distance (remember that they did not even want to go to the *Fiscal Indígena* in Latacunga to get the doctor's bills certified), this probably would have resulted in the case being considered in strictly legal terms. Infidelity is not a crime or a violation according to penal law, and is also not mentioned in family law, so such a disagreement would probably not have been resolved in the court room. Consequently, the "narrowing" into legal terms of this whole issue would have meant that, in a best-case scenario, only the issue of the initial fight and its economic consequences would have been dealt with. The *teniente político*, on the other hand, was able to deal with the full scope of the conflict.

This lack of a competent *cabildo*, combined with the apparent limitations of national law, led Rosita and Miguel to seek justice with the *teniente político*. Although he is a political official bound by national law, in his self-designed role as *juez de paz*, he was able to deal with this case from a rather broad perspective. As a matter of fact, everybody I had spoken to about his juridical competence had mentioned examples similar to the *Rosita v. Miguel* trial. Whether it was the *Fiscal Indígena*, a police officer or Ecuadorian friends, they all emphasized the *teniente político*'s role in settling family affairs and petty disputes. A combination of trust and authority provided him local legitimacy to settle conflicts. And that is what he did. More specifically: that is what he was asked to do. Although one could argue that, in a strictly legal sense, this case exceeded his financial competence and as a state official he was not able to deal with infidelity, this did not seem to bother anyone present on that Wednesday in December. Nobody inside or outside the office referred to the *teniente político*'s limited jurisdiction. On the contrary, because infidelity is a serious offense according to customary norms, it was expected that he would deal with it. And he had to deal with that aspect of the dispute before resolving the financial matter.

The whole procedure had unmistakably strong signs of local customary law. First, the entire procedure was oral and everybody present got a chance to express his or her point of view. Spanish as well as Kichwa was spoken. And, as far as the proceeding itself was concerned, time did not seem to matter. These are all typical features of customary law proceedings in the Ecuadorian Andes, where one's ability to reason, argue and engage in dialogue is highly valued. Also striking was the role of the *dirigentes*, during the procedure as well as in the decision phase. The aspect of collective consensus is another characteristic of customary law, and so are the signs of a public hearing. Almost every move and every word said inside was passed through to the audience outside by those with their ears and faces pressed against the outside door and window. At one point, one of the *dirigentes* attending the proceedings had to go outside in order to calm the crowd by explaining what was happening inside the office. Openness is also a common and highly valued element in customary procedures in the Ecuadorian Andes. Finally, a brief comment is in order regarding the solution of the dispute. It was agreed that Miguel had to pay Rosita's costs. This form of compensation or restitution, monetary or otherwise, is typical of customary law, which values compensation and restitution to the victim much more than punitive

measures. These latter values are also highly characteristic of customary law, and account for the fact that the two unfaithful spouses were required to make public apologies. These apologies are considered essential for the restoration of harmony.

The most important lesson that can be learned from the *Rosita v. Miguel* case, however, has to do with interlegality. As explained, by using the term interlegality (i.e., the mixing of different legal spaces in people's actions and minds), this article aims to underscore the fact that the living reality of legal pluralism in the Andean Highlands shows that there is no such thing as a dichotomy between customary law and national law. An analysis of both the procedure and the final settlement of the *Rosita v. Miguel* trial points to the use of several elements of customary law by a state official. This situation clearly stems from a mixing of different legal systems in practice. Another reflection of the mixing of national and customary law was that the *teniente político* described his juridical role to me as being a *juez de paz* (which officially he is not), stressing his role in enabling parties to come to a solution themselves rather than that of enforcing the law. In the end, the most striking feature of the proceedings in this regard was the fact that one of the *dirigentes* present seemed to have forgotten that the *teniente político* was a state official. This is also a reflection of the mixing of the two systems among the indigenous population of Ecuador in general.

6. CONCLUSION

This article argues that indigenous people living in the Ecuadorian Andes are accustomed to the fact that there are different authorities using different procedures, thus providing different options to turn to in the event of a legal conflict. Therefore, the experience of Highland Indians is not that of the coexistence of two somehow self-contained legal systems (i.e., customary law and national law), but rather that of a "network of legality".[91] This "conception of different legal [orders] superimposed, interpenetrated and mixed", is known as "interlegality".[92] This article shows how, in cases involving internal conflicts, the inhabitants of the parish of Zumbahua have the choice to turn to a local indigenous authority, to the *teniente político* in the village, and on some occasions even to a court in a nearby town.

Evidence of interlegality in action in the daily life of Zumbahua can be seen in the empirical findings of this article regarding the variety of conflicts that can occur, and the different authorities and procedures available to the residents of the parish. Cases tended to involve matters that concerned (for example) both "family norms" and "community norms" involved both "minor" and "serious matters", and addressed both "civil" and "penal" issues,. A similar overlap was found in the jurisdictions of local authorities. No strict division can be made among the competences of families,

91 Goodale, *supra* n. 16, p. 33.

92 De Sousa Santos, *supra* n. 1, p. 437.

cabildos, *asambleas generales* and the *tenientes políticos*. Thus, I pose the following question: If conflicts as well as jurisdictions of authorities overlap, where should the line between customary law and national law be drawn in the first place? Residents of Zumbahua obviously do not conceptualize legal pluralism in terms of well-defined categories or clear-cut rules. Daily activity at the *teniente político*'s office underscored this conceptualization. The *Rosita v. Miguel* case shows that the actual mixing of two different normative orders in the actions as well as the minds of Zumbahuan residents is an unquestionable reality.

If my conclusion that ordinary inhabitants of the parish do not act or think in terms of a dichotomy between the two systems is correct, then the applicability of the "counter-hegemonic use of customary law" at a local level is necessarily called into question. Contrary to what has sometimes been suggested in the literature, Zumbahuans do not typically express either a favourable bias toward customary law or an unfavourable bias toward national law. The findings of the present study point instead to a much more nuanced reality: People living in Zumbahua display a certain scepticism regarding *both* normative systems. More specifically, if they express objections, these are for the most part not aimed at the systems as such, but rather at their application. This is consistent with the earlier observation that the dividing lines between different kinds of conflicts or procedures are not very clear. The practice of legal pluralism, accompanied by the perception of Zumbahuan residents reflecting interlegality, can therefore not be assumed *a priori* to be political in nature.