TWELVE

Ethical Issues Raised by Legal Anthropological Research on Local Dispute Settlement in Ecuador

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INTRODUCTION

Doing legal anthropological research on dispute settlement often involves digging into issues that are sensitive for personal, legal, or political reasons. For example, in cases concerning alimony in relation to sexual violence, the paternity question sometimes is resolved by a DNA test and this medical information forms part of that file. In cases concerning serious crimes, a great deal of sensitive and even disturbing information (e.g., like photos of bloody corpses, detailed witness declarations, extensive records of phone calls) forms part of the file. And, as I encountered during my recent research on dispute settlement in an indigenous community in the Ecuadorian highlands, underneath a lot of disputes concerning property, violent crime, or social norms, issues concerning local power play a significant role (Simon Thomas 2013).

Thus, while conducting archival research in files at courts, public prosecutor's offices, police stations, or even when reviewing handwritten documents that are not part of the official record, legal anthropologists are often given access to legal knowledge of great consequence for people. In line with Starr and Goodale (2002), this chapter states that the impact of publication of such sensitive knowledge on the people involved should be carefully considered on a case-by-case basis. This is because any dispute, whether it is in the pre-trial, trial, or post-trial phase, has an effect on the social environment. On the other hand, based

on fieldwork experiences, this chapter also argues that a legal anthropological researcher should not turn a blind eye to such sensitive conflicts.

BACKGROUND

The research on which this chapter is based was conducted during three distinct periods of fieldwork in the years 2007, 2009, and 2010. Its overall aim was to provide an understanding of the daily practice of dispute settlement in an indigenous community in the Andean highlands, specifically in a situation of formal legal pluralism, and what could be learned from this in terms of Indian-state relationships. It was shown that, at the local level, the phenomenological dimension of legal pluralism is best characterized in terms of "interlegality." At a macro level, legal pluralism still appears to be seen as a dichotomy between customary law and national law. It was argued that, because ordinary Indians are not positively biased in favor of customary law *per se*, a heterogeneity of legal practices can be observed on a daily basis, which consequently undermines the commonly held view of customary law as a "counter-hegemonic strategy." At other socio-geographical levels, however, this latter strategy does seem to hold true. With regard to the Indian-State relationship, the research showed that constitutional recognition of legal pluralism has worked both in favor of and against the legal-political empowerment of indigenous people in Ecuador.

The locality of the research was the parish of Zumbahua, Pujilí canton, Cotopaxi province, Ecuador. The methods used include archival research in files at courts, at public prosecutor's offices and at lawyer's offices, as well as in so-called *libros de actas* (books of handwritten files) that are used in indigenous communities; collection of other primary and secondary written sources; participant observation; semi-structured interviews and informal conversations. For example, at the four criminal courts of the Court of Justice in the provincial capital Latacunga and at the Civil Court in the cantonal capital Pujilí, I examined more than 120 files. On the La Cocha-Guantópolo murder case of 2010, I read through a file which contained more than 600 pages. And in the communities of Tigua and Gauntópolo, as well as at the *teniente político*'s office (the lowest juridical official in the countryside) in the town of Zumbahua I read through all *libros de actas* of the past 10 years. On numerous occasions during the course of my research, I came across highly sensitive legal and/or personal information which served as fodder for reflection on the ethical issues concerned with the subject of my research.

A stimulus to further reflection could be found in Ecuador's contemporary sensitive political relationship between the state and its indigenous population. In terms of the political and power structures in Ecuador, the indigenous population has been always subordinate. Things

seemed to change, though, when after years of protest a new constitution was promulgated. This Constitution of 1998 marked a radical break with the past, in the sense that, for the first time, several collective and other rights for indigenous people were recognized—including the right of indigenous authorities to make use of customary law instead of national law in order to settle internal conflicts. In other words, a situation of formal legal pluralism came into being. However, with the formal recognition of legal pluralism, almost immediately a subsequent, fierce political and juridical debate emerged regarding the scope of customary law in Ecuador. From the very 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 at the very moment the Constitution of 1998 became effective. This is because the Constitution stated (while remaining rather vague on the actual scope of the recognition) that the law should develop rules which would make both legal systems compatible. The law, according to the 1998 Constitution, should develop rules which would make both legal systems compatible.

Although this promise was repeated in the so-called Montecristi Constitution of 2008, no such coordinating rules have yet been developed by either politicians or jurists (Simon Thomas 2013). 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 2012a). So, it seems as if the Ecuadorian state formally "endorsed" customary law for political reasons, while doing nothing to support it. At the same time, the indigenous authorities (at the local, a provincial, or national level) continued their struggle to assure that the formal recognition was actually applied in the real world. They did so by trying to get new legislation implemented, but also by attempting to set new precedents in the courts. Some of the more serious cases (e.g., the La Cocha-Guantópolo murder case) evidently served that latter purpose. And in order to form a serious front against the unwilling state and the judiciary, the indigenous authorities had to act and speak with one voice. The second moral dilemma I faced thus had to do with the question of whether writing about internal quarrels, fights and conflicts might do harm by shattering the external perception of indigenous unity at a time when they were involved in a struggle to establish one of their fundamental rights.

RIGHTS TO CONFIDENTIALITY AND ANONYMITY

Legal anthropology inherently involves a consideration of both anthropological ethics and legal ethics, which sometimes do not perfectly coincide. According to the AAA Code on ethical obligations and challenges,[1] participants in research have the right to privacy, meaning that the ano-

nymity of the subjects of study should be protected as much as possible and that their rights to confidentiality are respected. This Code also addresses legal anthropological research on disputes. Basically this means that confidentiality and anonymity to the outside world must be ensured—the sociologist Tolich (2004) calls this "external confidentiality"—which can be for example done by using pseudonyms. Regarding the "internal confidentiality," on the other hand, one has to be aware of the fact that insiders may recognize other insiders often quite easily. Here, the researcher faces a conflict between conveying detailed accounts of social reality and protecting the anonymity of his informants. All one can do is to anticipate potential threats to confidentiality and anonymity as much as possible, and to be open to one's informants that full anonymity cannot be guaranteed (informed consent).

However, legal anthropology, as a social science, differs in this matter from legal research where, it should be noted, regional differences also exist. For example, with regard to lawsuits, in The Netherlands it is common not to mention full names of victims, defendants, and witnesses in law reports or annotations. Instead, criminal cases are always presented in an anonymous version (e.g., Mr. A, living in the town of B). This in contrast to many other countries like, for example, the United States, where important rulings are known by the names of the litigants (e.g., *Kramer vs. Kramer*) (Wagenaar et al. 1993).

A similar way of referring to court cases can be encountered in international legal bodies, such as the Inter-American Court of Human Rights. In Ecuador, where I conducted my research, socio-legal ethics hardly seem to exist. As an Ecuadorian lawyer once explained to me:

> In Ecuador the issue of protecting your interviewees is, in my opinion, completely ignored. Legal articles I have read usually mention the parties by name. Scholars in the social sciences are more careful, but I have read several papers from anthropologists and sociologists that also mentioned the interviewees' names. When I was in law school, we never, ever, received any course or even a class that explained how to address issues of our informants' privacy and safety.[2]

Despite these disciplinary and regional differences, it is fair to say that it is in the best interest of the subjects of legal anthropological research to protect their privacy as much as possible, and therefore that it is best practice not to mention their real names while publishing on their cases.

Why bother about the right to privacy, one could ask. After all, isn't adjudication a public affair in the first place? The fact of the matter is that the extent to which legal cases are matters of public record varies among different nations. Broadly speaking, in The Netherlands, legal cases are not public (with only the parties involved and their attorneys having access to court files), while most trials and the final decision of the judge are. In the United States, not only the trial and the decision are open to

the public, but the case files can be looked into by anyone who is interested, apart from certain exceptions. In Ecuador, files are open after the preliminary investigation is concluded. The point, however, is not so much the formal rules. From a legal anthropological perspective, it is far more interesting what the actual consequences are of the right (or lack thereof) to privacy.

Legal anthropological research emphasizes that disputes encompass not only the initial grievance and the trial, but also the final outcome of the case and its after-effects (i.e., the so-called post-trial phase). That is why it is important to pay careful attention to future consequences of legal cases and the extent of their public exposure in all different phases of disputes. Building on the work of Snyder (1981) and Felstiner et al. (1980-1981),[3] Von Benda-Beckmann (2003) argues that the dispute process should not be considered as having concluded after the final ruling has been issued. She distinguishes among a pre-trial, trial, and post-trial phase. With this, she in fact takes up a point previously made by Felstiner et al. (1980-1981, 639), namely that "there is always a residuum of attitudes, learned techniques, and sensitivities that will, consciously or unconsciously, color later conflict." They also argued that any given dispute might continue even after a settlement, or that the end of one dispute might lead in turn to a new grievance. This means that the expectation that disputes be resolved can be entirely unrealistic (Colson 1995; Von Benda-Beckmann 2003), and this makes the preservation of confidentiality of the parties involved in lawsuits so important.

Although protecting anonymity as much as possible is the rule, there are some exceptions. First, when cases are a matter of public record, it does not make much sense to conceal the identity of certain people involved. When names of people involved in a lawsuit have been revealed in newspapers or on television, then there is not much need for the researcher to protect the privacy of those persons. Second, there is no point in protecting the confidentiality of people (e.g., "public figures" like well-known indigenous leaders) or institutions whose identity and activities are a matter of public record. For this reason, I have chosen to refer to public figures such as politicians, published authors, public officials (e.g., judges, public prosecutors, *tenientes políticos*), and the organizations that they work for by their real names in all my articles. Thus, subjects whose real names have previously appeared in other publications or are a matter of public knowledge can be properly identified. In such cases, there is no need to ensure external confidentiality.

All other informants and subjects, however, should be referred to by pseudonyms, or by generic descriptions like "an ex-*dirigente*." Readers familiar with the events and institutions described may be able to discern the identity of these individuals, which challenges the internal confidentiality. However, in most cases the scholarly writings of the researcher won't provide them any facts that they were not aware of before (Wage-

naar et al., 1993). This, of course, cannot diminish the researcher's obligation to anticipate potential threats to confidentiality and anonymity, nor exempts this the researcher from his or her obligation to a continuous process of informed consent. Although according to the AAA Code of Ethics, any individual anthropologist must make carefully considered ethical choices, as soon as others have already revealed subjects' identities, there is no point in sustaining the pretense of protecting external confidentiality. With regard to the internal confidentiality, which in a way lies below the surface (Tolich 2004: 101), special attention of the researcher is needed at all times. Therefore, what the publication of detailed personal information means for the people involved must be considered on a case-by-case basis.[4]

FRAGILE POWER STRUCTURES

Given the fact that legal disputes, whether in the pre-trial, trial, or post-trial phase, have an impact to the social environment, the researcher has to treat the reporting of any such matters with care. This is especially true regarding knowledge that is intertwined with often fragile local (or even national) power structures. It is a fact that legal anthropological research tends to produce such knowledge (Starr and Goodale 2002). It is for this reason that, in reference to research on internal conflicts in indigenous communities in Ecuador, Becker (2010) asks whether highlighting divisions does harm to the struggle for equal rights and autonomy. Given Ecuador's heightened recent political sensitivity towards the recognition of indigenous rights, it would seem that his concern is justifiable. Roughly one-third of the population of Ecuador is considered indigenous, and the country has politically dealt with its diversity in a variety of different ways, alternately employing assimilationist, integrationist and (most recently) multicultural models (Simon Thomas 2013).

Struggles between indigenous peoples and power holders are nothing new, and it is only since the "National Indian Uprising" in 1990 that indigenous people have gained a place on the political stage. Among other things, this led to the promulgation of a new Constitution in 1998 in which several collective and other rights were recognized—including the right of indigenous authorities to make use of customary law instead of national law in order to settle internal conflicts (i.e., the recognition of legal pluralism). These rights were ratified in the Constitution of 2008. However, daily practice reveals a huge gap between formal and actual recognition. This is specifically shown in the ongoing political and juridical debates regarding the proper scope to be granted indigenous authorities for the administration of customary law alongside national law. Because the AAA Code on Ethics specifically addresses power differentials and vulnerable populations, one ought to be very careful when writing

about case studies that can be linked to this ongoing struggle for autonomy, in order not to harm the vulnerable position of the indigenous people involved.

On more than one occasion, I have had to deal with the dilemma of whether or not to write about disunity among indigenous people within the above-described context. One such instance involved the publication of material on the La Cocha-Guantópolo murder case of 2010 (Simon Thomas 2012a; 2012b; 2013). This case involved five indigenous persons who were suspected of homicide initially adjudicated by local indigenous authorities, before also being named as suspects in a criminal investigation conducted by the national courts. The traditional punishment the five received (consisting, among other things, of a ritual cleansing with stinging nettles and cold water, followed by a whipping) provoked an outcry from many sectors of Ecuadorian society. Elements of the media, "ordinary" Ecuadorians, jurists, and the government condemned the punishment as "barbaric."

Specifically the brutality of the treatment and lack of due process were criticized, and there was even disagreement about the proper content of customary law among indigenous people themselves. This public outcry, combined with the internal indigenous debates, helped bolster's President Correa's stance against full recognition of legal pluralism. On the other hand, the fact that the legality of the indigenous trial was questioned through the criminal investigation fueled the indigenous movement's dissatisfaction with the continued lack of full recognition of their formal rights. Finally, the fact that the people directly involved have had to live until today with the uncertainty of the outcome of a case that still has not been closed, helped strengthen the indigenous movement's case for full recognition of legal pluralism. In sum, this La Cocha-Guantópolo murder case turned out to be very politically sensitive and its consequences clearly transcended the actual case.

The moral dilemma I faced in this case was largely resolved by the case itself. This is because I was technically not allowed to do research in the files because no ruling has yet been issued on the case. The fact that I nevertheless had done so (the judge, the public prosecutor, as well as a couple of attorneys involved in this case had no objections at all that I read through their files more than once) did not absolve me from my obligation to write only about facts that had been made public already. In my publications on the La Cocha-Guantópolo murder case, I provided no new facts that had not already been published on television, in newspapers and in journals. However, when I was publishing on other cases concerning indigenous people and their customary law (e.g., Simon Thomas 2009; 2103), I did face the question of whether writing about disputes might harm vulnerable communities, or if doing so might disturb the fragile power structures within these communities (and in their

relationships with the national authorities). Despite Becker's (2010) justifiable concern, I always decided to tell the real story.

"The real story" in this sense, is not about the issue of "what happened" in terms of objective, "true" facts, it is about the question whether or not to "play up feuds and flaws of impoverished groups" (Colloredo-Mansfeld 2009, 146); it refers to the real daily practice. Legal pluralism, the topic of my research, forced me to talk to a wide range of people about closely related issues like customary law and national law, their interaction, and its political sensitiveness. I discussed these issues with persons form a wide variety of back grounds and education, from taxi drivers, market vendors, and hostel operators to scholars, attorneys, prosecutors, judges, and indigenous authorities. Proceeding in this fashion taught me two things. First, on an analytical level, it led me to understand that legal pluralism does not mean the same thing to all people. Second, on an emotional level, I realized that my opinion on customary law had changed. At first, I had been uncritically in favor of it, attracted by its emphasis on reconciliation, compensation and restitution, instead of on meting out punishment. Over time, however, I began to realize that customary law, like any legal system, has its drawbacks and is not immune for criticism. This taught me once again that the daily practice of legal pluralism in Ecuador is told by many voices, rather than being an objective one. In a similar way this counts for stories about local internal conflicts too: of course conflicts do occur, but different versions of causes and effects exist. Truth, and stories on it, comes in many forms.

Therefore, telling the real story of daily practice—that is, local internal conflicts *do* happen, although there are many sides to it—is, in my opinion, the only option a scholar has. Colloredo-Mansfeld (2009, 146) argues that "turning a blind eye to internal fights will not do." This is because, according to him, plurality rather than unity has not only been typical for indigenous communities, but has also been a key factor to the success of indigenous movements in Ecuador (Colloredo-Mansfeld 2009). In line with this argument, I decided to tell the stories about local internal conflicts and the political controversy some of these cases caused on a national level as fairly as possible. I decided to do so because I believe that the challenge of legal pluralism (the overall subject of most of my research so far, and the subject by which most of my informants are influenced, or are concerned with) should not be understood as primarily a jurisprudential process.

I think it important to describe, analyze and understand it as an empirical reality—a reality of which conflicts form a substantial part. After all, because "any indigenous community will be riddled with conflicts" (Jackson 2002, 120), its customary law is invariably contested within the community itself, and thus reflects local tensions (Sieder and Sierra 2010). The reality is more complex than essentialist (or sometimes politically driven) portrayals of indigenous communities as harmonious, and custo-

mary law as always just, would suggest. It therefore makes no sense to ignore these tensions just because of a paternalistic idea that hiding them would serve the indigenous people's agenda best. It is my strong opinion that the opposite is true. If one takes his informants, their internal disputes, and their political struggle for autonomy seriously (regardless of whether one takes a stance in that struggle or not), one has to picture daily reality as accurately as possible, even if this means reflecting conflict and discord.

CONCLUSION

According to both anthropological and legal ethics, the protection of people's privacy, and therefore withholding publication of their real names in writing about their cases, is in their best interest. One of the reasons for this is that there is always a post-trial phase, meaning that disputes are not over after they are resolved, and thus individuals' positions in this later phase should be influenced as little as possible. However, when subjects' names have become known already through earlier publications or because they are public figures, there is no longer any privacy to protect. However, a clear distinction here should be made between external confidentiality (i.e., regarding the outside world) and internal confidentiality (i.e., concerning insiders). That is why the implications of the publication of detailed information for the people involved must be considered on a case-by-case basis. This also applies when writing about communities or populations which are already vulnerable, or if doing so might disturb often fragile power structures. The AAA Code on Ethics specifically draws attention to this. However, this attentiveness does not mean that internal tensions among or between such groups should be hidden. Telling the real story, even when that story involves conflict, is the only option a scholar has.

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NOTES

1. See http://ethics.aaanet.org/ethics-statement-0-preamble/ for the Code of Ethics of the American Anthropology Association (accessed June 4, 2014).

2. Personal e-mail correspondence on May 28, 2014.

3. Snyder (1981), for example, recognizes the pre-conflict or grievance stage, the conflict stage, and the dispute stage, as three phases of the dispute process. Felstiner et al. (1980-1981) went further, identifying what they call the naming, the blaming, and the claiming, as three important aspects of conflict preceding the actual trial.

4. In order to avoid any appearance of impropriety, it seems to make sense for the researcher to clearly indicate that the identities of individuals he or she has named have already been revealed in published or broadcast reports (and to reference those reports). This is the practice that I myself follow.