

Marc Simon Thomas

C U A D E R N O S D E L C E D L A

Legal pluralism and interlegality in Ecuador

The La Cocha murder case

24



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LEGAL PLURALISM AND
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IN ECUADOR

THE LA COCHA MURDER CASE

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LIST OF ABBREVIATIONS

CEDLA	Centro de Estudios Latinoamericanos y del Caribe – Centre for Latin American Research and Documentation
CODENPE	Consejo de Desarrollo de las Nacionalidades y Pueblos del Ecuador – Council for Development of Nationalities and indigenous groups in Ecuador
CONAIE	Consejo de Coordinación de las Nacionalidades Indígenas del Ecuador – Confederation of Indigenous Nationalities of Ecuador
CONFENAIE	Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana – Confederation of Indigenous Nationalities of the Ecuadorian Amazon
DINAPIN	Dirección Nacional de Defensa de los Pueblos Indígenas – Directory of National Defence of Indigenous Peoples
ECUARUNARI	Ecuador Runacunapac Riccharimui; Confederación de los Pueblos de Nacionalidad Kichwa del Ecuador – “awakening of the Ecuadorian Indian”; Confederation of the People of the Quichua Nationality
FEI	Federación Ecuatoriana de Indios – Federation of Ecuadorian Indians
FIPSE	Federación Independiente del Pueblo Shuar del Ecuador – Independent Federation of the Ecuadorian Shuar People
FLACSO	Facultad Latinoamericana de Ciencias Sociales Sede Ecuador – Latin American Faculty on Social Sciences in Ecuador
FUDEKI	Fundación Defensoría Kichwa de Cotopaxi – Foundation of Quichua Defence in Cotopaxi
ILO Convention 169	International Labour Organization’s Indigenous and Tribal Peoples Convention (No 169 of 1989)
MICC	Movimiento Indígena y Campesino de Cotopaxi – Indigenous and Rural Movement in Cotopaxi
MUPP-NP	Movimiento de Unidad Plurinacional Pachakutik Nuevo País – Pachakutik Party
OSG	Organización de Segundo Grado – Organisation of the Second Degree
OTG	Organización de Tercero Grado – Organisation of the Third Degree
UNOCIC	Unión de Organizaciones y Comunidades Indígenas de La Cocha - Union of Indigenous Organizations and Communities of La Cocha

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PROLOGUE

At sunrise, on May 5, 2002, hundreds of *indígenas* came walking down the unpaved mountain road, to the La Cocha community. The sun was still watery, the always present Andean wind was blowing, and the background of sand-coloured hills showed signs of green – a forerunner of the upcoming harvest. The colourfully dress of the women, their red or yellow shawls, purple or bleu wraps, white, woollen stockings and the unmistakable Indian hat, contrasted cheerfully with the blurred, brownish background. Indigenous songs were sung. However, a close look at their faces showed that these *campesinos* were not happy at all. Glances were sorrowful. Quite understandable, considering the fact they were heading to a lawsuit. Ultimately, almost five thousand Indians gathered that day at the dusty plaza of La Cocha ‘...*para hacer justicia*’ (...to do justice). They formed a large circle, and waited for the public execution of three men, 31, 29 and 22 years old, who were under suspicion of killing a 44 year old fellow-villager. Awaiting their trial, these three young men were locked up in a small, tin-roofed prison. They were guarded by a dozen fierce-looking warders, dressed in thick coats as shelters against the blowing cold. As the padlocks were being removed and the rusty metal doors got opened, the three captives were forced by their guards to strip to their underwear. Only dressed in blue shorts and sneakers, one of them was ordered to carry a heavy sack to the main plaza. Because of the weight of the sack, he stumbled with his back bent. Around his neck dangled a cardboard on which in capitals was written: ‘*Yo maté con este desarmador*’ (I murdered with this screwdriver). All the way from the prison to the plaza he was escorted by guardians. At the inside of the large circle, he had to walk a lap. After he had finished his round, the other two were compelled to

do the same. Clearly visible to all the attendants, one of them carried a metal bar. The purpose of this practice was to provide the crowd a good look at the three litigants, and to form a picture of the weapons that had been used.

Meanwhile, in a crowded room in one of the houses near the plaza, a clamorous and well-attended meeting took place. Behind two shaky desks, village leaders were presiding the lawsuit. One at a time they were telling something about the three men or about the killing that had been committed. A young, frightened-looking woman with her six children was sitting in front. Two weeks ago she had become a widow. The remaining attendants were standing, and if one could get a hold of the microphone, one was allowed to provide some information too. Some of them were dressed in a red poncho, the traditional garment of the *Panzaleos* peoples, to which the community of La Cocha belongs. Almost everyone wore an Indian hat. In this particular room, the public hearing of the *cabildo* (village counsel) took place, which was part of the lawsuit in conformity with customary law. One of the penalties read as follows: ‘...*castigados con ortiga*’ (...they are being punished with stinging-nettle). In the meantime some other men were counting banknotes. The sum of money was being counted and recounted. All of it were small notes: of ten, twenty dollar maximum. The men were counting upon a sum of six-thousand dollars, the fine to which the three accused were being passed sentence on. The money had to be paid to the widow and her children as a compensation for the loss of their husband and father. As it became clear that the three litigants never could provide such a large sum by themselves, it was expected that their family-members would bail them out. Everything was written down accurately in a so-called *Acta*.

After the three convicted men had completed their laps, they had to wait, shivering from cold. Considering the amount of stinging nettle that was put in the middle of the plaza, it was not hard to imagine what would follow next. As soon as the widow, her children and the *cabildo* had joined the crowd, the next part of the public lawsuit could commence. Firstly, the three men had to lay down, ventral side, in the stinging nettle. Secondly, they were beaten thirteen times on the back of their upper legs, with a whip. After this punishment was executed by *dirigentes* of neighbouring communities, women poured ice-cold water over the three convicted men. Soaked to the skin they were finally allowed to get dressed, before they were expelled from the village.

The above narrative of what happened in La Cocha on May 5, 2002, is my description of what was shown on Ecuadorian television

a few days after its occurrence. '*Todo es parte de un proceso de purificación*' (This all is part of a purification ritual), as the reporter finally would explain. Since I conducted my research for this study in 2007, I actually did not see it when it was broadcast nationwide. Five years later, however, I watched it as a dvd copy was put at my disposal by the television channel ECUAVISIA. The broadcast of this three-minutes commentary of an indigenous lawsuit caused a lot of commotion at the time, not only in the nation but also among lawyers. Therefore, it became the start of one of the most striking criminal law cases in recent Ecuadorian juridical history. The reason why it is of such interest for this legal-anthropological study is twofold. Firstly, it provides a good overview of the nation's contemporary juridical state of affairs, and secondly, it provides a clear and innovative insight into how this current position has its effect on customary law. Consequently, the La Cocha indigenous lawsuit and its subsequent criminal lawsuit are at the centre of this study.

INTRODUCTION: RESEARCH QUESTIONS AND FIELD SETTING

As the title indicates, this study is about legal pluralism and interlegality. Its main objective is to add something to the analytical elaborations on the latter topic. The underlying research has been conducted in Ecuador because since 1998 the country formally recognized customary law and therefore legal pluralism. As a legal anthropologist it does interest me how such a situation works out in daily practice. In this study legal pluralism is understood as the presence in a state of more than one legal order. The mixing of elements of these legal orders is called interlegality – one could compare it to the situation of religious syncretism. Boaventura de Sousa Santos is considered as the founding father of the term interlegality. However, it has been André Hoekema who has elaborated its scientific basis. Among other things, he states that in the situation of formal legal pluralism so-called conflict rules – i.e. rules that determine the legal order which is applicable to specific situations – affect the process of interlegality. Hoekema's analytical elaboration of interlegality is the main theoretical notion that will guide this study. As will be shown, Ecuador provides a situation of formal legal pluralism without conflict rules. Such a situation has not been attended to by Hoekema's work. That is why this study's central question is: what happens to the process of interlegality, given the situation of formal legal pluralism, but *without* escorting conflict rules?

Legal pluralism is opposed to juridical monism, which signifies that there can be only one law or one juridical system produced by the state. When national law does not recognize the existence of another legal order, for instance customary law, although this order is being applied

in reality, this is called real, or factual (*de facto*) legal pluralism. If this situation has been formalized, official, or formal (*de jure*) legal pluralism comes into being. Since the past decades, legal pluralism has been the main focus of legal anthropology. Earlier legal anthropologists, often working in a colonial situation, were concerned with law, norms, and regulation in 'primitive' society. Working first from a socio-cultural evolutionist perspective followed by a structural-functionalist perspective, they studied the workings of local village societies as isolated phenomena. From the 1970s onwards, legal anthropologists increasingly came to realize that local law, like other domains of social life, cannot be understood outside its wider context, and started focusing on the way socio-legal structures are shaped, mediated through human agency, in relation to each other. Building on the concept of semi-autonomous social fields, as developed by Moore (1978, pp. 55-56), legal anthropologists began to analyse the complex and ambiguous relationship between customary law on the one hand and national law and the wider society on the other. A general present-day perspective on legal pluralism allows us to speak of coexistence of two or more legal orders in the same social field, which should be understood as a plurality of continually evolving and interconnected processes in wider power relations.

For a long while, legal pluralism was considered as a plurality of different, independent, static legal orders. Traditional legal anthropology conceived legal pluralism as separate entities coexisting in the same political space. As the above mentioned interconnectedness suggests, contemporary legal anthropologists point to its contextual dependency and its flexibility. In consequence, national law and customary law do not exist the one next to the other as self-contained entities. On the contrary, there has been and there is a constant interpenetration between them (Hoekema, 2005, p. 6). This blending is called interlegality. In other words: interlegality is a result of legal pluralism (De Sousa Santos, 2002, p. 437). Although De Sousa Santos describes interlegality thoroughly, he does not provide an analytical explanation, not even in his voluminous study *Toward a New Legal Common Sense* (2002). At any rate, that is Hoekema's opinion. He intends to fill this gap in his oration *Rechtspluralisme en interlegaliteit* (2004):¹ 'although he [De Sousa Santos, MST] uses the concept of mixing these orders "in our minds, as much as in our actions" and gives us interesting cases, I venture to say that my stress on the mixing itself and the mixed outcome of this process takes the study of concrete cases of interpenetrating legal orders a step further' (Hoekema, 2005, p. 11). As he puts it, 'interlegality is

not just an accumulation of distinct elements, it provides a hybrid new legal order' (Hoekema, 2004, pp. 18-24). It is an intermingling of concrete norms, as well as an adoption of values which accompany these norms and give them sense. Hoekema provides an example in the usage of an *Acta* by indigenous leaders. This *Acta* resembles a written sentencing of a formal court. When the fulfilment of this judgement is brought into question, the parties involved will rather rely on what is written down than consult, for instance, the elders and their memory. So, this blending takes place through behaviour, as well as through meaning. As a phenomenon, interlegality has already been common in legal anthropology for decades. Considering this fact, Hoekema posits the problem: is it possible to conduct research on typical features of a certain group's legal order. Fortunately, he provides the answer himself: research on a distinct legal order can be done, considering the fact that during the process people continually draw lines between their own legal order and that of the other. By refusing strange norms or values they express their peculiar values. This is what he calls an ethnic reconstruction. In line with the concept of semi-autonomous social fields, Hoekema argues that indigenous leaders do not get a free hand in this reconstruction. From the top-down they are being influenced by the dominant national law, but pressure from bottom-up has to be taken into account as well. In case of a situation of formal legal pluralism conflict rules will guide the process of mixing customary law and national law. According to Hoekema (2005, p. 15): 'the moment local law is recognized formally as partner in the national legal order, conditions for interlegality may change, even drastically. But this is a two-edged sword. One often hears comments like this: official recognition will automatically provide better chances for local legal perceptions to resist assimilation and these views will even be respected by and blended into majority law. Such conclusions are not warranted at all. Legalizing local law may well deal a final and fatal blow to its (semi-) autonomous existence.'

Besides the above mentioned reason of the actual situation of legal pluralism, the research for this study has been conducted in Ecuador because of the presence of a large indigenous population. Ecuador is one of the smaller countries in South America, located on the west coast and straddling the equator. It is bounded to the South and the East by Peru, and to the North by Colombia. The chain of the Andes Mountains divides the country into three different zones, the coast (*Costa*), the highlands (*Sierra*), and the interior (*Oriente*). The highlands are made up of three northward-trending divisions: the two *Cordilleras*

and the Inter-Andean Valley, which lies between them. Ecuador has a population of approximately 13.5 million people, of which one-third is considered being indigenous. Its indigenous peoples are distinguished as highland Indians, Indians from the interior, and Indians living near the coast. The highland Quechua Indians form the greatest ethnicity, or nationality as they call themselves.² It was the national indigenous confederation CONAIE (Consejo de Coordinación de las Nacionalidades Indígenas del Ecuador – the Confederation of Indigenous Nationalities of Ecuador) which was held responsible for the constitutional changes in 1998, due to which the country legally acknowledged its pluri-cultural and multi-ethnic character.³ One of the remarkable features of this acceptance was the recognition of indigenous customary law along with national law, through which formal legal pluralism came into being. Compared to five centuries of actual legal pluralism, in which national law was considered the only officially applicable law, and customary law – at best – was being tolerated only in the absence of national law, this was quite a transformation.

Due to colonialism, a situation of actual legal pluralism had come into being. Since time immemorial, justice had been done according to *derecho consuetudinario* (customary law), which was based on a particular *cosmovisión*,⁴ but, from the first half of the sixteenth century on, the rules of the Spanish Crown overruled it. During colonialism customary law could only be applied in the so-called *República de Indios*, as long as it did not conflict with the interests of the Spanish Crown, nor was in conflict with what was thought of public morality. This segregationist policy was replaced by an assimilationist model from 1830 on. The new independent Republic of Ecuador aimed at formally sweeping away the indigenous world, including its legal systems. The identity between law and state was characterised by monism. However, customary law continued to be practised, so the situation of real legal pluralism kept on existing. From the late nineteenth century on, *indigenista* movements began to emerge who drew attention to an indigenous perspective; the absence of indigenous people from constitutional texts and the disappearance of their rights began to be questioned. This led, among other things, to a limited acceptance of communal land tenure, combined with some autonomy, where customary law could be practised (Lyons, 2001, p. 24; Yashar, 2005, p. 95). However, this integrationist model still hung on to juridical monism. This all changed when Ecuador – due to interference of the indigenous movement CONAIE – became a pluri-cultural and multi-ethnic state, and gave constitutional recognition to indigenous jurisdiction and customary law in 1998.

Developments in Ecuador do not stand alone. Over the past two decades or so new constitutions have been proclaimed in a series of Latin American countries; all of them acknowledging the cultural and ethnic diversity or the pluri-cultural and multi-ethnic character of Latin American states.⁵ This development is undoubtedly related to a renewed vigour and increased visibility of indigenous peoples' movements. Furthermore, Latin American states have been among the first to ratify the ILO Convention 169 concerning indigenous and tribal peoples in independent countries, giving it the status of national law (Assies, 2000, p. 3).⁶ So, not only Ecuador, but most of the continent embraces step by step the situation of formal legal pluralism. However, the CONAIE has been considered as one of the most influential and strongest indigenous movements in Latin America. Although it is doubtful whether it still is (Baud, 2007; Clark and Becker, 2007, p. 2; Korovkin, 2006; Van Cott, 2005, pp. 229-234), the constitutional changes it achieved are considered among the most sweeping in the region (Andolina, 2003, p. 724). That is why it is interesting, ten years later, to analyse how the situation of formal legal pluralism worked out in practice. The concept of interlegality provides an interesting analytical tool to do so.

In the first instance, the aim of the research that proceeded this study was to analyse which scenario of Hoekema's analytical elaboration on interlegality would apply to the present-day legal situation in Ecuador. Considering its circumstance of formal legal pluralism it seemed to be relevant to conduct research on conflict rules, in order to analyse whether these rules provided more or better opportunities for customary law to sustain, or whether they proved to be its knockout. However, at an early stage it became clear that no conflict rules had been developed yet! As stated before, that specific situation had not been attended to by Hoekema. Therefore, this research provided an opportunity to add something new to his elaboration. For such a specific situation the term *interim* shall be introduced in the final chapter of this study.

Methodology

The study is based on qualitative research: fieldwork was done in Quito, in Latacunga and in Zumbahua from mid-June until mid-August 2007. Ecuador is at a stage at which it learns to deal with formal legal pluralism. Given that context, this study focuses on the process of interlegality by investigating the La Cocha murder case of 2002. Its major strategy is

that of a case study, because it is an empirical inquiry that investigates a contemporary phenomenon within its real-life context, considering that the boundaries between the phenomenon and its context are not clearly evident (Yin, 2003, pp. 13-14). Because of the relatively short period in the field, this study does not depend solely on participant-observer data, but on (in)formal interviews and texts found in libraries, bookshops and archives as well. Conducting scientific research on lawsuits, by using a similar strategy, has been done before. In *Practicing Ethnography in Law* by Starr and Goodale (2002) – a book in which several strategies on legal anthropological research have been drawn up – Engle Merry (2002, p. 137) demonstrates that archival research in combination with ethnography is essential to demonstrate the linkages between lawsuits and changes in a social order.

Much research in Latin America on legal pluralism, and recently on interlegality, has been done. These investigations provide good reference material, although detailed differences always will exist. Take for instance the article ‘The Battle Field of Water Rights’ by Boelens and Doornbos (2002). They did fieldwork in the Chimborazo province between 1992 and 1997 on water rights and how customary law adapts to changing circumstances. Because they provide such a good insight in the concept of forum shopping in combination with Moore’s theory on semi-autonomous social fields, their results will come up for discussion further on. However, Boelens and Doornbos do not pay attention to the difference between actual and formal legal pluralism, nor to interlegality. The main reason though why a thorough comparison falls short is that they do not pay attention to the role of judicial and executive branches of the state. From that point of view, the article ‘Autonomy Rights and the Politics of Constitutional Reform in Mexico’ by Assies, Ramírez Sevilla and de Ventura Patiño (2006) provides better reference material. They take a close look on constitutional changes in the Michoacán province in Mexico by investigating the bottom up discourse on identity politics and the politics of recognition top down. Their conclusions on these two forces are applicable for this study. For that reason, their results shall be taken into account further on as well. Closest to this study comes the doctoral research conducted by Orellana Halkyer in the years 2000 until 2002. Orellana Halkyer aimed specifically at the process of interlegality in two *resguardos* (Indian reservations) in Bolivia. His dissertation also shall be discussed later. However, no research has been conducted in Latin America in a context of formal legal pluralism while conflict rules are lacking. This study aims at filling that gap.

It is argued that, by and large, the drawback of qualitative research and conducting a case study in particular, is its reliability. For that reason I have carefully documented each step in my research as fully as possible. In accounting and bookkeeping I have always been aware that any assertion must be capable of being audited. I have started my preparations at the end of 2006 by attending two specific academic courses on my research topic and setting.⁷ Afterwards, the two teachers involved became my supervisors during my research.⁸ During the proceeding months I did not only study literature, I also made contact via email with local scholars who could be of any help during my fieldwork. In May 2007, Fernando García of FLACSO (Facultad Latinoamericana de Ciencias Sociales Sede Ecuador – Latin American Faculty on Social Sciences in Ecuador) promised me his help.⁹ Once arrived in Quito, he put me almost immediately on the right track to the La Cocha murder case. Through him I was able to make contact with important informants like Lourdes Tibán, Raúl Ilaquiche en Carlos Poveda.¹⁰ They provided easy access to organizations like the FUDEKI (Fundación Defensoría Kichwa de Cotopaxi – Foundation of Quechua Defence in Cotopaxi) and the MICC (Movimiento Indígena y Campesino de Cotopaxi – Indigenous and Rural Movement in Cotopaxi), both established in Latacunga. Through these organizations I got introduced in the *parroquia* (parish) of Zumbahua and in the La Cocha community. Thanks to these people and organizations I was able to meet with all my informants in an indirect and informal way.¹¹

I stayed in Quito, and spent a great deal of time there because the major libraries, bookstores and archives are located in the capital. During those months, I paid four three-days visits to Latacunga in order to meet Carlos Poveda (judge on the La Cocha murder case) three times, to conduct archival research at the *Juzgado de lo Penal de Cotopaxi* (Court of criminal law in Cotopaxi), and to attend a conference on customary law. During the entire time of my research, I carried a writing pad with me, which I filled with notes of my observations. Every evening I transcribed these jot notes into field notes. I also wrote the numerous interviews and informal conversations out as soon as possible. All of these expanded field notes are filed on my laptop. To be as consistent as possible, I also kept a log and saved all my – mainly reflective – emails to the home front.¹² Finally, I filed the numerous pictures I made with my digital camera on my laptop as well. Literature of specific relevance was found in libraries and bookstores, but most of the primary sources were located in archives in Quito and in Latacunga and on the internet.¹³ During the research, I have made a start

in analysing and commenting on this data; these meta notes were filed too. In short, I conducted my research as if someone was constantly looking over my shoulder.

As DeWalt and DeWalt (2002, p. 81) state: ‘the ‘quality’ of ethnography [in order to approach the reliability problem, MST] will vary depending on the personal characteristics of ethnographers, their training and experience, and perhaps their theoretical orientation. As interpretive anthropology makes clear, all of us bring biases, predisposition, and hang-ups to the field with us and we cannot completely escape these as we view other cultures.’ That is why I think it matters to make these biases as explicit as possible, by reflecting on myself as a researcher. In 1992, I graduated with a law degree from the University of Leiden, The Netherlands. I was employed in a juridical post for a couple of years, and experienced how to read and interpret juridical texts. In 2006 I received my bachelors degree in Cultural Anthropology at Utrecht University. A year and a half later, I received my masters degree in Latin American Studies at CEDLA in Amsterdam.¹⁴ This combination of experience and knowledge proved significant in conducting the underlying research and finally in writing this study. I was able to read (literally) the juridical texts as a jurist, and I could ‘read’ (figuratively) what actually happened in the field as an anthropologist. However, since I lack profound knowledge of Ecuador’s legal system, I have conducted the research as a legal *anthropologist*, and not as a juridical scholar.¹⁵ Although I have tried to be as objective as possible, still, this study is an account of my presence in the field and of my interpretation and analysis of the data. Therefore this study is not entirely free from value judgements.

In addition to its reliability, the validity of qualitative research can be a tricky problem. A major advantage of qualitative research, though, is its flexibility in the usage of the different research methods. One can continue to ask questions or to conduct in-depth research on data as soon as this proves to be relevant. It is even possible to change one’s central question, as I gladly experienced the moment I discovered that no conflict rules had been developed as yet; my initial aim changed to analyse which scenario of Hoekema’s analytical elaboration on interlegality would apply to the present-day legal situation in Ecuador. During my first week in the field I could switch to try to add something new to that elaboration. I have tried to guarantee the internal and external validity of my research in several ways. I made use of different data sources and of methodological triangulation, and I used the opportunity to ask feedback on my progress-so-far from my informants, for instance

from Carlos Poveda and from Fernando García. The latter was so kind to spare me – on a regular basis – some time to discuss my progress, thoughts and doubts. I spent a great deal of time on thinking whether my findings could be generalized beyond this immediate case study. I have overcome that difficulty in my conclusion, by stating that in similar cases similar things could occur. As I said before, it is quite imaginable that in other situations, when formal legal pluralism comes into being, profound conflict rules do not immediately exist, but rather have to be developed in time. Therefore, this study's conclusion can be generalized to a larger universe.

The outline of this study is straightforward. Starting with a general overview of the theory, it zooms in on a contextual relevant setting, in which a specific case is being analysed. In view of that small case, finally a larger conclusion is being drawn. The second chapter aims to provide a summary of scholarly literature on the main topics: customary law and interlegality. However, it starts with an bird's-eye-view on the development of legal anthropology as a coordinating and independent discipline. Aligned with what Von Benda-Beckmann (2001, p.18) wrote: 'This [kind of, MST] research is characterized by a high degree of regional [...] diversity', I shall use as much as possible literature of Latin American scholars, or of studies related to the Latin American region. The next chapter focuses on the process of acceptance of the situation of formal legal pluralism in Ecuador, as has been demonstrated after the constitutional changes in 1998. The first section provides a historical overview of the proceeding five centuries of real legal pluralism. The second and third section are about the failure of developing legislation and jurisprudence, which should have guided the process of accepting formal legal pluralism. Section four is dedicated to a couple of side-projects that were carried out. Despite all good intentions, it shows that the two legal systems do not go together with each other smoothly, and that this prevented the development of conflict rules. In the penultimate section, I will attempt to explain why this process is tough going. The last section of this third chapter provides a premature conclusion. A killing in April 2002 in the La Cocha community gave cause for the first lawsuit, and to the present day the only, in which a judge legally recognized customary law. That murder case is the central theme of the fourth chapter. Its first section describes in detail what happened. The second section is about the community's context and its population. Section three provides insight in the customary lawsuit; section four does the same concerning the ensuing formal lawsuit, and section five is about this

lawsuit's aftermath. This chapter ends with a premature conclusion too. The final chapter summarizes it all, draws conclusions on accentuating Hoekema's analytical elaboration on the process of interlegality, and it provides an answer to this study's central question. It will be proven that this study succeeds in providing a general supplement to Hoekema's study. After all, in similar situations, when formal legal pluralism comes into being, it probably too will be an interim, to develop conflict rules. Consequently, this study's analysis and conclusion not only prove their relevance for Ecuador, but they could be applicable in comparable situations as well. Finally, this study will be balanced with an epilogue written by André Hoekema, in which he comments on the findings of this study.

THEORETICAL ACCOUNT

‘Cuando un pueblo ha perdido la vigencia de su derecho tradicional, ha perdido también una parte esencial de su identidad étnica, de su identidad como pueblo, aún cuando conserve otras características no menos importantes para su identidad. En América Latina, los pueblos indígenas de mayor vitalidad étnica son aquellos entre los cuales subsiste el derecho consuetudinario propio.’¹⁶

Rodolfo Stavenhagen¹⁷

Anthropology of Law: a bird’s-eye-view

Anthropology of law has developed – initially as a sub discipline of cultural anthropology – into an independent discipline, with its own development of theories on legal pluralism. A general present-day perspective on legal pluralism allows us to speak of coexistence of two or more legal orders in the same social field, which should be understood as a plurality of continually evolving and interconnected processes in wider power relations. The underlying debate on legal pluralism is an older one, which in Latin America goes back in history to the sixteenth century. An important issue then was: is the qualification law exclusively to the law of the Spanish Crown, or can other normative orders meaningfully be labelled as law as well? On the basis of two articles: ‘Costumbre, ley y procesos judiciales en la antropología clásica: apuntes introductorios’ (2002) by De la Peña and ‘Los debates recientes y actuales en la antropología jurídica: las corrientes anglosajonas’ (2002) by Sierra and Chenaut, I shall sketch legal anthropology’s maturation. Six scholars who gave this field of study its own character will pass under separate review in the first part of this section. It is typical that they mainly dealt with small-scale, closed, untouched societies – the colonial state and its representatives were disregarded. The second part deals with three paradigms in legal anthropology and also analyses Moore’s concept of semi-autonomous social fields.

Legal anthropology's development began by the jurist and historian Maine and by the sociologist Durkheim. They had, as was common practice at the end of the nineteenth century, a socio-cultural evolutionist view on the issue of legal conceptions. Maine attempted to lay out the difference between the legal conceptions found in ancient communities and those in modern (i.e. nineteenth century England) society, and he argued that these conceptions evolved through time. This evolution differed per society as a result of the historically changing relationship between state and authority. He contended that archaic communities were held together by sentiment, or instinct, which was generated by kinship. Eventually kinship was replaced by the principle of local contiguity, or in other words, society based on blood relationship (*ius sanguinus*) evolved to society based on geographic boundaries (*ius soli*). A consequence of this development was the coming into existence of public space to which law adjusted. With his phrase 'from status to contract', he meant that one's legal situation originally was determined by place in the family, but later was negotiated by oneself (De la Peña, 2002, pp. 52-56; Moore, 2005, pp. 20-22).¹⁸ Durkheim's explanation is different. He stated that in traditional societies everyone was more or the less the same, and therefore communality was mechanical. The law's aim was to be repressive; it served as a tool to prevent deviant behaviour. In modern societies, though, the highly complex division of labour resulted in an organic solidarity. That is why, he argued, the law's aim was to be restrictive. In a way it tried to anticipate potential conflicts (De la Peña, 2002, pp. 56-59).

Durkheim was among the first who analysed how law functioned. In traditional societies, with a mechanical solidarity, justice was done by the community itself. In modern societies, with an organic solidarity, law became a specialization. In the early years of the twentieth century, the anthropologist Malinowski disagreed with Durkheim's ideas of law originally being repressive. According to Malinowski, in every society, repressive rules do exist simultaneously. All societies do have some sort of law, although Malinowski divided it in norms with and norms without a formal authority who guaranteed these norms (Collier, 1995, p. 46; De la Peña, 2002, pp. 60-62). The point of departure of Radcliffe-Brown was, however, that solidarity and norms together defined equilibrium in society. Norms should be guaranteed by the use of coercive force, applied by a tribunal or specialized body. The aim of sanctions was to restore balance. Contrary to Malinowski, Radcliffe-Brown distinguished law from other aspects of social life, which could be of a moral or religious nature (Collier, 1995, p. 47; De

la Peña, 2002, pp. 62-63; Yrigoyen, 1999, p. 24; Yrigoyen, 2000, p. 200).¹⁹ Bohannan, for his part, completed Radcliffe-Brown's thoughts mid-twentieth century. According to Bohannan, no distinction should be made between customary law and national law, when it comes to the obligation to comply to them. Customs apply to everyone and in many different social spheres: family, church, at work, et cetera. Although no formal law existed in traditional societies, they did have tribunals to solve conflicts. This, however, could not be described in a Western, legal way. Gluckmann, on the other hand, did see no harm in describing tribal law by using Western terminology.²⁰ Law should be understood as a homeostatic mechanism, employed within a given social group to manage conflicts and to maintain order (De la Peña, 2002, pp. 65-66; Sieder, 1997, p. 10; Yrigoyen, 2000, p. 200). According to De la Peña (2002, p. 67), Gluckmann is the only one who recognized customary *law*. Every earlier mentioned scholar did, in one way or another, make a distinction between custom and law.

The above-mentioned development through the last century is called the normative paradigm by Sierra and Chenaut (2002, pp. 116-23). This paradigm supposes general rules that apply for everyone, and aim at the maintenance of order in a society. Research concentrated on authorities and institutions, and less on social processes. Conflicts were considered as deviant behaviour, and through analysing decisions of authorities and institutions, in combination with the power they exercise, one could ascertain the underlying norm. A second paradigm, which came in fashion during the second half of the twentieth century, considered conflicts as part of normal social behaviour, instead of looking upon it as an exception. In analysing norms and conflicts, one should carefully pay attention to the arguments of, the negotiations between, and the compromises of the concerned parties, instead of looking at authorities or institutions (Sierra and Chenaut, 2002, pp. 123-129). Both paradigms can be criticized: either they overestimate the role of authorities or institutions or they pay too much attention to social processes. And, it could be added, that both of them regard law as an autonomous phenomenon, disregarding its context. The present-day paradigm, as is argued by Sierra en Chenaut (2002, p. 161),²¹ takes the context in consideration, which means it takes (historical) power relations and changing social relationships into account. Starting from the 1970s, legal anthropology has developed a growing awareness that legal orders are not independent of other social systems. A legal order bears clear cultural elements, and therefore its context should always be

taken into account. In other words, law stands in relation to the state, and vice versa (Collier, 1995, p. 61; Nader, 1969, p. 10).

Three decades ago, legal anthropologist Moore, with her concept of semi-autonomous social fields, analysed this relationship with the state in a fascinating way. She argued that a small social field is capable of ‘generating rules and customs and symbols internally’. However, in doing so it is semi-autonomous: ‘it is vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded’ (Moore, 1978, pp. 55). Add to this, that the parties concerned in the field hypothetically could mobilize national law, or could threaten to do so. This too, has its impact on its internal capacity of making rules. On the other hand, the field does have means to induce or coerce compliance (Moore, 1978, p. 56). In a way, these fields do have some sort of autonomy, because ‘the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or non-compliance to state-made rules’ (Moore, 1978, p. 57). Moore’s concept is often cited by authors to explain customary law’s flexible and adaptive character, which are at the basis of the process of interlegality. Before this study examines that phenomenon further, it is necessary to deal with customary law at greater length.

Customary law: some characteristics

Literature does not provide an univocal definition of customary law.²² However, some characteristics can be deduced. Customary law on the one hand is distinct from national law, but on the other hand, it depends on it as well. It is generally understood to mean a set of unwritten, flexible, local, obligatory to a specific community, norms and practices. Because these norms and practices apply in a community, they are different from normative orders which exist within smaller social groups like a family; that would stretch the rules too much.²³ It is vital to recognize, that customary law can hardly be understood in essentialist terms (Assies, 2003, p. 167). To grasp what this means, it is necessary to provide an outline, starting with the term *indigenous*, or *indígena*. Although the term does have numerous definitions (Tibán, 2001, pp. 32-35), this study endorses the one given in the ILO Convention 169, article 1 (b):²⁴

This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the

national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

This definition emphasizes the fact that it is about a group of people, with a more or less acknowledged primordial claim, that hold on to their social, cultural and institutional principles. Organizations like the United Nations and The World Bank, use the often quoted working definition by Martínez Cobo, which specifically points to their legal systems.²⁵ However, indigenous people in Latin America for the most part stick to the ILO Convention 169 when the occasion rises. This study will also follow this ILO definition.

Customary law, instead of Western positive law, is not a system of law that is specialized or isolated; it is part of social life. Western, positive law in this study is understood as the theory of law from the perspective of Kelsen, who distinguishes between juridical norms and moral and religious ones. Moral norms are subject to – sometimes occasional and diffuse – social sanctions, and religious norms are limited to the threat of punishment in the hereafter. Positive law is made by man: written, formalized, general and applied by a bureaucracy. Customary law does not have this stringent distinction and it regulates a wide range of spheres of social life. It could concern collective land tenure, marriage, family relations, inheritance, conflict settlement, as well as principles and mechanisms for social regulation, and the organization of public order. It also includes norms or criteria designed to create such norms and to appoint authorities. In Latin America these norms and regulations have a strong coherence with *cosmovisión* (Assies, 2001, p. 84; García, 2004, pp. 30-32; Yrigoyen, 2000, pp. 200-203).

According to the jurist Yrigoyen, it is basically incorrect to use the term *customary* law, because *custom* has its own specific meaning in law. In her study *Pautas de coordinación entre el derecho indígena y el derecho estatal*, she distinguishes between the meaning of *la costumbre, usos y costumbres, usos y convenciones* and *derecho consuetudinario* (Yrigoyen, 1999, pp. 14-16). She argues that according to Roman law, which is at the basis of Western law, the term custom stands for a repetition of events, which, after it is secured in human consciousness, is considered as a binding norm. Yrigoyen's argument does make sense when

it comes to a distinction between the juridical term custom and the phenomenon of customary law. In Western law, custom is one of the formal sources of law. In that case, there has to be a repetition of juridical facts, a course of action in a set circle that, because of its repetition, establishes an expectation. This becomes juridically relevant as soon as people anticipate that expectation. It emphasizes a static meaning of custom. Because one of the characteristics of customary law is its flexibility, the adjective custom should be avoided, as Yrigoyen argues. Nevertheless, in my opinion it is semantical pettifoggery, when this is the only argument to avoid the use of it. Especially when, as she argues herself (2000, p. 199), ‘the term is employed both in international conventions and internal norms in order to make a reference to the judicial systems of “minority groups” – as distinct from national law – and as a synonym for indigenous law’. However, I do think there is a good argument to avoid the basis term customary law.

It has struck me that in Dutch literature different terms are used to express the same phenomenon: *gewoonterecht*, *inheems recht*, *volksrecht* or *adat-recht*. In English or Spanish literature I observed the same: customary law, traditional law, indigenous law, tribal law, folk law, or *usos y costumbres*, *derecho consuetudinario*, *derecho indígena*, *justicia tradicional*, *derecho originario*, *ley indígena*. All these expressions more or less attempt to allude to what is described as customary law. One can argue against all of these terms in different ways: they refer to a presumed unchanged past, they refer to the existence of just one version, or they emphasize its colonial character too much (Von Benda-Beckmann, 2001, p. 20). An explanation could be found in the term’s history. Originally, it had been used in a colonial context. It was used to describe situations in which dominant formal rules deferred to local practices. For instance, the British in Africa and India used customary law in order to administer and exploit their colonial subjects more efficiently (Sieder, 1997, p. 9), or like *adat* was applied by Dutch governmental institutions in Indonesia (Von Benda-Beckmann, 2001). Colonial rulers used this kind of legitimizing or formalizing of local practices in order to apply their judicial domination over large areas, not having enough manpower themselves (indirect rule). In addition to this, Sieder (2001) states that in Latin America the term *usos y costumbres* is used to refer to the customs of indigenous peoples that are supposed to have their origin in pre-colonial times. These *usos y costumbres* emphasize the indigenous identity. This is especially relevant for indigenous peoples in Latin America, because of their recent fight for recognition of identity and rights. Based on this identity claim, it

is obvious to translate *usos y costumbres* into indigenous law, whereas a literal translation pleads for customary law. However, to determine a thorough terminology to describe the norms and rules that are being used in and by a community – in addition to or instead of national law – it is my opinion that the term customary law serves this purpose best. To this could be added that the term indigenous law has an unwanted universalistic, essentialist or ethnocentric flavour. Compare Sieder and Witchell (2001, p. 217), who warn for having a fetish for or reifying custom or tradition, which undermines the flexible character of the phenomenon. Based on this, it could be concluded that the term customary law does not completely cover the rights of indigenous peoples. It would be better to use the compound term indigenous customary law. However, for readability purposes, this study will continue to use the term customary law.

The characteristics of customary law read as follows. Firstly, customary law is generally understood to mean a set of unwritten norms and practices that are orally administered – rhetoric, persuasion and argumentation play an important role (Assies, 2001, pp. 88-89; Sieder, 1998, p. 107). It is not only about norms, it also concerns the agreements when these norms are violated as well. Even the choice of the local authorities involved and their procedures form a part of customary law (ASIES, 1994, p. 47, cited in Sieder, 1997, p. 8). Depending on the circumstances, it could be applied by a wide range of bodies, from family elders, shamans, village elders, to tribunals, and also a decision often was made in consultation with the community in order to get as much as approval as possible (Hoekema, 2003, p. 183; Yrigoyen, 2000, p. 203). Secondly, a major characteristic of customary law is that it is neither uniform, nor fixed, norms and customs can even vary between neighbouring communities (Boelens and Doornbos, 2002, p. 218; Sieder, 1997, p. 9). Finally, it is of vital importance that it is recognized as obligatory by the majority of the community in question. Some authors add to this that it should have been practised for various generations,²⁶ but I disagree with that criterion. Like national law, customary law is a social construction (Geertz, 1983), and therefore in principal it is liable to changes at any time.

Customary law develops in and by daily practice. Although it is often looked at as authentic or traditional, this certainly is not always the case (Sieder, 2001; Von Benda-Beckmann, 2001). A second ingrained prejudice, namely that customary law is a perfectly fair and harmonious system, should be considered as a persistent fable (Assies, 2001, p. 88; Sieder, 1998, p. 106). However, it has a sustained effort

in maintaining the status quo within the community in question. It is strongly attached to reconciliation and it tends to give compensation and restitution to the victim, instead of punishment. And even when someone is punished, this will be done in public so it could serve as a warning. Apologies of the perpetrator are highly appreciated because they provide a basis to live in harmony together again. Aid to the victim plays an important role as well. Sanctions are imposed in relation to the damage that has been done. For instance, if the head of the family is injured because of a fight, the offender might be forced to take over his work in the field (Handy, 2004, pp. 553-557; Sieder, 1998, pp. 107-109; Yrigoyen, 2000, p. 203).

Customary law is locally applied by a community instead of or in addition to formal national law (Stavenhagen and Iturralde, 1990, p. 29, cited in Sieder, 1997, p. 8; Von Benda-Beckmann, 2001). Its relation to the state is a crucial issue when the phenomenon is subject of research. The study of customary law should not only concern norms, practices and authorities. The main concern should be the questions of why and when customary law is being practised, and how this evolves. In a way, the earlier mentioned classic legal anthropologists were interested in constructing and reconstructing the pre-colonial systems of native law, as if customary law was authentic (Moore, 2005, p. 2; Moore cited in Hoekema, 2004, p. 45, note 78). The aforementioned present-day paradigm does take wider power and social relations into account. Customary law is considered a form of resistance, as a strategy of the indigenous peoples to maintain their autonomy against the hegemony of the state and national law. As a marker of identity, it creates and maintains a socio-cultural boundary with other groups with whom interaction takes place (Collier, 1995, p. 61; Merry, 1988, p. 878; Sieder, 1998, pp. 105-106). From that point of view it is interesting to shed more light on the phenomenon of legal pluralism.

Legal pluralism: an illustration

Legal pluralism is the opposite of legal monism. The latter perspective claims that national law is the only normative order that can be called law because it differs fundamentally from other normative orders, while the former states that other normative orders could be called law as well, as they resemble in important ways national law (Von Benda-Beckmann, 2001). One of the effects of legal pluralism is that – some – inhabitants of a state coercively, and often conflictingly are tackled on their conduct (Hoekema, 2004, pp. 6-7). Since several decades,

the significance of legal pluralism as an analytical concept has been under heated scholarly discussion. This theoretical controversy has its origin in the question about the scope of the term law (Von Benda-Beckmann, 2001). Roughly, the debate according legal pluralism has two scholarly movements. Firstly, those with a centralistic perspective on law claim that (written) national law can and should be the only formal normative order, and because of that they reject legal pluralism as a concept. On the other hand, those with a decentralist perspective on law do recognize legal pluralism as a comparative-analytical as well as a legal-political concept.

Hoekema (2004, p. 17) states that the controversy mentioned above mainly is a juridical problem. With that statement he points to the juridical questions that arise when customary law is formally recognized, because pluralism in law in itself is not an uncommon phenomenon. After all, in positive law deviate rules do exist; take for instance the protection of professional confidentiality of lawyers or doctors, or specific rules according legal restraint which depart from common rules. The reason why (generally) legal scholars reject the concept of legal pluralism when it concerns customary law is that the characteristics of it contravene with those of positive law: unwritten, unique and flexible rules versus written, general and certain rules. This raises the question: how to deal with it? Legal pluralism can also be approached from a social scientist perspective, as legal anthropologists do. They raise a fundamental different question: how does it work out in practice? Understanding legal pluralism presupposes an open legal mind. Law should not be seen as an autonomous sphere of activity, but as part of a greater social whole in which power, dominance, autonomy and resistance play a crucial role. One should also be willing to recognize other peoples' law, even if that normative system does not recognize punishment as a sanction, or if it is supposed to be based on a certain *cosmovisión* (García, 2004, pp. 30-32).

In the colonial and postcolonial era, real or factual legal pluralism seems to have always been the case (Hoekema, 2004, pp. 6-7; Yrigoyen, 2000, p. 197). The Spanish Crown introduced its own, written legal system and tolerated customary law to a certain extent. This latitude was restricted after independence, but the use of customary law never totally disappeared. In these periods legal pluralism could be described as a construction in which a dominant legal system offered a limited playing field to an other normative system. This classic vision on legal pluralism is an outcome of colonialism (Sieder, 1997, pp. 9-10; Sierra and Chenaut, 2002, pp. 119-121). According to a new vision on legal

pluralism (Merry, 1988), law serves as an instrument for dominance, but it also provides space for resistance. Or, as Sieder (2002, p. 185, note 2 on p. 201) states: ‘legal pluralism should be understood not as a plurality of separate and bounded cultural systems, but rather as a plurality of continually evolving and interconnected processes enmeshed in wider power relations’. This means that customary law only can be analysed by acknowledging its social and political context, and when it is considered as a social construction. As it happens, national law itself is not a neutral system. It is developed and adjusted by a dominant group and it tends to ‘legitimize particular ideologies, asymmetrical power relations, and conceptions of personhood and agency’ (Sieder and Witchell, 2001, p. 203). As customary law coexists besides national law, indigenous people have developed strategies to make use of both systems. The fact that customary law, despite severe hindrance, survived over centuries means nothing less than that it did enjoy, and still does, both legitimacy and effectiveness at the level where it operates. Customary law survived because it shares the same cultural codes, common norms and values, and recognizes the need to resolve conflicts through negotiation and by reaching common ground. This allows the recovery of a certain level of social harmony,²⁷ or in other words: making things right again. Other – more practical – factors include geographical and financial ones. People do not have to travel to a court in town far away, nor are they required to pay lawyers or other costs of the national system (Yrigoyen, 2000, p. 205).

All the reasons mentioned above play a role in Latin America’s tendency to formally recognize customary law.²⁸ As soon as real or factual legal pluralism is being recognized legally, official or formal legal pluralism comes into being (Hoekema, 2004, p. 7). This formalization is usually understood as empowerment of the indigenous peoples. In her article ‘Recognising Indigenous Law and the Politics of State Formation in Mesoamerica’, Sieder (2002, p. 199) states that: ‘what indigenous people across Latin America claim today is not so much a return to “traditional law”, but rather the redress of historical injustices and the legitimate power to regulate their own affairs’. Hence, a claim for autonomy. Formal recognition can also be seen as a way for the elite to maintain their power and dominance. It is without doubt that any formal recognition of unwritten customary law, which is flexible in nature, will put pressure on some sort of codification (Assies, 2001, p. 94). It is questionable to what extent the indigenous people are able to regulate that process. In line with Charles Hale’s argument in his article ‘Does pluri-culturalism menace?’ (Hale, 2002), a small package

of customary norms and practices will be allowed by the state, but the major part shall be rejected. That is why formal recognition of customary law bears the danger of enclosing it by national law (Walsh, 2002, p. 30). How this is unfolding in the Latin American region, especially in Ecuador, is the main topic of the next chapter. However, it is without any doubt that customary law – whether formally recognized or not – and national law affect each other. This blending of elements of different legal systems is called interlegality.

Interlegality: Hoekema's analytical elaboration

According to Hoekema (2004, p. 23; 2005, pp. 6-7), interlegality refers to the interpenetration between national law and customary law. This often seems to be a one-way penetration only, from the powerful top to the bottom. However, the minorities are not just helpless victims. The blending of different views, principles, perceptions, definitions and norms might work the other way around as well; this is what he calls interlegality in reverse. Interlegality leads to a new, hybrid legal order. It is the mixing of foreign elements within the own legal system; a *bricolaje* (do-it-yourself handicraft) as María Teresa Sierra (2004, p. 34) calls it. This mixing occurs on two levels, it is a mixing in our actions as well as a mixing in our minds (De Sousa Santos, 2002, p. 437). Consequently, interlegality is not just an accumulation of different elements – it rather produces something new. An appropriate comparison would be the phenomenon of religious syncretism (Hoekema, 2004, pp. 19-20). Interlegality can be analysed in a situation of real legal pluralism, as well as in a situation of formal legal pluralism.

The phenomenon interlegality as a blending or cross-pollination of different legal systems is nothing new. On the contrary, in a context in which different normative systems exist, this is quite normal. After all, one cannot speak of autonomous legal systems. The real question is: how are the lines between two systems drawn? In case of customary law, this is done by the indigenous leaders. They mark the borders between us (our legal system) and them (the other legal system), by which they claim that the newly created system still gives voice to their own values. This is an example of ethnic reorganization.²⁹ However, the indigenous leaders are not completely free in doing so. Moore's concept of semi-autonomous social fields has already shown that they have to cope with internal pressure, as well as with external pressure. After all, the indigenous people involved have the opportunity of choice which legal systems serves their interests best. This threat of forum shopping

forces indigenous leaders to some sort of flexibility (Hoekema, 2004, pp. 21-22).³⁰ A case concerning water rights that is analysed by Rutgerd Boelens and Bernita Doornbos in their article 'The Battle Field of Water Rights' (2002) could serve as an appropriate illustration of that flexibility.

Water rights are of vital importance in the Ecuadorian highlands. These collective rights contain specific local normative rules how to develop and how to maintain irrigation systems. The irrigation management rules reflect on the one hand local power relationships, while on the other hand their dynamics influence them. Boelens and Doornbos analysed a case in Ceceles, *parroquia* Licti, in the Chimborazo province. Due to little rainfall, agriculture is subjected to great stress. That is why more than a century ago, the former hacienda built an irrigation system which made use of water from a nearby stream. Originally, the *hacendado* (hacienda owner) owned the water rights, but due to land reform laws the land including the irrigation system passed into the hands of the indigenous peasants, who had worked for the hacienda for over decades. Because of inheritance and sale, these land rights disintegrated and with it the water rights fell apart as well. However, this irrigation system once was built by and kept up by the community in question. This means that every individual user had obligations and had rights to the use too. This system of collective labour is called *minga*,³¹ and is the fundamental mechanism for consolidating and recreating rights. According to one's efforts, a *minga* provides rights concerning policy decisions over this irrigation system. In case of disagreements, the collectivity, under guidance of local leaders, was able to solve their problems internally. So far so good, until a new, more sophisticated irrigation system was proposed by the government.

The governmental design, though, was made with little knowledge of neither the actual local situation nor local social relations. The desk designers ignored the fact that all the community members should benefit and if not, this could lead to a potential threat of a social divide. If this plan was implemented just a minority would benefit from the new irrigation system, as a result of which the majority could reject the plans. This controversy blazed when the majority, founding their menace on customary law, threatened to refuse the minority's use of the original irrigation system immediately. As a reaction to this, the minority threatened to go to court to secure their water rights through national law. In the end, both groups came to realize that an escalation of the conflict would not benefit anyone, so they came to a compromise in which both groups preserved their rights over the old system and

received new ones for the new irrigation system (Boelens and Doornbos, 2002). Obviously, this case is not an example of interlegality. However, the authors do show how external influences combined with internal pressure enables a community to change or modernize their local rules to achieve maintenance of their autonomy.

Illustrative examples of interlegality are provided by Orellana Halkyer's dissertation, published in 2004. Quechua speaking local leaders in Bolivia have developed their own organization and administration of justice by using parts of national law supplementary to customary law. For instance, written statements are used more often, and lengthy monologues are cut short in favour of relevant facts. Also, they use juridical and official language frequently (Hoekema, 2004, pp. 18-19; Orellana Halkyer, 2004). By using an analysis of two different indigenous communities in the Cochabamba department – Raqaypampa in the south and Rinconada in the north-west – Orellana Halkyer illustrates two effects of interlegality. Firstly, in Raqaypampa, people recognize and acknowledge the blending of the two legal systems, which leads them to attempt to swell the ranks and to control national law's influences. Unlike Raqaypampa, in Rinconada people seem to care less when it comes to the protection of their own legal norms and practices (Orellana Halkyer, 2004, pp. 326-327). In addition, Sierra's study *Haciendo Justicia* (2004) provides some interesting examples of interlegality in Mexico. The other way around, examples of judges or other state officials adopting – without any obligation – certain elements of customary law occur too. A special issue of the *Journal of Legal Pluralism* (51 [2005]) provides several examples from all over the world. When it comes to the Latin American region, one is inclined to come up with numerous examples of reconciliation that are provided as a solution by lower courts of justice. During my own bachelors fieldwork in Guatemala I witnessed how judges were given further training in *derecho Maya* (as local customary law is called over there), and these judges told me that they took customary law as much in consideration as was allowed by the law. Indeed, the number of *Actas de Conciliación* (reconciliation agreements) that were signed at the *Juzgados de Paz* was striking (Simon Thomas, 2006, p. 29). Sierra (2004, pp. 23) paints a similar picture regarding the *Juzgados de Paz* in Mexico.

As explained before, as soon as customary law officially is recognized formal legal pluralism comes into being. However, this formalization does not say anything with regard to practical consequences. The question is how further legislation or jurisprudence develops (Assies, 2003, pp. 168) and what effect this has on the process of interlegality.

According to Hoekema (2004, pp. 24-25), the final juridical position of customary law is guided by internal conflict rules.³² And when it comes to the effects of that positioning he states that it is questionable how these conflict rules – if they are observed – influence the process of interlegality. The parenthesis ‘if they are observed’ is of major importance, because the question arises why judges would act upon these conflict rules. After all, these conflict rules are for the most part vague and leave space for a broad interpretation, according to Hoekema. This could lead to a situation in which conflict rules are not applied, and consequently, the process of interlegality remains unchanged in comparison to a situation of real legal pluralism. The opposite situation, when conflict rules are applied, leads to one of two possible variants (Hoekema, 2004, pp. 25-26). Firstly, it could have a flywheel effect on the process of interlegality. The blending of the two different legal systems becomes more obvious and it can be predicted that local leaders are more able to control the process than before. Secondly, formal legal pluralism in combination with conflict rules could mean a serious threat for the survival of customary law. As an illustration to this, I would like to recall Assies’ and Hale’s earlier mentioned arguments. Both variants, the flywheel effect vis-à-vis the threat are almost perfectly matched by the Raqaypampa and the Rinconada examples, provided by Orellana Halkyer’s study. Here, it becomes clear that it is important how conflict rules are formulated and how they are brought into practice. For instance, if customary law is tested against universal (individual) human rights in a profound universalistic way, this could lead to an unwanted strong limitation. Nevertheless, formal recognition that is guided by conflict rules is never unconditional – after all, it mainly concerns domestic affairs.

Within the scope of this study, three elements in Hoekema’s elaboration are of major importance, namely: (internal) conflict rules, the parenthesis ‘if they are observed’, and the suggestion that ‘the process of interlegality remains unchanged’ in case the conflict rules are not applied. To start with the first element, what precisely are internal conflict rules? In first instance, Hoekema (2004, pp. 24) refers to Anthony Allot’s internal meta rules. In second instance, he uses an analogy from international private rules (Hoekema, 2005, p. 5).³³ Allot (1975, pp. 154-56) describes the case of an internal conflict by which he meant that given the situation it was unclear which normative order was applicable. For instance, if it was not clear which rules were applicable, or which authority should be consulted. Theoretically, three types of these conflicts can be defined: between customary law and national

law, between customary law and human rights, and between customary law and public institutions like the police or the Public Ministry (The World Bank, 2006, p. 149). However, it should be emphasized that only when – or even better: as soon as – customary law officially is recognized, the possibility of a conflict is created and Hoekema's conflict rules become relevant. By using an analogy from formal sources of law, Hoekema (2005, p. 5) states that conflict rules could result from jurisprudence, national legislation, international treaties, or public administrative decisions.

However, neither legislation, treaties, nor jurisprudence come into existence spontaneously, they have to be made. Lawmaking is the legislature's responsibility and jurisprudence is developed by the judiciary. Practice has shown that it is not only a theoretical hypothesis that political and juridical power holders could frustrate the process of development of conflict rules. This situation precedes Hoekema's description of the possible effects conflict rules can have. Hoekema states – although without giving a concrete example – that, when conflict rules are not applied, the process of interlegality remains unchanged. *Mutatis mutandis*, one could suggest that the same occurs when conflict rules have never been developed. However, the next two chapters of this study aim to demonstrate that such is not the case, at least not in Ecuador. As soon as customary law was being recognized constitutionally, the effects upon the process of interlegality were irreversible. Whether or not conflict rules had been developed did not seem to be of any relevance.

Conflict rules define customary law's juridical place after it is formally recognized by national law. As put forward above, legislation or jurisprudence have to be developed as they do not just come into existence unexpectedly. Great advantages of official legislation are its legal certainty and its legitimacy. A disadvantage is its inflexibility. Especially when it takes a long time – due to languid bureaucratic procedures – to get a new law or an amendment approved into a law. This could raise the problem that the new rules are not appropriate anymore as social reality has changed over time. Jurisprudence, on the contrary, does have the advantage of being flexible. Its disadvantage though is its unpredictability, especially when case law is developed by lower courts, which could lead to different results in almost similar cases.³⁴ As well as with the design of legislation, as with the development of jurisprudence, the party who will benefit the most shall lead. If either the legislative branch or the judiciary will benefit, one could hardly foresee any problems when it comes to the development of

conflict rules. On the other hand, if these power holders – no matter for what reason – do not believe it will be to their benefit, they have the power to thoroughly frustrate the process throughout. After all, a government cannot be forced to change laws, neither do judges have the obligation to develop case law.

Hoekema (2003, p. 185) points up correctly the lack of pace when it comes to real application of formal legal pluralism.³⁵ None of the Latin American countries that have recognized customary law succeeded until now in the development of permissive law or coordination rules. For instance, in Ecuador two bills have been introduced into parliament but neither of those proposals passed. It is Colombia, with its jurisprudence, that has a contemporary leading role in the region. Not only because it changed its Constitution in favour of the recognition of customary law as early as in 1991, but it actually gave an interpretation to the situation of formal legal pluralism by the development of jurisprudence, which in fact substituted a coordination law as was foreseen in the Constitution (Assies, 2003, p. 168). The Colombian case is particularly interesting because it profoundly deals with the issue of collective rights in the light of human rights. Point of departure of the debate concerning collective rights versus individual rights is that from a liberal point of view everyone is guaranteed basic individual human rights. Indigenous people included. In case they cannot enjoy these basic rights, the law itself is not to blame, its enforcement is. If basic human rights are violated, a solution should be found in the execution of the law. At least, according to critics of collective rights. Indigenous movements share an opposite opinion. They claim that in a socially stratified society, in which power belongs to the elite, indigenous peoples are marginalized and discriminated in such a way that it is impossible for them to practise their basic human rights. They claim that something more is needed, such as a bundle of group rights allowing them to fully live their cultures and organize their lives according their own norms and practices (Stavenhagen, 2002, p. 37). Crucial issues in the indigenous peoples' discourse are land and autonomy. These issues are accompanied by the claim to be recognized as peoples (with the tell-tale final s), because this recognizes the right of self-determination conforming with international rules. The ILO Convention 169 was, until September 2007, the first and only official international document that formally recognized them as peoples.³⁶ In the Latin American context indigenous territorial claims have a precedent in the concept of the colonial *República de Indios*. The biggest fear of the elite is a Balkan-like scenario, in which contemporary

nation-states will be disunited (Stavenhagen, 2002, p. 34-35). However, in none of the countries involved is such a claim part of the indigenous movements' agenda.

The debate concerning group rights versus individual rights comes to a head when it is about the formal recognition of customary law. In the international arena, indigenous group rights are more and more considered as human rights because – conform Stavenhagen's argument – these collective rights are a condition for enjoying individual rights. From this line of argument follows the suggestion that those collective rights that threaten individual rights, should not be regarded as human rights. The Canadian philosopher Will Kymlicka, in his well known book *Multicultural Citizenship* (1995, pp. 152-172 and cited in Assies, 2000, p. 303; Assies, 2003, p. 168 and p. 182; Assies, 2006, p. 39) is such a spokesman. Kymlicka's basic feature is the distinction between external protections and internal restrictions. External protections involve inter-group relations and are intended to protect a minority from the impact of external decisions of the larger society, like group rights or some sort of autonomy. From a liberal point of view these rights should be allowed, as they promote equality between the minority and the majority. Internal restrictions, by contrast, involve the claim of a group against its own members and are intended to protect the group from domestic affairs. Kymlicka argues that these restrictions are unacceptable since they curtail the civil and political liberties of group members. In his view, there is one exception: under extreme circumstances internal restrictions may be justified on a temporary basis, where they are required to protect the society from literally disintegrating (Kymlicka, 1995, p. 512 and p. 230 note 1, also cited in Assies, 2003, p. 182). Concerning the prohibition of internal restrictions, Assies disagrees with Kymlicka, because this would in fact undermine indigenous peoples' self-governing capacities (Assies, 2000, pp. 303-304; Assies, 2003, p. 182). Kymlicka's main point of departure – that customary law should be internally liberal³⁷ – is not shared by Assies. The jurisprudence as developed by the Colombian Constitutional Court confirms Assies' view.

Colombia's Constitution formally acknowledged legal pluralism in 1991. However, coordination rules, although they were promised, never came into being.³⁸ That is why case law developed some standards concerning the interpretation of the recognition of customary law, based on which the Constitutional Court in its turn developed a doctrine that, within the parameters of human rights, addresses maximizing the autonomy of indigenous authorities. Firstly, the verdict of case C-139

of 1996 (Ochoa García, 2002, pp. 274-75; Sánchez, 2000, p. 231) formulated four basic principles according to indigenous jurisdiction: indigenous authorities are justified by law; they are allowed to formulate their own norms and procedures (however, these norms and procedures are subordinate to national legislation) and finally, further coordination rules or jurisprudence should be developed.³⁹ That is why in case T-349 of 1996 (Assies, 2003, pp. 170-74; Sánchez, 2000; Trujillo, 2001, p. 27) the main question was: what concrete constitutional restrictions apply to the competence of indigenous authorities? The Constitutional Court stated that in general constitutional restrictions should not be applied too strict, as the recognition of cultural diversity would be effectively reduced to just a rhetoric matter. One of the cornerstones of the Court's decision was that autonomy of indigenous peoples should be maximized to assure their cultural survival. In applying customary law, the authorities can only be required to respect a core of the most fundamental human rights and a form of due process, although this should not undermine customary law's flexible character.

In the verdict of case T-523 of 1997 (Assies, 2003, pp. 174-77; Sánchez, 2000; Trujillo, 2001, pp. 28-30), the Court accentuated its doctrine. This time the key question was whether whipping and expulsion from the community should be permitted. The Court ascribed the authorities the right to do so, and formulated the conflict rule that 'in a society that pretends to be pluralistic, no world view can be simply imposed'. In this specific case this meant that flogging on the lower parts of the legs with a cattle whip as a punishment is permitted, because the objective is not to cause excessive suffering, but to purify the individual and to re-establish harmony. That is why one cannot speak of torture, and therefore violation of human rights.⁴⁰ In case SU-510 of 1998 (Assies, 2003, pp. 177-79; Sánchez, 2000; Trujillo, 2001, pp. 30-32) the Constitutional Court came to a unifying sentence that reads as follows. Indigenous people are entitled to two forms of original belonging, that is, both to the Colombian state and to their traditional community. This could lead to tensions, but the two principles should coexist harmoniously. In case of conflicts between normative orders (compare Hoekema's elaboration on interlegality), solutions should be found for each particular case. Cultural diversity presupposes an open mind and, as the occasion arises, the Court seeks a position in the middle between universalism and cultural relativism.⁴¹ Cultural diversity prevails over constitutional interests of a lower order, however, fundamental rights should be respected. Nevertheless, the more traditional culture is preserved, the greater the autonomy that should be granted. In practice however, this traditional requirement is quite slippery and barely applicable, and sometimes even leads to ethnocentric

views on what is indigenous or not. Exemption from military service, for example, was made conditional on residence in a indigenous territory, which in fact discriminated against those who lived (because of work or study) outside the territory (Sánchez, 2000, p. 226; Sánchez and Jarambillo, cited in Assies, 2003, p. 184, note 8).⁴²

Conclusion

This chapter has provided an introduction to the anthropology of law as an independent discipline and has given insight in phenomena like customary law, legal pluralism and interlegality. If the term customary law is used in the Latin American context, it is meant to define indigenous' peoples customary law. Because of that, I have argued that it would be appropriate to use the extensive expression indigenous customary law, but for practical purposes this study will continue to skip the adjective indigenous. Legal pluralism – as developed by legal anthropology – is the theoretical perspective that allows us to speak of simultaneous coexistence of more than one legal order in the same social field. Formal recognition of Latin America is affected by constitutional recognition of customary law. When this formal recognition does not take place, one speaks of real or factual legal pluralism. Whether customary law formally is recognized or not, both systems interpenetrate. The term interlegality has been introduced by Boaventura de Sousa Santos and analytically further elaborated in André Hoekema's oration. One of the cornerstones in his elaboration is the conflict rule. Because the constitutional recognition of customary law could raise conflicts concerning national law's or customary law's competence, conflict rules are meant to solve these conflicts. Hoekema explains that two situations could occur: conflict rules are being applied or they are not. The process of interlegality remains unchanged in case the latter situation occurs. Conflict rules could be found in legislation as well as in case law, but in both cases these rules have to be designed or developed. The Latin American region does not provide an example of a permissive law or coordinating rules, Colombia's jurisprudence illustrates such legislation in fact however.

The contemporary situation in Ecuador will be the main topic of the next chapter. It describes the process concerning the attempts to develop both legislation and case law. The aim of Chapter Three will be to demonstrate that, in addition to the two possible situations in Hoekema's analytical elaboration on interlegality, a third possibility could occur as well. That is, in a situation of formal legal pluralism combined with the situation of an conflict between normative orders, efforts are made to develop conflict rules but, despite the need for these rules, this development is being frustrated by the legislative branch and the judicature.

FROM REAL TO FORMAL LEGAL PLURALISM

*No cabe duda de que la igualdad ante la ley debe ser entendida en función de las características esenciales de los ecuatorianos, razón por la cual no existe justificación jurídica para establecer ni discriminaciones ni privilegios cuyo fundamento sean factores relacionados con características de nacimiento, edad, sexo, etnia, color, origen social, idioma, religión, filiación política, posición económica, u otras, salvo que estos privilegios estén consagrados en el ordenamiento fundamental del Estado, como ocurre en nuestra sistema con los grupos vulnerables.*⁴³

President Gustavo Noboa⁴⁴

History: from the colonial period until 1998

From the colonial period on, customary law has coexisted along with national law. The political way of dealing with this real legal pluralism has differed. During colonialism a segregationist model was being used, which was replaced with an assimilationist model, and later by an integrationist model. In all these models, the indigenous peoples were subordinate to the Spanish and *mestizo* population.⁴⁵ It was only by the end of the twentieth century, when the indigenous movement became active, that the first steps towards a situation of formal legal pluralism were made. Since times immemorial, oral justice had been done, which is supposedly based on the *cosmovisión* of the indigenous ancestors. Norms, rules and authorities, all resulted (in)directly from that distinct world view. According to Reyes (1989, cited in Tibán, 2001, pp. 21) a distinction was made between conflicts concerning ordinary people and conflicts at the level of communities. The former were being solved by local authorities which were appointed by suc-

cession. In case of the latter conflicts, a so-called *Consejo de Ancianos* (council of elderly) had to be consulted. Whether this all is true or not remains unclear. However, it is relevant to emphasize that according to general consensus indigenous customary law has its roots in that pre-colonial period.

At the time the Spanish Crown colonized Latin America, it introduced Spanish law straightaway. However, customary law kept on being applied in practice. The Spanish Crown introduced special legislation that separated the indigenous people – *indios* as they were called – legally as well as administratively from the Spanish people.⁴⁶ These legally separated worlds were called *Repúblicas*. In fact two classes – following the European medieval class-ridden society – were designed: *República de Españoles* (Spanish class) and the *República de Indios* (Indian class). It should be kept in mind that this was just a legal divide, not an ethnical one. Anyone who lived in this legally and administratively separated latter *República* was considered an *indio*. It did not matter if he or she was *mestizo* or even if he or she was of Spanish descent. However, the Spanish Crown's purpose was to keep the indigenous people separated from the colonizers (Crain, 1990; Kloosterman, 1995, p. 42; Ouweneel and Hoekstra, 1993, p. 112).

Within the *República de Indios*, some local cases of conflict management were left in the care of the *indios*, other cases had to be handed over to the Spanish authorities. The recognition of customary law was limited to a sphere that did not contradict the 'divine and human law', nor did affect the official religion, nor the colonial economic and political order (Ouweneel and Hoekstra, 1993, p. 112; Yrigoyen, 2000, p. 204). At the same time, the indigenous people could make use of the formal legislation as Spanish colonialism, which was characterised by a strong juridical formalism, assigned all inhabitants certain privileges. This formalistic view allowed indigenous people to use Spanish legislation in cases of disputes or conflicts just like anyone else – and so they did as the occasion arose (Baud, 1993, p. 190). Even then, the possibility of forum shopping existed.

This segregationist model was replaced by an assimilationist model from 1830 on,⁴⁷ when the new independent Republic of Ecuador aimed at formally sweeping away the indigenous world. Customary law became illegal and the state strongly supported legal monism. In this model the state represents 'one sole nation', meaning one people, one culture, and one normative system (Yrigoyen, 2000, pp. 206-07). However, customary law continued to be practised, so the situation of real legal pluralism kept on existing. Partly, this was the result of a weak

state control, especially in remote areas, and partly this was because Indians still felt being marginalized. From that point of view, the use of customary law can be understood as a counter-hegemonic strategy, used to protect their limited and conditional autonomy (Merry, 1988, p. 878; Sieder, 1998, p. 105; Yrigoyen, 2000, p. 204). From the decade of the 1920s, the integrationist model came into fashion. Because of strong demands for land and other claims, in combination with the emergence of the leftist, intellectual *indigenista* movement, politics became aware of and interested in indigenous issues. This all led to legal land reforms concerning communal land tenure,⁴⁸ and to some other legal liberalizations, concerning traditional clothing and language. The land reforms also created a space in which indigenous communities could secure more local autonomy to sustain and strengthen customary law (Lyons, 2001, p. 24; Yashar, 2005, p. 95). Still, the integrationist model supported juridical monism, thus limiting the recognition of legal pluralism (Yrigoyen, 2000, p. 208).

The rise of the indigenous movements in the second half of the twentieth century eventually led to a new Constitution in 1998. From a situation of real legal pluralism, the country transformed into a situation of formal legal pluralism, mainly because of the involvement of the CONAIE. This national indigenous movement was founded in 1986, but has its origin in significant regional federations: the ECUARUNARI (Ecuador Runacunapac Riccharimui), Confederación de los Pueblos de Nacionalidad Kichwa del Ecuador – ‘awakening of the Ecuadorian Indian’ – (Confederation of the People of the Quechua Nationality of the Andes), and the CONFENAIE (Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana (Confederation of Indigenous Nationalities of the Ecuadorian Amazon). For its part, the ECUARUNARI emerged in 1972, drawing on pre-existing rural organizations whose intended aim was to secure land rights and equal treatment of all peasants, as was promised with the land reforms but never really were effected (Yashar, 2005, pp. 105-109). The CONFENAIE originated in a radically different history of state-Indian relations. Because of an increasing demand for natural resources (like oil) and concomitant government interference, and the encouragement of rural migration from the Andes to the Amazon in order to relieve pressures for land reform in the highlands, the Amazon Indians began to notice state control only since the 1960s. These changing conditions forced them to get organized. At first, it politicized Indians only at a local level,⁴⁹ but in 1980 a regional federation came into being (Yashar, 2005, pp. 109-30).

With the emerge of the CONAIE, the indigenous struggle for equal rights really began. Yet, despite political promises, still practically nothing had changed at the end of the 1980s. As a result, the CONAIE decided on serious protests. What began with hunger strikes and peaceful protest marches, culminated in June 1990 in a *Levantamiento Nacional Indígena* (Indian Uprising),⁵⁰ with a ten days' violation of public order, the occupation of churches, and strategic roadblocks. And again, contrary to political promises as a result of that Indian Uprising, nothing really changed in favour of the indigenous people. That is why in April 1992 – during the year of celebrations of 500 years 'discovery' of the continent by Columbus – a two-week protest march of thousands of indigenous activists, both from the Amazon and from the highlands, to Quito was undertaken.⁵¹ In these years the CONAIE showed its power of mobilization, in 1994 it demonstrated its power of negotiation as it debated, protested, and then renegotiated a law on agrarian reform (Yashar, 2005, pp. 147-148). In 1996 the CONAIE entered electoral politics, by choosing to form part of a national coalition, the MUPP-NP (Movimiento de Unidad Plurinacional Pachakutik Nuevo País – Pachakutik Party). One of the demands by CONAIE was a Constituent Assembly – they had suggested such an assembly already in 1994. With the MUPP-NP and their eight seats in the *Congreso Nacional* (National Congress), their chances increased. Its overall aim was a constitutional guarantee on the rights of indigenous people, plus the recognition of Ecuador as a pluri-national state. Finally, by referendum, such a Constituent Assembly was approved. In November's elections, the MUPP-NP obtained seven out of seventy seats. By the end of December the Assembly got installed and in May 1998 it was finished. The demand for a pluri-national state was not complied with. However, their negotiations did result on August 10, 1998, as mentioned before, in a new Constitution, in which, among other things, customary law formally was recognized (Andolina, 2003, pp. 729-730 and 739; Ayala Mora, 2007, p. 105).

From 1998 (1): refusal of new legislation

The constitutional recognition of customary law in 1998 is an essential amendment vis-à-vis the former tradition of legal monism combined with real legal pluralism. Despite the fact that this new constitution was passed a number of years after similar reforms in Bolivia (1994), Colombia (1991), and Peru (1993), it included more extensive reforms on customary law than most other Latin American countries (Andolina,

2003, p. 724). However, it seems like the dialectics of progress occur, because this progressive legislation is sparsely applied. One of the causes of this delay is the lack of permissive law or coordinating rules – up to today. Therefore, this failure of draft legislation is the theme this paragraph.

According to the pluri-cultural and multi-ethnic character of the state, the next articles in the Constitution of 1998 are of major relevance:⁵²

Artículo 1 (1). *El Ecuador es un estado social de derecho, soberano, unitario, independiente, democrático, pluricultural y multiétnico.*

Artículo 83. *Los pueblos indígenas, que se autodefinen como nacionalidades de raíces ancestrales, y los pueblos negros o afroecuatorianos, forman parte del Esatado ecuatoriano, único e indivisible.*

Artículo 84. *El estado reconocerá y garantizará a los pueblos indígenas, de conformidad con esta Constitución y la ley, el respeto al orden público y a los derechos humanos, los siguientes derechos colectivos: [following fifteen sections, MST]*

Artículo 191. (4) *Las autoridades de los pueblos indígenas ejercerán funciones de justicia, aplicando normas y procedimientos propios para la solución de conflictos internos de conformidad con sus costumbres o derecho consuetudinario, siempre que no sean contrarias a la Constitución y las leyes. La ley hará compatibles aquellas funciones con las del sistema judicial nacional.*⁵³

Above all, this is a recognition of the previous existence of customary law, and that its practice is not created by the coming into operation of the latest constitution. However, the restriction that these practices should not contradict with the constitution or other legislation gives rise to the debate over customary law's range. According to international legislation, it may not be contrary to individual human rights as well (Yrigoyen, 2000, pp. 209-214). That is why article 191, section 4, last sentence, states that the law shall make these practices compatible with the national judicial system. Trujillo (2001, p. 65) indicates correctly that this future permissive law and its coordinating rules always will form part of national law, and therefore never can or shall form any content of customary law. In line with that argument I would like to emphasize the impossibility of codification of customary law. That would do severe harm to its oral and flexible character. Or worse, this could affect a situation in which, besides codified and formally recognized customary law, an unrecognized variant would continue.⁵⁴ However, contrary to article 191, section 4, last sentence, neither permissive law, nor coordinating rules have been developed yet, although two initiatives have been taken. But to complete this

chronological survey correctly, first of all the ratification of the ILO Convention 169 (also in 1998), should be analysed.

The ILO Convention 169 is an important international declaration concerning indigenous peoples rights. Originally, their rights had been secured in the Universal Declaration of Human Rights of 1948.⁵⁵ Its juridical status, however, is limited because it is not legally binding. Nevertheless, the declaration served as the foundation for two binding UN human rights covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, as were passed by the United Nations in 1966.⁵⁶ Some other international declarations mention indigenous groups as the subject of rights, for instance the International Labour Organization's (ILO) Indigenous and Tribal Peoples Convention (No 169 of 1989), abbreviated as the ILO Convention 169. For a long time this was the only statutory document concerning the rights of indigenous peoples (with the tell-tale final s), although its international juridical implications are limited (Kloosterman, 1995, pp. 5-6).⁵⁷ The convention states that rights for the indigenous peoples to land and natural resources are recognized as central for their material and cultural survival. In addition, indigenous peoples should be entitled to exercise control over, and manage their own institutions, ways of life and economic development in order to maintain and develop their identities, languages and religions, within the framework of the states in which they live. It obliges states to respect customary law as long as it does not contradict human rights. In practice, most states add to this that customary law should not contradict with national law. On April 30, 1998, at the same time in which the Constituent Assembly was occupied with a new constitution, the ILO Convention 169 was ratified. According to article 38 of this Convention, it comes into force twelve month after the date of ratification, and from that moment on it is binding. Nevertheless, until today the ILO Convention 169 is not really accepted in (legal) practice, neither by the government, nor by society. State reports are limited, and indigenous organizations succeeded only once in applying this convention (García, 2005, p. 167).

In September 1998, almost directly after the new constitution became effective, the CONAIE started a project that aimed at coordinating and harmonizing differences between customary law internally, as well as between customary law and national law. Its main topic was to secure the application of the constitutional recognition of customary law. From its start, this project was approved by the Comisión de Asuntos Indígenas y Otras Etnias of the National Congress, which at regular

intervals was kept informed about its advance. During the project, the CONAIE asked for and received assistance of several professionals and college graduates, indigenous as well as non-indigenous. Finally, this resulted in a bill called *Ley de Ejercicio de los Derechos Colectivos de los Pueblos Indígenas*,⁵⁸ which, when it was presented at the National Congress on November 14, 2001, could lean on broad political and social bases. According to history, this was quite extraordinary. Subsequently, this bill was discussed by a complete Congress twice. Several amendments were dealt with, and after lengthy negotiations between legal specialists of all parties, the National Congress decided in a final debate on December 18, 2002, to hand the final text over to the president. According to legislation making rules, he could either approve the bill's text completely or he could partly or fully exercise his veto against it (García, 2005, pp. 155).

After three weeks, on January 8, 2003, Dr. Gustavo Noboa, president at that time fully exercised his veto against the CONAIE bill. He did so by just sending an official note to the National Congress,⁵⁹ in which he stated that the already existing rules proved to be sufficient. In his article 'El Estado del Arte del Derecho Indígena en Ecuador' (2005), Fernando García provides a detailed critic with respect to this veto's content. To put it shortly, the president's arguments not only are inconsistent with the constitution, they also clearly show his ethnocentrism. Because of that veto, further development of a pluri-cultural and multi-ethnic state had been frustrated considerably. After such a veto, the National Congress is only allowed to put this bill back on the legislative agenda after twelve months, accompanied by the approval of a minimal three-quarter majority. In practice, this meant the final end of that bill and with it the end of the most serious attempt so far to develop permissive law (García, 2005, pp. 155-159; García and Sandoval, 2007, pp. 49).

A second bill, the *Ley de Compatibilización y de Distribución de Competencias en la Administración de Justicia*, has a similar history⁶⁰. The realization of this project, which resulted from article 191, section 4, last sentence of the Constitution, had been offered in 1999 to the Universidad Andina Simón Bolívar. The project was financed by the Fondo Derecho y Justicia and supervised by ProJusticia and The World Bank,⁶¹ and the developers were assisted by indigenous organizations, (legal) scholars, judges and high-ranking officials. A draft was published as well in *Justicia Indígena en el Ecuador* (Trujillo, 2001) as in *Justicia Indígena: Aportes para un debate* (Salgado, 2002).⁶² This bill provided a medium between controlling legislation and the

possibility for jurisprudence to be developed. It stated that it would be impossible to cope in advance with all potential conflicts between customary law and national law, or between customary law and human rights. That is why it pleaded for solutions case by case. The developers kept a close eye on the development of case law in the neighbouring country Colombia, when they stated that (in accordance with the above mentioned statement of Colombia's Constitutional Court): in general, constitutional restrictions should not be applied too strictly, because effectively the recognition of cultural diversity then would be reduced to just a rhetoric matter (Trujillo, 2001, pp. 20-22).

On November 27, 2002, the final text of this second bill was presented at the National Congress. That same day, the chairman sent it on – which proved to be a wrong move – to the *Comisión Especializada Permanente de lo Civil y Penal*, a commission with much experience and knowledge on bills and amendments on public and penal law, but without such skills on customary law. Eventually, after some serious delay, the bill was sent – correctly – to the *Comisión de Asuntos Indígenas y Otras Etnias* (García, 2005, pp. 159). This latter commission approved the text. The former commission (the wrong one), however, already had formulated a list that contained thirty shortcomings, and therefore it declared the bill unlawful and consigned it to the wastepaper basket. Just like in the case of the above analysed veto of Noboa, this bill's treatment expressed the lack of legal space and political will to actively fulfil article 191, section 4, last sentence of the Constitution. Still, legal monism prevails over legal pluralism (García, 2005, pp. 155-56).

From 1998 (2): sparsely development of jurisprudence

As was shown in the previous section, neither permissive law, nor coordinating rules have been developed so far. So this section's main topic is the relevant and recent examples of case law, which tried to stand in for the lacking legislation. The first relevant lawsuit to be mentioned should be the case of Arco versus FIPSE. In April 1998, the government permitted Arco Oriente Inc. to drill for oil in a specific part of the Amazon, despite the fact that almost seventy percent of that area was inhabited by Shuar Indians, who were never consulted with regard to that permit. This led to legal action of the FIPSE (*Federación Independiente del Pueblo Shuar del Ecuador* – Independent Federation of the Ecuadorian Shuar People) against Arco, in which they lodged an appeal at article 84 of the Constitution and to the ILO Convention

169. In the first instance, the Arco company refused to recognize the FIPSE as a subject of rights, but after a verdict of the *Juez Primero de lo Civil de Morana Santiago* on September 8, 1999, which was confirmed by the *Tribunal Constitucional* on March 16, 2000, they had to. In a special resolution, the FIPSE was given permission to represent the indigenous population involved, which was in accordance with the ILO Convention 169.⁶³ Although this created an important precedent, no indigenous organization succeeded in another appeal on the ILO Convention 169 afterwards. Because this case was not about a conflict between two legal systems, its jurisprudence – although interesting – did not provide any conflict rule.

The La Cocha murder case is a second relevant and unique lawsuit. By anticipating on the next chapter's main topic, this section only pays attention to the jurisprudence of this lawsuit. Until now, it is the one and only case law in which a judge legally recognized and confirmed a verdict of an indigenous authority by using the appropriate constitutional regulations. Therefore, this progressive judge and the indigenous authorities involved nearly succeeded in drafting a unique conflict rule. Nevertheless, due to an appeal to a higher court and subsequently a verdict in second instance, no jurisprudence in the meaning of new formal rules were developed. That is why this lawsuit too, did not develop a conflict rule.

A third, interesting lawsuit to be mentioned, took place at the same penal court in the COTOPAXI province as the La Cocha murder case did – even the same judge, Carlos Poveda, was involved. This time it concerned the inhabitants of the Maca Chico community, who were accused of having stolen the image of *el Señor de Maca* (the saint Maca) from a Catholic church in the neighbouring parish Poaló. It all happened as follows: on February 10, 2004, a dozen indigenous community members came down the hill from Maca Chico to visit the church of the peasant community of Poaló. Tradition told them, while there was music and fireworks, to lift the image of the saint Maca and to carry it in procession to their own village. This had been done so for years, it was Mardi Gras. Like always, the image was supposed to be kept a couple of weeks before returning it in procession to Poaló again. This time, however, things went different. The people of Maca Chico refused to return the image of the saint Maca to the parish of Poaló. This made the people of Poaló very angry, and culminated in a massive fight between the two villages, in which at least six people got seriously injured and resulted in the death of a sixty-five year old Maca Chico inhabitant a couple of days later. Nevertheless, the image

was not returned. That is why the people of Poaló at first turned to Catholic officials for help. But when these officials indicated it was not possible for them to mediate, they went to court, accusing the Maca Chico people of theft (Chávez, 2005, pp. 42-45; Naranjo, 1996, p. 63). During the trial numerous witnesses were heard and many historical sources were being used.⁶⁴ It turned out that in 1705 a Christ figure had revealed itself to an Indian, when he was cutting a branch of a Kishuar tree. The image of that revelation was brought to Tilipulo Grande, a Jesuit hacienda near Poaló. In 1864 it finally was handed over to the Catholic church. Several documents show that, already since the eighteenth century, the indigenous people had been asking for restoration. Based on these juridical facts, Judge Poveda decided as follows. Firstly, the decision not to return the image of the saint Maca was not made by just a couple of people, but by the community of Maca Chico as a whole. This meant that it was a collective action, for which not just a few people could be held responsible. Secondly, as historical sources proved, the revelation happened to an indigenous member of the Maca Chico community. By using article 84, section 4, of the Constitution, and articles 3, 4 and 5 of the ILO Convention 169, the judge decided that it was a fundamental right of this community to protect their cultural inheritance, and therefore he decided that the plea for theft was unfounded. '*Ahora [el Señor de Maca] regresó a su casa*' (Finally, the saint Maca has come home), as Maria Oña, leader of the Maca Chico community, stated (Comercio, 2004). The significance of this case is the use of the ILO Convention 169, without which Judge Poveda never could have come to this decision. Strictly speaking, in this *el Señor de Maca* case jurisprudence – in its meaning of a new formal rule – is out of the question. It was simply a progressive use of already existing legislation. That is why, in this case too, no conflict rule had been developed.

The last lawsuit to be discussed in this section is still active, while this study was carried out. It has not provided any jurisprudence so far, but experts do have the impression this might be the case in the near future.⁶⁵ In the Gallorumi community, canton Cañar, in the Cañar province, an indigenous community member died during an indigenous trial against him in April 2005. The man was accused of cattle-theft, and in accordance with local customary law he had to be punished physically, among other things by immersing him into an ice-cold lake. During, or as a result of, this plunge the man had a heart attack, of which he finally died. The public prosecutor of the Cañar province, after having done some research, accused three leaders of this

particular community. The judge however, decided to imprison only one of them for the duration of sixteen years. The defence stated that the death was not one man's responsibility, but that the community as a whole should be held accountable for it. After all, it was a collective trial. Secondly, this death was an accident, because customary law does not recognize death as a penalty.⁶⁶ In this case, the defence made use of relevant articles of the constitution, as well as of the ILO Convention 169. In 2007 the defence lodged an appeal at the court of cassation (Ministerio Público, 2007).

From 1998 (3): other initiatives

In sum, neither legislation, nor jurisprudence provided adequate conflict rules. However, one should not conclude that nothing was undertaken. On the contrary. A couple of initiatives have been shown, aiming at collaboration of national law and customary law. The FLACSO played an important role in these initiatives. To start with the first initiative, after the constitutional amendment in 1998, the government asked the *Corte Suprema* (Supreme Court) to start research on customary law, in order to gain insights into it. After all, one should have some knowledge on what actually was recognized. The Supreme Court sponsored two projects, which were executed by ProJusticia, and were financed by The World Bank (García, 2002, p. 9).⁶⁷ Both projects finally have been carried out by the FLACSO. The first project was realized between 1998 and 2000 and concerned research on customary law in three Quechua communities, two Andean and one Amazonian. This resulted in an ethnography called *Formas indígenas de administrar justicia* (2002). In line with that study, Fernando García and Gina Chavéz carried out continuing research on customary law in Amazonian communities of the Shuar, Achuar and Quechua peoples. This study was separately financed by the Gerencia Ambiental de Petroecuador and resulted in a legal ethnography called *El derecho a ser: diversidad, identidad y cambio* (2004). ProJusticia's second project was realized in the years 2004 and 2005 and was one of four sub-projects of the overall Proyecto Derecho y Justicia Indígena para los Pobres.⁶⁸ This sub-project resulted in a report from the FLACSO, addressed at ProJusticia, which in the end became part of the overall survey Documento de Sistematización: Proyecto Derecho y Justicia Indígena para los Pobres (2006) (García and Sandoval, 2007, p. 47).⁶⁹

In addition to the two projects that were carried out in cooperation with ProJusticia, the FLACSO made on its own initiative an analysis

of the implementation of the ILO Convention 169. As mentioned above, the ILO Convention 169 comes into force twelve months after its ratification. Due to its aim, to make national legislation consistent with ILO's objectives, the interim period of one year is meant to provide time to straighten out legislation and legal practices. After that year, a country has to report on its progress. This has to be done in the second year after ratification as well. After this second report on implementation, the ILO expects a report on the application of its Convention 169 every five years. Despite these obligations, the Ecuadorian government only did so in 2003 and in 2005, and the ILO had to request for it repeatedly.⁷⁰ However, the ILO provides the opportunity of alternative reporting. And that is what the FLACSO did in the years 2005 and 2006, which resulted in 2007 in the report *Los pueblos indígenas del Ecuador: derechos y bienestar: Informe alternativo sobre el cumplimiento del Convenio 169 de la OIT*, accompanied by a CD-rom with appendices (García and Sandoval, 2007, pp. 7-8).⁷¹ This report's topics are in line with the ILO interests: natural resources, customary law, health and labour, education and participation. Concerning customary law, the report only mentions the two rejected bills, ProJusticia's initiatives, and some jurisprudence. In its final section, the report makes some recommendations according to customary law. It states that the indigenous people have the constitutional right on the conduct and the defence of their cases in their own language, and that indigenous authorities have the right to do justice according to customary law, but that none of it is complied with. For that reason it pleads for permissive law. The report also has critique on the formal juridical system by mentioning a significant number of people who are detained without trial or without a proper defence. It points a finger at the inefficiency of the system and at the problems of corruption. Finally it emphasizes that only a minor part of all detainees is indigenous, and that this minority's majority is involved in drugs trafficking. Organizations like the CODENPE (Consejo de Desarrollo de las Nacionalidades y Pueblos del Ecuador – Council for Development of Nationalities and indigenous groups in Ecuador) and the DINAPN (Dirección Nacional de Defensa de los Pueblos Indígenas – Directory of National Defence of Indigenous Peoples),⁷² both established in Quito, especially are mentioned because of their struggle for basic rights for indigenous people like the aid of interpreters, a good defence, a fair trial, the possibility of reduction of one's sentence and the coordination of customary law and national law (García and Sandoval 2007: 50-51).

By way of explanation

The question forces itself upon us why, after the recognition of formal legal pluralism, neither the legislative branch nor the judiciary did develop any conflict rule. It is outside the scope of this study to find an explanation for the opposition of the government. The observation that politicians do not show much enthusiasm for the present-day situation of formal legal pluralism, will do. The question why neither the judiciary nor lawyers took up the gauntlet is inside this study's scope. Especially because several informants shared their opinions about it with me. Contrary to a few above-mentioned examples, jurists are conspicuous by their absence when it is about their efforts to develop conflict rules by jurisprudence. To put it more strongly, the relevant articles of the Constitution or of the ILO Convention 169 are rarely if ever used. According to my informants, this is mainly through ignorance. A case in point is the La Cocha murder case. During the first months of the process, neither state officials, nor indigenous authorities, had paid any attention to article 191 of the Constitution, which in this particular case clearly provided the La Cocha community the right to do justice in conformation with customary law (Ilaquiche, 2001b; Poveda). The main reason why things in the La Cocha murder case finally turned out as they did, could be completely attributed to Judge Poveda and the two indigenous lawyers involved: Lourdes Tibán en Raúl Ilaquiche. They had the relevant knowledge and skills, contrary to the members of the *Corte Superior de Justicia de Cotopaxi* (Court of Justice of Cotopaxi), whose knowledge was limited to the impression that customary law formally could be applied only in cases of family law.⁷³ On the other hand, indigenous authorities lack sometimes basic knowledge too (Brandt and Valdivia, 2007, p. 233). An indigenous lawyer once told me that it is not only a matter of lack of basic knowledge. Indigenous lawyers often only specialize in local customary law and local circumstances, while there is no coordinating organization that provides a platform to share experiences and knowledge.⁷⁴

Besides ignorance, the judiciary could be blamed of unwillingness as well. To start with, juridical monism is still strongly defended in their discourse, in their sentences and in their conversations (Yumbay 2007). A judge told me once that according to his opinion national law and customary law could never go together.⁷⁵ The discourse that is being used concerning customary law is: barbaric, folklore, irrational, primitive, and not in accordance with human rights (Yumbay 2007). When the national newspaper *El Comercio* (2007) reported on a case in which stinging-nettle and ice-cold water were used, it used the phrase:

'forma de castigo ancestral', punishment used by ancestors. Finally, customary law often is compared with, or even equated with lynching (García and Sandoval, 2007, p. 51), while in numerous reports and articles the opposite has been proven (Handy, 2004; World Bank, 2006, p. 129). But, when words are not effective, judiciary does not fear to act physically when it comes to the protection of juridical monism. Several (illegal) actions against judges who considered making use of article 191 of the Constitution have been taken, for instance, accusing them of incapacity. A harrowing example is provided by the La Cocha murder case, when the Corte Superior expressly made attempts to get Judge Poveda expelled by the *Consejo de la Judicatura* (Judiciary Council) (García, 2005, pp. 154).⁷⁶ Similar examples of indoctrination are known concerning indigenous authorities when they wanted to make use of their constitutional rights.⁷⁷

However, despite ignorance and unwillingness concerning the actual situation of formal legal pluralism, customary law is still being used in practice.⁷⁸ When asked for an explanation, most of the time practical reasons are put forward, like most indigenous people are not fluent in Spanish, the long duration of formal legal processes, and the lack of confidence in national law (Chávez and García, 2004, p. 31; García, 2002, p. 58). In addition, distance to a court of law – literally as well as metaphorically, in the sense of time and money – is long (Sieder, 2000, p. 41). Add to this, Raúl Ilaquiche's sound argument, that customary law not only is employed because it has been so since times immemorial, but notably because it is constitutionally permitted.⁷⁹ The main question remains how to define customary law's juridical location as soon as, and as appropriately as, possible in the near future? In a recent report of The World Bank (2006) – which dealt with collective rights in Bolivia – a comparison between legislation and jurisprudence has been made. Although this report points to the relevant experiences with jurisprudence in Colombia (The World Bank, 2006, pp. 138-139), it prefers permissive law or coordinating rules (The World Bank, 2006, p. 149). A majority of the people to whom I have spoken share this opinion. However, they are not unanimous in their arguments, and sometimes they seem not totally convinced. For instance, Lourdes Tibán (2001, p. 122) stated a couple of years ago that legislation should be improved. Her present-day opinion is less black-and-white, she told me that jurisprudence should definitely be developed too.⁸⁰ An indigenous lawyer I spoke to does not hold strong views either, but he inclines towards legislation, because in his opinion the indigenous people shall never succeed in developing jurisprudence.⁸¹ Raúl Ilaquiche en Carlos

Poveda, both having legal practice, share the opinion that theoretically spoken the constitution must provide a profound juridical basis, which basically means that extra legislation need not be necessary.⁸² However, Carlos Poveda adds to this statement that some practical legislation is essential, because judges base their verdict generally (if not only) on legislation.⁸³ This argument is used by others as well, when they make suggestions on how to cope with the judiciary's unwillingness (Brandt and Vidalvia, 2007, pp. 233-234; World Bank, 2006, p. 149). On the other hand, others plea for a solution that copes with the ignorance. In the alternative ILO report by the FLACSO, the authors plea for instance for further training (García and Sandoval, 2007, p. 51).

Conclusion

This chapter dealt, in chronological order, with the failures in the process of the development of conflict rules. In the period from colonization until 1998 it was a matter of real legal pluralism. With the constitutional amendment a situation of formal legal pluralism came into being. As soon as customary law formally was recognized, the possibility of a conflict between two normative orders was created. In order to accompany the coexistence of two legal orders, and to deal with conflicts between them, conflict rules have to be developed. The ratification of the ILO Convention 169 did not lead to such conflict rules. On the contrary, the ratification of this convention just stimulated conflicts. In addition to international treaties, national legislation could provide conflict rules as well. Two thorough bills were drafted, but neither of them got sufficient political support. Theoretically, case law or public administrative decisions remain. Three potentially relevant lawsuits were passed in review – notably in two cases involving the same judge – but for interesting jurisprudence in its general meaning, no conflict rules have been developed due to the lack of jurisprudence in its meaning of formal rules. There were no signs at all of public administrative decisions. Although a couple of projects and governmental agencies tried to provide more understanding of and knowledge about customary law, its effects on (political) decision-making remains almost nil.

In brief, the development of conflict rules through legislation or jurisprudence is a very tough process. This study does not supply an explanation for the governmental opposition, but the juridical opposition could be consecrated as mixture of ignorance and unwillingness. It is understandable that, for whom it may concern, it must be frustrating that neither the relevant articles of the constitution, nor those of the

ILO Convention 169, are applied by the judiciary. Their call for a fast and strong impulse to change present-day practice is comprehensible, and from their point of view it is legitimate that they demand permissive law or coordinating rules. That is why they have strong faith in the next Constituent Assembly.⁸⁴ However, I do not think that the unwillingness of the judiciary will be soon removed, especially not by legislation. After all, as long as their unwillingness remains they, of all people, would be held capable of interpreting or using the law as they please. As was explained before, no strong and well-organized indigenous legal opposition exists. It takes time to combat unwillingness and the clue is to rectify ignorance.⁸⁵ Education could provide a change of attitude. However, in addition to practical arguments why permissive law or coordinating rules would not change legal mentality, there are also substantive arguments against legislation. In a way, legislation is a straitjacket not compatible with the flexible character of customary law. That is why I support the development of jurisprudence.

THE LA COCHA MURDER CASE

*'Una conclusión me puedo decir es, en este caso: la justicia indígena triunfó y la justicia ordinaria perdió.'*⁸⁶

Carlos Poveda⁸⁷

Murder in La Cocha

It was half past ten in the evening when, during a party at one of the houses in the indigenous community of La Cocha, suddenly the atmosphere turned. Until that moment a crowd of family members, godparents, neighbours and other community members, celebrated a child's baptism. Juan, from the Quilapungo sector, and relative of the master of the house, together with two fellow-villagers Nicolás and Jaime got into an argument with the 44 year old Maly from La Cocha. It was said that the argument was about some gossip. It was Maly who started the fight. In first instance the four seemed to make up, but as the evening progressed, and they began to drink heavily, their fight continued. This time, Juan, Nicolás and Jaime attacked Maly. A screwdriver, a pipe and a rock were the weapons they used to beat him up. They kept on hitting until he became unconscious. With great dispatch, the badly wounded Maly was brought to hospital. After twenty-four hours of intensive care, on Tuesday April 24, 2002, Maly died from the effects of the beating (García, 2005, pp. 2-3; Sarango, 2004, pp. 84-85; Caso 43-2002).⁸⁸

Obviously, the death of Maly had its impact on the social harmony in La Cocha. That is why almost immediately the *cabildo* assembled to meet. Because they were convinced that this was a domestic affair, and therefore part of their jurisdiction, they decided to come into operation. Their first activity was to turn in Nicolás and lock him up. He had to

stay in prison in La Cocha for eight days, until the other two fighters had turned themselves in. Subsequently, the *cabildo* arranged a meeting with the other thirteen communities of the parish and decided that the three detainees should not be handed over to state authorities, but they would be adjudicated in conformation with customary law. They also decided that the widow had to be compensated for losing her husband. Having made those decisions, the *Asamblea General* (a meeting of several *cabildos* together) was called together on Sunday, May 5, 2002, only fifteen days after the fatal fight at the party. At the La Cocha plaza, in the presence of almost five thousand Indians, Juan, Nicolás and Jaime were found guilty of murder. They got punished in accordance with local customary law. Firstly they were given the advice never again to act like they had and they had to apologize in public. The next sanction on their bad behaviour was to pay a penalty of six thousand dollars to Maly's widow. Then they were whipped thirteen times, were purified with stinging nettle and ice-cold water, and finally they were expelled from the village for several years. According to the majority of the attendants justice had been done. Everything was put down in writing in a so-called *Acta*, and signed by all persons concerned. With that, the case was closed, and social harmony was restored (García, 2005, pp. 2-3; Sarango, 2004, pp. 84-88; Tibán and Ilaquiche, 2004, pp. 60-68).

Iván León Rodríguez, the *Fiscal* (public prosecutor) of the Cotopaxi province, must have been furious a few days later, when he watched ECUAVISAS's broadcasting of the indigenous trial. That same week he started his own investigation. From the first moment on, it was perfectly clear that he would not take it lying down. So, he began to collect testimonies, he started to produce evidence, and he even decided to exhume Maly's body to determine the exact cause of death. As soon as he was convinced that he had gathered enough evidence, he went to José Luis Segovia Dueños, criminal judge in the Cotopaxi province. This judge was impressed by the public prosecutor's preliminary work, and therefore he decided on a formal judiciary inquiry. The preparatory court investigation's dossier grew, and when, at the end of August, enough evidence had been produced, a meeting of the court was set on September 9, 2002. Nicolás, Juan and Jaime had to fear sixteen years of imprisonment. By chance, Judge Segovia was absent that particular day, so this case came up by his colleague, Judge Poveda. Judge Poveda seemed to be much less convinced of the evidence and changed the approach. In his opinion, a constitutionally recognized indigenous authority had, with regard to their customary law, already pronounced judgement. To the public prosecutor's utter

amazement, Judge Poveda argued that, according to the *ne bis in idem* rule (it is prohibited to try the same case twice), he was not competent to adjudicate this particular criminal case. Therefore he declared the public prosecutor's investigation invalid.

As soon as the public prosecutor got over his shock, he challenged the measure in proceedings before the court. Successfully, as it turned out, as on September 27, the Court of Justice of Cotopaxi reversed Judge Poveda's decision. Meanwhile, the indigenous movement had been informed about this unique case, and as a result they stood firmly behind Nicolás, Juan and Jaime, the involved indigenous authorities, as well as behind Judge Poveda. That is why this lawsuit immediately obtained political significance. Despite all the attention the indigenous lawyers and their appeal got, the noise that surrounded this case died down after awhile. Nevertheless, the three men have not been convicted as yet. And Carlos Poveda has changed his job.

The hacienda's inheritance

La Cocha is a settlement like many others in the Andean highlands. As part of a former hacienda, it is a small community in the parish of Zumbahua, canton Pujilí, in the Cotopaxi province. It contains approximately fifty dwelling places, of which half surround a dusty plaza. The other half, all made of cement blocks and with roofs covered with corrugated zinc, are spread over the surrounding area. Most of them are next to the unpaved road that leads to the community. La Cocha is situated northwest of the town of Zumbahua, about a twenty minute drive by pickup truck. At the plaza, a yellow ochre painted Catholic church with a reddish brown corrugated roof is centrally situated. On the outskirts of the community a school is situated, and the village has a cemetery as well. On a weekday in August, it usually is chilly, windy and dusty. Except for some playing children and their teacher looking after them in the schoolyard, the road and the plaza are deserted. One could estimate its population at approximately two hundred.⁸⁹ The neighbouring town of Zumbahua is situated on the west side of the west Andean ridge, the *Cordillera Occidental*. Its centre has a paved plaza, some unpaved streets, a Catholic church, a school, a clinic, the office of the *teniente político's* (the nominal political head of Zumbahua), three ordinary hostels, and a series of small shops, which sell dry goods or liquor. On weekdays it gives a similar desolate impression as La Cocha does. However on Saturdays, the weekly market day, and on the preceding Friday night, Zumbahua gets really crowded. The hostels and

shops that are for the most part locked and empty during weekdays, open for the market. Zumbahua is easily accessible: it is situated on an asphalted road that runs from the province's capital Latacunga to Quevedo. It is one of the few highways that links the highlands and the coast. At Zumbahua, a second asphalted road starts; this one leads to Lake Quilotoa, a tourist attraction, some ten kilometres north of town. All other roads are unpaved. The town of Zumbahua has an estimated population of one thousand.⁹⁰ The parish of Zumbahua area is about 280 square meters wide, it is situated in the northwest of the Cotopaxi province, at seventy kilometres from Latacunga, not far from the equator. Because it is situated at an altitude between 3,400 and 4,000 meters above sea level, climate, depending on the season, is cold and dry (summer), or chilly, gray and rainy (winter).⁹¹ Long vistas, encompassing heights and depths of several hundred meters are commonplace. Because of cultivation and erosion, almost no trees are left. The most important crops are barley, potatoes and beans. If one has livestock, it probably is a flock of sheep, or, at the highest level, llamas (Umajinga, 1995, pp. 248-249; Weismantel, 1988, pp. 40-49).⁹²

Zumbahua is one of the rural parishes in the canton of Pujilí, in the province of Cotopaxi, situated in the country's centre. The city of Latacunga is the province's capital. During the years of the *República de Gran Colombia*, Latacunga was still part of the department of Quito. In 1851 the León province was founded, which changed its name in 1938 in Cotopaxi. Latacunga is one of the smaller provincial capitals in the highlands, and is situated near the *Panamericana* (Pan-American highway), that leads from the Pichincha province (with its capital Quito at ninety kilometres northwards), through Cotopaxi, to the Tungurahua province southwards. The second major asphalted road starts in Latacunga, and leads to the west, to Quevedo, which is an important trade centre with the coast. Cotopaxi's population is estimated at 350,000, of which almost three-quarter is peasant. The majority of the population consider themselves part of the *Panzaleos* peoples of the Quechua of the *Sierra* nationality. Their mother tongue is Kichwa shimi; Spanish is the second most spoken language, although not everybody speaks it fluently (Almeida, 2005, p. 258; Naranjo, 1996, pp. 22-44; Tibán, 2001, p. 29; Tibán, 2003, p. 8; Umajinga, 1995, pp. 248-49).⁹³

Cotopaxi's countryside is inhabited by so-called *campesinos*, in anthropology referred to as peasants. *Campesinos* are the poorest people of the countryside, who have a very simple means of existence. Their society is called a *comuna*. The political life of the *comunidades* is in sharp contrast to the stereotypical image of the closed corporate community

in Latin America. People acknowledge their relationships to the place they live and to the land they farm, but kinship and marriage create ties that bind people from different *comunas*, and these ties have a strong political significance. In line with this, the *comuna's* boundaries seem to be of no importance at all (Churuchumbi, 2006, p. 22; Naranjo, 1996, p. 139; Weismantel, 1988, p. 52).⁹⁴ Because of contemporary migration to cities, or even to other countries, these webs can have many branches. Besides one's direct kin, godparents are the second most important relatives in one's social organization. After a baby is born, at its baptism, godparents are chosen, as was done at the party that particular Sunday in La Cocha. In this particular web, it is not about the relationship between godchildren and their godparents, as well as it is about *compadrazgo*, co-parenthood. This means that the relationship between the real parents and the godparents is of vital importance. Such a relationship is characterized by rights and duties – some happen rarely, some happen frequently. Grandparents could be godparents, but one could easily ask someone else. Those with an economic stable position are frequently asked to be a godparent. For peasants, who are poor, an assembly of influential, or wealthy godparents is of vital importance. For them it is a way to survive. On the other hand, the more godchildren one has, the more important he or she will be. In the province of Cotopaxi examples are known of godparents with over ninety godchildren (Naranjo, 1996, pp. 140-43; Tenesaca, 1995, pp. 296-98; Weismantel, 1988, p. 53). Obviously, the party on April 21, 2007, was not just an ordinary party; vital social relations were made and confirmed. That is one of the reasons why the *cabildo* took the events so seriously: social harmony of the community as a whole was at risk.

Zumbahua's history starts after the arrival of the Spaniards, when, at the beginning of the seventeenth century, a hacienda was established. Whether or not the area was inhabited in pre-colonial times is unknown (Weismantel, 1988, p. 60). When the Spaniards came to the Andes, at the beginning of the sixteenth century, they first settled in already existing towns and focused on the trading and the quarrying of precious metals. They belonged to the *República de Españoles*, the peasants of the surrounding rural areas belonged to the *República de Indios*. In the wake of colonization, from the second half of the sixteenth century on, the Spanish began to legalize (collective) land tenure of the *pueblos de indios* (Indian villages). As a result, when the Spanish wanted to expand their business to agriculture and stock breeding, legally they were forced to establish their haciendas in the remote areas of the Andes: the highlands

of the *Sierra* (Baud, 1993, p. 87; Ouweneel and Hoekstra, 1993, p. 117).⁹⁵ That is why, in 1639, an Augustinian hacienda bought the land (which came to be known as Zumbahua) to tend their sheep. It was with this introduction of herds, that the highlands came into their own as a major productive zone. The hacienda needed workers, as a result of which a new population settled where none had previously existed. Mainly, the workers were recruited from elsewhere. Partly this was a result of a Spanish rule that forced people to pay tribute through labour, so inhabitants of overpopulated, lower areas were pushed to move to higher situated haciendas (*repartimiento de trabajo*). Partly, this was a result of the opportunity for a lot of low-paid workers to gain some land of their own. The hacienda was not able to pay a lot in cash, so it paid with small land titles. Most workers that came to the hacienda stayed there all their lives; mainly due to an inheritable debt system between the hacienda and the workers. They did the yearly routine jobs, the seasonal jobs were done by workers that were hired from neighbouring indigenous communities (Bock, 1993, p. 210; Waters, 2007, p. 123). Together with obvious trading relations between hacienda and their surrounding communities, contacts got more profound over the years. Baud (1993, p. 187) mentions that, because of the absence of state authorities, *hacendados* had to be careful how to treat their indigenous neighbours. Principally, the parties involved had to establish and maintain a peaceful coexistence with each other.

The inheritable debt system did not disappear after 1830, when Ecuador became independent. On the contrary, the number of *huasipungueros* (people who lived on, and worked for a hacienda in exchange for a small piece of land of their own) increased. That is why, on these haciendas, communities came into existence with a specific character, in which personal ties and granting favours played an important role. The relation between a *hacendado* and his workers has been characterized as an asymmetrical dependence, in which the *patron* took care of 'his Indians', and in which he is thanked by them with labour and loyalty. In his study *La semántica de la dominación: el concertaje de indios* (1991), Andrés Guerrero describes such a situation at the beginning of the twentieth century in the northern parts of the Andean highlands. With independency, the system of the two *Repúblicas*, or two classes, officially was abolished. However, in fact, on haciendas it existed until the first decades of the twentieth century. The unequal relationship between haciendas and workers did not disappear, although it provided the latter safety to a certain extent. Guerrero argues that, although most of the times the *hacendado* dominated the workers, some forms

of resistance occurred too (Guerrero, 1991, p. 335). When it comes to the hacienda of Zumbahua, Weismantel (1988, pp. 69-71) also mentions examples of such rebellion.

In 1908, the hacienda of Zumbahua, officially transferred to the Junta Central de Asistencia Pública. Subsequently, this public body rented the hacienda out to landlords, for eight years each time. In turn, these landlords transferred their responsibilities to *mayordomos en mayores*, administrators and supervisors. In his article 'Indigenous Struggles for Land Rights in Twentieth-Century Ecuador' (2007), Marc Becker describes conflicts between agricultural workers and the landowners in Zumbahua in the 1930s and 1940s. With help from a Socialist Party lawyer from Quito, the *huasipungueros* addressed their complaints concerning wages and treatment to state authorities. In one particular case in 1943, encouraged by the *Ley de Comunas* (Law on Comunas), they tried to get recognized as a *comuna*, but that request was declined.⁹⁶ However, the hacienda's end was near. As a result of land reform laws of 1964, the hacienda of Zumbahua was abolished, and the land was divided among the workers (Becker, 2007, pp. 162-65, pp. 174-75; Naranjo, 1996, p. 53; Novo, 2004, pp. 243-44; Umajinga, 1995, pp. 250-51, p. 258; Weismantel, 1988, pp. 69-70).⁹⁷ One of the heritages of this former hacienda period is La Cocha's central role in the socio-political sphere. Before the land reforms, the haciendas were divided in so-called *comunidades*, *lugares* and *departamentos*. Together with six subordinated *lugares* and *comunidades*, La Cocha formed such a *departemento*. Because of its central role then, today it still has a church, a cemetery, a school, and even a small prison. The neighbouring community of Pasobullo, a settlement of some disconnected dwellings, does not have such facilities, and therefore it has to turn to La Cocha if the occasion arises (Weismantel, 1988, p. 52).⁹⁸

After the abolition of the hacienda, La Cocha officially became a *comuna*: one of the country's smallest political units. A *comuna* is theoretically a political unit designed to protect the geographic integrity of indigenous communities. Its peculiar legal status is based on the supposed communal nature of indigenous social organization, including the inalienability of communal land. Because of its specific facilities, and its important role for neighbouring communities, La Cocha sometimes is called a sector as well. It is a subdivision of the parish of Zumbahua, with the town of Zumbahua as its administrative and economic centre (Weismantel, 1988, pp. 51-52). Zumbahua is since 1972 both a civil parish (*parroquia civil*) and a ecclesiastical one. As a civil parish, it is one of the seven rural parishes in the canton of Pujilí in the province

of Cotopaxi.⁹⁹ A *comuna* is governed by a *cabildo*. The phenomenon of the *cabildo* was introduced by the Spaniards. After they established the two *Repúblicas*, they transformed the pre-existing indigenous villages into a *pueblo de indios*, which formed the bases of the *República de Indios*. Such a *pueblo de indios* was governed by a *gobernador de indios* (Indian governor). This had to be an indio in its legal sense, and was elected by an electoral college of indigenous aristocrats, the so-called *curacas*.¹⁰⁰ Every *pueblo* was divided into a head village with several sub-villages, while both could be divided into districts. A sub-village was governed by an *alcalde* (mayor), and even the districts got their own civil servants. The complex of all these civil servants was called the *cabildo* (Ouweneel and Hoekstra, 1993, p. 113).¹⁰¹ It should be noted though, that the Andean situation had a rather unique characteristic of widespread dwellings and settlements. This resulted from the pre-colonial period, in which the social organization was based on so-called *ayllus*. An *ayllu* is a community based on kinship (*ius sanguinus*), whose means of sustaining life was agriculture. Such an *ayllu* had a vertical connection that extended different heights with different climates, and therefore with different crops. An *ayllu* could be self-supporting. This vertical connection resulted in spread settlements. Because the Spaniards preferred concentrated villages over extensive settlements, they turned the *ayllus* into so-called *reducciones*, or connected centres, under the control of one *cabildo*.¹⁰² It is important to note, however, that this *cabildo*-system only affected 'free' peasant communities. The communities on a hacienda did not have a *cabildo*, they were governed by the *hacendado*. This all changed when the haciendas were abolished as a result of the *Ley de Comunas* and other land reform laws. From the moment of abolishment on, these communities came under supervision of a *cabildo* as well (Lyons, 2001, p. 23). Nowadays, these *cabildos* consist of a *presidente* (chairman), a *vice-presidente* (deputy chairman), a *secretario* (secretary), a *tesorero* (treasurer), a *sindico* (delegate) and some ordinary members. Each of them is chosen for a term of office of two years. Only decent community members qualify for election (Becker, 1999, p. 541; CODENPE, 2003, pp. 29-30; Weismantel, 1988, pp. 52-53).

A final important characteristic of the social relations in Andean peasant societies is reciprocity. Its basis is supposed to originate from the *ayllu*. The different crops that were grown at different heights, were exchanged on the basis of a complicated system, without intervention of a market. A lamb, for instance, was swapped for a *quintal* (approximately 46 kilos) potatoes or barley. With lower Andean areas,

potatoes or barley were swapped for maize and in coastal areas for honey (Umajinga, 1995, 258). Despite the fact that the history of development of haciendas and their administrative system, differ from free communities, the patron-client relations between a *huasipunguero* and a *hacendado* were based on reciprocity as well. Although exchange within an *ayllu* was based on equality, the exchange between a patron and his worker was characterized by the profit for the former (negative reciprocity). In both cases though, the people involved needed each other to survive. In addition to reciprocity, traditional solidarity and collectivity are still considered of major importance to survival (Almeide, 2005, p. 258; Churuchumbi, 2006, pp. 28-30; CODENPE, 2003, pp. 29-30; Ilaquiche, 2004, p. 30). In case of these traditions, it does not matter that, as history shows, with the genesis of haciendas people started to settle in remote areas that had not been inhabited before. This basically means that the very existence of an ethnic group is not that of the native Indians of Zumbahua, but rather that of an artefact of the colonial period (Weismantel, 1988, pp. 60-61).

The cabildo adjudicates

Maly's death had such an impact on social harmony in La Cocha, that the *cabildo* decided to adjudicate the three accused according to customary law. This indigenous lawsuit is the section's main topic. However, before analysing the trial it is important to explain the term indigenous in relation to customary law once more in detail. As showed before, the La Cocha community originated from the hacienda of Zumbahua. This hacienda was governed by a *hacendado*, who, when the occasion rose, adjudicated cases. Whether he always obeyed the law is doubtful – after all, the strong arm of the law was absent (Baud, 1993, p.187; Lyons, 2001, p. 24). Adding to this the social diversity of the hacienda communities and considering the fact that most workers originally came from different places, it is a reasonable assumption that they all brought with them their own legal consciousness and their own norms and customs. Within these communities a new normative order came into existence: a local customary law *avant-la-lettre*, in which the flexible and adaptive character made the most of its chances.¹⁰³ As stated before, the communities on the hacienda had to maintain a peaceful coexistence with their neighbouring indigenous communities. Obviously, the back and forth interpenetrating of elements of different normative orders must have occurred. And finally, direct or indirect, national law played its role in this process of blending too. The *hacendado*, as well

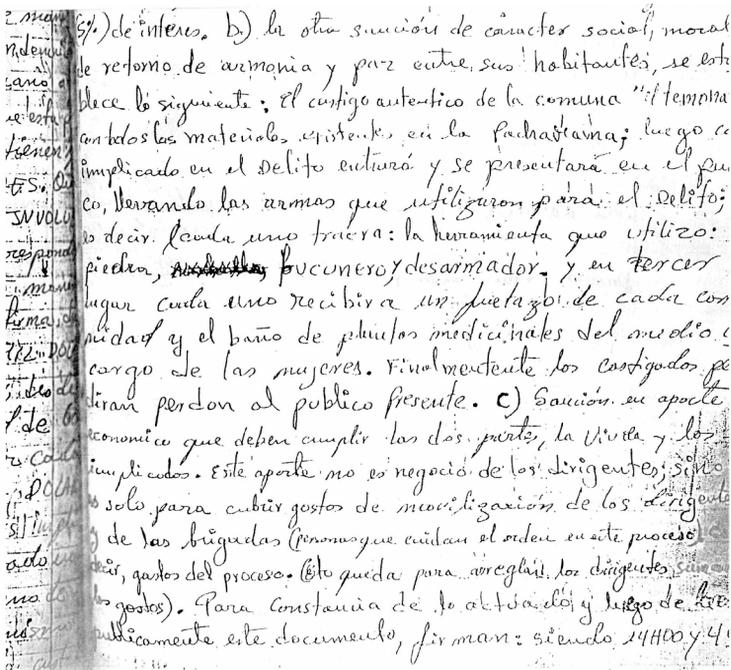
as the *cabildos*, had to obey the law, of which the agricultural workers and the peasants were very well aware (Lyons, 2001, p. 25). In practice, this meant that the *cabildo* had to deal with difficult choices: from the inside they were forced to defend local norms and practices, but from the outside they felt pressure from state authorities (Baud, 1993, p. 189; Ouweneel and Hoekstra, 1993, pp. 112-14; Whitten, 1976, pp. 257-61). A situation similar to Moore's semi-autonomous social fields. In summary, because of a mixing of different elements, in combination with internal and external pressure, the kind of customary law that developed on a hacienda should rather be called local law, instead of indigenous law. However, the people involved nowadays claim their customary law to be indigenous, in its meaning of traditional and their lawsuits are performed in their Quechua language as well. That is why this study continues to call their normative order customary law.¹⁰⁴

As mentioned before, it was Clifford Geertz who already stated that law is a social construction. Consequently, the vital social principles of reciprocity, solidarity and collectivity, are the guiding principles in customary law in the Andean communities. Therefore, the most important umbrella norms are *ama llulla* (do not lie), *ama shua* (do not steal) and *ama killa* (do not be slothful) (García, 2002, p. 41; Ilaquiche, 2004, p. 30; Yumbay, 2007).¹⁰⁵ With these basic norms in mind, customary law recognizes the following kinds of deviant behaviour. Firstly, there can be problems in a domestic sphere, like a family quarrel, disrespect to elders, domestic violence, or divorces. A second type of conflicts disrupts social harmony, like gossiping, disrespect to authorities, refusing to perform one's *minga* duties, or vandalizing public property. Thirdly, there can be conflicts about ownership or titles, like the dividing of a legacy, or arguments about cattle or land. Finally, the most severe violation of the norms are offences aimed at one's life, like murder, homicide or the intention to do so (García, 2002, p. 30; Ilaquiche, 2004, pp. 60-62).¹⁰⁶ It depends on where the conflict took place, within a family or between (members of) different communities, and also on the seriousness of the conflict, as to which authority is competent. Concerning domestic problems, parents, grandparents or godfathers are competent to solve the problems, usually by giving good advice. Authorities on community level are *cabildos*, *ex-cabildos* or *curacas*. They are allowed to (threaten to) punish. Serious offences need to be brought before an *Asamblea General* or an OSG (Organización de Segundo Grado – Organization of the Second Degree) (García, 2002, pp. 31-41; Ilaquiche, 2004, pp. 60-62; Lyons, 2001, p. 24; Yumbay, 2007). Obviously, the murder in

La Cocha was such a serious offence, that it had to be managed by the highest authority possible.

The different procedures in customary law have been described in detail by Tibán and Ilaquiche in their study *Manual de Administración de Justicia Indígena en el Ecuador* (Tiban and Ilaquiche, 2004, pp. 36-41), as well as by Brandt and Vidalvia in theirs *Justicia comunitaria en los Andes: Perú y Ecuador: el tratamiento de conflictos* (Brandt, 2007, pp. 31-33).¹⁰⁷ They distinguish seven stages during an indigenous lawsuit, which will guide this study's analysis of the La Cocha murder case and its *Acta*. See Figure 1.¹⁰⁸

Figure 1. Scan of a page of the *Acta*.



The first stage in an indigenous lawsuit is called *willachina*, or report. A victim, or his relatives, has to report orally to (a member of) the *cabildo* where it has happened. Such a report is accompanied by a request to the *cabildo* to solve the problem. Both studies I consulted emphasize that only victims or their relatives could make such a report and such a request. Third parties are not supposed to have such an interest. Although the accounts on the La Cocha murder case are not that specific, it is my assumption that it was Maly's wife or her relatives who went to the *cabildo*.¹⁰⁹ The second stage, *tapuykuna*, concerns the

investigation done by the *cabildo*. It is done independently and with the possible use of several means. The *cabildo* could want to determine by themselves what damage exactly had been done by investigating the scene of the crime. They could hear witnesses or could conduct a search of someone's premises. All of this aimed at obtaining a complete picture of what happened, what damage had been done, and who could be held responsible. In the La Cocha murder case, the *cabildo* decided to lock up Nicolás and to send for the other two suspects (Sarango, 2004, p. 85).

The next stage, *chimbapurana*, is when the perpetrator and his victim are confronted. This third stage is the start of the public trial and can be divided in two phases. During the first phase the *cabildo* is informed by its *presidente* over the results of the investigation and a possible solution is proposed. During this meeting, the *cabildo* decides on which authority is competent and when the trial should take place. In the La Cocha murder case, the *cabildo* decided to call for an *Asamblea General* of the OSG UNOCIC (Unión de Organizaciones y Comunidades Indígenas de la Cocha – Union of Indigenous Organizations and Communities of La Cocha), in which the thirteen *comunidades* were represented.¹¹⁰ At the same time, the OTG (Organización de Tercero Grado – Organization of the Third Degree) MICC was invited to accompany the public trial. The presence of both the UNOCIC and the MICC is striking, because they form part of the formal indigenous administration.¹¹¹ Finally, the *cabildo* decided not to bring in the three suspects to state authorities, but to adjudicate in conformance to customary law and that some sort of compensation for the widow and her children should be one of the most important solutions (Sarango, 2004, p. 85). Because of the good pace of the procedure – which is one of the characteristics of customary law – the date of the public hearing was set on May 2, 2002.

The second phase of the third stage concerns the actual public trial. During this phase, first the victim or the prosecuting party is allowed to illustrate what did happen and why the *cabildo's* help was enlisted. Then it is the turn of the suspect or defendant to tell his version. Both parties speak for themselves, contrary to national law they cannot be represented by a lawyer. The purpose of this oral session is to provide a stage on which everything can and should be said. As its final aim is reconciliation, every community member – generally elderly, (ex-) members of the *cabildo*, relatives or godparents – puts in their two cents worth. Basically everyone involved or with some kind of status is given speaking time.¹¹² In the La Cocha murder case, not only the compensation for the widow was at stake, but the (future) lives of the

three perpetrators and their families as well. During the debate questions were asked like: ‘what will happen to the widow and her children?’, as well as: ‘who will take care of the families of the three perpetrators?’. Even the option of reporting the case to state authorities was discussed. The community wondered whether imprisonment would benefit or harm the three perpetrators: ‘how will they return after sixteen years in jail?’ and ‘what effect will those years have on their personality?’ (Tibán and Ilaquiche, 2004, p. 63). During this third stage, the fourth stage in a way was embedded. All speakers provided the three perpetrators with *kuana*, which means good advice (García, 2005, pp. 2-3).

The fifth stage is called *killpichirina*, during which the sentence is determined. This is done by the authorities in question. Customary law contains several sentences, obviously depending on the violated norm. As was stated before, customary sanctions are strongly attached to reconciliation and compensation, in order to restore harmony. Examples of sanctions which conform to Quechua customary law are: pay a fine, return or repay stolen items, repair damage, execute a community service, whipping, purification by a medicinal bath, banishment, or combinations of different sentences. Whipping as a sanction is considered to date back from the hacienda-period, when corporal punishment – whether or not regular – was used by *hacendados*, *mayordomos* or *mayorales* (Becker, 2007, p. 165; Lyons, 2001, p. 27).¹¹³

The punishments imposed in the La Cocha murder case have been recorded in detail in the *Acta* and contained three types of sanctions: Firstly a compensation of US\$ 6,000 was fixed for the (pregnant) widow and her four minor children, secondly, the authentic punishment *el timonar* was carried out and finally, an agreement (with an economic character) for further assistance had to be made between the three wrongdoers and the widow.

The fine of US\$ 6,000, given as a compensation refers to solidarity, as was explained in the *Acta*. After all, solidarity is one of the three characteristics of Andean peasant society. In great detail, the *Acta* described when the fine had to be paid, which guarantees had to be given by relatives of the condemned, and which penalty interest had to be paid in case of non-payment. As was shown in the broadcast by ECUAVISA, the sum of money was being counted and recounted. The fact that the three litigants were bailed out by their family-members obligated them for life, which could be considered as a part of the sanction. The fine is a perfect example of the adaptive character of customary law. Money was introduced in the Andes by the Spanish, in pre-colonial times this way of payment did not exist. Although market

economy since those times had increased, the exchange of goods and food based on reciprocity still continued to be an important character of the Andean economy until the twentieth century (Baud, 1993, pp. 188-189). For instance, in an *aylly* of free communities, agricultural products between inhabitants of different micro-climates at different heights still were being exchanged, which was done through so-called *intermediarios* (middlemen).¹¹⁴ Also on the haciendas, real money was of minor importance. Although it was common to keep a detailed record of working hours and private loans in so-called *libros de rayas*, money in cash was not paid – debts and belongings only existed in the books. Even fines were included in those *libros de rayas*. The fact that fines today form part of customary law, endorses to the viewpoint that local Andean customary law originated from haciendas and was influenced by the rules of the *hacendado* (Lyons, 2001, p. 27). The secondary position of money – in free peasant communities as well as at haciendas – changed during the twentieth century. This is shown by the conflicts between rural workers and the Zumbahua *hacendado* in the 1930s and 1940s that concerned the height and payment of salary (Becker, 2007; Waters 2007, p. 123). However, Weismantel (1988, pp. 73-74) analyses that nowadays cash in Zumbahua is so scarce, that its value exceeds its rate. In her opinion, this lack of money (currency) is another legacy of the hacienda-period.¹¹⁵

The second type of sanction (the authentic, *el timonar*) contained several elements aimed also at restoring social harmony, but this time by using materials that were provided by *Pachamama* (the Holy Earth). The penalties also aimed at purifying the perpetrators from the evil spirit that incited them to their actions as the intended result was to restore their personal harmony as well. Firstly, the perpetrators had to appear personally and show the applied weapons (in the La Cocha murder case: a rock, a pipe, and a screwdriver) to the attendants at the public trial. This was meant to warn the public what could happen if one got mixed up in a fight in which such weapons are used. Secondly, the three perpetrators were condemned to get a whipping, which was executed by the thirteen attendant *cabildos* of neighbouring communities. Then they got purified with a medicinal bath, which included a rub with stinging nettle, followed by a shower of ice-cold water. This ritual bath is considered to have a purifying effect (Yumbay, 2007). They also had to apologize in public, and because of the seriousness of the case, they were expelled from the community for two years as well (Sarango, 2004, p. 85). The third, and final sanction had an economic character. Between the wrongdoers and the widow an agreement was

made how to offer her and her children future assistance. However, as was explained in the *Acta*, this agreement was not in the sphere of influence of the *Asamblea General*.

To appear accompanied by the weapons used and the public apologies are considered to be the sixth stage during an indigenous lawsuit: *allichuna*. The seventh and final stage, the execution of the punishments, is called *paktachina*. The performance of the corporal punishment is put out to community members with a good reputation or prestige. For the most part, these are elders, members of the *cabildo*, or godparents. In the La Cocha murder case, the whipping was done by the *presidentes* of the *cabildos* of neighbouring communities and the bathing with ice-cold water was done by women. A verdict of an indigenous lawsuit is written down in an *Acta*. The aim of an *Acta* is twofold: it serves as an accompanying document for the fulfilment of the agreements, and it can be used as a reference in case someone falls back into old mistakes (Chávez, 2005, pp. 31-32). The La Cocha murder case *Acta* was signed by the three perpetrators, by their family-members who had bailed them out, by the widow and her two children of age, by the chairpersons of the UNICOC and the MICC, by the *presidentes* of the *cabildos* of neighbouring communities, by Lourdes Tibán as vice-president of the MICC and as secretary of the trial, and by Raúl Ilaquiche as chairman of the trial.

To recapitulate, the three wrongdoers were punished with a fine of US\$ 6,000, a ritual bath plus public apologies, and an agreement for further assistance to the victim's family had to be made. From a national law perspective this does not appear to be a severe penalty, compared to an imprisonment of maximum sixteen years. This raises the question of the actual meaning of these customary penalties. To start with the fine: US\$ 2,000 per person equals roughly four to five years labour in the La Cocha area for someone *de ocupacion jornalero* (day labourer) like the three men.¹¹⁶ Add to this the condition of cash being a marginal good, and that the actual bail was being paid by family members, this fine was a serious burden. However, if sixteen years could be capitalized (in terms of lost income), it probably would be more. But, as explained earlier, a national law or western perspective is not the proper way to value customary practices. In a rural community, where reciprocity, solidarity and collectivity – on which social harmony is based – are of vital importance, the other elements like the ritual bath and the apologies, mean a condition for survival, for the individuals involved as well as for the community as a whole. It is from this point of view their real meaning should be valued.

However, for the purpose of this study, the La Cocha murder case provides a good example for analysing the process of interlegality. The norms, the potential offences, the authorities, the procedure, the possible punishments and their execution, all together comprise customary law in the La Cocha *parroquia*. As stated before, it rather should be called local than indigenous customary law. It originated from the hacienda and is a mixture of various customary law systems brought along by the new workers recruited from elsewhere, the rules of the *hacendado*, and customary law of the neighbouring free communities. Additionally, this mixture has been influenced – (in)directly – by national law. This process of influencing has not come to an end, as is shown by elements that became part of customary law recently. Examples of this mixing and blending with elements of national law – interlegality – are: the written *Acta* and the reference to the *carácter penal* (nature of a criminal act) of the conflict in that same *Acta*.¹¹⁷ The last two sentences of the *Acta*, in which it is forbidden to make use of national law in second instance, provides a good example of discouraging forum shopping. More interesting though, is the explicit reference to the articles 1, 83, 84 and 191 of the Constitution. As was exemplified earlier, article 1 of the Constitution states that Ecuador is a pluri-cultural and multi-ethnic state, articles 83 and 84 of the Constitution refer to the indigenous nationalities and their collective rights, and article 191, section 4, of the Constitution mentions the right of local authorities to perform customary law in case of domestic affairs. Furthermore, by mentioning *los procedimientos del debido proceso*, which means the right to a fair trial conformed to prévisible procedures, the *Acta* implicitly refers to the universal human rights. Both are examples of interlegality in a situation of formal legal pluralism. The references to the Constitution and to the human rights probably have not been made by accident. It is plausible that the MICC (or more specific: Lourdes Tibán and Raúl Ilaquiche) could be held responsible for this. After all, it was the MICC that supported Juan and Jaime with juridical assistance when they got involved in the formal lawsuit. Lourdes Tibán and Raúl Ilaquiche represented them before the Court of Justice of Cotopaxi as their lawyers. In my opinion it is without doubt that they have articulated their relevant juridical knowledge in the *Acta* on May 5, 2002, deliberately.

Judge Poveda makes history

As expected, after the broadcasting of the La Cocha murder case and the publication in national newspapers, someone would object

to these practices. That person happened to be the public prosecutor of the Cotopaxi province. On May 9, 2002 he decided to start a preliminary investigation by sending a letter to the *Ministerio Público* (Public Prosecutor) about his intentions to start a criminal investigation.¹¹⁸ In that particular letter he set out the urgency of an *exhaustiva investigación* (exhausted investigation) and announced his intention to arrest the three suspects for interrogation and hearing witnesses. He underlined the need for an exhaustive investigation by referring to two articles in the national newspaper *El Comercio* (2002a; 2002b) of May 10, 2002: '*La Cocha quiere aumentar el castigo en caso de muerte*' (La Cocha aims at increasing corporal punishment in cases of homicide) and '*No hay confianza en la Ley*' ('There is no confidence in the law'). However, the public prosecutor never succeeded in arresting the three men, because the police could not find them and during the investigations not a single family member turned out to have any clue where the suspects might possibly be living or what their whereabouts were; '*..debido a la falta de colaboración de los familiares..*' (..because of the lack of cooperation of members of the family..), as it was conveyed to the public prosecutor by the police.¹¹⁹ Even the number of hearings of witnesses that had taken place was disappointing: just one.¹²⁰ However, the public prosecutor was not discouraged by these setbacks, and kept working tirelessly on his criminal investigation. He even decided to exhume Maly's dead body to determine the exact cause of death. In the presence of two witnesses, an autopsy was carried out.¹²¹ It turned out that Maly had succumbed to a combination of head and body injuries. On July 3, 2002, the public prosecutor had gathered enough evidence to request a preparatory court investigation.¹²² Among other things, he requested a provisional custody of the three men, because they were under suspicion of murder according to article 450 of the *Código Penal* (Criminal Code).¹²³ That same day, Judge Segovia, Juez Tercero de lo Penal de Cotopaxi, accepted this request.¹²⁴ Almost a month later, enough evidence had been gathered in the dossier of Caso 43-2002; so, on August 20, 2002, Nicolás, Juan and Jaime were formally accused of assassinating Maly according to article 450 of the *Código Penal*.¹²⁵ On September 3, 2002, a decision was made to have a court session on Monday, September 9, 2002, at 9.00 p.m.¹²⁶ Due to Judge Segovia's absence, Judge Poveda, Juez Segundo de lo Penal de Cotopaxi, took over the principal court investigations.

During the court session, Judge Poveda took all the preparatory steps as set by the law that were necessary before the court deliberations and the rendering of the final judgement could take place. In essence, this

meant that an examination of the facts and persons at issue in the case took place. For instance, the judge studied the exhibits to form himself an idea of what exactly had happened at the party and afterwards. He also looked into the details of the criminal investigation and of the preparatory court investigation. In his verdict, that was rendered on September 10, 2002, the judge made mention of all of these steps as taken by him, while referring to the testimonies of the witnesses and the experts, to the reports of the court session as well as to other documents that formed part of the dossier.¹²⁷ Halfway through the verdict, the judge paid attention to the blame that the *Defensor Público* (Public Defense) had put on the public prosecutor concerning the violation of the *ne bis in idem* rule. From there on, Judge Poveda continued his further line of reasoning. Firstly, he brought the formal recognition of customary law (article 191, section 4, of the Constitution) to mind, as well as the ratification of the ILO Convention 169 by Ecuador. In other words, the judge explained that the indigenous peoples were empowered to adjudicate according to their own customary law, as long as this did not conflict with national law or universal human rights. National authorities as well as courts should respect this right of indigenous people, and, if necessary, the indigenous peoples ought to be protected against any violation of this right. Subsequently, the judge referred to articles 17 and 18 of the Constitution, in which human rights have been codified.

The judge was forced to make this reference, because, on the one hand, article 191, section 4, of the Constitution makes mention of legislation that should coordinate customary law and national law, but, on the other hand, such coordination had in fact not yet taken place. As stated before, these coordinating rules should prevent violations of national law and universal human rights. That is why the judge needed this reference to confirm that making use of customary law is legitimate. To support his argument, he also referred to the jurisprudence of the Constitutional Court of Colombia, which demonstrates that customary law can be applied without coordinating rules or permissive law:

Finally, he expatiated upon the death of Maly concerned a domestic affair, the fact that the La Cocha *cabildo* was competent to adjudicate, the procedure and the sentence were in conformation with local customary law, and therefore for sure no national law or international rules had been violated. The judge underlined the *Defensor Público's* argument of violating the *ne bis in idem* rule. On September 10, 2002, at 8.30 p.m. – less than twenty-four hours after the commencement of the court session – the verdict in the La Cocha murder case was given. Judge Poveda declared the public prosecutor's *investigation nulidad a todo lo actuado* (invalid), see Figure 2.

Figure 2. Scan of the Judge Poveda verdict.

del Ecuador, por lo que dentro del presente caso es plenamente aplicable la institución argumentada por el Defensor de los imputados **NON BIS IBIDEM**, por lo que el Fiscal debía analizar de manera jurídica su posición antes de emitir su opinión de inicio en la acción penal público, debiéndose indicar que el hecho de conocer por "voz pública", es una posición meramente personal, toda vez que nuestro Código de Procedimiento Penal no mantiene esta figura que si lo tenía el Juez Penal en el Código anterior, ya que las maneras de conocer es por el informe o parte de la Policía o en su defecto por denuncia, situaciones que jamás se verificaron en este enjuiciamiento. Con estos antecedentes al no haber existido jamás mérito para incoar este enjuiciamiento al amparo de lo que dispone el artículo 364 del Código de Procedimiento Civil, dicto la **NULIDAD DE TODO LO ACTUADO** a partir de fs. 1, en virtud de las acciones conocidas fueron juzgadas de conformidad a lo que dispone el artículo 191 inciso cuarto de la Constitución Política del Ecuador. Sin costas. Léase, notifíquese y cúmplase. Enrendado, civil, vale. Certifico.


DR. CARLOS POVEDA MORENO.
JUEZ SEGUNDO DE LO PENAL DE COTOPAXI
ENCARGADO DEL TERCERO.


Certifico. - El Secretario.

The public prosecutor's counterattack

Three days later, on September 13, 2002, the public prosecutor wrote to the court that he would not accept the judge's verdict and that therefore he would lodge an appeal at the Court of Justice of Cotopaxi.¹²⁸ He also wrote that the verdict had left him with '*una amarga sensación de inseguridad jurídica*' (an aftertaste of bitterness). According to him, it was unacceptable that ancestral practices were performed in a civilized culture. In the meantime, the indigenous authorities of the Cotopaxi province were informed about this official protest of the public prosecutor and decided to get involved. In a letter to the Court of Justice of Cotopaxi, dated September 19, 2002, the *presidentes* of the La Cocha community, of the UNICOC, and of the MICC (the same persons who had signed the *Acta*), accompanied by two lawyers (Lourdes Tibán and Raúl Ilaquiche)¹²⁹ pleaded that the verdict should be upheld.¹³⁰ The indigenous authorities – just like Judge Poveda – referred to article 191, section 4, of the Constitution as well as to the ILO Convention 169, but they also referred to articles 1, 83 and 84 of the Constitution. Their letter can be seen as an elaboration of the implicit and explicit references in the *Acta* to the Constitution and the universal human rights. The handwritten *Acta* of May 5, 2002 – which until then had not been an exhibit – was added as piece of evidence to the letter.¹³¹ Nevertheless,

their plea was of no avail because on September 27, 2002, the Court of Justice of Cotopaxi decided to follow the public prosecutor's appeal, and subsequently the Court of Justice referred the case back to the same court of first instance. By pointing out that in its view customary law could only legally be applied to internal family disputes, the Court of Justice not only showed its unwillingness to apply customary law but also its ignorance on this point.¹³² According to Tibán and Ilaquiche (2004, pp. 66-67) this was clear evidence of the lack of knowledge of the Court of Justice of Cotopaxi concerning the content and the meaning of article 191 of the Constitution and concerning the existence of binding legal force of the ILO Convention 169, as well as proof that they regard customary law as barbaric.

That is how Judge Segovia received a second chance to adjudicate the La Cocha murder case. On October 8, 2002, he declared the three accused guilty and he convicted them to imprisonment according to article 450 of the *Código Penal*. On their part, as lawyers of the three accused, Lourdes Tibán and Raúl Ilaquiche lodged an appeal at the Court of Justice of Cotopaxi against the judge's verdict.¹³³ So, on October 25, 2002, Tibán, Ilaquiche and the public prosecutor met again at the Court of Justice of Cotopaxi in Latacunga. As a means of emphasizing the relevance of this case for the indigenous movement, several important individuals attended the court session. Luis Macas, the current president of the CONAIE, Leonidas Iza, the former president of the CONAIE, Patricio Shingri, director of the ECUARUNARI, and several directors of the MICC, the UNICOC and the La Cocha community were present. Their attempts were of no avail, because the Court of Justice of Cotopaxi confirmed its earlier decision.¹³⁴ At this court session also fifty police officers were present because *los indios son un peligro* (Indians are dangerous), as one of them explained (Tibán and Ilaquiche, 2004, pp. 67-68). In the end, the defence team decided to make no further efforts and let the case rest.

Judge Poveda obtained high praise for his verdict of September 10, 2002, but he became subject to insults as well. Organizations that praised him included indigenous organizations like the MICC and the Comisión de Asuntos Indígenas y Otras Etnias of the National Congress. On the other hand, he was insulted by colleagues in the legal field. The clearest example of this is the procedure to sack him as a judge (García, 2005, p. 3). In spite of the opposition he encountered, Judge Poveda managed to deliver an interesting piece of jurisprudence through the saint Maca case in 2004. It should be noticed that in that particular case the lawyers Lourdes Tibán and Raúl Ilaquiche of the

FUDEKI. I played a role as well. Nevertheless, in 2006 Carlos Poveda decided to resign as a judge and to continue his career as an independent lawyer. In 2007 he decided to run for a seat in the Asamblea Constituyente. Unmistakably, that touched some people's sore spot, as the *Tribunal Electoral de Cotopaxi* decided to disqualify him as an eligible candidate – on legal grounds (Gazeta, 2007). Judge Segovia did not succeed to imprison the three condemned men, because they never were caught and brought in, in a juridical proper way. Meanwhile, two of these men have returned to the parish of Zumbahua. They have rehabilitated themselves and nowadays they offer Maly's widow and her children (economic) assistance, as was agreed at the indigenous lawsuit and recorded in the *Acta*. '*Una conclusión me puedo decir es, en este caso: la justicia indígena triunfó y la justicia ordinaria perdió*' (This case draws me to just one conclusion: customary law conquered national law), concluded Carlos Poveda in an interview I had with him.¹³⁵

Conclusion

The aim of the indigenous lawsuit was to restore social harmony in the La Cocha community. Since two of the three perpetrators finally have been rehabilitated, one could conclude the goal was achieved. In a peasant society, like the parish of Zumbahua, social harmony is a survival strategy. An imprisonment of maximum sixteen years, in accordance with the national law, would not have restored the disturbed social harmony. That is why the *cabildo* decided to adjudicate the three according to their local customary law. As was explained, solidarity, reciprocity and collectivity are the guiding principles of customary law. Moreover, the *cabildo* considered itself a competent authority. According to customary law, that certainly was the case. However, according to the wide formulation of legal pluralism in the Constitution that was not a foregone conclusion. Hoekema (2004, p. 25) states that it is just because of those wide formulations, (formal) judges and courts do not apply conflict rules. As explained before, I do not hold the same opinion, in my view the wide formulation in the Constitution causes conflicts, instead of being a conflict rule itself. Due to the wide formulation, combined with the lack of coordinating rules, the formal coexistence of customary law and national law is insufficiently regulated. This causes uncertainty and consequently dispute.

The declaration of the investigation by the public prosecutor being invalid, based on the *ne bis in idem* rule, was the grand finale of such a dispute. With this, Judge Poveda provided unique jurisprudence. He

decided that the customary lawsuit formed part of the constitutional legal pluralism and that the preliminary investigation never should have taken place. Despite the Fiscal's appeal, the Superior Court's decision, and the conviction of the three accused, jurisprudence was developed in an abstract, general way. However, as the case was referred back to the same court which resulted in a conviction, no jurisprudence in the meaning of formal rules was developed. In the light of the formal coexistence of customary law and national law, that is a pity because this being a clear cut case of a conflict could have led to the development of a conflict rule – which would have been the first since the constitutional reforms of 1998.

Without such conflict rules, it is not possible to analyse which scenario of Hoekema's analytical elaboration on interlegality applies to the present-day legal situation – do these conflict rules provide more or better opportunities for customary law to sustain, or do they prove to be its demise. However, referring to this study's central question, it is interesting to analyse the processes of interlegality given this specific situation of formal legal pluralism without accompanying conflict rules. The situation of lacking conflict rules did not prevent the indigenous leaders and their advisors to incorporate elements of national law into their own customary proceedings. Examples of the written *Acta* and the reference to the *carácter penal* date from the earlier time of real legal pluralism. However, the explicit and implicit reference to the Constitution and the universal human rights provide examples of incorporated elements of national law the present-day situation of formal legal pluralism. The La Cocha murder case shows that, in a situation in which customary law constitutionally is recognized but in which conflict rules are lacking, processes of interlegality continue. Because they take the situation of formal legal pluralism into account, this process differs from the preceding period.

RECONSIDERING THE PROCESS OF INTERLEGALITY

One might consider the contemporary state of formal legal pluralism in Ecuador a farce, from a legal anthropology's point of view. However, according to Hoekema's elaboration on interlegality – this certainly is not the case. The tough process of transformation after the constitutional changes plus the La Cocha murder case, provide two interesting perspectives. Firstly, the pace of the transformation process in a fresh situation of formal legal pluralism is limited. This is a conformation of Hoekema's earlier findings. However, the pace is so slow, that neither legislation, nor jurisprudence provided any conflict rules. This leads to what I will call an interim: a situation of formal legal pluralism, but *without* escorting conflict rules. This specific situation had not been addressed by Hoekema's elaboration. Secondly, the La Cocha murder case shows that in such an interim, processes of interlegality continue, however differently from the preceding period. This too is a supplement to Hoekema's work. These two observations lead to this study's major conclusion: Hoekema's elaboration on legal pluralism requires some adaptations.

To recapitulate the preceding chapters, interlegality is a process of mixing and blending of foreign legal elements within a country's own legal system. Implicitly, this assumes two or more active legal systems – therefore a situation of legal pluralism. With the arrival of the Spaniards and their legislation to the area now called Ecuador, a situation of real legal pluralism had been created. After all, since time immemorial, justice had been done according to customary law. The Spanish Crown introduced a class-ridden society: the *República de Españoles* versus the *República de Indios*. In this legally and administratively separated latter

República, customary law was tolerated as long as it did not conflict with the interests of the Spanish Crown, nor was in conflict with what was thought of public morality. With the independence of 1830 this segregationist policy was replaced by an assimilationist policy. The new independent republic of Ecuador aimed at formally sweeping away the indigenous world, including its legal systems. Legal monism was the goal to be achieved. However, partly due to the absence of the strong arm of the law and partly due to the importance the indigenous peoples attached to their own normative order, customary law continued to be practised. This situation of real legal pluralism did not change until 1998, not even during the integrationist model of the early twentieth century. With a new Constitution Ecuador became a pluri-cultural and multi-ethnic state that gave formal recognition to indigenous jurisdiction and customary law.

In addition to their legal legacy, the Spaniards can be held responsible for the creation of free peasant communities in the Andes on the one hand, and haciendas on the other. When the Spaniards came, they first settled in already existing towns. The on kinship-based existing peasant communities (so-called *ayllus*) were merged to *pueblos de Indios*. Reciprocity, solidarity and collectivity as the basis for social relationships, continued to be of vital importance in these free communities. During the second half of the sixteenth century, the Spanish began to legalize collective land tenure and *cabildos* were installed to govern these Indian villages. These *cabildos* were permitted to adjudicate in conformation with customary law as long as it did not conflict with earlier mentioned limiting conditions. After the independence of 1830 when juridical monism had become the official norm, this situation of real legal pluralism continued its existence. Today the *cabildo* adjudicates still conform customary law and its guiding principles: *ama llulla*, *ama shua* and *ama killa*. The haciendas do have a somewhat different history. At a certain time the Spaniards started to occupy themselves with agriculture and stock breeding. Because of the legislation of collective land tenure of the *pueblos de indios*, they were forced to establish their haciendas in the remote highlands of the *Sierra*. The workers who settled there – in most of the cases for life – came from elsewhere. When then the occasion arose it was the *hacendado* who had to be the judge. Of course he had to obey the law, but he had to take the standards of his workers into consideration too. After all, the strong arm of the law did not always reach as far as those remote areas. And because of trading relations, he had to take the customary norms of neighbouring free communities into account as well. Within these hacienda com-

munities a new normative order came into existence: a local customary law. When as a result of land reform laws the haciendas were abolished, their communities kept on existing. Constitutionally they became a *comuna* or a *parroquia*, and had to be governed by a *cabildo*. Just like the already existing ones, these new *cabildos* were – with limitations – allowed to adjudicate conform customary law. With this history in mind, I have argued that this legacy of the hacienda provided rather a local customary law than an indigenous customary law. However, the people involved claim their customary law to be indigenous.

The above elucidated general history of Andean haciendas, can easily be used to illustrate La Cocha's past. For centuries, la Cocha was a *departamento* of the Zumbahua hacienda. Because of land reform rules this hacienda was abolished in the second half of the twentieth century. Constitutionally it became a *parroquia* in 1972 and La Cocha remained part of it as an autonomous *comuna* with its own *cabildo*. Customary law was – and still is – used by that *cabildo*, originating from and influenced by *hacendados*, the standards of the foreign workers, national law, and the norms and practices of neighbouring free communities. Examples of the adaptive character of La Cocha's customary law are the sanction *el timonar* with its use of elements provided by *Pachamama*, and the fine which probably once was introduced by a *hacendado*. Even elements of national law got adapted: the use of a hand-written *Acta* and the *cáriter penal* of certain violations. All these events took place in the years in which juridical monism was the rule and customary law formally was not allowed.

In its Constitution of 1998, Ecuador renounced this situation of real legal pluralism. This is in line with constitutional developments in a series of Latin American countries. That same year, the ILO Convention 169 was ratified as well. Article 1 of the Constitution declares the country a pluri-cultural, multi-ethnic state, the articles 83 and 84 refer to indigenous collective rights, and the important article 191 formally acknowledges customary law. That is how the contemporary situation of formal legal pluralism began. In the meantime, the possibility of a conflict was created, i.e., what will happen in a situation when it is unclear which normative order is applicable. National law or customary law? That is why article 191, section 4, last sentence, of the Constitution states that the law shall make these practices [of customary law, MST] compatible with the national judicial system. Until today no such legislation has been developed, although two initiatives have been taken. President Noboa exercised his veto against CONAIE's bill, the *Ley de Ejercicio de los Derechos Colectivos de los Pueblos Indígenas*, and the

National Congress rejected the Universidad Andina Simón Bolívar's bill, the *Ley de Compatibilización y de Distribución de Competencias en la Administración de Justicia*. In essence, these two failures did not have to be a severe frustration for the process of making the two systems compatible. The conflict rules, as Hoekema calls the rules that define the juridical place of customary law in a situation of formal legal pluralism, do not have to result from legislation. By using an analogy from formal sources of law, conflict rules could result from jurisprudence as well. The conflict rules as developed by the Constitutional Court in Colombia provide an excellent example.

However, no jurisprudence in the sense of conflict rules has been developed yet. In the last decade three potentially relevant lawsuits passed sentence, but besides jurisprudence in a general way they provided no formal rules. In accordance with the ILO Convention 169, in the Arco versus the indigenous organization FIPSE case in 2000, the latter was entitled to represent the indigenous population involved. In the saint Maca case in 2004, it was decided that it is a fundamental right for indigenous peoples to protect their cultural heritage, i.e. a holy image in this case. The La Cocha murder case in 2002 irrefutably is the most interesting one. In first instance, a lower court approved the use of customary law in case of an assassination in an indigenous community. In second instance, however, this verdict was negated by the Court of Justice of Cotopaxi. In chronological order the following events occurred: because of a fatal fight that disturbed social harmony in the community of La Cocha the *cabildo* decided to adjudicate three wrongdoers according to customary law; fifteen days later, the three men were found guilty of murder during a public lawsuit and were punished with a fine of six thousand dollars, then they had to apologize in public and get purified with a ritual bath of stinging nettle and ice-cold water. Because of supposed legal inequality, the public prosecutor in the Cotopaxi province started a criminal prosecution. Four months later, this investigation was declared invalid during an official lawsuit, because Judge Poveda appealed to the *ne bis in idem* rule. He concluded that he was not competent to adjudicate a criminal case which had been adjudicated regularly before. This made him the first – and until now the only – judge who concluded that the indigenous authorities had the right to adjudicate conform customary law, based on the relevant rules of the Constitution of 1998 and of the ILO Convention 169. The public prosecutor counterattacked with an appeal in which the Court of Justice of Cotopaxi decided to refer the case back to the same court. Finally, another judge declared the three accused guilty of murder and

he convicted them to imprisonment according to article 450 of the *Código Penal*. So, in first instance it seemed like Judge Poveda had created a conflict rule. However, because the case was referred back and resulted in a conviction, in the end no jurisprudence in the meaning of formal rules was developed.

The fact that after ten years there has still no legislation nor jurisprudence been developed demonstrates that the pace of the transformation process is slow. It comes as no surprise that the developments in Colombia are viewed with envy. Even The World Bank refers to that jurisprudence in a report on collective rights of indigenous peoples in Bolivia. However, if a choice has to be made what will be given preference to, legislation or jurisprudence, The World Bank prefers the former. I observed that same preference when discussing the matter with my informants. Personally, I doubt if they are right. It is my opinion that sooner or later, legislation will put unwanted pressure on the flexibility of unwritten customary law. Besides this intrinsic objection, I have serious doubts about the practical consequences. If legislation will work out in practice, the cooperation of the juridical branch is needed. And as was shown before, their ignorance and unwillingness indicate the opposite. I find it hard to avoid the impression that legislation will not be able to change their behaviour. After all, a strong opposition of organized indigenous lawyers is lacking. And because of practical obstacles ordinary indigenous people experience in going to a formal court, a boom in relevant lawsuits is not to be expected. This leads to the conclusion that formal recognition of legal pluralism is one thing, the practical elaboration of it is another. The process of two different legal systems going together requires patience and flexibility, and that pleads for the development of jurisprudence. As the La Cocha murder case shows, with the combination of a progressive judge and two professional indigenous lawyers, sooner or later from bottom-up a conflict rule will be developed.

In his study *Rechtspluralisme en interlegaliteit* (2004) Hoekema states that given a situation of formal legal pluralism two situations can occur: conflict rules are being applied or they are not. Implicitly, he supposes the existence of these conflict rules in such a situation. However, this study shows that another situation could occur as well: a situation of formal legal pluralism, but *without* escorting conflict rules. Earlier, I have called such a situation an interim. Although this study only concerns Ecuador, I do think that in comparable situations a similar interim could occur. After all, the situation of formal legal pluralism is for instance created when a new constitution becomes effective. Such a constitution probably will not contain extended coordinating rules.

Those accompanying conflict rules have to be developed, through legislation or through jurisprudence, but none of them come into existence spontaneously. That is why an interim is very likely to occur when a situation of formal legal pluralism comes into being.

In his elaboration on interlegality, Hoekema explains that in a situation in which conflict rules are applied, two possible variants are conceivable. Firstly it could have a flywheel effect on the process of interlegality, or secondly, it could mean a serious threat for the survival of customary law. However, in a situation in which the conflict rules are not applied, the process of interlegality remains unchanged. In line with these possible developments, the question arises: what will happen with the process of interlegality during an interim? Does it remain unchanged, or will something else occur? The La Cocha murder case proves the latter. The *Acta*, as was formulated at the end of the indigenous lawsuit, contains explicit and implicit references to the Constitution of 1998 and to universal human rights. These references were theoretically underpinned in a letter the indigenous authorities and their lawyers wrote to the Court of Justice of Cotopaxi. This means that the effect of a situation of formal legal pluralism without conflict rules on the process of interlegality is that this process continues, but emphatically considers the Constitution and the ILO Convention 169. In other words, the process of interlegality puts pressure on national law to hurry up in developing conflict rules. And that is why this process differs from the preceding period.

With this observation, not only this study's central question (what happens to the process of interlegality, given the situation of formal legal pluralism, but without escorting conflict rules?) can be answered, it also leads to the conclusion that Hoekema's analytical elaboration on interlegality deserves some adaptations. I suggest to reformulate his elaboration as follows. With the creation of a situation of formal legal pluralism, potential conflicts between two normative orders are created immediately. Most likely, conflict rules that should cope with these conflicts do not come into being quickly; after all, the pace of transformation is slow. In such an interim the process of interlegality continues, whether or not unchanged. A change from the preceding period could be that bottom-up pressure is put on the development of conflict rules. As soon as these conflict rules exist – following Hoekema's elaboration – two scenarios could occur: conflict rules are being applied or they are not. If not, the process of interlegality remains unchanged. If they are applied, two variants are conceivable: it could have a flywheel effect on the process of interlegality, or it could mean a serious threat for the survival of customary law.

Notes

¹ Professor Hoekema's inaugural lecture, delivered on December 4, 2003 at the University of Amsterdam.

² Ecuador has thirteen nationalities: Awá, Chachi, Epera and Tsá'chila on the coast, the Quechua of the Sierra and the Achuar, A'í Cofán, Waorani, Secoya, Shiwiar, Shuar, Siona, Záparo of the Amazon (Tibán and Ilaquiche, 2004, p. 18; Zeas Sacoto, 2006, p. 28). Although the indigenous peoples call themselves *nacionalidades* (nationalities), they are *not* looking for their own state (see for instance: Baud, 2007 or Van Cott, 2005, pp. 99-139).

³ In first instance, the CONAIE demanded for incorporation of the term plurinacionalidad (pluri-national) in the constitution. But as a result of negotiations, they had to settle for the less divisive pluricultural (pluri-cultural) and multiétnico (multi-ethnic). Because of the great importance that is attached to these terms by the parties concerned, I have chosen to leave them as much as unchanged as possible in my translation.

⁴ *Cosmovisión* can be translated as 'worldview'. It explains how the world and how human beings originated, and it forms the basis of master values and customs that guide life. Guidelines like *ama llulla* (do not lie), *ama shua* (do not steal) and *ama killa* (do not be slothful) result from that *cosmovisión*. One of the pillars of *cosmovisión* is harmony. One has to be in harmony with oneself, with the community and with *Pachamama* (Mother Earth); every disturbance of that harmony has to be restored as soon as possible.

⁵ Argentina (1994), Bolivia (1994), Brazil (1988), Colombia (1991), Costa Rica (1977), Ecuador (1998), Guatemala (1985), Nicaragua (1986), Panama (1972 and 1983), Paraguay (1992), Peru (1993), Mexico (1992). Chili modified its *Ley Indígena* in 1993 (Assies, 2000, p. 3, note 2).

⁶ Twelve Latin American countries have ratified the ILO Convention 169: Mexico (1990), Bolivia (1991), Colombia (1991), Costa Rica (1993), Paraguay (1993), Peru (1994), Guatemala (1996), Honduras (1995), Ecuador (1998) Argentine (2000), Brazil (2002) and Venezuela (2002) (Assies, 2000, p. 3, note 3).

⁷ I have attended two so-called *lecturas guiadas* (supervised literature study): 'Legal pluralism in Ecuador', supervised by Assies and 'Capita Selecta on ethnographic research in Ecuador' supervised by Ouweneel.

⁸ Ouweneel has been Associate Professor at the Centre for Latin American Research and Documentation (CEDLA) in Amsterdam since 1985, and was Special Professor of Historical Anthropology of the Amerindian Peoples at the Utrecht University from 1999 to 2004. Assies has been senior researcher at the Van Vollenhoven Institute (VVI) in Leiden.

⁹ García is an anthropologist, and works as a teacher/researcher at the FLACSO in Quito.

¹⁰ Tibán studied law at the Universidad Central (Central University) in Quito and received her masters degree in Social Sciences at the FLACSO. She has been director of the MICC (Movimiento Indígena y Campesino de Cotopaxi – Indigenous and Rural Movement in Cotopaxi), she is associated as a lawyer at the FUDEKI (Fundación Defensoría Kichwa de Cotopaxi – Foundation of Quichua Defence in Cotopaxi) and she is *Secretaria Ejecutiva Nacional* (national managing director) of the CODENPE (Consejo de Desarrollo de las Nacionalidades y Pueblos del Ecuador – Council for

Development of Nationalities and indigenous groups in Ecuador). Ilaquiche studied law at the Universidad Central in Quito as well, and received also his masters degree in social sciences at the FLACSO. Like Tíban, he was director of the MICC and worked as a lawyer for the FUDEKI. He has been director of the ECUARUNARI (Ecuador Runacunapac Riccharimui - Confederación de los Pueblos de Nacionalidad Kichwa del Ecuador – Confederation of Quichua peoples in Ecuador). He was elected in the *Congreso Nacional* (National Congress) as a member of the MUPP-NP (Movimiento de Unidad Plurinacional Pachakutik Nuevo País – Pachakutik Party). Poveda studied law at the Universidad Andina Simón Bolívar (Andean University Simón Bolívar) in Quito. He started working as a lawyer, changed his career to become a judge, and currently changed back to be a lawyer again.

¹¹ In this study I only use the real given names and surnames of my informants when I believe this will not harm the informant in question, when the informant holds a public function or when the informant's name already appeared in other publications. For instance, I use the real given names and surnames of the judges and the prosecutor involved in the La Cocha murder case because several authors have done so earlier. However, although the offenders and the victims in the La Cocha murder case have been already published too, I only use their names (without their surnames); for instance Maly [...]. The anonymity of all other informants is ensured.

¹² On my laptop I filed not only my field notes, my journal and my emails, I also saved the interviews which I had recorded with a digital 'voice recorder'. Finally, I made an extensive file of relevant data (addresses and telephone numbers) of informants I had spoken with and locations I had visited, and I recorded my financial accounts.

¹³ I found books, articles and law books in the following libraries: CEDLA in Amsterdam, Utrecht University, Leiden University, the FLACSO in Quito, Universidad Andina Simón Bolívar in Quito, the CODENPE in Quito, and in the private collection of Assies. I bought books at the following bookstores: Abya-Yala in Quito, Libro Express in Quito, Libri Mundi in Quito, and the CODENPE in Quito. I found primary sources (juridical files, evasions of law, surveys, articles in newspapers, and broadcast recordings) in the following archives: the DINAPIN (Dirección Nacional de Defensa de los Pueblos Indígenas – Directory of National Defence of Indigenous Peoples) in Quito, Juzgado de lo Penal de Cotopaxi in Latacunga, the FUDEKI in Latacunga, TV Color in Latacunga, ECUAVISIA in Quito, and the FLACSO in Quito.

¹⁴ CEDLA: Centro de Estudios Latinoamericanos y del Caribe – Centre for Latin American Research and Documentation.

¹⁵ In line with this statement, I have decided not to translate juridical texts, like articles, or parts of sentences, into English, but to transcribe them in Spanish. I presuppose that most readers of this study have basic knowledge of the Spanish language, and therefore are capable of interpreting those texts properly. But of major importance is that these texts, or even just the – or some – words or terms have a specific legal meaning, which most of the times is very hard to translate; as a jurist I am aware of the risks of translating or interpreting them wrongly.

¹⁶ As soon as a people has lost the legitimacy of its customary law, it has lost an essential part of its ethnic identity, even if it succeeds to preserve all other significant parts that identity. In Latin America, the people who manage to defend their own customary law, are those with the most vigorous identity [translation MST].

¹⁷ Stavenhagen (1990, p. 28, cited in Ilaquiche [2004, p. 13] and cited in Tibán [2001, p. 86]).

¹⁸ See Ouweneel and Hoekstra (1993) for a comprehensive illustration on how a period in which personal ties ruled (*Personenverband*) evolved to a period in which territory dominated (*Terrotorialverband*).

¹⁹ An appropriate example of Radcliffe-Brown's line of thought is provided by Harner, in his ethnography about the semi-nomadic Shuar in Ecuador's *Oriente* (1973, p. 170) describes that the Shuar usually disagree about the justification of sanctions. He states that: 'this situation, *of course* [my italics, MST], is quite understandable in a society where there is no state (...) which can impose judicial decisions and enforce them.'

²⁰ This is called the 'Bohannan-Gluckmann controversy' (Collier, 1995, p. 50; Roberts, 1998, pp. 101-102; Sierra and Chenaut, 2002, pp. 122-123; Von Benda-Beckmann, 2002, p. 44). Bohannan used local-oriented (*emic*) terminology to describe customary law among the Tiv in Nigeria. Gluckmann, by contrast, used Western-oriented, juridical terminology (*etic*) to describe the system of law of the Barot in Rhodesia, as it then was called.

²¹ Sierra en Chenaut rest their three paradigms on *Rules and Processes: the Cultural Logic of Dispute in an African Context* (1981) by Comaroff en Roberts.

²² In *Customary Law and Democratic Transition*, Sieder (1997, pp. 8-9) provides a few examples on how difficult it is to define customary law.

²³ Opponents to the recognition of customary law as law, like the jurist Tamanaha, point at this somewhat vague dividing line. Tamanaha (1993, p. 193) argues that, when the rule-making and enforcing power of social institutions (like universities, community associations, little-league baseball, down to and even including family) are being recognized, it slippery slides to the conclusion that all forms of social control are law. That is why Hoekema (2004, p. 10) makes a helpful attempt by making a difference between functional groups (like unions, or a bank) and small-scale communities. Functional groups aim at achieving targets, in this sense they bound the people involved in just a narrow way; therefore, he prefers to speak in those cases of 'group norms', instead of labelling it customary law.

²⁴ Website: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

²⁵ '*Son comunidades, pueblos y naciones indígenas los que, teniendo una continuidad histórica con las sociedades anteriores a la invasión y precoloniales que se desarrollaron en sus territorios, se consideran distintos de otros sectores de las sociedades que ahora prevalecen en esos territorios o en partes de ellos. Constituyen ahora sectores no dominantes de la sociedad y tienen la determinación de preservar, desarrollar y transmitir a futuras generaciones sus territorios ancestrales y su identidad étnica como base de su existencia continuada como pueblo, de acuerdo con sus propios patrones culturales, sus instituciones sociales y sus sistemas legales*' (website: <http://www.un.org/spanish/indigenas/2003/>). Or in English: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems' (Martínez Cobo, 1987, p.29, cited in Assies, 2000, p. 4).

²⁶ See for instance ASIES (1995, p. 7, cited in Sieder, 1997, p. 8).

²⁷ See for instance Nader's *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (1990).

²⁸ Andean countries that – in different degrees – constitutionally recognize customary law are: Colombia (1993), Peru (1993), Bolivia (1994) and Ecuador (1998).

²⁹ Hoekema (2004, pp. 21-22 and p. 43, note 68) uses the term '*etnische reconstructie*' as a translation for the term 'ethnic reorganization', which was introduced by Nagel and Snipp. According to them, ethnic reorganization occurs when: '...an ethnic minority undergoes a reorganization of its social structure, redefinition of ethnic boundaries, or some other change in response to pressures or demands imposed by the dominant culture' (Nagel and Snipp, 1993, p. 204).

³⁰ See Von Benda-Beckmann (1981) for the concept of 'forum shopping'.

³¹ A *minga* is a day work (without pay) for the common interest, attended by the members of a community or irrigator's organization (Boelens and Doornbos, 2002, p. 226, note 6).

³² In his inaugural lecture, Hoekema (2004) uses the term internal conflict rules. In other articles he (Hoekema 2003; 2005) elaborates this phenomenon by using the shortened term conflict rules. In my opinion it is more appropriate to use the latter term. After all, what exactly does the adjective 'internal' add, when it is about a conflict between two normative orders. That is why – as well as for readability purposes – I will use the term conflict rule in future.

³³ Allot (1975, p. 154) did the same. In international private law, conflict rules determine the law of which country is applicable to specific relations.

³⁴ Jurisprudence, or case law, has two different meanings. Firstly, it has an abstract, general meaning: a judgement or verdict. Secondly, it has the meaning of formal rules which are established by the outcome of former cases, rather than by legislation. It is obvious that when one of the terms is used in this study, it refers to this second meaning.

³⁵ Hoekema uses Van de Sandt's study in two Colombian *resguardos* as an example. It shows that local elites are very capable in slowing down the process of changes. See also Van de Sandt's article 'Communal Resource Tenure and the Quest for Indigenous Autonomy' (2003).

³⁶ On September 7, 2007, the United Nations Declaration on the Rights of Indigenous Peoples (until then this declaration still was a draft) was signed by the United Nations.

³⁷ Kymlicka (1995, p. 165) uses the term 'illiberal' to illustrate the opposite.

³⁸ Article 246, last sentence, of the *Constitución Política de Colombia* (Constitution of Colombia) states: '*La ley establecerá las formas de coordinación de esta jurisdicción especial con el sistema judicial nacional*', see http://www.secretariasenado.gov.co/leyes/CONS_P91.HTM (visited on December 30, 2007). In English this sentence reads: 'The law will establish the forms of coordination of this special jurisdiction with the national justice system'.

³⁹ See <http://www.oit.or.cr/mdtsanjo/indig/c139-96.htm> (visited on November 5, 2007).

⁴⁰ See <http://www.oit.or.cr/mdtsanjo/indig/t523-97.htm> (visited on November 5, 2007).

⁴¹ In his Master's Thesis *Collective Rights in Colombia* (2007), Tan concludes that the Constitutional Court inclines towards cultural relativism and that the protection of cultural diversity is subordinated to the protection of human rights.

⁴² It is precisely this argument, who does belong to an indigenous community and who does not, that often is used by opponents to the recognition of group rights (Stavenhagen 2002: 35). This debate still continues, and is perfectly illustrated – as far as I am concerned – by the lengthy discussions about the final document of the *United Nations Declaration on the Rights of Indigenous Peoples*, where the parties involved seemed never to reach a consensus on the tell-tale final 's' in the syllable 'peoples'.

⁴³ It is without any doubt that the principle of equality before the law is an essential feature of being an Ecuadorian citizen. That is why there is no legal justification to establish neither discrimination of, nor preferential treatment to people's origin, age, gender, ethnicity, skin colour, social status, tongue, religion, political affiliation, economic position, or otherwise, except for those cases that preferential treatment concerns the fundamental ordering of the state, like regarding vulnerable groups [translation MST].

⁴⁴ Part of the veto of January 8, 2002, President Noboa put on the bill called: *Ley de Ejercicio de los Derechos Colectivos de los Pueblos Indígenas*.

⁴⁵ When this study uses the term '*mestizo*', it is meant to describe the population which shares an indigenous with a Spanish descent. In a social stratified society they are considered to have a social and political higher ranking order than the indigenous population. If this term is used, it is because literature, or respondents made that distinction between the indigenous and the *mestizo* population.

⁴⁶ This legislation's establishment was strongly influenced by Bartolomé de las Casas (1474-1566) who worked in the 'New World' as a priest of the Dominican order. He became known for his descriptions of the indigenous population as human beings, and not just as brutes. This led in 1542 to legislation in which slavery was forbidden and colonizers were bound to take their well-being into account. Finally, in a renowned debate with Juan Ginés de Sepúlveda in 1550, he succeeded in having the indigenous people recognized as *rational* human beings.

⁴⁷ In 1822, under leadership of Simón Bolívar, independence was gained. Aligned with his dream of creating one, the continent embracing, Latin American state, he founded the *República de Gran Colombia*, which already fell apart in 1830 in three sovereign states: Colombia, Venezuela and Ecuador.

⁴⁸ The 1937 *Ley de Comunidades Indígenas y Montuvias* (usually abbreviated in *Ley de Comunas*) increased possibilities for (indigenous) communal land tenure. Land reforms of 1964 and 1973 enhanced this (Becker, 1999; Yashar, 2005, pp. 85-151).

⁴⁹ Among them: the FOIN (Federación de Centros Shuar, Federación de Organizaciones Indígenas del Napo) and the OPIP (Organización de Pueblos Indígenas de Pastaza) (Yashar 2005: 118-128).

⁵⁰ This Levantamiento was more than the 'typical' peasant mobilization demanding land and credits, it was and came to represent the first national mobilization of Indians (Yashar, 2005, p. 146).

⁵¹ See for details on that protest march the article 'Return of the Yumbo: the indigenous Caminata from Amazonia to Andean Quito' (Whitten, 1997).

⁵² The complete text of Ecuador's Constitution (*Constitución Política de la República del Ecuador*), along with other relevant legislation, can easily be found on the inter-

net. For instance on the website: <http://www.dlh.lahora.com.ec/paginas/judicial/PAGINAS/Pjudicial2.1.htm> (visited on September 3, 2007) and go to *legislación* and *Constitución*.

⁵³ Article 1 (section 1) Ecuador is a social State of law, sovereign, unitary, independent, democratic, pluri-cultural and multi-ethnic [translation Yrigoyen (2000, p. 220)].

Article 83 The indigenous peoples, who call themselves nationalities from an ancestral race, blacks and afro-Ecuadorians, form part of the Ecuadorian state, which is unique and indivisible [translation MST].

Article 84 The state recognizes and guarantees, with respect to the public order and to human rights, as an exception to this Constitution and other legislation, the following group rights: .. [translation MST].

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

⁵⁴ In the beginning of the twentieth century, Van Vollenhoven (1907, cited in Von Benda-Beckmann, 2001) already pointed at a similar contrast, when he studied customary law in the Dutch Indies. He distinguished between ‘*adat-recht*’ and ‘*adat*’. The former is customary law as is applied by government institutions, and the latter is local law as it is developed and applied by the local population itself.

⁵⁵ This Declaration’s full text can be found on the website <http://www.un.org/Overview/rights.html> (visited on August 28, 2008). Basically this Declaration constitutes rights of the individual, such as the right to life and the prohibition of slavery, the rights in civil and political society, spiritual, public and political freedoms such as freedom of religion and freedom of association, and finally, economic and cultural rights.

⁵⁶ The full text of the *International Covenant on Civil and Political Rights* can be found on the website http://www.unhchr.ch/htmlmenu3/b/a_ccpr.htm (visited on November 4, 2007). Ecuador signed this Covenant on April 4, 1968, and ratified it on March 6, 1969. The full text of the *International Covenant on Economic, Social and Cultural Rights* can be found on the website http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (visited on November 4, 2007). Ecuador signed this Covenant on September 29, 1967, and ratified it also on March 6, 1969.

⁵⁷ Article 1 (section 3) ILO Convention 169 reads: ‘The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law’.

⁵⁸ Implementation Law concerning the Collective Rights of Indigenous People [translation MST]. Originally, this bill was titled *Ley de Nacionalidades y Pueblos Indígenas del Ecuador*, after its initiator, the CONAIE, but the National Congress changed it in its definitive title (García 2005: 152 note 1). This bill’s full text was put at my disposal by Fernando García of the FLACSO.

⁵⁹ This official note’s full text (*Oficio* No. T.2473-DAJ-2003-6711) was put at my disposal by García of the FLACSO.

⁶⁰ Law on Coordination and Distribution of Competences in the Administration of Justice [vertaling MST].

⁶¹ More information on ProJusticia (*Unidad de Coordinación para la Reforma de la Administración de Justicia en el Ecuador*) and this specific project is provided on the website: <http://projusticia.org.ec/> (visited on November 4, 2007).

⁶² Both studies discuss and comment on the draft bill. After it had been presented – and finally had been rejected – this bill has been commented by Assies in ‘Indian Justice in the Andes: Re-rooting or Re-routing?’ (2003, pp. 179-181) and by Hoekema in ‘A New Beginning of Law among Indigenous Peoples: Observations by a Legal Anthropologist’ (2003, pp. 213-216).

⁶³ *Resolución 247-RA-00-IS, Caso 994-99-RA*. An extensive analysis of this Arco versus FIPSE case can be found in *Anexo 33*, on the CD that is provided by the study *Los pueblos indígenas del Ecuador: derechos y bienestar* (García, 2007).

⁶⁴ A full copy of the dossier of this case, *Caso 12-2004 Juzgado Segundo de lo Penal de Cotopaxi*, is in my possession.

⁶⁵ The suggestion of this case its relevance was made during conversations I had with García on July 2, 2007, and with an indigenous lawyer on July 11, 2007.

⁶⁶ The Andean Quichua do not recognize death penalty (García, 2002, p. 39). The Amazonian Shuar do, as is claimed. See for instance Harner (1973, pp. 178-179), or Yumbay (2007). Still, this assertion is *communis opinio*, so I found out when I had a discussion with a judge in Quito. When customary law became subject of this discussion, he made a horizontal move with his forefinger by his throat, suggestion that ‘they’ did ‘that’ in the Amazon.

⁶⁷ See website <http://www.projusticia.org.ec/> (visited on October 26, 2007).

⁶⁸ The other three sub projects were: *Cultura de Paz, Servicios Alternativos de Resolución de Conflictos* and *Servicios de Defensoría Pública (Asistencia Legal Gratuita)*. See website http://www.projusticia.org.ec/index.php?option=com_content&task=view&id=7&Itemid=9 (visited on October 26, 2007).

⁶⁹ This report’s full text can be found as *Anexo 32*, on the CD that is provided by *Los pueblos indígenas del Ecuador: derechos y bienestar* (2007).

⁷⁰ Both reports can be found in *Anexos 59 and 60*, on the CD that is provided by *Los pueblos indígenas del Ecuador: derechos y bienestar* (2007). ILO’s requests can be found in *Anexo 58*, on the same CD. They are also provide don the website <http://www.ilo.org/ilolex/spanish/newcountryframeS.htm> (visited on November 4, 2007): *Solicitud directa individual* 2003 and 2004 and *Observacion individual* 2003 and 2004. Meanwhile, two comparable requests have been sent by the ILO to the Ecuadorian government in 2007.

⁷¹ This alternative report made use of the same research methods as should be done by the ILO itself (García and Sandoval, 2007, p. 8).

⁷² The CODENPE is an Ecuadorian agency, which aims at helping indigenous peoples. It was established on December 11, 2008. Among other things, this institution looks after the compliance with the Constitution an the ILO Convention 169 concerning individual and collective rights of indigenous peoples. See their website <http://www.codenpe.gov.ec> (visited on November 4, 2007). The DINAPIN was established on September 20, 2000, as part of the *Defensoría del Pueblo* (see website <http://www.>

defensordelpueblo.gov.ec/dir-com/dir-indigena.php, visited on November 4, 2007) and since 2002 it has established a web to promote and in cases to defend indigenous people and communities (García and Sandoval, 2007, p. 48). If asked, the DINAPIN monitors lawsuits, and under circumstances they can act for indigenous people (interview on July 19, 2007, DINAPIN).

⁷³ This illustration was provided to me by Poveda at a conference on customary law in Latacunga on July 3, 2007.

⁷⁴ Interview with an indigenous lawyer on July 11, 2007.

⁷⁵ Interview on July 3, 2007. The judge's argument was that customary is holistic of nature, it does not distinguish between criminal law, civil law, etcetera, like national law does.

⁷⁶ In an emotional interview on July 18, 2007, Poveda did provide me more details on the Court of Justice of Cotopaxi's attempt.

⁷⁷ Examples of this kind of indoctrination can be found in Anexo 35 on the CD, that is provided by *Los pueblos indígenas del Ecuador: derechos y bienestar* (2007).

⁷⁸ The study *Justicia comunitaria en los Andes: Perú y Ecuador: el tratamiento de conflictos: un estudio de actas en 133 comunidades indígenas y campesinas en Ecuador y Perú* (Brandt and Vidalvia, 2007) provides a quantitative basis for this statement.

⁷⁹ This was argued by Ilaquiche on a conference on customary law in Latacunga on July 30, 2007.

⁸⁰ Interview with Tibán on July 23, 2007.

⁸¹ Interview with an indigenous lawyer on July 11, 2007.

⁸² Stated by both of them at a conference on customary law in Latacunga on July 30, 2007.

⁸³ Interview with Poveda on July 18, 2007.

⁸⁴ In April 2007 people voted for a new Constituent Assembly in a referendum. When fieldwork for this study was done (June, July and August), several candidates limbered up for the elections of October 2007.

⁸⁵ I quoted Hoekema (2003, p. 185) before, when he states that the extent to, and the speed of which customary law juridical is located, is limited. Sieder (1997, p. 58) has a similar opinion according to the Guatemalan case.

⁸⁶ 'This case draws me to just one conclusion: customary law conquered national law.'

⁸⁷ Statement made by Poveda during an interview on July 18, 2007.

⁸⁸ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 18: testimony of one of the attendants at the party. Interview with Poveda on July 18, 2007.

⁸⁹ This valuation is based on informal conversations with an informant from La Cocha on August 8, 2007. That day, he showed me around in the parish of Zumbahua. In a different study concerning a similar community, Maca Centro, situated in the parish of Poaló, its population is estimated on two hundred too (Chávez, 2005, pp. 19-22).

⁹⁰ My informant estimates Zumbahua's population at approximately one thousand (interview on August 8, 2007). Weismantel (1988, p. 40) points at a census dating from 1978: at that time 386 inhabitants were counted. In 1991, Umajinga (1995, p. 248) counted 474 inhabitants, and estimated the parish' total population at ten thousand.

⁹¹ Temperature fluctuates between 6 and 12 degrees Celsius. The month of August (when I visited this place) temperature is at its lowest level (Umajinga, 1995, p. 248; Weismantel, 1988, p. 43). The La Cocha community is situated at 3,600 meters above sea level.

⁹² Between 3,400 and 3,800 meters above sea level a lot of cultivation takes place. That is why most communities are situated that high. Higher places are for the most part used as pastureland (Weismantel 1988: 43). Some *campesinos* do have some goats, pigs, cows or geese. Llamas are useful because of their wool, their milk, and because they are used as a mean of transport (Umajinga 1995: 261).

⁹³ Thirty-six percent of the Cotopaxi population only speaks Kichwa shimi (Tibán, 2003, p. 8). During one of the informal conversations I had on August 8, 2007, my informant told that a fifty years old relative of him did not understand a single word Spanish. She always had to be accompanied by a bilingual family member, when she wanted to go to Latacunga.

⁹⁴ Weismantel (1988, p. 52) explains that boundaries between *comunas* only seem to be of significance when they demarcate people who are hostile to another. During the conversations I had with an informant from La Cocha on August 8, 2007, he told me that actually differences in language as well as in customary law existed between different *comunas*. Umajinga (1995, pp. 263-264) makes a similar statement.

⁹⁵ In case of agriculture, the Spaniards mainly went to the warmer coastal areas to grow sugar (Peru) and cacao (Ecuador) (Baud, 1993, p. 187).

⁹⁶ The *Ley de Comunas* of 1937 provided rural communities of more than fifty persons, the right to be recognized as a *comuna*, which status provided the right to obtain (collective) land rights. This law's history is a political one. On the one hand, this law compromised to the intellectual *indigenista* movement's request to pay attention to 'Indian concerns'. On the other hand, this law provided them a tool to break traditional power of the 'Holy Trinity' (*hacendados*, Catholic church, and *tenientes políticos*) (Becker, 1999, pp. 531-544; Yashar, 2005, pp. 88-91).

⁹⁷ The land reform laws of 1964 officially abolished the *huasipunguero* system (Becker, 1999, p. 235).

⁹⁸ Informal conversations on August 8, 2007.

⁹⁹ Article 224 of the Constitution divides the country in provinces, cantons and parishes. The province of Cotopaxi is divided in seven cantons: Latacunga, La Maná, Pangua, Salcedo, Saquisilíen and Pujilí; the latter is divided in seven parishes: Pujilí, Angamarca, Guangaje, La Victoria, Pilaló, Tingo and Zumbahua.

¹⁰⁰ In Mexico these indigenous aristocrats are known as *caciques*.

¹⁰¹ Ouweneel and Hoekstra (1993) (my source for this description of the *cabildo*) base their study on the Mexican situation. Because Spanish rules concerned the whole continent, it is my assumption that the same description counts for Ecuador. Although it should be noted that a *cabildo's* specific organization differs from place to place as communities and their characteristics do as well (Kloosterman, 1995, p. 86).

¹⁰² Ouweneel and Hoekstra (1993, p. 114) describe a similar situation in Mexico, that of the so-called *congregaciones*. Their explanation of this consolidation is that the Spaniards believed in a 'natural order' of the world, plus they believed in its managerial advantages. For instance, the collection of tribute became much easier, and the conversion to Catholicism could go faster. Besides, these connected centres' character

was much more in line with their idea of getting all indigenous settlements under the 'protected area' of a *pueblo de indios*.

¹⁰³ Sieder and Witchell (2001, p. 215) mention a similar process in the so-called 'model-villages' of the late 1980s in Guatemala. During the civil war, throughout the 1980s and 1990s many indigenous people were displaced and resettled in newly build villages by the army. They came from different areas and different linguistic groups, and had different customs. In the process of re-establishing peaceful coexistence with another, a new customary law was developed.

¹⁰⁴ As mentioned before, this phenomenon of 'believing' in ones system as 'traditional' itself is one of the characteristics of customary law.

¹⁰⁵ These norms are even recorded in article 97, section 20, of the Constitution; *nota bene* as well in Quichua as in Spanish.

¹⁰⁶ García (2002, p. 30) explains that most cases of murder or homicide occur during parties (like the one in La Cocha) at which a lot of people are gathered [and where they usually hit the bottle real hard, MST].

¹⁰⁷ Tibán and Ilaquiche's *Manual de Administración de Justicia Indígena en el Ecuador* (2004) even was recommended to me by a judge in Quito. Other studies that could serve as sources for the description of an indigenous lawsuit are: *Formas indígenas de administrar justicia* (2002) by García, *El derecho a ser: diversidad, identidad y cambio: etnografía jurídica indígena y afroecuatoriana* (2004) by Chávez and García, and 'El ejercicio de la administración de justicia indígena en el Ecuador' (2007) by Yumbay. For the sake of readability of this section, references shall be limited to a minimum; mentioning of the most important sources at the start of this section must be sufficient. Details of the La Cocha murder case, as long as they do not follow on the *Acta*, of course do get a reference.

¹⁰⁸ Source: handwritten *Acta* compromiso de indemnización, of which a copy was filed as exhibit 72-74 in the dossier of Caso 43-2002. A typed version of this *Acta* can be found in *Pluralismo jurídico y administración de justicia indígena en Ecuador: estudio de caso* (2004, pp. 68-72) by Ilaquiche and in 'Brandnetels en boete: Rechtspluralisme en interlegaliteit in Ecuador' (2008, pp. 57-59) by Simon Thomas. A full copy of the dossier of Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi is in my possession.

¹⁰⁹ I make this assumption because both Tibán as Ilaquiche (as indigenous leaders) had been present at the indigenous lawsuit. In their study *Manual de Administración de Justicia Indígena en el Ecuador* (2004), that was written afterwards, they do not mention this case as an exception to the rule, which I suppose they would have done as that had been the case.

¹¹⁰ It struck me that the *Acta*, as well as studies concerning this case that have been published, mentions thirteen *comunidades*, while counting the list provided in that same *Acta* leads to twelve *comunidades*. I have no explanation for this dissimilarity.

¹¹¹ Culturally, the indigenous population is divided in *nacionalidades*, *pueblos* and *comunidades*. The La Cocha *comunidad* belongs to the Panzaleos *pueblo*, which on its turn belongs to the Quichua nationality. *Comunidades* within a sector or parish are organized in an OSG, which forms part of an OTG on provincial level. The Andean OTG's are organized in the ECUARUNARI, which is part of the national indigenous movement, the CONAIE (Ilaquiche, 2001, pp. 111-112; Tibán, 2001, p. 51). The indigenous movement is modelled on the country's organic organization: the ECUARUNARI and the CONFENAIE are regional organizations, OTG's are provincial organizations,

and OSG's are cantonal organizations (Almeida, 2005, p. 45). The ECUARUNARI originated in rural organizations and unions of the 1940s and was established in 1972. According to Yashar (2005), the ECUARUNARI came into existence partly as a result of a pre-existing social network of local rural organizations. Those organizations emerged as pressure groups for the land reforms that were passed in 1964 and 1973, which originated in the *Ley de Comunas* of 1937. Yashar (2005, pp. 100-101) states that the first significant organization, the FEI (Federación Ecuatoriana de Indios – Federation of Ecuadorian Indians), which was founded in the mid-1940s, worked largely with rural workers tied to the haciendas. The FEI was tied to the Communist Party, with a primary concern for class exploitation and land tenure issues. Obviously, during that period of leftist, intellectual *indigenistas*, it became politically relevant to be associated with the indigenous farmers. Becker (2007, p. 161) points at conflicts on the Zumbahua hacienda in the 1930s, in which the Socialist Party provided legal aid to the rural workers. In sum, the originally on class based rural organizations were at the basis of the contemporary, based on ethnicity, Andean indigenous movement. This could be considered as a legacy of the haciendas too.

¹¹² This second phase of the third stage was explained thoroughly to me by a resident from Zumbahua and now working for the DINAPIN, in an interview I had on July 19, 2007.

¹¹³ It is debatable whether or not the suggestion – which lies perdu in this assertion – that the Spanish introduced corporal punishment or whipping in particular, is true.

¹¹⁴ Those middlemen of the olden days nowadays posses fixed spots on weekly markets in Zumbahua, Pujilí and Latacunga. Under the influence of the market-economy they became a sort of speculators. The strategy they use is to drive by *campesinos* with pick-up trucks in order to buy their crops. Sometimes they even buy the harvest in advance. Large amounts of goods and food are still being changed between different parts of the country; smaller amounts are being sold on weekly markets. In Zumbahua, middlemen are on top of the social ladder; obviously they are sought-after godparents (Umajinga, 1995, pp. 258-259).

¹¹⁵ According to Weismantel, the contemporary lack of money results directly from the economical system at the hacienda, where cash played a marginal role. As soon as the hacienda was abolished, it became clear how awkward the absence of cash money can be. Although the former *huasipungueros* finally received their land, they lacked money to invest. Paradoxically, along with the disappearance of haciendas, they lost their means to earn cash money. That is why they almost directly were driven into the arms of existing middlemen. And if that was not the case, sooner or later they were driven into the arms of former *mayordomos* or *mayorales*, who stayed in Zumbahua as shop-owners. So, in a way, the asymmetrical *compradazgo* relations de facto kept on existing (Weismantel, 1998, p. 71).

¹¹⁶ According to The World Bank (<http://www-wds.worldbank.org>) and go to Ecuador - Poverty Reduction and Local Rural Development (PROLOCAL) Project) the poverty (US\$2 per day) in the country is estimated on 60 percent and extreme poverty (US\$1 per day) on 20 percent

¹¹⁷ Originally, customary law was applied orally, and criminal law as a subdivision of the administration of justice does not go together with the holistic character of customary law. In Chapter 2 I already referred to Hoekema (2004, pp. 18-19), who mentions that written *Actas* and juridical language (and '*carácter penal*' is juridical language)

provide examples of interlegality. Chávez and García (2004, p. 32) recognize style and linguistic usage of national law related terms in *Actas* too.

¹¹⁸ A criminal procedure that is conducted according to national law contains two phases: the preliminary investigation and the principal court investigation. A criminal procedure starts with a criminal investigation by the police or by the public prosecutor. As soon as a judge gets involved, the preparatory court investigation commences. Both form part of the preliminary investigation. The principal court investigation takes place at a court, and contains the court session, the court deliberations and the final judgement. These procedures are laid down in the *de Código de Procedimiento Penal* (Code of Criminal Procedure), that can be found on the website <http://www.dlh.lahora.com.ec/paginas/judicial/PAGINAS/Pjudicial2.1.htm> (visited on November 5, 2007).

¹¹⁹ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 36.

¹²⁰ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 18.

¹²¹ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 33, 34 and 35.

¹²² Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 5.

¹²³ The Código Penal can be found on the website <http://www.dlh.lahora.com.ec/paginas/judicial/PAGINAS/Pjudicial2.1.htm> (visited on November 5, 2007).

¹²⁴ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 37.

¹²⁵ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 53.

¹²⁶ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 56.

¹²⁷ The verdict of Judge Poveda (Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 60-63) was copied by Luis Fernando Sarango (2004: 92-102) in his article 'La administración de justicia indígena en el Ecuador: Una práctica ancestral con reconocimiento constitucional' which was published in the journal *Yachaykuna*. It could also be downloaded in pdf-format from the website <http://icci.nativeweb.org/yachaikuna/5/> (visited on November 6, 2007).

¹²⁸ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 64-65.

¹²⁹ The exchange of roles of Tibán and Ilaquiche has been noted before: in May they were representatives of the MICC, in September they posed as lawyers.

¹³⁰ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 66-71.

¹³¹ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 72-74.

¹³² Statement made by Poveda at a conference on customary law in Latacunga on July 30, 2007.

¹³³ On October 10, 2002, Tibán and Ilaquiche, as lawyers of the FUDEKI, became the defendants of Nicolás and Juan. Jaime was counselled for the defence by the *Defensor de Oficio*. Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 84-86.

¹³⁴ Caso 43-2002 Juzgado Tercero de lo Penal de Cotopaxi, exhibit 88-90.

¹³⁵ Interview with Poveda on July 18, 2007.

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EPILOGUE

PROF. ANDRÉ HOEKEMA

Having read this study by Marc Simon Thomas I am a most happy man. Not only do we get an excellent description of local, indigenous communitarian justice in full action, but also an in depth exploration of the analytical promises contained in the concept of interlegality. The La Cocha case in Ecuador got fame because it laid bare the fierce resistance of the officialdom against any form of recognizing indigenous law and justice as part of the official legal order of the land. But it also shows how such recognition is inexorably conquering the legal orders of states, for a variety of reasons like the ever stronger indigenous mobilizations all over the world but also ever stronger international treaties and, to a lesser degree, national constitutions. These circumstances are coupled with busy activity by a myriad of ngo's, civil society organizations, researchers like Marc Simon Thomas, international solidarity networks, and donors. Strikingly enough the El Chico case in Guatemala shows the same tangle of threads: an elaborate local procedure on the basis of procedural and material norms quite distinct from the prevailing official state ones, harsh rejection of this way of doing justice by police, the press and many legal and other officials but also support from many sides culminating in a final verdict by the highest Guatemaltecan court in which legally correctly was stated that international and national norms clearly imply that in this case indigenous justice is official justice (Padilla 2008). Therefore, the state legal agencies cannot try the case again (*ne bis in idem*, lawyers would mutter). In Ecuador however the highest Court showed itself ignorant to say the least and did not confirm the official recognition indigenous justice already has in the name of Ecuadorian binding norms like the ILO Convention 169 and its own constitution..

Such case studies, then, lead us into the heart of struggles between indigenous – and generally minority – communities living within societies dominated and often harshly marginalized by people of another culture, world view, economic institutions, language, etcetera (to summarize these differences I use the term ‘distinct’ communities). Various rounds of struggle have been waged already. Firstly there was a struggle for territorial rights, to be granted to a collective subject, a people or community. This fight is not over yet but the notion of territorial rights is in the phase of wider acceptance by politicians and legislators. The second struggle proceeds in terms of claiming the right to say yes or no to large scale development projects on their territory which ruin the resources like land, forest and water: the matter of the requirement of ‘free, prior and informed consent’ as soon as the state considers giving concessions to extractive industries, logging companies, oil palm producers and so on. This fight will only get more bitter and harsh, I am afraid. Meanwhile a third round of struggles is going on for a while already, the fight for an official grant of a not too restricted type of self-government (autonomy) within the national public administration, either as a sequel of the right to self-determination as a people (restricted to internal self-determination) or as a consequence of some rational thinking about the need for state decentralization.

Whatever motive and set-up behind it, in some cases it would provide these peoples with some scope for determining themselves how to develop as a people within the surrounding distinct and often oppressive world. Part of this autonomy is having the collective right to live under your proper norms, principles and practices to solve conflicts between your people. This means: official recognition of local decisions to punish people, to solve border conflicts between land users, to settle marriage problems, unpaid debts, and inheritance matters, to repress violence. These decisions would then be declared official and legally binding decisions that preclude any further state competence to deal with the same case (as I wrote: *ne bis in idem*). Here we meet Ecuador again. And Colombia, and, to a lesser extent, Panama, Guatemala, Mexico, Peru, The Philippines, Greenland, Indians nations in the USA and Canada, among others.

This case study we just read about brings us important news about this jurisdictional autonomy as well. What are the features of communitarian justice? Looming large is the very tenacious matter of the conditions under which the state will grant this official recognition of indigenous ways of doing justice. Politically this is such a sensitive area that in no state in the world until now any official law of coordina-

tion between indigenous jurisdiction and state jurisdiction has been proclaimed (In the USA however there are some coordinating laws, contested though, as you might expect). It is true that various attempts have led to drafts of coordination laws (Bolivia, Ecuador, Colombia among others, I analyze these in my article (Hoekema 2003)) but nowhere the legislator has overcome the political turmoil around this matter. But as is widely known, the Colombian Constitutional Court has led the way to overcome this legal and political stalemate. In a careful step by step approach they developed an elaborate whole of principles, maxims and norms about the personal and material competence of indigenous justice (in Colombia), the relations to state's prerogatives and also about the nagging problem what individual human rights must not be violated in the doing of local justice. Forgive me now that I am going to write that the mentioning of respecting human rights as a kind of 'natural' and obvious restriction to be imposed on any local indigenous way of doing justice, often is used just to demonize that local justice, just to show that the speaker wants to do away with it. Nevertheless the matter is serious enough.

Herein this account of the La Cocha case it is shown first of all how indigenous justice functions, what values and principles are at stake, and many features more. One gets an idea how distinct ways of punishment and restoring order have their specific place within the local view on man, nature and the world, the *cosmovisión* as it is often called. Quite a few western observers do not have a firm understanding about these underlying principles and continue looking at local justice in an ethnocentric way. Marc Simon Thomas does not suffer from this myopia. He places himself squarely into the ranks of fine legal anthropologists. Masterfully Esther Sanchez (2006) from Colombia has exposed what set of ideas and deeply engrained notions lay behind specific forms of punishment or specific procedures used. Rupert Ross' (2006) excellent and highly readable book about Canadian aboriginal ways of defining man and its relation to fellow men, to the divine sphere and to nature, should be mentioned too. Orellana (2004) in Bolivia, Padilla (2008) in Guatemala, Proulx (2005) in Canada, James Zion (2002) in the USA and the great Jane Collier (1998) are just some of these people who know exactly what they are talking about and have explored native justice. The problem mentioned above, the problem 'where to draw the line' as to the binding character of indigenous justice can only be solved peacefully by first of all knowing exactly where we are talking about and here the study by Marc Simon Thomas offers us great help.

All my talk about *cosmovision* and deeply engrained notions about man the world and nature should not distract us from seeing the inconsistencies in indigenous culture, in outlook, and from having a keen eye for the many internal fights and clashes between the modern and the traditional, the women and the men etc. There is not such a thing as ‘a culture’, rather as we know this is an ideological term which hides the ruptures within that culture and the life ways. It also hides the important fact that hardly anywhere such distinct communities and their ‘cultures’ exist in a vacuum, never change and if they do, from internal developments only. To the contrary and here Marc Simon Thomas shows us the way again. He shows how in the Ecuadorian highlands already from centuries back these communities, rather ad hoc groupings of people from a variety of origins, have been in constant exchange with the outer world. Under the old hacienda system where Indians worked as quasi slaves or as indented labourers notwithstanding oppressive circumstances, they took over elements from the boss’ norms and ways of doing things. These elements have been reworked and have become elements of their own culture which then has a hybrid character. This perception is nicely captured with the concept of interlegality. Interlegality often runs from top to bottom, but sometimes the other way round, when the dominant officials take over elements of aboriginal ways of doing justice and going for conciliation and harmony (see the illuminating article by Proulx (2005)). The approach condensed in the concept of interlegality is now gaining ground rapidly within the present day legal anthropology. The authors of this study has settled in the ranks of forerunners like De Sousa Santos (2002), and analysts like Von Benda-Beckmann (1992), Twining (2000), Sierra (2004), Sanchez (2006), and, if I may mention this, myself (Hoekema 2005 and forthcoming 2009).

As to this theme a final word of joy should be written. Studying indigenous justice under the umbrella of interlegality is opening your eyes to the very real possibility that the mere fact of official recognition of local justice is changing the empirical patterns of exchanges between indigenous ways of solving conflicts – that take place anyway whether recognized or not - and national ones. It may well be that now that some official status has been granted to the village justice, the local authorities and/or the rank and file are perceiving opportunities to improve their own life ways either for substantial reasons, like when woman now hark back to women’s rights and claim that their own authorities have to adapt their thinking to modern times, or for strategic reasons. A strategic motive would be to show the hostile envi-

ronment a 'decent face' which perhaps helps in the further struggle to get the recognition really implemented and fully accepted. Or perhaps the official recognition promotes interlegality in the reverse: state officials might not only accept the *ne bis in idem* but also get the feeling for some of the practices of their indigenous brothers and sisters and therefore try to enrich national justice with local approaches. These dynamics get an even further twist when by law or, rather, by national legal practice and perhaps official jurisprudence, indigenous justice is bound by new 'repugnancy rules' like the colonial powers did when insisting legally that customary law under some circumstances is to be applied 'so far as it is (...) not repugnant to natural justice, equity and good conscience' as this was written once in a 1962 law in already independent Uganda. The old and the new repugnancy rules often tell us also that indigenous justice should not violate the laws of the land and the constitution (as indeed the 1962 Uganda law says as well, but the 1992 Colombian Constitution and many others do it the same way). This restriction boils down to not granting any space for indigenous justice at all as the Colombian Court aptly said, the restriction is like saying that normally such local justice is repugnant.

When such (what I call) conflict rules are issued or at least applied by courts, the situation grows worse and risks to get out of hand. The fight for legal autonomy will go on. Now, what about interlegality under these not very uncommon circumstances? Obviously I cannot develop all the possible dynamic patterns of resistance, oppositions, claims and counterclaims that in any situation may be found. But Marc Simon Thomas has persuasively opened up another situation for a study of interlegality. What happens in cases like in Ecuador, where official recognition legally speaking is perfect but - as usual - no conflict rules, no law of coordination is in place (and neither a consistent jurisprudence by some constitutional court). Here the author fills a yawning gap and he is the first to do it.

What an edifying and original study we just have read.

Andre Hoekema, Amsterdam July 2009.

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With its Constitution of 1998, Ecuador legally acknowledged its pluri-cultural and multi-ethnic character. As a feature, it recognized customary law along with state law, through which a situation of formal legal pluralism came into being. Despite several attempts to develop a coordinating law and jurisprudence, no so-called conflict rules have yet been developed. Consequently, it is still unclear how to deal with conflicts over jurisdiction. That is why a homicide in La Cocha could be adjudicated by indigenous authorities in the first place, but a couple of months later the verdict overruled by the national legal system. A judge recognized the indigenous administration, but subsequently the Court of Justice referred the case back to a national criminal court.

The La Cocha murder case illustrates what may happen to the process of interlegality – that is, the interaction between two different normative orders – in a situation of formal legal pluralism when conflict rules are lacking, providing a supplement to existing elaborations on interlegality.

Professor ANDRÉ HOEKEMA, an internationally renowned expert on legal pluralism and interlegality, has written an epilogue to the text.

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