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Clashes between the Indigenous Justice System and Ordinary Law in Ecuador

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Indigenous groups in Ecuador have practiced their own justice system for hundreds of years. After the new Constitution was approved in 2008, the law has granted autonomy for the recognised indigenous minority communities in the country. However, there are various limitations to this system, despite the fact that the Ecuadorean law has accomplished to comply with international legal instruments on indigenous rights. While the law's intention is to protect the country's indigenous heritage, there are still many different issues at stake. This article addresses the debate regarding the constitutionality of indigenous justice, taking a look also at the human rights violations around the issue and other relevant problems.

Indigenous groups in Ecuador have practiced their own justice system for hundreds of years. After the new Constitution was approved in 2008, the law has granted autonomy for the recognised nationalities in the country. However, there are various limitations to this system, despite the fact that the Ecuadorean law has accomplished to comply with international legal instruments on indigenous rights. While the law's intention is to protect the country's indigenous heritage, the fact that there are still issues at stake cannot be ignored. In this context, the debate regarding the constitutionality of indigenous justice, as well as human rights violations around the issue, are still on vogue.

I shall address the limitations of the indigenous justice system in Ecuador, by looking at community and individual level cases. With this aim, I will take into account the human rights factor and its possible violations. In spite of being able to exercise their own justice system, and being recognised as national minorities in the Constitution, it can be argued that such independency can get close to human rights violations. On the one hand, it can be said that Ecuador is being consistent with international legal instruments. On the other hand, it can be argued that this compliance is resulting in human rights violations, among the indigenous groups themselves, and could represent a potential risk for non-members of the group and impede an adequate interaction of the population as a whole. In this sense, I shall analyse the issue from a legal point of view, employing legal instruments on the issue in question, as well as the country's Constitution. Moreover, I shall also employ case studies, reports,

articles and research, in which the exercise of indigenous justice has clashed with the current ordinary justice system.

Methodology

Regarding the methodology, at the legal level I shall employ Ecuador's 2008 Constitution as well as the 1998 version, and other national legal instruments. Furthermore, I shall use research and case studies on the issue, published by the following universities in Ecuador: Universidad San Francisco de Quito, and the Facultad Latinoamericana de Ciencias Sociales (FLACSO), as well as a few newspaper materials.

Contextualisation of the Issue

The 2008 referendum introduced new terms, rights and obligations for the state vis-à-vis the indigenous communities in the country. The 2008 Constitution recognises thirteen nationalities and fifteen indigenous peoples in Ecuador. On its fourth chapter, as well as establishing the indigenous peoples' right to exercise their identity, ancestral traditions, the right to be consulted by the state for any extraction of resources within their lands, and protection against racial and ethnic discrimination, it also typifies the group's right to exercise their own justice system.[1] Additionally, this Constitution widens the concept of "indigenous peoples", and establishes specific rights to the group, as mentioned above. Moreover, it also introduces the term "peoples in voluntary isolation", which was not stipulated in the 1998 version of the instrument, as a minority within a minority, who in turn, have acquired additional land rights.

History tells us that before Ecuador's independence as a Republic, the Spanish authorities recognised the indigenous communities and granted them land rights, in a time when the Catholic Church and the Spanish crown fought for landownership. Legal documents from the 16th century reveal the surge of legal battles between the Church and the indigenous communities.[2] In this sense, including indigenous rights on the country's Constitution, even though it is not a novelty for Ecuadorian legal instruments, has remained a challenge for law enforcement officials and the state itself. While indigenous communities have the right to exercise their own rules and norms, at the same time, the state has the obligation and responsibility to decide over legal issues that clash with the country's ordinary law. Granting special rights to an ancestral minority group that has been present in the country since the Inca ruling period, comes with legal challenges and loopholes.

There have been cases where the indigenous justice system has clashed with the ordinary justice system of the country. While it can be said that Ecuador's Constitution is "one of a kind" in respect to indigenous rights, there is indeed a thin line between protecting the minority and the responsibility of the state to protect all its citizens.

1 OAS 2008

2 Serrano Pérez 2009

Indeed, the indigenous minorities, their traditions, customs and way of life, have without a doubt the right to be protected by the state. Nevertheless, the state should guarantee the protection of all individuals, as well as the harmonious interaction between them, while allowing both groups to exercise their rights without conflicting with one another. In the sections below, I shall address two cases, the Lumbisí and the La Cocha, in order to analyse the legal conflict of both types of law at the community and individual levels, respectively.

Indigenous Justice System vs. Ordinary Law

Community level – The Lumbisí case

Indigenous rights clash with ordinary law, at both the community and the individual level. Regarding the former, the case of the Lumbisí township is a clear example of how both laws collide, illustrating the need of a conjoint law. The township of Lumbisí, located close to the valley of Cumbayá within the capital city, was first established in 1534. The village was inhabited by indigenous people, who at the same time served the Spanish landowner Diego de Tapia, known as yanaconas. In 1535, the land came under the rule and ownership of the indigenous inhabitants, who were under the rule of Collahuazo, Cumbayá's indigenous chief. More than twenty years later, in 1570, the inhabitants opposed the sale of such land. It had been passed on to numerous Spanish landowners, the last of whom decided to sell it to the Limpia Concepción convent in 1601. In 1647, the conflict continued its course, the indigenous workers who became the nuns' workforce, weren't being paid, while, the land managers demanded additional responsibilities from the workers.[3] The conflict between the indigenous inhabitants or yanaconas, and the convent of nuns, finally came to an end in 1824, after King Ferdinand VII ruled in favour of the yanaconas, and granted them landownership.[4]

Nowadays, the township of Lumbisí has witnessed a growing real estate industry, as well as higher numbers on its population. As of today, a total of 31,463 people live in Lumbisí, such population only amounted to 10,000 during the early 1980s, bringing an end to the sole indigenous ownership of the land. Nevertheless, a smaller township within Lumbisí called San Bartolomé de Lumbisí, still functions as it did during the colonial period. It is divided into nine sectors and its population amount to 3,000 individuals. The villagers have a strict no-selling policy, which is also stipulated under the Law on organization and regime of townships.[5]

The case of Lumbisí is an example of the conflict between the indigenous justice system and ordinary law in Ecuador. Despite the fact that, indigenous rights have

3 Rebolledo 1992
4 Serrano Pérez 2009
5 García 2018

been part of the Ecuadorean judicial context even before its independence, we should take into account that the society is still divided into socio-economic classes. Such polarisation conditions the people's behaviour, and consequently, that of those in power, which in turn, creates an obstacle for the population's interaction. In this sense, the Constitution still speaks of two different peoples, namely the white population, who is ruled under ordinary law, and the indigenous population, who create their own justice system themselves.

In case of Lumbisí, there are certain factors that haven't changed in today's society. The influence of the Church on a community's behaviour and moral system, the colonial working system under which the indigenous community becomes the main workforce for the white landowners, and the role of the state of ruling over matters that cannot be solved without its intervention. In this context, the current Constitution has not accomplished to merge both populations at the legal level. Even though the document itself describes the country as being a plurinational and intercultural state, implying that all nationalities recognised by the Constitution are well-integrated and interact with one another, but unfortunately, this is not the case. Let us highlight that the Ecuadorean society is not homogeneous, we cannot talk about a majority population; we may classify the society, if we need to do so, in indigenous and non-indigenous members of the society.

Although the Constitution grants rights and protection to the indigenous population, it fails to portray an egalitarian environment for the whole population, especially regarding landownership. According to the Constitution, land owned by indigenous communities are exempt of any property taxation; the land cannot be sold nor divided by anyone, unless the state considers such land can be of public interest.[6] Nevertheless, such measures do not allow the inhabitants of these lands to integrate with the rest of the society. Properties such as Lumbisí, are currently within the elite neighbourhoods, where living costs keep increasing, resulting in the marginalisation of the indigenous communities living in these properties. Furthermore, the taxation exemption does not allow these communities to receive the same amount of resources as the neighbouring properties.

In Lumbisí, close to many elite neighbourhoods and costly properties in the valley of Cumbayá, indigenous residents complain that they do not have adequate streets and infrastructure, which added to the fact that they do not pay any taxes, may result in the lack of resources from the municipality. Furthermore, the fact that such lands cannot be sold, and taking into account that they can be worth thousands of hundreds of dollars given its location, such condition impedes the community to have access to market opportunities. In this sense, the Constitution fails to provide equal opportunities to the indigenous minority at the economic and social levels, while also impeding an egalitarian development of urban areas.

6 OAS 2018

Individual level analysis – The Cocha case

Although both indigenous and ordinary law have the aim of maintaining order and a harmonious interaction within their societies, indigenous law lies on a different basis. The indigenous justice system is based on the dynamism of its rules and norms; it is also worth stating that it does not exist a written version of such law. Furthermore, it is not based on any moral or religious norms, and most importantly, it is a participative system, in which it is not a judicial entity that proposes the law, but the community itself.[7] On the one hand, the nature of this law makes it a flexible system, that can change according to the communities' needs and interests. On the other hand, one can argue that it also makes it an unstable system, which may cause conflicts with the rest of the population, who are under the rule of ordinary law.

In this context, the case of La Cocha is yet another example of the clash between ordinary and indigenous law. After the indigenous community applied their sentence to the accused, the family of the victim presented their case to the Constitutional Court, asking them to decide whether the indigenous justice was violated by that of ordinary law. In 2002, in Quilapungo, an area within the community of La Cocha, a family invited the whole community to celebrate one of their children's baptism. During the night celebrations, a fight between two families resulted in the assassination of Marco Antonio Olivo Pallo, by three members of the community. After the investigation of the incident by the villagers themselves, La Cocha decided the following sentence: the accused would have to pay a total amount of six thousand dollars to the victim's family (two thousand dollars for each child), and would be subjected to a cold bath and lashes with stinging nettle. While the community exercised their right to apply their own justice system, the Attorney General interfered with the case, by seizing the accused individuals, who later on were liberated by the authorities.[8]

It is said that the indigenous justice system is based on the individuals' reincorporation into society and its forms of punishment intend to rehabilitate the wrongdoers. However, let us remember that indigenous law accepts the death penalty as a form of punishment, which clearly contradicts its principles. It is important to note that Ecuadorean ordinary law does not include the death penalty as a form of punishment. Furthermore, indigenous law also encompasses the expulsion of the individual from the community, resulting in the complete marginalisation of the individual, leaving no space for rehabilitation or reincorporation. Both the death penalty and the expulsion of the wrongdoer illustrate the lack of harmony between indigenous and ordinary law. While the Constitution allows the indigenous justice system to apply their own norms and rules, it does not protect those being accused, as it would any other non-indigenous individual.

Following the case of La Cocha, four years after the assassination, in 2014 the family of the victim presented their case to the Constitutional Court, denouncing

7 Llasag Fernández 2010
8 Llasag Fernández 2010

the interference of the Ministry of Justice and the Attorney General. I may highlight that this particular case was highly debated in the national media. The Court investigated the family's request and ruled in favour of the victim's family. The sentence by the Constitutional Court was submitted on July, under Case N. 0731-10-EP, Sentence N. 113-14-SEP-CC,[9] it explains that indeed the community's constitutional right to exercise their own justice system was violated by the authorities; and that, the La Cocha community acted within the Constitution's framework. Additionally, the Court advised the authorities to respect the indigenous peoples' Constitutional right to exercise their judicial system in order to avoid double judging of cases.

Is it Constitutional though, not to mention the lack of respect to human rights, to allow the death penalty in a country where it is not encompassed by the Constitution itself? Is the state really and truly protecting the whole population, by tolerating the use of physical violence as a form of punishment? In what way the indigenous justice system effectively rehabilitates their wrongdoers? How can its effectiveness be measured? What lines need to be crossed, or what human rights would need to be violated, so that the state can have a say on these matters? But most importantly, is there a way to merge both justice systems, that protects both indigenous and non-indigenous members, while preserving indigenous ancestral traditions and allowing marginalised populations to be integrated within the society? The La Cocha case was highly discussed in the national media, and even though a sentence was ruled by the Constitutional Court, the issue it brought to light may never stop being questioned.

Conclusion

The Ecuadorean Constitution is indeed an unprecedented case that has included indigenous rights on its Magna Carta, however, as pioneering as it is, it remains a challenge, for the national and local authorities, as well as for the whole population. The cases of Lumbisí and La Cocha are just some examples of the battle between ordinary and indigenous law. It is indeed extremely difficult to take a clear position on this issue, there are many factors at stake, and one may end up in a compromised situation. However, the article by renowned Ecuadorean historian Enrique Ayala Mora presents a valuable point. He says that including indigenous rights within the Constitution is a complex decision that still needs to be matured. In this sense, the Constitution continues to separate indigenous and non-indigenous individuals at the legal level, while it should merge both laws in a harmonious and respectful way. Furthermore, he emphasises that both indigenous and non-indigenous political authorities have been democratically elected by all members of the society, meaning that whether one belongs or not to an indigenous community, everyone can identify themselves with any leader and their ideas.

9 Sentencia N. 113-14-SEP-CC. Caso N. 0731-10-EP 2014.

The Constitution needs to be amended in order to carefully merge both laws, taking into account their opposing nature and principles. It also needs to concretely apply its description of the state as plurinational and intercultural at the legal level. A plurinational state, which recognises not only the existence, but also the rights and responsibilities of all nationalities and peoples, and an intercultural state, that does not only respect all traditions and customs, ancestral and non-ancestral, but also promotes the harmonious, respectful and fair interaction of all its citizens. Moreover, there are many factors at stake behind the legal clashes between indigenous and ordinary law. The resulting marginalisation of indigenous communities, who are left behind by the municipalities, and who cannot decide over the use of their own properties and lands, obstructs the economic and social development of the communities. Are tax exemptions an advantage or a disadvantage for the community's urban development and their participation within the internal revenue system?

Going back to the paper's questions, there is no doubt that Ecuador complies with the international legal instruments in relation to indigenous rights by including them into its Magna Carta. Ecuador could be described as one of the pioneers on this matter, however, this decision comes with many challenges and unresolved questions. The country's past and current leaders still face conflicts with the indigenous population, at the community and individual levels, especially regarding matters of forms of punishment and landownership.

All in all, this paper brings back even more questions about the issue, however, we can conclude that the protection of minorities is a complex issue, which at times may seem straightforward, but as we look at it in-depth, we may discover that it is definitely as intricate as it gets. Both law systems could take the opportunity to learn from one another. For example, what if the principle of rehabilitation of the wrongdoers is applied within the country's system of imprisonment? What would be the best way to merge both laws, taking into account their contradicting nature and sources? With no doubt, it is vital that the authorities address such issues, so that the Constitution does not only comply with legal instruments, but applies them properly into its own reality.

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