Indigenous Justice in Ecuador
From a Human Rights Perspective
- A field study of Kichwas in the Andean region of Ecuador

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Abstract

In Ecuador the traditional indigenous justice has been practiced alongside with the national justice since the conquest in the 16th century. As of 1998 it is legally recognized by the state through the ratification of the Indigenous and Tribal Peoples Convention C169 and the subsequent adoption of a new constitution. Since then the rights of the indigenous peoples have been further developed by the adoption of Ecuador’s present constitution in 2008. In this thesis the indigenous justice is examined from a human rights perspective and especially the responsibility of the Ecuadorian state in guaranteeing the human rights of its indigenous citizens is discussed.

In order to collect empirical material for the thesis a field study was carried out in the Andean region of Ecuador. Individuals with knowledge of, and experience in, the indigenous system of justice were interviewed in primarily the capital Quito and in the indigenous Kichwa-village Apatug.

The findings from the field study give an understanding of how the indigenous justice is practiced among the indigenous people Kichwa today and the cultural values that support it. The field study also shows that the Ecuadorian state is not succeeding in guaranteeing the human rights within the indigenous justice. Especially the failure of protecting its citizens from corporal punishments is a violation of human rights.
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<tr>
<td>C107</td>
<td>Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957</td>
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<td>C169</td>
<td>Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989</td>
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<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment</td>
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<td>CONAIE</td>
<td>Confederación de Nacionalidades Indígenas del Ecuador</td>
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<td>FLACSO</td>
<td>Facultad Latinoamericana de Ciencias Sociales</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>MITA</td>
<td>Movimiento Indígena de Tungurahua-Atocha</td>
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<td>NGO</td>
<td>Non-Governmental Organization</td>
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1 Introduction

Indigenous peoples exist in various parts of the world where they lead their lives in different degrees of integration with descendants of the people who once colonized their territories and other non-indigenous peoples. There are a number of indigenous peoples that have chosen not to have any contact with the outside world but usually indigenous and non-indigenous peoples interact with each other and influence each other. However, it is not uncommon that the indigenous peoples have maintained their own culture, speak a different language, and practice different traditions than the non-indigenous peoples.

This thesis focuses on one of Ecuador’s indigenous peoples: Kichwas. The indigenous peoples of Ecuador are made up by different groups that mainly live in the Amazon area and in the Andes. In Ecuador 28 different indigenous peoples have been identified. Of these peoples, Kichwa is the most numerous and also the most geographically dispersed. The Kichwa people is not homogenous but consists in turn of 14 different peoples, situated mostly in the Andes but also in the coastal- and amazonic regions. They live primarily in eight of the ten mountain provinces and to a lesser extent in three of the coastal regions.

The percentage of indigenous peoples in Ecuador is uncertain since there is no really reliable information. There is no official number and the estimations that have been made vary greatly. However, all evidence points to the same result: that the indigenous peoples are in minority. The estimations of the percentage of indigenous peoples vary from 40 % down to 6,8 %. The lowest number (6,8 %) was obtained in the latest census made by the government in 2001. The population was asked to identify themselves as either indigenous, black, mestizo (of mixed heritage), mulatto, white or other. The fact that so few choose to voluntarily define themselves as indigenous can be seen as a sign of the low status they hold in the Ecuadorian society.

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2 Garcia, Fernando and Mates Sandoval (2007), Los pueblos indígenas del Ecuador: derechos y bienestar. Informe alternativo sobre el cumplimiento del Convenio C169 de la OIT (Quito: FLACSO, Sede Ecuador), p 9
peoples of Ecuador are discriminated against in many fields of the Ecuadorian society even though the situation is gradually improving.5

In recent years it has been acknowledged that the ways of life of the indigenous peoples need special protection and for this purpose the International Labour Organization (ILO) adopted “Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries” (Indigenous and Tribal Peoples Convention C169), which Ecuador ratified in 1998. The convention covers a wide range of areas, such as land, education, vocational training and social security, where the government is obliged to take special measures regarding its indigenous population. Through the ratification of this convention, Ecuador recognizes the special status of its indigenous peoples and is obliged to respect their cultures and ways of life.

Another area that the convention covers is the matter of indigenous justice, which is the subject of this thesis. In 1998, the same year as Ecuador ratified the convention, a new constitution was adopted which entailed a number of improvements in the situation of indigenous peoples. Among other things the constitution states that Ecuador is a multietnic and multicultural society and grants the indigenous peoples as a group a number of rights, among these the right to exercise their own administration of justice to some extent. Through the adoption of the constitution, the practice of indigenous justice was for the first time legalized in Ecuador. The articles of the constitution regarding indigenous justice are clearly influenced by related articles in the ILO convention. In 2008 a new constitution was adopted where the provisions regarding the practice of indigenous justice were further elaborated.

Even though the legalization of the practice of indigenous justice was an advance for the indigenous peoples as a group, it does not necessarily entail solely advantages for the indigenous individual. In this thesis the practice of indigenous justice will be examined with both the individual’s rights and collective rights in mind.

5 www.latinamerika.nu (2008-09-28)
1.1 Purpose

The purpose of the thesis is to examine whether the human rights of individuals subjected to the indigenous justice, as practiced among Kichwas in the Andean region of Ecuador, can be guaranteed successfully.

1.2 Research Questions

- What is the legal basis for the indigenous justice?
- How is the indigenous justice practiced among Kichwas in the Andean region of Ecuador?
- What obligation does the Ecuadorian state have to guarantee the human rights of its indigenous citizens?

1.3 Method and Material

The Indigenous and Tribal Peoples Convention C169 and Ecuador’s constitutions of 1998 and 2008 have been examined together with other relevant international instruments of human rights.

In order to collect empirical material a field study was carried out in Ecuador during which interviews were conducted in three different layers of the society: (1) with representatives from the judicial system, (2) with members of non-governmental organizations (NGOs) working in the interest of the indigenous peoples, and (3) with members of the indigenous people Kichwa in the village of Apatug. This village was chosen since I had established contacts there beforehand and I knew that the indigenous justice is practiced there.

During my field study the constitution of 1998 was still in force and it was not known if the proposal for the constitution of 2008 would be approved in the national referendum that took place in September 2008. Therefore both the constitution of 1998 and that of 2008 are discussed in the thesis. All translations of articles in the two constitutions are made by myself since there is no official English translation and the original text in Spanish can be found in annex 1 and 2.
1.3.1 Field Study

For the purpose of the thesis I carried out a field study in Ecuador during ten weeks in June, July and August 2008. The larger part of the study I based myself in the capital, Quito.

The main purpose of the study was to collect information regarding the indigenous system of justice through interviews. The interviews were carried out with lawyers, members of NGOs, members of the indigenous organization Confederación de Nacionalidades Indígenas del Ecuador (CONAIE), one anthropologist, one prosecutor, several village authorities in the Kichwa-village of Apatug, ordinary villagers of Apatug, and one judge at the court of Quito. A list of all interviews used in the thesis can be found in annex 3. Both indigenous and non-indigenous individuals were interviewed. The interviewees were selected for their knowledge of, and interest in, the indigenous administration of justice. All interviews were carried out in Spanish without interpreter. This includes the interviews carried out in Apatug, where Kichwa is the first language of the inhabitants. 22 persons were interviewed in total but not all interviewees are quoted in the thesis. The interviews were almost without exception carried out with the help of a tape recorder and the duration was approximately one hour per interview.

The interviewees were mainly found through contacts. In Ecuador I came in contact with Soledad Dueñas, the local coordinator of the Swedish NGO Solidarity Sweden-Latin America (SSLA), that has an office in Quito. Dueñas could recommend a number of plausible persons to interview. These persons were in turn asked to recommend other plausible interviewees. I also visited indigenous NGOs where I found a number of suitable interviewees. In addition to this, I contacted a number of persons who have published books on the topic of indigenous justice. My local supervisor for the field study, Jaime Garcès Nieto, lawyer and professor of jurisprudence, helped me to come in contact with a number of lawyers. In the indigenous community Apatug I conducted interviews with present and former community authorities as well as with ordinary inhabitants. In total approximately one week was spent in the community on two separate occasions.

The interviews were qualitative and semi-structured and the questions were open. During the interviews I used a standardized questionnaire but chose the questions according to the knowledge and interest of the person interviewed. Therefore not
everyone has answered the same questions. For example the interviews made with lawyers and villagers cannot be compared.

Unfortunately I did not get access to the national system of justice in the way that I had hoped. It proved to be very hard to get interviews with judges and prosecutors due to lack of time or interest on their part. I only managed to make one interview with a judge at the court of Quito and as it turned out he was not familiar with the subject of indigenous justice. For this reason the national system of justice is largely represented by lawyers in the thesis.

**1.3.2 Literature and Other Sources**

In order to collect information for the thesis I have used written sources such as books, internet sources, international conventions, reports and articles.

As part of the field study I collected written sources regarding indigenous justice in Ecuador since these are hard to find in Sweden. In Quito I visited the Latin-American faculty of social sciences FLACSO (Facultad Latinoamericana de Ciencias Sociales) on several occasions in order to collect information since they have a library with an extensive collection of literature regarding indigenous peoples. Apart from literature collected in Ecuador I have also used books on human rights covering areas such as ethics, group rights and cultural relativism.

The official documents used have primarily been the two most recent constitutions of Ecuador and the Indigenous and Tribal Peoples Convention C169. In addition to these, other international conventions such as the International Covenant on Civil and Political Rights (ICCPR) have been studied.

Internet has turned out to be an important source of information concerning the Indigenous and Tribal Peoples Convention C169 since there are not many books that deal with the convention in relation to Ecuador. I have made use of Internet sources that I deem credible, among these official homepages belonging to organisations such as United Nations (UN), ILO and SSLA.
1.4 Explanation of Terminology

There are a number of terms used throughout the thesis that may need explanation in order for the reader to fully understand the thesis.

1.4.1 Indigenous

There is no official definition of indigenous peoples made by UN or ILO. However, the Indigenous and Tribal Peoples Convention C169 is clear about what groups are covered by the convention by their indigenous status. Factors that are crucial are that they have inhabited a geographical region at the time of conquest or colonization and that they “retain some or all of their own social, economic, cultural and political institutions” (article 1, paragraph 1(b). Another factor that is crucial is that the groups identify themselves as indigenous.

In the thesis the term *indigenous people* refers to any people that fulfil the criterion above and the term *indigenous individual* refers to any person belonging to an indigenous people.

1.4.2 Non-indigenous

In the thesis I have used the term *non-indigenous* to refer to any people/person that is not considered as indigenous. This also applies to individuals of mixed ancestry (indigenous/non-indigenous) that choose not to identify themselves as indigenous.

1.4.3 Indigenous Justice

The term *indigenous justice* is used in the thesis to represent the set of rules and moral standards and traditions used by indigenous authorities in order to maintain order and harmony in their communities.
1.4.4 Customary Law

The term *customary law* is used in some of the conventions quoted in the thesis and is used in the thesis as a synonym to *indigenous justice*.

1.4.5 Community

In Ecuador, the term *comunidad* is generally used to refer to a small village or a group of people living together in rural areas. Throughout the thesis I have used the English term *community* in the same sense. Indigenous communities generally enjoy some form of self-government and have their own authorities.

1.4.6 National Justice/Ordinary Justice

Both *national justice* and *ordinary justice* are used throughout the thesis and signify the justice used by the Ecuadorian state, as opposed to the indigenous justice.

1.5 Delimitations

There are indigenous peoples in many parts of the world, but I have chosen to focus only on Ecuador and how the indigenous justice is practiced among Kichwas, one of the many indigenous peoples within its borders. During the field study I chose one indigenous village where I made an in-dept study. As traditions and customs differ between villages the description of the routines in this specific village cannot be used as a general reference of how indigenous justice is practiced among Kichwas, but shall be seen as an example of how it can be done.

This thesis will not deal with the indigenous justice in relation to Ecuador’s national law. Partly because the national is subordinate to the constitution (which is examined in the thesis), but also because of the risk of miscomprehension when interpreting a foreign country’s laws, considering that I am not a lawyer.

As I have learned more about the subject of indigenous justice through my field study and the subsequent work with the thesis, many new, interesting angles of approach have emerged that deserve to be examined, but due to the limit of time and space they
cannot be followed up in this thesis. Subjects worthy of examination could e.g. be how indigenous individuals themselves regard indigenous justice and if there is an extensive support for the practice of this justice or if they would prefer to assimilate with the ordinary justice, provided that it could be done in a non-discriminatory way.

1.6 Chapter Outline

In order to fully understand the indigenous system of justice from a human rights perspective it is important to determine who is responsible for guaranteeing the human rights of persons subjected to the indigenous justice. It is also important to understand the human rights standards in regard to the indigenous system of justice and how these rights can be invoked by a group or an individual. In this context it is also essential to get an understanding of how the indigenous system of justice is practiced, both in theory and in reality. Since the subject of indigenous justice is not well known I have chosen to give quite a lot of background information so that the reader can get a basic understanding of the complexity that surrounds the subject when it comes to culture for instance.

In chapter two I will examine the legal basis for the indigenous system of justice. An introduction to the indigenous justice is made with focus on history and thereafter the significance of the Indigenous and Tribal Peoples Convention C169 as an international instrument of human rights and the present and previous constitution of Ecuador will be discussed.

In chapter three the legal procedure of the indigenous system of justice will be discussed. In this chapter the findings from the indigenous village Apatug will also be discussed and I will explain how the legal procedure is practiced in this particular village.

In chapter four the responsibility of the state will be discussed together with the state’s jurisdiction on indigenous territory. The Ecuadorian constitution will be my main source for determining what responsibilities the state has. In this chapter I will also discuss the hierarchy of collective and individual rights.

In chapter five the findings of chapters two, three and four will be analysed in order to get a complete understanding of the topic and how the different parts interact
and affect each other. In this chapter I will also present opinions expressed by my Ecuadorian interviewees.

In chapter six I will make a short summary and my conclusions will be presented.
2 Legal Basis of Indigenous Justice

2.1 Background

The practice of indigenous justice was not legally recognized in Ecuador until 1998, but it has been in use since long before then. The laws and norms have developed during thousands of years in all parts of Ecuador. When the Spanish conquerors during the 16th century arrived in what would later become Ecuador, they did not arrive to a no man’s land, but stumbled upon existing societies made up by primarily farmers. These indigenous peoples consisted of different ethnic groups with well defined cultures and ways of handling issues regarding social welfare and juridical problems among other things.\(^6\) Dr Carlos Pérez Guartambel, professor of jurisprudence and author of the comprehensive work on indigenous justice *Justicia Indígena*, claims that before the conquest the life in the communities was dominated by reciprocity and family life in harmony and cooperation. The judicial system was so merged with spiritual, religious and moral perceptions that it was hard to compare with the contemporary society of the conquerors, but nevertheless a social order existed in which every people and community strived for the peaceful co-existence of its citizens.\(^7\)

However, the conquerors thought that the indigenous peoples were something in-between humans and animals and now started an era of trying to save them from their paganism and at the same time using them as labour while appropriating their land.\(^8\) The indigenous societies were ripped apart as they were forced to work as slaves in haciendas. However, the indigenous system of justice survived into our days. During a period it was allowed to practice the justice for minor problems but during other times it was not allowed. However, even when not allowed, it was practiced in secret and sometimes punished by the ordinary authorities.\(^9\) According to Lourdes Tibán, minister in the Ecuadorian Ministry of Indigenous Issues and author of several publications regarding indigenous justice, the practice of indigenous justice is part of the history and

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\(^6\) Tibán, Lourdes and Raúl ILaquiche (2004), *Manual de Administración de Justicia Indígena en el Ecuador* (Quito: Nina Comunicaciones), p. 15

\(^7\) Guartambel, Carlos Pérez (2006), *Justicia Indígena* (Cuenca: Talleres Gráficos de la Universidad de Cuenca), pp. 227-228

\(^8\) Ibid

culture of indigenous peoples and the only change that the constitution of 1998 and the C169 brought was to recognize and legitimize it.  

Indigenous movements have fought for the improvement of their situation and in 1986, CONAIE was created. It is one of the most influential indigenous organizations in Ecuador today and one important issue for them was the ratification of the Indigenous and Tribal Peoples Convention C169 and the subsequent introduction of the rights of indigenous peoples in the constitution of 1998.

When the constitution of 1998 came into force the indigenous system of justice was for the first time recognized and legalized in Ecuador. The recognition of the indigenous justice in the constitution depended a great deal on the ratification of the Indigenous and Tribal Peoples Convention C169, which Ecuador ratified in the same year. In 2007 the UN adopted the United Nations Declaration on the Rights of Indigenous Peoples, where the right of indigenous peoples to maintain their juridical system is affirmed. The declaration is not binding but provides a tool for interpreting other international human rights instruments as they are applied to indigenous peoples. The latest development in Ecuador regarding indigenous justice was the adoption of the new constitution in 2008. In this constitution the rights regarding indigenous justice are further developed. In chapters 2.2 and 2.3 the significance of the Indigenous and Tribal Peoples Convention C169 and Ecuador’s present and last constitution will be discussed.

2.2 Indigenous and Tribal Peoples Convention C169

When it comes to international instruments it is chiefly the Indigenous and Tribal Peoples Convention C169, in this chapter called C169, that has had an impact on the legal status of the practice of indigenous justice.

C169 was elaborated by ILO as a development of the Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (C107), which Ecuador ratified in 1969. When C107 was adopted in 1957 it was the first ILO-convention that was specifically directed to the indigenous peoples. During that time the societies of the indigenous

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peoples were regarded as temporary and backwards and it was believed that the best for the indigenous peoples would be to adapt to the national norm through integration and assimilation.\footnote{International Labour Organization (2003), \emph{ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual} (France: Dumas-Titoulet Imprimeurs).}

However, as time passed both international law and the situation for indigenous peoples in all regions of the world underwent changes and the ILO thought it appropriate to adopt new international norms with the purpose to eliminate the “assimilationist orientation” which permeates the C107.\footnote{Convention concerning Indigenous and Tribal Peoples in Independent Countries (C169)} The C169 was therefore developed and came into force in 1991. Thereby it revised C107 that closed for ratification. Since Ecuador has ratified the C169, the C107 is no longer in force in the country.

Articles 8 and 9 of C169 deals with the rights of the indigenous peoples to preserve their customs and customary law. Article 8 read as follows:

\begin{quote}
\textbf{Article 8}

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.
\end{quote}

As is evident from the second paragraph, the indigenous peoples have the right to preserve their own customs and institutions, provided that they do not violate certain fundamental national rights or any human rights. In other words, no human rights may be violated in the pretext of preserving existing customs and it is clear that the indigenous individual’s human rights are equally protected as those of any other citizen. Since the state of Ecuador is a party to the convention, it is ultimately the state that is responsible for making sure that no human rights of the indigenous peoples are violated. It is also the state’s responsibility to make sure that, when needed, there are established procedures to “resolve conflicts which may arise”.

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The third paragraph signifies that the rights granted to the indigenous peoples through article 8 cannot be seen as a way of taking from them any of the other rights or duties they have by law. In other words, it is not possible to make them “second-class citizens” or deprive them of any rights given to the rest of the population.

Article 9, paragraph one deals strictly with offences committed by members of the indigenous peoples and read as follows:

*Article 9*

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

In this article it is clear that the traditional way of dealing with offences only applies to the members of the peoples concerned. However, it does not specify that the offence must be directed to other indigenous individuals, nor does it specify that the offence must have taken place on indigenous territory. According to this article, the state has an obligation to respect the indigenous administration of justice as long as it does not violate national law or human rights. However, since this article falls under the national legal system, it can be difficult to invoke unless there is no national legislation on the subject.

The second paragraph of article 9 refers to punishments and applies to any authority or court dealing with cases concerning indigenous persons. In the case of Ecuador this could mean both indigenous and national authorities and courts. However, the wording “taken into consideration” makes this paragraph quite weak.

### 2.3 The Role of the Constitution

In Ecuador, the rights of the constitution are of immediate and direct application and consequently any national law that is not in conformity with the constitution is invalid. This will be further discussed in chapter three.
2.3.1 Constitution of 1998

The relevant article in the constitution of 1998 is number 191.

\textit{Art. 191}

The authorities of the indigenous peoples shall exercise functions of justice, applying their own norms and proceedings for resolving internal conflicts in accordance with their customs or customary law, provided that they do not contradict the Constitution and the laws. The law shall make these functions compatible with those of the national judicial system. [my translation]\(^{15}\)

According to this article, the indigenous authorities have the right to resolve all \textit{internal} conflicts in conformity with their customs or customary law, as long as it is not incompatible with the constitution or the law.

From this article we can firstly observe that it is the \textit{authorities} of the indigenous peoples that have the right to resolve conflicts and this should be done in accordance with their \textit{customs} or \textit{customary law}. Thus the conflict solving has to be done by assigned persons using an existing system.

Secondly we can observe that the authorities have the right to resolve all \textit{internal} conflicts. It is not further specified what constitutes an internal conflict and during my field study I encountered many different answers to this question. This will be further discussed in the analysis in chapter five.

Thirdly we can observe that the functions of justice are allowed to be exercised as long as they do not contradict the \textit{constitution} and the \textit{law}. Even though no mention is specifically made of international human rights they are protected through the constitution.\(^{16}\)

Last but not least, according to the article the law shall make sure that the functions of indigenous administration of justice are compatible with the functions of the national judicial system. This is ultimately the responsibility of the state. However, during the ten years that this article was in force, no such law was created.

\(^{15}\) The original article in Spanish is found in annex 1.  
\(^{16}\) Article 18.
2.3.2 Constitution of 2008

In September 2008 a new constitution was adopted through a national referendum. The constitution came into force October 20th 2008. There are two articles in the constitution that deals with the indigenous administration of justice; article 171 and article 57(10). Article 171 is a further development of article 191 in the constitution of 1998 and reads as follows:

**Art. 171.**

*The authorities of the indigenous communities, peoples and nationalities shall exercise judicial functions, based on their ancestral traditions and their own justice, within their territory, with a guarantee of women’s participation and decision. The authorities shall apply their own standards and procedures for resolving their internal conflicts, and not contrary to the Constitution and human rights recognized in international instruments. The State shall ensure that the decisions of the indigenous jurisdiction are respected by public institutions and authorities. Such decisions are subject to control of constitutionality. The law shall establish mechanisms for coordination and cooperation between indigenous jurisdiction and ordinary jurisdiction.* [my translation]  

Some rights are essentially the same as in article 191 of the constitution of 1998; the indigenous *authorities* have the right to exercise functions of justice in order to resolve *internal* conflicts as long as this is not contrary to the *constitution*.

An important restriction is the fact that the indigenous authorities only have jurisdiction within their territory, a provision that was not expressed in the constitution of 1998. Another difference is that there is a stronger protection for the decisions taken by the indigenous authorities since the state shall make sure that the decisions they make are respected by public institutions and authorities. However, it is also stated that these decisions are subject to control of constitutionality, which is done by the Constitutional Court (*Corte Constitucional*). This is also an important restriction of the indigenous justice since it should be quite easy to overthrow a decision made by the indigenous authorities by referring to the constitution.

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17 The original article in Spanish is found in annex 2.
In article 171 it is not stated that the indigenous justice cannot be in violation of the national law. However, both the constitution and human rights are mentioned. Also in this constitution it is stated that the law is responsible for establishing mechanisms for coordination and cooperation between indigenous jurisdiction and ordinary jurisdiction.

Article 57(10) in the constitution of 2008 is intimately connected with article 171 of the same constitution and reads as follows:

**Art. 57**

The following collective rights are recognized and guaranteed for indigenous communities and peoples in accordance with the Constitution and international agreements, conventions, declarations and other international instruments of human rights:

[...]  
10. To create, develop, apply, and practice their own right or customary law, which is not allowed to violate constitutional rights, especially those of women, children or adolescents. [my translation]

This article is especially noteworthy since it gives the indigenous peoples the right to create and develop their customary law, a right which is not expressed in the constitution of 1998. The significance of this right will be further discussed in chapter 5.3.1.

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19 The original article in Spanish is found in annex 2.
3 The Indigenous Justice among Kichwas in the Andean Region of Ecuador

What is characteristic for indigenous communities is the ambition to create and maintain harmony within the society as well as with Mother Nature. According to Guartambel, the indigenous peoples have their own ancient philosophy that guides the members on how to lead a life in harmony with each other. Since the striving for social harmony permeates the daily activities in the communities it is not surprising that harmony is also the base for, and purpose of, the indigenous justice. Everything that disturbs the harmony is seen as a breach and needs to be taken care of. The indigenous justice is a living system that it is not written down and is therefore dynamic. It is based on customs and regulates all aspects of the collective way of living, exercising a social control in its territories and among its members.

3.1 Legal Procedure

Within the indigenous justice it is not the punishment that is the most important; instead the aim is re-establishing the harmony and balance in the community and re-integrating the individual into the society. It is not possible to give an unambiguous answer to the question of how the indigenous justice is practiced among Kichwas today. The legal procedure differs from village to village and one will not find the exact same system of justice even in two neighbouring villages. Nevertheless, according to Tibán there are five cornerstones in the indigenous administration of justice; Willachina, Tapuykuna, Chimbapurana, Killpichirina and Paktachina.

Willachina (notice or request): The first thing the affected person should do is to orally inform the leaders of the council what has happened, for example fights, robberies, or deaths.

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22 Interview with Floresmilo Simbaña, Quito 2008-06-24
Tapuykuna (examination of the problem): This part consists of various procedures, such as determining the magnitude of the conflict, verifying the death in case of murder, determining who the guilty one is, and in some cases search of the house or place where the crime took place.24

Chimbapurana (confrontation of the accused and the plaintiff): The confrontation consists of two parts. First the president of the council installs the assembly, which is informed in detail of the situation and the conclusions of the investigation. The community is informed of who the accused are, where, how, and when the conflict took place. Secondly, the accusing part orally informs about the facts that made them initiate the legal process and thereafter the accused part is allowed to defend himself and either accept or deny the accusations that are laid before him. If he accepts the accusations he is allowed to beg pardon in front of the assembly and thereby bring about a reduction or cancellation of the punishment.25

In contrast to the ordinary system of justice, in the indigenous justice there are no lawyers to represent the parties, but the plaintiff and the accused themselves speak as many times as is necessary to make everything clear so that there is no confusion at the moment when the guilty ones and the punishments are to be determined. In the final part, the leaders of other communities, the villagers of the community and the family of the parties involved intervene in order to advise the accused so that they do not continue committing crimes.26

Killpichirina (determination of the punishment): Within the indigenous system of justice, there are numerous punishments, such as fines, returning robbed objects plus payment of damages, cold bath, herbal whipping, community work, and in rare cases expulsion from the community.27

Paktachina (enforcement of the punishment): The physical punishments should be carried out by men or women who are honest and well respected. Generally the persons carrying out the punishments are elderly, family members, godparents, the president of the council, or other local indigenous authorities.28

24 Tibán, Lourdes and Raúl ILaquiche (2004), Manual de Administración de Justicia Indígena en el Ecuador (Quito: Nina Comunicaciones), p 38
25 Ibid pp 38-39
26 Ibid p 40
27 Ibid pp 40-41
28 Ibid p 41
These five steps are the basis for conducting administration of justice in the communities. In some cases, the traditional system of justice has been confounded with *justicia por mano propia*, discussed below.

### 3.2 Justicia por mano propia

*Justicia por mano propia* signifies to take the law in one’s own hands and often results in lynching or arbitrarily judging or killings. This occurs sometimes but it is not part of the indigenous justice. If it results in death it is regarded as murder and punished by the national system of justice. However, when someone is lynched in an indigenous village the media is eager to present it as part of the indigenous justice and since not much is known among non-indigenous individuals about the way the indigenous justice functions, many misunderstandings and prejudices are spread regarding indigenous justice.  

### 3.3 The Practice of Justice in Apatug

In order to get an actual example of how the indigenous administration of justice can be practiced, I visited the indigenous village Apatug during my field study. Apatug is an indigenous village located one hour south-west of Ambato at 3 400 meters above sea level in the central highlands. The 400 families living in the village belong to the indigenous people Kichwa and their native language is Kichwa.

#### 3.3.1 Authorities in Apatug

As discussed in chapter two, the constitution grants the indigenous authorities the right to exercise functions of justice. What constitutes authorities is not further specified and may differ from village to village. In order to get an accurate understanding of how the authorities function in Apatug I conducted interviews with the president of the drinking-water, who chose to remain anonymous; Francisco Yanzapanta-Pomaquiza, former

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30 Interview with the president of the drinking-water, Apatug 2008-07-16
member of the council;\textsuperscript{31} Lorenzo Yanzapanta, former president of the indigenous organization Movimiento Indígena de Tungurahua –Atocha (MITA) and a respected inhabitant in the village with good knowledge of all aspects of the daily life in the village.\textsuperscript{32} The interviews were carried out separately and they all gave me the same information of how the village-authority is structured and how the indigenous justice functions in their village.

In Apatug the formal authority consists of the council, the delegates and the persons responsible for the drinking-water. The members of the council and the delegates hold their office during one year whereas the president of the drinking-water holds his office during a period of two years. The highest authority in the community is the council. Every year in the middle of December the whole community of approximately 400 families gathers in the community house to elect the members of the council for the following year. Every person over the age of 18 living in the community has one vote and everyone is obliged to vote. This is called the general assembly. Any woman or man over 18 years old living in the community can be elected. The person who receives the most votes becomes the president, second most votes becomes vice president, thereafter treasurer, ombudsman and secretary. These five persons constitute the council, with the president as their highest authority. The council is not only responsible for the administration of justice but also for anything else of great importance in the village, such as the maintenance of the roads.

Every second year a new president of drinking-water is elected. He or she is responsible for making sure that the pipes that deliver the drinking-water from the mountains function properly and that everyone pay the monthly fee. All together they are about ten persons involved in the management of the drinking-water.

Apatug is divided into ten areas and in each area there is a delegate. These delegates gather to decide when it is time to do common work in the village, cleaning the roads for example. The delegates are elected in each area by the people they represent. The majority of the delegates in Apatug are women, according to the president of the drinking-water since they are considered harder working and better at dealing with problems than men. The women also spend more time in the village since many men have jobs outside the village whereas the women are left to take care of the agriculture.\textsuperscript{33}

\textsuperscript{31} Interview with Francisco Yanzapanta-Pomaquiza, Apatug 2008-07-07-17
\textsuperscript{32} Interview with Lorenzo Yanzapanta, Apatug 2008-07-18
\textsuperscript{33} Interview with the president of the drinking-water, Apatug 2008-07-16
All in all there are about 45 persons that can be said to be official authorities in the village. Other than these, especially older family members are involved in the administration of justice in the village. According to Yanzapanta, no one receives any payment for the time they spend as village-authorities in Apatug but it is seen as an honour and an important responsibility.34

3.3.2 Legal Procedure in Apatug

Smaller problems, such as disagreements between family members, are generally solved within the family with the help of godparents, grandparents, parents, uncles and aunts that can guide younger family members and show them the way to live in harmony.

If the problem cannot be solved within the family-sphere one turns to the council. There are regulations in the village but these seem to be more like guidelines and are not always followed. Instead the punishment depends on the circumstances. When someone is judged it is the job of the secretary to document everything that is said and done. This is important since the council changes every year. All documents regarding the administration of justice are kept in the house of the president of the council. In this way it is easy for the president of the council to keep track of what problems any specific person has caused earlier and what punishment he has received. This is important since the punishments increase with the number of times a person has caused problems. All proceedings take place during the night since many villagers work outside the community and do not have the opportunity to participate during the day.

Any case that reaches the council invariably generates an economic fee or fine that is used for the good of the whole village, e.g. maintaining the roads. The fines can vary from $5-20 the first time a person has caused trouble and is generally doubled and tripled according to how many times a person has caused trouble. Until the matter is solved the accused person can be held in custody in the community prison for up to 48 hours. The prison in Apatug consists of a small room without any other facilities but a bench. During the time the person is imprisoned it is the responsibility of the family to take care of him and bring him food.

If the accused person is found guilty of a crime that is not minor, he or she is punished with cold baths and/or whipping with stinging nettle in order to be purified.

34 Interview with Lorenzo Yanzapanta, Apatug 2008-07-18
The punishment is carried out in public in the middle of the night since the water that comes from the mountains carries the lowest temperature at this moment. The person is stripped of his clothes and buckets of cold water are thrown over him or he is whipped with the stinging nettle on his back. When it comes to corporal punishments it is always the general assembly (the whole village) that decides the punishment even if it is the president of the council that has the last word. The persons carrying out the punishment can be the council, the president of the drinking-water, the delegates and the family. When the punishment is carried out the whole village is present and in this way the punishment functions as a warning to the other villagers.

In the indigenous justice no distinction is made between penal and civil law since everything that threatens the harmony is seen as a problem. In Apatug there are a number of situations that breaks the harmony that are not seen as crimes in the ordinary justice of Ecuador but are punished in the village; adultery and divorce for instance. In the village it is not allowed for a husband and wife to separate or get a divorce, once they are married they are to stay together their whole lives. If they move apart the council is called to solve the problem and determine who is responsible for the problem and what can be done to solve it. When the council arrives they try to persuade the couple to get along and stay together. According to Yanzapanta, it does not matter how bad things are, even if one of the spouses is physically or psychologically abusing the other, they still have to stay together, especially for the sake of their children. If the council does not manage to persuade them to continue living together the couple is placed in the community house for a few hours or a night until they have worked it out and agree to continue their lives together.35

In Apatug the indigenous justice is not reserved only for members of their own village. If a non-indigenous person enters the community and commits a crime he or she is first judged and punished according to the traditions of the community and then handed over to the police. The president of the drinking-water claims however that it is very rare that people from outside come to the community in order to steal or commit other crimes since they know that the punishment is hard,36 and Yanzapanta points out that no suspicious persons are allowed to enter the village. As soon as someone

35 Interview with Lorenzo Yanzapanta, Apatug 2008-07-18
36 Interview with the president of the drinking-water, Apatug 2008-07-16
suspicious tries to enter a call goes out in the loud-speaker system and everyone from the village gather to stop the intruders.\textsuperscript{37}

As is evident from this chapter, there are a number of elements in the indigenous justice that are problematic from a human rights point of view; especially noteworthy is the practice of corporal punishments. This will be further discussed in chapter five.

\textsuperscript{37} Interview with Lorenzo Yanzapanta, Apatug 2008-07-18
4. State Responsibility in Guaranteeing Human Rights

It is the responsibility of the state to make sure that no human rights of its citizens are violated. This responsibility consists of three parts: 1) respecting, 2) protecting, and 3) assisting and fulfilling the human rights of its citizens. To respect implies that the state must refrain from doing anything that can violate the rights of its citizens. To protect implies that the state must protect its citizens from having their rights violated by other citizens. This can be done through legislation. To assist and fulfil implies that the state must take necessary measures to render possible the fulfilment of rights.

It is only the state or its institutions that can violate a person’s human rights and the human rights can only be claimed at a vertical dimension, by the people from the state. Since the indigenous authorities are not part of the state or its institutions the punishments are imposed on a horizontal level and therefore the indigenous authorities cannot be accused of being in violation of an international human rights convention. Thus, there must be national legislation that protects the rights of the indigenous individuals from violation by their authorities. It is the responsibility of the state to legislate in order to criminalize actions that may violate human rights between two individuals, i.e. in the horizontal dimension. It is not possible to go to a court and say that this person violated my human rights since these rights can only be violated by the state. However, the state may violate a person’s human rights if they do not criminalize conducts that lead to the non-fulfilment or violation of the rights of a person.

4.1 State Jurisdiction on Indigenous Territories

The indigenous peoples in Ecuador have the right to some self-determination, as granted in article 4(6) of the constitution of 1998 and article 57(9) of the constitution of 2008. However, this does not imply that the state responsibilities are taken over by the indigenous authorities. In article 83 of the constitution of 1998 and article 56 of the constitution of 2008 it is stated that the indigenous peoples are part of the Ecuadorian state, which is indivisible. Thus, the indigenous territories are under the jurisdiction of

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the Ecuadorian state and any right to self-determination on indigenous territories emanates from the state. This means that the state cannot be prevented from controlling that no violations of human rights occur on indigenous territory.

The indigenous territories are defined by law in accordance with article 84 and article 224 of the constitution of 1998 and in accordance with article 57 and article 257 of the constitution of 2008, found in annex 1 and 2.

4.2 Of Direct and Immediate Application

In both the constitution of 1998 and that of 2008 it is stated that the rights of the constitution and those of international human rights instruments are of direct and immediate application. Therefore no further legislation is necessary to apply the rights granted in the constitutions or any international instruments that Ecuador has ratified. Article 18 in the constitution of 1998 reads as follows:

Article 18

The rights and guarantees established in this Constitution and international instruments in force shall be of direct and immediate application by and before any judge, court or authority. [my translation]

Article 11(3) and 11(4) of the constitution of 2008 read as follows:

Article 11

3. The rights and guarantees established in the Constitution and international human rights instruments are of direct and immediate application by and before any public, administrative, or judicial official servant, or at the request of a party. Conditions or requirements that are not specified in the Constitution or in the law are not required for the exercise of the constitutional rights and guarantees. The rights are fully justiciable. It is not possible to claim lack of rule of law to justify their violation or ignorance, to dismiss the action by these facts or to deny their recognition.

4. No rule of law may restrict the content of the rights or constitutional guarantees. [my translation]

39 Article 18, 163 and 272 in the constitution of 1998 and article 11 in the constitution of 2008.

40 The original article in Spanish is found in annex 1.
Hereby it is clear that no existing law is valid if it is not in conformity with the constitution and that no new laws can be created if they are not in conformity with the constitution. It is also clear that any citizen has the right to claim the rights guaranteed in the constitution before the state or its institutions.

4.3 Collective Rights

The Ecuadorian state guarantees the indigenous peoples a number of collective rights through article 84 in the constitution of 1998 and through article 57 in the constitution of 2008. Among these rights one can find the right to develop and strengthen their identity and traditions, the right to conserve and develop their social structure and authorities, and the right to retain their ancestral territories. Since these rights are collective they cannot be claimed by an individual unless he or she is part of a group that is protected by these rights. The collective rights protected by the constitutions of 1998 and 2008 are in conformity with the Indigenous and Tribal Peoples Convention C169, which applies to peoples and any individual can therefore enjoy the rights guaranteed in this convention only as long as he or she belongs to the collective.

However, the individuals belonging to peoples protected by this convention also have the right to enjoy their individual rights and the application of the Indigenous and Tribal Peoples Convention C169 or any constitution is not allowed to affect them in a negative way. Marek Piechowiak, doctor at the Tadeusz Kotarbinski Pedagogical University and the Poznan Human Rights Centre, expresses this very well:

An individual must never be treated as a mere means to achieve the well-being of a group [...]. A human being is autonomous, he or she is not a mere part of society; society exists for his or her benefit.

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41 The original article in Spanish is found in annex 2.
43 Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. Article 35
What this is to say is that the individual is more important than any group that he or she may be a member of. Pechowiak also illustrates the importance and inherent dignity of the individual by his statement that “rights are secondary to an individual and exists for the benefit of an individual as a whole”.45

So the state then not only has an obligation to protect the indigenous peoples but also an obligation to protect a member of any specific people from other members of the same people.

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45 Ibid p. 9
5 Discussion

In this chapter the facts and findings presented in chapters two to four will be further elaborated, analysed and discussed.

5.1 Are the Constitutions in Conformity with the Indigenous and Tribal Peoples Convention C169 Regarding Indigenous Justice?

In my opinion, article 191 in the constitution of 1998 and article 171 in the constitution of 2008 fulfill the rights specified in article 8 and 9 of the Indigenous and Tribal Peoples Convention C169 in regard to the possibility of indigenous peoples to exercise their own system of justice.

In the constitution of 1998 it is not explicitly expressed that the traditional justice is not allowed to break human rights, but it refers to the constitution and “the laws”, and since the human rights treaties signed by Ecuador are part of their legal system, one might assume that the human rights are included. It is also stated in both constitutions that the law shall make the functions of the indigenous system of justice compatible with the national system of justice, which is in accordance with article 8(2) of the Indigenous and Tribal Peoples Convention C169. Therefore I conclude that the Ecuadorian state has succeeded in incorporating the rights of the convention in its constitutions. However, the fact that the rights are incorporated in the constitution does not automatically ensure that they are sufficiently protected in practice.

5.2 Implications of the Fact that there is no Secondary Law

As noted in chapter 2.3.1, no secondary law or other norms have been created by the state in order to make the indigenous system of justice compatible with the ordinary system of justice. Several law proposals were made by the CONAIE, all of which were turned down by congress.\textsuperscript{46} This has led to a great deal of confusion and conflicts between the indigenous system of justice and the ordinary system of justice. As noted in chapter 4.2, international instruments and the constitution are of direct and immediate

\textsuperscript{46} Interview with Silveiro Cocha, Quito 2008-07-11
application and the rights granted must be applied by all public institutions as soon as the constitution comes into force. However, according to Jaime Vintimilla, lawyer specialised in indigenous matters, it is common that judges, prosecutors and police disregard the rights granted since there is no further legislation on the area and the public institutions do not have sufficient experience on the subject.\footnote{Interview with Jaime Vintimilla, Quito 2008-08-21} In many cases, individuals who have already been judged and sentenced within the indigenous system of justice are judged and sentenced again in the ordinary system of justice.\footnote{Rapport av utrikesdepartementet angående mänskliga rättigheter i Ecuador 2007. http://www.manskligarattigheter.gov.se/dynamaster/file_archive/080326/038d28bd9d6a15f6c7959aaa8aaa7b9a/Ecuador.pdf}

The lack of established norms regarding how the indigenous justice shall be carried out also leads to confusion regarding the jurisdiction of the indigenous authorities. A secondary law could for example determine the legal boundaries of the indigenous system of justice in regard to what punishments can be imposed, how the legal procedure should be handled, what crimes can be judged etc.

In article 171 in the constitution of 2008 it is stated that the decisions of the indigenous authorities are subject to control of constitutionality. With the adoption of the constitution of 2008, a constitutional court was created in order to handle questions of constitutionality. However, it is only possible to access this court when all other remedies are exhausted.\footnote{http://www.tribunalconstitucional.gov.ec/c_resolucion.asp (2008-12-01)} This will not make it an efficient instrument for creating norms for the indigenous justice and its compatibility with the ordinary system of justice since not many cases will reach this far. Instead it is as important as ever that the Ecuadorian state take measures to create a secondary law on the subject.

\subsection*{5.3 Changes through the Constitution of 2008 and their Implications}

The notable differences between article 191 of the old constitution and article 171 of the new constitution is the formulation that the decisions taken by the indigenous authorities will be subjected to control of its constitutionality, as discussed above, the ability to create law, and the restriction to indigenous territories.
5.3.1 Create New Law

As noted above in chapter 2.3.2, article 57 of the constitution of 2008 gives the indigenous peoples the right to create, develop, apply, and practice their own right or customary law as long as it does not violate constitutional rights. The terms *create* and *develop* are not mentioned in the Indigenous and Tribal Peoples Convention C169, which only refers to “methods customarily practiced” in article 9. The terms are not mentioned in the constitution of 1998 either, which refers to the right to resolve conflicts “in accordance with their customs or customary law” in article 191.

Fabián Corral, professor of jurisprudence at the university Universidad San Francisco de Quito (USFQ) in Quito, is concerned that article 57 will lead to the creation of a parallel judicial authority, which in turn will lead to an uncontrollable legal chaos with every village creating their own laws instead of sticking to the traditional way of administering justice.50

I do not agree with Corral. There are already different systems of justice in the villages and I do not believe that much will change in practice with the new constitution. If anything, the article gives the indigenous authorities a chance to change the way they practice justice and make it compatible with human rights and the constitution. Another point is that no legal system is static but always in process. There is no reason why the indigenous system of justice has to be practiced today in the exact same way as it was practiced in the 16th century. As long as the Ecuadorian state creates minimum standards for the indigenous justice I do not think that this article will result in a negative outcome for the possibilities of guaranteeing human rights.

5.3.2 Restricted to Territory

Many of my interviewees expressed concern over article 171 in the constitution of 2008, which restricts the jurisdiction of the indigenous authorities to legally recognized indigenous territories. Before the constitution of 2008 came into force there was no geographical restriction and both Floresmilo Simbaña, employee at the indigenous organization Kawsay, and Fernando Garcia, anthropologist specialized in indigenous

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matters at the University of FLACSO, express concern over what will happen now to the indigenous peoples that live outside their villages.\textsuperscript{51}

Raul Lласаг, lawyer specialized on indigenous rights, argues that besides the indigenous territories, the indigenous justice in practice also exercise jurisdiction over places where indigenous peoples normally perform economic activities, e.g. in market places.\textsuperscript{52} Silviero Cocha, president at the indigenous organization Ecuarunari, goes even further and claims that the indigenous authorities have jurisdiction over any conflict regarding indigenous individuals regardless if they occur on indigenous territory or not, i.e. even in the cities.\textsuperscript{53}

In practice, as opposed to in theory, the indigenous authorities can be said to exercise their power over any conflict where the parties agree that they have jurisdiction, as long as the national authority is not informed. Cristobal Pomaquiza, villager of the indigenous community Apatug, points out that when a conflict between two indigenous individuals occurs in the city, no one has an interest in letting the police know. Instead they resort to the indigenous authorities and have the conflict solved according to the indigenous justice.\textsuperscript{54}

5.4 Interpretation of “Internal Conflict”

According to the constitution of 2008, the indigenous authorities have jurisdiction over internal conflicts within their territory. Thus, the geographic limit is specified but the term \textit{internal conflict} is still not determined and there are divided opinions whether or not non-indigenous persons may be subjects of the indigenous administration of justice when they are on indigenous territory.

5.4.1 Who can be Involved in an Internal Conflict?

One interpretation of the phrasing \textit{internal conflict} is that all conflicts that take place within indigenous territory are to be regarded as internal. If this is the case, it does not

\textsuperscript{51} Interview with Floresmilo Simbaña, Quito 2008-06-24 and Fernando Garcia, Quito 2008-08-21
\textsuperscript{52} Interview with Raul Lласаг, Quito 2008-08-23
\textsuperscript{53} Interview with Silviero Cocha, Quito 2008-07-11
\textsuperscript{54} Interview with Cristobal Pomaquiza, Apatug 2008-08-05
matter whether the persons involved are indigenous or not. For example, if a non-indigenous person steals a car on indigenous territory, he can be judged and punished according to the indigenous administration of justice. Bolívar Beltrán, member of the indigenous organization Ecuarunari, claims that as soon as any person enters a community he is under the jurisdiction of the indigenous authorities and Segundo Chaluis, prosecutor of indigenous matters, confirms that there is nothing in the constitution or the national law that hinders that a non-indigenous person who commits a crime within a community is judged according to the indigenous administration of justice. Simbaña agrees with them and points out that the indigenous administration of justice is not only for the indigenous peoples but that it is a structure in the community. He adds that the legal term is “internal conflict” and not “indigenous conflict” and therefore it applies to everyone that enters indigenous territories.

A second interpretation is that all persons living on indigenous territory are subjects to the indigenous administration of justice, whether they are indigenous or not. Thus, any non-indigenous person that has chosen to settle down on indigenous territory has automatically accepted the jurisdiction of the indigenous administration of justice. Farith Simón, professor in law at the university USFQ, thinks that when you live in a community you should be judged according to their justice, but not if you are only there temporary. Cesar Pilataxi, president of the indigenous organization Kawsay, is of the same opinion. He explains that if a person who is not indigenous owns land on indigenous territory, he or she is automatically a subject of the norms and laws of that community. According to Pilataxi, if a non-indigenous person who does not live in the community commits a crime within the community he is usually captured and the ordinary authorities informed. Sometimes the ordinary authorities are invited to the community where the person is judged and punished and then handed over the ordinary authorities.

During my interviews I did not come across the opinion that only members of indigenous peoples fall under the jurisdiction of the indigenous authorities. However, as discussed in chapter 2.2, it is clear that article 9 of the Indigenous and Tribal Peoples Convention C169 only applies to indigenous peoples. In this regard, the two

55 Interview with Bolivar Beltrán, Quito 2008-07-24
56 Interview with Segundo Chaluis, Ambato 2008-08-05
57 Interview with Floresmilo Simbaña, Quito 2008-06-24
58 Interview with Farith Simon, Quito, 2008-08-22
59 Interview with Cesar Pilataxi, Quito 2008-06-24
constitutions are more far-reaching when not specifying that the indigenous justice only applies to members of indigenous peoples. This raises the interesting question whether the human rights of non-indigenous persons are violated if they are subjected to the indigenous administration of justice. This question will, however, not be further discussed in this thesis.

5.4.2 What Types of Conflicts are Internal?

Just as there are divided opinions on who can be involved in an internal conflict, there are also divided opinions on what an internal conflict is and consequently what types of conflict the indigenous authorities are competent to judge. Chaluis believes that legally the indigenous authorities are not authorized to judge crimes such as murder and that it is better that the competent authority within the ordinary administration of justice takes over the process so that the person is judged according to national law. But on the other hand he says that unfortunately there are no norms within the penal code that regulate what crimes the indigenous administration of justice is allowed to judge.  

Simón agrees with Chaluis and says that not all crimes can be judged within the communities and especially murder should be judged by the ordinary justice.  Raul Llasag, indigenous lawyer, on the other hand, thinks that the indigenous authorities are competent to judge all crimes since there are no restrictions in the constitution or in the Indigenous and Tribal Peoples Convention C169. Vintimilla thinks that all types of crimes should be regarded as internal but in certain serious matters it should be coordinated with the police. Through all of these different interpretations it is clear that there need to be norms established by the state on this subject.

5.5 Possible Human Rights Violations in the Indigenous Justice

There are a number of elements in the indigenous justice that can be questioned from a human rights perspective, discussed below.

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60 Interview with Segundo Chaluis, Ambato 2008-08-05
61 Interview with Farith Simon, Quito, 2008-08-22
62 Interview with Raul Llasag, Quito 2008-08-23
63 Interview with Jaime Vintimilla, Quito 2008-08-21
5.5.1 The Due Process

Everyone has the right to a fair trial, as expressed in article 14 of ICCPR. Since Ecuador is a state party to this covenant, the state is obliged to guarantee that this right is fulfilled also in the indigenous justice.

As noted in chapter 3.1, there is an established process consisting of five steps within the indigenous justice. If correctly followed the procedure ensures that the accused part is informed of the charges brought before him and also ensures him the right to defend himself. Vintimilla confirms this when he points out that the indigenous justice has proceedings just as in the ordinary justice and that these proceedings are not arbitrary but simply of a different judicial logic. Chaluis, on the other hand does not think that the due process can be guaranteed in the indigenous justice. He claims that in some cases the accused person has not been allowed to defend himself and the authorities act very quickly when judging a person, without thinking about the consequences. According to him, this is in great deal due to the lack of experience and education of the authorities.

I agree with Chaluis that it is a problem if the indigenous authorities do not have the adequate knowledge to administer indigenous justice. Even though there certainly exists a judicial logic in the indigenous justice, this is not sufficient to guarantee the rights of individuals if the proceedings are not applied in the right way. As noted in chapter 3.3, there are regulations in the indigenous village Apatug regarding the proceedings of the justice but these are not always followed since the punishment depends on the specific situation. The reason for this is of course to solve the situation in the best way possible and make sure that the harmony is re-established in the village as soon as possible. However, it can create a situation where one cannot be certain of the punishment of any given crime or disturbance of the harmony. My concern is also that it can be hard to be unbiased when judging someone you know, be it your relative, neighbour or a person that you simply do not like.

Another concern is the issue of double judgement, which is a problem when there is more than one system of justice in force in the same country. When a non-indigenous individual commits a crime in an indigenous village and is first judged by the indigenous

64 Interview with Jaime Vintimilla, Quito 2008-08-21
65 Interview with Segundo Chaluis, Ambato 2008-08-05
authorities and thereafter handed over to the national authorities, there is a risk of the person being punished by both authorities. The same problem occurs when the ordinary justice does not recognize that an indigenous individual has already been tried and sentenced within the indigenous justice but decides to try the same case in the national court.

**5.5.2 Justice as a Means of Social Control**

As noted in chapter three, the purpose of the indigenous justice is to maintain harmony and every action or situation that disturbs the harmony in the community is seen as a conflict. This means that no distinction is made between civil law and penal law. Thus, situations that fall under civil law in the ordinary administration of justice, such as divorce and adultery, can be forbidden and punished in the indigenous administration of justice. As noted in chapter 3.3.2, it is not possible for a couple to separate in Apatug and any attempt will be punished. It is not this strict in every community; in other communities there are exceptions when a couple can be allowed to separate. However, in communities such as Apatug, this may lead to couples being forced to live together even in situations of physical or psychological abuse of one spouse or of children.

When a couple is legally married they have to go to the ordinary authority to get a divorce since the indigenous authorities do not handle marriages and divorces. Theoretically a couple can get a divorce without the consent of the indigenous authority and still be forced to live together in the community. According to Simón, one reason why separation is not allowed is to prevent women from leaving the community or establishing contacts outside the community. Pilataxi points out that the church has a strong influence among the indigenous communities and this is the reason why separation of spouses, adultery and other “immoral” behavior are severely punished. Lorenzo explains that separation is not allowed in Apatug since it would lead to disintegration of the society and it is best for the children that their parents stay together.

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66 Interview with Segundo Chaluis, Ambato 2008-08-05
67 Interview with Farith Simon, Quito, 2008-08-22
68 Interview with Cesar Pilataxi, Quito 2008-06-24
69 Interview with Lorenzo Yanzapanta, Apatug 2008-07-18
Since separation and divorce are allowed in the ordinary society, the state violates the principle of non-discrimination by allowing this right to be denied its indigenous citizens. Thus, this is an example of indigenous individuals being denied rights granted to other citizens. It is not the state that denies these rights, but by allowing it to continue the state is facilitating the violation of their rights. This is a clear case where the individual rights have been allowed to stand back for the good of the community as a whole.

5.5.3 Punishments

There are a number of punishments within the indigenous administration of justice that are problematic from a human rights perspective. In accordance with the indigenous culture, a person disturbing the harmony is ill and needs to be cured, for his own sake and for the sake of the community. With the help of cold baths, being whipped with stinging nettle, and apologizing to the community the bad energy and spirits leave the body and new, good energy and good spirits are allowed to enter, thus healing the person.\textsuperscript{70}

Shall the cold baths, the whipping with painful herbs and the public humiliation be seen as violations of a person’s integrity and as degrading treatment or shall it be seen as a cleansing from bad energy in the best interest of the individual? Ecuador is a party to the ICCPR and therefore has an obligation under article 7 to ensure that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Ecuador has also ratified the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT). The punishments within the indigenous justice do not fall under the definition of \textit{torture} as defined in CAT since it is stated in article 1 that the action must be taken by a public official or other person acting in an official capacity in order to obtain information or a confession.

However, according to article 16 of the same convention, the Ecuadorian state has the obligation to prevent acts of degrading treatment or punishment on its territory. Among my interviewees, there are divided opinions whether the public execution of physical punishments constitutes degrading treatment or not. Vintimilla, lawyer specialized in indigenous matters, claims that the physical punishments only are applied

\textsuperscript{70} Interview with Manuel Morocho, Quito 2008-07-04
to indigenous peoples and that the punishment is a part of their culture and therefore accepted by the persons receiving the punishment. For this reason they are not degrading. He also adds that for an indigenous individual it is more degrading to be sentenced by the ordinary justice and maybe sent to jail than being sentenced by the indigenous justice.\textsuperscript{71} However, there are other interviewees that have testified that it is usual that any person, indigenous or not, receive corporal punishments when deemed necessary by the indigenous authorities.\textsuperscript{72} Segundo Chaluis, prosecutor, points out that the physical punishments violate the integrity of the person and are therefore a violation of human rights regardless if they are applied to indigenous- or non-indigenous individuals.\textsuperscript{73}

There are also occasions when persons are deprived of their liberty, as is the case in the indigenous village Apatug. According to Chaluis this is not allowed in Ecuador without a court order written by a competent authority.\textsuperscript{74} Article 9 of ICCPR states that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”, which is thus not the case in Apatug.

Ultimately it is the state that is responsible for making sure that no human rights are violated and in the case of physical punishments and incarceration it has failed to protect the rights of its citizens.

### 5.6 Human Rights and Indigenous Culture

As discussed in previous chapter, corporal punishments are seen as part of the indigenous culture. Ecuador has signed a number of international conventions and the norms set forward in these automatically apply to all peoples within its borders, regardless of their culture. However, the case may be that not all peoples agree with these norms or they may not be compatible with their distinct culture. It is impossible to evaluate the indigenous justice without contemplating the cultural context in which it exists. The question one can ask is how one can define culture and who has the privilege of defining culture.

In her book Ethics, Human Rights and Culture: beyond Relativism and Universalism, Xiaorong Li defines culture as:

\begin{itemize}
\item \textsuperscript{71} Interview with Jaime Vintimilla, Quito 2008-08-21
\item \textsuperscript{72} Interview with Lorenzo Yanzapanta, Apatug 2008-07-18 and Segundo Chaluis, Ambato 2008-08-05
\item \textsuperscript{73} Interview with Segundo Chaluis, Ambato 2008-08-05
\item \textsuperscript{74} Ibid
\end{itemize}
I agree with Li; culture is by definition not static. It is a living and developing thing that is influenced by everything around it. It is also influenced by the people themselves, it cannot be assumed that all individuals within a culture agree with all cultural norms or that it is the best for them.

Li further argues that no practice can be enforced solely by referring to it being a cultural tradition since not everyone belonging to the same culture automatically interprets the principles of that culture in the same way. Furthermore, Li states that when a group enjoys special cultural rights (as is the case with the indigenous peoples in Ecuador) the members must have the option to “opt out of practices that infringe upon their equal rights and liberties guaranteed by the larger society’s constitution and laws”. That is to say, that any practices that are protected under the Indigenous and Tribal Peoples Convention C169 still falls under the constitution and national laws of Ecuador. Hence, if one applies this thought to the corporal punishments of Apatug, it means that no one can be forced to be subjected to this without his or her consent since it is not allowed in the larger society.

When discussing human rights and how well a specific culture abides by the norms set forth in international declarations it can be easy to overlook that the idea of human rights has a western origin and is part of our culture. I believe that it is a dangerous assumption to think that all human rights are universal and somehow “natural” to all humans. The question is, thus: do we in “the West” have the right to impose our cultural values on other peoples?

The standpoint that individuals are best off in their own cultural context and that there is no such thing as universal values is usually referred to as cultural relativism. Marie Bénédicte Dembour is concerned that cultural relativism leads to indifference to,
what she calls, immoral situations.\footnote{Dembour, Marie-Bénédicte Dembour (2001), "Following the Movement of a Pendulum: between universalism and relativism" in J. Cowand et al. (red) \textit{Culture and Rights. Anthropological Perspectives} (Cambridge: Cambridge UP). p. 59} That is, that one is content standing aside and looking at violations that one would not accept in one’s own culture with the pretext that it is part of their culture and thereby it is the best for them. I agree with Dembour on this point, even though I do not think that human rights are necessarily universal and directly applicable in all contexts, I think that it is important to interpret human rights in a way that is the most beneficiary to the individual. No one should be denied rights just because they happened to be born into a specific culture.

5.7 Reasons Why the Indigenous Justice is in Use

There are a number of reasons why the indigenous justice is in use. One reason can be that indigenous individuals are punished by their own authorities when resorting to the ordinary justice. In Apatug, Yanzapanta explains, any person who decides to use the national justice without the consent of the council has to pay a fine.\footnote{Interview with Lorenzo Yanzapanta, Apatug 2008-07-18} However, the main reason why the indigenous peoples prefer their own system of justice seems to be because it is a tradition and they think it works very well with their way of life. It is efficient; usually a conflict is solved within a few days. It is cheap since there is no need to hire a lawyer and the person who caused the conflict can be re-integrated into the society after he has received his punishment and does not have to spend time in jail.\footnote{Interview with Fernando Garcia, Quito 2008-08-21} The punishment can be adapted to the situation and varies according to the needs of the parties involved. In one case where a man was killed in a fight, the three persons responsible were sentenced to economically take care of the wife and four children of the dead man.\footnote{Ibid} Community work is also a frequent sentence and is seen as a good way of rehabilitating a person at the same time as he is doing something useful for the community.\footnote{Interview with Floresmilo Simbaña, Quito 2008-06-24}

The use of the indigenous justice must also be seen in the light of the poor prison conditions in the ordinary system of justice. According to a country report on human
rights practices released in 2008, there are serious problems in following areas in Ecuador:

[...] isolated unlawful killings and use of excessive force by security forces; occasional killing and abuse of suspects and prisoners by security forces, sometimes with impunity; poor prison conditions; arbitrary arrest and detention; a high number of pretrial detainees; and corruption and denial of due process within the judicial system. Members of the National Police were accused of murder, attempted murder, rape, extortion [...]83

This confirms many of the concerns expressed by my interviewees. Cocha, president of the indigenous organization Ecuaranari, claims that especially indigenous persons are victims of physical and psychological abuse in the contact with the ordinary system of justice.84 Another reason why the indigenous system of justice is in use is that there is little faith in the ability of the ordinary system to rehabilitate. Morocho points out that in the ordinary system of justice, a person is sent to jail with a lot of thieves and rapists. A person sent to jail cannot be cured but he will leave the jail even worse than when he entered, with a mind set on causing more problems in the community and the society as a whole.85 There is also the belief among indigenous peoples that there is a lot of impunity within the ordinary system of justice. People are allowed to escape the justice through bribes or other favours.86 A common reason why indigenous persons prefer their own justice is also the fact that the legal proceedings in some cases last for years within the ordinary system of justice.87

84 Interview with Silveiro Cocha, Quito 2008-07-11
85 Interview with Manuel Morocho, Quito 2008-07-04
86 Interview with Janeth Cuji Gualinga, Quito 2008-06-26
87 Interview with Fernando Garcia, Quito 2008-08-21
6 Summary and Conclusion

The practice of indigenous justice can be traced back a long time and affects members of the indigenous peoples in all areas relating to their personal and family life. The separate system of justice, as practiced among the indigenous peoples in Ecuador, is legally recognized by the state since 1998 when the Indigenous and Tribal Peoples Convention C169 was signed and a new constitution was adopted. However, the practice of indigenous justice is not unproblematic from a human rights perspective.

The purpose of this thesis has been to examine whether the human rights of individuals subjected to the indigenous justice, as practiced among Kichwas in the Andean region of Ecuador, can be guaranteed successfully.

As I have shown, it is the responsibility of the Ecuadorian state to make sure that no human rights of individuals within its borders are violated, whether these individuals are indigenous or non-indigenous. Since the indigenous justice is sanctioned by the state it is the state’s responsibility to ensure that it functions in an adequate way and that the indigenous authorities have the proper knowledge and experience to administer the justice in a way that does not violate national law or international human rights.

By sanctioning the practice of indigenous justice, the state allows two separate systems of justice to be in practice within its borders simultaneously and it is therefore the responsibility of the state to make sure that the two systems function smoothly with each other.

The legal basis for the indigenous system is foremost the Indigenous and Tribal Peoples Convention C169 and the Ecuadorian constitution. Both these instruments are of direct and immediate application and no national law in Ecuador is valid if it is not in conformity with these instruments. The rights granted indigenous peoples in the Indigenous and Tribal Peoples Convention C169 regarding indigenous justice were for the first time incorporated in the Ecuadorian constitution in 1998 and then again in the constitution of 2008.

In both constitutions, the rights set forth in the Indigenous and Tribal Peoples Convention C169 regarding indigenous justice have been incorporated in a satisfactory way. In the new constitution of 2008, the rights regarding indigenous justice have been further developed and contain both restrictions (regarding where the indigenous justice
can be practiced) and new opportunities (allowing the indigenous peoples to develop the practice of their justice) in comparison with the constitution of 1998.

The state has thus fulfilled its obligations insofar that they have incorporated the rights of the Indigenous and Tribal Peoples Convention C169 in the constitutions. However, apart from that, I do not consider that they have succeeded in guaranteeing the human rights of its indigenous population in regard to the indigenous justice. There are a number of elements in the practice of the indigenous justice that may violate the individual’s human rights. Especially the right to a fair trial, the right not to be arbitrarily deprived of one’s liberty, and the risk of being subjected to corporal punishments are of concern to me. I also find it alarming that indigenous individuals are prevented from accessing the national justice.

In my opinion, it is imperative that the Ecuadorian state establishes norms on the area of indigenous justice. In the constitution of 2008 steps towards this have been taken since it is stated that indigenous authorities only can exercise functions of justice within their territory and all decisions are subjected to control of constitutionality. However, I do not believe that this is sufficient. Not many cases will reach the constitutional court since it can only be used as a last resort. I assume that those cases which do reach the constitutional court will form precedents but if the norms are to be established in this way it will take a very long time before there are enough precedents to cover all areas of the indigenous justice.

Since there is no secondary law on the subject it is difficult for the indigenous authorities to know what is allowed and what is not allowed. As discussed in chapter five there is a lot of confusion, both among indigenous peoples themselves and among representatives of the national system of justice, regarding the jurisdiction of the indigenous authorities. This makes the practice of indigenous justice highly uncertain today.

From the findings presented in this thesis I must draw the conclusion that the Ecuadorian state is not fully succeeding in guaranteeing the human rights of its indigenous citizens.
7 Suggestions for the Future

In order to diminish the risk of violations of human rights within the indigenous justice I think that it is important that the Ecuadorian state makes sure that norms are established on the area as soon as possible. At the moment, the boundaries of the jurisdiction of the indigenous authorities seem to be quite liquid and this need to be corrected so that there is no confusion regarding what is allowed and what is not allowed within the indigenous justice.

In my opinion, the best would be if these norms could be established in cooperation between the state and the indigenous peoples since this will give them legitimacy among the indigenous peoples as opposed to if they are created solely by the state. In that case the norms may not be sufficiently relevant to the indigenous justice and they may be seen as just an attempt of the government to exercise control over the indigenous peoples and the way they lead their lives. The purpose of the norms established must be to ensure that the indigenous justice is practiced in a way that is in the best interest of the indigenous communities as a whole and for the individual as well.

One area in which I find it especially important to establish norms is the question of corporal punishments. Should they be allowed and in that case how should they be practiced? Should they be allowed to be used as a punishment at all or should they only be seen as a cleansing and purification process which can be undergone voluntarily? In my opinion, the corporal punishments constitute degrading treatment and should be criminalized when used as a punishment. However, since the purification process is part of the indigenous culture the option could remain to undergo this process as a voluntary act.

As noted in chapter three, community work is a common punishment within the indigenous justice. I think that this could be a very good option to promote instead of corporal punishments. This option would also help re-integrating the individual in the society and re-establish the harmony since it can be adapted to the situation at hand. In Apatug, for example, most families practice agriculture to some extent. A person that is victim of a crime could for example be compensated by letting the offender work in the agriculture for a specified time. This could also be combined with an economic fee and the voluntarily cleansing. Or the offender could choose between community work and cleansing.
When it comes to crimes such as murder and rape the solution could be that if the community does not wish to hand over the criminal to the ordinary justice they could be allowed to sentence the person in the village but under the surveillance of a state official.

Regardless of what is decided regarding the norms on how indigenous justice should be practiced, the most important thing is that these norms are created. I also think that it is important that the Ecuadorian state as soon as possible legislate about the relationship between the indigenous justice and the ordinary justice. This would diminish the problems and confusion regarding double judgement.

However, it is not sufficient that the norms are established, it is imperative that the norms be known in every community that exercise indigenous justice and there has to be some sort of control mechanism that makes sure that the indigenous authorities are competent to handle indigenous justice. It could for example be mandatory that the authorities get an education in the minimum standards that are set by the state.

There should also be some instance that individuals can turn to when they feel that they have not been treated in a fair way in the indigenous justice. The state must make sure that it is known that there is an instance individuals can turn to in order to have their sentence reviewed.

All of this of course requires a lot of administration and perhaps the Ecuadorian state need to establish a totally new department within its government to handle these questions.

I would also recommend that all persons involved in the ordinary justice, be it lawyers, judges, prosecutors or police are trained in the indigenous justice and how to handle any conflict that may arise between the two systems of justice.

Throughout this chapter I have made a number of suggestions of how the Ecuadorian state should act to protect the human rights of its indigenous citizens. However, any intervention from the state should be done in a careful way. The human rights and national laws do not exist for their own sake but in order to protect individuals and should therefore be used in the way that in the best way benefit these individuals. It is not certain that the best way to protect the human rights of indigenous individuals is through state intervention. Even if the purpose is good this may destroy functioning structures within the society and leave the indigenous peoples more vulnerable than before, if measures are taken without carefully contemplating the consequences.

My hope is that more research will be done on the area of indigenous justice and how it can be practiced in harmony with human rights. And perhaps we in “the West”
can learn something from the indigenous justice and the way they manage to re-integrate offenders back into the society instead of just locking them up in prisons.
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- Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989
- Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957
- International Covenant on Civil and Political Rights
- United Nations Declaration on the Rights of Indigenous Peoples

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- Ecuadorian Constitution of 2008: Constitución de la República del Ecuador de 2008

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Cited Articles in the Constitution of 1998

Art. 4.- El Ecuador en sus relaciones con la comunidad internacional:

[...]

6. Rechaza toda forma de colonialismo, de neocolonialismo, de discriminación o segregación, reconoce el derecho de los pueblos a su autodeterminación y a liberarse de los sistemas opresivos.

Art. 18.- Los derechos y garantías determinados en esta Constitución y en los instrumentos internacionales vigentes, serán directa e inmediatamente aplicables por y ante cualquier juez, tribunal o autoridad.

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

Art. 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:

[...]

3. Mantener la posesión ancestral de las tierras comunitarias y a obtener su adjudicación gratuita, conforme a la ley.

[...]

7. Conservar y desarrollar sus formas tradicionales de convivencia y organización social, de generación y ejercicio de la autoridad.

Art. 163.- Las normas contenidas en los tratados y convenios internacionales, una vez promulgados en el Registro Oficial, formarán parte del ordenamiento jurídico de la República y prevalecerán sobre leyes y otras normas de menor jerarquía.

Art. 224.- El territorio del Ecuador es indivisible. Para la administración del Estado y la representación política existirán provincias, cantones y parroquias. Habrá
circunscripciones territoriales indígenas y afroecuatorianas que serán establecidas por la ley.

**Art. 272.-** La Constitución prevalece sobre cualquier otra norma legal. Las disposiciones de leyes orgánicas y ordinarias, decretos-leyes, decretos, estatutos, ordenanzas, reglamentos, resoluciones y otros actos de los poderes públicos, deberán mantener conformidad con sus disposiciones y no tendrán valor si, de algún modo, estuvieren en contradicción con ella o alteraren sus prescripciones.

Si hubiere conflicto entre normas de distinta jerarquía, las cortes, tribunales, jueces y autoridades administrativas lo resolverán, mediante la aplicación de la norma jerárquicamente superior.

**Art 191.-** 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 contrarios a la Constitución y las leyes. La ley hará compatibles aquellas funciones con las del sistema judicial nacional.
Cited Articles in the Constitution of 2008

Art. 11

[...]  
3. Los derechos y garantías establecidos en la Constitución y en los instrumentos internacionales de derechos humanos serán de directa e inmediata aplicación por y ante cualquier servidora o servidor público, administrativo o judicial, de oficio o a petición de parte.  
Para el ejercicio de los derechos y las garantías constitucionales no se exigirán condiciones o requisitos que no estén establecidos en la Constitución o la ley.  
Los derechos serán plenamente justiciables. No podrá alegarse falta de norma jurídica para justificar su violación o desconocimiento, para desear la acción por esos hechos ni para negar su reconocimiento.  
4. Ninguna norma jurídica podrá restringir el contenido de los derechos ni de las garantías constitucionales.

Art. 56.- Las comunidades, pueblos, y nacionalidades indígenas, el pueblo afroecuatoriano, el pueblo montubio y las comunas forman parte del Estado ecuatoriano, único e indivisible.

Art. 57.- Se reconoce y garantizará a las comunas, comunidades, pueblos y nacionalidades indígenas, de conformidad con la Constitución y con los pactos, convenios, declaraciones y demás instrumentos internacionales de derechos humanos, los siguientes derechos colectivos:

1. Mantener, desarrollar y fortalecer libremente su identidad, sentido de pertenencia, tradiciones ancestrales y formas de organización social.

[...]  
4. Conservar la propiedad imprescriptible de sus tierras comunitarias, que serán inalienables, inembargables e indivisibles. Estas tierras estarán exentas del pago de tasas e impuestos.
5. Mantener la posesión de las tierras y territorios ancestrales y obtener su adjudicación gratuita.

[…]

9. Conservar y desarrollar sus propias formas de convivencia y organización social, y de generación y ejercicio de la autoridad, en sus territorios legalmente reconocidos y tierras comunitarias de posesión ancestral.

10. Crear, desarrollar, aplicar y practicar su derecho propio o consuetudinario, que no podrá vulnerar derechos constitucionales, en particular de las mujeres, niñas, niños y adolescentes.

**Art. 171.-** Las autoridades de las comunidades, pueblos y nacionalidades indígenas ejercerán funciones jurisdiccionales, con base en sus tradiciones ancestrales y su derecho propio, dentro de su ámbito territorial, con garantía de participación y decisión de las mujeres. Las autoridades aplicarán normas y procedimientos propios para la solución de sus conflictos internos, y que no sean contrarios a la Constitución y a los derechos humanos reconocidos en instrumentos internacionales.

El Estado garantizará que las decisiones de la jurisdicción indígena sean respetadas por las instituciones y autoridades públicas. Dichas decisiones estarán sujetas al control de constitucionalidad. La ley establecerá los mecanismos de coordinación y cooperación entre la jurisdicción indígena y la jurisdicción ordinaria.

**Art. 257.-** En el marco de la organización político administrativa podrán conformarse circunscripciones territoriales indígenas o afroecuatorianas, que ejercerán las competencias del gobierno territorial autónomo correspondiente, y se regirán por principios de interculturalidad, plurinacionalidad y de acuerdo con los derechos colectivos.

Las parroquias, cantones o provincias conformados mayoritariamente por comunidades, pueblos o nacionalidades indígenas, afroecuatorianos, montubios o ancestrales podrán adoptar este régimen de administración especial, luego de una consulta aprobada por al menos las dos terceras partes de los votos válidos. Dos o más circunscripciones administradas por gobiernos territoriales indígenas o pluriculturales podrán integrarse y conformar una nueva circunscripción. La ley establecerá las normas de conformación, funcionamiento y competencias de estas circunscripciones.


Appendix 3

**List of Cited Interviewees**


Cocha, Silverio: Vice president of the indigenous organization Ecuarunari. Indigenous.

García, Fernando: Anthropologist at the University of FLACSO. Non-indigenous.

Gualinga, Janeth Cuji: Informant at CONAIE. Indigenous.

Llasag, Raul: Lawyer. Indigenous.

Morocho, Manuel: Employee at the legal department of CONAIE. Indigenous.

Pilataxi, Cesar: President of the indigenous organization Kawsay. Indigenous.


Simbaña, Floresmilo: Employee at the indigenous organization Kawsay where he works with developing international legal documents. Indigenous.

Simón, Farith: Professor in law at USFQ. Non-indigenous.

