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„Justice is achieved if peace is restored“

Indigenous Justice, Legal Pluralism, and Change in Peru and Ecuador

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Hans-Jürgen Brandt[1]

ABSTRACT

Partly for reasons of cultural identity and partly because the state has proved unable to protect them against criminality, indigenous communities in Peru and Ecuador have maintained their traditional judicial systems. Though recognized constitutionally, these systems continue to be a source of legal and political contention. Considering both the major social significance of indigenous justice as a means of conflict-resolution and the ongoing controversy over its scope, information about current judicial practice in the communities in question is surprisingly scant. It is on this gap in research that the present study focuses, examining in particular: the principles and rules applied in indigenous justice; the relative frequencies of different types of conflict and conflict-resolution; the problems associated with this type of justice; the differences between the various legal cultures reviewed; and key trends and determinants of change. The study, of mixed-method design, reveals that indigenous justice is primarily consensus-oriented. Its chief objective is to restore communal peace and reintegrate offenders. The legal regulations and practices used to achieve these goals, however, are not static: the notion of autochthonous legal systems based on immutable 'ancestral' rules is a myth. Contrary to what this common preconception would suggest, the study indicates that any traditional legal norms that run counter to the interests of the local community are modified by the introduction of new legal rules, many of which – such as the protection of women from gender-based violence – derive from state law. Among the factors which indigenous representatives interviewed for this study considered key in bringing about change was local NGO-led education and training – notably on human rights.

1 INTRODUCTION: MAKING GOOD THE EMPIRICAL GAP: AIMS AND STRUCTURE OF THE STUDY

As in other countries in Latin America, local campesino and indigenous justice, administered by elected communal officials and the village assembly, plays an important role in both Peru and Ecuador. It is the main instrument through which rural society resolves interpersonal conflict and assures peaceful coexistence. Although recognized constitutionally, indigenous justice remains controversial both legally and politically. The chief quarrel here is over the demarcation of legal competences between community and state – an altercation fuelled by the failure of lawmakers to comply with constitutional provisions requiring them to enact coordinating legislation. On one side of the debate are the forces of conservatism and the captains of the oil, gas, and mining industries, whose operations are generally located in indigenous territories and who are therefore fearful of their employees falling foul of local justice. These groups seek to limit the scope of communal justice. On the other side are campesino and indigenous organizations struggling to get their cultural values respected and their autonomy secured. Their leaders call for local jurisdiction to be extended to all types of conflict. The general uncertainty over legal competences has led to community leaders being prosecuted for putting offenders in their villages through the local judicial process.[2]

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2 For relevant cases from Peru, see: Renato Levaggi Tapia, 'Situación de los casos de miembros de Comunidades Campesinas, Nativas y Rondas Campesinas denunciados ante Ministerio Público por el ejercicio de su función jurisdiccional', in Javier La Rosa Calle and Juan Carlos Ruiz Molleda, (eds.), *La Facultad Jurisdiccional de las Rondas Campesinas, Comentarios al Acuerdo Plenario de la Corte Suprema que reconoce facultades jurisdiccionales a las rondas*

Considering the social significance of communitarian justice and the ongoing clashes between the two judicial systems, it is surprising how little information is available on the actual practice of indigenous justice. In Ecuador, there is widespread debate about justice in plurinational contexts[3] and about the collective rights of members of indigenous groups.[4] A general survey has also been produced of the law systems of 17 of the country's indigenous nations.[5] Although studies exist which look at the issues globally, or discuss particular aspects of indigenous justice,[6] there are very few empirical accounts of the judicial practice of indigenous communities.[7] Peru, meanwhile, boasts a wide range of studies on indigenous peoples[8] and on the *rondas campesinas* – 'village patrols' – responsible for ensuring local security and administering communal justice.[9] A small number of these investigations look at the operation of communal justice amongst specific Peruvian ethnic groups,[10] but what is lacking, here and in Ecuador, is systematic, cross-cultural analysis of the legal norms operating in the relevant communities and of the relative frequencies of different types of infringement and sanction. Likewise, there is a dearth of information on the similarities and differences between the indigenous legal cultures involved and a failure to address the important question of what drives change in the judicial practice and legal frameworks of campesinos and indigenous peoples. It is on these gaps in research that the present study focuses.

The questions the study will seek to answer are: What kinds of legal principles and norms operate in the different communities? What are the most frequent types of conflict and how are they resolved? What are the similarities and differences between the indigenous legal cultures under scrutiny? What is the influence of state law and the state judiciary on indigenous cultures? Is there anything to indicate that campesino and indigenous judicial practice is undergoing change?

Section 1 of the text describes a series of mixed-method, multi-facet empirical investigations carried out between 2002 and 2016 and forming the basis for the present study. This is followed, in Section 2, by a clarification of the terms 'campesinos', 'indigenous people',[11] and 'indigenous law'. Section 3 sets out the key characteristics of ethnic legal systems in the context of the pluri-cultural, pluri-legal societies of Peru and Ecuador. Section 4 then considers the objectives and principles of such systems, pointing up reparation of damaged social relations and restoration of peace at family and community

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campesinas (Lima: Instituto de Defensa Legal – IDL, 2010), pp. 9–19. In Ecuador, the emblematic *La Cocha* case saw individuals involved in the dispensation of communal justice brought before the criminal courts and have their case ultimately reviewed by the country's Constitutional Court (Corte Constitucional del Ecuador, Sentencia No. 113-14-SEP-CC).

3 Carlos Espinosa Gallegos-Anda and Danilo Caicedo Tapia (eds.), *Derechos Ancestrales, Justicia en Contextos Plurinacionales*, *Serie Justicia y Derechos Humanos/Neoconstitucionalismo y Sociedad* (Quito: Ministerio de Justicia, 2009).

4 María Paz Avila Ordoñez and María Belén Corredores Ledesma (eds.), *Los Derechos Colectivos, Hacia su efectiva comprensión y protección,* Justicia y Derechos Humanos, Neoconstitucionalismos y Sociedad, No. 16 (Quito: Ministerio de Justicia y Derechos Humanos, 2009).

5 Vladimir Serrano P., Ricardo Rabinovich B. and Pablo Sarzosa J., *Panorámica del Derecho Indígena Ecuatoriano* (Quito 2005).

6 Boaventura de Sousa Santos and Agustín Grijalva Jiménez (eds.), *Justicia indígena, plurinacionalidad e interculturalidad en Ecuador* (Quito: Fundación Rosa Luxemburg and Abya Yala, 2012).

7 Eddie Cóndor Chuquiruna, Nelson Romero Bossa, and Fernando García Serrano, *Normas, procedimientos y sanciones de la justicia indígena en Colombia y Ecuador* (Lima: Comisión Andina de Juristas, 2012); Fernando García S., *Formas indígenas de administrar justicia* (Quito: FLACSO, 2002).

8 For an overview, see: Carlos Iván Degregori (ed.), *No hay país más diverso, Compendio de Antropología Peruana* (Lima: IEP, 2000).

9 See e.g. Wilfredo Ardito Vega, *La Promoción del Acceso a la Justicia en las Zonas Rurales* (Lima: Poder Judicial, 2011); John S. Gitlitz, *Administrando justicia al margen del estado, Las Rondas Campesinas de Cajamarca*, (Lima: Instituto de Estudios Peruanos – IEP, 2013); Ludwig Huber and Juan Carlos Guerrero, *Las Rondas Campesinas de Chota y San Marcos* (Cajamarca: PROJUR, 2006); Paula Muñoz and Ángela Acevedo, *La Justicia Local en Chota y San Marcos, Cajamarca* (Lima: ProJur, SER, Paz y Esperanza and COSUDE, 2007).

10 Examples include: Antonio Alfonso Peña Jumpa, *Poder judicial comunal aymara en el sur andino: Calahuyo, Titihue, Tiquirini-Totería y liga agraria de Huancané* (Bogotá: ILSA, 2004); Mechthild Bock and Luis César Maury Parra, *Investigación sobre el derecho Asháninka y formas tradicionales y actuales de resolución de conflictos* (Lima: Defensoría del Pueblo, Programma de Comunidades, 2002), www.ziviler-friedensdienst.org/de/publikation/investigacion-sobre-el-derecho-ashaninka-y-formas-tradicionales-y-actuales-de-resolucion-de, accessed 5 February 2017.

11 I use 'indigenous peoples' to refer to nations but 'indigenous people' to refer to persons.

level as the key objective, with offenders being re-educated and reintegrated into the village community. An analysis of the frequency of different types of conflict and conflict-settlement follows in Section 5, revealing, most importantly, that communitarian justice as here examined is strongly consensus-oriented. Corporal punishment – reported to occur in approximately 4 per cent of cases – presents a special problem. In contrast to the situation in Peruvian communities, where a shift in standpoint can be observed, physical punishment is widely accepted in Ecuador. Section 6 traces the interrelationship between actors, conflicts, and conflict-settlements. Statistical analysis demonstrates that communitarian justice, far from being arbitrary, is governed by a rationality derived from legal rules espoused by the community. Changes and trends in indigenous justice are the subject-matter of Section 7. A change in legal consciousness – particularly as regards the rights of women – is discernible in both the countries under review. Although in Ecuador collective rights still prevail over the individual kind, communities in Peru are beginning to grant more individual rights to their members. Interviews with villagers indicate that training, dialoguing activities, and consultancy have been key in bringing changes to the legal culture. Section 8 examines the strained relationship between state and communal justice. The major obstacle to progress here has been the failure of the respective legislatures to fulfil a constitutional obligation to enact measures coordinating the different judicial systems. Antagonistic interests have precluded the formation of the requisite political majority. Summarizing the results of the study, the concluding section underscores the dynamic quality of indigenous justice and the mythic nature of the discourse that evokes an autochthonous legal system based on 500 years of tradition. Far from bearing out the notion of such a monolith, the findings confirm a structural link between the legal norms of community and state, resulting in an interpenetration and superposition of rules.

2 Methodological approach

The questions posed in the present text were the object of a number of field studies which the author conducted, together with colleagues and partner-institutions in Peru and Ecuador, over a period extending to 2016.[12] The studies covered three population-groups in each of the countries mentioned. These were: in Peru, campesinos from provinces in the Cajamarca region and Quechua from provinces in the Cusco and Puno regions and in Ecuador the Kichwa of various cantons in the Cotopaxi and Chimborazo provinces and the Saraguro people of Loja province.[13] In an initial study in 2002–3, 744 conflicts in 131 communities were subjected to quantitative analysis.[14] In 2005, a qualitative review – based on 'focus group' interviews with 183 representatives from 45 communities in the previously mentioned cantons and provinces[15] – looked at the values, objectives, and principles underlying indigenous justice in these areas, and the rules and procedures that govern it. A follow-up study conducted in 2011–12 reviewed a further 352 conflicts in 23 communities.[16] During the same

12 The collaborating institutions were: The Peace Research Institute Frankfurt (PRIF); the Instituto de Defensa Legal/Lima; and the Centro sobre Derecho y Sociedad/Quito (CIDES). The research was funded, as part of development cooperation, by the German Federal Ministry for Economic Cooperation and Development and the German Federal Enterprise for International Cooperation (GIZ).

13 Hans-Jürgen Brandt, *Indigene Justiz im Konflikt: Konfliktlösungssysteme, Rechtspluralismus und Normenwandel in Peru und Ecuador* (Baden-Baden: Nomos, 2016), pp. 31–51.

14 The communities in Peru were located in the provinces of Cutervo, Hualgalloc, Canas, Chumbivilcas, Carabaya, and Melgar. Those in Ecuador were located in the cantons of Latacunga, Pujilí, Saraguro, and Guamote. For the names of the individual communities and the data-collection methods used, see Brandt, *Indigene Justiz*, pp. 40–4. See also Hans-Jürgen Brandt and Rocío Franco Valdivia, (eds.), *El Tratamiento de Conflictos, Un Estudio de Actas en 133 Comunidades, Serie Justicia comunitaria en los Andes: Perú y Ecuador*, vol. 1 (Lima: Instituto de Defensa Legal – IDL, 2006).

15 Hans-Jürgen Brandt and Rocío Franco Valdivia, (eds.), *Normas, Valores y Procedimientos en la Justicia Comunitaria, Serie Justicia comunitaria en los Andes: Perú y Ecuador*, vol. 2 (Lima: Instituto de Defensa Legal – IDL, 2007). On the methodology, see ibid. pp. 21–41.

16 The Peruvian communities were located in the provinces of Canas and Canchis in the Cusco region, specifically in the districts of Checca, Layo, Qquehue, Túpac Amaru, and Yanaoca. Those in Ecuador were located in the *parroquias* (parishes) of Toacaso and Zumbahua in the province of Cotopaxi. See Hans-Jürgen Brandt (ed.), *Cambios en la Justicia*

period, structured interviews were carried out, in both Peru and Ecuador, in which 130 representatives of indigenous communities and 35 members of the state judiciary were asked for their views on communitarian justice.[17] In parallel with these studies, a close watch was kept, until the end of 2016, on tensions between indigenous and state justice. Conceptually, the project was designed as an exploratory study intended to yield new findings and hypotheses about continuity and change in indigenous justice. All statistical group results presented here were subjected to homogeneity tests. The outcomes are statistically significant at the 0.05 level. They are representative only for the cultural groups surveyed and cannot be generalized to all Quechua- or Kichwa-speaking peoples of the Andes.[18]

3 'CAMPESINOS', 'INDIGENOUS PEOPLE', AND 'INDIGENOUS LAW': NOTES ON TERMINOLOGY

Peru and Ecuador are multi-cultural, multi-ethnic countries whose societies comprise: native inhabitants, descendants of the 'conquistadors', so-called *mestizos* (people of mixed Indian and Spanish origin), and immigrants. Assessing the size of the indigenous population is problematic, with results varying according to whether a census asks for the mother tongue or the ethnic affiliation of the respondent. In countries where *indio* has a centuries-long history as a term of abuse, self-identification does not always tally with actual membership of an ethnic group. Fearful of discrimination, many indigenous inhabitants – particularly those living in cities – prefer to classify themselves as *mestizos*. None of the censuses carried out by the Peruvian Institute of National Statistics over the last twenty years has asked respondents for their ethnic identity, only for their mother tongue. In the 2007 census, 16 per cent of the country's 28.2 million inhabitants identified themselves as speaking an indigenous language.[19] Within this group, the largest contingent was made up of Quechua from the Peruvian Andes. In Ecuador, meanwhile, where, by contrast, the 2010 census did ask respondents directly to identify their ethnic affiliation, only 7 per cent of the country's 14 million inhabitants identified themselves as indigenous.[20] The largest national group in the country was that of the Kichwa, who made up 71.7 per cent of those identifying as indigenous.[21] (Like the Quechua in Peru, the Kichwa are descendants of the Incas and the tribes subject to them.) Given the uncertainties of self-identification and the absence of reliable data, the true figures for the indigenous population in both countries is reckoned to be significantly higher than these statistics suggest – lying somewhere in the region of 30 per cent.[22]

As distinct from indigenous people, campesinos (peasants) are characteristically thought of as small-scale farmers or as members of village communities in the Andes (the Sierra) who do not identify with a specific ethnic group. Although they have abandoned their indigenous languages for Spanish (witness the campesinos of the Cajamarca region in Peru), they form societies that have an Andean culture similar to that of indigenous peoples, reflected in their rites, music, and customs.

Comunitaria y Factores de Influencia, Serie Justicia comunitaria en los Andes: Perú y Ecuador, vol. 9 (Lima: Instituto de Defensa Legal – IDL, 2013).

17 The interviewees were based in the provinces of Canas and Canchis in the Cusco region of Peru and in the provinces of Cañar, Chimborazo, Imbabura, Loja, Napo, Pastaza, Pichincha, and Zamora in Ecuador. On the methodology, see Brandt, *Indigene Justiz,* pp. 44–7.

18 Again, on methodology, see ibid. pp. 31–78.

19 Figures are drawn from: Instituto Nacional de Estadística e Informática, *Censos Nacionales XI de Población y VI de Vivienda, Sistema de Consulta de Datos, Base de Datos*, available at http://censos.inei.gob.pe/Censos2007/redatam/, accessed 3 June 2017.

20 Instituto Nacional de Estadística y Censos, *e-Análisis, Revista Coyuntural*, Tercera Edición (Quito: INEC, August 2012).

21 Instituto Nacional de Estadística y Censos, *e-Análisis*.

22 In the case of Peru, Solis arrives at this figure as an average based on estimates of between 25 and 48 per cent posited by other authors: Gustavo Solis F., 'Perú Amazónico' in UNICEF and FUNPROEIB Andes (eds.), *Atlas Sociolingüísticop de Pueblos Indígenas en America Latina* (Cochabamba: FUNPROEIB Andes, 2009), pp. 302–32, 306. Meentzen quotes estimates as high as 47 per cent for Peru and 43 per cent for Ecuador: Angela Meentzen, 'Indígena und Politik im Andenraum: Peru', in Konrad-Adenauer-Stiftung e.V. (ed.), KAS/Auslandsinformationen 1/05 (Berlin 2005), pp. 30–56, esp. 35. Cf. Brandt & Valdivia (eds.), *El tratamiento de Conflictos*, 13.

Despite state efforts to retrench traditional customary law and systems of conflict-resolution operated for centuries by campesinos and indigenous peoples, both groups have managed to preserve these institutions. Although the term 'campesino law' lends itself more to the Peruvian context and 'indigenous law' to the Ecuadorian, the two are here used interchangeably, as are: 'communal/ communitarian law', 'indigenous/campesino/communitarian justice'.

4 LEGAL PLURALISM AND INDIGENOUS LEGAL CULTURES

The notion that there could be other legal systems in competition with state law was alien to many lawyers until a few years ago. From the standpoint of legal positivism – which by the end of last century had become the predominant school of legal thought in Latin America – there could be only one judicial system in operation in a given state.[23] On this view, law can only be created by legislatures: what is crucial in determining its validity is not legal practice but the mode of its creation.

The ideological controversy over the existence, nature, and extent of legal pluralism that has been bubbling away in the sociology of law since the 1970s[24] has largely lost its relevance in Latin America following various constitutional reforms. By recognizing the customary law of indigenous peoples, the constitutions of Peru (Art. 149), Ecuador (Art. 171), Colombia (Art. 246), and Venezuela (Art. 260) have implicitly sanctioned legal pluralism. Article 1 of the Bolivian constitution expressly establishes the country as a 'Unitary Social State of Plurinational Communitarian Law' ('Estado Unitario Social de Derecho Plurinacional Comunitario') founded on 'juridical … pluralism'.[25] Legal pluralism is thus no longer simply – as the German sociologist Gunther Teubner wryly describes it – 'an object of fascination to postmodern lawyers', to be found on the 'dark side' of the law, where the 'subversive potential of suppressed discourses' lies ready to be unleashed.[26] It is now embodied in constitutional law. With this absorption into positive law, even legal positivists are forced to acknowledge its reality. As a result of these developments, legal pluralism is no longer questioned in the Latin American literature: it is seen as a fact for which no justificatory theory is now required. Explanation is all that is needed, with appropriate reference to theorists of legal pluralism such as those previously mentioned – Santos, Kymlicka, Griffiths, Pospišil (to name but a few).[27]

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23 Arthur Kaufmann, 'Problemgeschichte der Rechtsphilosophie', in Arthur Kaufmann, Winfried Hassemer, and Ulfrid Neumann (eds.), *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart* (Heidelberg: Müller, 2004), pp 26–147, esp. 26, 72.

24 Widely discussed 'classic' contributions to the international debate include those of Hooker, Gilissen, and Vanderlinden: Michael B. Hooker, *Legal Pluralism – An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon Press, 1975); John Gilissen, 'Introduction à l'étude comparée du pluralisme juridique', in John Gilissen (ed.), *Le pluralisme juridique* (Brussels: Institut de Sociologie, 1971), pp. 7–17; Jacques Vanderlinden, 'Le pluralisme juridique: essai de synthèse', in John Gilissen (ed.), *Le pluralisme juridique,* pp. 19–56; Jacques Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later', *Journal of Legal Pluralism and Unofficial Law,* 28 (1989), pp. 149–57. Discussions in legal anthropology and sociology have been dominated by Griffiths, Pospišil, Merry, Moore, Kymlicka, and, from a postmodern perspective, Santos: John Griffiths, 'What is Legal Pluralism?', *Journal of Legal Pluralism and Unofficial Law*, 24 (1986), pp. 1–55; Leopold Pospíšil, *Anthropologie des Rechts, Recht und Gesellschaft in archaischen und modernen Gesellschaften* (Munich: Beck, 1982), pp. 53, 137–71; Sally Eagle Merry, 'Legal Pluralism', *Law and Society Review*, 22: 5 (1988), pp. 869-96; Sally F. Moore, 'Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject to Study', *Law and Society Review*, 7 (1973), pp. 719–46; Will Kymlicka, *Multicultural Citizenship, A Liberal Theory of Minority Rights* (Oxford: Clarendon University Press, 1995); Boaventura de Sousa Santos, 'Law: A Map of Misreading, Toward a Postmodern Conception of Law', *Journal of Law and Society*, 14: 3 (1987), pp. 333–56. See also: Armando Guevara-Gil and Joseph Thome, 'Apuntes sobre el pluralismo legal', *Ius et Veritas*, 19 (Lima: PUCP, 1999), pp. 286–304; Klaus Günther, 'Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory', *Journal of Extreme Legal Positivism*, 5 (Helsinki: NoFo, April 2008), pp. 5–21.

25 Art. 1, Constitución Política del Estado (2009).

26 Gunther Teubner, 'Die zwei Gesichter des Janus: Rechtspluralismus in der spätmodernen Gesellschaft', in Eike Schmidt (ed.), *Liber amicorum, Josef Esser zum 85. Geburtstag am 12. März 1995* (Heidelberg 1995), pp. 191–214.

27 See: Christian Masapanta Gallegos, 'El Derecho Indígena en el Contexto Constitucional Ecuatoriano', in Gallegos-Anda and Tapia (eds.), *Derechos Ancestrales,* pp. 409–50; Neus Torbisco Cassals, 'La interculturalidad posible: el reconocimiento de los derechos colectivos', in Ordoñez and Ledesma (eds.), *Los Derechos Colectivos,* pp. 61–100; Raúl LLasag Fernández, 'Plurinacionalidad: una propuesta constitucional emancipadora', in Ramiro Ávila Santamaría (ed.), *Neoconstitucionalismo y Sociedad* (Quito: Ministerio der Justicia y Derechos Humanos, 2008), pp. 311–55; Raquel Z. Yrigoyen Fajardo, *Pautas de Coordinación entre el Derecho Indígena y el Derecho Estatal* (Guatemala: Fundación Myrna Mack, 1999); Vicente Cabedo

Legal pluralism is defined as a situation in which two or more legal systems co-exist. Where this occurs, state and non-state legal norms may be in competition with one another. A key task here is to determine what distinguishes non-state norms as legal and what differentiates these norms from the social kind, as embodied in customs and moral codes. In what follows, legal norms will be taken to mean rules that define expected conduct, are imposed by a competent authority, and, where infringement occurs, carry the possibility of sanction.[28] The essential function of legal norms, meanwhile, is taken to be the resolution of conflict.

One of the constitutive features of legal pluralism is permanent interaction between the different legal systems involved.[29] According to Boaventura de Sousa Santos – whose publications enjoy a wide readership in Latin America – legal systems do not sit alongside one another in society, as posited in traditional legal anthropology. Rather, the different legal spaces are superimposed on one another and become merged in the consciousness and conduct of the relevant actors.[30] To describe this interpenetration of legal orders, Santos has coined the term 'interlegality'.[31] This interactive thesis is borne out in the findings we present below.

What elements make up the campesino and indigenous legal systems? Our empirical investigations identify the following key components:

a. *Customary law*. This is defined by Stavenhagen as a set of traditional, non-codified legal norms that have been handed down orally and are distinct from the 'official' law of the state.[32]

b. *State law*. The legal systems of indigenous peoples are not 'laws without a state' but rather normative systems within the state[33] which have developed into hybrid 'sets' through the absorption of rights and procedures established in constitutional and ordinary legislation. The right to the recognition and preservation of cultural identity is one such element. Another is the mode of organization of an indigenous community (*comunidad*) and the rights that community enjoys.

c. *Statute law*. As legal entities, indigenous communities are obliged, by state law, to have official statutes and rules of procedure *(reglamentos*).[34] By virtue of this fact, wherever the communities in question are formally registered, a body of legally recognized statute law is created. This law is far from 'dead': in most villages, the sanctions which the statutes stipulate for infringements of indigenous rules are widely applied.

d. *Agreed law*. Village assemblies define new norms and record these in their minutes (*actas*).

A legal system forms part of an overall culture.[35] The Andean inhabitants of Ecuador and Peru, however, do not constitute one homogenous culture – implying that their legal cultures will also differ. Speaking of the Quechua and Aymara in Peru, Irarrázaval notes that rather than encountering cultural singularity in the Andes, we find ourselves 'moving between different cultures'.[36] These cultures, moreover, far from being static, are shaped by the powerful influences of urban, market-oriented majority society. The Kichwa cultures in Ecuador are likewise undergoing change, driven by

Mallol, 'Análisis de las Constituciones Latinoamericanas', in Antonio Peña Jumpa, Vicente Cabedo Mallol, and Francisco López Bárcenas, *Constituciones, Derecho y Justicia en los Pueblos Indígenas de América Latina* (Lima: Pontifica Universidad Católica del Peru 2002), pp. 23–59.

28 Cf. Georg Mohr, 'Zum Begriff der Rechtskultur', *Dialektik: Zeitschrift für Kulturphilosophie,* 3 (1998), pp. 9–29, 24.

29 Hooker, *Legal Pluralism*, p. 6.

30 Santos, 'Law: A Map of Misreading', p. 352.

31 Ibid.

32 Rodolfo Stavenhagen, 'Introducción al Derecho indígena', in *Cuadernos del Instituto de Investigaciones Jurídicas, I Jornadas Lascasianas: Derechos humanos de los pueblos indígenas*, 17 (Mexico City: Universidad Nacional Autónoma de México, 1991), pp. 303–16, esp. 304.

33 Stefan Kadelbach and Klaus Günther, 'Recht ohne Staat?', in Klaus Günther and Stefan Kadelbach (eds.), *Recht ohne Staat? Zur Normativität nichtstaatlicher Rechtsetzung, Normative Orders,* 4 (Frankfurt am Main: Campus, 2011), 9–48, 15–18.

34 See e.g. Ley de Rondas Campesinas (Ley No. 27908), Art. 5.

35 Mohr, 'Zum Begriff der Rechtskultur', p. 24.

36 Diego Irarrázaval, *Tradición y Porvenir Andino* (Lima: IDEA/tarea, 1992), p. 128.

the same sorts of factors that operate in Peru: the state legal order, the economic environment, the migration of the rural population to the cities, education, military service, the work of evangelical churches, the media (notably radio and television), and the increased integration of indigenous communities into overall society brought about by modern communications (the Internet, mobile phones) and by improvements in the transport infrastructure.

In a reaction to these developments, attempts are being made to revive Andean cultures – particularly in Ecuador, but also, in recent years, in Peru. This trend is reflected, on the one hand, in the sometimes radical, ethnocentric discourse of certain political representatives of the indigenous population (notably those belonging to the CONAIE in Ecuador and the CUNARC in Peru[37]) and, on the other, in concrete attempts by the social base to reconstruct values and norms of customary law that had fallen into disuse.[38] In multicultural societies, actors make use of what can be seen as 'assembly sets', comprising elements of their own and foreign culture which are 'continually assembled, taken apart, and reassembled afresh'.[39] In just this kind of process, campesinos and indigenous people adopt values and legal rules deriving from majority society. There is no one, pure, authentic, autochthonous Andean culture. What we have, rather, is a syncretic entity into which elements of other cultures have penetrated and which assumes distinct forms in different regions. In line with this at the legal level, there are no self-contained, autochthonous campesino or indigenous judicial systems unaffected by the cultural environment. Here too, processes of hybridization[40] are observable in which 'traditional' legal norms are mixed with more recent rules derived from the cultures of dominant social groups. In sum, then, the legal cultures of indigenous peoples and communities are constructions characterized by multicultural heterogeneity, with each particular culture exhibiting a distinctive mix of elements.

5 Indigenous Justice in the Legal Systems of Peru and Ecuador

The constitutions of Peru (Art. 2 [19]) and Ecuador (Art. 21) affirm the right of every person to an ethnic and cultural identity and the right of indigenous communities to exercise judicial functions within their territories according to their customary law (Art. 149 Constitution of Peru, Art. 171 [1] Constitution of Ecuador). Both countries have also ratified Convention 169 of the International Labour Organization, which stipulates that indigenous 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' (Art. 8 [2]). The Convention also requires that 'the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected' (Art. 9 [1]).

The players involved in dispensing indigenous justice are: in Peru, the *juntas directivas* (executive committees) of the *rondas campesinas* (village patrols); and in Ecuador the *cabildos* (community councils). These bodies are chaired by presidents and secretaries democratically elected by, and operating under the oversight of, the people of the village.[41] Only lesser disputes are dealt with by the president acting alone; for all major decisions affecting coexistence in the community, particularly the determination of sentences, the *asambleas* – local assemblies comprising all inhabitants of legal

37 CONAIE: Confederación de Nacionalidades Indígenas del Ecuador (Confederation of Indigenous Nationalities of Ecuador). CUNARC: Central Única Nacional de Rondas Campesinas (United National Organization of Country Patrols). Examples of the type of discourse involved are given in Sect. 8 below.

38 One example is the revival of lost judicial traditions by the Saraguros of Ecuador, who in 2001 reintroduced a system of communitarian justice based on long-neglected rules and principles. See Brandt, *Indigene Justiz*, pp. 74–8.

39 Eric R. Wolf, *Die Völker ohne Geschichte, Europa und die andere Welt seit 1400* (Frankfurt/Main, Campus-Verlag, 1991), p. 539.

40 Nestor García Canclini, *Culturas híbridas, Estrategias para entrar y salir de la modernidad* (Buenos Aires: PAIDÓS, 2001), pp. 14, 20.

41 Peru: Ley de Rondas Campesinas (Ley Nº 27908), Reglamento de la Ley de Rondas Campesinas (Decreto Supremo Nº 025-2003-JUS), Ley General de Comunidades Campesinas (Ley Nº 24656). Ecuador: Ley de Organización y Régimen de las Comunas, Codificación 2004–04

age – are brought into the process. The communal assembly is the most important decision-maker in the community and the democratic overseer of all the latter's activities.

Although the constitutions of both Peru (Art. 149) and Ecuador (Art. 171 [2]) call for legal measures to coordinate the indigenous and state systems of justice, relevant action is still awaited. With the purview and competencies of community judiciaries undefined, tension has grown up between the state judiciary and its indigenous counterpart. Actors from the two systems intervene with differing objectives, impeding the effective resolution of conflicts. In fact the situation is such that representatives of community justice are often prosecuted for exercising their constitutional rights, with charges of deprivation of liberty and bodily harm being levelled against them.[42]

Another bone of contention is the extent to which community justice is circumscribed by constitutional provisions. Thus, the constitutions of both Peru (Art. 149) and Ecuador (Art. 171 [1]) stipulate that the procedures and decisions of local judicial authorities may not contravene fundamental rights and this has led to controversy over the physical punishments which such authorities continue to dispense in both countries. Representatives of indigenous organizations call for an intercultural interpretation of human rights, seeking to justify problematic penal practices as spiritual purification (see below).[43]

6 Objectives and principles of campesino and indigenous justice

Despite the heterogeneity outlined above, a good many similarities are observable between the communitarian justice-systems of the villages that we surveyed in Peru and Ecuador.

On a three-point scale ranging from 'very important', through 'important', to 'not important', 86 per cent of all community representatives rated the following objectives of campesino and indigenous justice as 'very important':

1. *Restoration of social equilibrium*. One of the key goals of Andean justice is to bring relations at family and community level back into balance following their disruption by the matter at issue. The outcomes it seeks therefore chiefly take the form of conciliation (*conciliación*) or settlement (*arreglo*).[44] This approach – mediation between two standpoints, negotiation between two sets of interests, and the generation of moral pressure aimed at ensuring respect for local cultural values and legal norms – is not on offer in the state legal system.[45] Given the difficult conditions under which agriculture operates in the Andes, and given the need for small-scale family-units to call on other families for help with sowing, harvesting, and irrigation, social relations are of crucial importance.[46] Any disruption of them can threaten the economic existence of the community. What campesino and indigenous judicial systems therefore aim to do is ensure freedom from conflict as a prerequisite for the effective economic operation of the *comunidad*.
2. *Fostering awareness*. Local justice aims to make offenders aware of the rules they have broken and to educate them, both on the ways in which they must change their behaviour and on the need for them to respect local legal provisions in future. In the 'dialogue' phase of proceedings, when they interact with local-justice actors, offenders are given the opportunity to justify their behaviour. The officials then assess the facts, making it clear that infringement of the rules is not tolerated by the community. The punishments imposed are intended to serve as lessons and execution of them is accompanied by exhortation and 'good counsel'. Offenders must express regret for their

42 Levaggi Tapia, 'Situación de los casos de miembros de Comunidades Campesinas, Nativas y Rondas Campesinas', pp. 9–19.

43 Lourdes Tibán and Raúl Ilaquiche, *Kichwa Runakunapak Kamachik, Manual de Administración de Justicia Indígena en el Ecuador* (Latacunga: Fundación Defensoría Kichwa de Cotopaxi, 2004), p. 45.

44 Brandt and Franco Valdivia (eds.), *Normas, Valores y Procedimientos*, pp. 79, 92.

45 Hans-Jürgen Brandt, *En Nombre de la Paz Comunal, Un análisis de la Justicia de Paz en el Perú* (Lima: Centro de Investigaciones Judicialies y Fundación Friedrich Naumann, 1990), p. 218.

46 Jürgen Golte, *Cultura, racionalidad y migración andina* (Lima: IEP, 2001), pp. 41–7.

actions and ask the community for forgiveness. At the end of proceedings, they usually sign a 'promise of good conduct' (*promesa de buena conducta)*, in which they undertake not to offend again.

3. *Reintegration*. Having undergone their punishment, offenders are reintegrated into the village-community. In serious cases, a prerequisite for reintegration – in addition to the offenders recognizing their crime and petitioning for forgiveness – is that they go on to demonstrate good behaviour over a substantial period of time.[47] During this time, the offender is under continuous observation by the authorities and does not enjoy the full rights of community membership. Indigenous villages are very successful at implementing this objective: even notorious offenders are reintegrated into the community – some actually achieving election to community office.[48]

When it comes to the principles of communitarian justice, here again there is substantial consensus amongst representatives of indigenous communities in both countries. Interviewees were asked which elements of their judicial systems they thought marked them out as 'fair'. The answers correspond to principles of constitutional rule of law – the right to a defence, for example, the requirement for judicial impartiality, and the precept of 'no punishment without law'. In other respects, however, indigenous and state principles diverge. Whereas defendants in the state judicial system have the right to remain silent in order to avoid incriminating themselves, in campesino and indigenous justice they are obliged to participate in the truth-finding process. If the offenders decline to defend themselves, it is assumed they have something to hide and the refusal to testify is regarded as an admission of guilt. A defendant is expected to tell the truth even if they thereby incriminate themselves. Untruths and self-serving statements are not permitted. The obligation of defendants to cooperate is closely tied to the indigenous justice-system's goal of educating offenders and reintegrating them into the local community – a goal that cannot be achieved without the collaboration of the parties involved. Hence too, offenders are forced to make a confession even in cases where the evidence is overwhelming. On the other hand, if the communal authorities are not convinced a person is guilty, pressure is not put on the individual to confess.

To secure an admission of guilt, a variety of rather unorthodox methods are used.[49] In Peru, for example, use of 'exercises' of the kind campesinos have to do during military service is widespread. These include: frog-jumps (*rana*); spins (*vueltas de trompo*), in which the person has to place their thumb on the ground and move round it in a circle; and press-ups (*planchas*). A common method in the Peruvian regions of Cajamarca and Cusco, and also in Ecuador, is use of the whip (*látigo, penca*). One interviewee in Cajamarca commented: 'Two lashes (*pencasos*) are enough and they admit what they've done.' Another means of making an accused person talk is immersion in cold water. In theory Quechua and Kichwa use this as a form of spiritual cleansing, because it is reputed to eliminate 'bad thoughts'. However, if the head is pushed under water – as sometimes happens[50] – it is the coercive rather than the purificatory nature of the process that predominates.

If an accused person or disputant is unwilling to cooperate despite collective pressure, the case is handed over to the national judicial authorities.

47 Brandt and Franco Valdivia (eds.), *Normas, Valores y Procedimientos*, p. 94.

48 Thus, in one case covered by our study in Ecuador, an individual convicted of murder was not only reintegrated into the community but was actually elected its president: Brandt, *Indigene Justiz*, pp. 17, 176.

49 The same practices may also figure as punishments.

50 Cases of this were documented in Nuñoa, in the Puno region of Peru, and in Tuncarta, Saraguro canton, Ecuador. See Brandt, *Indigene Justiz*, pp. 77, 264.

7 CONFLICTS DEALT WITH BY COMMUNITARIAN JUSTICE

What types of conflicts are most commonly dealt with by local justice-systems? The answer, in brief, is the full spectrum.

Heading the list in Cusco, Peru (see Table 1) are property-related disputes and conflicts involving a variety of offences defined as criminal. Not included under this latter head are offences involving violence against women or the abuse of minors, which, for reasons to do with analysis, were treated as separate categories. These two last groups, and all remaining types of cases, come in, on average, at less than 10 per cent of the total. The main categories of property-related conflict dealt with are compensation claims relating to physical damage, ownership disputes, and boundary disputes. Featuring in the 'criminal offence' category as here defined are physical and verbal aggression, robbery and theft, and defamation.

Table 1. Types of conflict dealt with by local justice in five selected communities in Cusco (Peru)[51] 2002–2010 (%)*

	2002–2003	2009–2010	Total
Property-related disputes	38.5	47.2	43.7
Criminal offences	34.9	29.6	31.7
Failure to fulfil communal duties	11.9	8.2	9.7
Family disputes	6.4	5.7	6.0
Violence against women	7.3	5.0	6.0
Abuse of a minor	0.0	0.6	0.4
Other	0.9	3.8	2.6
Total	100%	100%	100%
	N=109	N=159	N=268

*Data from 2012 follow-up study. Chi2 =6.20, sig.= 0.52 (no significant difference between periods).

The findings for Ecuador show that the indigenous justice-system there has a differently configured work-load. The *cabildos* (councils) and *asambleas* (village assemblies) have fewer property disputes to tackle but a greater number of criminal offences, family disputes, and cases of violence against women to deal with. Other types of cases each make up less than 10 per cent of the total.

Table 2. Types of conflict dealt with by local justice in two selected communities in Cotopaxi (Ecuador)[52] 2002–2010 (%)*

	2002–2003	2009–2010	Total
Criminal offences	37.0	60.5	47.6
Family disputes	28.3	26.3	27.4
Violence against women	17.4	5.3	11.9
Property-related disputes	8.7	5.3	7.1
Failure to fulfil communal duties	6.5	0	3.6
Other	2.2	2.6	2.4
Total	100%	100%	100%
	N=46	N=38	N=84

*Data from 2012 follow-up study. Chi2 =7.87, sig. = 0.16 (no significant difference between periods).

51 The Checca, Layo, Qquehue, Túpac Amaru, and Yanaoca communities in the provinces of Canas and Canchis. See Brandt, *Indigene Justiz*, p. 43.

52 *Parroquias* of Toacaso and Zumbahua. See Brandt, *Indigene Justiz*, p. 43.

In the overwhelming majority of disputes dealt with – 85 per cent in Peru and 80 per cent in Ecuador – the legal provisions underlying the process of resolution have equivalents in state law. Theoretically, therefore, these cases could be dealt with by the state judiciary – but this is highly unlikely to be considered an option by campesinos and indigenous people, given the differing objectives of the two systems. Looking at the figures from the opposite point of view: 15 to 20 per cent of disputes are dealt with exclusively on the basis of community law. Their relatively high number is due to the frequency with which indigenous family law is invoked in bringing a case. Grounds here include jealousy, infidelity, malicious abandonment of the family, and petitions for divorce or separation from members of the community married under indigenous law.[53] These cases, not falling within the scope of national law, would be turned down for consideration by the state courts and their resolution therefore justifies the existence of the communitarian judicature. In rural areas of the Andes, serious family conflicts are not seen as purely private matters involving only the affected families: as mentioned previously, family cohesion is of crucial economic importance to the community as a whole.

8 Modes of conflict-resolution

How are conflicts resolved? Communitarian justice is strongly consensus-oriented: the majority of cases it deals with (58.8 per cent) are resolved through conciliation or settlement. This fact underlines the centrality of social balance as an objective of indigenous justice: the disruption to equilibrium caused by the dispute in question has to be rectified as a prerequisite to peaceful coexistence in the community.

Table 3. Modes of conflict-resolution in local justice in 131 selected Peruvian and Ecuadorian communities[54]*

	Ecuador		**Peru**		**Total**	
	Count	***%***	**Count**	***%***	**Count**	***%***
Consensus	130	*61.0*	300	*57.9*	430	*58.8*
Ruling	42	*19.7*	116	*22.4*	158	*21.6*
Deferment	41	*19.2*	102	*19.7*	143	*19.6*
Total	213	*100*	518	*100*	731	*100*

*Data from the initial study in 2002–3. N = 731 (missing values N = 13), chi^2 =0.764, sig.= 0.682 (no significant difference between Peru and Ecuador).

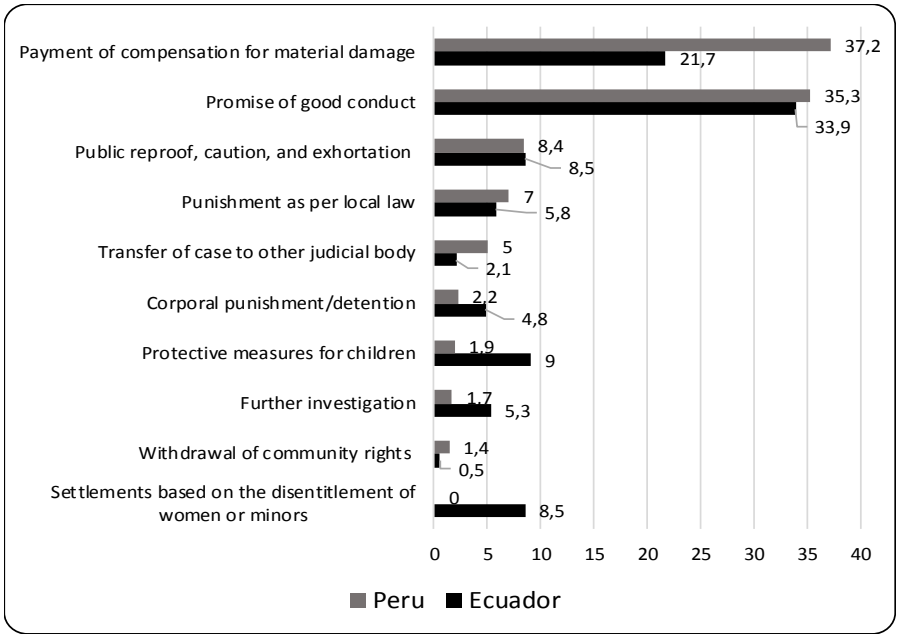
Where the parties are unable to reach an amicable settlement, conflicts are resolved by a ruling issued either by the relevant local officials or, in serious cases, by the communal assembly (21.6 per cent). This is the commonest outcome in property-related disputes and cases of theft.

In terms of the nature of the resolutions arrived at, most actions are settled either by payment of compensation for material damage (Peru 37 per cent, Ecuador 22 per cent) or – particularly in the case of criminal offences – by an undertaking from the offender to abide by the community rules and avoid further misbehaviour ('promise of good conduct'). All other modes of resolution fall below the 10 per cent mark (see Fig. 1).

53 Marriage under indigenous law is traditional, especially in Peruvian communities. According to demographic statistics for Peru, the proportion of cohabiting couples is roughly the same as that of couples married under civil law (28 per cent and 29 per cent respectively – see Brandt, *Indigene Justiz*, 214–16). It is assumed that many of these cohabiting couples are in fact couples married under indigenous law. Traditional marriage is by no means an informal matter. Through it, specific individual and communal rights are established. As a result, separation or 'divorce' (normally at the request of one or other spouse) requires a ruling by the communal authorities.

54 For the locations of the communities, see footnotes in Sect. 1; also Brandt, *Indigene Justiz*, p. 41.

Figure 1. Types of conflict-resolution in local-justice systems in Peru and Ecuador (%)*, **

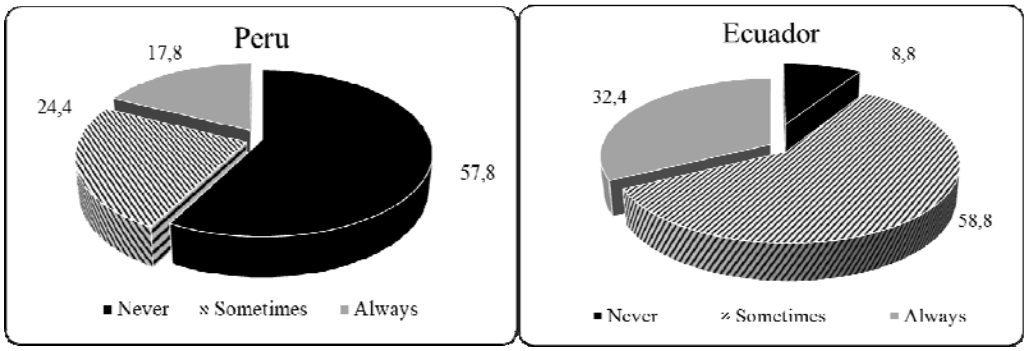


*Data from the initial study in 2002–2003. Ecuador: N= 189, Peru: N=417, total: N= 606, missing values: 138. Chi2 = 74.8, sig. = 0.00.

**For reasons to do with analysis, 'corporal punishment' was treated separately from 'punishment as per local law' – which covers sentences such as fines and community service (e.g. clearing irrigation ditches, making mud bricks for use in communal buildings).

One problematic aspect of indigenous justice is its use of physical punishments such as flogging, immersion in cold water, and nettle whipping. Our initial study, in 2002–3, recorded the use of such sanctions in approximately 4 per cent of all cases (N = 744). By contrast, in the follow-up study looking at cases up to 2010, no instances at all were recorded in Cotopaxi in Ecuador while in Cusco in Peru, the figure was only 2.5 per cent (Ecuador 2010: N = 84, Peru 2010: N = 202). Although almost all community representatives are aware that such sanctions are prohibited by state law, or at least that they are controversial, there does not appear to be any corresponding move by village authorities to prevent their imposition. As regards the figures, therefore, we must assume the decline was simply due to fewer cases being officially recorded. The continued use of the relevant punishments is evidenced in the interviews conducted with community representatives in both countries. Although the majority of representatives in Peru (58 per cent, N = 91) said they were opposed to them, a significant number (42 per cent) believed they were either sometimes or always justified. In sharp contrast, Ecuadorian representatives showed broad acceptance of them: 91 per cent (N = 49) considered they constituted an effective form of sanction.

Figure 2. Opinion of community representatives on the justification for corporal punishment (%)*



*Peru N = 91, Ecuador N = 49

In practice, however, physical penalties do not seem to be imposed as often as the support in the two countries would lead one to expect. Only 22 per cent of Peruvian community representatives reported physical punishments being imposed during the preceding 12 months (once: 12 per cent, more than once: 10 per cent). In Ecuador, 35 per cent had no punishments to report for the period and 65 per cent reported one or more.

The support expressed for physical punishment should not be taken as cause for high-minded moral indignation: given the slowness of the state justice-system and the deplorable conditions in the relevant countries' prisons, incarceration by state courts is regarded by campesinos as a much worse option than the sanctions imposed by local justice. Even so, the training and dialoguing activities carried out as part of our field-work did attempt to promote reflection among communal authorities as to whether physical penalties were still consonant with their own value-system or whether they might be replaced with alternatives such as community service.

9 Interrelations between actors, conflicts, and modes and types of resolution

The interrelations between actors, conflicts, and resolutions were analysed statistically using Cramér's V contingency coefficient, which provides symmetric measures for the strength of association between nominally scaled variables.[55] Figure 3 shows that conflict-resolution outcomes are significantly influenced by four key interconnected variables:[56]

(1) Type of conflict: criminal offences, property-related disputes, failure to fulfil communal duties, family disputes, violence against women, abuse of a minor.

(2) Mode of resolution: consensus, ruling, deferment

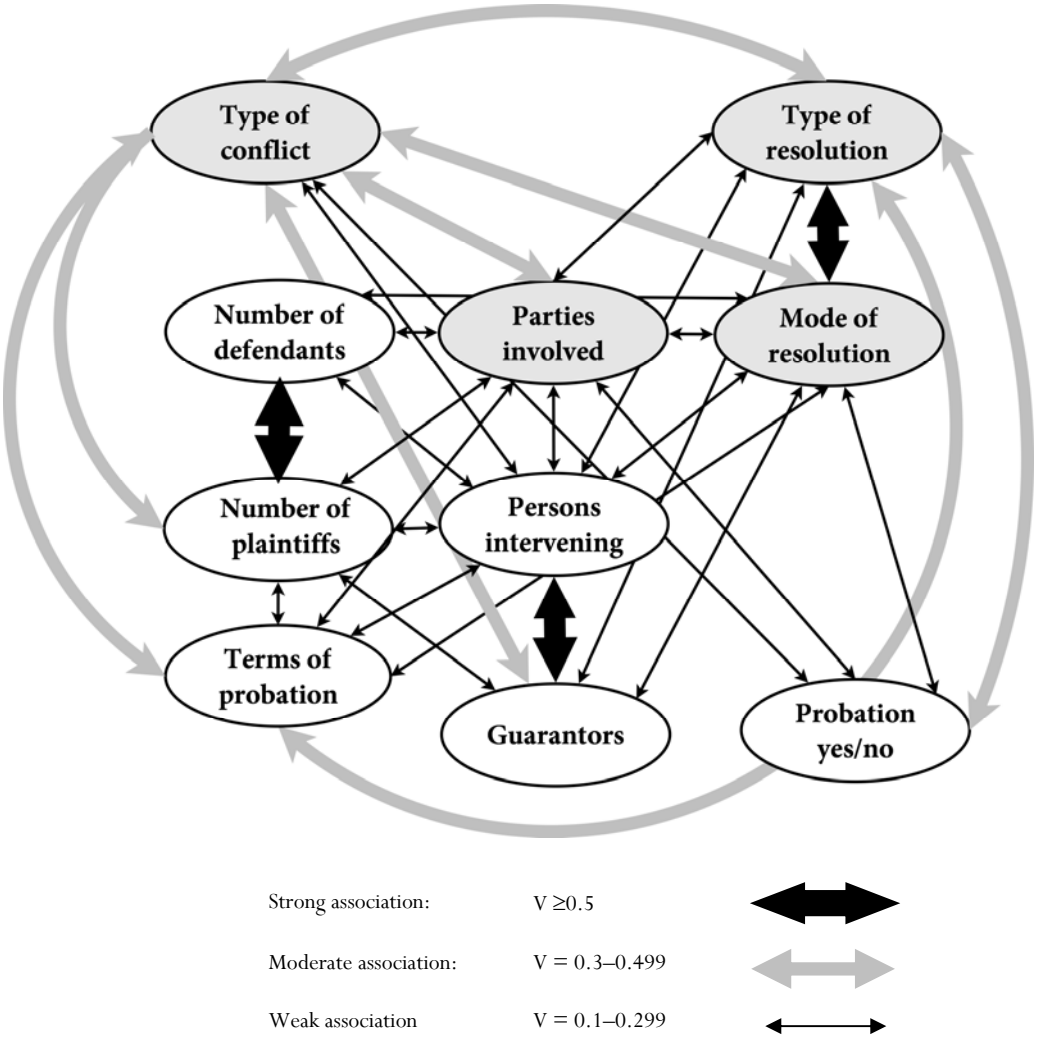
(3) Type of resolution: payment of compensation for material damage, exhortation, undertaking not to reoffend, physical punishment, institution of measures to protect family members, further investigation, transfer to another judicial body.

(4) Parties involved: plaintiffs, defendants, and the family members and neighbours supporting them.

55 Cramér's V coefficient is a symmetrical measure of the strength of association between two nominal variables, giving a value between 0 and +1, whereby the maximum value cannot be reached unless the two variables are equal to each other. See Brandt, *Indigene Justiz*, pp. 297–301.

56 The 'guarantors' variable in Fig. 3 might also be expected to be of influence. Guarantors oversee implementation of judicial decisions and ensure compliance by signing the record of proceedings (*acta*). However, these records show that they play no part in the decision-making process, becoming involved only after a determination has been arrived at.

Figure 3. Interrelations between actors, conflicts, and modes of resolution*



*Cramér's V contingency coefficients. Data from the initial study in 2002–2003. N = 731 conflicts. All results significant (sig. <0.05).[57]

Although the coefficients cannot be interpreted as indicating a linear cause–effect relation, they do demonstrate that community-based conflict-resolution procedures, far from being arbitrary, are in fact based on a rationale decision determined by the related key variables. The system is grounded in the legal norms of the *comunidad*. The results of the analysis can therefore also be interpreted as evidence of rule-based behaviour on the part of actors involved in community justice.

10 Changes and trends

Representatives of communitarian justice interviewed for the study were asked what kinds of changes had taken place in their judicial systems in the period between the 2002–3 and 2009–10 surveys. Although there was consensus amongst them that there had been virtually no change in objectives or principles, they did report other developments.

In Peru, most community representatives (84 per cent, N = 88) were of the opinion that campesino and indigenous justice had seen changes over recent years. The change identified by most

57 On the coefficients, see Brandt, *Indigene Justiz*, p. 298.

interviewees (58 per cent) was better coordination between state and local justice. In second place was improvement in communitarian justice's own internal procedures (23 per cent).

The interviews conducted in Ecuador present quite a different picture: though the majority of community representatives here also thought there had been changes, their proportion was much lower (51 per cent, N = 39). As evidence of movement, they cited increased judicial competence amongst community-justice actors, thanks to education and training, and the fact that officials of the state judicial system were beginning to show respect for indigenous justice. They were of the opinion that there had been a change in the form taken by conflict-resolution, with more emphasis being placed on 'dialogue' with the parties to the dispute. In addition, they believed the officials delivering indigenous justice had become less authoritarian. The remaining interviewees, meanwhile, rejected the idea that there had been any change, maintaining that indigenous justice continued to be practised as it always had been.

In both countries, a change is observable in legal awareness. Documenting as it does the way in which campesinos and indigenous people have incorporated elements of state law into their own legal cultures over the period of the research, the study confirms the thesis of 'interlegality' – that is, the interpenetration of legal systems. A notable example of this absorption is observable in the domain of women's rights. Reflecting the traditional view of the husband as 'head of the family', with the right to exert authority and chastise his wife and children, one member of a men's focus group interviewed in Cajamarca, Peru, in 2005 commented: 'As the boss, as the husband, I'm entitled [to discipline them]. How else could I command respect?' Now, however, patriarchal attitudes such as this are beginning to be challenged: five years after the interview in question, 58 per cent of Peruvian community representatives and 56 per cent of their Ecuadorian counterparts reported that national legal norms relating to the protection of women against gender-based violence[58] had been integrated into local law. In addition, 15 per cent of representatives in Ecuador and 17 per cent in Peru (N = 34 and 89 respectively) believed village assemblies were showing greater awareness of women's rights. Realization is thus growing that the use of violence against women and children is unacceptable and that where there is domestic abuse, the community must intervene to protect families from the aggressor. In Peru, sexual abuse of minors is regarded by community representatives as a particularly serious offence and the majority of them (64 per cent) feel such offences should be dealt with via the state legal system rather than by community justice. In Cusco, over 90 per cent of the representatives interviewed were of the opinion that campesino and indigenous justice could not deliver adequate sanctions in cases of this type. This signals a change of reference-norms. The situation is similar in the case of adult female rape. Though this offence is regarded as being not quite as serious as abuse of a female minor, local law is considered insufficient to deal with it: only 35 per cent of the community representatives interviewed in Cusco believed the sanctions dispensed by local law were adequate in such cases.

Similar opinions are expressed in Ecuador: asked who should deal with cases involving the rape of female minors, only a minority of respondents (30 per cent) were of the view that indigenous justice should have exclusive jurisdiction. A substantial proportion of both indigenous representatives (53 per cent, N = 59) and state judges and prosecutors (57 per cent, N = 20) were agreed that there had been an improvement in community response to violence against women. When invited to say why this might be, they said they felt women today were more aware of their rights and more inclined to demand that the rules be applied.

These developments are a sign that communities are beginning to grant their members greater individual rights and that traditional values and norms of customary law that work counter to this trend are being retrenched. Asked about the relative importance to them of community and

58 Peru: Ley de Protección frente a la Violencia familiar; Ley de Prevención y Sanción del Hostigamiento sexual. Ecuador: Ley contra la Violencia a la Mujer y la Familia, Ley reformatoria al Código Penal que tipifica los Delitos de Explotación Sexual de los menores de edad.

personal concerns, only 8 per cent of communal representatives in Cusco (Peru) identified the *comunidad* as their prime focus. However, an equally small number (7 per cent) identified 'personal affairs' as meaning individual concerns, the great majority – 85 per cent (N = 75) – citing family interests in this connection. A shift in interests is thus observable in the case of Peru: communal interests are still important, but the main focus is now on family affairs – where 'family' implies a basic father–mother–offspring unit plus any relatives living under the same roof.

Notwithstanding these developments, there is no evidence of radical cultural change. All 17 sets of community statutes and *reglamentos* subjected to scrutiny[59] cite objectives that explicitly seek to 'revitalize cultural values and rules' and 'defend communal interests'.[60] The way in which communal legal norms are evolving, however, reflects the endeavour to find a new balance between individual and collective interests. The statutes of the Hampatura community in Cusco region, for example, state that the reactivation of traditional values and legal rules must be 'compatible with the development of the people and communal society'.[61] In other words, traditional legal norms are not being preserved wholesale, out of nostalgia, but only insofar as they do not impede communal progress and the individual development of members of the community – women as well as men.

On the question of 'personal' versus 'communal', the interviews conducted in Ecuador paint a different picture from that in Peru. The majority of indigenous representatives (58 per cent, N = 38) feel that community interests continue to be of greater importance than individual and family interests and concerns. Even so, here too there are signs of a growing awareness of women's rights and a trend towards adapting communal legal norms to state requirements – for instance in regard to participation by individual women in the political life of the community. Equality of rights for women, including their equal participation in the decision-making processes of indigenous communities, is enshrined in the Ecuadorian constitution (see, for example, Arts. 57 [10] and 171 [1]).

11 Factors driving change

Community representatives, along with judges and public prosecutors from the state system, were asked to identify the factors they thought were driving change in communitarian justice. They were given a choice of five options, four of which – 1. changes in state law, 2. consultancy, 3. NGO-led training, and 4. NGO-led dialoguing activities – had been selected through preparatory interviews and pre-testing and one of which had a free-text format. The findings from the definitive interviews again revealed differences in perception in Peru and Ecuador.

In Peru (see Table 4), 71 per cent of local representatives and 61 per cent of judges and prosecutors identified long-established NGO practice-oriented training in human rights as crucial. Joint second on the list, with 12.2 per cent each, community representatives placed consultancy (*asistencia técnica*) and dialoguing (*mesas de diálogo*). The empirical study thus supports the thesis of Sieder and Barrer, as expressed specifically in relation to women's rights, that workshops conducted in native languages 'continue to be a key entry strategy in order to raise the level of consciousness'.[62] The introduction of new state laws, meanwhile, was ranked lower in influence by

59 Sources in Peru: the Central Unificada de Rondas Campesinas, province of Hualgayoc; the Rondas Campesinas y Urbanas of the province of Cutervo, Cajamarca región; and the following communities in the Cusco region: Chaupibanda, Machaccoyo A, Hampatura, Llallapara, Taypitunga, Urinsaya Ccollana, Chirupampa, Ccochapata, Yanaoca, Quechaquecha, Pongoña, Sausaya. Sources in Ecuador: the community of Chicho in Zumbahua parish in the canton of Pujili and the community of Chisulchi Grande in Cotopaxi province.

60 Art. 4 b) Reglamento and Art. 8 b) Statute of the Comunidad Campesina Yanaoca, Cusco (Peru), 2010.

61 Art. 8 i.) Statute of the Comunidad Campesina Hampatura, Canas, Cusco (Peru), 2009.

62 Rachel Sieder and Anna Barrera, 'Women and Legal Pluralism: Lessons from Indigenous Governance Systems in the Andes', *Journal of Latin American Studies,* January 2017, pp. 1–26, 18. Published online 16 January 2017: https://doi.org/10.1017/S0022216X16002273.

local representatives, alongside factors in the 'other' category (2.4 per cent each). This contrasted with responses from actors in the state legal system, for whom changes in state legal norms and 'other' factors ranked second in importance after training.

Table 4. Factors cited as drivers of change in Peruvian communitarian justice*

	Representatives of community justice		Representatives of state justice		Total	
	Count	**%**	**Count**	**%**	**Count**	**%**
Training	58	*70.7*	11	*61.1*	69	*69.0*
Dialoguing activities	10	*12.2*	1	*5.6*	11	*11.0*
Consultancy	10	*12.2*	0	*0.0*	10	*10.0*
Changes in state law	2	*2.4*	3	*16.7*	5	*5.0*
Other	2	*2.4*	3	*16.7*	5	*5.0*
Total	82	*100*	18	*100*	100	*100*

*Chi^2 =14.936, sig. = 0.005

Diverging from the respondents in Peru, the majority of indigenous representatives interviewed in Ecuador (32.4 per cent) considered that new state laws, including the 2008 constitution, had had the greatest impact in bringing about changes in indigenous justice (see Table 5). The decisive consideration here was that, as well as explicitly recognizing indigenous justice, the constitution proclaims a plurinational, intercultural state based on the indigenous principles of *pachamama* (Mother Earth) and *sumak kawsay* (*buen vivir* or well-being). Ranked in second place by indigenous respondents was training (20.3 per cent) and after that consultancy and dialoguing activities. In the case of the judges and prosecutors interviewed, meanwhile, the major driver of change in communitarian justice was felt to be training.

Table 5. Factors cited as drivers of change in Ecuadorian communitarian justice*

	Representatives of community justice		Representatives of state justice		Total
	Count	**%**	**Count**	**%**	**Count**
Changes in state law	24	32.4	6	28.6	30
Training	15	20.3	8	38.1	23
Dialoguing activities	12	16.2	4	19.0	16
Consultancy	12	16.2	0	0.0	12
Other	11	14.9	3	14.3	14
Total	74			21	95

*The interviewees in Ecuador were allowed multiple choices (minimum 2, maximum 3). The figures for frequency and percentage reflect numbers of answers rather than numbers of interviewees.

Despite the divergent responses in the two countries, it would be incorrect to conclude that state law has had a greater impact on indigenous justice in Ecuador than in Peru. In the case of Ecuador, there was a special factor at work at the time of the interviews (2012): the national debate on the 2008 constitution would still have been fresh in the minds of the representatives of indigenous justice.

The significance of state law has already been alluded to in our account of the incorporation of state norms into campesino and indigenous law in both Peru and Ecuador. Another way in which it makes itself felt is through the social conflict it repeatedly generates as legislative projects are

imposed which affect the constitutional rights of indigenous peoples (in regard to land, water, and the environment, for example).[63] Constitutional rules can be an important resource in bringing about social progress because they can legitimize individual and social demands. However, formal written law does not function as a straightforward instrument of state policy, controlling and modifying social life by conditioning individual behaviour.[64] The discussion on legal pluralism (Section 3) has shown that 'law on the books' is not always 'living law' – to quote Eugen Ehrlich, writing over 100 years ago.[65] 'Law in action' – meaning law as actually applied in society – calls for appropriate legal awareness. And the sense of what is legally appropriate and what is not is something that can be fostered by training – a fact borne out by our interviews.

12 The relationship between communitarian and state justice

Nowadays, judges and public prosecutors in both Peru and Ecuador view campesino and indigenous justice as a distinct, constitutionally enshrined jurisdictional sphere. There was consensus amongst interviewees from state justice in both countries that – for cultural reasons and because of its greater effectiveness – community justice continues to be better suited than its state counterpart to the task of resolving internal community conflict. Some differences of approach between the two countries are, however, observable.

The executive council of the Peruvian judiciary (*poder judicial*) has issued a number of directives on intercultural judicial policy and this has resulted in structural changes in the judicial apparatus.[66] Since the end of 2012, the functions of the National Bureau of the Justice of the Peace (ONAJUP[67]) have been expanded to include the promotion of indigenous justice. In 20 judicial districts, schools of intercultural justice affiliated to the superior courts (*cortes superiores*) now offer training programmes and dialoguing activities for representatives of community and state justice. Overall, tensions regarding jurisdiction have diminished.

Developments in Ecuador have been slower – despite the constitution's explicit injunctions on indigenous law and despite legislation providing for the creation of an intercultural judiciary and the coordination of the two judicial systems (Art. 344, 346 *Código Orgánico de la Función Judicial*). Although the 2013–2019 Strategic Plan for the Ecuadorian judiciary talks of 'fostering an intercultural dialogue in order to strengthen . . . coordination and cooperation between the indigenous jurisdiction and the ordinary jurisdiction',[68] the 'plans and programmes' rubric in the 2016 report of the Ecuadorian Judiciary Council (*Consejo de la Judicatura*) lists no relevant activities.[69] Sporadic measures have been reported in the press,[70] but so far no details have emerged of any master plan for intercultural dialogue on law and jurisdiction.

63 One high-profile example was the confrontation that occurred in the town of Bagua, in Peru, in June 2009. Thousands of indigenous people, led by representatives of their communities and associations, set out to protest against legislation designed to facilitate foreign investment in areas populated by indigenous groups. The violence, in which many died or were injured, rocked the country.

64 James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Wisconsin: The University of Wisconsin Press, 1980), p. 11, 275 ff. Hans-Jürgen Brandt, 'Human Rights, Legal Services and Development: Theory and Practice', in Friedrich Naumann-Stiftung (ed.), *Law, Human Rights and Legal Services: A Neglected Field of Development Cooperation, Proceedings of an International Conference in Königswinter, Federal Republic of Germany, 30th June-4th July 1986* (Sankt Augustin: COMDOK, 1988), pp. 17–44, 27.

65 See e.g. Marc Hertogh, *Living Law: Reconsidering Eugen Ehrlich*, Oxford [u.a.]; Hart Publishing, 2009.

66 Poder Judicial del Perú, Oficina Nacional de Justicia de Paz y Justicia Indígena – ONAJUP (ed.), *Protocolo de Coordinación entre Sistemas de Justicia / Protocolo de Actuación en Procesos Judiciales que Involucren a Comuneros y Ronderos*, *Colección Documentos de Política* Nº 3, (Poder Judicial Área Justicia: Lima, 2013).

67 Oficina Nacional de Justicia de Paz y Justicia Indígena.

68 Consejo de la Judicatura (ed.), *Plan Estratégico de la Función Judicial 2013–2019, Para el desarrollo permanente del Sistema de Justicia al servicio de la ciudadanía* (Quito, 2013), p. 41.

69 Consejo de la Judicatura, Transparencia, Literal k) Planes y programas en ejecución, www.funcionjudicial.gob.ec/index.php/es/transparencia/transparencia-2016.html, accessed 5 May 2017.

The relationship between the two judicial systems would be considerably improved if the legislatures in both countries acted on constitutional injunctions and finally adopted legislation on the intercultural coordination of communitarian and state justice. At the moment, however, discussion on the content of such legislation is polarized, preventing achievement of the necessary political majorities in the two parliaments.[71] To widen the focus for a moment: even in Bolivia, where, in 2010, the Plurinational Legislative Assembly passed a Jurisdiction Demarcation Act,[72] the substance of the legislation remains controversial.[73]

In such debates we have, on the one side, conservative politicians and lawyers who question the validity of indigenous justice and the special jurisdiction attributed to it. They invoke equality of rights for all citizens and advocate restrictive regulation of the material and personal competences of those who administer community justice. In Peru, supporters of this point of view include the business association CONFIEP,[74] which believes the interests of its member companies would be at risk in areas where natural resources are exploited if campesino and indigenous justice were to be responsible for dealing with disputes involving either the companies or their employees. The areas in question are located in indigenous territories either in the Andes, where opencast ore-extraction is conducted, or in the Amazonas region, where there are oil and gas operations.

On the other side of the argument we have those of ethno-populist conviction who seek maximum competences for indigenous justice over all types of conflicts, whether these occur within a community – between villagers – or between villagers and outsiders. Supporters of this approach include, in Peru, the national association of rondas campesinas – CUNARC – and in Ecuador the indigenous peoples' umbrella-organization CONAIE. To justify their position, adherents of this point of view draw on the narrative of 'ancestral' indigenous law.[75] Given the social conflict over the protection of the environment and the conservation of nature, and over the economic and social changes wrought by the oil and mining industries, the dream of a 'back to basics', millennia-old culture whose survival must be assured exerts a powerful attraction on many indigenous people. It is a reaction to the complex, market-oriented, multicultural society, offering a counter-model of clear, consensus-oriented ethnic order. This view glosses over the fact that campesino and indigenous cultures are constructions with multiculturally rooted legal norms. It neglects the trend towards pluralism – including, in particular, internal differentiation of communities according to income, education, and life-setting – that is observable amongst indigenous people and it chooses to ignore the evidence that the notion of 'pure', 'traditional' indigenous culture is a myth. The campesinos and indigenous peoples of the Sierra no longer live isolated lives in remote communities; they have become increasingly integrated into wider society. It therefore makes no sense for their justice-systems to be isolated. Rather, the legal competencies of the state and the indigenous communities must be defined complementarily: matters that exceed the arbitrative

70 On 3 February 2015, for example, the newspaper *Crónica* reported a 'first meeting' between representatives of the Saraguro people and members of the Judiciary Council at which 'plans of action' were discussed: http://cronica.com.ec/index.php/informacion/ciudad/item/1053-judicatura-se-compromete-a-trabajar-en-temas-de-interculturalidad, accessed 10 February 2015.

71 Hans-Jürgen Brandt, 'La Justicia Comunitaria y la lucha por una Ley de Coordinación de la Justicia', in *Derecho PUCP: Revista de la Facultad de Derecho* No. 78, 2017, pp. 215-47, https://doi.org/10.18800/derechopucp.201701.009, accessed: 20 June 2017.

72 Ley Nº 073 de Deslinde Jurisdiccional, 29 December 2010.

73 Thus, the Bolivian Deputy Minister for Decolonization, Félix Cárdenas, condemned the Act as 'utterly racist' because, he said, 'although the constitution states that both systems of justice [the ordinary and the indigenous] have the same hierarchical status, some Western-minded people in parliament have decreed: "These poor farm-folk are not going to decide about big issues, only about theft and robbery." This is legal racism … [The Act] runs counter to the requirements of genuine justice', Erbol Digital, 16 Mar. 2016: http://www.erbol.com.bo/noticia/indigenas/16032016/cardenas_la_ley_de_deslinde_jurisdiccional_es_racista, accessed 19 June 2017.

74 Confederación Nacional de Instituciones Empresariales Privadas. The author possesses a copy of the letter of the president of the CONFIEP to the president of the Congress dated 29 January 2014 (CONFIEP PRE-011-2014) which expresses these concerns.

75 See e.g. Gallegos-Anda and Tapia (eds.), *Derechos Ancestrales*.

capabilities of the community (examples here are drug-related offences, organized crime, murder, and rape[76]) should be reserved to the state judiciary. In addition, steps should be taken to ensure the protection of individual members of indigenous communities in law, including against wrongful rulings by their own authorities.[77] This is a topic not currently under discussion either in Peru or Ecuador.

13 Conclusion

The communal justice-system of campesinos and indigenous peoples enjoys a high level of acceptance and trust amongst the system's users. Even the state judges and prosecutors we interviewed agreed that it was better suited than its national counterpart to resolving conflicts amongst villagers – because it deals with matters swiftly, can be accessed free of charge, and takes into account the traditional values and legal norms of the community.

The main objective of indigenous justice is to restore peace in the community. This being so, it is strongly consensus-oriented, most disputes being settled by compromise or conciliation. If conciliation is not possible, the dispute is brought to an end by a ruling from the competent person or body.

As well as seeking to restore social equilibrium at family and community level, the process aims to rehabilitate offenders and reintegrate them into local society. All types of cases arising with the community are dealt with. Most could theoretically also be addressed by the state justice-system, but given the differing aims of the two systems, members of indigenous communities would not consider this an option.[78] Between 15 and 20 per cent of conflicts are dealt with exclusively on the basis of communal regulations – particularly those relating to the family – for which no equivalents exist in national law. These cases – involving issues such as jealousy, infidelity, family desertion, and divorce or separation of couples married under indigenous law – would be rejected by the state courts and their resolution therefore justifies the existence of the communitarian judicature.

A particularly problematic aspect of indigenous justice is its use of physical penalties such as flogging, immersion in cold water, and nettle whipping. Contrary to widespread belief, utilization of such punishments is not systematic: they are applied only in a small proportion of cases (c.4 per cent), being called upon in particular for offences such as theft, bodily injury, defamation, and adultery. Although almost all communal authorities are now aware that penalties of this kind are prohibited by national criminal law, use of them persists because they are deemed to be highly effective. Our study revealed fundamental differences in the attitudes of Peruvian and Ecuadorian communal representatives to this issue: whereas most of the former (58 per cent) were opposed to the use of physical punishment, the overwhelming majority of the latter (91 per cent) continued to endorse it.

The procedures of indigenous justice-systems, and the determinations they produce, are not arbitrary. That they are based on underlying communal rules is demonstrated by the statistical coefficients in our study, which show that the type of conflict involved strongly influences both the mode (consensus, ruling, etc.), and type of determination arrived at (payment of compensation, subjection to exhortation, etc.).

The study also demonstrates continuity in the overall objectives and principles of indigenous justice in the period under review. Although these are based on 'ancestral' legal norms, the body of

76 The first two are unsuited to treatment by communal justice because they have society-wide repercussions, the last two because the family and neighbourly ties between plaintiff, defendant, and enacters of indigenous justice cast doubt on the impartiality of proceedings.

77 Brandt, 'La Justicia Comunitaria', pp. 238 ff.

78 Except in cases involving serious offences such as murder or rape.

indigenous legal rules as a whole is not a static entity: where the need arises, relevant provisions are adjusted – as is demonstrated by the recent incorporation of women's rights from state law. The study thus confirms the thesis of 'interlegality'[79] – in other words of the interpenetration and superposition of communal and national legal norms.

The motors of change here are many and various. Amongst the most important are the increasing social and economic integration of campesinos and indigenous people into national society, improved education, the influence of the media, and the advent of new communications-technologies. In Peru, the majority of community representatives identified NGO-led training in mediation and human rights and improvements in leadership and communal organization as major contributors to change. For Ecuadorian representatives, meanwhile, training came second to changes in state law – notably constitutional reform, with its acknowledgement of indigenous objectives and communitarian justice.

One problem that remains unresolved in both countries is that of coordination. Harmonization of the state and indigenous judicial systems is specifically called for in the constitutions of both Peru and Ecuador. Despite this, as of the present time (June 2017) – in other words, decades after the relevant provisions were enacted[80] – we have been unable to identify a single occasion on which a legislative initiative in this direction has secured a majority in either of the countries' legislatures. The chief obstacle to consensus is an irresolvable clash of interests. In one camp we have the 'minimalists', a powerful group of stakeholders who seek to limit the competences of indigenous justice. Notable amongst them are oil and mining companies and business organizations keen to see their corporate activities and interests in indigenous territories kept out of the purview of communitarian justice. In the opposing camp we find the 'maximalists', who are against any kind of restriction on indigenous justice, arguing that indigenous peoples, after 500 years of oppression, must now be allowed to exercise their rights to the full. On this view, the state legal system should play no part at all in the resolution of conflicts in indigenous villages – even in cases, such as intra-community murder. In sum: the polarized and emotionally charged debate makes it very difficult for mediating voices concerned with general welfare and a balancing of interests between indigenous people and society as a whole to make themselves heard.

I conclude by giving the final word on indigenous justice to those who practise it:

> We do justice to clarify mistakes.[81]
>
> Our justice is free – we do not charge for it. We are not like the institutions and judges who demand money. We do not dispense justice on our own – the *ronda* decides democratically along with everyone else [in the *comunidad*]. They all take part.[82]
>
> Justice is achieved if peace is restored.[83]

79 Santos, 'Law: A Map of Misreading', p. 352.

80 Art. 149 of the 1993 constitution in Peru; Arts. 191 [3]/171 [2] of the 1998/2008 constitutions in Ecuador.

81 Focus group interview, women's group, Cusco (Peru), 2005.

82 Focus group interview, men's group, Puno (Peru), 2005.

83 Focus group interview, women's group, Cusco (Peru), 2005.

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