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Turning Legal Pluralism into State-Sanctioned Law: Assessing the Implications of the New Constitutions and Laws in Bolivia and Ecuador

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Abstract

Ethnically diverse societies have long faced the challenge of accommodating distinct and often conflictive normative orders within a single polity. Leaving the ideal of a single, homogeneous legal order aside, many Latin American states have recently acknowledged the right of indigenous peoples to practice and generate proper law. The ensuing question of how to address the challenges implied by this state-sanctioned form of legal pluralism is examined by a comparison of Bolivia and Ecuador in this paper. Similarities between cases can be identified as to the definition and limits of indigenous jurisdictions and the coordination among legal authorities. Marked differences exist with regard to the status of indigenous law, the ability to appeal indigenous rulings, and the incorporation of indigenous legal cultures into the state's legal system. While the new frameworks constitute remarkable progress, their effects in the longer term will depend on the broader political context and the willingness to alter the long-established attitudes of justice operators and broader societies alike.

Keywords: legal pluralism, constitutional change, judicial reform, indigenous peoples, plurinational state, Bolivia, Ecuador

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Turning Legal Pluralism into State-Sanctioned Law: Assessing the Implications of the New Constitutions and Laws in Bolivia and Ecuador

Anna Barrera

Article Outline

1 Introduction

Former colonial countries and ethnically and/or religiously diverse societies have long faced the challenge of accommodating distinct and largely conflictive normative orders within a single polity.[1] In such contexts of legal pluralism, particular social groups have often, besides state law, followed their own law-like principles, rules, and procedures, which typically originate from distinct sources of legitimacy such as tradition or religion, cultural values and forms of organization (Griffiths 1986; Sousa Santos 1987; Merry 1988; Benda-Beckmann 2002). How

1 An earlier version of this paper was presented at the International Conference "New Constitutionalism in Latin America from a Comparative Perspective: A Step towards Good Governance?" held at the GIGA Insti-

plural legal orders have been accommodated has varied considerably across time and space. In the case of Latin America, the relationship between former colonial/republican judicial systems and legal practices of indigenous groups had long been contingent on geographic proximity, the rulers' interests with regard to specific regions and their effectiveness in penetrating them. Accordingly, the modes of accommodation had ranged from tolerance to criminalization of local normative orders. Nevertheless, these orders survived or were revitalized not only due to insufficient provision of and access to state justice institutions, but also because many indigenous groups have ascribed more legitimacy to their proper forms of law. Importantly, the centuries-long, asymmetric interplay between these orders resulted in modifications and a hybridization of indigenous law, thereby revealing the non-statist and adaptive nature of indigenous legal practices (Yrigoyen Fajardo 2000; Cóndor Chuquiruna 2009; Kuppe 2010).

Since the 1990s, many Latin American countries have gradually recognized the existence of legal pluralism within their territories. Several international and domestic developments have pushed these states in this direction:

First, a series of collective rights of indigenous peoples,[2] including the right to administer justice by recourse to proper norms and institutions, have been established by international legal instruments, especially by the International Labour Organization Convention (ILO) 169 Concerning Indigenous and Tribal Peoples (1989), a legally binding instrument that has been ratified by 14 Latin American countries thus far (Kuppe 2010; Yrigoyen Fajardo 2010). [3]

Secondly, at the same time, many countries in the region engaged in larger constitutional reforms in order to enhance their legitimacy, and they designed more inclusive political systems.[4] These reforms were influenced by global debates on multiculturalism and differentiated citizenship regimes, which revealed the blindness of liberal notions of rights (such as formal equality) towards existing asymmetries between individuals and groups (Young 1990; Kymlicka 1995). Thus, in their renewed constitutions, states recognized the culturally diverse composition of their populations and granted collective rights to indigenous peoples, of which

2 In this paper, the term "indigenous peoples" is used interchangeably with alternative denominations such as "groups" or "communities." To date, no consensus on the definition of the term "indigenous peoples" exists. The recently adopted Declaration on the Rights of Indigenous Peoples (2007) has not brought much clarity to this contested topic, leaving the decision on the identification criteria for "indigenous peoples" to the respective groups themselves (see Art. 33). Therefore, some analysts and legal practitioners still rely on (equally contested) criteria proposed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities: see UN Doc. E./CN.4/Sub.2/1986/7/Add. 4.para 379 (1986). In this study, indigenous peoples are understood as groups who claim to have a historical continuity to ancestral societies who inhabited (parts of) the current national territories prior to the arrival of colonial powers (this continuity can also be cultural in nature), and who consider themselves distinct from other sectors of the contemporary societies.

3 Bolivia ratified the convention in 1991, Ecuador in 1998; see <www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (10 March 2011).

4 Throughout the 1990s, constitutional reforms that included provisions on legal pluralism took place in the following Andean countries: Colombia 1991, Peru 1993, Bolivia 1994, Ecuador 1998 and Venezuela 1999; see Yrigoyen Fajardo 2004.

the rights to self-govern and to practice and generate proper law form an essential part. The latter challenged what had hitherto been a core concept of the state-building process: the establishment of a homogeneous, exclusive legal order claiming validity for all citizens living within the states' territory (Yashar 1999, 2005; Van Cott 2000a, 2000b; Sieder/Witchell 2001; Sieder 2002).

A third motive for the recognition of group-based rights of indigenous peoples stemmed from international agencies of development cooperation in the context of their broader programs of judicial reform in Latin America. It was held that the recognition of legal pluralism in heterogeneous societies could help to improve the legal protection of marginalized citizens and extend the rule of law, especially where judicial state institutions were ineffective or inaccessible (Domingo/Sieder 2001; Van Cott 2003, 2005a).

All these developments have of course been shaped by indigenous organizations' mobilizations around group-based rights as well as their gradually enhanced access to national and international decision-making forums (Assies/van der Haar/Hoekema 2000; Sieder 2002; Van Cott 2003).

Based on the recent development of innovative jurisprudence by the Colombian Constitutional Court on issues related to legal pluralism,[5] Donna Lee Van Cott (2005: 837) argued that effective judicial institutions could prove as vital to the quality of inter-ethnic relations as they did for the quality of democracy. But designing new or reforming existing judicial institutions in order to accommodate new realities seems far from an easy task given the manifold challenges that characterize legally distinct normative orders.

In this regard, the Bolivian and the Ecuadorian cases seem of particular interest: both countries have recently adopted new constitutions – Bolivia in 2009 and Ecuador in 2008 – that called for a redesign of their very foundations. With a nod to the concurrent adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, which established the right of indigenous peoples to self-determination (Charters/Stavenhagen 2010), the constitutional assemblies of both Bolivia and Ecuador accepted a key demand of their domestic indigenous organizations:[6] they agreed to transform their states from assimilative nation-state models into *plurinational* state models. Taking cultural diversity as its point of departure, this model envisions that all identity groups living under the umbrella of the state encounter one another as "equals" and share responsibilities of co-governance through institutions in areas that have a common interest. Accordingly, existing institutions (such as the justice systems) require a modification in order to guarantee the representation of these groups and a due consideration of their interests and world views. Simultaneously, the plurinational state is conceptualized as a polycentric entity conceding all groups a due space of autonomy within which they can freely decide the course of their development,

5 See, for instance, Sánchez Botero 1998a, 2001, 2009 and Kuppe 2010.

6 See "Propuesta de las Organizaciones Indígenas, Originarias, Campesinas y de Colonizadores hacia la Asamblea Constituyente" 2006 and Confederación de Nacionalidades Indígenas del Ecuador 2001, 2007.

based on their own values, norms, and identities. The administration of proper legal institutions would constitute an integrative part of this autonomous sphere.[7]

Bolivia and Ecuador have not only anchored legal pluralism within their new constitutions, lawmakers in both countries have ever since also been engaged in designing or adjusting secondary legislation so as to incorporate elements of indigenous legal practice into their own judicial systems and have sought means for coordination and demarcation between the distinct jurisdictions. Ultimately, this process has led to the adoption of the new Law on Delimitation between distinct jurisdictions in Bolivia, whereas a homologous Ecuadorian law still awaits its due consideration within the legislature.

This, in turn, points to the fact that these developments have taken place in very distinct political contexts: In Bolivia, citizens who self-identify as belonging to an indigenous group constitute a clear majority of the population (62 percent).[8] As a result of mass mobilizations against centuries-long marginalization of indigenous peoples and recent neoliberal politics that disproportionally hit this largely poor sector of Bolivian society, in a historic election in 2005 Evo Morales came to power as the country's first-ever president of indigenous origin. His electoral campaign had been backed by various social movements that bracketed all their divergences and united their electoral power to haul him into the presidential office. Despite strong resistance by economically dominant white and *mestizo* interest groups, Morales' policies have hitherto headed towards the "decolonization" of all aspects of the state and state–society relations. The justice system has figured prominently in this endeavor; its redesign would, in Morales' words, mark the end of a historical period in which the country primarily replicated foreign legal formats (La Jornada, 25 June 2010).

The Bolivian context stands in stark contrast to the Ecuadorian case, where the census of 2010 did not yield conclusive insights on whether the actual proportion of the indigenous population approximates official estimations (6.6 percent)[9] or alternative ones, which range

7 On the plurinational state, see Sousa Santos 2007, 2010; Larrea 2008; Aparicio Wilhelmi 2009; Walsh 2009 and Tapia Mealla 2010. The political relevance of the concept of a plurinational state reveals itself not only by its focus on social reality in its historic and present variants and, thus, its renunciation of the liberal ideal of an integrative nation-state – which has arguably not succeeded in becoming prevalent ever since these states had gained their independence from colonial rule (see, for instance Zavaleta Mercado 1990; O'Donnell 1993; Rivera Cusicanqui 1993; Tapia Mealla 2006; Programa de las Naciones Unidas para el Desarrollo 2007), its significance also becomes apparent when considering that the thorough implementation of this model would imply a considerable reconfiguration of the power relations among the social groups of these states, which helps to explain the resistance that the dominant sectors of both societies have shown against its realization; see Garcés 2010; García Linera 2010; Sousa Santos 2010.

8 The census of 2001 was surveyed only for the population above age 15 (5,064,992 million in total), see: <www.ine.gob.bo/indice/indice.aspx?d1=0303&d2=6> (10 March 2010).

9 Taken from the national census of 2001, explained in León Guzmán 2002: 3. The overall Ecuadorian population was estimated at 12,879,000 by this previous census.

between 25 and 43 percent.[10] After a period of successful mobilization by the indigenous peoples' organization CONAIE throughout the 1990s and the beginning of the 2000s, the pendulum slowly swung back through internal divisions caused by a short-termed participation of indigenous ministers in the government of former President Lucio Gutiérrez in 2003. And while there was still a clear consensus within the constitutional assembly on the incorporation of indigenous visions of "the good life" (Buen Vivir/Sumak Kawsay) into the constitutional text, the dialogue between the government of Rafael Correa and indigenous groups came to a stalemate after disagreements on key legislative projects on access to and exploitation of natural resources and the territorial order. Correa's qualification of indigenous legal practices as "barbarism" (El Vistazo, 26 May 2010) was anything but helpful in reducing the tensions.

Against this backdrop, this paper aims to compare how Bolivia and Ecuador have addressed the challenges posed by the official recognition of the coexistence of a plurality of legal orders since the adoption of their latest constitutions, and to discuss which new problems have thereby come to the fore. In particular, it examines the status indigenous law now enjoys vis-à-vis the state legal system (Section 2), the competences that indigenous legal authorities are authorized to exert (Section 3), the limits imposed on indigenous law (Section 4), the representation of indigenous normative orders within the states' justice systems (Section 5), and the mechanisms of coordination and mediation of conflicts over competences between state and indigenous authorities (Section 6). The conclusion briefly summarizes the main points of convergence and divergence in both cases (see also Table 1) and points both to important shortcomings of the new legal frameworks and to factors that will have an impact on their effectiveness in the years to come.

The comparison will show that both states have adopted similar approaches considering the definition of indigenous jurisdictions, limits to indigenous legal practice, and mechanisms to coordinate the work of legal authorities. Notable divergences can be found in the provisions on the status of indigenous law vis-à-vis state law, the opportunity of affected parties in conflict to appeal indigenous rulings, and the incorporation of indigenous legal cultures into the state's justice system. Even though many pressing issues have been left unaddressed, the new institutional frameworks still constitute remarkable progress compared to the thin legal foundations of legal pluralism in the period predating the new constitutions. In the longer term, their effects will depend on the broader political context and the willingness of justice operators and societies to alter long-established prejudices and practices.

10 Estimates by the Inter-American Indigenous Institute and the International Labour Organization; see Van Cott 2005b: 100–101.

2 No Longer in a Legal Gray Zone: Official Recognition and Status of Indigenous Law

Besides fulfilling an internationally codified collective right of indigenous peoples, perhaps the most important advantage of formally accommodating legal pluralism in states such as Bolivia and Ecuador lies in the improvement of legal certainty for legal operators and citizens alike. As long as non-state legal systems persisted within a non-recognized gray area, they were either ignored or criminalized by the Bolivian and Ecuadorian authorities. Cases already examined and sanctioned within a regular indigenous legal process could thereby easily be brought before a state court for a second examination, either because a party in conflict did not accept the indigenous authority's ruling, or because official law enforcement agencies issued the case to the state's justice authorities (García Serrano 2009: 494; Poveda Moreno 2009: 475). Thus, legal accommodation presupposes the conveying of legality to indigenous legal systems, with the assurance that indigenous authorities can perform their duties as effectively as all state justice operators.

Bolivia

As compared to the constitutional reform of 1994 in which it was only considered form of alternative dispute resolution,[11] indigenous law was assigned a clearly more meaningful status in the new Bolivian Constitution of 2009:[12] Article 1 of the constitution stipulates that Bolivia is founded upon linguistic, cultural, economic, political, and *legal* pluralism. While the judicial branch of the state maintains its unitary character, indigenous law now figures among its pillars – next to ordinary, agro-environmental and special jurisdictions. What is more, the constitution, the subsequent Law on the Judicial Branch (June 2010)[13] and the Law on Jurisdictional Delimitation (December 2010)[14] consistently state that indigenous law shall enjoy the same hierarchical status as ordinary law.[15] The entitlement to practice proper law is recognized not only as a collective right, common to all indigenous peoples, but simultaneously as a right that can be exerted within established autonomous territories of indigenous communities.[16]

These provisions can be interpreted as determined steps towards the full legal recognition of indigenous legal practice as envisioned by the respective standards set by the ILO Convention 169 and UNDRIP. In addition, the conveying of indigenous and ordinary justice with an equal status is unprecedented in the entire Latin American continent. The Bolivian government is thereby paving the way for judicial co-governance "among equals" and hence approximates the ideal of plurinationality in the judicial realm – at least at the formal level.

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11 See Art. 171 of the previous Bolivian Constitution after its reform in 1994, or Barié 2003: 139–141.

12 The Constitution of the Plurinational State of Bolivia came into force on 7 February 2009.

13 See Ley N° 025 del Órgano Judicial.

14 See Ley N° 073 de Deslinde Jurisdiccional.

15 Art. 179 I and II of the Bolivian Constitution; Art. 4 of the Bolivian Law on the Judicial Branch; Art. 3 of the Bolivian Law on Jurisdictional Delimitation.

16 Art. 30.II.14.; 190.I; 289; 304.I.8 of the Bolivian Constitution; see also Albó/Romero 2009.

Ecuador

Ecuador, as well, chose to lend more weight to legal pluralism in its new constitution of 2008.[17] The former constitution (1998) took brief notice of the existence of indigenous law in the chapter on the judicial branch and referred to it within the block of collective rights of indigenous peoples in an indirect manner.[18] In the new constitution, by contrast, the right of indigenous peoples to create, develop, and exert proper forms of justice within their legally recognized or traditionally inhabited territories has been conclusively included within the package of collective rights of indigenous peoples and in the chapter on the judiciary.[19]

The Organic Law on the Judicial Branch (October 2009)[20] confirms the legality of indigenous law. Moreover, while stating that the administration of justice by state legal institutions constitutes a service to the community that helps to fulfill constitutionally enshrined rights of Ecuadorian citizens, this law views the judicial functions performed by indigenous authorities as a distinct form of the same service.[21]

Unlike the Bolivian case, Ecuadorian indigenous legal institutions have not become part of the judicial branch of the state, but remain particular judicial spheres, meant to address internal legal issues of indigenous groups. The status of indigenous law is also not equated with the state judicial system. Nonetheless, Ecuador's new legal framework guarantees more determinately the right of indigenous peoples to foster their own forms of legal governance. Indigenous legal practice has thereby been pulled out of the illegality with which state judicial authorities have associated it thus far. The provisions express respect for the work of indigenous legal authorities and also hint at objectives common to all judicial institutions in the country.

3 Who is Responsible? Demarcating the Competences of Indigenous Legal Authorities

While facilitating distinct judicial authorities to operate within a single territory, all actors must be able to know which law applies to which situation. The Bolivian and Ecuadorian legal landscapes now involve one general, state-controlled jurisdiction, responsible for all citizens and covering a wide range of legal issues and the entire territory, which intermingles and is partly suspended by a large number of indigenous authorities at the communal level, whose jurisdiction holds sway over particular groups, specific thematic realms (arising from their proper law), and limited geographic spaces. Far from being an easy task, legal provi-

17 The Ecuadorian Constitution came into force on 20 October 2008.

18 For example, Art. 81.7. of the Constitution of 1998 entitled indigenous peoples to "preserve and develop their traditional forms of life, social organization, and generation and exercise of authority" (author's translation); see also Art. 191 of the former Ecuadorian Constitution of 1998 and Barié 2003: 292, 296.

19 Art. 57.9. and 57.10, as well as Art. 171 of the Ecuadorian Constitution of 2008.

20 See Código Orgánico de la Función Judicial.

21 Art. 7 and 17 of the Ecuadorian Organic Law on the Judicial Branch.

sions still have to address this normative diversity by clarifying as neatly as possible the competences of each jurisdiction.

Bolivia

The Bolivian Constitution, in combination with the Law on Jurisdictional Delimitation, confine the scope of applicability of indigenous law to cases where personal, territorial and material jurisdictions are simultaneously at work: as for personal jurisdiction, indigenous law shall apply to all individuals who are bound by a specific relationship to an indigenous group or who are considered members thereof. Territorially, indigenous authorities have the competence to rule on those legal conflicts that are produced within or affect the territorial jurisdiction of an indigenous community. Concerning the material jurisdiction, indigenous authorities shall rule on legal issues that they traditionally used to address.[22]

Bolivia has also established a long list of legal areas for which indigenous authorities may not undertake adjudication, including public and private international law (crimes against humanity, crimes affecting the security of the state, terrorism, trade), criminal law (corruption, the trafficking of human beings, arms, or drugs), or tariff law.[23] Indigenous authorities cannot act upon civil law issues in which the state is a party in the conflict. Nor does their competence extend to violations of the integrity of children and adolescents, cases of homicide or assassination, or issues related to labor, social security, tax, information, hydrocarbon, forest, and agrarian law.[24] In addition to these general rules, an innovative provision in the new Law on the Judicial Branch allows for the territorial extension of a jurisdiction (of a state court, for instance) in cases where all parts of a legal conflict expressively or tacitly decide to submit themselves to a judge who normally would not have the competency over one or all of the persons involved.[25]

Overall, the approach to defining the competences of indigenous legal practice by personal, territorial, and material dimensions constitutes a reasonable starting point. Most shortcomings arise from the fact that more complex case constellations and the nature of indigenous legal practices have not been duly considered. For example, if personal, material, and territorial jurisdictions need to be simultaneously at work in order for indigenous authorities to becoming cognizant of a legal conflict, an issue between members of an indigenous community occurring outside of the indigenous territory would apparently not fall within their jurisdiction. Indigenous justice systems also hold no sway over cases in which non-members commit an assault or a theft or induce other types of harm to indigenous persons within in-

22 Art. 191 of the Bolivian Constitution and Art. 8–11 of the Bolivian Law on Jurisdictional Delimitation.

23 Similar restrictions to indigenous jurisdictions were established in Art. 133.3. of the Venezuelan Organic Law on Indigenous Peoples and Communities 2005, see Ley Orgánica de Pueblos y Comunidades Indígenas.

24 The only exception with respect to agrarian issues refers to the internal management of land over which indigenous communities hold legal titles; see Art. 10.II. of the Bolivian Law on Jurisdictional Delimitation.

25 Art. 13 of the Bolivian Law on the Judicial Branch.

digenous territories – a rule that will certainly not easily be accepted by rural communities with limited presence of other state legal institutions. In the same vein, the current legislation does not speak to constellations in which members of distinct indigenous communities are involved in a conflict. One might also wonder why the material competence of indigenous authorities remains confined to legal issues that they "traditionally" used to address. Considering the highly dynamic and flexible nature of indigenous legal practices – which has facilitated their adaptation to the living conditions and evolution of indigenous communities for centuries – it seems inappropriate that indigenous authorities are now viewed as incapable of finding adequate solutions for the recent or future problems of their constituents.[26]

Ecuador

Thus far, provisions on the competences of indigenous legal authorities in Ecuador have been inscribed in the Constitution of 2008 but await their concretization in secondary laws. A governmental project for the homologous Law of Coordination and Cooperation between Indigenous and Ordinary Justice has come to a halt as a result of the abovementioned tensions between the Correa government and the indigenous movement.[27] In reaction to that, the indigenous parliamentarian Lourdes Tibán (Pachakutik Plurinational Unity Movement-New Country) designed a draft of such a law[28] and submitted it for consideration to the parliament in February 2010, where it so far has been examined by the Legislative Commission on Justice and State Structure.[29] Independent from the fact that this draft will certainly be exposed to modifications on its way through the parliament, and that its approval by the executive is all but secured in the light of the current political context, its revision seems worthwhile out of a comparative perspective.

Similar to the Bolivian case, indigenous jurisdiction is circumscribed by territorial, material, and personal dimensions. The Ecuadorian Constitution stipulates that indigenous legal practices remain confined to "legally recognized territories and communitarian lands of ancestral possession." Lourdes Tibán's draft law defines "indigenous territories" as the habitat in which indigenous peoples live and develop their cultures and their own forms of social, economic, and legal organization.[30] Both formulations are problematic: The boundaries of the "habitat" of indigenous communities in Ecuador are far from clear, particularly in the Ecuadorian highland, where most municipalities are populated by *mestizo* and indigenous citizens alike (Grijalva 2008: 61). Moreover, because of educational, occupational, or private matters,

26 A similar argument has been expressed by Xavier Albó 2010.

27 Information based on personal correspondence with the Ecuadorian legal anthropologist Fernando García.

28 See Proyecto Ley Orgánica de Coordinación y Cooperación entre la Jurisdicción Indígena y la Jurisdicción Ordinaria.

29 See Asamblea Nacional 2010; Ecuador Inmediato (1 June 2010); Comisión de Justicia y Estructura de Estado 2011.

30 Art. 57.9. of the Ecuadorian Constitution of 2008 and the 4th disposition of the Ecuadorian Draft Law on the Coordination and Cooperation between Indigenous and Ordinary Justice.

the habitat of many indigenous persons has long since extended to locations outside their communities of origin. But when searching for "legally recognized" indigenous territories, we find that so far not much progress has been achieved in the creation of specifically designed indigenous circumscriptions, even though the Constitutions of 1998 and 2008 as well as the newly enacted Law on Territorial Organization explicitly call for the establishment of such new entities.[31] Therefore, many rural indigenous communities in the highland are still organized and formally registered as "communes," according to a law dating back to 1937 (Ley de Comunas), or as "associations." The existence of "ancestral lands" of the proportionally smaller indigenous population in the Ecuadorian lowland, in turn, has been seriously put at risk by resource extraction activities conducted by domestic and transnational corporations.[32]

With regard to the material dimension, the Constitution stipulates that legal self-governance of indigenous communities shall refer to "internal conflicts" that take place within the territorial jurisdictions of indigenous groups and are not otherwise defined. The draft law clarifies that the term "internal conflicts" relates to any action or omission that destabilizes the harmony, or any act considered not permissible by a given collective. It adds that this competence should be limited neither to specific kinds of offenses nor to the amplitude or severity of a crime.[33] As in the Bolivian case, we can expect this provision to have exceptions (e.g. crimes against humanity), which, from the perspective of international and state law, would typically fall within the states' areas of responsibility.

As for the personal jurisdiction, indigenous authorities shall hold sway on members of indigenous groups when those conflicts occur within indigenous territories.[34] Accordingly, the draft law specifies state courts shall be responsible for resolving conflicts between indigenous and non-indigenous individuals that occur outside of an indigenous territory. In these cases, the courts shall respect the principle of due process, provide the indigenous persons involved in the conflict with a translator, and base their decisions on an intercultural interpretation of the conflict at hand, for which experts in indigenous law are to be consulted. At the same time, those indigenous parties to conflicts who are affiliated with indigenous collectives that dispose of their own organization can ask to be judged for their offenses by their own indigenous authorities. In the same vein, their proper authorities can equally claim their competence to resolve the case. Unfortunately, no mechanism that would determine the concrete proceedings in such situations is indicated here.[35]

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31 See Art. 224 of the Ecuadorian Constitution of 1998 and Art. 60 of the Ecuadorian Constitution of 2008 and the Código Orgánico de Organización Territorial, Autonomía y Decentralización.

32 See Zamosc 1995 and Yashar 2005.

33 Art. 171 of the Ecuadorian Constitution of 2008; Art. 10 and the 1st disposition of the Ecuadorian Draft Law on the Coordination and Cooperation between Indigenous and Ordinary Justice.

34 Art. 171 of the Ecuadorian Constitution of 2008.

35 Art. 18 and 19 of the Ecuadorian Draft Law on the Coordination and Cooperation between Indigenous and Ordinary Justice.

Interestingly enough, the draft law provides for situations in which individuals deny their membership to an indigenous group. The competence to decide on conflicts between such persons and indigenous collectives is conferred to the Ecuadorian Constitutional Court. Indigenous authorities may put those persons on trial who unlawfully usurp their functions – a provision that may be interpreted as a preventive measure to reduce the cases in which people abuse the "shield" of indigenous justice to arbitrarily exert justice by their own hands. Furthermore, indigenous authorities' jurisdiction can be extended to conflicts among non-indigenous *campesinos* (peasant farmers or workers), provided the involved agree to submit themselves to this legal system. Conflicts emerging among distinct indigenous groups, in turn, shall be resolved by the respective superior organizations of these communities.[36]

What is more, the draft law declares indigenous authorities responsible for cases in which non-indigenous individuals violate the rights of indigenous persons within indigenous territories. In cases of non-compliance with the indigenous authority's resolutions, non-indigenous individuals residing in the indigenous territory can be expelled from the community, while all their immobile goods or properties shall be passed to the community in exchange for a monetary compensation. Non-residents can be sanctioned by a material compensation of the harm caused to the community.[37] This provision points to a critical legal field which unquestionably requires regulation. It emphasizes the fact that the lives and activities of indigenous and non-indigenous persons in most parts of the country are highly interdependent, and that some activities conducted on indigenous territories (such as oil exploration by transnational companies) seriously compromise the development of indigenous communities. But it ignores the enormous power asymmetry that may exist, for instance, between a foreign national company owner and an indigenous legal authority. Issues of this type would require a case-sensitive approach, measuring the degree of harm caused by non-indigenous actors. For cases with a considerable power asymmetry, it might be advisable to utilize effective state agencies to mediate between the conflict parties and to secure the protection of the rights of the less powerful communities. However, issues involving natural resource extraction might be better accommodated through the consultation processes with the affected population – in fact, both strategies on their own constitute collective rights of indigenous peoples.[38] Thus, we can expect a high degree of reluctance and criticism against this provision as it passes through the legislative decision-making process.

36 Art. 13–16 of the Ecuadorian Draft Law on the Coordination and Cooperation between Indigenous and Ordinary Justice.

37 Art. 17 of the Ecuadorian Draft Law on the Coordination and Cooperation between Indigenous and Ordinary Justice.

38 Art. 6, 7, 14–18 ILO Convention No. 169.

4 Limits of Legal Autonomy: Subjecting Indigenous Law to Constitutional Review

Another challenge emerges out of the fact that norms, procedures, and sanctions applied by indigenous legal authorities may considerably diverge from those applied by the state's justice institutions. It is important to note that indigenous legal practices vary from location to location. Sometimes, norms deal with aspects of behavior not considered unlawful by state law. Procedures tend to adjust to the specific case and give much weight to the parties in conflict, while sanctions tend not to focus as much on identifying the guilty but rather seek to restore social relations (Kuppe 2009). The interests and well-being of the collective are usually prioritized, and distinct sub-groups (such as children or women) often receive a differentiated treatment in indigenous law – both practices possibly generating practices that may stand in stark contrast to internationally and nationally codified individual rights.[39] This requires that states strike a sensitive balance between the fulfillment of an important collective right of indigenous people and the protection of basic human rights to which all citizens are entitled. The placing of legal limits on indigenous legal practice and the right to review a court's ruling before a second forum constitute some of the plausible means to tackle such issues.

Bolivia

While the exercise of indigenous law was formerly limited by the Constitution and Bolivian laws,[40] the new legal framework expects indigenous authorities to respect and even to promote and guarantee the right to life, the right to legal representation, along with all other rights and guarantees established in the new constitution.[41] Just like all other justice operators, indigenous legal authorities cannot justify the violation of human rights because of the absence, obscurity, or insufficiency of existing laws, or by ignorance of those rights.[42] The death penalty is generally prohibited and violations thereof shall be processed by ordinary penal courts. The Law on Jurisdictional Delimitation calls the attention of indigenous authorities to the idea that violence against children, adolescents and women cannot be tolerated and that rulings urging conciliation between the perpetrator and the victim are not appropriate means to deal with such cases. Neither elderly nor handicapped persons can be sanctioned by indigenous authorities with the privation of their lands or the expulsion from their communities when accused of non-compliance with communal duties.[43]

The fact that these provisions expect from indigenous authorities the fulfillment of normative standards that ordinary state institutions themselves have so far not accomplished in a satisfactory manner notwithstanding, they also demand substantial adaptations on the part

39 See, Red Participación y Justicia et al. 2008; Ávila Santamaría 2009; Salgado Álvarez 2009.

40 See Art. 171 of the previous Bolivian Constitution after its reform in 1994, or Barié 2003: 139–141.

41 Art. 190.II. and 410 of the Bolivian Constitution and Art. 5.I. of the Bolivian Law on Jurisdictional Delimitation.

42 Art. 15.III. of the Bolivian Law on the Judicial Branch.

43 Art. 4, 5, and 6 of the Bolivian Law on Jurisdictional Delimitation.

of indigenous authorities, whose practices are not always easily to reconcile with fundamental constitutional rights. While some indigenous authorities have cautiously started to engage in reflections upon the normative foundations of their practices, many others still perceive such clauses as unacceptable interventions into their internal affairs (Ströbele-Gregor 2007, 2010; Lang/Kucia 2009). Therefore, the holding of dialogue forums on the application of human rights among representatives from different judicial systems, as proposed by the Law on Jurisdictional Delimitation,[44] might encounter resistance and will certainly not suffice to obtain the desired outcomes. For those authorities willing to critically reconsider their legal practices, comprehensive human rights trainings that would take the local realities of indigenous communities into account might have constituted more adequate means to support these actors with more clarity and concrete guidelines on this issue.

Even though a former draft included the right to appeal the rulings of indigenous authorities,[45] Bolivian lawmakers ultimately decided not to incorporate such a mechanism into the new Law on Jurisdictional Delimitation. Instead, they equipped the (future) Plurinational Constitutional Tribunal[46] with a special chamber that gives guidance to indigenous legal authorities as to their inquiries on the compatibility of their own norms with constitutional guarantees in concrete cases. Inquiries can be submitted in oral or written form. Decisions on their admissions are to be released within 72 hours, and the final response is supposed to follow within a time frame of 30 days in both Spanish and the native language of the respective indigenous group. If the court arrives at the conclusion that an indigenous norm is incompatible with constitutional provisions, it shall propose an alternative, culturally sensitive solution for the conflict at hand. This solution is mandatory for the indigenous authorities.[47] In light of the fact that no such scope for agency was given to the previous Constitutional Court in Bolivia, these recent provisions undoubtedly move in a positive direction by establishing an indirect mechanism of constitutional control over indigenous legal practice that still leaves the initiative to apply it in the hands of indigenous authorities.

With regard to individual claims towards indigenous authorities' rulings, legal provisions are not as straightforward. In general terms, all citizens are entitled to make use of a series of "defense actions" (writs of protection), which can be invoked to demand the fulfillment of constitutionally guaranteed rights. Subnational courts serve as a first stop in this respect, while the Constitutional Tribunal acts only in cases of revision.[48] The "action of liberty" (*habeas corpus*), for instance, can be invoked by citizens whose lives are at risk, who are unlawfully tried or deprived of their liberty. The "action of constitutional protection," in

44 Art. 14b of the Bolivian Law on Jurisdictional Delimitation.

45 See Article 21.II. in Anteproyecto de Ley de Deslinde Jurisdiccional – Texto oficial sujeto a consulta, 20 June 2010.

46 See Ley N° 027 del Tribunal Constitutional Plurinacional.

47 Art. 12, 32, 137–140 of the Bolivian Law on the Plurinational Constitutional Tribunal.

48 Art. 125–136 of the Bolivian Constitution of 2009 and Art. 56–64 of the Bolivian Law on the Plurinational Constitutional Tribunal.

turn, can be submitted in cases in which an individual, a collective, or a public functionary restricts or threatens to restrict constitutional rights.[49] While these writs potentially address actions and omissions of an indefinite range of actors, we could think of situations in which they might prove applicable for practices or omissions of indigenous authorities.[50] It remains to be seen whether Bolivians, including indigenous persons, gain knowledge about these possibilities and take advantage of them.

Ecuador

The Ecuadorian Constitution of 2008 establishes that indigenous legal practices should be contrary neither to the constitution nor to internationally codified human rights (particularly the rights of women and minors), whereas the former constitution (1998) also included the state laws and the public order in its respective clause.[51] In contrast to their Bolivian counterparts, indigenous authorities in Ecuador are not obliged to promote and guarantee international and fundamental constitutional norms, but they are supposed to respect them.

Similar to the Bolivian case, the Constitution and the Law on Jurisdictional Guarantees and Constitutional Control (October 2009)[52] provide citizens with a series of constitutional guarantees that support them in the effective implementation of their constitutionally enshrined rights. One of them – the "extraordinary action of protection" – is concerned with the constitutionality and due process of court rulings.[53] In principle, this guarantee would enable citizens to appeal state courts' decisions, but legislators developed their own version for decisions emanating from indigenous legal authorities.

According to this provision, individuals or groups judged by indigenous authorities can appeal against these rulings when they believe that their constitutional rights have been violated. Within an (arguably short) time frame of 20 days after the authority's ruling, the affected have to submit their claim to the Ecuadorian Constitutional Court in oral or written form.[54] Decisions on admissibility and about hearing dates must be expeditious; proceedings

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49 The other guarantees are the "action of compliance," which can be invoked to oblige public authorities to fulfill constitutional or other codified legal provisions; the "action of privacy" (*habeas data*); and the "popular action," by which collectives can defend their rights when faced with impending damage or impairment of public goods such as patrimony, health, security, or environment; see Art. 125–136 of the Bolivian Constitution of 2009 and Art. 65–100 of the Bolivian Law on the Plurinational Constitutional Tribunal.

50 Most of the writs can be submitted by affected individuals or collectives, persons acting on their behalf, or ombudspersons; the responsible courts are required by the law to proceed in an expeditious manner, see Art. 56, 59, 61, 67, 75, 83, 90, 97 of the Bolivian Law on the Plurinational Constitutional Tribunal.

51 Art. 57.10 and 171 of the Ecuadorian Constitution of 2008; Art. 84 and Art. 171 of the former Constitution of 1998; Barié 2003: 292, 296.

52 See Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional.

53 See Art. 88–92 of the Ecuadorian Constitution of 2008 and Art. 39–64 of the Ecuadorian Organic Law on Jurisdictional Guarantees and Constitutional Control.

54 The Constitutional Court is based in the Ecuadorian capital, Quito. A journey from a remote community in the Amazon lowland to the capital requires the availability of time and financial resources. Some additional time

are oral and, if necessary, persons involved will be provided with translators of the relevant indigenous language. The proceedings prescribe constitutional judges to ground their deliberations on internationally and nationally codified human rights, including the rights of indigenous peoples, and on other national laws. "Ethnocentric and monocultural" (Art. 66.1.) interpretations shall be avoided by developing an intercultural understanding of the presented conflicts, for which experts in the legal practices of the respective community can be consulted. In their resolutions, judges can explicitly "harmonize" (Art. 66.12.) constitutional norms with indigenous norms. As a means of counterbalancing the competences of the Court with those of indigenous legal authorities, judges are also obligated to secure a maximum degree of autonomy for the latter with respect to the exercise of their juridical functions.[55]

This legislation goes a step further than the Bolivian one, since the constitutional control of indigenous legal practice is more immediate, enabling persons affected by indigenous rulings to directly appeal them. Therefore, this provision constitutes a powerful instrument for indigenous individuals and groups who are of the opinion that their basic rights were neglected by their own authorities. At the same time, the "appellation body" here is not under the control of indigenous authorities, but is in fact operated by a state institution, which raises the need of a culturally sensitive jurisprudence of the Constitutional Court.

5 Incorporating Legal Diversity into the State's Justice System: New Magistrates and Intercultural Jurisprudence

The acknowledgement of the plurinational character of the Bolivian and Ecuadorian states has involved reflections on how the worldviews and values of indigenous peoples could possibly be incorporated into the existing institutional frameworks, of which the justice system forms a part. Besides the issue of representation, such reflections are also necessary if we recall that indigenous and non-indigenous legal subjects in both countries are mobile, crossing legal jurisdictions and relating to members of other identity groups on regular terms. For situations in which indigenous persons were involved in legal procedures falling within the domain of state institutions, ILO Convention 169 obliges states to take the normative background of the involved into account.[56] In addition to supplying state-controlled legal procedures with translators and experts in the respective legal culture, states could consider more general reforms of their legal institutions in order to open their doors for indigenous staff and offer specific training to the existing personnel.

for the preparation of such a claim, ideally with assistance of a legal counsellor, should also be included in this calculation.

55 Art. 65 and 66 of the Ecuadorian Organic Law on Jurisdictional Guarantees and Constitutional Control.

56 Art. 8 ILO Convention N. 169.

Bolivia

The Bolivian debate on the representation of indigenous normative orders has thus far centered on the reform of the Constitutional Court. As an essential element of the renewal of the judiciary, the Bolivian Constitution prescribes the creation of a Plurinational Constitutional Tribunal, which shall determine the constitutionality of rulings and guarantee the fulfillment of constitutionally established rights.[57] The Law on the Plurinational Constitutional Tribunal (July 2010) converts this institution into a new space for legal co-governance by determining that at least two of the total seven constitutional judges shall stem from the indigenous judicial system. In an unprecedented innovation in the entire region, the judges of this and all other highest authorities of the judiciary will be elected by universal suffrage.[58] While marking a straightforward end to the traditional method of judicial appointing based on political partisanship or the affiliation with elite families in Bolivia, doubts remain about whether universally elected judges may indeed be able to preserve their independence. The selection of a candidate based on his or her merits presupposes a well-informed citizenry. And even though neither the candidates themselves nor third parties are allowed to conduct electoral campaigns, it also remains to be seen whether the media will voluntarily abstain from influencing public opinion throughout the electoral process (Chivi Vargas 2010: 416–17; Rodríguez Veltzé 2010: 431).

Candidates for the position of constitutional judge have to fulfill the general requirements for the public administrative service – including the mastering of a second official language of the state – hold the title of lawyer, and have a specialization in the field of constitutional law, administrative law, or human rights. Having exercised the function of a legal authority in an indigenous community is treated only as an asset to be considered among a candidate's merits, whereas the requisite of a second official language is to be applied in a gradual rather than immediate manner.[59] As seen from the perspective of the mostly less professionally qualified members of indigenous groups, these requisites seem very demanding. Not only does this law foreclose any form of participation of legal indigenous authorities who do not comply with the requisite of having an official legal career (Yrigoyen Fajardo 2010: 35), but we can also anticipate that, for years to come, not many candidates from among the indigenous population will be eligible for the positions reserved for them.

57 Art. 179, 196–204 of the Bolivian Constitution of 2009.

58 The elections are scheduled to take place in October 2011 (BolPress 13 May 2011). The electoral proceedings foresee that candidates either postulate on their own initiative or are nominated by civil society organizations. The legislature selects 28 pre-candidates from among all proposals by the vote of at least two-thirds of its present members before remitting the applications to the Plurinational Electoral Organ, which in turn organizes the electoral process and makes information on the merits of the candidates available. The period for the office of the constitutional judges has been reduced from ten to six years, without the possibility of immediate re-election, see Art. 13–22 of the Law on the Plurinational Constitutional Tribunal.

59 Art. 17 of the Law on the Plurinational Constitutional Tribunal and Transitory Disposition No. 10 of the Bolivian Constitution of 2009.

These difficulties notwithstanding, the opening of the new Bolivian Constitutional Tribunal for the representation of indigenous judges and the creation of a specialized chamber for inquiries stemming from indigenous authorities (see above) present respectable steps towards a responsible engagement of the Bolivian justice system with the normative diversity present in the country. What is striking, though, is that the Bolivian legislation has thus far not reflected upon the question of how the rights of indigenous persons could be effectively protected in lawsuits held before institutions of the ordinary justice system in more general terms. As discussed in the section on indigenous jurisdiction, it is the ordinary judicial system (and not indigenous authorities) that will be competent, for instance, to rule on violations of the integrity of minors, labor issues, and conflicts between indigenous and non-indigenous persons occurring outside indigenous territories. In this sense, Bolivian lawmakers missed the opportunity to convert legal pluralism and intercultural jurisprudence – mentioned solely as general principles in the introductory section of the Law on the Judicial Branch – into integral parts of all judicial processes in which members of indigenous communities are involved. An interesting strategy in this regard is the engagement of legal anthropologists and their assessments of legal conflicts within judicial processes; this support has proved a valuable source for judges meting out justice in Colombia (Sánchez Botero 1998b). If universities had been asked to adjust their current law programs to the cultural and legal diversity present in the country, and if practicing jurists had been offered professional trainings on relevant topics, the ongoing transformation of the judicial system could have been more sustainable.

Ecuador

The Ecuadorian Constitution likewise calls for a reform of the former Constitutional Tribunal.[60] The members of the previous court will continue in office until they are replaced by a new constitutional body,[61] and according to the recent Law on Jurisdictional Guarantees and Constitutional Control, the new court will basically maintain its former structure and will not provide for specifically reserved seats for indigenous legal authorities.[62]

Expressing dissatisfaction with this regulation, the parliamentarian Lourdes Tibán proposes in her draft Law of Coordination and Cooperation between Indigenous and Ordinary Justice the creation of a specialized chamber within this institution which would hold the exclusive competence for conflicts in which indigenous individuals were involved. The chamber is thought to be comprised of representatives from the indigenous and state judicial

60 Art. 429–440 of the Ecuadorian Constitution of 2008.

61 See Resolución Corte Constitucional del Ecuador, Oficio N°002-CC-SG.

62 Candidates for the position of judge of the Constitutional Court are required to be jurists and to have practiced a legal office for a minimum of ten years. Every three years, a third of the total nine constitutional judges will be selected in a procedure that includes the personal application of interested candidates, a phase of pre-selection, and the examination of candidates' qualifications by a committee appointed by the executive, legislative, and the newly created branch of transparency and social control. The entire selection process is planned to be open to the public, and citizens will be able to appeal the qualification of preselected candidates. The judges will be invested with this office for a period of nine years without the option for immediate re-selection; see Art. 171–172 and 177–183 of the Ecuadorian Law on Jurisdictional Guarantees and Constitutional Control.

systems, as well as experts on indigenous law. Without providing the corresponding procedural steps, the draft foresees that representatives from all indigenous groups of Ecuador should participate in the selection of the indigenous members of this chamber.[63]

While indigenous authorities are not directly participating in legal processes led by the state's justice institutions, the Law on the Judicial Branch has established a set of "principles of intercultural justice" for cases involving members of indigenous groups. These principles oblige judicial staff to respect the legal diversity present in this country and to guarantee equality among the parties to the conflict, which may involve the engagement of translators and experts in indigenous law. The state's legal personnel shall obey the principle of *non bis in idem*, reinforcing thereby the constitutional rule according to which cases submitted before indigenous authorities cannot be examined a second time by state courts (the exception being the constitutional control exerted by the Constitutional Court; see above). Another principle, *pro jurisdicción indígena*, shifts priority to indigenous jurisdiction in cases of doubt of whether the state or indigenous legal competence prevails. Finally, judges are expected to resolve cases by means of intercultural interpretation, which requires a comprehension of the normative contexts out of which an individual or group is acting, and the consideration of the rights guaranteed in the Constitution and international treaties.[64]

With its first key decisions based on this law, the Provisional Constitutional Court has proved its willingness to advance an intercultural form of justice that stands in line with the groundbreaking jurisprudence that has been developed by the Colombian Constitutional Court over the past two decades (Sousa Santos 2010: 85–86; Sánchez Botero/Jaramillo 2009). An illustrative case constitutes the "action of non-compliance" submitted to the Court in 2009 by representatives of the indigenous Amawtay Wasi University against a decision by the National Council for Superior Education of Ecuador (CONESUP).[65] The latter refused a request of this (recently inaugurated) university to offer decentralized academic programs for indigenous students in three remote regions of the country. CONESUP justified its decision by arguing that the actual seat of the university was in Quito and that, just like any other educative center, it would first need to establish its work in this city for a period of at least five years before extending its academic program to other regions. Grounding its ruling on international and national norms, the Court found that CONESUP had mistakenly treated the indigenous university as a conventional educative institution, thereby applying criteria that would go against basic indigenous concepts of knowledge transmission. Indigenous forms of education usually do not follow a unidirectional transmission of information, and even less so through distant educative centers. Transmission takes place within the communities and in mutual exchange of knowledge among all participants. Therefore, the judges agreed with the indigenous claimants that CONESUP's decision had violated their right to maintain their own educative systems based on their own values, forms, and methods.

63 Art. 28 of the Ecuadorian Draft Law on the Coordination and Cooperation between Indigenous and Ordinary Justice.

64 Art. 344 of the Ecuadorian Law on the Judicial Branch.

65 See "Sentencia N°0008-09-SAN-CC."

6 Avoiding Double Efforts and Conflicts by Coordinating Legal Institutions' Work

Unlawful activities may take place almost anywhere, and since legal subjects can freely move throughout the territory and jurisdictions partially overlap, the distinct legal institutions in Bolivia and Ecuador will need to find viable ways to coordinate their work. Respective legal provisions must not only bear in mind that the functioning of state and indigenous legal authorities underlie fairly distinct logics, but also that these institutions have very different financial, technical, and human resources at their disposal. The parallel working upon specific cases must be avoided, for which more transparency seems indispensable. In certain circumstances, the investigation of a legal case by one legal authority will require the support of other authorities. For this purpose, specific channels and rules of communication would need to be devised. Decisions emanating from one jurisdiction must be respected by all other justice operators, and where conflicts of competences arise, adequate mechanisms for their solutions have to be found.

Bolivia

Bolivia's legislation emphasizes the necessity of cooperation, based on mutual respect, between all judicial systems present in the country. It follows that legal institutions shall neither obstruct the work nor usurp the competences of one another.[66] Decisions emanating from indigenous authorities have to be abided by all public authorities; they cannot be reversed by the ordinary legal system.[67] A transparent information system on criminal acts and personal records shall be made accessible for all indigenous and state-controlled justice operators. Upon request, judicial and law enforcement authorities, including the Public Prosecution Department, the Bolivian Police, and the prison system, shall provide indigenous legal authorities with information required for resolving pending cases. Conversely, indigenous authorities are expected to support the state's judicial institutions in order to facilitate them with the means to comply with their legal functions. Cooperation in all its forms shall be guided by such principles as equity, transparency, solidarity, and celerity and can proceed by recourse to oral or written forms of communication. Non-cooperation can be sanctioned as a severe disciplinary omission before the ordinary justice system. Indigenous authorities can process such negligence according to their proper norms and procedures, as well. Conflicts that may arise between indigenous, ordinary, and agro-environmental jurisdictions shall be resolved by the future Plurinational Constitutional Tribunal.[68]

In order to obtain more orientation for their work, the planned information platform on criminal records could have been complemented by an easy access for indigenous authorities to those (future) resolutions of the Constitutional Court that deal with the constitutionality of

66 Art. 6 of the Bolivian Law on the Judicial Branch.

67 Art. 192.I. of the Bolivian Constitution of 2009 and Art. 12 of the Bolivian Law on Jurisdictional Delimitation.

68 Art. 13–17 of the Bolivian Law on Jurisdictional Delimitation and Art. 12.11, 28.I.10, 124–126 of the Bolivian Law on the Plurinational Constitutional Tribunal.

legal practices of indigenous peoples. Furthermore, any form of cooperation between distinct authorities requires the availability of human, financial, and technical resources (Aragon Burgos 2009: 247–249), an issue which has not been taken into account in recent legislation.

Ecuador

Ecuador's new constitution compels state authorities to respect cases resolved by indigenous authorities; just like in Bolivia, persons who were put on trial by the latter cannot be judged for the same offense by state courts again.[69] In addition, the Law on the Judicial Branch strengthens indigenous authorities by vesting them with the right to undo the admittance of a suit before a state court by providing evidence of their own acting upon the same case. It stipulates that the Ecuadorian Judiciary Council (Consejo de Judicatura), a supervisory body for all state courts, shall provide resources to facilitate the coordination among indigenous and state jurisdictions. Issues such as cultural diversity shall be included in the curricula of law schools, and law enforcement personnel working in regions with a substantial indigenous population shall receive specific professional training on indigenous legal norms and practice.[70]

Lourdes Tibán's draft Law of Coordination and Cooperation between Indigenous and Ordinary Justice expects state institutions to abstain from investigations in cases that fall within an indigenous jurisdiction and to remit all respective information to the competent indigenous authority. Indigenous authorities could solicit the support of judicial and law enforcement agencies of the state in order to comply with their judicial functions, while state authorities could count on the same cooperation from their indigenous counterparts. Cooperation should be immediate and expedient, and non-cooperation is a prosecutable offense, according the country's penal code. In order to provide evidence for an indigenous authority's acting upon and resolution of a case, the draft proposes that all indigenous authorities should administer protocols on their legal proceedings.[71] These protocols shall also facilitate the passing of information from indigenous authorities to the state's institutions in specific cases (for example, to confirm the recognition of an extramarital child or the outcome of a land property dispute). Furthermore, the draft prescribes an amplification of the curricula of law schools and professional trainings with thematic sections on legal anthropology, cultural and legal pluralism, and intercultural communication. Conflicts between indigenous and the ordinary legal system shall be remitted to the Constitutional Court.[72]

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69 Art. 76.7.i; 171 of the Ecuadorian Constitution of 2008.

70 Art. 69, 345, 346 of the Ecuadorian Law on the Judicial Branch.

71 Some indigenous communities have maintained the oral nature of their legal proceedings; others have mimicked the practice of state justice to write files on their rulings. After the first mention of indigenous law in the Ecuadorian Constitution of 1998, the practice of writing files obtained more weight and was professionalized, especially in the Ecuadorian highland; see: Brandt/Franco Valdivia 2006, 2007; Hueber 2009.

72 Art. 12, 20–24, 26, 32 of the Ecuadorian Draft Law on the Coordination and Cooperation between Indigenous and Ordinary Justice.

Precisely because of the pertinence of the issues addressed in this draft law – demarcation of jurisdictions, remittance of cases, mutual supply with information, and specification of the Constitutional Court's competences and duties – and considering that many interesting ideas in this respect have been already elaborated by qualified experts in this country (e.g. Salgado 2002), it seems particularly unfortunate that no clear political will on the part of the Ecuadorian government to pass such a law has been evident thus far.

Table 1: Recent Legal Initiatives to Accommodate Legal Pluralism in Bolivia and Ecuador

	Bolivia	Ecuador
Legal recognition and status of indigenous law	Judicial branch of the state remains unitary and incorporates indigenous law as one of its pillars State law and indigenous law range at the same hierarchical level Indigenous peoples have the right to practice proper law as collectives and within autonomous territories	Indigenous law is officially recognized and its legality is affirmed Indigenous legal systems remain particular institutions, separate and not equated with the state justice system Indigenous peoples have the right to create, develop, and exert proper law within their legally recognized or traditionally inhabited territories
Scope of indigenous jurisdictions	Indigenous legal authorities have the competence to rule on a case when personal, material and territorial jurisdictions are simultaneously at work Indigenous jurisdictions are not competent in legal issues pertaining to international public and private law, criminal law, tariff law, cases in which the state is a party in conflict, violations of minors, homicide, assassination, and other issues A jurisdiction can be extended when all parties in the conflict tacitly or expressly agree to this proceeding	The Ecuadorian Constitution organizes indigenous legal authorities' competences around personal, material and territorial jurisdictions (A draft law foresees that personal competence may be extended to non-indigenous persons such as *campesinos*, persons who unlawfully usurp the judicial functions of indigenous authorities, and non-members who cause harm to an indigenous community)
Limits and constitutional control of indigenous legal practice	Indigenous authorities have to respect, promote, and guarantee the right to life, the right to defense, and the rights and guarantees established in the constitution Indigenous legal processes have to provide minors, women, elderly and handicapped persons with special protection The death penalty is prohibited Dialogue forums on the application of human rights Indigenous legal authorities can consult the Plurinational Constitutional Tribunal on the compatibility of their norms with constitutional guarantees in concrete cases	Indigenous legal practices should be contrary neither to the constitution nor to internationally codified human rights Citizens can appeal decisions emanating from indigenous legal authorities before the Ecuadorian Constitutional Court
Representation of indigenous legal cultures in state institutions	At least two out of seven members of the new Plurinational Constitutional Tribunal shall stem from the indigenous judicial system; the magistrates will be elected by universal suffrage	In lawsuits involving members of indigenous collectives state authorities are bound to principles of intercultural justice: diversity, equality, *non bis in idem*, *pro jurisdicción indígena*, intercultural interpretation
Coordination among distinct jurisdictions	Legal institutions shall neither obstruct the work nor usurp the competences of one another All public authorities must abide by decisions made by indigenous authorities; they cannot be reversed by the ordinary legal system Shared information system on criminal acts and personal records Mutual support and provision with information in specific cases Conflicts between distinct jurisdictions shall be resolved by the Plurinational Constitutional Tribunal	Cases processed by indigenous authorities cannot be submitted before state courts for a second time Indigenous authorities can undo the admittance of a suit before a state court by providing evidence of its own acting upon the same case The Judiciary Council Resources shall provide resources for coordination efforts Cultural diversity is included in the curricula of law schools Law enforcement personnel shall receive professional training on indigenous legal norms and practice

Source: Author.

7 Conclusion

In light of the thin legal framework to accommodate legal pluralism in Bolivia and Ecuador before the adoption of the new constitutions, the provisions that have been elaborated in the past few years constitute a remarkable progress. This time, political actors in both countries moved beyond paying lip service to the constitution and proceeded to engage with key elements of secondary legislation in order to elaborate more concrete guidelines for a model of justice that takes diversity as its point of departure. These efforts can be qualified as innovative and experimental at the same time. Initial experiences with the reforms and insights gained over the course of time will certainly lead to adaptations and refinements in the future.

Both countries seem to agree on the general directions of their approaches. At the same time, the concrete steps to address specific issues may diverge considerably. For instance, while the collective right of indigenous peoples to practice proper law is fully recognized in Bolivia and Ecuador alike, indigenous law still enjoys a quite distinct, formal status in each case: Bolivia has established a hierarchical equality between the ordinary and indigenous judicial systems; the latter have been incorporated into the overall structure of the state's justice system. Ecuador, in contrast, conceives of indigenous legal practices as particular institutions that are by no means equated with the state justice system.

Furthermore, both states tend to define the competences of indigenous legal authorities by personal, material and territorial jurisdictions. Provided with more political backing of the executive, Bolivia has already concretized initial perimeters of these jurisdictions in a Delimitation Law, while the elaboration of a homologous Ecuadorian law has been obstructed by serious political tensions between the government and the indigenous movement.

In both countries, indigenous legal practices must respect basic constitutional rights, but the ensuing constitutional control of these practices is more immediate in the Ecuadorian case: Bolivia leaves it to the discretion of indigenous authorities to request the Plurinational Constitutional Tribunal to assess the compatibility of their norms with the constitution, whereas the Ecuadorian Constitutional Court can even explicitly review indigenous authorities' decisions in cases in which they are accused of having disregarded constitutionally enshrined rights.

To secure the representation of indigenous legal cultures within the judicial system, Bolivia's Constitutional Court will open its doors for magistrates who have had experience with indigenous legal practice, a step that Ecuadorian lawmakers have not been willing to consider thus far. Meanwhile, Ecuadorian state courts dealing with cases involving indigenous persons are obliged to take newly established principles of intercultural justice into account and are encouraged to seek the advice of experts in indigenous law; Bolivia has not developed such an instructive legislation on intercultural justice yet.

State and indigenous legal institutions in both countries shall now mutually respect each other's responsibilities and decisions. Channels for coordination among these authorities such as a shared information system on criminal records or the exchange of information in

pending cases have been established. Additionally, cultural diversity and legal pluralism will become integral parts in the education and training of law enforcement personnel in Ecuador.

This progress notwithstanding, many related issues have been left unaddressed. The effective coordination among jurisdictions, for instance, calls for a much more determined assignation of a budget, technical resources and personnel than political actors have been willing to provide thus far. The coordination efforts would additionally require the designation of an institution that would not only supervise these efforts, but also be capable of mediating between the different world views and interests involved in order to craft flexible solutions that can meet the needs of and adapt to local realities. Importantly, legal institutions have to be brought closer to the citizens, particularly to the rural parts of the countries. Otherwise, many of the newly incorporated legal instruments (such as the exchange of information on specific cases) or the submitting of writs of constitutional protections will remain interesting but unrealizable ideas.

While holding indigenous authorities accountable for complying with human rights, the provisions offer few ideas on how these authorities could be familiarized with the contents of these rights, and how they could actually apply them to the cases they deal with in their own communities. Given the complex inter-legal relationships and patterns of mobility and co-habitation of individuals and groups in both countries, the attempts to define personal, material, and territorial competences of indigenous legal authorities will certainly not suffice to reduce the number of constellations in which legal ambiguity prevails; the Constitutional Tribunals will play a crucial role in this context (Sousa Santos 2010: 90). Lawmakers should also design affirmative policies towards young indigenous women and men interested in studying a legal career in order to guarantee a more balanced composition of courts and an intercultural interpretation of legal cases in the longer term.

Ultimately, the latest reforms on legal pluralism ignore the prejudices and at times overtly racist attitudes on the part of the non-indigenous populations towards indigenous peoples' practices, and the mistrust, nurtured by many experiences of discrimination and mistreatment, that members of indigenous peoples have towards non-indigenous authorities (Cóndor Chuquiruna 2009: 235; Molina Rivero 2009: 58). It is here where the underlying structural obstacles for more balanced inter-ethnic relations are rooted; respective measures would have to involve the media and broader society alike.

We should keep in mind that the examined legislation is recent and that some of the newly designed institutions such as the Bolivian Plurinational Constitutional Tribunal have not even been installed as of this writing. More generally, both states have been characterized by political crises and institutional instability for decades. This context has impeded the sustained and coherent work on public policies and the binding of qualified human capital and expertise in critical policy fields. Previous constitutional reforms were often accompanied by little effectiveness in their implementation (Grijalva 2008; Yrigoyen Fajardo 2010: 40–43). If such factors combine with the lacking political will of the government (as can presently be

seen in Ecuador) and the unwillingness of judicial operators to change established habits, the advances in the field of legal pluralism will primarily remain confined to the formal-legal level.

Independent of the concrete form of its accommodation, the interplay of legally plural orders will generate conflictive situations and confront actors with challenges on a daily basis. Thus, as of this moment, the effectiveness of the current efforts in this field will depend on the following: informed citizens and their willingness to actively invoke their constitutional rights; the creativity of the distinct judicial and law enforcement authorities to find non-judgmental and constructive ways to related to each other and coordinate their work; and, the capability of judges to perceive distinct realities *among* and *within* collectives, and to interpret norms and customs in a way that does not do away with but rather re-signifies cultural values and principles so as to guarantee the dignity of all persons involved.

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