

Juridical Pluralism and Indigenous Justice: A new perspective for consolidating cross-cultural sustainable development

Víctor D. Cabezas Albán. Lawyer. Universidad San Francisco de Quito
Associate. Jaramillo Dávila Abogados. Quito-Ecuador

vcabezas@jaramillodavila.com

(593)984008553

Avenida Amazonas y José Arízaga

Quit-Ecuador

1. Introduction

The legal sphere, has been historically related to a rigid structuralism specially regarding the maintenance of institutions and the stability of a unitary system of social organization¹. Therefore, admitting other forms of order, law and justice that scape this monopolistic view and that could reflect an ancestral philosophy has been neglected and rejected by the juridical systems.

In 2008, Ecuador –one of the countries with the highest indigenous demographical density²- promoted a new Constitution in which multiculturalism emerged as one of the most important values of the Republic³. As a direct consequence of this constitutional change, Ecuador established a juridical system that was not only based in the classic continental form of order but, instead, recognized that the ancient communities had the right to administrate their own form of justice, thus, juridical pluralism was founded in the Constitution introducing a new paradigm in the Ecuadorian justice administration⁴.

The fundamental thesis behind this paper is that the recognition of the diverse forms of administration of justice –or the so called juridical pluralism- is intimately related with the development of cultural minorities and, specifically, indigenous communities. In this order of ideas, we will first address the basis of indigenous justice and why is this important for sustainability. Subsequently, the Ecuadorian Constitution and the way it recognizes the application of indigenous justice will be attended and finally this paper will analyze whether the application of this forms of justice could eventually collide with human rights. Considering that this is a broad and complex subject that has not been largely treated by the doctrine or by the case law, we will focus the reflections on the Ecuadorian experience with the indigenous justice, hoping that they could be a starting point for new deliberations from other jurisdictions.

2. Indigenous justice: Why is it important for sustainability?

Perhaps one of the first questions that arise from the reading of the heading of this paper is: In which manner is indigenous justice or juridical pluralism related with sustainability? And the answer is quite simple, sustainability is not only related to maintain harmony between human action and the environment, it also entails the establishment of economic, educational, political and social conditions for human development as an individual and as a member of a community⁵.

¹ Frederic Shauher. *Pensar como un abogado*. (Marcial Pons: Madrid, 2006)

² Comisión Económica para América Latina CEPAL. *Los pueblos indígenas en América Latina*. (CEPAL: Santiago de Chile, 2014)

³ Constitución de la República del Ecuador. Artículo 1.

⁴ Ramiro Ávila Santamaría. *El Neoconstitucionalismo Andino*. (Huaponi Ediciones: Quito, 2016)

⁵ Dorothee Louise. "Comparative Perspectives in Indigenous Rights". *American Anthropologist* 104 (4): 1037-1039

In this sense, the indigenous population is, in essence, regarded as outsiders not only due to their ancient origin but also because of their language, religion, culture, philosophy and traditions that differ from the dominant culture. It is estimated that there are around 370 million indigenous people in the world that belong to 5000 different groups which largely live in poverty and struggle to find spaces for the exercise of their collective rights in a context in which their culture is not dominant⁶. Every effort to ensure the existence and development of the rights these minorities is intimately related with sustainability, in its wide definition.

Now, there have been a series of actions that tend to preserve this cultural diversity through different affirmative actions such as, the recognition of the ancient language of the different indigenous communities as an official form of communication and its integration to the different State channels. Also, the establishment of a flexible educational system that could assimilate the cultural values of the community, its necessities and its priorities into the curriculum as well as the recognition of the diverse forms of education. All these has been an approach destined to accept the cultural differentiation and ensure its sustainability; among these actions, we also find the recognition of a juridical pluralism as another way to achieve a multicultural state in which different communities may coexist.

Now, focusing in our main topic, the recognition of juridical pluralism is essentially defined by the following concepts:

- a) *Acknowledging the existence of diversity in the values and ethics*: Despite the differences related to traditions, manners or language, indigenous communities generally professes a dissimilar way of understanding the world, the sense community, the role of the environment in our daily life, the objective of work, and so forth⁷. A large catalogue of beliefs that differ from the common occidental based society determinate their identity and, thus, shall be protected by the State. In other words, the values, priorities, sense of order and social tasks of the indigenous communities shall be understood as valid aims and as an essential part of their existence. One of the ways to protect this essence and to potentiate it is, precisely, to recognize that their own means to process conflicts between them are valid and must be guaranteed by the State.
- b) *Understanding that State-Centered justice is not the only way to process conflicts*: As we mentioned in the introduction, the idea that the society should process and handle its conflicts through a single model has been predominant. Therefore, the first step in order to reflect about juridical pluralism is to understand that inside a nation in which diverse cultural expressions coexist, the mechanisms for the resolution of disputes shall, as well, be recognized as legitimate forms to process the differences that may arise from the individuals. Maybe it could sound ethereal but this initial idea is essential: the social acknowledgement regarding the fact that society may pursue justice through different means and models is essential for the acceptance of diverse forms of justice administration.
- c) *Recognizing that juridical pluralism ensure the existence of the community*: If the State accepts that justice may be administered by the communities, following their values, regulations and social objectives, we are indirectly ensuring its sustainability as a collective entity since processing their conflicts though their own means enforces the idea that their autochthonous values actually have a space to be developed and exercised inside the society. Recognizing juridical pluralism allows the communities to potentiate their culture because, though this

⁶ United Nations Permanent Forum on Indigenous Issues. Who are Indigenous People? Accessed august 13th http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

⁷ Josef Esterman. Filosofía Andina. (Abya Yala: Quito, 1998)

mean, they may punish the actions that, in the specific context of the community, may be classified as contrary to the local order⁸. In conclusion, giving the indigenous the faculty to decide about the conflicts that are generated inside their *jurisdiction* strengthens the community, the sense of real acceptance of diversity, establishes an adequate space to ponder their values and social objectives, punishing only what counters order inside their collective view, establishing penalties that may repair the hazard and rehabilitate who committed it. In a global view. All these condenses a State in which diversity is understood as an opportunity for underpinning local values, ensuring the sustainability of the communities that differ from the predominant culture and, through these means, constructing a united society⁹.

3. How have the legal systems integrated indigenous justice: The Ecuadorian experience

At least in Ecuador, the State justice administration has been largely regarded as systematically deficient, specially in criminal matters where the intervention of State has leagued thousands of people inside the jails with no judicial process and inside a system in which rehabilitation is the last objective achieved¹⁰.

As we mentioned in the introduction, in 2008 Ecuador had a National Assembly whose mandate was to write a new Constitution that could integrate the basis of a pluricultural State, recognizing the existence of juridical pluralism was a priority for the configuration of this legal text in which these considerations where taken into account:

- a) The indigenous justice is based on the principle of rehabilitating the individual who has attempted to the social order so that he or she could be efficiently integrated into society; this basis is in accordance to the principle that .at least heroically- rules the Ecuadorian criminal law system¹¹.
- b) The indigenous justice is based on reconciliation: Inside indigenous communities the principal objective related to a conflict resolution process is to overcome the situation and integrate the individual inside the society assuring that the community is convinced about the nature of the process and how it is destined not to exclude the person from the collectivity but to re incorporate him or her after a procedure of reflection¹².
- c) The reparation inside the indigenous world¹³: The indigenous system is based in harmony and balance not only with nature and the environment but also between every single member of the community. Therefore, when that balanced is lost, the community starts the process to recover it and establish a reparation that may satisfy the victim and the collectivity. In consequence, the indigenous community is focused on finding measures that can effectively satisfies the victims necessities and also that meets the requirement of the community of reparation. In this sense, for example, putting someone in jail is not an option for indigenous communities since extracting this person from the society is not considered as a form of rehabilitation.

⁸ Brand Hans Jurgen and Rocío Franco. *El tratamiento de los conflictos. Un estudio de actas en 133 comunidades indígenas y campesinas en Ecuador y Perú.* (Instituto de Defensa Legal: Lima, 2006)

⁹ Jaime Vintimilla Saldaña, Milena Almeida and Remigia Saldaña. *Justicia comunitaria en los andes* (Instituto de Defensa Legal: Lima, 2007)

¹⁰ Ramiro Ávila Santamaría. *La prisión como problema global y la justicia indígena como alternativa local.* (Universidad Andina Simón Bolívar: Quito, 2014)

¹¹ Josef Esterman. *Filosofía Andina.* (Abya Yala: Quito, 1998)

¹² *Supra* 8

¹³ Guillermo Padilla. *La Historia del Chico: Sucesos en torno al pluralismo jurídico en Guatemala.* (Konrad Adenauer: México DF, 2008)

- d) Juridical pluralism will establish an administration of justice that could contribute to the local development since having the community managing the conflicts may weigh their values, social objectives, ensuring the maintenance of the community as a whole.
- e) The system cannot neglect that more than one million people living in Ecuador professes a different way of understanding life¹⁴, society, the role of the environment, the sense of the economy and the objectives of collective living. Therefore, and facing this reality the State has the obligation to guarantee the sustainability of their members and from the own community and one of the ways to achieve this goal is to ensure that their conflicts may be processed according to their own commitments and beliefs.

With these considerations, the Constitution of Ecuador in 2008 recognized indigenous justice, giving the faculty to the community to process different conflicts according to their own form of understanding social order and established a series of conditions for its operation, among them we find the following¹⁵:

- a) The Constitution accepted that the State is not the only entity that can exercise jurisdiction and thus recognized an “indigenous jurisdiction” in which the community could process the conflicts between its members.
- b) Regarding the competence of the community to attend controversies, the Constitution established that it had these main basis: (1) The indigenous community can handle the conflicts when they happen inside the territory in which they live; (2) The indigenous community can process the conference only when they involve members of the community.
- c) The indigenous justice cannot process crimes, specially those related to sexual rights and life and the decisions shall counter international human rights treaties.

Inarguably, the recognition made by the Ecuadorian Constitution has initiated a new paradigm inside the local judicial system since now we have a multiple model for the administration of justice that not only is exercised by the State and based on the positive law, but also by indigenous communities based on customary non-written regulations and with diverse forms of punishment and rehabilitation.

Although Ecuador has ten years since indigenous justice was recognized, there are still quite a lot of points to reflect regarding this topic:

- a) *The role of women inside the community*: Many authors affirm¹⁶ that indigenous justice may become a form of validating discrimination against women since local leaders –the ones that operate the justice system- are men and the structures of the communities impede women to occupy leadership roles relegating them to minor housework occupation. Moreover, the sense of belonging of the women to the man is strongly present in the indigenous life and, thus, having a judicial system managed by men and destined to maintain this state of inequality may be one form of institutionalizing discrimination. Consequently, the role of women inside juridical pluralism and, specially, how to potentiate their participation and how to use this system for gender equality is one of the main issues subject that we need to reflect.

¹⁴ Comisión Económica para América Latina CEPAL. Los pueblos indígenas en América Latina. (CEPAL: Santiago de Chile, 2014)

¹⁵ Rafael Oyarte. *Derecho Constitucional Ecuatoriano y Comparado*. (Corporación de Estudios y Publicaciones: Quito, 2015)

¹⁶ Ramiro Ávila Santamaría. *El Neoconstitucionalismo Andino*. (Huaponi Ediciones: Quito, 2016)

- b) *Human rights vs indigenous justice*: There have been cases in which human rights have collide with the form of justice administration inside the community. Particularly regarding the forms of punishment, most of the indigenous communities execute physical punishment which, in some cases, have raised the debate of whether they constitute a form of torture. The indigenous people say that their forms of punishment are desisted to purify the soul and body, and anyhow imprisoning somebody and extracting him or her from society –as the local criminal law does- is largely a cruel measure. However, and taking into consideration different videos that have shown how are some of these punishments executed, it is necessary to establish limits for the execution of physical punishment, especially when they put life in risk and may attempt to human rights.

4. Conclusions

This short paper is just destined to rise the debate about the necessity to recognize diverse legal orders as a way to ensure cultural diversity which, in essence, is one of the main edges of sustainable development. We have briefly acknowledged the Ecuadorian process to integrate juridical pluralism into our legal system, emphasizing how this is essential for the existence of indigenous communities, also, we have presented the main issues that the consolidation of this process is facing in Ecuador.

Finally, we would like to end up insisting in our main thesis: the recognition of juridical pluralism inside a pluricultural State –such as Ecuador, Colombia, Peru, Bolivia, etc.- is not a minor theme, conversely, it represents an effective way of ensuring the sustainability of the communities, the sense of acceptance of their differences and, lastly, the preservation of their ancestral values, philosophy and ethics. Ensuring all these, precisely, inside a multicultural society, shall be one of the main purposes of the State whose obligation is to create public policy, law and education measures for the compliance of this high objective.