
ECUADOR'S *LA COCHA* CASE AND THE ROLE OF LEGAL PLURALISM AND INDIGENOUS JUSTICE

by Mayra Tirira Rubio

INTRODUCTION

Domestic law rarely offers a comprehensive and harmonious embrace of legal pluralism to resolve criminal cases outside mainstream processes. More typically it offers tokenistic engagement with pluralism. For instance, in the United States, Indigenous communities can apply their own justice where the maximum penalty is less than six months' imprisonment. Another approach, for example, in Papua New Guinea, is to acknowledge that Indigenous custom can be taken into account to determine the possible reasonableness of an offender's actions, for example in the context of provocation, or to assess if his or her conduct is indecent or improper.¹

Ecuador has embarked on a more ambitious approach. It recognises the possibility of resolving serious criminal cases in a legal pluralistic environment, thereby respecting Indigenous justice. According to the Ecuadorian *Constitution*, Indigenous communities have the right to develop, apply and practise their own legal system or common law as long as it does not infringe on constitutional rights, especially those protecting women, children and adolescents.² As the following account of the 2010 *La Cocha* case indicates, although this recognition is bristling with opportunity, much of it remains unrealised. It also illustrates the challenges of legal pluralism where serious crime, such as murder, is in issue. *La Cocha* is a fascinating insight into the collision of process and of Indigenous/Western misunderstandings. It highlights the difficulties Ecuador faces in applying Indigenous justice and may offer guidance to other countries seeking to respect Indigenous culture and justice within a state criminal justice system.

THE 2010 *LA COCHA* CASE

On 9 May 2010, within the Indigenous community of La Cocha, Marcelo Olivo Pallo died of suffocation. The next day the Indigenous authorities formed a commission to investigate the possible commission of a crime. After 15 days of this investigation, the commission determined that five Indigenous La Cocha people (Flavio Hernán Candejejo Quishpe, Iván Candejejo Quishpe, Wilson Ramiro Chaluiza Umajinga, Cléber Fernando Chaluiza Umajinga and

Manuel Orlando Quishpe) were responsible for murder—Manuel Orlando Quishpe as the principal and the others as accessories. On 16 May 2010, the supreme authority in the La Cocha community, the general assembly,³ imposed sanctions upon the offenders. The accessories were:

- required to indemnify the family of the victim by US\$5000; the family then donated this money to the community to build and/or repair certain communal infrastructure;
- prohibited from participating in social and cultural events for five years in Zumbahua (the Indigenous territory where La Cocha is located);
- expelled from the community for two years;
- required to submit to physical punishment; this involved the following traditional punishments such as taking a cold shower and being nettled,⁴ walking naked around the square carrying a 'quintal' (that is, 46 kilograms of soil) and receiving one lash from each authority or community elder;⁵ and
- required to make a public apology.

The physical punishments were intended to restore harmony between the offenders' spirits and their bodies. Notably, it is important symbolism that the materials relied upon in this punishment come from the earth, *Pachamama*. These materials assist to reconcile the offenders with nature and to preserve their dignity. Further, throughout the offenders' expulsion from the community, La Cocha elders and the offenders' families monitor those who have been expelled, guiding their behaviour until they are ready to return to the community.⁶ For the community, jail is not considered a suitable sanction. Instead the offenders were detained in the house of an impartial member of the community, to be released once all the sanctions had been administered.

A week later, on 23 May 2010, the principal responsible for Marcelo Olivo Pallo's death, Manuel Orlando Quishpe, was required to submit to a similar physical punishment regime and to pay US\$1700 to the victim's mother. He was not expelled from the community, but was forced to undertake five years of community service under the supervision of the community leaders.⁷

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At the time of investigation, the media reported rumours of a possible death penalty arising through the administration of Indigenous justice. As a result, mainstream justice processes commenced. The prosecutor started investigating Marcelo Olivo Pallo's death, indicating concern that Indigenous justice breached the accused persons' human rights, due to its reliance on the various forms of physical punishment detailed above.⁸ Five days after Quishpe had submitted to the physical punishment imposed upon him by the general assembly, the state prosecutor sought pre-trial detention of all five offenders. Four months later, the five were tried before a state judge under Ecuadorian law.⁹ During this case, the defence lawyers criticised the quality of the general assembly's investigations and condemned the physical punishments for their cruelty and savagery.

In what to Western eyes looks like a remarkable turn of events, while these state proceedings were underway, Victor Olivo Pallo, the victim's brother, presented a petition to the Constitutional Court seeking a stay of proceedings on the application of the *ne bis in idem* (rule against double jeopardy) principle in recognition of the Indigenous authorities' finalisation of the criminal justice issues.¹⁰ Pallo submitted that the duplicate proceedings impacted not only on the offenders, but also effectively revictimised him, the victim's brother. This petition argued that mainstream Ecuadorian justice should respect Indigenous justice since Indigenous communities have a constitutionally protected right to rely on their own justice.¹¹

In December 2010, the offenders changed lawyers and although their new representation remained critical of Indigenous justice and punishment, they joined Victor Olivo Pallo's petition seeking a stay of proceedings.¹² The petition ultimately came before the Constitutional Court for consideration.

The Constitutional Court is Ecuador's supreme interpretive body on constitutional rights, including the constitutionality of Indigenous justice.¹³ In this case, it was tasked with evaluating two different legal frameworks: ordinary and Indigenous. The Constitutional Court also provides guidance on constitutional issues arising

from the Law of Judicial Guarantees and Constitutional Control of Ecuador, international instruments on human rights such as *Convention No 169* from the International Labour Organization and Indigenous laws. In the latter capacity, the Court can gain assistance from experts on Indigenous issues, including anthropologists.

CONSTITUTIONAL ISSUES WITH THE 2010 *LA COCHA* CASE¹⁴

In *La Cocha*, the Constitutional Court ruled that Indigenous justice in Ecuador exists within national law and that Indigenous authorities are able to apply their own justice in their communities. The Court evaluated Indigenous justice within a legal framework, focusing on two aspects in its inquiries:

- the scope for Indigenous authorities to resolve the case based on ancestral (or customary) procedures, but respecting human rights; and
- the respect that non-Indigenous authorities accorded to Indigenous justice decisions.

The Constitutional Court resolved the constitutional questions before it in the following way.

INDIGENOUS JUSTICE—REAL JUSTICE

The Court ruled that Indigenous authorities have the right to rely on customary law, but in doing so they must respect human rights. In reaching these conclusions, the Court relied on history and the efficacy of Indigenous justice.¹⁵ In particular, it acknowledged that Indigenous communities have been applying their own justice for centuries, since before colonisation. The King of Spain confirmed this expressly to the authorities of the Real Audience of Quito in 1582: 'The natives had their own customs to solve conflicts and for that the Royal authorities were ordered to not open ordinary process, unless it produced an unfair outcome.'¹⁶

Further, and crucially, the Constitutional Court relied on evidence from anthropologists to demonstrate that contemporary Indigenous justice exercises authority in its community and has structured processes for resolving criminal allegations. Specifically, in *La Cocha*, the authority to solve serious conflict is the general assembly. This is a communal and horizontal organisation where community leaders facilitate deliberation, enabling a decision to be made by the whole assembly. Evidence before the Constitutional Court also showed that Indigenous justice follows defined processes, taking approximately 14 days. The evidence showed that the La Cocha community relies on five defined stages in its criminal justice processes:

1. *Willachina*: the communication of the problem and request for intervention to solve the conflict;

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2. *Tapaykuna*: the order by the general assembly to investigate. In general, it is conducted through conversations about the lives, feelings and problems that affect the offenders. In addition, depending on the circumstances in a particular case, there can be commissions of investigation, for example to recognise a particular place or offender;
 3. *Nawichina o chimbapurana*: confrontation of information;
 4. *Paktachina* or resolution: sanction that the offenders usually agree to; and
 5. *Chikiyashka*: execution of the punishment and forgiveness from the community.

INDIGENOUS JUSTICE—EFFECTIVENESS

The Indigenous justice system in La Cocha aims to resolve conflict in the community. As it operates in a homogenous society, it emphasises community cohesiveness and order. As the Constitutional Court recognised, the justice system focuses on restoring peace and harmony in the community and dissuading others from committing offences. The sanctions applied are symbolic, restorative and redistributive, seeking to reconcile the perpetrators with their community while also attending to victims' needs.

However, somewhat controversially, the Court also ruled that in this case there was no violation of the rule against double jeopardy (that is, the *ne bis in idem* principle) because the Indigenous criminal justice system serves functions distinct from that of the state system. In a judgment that is superficially compelling, the Court ruled that the two systems could coexist and operate concurrently. The state justice system protects an individual's 'right to life' as recognised in the *Constitution* (and in international treaties and human rights conventions),¹⁷ while Indigenous justice focuses on restoring harmony to the community (that is, on a collective right). Because only state justice has authority to resolve crimes against 'life', the two justice systems can sit side by side. This means that La Cocha community members are amenable to the state justice system as well as their own Indigenous justice system. One wonders if the Constitutional Court truly appreciated what *life*, or its absence, means for the five offenders and for Indigenous communities such as La Cocha.

THE GOALS OF LA COCHA CRIMINAL JUSTICE

Despite the Constitutional Court employing its best endeavours, including relying on history and anthropological expertise, two questions remain. Did the Constitutional Court fully understand La Cocha justice? And could there be a different interpretation to the view that the two justice systems could coexist even though both administered justice to the same offenders?

As William Ewald has fully explored in *'What Was it Like to Try a Rat?'*,¹⁸ seeking to understand another's justice system while being a mere observer is perilous. It is not enough merely to understand its rules and procedures, because it is not the external aspects of a justice system that count. Any interpretation of another's justice needs to be framed within the cosmos of the other. This means stepping outside the existing frame of references and appreciating a justice system's cognitive structure—the beliefs, ideals and values that shape and explain its authority and respect within its own community.

Understanding what 'life' means in any society is difficult, and this article does not attempt to provide a neat answer to what is essentially a philosophical question. Instead, it seeks to highlight what was absent from the Constitutional Court's reflections. Its starting point is to note that the Constitutional Court was effective in interpreting the events and the dispensed justice from the standpoint of *Western* values. In fact, it used norms and opinions founded upon expertise and human rights ideology recognised in contemporary constitutionalism.

However, it did not look into the reasons that each society has for criminalising behaviour. Instead, it appears to have taken for granted that Western values were appropriate without ever questioning the potential for them to be flawed. Further, the Court on its reasoning did not appear to consider that globally there is no consensus regarding the 'right to life' and the measures of punishment appropriate for violation of the right to life. It did not note that some states provide the death penalty, where others do not. Further, human rights treaties and conventions do not agree on this. The Court did not note that the *American Convention of Human Rights* protects the right to life requiring it not be arbitrarily deprived,¹⁹ while the *Universal Declaration on Human Rights* merely states, 'Everyone has the right to life, liberty and security of person',²⁰ and offers no more guidance on how the right to life is to be protected. If the Constitutional Court had analysed the right to protect life and the variety of sanctions for breach of the right outside the *Western* perspective, it may have realised that it needed to understand the Indigenous cosmos and its mindset about life and death.

Life within the La Cocha community is not understood as an individual right. It is a community value explained by the relatedness principle. The individual in La Cocha understands life from his or her relationship with others. From the Indigenous perspective, the individual does not exist without a community.²¹ A person—*runa* in kichwa—is only conceived in relation to her family, community and nature. When a death occurs, it affects relations within the community. According to the Indigenous

perspective in La Cocha, this impact is comparable with pain, or *llaki* in kichwa language, which means disharmony in the community and its relations.²² If this pain is caused because one member of the community violates another's life, the *llaki* is more intense because it further violates the sense of community. Hence, to repair this pain, unlike traditional Western application of justice, La Cocha justice is communitarian in its focus. It requires reharmonising the community after a conflict by relying on its holistic cosmos, linking nature, society and spirit.²³ Symbolism is integral to La Cocha Indigenous justice. For example, during the sanction or *Paktachina*, the physical punishment connects the spirit with men and women, and expels the bad energies in order to preserve 'human dignity' and wellbeing.²⁴ Crucially, for the offenders as well as the whole La Cocha community, prison is not a possible sanction because it brings estrangement from the community, that is, from *life* itself.

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RIGHTS AND CRIMINAL JUSTICE

Thus, in sanctioning the five offenders to prison, the Constitutional Court is in fact punishing them with a sanction almost equivalent to death. Further, it did so in the context of its failure to appreciate the impact of both justice systems on the offenders or on the La Cocha community. For La Cocha, state justice is from a different cosmos. The La Cocha community does not, and cannot, conceive the state criminal processes, the *Western* model of justice, as just due to the absence of restorative justice qualities. These are integral to Indigenous justice. At its essence, *life* for Indigenous communities has quite a different meaning from its Western conception.

However, the Court failed to properly evaluate the core meaning of Indigenous justice, nor did it reflect deeply on its own sense of justice. For the offenders and the Indigenous community, this enormous gap of understanding meant that the offenders were punished twice. In addition, the state's punishment was outside La Cocha's frames of reference because it did not respond to the harm caused to the community by the crime, nor did it provide comfort to the victim's family. Indeed, it effectively revictimised the victim's family and punished the community, as well as the offenders. The offenders were effectively prosecuted and punished twice, irrespective of the legal meaning given to the double jeopardy by the Constitutional Court.

CONCLUSION

The *La Cocha* case of 2010 is an example of two legal systems, the Indigenous and the mainstream, colliding. This important Ecuadorian constitutional law case raises questions regarding what the right to legal pluralism actually means and how it can and should function. It also shows that legal pluralism has to be more than tokenistic, more than a process of application and cooperation between laws and procedures. In this case, a superficial understanding of justice created injustice to the offenders and to the Indigenous community of La Cocha as well.

The sad fact is that although Ecuador is one of the very few countries in the world to accept legal pluralism in criminal justice, its highest court has failed to realise the importance of understanding the complexity of multiple justice processes. Despite the Constitutional Court of Ecuador making an enormous effort to resolve the issues of competence between two justice systems within Ecuador, ultimately its failure to understand the Indigenous cosmos—or to even understand the need to appreciate that its issues required considering a non-Western perspective—caused justice to fail. Its application of a narrow Western frame of reference (albeit a well-informed one) failed to accord respect and dignity to Indigenous criminal justice.

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- 1 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986).
- 2 *Constitución de la República del Ecuador* [Constitution of Ecuador] (Ecuador), art 57 n 10.
- 3 The general assembly is composed for all of the community members and resolves severe cases, such as murders. R LLasag, *Justicia Indígena ¿delito o construcción de la plurinacionalidad?* [Indigenous Justice, Crime or Plurinationality Construction?] (Quito, 2012) 339.
- 4 That is, compelled to roll in stinging nettles.
- 5 LLasag, above n 3, 341.
- 6 Ramiro Ávila, R. *La Prisión como Problema Global y la Justicia Indígena como Alternativa Local* [Prison as Global Problem and Indigenous Justice as Local Alternative] (Oñati, 2011) 22.
- 7 Ministerio Coordinador de Patrimonio, *Viviendo La Justicia: Pluralismo Jurídico y Justicia Indígena en el Ecuador* [Living the Justice: Legal Pluralism and Indigenous Justice in Ecuador] <http://www.ceppas.org.gt/media/uploads/documents/oacdh_viviendo_la_justicia.pdf March 10th of 2015>.
- 8 *Ibid.*
- 9 Constitutional Court of Ecuador, Decision 113–14- SEP- CC, 30 July 2014.

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- 10 Ávila, above n 6, 20–2.
- 11 *Constitucion de la República del Ecuador* [Constitution of Ecuador] (Ecuador), art 57.10.
- 12 Ávila, above n 6, 20–5.
- 13 *Constitucion de la República del Ecuador* [Constitution of Ecuador] (Ecuador), arts 171 and 429.
- 14 Above n 9.
- 15 These points are the result of a content analysis of the arguments that the Constitutional Court gave in the *La Cocha* decision.
- 16 *Ibid* 15.
- 17 *Ibid*.
- 18 William Ewald, *Comparative Jurisprudence(I): What Was it Like to Try a Rat?*, 143 U. P.A. L. REV.1889 (1995) <http://scholarship.law.upenn.edu/penn_law_review/vol143/iss6/2>.
- 19 American Convention of Human Rights, art 4.1.
- 20 *Universal Declaration on Human Rights* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 3.
- 21 C Silva, ‘¿Qué es el Buen Vivir en la Constitución?’ [‘What is the Good Living in the Constitution?’], in Ramiro Ávila, *Ecuador, Estado Constitucional de Derechos y Justicia, en Constitución del 2008 en el Contexto Andino*, Quito, Ministerio de Justicia y Derechos Humanos [Ecuador, Constitutional State of Rights and Justice] (Quito 2008) 116–20.
- 22 Ministerio Coordinador de Patrimonio, above n 7.
- 23 *Ibid* 55.
- 24 LLasag, above n 3, 326.
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