



Conflicts of competence of the indigenous jurisdiction vis-à-vis the ordinary jurisdiction

Los conflictos de competencia de la jurisdicción indígena frente a la jurisdicción ordinaria

Jessica Diana Supe Guashco

Estudiante de la Facultad de Derecho y Ciencias Políticas.

Universidad Indoamérica

jsupe@indoamerica.edu.ec

<https://orcid.org/0009-0005-9091-6390>

Alexandra Anabel Jaramillo León

Abogada de los Juzgados y Tribunales del Ecuador, Mediadora avalada por el Consejo de la judicatura, Magister en Derecho, mención en Derecho Procesal, Docente de la carrera de

Derecho de la **Universidad Indoamérica**

alexandrajaramillo@uti.edu.ec

<https://orcid.org/0000-0002-7556-1166>

ABSTRACT

The ordinary jurisdiction is governed by the common laws of law, while the indigenous jurisdiction is governed by the customary law of the traditions, customs and culture of indigenous peoples, communities and nationalities; and, it is from the application of this legal pluralism recognized by Art. 1 of the Constitution of the Republic of Ecuador, where conflicts of jurisdiction arise between these two jurisdictions, because there is no law regulating the coordination and cooperation between the ordinary and indigenous jurisdiction. For this reason, the main objective of the research is to analyze the conflicts of competence generated in the applicability of the indigenous jurisdiction vis-à-vis the ordinary jurisdiction. The methodology is based on a qualitative approach, which is carried out through the use of the bibliographic-documentary method, which is

carried out through the analysis based on books, pamphlets, articles and other documentary materials that allow developing a deep investigation based on the collection of information of bibliographic and documentary sources of great relevance to expand knowledge. This allows concluding that at present the indigenous jurisdiction is managed as an isolated world trying to regulate the coexistence of peace and harmony in its territory, and that the ordinary jurisdiction observes the pronouncements of the National Court of Justice or Constitutional Court of Ecuador, to be able to act in analogous cases, making use of the sources of law that these provisions emanate.

RESUMEN

La jurisdicción ordinaria se rige por las leyes comunes del derecho, mientras que, la jurisdicción indígena se rige por el derecho consuetudinario propio de las tradiciones, costumbres y cultura de los pueblos, comunidades y nacionalidades indígenas; y, es partir de la aplicación de este pluralismo jurídico que reconoce el Art. 1 de la Constitución de la República del Ecuador, donde surgen los conflictos de competencia entre estas dos jurisdicciones, debido a que, no existe una ley que regule la coordinación y cooperación entre la jurisdicción ordinaria e indígena. Por esta razón, el objetivo principal de la investigación es analizar los conflictos de competencia que se generan en la aplicabilidad de la jurisdicción indígena frente a la jurisdicción ordinaria. La metodología se basa en un enfoque cualitativo, que se lleva a cabo mediante la utilización del método bibliográfico-documental, que se realiza mediante el análisis en base a libros, folletos, artículos y demás materiales documentales que permiten desarrollar una profunda investigación en base a la recolección de información de fuentes bibliográfica y documental de gran relevancia para ampliar el conocimiento. Esto permite concluir que en la actualidad la jurisdicción indígena se maneja como un mundo aislado tratando de regular la convivencia de paz y armonía en su territorio, y que la jurisdicción ordinaria observa los pronunciamientos de la Corte Nacional de Justicia o Corte Constitucional del Ecuador, para poder actuar en casos análogos, haciendo uso de las fuentes del derecho que estas disposiciones emanan.

Keywords / Palabras clave

jurisdiction, conflicts, indigenous jurisdiction, ordinary jurisdiction

competencia, conflictos, jurisdicción indígena, jurisdicción ordinaria

Introduction

The indigenous justice was already applied since pre-Inca times, governed by the customs and the cosmovision to which each of the communities belonged, its settlement took place before the Spanish conquest in Latin America. One way of doing justice within the communities of indigenous peoples and nationalities was by means of purification punishments without this being established within a regulation. However, within the Ecuadorian territory was with the Political Constitution of 1998, which is recognized as an alternative way to resolve conflicts that are generated within the indigenous peoples and nationalities through the application of rules under their beliefs, customs and traditions, was thus raised as a way of judging within the territories.

With the promulgation and enforcement of the 2008 Constitution, indigenous justice has achieved greater value, since Article 1 in the declaration of the State as a constitutional State of rights involves interculturality and plurinationality, making this type of justice equal in hierarchy to ordinary justice; However, due to the respect for the function of indigenous justice, their ancestral knowledge and the establishment of internal control provisions or norms, communities, peoples and nationalities are treated differently, as holders of collective rights that are established and guaranteed within the supreme norm, through the granting of the right to self-determination, which is manifested under their own autonomy and self-government within the internal and local affairs to regulate the peaceful coexistence of human beings in society. However, there have been numerous conflicts with respect to the competence of each jurisdiction.

Jurisdiction is defined as the legal limits that are distributed among the different judicial authorities to exercise their power of jurisdiction in some delimited and categorical process; therefore, it is necessary to state that, within these limits in the jurisdictional field, jurisdiction is given by reason of matter, territory, degree and person. (Bolívar et al., 2021).

When speaking of competencies in terms of subject matter, it means that both the indigenous and ordinary jurisdiction have the power to hear and provide solutions to internal conflicts as long as they are not contrary to the supreme law and international human rights instruments, as they are susceptible to nullity due to the violation or

infringement of the rights legally recognized in the national and international legal system. Thus, the indigenous jurisdiction cannot hear or resolve serious crimes that compromise a protected legal right.

Jurisdiction by reason of territory is the determination given to the judicial authority based on geographical reasons or territorial circumscription, i.e. the place where the act or omission to be judged took place, the domicile of the procedural parties involved in the litigation, on the basis of this type of jurisdiction the judicial bodies are distributed.

Jurisdiction by degree involves the functional competence that is determined by the hierarchical levels of the jurisdictional bodies; that is to say, a case may be brought before judges of first instance within the different Judicial Units, once this phase is concluded, any of the procedural parties that are not satisfied with the sentence issued by the competent authority may have access to specialized chambers of the Provincial Court of Justice and from there to the National Court of Justice and within the communities, peoples and nationalities, the indigenous authorities have the power to do so.

Jurisdiction by reason of the person consists of conferring jurisdiction to hear cases according to the division established by law for each specific case, i.e., determining the quality with which a person appears in the litigation, so that a strict procedure is followed for new cases to be attributed to them by the courts having jurisdiction in the same matter.

As for indigenous justice, since it has been declared of equal hierarchy to ordinary justice, it has been competent to resolve internal conflicts that arise within their territories; however, no individual regulations have been presented to govern the application and individualization of each of the jurisdictions, only doctrine referring to indigenous justice has been observed. Within the constitutional provisions, Article 171 is the only one that establishes that "the authorities of indigenous communities, peoples and nationalities shall exercise jurisdictional functions based on their ancestral traditions and their own law within their territorial scope" (Constitution of the Republic of Ecuador, 2008, art. 171).

Therefore, it has been the Constitutional Court who, through judgments, has been establishing parameters to try to delimit and resolve conflicts of jurisdiction that arise within the indigenous jurisdiction. As a clear example we have one of the sentences that is No

113-14-SEP-CC that was given July 30, 2014 issued by the Constitutional Court of Justice on the La Cocha Case, in which it alludes to the limits of competences that must be fulfilled within the indigenous jurisdiction, thus establishing that, within this jurisdiction cases on the inviolability of life may not be heard.

That said, the main objective of this scientific article is to analyze the conflicts of competence generated in the applicability of the indigenous jurisdiction versus the ordinary jurisdiction. For this purpose, the methodology to be applied is the bibliographic-documentary method of a scientific research with a qualitative approach, based on the bibliographic analysis based on books, pamphlets, articles and other documentary materials that allow developing a deep research based on the collection of information, which allows deepening in the subject matter addressed.

Materials and Methods

The research was based on a qualitative approach that aimed to analyze conflicts of competence arising in the applicability of indigenous jurisdiction vis-à-vis ordinary jurisdiction in Ecuador. The bibliographic-documentary method was used, which involved the collection and analysis of various sources of information, such as books, pamphlets, articles and relevant documents.

First, a compilation of documentary sources related to the topic of indigenous jurisdiction and its interaction with ordinary jurisdiction in the Ecuadorian legal context was carried out. These sources included current legislation, jurisprudence, academic documents and other relevant materials.

Subsequently, a detailed analysis was made of the documentary sources collected. Key information, relevant data and arguments related to the conflicts of competence between the two jurisdictions were identified.

The data collected were interpreted and synthesized to identify patterns, trends and relevant perspectives in relation to the topic of study. Based on this analysis and synthesis of data, the article was prepared with the main objective of analyzing conflicts of jurisdiction between indigenous jurisdiction and ordinary jurisdiction in Ecuador.

Finally, the article was reviewed and validated by experts in the field of indigenous law and jurisprudence to ensure the accuracy and consistency of the information presented.

This methodology provided a solid basis for the analysis of conflicts of jurisdiction between the two jurisdictions in the Ecuadorian context, contributing to the understanding of this complex legal and social dynamic.

Results

Jurisdiction in Ecuador is regulated by the Organic Code of the Judicial Function (hereinafter COFJ), thus Article 150 prescribes that it is "the public power to judge and enforce what is judged, a power that corresponds to the judges established by the Constitution and the laws, and which is exercised according to the rules of competence." (Código Orgánico de la Función Judicial, 2015, art.150). In other words, competence becomes a power conferred to judges to administer justice in the Ecuadorian territory and resolve disputes that exist in the social sphere, under the condition of following the rules of competence.

Guillén, (1992), states that there are three elements that are part of jurisdiction:

Form: Refers to the presence of the parties, Judge and the procedures established in the Law.

Content: The existence of a conflict or difference of legal relevance that must be resolved by the Judges by means of a decision (sentence) that has the quality of *res judicata*.

Function: It is the task, the end: to ensure justice, social peace and other legal values through the application of law.(p. 123).

Jurisdiction, being granted by the constitution and the law, enjoys intrinsic characteristics that nurture it and give it a social and legal value; for example: power, since not all persons enjoy this prerogative, because a person with a broad background, knowledge, experience and ethical and moral values is invested with legal authority, occupying a hierarchical rank within the judicial function and the administration of justice.

The power that comes from jurisdiction depends on the importance that is intended to be given to each particular case, which according to White. O, (2008) "there are four factors, the decision, documentation, coercion and enforcement" (p. 26): the first factor is the decision, which obliges the judge to issue a ruling recognizing which of the procedural parties is right or wrong and is assisted by law.

The second factor is the documentation, considered as those material means that intend to inform the judge of proven facts, that is to say, they are the evidence that each of the procedural parties provide to the process and judicial procedure that intends to reach a procedural truth. This type of document at present, in spite of coming from the responsibility of the procedural party, that is to say at the request of the party, either by request of the latter through the request for judicial access, does not interfere in that the judge of his own motion can arrange the practice or presentation of different types of documents that allow him to have a more appropriate and real knowledge of the facts that are being litigated.

The third factor alluded to is coercion, that is to say that through the authority of the judge, he can enforce the rights of the persons, or seek suitable ways to obtain or gather information, for example, the search and seizure of evidence. And finally, the fourth factor is the execution, since it is the power of the judge to enforce the resolution that the same or another judge has made. That is to say, to execute the sentence.

Jurisdiction can also be observed from the point of view of the function, since the person to whom a jurisdiction is granted fulfills a specific position which is to administer justice by guaranteeing and protecting the rights of all holders and in observance of previously established legal provisions, it should be mentioned that this function is solely and exclusively attributed to the judges of the judicial function.

However, jurisdiction is not absolute because Article 153 of the COFJ indicates the grounds on which jurisdiction may be suspended. Therefore, these may be absolute or relative: the first occurs when there is a conviction. The second occurs when an order is issued calling for trial until his innocence is ratified, license granted and suspension of the rights of political participation. Within the latter, it is questionable whether it corresponds to a definitive suspension or a relative one, that is to say, until when such suspension lasts, regardless of the time for which it was granted.

Related to this is the definitive loss of jurisdiction for the following facts:

By death; 2. By resignation from office, as soon as it is accepted; 3. By expiration of the time for which he/she was appointed; however, the functions of the judge shall be extended until the day on which the successor enters into the effective exercise of the office; 4. By possession of another public office; and, 5. By removal or dismissal, as soon as the corresponding resolution becomes final. (Código Orgánico de la Función Judicial, 2014, Art.154).

Competence, on the other hand, comes from "competer", which means to correspond, to be incumbent upon something, i.e. the extent to which jurisdiction is distributed among the various judicial authorities, or also the power of a public official to administer justice in a particular case. It is said then that competence is the limit of jurisdiction (Artavia and Picado, 2020, p. 1).

The Constitution of the Republic of Ecuador, by creating the judicial function as the entity in charge of administering justice, makes the competence exist and be accredited in a certain judicial process, the same that can be granted by reason of the territory, degree, matter or person, following the rules of competence determined by the different legal bodies in the different areas of law, in consideration of the particularities of the act, fact or omission that is intended to be brought to judicial knowledge.

Compliance with jurisdiction is subject to constitutional control as it is the legal aptitude that allows compliance with the right to effective judicial protection, due process, defense and legal security prescribed in Article 11, No. 9; Articles 75, 76 and 82 of the Constitution of the Republic of Ecuador in accordance with the provisions of the COFJ.

In this way, competence is usually assigned to the judge so that based on the investiture he/she has, he/she can establish a decision according to the claims of the procedural parties, within this strictly procedural context it can be verified that competence observes and occurs under two optics, considering that:

The concept of competence is thus displaced by a phenomenon of metonymy: that is to say, from a subjective measure of the powers of the judicial body, it is understood, in practice, as an objective measure of the matter on which the judicial body is called upon to rule, thus understanding the competence of a judge as the set of causes on which

he can exercise, according to the law, his fraction of jurisdiction (Gabuardi. C, 2008, p. 89). (Gabuardi. 2008, p. 89).

In this sense, the competence lasts as long as the process persists, until a resolution or sentence is reached. "The competence, to know a process, involves jurisdiction, but whoever exercises the latter is not qualified to know indistinctly all the processes" (Azula, 2019, p. 133).

Jurisdiction has been confused with jurisdiction, but each of these terms means and encompasses different contents, characteristics and elements, although they are interrelated. Jurisdiction is understood as an attribution that has been conferred to the authorities for the knowledge of different acts or facts in order for them to enjoy legal validity. While jurisdiction "can be conceived as the power of the judicial authority" (Vásquez and Barrios, 2018, p. 5). From this statement it is understood that for a judge to be competent to hear a particular case, he or she must have jurisdiction, guaranteeing from this section the validity of the proceedings.

Ordinary and special jurisdiction

Ordinary jurisdiction, being a type of conventional jurisdiction that regulates the controversies or problems that occur in people's daily lives, is usually a type of justice to which most Ecuadorians are subjected, for this reason it has normative specifications for each specific case, since it is based on principles and strong rules to regulate social coexistence. (Fernández, 1999).

Therefore, the ordinary jurisdiction is established under law; therefore, it has different normative bodies that help the solution of conflicts within the competence and justice; that is, the power that the competent authority has to judge or know all the causes or lawsuits that are presented. The ordinary jurisdiction has had greater strength for the administration of justice that has the judicial function, being a type of justice where people are subjected to comply with the necessary requirements to be sentenced.

The ordinary jurisdiction being the power granted to the judge to administer justice allows the birth of two ways: legal - conventional and agreement, i.e. are governed by procedural principles, for example, there is no penalty if there is no law, which is an aspect that reflects the principle of legality, for it in the ordinary justice by express mandate of the law must follow a procedure according to the particular case. The affected party begins by proposing his complaint, quellera or

particular accusation before the competent judicial authority, who in a legal term must qualify the complaint if it complies with each and every one of the requirements, otherwise it will establish a new term to complete it being susceptible to be qualified or filed in the event of non-compliance with the request.

When there is a conflict of competence in the ordinary jurisdiction, it is the provincial or national court that decides which judicial authority is competent to hear and resolve a specific case. Being the scope of the jurisdictional power that allows the competence to be fulfilled, because it arises from the obligation of the judges to comply with the functions that have been entrusted to them by the constitution and the law.

In the order of qualification of the complaint, the judge orders that the defendant be summoned in order to assert his right to defense with the answer to the complaint, and the opposing party is also summoned to make a statement on the matter, then the judge sets a day, time and date for the hearing, where he will hear the parties in accordance with the structure of the hearing depending on the procedure that has been selected. Based on all the proceedings, during this judicial proceeding a sentence will be issued orally, notifying the parties in writing so that they may file an appeal.

The special jurisdiction has been designed for the resolution of specific and concrete conflicts. Within this type of jurisdiction is the special indigenous jurisdiction which, in Ecuador, also seeks to access and administer justice from the community, people or national, since they have independence and autonomy that allows them to make appropriate decisions to guarantee the rights of their indigenous brothers. "For indigenous peoples it is no longer a matter of fighting for the recognition of their cultural specificity, but of fully enjoying their collective rights and exercising their jurisdictional competence" (Zambrano, 2003, p. 19).

There is an idea of justice pursued by the indigenous jurisdiction, namely:

1. The relationship between cosmovision and territory with forms of social control and justice practices.
2. The acceptance of conflict as something natural and its interest in preventing it and dealing with it preferably in an amicable manner, instead of resorting to repressive and punitive measures.

3. Unique conceptions of counseling, as a practice for healing and redressing offenses.
4. Forgiveness as a prevention of revenge or violence, as a way of transcending guilt and as a policy of friendship.
5. The strengthening of ethnic justice through a process that combines the persistence of ancestral conceptions and the appropriation and resignification of state legal norms.
6. Material compensation for the damage or offense caused as a means of redistribution of goods and at the same time as strengthening or reestablishing social alliances.(González, 2018, p.36)

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In this way, the indigenous jurisdiction tries to solve the problems that exist in their environment by applying their customs, traditions, culture and ancestral knowledge that have been maintained since previous years and that have reached a legal value at present, making their identity remain.

The indigenous jurisdiction does not arise from the law, but from the will of the indigenous communities, peoples or nationalities according to their customs. It should be emphasized that each indigenous community has its own procedure for the solution of internal conflicts, there are those that do it in writing and others do not, the procedure depends on each community.

A trial procedure is then established that is adopted by most of the communities, and for others it serves as an inspiration or example so that the indigenous jurisdiction can become effective.

This originates from the first step to be taken by those affected: to inform the leaders of the council orally and clearly of everything that has happened. Thus, the WILLACHINA is an act by which the offended party formulates the petition for a solution to the Cabildo, a petition that will later be the main topic of resolution in the assembly. The victim or any person, orally, exposes the issue before the indigenous authorities; The TAPUYKUNA, is for the investigation of the problem with a variety of diligences such as the ocular inspection or verification of the fact in order to establish the magnitude of the event; The CHIMBAPURANA, for the clarification of the facts before the assembly of the community. At this stage, those responsible for the event are identified and a resolution is issued, which is recorded in the minutes. The accused has the right to legitimate defense; The

KILLPICHIRINA, is the stage where sanctions are imposed depending on the seriousness of the facts, such as fines, the return of the stolen objects plus compensation, the purification bath with cold water and nettle, the whipping or lashes, and communal work; exceptionally the expulsion from the community is applied based on the internal regulations of the community. The execution of the sanction, called PAKTACHINA, is where the penalty is executed by men and women of good reputation and honesty, they are: parents, godparents, grandparents and indigenous authorities, such as the president and the board of the community, elected and recognized by the assembly of the community. (Díaz, et, al., 2016. p.12)

The indigenous jurisdiction has some general characteristics among which we can distinguish:

- a) The authorities are specific to each community, people or nationality.
- b) It has its own special procedure.
- c) Application of common law rules, based on the legal systems of each people or community.
- d) The sanction is of a social, curative nature and allows for the instant reintegration and rehabilitation of the accused.
- e) Participation and collective decision of the community to resolve the conflict.
- f) It is free of charge.
- g) It is oral and in its own language.
- h) The immediate restitution of communal or collective harmony and peace (Tiban. L, 2023, p.5).

The indigenous jurisdiction differs from the ordinary jurisdiction because at the moment of establishing sanctions or resolutions each one of them imposes something different, for example, in the case of animal theft, typified as abigeato in the Código Orgánico Integral Penal (hereinafter COIP), the indigenous jurisdiction retains the suspect or participant in said fact, whips him with nettles, beats him with toys or straps, bathes him in ice water, and locks him in naked rooms until the main authorities of the community can resolve what is going to be done

with the member of the community that is going to be arrested, They beat them with toys or leashes, bathe them in ice water, and lock them in naked rooms until the main authorities of the community can decide what to do with the member of the community that did not respect the peaceful coexistence of all the inhabitants, since he caused an alarm and the rest of the inhabitants maintain that the person in question was the one who on previous occasions stole the animals.

To this end, the leaders hold a meeting among those involved, give way to the word of the perpetrator or any of his relatives and likewise do the same with respect to the victim, who offer ways of solution among them is the fact of returning to each of the owners what was stolen in a considerable time, establishing that while the obligation is not fulfilled that person will remain under orders and control of the indigenous justice system. The document they sign is simple, without protocols or legal formalities.

Through this type of actions, the indigenous jurisdiction tries to set an example to the rest of the people, making them think about this type of conduct, which is reprehensible and deserves to be sanctioned.

Conflicts of competence

From indigenous jurisdiction to ordinary jurisdiction conflicts arise that cannot be solved due to the lack of specifications on the scope of indigenous jurisdiction, considering the reality in which they live and the thinking of the authorities that is framed within the will of the community, people or indigenous nationality, through customary law that by its nature and the intrinsic value of the custom is usually not written, but oral. In this way, legal pluralism leads to frequent conflicts:

It manifests itself as a dispute over the legitimacy of the exercise of justice in a given geopolitical space, where the indigenous jurisdiction disputes with the ordinary jurisdiction over concrete cases, since the peasant community intends to apply its norms and procedures, while the ordinary justice system, as state legality, ignores the resolutions of the indigenous justice system. A correlation of forces between indigenous and ordinary jurisdiction is noticed; in that sense, hierarchical equality, although recognized by the constitution, in praxis, is not visible, because the subordination of the state legal model is still in force within the communities that exercise their own justice.(Luna, 2016,p. 254)

Within this context, it is important to highlight that according to the improvement of the Law, there are some legal minimums that the indigenous jurisdiction must observe in order to respect the application of Human Rights, among which the following can be distinguished:

- a) Right to Life: Life is an inviolable right of every human being. Indigenous law does not recognize the death penalty, therefore, the sanction cannot be death.
- b) Right to due process: as in any process, the parties have the right to defend themselves either personally or through third parties. In addition, due process has to do with complying with all principles, norms and rules with fairness and impartiality.
- c) Right to freedom from torture, slavery and cruel treatment: this is a right of all persons, therefore, laws prohibit this type of treatment. In this sense, any sanction will be monitored to ensure that it does not fall within this prohibition.
- d) Right to freedom from physical and psychological aggression: this right has been the most questioned by society and by human rights defense institutions, because the facts have been analyzed outside the context of the cultural and social cosmovision of the communities of indigenous peoples (Tibán, 2023, p. 4).

Within the indigenous communities, peoples and nationalities, ordinary justice is a culture alien to that which is applied within the indigenous territories, because this type of justice is governed by specific rules and procedures and technical terms of law that are difficult to understand.

The conflict between indigenous and ordinary justice is part of the legal pluralism prescribed by the Constitution of the Republic of Ecuador, however, it has been more affected by the migration of indigenous people to the big cities, which has involved them in another social role and changed their life expectancy, including their customs and traditions.

Thus, in the treatment of various cases of administration of justice, one wants to overcome the other, since the Constitution in Article 171, inc.2 in its core part prescribes that: "The law will establish the mechanisms of coordination and cooperation between the indigenous jurisdiction and the ordinary jurisdiction" (Constitution of the Republic of Ecuador, 2008, Art. 171, inc.2). (Constitution of the Republic of

Ecuador, 2008, Art. 171, inc.2), actions and obligations that are not always fulfilled, due to the fact that the current conflicts arise with respect to protected legal assets and not to minor social behaviors that deserve to be reprimanded with the sole application of indigenous justice.

Conflicts between these two justice systems arise at the moment of guaranteeing protected legal goods and rights legally established in the national legal system, since there are occasions when the indigenous justice system wants to solve serious problems by violating human rights, one of them being the right to life. This is due to the fact that they do not follow the due process that must be applied to both ordinary and indigenous justice, since the fact of administering justice does not only mean access to a sentence, but also in establishing essential guarantees that must be given to the holder of the right, such as: to protect, repair damages and obtain a fair decision by the authorities applying the law.

In view of the above, it should be understood that the ordinary jurisdiction has established clear rules for its application in the national territory, while the indigenous jurisdiction still has a lot of work to do on this issue, which is the responsibility of its main leaders and authorities;

It is important to point out that, according to the preceding analysis, there is no special law in force in Ecuador regarding indigenous jurisdiction, 27 but rather a set of scattered provisions that serve to guide the way in which probable conflicts between the decisions of indigenous justice and human rights should be resolved. These are provisions that tangentially refer to different aspects of the problem without establishing a comprehensive solution at the legislative level, which does not mean that the existence of such a law is the only way to legally resolve the referred conflicts. (Yoel, et al., 2016, p. 18)

That is to say that the indigenous jurisdiction is not properly structured to put limits to the actions that arise within the indigenous communities, peoples and nationalities. Because so far there are "four requirements to use it: that the person involved is indigenous, that the act, fact or omission has been developed within a community, indigenous people or nationality, that the persons involved agree to submit to indigenous justice and that the problem to be solved is within the competence of indigenous justice". (Días and Antúnez, 2016)

In order to avoid conflicts of competence between the ordinary and indigenous jurisdiction, an infra-constitutional regulation should be created for the latter to regulate its actions, but above all, it should be compatible with the rights to effective judicial protection, due process and legal security as fundamental human rights, inherent to dignity, which have been susceptible to violation or infringement due to the lack of application of the regulations.

Development of indigenous jurisdiction in the constitutional process

The Constitution of the Republic of Ecuador, due to the conception of the State as intercultural and plurinational, allows the special indigenous jurisdiction to take greater prominence due to its recognition, not only based on social concurrence, but also on that egalitarian, protective and guaranteeing scope that comes from the current of neoconstitutionalism or modern constitutionalism. This constitutional recognition prohibits;

The double judgment *non bis in idem*, recognized in Article 76, numeral 7, literal i of the Constitution Reference that is also included in Article 344 letter "c" of the Organic Code of the Judicial Function, as well as in Article 4.9 of the Organic Integral Penal Code, which expressly states the prohibition of double judgment in cases that have been resolved by the indigenous jurisdiction. (Santa Cruz, 2020, p. 7).

Under this constitutional protection the indigenous jurisdiction makes the indigenous communities, peoples and nationalities enjoy autonomy, allowing them to know and judge internal acts or facts of the indigenous communities in a definitive way, for this they will count on the collaboration and cooperation of the ordinary jurisdiction, which according to Llasag, (2007) "has the objective of not violating the legislative and jurisdictional autonomy recognized in favor of the indigenous collectives" (p. 210), allowing the institutionalization of the indigenous jurisdiction that must be respected by any public judicial authority or not, and without any type of actions that may put at risk the validity of all the acts, sentences and judgments of the indigenous communities, which must be respected by any public judicial authority or not. 210), allowing the institutionalization of the indigenous jurisdiction that must be respected by any public judicial or non-judicial authority and without any type of actions that may jeopardize

the validity of everything acted, sentenced or resolved through this jurisdiction.

Customary procedures have at least eight characteristics: a) Willachina. Formulation of the petition; b) Tapuykuna. Investigation of the problem; c) Chimbapurana. Referred to as face-to-face confrontation or interview; d) Killpichirina. Imposition of the sanction; e) Allichina. Repentance of the aggressor; f) Kunana. Advice to the aggressor; g) Paktachina. Execution of the sanction; and, h) Chisqui Yahsca. Cleansing or purification of the aggressor (Poveda, 2007, p. 185).

This type of proceedings do not allow the interference of the ordinary jurisdiction, however, this type of jurisdiction as an exceptional case and exception provides order and constitutional control, forcing that all decisions that have been ventilated under the indigenous justice system are adequate and do not violate or infringe human rights.

The constituent implicitly recognized: a) that there is a legal procedure different from that established in the ordinary justice system; b) that such a norm obliges the indigenous authority to apply the procedure in accordance with the customs or customary law of their people, and c) recognizes the right of the accused to demand compliance with the procedure they have been practicing ancestrally. (Colmenares, 2006, p. 10).

However, this aspect has only been embodied in a body of law, because the COFJ is often not observed. Therefore, the following must be taken into account:

The Ecuadorian Constitution delegated to the legislature the creation of a law on coordination and cooperation between indigenous and ordinary jurisdictions, which, to this day, is a pending task of the National Assembly, which has failed to move from debate to the enactment of a law that adequately addresses this issue. (Santa Cruz, 2020, p.7).

Due to this legal vacuum, it has been the National Court of Justice or the Constitutional Court of Ecuador, which have established triple reiteration or binding sentences so that cases can be resolved when there is a conflict of competences and on the actions of the indigenous jurisdiction itself.

It should be borne in mind that indigenous coexistence is based on the following basic principles

in a worldview that recognizes and respects the relationship man-nature and society for this reason, there is no such classification or division by subject, thus, the competent authority, with the procedure established within each community, has the power to resolve all types of conflicts that occur within the indigenous society. (Paz. M, 2018, p. 10)

This happens because there are no provisions that help indigenous customary law to oversee the strict compliance and enforcement of the rights enshrined in the Constitution.

Analysis of case law

The following is an analysis of a ruling on a protective action filed before the Constitutional Court of Ecuador to resolve the application of indigenous justice in the La Chocha Community belonging to the Panzaleo sector, Salcedo canton, Cotopaxi Province.

Table 1

Analysis of the judgment

Ruling: N o 113-14-SEP-CC- Case 0731-10-EP Constitutional Court of Ecuador
Related legislation: Constitution of the Republic of Ecuador. Organic Code of the Judicial Function.
Articles cited in the judgment: The plaintiff considers that the constitutional rights violated are Articles 10, 11 paragraphs 3, 4 and 5; 57 paragraphs 1, 9 and 10; 76 paragraph? literal i and 171 of the Constitution of the Republic; Articles 343, 344 literal a, b, e, d and e; 345 and 346 of the Organic Code of the Judicial Function, and the general provision of the reforms of March 201 O, to the Code of Criminal Procedure.
Action / Infraction: Extraordinary protection action
Presented by: Victor Manuel Olivo Palio
Against: Indigenous justice decisions adopted on May 16 and 23, 201 O, belonging to the Panzaleo people, of the Kichwa nationality, of the province of Cotopaxi, in relation to the murder of Marco Antonio Olivo Palio.

Source that generated the claim: The plaintiff states that according to the minutes of the resolution made by the indigenous authorities of the Community of La Cocha, on Sunday, May 9, 2010 at about 7:00 p.m., in the urban center of the Zumbahua parish, of Kichwa-speaking indigenous population, Pujili canton, province of Cotopaxi, the murder of his brother Marco Antonio Olivo Palio took place.

Based on articles 171 of the Constitution of the Republic and 343 of the Organic Code of the Judiciary, the indigenous authorities of the communities of La Cacha and Guantopolo heard the case. On Sunday, May 23, 2010, they established the guilt of the five indigenous youths of the Guantopolo community and imposed sanctions in accordance with indigenous justice.

That this decision has generated diverse reactions in the media and in Ecuadorian society, and the interference in indigenous justice by the State Attorney General, who on May 19, 2010 attempted to arbitrarily enter the indigenous community of La Cacha, in order to rescue one of the main people involved in the death of Mr. Olivo.

The Minister of Government and Police has also tried to use public force to rescue those involved and the Minister of Justice requested that legal actions be initiated against the indigenous leaders, who were arrested on June 4, 2010 and subsequently released by the Court of Justice of Latacunga at that time, due to the "amparo de libertad" (protection of liberty) filed. He points out that in previous cases the judges and prosecutors have acted within the framework of respect, coordination, cooperation, and in compliance with constitutional and legal norms have accepted the decisions of the indigenous jurisdiction. He cites in his lawsuit Article 10, paragraph 2 of ILO Convention 169, referring to the application of the sanctions of the indigenous cosmovision, the nettle, the cold water bath, whips, etc., which represent the philosophy and cosmovision of indigenous justice, which according to "the Constitutional Court of Colombia, do not constitute an attack on fundamental human rights".

He states that the five responsible for the murder submitted themselves to the indigenous justice system of their own free will and accepted that the indigenous legal system be applied to them, and that they tried them under the ordinary jurisdiction, for which they were prosecuted under the ordinary justice system, which evidences "a process of double jeopardy". That as the brother of the deceased, he voluntarily requested the intervention and action of the indigenous authorities of La Cocha, together with that of the community of Guantopolo, where the youths involved belong, which, in application of the provisions of articles 171 of the Constitution of the Republic, 343 of the Organic Code of the Judicial Function and 8, 9 and 10 of Convention 169 of the ILO, solved the case, a resolution with which the relatives of the deceased agree.

Purpose of the sentence: To answer the following questions:

1. Did the indigenous authorities adopt decisions under authorized competencies, applying their own procedures, within the constitutional parameters and the protection of human rights recognized by international conventions?

2. Did the institutions and authorities respect the indigenous community involved in the trial process under review, especially the decisions of the indigenous justice system?

Right violated: life

Analysis of the judge's motivation: The Constitutional Court of Ecuador upholds three aspects of motivation:

1.- Regarding the competence of the indigenous justice system. - Therefore, based on the specialized studies and an intercultural interpretation, this Court finds that, in the specific case, the General Community Assembly is the competent authority to hear and resolve cases of internal conflicts that affect the community legal assets of the Kichwa Panzaleo peoples. This collective nature of the judging entity in the indigenous justice process allows us to affirmatively answer who is the authority that legitimately administers indigenous justice, but it also allows us to carry out the constitutional control regarding the responsibility and obligation of this authority to ensure that its actions are subject to its norms, procedures and its own law, as well as to the Constitution and international human rights conventions.

Regarding the protection of rights. - Without being able to speak of interference or diminution of the right of jurisdictional autonomy of the indigenous communities, peoples and nationalities, in the event that a crime against life occurs within an indigenous community or territory, the State guarantees, as in the rest of the national territory, that it will be judged and punished in accordance with the laws of the Ordinary Criminal Law. In such a way, and by virtue of Article 66 numeral 1 of the Constitution of the Republic, the knowledge of all cases of death will always correspond to the State, and consequently, it is incumbent upon the ordinary criminal justice system to investigate and carry out the corresponding investigations, either ex officio or at the request of a party, and to judge and punish the punishable act in accordance with the Constitution, the international instruments and the laws of the matter, taking care to apply the due, timely and prior coordination mechanisms with the indigenous authorities concerned in the respective case, in order to determine the person or persons responsible for the life-threatening acts.

3.- Regarding journalistic performances. If society does not have complete, contextualized, plural and verified information, it cannot know and understand the specific reality and, on the contrary, it can be induced to misunderstanding and discriminatory prejudice, so that in cases like this one, subject to a particular constitutional protection, and given its special situation and socio-cultural characteristics, it is essential that all information disseminated in the media, as well as by public authorities, have the participation of experts and members of the community, and that its dissemination be framed within the framework of the interculturality that our Constitution mandates and recognizes.

Legal Effects: Infringement of the right to the inalienability of the right to job stability.

Source: No 113-14-SEP-CC- Case 0731-10-EP. Constitutional Court of Ecuador

Prepared by: Jessica Supe

The Constitutional Court of Ecuador holds that indigenous justice administers justice based on customary law and legal pluralism, because it is based on the application of their traditions and the maintenance of their cultural identity, stating that the acts to reprimand the guilty such as lynching, nettling, and beatings do not mean an attack on the rights of citizens, since they seek to cause shame in the accused to amend his mistake, apologize and improve his life. In these rituals the maximum authority of the community and the relatives of the two parties involved in the conflict are forgiven and advised so that this type of negative acts do not damage the collective coexistence of the community, people or indigenous nationality.

In the words of Añazco Aguilar, Nadia Sofia del Cisne (2020):

Therefore, it is clear that the Constitutional Court, in several of its rulings, has ruled on the application of indigenous justice, recognizing in several of the judgments reviewed, as determined by the Constitution, the procedures of indigenous communities, peoples and nationalities based on their ancestral traditions. Although there are problems due to language, different interpretations of concepts, scope and limits of indigenous law, in several of the sentences analyzed it is evident that the application of indigenous law, as stipulated in the Constitution, has been guaranteed (p. 66).

The first question to be resolved by the Constitutional Court of Justice on Did the indigenous authorities adopt decisions under authorized competences applying their own procedures, within the constitutional parameters and the protection of human rights recognized by international conventions? It allowed to establish that the appropriate authority to hear and resolve cases of indigenous justice is the General Assembly of the Indigenous Community. In the present case, it was this organization that learned about the murder of Mr. Marco Olivo Palio and after 15 days of investigations and inquiries, it met to determine the sanctions to which the five participants were exposed:

The compensation of five thousand dollars that are donated to the UNOCIC organization to be invested in community works; the

prohibition of the entry of groups of "gang members" to community parties; the expulsion of the youth from the community for two years with the obligation of the family members to rehabilitate them; physical sanctions and the aggravated sanction to the material perpetrator of the act. (No 113-14-SEP-CC- Caso 0731-10-EP. Constitutional Court of Ecuador, 2014, p.20).

Under this consideration the Constitutional Court of Justice states that, although it is true, the indigenous justice has an existence since before Ecuador was formed as a republic, since, at that time the recognition was endowed by the king in times of monarchism, which with the passage of time was perfected indicating that the Constitution of the Republic of Ecuador of 2008, by recognizing as a constitutional state of rights and social justification, plurinational, intercultural and unitary, mentions that these three aspects are interrelated, leads to the sovereignty and democracy of the country, and in no way affect the rights recognized in the constitution and international human rights instruments.

Emphasizing that indigenous justice has its own essence, since it is based on the application of ancestral knowledge and its own disciplinary procedure. Therefore, it was competent to judge the alleged case. It is important to recognize and value the diversity of justice systems that exist in the world, and indigenous justice is a clear example of this. Its uniqueness lies in its foundation in ancestral knowledge and its own disciplinary procedure. By allowing indigenous communities to apply their own forms of justice, respect for their autonomy is promoted and their knowledge accumulated over generations is recognized.

Regarding the sanction that was carried out through the application of indigenous jurisdiction, it is important to emphasize two aspects on which the court pronounced itself: the first corresponds to the fact that the authorities of this jurisdiction did not present in writing the resolution of the controversy that came to their knowledge, which is not accepted, because part of the legal pluralism that is guaranteed in a State of rights in the acceptance of the indigenous communities', peoples' and nationals' own law, but not the State's interference as they want to show; and the second aspect refers to the fact that was subject to sanction, where the court alleges that there were no procedural parties, and that the resolution taken, although it is true, was made by the competent authorities of the indigenous jurisdiction, were only considered on the basis of the harmonious relationship, peace and

social coexistence among the members of the community, precisely between the relatives of the victim and the aggressors, but it was not directly about the murder, but rather, about the bad behavior of the members of the community, in this sense, it cannot be evidenced any type of integral reparation in favor of the relatives of the victim, on the contrary, a compensation was fixed in favor of the indigenous community.

To the second question, which deals with Did the institutions and authorities respect the indigenous community involved in the trial process under review, especially the decisions of the indigenous justice system? The Constitutional Court of Ecuador, respecting the institutionality of justice, holds that the right to life prescribed in Article 66 of the Constitution of the Republic of Ecuador and Article 3 of the Universal Declaration of Human Rights is inviolable and that it is the responsibility of the Ecuadorian State to guarantee this right and to punish when it has been violated or infringed.

It should be emphasized that the indigenous justice system only acts to regulate the behavior of the human being in the community, that is to say, under its own customary law, an aspect that is evidenced by the resolution issued by the Indigenous Community Assembly. Therefore, the ordinary justice and the pre-procedural actions carried out by the State Attorney General's Office is correct, since it complies with the legal norms of the national legal system.

The double judgment in the present case does not exist, although it is true that two types of jurisdiction were used, the ordinary and the special in the indigenous sphere, this because the indigenous justice system agreed on a compensation in favor of the community; and not the victim's relatives, since the indigenous jurisdiction cannot resolve matters that threaten protected legal assets, which in this case was life, and therefore, it must be considered that it acted in observance of the constitutional principles of great value, non bis in idem and iura novit curia to provide the guarantee and protection of all national and international rights to all those involved, without any of them being left defenseless or being denied due process, which is the source of both ordinary and indigenous jurisdiction.

The indigenous jurisdiction dates back to the history of man himself on the face of the earth, since according to their beliefs, traditions and cultures they forged their ancestral knowledge to direct the good living within the community, people or indigenous nationality. Thus, their

actions are focused on their own law and their jurisdiction must respect, comply with and enforce the rights recognized in the constitution and the law.

The indigenous jurisdiction is governed by customary law, however, has certain limits of action that are aimed at strict respect for the rights enshrined in the Constitution of the Republic of Ecuador and international human rights instruments. In this way, the position it pursues is similar to the ordinary jurisdiction, which cause the birth of conflicts of competence, since, both jurisdictions having this attribution conferred by the constitution and the law have the power to decide on acts and facts that arise in their territories submitting them to the decision of their own rule and form of conflict resolution, according to the will of the plaintiff to be governed by a form of justice either ordinary or indigenous.

The legal pluralism in Ecuador since the 2008 constitution is a new paradigm that appears from the current of neoconstitutionalism, and from the section of pluriculturalism and plurinationality making the indigenous jurisdiction has the same powers as the ordinary jurisdiction, with certain restrictions subject in the same rule, under the only difference that the first is governed by customary law and the second by common or conventional law.

Thus, the indigenous jurisdiction is competent to hear cases of conflicts in the community, but it cannot establish any sanction when there is a violation or violation against protected legal rights such as life. This right, being a fundamental human right and inherent to the dignity of the person, must be guaranteed by the State and in this context the ordinary justice system must assume the pre-procedural investigation to establish the responsibility of the persons involved in the commission of the crime, reaching a sentence in accordance with the law.

Therefore, to avoid conflicts of competence between ordinary and indigenous jurisdiction, it is important that the authorities and leaders of the communities respect and observe the cooperation and collaboration that should prevail when there are solutions to problems that tend to regulate the peaceful coexistence in society, thus nurturing the use of the culture of peace under the strict observance of the Sustainable Development Goals scheduled until the year 2030, complying with Goal No. 16 which deals with peace, justice and strong institutions, considering that its goals are as follows:

16.1 Significantly reduce all forms of violence and the corresponding mortality rates worldwide;

16.2 Put an end to abuse, exploitation, trafficking and all forms of violence and torture against children;

16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all;

16.4 By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets, and combat all forms of organized crime;

16.5 Significantly reduce corruption and bribery in all its forms

16.6 To create effective and transparent accountable institutions at all levels;

16.7 Ensure inclusive, participatory and representative decision-making at all levels that is responsive to needs;

16.8 Broaden and strengthen the participation of developing countries in global governance institutions;

16.9 By 2030, provide access to legal identity for all, including through birth registration;

16.10 Guarantee public access to information and protect fundamental freedoms, in accordance with national laws and international agreements;

16.a Strengthen relevant national institutions, including through international cooperation, to build capacity at all levels, particularly in developing countries, to prevent violence and combat terrorism and crime.

16.b Promote and enforce non-discriminatory laws and policies for sustainable development (UN, 2023).

That is to say that, through this objective, the actions of the indigenous jurisdictions are projected in the construction of a functional justice system. This can be achieved with an unquestionable commitment between these two jurisdictions and the creation of a specific law to regulate this action.

Conclusions

One way to solve the conflicts of competence between the ordinary and indigenous jurisdictions would be for the National Assembly, within the framework of its competences and attributions, to establish a law that regulates the principle of cooperation and coordination between these two jurisdictions, in order to guarantee, within legal pluralism, the rights to due process and legal security, which are legally recognized at the national and international level and must be complied with in accordance with the law.

The ordinary jurisdiction has established clear rules for the application of justice in the national territory, while the indigenous jurisdiction still has a lot of work to do with respect to the competence it must comply with, this being the responsibility of its main leaders and authorities who, in order to apply their competence, must comply with the limits and powers they have under their jurisdiction, without falling into non-observance and violation of the rights of the people that are guaranteed in the constitution.

The indigenous jurisdiction has a recognition that is presented by the Andean and indigenous worldview, since it focuses on the explanation of the material and spiritual reality that each people, community or indigenous nationality has, for the application of this justice is strictly based on beliefs and ancestral knowledge, the human being is part of the community and that there is respect for the pacha mama or mother nature. Thus, its recognition is established in the Constitution of the Republic of Ecuador.

In the analyzed sentence it could be evidenced that the application of the indigenous jurisdiction for the murder of Mr. Olivo was not enough because the procedural parties were not given an adequate sanction, from this point of view, it can be stated that in the matter of the solution of the conflict it was based on the harmonic coexistence within the community, However, it was not an attempt to establish a sanction for the violent act that caused the death of the aforementioned citizen, since there was no sentence to repair the damages caused by this crime, for which reason, there is no impediment for the ordinary jurisdiction to establish the criminal liability for the five participants in the criminal act.

Within the Codification of the Law of Organization and Regime of Communes, regulated in 2004, it is possible to identify that the

indigenous authority is the one that has been nominated and appointed by the indigenous people, community or nationality, therefore, from this selection it becomes the official organ of the community and becomes part of the cabildo, However, this designation is not sufficient when there are no fully defined parameters, guidelines and goals for the operation of the indigenous jurisdiction, which generates conflicts of competence with the ordinary jurisdiction.

This has been witnessed because in the course of time and the updates of the changing society and the same globalized world, each day has had to be coupled more to the demands, needs and interests of the right holders, however, the recognition of legal pluralism in the supreme norm has been a great advance to ensure the equality of all Ecuadorians. However, this legislative fact has not helped to regulate the norms of community or collective coexistence in accordance with the needs and acceptance of indigenous peoples, communities and nationalities, since they consider that the ordinary jurisdiction, proper to them, is applied for internal conflicts and do not accept the interference of any other aspect that is not of this nature.

At present, it is the members of the communities themselves who do not feel comfortable with the provisions and judgments that are given within the indigenous jurisdiction, so that some people say that by submitting to the ordinary jurisdiction, all their rights are guaranteed, respected and protected, although such cases occur more in family matters such as alimony, this is due to the certainty and reliability that have the ordinary justice, since, in case of non-compliance the sanctions by this route are more severe and in one way or another force them to be fulfilled.

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