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Indigenous Justice in Ecuador

By Luis Ángel Saavedra

What is indigenous justice? Does an indigenous justice system really exist? Should indigenous justice be subordinate to a country's ordinary (national) justice system? These and other questions are perplexing legal experts trained in Western law as they analyze and try to put into practice the mandate in the Ecuadoran Constitution's Article 171. The article recognizes the competence of indigenous authorities to apply their own norms and procedures that are appropriate for resolving internal conflicts and not contrary to the Constitution or human rights. This article also requires that mechanisms be designed for coordination and cooperation between indigenous justice and ordinary justice.

Opinions differ widely on how to respond to the constitutional requirements, from grassroots systems set up by indigenous communities to carrying out legal studies, proposed by organizations such as the UN Office of the High Commissioner for Human Rights (OHCHR) or carried out by networks of indigenous lawyers. However, none of these proposals seems to answer all the conflicts created between indigenous justice and the ordinary justice system.

Distortions of indigenous justice

The first problem that indigenous-justice analysts face is distortion by the media and various mestizo authorities. The media confuse lynchings of criminals, which usually end in a horrible death, with authentic indigenous justice systems, which do not include the death penalty and do not have a concept of punishment for a committed crime.

Lynchings generally happen in poor urban settings where residents have given up on the ordinary justice system, either because the processes are so slow or because those who carry out justice are so susceptible to bribes, making the administration of justice a system in which whoever runs the courts or has the economic power to buy the judge's decision prevails.

Following President Rafael Correa's thinking, government authorities challenge indigenous justice on the grounds that it resorts to torture and kidnapping. "The whole world knows that hanging naked young men by their arms and whipping them in public is torture; that is not justice. This is not a problem of law; it is a problem of stopping torture, stopping barbaric practices in the 21st century. Those who kidnapped these young people will go on trial because kidnapping, torture, and humiliation cannot be carried out in the name of indigenous justice," said Correa.

Correa was referring to a case in which four indigenous youth were accused of murder. They were detained in a communal house while they were investigated, and, after their guilt was established, they were subjected to what indigenous communities consider punishment—being drenched with cold water and lashed with stinging nettles.

Indigenous lawyer Verónica Yuquilema Yupangui of the Fundación Regional de Asesoría en Derechos Humanos (INREDH) says that, in the indigenous worldview, a crime is not committed because a person is bad but because the person is sick as a result of an imbalance of spirits in the body. Therefore, indigenous justice aims to restore the balance through the use of cold water and stinging nettles.

One of the most conflictive issues is whether the indigenous justice system is competent to deal with serious crimes. Correa says, "Indigenous justice should be applied in internal community matters such as land disputes, theft, even family problems, but it cannot be applied in serious cases such as rape or murder. These cases must be handled by the ordinary justice system."

Dr. Yuquilema says that indigenous nationalities have the ability to handle all cases, regardless of their seriousness. But above all, they have the ability to prevent crime through the processes set up by the indigenous justice system, something impossible under ordinary justice because its processes do not heal wounds, they cause new victims. "Is there any worse torture than keeping a person locked up for many years in inhumane conditions? Is justice served when the harm is not remedied but instead new damage is caused by locking up a person and perhaps depriving innocent children of economic support, when they are not to blame for mistakes of their father or mother?" asks Yuquilema, saying that indigenous justice aims to repair the damage without affecting other innocent people.

Proposals to build an indigenous justice system

Indigenous lawyer Atik Curicama says three schools of thought are trying to resolve the conflict between the ordinary and indigenous justice systems. The first calls for training indigenous judges and prosecutors to incorporate the indigenous worldview into the ordinary justice system. "Nothing is gained by recruiting indigenous lawyers, because they will use the same methods as ordinary justice," says Curicama.

However, several indigenous leaders have opted to support this process, led by the Consejo de la Judicatura de Transición, which has been working for the past two years to transform and modernize the justice system, improving its effectiveness and, above all, eliminating corruption.

A second proposal comes from international agencies, such as the OHCHR in Ecuador. It aims to spell out mechanisms for coordination and collaboration between the ordinary and the indigenous justice systems and explain the achievements of the "legal pluralism" spoken of in the Constitution.

The OHCHR wrote several training manuals for public institutions connected with the justice system and wants to influence them so that they respect the indigenous justice system's processes and competencies.

Curicama says that the OHCHR process, in which he participated, is important but is removed from the indigenous communities and has centered its impact on the spaces of political power. "A more effective coordination process is needed with communities that have already developed systems of applying indigenous justice," he says.

The third proposal for constructing an indigenous justice system tries to do precisely that. It is being developed from grassroots indigenous communities and peoples. This allows a response to local justice needs and recognizes that there is not just one system in the indigenous world but that each nationality, each people, and even each community responds differently at the moment of handling a case. "We must speak of systems of indigenous justice, not a system, because each group is different. We must also consider treating each case, even if it is similar to others, in a different way, analyzing the particular circumstances. We do not have a formula like ordinary justice, which says so many years for this or so many years for that," said Curicama.

Indigenous justice from the grassroots

Independently, several indigenous peoples have worked out their justice systems according to their needs, as the Nacionalidad Eperara Siapidara (NAESE) has done. The group lives in the northern part of Esmeraldas province on the Ecuadoran coast.

Salvador Chirimía, president of the NAESE, says it was necessary to set down various principles of justice that the nationality applied because new generations were forgetting the principles of life that govern the Eperaras. "Young people ask why the grandparents say that we must be this way or why the leaders insist on certain behaviors; so, we had to write down the principles that guide us," said Chirimía.

Indigenous justice is transmitted orally; there are no written laws. What the Eperaras did seems to contradict this principle. However, Chirimía says that what they did can in no way be considered regulations or a group of laws. "What we did was express our general principles, which are what is going to guide our communal life, and we base each case that we assume on these principles, but they will be treated individually and consider what has happened in each case," he says.

Like the Eperaras, the Saraguro de San Lucas people in Loja province on Ecuador's southern border and the Puruhá de Cebadas people in Chimborazo province in the central highlands have configured justice systems determining procedures and competent authorities. "Punishments have not been established because that concept does not exist in the indigenous world; the form of administering justice is all that has been determined," said Curicama.

The grassroots indigenous communities want to build their justice systems from the bottom up, but they must face the prejudices and impositions of state agencies. However, and despite

everything, the grassroots communities know best how to structure their justice systems, and they hope their processes are respected. "We want to coordinate and collaborate with the ordinary justice system, but we want to do so as equals and with mutual respect," said Curicama, showing his leaning toward the grassroots processes.