Legal Pluralism in Ecuador: A Way to Reach SDG16?

A Case-study of Pueblo Kayambi

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Abstract

By 2030, all countries in the World have agreed on fulfilling the 17 Sustainable Development Goals: being a tool for Sustainable Development Worldwide. To accomplish this, all countries need to find solutions how to reach these goals in their National contexts. In this regard, the thesis has examined whether legal pluralism can be a way to reach SDG16 in Ecuador, and if it complies with individual and collective Human Rights. Therefore, a case-study of legal pluralism in Pueblo Kayambi, Ecuador, has been conducted, and the thesis has utilized different theoretical and analytical concepts of what comprises a fair justice system, guaranteeing rights and freedoms to the people. It is a qualitative study, focusing on people's own experiences and views about *justicia indígena*, *justicia ordinaria*, and legal pluralism. The method of Triangulation was used to cross-check the findings obtained from 42 semi-structured interviews, 16 observations, including five audiences, and several legal and public documents. The thesis concludes by arguing that legal pluralism could both be a way to reach SDG16 in Pueblo Kaymabi and Ecuador, having a more inclusive, accessible, and fairer justice system for all, but could also be a way to hinder the fulfillment of SDG16 if not granting compliance with Human Rights in both justice systems, and striving for more comprehension, cooperation and collaboration between the two justice systems.

The Author's Thanks

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¡Jupaychani tukuy shunkuwan!

List of Acronyms

CEDAW – The Convention on the Elimination of all Forms of Discrimination Against Women

CPK – La Confederación del Pueblo Kayambi (The Confederation of Pueblo Kayambi)

DRIPS – Declaration on the Rights of Indigenous peoples

GA – General Assembly

HR – Human Rights

JI – Justicia Indígena (the Indigenous Justice System)

JO – Justicia Ordinaria (the Conventional Justice System)

PK – Pueblo Kayambi

SDG – Sustainable Development Goal

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNSG – United Nations Secretary General

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"No Peace without Development, No Development without Peace and neither Peace nor Development without Respect for the Human Rights."

Jan Eliasson

(Quoted in UNDP, 2013: 3, Author's translation)

1. Introduction

Over the next-coming 12 years, all 193 States of the United Nations (UN) have agreed upon a new Development Agenda, Agenda 2030, including its 17 Sustainable Development Goals (SDGs) with the aim to reach a social, environmental and economic sustainable development for all people. An important component in the Agenda is SDG16, which states that all countries should "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels" (UN,2018). However, as former UN Deputy Secretary-General Jan Eliasson claims above, it is not possible to reach sustainable development without respecting Human Rights (HR's) and having peace. Justice is a fundamental HR and numerous articles in the UN Declaration of Human Rights acknowledge different aspects of justice (See UDHR, 1948: Articles 3, 5-11, 29; Appendix 4). Therefore, to be treated justly and to have access to a fair justice system that is inclusive, accessible and at the same time upholds Universal Human Rights is crucial for sustainable development.

Additionally, in a post-colonial era, the movement for indigenous peoples' rights is an on-going process in many parts of the World and has received ground last decades, not least since the 1989 ILO Convention no.169 and the adoption of the 2008 UN Declaration on the Rights of Indigenous Peoples, affirming the concerns and discriminations that indigenous people have suffered worldwide and reaffirming indigenous peoples' collective rights to follow ancestral traditions, practices, and customs (ILO, 1989; DRIPS, 2008).

Moreover, in Latin America, the indigenous-movement has been quite successful the last two decades; leading to the inclusion of indigenous people's demands of Multi-Culturally and collective rights in the countries' Constitutions (García, 2010). Furthermore, in 2008, Ecuador declared itself to also be a Pluri-National and Pluri-Legal State, and Bolivia followed in 2009 – being two of the region's fore-runners for indigenous-rights. In Ecuador's new Constitution, recognition is given to the indigenous people's discrimination and struggles during centuries, and is granting the indigenous people the legal right to exercise their own justice system, *justicia indígena*, which builds upon customary laws and ancestral-practices (Ecuadorian Constitution, 2008; Art. 1, 171). Despite much progress in the Latin-American region, Ecuador is the country that gives most acknowledgement and legal status to the indigenous justice system: making it stand on equal terms as the conventional justice system, *justicia ordinaria* (Ecuadorian Constitution, 2008: Art.171; Andolina, 2003: 724; Simon Thomas, 2012).

Therefore, being an interesting case-study, this thesis seeks to examine how legal pluralism ties to the above discussion about SDG16 and HR's, particularly the access to a fair justice system *for all* – even the historically most marginalized: the indigenous people. The thesis presents a case-study of legal pluralism in one *pueblo*[1], Pueblo Kayambi, in which the two justice systems operate side-to-side. The study is qualitative, based on 42 semi-structured interviews, 16 field-observations, and legal documents and records. The purpose of the thesis is to examine if legal pluralism can lead to a fairer, more accessible and inclusive justice system for all, as SDG16 requires, and simultaneously maintain and grant individual and collective HR's. The main focus is on the indigenous people, since they during centuries have been a marginalized group, recently gaining more recognition and being an important group to include for fulfilling the SDGs.

Outline

Firstly, the research-questions are presented, followed by the background-section, which outlines historical events and provides facts about Pueblo Kayambi. Thereafter, the literature review situates the study in scholarly-discussions and empirical-studies of legal pluralism and customary law practices. This is followed by an outline of the theoretical concepts informing the analysis; before explaining the methodological framework. After that, the study's findings and the analysis of the data are presented. The thesis concludes by arguing that legal pluralism could both be a way to reach SDG16 in Pueblo Kaymabi and Ecuador, having a more inclusive, accessible, and fairer justice system for all, but could also hinder the fulfillment of SDG16 if not granting compliance with HR's-practices in both justice systems, and striving for more comprehension, cooperation and collaboration between the two justice systems.

Lastly, this study does not incorporate any quantitative component. Although it would have been an interesting contribution to the analysis, to examine how many of the accused people get convicted as well as the number of crime-relapses in each justice system[2], national statistics from the indigenous justice system is presently missing; and the research questions are therefore of qualitative nature. Moreover, it would have been interesting to do a multiple-case study, stretching over different Latin American countries, investigating how legal pluralism may be a way to reach SDG16, including all and providing fair and accessible justice.

[1] In Spanish *pueblo* means town, people, village. In the Ecuadorian context *pueblo* is referring to a specific geographical space, inhabited by several indigenous communities, which together make up a *pueblo.*

[2] Which could have been categorizing into geographical-space, gender, age, crime, etc.

2. Research Questions

The field of Development Studies is vast and this is reflected in the 17 SDGs, which all covers specific topics relating to Sustainable Development. This study emphasizes the fulfillment of SDG16, although the interconnectedness of the SDGs provides ground for taking steps towards SDG5 and SDG10 as well.

As noticed, the conventional justice system (JO) is working parallel with the indigenous justice system (JI) in Pueblo Kayambi (PK), making it an interesting case-study for legal pluralism. Moreover, PK is part of the national movement demanding acknowledgement for indigenous people's rights in Ecuador and is seen as a national referent regarding performance and political promotion of JI (Interview 1, 2, 9, 17). Although several studies have been conducted concerning customary law practices in the light of individual and collective HR's, previous literature has not given much attention to this specific geographical-area in the Andes, neither have scholars sought to examine legal pluralism in Ecuador in the light of achieving the SDGs. This thesis therefore seeks to contribute to the literature and development discussion by looking at legal pluralism in this regard. The thesis' research- and sub-research questions are:

To what extent do the two legal systems operating in Pueblo Kayambi provide ground for reaching SDG16: to promote peaceful and inclusive societies, provide access to justice for all and build effective, accountable and inclusive institutions of justice?

SRQ 1: *How does legal pluralism function in Ecuador and more specifically in Pueblo Kayambi?*

a. *What is Justicia Indígena and how does it function in Pueblo Kayambi?*
b. *What is Justicia Ordinaria and how does it function (in Ecuador and) in Pueblo Kayambi?*

SRQ 2: *What are the similarities and differences between Justicia Indígena and Justicia Ordinaria in Pueblo Kayambi?*

SRQ 3: *To what extent do the two justice systems in Pueblo Kayambi uphold collective and individual Human Rights, taking into consideration a gender-aspect?*

SRQ 4: *What lessons can be learned from the case of Pueblo Kayambi?*

Thus, to provide a broader understanding of legal pluralism in PK, SRQ1 is foremost descriptive and outlines how the two justice systems functions. SRQ2 provides an analytical comparison between the two systems, relating it to SRQ3; which examines the compliance with collective and individual rights, including an indigenous gender-perspective. Although findings from qualitative-studies are hard to generalize, being context-specific (Creswell, 2012), SRQ4 sheds light on what lessons could be learned from PK, including potential policy-implications. The overall RQ connects back to global discussions of Sustainable Development and inclusive and fair justice for all.

3. Background and History: The Indigenous People's Movement and Legal Pluralism

3.1. The Development Problem on a Global and Regional Level

During the "Age of Discovery", the Europeans exploited and colonialized serval countries in Africa, Asia, Australia and America. Moreover, in 1492, Christopher Columbus "discovered" America, leading to the colonialization of many Latin American-countries. During centuries, the indigenous people in the region were oppressed, experiencing racism and violence, being seen as an inferior people, and not enjoying the same rights and freedoms as the white *mestiza* population. Nonetheless, this oppressive treatment was not unique for the region. Altmann (2016: 122) argues that the "international panorama is reflected in most countries with a considerable indigenous population" as the States were "generally inscribed in a paternalizing treatment of indigenous peoples as objects of state action – in Latin America, this was called Indigenism", resulting in centuries of oppressive treatment.

Table 1:

Short fact about Indigenous people

Around 5% of the world's inhabitants are indigenous people, currently living in 70 countries, extending from the tropics to Arctic. At the same time that indigenous people help to remain and protect around 80% of the biodiversity on Earth, they also make up 15% of the poor.

An universal definition of indigenous and tribal peoples is lacking, but the ILO Convention No.169 offers certain criteria that can be used for identification.

Source: ILO, 2018b.

However, the indigenous peoples' struggle to be seen as equal human beings and govern themselves amplified in the 1960s-70s, when they demanded their rights to participate in decision-making processes (Altmann, 2016). Although matters of colonialism have been on the International Agenda in for example the UN, the international legal recognition of indigenous people's rights is a quite new phenomenon, having its breakthrough in 1989 with the ILO

Convention no.169 on Indigenous and Tribal Peoples Rights (ILO, 1989) and later with the (non-legally binding) 2008 UN Declaration on the Rights of the Indigenous peoples (UNDIP, 2008).

Moreover, in Latin America, the indigenous people's movement expanded during the 20th century. The ratification of the ILO Convention no.169 and on-going national demands finally resulted in Constitutional reform processes. The combination of the pressure from the indigenous movement as well as having weaker states during these years, resulted in reforming the Constitutions in Colombia 1991, Peru 1993, and Bolivia in 1994, followed by Ecuador in 1998 (Thomas, 2012: 65). Currently, most of the Latin American Constitutions[3] include writings of being *Pluri-Cultural* and *Multi-Ethical*[4] (García, 2010) as well as granting specific collective-rights to the indigenous people (Stavenhagen, 2008). Furthermore, two core values in the Bolivian and Ecuadorian Constitutions are the ideas of *Sumak Kawsay*, which means to live well and in balance with each other and the nature, and *Pluri-Nationality*, giving the indigenous population the freedom to employ self-determination and autonomy[5] in their territories, in which *justicia indígena* is key (Bolivian Constitution, 2009; García, 2010; Magne and Sharifpour, 2016). However, Stavenhagen (2008: 115) warns about "the implementation gap", namely, if the Constitutional norms in these countries actually translate into real practices – or if they are mainly there for display.

3.2. National level: Post-Colonialism and Indigenous Demands in Ecuador

As with many other countries in the region, Ecuador was a Spanish colony for long time, beginning in the 16th century. Once the Spanish people settled in the country, they started to impose their own legal system – following Spanish laws – and customary laws (the indigenous peoples' laws) became subordinated. After centuries of colonialization, Ecuador reached independence and became a Republic in 1830. However, instead of acknowledging the Multi-culturalism and heterogeneity of the country, which had been oppressed during the Spanish rule, an assimilation-process was initiated, and a segregationist-model adopted, promoting values such as "one people", "one nation, "one legal system", making it difficult for the indigenous population to follow ancestral practices and customary laws (Simon Thomas, 2012: 60-65). However, as in various countries in the region, different reforms were implemented in the 20th-

[3] In countries such as Argentina, Bolivia, Brasil, Colombia, Ecuador, Guatemala, México, Nicaragua, Panamá, Paraguay, Perú and Venezuela (Stavenhagen, 2008).
[4] With the aim to show the diversity in the countries.
[5] The notion of self-determination also brings into light the discussions of autonomy and sovereignty, which is not unique for the region. Different countries in different continents have experienced "similar" things, such as the Soviet-Union, Spain, etc. For a theoretical discussion see for instance: De Benoist, A. "What is Sovereignty?" *Telos*, 1999:116, pp. 99-118.

century when numerous population groups started to request their rights; creating movements for land reforms, worker's rights, and strengthening of women's positions. In this light, the national indigenous organization CONAIE[6] was created, gaining political importance by pressuring the government for political reforms in favor for indigenous demands (Simon Thomas, 2012). Important milestones in this struggle was the passing of the 1937 Community Law (Ley de Comunas) that gave permission to the communities to elect a *cabildo* (village council), to collectively earn property and undertake local matters; and the Agrarian reforms during the 1960s-70s, which were granting rural populations some land rights, strengthening the communities, and reducing the power of *hacienda owners*[7], the Catholic Church, and the *teniente politico*[8] whom made up the "Holy trinity" before these land-reforms. The reform-process gave the indigenous population ability to more freely govern themselves, hence, both maintaining and strengthening local practices of customary laws, exercised by local *cabildos* and General Assemblies in the communities (Cervone, 2012; Korovkin, 2001: 51-52; Lyons, 2001: 24; Simon Thomas, 2017: 50; Yashar, 2005: 95).

In addition, the ILO Convention no.169 was ratified by Ecuador in May 1998, entering into force in May 1999 (ILO, 2018a). Several articles in the Convention concern the indigenous peoples' rights to exercise JI according to ancestral practices (See ILO, 1989; Art. 8-10). Besides, in the 1990s, a wave of neo-liberalism spread over the world, and principles of decentralization were introduced and enforced on the International Development arena. It has been argued that the influences from the World Bank to adopt these neo-liberal policies together with the implementation of *ProJusticia*[9], created a space for indigenous demands of Pluri-Nationality and Pluri-Legalism (Van Cott, 2008; Simon Thomas, 2009).

To sum up, the pressure from the social movements in Ecuador, the international and continental pressure for indigenous people's rights and demands for more recognition and authority, together with the spread of neo-liberalism, resulted in the 1998 and 2008 Constitutions. In 1998, Ecuador claimed itself to have formal (de jure) legal pluralism, and for the first time in history, legally acknowledging customary laws alongside national laws (Thomas, 2012: 60-65). In Article 191 of the 1998 Constitution the indigenous people are granted the right to exercise their own juridical functions. Although the coordination and guidelines of legal pluralism were un-clear, these writings recognized customary laws more strongly than other Latin American'

[6] Namely, the *Confederación de Nacionalidades Indígenas del Ecuador*, which is working nationally for demanding indigenous peoples political and social inclusion, and board members are elected for a three-years period (CONAIE,2018).
[7] Owners of farms, ranches and estate in the communities.
[8] The lowest political authority in the rural area.
[9] The National Program for the Reform of the Administration of Justice.

Constitutions (Andolina, 2003: 724). The status of customary law later became more elevated in the 2008 Constitution (Thomas, 2012: 66). Finally, an important component for a Pluri-National State is legal pluralism. Article 171 of the 2008 Constitution grants JI jurisdiction, alongside the ordinary justice system (JO), including HR's and Women's participation and decision-making:

> ***"The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee for the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments.***
>
> ***The state shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to monitoring of their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction."***
>
> ***(Translation from Spanish by Hinz, 2012:80)***

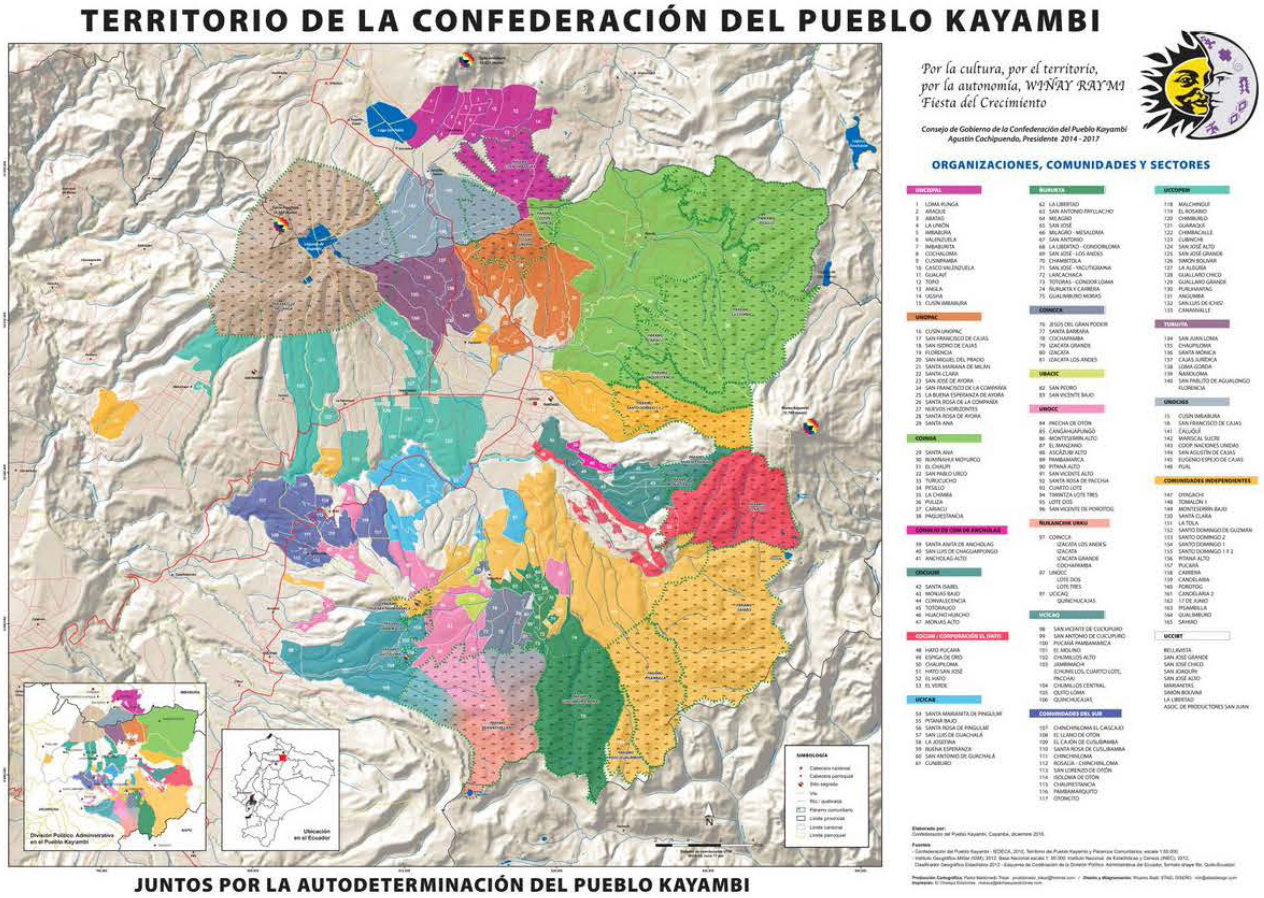
3.3. The Local Level: The Case of Pueblo Kayambi

Around 25% of Ecuador's population, approximately 2.6 million people, is indigenous[10] (Chisaguano, 2006). Moreover, in Ecuador, the indigenous peoples are divided into *pueblos* and *nations*, as realized in article 171 of the Constitution. *Nations* refers to the 14 different groups of indigenous people in the country. The Kichwa-people is the largest group, constituting 47.5% of the total indigenous population, located in different parts of Ecuador (UNICEF, 2014). Pueblo Kayambi (PK) is part of this group, and the majority of PK's population is indigenous. Moreover, PK is located in the Andes and stretches from Pichincha to Imbabura and Napo, covering 120,186.5 hectares and inhabiting 13,438 people (SAL, 2016; Interview, 9). Furthermore, neighboring communities are together making up a *pueblo*, where the territorial-borders are crucial (Interview,11). Pueblo Kayambi consists of 174 local communities (see image below). Every or every second year (depending on the community), the community elects their leaders, the Directive Board, in the villages' General Assemblies. The elected President is the highest authority and is considered the JI-judge. Additionally, every three years there is a regional Congress in which the Directive Board for the *Confederación del Pueblo Kayambi* (CPK), the *regional* indigenous-leaders in the *pueblo*, is elected for a three-year period. The

[10] However, it is difficult to find precise and accurate statistics on how large the indigenous population is, since data is conducted infrequently, measurements vary, and the actor who conducts the statistic plays a significant role (UNICEF,2014; Altmann,2016). Moreover, how one chose to define him/herself has an vital impact, as some groups and individuals consciously decide not to view themselves as 'indigenous', for instance due to reasons related to identity and culture, migration to larger cities, and fear of discrimination originated from colonial-times (UNICEF,2014; Interview,9).

President of CPK has the authority to assist and/or perform JI in all the 174 communities of the territory (Interview 9-14). Moreover, CPK is arranging workshops and holding lectures to strengthen and capacitate the communities in JI-application. Although the JI-practice was not legally accepted during colonial and post-colonial times, the indigenous people in Ecuador and around the world still performed customary law-practices during these times (Hintz, 2012). However, the structural-oppression lead many to forget their ancestral-practices, including how to exercise JI properly (Interview 10, 17).

Image 1: Map of Pueblo Kaymabi



3.4. The Development Problem's Connection to the SDGs

Finally, the topic of legal pluralism in this case-study is related to several of the SDGs. Although the main focus of the thesis is on SDG16, SDG10, to "reduce inequality within and among countries", and SDG5, to "achieve gender equality and empower all women and girls" (UN, 2018) are also important to bear in mind for the analysis in Section 7.[11]

[11] See also Appendix 3 for a list of relevant targets within these three SDG's in connection to the study.

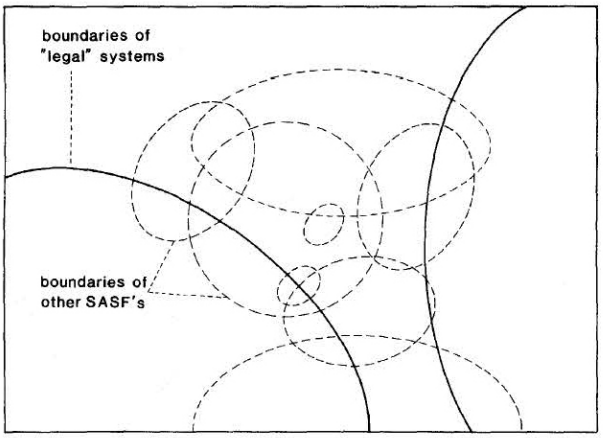
4. Literature Review

To begin, the literature concerning legal pluralism is vast and comprises both theoretical and empirical studies from different parts of the World. In this thesis, the empirical-part is most relevant looking at the RQ/SRQ's. Nevertheless, to understand the complexity and comprehend of the contested nature of legal pluralism and customary law (even theoretically) the first section outlines some of these challenges, which impacts on real-life application, since literature guides policy-making, hence influences everyday-life experiences. A few empirical-studies from different parts of the World are mentioned, having direct relevance for the study, before turning to previous studies conducted in Ecuador: the main focus of the review.

4.1. What is legal pluralism?

The definition of legal pluralism is "the presence in a social field of more than one legal order" and the level of legal pluralism, ranging from 'weak' to 'strong' jurisdiction, depends on how much power the State is enjoying regarding legal matters (Griffiths, 1987: 1, 4). Despite the long historical past of legal pluralism, (Tamanaha, 2008) the prevalent ideology during centuries was legal centralism, emphasizing that only the State and its institutions could (and should) hold legal power. However, legal centralism has been starkly criticized as not reflecting the reality, nor being able to observe and explain real-life cases (Griffiths, 1987: 4). Instead, as in many post-colonial States, several legal systems are operating simultaneously. This can be seen as a reflection of the dynamic social organization in countries, displaying that "social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields'", which exercise self-regulatory activities (Griffiths, 1987: 38). This idea is developed by Moore (1978: 78-80) who defines 'semi-autonomous social fields' as a distinguishable social group (such as indigenous people) that engages in reglementary activities, being for instance customary law practices (See image 2). This addresses the complex social situation in which legal systems operate, and provides some understanding of legal pluralism in the society: hence, being a reflection of social organization (Griffiths, 1987; Moore, 1978) but also reflecting a historical past – as described in the Background chapter.

Image 2: Moore's Semi-autonomous social fields



Source: Griffiths,1987:35

Moreover, when defining legal pluralism, considerable focus has been on the *interaction* between customary law and national law, and it has influenced the discussions in Latin-America. However, Simon Thomas (2017: 60) argues that one cannot understand people's everyday-experience of legal pluralism if distinguishing between legal systems as isolated units, but one needs to understand the *impact* of the different systems. Some scholars have disregarded legal pluralism as a concept, and instead argued for "interlegality" as more suitable to describe the legal situation (Goodale, 2009). Interlegality is nevertheless defined by De Sousa Santos (2002: 437) as an experience of legal pluralism, namely as "different legal spaces superimposed, interpenetrated, and mixed in [people's] minds, as much as in [people's] actions". Following Simon Thomas' (2017: 60) argument, the term legal pluralism is still valid in the discussions of legalities in Ecuador, but means different things in different geographical spaces. The thesis now turns to customary law, playing a central role in legal pluralism.

4.2. Customary law

Customary law has its origin in discussions of colonialism, organization of local communities and indigenous laws and practices (WIPO, 2013). Customary law is "passed on by unwritten tradition" taking ancestral-practices, culture and customs into consideration (Badawi, 1986: 107; Tamanaha, 2008). As with legal pluralism, the concepts of 'law' and 'customs' are contested and there are on-going scholarly-discussions of how to define and use the terms. Some scholars claim that it is impossible to make an universal definition, as "law" and "customs" are context-specific and can be defined different by different people in different circumstances (White, 1965). Furthermore, Lloyd (1962) states that "[c]ustomary law needs no lawyers since all know the law; and since it has no lawyers it does not develop into an esoteric science – until, of course, it is written down and one can begin to quibble over the meaning of word" (in White, 1965: 89).

4.3. Customary laws and Legal Pluralism around the Globe

Moreover, in most of the 70 countries with an indigenous population customary law is exercised, regardless if the State has defined itself as Pluri-legal or not. Unfortunately, due to the word limits, the thesis only brings up a few examples that have direct connection to this study.

Hinz (2003; 2008; 2011; 2012) has written about legal pluralism and the jurisdiction of customary law in Africa. In many African countries, customary law cases are not divided by 'modern' categorization into criminal cases or civil cases, and the emphasis is not on punishing but on compensating the victim and/or the victim's family (Hinz, 2003). Hinz (2012) main focus

has been on Nambia, and he illustrates that the Nambian Constitution from 1990 to some extent has similar writings as the 2008 Ecuadorian Constitution, giving both customary law and national law jurisdiction in Article 66. Nevertheless, there are jurisdiction conflicts and the principle of *ne bis in idem* (to only be tried once for one crime by one jurisdiction) has been violated. Sometimes the two systems have "succeeded" to collaborate and he brings up one murderer-case, which was solved with customary law, including a payment of cattle to the victim's family, but thereafter also was sanctioned by ordinary law, sending the aggressor to imprisonment; however, being able to reduce the number of years in imprisonment due to the compensation of cattle to the family. Furthermore, Akpa (2017) has examined the Nigerian legal system, in which legal pluralism exists but customary law is acquiescent to national law: being demanded to go through legitimacy-tests. Akpa also found that definitions differ in the systems, for instance that of a 'child', resulting in legal implications.

Moreover, Smith (2005: 139-140) shed light on another aspect of customary law and collective practices among the indigenous population in America, acknowledging the un-fair treatment of indigenous people in the ordinary justice system, particularly in USA; and brings up the example of indigenous people in Canada who embrace "restorative justice" principles, addressing crimes from a "restorative and reconciliatory rather than a punitive framework" to restore the balance in the community and between the different parties.

Lastly, Van Cott (2000) examines legal pluralism in Bolivia and Colombia, and argues that the political-elites in both countries have acknowledged indigenous peoples' rights to customary law since they "understand the urgency to provide a cheaper, more accessible, more face-to-face form of justice administration, particularly in rural areas, in order to legitimize the authority of the state and extend the presence of the rule of law throughout the territory". Hence, claiming that political interests are at play. Following the argument by Iturralde (1990; 1993)[12] she also states that the application of indigenous customary law often-times are limited to family cases and minor cases such as theft and insults, and that severe cases are directed to national law.

The thesis will now turn to Ecuador, being the main focus in this review.

[12] See for instance: Iturralde, D. (1990) "Movimiento indio, costumbre juridica y usos de la ley' in R. Stavenhagen and D. Iturralde (eds.), *Entre la ley la costumbre. El derecho consuetudinario indigena en America Latina*. Mexico. And also: Iturralde, D. (1993) "Usos de la Ley y usos de la costumbre", in Alberto Wray et. al, *Derecho, pueblos indigenasy reforma del Estado*. Quito.

4.4. The Case of Ecuador

To begin, "Ecuador is an excellent case to look at since its 2008 Constitution formally recognizes indigenous jurisdiction as equal to ordinary jurisdiction and establishes that their relationship must be governed by the principles of cooperation and coordination" (Viaene, 2017: 1). Numerous scholars (for instance: Altmann, 2016; García, 2010; Illaquiche Licta ,2001; Simon Thomas, 2012; Truffin, 2009) have analyzed the historical movements leading to the 1998 and 2008 Constitutions and thus, the integration of indigenous people's collective rights and legal pluralism. Scholars have also examined the impact of such rights for the indigenous populations' political and legal empowerment and investigated if there are sufficient coordination and cooperation between the legal systems, and if women are included as indicated in the Constitution.

To begin, Altmann (2016) has analyzed plural legalism through an 'oppression frame' (a way for the elite to retain their interests and continue oppression) and a 'liberation frame' (as means for empowerment and eliminating discriminatory principles towards the indigenous peoples). Altmann (2016: 132) finds that social movements regard the laws as a "double-edged sword", since it can be used in favor for and against indigenous empowerment – since the legal situation both provides opportunities (liberation frame) and imposes constraints (oppression frame), in which the State sometimes was seen as an "exclusive, oppressive, elitist and badly managed" entity, having some discriminatory laws. He argues that "law does appear as an instrument of repression if it does not recognize indigenous social, legal, political structures" (Altmann,2016:133). The study hence points to the difficulties of being a Multi-cultural, Pluri-national and Pluri-legal State, and the impact of legal pluralism for the indigenous peoples' empowerment.

Moreover, when ensuring Pluri-legalism, there are risks for clashes between the different justice systems as stated earlier by Hinz (2012). Ruiz-Chiriboga (2017) investigates what rules and laws would be applicable in conflicting cases of jurisdiction. He argues that *Ne bis in idem* is an important aspect and he shed light on the complications of boundaries between the justice systems, in which the territorial-aspect is prominent, but also cultural-boundaries. Ruiz-Chiriboga acknowledges that no law has been passed on cooperation and coordination between the legal systems although the Parliament was commanded to create such laws after the 1998 *and* the 2008 Constitutions. Nevertheless, there are some rulings on how the interrelation between JI and JO can be looked at in the Organic Code, article 344, as well as in article 345 stating that the justice systems can request a *transferal of jurisdiction* from one justice system to

another. Moreover, Ruiz-Chiriboga (2017: 3) claims that the laws and rules impact on HR's, for instance the right to "be heard by a competent court" and argues that restraining a person "from his/her natural judge is a fair trial violation", while he at the same time notices that deciding *who* is the "competent court"/"natural judge" for a person may be challenging and generating further clashes.

In line with the above studies, Simon Thomas (2009; 2012; 2017) has written several articles and books about the problematics with legal pluralism in Ecuador, making in-depth analysis of cases where JI was applied – and scrutinized how JO responded to it. Simon Thomas (2017) makes a comparison of two cases of "internal conflict" in the village Zumbahua, and argues in line with Ruiz-Chiriboga (2017) that legal pluralism can both strengthen and weaken indigenous political and legal empowerment, depending on the involved parties and the severity of the case. The first case he examines is a long-lasting dispute between two local groups (Toaquizas and Tigua), concerning an insult. It was brought up to the ordinary judge (JO), but the case was transferred to JI upon request and in favor for the local *cabildo* (village council). Simon Thomas therefore argues that it was a case of empowerment for the indigenous authorities, as they had the constitutional right to exercise JI – and importantly, were granted such right in reality.

The second case is a controversial case of great significant in Ecuador, namely the Cocha-case that has been examined by several scholars (Pinoargote, 2014; Jaramillo Villa, 2014; Simon Thomas, 2009; 2017) and has received great attention and media-coverage. It treats a homicide-case in Guantópolo, in which a man was murdered in 2010 and five suspects were handed over to the *cabildo* in Cocha[13]. Both the victim's family and the five suspects wanted the case to be judged by JI/customary laws. The men were convicted by JI in Cocha, and the sentence determined: to make apologies; provide a compensation payment to the victim's family; perform a *ortigazo*[14]; be whipped; and finally be banished from the community (Simon Thomas, 2017). However, this case reached the media and an outrage broke out, in which the five men's' sentences were described as "barbaric" and Ecuador's top-ranked Public Prosecutor declared that "[c]ustomary law can be applied in minor offenses, but not in crimes like homicide" (Simon Thomas, 2017: 54). All these events resulted in the five men being detained and the case being brought up in a JO-court before reaching the Constitutional Court, in which several hearings and

[13] The reasons why they were not brought forward in Guantópolo, but instead the neighboring village Cocha, were twofold, firstly the close relationship between Guantópolo's cabildo and the suspects, thus risks of partiality, and secondly, Cocha's earlier experience of exercising JI in a homicide-case in 2002 (Simon Thomas,2012).

[14] Strikes of stinging nettles generally in combination with ice-cold water to spiritually clean the person from 'bad' energies (Simon Thomas,2017). This will later be referred to as *baño de purificación*, since that was the term used in Pueblo Kaymabi.

an expert-testimony were conducted; trying to interpret Article 171 in the Constitution. After one year, the five men were set free. However, the Constitutional Court continued the investigations. In July 2014 it declared; to limit the use of JI/customary laws in cases against *the right to life,* which should be solved by national law, adding to the Constitution that customary law is valid when indigenous "internal affairs" regards "local values" (Simon Thomas, 2017: 55). This was a turndown for JI and implied that one may not only look to territorial-boundaries for determining jurisdiction, but also make interpretations of what compromises "local values". Simon Thomas (2012: 66) claims that: "everything is politics" and García (2010: 15) argues in line with this statement, meaning that political power struggles are visible in justice cases – since its application constitutes an exercise of power, hence, generating clashes between the State and local authorities.

Furthermore, another challenge with legal pluralism and customary law practices is described by Truffin (2009: 142-144) stating that indigenous families have expressed the need of socialization and teaching of their own customary laws and collective rights. This is displaying the problem that a right "does not have in itself more strength than that of the actors that mediate it" and even though Ecuador is claiming to "strengthen national unity in diversity", many challenges persist, not least with the political situation and the last years weakening of the national indigenous movement (Truffin, 2009: 144, 142, Author's translations).

Finally, customary law is part of the indigenous people's everyday lives and was prevalent centuries before the *de jure* (formal) recognition in 1998; and importantly, Ecuadorians may not be able to choose what system to be judged in (Simon Thomas, 2012; 2017). This makes it hard for people to know which system they will be treated in; and the mentioned conflicts between the two justice systems "also creates opportunities for individuals and groups within society, who can opportunistically select from among coexisting legal authorities to advance their aims" (Tamanaha, 2008: 375).

4.4.1. Gender aspects

Additionally, FineDare (2014) examines Ecuadorian women's experiences of the 2008 Constitution. She focuses her study on Quito and the Kichwa population[15], examining what Constitutional-rights are granted to women, talking about *sumak kawsay* (the good life) and indigenous feminism (feminismo communitario). FinDare (2014: 30) argues that the 2008 Constitution indirectly promotes women to claim their "indigeneity over femaleness", which she

[15] Which Pueblo Kayambi is a part of.

claims signals a colonial-past and something yet present in the indigenous-movement; following O'Connor's (2007: xi-xii) argument that "indigenous women are central to and yet often marginalized within indigenous activism". Furthermore, FinDare (2014: 30) observes that women having legislative-positions in the country is somewhat improving, but women still face obstacles occupying such positions, remaining subordinated to men regardless of their social-class or cultural-background. The latter is supported by Sieder and Sierra (2010), whom also stresses the disadvantages women face in both JI and JO, partly because fewer women hold leading-position in the justice systems, but particularly due to patriarchal norms. This is especially prominent in cases of domestic- and sexual violence, as this in many communities is regarded as "taboo" and a "private matter"; and indigenous women experience discrimination due to class, ethnicity and gender, resulting in women having lesser access to justice than men (Sieder and Sierra, 2010: 32, 38).

Lastly, legal pluralism "has provoked many important debates in international human rights law as its formal recognition by the State involves a critical revision of modern concepts of sovereignty, unity, autonomy and territoriality" (Viaene, 2017: 1) and there are several studies done globally on how customary law may not comply with human rights and how individual and collective rights might be in conflict[16]. For instance, Radcliffe (2014) has seen the negative effects of customary law practices in terms of women's land-rights in Ecuador, and in both Ecuador and other countries, cases of sexual violence and incest are not treated as crimes due to reasons of shame, and the dependence on the male breadwinner (Sieder and Sierra, 2010: 12).

4.4.2. How Previous Research Connect to My Study

To sum up, most of the scholars argue that the acknowledgement of legal pluralism in Ecuador from the 1998 and 2008 Constitutions have generated mixed results. It has led to some empowerment for the indigenous population, given them the right to apply customary laws. Nevertheless, it also displays that being granted Constitutional rights do not necessarily translates into reality. Previous literature has examined the scoop and boundaries of the indigenous-jurisdiction and application of customary laws (JI), and argued that the two justice systems do not operate on equal terms and there is a lack of cooperation and coordination between the two systems. Besides, indigenous women may have less access to justice due to patriarchal norms and might have to "choose" indigenous collective rights over women's rights (FineDare, 2014; O'Connor, 2007; Sieder and Sierra, 2010). The Cocha-case and the statement from the top-ranked Public Prosecutor also indicate that legislative-professionals may not regard

[16] For a theoretical discussion of this, see Section 5.1.

JI as sufficient in severe cases.

This thesis can contribute to the field by giving a development-perspective on legal pluralism, connecting it to the current debates about the SDGs, examining if legal pluralism and the right to JI-application could be a way of fulfilling SDG16: having fair, inclusive, and accessible justice for all – including the indigenous people. It furthermore adds a local perspective on how the people who are exercising and experiencing JI and JO think about legal pluralism and what their experiences of legal pluralism are.

5. Theoretical and Analytical Concepts

In this chapter, the theoretical and analytical concepts[17] utilized for the analysis is presented. This includes discussion on individual and collective rights and what right-holders should be given preference in what cases. It presents concepts of what makes up a fair justice system, guaranteeing rights and freedoms to the people, as well as shortly explaining an indigenous feminist perspective, providing ground for further gender insights.

5.1. Individual and Collective Rights - *Who* is a Right holder?

This section defines three types of right-holders: the individual, the collective/group (the group of people composing it), and the collective (having value in itself).

The discussion of who is a right holder is essential for comprehending HR's and their application in cases of legal pluralism. Several scholars make a separation between individual and collective rights, in which the former refers to rights enjoyed individually and the latter to collective rights implemented in unison, providing collective protection of the individuals (Jovanović, 2012: 110). Individual rights can be claimed in three ways: a) individually, b) by the right holder's agent[18], or c) through universal group-rights such as the rights to assemble, associate, or strike, in which each person exercises the right individually but simultaneously conjointly as a group right (Jovanović, 2012: 114). For long time the theory of *value individualism* was dominant in different fields, focusing on individual-rights, but the last decades collective-rights have been more known and applied.

Moreover, Thornberry (1991: 57, Author's emphasis) acknowledges that groups "through the

[17] These theoretical and analytical concepts will be marked in bold to make it easier to distinguish them in this chapter and in the Analysis and Discussion.
[18] In cases when the person is a minor and/or has special needs/circumstances.

shared consciousness of its members, manifested perhaps through language, culture, or religion, a shared sense of history, a common destiny" is present and that "[w]ithout this "existence" it is possible to say that individuals live but the group does not". This statement implies that humans do not only have rights individually and in a group, but that the *collective* in itself composes qualities that are important to sustain. An example of such group is the indigenous people as they share certain values, culture, language, and history, which may be threatened if not given special recognition (Jovanović, 2012). This notion is supported by Fleiner and Basta Fleiner (2009: 648) whom argue that in a contemporary Multi-cultural State (such as Ecuador) collective constitutional rights should secure both ***values and autonomy of the group***, which are essential for ***peace*** in the country, but correspondingly need to grant ***protection of individual liberties***. To harmonize between collective rights and personal liberties could mean "to restrict individual language rights in order to uphold the collective rights of a minority that fears for the survival of its culture" (Fleiner and Basta Fleiner, 2009: 648). This approach is called ***value collectivism*** and is useful for understanding the complex discussions of right holders and HR's in Ecuador. Value collectivism goes beyond realizing individual autonomy and liberties, and looks into the group's autonomy and ***value in it-self***; therefore being a third category of right holders, and it can supersede individual rights outside and within the group (Jovanović,2012:46). This may lead to difficulties defining what rights should be guaranteed over others. The technique of ***proportionality*** is one way of ***balancing*** between different rights and right holders. Although being contested by various scholars with the argument that rights are 'incommensurable' (implying that one cannot prioritize certain rights over others), the idea is to make a comparison of interests, based on the ***identification, assessment, and evaluation of opposing sides and their welfares*** (Aleinikoff, 1987: 945; Jovanović, 2012: 151-152). Jovanović, (2012: 152) exemplifies that collective-rights can gain prevalence over individual rights if demonstrating "that their interest in maintaining a certain practice, rite or lifestyle is vital for the existence and flourishing of the group, and that, as such, it outweighs conflicting claims of the individual members of a group and/or state." Hence the ***existence of the group*** is crucial for the third category of right holder, the collective itself, to be prioritized over other right-holders. If the existence of the collective/group is not threatened one might instead follow Ignatieff's (2001: 108) opinion regarding balancing processes between individual and group rights, stating that "the ultimate purpose and justification of group rights is not the protection of the group as such but the protection of individuals who compose it", signaling that ***individual protection*** is crucial.

5.2. Collective Omission

Importantly, this notion leads to the conclusion that being granted rights also requires taking

responsibility. It is hence vital that the collective/group is responsible for and ***accountable*** to the group members, especially if exercising practices in which collective rights could override individual rights, as with customary law application. May (1992:107-8) explains that joint activities should ***not impose any ill-treatment for the individuals***, and that the group should take responsibilities for their actions, and feel a sense of guilt if not performing these acts accurately. ***Morals*** become central. This invites to the awareness of ***collective omission***, which means that a collective/group mutually decides *not* to act when they should (Jovanović, 2012) hence not taking requisite responsibility. Avoiding collective omission is crucial for a fair justice system and critical when discussing legal pluralism and customary laws.

5.3. "Justice as fairness" - What is a Fair Justice System?

Moreover, the above discussions also relates to Rawls (1993: 291) argument of "justice as fairness", which he describes as an individual having "an equal right to fully adequate scheme of equal basic liberties which is compatible with similar scheme of liberties for all" and being to the "greatest benefit of the least advantaged members of the society" (in Sen, 2009: 59) and that the justice system should be ***open to everyone*** (Rawls, 1999: 77). Further, Sen (2009: 54, 63) uplifts the importance of ***impartiality,*** paying focus to the concerns of all parties, and having a sense of what is good and morally correct to do. One should "***seek institutions that* promote *justice***" including the ***well-being, liberties and freedoms of living people and future generations*** (Sen, 2009: 82). In these statements, one can draw the conclusion that having a fair justice system suggests having ***access to*** and ***accountability*** from the justice system, being ***non-discriminatory***, and ***benefitting the weakest members*** of society, exercising impartiality and up-holding moral principles. Moreover, if the accused "finds an escape" by utilizing the justice system that s/he finds most 'soft', it may impact negatively on the principles of justice, and "[l]egal pluralism is a reality that should increase access to justice and not foster impunity" Ruiz-Chiriboga (2017: 25), shedding light on another important notion: ***to not foster impunity***.

Freedoms

Additionally, Sen's approach about human freedoms and capabilities can give important insight into the discussion of legal pluralism and its fairness, acknowledging the human reality. Essentially, Sen (2009) states that ***freedom*** includes two main concepts: opportunities and the process of choice. The ***opportunity*** aspect is seen as the possibility one has to: do the things one value in life, reaching one's objectives, and living the life one wishes to (Sen, 2009). In regard to justice, that could mean that a person has the opportunity of protection, reporting a crime and having a fair trial and might even include some kind of re-compensation. ***The process of choice***

aspect means that one is not forced to certain actions due to restraints imposed by other people, but has the freedom to choose (Sen, 2009: 228). In the case of legal pluralism, such principle could infer that the victim should have the choice to decide if the case is investigated or not and by which legal system. Additionally, as Marx (1959:104) warned: "What is to be avoided above all is the re-establishing of "Society" as an abstraction vis-á-vis the individual", and the lived reality of the people should not be forgotten.

Moreover, the principles of UNDP's (2004: 6) "Fundamental elements of Access to Justice"[19] are valuable, as they argue for a ***HR-approach***, including elements of HR's at all stages of the justice-process: HR-recognition; HR-awareness; HR-claim; and adjudication and enforcement in line with HR's for reaching a just remedy (sentence). UNDP also acknowledges the importance of ***capacity-building*** of HR's for granting access to a fair justice system.

5.4. Gender-perspective and Feminismo Communitario

Lastly, ***Feminismo Communitario***, is an indigenous, collective-oriented feminism in Latin America, questioning dominant structures of patriarchies, colonialism, sexism, capitalism and neoliberalism, which is prevalent in post-colonial countries such as Bolivia and Ecuador, seeking to ***change oppressive structures*** (CampBell, 2012; Feminismo Communitario, 2018; Sardenberg, 2008). Since it was discovered in the literature review that JI (and JO) may be insufficient in cases of domestic- and sexual violence, an indigenous gender-perspective is helpful to grasp how indigenous-women look at these situations and what is missing today. This gender perspective emphases ***Sumak Kawsay***, meaning the "good life", "beautiful existence," "collective well-being" (FineDare, 2014: 18, 19, 29) and the main focus is not on individual-rights but rather how the ***collective can bring upon positive changes for women***. Feminismo communitario is putting ***indigenous women at the center of analysis***, and is striving for the elimination of gender-based violence, bringing up cultural and political matters for the indigenous people and indigenous-women on the National Agenda (FinDare, 2014; Smith, 2005). They aim to change structural oppression from ***sexism and patriarchism*** by ***raising awareness*** of women's rights (Sardenberg, 2008) therefore bringing about ***behavioral change*** and showing indigenous-women's ***agency***. Finally, it is important to bear in mind Mirchandani (1999) warning about the risk of women's ***double burden*** when being responsible for both household chores *and* work outside of the home – if they do not receive the ***support and shared responsibility*** from men.

[19] This HR-approach is developed for targeting crisis and post-conflict countries (UNDP,2004), but brings up important argument for Access to Justice that is applicable also in this case.

6. Methodological Framework

In this chapter the methodological framework and the data-collection process are described.

6.1. Qualitative Case study of Legal Pluralism in Pueblo Kayambi

The research design has been a *case study* of the two legal systems operating in PK, as the thesis seeks to get an in-depth understanding of legal pluralism, its functions, and its impact on the fulfilment of SDG16 and compliance with HR's (Creswell, 2012). It has also looked more deeply into three penal-cases in the analysis, which illustrate important features of legal pluralism. Moreover, Merriam (1988: 193) argues that "there is no standard format for reporting case study research", but Creswell (2007: 195) states that "[t]he overall intent of the case study undoubtedly shapes the larger structure of the written narrative". Conducting a case-study implies to examine one or several 'bounded system(s)', case(s), to illustrate an issue, presenting a case description and theme-analysis, and commonly utilizing different data-collection methods (Creswell, 2007: 73; Yin, 2003). This study has utilized interviews, observations, participant-observations, legal documents and legal records, providing ground for an 'embedded analysis' (Yin, 2003; Creswell, 2007). Moreover, the study is to some extent inductive, since the collected data guided the selection of relevant concepts for analyzing the data (Hammett et. al., 2014: 28).

In line with the research design, qualitative-methods are useful for comprehend a specific topic/problem (such as legal pluralism) and analyzing people's perspectives, values, opinions, behaviors, and relationships of such (Mack et. al., 2005: 1). This in-depth knowledge is very difficult to obtain in quantitative analyses, for instance using surveys and/or questionnaires (Bryman, 2012; Halperin and Heath, 2012; Creswell, 2007). Moreover, Halperin and Heath (2012: 254) argue that face-to-face interviews are "the best data-collection type for open-ended questions and in-depth exploration of opinions" as it examines the research-subjects views and experiences and thus produces validity of the data.

Additionally, the research-subjects were seen as "active subjects" (research-subjects), not only giving information, but producing data jointly with the researcher – leaving space for their own reflections, examples, and comments on the topic (Halperin and Heath, 2012: 256-8; Ryen, 2004). Thus, the interaction and collaboration between the researcher and the research-subjects was vital since knowledge-accumulation is an 'iterative process' (Hammett et. al., 2014: 15-21). Therefore, the researcher did her best to follow the advice of being a good listener, being non-judgmental, and offering pauses of silence to encourage the research-subjects to further his/her responses and create trust, which increases data validity (Halperin and Heath, 2012; Ryen,

2004). However, the reliability and trustworthiness of the data can be difficult for the researcher to assess, since the research-subjects could have certain prejudices and biases, resulting in the 'interview effect'; namely, responding to the questions in a way that s/he thinks is expected, or answering questions s/he may not know to avoid looking 'bad' (Halperin and Heath, 2012: 259).

Moreover, the interview-guide was not fixed, and included structured elements (specific questions) and un-structured elements (themes) as well as individual follow-up questions in each interview depending on the verbal and non-verbal responses from the research-subjects. One disadvantage with semi-structured interviews is that the data is difficult to standardize, as the interviews differ; making the reliability a bit lower than in structured-interviews with fixed questions. In contrast, it allows for richer data-production; hence more internal validity (Halperin and Heath, 2012). In addition, being a qualitative-study and a relatively small sample, the findings cannot be generalized to all other contexts. Nevertheless, it is an illustrative example of the matter (legal pluralism) in the specific research-location (Pueblo Kayambi) (Bryman, 2012: 177; Creswell, 2012: 76; Glesne and Peshkin, 1992). Additionally, to increase the credibility and trustworthiness of the data, different methods were used, revealing similar findings (Halperin and Heath, 2012). This is called Triangulation, utilized to verify and diversify the data obtained from the three methods employed; being useful for cross-checking the findings.

6.2. Material

The data-collecting process took place between September-December 2017 in PK and Quito. The methods of interviews, observations and use of legal documents/public records were employed. A total of 42 face-to-face interviews with 39 persons were conducted in Spanish[20]. The interviews generally lasted for 30-60 minutes, but some were shorter/longer. A total of 24 men and 15 women were interviewed in different age-groups. A mixture of Academics; Assemblymen; Community-members; Employees at the Municipality, Juntas, Ministries, and State-institutions; Indigenous-leaders (local, regional and national); Judges; Lawyers; a Policeman; Prosecutors; a Public Defender; and a few other people with some interesting insights/experiences of the legal systems were interviewed. Moreover, 16 participant-observation and field-observations were conducted in PK[21]; including participation in some of CPK's activities, meetings and workshops related to Pluri-Nationality and *Justicia Indígena* as well as in the Congress to elect the regional indigenous-leaders. One case of *justicia indígena*

[20] Two of which have been group-interviews with two people in each interview-group, four have been informal, open interviews, and the rest have been semi-structured interviews following interview-guide/themes.
[21] In order to get a deeper understanding of how JI is functioning in practice, what is missing, and what CPK and the Communities were doing in their work for and implementation of JI.

was observed in the village Pisambilla in PK. Furthermore, four audiences of *justicia ordinaria* were observed: two audiences in the first instance Penal Court in Cayambe; one case of appeal in the Provincial Court in Quito; and one "mixed" audience of JO (and JI) in the *Junta de niñez* in Cayambe.[22] Besides, information was collected from national and international legal documents and conventions, and four legal records of cases, *Actas*[23], to validate and detail the data collected from interviews and observations. *(See a complete list of Research-Subjects, Observations and Documents used in Appendix 1.)*

6.3. Sampling and Data Collection

The research-subjects were selected purposefully by having Gatekeepers at *Solidaridad Suecia-América Latina* and the *Confederación del Pueblo Kayambi*, whom facilitated the contact with relevant research-subjects and were helpful to assist field observations (Creswell, 2007; Hammett et. al., 2014). The aim was to interview as many different actors as possible in the two legal systems to get a broad perspective on legal pluralism in PK and avoid biases. The 'snowball sampling-method' (Hammett et. al., 2014: 143) was utilized, by asking the research-subject if s/he had any recommendation of who would like to participate in an interview, bringing further insights. Initially an interview-guide was utilized, but soon the semi-structured interviews were mainly organized around specific themes rather than a set of fixed interview-questions, to leave room for the research-subjects to express their experiences, perspectives and provide examples from their professional and personal lives *(See Appendix 2).*

Furthermore, all interviews and most of the observations were tape-recorded using a Dictaphone and my phone as a backup device. The data was stored on Google Drive and on my private computer, being secured by password. The interviews were transcribed using the NVivo-software to assist data-coding and interpretation of the findings, and was divided into themes to assist the analysis.

6.4. Ethical considerations

It is vital to consider ethical-aspects throughout the whole research-process, striving for informed consent, protecting the research-subjects, and to not do harm (Ryen, 2004: 156). Therefore, I started the interviews by presenting myself, the study and its purpose, and explained

[22] In this study, the participant-observations were only for JI-matters, since I did not have extensive knowledge nor experience of indigenous justice and therefore wanted to learn as much as possible; and thanks to my Gatekeepers, I had access to the field and could do that. On the contrary, four crime-cases were observed in JO and only one in JI. In the interviews I strived for having an even distribution of research-subjects from the two systems as well as other interesting actors, to avoid biases.

[23] An Acta is a written legal document in which the crime is briefly described and the sentence/resolution is specified, having equal value as a public record for a sentence in JO. The Acta is signed by the victim, the aggressor and the indigenous-leader to confirm its validity (Interviews and Observations).

how the material would be used. I asked permission to tape-record the interviews and informed that the research-subjects will remain anonymous. To secure confidentiality, real names of the interviewed/observed are not publicized. Instead, I provide a list of the participant's titles (Appendix 1) to allow for transparency and credibility, and have used "fake names" and numbers to relate to research-subjects. I sought to have correct citation and paraphrasing in the thesis, not excluding important information (Kvale and Brinkmann, 2014) although interpretation of what is relevant for the study and the relation to the RQ's are important and may differ from study to study, and researcher to researcher (Halperin and Helth, 2012). Subjectivity and personal interpretations are difficult to fully avoid in qualitative-studies. Nonetheless, I have been self-reflective throughout the whole research-process to avoid prejudices and incorrect interpretations, and I have strived to have an even selection of research-subjects from both JI and JO, well aware that my own biases could impact on the findings (Halperin and Heath, 2012; Kvale and Brinkmann, 2014; Ryen, 2004; Tracy, 2010).

6.5. Delimitations

Upon arrival to Ecuador, the goal was to do a mixed-method study, with major focus on the qualitative part. This, however, was not possible because of the lack of national/local statistics. JI is exercised orally and it is therefore hard to find relevant quantitative data.

Although gender-balance was sought in the data-collection, there were 24 men and 15 women interviewed. Ecuador is progressive when it comes to increasing the numbers of women in decision-making positions and legislative-positions; yet, there is not gender-parity (Interview 19, 20, 25; Sieder and Sierra, 2010). The fact that more men than women were interviewed could be argued to be a reflection of the reality, as more men than women are elected as Indigenous-leaders and work as Prosecutors, Police-men, etc.

Besides, due to holidays, reserved cases, and other circumstances, no audiences could be observed in the National Court or Constitutional Court. As a compliment, I interviewed the Director at the Research Center at the Constitutional Court and two judges at the Provincial Court for getting more insights in the proceedings.

In regard to literature, public reports and legal documents used, I utilized a range of different sources: foremost publicized sources and journal articles, but I have also used some un-published documents and records; because of their relevance for this study and the access through my Gatekeepers to material that was not published, such as the *Actas*. I sought to avoid

prejudices and to be critical to the material, being aware that there might be interests at play.

Finally, doing qualitative, cross-cultural research could impact on the access to data both positively and negatively, since gender, age, culture, ethnicity, and clothes of the researcher can play an important role (Ryen, 2004). I noticed that having connections with two major organizations working with indigenous people's rights was beneficial for getting access to the field, and people generally opened up and got interested in the study. Such an "intimate" relationship is realized by Funder (2005: 4) as a way to get more correct information, increasing validity; and being seen as an "outsider" may be a hindrance. Meadow (2013: 468) argues that the research-subjects are "also laboring, watching us, making meaning of us". One lawyer stated that the locals are more talkative and sharing of experiences to foreigners (Interview 22) which seemed to be true. Lastly, a shortcoming with cross-cultural studies may be the language-barrier. All the interviews, observations and documents were conducted in Spanish, which is my third language. Although being fluent in Spanish, I do not have the same language-proficiency as a native speaker, and this made it slightly harder to investigate technicalities of the justice systems. Nevertheless, the tape-recordings have proven useful to comprehend such details later-on when transcribing the interviews.

7. Findings and Analysis

In this chapter, the findings are presented and analyzed through identified theoretical and analytical concepts, answering the RQ and SRQs, and relating the study to current development debates. Due to the interconnectedness of the findings and the analysis, these two parts are merged, to provide a coherent analysis. The chapter starts by examining SRQ1 and SRQ2, providing ground for further analysis for the main RQ and SRQ3, and finally makes some notes of SRQ4.[24]

7.1. How does Legal Pluralism function (in Ecuador) and in Pueblo Kayambi?[25]

To answer this question, the section briefly outlines the rights and guiding rules for *justicia indígena*[26]. Thereafter, it provides two illustrations of the procedures in a domestic/sexual

[24] Moreover, although the subtitles used in this chapter are referring to specific research-questions, the sections include information that is connected to and answering other RQ/SRQs as well.
[25] The SRQ1 is partly answered in the literature review, bringing up the national level, but the question is more fully answered in this chapter, also being more locally-specific.
[26] The emphasis is on *justicia indígena* since the ordinary justice system is quite similar to other countries' legal systems: building on fixed laws and regulations, juridical institutions, prosecutors whom investigate the case and present it to the judge, and a Court system with different instances. Deliberation (prison) is the most common sentence (Interview,19-21,25,31).

violence case investigated by JI and in JO respectively, followed by a comparison of the two justice systems. Further comparisons, conclusions and implications are addressed in the later sections.

Jurisdiction and Rights

In the 2008 Ecuadorian Constitution, Pluri-legalism and JI are realized in articles 1, 56.9, 57, and particularly article 171, in which JI and JO are granted equal status. The message is that all cases could be resolved by JI, granting indigenous people their *collective-rights* but simultaneously consider *HR's* and *women's participation*. These collective-rights are also granted in the *United Nations Declaration on the Rights of Indigenous Peoples*, particularly Articles 3-5, and 34 (DRIPS, 2008). However, since the constitutional-addition in July 2014, originating from the Cocha-case, JI cannot treat *cases against life*, such as murderer or femicides. Nonetheless, the idea of *subsidiarity*, meaning that legal-cases are brought up at the lowest level authorities, thus in the communities' General Assemblies or with a *cabildo*, is utilized in Ecuador's rural-areas (Simon Thomas, 2012: 66) and supported by the findings in this study. Besides, as noticed in the literature review and confirmed by various research-subjects, there are territorial and cultural aspects at play when determining what system holds jurisdiction; and several jurisdiction conflicts were reported.[27] Nonetheless, the majority of the research-subjects stated that if something happens within the borders of an indigenous-community in PK, JI is applied, since the case is an "internal affair". Moreover, the interviewed indigenous-leaders and academics were quite upset about the outcome of the Cocha-case and the restriction of JI-application. The indigenous-leaders believed that JI should be able to examine all cases, as initially stated in article 171 of the Constitution – especially if the community has the requisite experience and knowledge (Interview 7-15, 17).

Moreover, there are some international and national rights/pre-conditions that should guide the legal practice of JI and JO, considering both individual and collective rights. Firstly, the fundamental right of access to justice – described as "the ability of individuals to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human right standards" (Ruiz-Chiriboga, 2017: 23), which should be the aim of any legal system

[27] For instance, the Prosecutor-office gave examples of not being able to enter into a community when a crime had occurred, since the indigenous-leaders claimed their jurisdiction. For example when a traffic-accident had occurred and the indigenous-community was blocking the road, hindering the Police and the Prosecutor from entering the site. In another occasion, the indigenous-community had caught the Police-men (who had tried to enter for detaining a suspect) and they had been forced to do a purification-bath (Interview 34-35). This resulted in the Police-men being more hesitant to intervene in the communities due to personal security issues (Interview,36). Moreover, the indigenous-leaders reported that the Prosecutors did not respect their jurisdiction and that they were welcome to observe cases but not trying to *investigate* cases of JI-jurisdiction. They also forwarded the wish to get help from the Police to detain suspects (Interview 9-11). The Police reported that they can just do so if the request is coming from a "competent judge" as stated in national legal documents, which is being interpreted as a JO-judge, and not an Indigenous-President being a JI-judge (Interview,36).

(and being in line with SDG16). Secondly, all people should be guaranteed the right to be heard by a competent court. As noticed by Ruiz-Chiriboga (2017), this leads to discussion of who *is* the competent court. Language, culture, and contextual knowledge are important factors (Interview 7, 9) and Article 8 in the ILO Convention No.169 states that respect for customs and/or customary laws are significant conditions for a competent court. Thirdly, the rule of *Ne bis in idem* applies. Hence, a case sanctioned in JO cannot be sanctioned again by JI, and vice versa. Furthermore, being granted in article 345 of the Organic Code of Judiciary, both JI and JO-authorities can request transferal of jurisdiction, and approval is determined by competent JO-judges, something which have been applied in PK several times (Interview 7, 9). Finally, as being stressed in article 171 of the Constitution, Women's rights are of great importance, which ties into discussions of women's access to justice, participation in decision-making, and freedom from violence; and the importance is documented in several international UN-documents, such as DRIPS (2008) articles 21.2 and 22, the CEDAW-Convention, the HR-Declaration, and SDG5 – all of which have been ratified by Ecuador. In 1995, Ecuador passed the Law 103 against gender-violence and intra-familial violence, for protecting women (Sieder and Sierra, 2010).

Indigenous-authorities in PK

As mentioned in the Background chapter, indigenous-leaders are the men and women appointed as authorities (board members) of the communities, pueblos or nationalities and they are elected in the General Assembly (GA) or Congress every 1-3 years depending on the rulings in each community (1-2 years) or pueblo (3 years). Besides, there are special recognition given to *Taytas*/*Mamas* who are elderly people acknowledged in the community for their knowledge, wisdom, and good character, being moral examples for the community-members. They offer recommendations for sanctions/resolutions and/or give advices to the involved parties, particularly for the convicted person in combination with the *baño de purificación*[28] (Interview 13, 23; Observation 7).

JI in PK: Procedures and Resolutions

The crime is solved collectively in the community by calling a GA-meeting[29], which is the highest authority in the community (Interview 26). Sometimes crimes or disputes are solved without holding a GA-meeting, by the President and/or other indigenous-leaders and/or Taytas/Mamas, making resolutions between the two parties by dialogue. The victim sometimes

[28] The purification bath with ice-cold water and stinging nettles.

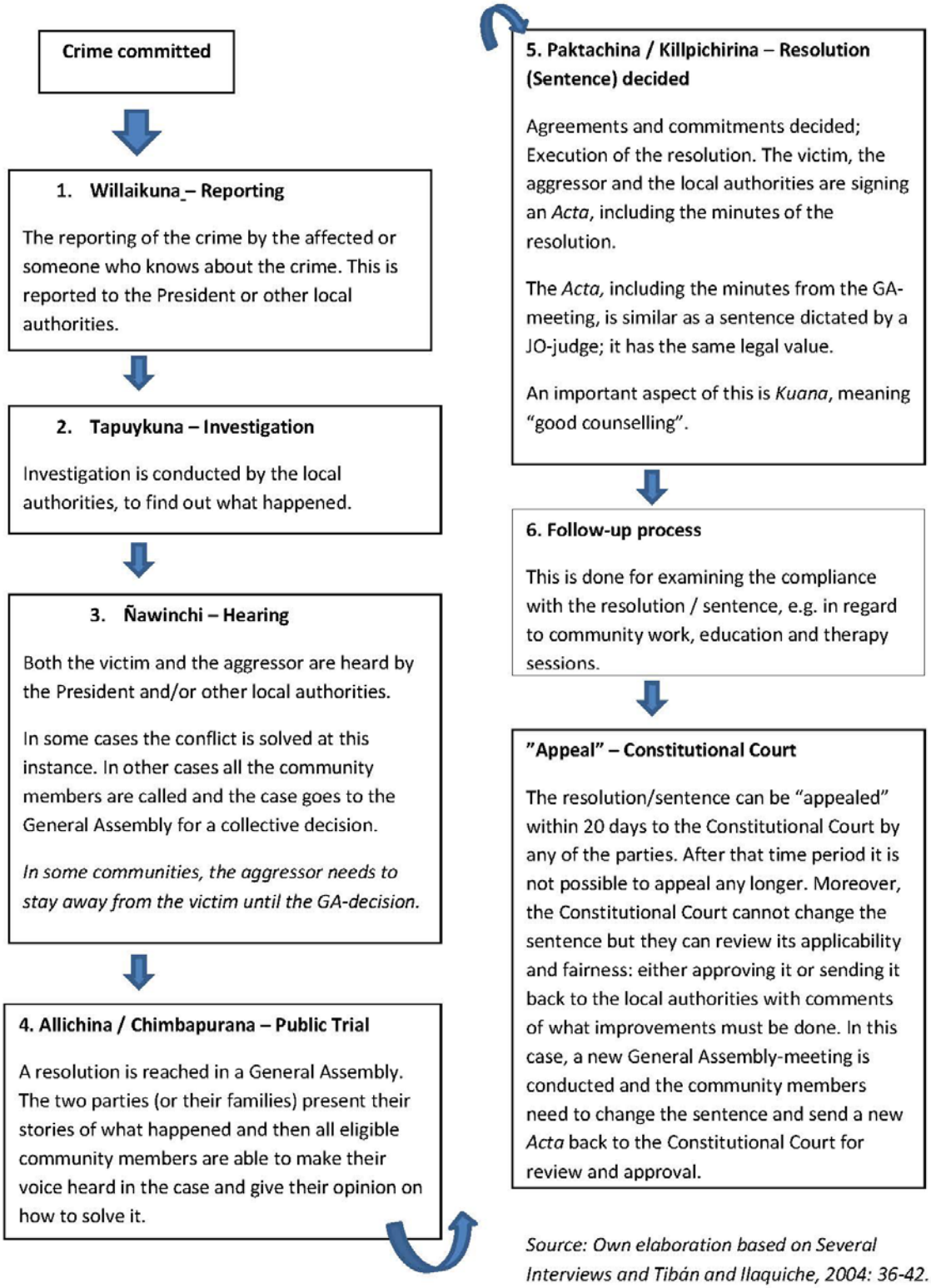
[29] The General Assembly (GA) consists of parts or whole of the community depending on the community's structure and internal rulings. Who is eligible to participate and vote in the General Assembly is regulated in the community's *Reglamente Interno* (Internal Rules of Procedures). It can for example be all people over 16 years or 18 years, or one represent of each family or in some cases only the elderlies of the community.

requests the authorities to not call a GA-meeting if s/he feels ashamed of what have happened and want to keep it private, for instance in cases of domestic-violence (Interview 23). Moreover, as with the indigenous people in Canada (Smith,2005), JI in PK emphasizes restorative sentences, which could be economic compensation to the victim and/or his/her family; community work; *baño de purification*; therapy-sessions; advices from Taytas/Mamas; community banishment, etc. Similarly as in Namibia (Hinz, 2003; 2012), the indigenous-authorities investigate and solve crimes of different character, although not categorizing the crimes into modern labels. The regional authority CPK solves penal- and family-cases but also civil-cases which is quite unique in the country since it requires special measures (Acta 4; Observations; Interview 1, 10). Moreover, in JI, each case is treated uniquely, depending on the circumstances; nonetheless, the general proceedings are similar (Interview 9, 15, 17, 23).

On the next three pages, the thesis illustrates how a domestic/sexual violence case is solved by JI and JO respectively, by outlining the procedures taken in each system, followed by Table 2: describing the main characteristics and differences between the justice systems.

7.1.1. How does *Justicia Indígena* functions in Pubelo Kayambi?

Image 3: General Proceedings in a Case of Sexual or Gender-based Violence in *Justicia Indígena*



Source: Own elaboration based on Several Interviews and Tibán and Ilaquiche, 2004: 36-42.

7.1.2. How does *Justicia Ordinaria* function (in Ecuador and) in Pueblo Kayambi?

Image 4: General Proceedings in a Case of Sexual or Gender-based Violence in *Justicia Ordinaria*

Crime committed

Complaint / Denouncement
This can be an oral or written complaint done by the affected person (the victim) or another person. Civil servants, teachers, doctors etc. have the responsibility to report cases of violence if having knowledge about it.

There are Centers supporting women who have been victims of violence that can help the victim to make the complaint.

Prosecutor
The complaint goes to the prosecutor who starts to investigate the case. This is regulated in the Criminal Code.

Pre-Investigation
The Prosecutor has up to two years to investigate cases that can generate more than 5 years of imprisonment, such as domestic violence and sexual violence.

For cases that may result in sentences lesser then 5 years, the Prosecutor has one year to investigate.

This period can be pro-longed by the Prosecutor for a maximum of two times by 30-90 days each time.

The victim can get access to ten different protection measures if needed and requested, such as a restraining order and reception centers.

SEPES is one department of the Ministry that offers free psychological counselling to the victim and can also offer it as family sessions.

Accusation
The Prosecutor decides if there are enough charges against the suspected to get accused. The accused person can be seen as innocent or there can be a lack of evidence, which means that no accusation can be furthered to the judge and the case gets archived. The majority of domestic violence cases stop at this stage, as not sufficient evidence has been collected.

The Prosecutor decides to Accuse

"Periodo de pruebas" (Period of testing)
This is during 15 days. The Judge must notify the two parties. Evidences are brought forward. An invitation to Audience is sent out to all involved parties.

Audience – with Unipersonal Judge
This is the first instance court. The judge listens to the two parties. Evidences are presented, such as medical examination records, testimonies, videos, photos, etc.

The parties have the right to a lawyer, which s/he decides by him/herself. They can get a Public defender provided by the State if the parties do not have the economical means for a private lawyer.

Sentence
The judge takes into consideration the material provided and dictates the sentence according to fixed laws and regulations in the Criminal Code. For domestic/sexual-violence crimes there are normally between 19-30 years of imprisonment depending on the gravity etc.

Appeal
The sentence can be appealed by one of the parties.

First instance of appeal
It then goes to the Provisional Court, in which a Tribunal (three judges) are confirming or changing the sentence.

Second instance of appeal
If one of the parties still does not accept the sentence, it can go to the last instance of appeal for JO, the National Court.

(Constitutional Court
If the crime would be a violation against or in relation to Constitutional matters, it is directed to the Constitutional Court, judged by nine judges.)

Source: Own elaboration based on Several Interviews.

7.1.3. Comparison of the Legal Systems in Pueblo Kayambi

Table 2: Comparison of Justicia indígena and Justicia Ordinara

Theme	Justicia Indígena	Justicia Ordinaria
Characteristics	Following customs and ancestral practices.	Following legal fixed procedures.
Expenditures	Mainly free of charge.	Can be costly. E.g. Travel costs, and costs of lawyers (can choose public defender but will only represent).
Required time for reaching a resolution	Solved fast, normally within a few days or weeks.	Following specific procedures and it can be time-consuming to go through all the steps. One case can take years to solve.
Treatments of Crimes	If the accused has committed several crimes, all of the crimes are included when solving the case.	If the accused has committed several crimes, they are resolved separately, crime by crime.
Are the proceedings written down?	The process is oral and has generally only one written element, the *Acta*.	Follows a specific system of procedure and everything is written down.
Use of Lawyers	Do not use Lawyers.	Use of Lawyers (or Public Defenders).
Who is in Charge to judge the case?	It is a collective decision in the community, by whole or parts of the community depending on the General Assembly-structure regulated in the community-rulings.	Decided by one judge (first instance), a tribunal (when appealing at Provincial Court) or by nine judges (in matters for the Constitutional Court).
Procedure for reaching a Resolution/Sentence	The procedure includes: background and investigation of the case; considerations of the two parties; resolution/sentence; agreements and commitments; and a follow-up process regarding the compliance with the resolution/sentence.	The procedure includes: background and investigation of the case (with help from the police and other state institutions if required); considerations of the two parties; and the resolution/sentence.
Sentence/Resolution	The resolution/sentence does not include deprivation of liberty (jail). Focus is on restitution in the community and to restore the "balance" in the community.	The sentence is normally given as deprivation of liberty (jail) but could include fines and rehabilitation elements.
Appeal	No appeal is possible, but the Constitutional Court has the mandate to review sentences.	The sentence can be appealed at the Provincial, National and Constitutional Courts.
Jurisdiction	Can take up cases within the territorial jurisdiction, "Internal affairs", and not concerning *the right to life.*	Can take up all cases, if there is not a case in which JI has the right to jurisdiction.
Transferal of jurisdiction	Can request transferal of competence (transfer the case from JO to JI).	Can request transferal of competence (transfer the case from JI to JO).
Required Education	No specific education for being an indigenous judge is needed, s/he is elected by the community as the President, and hence the judge.	Specific education is a requirement for judges, including specific university degrees in law.
Public Resources	Do not receive any funds or other resources from the government.	Receives funds from the government and can receive help from public instances and the police.
Collective and individual rights	Focus is mainly on collective rights, but takes into consideration individual rights.	Focus is mainly on individual rights, but can take into consideration collective rights.

(Source: Own elaboration from several Interviews and Observation 17 at seminar about Justicia.)

The above illustrations and table 2 summarize most of the findings in regard to SRQ1 and SRQ2. This is presented as basis for the analysis that follows. The thesis will now explain and analyze three real-life cases, selected for shedding light on the problematics and advantages with JI, JO and legal pluralism in regard to fulfilling SDG16 and HR's; providing ground for answering the RQ and SRQ3; before giving final remarks for SRQ4 and potential policy-implications.

7.2. Compliance with Human Rights and Advances for SDG16? Three Real-life Cases

The following cases[30] will be analyzed: a) a Land-right/Insult-case (JI), b) a Sexual Violence-case (JI), and c) a case of Incest/Child-care (JO/JI).

7.2.1. A Case of Land-rights and Insult

This was an on-going case in the community Pisambilla in PK, initiated in 2016. In the community, everyone owns two hectares of land, and this case treats one community-member, Manuel, and his unwillingness to share the seven hectares of land he held, as he claimed that it was bought by his family decades ago. This was investigated, but the community-leaders did not find any records of ownership in Pisambilla nor in the municipality in Cayambe. This led to several GA-meetings where they tried to find a "peaceful solution" by discussing different suggestions of how the land could be divided in a fairer way for the whole community, aiming that Manuel would get a smaller lot or give some land to his children. Nevertheless, Manuel denied all suggestions, and several insults from him and his spouse to different community-members were reported (Acta 3). Therefore, in December 2017, the Pisambilla-authorities came to CPK's office to ask for their presence in a new GA-meeting, demonstrating the seriousness (Observation 7). A few days later, the GA-meeting took place on a mountain in Pisambilla (Observation 1). Manuel, the indigenous-authorities, and men, women and children from the community participated and were able to speak and give their testimonies and opinions. All authorities were men, and more men than women spoke, but there was a respectable climate. After almost four hours of discussions it was decided that Manuel and his spouse had to undergo the *baño de purificación* and receive two lashings each "as a sign of purification, with respect to the human rights" and were also charged with temporal/definitive exclusion from the community; to prevent others from following their bad examples (Acta 3; Observation 1). In normal proceedings, the purification-bath would have happened immediately after the GA-decision, but something extraordinary occurred. Manuel had tied his horse close to the meeting-

[30] From the 42 interviews, the five observed Audiences, and the four Actas, several interesting cases were brought up, but due to the word limit, only these particular three cases are presented in more detail. The reason why these cases were chosen is mainly due to their fascinating characteristics, as each of them shed light on different aspects of access to justice and HR's.

point, although the rest had left their horses and cars further down the mountain, and when the GA-meeting ended he mounted his horse and rode away with high speed, escaping the sentence and leaving the indigenous-authorities and community-members shocked. No one had experienced such escape earlier. One indigenous-leader commented that it was not an intelligent move, since the sentence would still be valid and living in the community, it would be hard to escape it (Observation 1).

Analysis

This case shows the importance of a fair justice system to ***not foster impunity (***Ruiz-Chiriboga 2017). Manuel escaped from his sentence by riding away, instead of taking the case to the Constitutional Court for 'appeal', which would have been the legal way for him (and his wife, who was not present in the GA-meeting) to overlooking the sentence's appropriateness. Furthermore, many of the research-subjects claimed that the purification-bath is a way of purifying the soul and also to be re-integrated and included in the society again, eliminating the "bad energies" that generated the bad behaviors according to their Cosmology and ***Sumak Kawsay***. Having to do the purification-bath either naked or with undergarments, with ice-cold water and stinging nettles, in front of the whole community, is a way of preventing the convicted person and other people in the community from committing crimes, as one will be embarrassed and remember the psychological and physical pain (Interview 7, 10). It sets an example for the whole community to avoid crimes – sometimes working preventative[31] (Interview 7, 10). The physical pain from lashing is an addition to such, ordained in certain cases. These punishments are not regarded as "cruel, inhuman or degrading treatment" (UDHR, 1948: Art.5) but rather as a way of restoring balance in the person and the collective (Interview 10, 23) and the physical consequences could be to suffer from a cold and some marks that "disappear within a few days" (Interview 7). The person is nonetheless forgiven after this, since s/he has "cleaned the soul" and all community-members had the opportunity to speak their minds in the GA-meeting regarding the matter; hence, the person is not looked bad upon after, if complying with the measurements dictated in the *Acta* (Interview 17). Therefore, the convicted person normally fulfills the requirements in the sentence/resolution, restoring ***peace*** in the collective – and returns to be part of it, which is important for the ***values and autonomy of the group*** (Fleiner and Basta Fleiner, 2009).

Hence, this case points to the relevance of ***customs and group values*** in JI/customary law (Jovanović, 2012). Manuel and his wife were excluded temporally/definitively from the

[31] In at least one community, the crime-rates had decreased during the last years after they had applied JI to a few robbery-cases, and it was hence argued that JI-application could prevent crimes (Interview,7,10).

community, therefore not being part of the community, since they did not comply with the ***"shared consciousness of its members"*** (Thornberry, 1991: 57). To insult others, being stingy and taking up land without having the right to do so, were considered a violation not only to the people directly affected, for instance those subjected to the insults, but indirectly to the whole community and their ***collective value***. This is in line with ***value collectivism*** (Jovanović, 2012) and ***Sumak Kawsay*** – that everything is connected and if one part is 'broken' it could destroy the collective (Observation 11) hence the ***existence of the group*** (Jovanović, 2012) is somewhat at play in this case. Moreover, whether the exclusion from the community would be temporal or definite may depend on the convicted couple's willingness to restore the balance; prioritizing the ***collective right*** to equal land-lots and ***community values*** over their own likings to hold bigger lands.

Outcome in JO

Since there were no documents supporting the claim that Manuel's family owned the land, the case had been similar in JO; Manuel could not have claimed his individual property right, since he did not have any evidence of his ownership. In most cases he would have lost the land and might have been charged to pay a fine for the insults (which would have benefitted the victims of the insults economically). Nonetheless, the collective and spiritual punishment parts – such as the purification-bath and the exclusion from the community, would not have occurred in JO.

Gender-aspect

Finally, another remark is gender-related. All the indigenous-leaders were males, and although the presence and *inactive* participation between men and women was even, around 3/4 of the people expressing their opinions in the GA-meeting were men (Observation 1). This supports the arguments from several research-subjects, saying that despite PK being one of the best in Ecuador regarding gender-issues, more men are taking leading-positions[32]. Women's participation is determined in the Constitution, and women *are present* – but they do not participate as *actively* as men, and few women hold leading-positions. As argued by Feminismo communitario (2018) ***structural changes*** are needed and women need to show their own ***agency***, but in accordance with their Cosmology and collective rights, in order to change this – and men need to help. This requires ***awareness-raising*** education, but also ***behavioral changes*** at all levels. Arguably, this starts at the family level, with ***shared responsibilities*** in the household, so it does not mean a ***double burden*** (Mirchandani, 1999) for women to be leaders –

[32] Even in CPK, 6 out of 8 indigenous-leaders are men, and the President is male; and similar findings are found at local, regional and national instances around the country, although since September 2017, the Vice-President of CPK is female (Several Observations and Interviews).

something that several research-subjects reported was an obstacle, together with the lack of ***support from men***. However, this is not unique for the indigenous people, but goes for the whole country and all decision-making and legislative positions, as gender inequalities equally exist in the JO-system (Several Interviews; FinDare, 2014; Sieder and Sierra, 2010).

7.2.2. A Case of Sexual Violence

Moreover, in 2013, a man (Cesar) was sexually abusing a teenage-girl (Diana) in the community San José Chico. The case was taken up by the Prosecutor in Cayambe. Nevertheless, since the crime occurred within one of the 174 communities of PK, the indigenous-leaders in San Jose Chico asked assistance from CPK to request transferal of the case-jurisdiction from JO to JI, which was approved by *Tribunal Tercero de Garantías Penales* being an "internal affair". The indigenous-leaders from San Jose Chico, with the full assistance of CPK and the presence of other indigenous-organizations, called for a GA-meeting. In the GA, the case was presented and discussed, and Cesar was declared guilty of the crime, convicted for sexual abuse and for disturbing the honor, peace and security of the victim, her family and the community at large. The sentence determined: for Cesar to pay 10.000 USD[33] to Diana in compensation; to do community-work for 6 years, 40 hours a week[34]; perform a *baño de purificación* and receive "good counseling" by a Tayta/Mama; was forbidden to cause harm or pose threat to the victim, her family or the community at large; was forbidden to move and/or to leave the country; and he had to finish his High School-Diploma and provide food and clothes to his child. Moreover, Diana had to immediately start rehabilitation through psychotherapy and community-rehab and finish her High School Diploma (Acta 1; Interview 10, 17). The case has been followed-up by the local-authorities in San Jose Chico and the community-work has been registered in a community-record since 2013 (Interview 17; Observation 12). As with other *Actas*, it was sent to the Prosecutor office for archival.[35]

Analysis

To begin, this case is extraordinary since it shows the transfer of the case of sexual violence against a minor (being a severe case) from JO to JI-jurisdiction as well as the example of assistance from regional indigenous-leaders to local community-leaders, which increased the

[33] Of which 8000 USD would be for purchasing a land, and 2000 USD for covering transportation- and alimentation expenses when attending therapy-sessions (Acta,1). Moreover, it was stated that it is sometimes hard and takes long time for the convicted person to provide the economic compensation to the victim (Interview,42), but that the convicted person's family also is responsible for accomplishing the payment (Interview,11).

[34] This would be for eight hours daily Monday-Friday and would be carried out in San Jose Chico (70%) as well as helping the other organizations present at the General Assembly meeting (30%) (Acta,1).

[35] The Prosecutor office reported that this step is not always fulfilled, and in most of the JI-cases the Acta is not sent to the Prosecutor-office for Archival (Interview,34,35).

community's knowledge of correct JI-application (Interview 17). Moreover, as several research-subject claimed, many indigenous people in the rural-area have limited time and resources: and having the sexual-violence case tried in JO require time for medical examinations and meetings at the Police and Prosecutor offices; hence, including traveling from the community to the city[36], costing money and taking time, both of which a community-member seldom have. Hence, these factors limit the indigenous people's ***access to justice*** in the JO-system. Additionally, it was claimed by some research-subjects that indigenous people frequently were ***discriminated*** in the JO-system and it could also be language-problems (since some indigenous people only speak Kichwa). In contrast, having the case tried in JI is free of charge and can be done in a short time-period, neither necessitating much time nor money from the victim (or the accused). Hence JI can be a way of increasing indigenous people's access to justice (Several Interviews).

However, there are no medical examinations in JI nor help from the Police (Interview, 9) so ***moral principles*** (May, 1992; Sen, 2009) including honesty, are required by all parties as well as ***impartiality*** (Sen ,2009) to have a fair trial. As understood from previous chapters, and argued by UNDP (2004) justice should include ***HR-consciousness at all stages***. For example, in the Prosecutor's office, a case of sexual abuse in 2015 was explained, in which a male professor abused a student. When the student reported the crime to the community no one believed her since the professor was regarded a respectable man. Instead, the woman was called a liar who made up the story (Interview 34). There are also other cases in the country in which sexual abuses are not seen as violations (Siender and Sierra, 2010). These are clear examples of ***collective omission*** (Jovanović, 2012) when the community does not take their ***responsible***, missing to grant the victim his/hers ***HR's*** and ***imposes ill-treatment of the individual*** (May 1992). The local-authorities are granted collective-rights to exercise JI, but in these cases they neither apply ***impartiality*** nor examining the ***concerns of all parties*** (Sen, 2009), hence violating the ***individual rights and freedoms*** of the victims: being against the National Constitution and Law 103. These practices are fostering ***impunity*** for the crime and limit the victim's access to justice and his/her right to a "natural judge" (Ruiz-Chiriboga, 2017). However, one advantage with legal pluralism is that s/he could turn to JO-jurisdiction if no sentence is determined in JI, still respecting the principle of *ne bis in idem*.

Protecting the Victim and the Collective – Increased Access to Justice

Nevertheless, this case is arguably one when the procedures and sentence were performed according to ***individual and collective HR's***, considering the ***protection and well-being*** (Sen,

[36] As the Prosecutor Office and Police Office are located in the city of Cayambe.

2009) of the victim *and* the collective. It supports the argument that JI is caring about the "well-being of the two parties" (Interview 17) as well as emphasizing the restoration of ***Sumak Kawsay*** and ***peace*** in the community; if hurting one person, one is hurting the whole collective (Interview 9, 13, 17). The victim was compensated economically, was ordained to go through psychotherapy to treat the trauma, and to continue with her studies – and the aggressor had to do the same, while at the same time performing community-work for six years and taking care of his child. Hence, the JI-sentence followed Ignatieff's (2001) emphasis on ***individual protection*** of the victim, but also included the ***collective's protection*** from further aggression from the convicted. Furthermore, one could argue that it took both parties', *and* the aggressor's child's, ***well-being and freedoms*** into consideration, focusing on mental recuperation (psychotherapy), spiritual recuperation (purification-bath and advices from Mama/Tayta), and economic recuperation (for the victim), while promote finishing their education (for future concerns); and considered the ***individual rights and well-being*** of the victim *and* the aggressor's child (who would have suffered from her father's actions if he got imprisoned for two decades and could not provide for her). Despite being a great trauma for the victim, the sentence could allow both parties certain ***freedoms*** to live the lives they wish (Sen, 2009) since the aggressor was both punished and re-integrated in the society, having to make public apologies to the victim and the collective, as well as having the community's guarding eye on him to not do any further harm, and to comply with all parts of the sentence (Interview 17).

Therefore, this thesis argues that this is a case when the community is taking ***responsibility*** and granting ***access to justice***. The indigenous-authorities wanted to help the victim, but did not have the capacity to do so, hence called for support from CPK, demonstrating that they prioritize ***accountability***, seeking help when not having proper knowledge, which also increases the community's capacity to perform JI at later stages. This rises the ***fairness*** of the JI-system as it then supports "***the least advantaged members*** of the society" (Rawls, 1993: 291, Author's emphasis in Sen, 2009), being ***open to everyone*** (Rawls, 1999). Therefore, one can argue that this is a case that displays the capacity of legal pluralism and JI-application to ***increase access to a fair justice system*** for the indigenous people, taking both ***collective and individual rights*** into consideration, hence providing ground for the fulfillment of SDG16, but also for SDG10 and and SDG5, reducing inequalities.

Outcome in JO

In contrast, the benefit of the JO-system is that it is predictable and follows fixed procedures, backing up charges with evidence and having the sentences determined in the Criminal Code.

This support the ***fairness*** of the system, as all people (in theory) are treated equally before the law, in line with HR's (UDHR, 1948; Art. 6-11: Appendix 4). Nevertheless, in PK, most violence cases (particularly domestic violence) do not proceed to the accusation stage, although almost all cases that lead to the Court convict the aggressor to long imprisonments (Interview 32-34). The research-subjects brought up several reasons for this: the lack of support and empathy for the victims during the investigation-process (Interview 15, 27), the lack of collaboration from the victim and changing of her/his mind (Interview 32-34) and the inability for the victim to participate in all required examinations due to time-, travel- and money-constraints (Several interviews). Unfortunately, these factors restrain the ***access to justice*** and indirectly result in ***impunity*** for domestic/sexual violence-cases, as the majority of the cases becomes un-finished and archived (Interview 32-34). Moreover, it was suggested that the Prosecutors should have the mandate to continue the investigation without the collaboration of the victim and aggressor to hinder this outcome (Interview 22).

Lastly, the case displays a collaboration between JI and the Ministry for Internal Affairs, since the prohibition to leave Ecuador during the six years of community-work was forwarded to and applied by the Ministry (Acta 1).

7.2.3. Previous Incest-Case/Request of Child Care

This last case of JO(/JI) demonstrates the complexity of legal pluralism, HR's and fair justice for all. It also points towards some kind of cooperation between the two legal systems, as authorities from both JO and JI were participating; following-up on an old JI-case of Incest, now treated by JO in terms of Child Care. Moreover, it was stated in the Audience that the indigenous-authorities could transfer the case to JI-jurisdiction at any time (Observation 5).

Background

In 2003, an incest-case occurred in one of the outer villages of PK. An adolescent girl, Rosa, was sexually abused by her father Luis, and got pregnant after the violation. The case was brought up to the indigenous-authorities in the community, who declared the father guilty, exercising JI in accordance with article 191 of the 1998 Constitution. Luis was charged to be economical responsible for the baby and had to undergo the purification-bath to take away "bad energies". The baby, Josephine, came to live with Luis. No psychological, emotional or other professional help was offered to Rosa, since no treatments were included in the resolution/sentence (Interview 28; Observation 5).

Moreover, Rosa lived in another community as she did not want to live close to Luis. Almost 15 years later, when Josephine was 14 years old, Rosa decided to turn to the JO-system as she wished Josephine to come and live with her. Rosa went to the *Junta de ninez*, treating issues of Child-care, to report suspected mistreatment of Josephine by her parents. She made an announcement in October 2017 and an investigation started, collecting psychological/medical reports from Rosa and Josephine, information from Josephine's teachers, school-results, etc. A restraining-order from the Police prohibiting Luis to meet Josephine during the investigation-period was authorized and the Police were requested to help Josephine move from Luis to Rosa if the accusation was accurate and the adolescent decided to live with her mother (Interview 28; Observation 5).

In November 2017, an Audience was arranged in the *Junta* to hear the different parties. Rosa, her parents, three Junta-employees (including one lawyer) and the two Indigenous Presidents of the two affected communities[37] participated in the audience. The community-leaders were invited as an attempt of collaboration between JO and JI. The Audience started by the Junta-lawyer presenting the case and results from the investigation. After that each person in the room could confirm, decline or add to the information presented, and give their views about the suspected mistreatments. After this, all were asked to leave the room and Josephine was invited inside. She was interviewed by one female Junta-employee. They discussed Josephine's situation and how it was to live with Luis and her grandmother. She was also asked if she wished to live with them or with her mother, and it was explained to the adolescent that her mother had been a victim of sexual abuse by her father (Interview 28; Observation 5).

From the assessment done by the JO-authorities, it was decided that Josephine should continue to live with Luis and her grandmother, as no sign of physical or psychological abuse could be seen neither from the medical- and psychological-reports nor from the interviews. The adolescent herself seemed content to live with them, and when she was asked with whom she wished to live, she decided to stay with Luis and her grandmother (Interview 28; Observation 5).

Analysis: So what would have happened if the Incest-Case would have been judged by JO?

After this audience, some discussions with the Junta-employees took place. They predicted that if the Incest-case in 2003 had been judged by JO, the outcome would have been different (Interview 28) and this was supported by a lawyer specialized on child-and adolescent-cases (Interview 22). To begin, they said that Luis would have been sent to prison for 26-30 years if

[37] The President of the community in which Luis, his wife and Josephine were living and the President of the community where Rosa was living.

found guilty, according to the Criminal Code and due to the gravity of the case. This would have resulted in several consequences for the family. First, there would have been no economic security for the child as the breadwinner was sent to a long imprisonment and could not have contributed economically for basic expenses. Secondly, due to the trauma for the young mother, the child would have been taken care of by the grandmother or by another relative (as the Ecuadorian law seeks to make the child live with close relatives) or would have been taken to a foster-home. Moreover, all three warned that the child even could have been destined to live in the street, as many "un-wanted" children become homeless (Interview 22, 28). In this light, they claimed that for the child herself, the outcome was better in JI, as she ended up healthy without any diseases, living in a proper house with her father and grandmother, going to school, seemingly content, even though she did not meet her mother, as Luis and the grandmother did not allow Rosa to visit (Interview 28; Observation 5). Hence, the ***individual rights, protection, and well-being*** of the child (Ignatieff, 2001; Sen, 2009) was granted by JI.

Nevertheless, it was also pointed out that Rosa was not treated according to her ***individual rights, protection and well-being*** as she was left without her baby, and without any psychological, emotional or professional support, nor with any compensation. She moved to another community as she wanted to stay away from Luis. She tried to visit her daughter but was rejected to enter her parents' house and meet with her child (Interview 28; Observation 5).

Lack of Capacity-building, HR's, and Gender-perspective

In contrast to Case b), this case is missing a gender-perspective, and is not up-holding ***individual rights and protection*** for the victim, which is important for an inclusive justice system. Nor is Rosa able to enjoy the ***freedom of choice*** (Sen, 2009) in regard to meeting her own daughter. Her daughter on the other hand, is granted the ***freedom to choose*** who to live with, although it seems that she does not have the choice to meet her mother. Besides, one has to bear in mind that the Incest-case was investigated before the 2008 Constitution and *before* the constitutional inclusion of Women's rights and HR's in JI-application – although it should be clear from National laws (for instance Law 103) and ratified International Conventions.[38] Moreover, this complex case displays that ***Capacity-building, Gender-sensitiveness and an overarching HR-perspective*** are crucial for fair justice systems (FineDare, 2014; Sieder and Sierra, 2010; UNDP, 2004).

[38] Such as CEDAW, but also The Human Rights Declaration, and The Millennium Development Agenda, including MDG3.

Additionally, various research-subjects pointed to the lack of female indigenous-leaders as a reason why sexual violence-cases (especially within the family) are neither recognized nor investigated properly. ***Patriarchal ideas*** and normalization of domestic- and sexual violence within the families were brought up as key factors for hindering justice (Interview 22, 25-28, 41) and ***not benefitting the most disadvantaged*** (Rawls, 1993) as with Rosa. While the outcome arguably seemed to be better for Josephine in JI, the JI-sentence should have included measures for enhancing the ***well-being***, ***protection and individual rights*** (Ignatieff, 2001; Sen, 2009) of the victim, as in Case b).

Moreover, various research-subjects doubted the sufficiency of JI-resolutions in regard to cases of domestic- and sexual-violence and stated that the victims neither receive support nor recuperation-measurements (Interview 20, 31-35). Although Case b) is an example of the contrary, Case c) displays another reality. As a Junta-employee claimed "they punish the aggressor, but they do not help the victim", being a common phenomenon in the communities, since there is a lack of comprehension of HR's and Women's rights (Interview 28). The ideas in ***Feminismo Communitario*** are important here, as it questions ***dominant structures*** of ***patriarchies and sexism*** and argues that the problem is multi-leveled and structural. In one interview (22) it was explained that due to alcohol and drug-problems, the husband sometimes goes to the daughter at night, believing it is the wife… Similarly as Sieder and Sierra's (2010) findings, incest is not even regarded as a crime in some communities in PK, as incest and domestic violence have been normalized (Interview 22) creating a vicious circle of violence for the next-coming generations (Interview 41) with great risks for psychological and physical problems in the families. This is the opposite of ***Sumak Kawsay***, which includes "collective well-being" and "beautiful existence" (FineDare, 2014: 19, 29) and is not creating a desirable climate for ***accountability from*** nor ***access to*** a fair justice system in the community, which if not changed, neglects the ***well-being, liberties and freedoms of living people and future generations*** (Sen, 2009) being an example when the ***values of the group*** is preventing the realization of the victim's ***individual rights*** (Ignatieff, 2001).

Finally, in line with ***value collectivism*** and ***Sumak Kawsay***, all parts of the community are needed. One could therefore argue that if the communities do not uphold HR's, Women's rights, and are granting ***protection and well-being*** for all community-members (hence upholding the ***individual rights and freedoms***) it might be impossible to reach ***peace***: both at a family and community-level, as well as to grant the ***collective in itself its right***, as the whole no longer is whole, and ***"institutions that*** **promote** ***justice"*** are lacking (Sen, 2009: 82). Moreover, in Case

a), the wrong-doer Manuel had to leave the community as he disturbed the ***peace*** in the collective, but in Case c), the victim had to leave, due to the lack of protecting measurements.

7.3. To what extent could legal pluralism lead to the fulfillment of SDG16, and to what extent do the two justice systems in Pueblo Kayambi uphold collective and individual Human Rights?

One could argue that for the indigenous population living in the rural areas in PK, having limited access to the JO-system due to economic and geographical reasons as well as time-constraints and language barriers, the right to legal pluralism and JI-application increase their access to justice, since it eliminates all these obstacles. From the above analysis we can draw conclusions that JI may be a) a fair and inclusive justice system leading to more access and peaceful communities (Arguably Case a and b) or b) an unfair system not granting individual rights and well-beings (Arguably Case c), hence fulfilling SDG16 to different extents depending on the case and the community's response and HR's-consciousness. If accomplishing the HR's and Women's-inclusion aspects in Article 171, JI could indeed enhance inclusive and fair justice *for all* (targeting an often marginalized group) while considering individual *and* collective rights and freedoms.

Moreover, in Pueblo Kayambi, the non-indigenous population uses the JO-system, and are rarely tried in the JI-system[39]; providing different options to different parts of the population. This could increase the access to fair justice, being a Multi-Cultural and Pluri-National country, as the jurisdiction to some extent is determined based on the person's culture, norms, and values. However, a country could not have "too much" legal pluralism, as all citizens are subjected to the National Constitution and should be equal before the law. Arguably, this is not the case in PK, as different people may be convicted in either JI or JO (depending on territorial- and cultural-aspects) with distinct sentences, differing from cases to cases, possibly creating uncertainties of the legal procedures. Moreover, if a crime is not seen as a crime in JI, the community-member can turn to the JO-system, but not vice versa. Therefore, one could argue that legal pluralism improves the indigenous populations' access to justice and reduces inequalities (SDG16 and SDG10), which is important since they historically is a marginalized group, encompassing around ¼ of the population. But simultaneously, legal pluralism does not provide the same opportunities for the whole population, and as noticed in the literature review,

[39] This is however determined on a case-to-case basis, as a case of robbery was reported in which a man from Quito robbed a community's televisions and hence was convicted in JI, due to the territorial-aspect (Interview,17).

the person may not know which system will be given jurisdiction, which could create confusion and less trust in the justice systems, potentially decreasing chances of reaching SDG16. There are also risks of subjectivity in JI since no laws are written down and each case is judged uniquely, which could lead to corruption[40]. At the same time, a case-to-case approach could also enhance more fairness as the reasons why the crime was committed is considered.[41]

Moreover, it is difficult to determine to what extent the two justice systems are granting collective and individual HR's in PK, since there are good practices and lacking points in both systems and the HR's-consciousness differs from case-to-case. Machoism, patriarchy and discrimination exist in whole Ecuador, and there is a need for increased gender-sensitiveness and HR-perspective in both JI and JO. Domestic- and sexual violence is very common and recuperation-measures for the victims are vital. The JO-system has more institutions and measurements at its disposal for helping the victims of violence, which potentially could be implemented, but the understanding of the cultural and personal contexts might be missing, which leads to few cases proceeding to accusation. The JI-system might have an advantage to tackle these challenges as being the "natural-judge" (Ruiz-Chiriboga, 2017) and the most likely to speak the indigenous people's language, understanding their culture and norms, and striving for Sumak Kawsay (Sieder and Sierra, 2010). Nevertheless, if the Indigenous-leaders, the Prosecutors, the Police, and the Judges do not support and protect the victims, and create trust, inclusiveness, and accountability in both justice systems, the victim may not turn to any legal system for support, and hence the justice system fails to include the least advantaged, which according to the majority of the research-subjects, often-times are indigenous rural-women subjected to violence. In this sense, neither SDG16 or SDG5 nor HR's will be reached.

7.4. What lessons can be learned from the Case of Pueblo Kayambi?

Firstly, as the majority of the interview-subjects stressed and in line with Truffin's (2009), UNDP's (2004) and Feminismo Communitario's (2018) arguments: that education and capacity-building, more gender-sensitivity and inclusion of a HR-approach at all stages are needed – and at the same time applying the notions of a fair and inclusive justice system *for all*. Secondly, to increase the understanding and collaboration between JI and JO for tackling the acknowledged challenges with legal pluralism, which together with HR's-considerations could erase most of

[40] One example was brought up of one adolescent/son of one indigenous President being free of charges when crashing his car in a wall in another community. Due to his father's position, no GA-meeting was called, and he did not have to compensate for the damage. However, it was also stated that this would have been harder to accomplish if the car-crash had occurred in his own community, as the General Assembly would have discussed it collectively and would probably have asked for compensation (Interview,2).

[41] For instance, if one is stealing something, the reason why this is happening, is examined and if it is found that the person for example is very poor and his/her family is in much need of food, the sentence would be milder and the community would also try to help the person to find a job, all which would be included in the *Acta* (Interview,7).

the current disadvantages with legal pluralism in PK and Ecuador at large. Thirdly, although much skepticism regarding JI-application on cases of sexual- and domestic-violence was found in previous literature and also claimed from research-subjects from the JO-system, Case b) points to something different: that JI can work to the benefit of both the victim, the convicted, and the community – if having HR-consciousness and truly applying the ideas of justice as fairness, individual and collective-rights and Sumak Kawsay.

Moreover, in minor cases, for instance robbery, JI was preferred even by the JO-Judges and Prosecutors, as it decreases the JO-workload and resolves the crime quickly without costing the victim nor the State anything (Interview 19, 20, 31-35).

Furthermore, Kofi Annan's statement[42] that for implementing justice, a "'one-size-fits-all' does not work" and that "[l]ocal actors must be involved" creating "strong local institutions" (in UNDP, 2004: 2) is relevant also in this case, as different parts of the population might have different needs.

From these findings, one may suggest three policy-implications. First, to create guidelines on how the justice systems can cooperate and coordinate with each other. Second, on a national- and regional-level, work for increasing the knowledge about legal pluralism, JO and JI, as well as HR's and Women's rights through education and capacity-building. This could be initiated by the central government, but also by the indigenous-movement,[43] to enhance learning and increase comprehension of the different legal systems and the importance of HR's. Third, although each case is unique and JI-application varies, it would be recommended to arrange an Annual-training/exchange of experiences for indigenous-leaders on HR's, Women's and Children's rights to provide ground for a JI-application that promotes individual and collective rights. This could be initiated for instance by indigenous-actors such as CPK or CONAIE, and could be financially and technically supported by the government in line with Article 39 in DRIPS (2008) [44].

Lastly, the three cases display the interrelations between Sustainable Development, Human Rights and Peace and Security, as stated by Jan Eliasson (2013) in the beginning. None of the three SDGs examined (SDG5, SDG10, SDG16) could be reached without granting both HR's

[42] Although talking in terms of justice in conflict-zones.
[43] Which is already slightly being initiated by CONAIE (Interview,18).
[44] Article 39 stating that: "Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration" (DRIPS,2008).

and Peace and Security. In Case b) all these three aspects were taken into consideration, whereas in Case c) several of them were lacking, and in Case a) most were granted. Arguably, the findings in this study, although being context-specific, point against the literature that argues that collective and individual rights often conflict with each other – rather, this study shows that both are needed simultaneously. Especially if one is to be granted access to a fair and inclusive justice system, providing ground for fulfilling the SDG's in Ecuador.

8. Conclusion

This thesis is based on a qualitative study conducted in Pueblo Kayambi and Quito during fall 2017. It has looked at Legal Pluralism and examined if it could be a way of reaching SDG16 while at the same time upholding individual and collective Human Rights. The thesis finds that JO might uphold criteria of being a fair system in theory, being predictable, following fixed procedures, striving for punishing the aggressor, and recently also including rehabilitation-services for the victim and the aggressor. Nevertheless, in practice, JO is somewhat flawed and is in need for further improvements. The thesis argues that JI might not be considered fair in theory, as the sentence/resolution differs from case-to-case and there are no written instructions, hence difficult to examine its properness. On the other hand, JI gives the victim and the aggressor access to justice despite being poor and living in the rural area (since accessing the JO-system would require time and money); also providing opportunities for the indigenous people to be heard by their "natural judge", whom knows their language, culture and background, arguably increasing the fairness. Furthermore, both legal systems are in need for capacity building and education in terms of HR's-application and gender sensitiveness, and to not re-victimize victims of domestic and sexual violence. It is also crucial with clearer guidelines and willingness to enhance collaboration between JI and JO. Therefore, this thesis argues that Legal Pluralism could both promote and hinder the fulfillment of SDG16 and other SDGs, as the two justice systems provide more access to fair justice for more people with different needs – when working properly, and both justice systems consider and fulfill individual and collective HR's.

To conclude, as mentioned in the Introduction-chapter, it would be interesting to expand this study's scope, doing a multiple case-study of the impact of legal pluralism on SDG's in several communities in Ecuador and in other Latin-American countries. Furthermore, due to ethical-considerations, this study did not interview any victims of domestic/sexual-violence. However,

considering that 6/10 Ecuadorian women are victims of domestic violence, femicides occur regularly, and only a small percentage is reporting the crimes (UN Women, 2018; Interview 27, 28) it would be an essential matter to examine, bringing important insights to the discussion, by including their experiences, suggestions, and needs for granting fair and inclusive justice for all – and at the same time reaching crucial targets in SDG5.

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10. APPENDICES

Appendix 1: List of Materials from Data Collection

a) List of interviews

Academics

- Interview 1. With a male indigenous Academic, 2017-11-13, Café in Quito.
- Interview 2. With a male indigenous Academic, 2017-11-01, Office of Pueblo Kitu Kara, Quito.
- Interview 3. With the male Director of the Centro de Estudios Corte Constitucional, 2017-12-21, Centro de Estudios Corte Constitucional, Quito.

Assemblywoman

- Interview 4. With Assemblywoman, 2017-12-13, Assamblea National, Quito.

Community Members

- Interview 5. With male Community member, Cayambe, 2017-12-04, Office of Pueblo Kayambi.
- Interview 6. (Informal). With young, male Community member, 2017-12-21, Cayambe.

Indigenous Leaders (local, regional, and national)

- Interview 7. With male Community member / Ex-President of la Junta Barraqoal de Gonzales, 2017-11-14, Park in Quito.
- Four interviews with the male President of Pueblo Kayambi, Office of Pueblo Kayambi.

- Interview 8. First interview on 2017-10-24.
- Interview 9. Second interview on 2017-11-21.
- Interview 10. Third interview on 2017-11-24.
- Interview 11. Fourth interview on 2017-12-20.

- Interviews with female Project Coordinator at Pueblo Kayambi, Office of Pueblo Kayambi.

- Interview 12. First interview on 2017-10-23.
- Interview 13. Second interview on 2017-12-04.

- Interview 14. With male Community Leader/Board member for Natural Resources at Pueblo Kayambi, 2017-12-04, Office of Pueblo Kayambi.
- Interview 15. With female Community Leader/Board member for Women's Affairs at Pueblo Kayambi, 2017-12-05, Office of Pueblo Kayambi.
- Interview 16. With male Community Leader/Board member for Education at Pueblo Kayambi, 2017-12-20, Office of Pueblo Kayambi.
- Interview 17. With one male President of one community in Pueblo Kayambi (San Jose Chico) / Community Leader/Board member for Youth at Pueblo Kayambi, 2017-10-28, in his home in San Jose Chico.
- Interview 18. With one male Community Leader/Board member for organizational issues of CONAIE, 2017-12-19, Office of CONAIE, Quito.

Judges

- Interview 19. With female Judge at Provisional Court, 2017-12-15, Corte Provisional Pinchincha, Quito.
- Interview 20. With male Judge at Provisional Court, 2017-12-15, Corte Provisional Pinchincha, Quito.

Lawyers and Public defender

- Interview 21. With one male Public Defender, 2017-11-22, Office in Unidad Judicial de Cayambe Unidad Penal.
- Interview 22. Group interview with one female Lawyer (specialized on cases regarding children and adolecents) and one male Public Accountant, 2017-11-30, Office in Cayambe.
- Interview 23. With male Indigenous Lawyer, 2017-12-04, Office of Pueblo Kayambi.
- Interview 24. With newly graduated male Lawyer in Cayambe, 2017-12-20, Lawyer Office in Cayambe.

Ministerio de Justicia, Derechos Humanos y Cultos

- Interview 25. With one female Employee / Lawyer, 2017-12-14, Ministerio de Justicia, Derechos Humanos y Cultos, Quito.

Municipality and Juntas

- Interview 26. With one female Employee / Lawyer at Junta de Protección de Niñez in Cayambe, 2017-11-23, Junta in Cayambe.
- Interview 27. With the female Director of UEPDE, 2017-12-06, Office of UEPDE in Cayambe.
- Interview 28. Group interview and discussion of "Mixed Case" with two female employees at the Junta de Protección de Niñez, 2017-11-29, Junta de Protección de Niñez in Cayambe.
- Interview 29. With a female Project Leader at UEPDE/community member, 2017-12-04, Office of UEPDE in Cayambe.
- Interview 30. With one female Employee at the Municipality / Ex-President of one Community in Pueblo Kayambi (Cochapamba), 2017-12-03, in her house in Cochapamba.

Office of Prosecutors

- Interview 31. With the male General Prosecutor and Ex-National Evaluation Prosecutor, 2017-11-19, Prosecutor Office in Cayambe.
- Interview 32. With the male Assistant of the Prosecutor for Gender Violence, 2017-11-17, Prosecutor Office in Cayambe.
- Interview 33. With the male Prosecutor of Gender Violence, 2017-11-29, Prosecutor Office in Cayambe.
- Interview 34. With the female Assistant of the Prosecutor of Indigenous Affairs, 2017-11-29, Prosecutor Office in Cayambe.
- Interview 35. With the male Prosecutor for Indigenous Affairs, 2017-12-19, Prosecutor Office in Cayambe.

Police

- Interview 36. With a male Police Officer, 2017-12-20, the Police Office in Cayambe.

Others

- Interview 37. Pilot interview with the male President of one Community in Bolivia, 2017-09-23, Café in Cayambe.
- Interview 38. Informal interview with one male taxi driver (ex-community member of PK, living in Quito), 2017-11-28, Quito.

- Interview 39. With one male Assistant to Lawyer in Cayambe, 2017-12-20, Lawyer Office in Cayambe.
- Interview 40. Informal interview with one female participant at a Case of Justicia Indigena, 2017-11-25, Café in Quito.
- Interview 41. Informal interview with male, indigenous employee UNICEF, 2017-11-25.
- Interview 42. Informal interview with wife to indigenous leader, 2017-12-21, Cayambe.

b) Observations

Case of Justicia Indígena

- Observation 1. Case of Justicia Indígena regarding land rights, 2017-12-07, in one community of Pueblo Kayambi, Pisambilla.

Cases of Justicia Ordinaria

- Observation 2. Audience, Robbery Case, 2017-11-22, Unidad Judicial de Cayambe Unidad Penal.
- Observation 3. Audience, Transit/Traffic Case, 2017-11-22, Unidad Judicial de Cayambe Unidad Penal.
- Observation 4. Audience, Tribunal/Provisional Court, Penal Case of Economic Abuse, 2017-12-15, Corte Provisional Pinchincha, Quito.

"Mixed" Case

- Observation 5. Audience, Child Abuse Case, 2017-11-29, Junta de Protección de Niñez in Cayambe.

Other field observations in relation to Justicia Indígena

- Observation 6. Election to the board of the Confederación of Pueblo Kayambi, 2017-09-08. Participated in the 6th Congress of the "Confederación del Pueblo Kayambi", which is an organization that consists of 174 communal organizations (SAL,2016) representing different indigenous groups in the provinces of Pichincha, Imbabura y Napo and the cantones Cayambe, Otavalo, Ibarra, Pedro Moncayo and Chaco (Kayambi,2017). They re-elected the previous president Agustin Cachipuendo Riengoso and new board members for the period of 2017- 2020.

- Observation 7. Workshop about Justicia Indígena in one of the communities of PK, 2017-11-24, Community of Las Casas.
- Observation 8. Field observation on 2017-12-03 in the community of Cochapamba.
- Observation 9. Observation of one complaint / request from three community members of Pisamabilla to receive Pueblo Kayambis assistance in one case of Justicia Indígena, 2017-12-04, Office of Pueblo Kayambi.
- Observation 10. Meeting with the Board of Pueblo Kayambi, 2017-12-05, Office of Pueblo Kayambi.
- Observation 11. Planificación del Pueblo Kayambi, 2017-10-26 and 2017-10-27, annual planning activity in one community of Pueblo Kayambi, Cochapamba.
- Observation 12. Observation and guided tour in the community San Jose Chico, 2017-10-28.

Other field observations in relation to Justicia Ordinaria

- Observation 13. Observation in the Prosecutors Office, 2017-11-21.

Conferences, workshops and seminars

- Observation 14. Forum "*Autonomía, autogobierno y Estado Plurinacional – Experiencias para una sociedad altemativa en Bolivia y Ecuador*". Universidad Andina Simón Bolivar, 2017-09-17, Quito, and in Teatro Municipal Luis Felipe Barja, 2017-09-22, Cayambe.
- Observation 15. Escuela de formación, educational activities with La Confederación del Pueblo Kaymabi and Foundación Kawsay.
- First seminar on 2017-09-23: About Autonomy and the impact of such in Pueblo Kayambi.
- Second Seminar on 2017-10-21: About the Political Situation in Ecuador and the relation to indigenous people.
- Observation 16. Water seminar with Pueblo Kayambi and their community members, 2017-11-22, Cayambe.

c) Legal documents

Several legal documents/public records have been used to support the information obtained in the interviews and the observations.

Four Actas: Documents of Proceedings / Sentences from JI:

- Acta 1. Case of Sexual Violation. Character: Penal. La Confederación del Pueblo Kayambi, 2013.
- Acta 2. Case of Violation, Intent of Abortion. Character: Penal. La Confederación del Pueblo Kayambi, 2017.
- Acta 3. Case of Land-rights and insult. Character: Penal. Organización Comuna Juridica Pisambilla, 2017.
- Acta 4. Case of natural death. Character: Civil. La Confederación del Pueblo Kayambi, 2017.

Other legal documents:

- ILO Convention No.169: Indigenous and Tribal Peoples Convention, 1989.
- Universal Declaration of Human Rights, 1948.
- United Nations Declaration on the Rights of the Indigenous peoples, 2008.
- Ecuadorian Constitution from 2008 (Constitución de la República del Ecuador, 2008).
- Ecuadorian Constitution from 1998 (Constitución de la República del Ecuador, 1998).
- Penal Code. Código Orgánico Integral Penal, 2014.
- Organic Code of Judiciary. CODIGO ORGANICO DE LA FUNCION JUDICIAL (2009)

Appendix 2: Interview Guide and Themes

Guía de Entrevista: Preguntas sobre Justicia Indígena and Justicia Ordinaria

(Interview Guide: Questions about the Indigenous and Ordinary Justice systems)

Muchas gracias por tomar tiempo a participar en esta entrevista sobre Justicia Indígena en Pueblo Kayambi / Ecuador. Esta entrevista es parte de un estudio del campo que estoy realizando para recolectar datos para mi tesis de la Maestría de Desarrollo Internacional y Gestión en la Universidad de Lund en Suecia. Además, esta entrevista también va a ser base de un documento de SAL (Solidaridad Suecia-América Latina) sobre Justicia Indígena, en cual SAL va a informar sobre el tema de Justicia Indígena. También, usted podría ser anónimo/a en la tesis y en el documento de SAL. Si me da permiso, esta entrevista será grabada.

1 a) ¿Cómo pueden ustedes obtener autonomía en el Pueblo Kayambi? *(How to obtain autonomy in the territory of Pueblo Kayambi?)*

b) ¿Cuáles pasos han hecho ustedes y que falta para ser una autonomía? *(Which steps have been taken in this process and what is missing to be an autonomy?)*

2. a) ¿Hay un sistema de justicia indígena ahora en Pueblo Kayambi? *(Does a system of Indigenous Justice currently exist in Pueblo Kayambi?)*

b) ¿Desde cuánto tiempo? *(Since when?)*

c) ¿Cómo funciona el sistema de justicia indígena? ¿En general? ¿En Pueblo Kayambi / las comunidades del Pueblo Kayambi? *(How does the system of Indigenous Justice Works? In general? In Pueblo Kayambi / the communities?)*

d) ¿Cómo realizar e implementar justicia indígena legalmente en un pueblo, por ejemplo en Pueblo Kayambi? *(How can one implement and carry out Indigenous Justice legally, in for instance Pueblo Kayambi?)*

3. a) ¿Hay algunos casos en Pueblo Kayambi cuando el pueblo o una comunidad ha utilizado el sistema comunitario de justicia indígena para resolver problemas con crimen etc.*? (Are there any cases of crimes etc. in the territory of Pueblo Kayambi when the system of Indigenous Justice have been used?)*

b) ¿Cuando? ¿Qué pasó? ¿Cómo fue el resultado*? (When? What happened? How did it go and what was the outcomes?)*

4. ¿Hay casos cuando no sea posible utilizar el sistema comunitario de justicia indígena, por ejemplo en Pueblo Kayambi? Legalmente o por otras razones: ¿Cuáles son/eran? *(Are there any cases when it is not possible to use the system of Indigenous Justice? Legally or of other reasons? What were/are the reasons?)*

5. ¿Cuál es su experiencia y su opinión sobre Justicia Indígena? *(What is your experience and opinion about Indigenous Justice?)*

6. ¿En su opinión, es el sistema de Justicia Indígena justo al respeto de género? ¿Hay alguna(s) diferencia(s) entre hombres y mujeres? *(In your opinion, is the system of Indigenous Justice fair in regard to gender? Are there any differences between men and women?)*

7. ¿Cuál piensa usted, es la opinión general de Justicia Indígena? *(What do you think is the general opinion about Indigenous Justice?)*

8. ¿Cómo se relaciona Justicia Indígena con el sistema legal convencional en Ecuador? *(What is the Indigenous Justice relation with the conventional legal system in Ecuador?)*

Interview Themes

The above interview-guide was the initial guide utilized in the study. However, after a few interviews, I instead start to ask about specific themes to make the discussions richer and put more emphasis on the interview-subjects views and experiences. These were:

1. Their work and what they are doing (to get an understanding of their professional background in connecting to plural legalism).
2. Their opinion / views about Justicia Indígena.
3. Their opinion / views about Justica Ordinaria.
4. What they personally and professionally saw as advantages and disadvantages with the two systems.
5. If they had any experiences/ examples of cases of justicia indígena and justicia ordinaria that they would like to explain and why these cases are relevant.
6. How they regarded gender parity and the gender-aspect in both systems.
7. Specific following-up questions depending on their responses.
8. If they had any further comments or information that they thought would be useful for me to know, including ideas/knowledge that might be hard for an "outsider" to grasp during a short visit in their country.

Some research-subjects were also asked about the cases of lighting people on fire, which had been called justicia indígena in the media, and also their views on the baño de purificación.

Appendix 3: SDG targets and indicators relevant to the Study

Even though this study does not have the scope and possibility to directly address these targets and indicators in the text, the connection of legal pluralism to the SDGs is extensive and covers several SDGs. The three SDGs referred to in the text and some specific targets and indicators of relevance for the study are acknowledged below to display the relevance of legal pluralism for potentially reaching a sustainable development in Ecuador and fulfilling the SDGs.

SDG16

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

16.6: "Develop effective, accountable and transparent institutions at all levels."

16.7: "Ensure responsive, inclusive, participatory and representative decision-making at all levels."

16.7.1: "Proportions of positions (by sex, age, persons with disabilities and population groups) in public institutions (national and local legislatures, public service, and judiciary) compared to national distributions."

16.7.2: "Proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group."

16.B: "Promote and enforce non-discriminatory laws and policies for sustainable development."

SDG 10

10.2: "By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status."

SDG 5

5.1: "End all forms of discrimination against all women and girls everywhere."

5.1.1: "Whether or not legal frameworks are in place to promote, enforce and monitor equality and non-discrimination on the basis of sex."

5.5: "Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life."

5.C: "Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels."

(Source: UN, 2018)

Appendix 4: Universal Human Rights Connected to the Study

Article 3: "Everyone has the right to life, liberty and security of person".

Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

Article 6: "Everyone has the right to recognition everywhere as a person before the law".

Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Article 8: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Article 9: "No one shall be subjected to arbitrary arrest, detention or exile."

Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 11: "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

Article 29: "(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

(Source: Universal Declaration of Human Rights, 1948)

Appendix 5: List of Tables and Images