In the parish of Zumbahua in the Ecuadorian highlands, a case involving five indigenous persons suspected of homicide was initially adjudicated by the local indigenous authorities. Two weeks later, the individuals in question were also named as suspects in a criminal investigation conducted by the national courts. It is striking that the consensus position of the population regarding the two different legal systems appeared liable to changes. Initially, their position reflected support for customary law, although it later shifted in favor of national law, before switching back again in favor of local customs.

As this murder case provides a good example of the daily practice of legal pluralism in the Andean highlands of Ecuador, it is used in this chapter as a case study to analyze how indigenous people resort to two different legal systems in cases involving internal conflicts, given the contemporary legal situation in Ecuador of formal legal pluralism in the absence of coordinating rules. It shows that indigenous people do not always blindly accept the course of justice under customary law, simply because it is their tradition.

Legal pluralism, in this chapter, is defined as “the presence in a social field of more than one legal order”;¹ in the Ecuadorian context

this means the existence of customary law alongside national law. In accordance with Moore’s “semi-autonomous social fields,” legal pluralism is about the dialectical and mutually constitutive relationship between customary law and national law, taking into account that this relationship is not power-neutral. “Legal pluralism is [...] understood as a relation of dominance and of resistance.” Therefore, the application of customary law alongside national law may be considered a form of resistance—i.e., a strategy of indigenous people to use their “traditional” norms and practices to secure their autonomy against encroachment by the state. That is not to say, however, that they always prefer customary law to national law. On the contrary, indigenous people are very well aware of the option of resorting to national law, if such action is considered likely to yield a more favorable outcome. Therefore, this chapter argues that viewing customary law as a “counter-hegemonic strategy” alone does not adequately explain the heterogeneity observed in the legal choices ordinary indigenous people make. Choosing between different legal systems is called “forum shopping,” and it is this phenomenon that will be used to explore the use of law as a cultural resource.

Law, according to Geertz, “is part of a distinctive manner of imagining the real.” In other words, law (i.e., talking about law, thinking about law, and practicing law) is conceived as a structuring discourse that shapes how reality is experienced. Legal reasoning thus becomes important for people trying to make sense of their world. This is especially true in cases of disputes. How an initial grievance develops into a dyadic disagreement (two people having an argument) and ends in a triadic dispute (a third party is needed to settle things) largely depends on what people consider right or wrong, as set forth in law. What people conceive to be law, therefore, can be considered a cultural resource. They use law—understandably, perhaps—to in-

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2 In this chapter, customary law is understood as a set of unwritten, flexible, local, and obligatory norms and practices for a specific community or group of people. Customary law not only prescribes how people should act, it also describes what to do in case of dissent. Customary law therefore both governs and metes out punishments.


6 The word tradition appears in quotation marks, because the indigenous norms and practices (or customary law) are not traditional in the sense of being static or authentic. Customary law is highly flexible, changeable, and develops in and by daily practice, and it is considerably shaped by its context. See: Collier, “Problems” (1995); Merry, “Legal” (1988), p. 878; Sieder, Customary (1997), and, “Customary” (1998), pp. 105-106; Sieder and Sierra, “Indigenous” (2010); K. Von Benda-Beckmann, “Legal” (2001).


10 Felstiner et al., “Emergence” (1980-81).
fluence the course of a dispute. This becomes especially intriguing in a legal pluralist setting, where indigenous people draw either on customary law, on national law, or on both. The aim of this article is to gain insight into how such a setting works in daily practice. Ecuador is, in this respect, an interesting case study. In addition to its large indigenous population, the country has experienced real (de facto) legal pluralism for almost 500 years, although more recently a situation of formal (de jure) legal pluralism has arisen. In its Constitution of 1998, the country officially recognized customary law alongside national law. Since a system that synchronizes both forms of law is lacking, conflicts occasionally arise regarding jurisdiction. Basically, this means that because the “challenge of coordination” has not yet been solved, indigenous people can choose to apply either customary or national law in cases involving internal conflicts; in other words, they can shop between forums.

This chapter is based on findings gathered during three distinct periods of legal-anthropological fieldwork in 2007, 2009, and 2010, including participant observation, interviews, and archival research. The fieldwork was mainly conducted in the parish of Zumbahua (Pujilí canton, Cotopaxi province), but some information was also gathered in the provincial capital Latacunga and in the national capital of Quito. The first section of the present study provides an historical overview of legal pluralism in Ecuador, illustrating how a situation of real legal pluralism came into being with the arrival of the Spanish colonists, and how, at the end of the twentieth century, formal legal pluralism took effect in the absence of any system of coordinating rules that would make these two legal systems compatible. The second section elaborates on the phenomenon of forum shopping, which is prominent in the Ecuadorian situation of legal pluralism. After these two fairly theoretical sections, the article shifts to a more empirical account. A case concerning a homicide will be elucidated in the following section, to explain possible effects of such forum shopping in the contemporary Ecuadorian situation of legal pluralism. The penultimate section discusses legal decision-making behavior by the indigenous people in the Ecuadorian highlands and demonstrates that this process is versatile and therefore often transcends rather simplistic ideas (e.g., that indigenous people resort to customary law, because it is “part of their culture,” or that they reject national law for purely procedural reasons). Instead, I argue in the concluding section that viewing customary law as a counter-

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11 Ecuador has a population of approximately 15 million people, of which one third (depending on who is doing the counting) is considered to be indigenous.

hegemonic strategy alone does not adequately explain the heterogeneity observed in decision making.

Legal Pluralism in Ecuador

When the Spanish colonized the territory now known as Ecuador, they implemented special legislation that introduced the concept of two separate repúblicas and then politically reorganized the peoples and the lands of their newly conquered territory. First, the Spanish introduced special legislation to bring about legal and administrative separation of the people who lived in the countryside (whom they called “indios”, regardless of their ethnic origin) from those who lived in cities and towns. Thus, two socio-political classes—following the social class structure of medieval Europe—were identified: the república de españoles (i.e., the Spanish and their descendants who lived in the towns) and the república de indios (i.e., those who lived in the countryside, whether of indigenous or Spanish origin). Next, the Spanish organized the existing dispersed settlements of the república de indios into reducciones (connected centers) to control the rural population and to secure a steady flow of taxes. In line with the strategy of indirect rule, these reducciones came under the control of local curacas (or caciques), members of the ancient, hereditary indigenous elite. In addition to their role in securing tax revenues, these curacas had judicial authority in certain matters, even though cases involving major offenses and penalties had to be handed over to the Spanish authorities. The recognition of customary law was limited to a sphere that did not contradict divine and human law, did not affect the official religion, and did not impact the colonial, economic, and political order. At the same time, the indigenous people could make use of formal legislation in cases of disputes or conflicts, just like anyone else. And so they did, as the occasion arose. Thus, even then, forum shopping between customary law and Spanish law was an option.

This colonial model of segregation was replaced by an assimilationist model from 1830 onward, when the nascent Republic of Ecuador aimed to formally abandon the “indigenous world.” The colonial division into two repúblicas was officially abolished, and a single, unified nation (meaning one people, one culture, and one normative

14 Korovkin, “Reinventing” (2001), p. 44.
16 Guerrero, “Curagas” (1989); Stern, Peru (1982).
system) began to be constructed. As soon as the first organizational laws were promulgated in Ecuador, the figure of the *teniente político* was introduced. As a consequence of the introduction of this new office, customary law became illegal. Basically, this appointed political officer was charged with two duties: one political (serving the state’s interests) and the other judicial (the adjudication of minor offences in indigenous communities). As a political official, the *teniente político* “translated” national politics for a local audience and vice versa. As judicial authorities, these officials had to enforce national law, but in practice they did not always observe the letter of the law. Nor did they always determine legal matters within the community. In this context, many rural indigenous communities ended up following their own local norms and practices within their communities, where possible. The indigenous authorities succeeded in maintaining some degree of autonomy. Within these so-called semi-autonomous social fields, customary law therefore continued to be practiced. The situation of two *republícas*, with its memories of a “colonial contract” thus remained practically unchanged, and the situation of real legal pluralism prevailed.

From the beginning of the twentieth century, an integrationist model slowly gained ground. On haciendas, indigenous peasants were bound to systems of *concertaje* and *huasipungo*, whereby they agreed to work for the landlord in exchange for the use of small plots of land. The relation between a landlord and his workers at the beginning of the twentieth century has been characterized as an asymmetrical dependence, in which the owner (the *patrón*) took care of his workers, who expressed their gratitude for his care with their labor and loyalty. Such a situation is described by Guerrero, although he also shows that while workers were usually dominated by the landlord, they at times resisted in various ways. One case of such resistance occurred at the Zumbahua hacienda, situated on the west-Andean ridge in the province of Cotopaxi. Becker describes conflicts between workers and the landlord of this hacienda that took place during the 1930s and 40s. These conflicts were essentially about working conditions and payment. The indigenous workers on the Zumbahuan hacienda managed to secure legal assistance from a socialist lawyer (who could be seen as an exponent of the *indigenista* movement) based in Quito. With his support, they finally succeeded

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in having most of their demands met. They did so by resorting to national law.

The demands by this indigenista movement included legal land reforms as regards communal land tenure. The first such reform that was enacted was the Ley de Comunas of 1937, which extended legal recognition to indigenous communities. After the Ley de Comunas, two more influential laws—the land reforms of 1964 and 1973—were implemented. Among the purposes of these reforms were the standardization of local organization and the consequent transformation of rural indigenous people into Ecuadorian peasants. The 1964 land reform primarily promised civil rights by attempting to reorganize material and political power relations in the countryside. The 1973 land reform provided more social rights for the peasantry. The significance of the land reforms was profound, especially in the Andean highlands. Combined with the state’s continuing weak control over the countryside, the reforms created a space in which indigenous communities could secure more local autonomy to sustain and strengthen customary law. Nevertheless, the integrationist model supported legal monism, thus limiting any official recognition of legal pluralism.

During the “long nineteenth century,” as well as throughout most of the twentieth century, the situation of real legal pluralism instituted by the Spanish remained unchanged. Recognition of this de facto autonomy of the rural indigenous population, along with that of their customary law, became one of the demands of the new indigenous movements that emerged in the second half of the twentieth century. The initial emphasis on socioeconomic issues shifted to ethnic-cultural claims or, in the words of Pallares, “from peasant struggles to Indian resistance.” The indigenous struggle for equal rights began in earnest with the rise of the national indigenous movement CONAIE. After years of protest, CONAIE entered national politics in 1996. Its involvement in politics eventually resulted in the promulgation of a new Constitution in 1998.

This new Constitution recognized indigenous authorities and their rights to apply their customary law in cases of internal conflicts. This recognition of legal pluralism, along with the ratification of ILO

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24 Pallares, From (2002).
25 The national indigenous movement CONAIE (Consejo de Coordinación de las Nacionalidades Indígenas de Ecuador—the Confederation of Indigenous Nationalities of Ecuador) was founded in 1986 but derives from significant regional federations: the ECUARUNARI (Ecuador Runacunapac Riccharimui, meaning “Indian Awakening” in Kichwa), the Confederación de los Pueblos de Nacionalidad Kichwa del Ecuador (Ecuadorian Kichwa Confederation), and the CONFENAIE (Confederación de Nacionalidades de la Amazonía Ecuatoriana—Confederation of Indigenous Nationalities of the Ecuadorian Amazon).
Constitution 169 (which also occurred in 1998), represents a radical change with respect to the former tradition of de jure legal monism combined with de facto legal pluralism. Despite the fact that this new constitution was passed several years after similar reforms in Bolivia (1994), Colombia (1991), and Peru (1993), it may rightly be said to have included more extensive reforms of customary law than the constitutions of most other Latin American countries. Seemingly vindicating the notion of “the dialectics of progress,” however, this progressive legislation is enforced very inconsistently. In two recent cases (both in 2002), the Ecuadorian government failed to develop rules that would harmonize national law and customary law.

Ten years after the Constitution of 1998 was promulgated, it was replaced. The Constitution of 2008 (or “the Montecristi Constitution”) not only recognized Ecuador as an intercultural and plurinational country; it also ratified the rights the indigenous nationalities had been granted in 1998. Echoing the 1998 document, the Montecristi Constitution calls for mechanisms (e.g., additional law or jurisprudence) to be developed to harmonize customary law with national law. Such harmonization has not yet occurred—neither through the promulgation of new laws nor through jurisprudence. In light of these frustrations, the new Constitution of 2008 and two permissive provisions (which were developed under the current Correa government) could be seen as an improvement. Once again, however, the significance of constitutional promises proved to be more or less symbolic, because president Correa recently showed that he is not in favor of extensive legal autonomy for indigenous authorities: on national television he proclaimed that customary law was subordinate to national law, and that in cases involving criminal acts (indigenous) perpetrators should be adjudicated by national courts.

The struggle regarding the extent to which indigenous authorities exercise jurisdiction thus appears ongoing.

The fundamental question here is how to reconcile two intrinsically different normative systems. The four most important challenges concerning such coordination are related to processes, norms, norms, and practices.}

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26 The ILO Convention 169 states that the rights of indigenous peoples (with the tell-tale final “s”) to land and natural resources are recognized as essential to their material and cultural survival. In addition, ILO 169 declares that indigenous peoples should be entitled to exercise control over their own institutions, within the framework of the states in which they live. It also requires states to respect customary law as long as the latter does not violate human rights.


29 Código Orgánico de la Función Judicial and Ley de Garantías Jurisdiccionales y Control Constitucional.

sanctions, and authorities. In terms of processes, customary law includes a substantial oral component and is flexible and dynamic. By contrast, national (positive) law is written, consistent, and based on precedent. Customary law also relates differently to the concept of due process; for instance, it does not provide the possibility of legal representation to accused parties or the possibility of appeal. Second, both normative systems are based on distinct sets of cultural meanings and values. Some offences according to customary law, such as gossip or witchcraft, are not considered violations of national law. Customary law values the social collective (the harmony of the community) much more than national law does; national law instead emphasizes individual rights. Third, customary law is to a large extent governed by the principle of reconciliation and tends to award compensation and restitution to the victim, instead of meting out punishment to the offender. Rituals that use stinging nettles and cold water and whipping, for example, are thus not seen as punishment in customary law systems but rather as a means of “purifying” the offender, so as to make him fit to re-enter society. In any case, such procedures are at odds with most national and international legal systems.

The fourth issue concerns which authority is qualified to exercise jurisdiction, in what situation, and where. Depending on the circumstances, customary law may be applied by a wide range of bodies, from older family members and village elders to cabildos (village counsels) or tribunals. National law, on the contrary, is applied by courts (for example the Civil Court in Pujílí or the Criminal Court in Latacunga) and by public prosecutors. An intruder is the figure of the teniente político, who, though a state official, in daily practice applies customary law. Several additional questions concerning the qualification of authorities arise. Should indigenous jurisdiction be mandatory or optional? In other words, does the possibility of forum shopping exist? Furthermore, what should be done when a conflict involves both indigenous and non-indigenous subjects? And finally, should indigenous jurisdiction be defined geographically? Ecuador continues to struggle with the challenges involved in developing coordinating rules that would answer these questions.

The overall picture of 500 years of legal pluralism in both Ecuador in particular and in Latin America as a whole can be summarized as follows. Customary law was legally subordinated to Spanish and national law until the end of the twentieth century. Because of its flexible and dynamic character, customary law was able to survive over the course of five centuries. Building on the concept of semi-

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autonomous social fields, legal anthropologists working in Latin America came to see customary law as the outcome of ongoing and often highly unequal struggles and negotiations in relation to overarching political and legal structures.\(^{32}\) This leads to the present-day perspective on legal pluralism as the simultaneous existence of more than one legal system in the same social field, which should be seen as a “plurality of continually evolving and interconnected processes in wider power relations.”\(^{33}\) The principle still seems to apply in contemporary Ecuador, which, having formally recognized customary law, continues to lack harmonizing rules. Recent political statements by President Correa might suggest that a quick solution is still far away. And thus the national indigenous movement CONAIE and its regional branches are forced to continue their struggle.

**Forum Shopping**

Any situation of legal pluralism, whether it is one of real or formal pluralism, offers the possibility of forum shopping. The concept of forum shopping has been introduced in the anthropology of law by Keebet Von Benda-Beckmann as follows:\(^{34}\) “I shall speak of ‘forum shopping’ [...] because disputants have a choice between different institutions and they base their choice on what they hope the outcome of the dispute will be, however vague or ill-founded their expectations may be.” Since her introduction of the concept in 1981, fairly uncritical references to it have appeared in dozens of anthropological studies of legal pluralism. On the one hand, this indicates that the concept is both simple and powerful and thus easy to use. When people can choose between different authorities or systems, they will shop for the most favorable one, as the common reasoning seems to be. On the other hand, the uncritical references could be seen as an indication of a certain lack of interest in the “how and why” of forum shopping.\(^{35}\)

Forum shopping refers to the choice one of the parties makes between two or more legal systems and their authorities that are empowered to consider the case at hand. This decision is based on the assumption that the authority chosen is likely to give the case the most favorable consideration. This choice-making behavior is not uncontested. Shahar shows that legal scholars, who study forum shopping as a symptom of conflicts of laws, tend to be especially critical of this phenomenon. These legal scholars look at it as “a disrup-

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\(^{35}\) Shahar, “Forum” (forthcoming).
tive practice that corrupts the legal system, interferes with the ‘efficient’ implementation of a unitary rule of law, and constitutes a grave infringement of the principle of equality under the law.”36 Similar “anti-forum shopping” legal sentiments can be recognized in Ecuador too, especially among legal practitioners criticizing the situation of formal legal pluralism.

Contrary to such a purely legal point of view, a legal anthropological point of view provides the tools to understand more profoundly what forum shopping actually does. It proves that forum shopping does not involve a strictly rational choice that takes place within a situation of different legal forums at the same level playing field. The decision-making process is often far more complex than just “a simple outcome of a rational deliberation of pros and cons.”37 Legal anthropological research shows that forum-shopping practices are embedded in social, cultural, and political contexts and therefore encompass a broader scope than legal scholars’ rational choice assumptions.38 As a matter of fact, Von Benda-Beckmann herself suggested more than thirty years ago that some “social control at the village level” influenced people’s decision-making behavior.39 Additionally, further research on forum shopping reveals that there are related phenomena like “idiom shopping,” “discourse shopping,” and even “shopping forums.”

Idiom shopping, as explained by Spiertz,40 basically refers to the strategy that people use when they frame some of their arguments in terms of customary law and others in terms of national law, depending on which authority is handling their case, and which vocabulary is thought to be appropriate and likely to be effective. Biezeveld, however, shows that not only legal arguments are used in that way, but that arguments based on history, politics, and power, are used in the same way too.41 She argues that people show “enormous creativity in the way they seek to employ these different kinds of discourse,”42 and consequently she introduces the concept of “discourse shopping,” as an analogy to forum shopping and idiom shopping. Additionally, when Von Benda-Beckmann introduced forum shopping into the anthropology of law, she simultaneously introduced the phenomenon of “shopping forums.” “Not only do parties shop,” she wrote, “but the forums involved use disputes for their own, mainly political ends too.” The institutions involved in her research expressed a tendency to “acquire and manipulate disputes from which

they expect to gain political advantage, or to fend off disputes they fear will threaten their interests."43

The question arises of how to utilize the concept of forum shopping in the Ecuadorian context? While doing desk research on legal pluralism, one might initially get the impression that indigenous people nearly always prefer local authorities who apply customary law to national courts that apply national law. The impression conveyed by the scholarly literature on legal pluralism in Latin America in general provides insight into the reasons why indigenous people prefer to resort to customary law.44 These reasons can be divided into two categories. The first may be termed “pro customary law,” which basically means that customary law is considered more efficient and legitimate (as well as cheaper and faster) than national law. The second category may be termed “contra national law” and has to do with—perceived difficulties related to—access to law. Both these authors and others,45 however, also hint that there are exceptions to the rule. This second train of thought has received consideration from other scholars too.

In-depth research on forum shopping reveals that many factors influence people’s decision-making behavior. As Franz and Keebet Von Benda-Beckmann argue, “a complex set” of personal characteristics, self-interest, the particular features of the available systems or the authorities within those systems, the nature of the conflict, the relationship between the parties, and the interests of other parties concerned are relevant.46 In addition, power relations and other factors involving social dependency deeply influence decisions. This means, for example, that indigenous people do not always resort to indigenous law, simply because it is part of their tradition.47 Nor do they always reject national law for purely procedural reasons. This is not to say that such “pro customary law” and “contra national law” arguments are not being used; as a matter of fact, they are used quite often. The point, however, is that additional reasons underlie these frequently used, obvious reasons.

These findings are in line with a recent study by the Ecuadorian anthropologist Fernando García.48 His data offer profound insight into indigenous people’s legal decision-making processes. García’s findings might initially suggest limited knowledge of national law, as expressed by indigenous people. His respondents, however, are keen-

ly aware that in some cases they are simply unable to avoid recourse to state law. This suggests more knowledge than is apparent at first glance, at least on the part of some of the informants. Even more telling is that the respondents who do express knowledge of state law and are “contra” are opposed to its use because of how it is applied, rather than because of any principle objection to its content. In other words, they do not seriously object to the rules as such but are wary of state officials, who are supposed to be professional and impartial but are in fact (i.e., in the eyes of many indigenous persons) corrupt and biased. Berk-Seligson even argues that many ordinary indigenous people prefer national law, but because of their limited access to it, they are forced to resort to customary law. Even more striking in the study by García is the criticism expressed by many indigenous persons of their own traditional authorities. Some informants complained (in a manner similar to their perspective on national law enforcement officials) about the indigenous authorities and the enforcement of customary law, rather than about the rules of customary law as such. The most common criticisms were that the most of the authorities were older persons, that they placed too much emphasis on parties’ records, rather than on the facts of individual cases, that they were biased in some cases, and that they sometimes abused their power by imposing excessively harsh sentences.

To recapitulate the two previous theoretical sections, two general approaches to the use of customary law in a situation of legal pluralism are discernible. One school considers customary law and its use to be the outcome of an ongoing and often highly unequal struggle in relation to national law and national politics. The use of customary law, therefore, can be seen as a counter-hegemonic strategy. Then there is the concept of forum shopping, which, in the Ecuadorian situation, means that ordinary indigenous people can more or less freely choose between customary law and national law. Better yet, these people express a very discerning attitude towards local authorities and procedures as well as towards authorities and procedures in national law, which suggests reasonable legal awareness. What this means in daily practice is the subject of the following sections.

Homicide in Zumbahua

At a party on May 9, 2010, a group of five youths got into an argument with a man who lived in the village of Zumbahua. According to eyewitnesses, they did not start a fight at the party. But when the corpse of the man was found later that day in the park, the five youths were immediately identified as suspects. All five were from the neighboring community of Guantópolo and had a reputation among the locals as “troublemakers.” The next day, the five suspects were apprehended and handed over to the cabildo of La Cocha, another neighboring community. This is interesting, because the community of Guantópolo has a cabildo of its own. Those who captured the five young men, however, knew that at least one of them was related to a member of the cabildo of Guantópolo and therefore might receive preferential treatment in that community. A second reason not to hand the five suspects over to the cabildo of Guantópolo was that this cabildo had absolutely no experience with serious crimes such as homicide. Because of its exemplary conduct during the fairly similar La Cocha murder case of 2002, the cabildo of La Cocha was considered to be the most trustworthy authority in the area.

After the five had been apprehended and handed over to the cabildo of La Cocha, the investigation of the case was launched. The investigation and the interrogations were concluded in less than two weeks. During this time, nobody except the cabildo and a few other select individuals knew where the five suspects were being held. As a result of the interrogations, the five suspects confessed that they had gotten into a fight with the deceased. None of them, however, admitted to having killed him. Nonetheless, according to the cabildo, the confessions all pointed at one suspect in particular, who seemed to have had the greatest degree of involvement in the fight. That is why the Asamblea General (i.e., several cabildos that collectively constituted a public court) tried four of the suspects two weeks after the fatal incident occurred and then tried the main suspect separately one week later. The elements of all five sentences were identical. Each of the five young men received the same public “punishment,” consisting of an obligation to apologize, a fine of US$ 5,000, expulsion from the community for two years, mandatory submission to a purification ritual, and a whipping by members of the cabildos present. The purification ritual consisted of rubbing the skin of the five young men with stinging nettles and then dousing with cold water. This “ritual

53 Zumbahua is both the name of a rural parish and the village that serves as its administrative and economic center.
54 Simon Thomas, Legal (2009).
cleansing” took half an hour, as prescribed in the acta (the handwritten record of the indigenous legal proceedings).

During the days that followed, several short commentaries on this indigenous legal procedure were broadcast nationwide, and the punishment received by the five young men instigated an outcry from many sources: on the part of elements of the media, “ordinary” Ecuadorians, jurists, and the government, all of whom condemned the punishment as “barbaric.” Some dissatisfaction with the procedure as a whole was even expressed in the parish of Zumbahua. Several people I interviewed about this case expressed their disapproval of what they saw as the physical brutality of the treatment. Some residents of Guantópolo in particular questioned whether all stages of the indigenous legal procedure had been conducted correctly. Their concerns with respect to due process were focused on the interrogation practices of the cabildo of La Cocha. It was considered strange that hardly anybody knew exactly where the five suspects were being held throughout the procedure, or how they were being treated. Residents were also angry about the force that had been used during the purification process and the whipping. It may have been this dissatisfaction that led the people of Guantópolo (among others) to convince the five young men to turn themselves in to the national authorities on May 27, 2010.

With this “surrender,” the criminal investigation by the fiscal (public prosecutor) and the prosecution according to national law as a whole shifted into high gear. The criminal investigation began with a preliminary inquiry regarding the role of the indigenous authorities during the indigenous trial. This resulted in the arrest of three members of the cabildo of La Cocha. With the assistance of two attorneys, these three were released within twenty-four hours, but the five young men had already been transferred from the jail in Latacunga to a prison in Quito. Rumor had it that the five young men and their supporters in Guantópolo were promised that the investigation would not take much longer than two months. Later, after the Criminal Court of Justice in Latacunga declared itself incompetent to exercise jurisdiction, as long as the Constitutional Court did not give its opinion on the relevance of the indigenous legal proceedings that had been conducted, it became evident that the case would drag on far longer, much to the consternation of the accused and their supporters. This forced the cabildo of Guantópolo to “collaborate” with the cabildo of La Cocha, as well as the regional indigenous organization MICC, in seeking the release of the five young men. All parties appeared before the Constitutional Court on November 13, 2010, to

55 On ECUAVISA, see e.g., Teleamazonas, GAMA TV and on MICC TV.
56 MICC (Movimiento Indígena y Campesino de Cotopaxi) is a provincial indigenous organization and as such is part of CONAIE.
submit a joint request for both the immediate release of the five men and suspension of legal proceedings against the three members of the *cabildo* of La Cocha. Despite the motions from four attorneys, the Constitutional Court determined that it was insufficiently informed to issue a ruling. In December, 2010, the Constitutional Court therefore ordered that expert testimony be given on the use of customary law in this specific case; this expert testimony was supplied by the Colombian legal anthropologist Dr. Esther Sánchez Botero in January 2011. The following month, the Constitutional Court decided to review the case once again.

**Considering the Case**

How could this case be conceptualized using the two approaches described above? The counter-hegemonic strategy clearly provides some useful clues. The reasons why customary law was preferred over national law were made clear by the *cabildo* of La Cocha, which considered the homicide an internal conflict, given that the pertinent events had all occurred in the indigenous parish of Zumbahua and involved only indigenous people. The *cabildo* therefore considered itself competent to try the case according to customary law and chose not to surrender the five suspects to the *teniente político* of Zumbahua or to the police. Following consultation with other *cabildos* and with the MICC, the *cabildo* of La Cocha decided to observe meticulously all steps of an indigenous legal procedure and to mete out an “authentic” style of punishment. That this was done partly in the local language Kichwa and partly in Spanish can be seen as an example of idiom shopping. The *cabildo* explicitly emphasized the “good example” provided by indigenous authorities in the 2002 La Cocha murder case. Everybody present (over 3,000 people attended the public proceedings) agreed on the norms, process, and sanctions, which aimed at reconciliation, compensation, and restitution. These “authentic cultural” elements were also emphasized by the four attorneys during the hearing that followed at the Constitutional Court. As such, these indigenous legal proceedings can be seen as “pro culture,” even though some “contra national law” elements can be detected as well. The *Asamblea General* believed that a lengthy and expensive procedure would not be appropriate, and that a prison sentence of 16 years (the maximum term of imprisonment according to the Criminal Code) would be excessive.

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57 One attorney represented the family of the victim. Another attorney acted on behalf of the MICC and therefore the “official” indigenous point of view on customary law. The third one represented the *cabildo* of the community of La Cocha, and the fourth spoke for the five accused.

58 Decision by the Constitutional Court on February 3, 2011, in Case 0006-11-CN.
In addition, the presence of the MICC during the indigenous legal proceedings, and the assistance provided by this organization during the subsequent trial in the national court suggest a possible hidden agenda on the part of the indigenous movement. It is common knowledge that CONAIE and its political branch Pachakutik have an understanding that is fundamentally different from that of the Correa administration regarding the jurisdictional scope of the indigenous authorities, as granted by the Montecristi Constitution. Both organizations are disappointed that no coordinating legislation or jurisprudence has been developed yet. The project to draft such legislation, which was initiated by Pachakutik assemblywoman Lourdes Tibán, should be seen in this light. Given all these factors, the trial of the five young men provided the indigenous movement with a perfect test case to pressure the judiciary and the Correa administration, with the Constitutional Court serving as an important platform to pursue this agenda. That is why, during the hearing on November 13, 2010, the four attorneys also emphatically referred to ILO Convention 169, to article 171 of the Montecristi Constitution, and to the absence of coordinating rules. As such, the La Cocha-Guantópolo murder trial and its continuation at the Constitutional Court can be seen as a strategy against inaction on the part of politics and the judiciary. As I have suggested above, however, this strategy is deployed by indigenous authorities and the indigenous movement, rather than by indigenous individuals. The analysis according to the counter-hegemonic strategy approach therefore does not sufficiently explain how individuals involved in this murder case made their choices. It remains unclear, for example, why some disagreed to a certain extent with the cabildo, or why the five accused voluntarily turned themselves in to the national authorities. An interpretation that employs the concept of forum shopping sheds light on the legal decision-making behavior of the indigenous individuals involved in the La Cocha-Guantópolo murder case by revealing how the people involved in that case used the law.

When the five suspects were apprehended and handed over to the cabildo of La Cocha, their captors believed that this was the wisest option. They expected this cabildo—because of its exemplary conduct in a comparable case in the past (i.e., the La Cocha murder case of 2002)—to be the most experienced one in the area. They also saw the cabildo of Guantópolo as biased. Finally, those who delivered the suspects to the cabildo of La Cocha obviously did not consider national law to be an option. The family of the victim, another party in

59 Proyecto Ley Orgánica de Coordinación y Cooperación entre la Jurisdicción Indígena y la Jurisdicción Ordinaria, Oficio No. AN-LTG-oo43-10 (el 2 de febrero de 2010).

60 Simon Thomas, Legal (2009).
this process, specifically wanted the accused to be judged according to customary law instead of national law. Even the people of Guantópolo (despite questions the investigation and interrogation practices on the part of some) did not turn against the La Cocha authorities. The presence of the cabildo of Guantópolo and several other inhabitants of that community at the public legal proceedings proves that they too thought that this was the best option at the time. Eventually, however, they disapproved of what they saw as excessive punishment. This insight made them question the previous decision not to let the cabildo of Guantópolo handle the case. Disagreements or even rivalries within and between indigenous communities are not uncommon in the Ecuadorian Andes, and questioning the correctness of the application of customary law can be seen as a way of challenging inequitable power relations.

Thus, some reconsidered their initial opposition to the use of customary law. Eventually, the five accused young men decided to turn themselves in to the national authorities. When the Criminal Court of Justice in Latacunga decided to withhold a ruling on the case, pending the decision of the Constitutional Court, however, the faith of the accused in the national legal system was shaken. As a consequence, the cabildo of Guantópolo saw no other option than to join the cabildo of La Cocha (despite the previous quarrel over jurisdiction) and MICC in requesting that the five young men be released immediately, and that the charges against three members of the La Cocha cabildo be dropped. The analysis of individual choices here shows that the people involved in the La Cocha-Guantópolo murder case have a broad sense of what law is. Like their ancestors, they switch easily between customary law and national law. They are able to act within both normative systems. While from a national perspective, the use of customary law may be seen as challenging the dominance of national law, on a local level the use of national law by the people of Guantópolo may be perceived as a weapon deployed in their rivalry with the cabildo of La Cocha.

Although murder cases are rare in the parish of Zumbahua, the elements that may be inferred from the La Cocha-Guantópolo case indicating how people shop between forums should not be seen in isolation. Based on the empirical data gathered during my research so far, it can be argued that the pro-contra dichotomy remains far too simplistic to reflect accurately the daily reality of legal decision-making behavior. The archives of both the Civil Court in Pujíli and the Criminal Court in Latacunga reveal that indigenous people have voluntarily participated in several “national law cases.” In matters in-

61 See Simon Thomas, “Legal” (2012) for a more extensive elaboration on this disapproval.
volving civil law (divorces, alimony, custody of children, etc.), such a choice might be explained by people needing to obtain essential documentation. Indigenous people are very well aware that in some cases they simply cannot avoid recourse to state law. Yet even in some criminal cases indigenous people may resort to national law instead of customary law. This suggests that in such cases they have few objections to the rules as such. In other words, they are not always “contra national law.” As such, the La Cocha-Guantópolo case and others I came across during my research reveal that the indigenous are not always “pro customary law” either.

Conclusion

Two distinctive approaches to interpreting the use of customary law in a situation of legal pluralism emerge in this study. The historical overview of almost 500 years of de facto legal pluralism showed that customary law was subordinate to Spanish and national law until the end of the twentieth century. In daily practice, however, customary law remained in use. That outline suggests that customary law was used as a form of resistance. At least, this is the common scholarly explanation for the survival of customary law over the course of five centuries. Instead of being helpless victims, rural indigenous people proved, as several authors have demonstrated, capable of preserving the boundaries of their semi-autonomous social settings. The use of customary law is thus considered to be a counter-hegemonic strategy.

This may be true of indigenous authorities and the indigenous movement, but in this article I argue that individuals are subtler in their speech and actions. This is especially the case in the contemporary Ecuadorian legal situation of de jure legal pluralism, where rules that would define the personal, territorial, and material spheres of both forms of law are absent. As the analysis of a homicide case in Zumbahua reveals, indigenous authorities, the indigenous national movement CONAIE, and one of its regional branches still use customary law in a counter-hegemonic manner. Because the indigenous authorities are disappointed that no coordinating rules have been developed, it was suggested that this case served as a test-case to pressure politicians and the judiciary. On the other hand, the individuals involved in the homicide case acted quite differently. Like their ancestors, they switched easily between customary law and national law. In other words, they shopped between forums. Additionally, it was shown that such a legal decision-making process transcends a simplistic “pro-customary law” and “contra-national law” dichotomy. Empirical data show that ordinary indigenous people are sufficiently knowledgeable to be critical of both legal systems, and that they know very well how to make use of the situation of legal pluralism in the
absence of coordinating rules. Rather than using customary law as a form of resistance, they appear to navigate tactically between customary law and national law to settle internal conflicts.

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