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Indigenous Justice in the Ecuadorian Constitution

La Justicia Indígena En La Constitución Ecuatoriana

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Abstract

Indigenous justice can intervene in certain cases when it comes to crimes of a personal nature since crimes that threaten the life of the human being must be dealt with by the ordinary justice system, and if there is an intervention of indigenous justice, it should not exceed human rights. The objective of this study was to describe indigenous justice in the Ecuadorian constitution. The methodology for the development of the research work was the quantitative approach, through exploration, collection, and critical analysis by means of a documentary typology, supported by the bibliographic design that seeks reflection and analysis. Constructing methods related to the judgment of the phenomenon and thus evaluate or discuss new arguments. Theoretical documentary sources, norms, laws, and refereed works related to the central aspects of the work were examined and analyzed. Likewise, a questionnaire of open and closed questions was applied, in order to provide greater openness to the collection of information that is of utmost importance for the topic of study. It was applied to a sample of 118 citizens. It is concluded that the existence of a regulation that supports legal pluralism is null. The legal system of the Indigenous peoples is not within the positive law, since it is only based on the transmission of ancestral knowledge in a verbal way, the reason for which it has not been possible to issue a regulation that harmonizes the coexistence of two or more systems within the territory.

Keywords: *Justice, Constitution, Ethnic Group.*

Resumen

La justicia indígena puede intervenir en ciertos casos cuando se trata de delitos que sean de carácter personal, pues los delitos que atenten a la vida del ser humano deben ser acatados por la justicia ordinaria, y si existiera la intervención de la justicia indígena no deberá sobrepasar los derechos humanos. El objetivo del presente estudio fue describir la justicia indígena en la constitución ecuatoriana. La metodología para el desarrollo del trabajo de investigación fue el enfoque cuantitativo, a través de la exploración, recolección y análisis crítico mediante una tipología documental, apoyada con el diseño bibliográfico que busca la reflexión y análisis. Construyendo métodos relacionados al juicio del fenómeno y así evaluar o discurrir nuevos argumentos. Se examinaron y analizaron fuentes documentales a nivel teórico, norma, leyes y trabajos arbitrados vinculadas con los aspectos centrales del trabajo. Así mismo, se aplicó un cuestionario de preguntas abiertas y cerradas, a fin de dar mayor apertura a la recolección de información que resulta de suma importancia para el tema de estudio. Se aplicó a una muestra de 118 ciudadanos. Se concluye que, la existencia de una normativa que fundamente el pluralismo jurídico es nulo, puesto que el sistema jurídico de los pueblos indígenas no está dentro del derecho positivo, ya que solo se basa en la transmisión de los conocimientos ancestrales de manera verbal, motivo por el cual no se ha logrado emitir una norma que armonice la coexistencia de dos o más sistemas dentro del territorio.

Palabras Clave: *Justicia; constitución; grupo étnico.*

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Introduction

This research project is based on legal pluralism, emphasizing the recognition of indigenous justice within the territory from the constitutional level. In the same way, it is directed to the study of the guarantees and principles framed in articles 56 and 57 of the Constitution of the Republic of Ecuador (2008), also adhering to the National Development Plan better known as the Opportunity Creation Plan 2021-2025, which in turn works jointly with the UN proposing policies within the different axes and objectives.

In this context, it is essential to mention that history reveals that Indigenous societies were established in the territory now recognized as the Republic of Ecuador long before the Spanish conquest of Latin America. These communities developed social practices to regulate relationships among their members and resolve conflicts that might arise, which is now recognized as Indigenous Law.

Thus, Indigenous Justice consists of a set of rules grounded in cultural values and principles, with their own methods and practices regulating social life within the community and its territory. Remedies for transgressions of these rules may involve reconciliation, compensation, and/or addressing the harm caused, rather than relying solely on punishment, which is the prevalent approach in mainstream or Western justice systems.

On the other hand, ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples opened significant avenues for Indigenous justice. Its implementation offers various possibilities, such as appointing customary peace judges in Indigenous societies or the cessation of police and mainstream courts in native territories, making way for Indigenous Justice authorities. The Ecuadorian Constitution of 2008, in its first article, declares that Ecuador is a constitutional state of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, plurinational, and secular. Furthermore, it recognizes and guarantees the collective rights of communes, communities, peoples, and Indigenous nationalities.

Moreover, the Constitution of the Republic (2008) states the following:

Article. 171.- The authorities of the Indigenous communities, peoples, and nationalities will exercise jurisdictional functions, based on their ancestral traditions and their own law, within their territorial scope, with a guarantee of participation and decision-making by women. The authorities will apply their own rules and procedures to resolve their internal conflicts, which are not contrary to the Constitution and the human rights recognized in international instruments.

The State will guarantee that public institutions and authorities respect the decisions of the indigenous jurisdiction. Such decisions are subject to judicial review. The law will establish the coordination and cooperation mechanisms between the indigenous jurisdiction and the ordinary jurisdiction.

This is why the power of the authorities of Indigenous societies to judge is present in the Constitution of the Republic. Continuously clarifying that the elections of the aforementioned authorities must be in accordance with the Constitution and International Human Rights Treaties, controlling the constitutionality of their acts and elections. At the same time, they can understand certain parameters that may apply for judgment by indigenous authorities. These could be established by law, primarily those that deal with the territorial constituency, where the issues of jurisdiction and its competence come into play.

Indigenous peoples and nationalities throughout history have had their own rights and they are those that belong to the inhabitants originating from a territory that was invalidly colonized by outsiders. It is confirmed that native peoples have suffered historical injustices for having been stripped of their countries, lands, and resources. In the same way, it cannot be considered that the law is written in total interaction with native peoples. The State has imposed an exclusive, harsh, inflexible legal system; without considering the heterogeneity of civilizations that the multiple peoples that make up the national territory possess.

Legal pluralism means the coexistence of diverse regulatory systems, regardless of their legal recognition or not by the national State. What is needed is its life as a legal system of a town, which recognizes it as valid and effective, within the State or the defined geopolitical space. However, there has been an imbalance in the harmony of indigenous justice and ordinary justice in the resolution of legal conflicts since both systems feel limited in various situations. On the one hand, the existence of legal pluralism seems to affect the sovereignty of the State, which would have to limit its opportunities; and, on the other hand, indigenous justice comes to feel little respected by the State, when it comes to resolving conflicts in the community that merit sanction.

In this order, Indigenous Justice, according to what Jumbo (2018) expresses, is a set of norms based on cultural values and principles originating from Indigenous peoples, with customary procedures and practices of the community and the territory. Therefore, it is convenient to point out that indigenous justice is a regulatory system that consists of its own jurisdiction and at the same time is consistent with the Constitution of the Republic of Ecuador, so both must go together for them to be valid. Indigenous justice has a deep relationship with ordinary justice and has the same value since once an individual has been sanctioned in indigenous justice, he cannot be sanctioned again in ordinary justice and vice versa.

The United Nations Organization (UN), through its own exercise of rights and powers, established the World Declaration of the Rights of Indigenous Peoples. (2007), determines that:

Article. 1.- Indigenous people have the right, as peoples or as individuals, to the full enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights standards.

It can be determined that indigenous justice enjoys a special jurisdiction which, according to Yrigoyen (2004), states that:

It encompasses all the powers that any jurisdiction has: notio, iudicium, imperium, or coercio. This is to say, the power to hear cases that fall within its jurisdiction, including operational functions such as summoning the parties and collecting evidence (notio); the power to resolve cases that it hears, following its own law (iudicium); and finally, the power to use force to apply its decisions if necessary. (p. 176)

Also, it is noteworthy how Indigenous justice is part of a special regime, as it has the authority to conduct its investigations or gather evidence to adjudicate, thereby achieving the necessary autonomy to apply sanctions in accordance with what Indigenous peoples consider applicable and to remedy the wrongs committed by the offender.

In this regard, Díaz Ocampo and Antúnez Sánchez (2016) point out that it should be recognized as a customary right, which means it is not codified but rather traditional. Its dissemination is primarily oral, and it resembles more of a moral code of justice established within the customs and traditions of each Indigenous community. These customs and traditions must be respected since, within their territorial jurisdictions, they represent both power and authority and subjective mechanisms of cooperation and reciprocity.

It is worth noting that despite not having written legislation as such, Indigenous Law includes rules established earlier that apply to everyone on an equal footing, without privileges or discrimination. Furthermore, it is important to mention that several practices have been amended in response to social demands agreed upon by the Indigenous community. Laguna Delgado et al. (2020) explain that the Indigenous Law's worldview, as a set of rules distinct from those in a particular country's legal system, does not receive recognition because it is not a positive rule. Instead, it falls within a moral code of justice established within the customs and traditions of each Indigenous people, community, or nation.

Therefore, legal pluralism describes the coexistence of various legal systems within the same socio-political space, with the state's law being one of the legal systems in this social reality. In other words, in a simple sense, the concept involves the coexistence and recognition of two legal systems within a territory. While they may not have the same power, both are legally applicable in relevant cases. Given the aforementioned, the precise aim of legal pluralism is the recognition of the ancestral practices of the original peoples of the territories. This recognition's sole purpose is to preserve customs and traditions and prevent the violation of the rights of natural persons who identify with a specific culture or original nationality. In this way, the priority is to seek harmony between the different legal systems coexisting within a state. In the context of our territory, this means conventional justice and Indigenous justice.

Legal pluralism has manifested itself throughout various moments in history, resulting in the emergence of a complex variety of interpretations depending on the context and field of action. Rosillo (2017) highlights that there are numerous philosophical, sociological, and political schools within legal pluralism, each with its origins and characteristics. Legal pluralism is underpinned by its recognition by states, as can be observed in countries like Bolivia, Peru, Colombia, and Ecuador, where their constitutions acknowledge the practice of Indigenous and native peoples' own traditions within their territories, granting them a level of legality that runs parallel to mainstream justice. This recognizes the coexistence of two or more justice systems that operate to maintain order and security within their jurisdiction, authority, and competence.

In Ecuador, legal pluralism has been recognized since 1998 and has been exercising jurisdiction and authority while adhering to its customs and traditions, as well as international human rights instruments. How to resolve the existing conflict between indigenous justice and mainstream justice, both recognized by the Ecuadorian Constitution? This study aims to preserve the ancestral rights and customs of Indigenous peoples and promote respect for them. It also aims to establish that all citizens should respect the various justice systems that exist in Ecuador. The objective of this study is to describe indigenous justice in the Ecuadorian constitution.

Method

For the research project's development, the adopted approach was quantitative, involving exploration, collection, and critical analysis through document typology, supported by a bibliographic design aimed at reflection and analysis. It involves constructing methods related to the understanding of the phenomenon and thus evaluating or developing new arguments. In this regard, Palella and Martins (2012) point out that document research is exclusively concerned with the collection of information from various sources. In this study, theoretical, normative, legal, and peer-reviewed works related to the central aspects of the research were examined and analyzed.

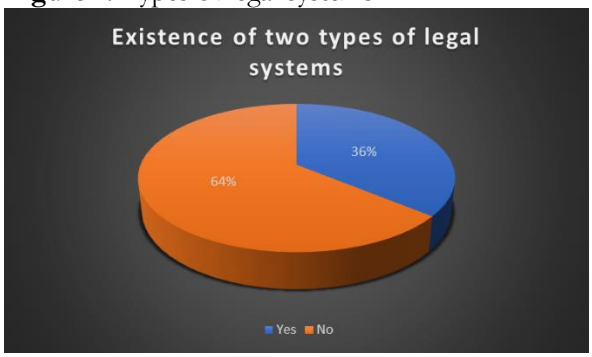
Furthermore, this research will employ a questionnaire containing both open-ended and closed-ended questions to enhance the data collection process, which is of significant importance for the study. These questions will be formulated clearly and concisely for better reader comprehension, serving the research's benefit, and will be administered to a sample of 118 citizens.

Results

Next, the analysis and interpretation of the survey results are presented.

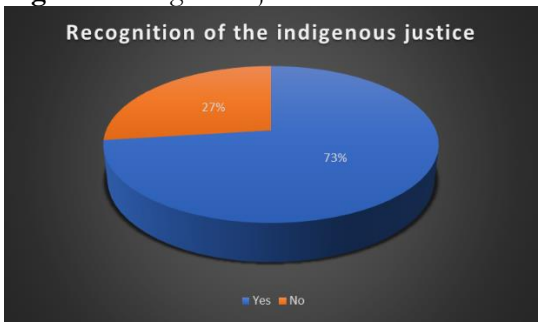
Question 1: Did you know that our country recognizes the existence of two types of legal systems?

Figure 1: Types of legal systems



With 64% in favor and 36% against, it is evident that there is a lack of awareness among the respondents regarding the existence of two legal systems within the country. This is despite cases where one of the systems has been publicized; nevertheless, many are unaware of its recognition.

Figure 2: Indigenous justice



Question 2: Are you aware that the Constitution of Ecuador recognizes the application of indigenous justice?

Since 73% of the surveyed individuals were aware that the Constitution includes the recognition of indigenous justice as a means to resolve conflicts, and that it must adhere to the limits set by human rights, the remaining 27% were unaware of this due to their lack of knowledge about the topics presented in the Constitution.

Figure 3: Applicability of Indigenous Justice.

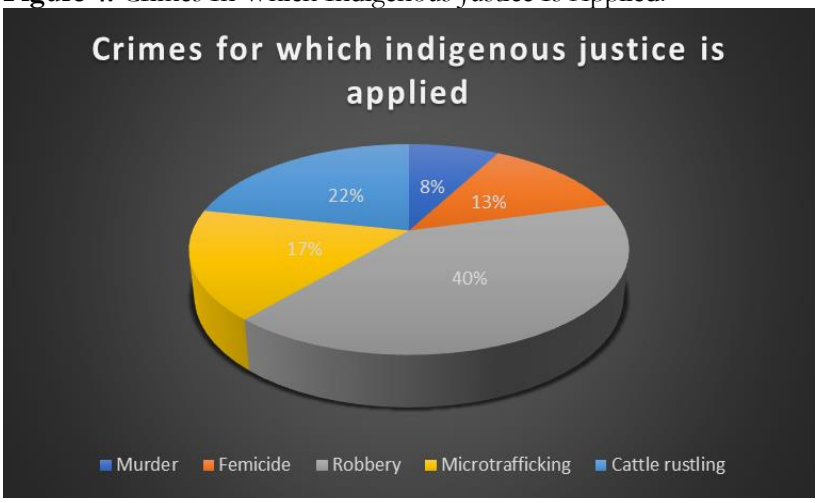
Question 3: Are you aware of the cases in which indigenous justice is applicable?

In response to this question, 42% of the surveyed individuals believe they are unaware of the cases or crimes in which indigenous justice can be applied. On the other hand, 58% claim to know because they

say these are very common cases in which this type of justice is the most appropriate and swift, as waiting for judicial authorities is a waste of time.

Question 4: In the case of the following crimes, in which do you believe indigenous justice should be applied?

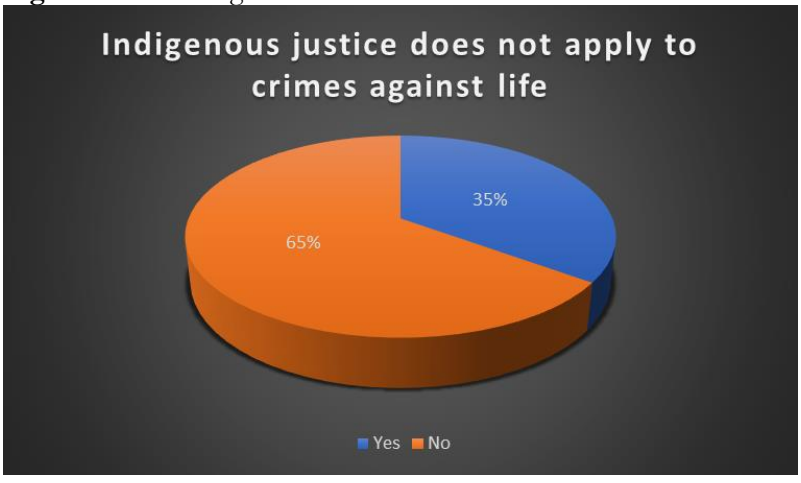
Figure 4: Crimes In Which Indigenous Justice Is Applied.



The criteria provided by the respondents in this question suggest that 45% believe indigenous punishment is carried out more in cases of theft, with 22% considering cattle rustling to be the most common, which is the theft of livestock. However, it is important to note that this question's premise is incorrect; indigenous justice does not punish micro-trafficking itself but, rather, punishes consumers once they become addicted in order to rehabilitate them.

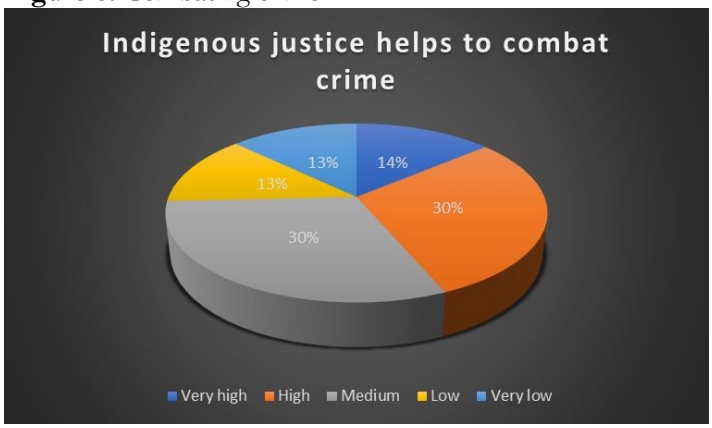
Question 5: Did you know that indigenous justice cannot be applied in cases that threaten people's lives?

Figure 5: Crimes Against Life.



Of the 100% of the surveyed individuals, 65% believe that indigenous justice should not be applied in cases of crimes that threaten lives, as these should be judged under the relevant regulations and through regular justice. The remaining 35% claim not to have known that indigenous justice does not apply to all types of crimes.

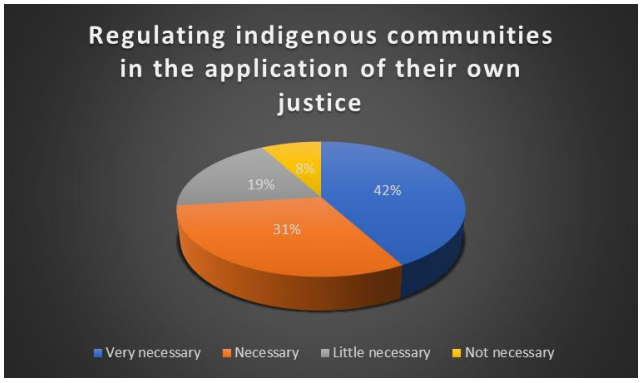
Figure 6: Combating crime.



Question 6: At what level do you believe indigenous justice is good for combating crime?

Regarding the question of whether indigenous justice helps reduce crime, 31% claim that the level of effectiveness is moderate, while 30% state that the level of effectiveness is high, demonstrating that the prevailing criteria are the fact that the application of these ancestral punishments has contributed to the reduction of crime rates.

Figure 7: Regulation of Indigenous Communities.



Question 7: In your opinion, do you think it is necessary to regulate Indigenous communities and peoples when they apply their justice?

42% of the surveyed individuals believe that the application of indigenous justice should be regulated because it has been observed that they want to apply it for the slightest situation or sometimes they exceed the punishment, while only 19% claim that it is not necessary because it can set an example so that they do not commit offenses in the communities.

Discussion

Legal pluralism means the coexistence of different normative systems, whether or not their laws are recognized by the nation-state, and if they exist as a legal system of a people, acknowledging their validity and applicability within a certain geopolitical space (Díaz & Antúnez, 2018). In this regard, López (2014) indicates the following:

The dominant legal paradigm did not prevent the existence of others who disagreed on many of its central claims. They certainly remained in a marginal and subordinate situation. Some of these theoretical positions long ago challenged the monopoly and centrality of the State in the legal phenomenon (p. 36).

As can be seen, although it is true that alternative justice systems within territories seek to counter the legal monopoly established by the state, it is not enough to rely solely on oral transmission. Since it is not officially registered as part of the positive law of a country, it depends solely on the leaders and knowledgeable individuals. This is why it may even lead to modification for personal gain.

On the other hand, there has been an attempt to stigmatize indigenous justice since media outlets and individuals have contributed to a context of misinformation by only focusing on the punishment and not the investigative process, debate, and resolution, in accordance with their traditions and social reintegration.

In this regard, the author Paredes (2020) states the following:

Indigenous justice is not just about punishment; it is a complex process in which all the rights enshrined in the Constitution and International Treaties are respected. For this reason, it must be carried out without violating the rights of each member of the community and those outside it, peacefully and harmoniously for both (p. 23)

Indigenous justice currently serves as an alternative for the application of justice within Indigenous or ancestral territories, communities, and peoples. However, it is important to note that this practice is not very common, as it primarily applies to offenses like theft and only within territories with Indigenous populations organized into urban or rural councils.

Conclusions

The existence of a legal framework that underpins legal pluralism is null because the legal system of Indigenous peoples is not part of positive law, as it is solely based on the oral transmission of ancestral knowledge. This is why there has been no regulation that harmonizes the coexistence of two or more legal systems within the territory. However, indigenous justice, despite not being codified, is recognized in the Constitution of the Republic of Ecuador and international human rights treaties and conventions. Therefore, it is legal for ancestral and Indigenous peoples to apply it within their jurisdiction, always respecting the limits established by current regulations.

References

Asamblea Nacional Constituyente. (1998). Constitución Política del Ecuador. Registro Oficial No. 1. https://www.acnur.org/fileadmin/Documentos/BDL/2002/0061.pdf

Burgos, F. (2020). Entre la justicia indígena y la ordinaria: dilema aún por resolver. Revista Derecho del Estado,21;96-108.https://cejamericas.org/wp-content/uploads/2020/09/19Entrelajusticiaindgenaylaordinaria.pdf

Díaz Ocampo, E., & Antúnez Sánchez, A. (2016). El conflicto de competencia en la justicia indígena del Ecuador. Temas Socio-Jurídicos, 95-117. https://doi.org/10.29375/01208578.2503

Díaz Ocampo, E., & Antúnez Sánchez, A. (2018). El derecho alternativo en el pluralismo jurídico ecuatoriano. Estudios constitucionales, 16(1), 365-394. https://dx.doi.org/10.4067/S0718-52002018000100365

Garzón López, P. (2014). Pluralismo jurídico. EUNOMÍA. Revista En Cultura De La Legalidad, (5), 186-193.https://e-revistas.uc3m.es/index.php/EUNOM/article/view/2178

Gómez, C., Álvarez, G., Castro, F., Vega, V., Comas, R., & Vásquez, M. (2017). La investigación científica y las formas de titulación. Quito: Jurídica del Ecuador. https://revistas.uh.cu/revflacso

Jumbo, E. (3 de diciembre de 2018). Justicia Indígena. Territorio indígena y gobernanza. https://www.territorioindigenaygobernanza.com/web/justicia-indigena/

Laguna Delgado, H., Méndez Cabrita, C., Puetate Paucar, J., & Álvarez Tapia, M. (2020). Origen y evolución del pluralismo jurídico en América Latina, como una visión crítica desde la perspectiva del derecho comparado. Revista Universidad y Sociedad, 12(5), 381-388.http://scielo.sld.cu/scielo.php?script=sci_arttext&pid=S2218-36202020000500381&lng=es&tlng=es.

López, L. (2014). El pluralismo jurídico: una propuesta paradigmática para repensar el Derecho. Umbral, 31-64. http://bivicce.corteconstitucional.gob.ec/bases/biblo/texto/Revista_Umbral_no_4/Umbral_4_T-2_2014.pdf

ONG Manos Unidas. (6 de mayo 2022). Acercando la justicia ordinaria y la indígena en Ecuador. https://www.manosunidas.org/proyecto/justicia-indigena-ecuador

ONG Manos Unidas. (6 de mayo de 2022). Acercando la justicia ordinaria y la indígena en Ecuador. https://www.manosunidas.org/proyecto/justicia-indigena-ecuador

Organización de la Naciones Unidas. (2007). Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas. https://www.ohchr.org/sites/default/files/Documents/Publications/UNDRIPManualForNHRIs_SP.pdf

Organización Internacional del Trabajo. (1989). Convenio 169 sobre pueblos indígenas y tribales. https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

Palella, S. y Martins, F. (2012). Metodología de la Investigación Cuantitativa.Fondo Editorial de la Universidad Pedagógica Experimental Libertador. Caracas. Venezuela

Paredes, R. (2020). La eficacia de la justicia indígena en la comunidad Tsachila del cantón Santo Domingo. Santo Domingo, Ecuador. https://dspace.uniandes.edu.ec/bitstream/123456789/12684/1/PIUSDAB082-2020.pdf

Rosillo, A. (2017). Fundamentos del pluralismo jurídico desde la filosofía de la liberación. Derechos en Acción,2; 51-74. http://sedici.unlp.edu.ar/handle/10915/59572

Secretaria Nacional de Planificación. (2021). Plan Nacional de Oportunidades 2021-2025. https://observatorioplanificacion.cepal.org/sites/default/files/plan/files/Plan-de-Creaci%C3%B3n-de-Oportunidades-2021-2025-Aprobado_compressed.pdf

Yrigoyen, R. (2004). Pluralismo jurídico, derecho indígena y jurisdicción especial en los países andinos. Revista "El otro derecho", 30; 171-196. http://ilsa.org.co/2018/06/07/revista-el-otro-derecho/