

# Reconciling Legal Pluralism With Equal Citizenship

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Colombian Multiculturalism and the  
Recognition of Wayú Customary Law

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*To my father*

## Prologue

*Uribia, La Guajira, Colombia, 2-3-2014*

It is dusky when I enter the compound of the Podero family. Right behind the concrete fence lies the house of Javier, the head of the Podero family, that connects to a flowery patio. In the middle of the patio stands a *enramada*: ten varnished wooden poles supporting a metal roof. You see a lot of these *patio-houses* in this part of Colombia, but this is definitely one of the more 'polished' versions. Close to a hundred people are gathered on Javier's ground. Men, women, but also playing children. The older men are mostly wearing jeans, a shirt and a sombrero (Wayú). Some of them do not wear pants, but a traditional *faja*, a colourful girdle that leaves their legs exposing. The woman wear long fine dresses in varying colours which cover most of their bodies, except for their neck and forearms.

We are waiting for the envoys of the Jamaya family and their *palabrero*.<sup>1</sup> When they arrive a wave of noise flows through the patio. Those that were sitting at the table under the *enramada* leave their seats and make way for some 'older' men: those who may actually contribute later on. There is a lot of crowding and pushing around the table, everyone wants to see what is about to happen. Since eleven years the families Podero and Jamaya are in conflict with each other, with incidents spreading across almost the entire Guajira Peninsula (also the Venezuelan part). Some call it a family war as the conflict has cost the Jamaya family two lives and there were several wounded on both sides due to violent attacks. Today, for the first time, the family leaders are starting a dialogue.

The *palabrero* opens the session, luckily for me in Spanish. In his introductory words he emphasizes the importance of seeking an agreement and in name of the Jamaya family indicates that they are willing to negotiate on a payment from the Poderos. While speaking he alternately turns to Javier, to the head of the Jamayas and at times to the rest of the crowd, which he addresses as "witnesses," as "all those eyes that are beholding this." Today's dialogue regards a first payment, *primer pago*, that is supposed to be followed up by several others in order to compensate for the inflicted harm. Then follows the proposal on which the *palabrero* has talked about with the

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<sup>1</sup> A *palabrero* is a mediator within the indigenous customary law of the Wayú community.

Poderos. Ostentatiously he puts a big silver revolver on the table, then a set of car keys, five golden necklaces with red gemstones (*tü'üma*), and a stack of paper money worth five million pesos (€1800,-).

Now the session really takes off and soon it becomes clear that this is not enough for the Jamayas. The Jamaya *jefe* wants to double the cash and is not satisfied with the quality of the necklaces. Soon Javier takes the floor, obviously unhappy with what is going on here. Irritated he asks the *palabrero* “what is it that you want?” He points out that the majority of his family does not have money available, and emphasizes his wish to pay in animals, in goats. That, he says, is the Wayú way: *no efectivo* (cash), *pero animales*. When the *palabrero* wants to clarify something Javier shuts him up. He will not be interrupted, and also questions the critique on the necklaces he offers. The game of negotiation has truly begun, a game that is played tough, especially by Javier. At one point he slams the table with both hands. While bystanders try to calm him in vain, he furiously stands up, making dismissive gestures and shouts “you are confusing tolerance with fear!”

In a corner of the patio the Podero elders contrive their next step. After a while tranquillity has returned. Everybody gets back to their seats and the ice is broken with a funny comment. The gentlemen continue their negotiations, but now it is no longer the *palabrero* who talks to Javier, but the Jamaya family head himself defends his views. There are only a few people that are allowed to speak here: older men, who are evidently well fed, all in the same ‘cowboy-like’ clothing style with open shirts, hats and also big rings and even bigger watches. They are bidding against each other, now and then counting money and examining gemstones. But today they will not reach an agreement. Mr. Jamaya needs to consult with his family regarding the animals. The advice from one of the men, “most correct would be to talk again on another date,” is followed, and in four months they will try again.

The text above describes an *arreglo*, an arrangement by which Wayú parties (try to) settle their conflicts by way of dialogue and compensation. To some the Podero vs. Jamaya *arreglo* may seem more like downright ‘outbidding’ and a pragmatic negotiation process in which the price of a certain payoff is debated. And to some extent this is certainly the case. However, this is also a dialogue: a long-lasting family conflict which has taken lives and a lot of blood is actually being talked about. It is out in the open, and

the offended and the offender, the families Jamaya and Podero respectively, are looking each other in the eye, they are sitting at the same table at the offender's house. Yes, they are negotiating on the *pago* (the payment), but an agreement on the *pago* will be an accord between the two parties involved, who by way of 'dialogue' and negotiation agree on what needs to be done for *restabilización*. This was the first time the *jefes* of both families were talking face to face but the process of negotiation started long before the actual *arreglo*. Several months prior to the the event a *palabrero* was mandated from one family to another, intermediating and starting a dialogue. When both parties thought there was enough understanding, when there was something they could truly negotiate on, an *arreglo* was arranged.

# **Chapter 1**

## **Introduction**

### **1.1**

**Introducing multiculturalism in Latin America: indigenous rights**

### **1.2**

**Indigenous customary law: legal pluralism**

### **1.3**

**Aiming for greater Inclusion: multicultural citizenship**

### **1.4**

**Research design**



# 1. Introduction

The description of the *arreglo* in the prologue of this thesis portrays a profound image of how conflicts are settled within Wayú customary law.<sup>2</sup> Since Colombia's constitutional reform of 1991 indigenous communities are granted the right to maintain their own legal norms and practices within their recognized territories (*resguardos*).<sup>3</sup> The official recognition of indigenous customary law is one aspect of the broader politics of multiculturalism that Colombia has adopted through its constitutional reform. This thesis focuses on the recognition of Wayú customary law (*Sistema Normativo Wayú*) and what this means for the Wayú of Uribia<sup>4</sup> and their relationship with the state – i.e. citizenship. I will look at this relationship through the paradigm of multiculturalism, whereby multiculturalism is broadly understood as the political accommodation of ethnic and cultural difference, with the aim to expand the democratic inclusion of minority groups in the wider society. This thesis examines to what extent the official recognition of Wayú customary law and the policies around it, as part of the politics of multiculturalism, is contributing to the greater inclusion of the indigenous people of Uribia within the Colombian society.

## 1.1 Introducing multiculturalism in Latin America: indigenous rights

In understanding multiculturalism in Colombia it is important to take into consideration (at least part of) the path that has led to the emergence of these politics. In Latin America multiculturalism is closely related to the recognition of 'indigenous rights' (Simon Thomas 2013: 47). The increased (political) significance of indigenous cultural identity in Latin America has had a major impact on the politics of multiculturalism in the region. The 'birth' of indigenous identity can be traced back to the colonization of the Americas, after which the numerous indigenous groups in Latin America for the first time became known as 'indigenous' – i.e. Indian (Field 1994: 240). This shows the

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<sup>2</sup> I will use the terms 'Wayú customary law,' '*Sistema Normativo Wayú*,' and 'Wayú legal system / order' to describe the normative system with which the Wayú of Uribia resolve their conflicts. When I speak of 'customary law' I am pointing to indigenous customary law in Latin America.

<sup>3</sup> Constitution of Colombia, chapter 5, art. 246

<sup>4</sup> When I speak of Uribia I mean the Urban zone, the town and not the entire municipality. When my descriptions concern the wider Wayú population or the wider municipality this shall be mentioned.

relational essence of (indigenous) identity, which should be understood as flexible and socially constructed in relation to others (as set forth by Barth 1969). The onset of Indian-non-Indian relations, the colonization of the Americas, became a disaster for the Indians (see Van Cott 2007: 127) and the emergence of independent states changed little in this regard (Stavenhagen 2002: 24).<sup>5</sup> Within the new republics there existed a total non-recognition of Indian cultural identity as being part of the national society (ibid: 25). For nearly two centuries Latin American politicians aimed to build 'European-like' homogenous nations, in which native cultures and identities would play no part (Stavenhagen 2002: 28-9; Sieder 2002: 4). As governments encouraged Indians to drop their backward cultural traits the process of *deindianization* took hold, in which indigenous people deprived themselves of their Indian identity in response to outside pressures (Chaves & Zambrano 2006: 12).

From the 1970s onward indigenous social movements sprang up and efforts were made to reverse *deindianization*, as some groups sought to reaffirm their Indian cultural identity in order to defend land rights (Van de Sandt 2007: 11; Rappaport 2005: 2; Chaves & Zambrano 2006: 10; Van Cott 2007: 130). By the 1980s the indigenous (resistance) movement really gained momentum, changing the way wider society perceived Indians and also how they viewed themselves (Stavenhagen 2002: 29). During this period many Latin American states took on a more neoliberal economic program (Chaves & Zambrano 2006: 6; Assies 2000: 9; Gabbert 2011: 275), which entailed increasing privatizations and a more decentralized state functioning, which resulted in social movements and local authorities taking over former state responsibilities (Assies, Calderón & Salman 2005: 6; Simon Thomas 2013: 53). The subsequent processes of democratization paved the way for indigenous political participation, and cultural identity became a political instrument (Hooker 2005: 298; Stavenhagen 2002: 40; Assies 2000: 3). Through the "mobilization of cultural identity" (Van Cott 2007: 134) – i.e. identity politics – indigenous peoples demanded recognition of difference on the basis of equality and special rights for indigenous groups (Sieder 2002: 187). The first wave of these claims evolved mainly about land rights, but increasingly forms of self-government and indigenous autonomy were demanded, so as to retain their 'traditional' customs and

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<sup>5</sup> Most states in Latin America gained independence between 1810-1825; Colombia did so in 1810 ([http://latinostories.com/Latin\\_America\\_Resources/Latin\\_American\\_Independence\\_Days.htm](http://latinostories.com/Latin_America_Resources/Latin_American_Independence_Days.htm))

institutions (Assies 2000: 3; Kymlicka & Norman 2000: 19; Gabbert 2011: 275; Van de Sandt 2003: 128 note 5; Sieder 2002: 199).

This eventually ended up in the constitutional reforms that mark the political shift towards multiculturalism throughout Latin America.<sup>6</sup> The new constitutions recognized the multicultural nature of Latin American nations and introduced a significant policy change towards granting group rights based on ethnicity – i.e. cultural identity (Van Cott 2000: 207; Hooker 2005: 285; Assies 2000: 3; Gabbert 2011: 276). Colombia is no exception in this matter: the Constitution of 1991 recognized that its nation is ethnically plural and it took on a policy of multiculturalism by granting specific group rights to indigenous communities.<sup>7</sup> This research elaborates on how the national reform is being implemented locally and what this means to Wayú Uribeans. Although constitutional reforms have at least symbolic importance, the actual processes of reform require further attention (Assies 2000: 9).

## **1.2 Indigenous customary law: legal pluralism**

Van Cott (2000: 211) describes the recognition of indigenous customary law as “crucial in realizing the multicultural conception” of the Latin American nations. Recognizing the validity of customary law means the official application of legal pluralism: the coexistence of different legal systems within the same social field (Simon Thomas 2013: 260; Sieder 2002: 9). The situation emerges where two legal mechanisms *could* be applicable to an identical situation (Simon Thomas 2013: 34). Legal pluralism is the feature of multiculturalism on which this research is focussed.

Contrary to the structure of the state’s law, customary law is not an autonomous and specialized subsystem; written records are seldom used, instead the indigenous legal system is strongly based on oral communication; and unlike the ‘liberal’ offence-sanction method, customary law aims at compromise, compensation and restitution (Simon Thomas 2013: 27; Gabbert 2011: 281). A fundamental value of indigenous conflict resolution is reconciliation (Sieder 2002: 10; Simon Thomas 2013: 1; Hoekema 2010: 258; Assies 2000: 16; Gabbert 2011: 282). Instead of departing from the

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<sup>6</sup> Bolivia (1994), Colombia (1991), Ecuador (1998), Guatemala (1998), Mexico (1994), Paraguay (1992), and Peru (1993) all took on forms of multiculturalism through their constitutional reforms (See Van Cott 2000b).

<sup>7</sup> Constitution of Colombia (this is an unofficial English translation). In Colombia land rights were also granted to certain Afro-Colombian communities (Chaves & Zambrano 2006; Hooker 2005)

individual, customary law is much more 'collective' in nature and serves to protect the communal harmony (Sieder 2002: 10). Although the two systems are (arguably) part of a different conceptual framework regarding legal matters (Speed & Collier 2000 in Sieder 2002: 10), scholars have argued that understanding legal pluralism as a dichotomy is a "far too simplistic assumption" (Simon Thomas 2013: 4; see also Assies 2000: 18 and Hoekema 2004: 23). In practice, the existence of legal pluralism often does not mean two strictly defined systems but rather we can see processes of "interlegality" (De Sousa Santos 2002: 437); meaning the hybridization of legal orders, whereby 'strange' elements are threaded into one's own legal system (Hoekema 2004: 19). The notion of interlegality – of the formation of a new hybridized legal order (Hoekema 2004: 20) – is an example of the changes that are always taking place within indigenous communities. In this light, interlegality denounces the idea of rigidly concealed (indigenous) cultures (Hoekema 2010: 260-1; 2004: 23); and reaffirms the supposition made by several scholars on multiculturalism that cultures are relational, contested, and continually re-creating their imagined boundaries (e.g. Benhabib 2002: 8; Assies 2000: 5; Gabbert 2011: 285; Modood 2007: 93; Parekh 2000: 152-3; Sánchez Botero 2000: 226).

Hoekema (2004: 22) sees interlegality as a process of legal hybridization, but also as the outcome of that process: a new hybridized legal order. For analytic purposes I keep the two separated. I think of interlegality as a 'multivocal' (Taylor 1972) process, which gives shape to a particular (hybridized) legal order, in which the processes of hybridization continue. What forms of interlegality exist in a certain situation of course depends heavily on the specific context. How legal pluralism is experienced in the Urubian context and how (and if) it contributes to the greater inclusion of an indigenous community are key issues within this thesis.

### **1.3 Aiming for greater inclusion: multicultural citizenship**

Colombia, among several Latin American states, now officially adheres to politics of multiculturalism. But what is meant by this political concept? For sociologist Tariq Modood (2007: 5) multiculturalism stands for the political accommodation of minorities. Others view multiculturalism as another term for 'minority rights' or 'differentiated citizenship' (Kymlicka & Norman 2000: 2). While the political

philosophers Kymlicka and Norman immediately take group specific *rights* into account, other theorists define multiculturalism in a broader sense and describe it as a political project to accept ethnic differences (cf. Postero 2007: 13). A more thorough description is given by legal anthropologist Marc Simon Thomas (2013: 47) who states that multiculturalism in essence stands for “the recognition of marginalized groups, ensuring their individual rights as citizens, and in some cases granting collective rights to entire groups” (cf. Postero 2007: 13). From this point of view multiculturalism concerns *marginalized* groups in particular. In this regard Sánchez Botero (2000: 231) serves as an example when she states that multiculturalism is the political obligation of liberal democracies to assist vulnerable and disadvantaged groups in preserving their culture. Seyla Benhabib (2002: ix) criticizes the notion that the aim should be to let minorities preserve their culture, arguing instead that the goal of multiculturalism should be to expand democratic inclusion in the broader society (see also Modood 2000: 193; 2007: 62). She states that a ‘culture preservationist policy’ based on a group’s right to determine the content and the boundaries of its own identity relates to a static conceptualization of culture and consequently leads to too rigid boundaries (ibid: 68). Benhabib (ibid: 25) pleads for an awareness of the “radical hybridity of all cultures” and advocates the acknowledgement of the fluidity of cultural boundaries. In understanding cultures as relational and shaped through hybridization, I see multiculturalism as the political accommodation of ethnic and cultural difference, which entails the recognition of (often marginalized) minority groups and their cultural identity, aimed at including these groups in the wider society, sometimes by granting group specific rights.

Multiculturalism nowadays appears at the forefront of political theory (Benhabib 2002: viii; Kymlicka & Norman 2000: 2), and contemporary debates about multiculturalism evolve around the question how *equal citizenship* is to be extended (Modood 2007: 6-8; Kymlicka & Norman 2000: 5). Citizenship, meaning state membership, involves the virtues, rights, practices and responsibilities of being a citizen in a liberal democracy (Kymlicka & Norman 2000: 1), and the liberal idea is that each and every citizen shall have equal citizenship. By granting group rights a state is altering the meaning of citizenship: it becomes group differentiated.<sup>8</sup> Critics on minority rights worry they could very well lead to the ‘politicization of ethnicity,’ thus eating away the ties that keep society together (Ward 1991 in Kymlicka & Norman 2000: 10). In this

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<sup>8</sup> The term ‘differentiated citizenship’ was first used by Young (1989: 251).

view multiculturalism can form a threat to social cohesion: the extent to which a society forms a political unity, in which social life is stable and civil peace is assured (Kymlicka & Norman 2000: 31). Others emphasize the uniting capabilities of ‘multicultural citizenship,’ meaning that the previously excluded and marginalized groups can be included on the basis of equality, and argue that the right to express ones cultural identity should be based on, not positioned as an alternative to, equal citizenship (cf. Benhabib 2002: 26; Modood 2013: 163; Rattansi 2011: 123). Considering that most members of minority groups do not strongly identify with the state they inhabit, it can be argued that a group right is a good way of encouraging alienated minorities to come to identify with the larger political unit (Kymlicka & Norman 2000: 37). However, to what extent a certain policy of multiculturalism relates to equal citizenship is something that should be examined case-by-case. This study aims to contribute to such examination by connecting ethnographic fieldwork (in Uribia, Colombia) to academic theories on legal pluralism and multicultural citizenship.

#### **1.4 Research design**

Uribia, a Colombian town inhabited by 11.000 people, is located in the north-eastern department of La Guajira.<sup>9</sup> The town Uribia should not be confused with the municipality that has a total population of over 150.000. Within the municipality lies the indigenous *Resguardo de la Alta y Media Guajira*, that belongs to the Wayú people. Out of the eighty-two indigenous groups that live in Colombia (Sánchez Botero 2000: 223) the Wayú form the biggest community with close to 150.000 members (Guerra 2002: 31).<sup>10</sup> The most prominent town in the *resguardo* is Uribia, also known as the ‘indigenous capital of Colombia.’ I traveled to this ‘urban zone’ located in the semi-desert of the Guajira Peninsula in order to get to a deeper understanding of what the official recognition of indigenous customary law means to the Wayú of Uribia and their relationship with the state.

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<sup>9</sup> See Appendix 1 for maps.

<sup>10</sup> The Wayú ethnic group also inhabit the Venezuelan side of the La Guajira Peninsula. Roughly half of the total Wayú people live in Venezuela, where they also form the most numerous indigenous group (Guerra 2002: 31). Hudson (2010: 86) states that approximately 3,4 percent of the Colombian population is indigenous, which amounts to 1,4 million people. Van Cott (2007: 128) shows differing statistics, stating that they only constitute two percent of the nation, amounting to 784.000 people.

Joris van de Sandt (2007: 16) states that local processes that follow from the recognition of indigenous rights are relatively understudied; this thesis aims to provide insight into such local processes in relation to legal pluralism and multiculturalism. Kymlicka and Norman (2000: 11) stress the importance of studying multicultural struggles through the careful examination of *specific contexts*. Within this light, I agree with the German anthropologists Zips and Weilenmann (2011: 11) who argue that legal pluralism needs to be explained in its empirical state in time and place. In order to understand and describe the specific local context of legal pluralism in Uribia this thesis is based on qualitative research. Data collection took place during three months of ethnographic fieldwork in Colombia's 'indigenous capital.' I agree with Geertz (1973: 9) when he argues that that what ethnographers call data are really their own constructions of other people's interpretations of their social life (see also Boeije 2010: 13; Rabinow 2007: 150). Therefore, anthropological writings (such as this thesis) are themselves interpretations (Geertz 1973: 15); they reconstruct meaning by placing the object of study in a framework from which it makes sense (cf. Benhabib 2002: 34).

I understand this 'sense-making framework' to be what Rabinow (2007: 6) calls: the ethnographer's "culturally mediated and historically situated *self*" (my emphasis). In this light, ethnographic fieldwork is a personal experience that consists of getting familiar in and confident with the 'field' (Geertz 1973: 13). In order to do so, the first method I have applied was 'being there.' For three months I lived with a Wayú family in Uribia and at times I participated in their daily activities (participant observation). This not only provided me insight in the family life of these people, but also enabled me to make my first contacts, select my first informants, and served as a stepping stone towards building rapport (Geertz 1973: 6; DeWalt & DeWalt 2011: 47). Establishing a relationship of trust with my informants is something I have always strived for. This is one of the reasons that I applied informed consent (De Walt & De Walt 2011: 214), whereby informants were made aware that they were subjects in my research, were informed about the research themes, and voluntarily participated. Next to keeping a diary and numerous informal conversations, (semi-structured) interviews have been an important research method. I have spoken to men and woman, young and old. I have talked to family heads, *palabrer*os and state officials.<sup>11</sup> Bit by bit I grew more familiar

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<sup>11</sup> Most of the informant's names were changed to protect their anonymity, except for public figures and informants who explicitly asked to be named accordingly.

with the field. Piece by piece the puzzle – that I created *myself* – started to make more sense.

This thesis can be seen as the “thick description” (Geertz 1973<sup>12</sup>) that has emerged from three months of fieldwork in northeast Colombia. The following chapters will show how I have come to know – how I have interpreted – a specific context of multiculturalism. Chapter 2 will shed light on the meaning and experience of Wayú customary law in Uribia, thereby explaining which local legal norms and practices have been legitimized. The official recognition of Wayú customary law means the existence of two legal systems in Uribia. Chapter 3 delves deeper into this situation of legal pluralism by examining the relationship between these two systems. In chapter 4 Uribia’s situation of legal pluralism will be integrated into academic debates on multicultural citizenship. Throughout this thesis I continually connect empirical study with academic literature. In the concluding chapter I will set out the way in which legal pluralism and equal citizenship are synthesized within Uribia.

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<sup>12</sup> Geertz adopted the term ‘thick description’ from the philosopher Gilbert Ryle.





# Chapter 2

## Experiencing Customary Law

### 2.1

**The family paradigm**

### 2.2

***El uso de la palabra / The use of the word***

### 2.3

***El pago / The payment***

## 2. Experiencing Wayú Customary Law

One morning in the town centre I served as translator between a Wayú man who was preparing his truck to go to Cabo de la Vela and a Canadian couple that wanted to join him there.<sup>13</sup> Afterwards the woman asked me what I was doing here. I told her I was doing research on the Wayú legal system. “How is it?” she asked smiling, “Not very legal I assume?”

I have been thinking a lot about this one phrase “not very legal I assume.” This western woman has a certain view of what ‘legal’ means or should mean, likely formed by liberal ideas such as individually based equal rights, which are formally written down and protected by the state. She naturally assumes that the Wayú legal system does not conform to these notions, and in thinking so she is right. Wrongly though, she presumes that when a system does not conform to these ideas, this inherently means that this system is “not very legal.” Wayú customary law is very legal though. It is a different legal system, operating through other mechanisms than just state institutions and *based on* different notions of law and society.

This chapter describes the *Sistema Normativo Wayú* (SNW) as I have come to know it during my stay in Uribia. Following Geertz (1973: 15) in his thinking on anthropological writings, this description is really my interpretation of this legal system, resulting from both studying literature and ethnographic fieldwork. It will be shown that the Wayú of Uribia take on legal practices in a collective manner, in which the extended family is a highly significant social unit. In explaining this I will use the term *family paradigm*. Of major importance within Wayú conflict resolution is the dialogue, and crucial in creating these dialogues between conflicting families is the role of the intermediaries (*palabrer*os or *pütchipü’ü*<sup>14</sup>). A key aspect of the Wayú legal order is compensation for the harm done. Through compensation social harmony is to be re-stabilized. As this legal system is now officially recognized, this chapter elaborates on how it is practiced and experienced by the Wayú Colombians living in Uribia.

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<sup>13</sup> Cabo de la Vela is a Wayú fishing village, and a relatively popular spot for travelers due the surrounding area of a dessert that turns into rocky cliffs which become beautiful Carribean Sea beaches.

<sup>14</sup>*Pütchipü’ü* is the Wayúnaiki word for the often used Spanish word *palabrero*. Which literally translates to ‘word-doer/bringer.’ Throughout the thesis I will make use of both terms.

## 2.1 The family paradigm

Traditionally, the Wayú of La Guajira uphold a matrilineal kinship system. They house their extended families matrilocally and the different communities<sup>15</sup> are often formed out of certain matrilineages (Watson 1967: 12; see also Sánchez Botero 2000: 228). However, anthropologist Weilder Guerra (2002: 73), who is a Wayú himself, points out that matrilocality and matrilineal family membership is not always strictly applied. In the urban zone of Uribia matrilocality is apparent but at the same time it is also common for a newlywed couple to look for a home apart from their families.<sup>16</sup> Family members do tend to live in the same neighbourhoods. Many members of the Pushaina family for example live in the same street, a street that extends into a dirt road which leads to rural settlements (*rancherías*<sup>17</sup>) inhabited by other Pushainas.<sup>18</sup> It is common for Wayú Uribians to live together with (parts of) their extended families as one household. The household I have been part of during my fieldwork consists of a grandmother, her son, three of her five daughters, and the four children of two of those daughters.<sup>19</sup>

For the Wayú of Uribia the life they live is a family life. It is the unit they live in, the social unit from which they think. The household described above consisted of nine members, who were sleeping in three bedrooms. In more rural areas it is common for entire households to all spend the night in the same bedroom (each in their own *chinchorro* – i.e. Wayú hammock).<sup>20</sup> Surely economic circumstances play a factor in creating and maintaining these ways of living together, but a conversation with Karina (21) shows that the *family paradigm* is also a way of thinking. Karina sleeps in the same bed with her brother (31) while also sharing the bedroom with her mother. During our conversation I told her that my mother, my sister and I all live in different houses. “Are you living in different cities,” she asked, “because you are studying?” I told her we are all

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<sup>15</sup>Communities is the term used by the *Secretaría de los Asuntos Indígenas* (SAI) and the municipal government. Next to the town Uribia, the municipality consists of 21 *corregimientos* (districts) which in turn are formed by multiple communities.

<sup>16</sup> Informal conversations with Alejo 25-2; Interviews with Aarón 8-4, Kayla 9-5.

<sup>17</sup> *Ranchería* is the term used for the typical rural Wayú settlements, distinguished from the urban zone.

<sup>18</sup> Informal conversation with Sara Pushaina 10-5.

<sup>19</sup> It is common for Wayú men to have more than one wife or lover as polygyny is accepted within (‘traditional’) Wayú cultural norms, polyandry is not (interview with Saarakaana Pushaina 13-4; informal conversation with Gabino, SAI employee, 14-5. Sánchez Botero (2000: 228) states that “according to the Wayú matrilineal kinship system the natural father only counts as the mother’s husband but not as a relative. The maternal uncle has the authority over his sisters children.” Fathers can be important actors in the upbringing of their children, but only if they choose to do so, society does not expect this from them (Watson 1987: 78 in Aretz 2011: 38).

<sup>20</sup> Informal conversation with Natividad, SAI employee, 25-4.

living in the same city. “So why then?” she asked. I explained that my sister and I like our privacy, and that it was time for us to go and take care of ourselves. She said she could understand what I meant, but that it still did not make sense to her.

The significance of the extended family as a social unit is mirrored in Wayú conflict settlement. Speaking on indigenous customary law Simon Thomas (2013: 29) states that “the resolution of a conflict often affects not only the parties involved but their families [...] as well.” An important aspect of the Wayú legal order is that families (matrilineal) carry collective legal responsibility (Watson 1967: 12). Concerning the SNW I would say that when conflicts erupt the parties involved almost inherently consist of the families of the individuals in conflict. Antonio, a twenty four year old man living in the urban zone of Uribia, told me about an experience he had with the SNW:

“About seven years ago I had an argument with a guy, outside, on the streets. We weren’t drunk, but we ended up fighting. I won the fight, he hit me, but I got him way worse. But the conflict was not over, he has his family. He was bleeding a lot, really a lot [making bloodstream gestures from his face], and the Wayú value blood. So his family sent a *palabrero* to my family. They talked and negotiated, and we ended up paying three million pesos [€ 1100,-].”<sup>21</sup>

When Antonio thinks and speaks about this conflict he immediately includes the family as a significant unit. He further explained this when he said that “the *Sistema Normativo Wayú* is all about respect for the family.” In relation to conflict resolution the family paradigm indicates that the SNW is a typical form of indigenous customary law, in which legal thinking does not depart from the individual but is much more collective in nature (Sieder 2002: 10). The anthropologist Richard Mansen (1988: 109 in Guerra 2002: 75), who did research in a Wayú community close to Uribia, states that the local matrilineage is the most relevant social group when it comes to disputes. Potential vengeance generally comes out of this unit, and it is the matrilineage of the other party that will be targeted within acts of vengeance. These assumptions resonate with what we have seen within the Podero vs. Jamaya conflict described in the prologue. It has to be said though, that when conflicts get more severe the consequences are likely to affect more people and spread out over a greater territory. The Podero vs. Jamaya conflict was not confined to Uribia’s town nor to the municipality. In fact the violent conflict spread across the

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<sup>21</sup> Interview with Antonio 13-3

Colombia-Venezuela border, as some members of both families were living in Venezuela.<sup>22</sup> Several of the Wayú I have spoken to have told me accounts of violent conflicts, concerning either their own family or another one, in which family members were attacked or murdered in the name of *retaliación*.<sup>23</sup>

## **2.2 *El uso de la palabra / The use of the word***

After the end of the actual Podero vs. Jamaya *arreglo* all the visitors were given dinner. As I ate my portion of rice and fried goat, Javier came up to me, and invited me to come over the next day so he could explain what the *arreglo* was all about. The following afternoon I knocked on the large steel gate, and a young man, a cousin of Javier, opened up. Later I would learn that Javier is not eager to open up the gate himself, he always lets someone else do it and he always seems a little on edge when someone knocks. Under the same *enramada* where the *arreglo* took place, Javier was now lying in his colorful *chinchorro*. This was the first of a series of conversations we have had like this: him in his Wayú hammock and me sitting next to him on a plastic chair. He started telling me how the Jamayas were “terrorists,” how they tried to kill him eleven years ago, showing me the bullet wound on his shoulder. “They rob families,” he said repeatedly, “they attack women.” A cycle of revenge attacks erupted in which eventually two Jamaya members lost their lives. The conflicting families did not get to an *acuerdo* during the *arreglo*, but agreed to talk again after four months. Until then, Javier believes that the families will be at peace. He cannot be sure of that though, so he is always ‘prepared.’ He always carries a gun, and more than once he had a shotgun lying next to him during our conversations. “For protection,” Javier told me when I first saw it. He feels that his life is in danger, and not just because of the conflict with the Jamaya’s, “there are others as well.”<sup>24</sup>

Acts of retaliation are real but the SNW serves to overcome such violence and to restore peaceful coexistence. When conflicts occur between families, the ‘normal’ way to go for an offended party is to send word to the other family in order to start a dialogue.<sup>25</sup>

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<sup>22</sup> Informal conversation with Javier Podero, family head, 3-3.

<sup>23</sup> Interviews with Antonio 13-3, Aarón 8-4; informal conversations with Javier Podero 3-3, Carlos Medero 5-3, Natividad 14-4.

<sup>24</sup> Informal conversations and interviews with Javier Podero 3-3, 2-4, 3-4, 1-5.

<sup>25</sup> Informal conversations with Daiciria 20-2, Natividad 24-2; Interviews with Aarón 8-4, Emmanuel 25-2, Amanda 11-4.

Often this means that an intermediary, a *palabrero*, is mandated to carry the word (*llevar la palabra*) from one family to another. He then opens up negotiations on a payment (*pago*) that will function as compensation for the harm done.<sup>26</sup> *Palabrer*os are arguably the most remarkable feature within the SNW. While in many indigenous communities throughout Latin America the local political authorities, the *cabildos*, sustain legal power, the Wayú do not contain a centralized political organization (Watson 1967: 32).<sup>27</sup> What they do have is the family heads (*jefes*). Usually, the head of a family lineage is the oldest maternal uncle,<sup>28</sup> and an essential part of their leadership is acting as a legal representative of the lineage (Aretz 2011: 31). Legal responsibility is thus shared collectively by families that are represented by their *jefe* when disputes erupt. The *palabrer*os function as intermediaries when conflicts occur between families. They are the most important persons when it comes to dispute settlement, and are considered crucial and indispensable figures within the SNW (Guerra 2002: 127; see also Aretz 2011: 47).

As the term *palabrero* indicates, the Wayú intermediaries are primarily concerned with *la palabra* (the word). The whole process of dispute settlement within the SNW is traditionally completely oral,<sup>29</sup> which echoes the general idea that customary law is strongly based on oral communication (Simon Thomas 2013: 27; Gabbert 2011: 281). The ‘first’ task of a *pütchipü’ü* is to carry the word from one party to another (Guerra 2002: 134), thereby establishing the platform on which conflicting parties can construct a dialogue and negotiate on a settlement. In doing so he<sup>30</sup> is more than just a messenger, but also needs to reason with the parties involved. During a process of intermediation a *palabrero* stands in direct contact with the heads of both lineages who may be accompanied by other (male) family elders.<sup>31</sup> Emmanuel (63), himself a *palabrero*, explained to me that it requires respect for conflicts to be settled in a peaceful

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<sup>26</sup> Guerra (2002: 117) writes that within the majority of the cases he knows of there was made use of a *palabrero* instead of seeking vengeance.

<sup>27</sup> Although information from 1967 might seem outdated, more present-day studies agree to this assumption. See for example Aretz (2011) and Guerra (2002).

<sup>28</sup> This presumption was confirmed throughout my entire fieldwork, some examples of confirmations are: Informal conversations with Daiciria 20-2, Carlos Medero 5-3; Interview with Emmanuel 25-2.

<sup>29</sup> Interviews with Emmanuel 25-2, Antonio 13-3; informal conversation with Carlos Medero 5-3.

<sup>30</sup> Although Guerra (2002: 138) speaks of exceptional female *palabreras*, my fieldwork confirmed the assumption made by Aretz (2011: 54) that there are no female *pütchipü’ü*; interviews with Emmanuel 25-2, Amanda 11-4.

<sup>31</sup> Interview with Emmanuel 25-5. He also told me that only a representative young man, recognized as very intelligent, smart and good with words might say something. These exceptional standards are the same for women, who usually do not speak directly to a *palabrero*.

matter. For him *palabrer*os are putting that required respect into practice.<sup>32</sup> Saarakana Pushaina (69) used to be a well known *pütchipü'ü*,<sup>33</sup> and gave further insight in the function of a *palabrero* with the example of a conflict:

“A woman is unfaithful towards her husband. She sleeps with another man, and her husband finds out. [...] This is a serious offence, because the man has paid for the woman. This has cost him. So the family of his wife must pay. But the husband does not go directly to his wife’s family, he goes to his uncle or his grandpa. An elder, or often the eldest. But, this being a very serious case, the uncle does not have the way to arrange this case, so he looks for a *palabrero*. A *palabrero* who knows how to do this, who knows what needs to be done and said. So that is what I do. [...] *Palabrer*os have the experience and the knowledge. They have the manner to resolve conflicts: speaking, dialoguing. A very important skill that *palabrer*os need to master is *el arte de lenguaje*.”<sup>34</sup>

These Wayú intermediaries are practicing the art of *lenguaje* (speech) and are using the right words in order to peacefully resolve conflicts. In doing so they never condemn, but persuade and advise in order to find agreement.<sup>35</sup> “A *palabrero* must possess a good sense of argumentation,” Emmanuel told me, “He must convince, he must have the gift of persuasion, and needs to be diplomatic.” Through the *pütchipü'ü* the SNW works to peacefully settle disputes within society, thereby affirming the viewpoint of many scholars that a fundamental aspect of indigenous customary law is reconciliation (e.g. Sieder 2002: 10; Simon Thomas 2013: 1; Hoekema 2010: 258; Assies 2000: 16; Gabbert 2011: 282; Van Cott 2007: 139).

Within Uribia the legal path to reconciliation is made possible by the intermediating work of the *palabrer*os. Victoria, a 54 year old Wayú woman and member of the household I lived with, highlighted the importance of the *pütchipü'ü* by stating that “*ellos consuigen la paz*” (they achieve the peace).<sup>36</sup> If they actually succeed in reconciling the intermediaries will get paid by the family that asked for their services (in

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<sup>32</sup> Informal conversation with Emmanuel 13-3.

<sup>33</sup> Nowadays Saarakana is very sick, and his physical condition does not allow him to work anymore. He is a former member of the *Junta Mayor Autónoma de Palabrer*os – part of Unesco’s Representative List of the Intangible Cultural Heritage of Humanity.

<sup>34</sup> *El arte de lenguaje* can be translated into ‘the art of speech.’ Interview with Saarakana 13-4.

<sup>35</sup> Informal conversation with Emmanuel 13-3.

<sup>36</sup> Interview with Victoria 22-3.



most cases this is the offended party).<sup>37</sup> For some this work is their only source of income. Saarakana for example, was “a *palabrero* and nothing else.” To him it is a profession that requires certain skills and experience.<sup>38</sup> Other men, like Emmanuel, are recognized as a *palabrero* within society and (intermittently) act as one when they are asked to. Guerra (2002: 127) explains that there are various “classifications of intermediaries.” There are those who are specialized in certain types of disputes and those who are more overall intermediaries.<sup>39</sup> Next to these differentiations, *palabrer*os also vary in their degree of commitment to the role (ibid).

Men like Saarakana are devoted to their profession as intermediaries within the SNW, while others take on that role occasionally. There is no formal title or education required to be a *palabrero*, but it is a matter of recognition within society (Aretz 2011: 47-48). In theory, any man could be a *palabrero*.<sup>40</sup> Ramon, a 45 year old Uribian, told me that “if you are asked to carry the word then you are a *palabrero*.”<sup>41</sup> Not everyone is asked to do so though. Especially the more severe cases require for careful selection of the intermediary (Guerra 2002: 117), and need the expertise of a (devoted) *pütchipü’ü*.<sup>42</sup> Although there is no formal education in order to get socially recognized as a *palabrero*, Saarakana does speak of certain “steps” that he took in order to become one.

“As an adolescent I accompanied my uncles to many families and communities. They travelled around to solve conflicts, and I went along. This was my life. So I listened, I looked and I learned. I nourished [*alimentar*] myself with the knowledge on how they resolve conflicts. I did this for a long time, for about 15 years this was my life. I walked around [*andar*] listening and observing. Following the steps to become a *palabrero*.”<sup>43</sup>

Aarón, a 22 year old Wayú, also used the words ‘looking’ and ‘observing’ when I asked him what it takes to become a *palabrero*. He added that one must be a calm and peaceful person, able to withstand the anger and the aggressive responses from the families.<sup>44</sup> Of great importance is the capability to dialogue and convince. If a man learns how to master *el uso de la palabra* (the use of the word), one day a person might request him to

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<sup>37</sup> Interview with Emmanuel 25-2.

<sup>38</sup> Interview with Saarakana 13-4.

<sup>39</sup> Interview with Emmanuel 25-2.

<sup>40</sup> See footnote 30 on female intermediaries

<sup>41</sup> Interview with Ramon 15-4.

<sup>42</sup> Interview with Saarakana 13-4.

<sup>43</sup> Interview with Saarakana 13-4.

<sup>44</sup> Interview with Aarón 8-4.

intermediate, recognizing him as capable of constructing a reconciliatory dialogue. Comprehensive dialoguing is an essential feature of Wayú conflict resolution,<sup>45</sup> as is often the case within indigenous customary law in general (Simon Thomas 2013: 27). When such dialogues come into being one of their main themes is negotiation on how the affected party is to be (economically) compensated. Compensation is an essential feature of the *Sistema Normativo Wayú*, aimed at recuperating social harmony (Guerra 2002: 127). The SNW exemplifies the notion that indigenous customary law is often collective in nature and serves to protect peaceful coexistence (Sieder 2002: 10) through compromise, compensation and restitution (Simon Thomas 2013: 27; Gabbert 2011: 281).

### 2.3 *El Pago / The payment*

Within the Wayú legal system the concept of compensation is practiced by way of economic payments (*pagos*). Unlike the 'liberal' offence-sanction method aimed at the individual (offender), the SNW is a form of indigenous customary law that aims at reconciliation through compensation. This means that every offence (physical and psychological) should be (and can be) compensated for materially (Guerra 2002: 171). The economic compensation mostly consist of animals (goats, cows, mules), money and necklaces with gemstones.<sup>46</sup> The *jefe* of the Podero family, Javier (70), with whom I spoke extensively about the nature of the *pagos*, told me that in the past the payments solely consisted of animals and the necklaces, but that things have changed a bit. As nowadays money is much more present within Wayú society some people prefer compensation in cash over payments in animals. "So nowadays people pay cash," Javier explained, "and sometimes with cars or even houses. This was not the case in the past."<sup>47</sup> This points to the changeable character of customary law. Although it is often described as a strict continuation of a traditional past, it actually adapts to economic, social and political circumstances (Gabbert 2011: 281; Simon Thomas 2011: 28). Within the Podero vs. Jamaya *arreglo* money and a car were part of the proposed *pago*, and the fact

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<sup>45</sup> This was shown throughout my fieldwork, but most literally expressed within the interviews with Saarakana 13-4 and Javier Podero 3-4.

<sup>46</sup> Interviews with Aarón 8-4, Ramon 15-4. The necklaces almost always contain red gemstones called *tü'üma* in Wayúnaiki, which are highly valued (one might say sacred) within Wayú culture, Javier Podero 3-4.

<sup>47</sup> Interview with Javier Podero 3-4.

that the Poderos preferred paying with animals while the Jamayas wished for money was one of the main reasons that an *acuerdo* was not reached that day.

The *pagos* show the collective nature of (Wayú) customary law and shed light on how legal responsibility is carried collectively within family lineages. If a family has to economically compensate for an offense, these materials (whether cattle or money) are collected (*recoger*) among its members.<sup>48</sup> This means that when negotiations on a payment lead to an agreement the ‘paying’ family elders (often the maternal uncles) will gather the required goods among their family members and friends – a process called *ounuwawaa* in Wayúnaiki. In explaining this process Aarón thought of an example in which I would be his close friend:

“Imagine that I have made a woman pregnant and our families have agreed on a compensation. Now we need to *recoger* and I ask you for your support. You do not have animals, so you may give me like 50.000 pesos [€ 18]. But other people do have animals and do not have cash. So they contribute what they can. And it works the other way around the next time, when you might be needing my support.”<sup>49</sup>

As mentioned, within the SNW all offenses should be compensated for economically. The payments related to such offences can vary from case to case, depending on the circumstances and also on the input of the *palabrero*.<sup>50</sup> A man’s life is highly valued within Wayú culture,<sup>51</sup> but if someone carries the blame for the death of another person the eventual *pago* is not always the same. If it was an accident the payment will usually be less than if there was intent.<sup>52</sup> The overall idea is that the price of the *pago* depends on the severity of the case – whereby ‘severity’ will be measured within the *Sistema Normativo Wayú*. As Javier told me: “depending on the damage, some strikes cost you fifty goats and others a hundred.”<sup>53</sup> When it concerns the loss of blood, the price goes up.<sup>54</sup>

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<sup>48</sup> Interviews with Javier Podero 3-4, Ramon 14-4, Aarón 8-4, Kayla 9-5. These interviews also point out that it is not uncommon that friends are asked to contribute as well. The *pago* will be received by the family head of the affected party, who will distribute it among the family. See Guerra (2002: 187) for more information on how *pagos* are divided (in relation to a certain type of offense).

<sup>49</sup> Interview with Aarón 8-4.

<sup>50</sup> Informal conversation with Juan 11-5.

<sup>51</sup> Interview with Kayla 9-5.

<sup>52</sup> Interview with Javier Podero 3-4.

<sup>53</sup> Interview with Javier Podero 3-4.

<sup>54</sup> Interviews with Javier Podero 3-4, Antonio 13-3, Ramon 15-4.

In regard to a case as severe as murder – provided that a *palabrero* has successfully mediated within a dialogue that has led to an agreement on the compensation – there will be multiple payments, spread annually over three to five years.<sup>55</sup> In the words of Javier:

“When it concerns really severe cases, if there is death, in my view the first payment is made in order to calm. But it all comes down to stopping the thirst for vengeance, and this takes time. So sometimes there are second payments, thirds and so on. Then there is the final payment, to reassure peace. Then the families get together, they share drinks, *cherinche*, they shake hands. This is part of the Wayú norms: *el apretón de manos* [the handshake].”

These ‘long-term’ payments demonstrate how the Wayú legal system not only functions to economically compensate for the inflicted damage but aims at constructive reconciliation. Together with the dialogues, the *pagos* are more than ‘payoffs’ but also serve to repair (social) damage and to structurally recover the peace. In order to do so it is crucial for conflicting parties to get to an agreement (*acuerdo*).<sup>56</sup> In most cases such *acuerdos* are indeed achieved, which leads to the opinion that Wayú customary law is a successful system in that it peacefully resolves conflicts.<sup>57</sup>

In Uribia, Wayú people experience legal matters in a collective manner through the family paradigm. Conflict are about the families that are involved, not just the individuals. In order to resolve conflicts and to get to a peaceful agreement the SNW makes use of intermediaries. With their expertise these *palabrer*os are vital links within Wayú dispute settlement by establishing the platform on which conflicting families can construct a dialogue and negotiate on a settlement. Compensation is a key feature here. Within the SNW all offenses should be compensated for economically. This takes place from one family to another as legal responsibility is carried collectively between families. If the parties involved reach an agreement on what a compensation should consist of the social damage can be repaired.

This chapter has elaborated on the meaning of the recognition of indigenous customary law for Wayú Uribians. I have described how Wayú customary law is

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<sup>55</sup> Interviews with Aarón 8-4, Javier Podero 3-4, Ramon 15-4.

<sup>56</sup> Interviews with Javier Podero 3-4, Ramon 15-4.

<sup>57</sup> Interviews with Emmanuel 25-2, Antonio 13-3, Carlos Medero 6-3, Victoria 22-3, Javier Podero 3-4, Ramon 15-4, Kayla 9-5.

experienced and practiced. This legal system is officially recognized and coexists with the national legal order. Although the Colombian state has legitimized indigenous customary law, in Uribia this does not mean that the national law has no legal power. As we shall see in the next chapter the national law is indeed present here, and this creates a particular context of legal pluralism, marked by continuous interaction between the national legal order and the *Sistema Normativo Wayú*.

# **Chapter 3**

## **The relationship between the two legal systems**

### **3.1**

**Uniting legal pluralism: *La Casa de Justicia***

### **3.2**

**Interlegality**

### **3.3**

**Distinguishing between the two systems**

### **3.4**

**The national law as a threatening force**

### **3.5**

**A new hybridized order**

### 3. The relationship between the two legal systems

It is late in afternoon and I am working on my field notes when I receive a rare phone call. It is Mr. Medero from the *Casa de Justicia*. "Are you still interested in the Wayú legal system?" he asks, "there will be an *arreglo* at Javier Podero's house, it starts in a few minutes." As fast as I can I pack my bag, jump into a pedicab and tell the driver that I am in a hurry. A few minutes later we arrive at the Podero compound. While I am trying to find a way through the crowd, looking for a spot from which I can see what is happening, a woman comes up to me. "Are you the anthropologist?" she asks, "I will give you seat." She takes a plastic chair and starts walking towards the *enramada* where the *arreglo* will take place. Decisively she worms herself and the chair through the crowd and places me right behind Javier. A little ashamed, I have a seat while at least sixty others are standing, I take out my notebook and pencil and start writing down as much as I can. The other people that are given a seat are mostly older Wayú men and state functionaries. Across from Javier are sitting two deputies of the Casa de Justicia (C.J.). Next to them, a colonel from the national police and the local ombudsman for human rights are also seated in the front row.<sup>58</sup> One chair remains empty.

A few minutes later that seat was taken by the mayor of Uribia, Abel José Giacometto Fominaya (35), who played a key role in constructing the dialogue and negotiations between the Poderos and the Jamayas, who have been in conflict for eleven years. The day after the *arreglo* I asked Javier, head of the Podero family, why this event took place at this specific time. Why now and not before? He told me he tried to arrange such talks in the past but that the Jamayas always refused. A few months ago things changed when the mayor took the initiative and started mediating between the two families, pursuing reconciliation that would benefit a lot of people (as both families are quite numerous). It was with the help and pressure of Uribia's mayor that a process of negotiating and talking was started between the families.<sup>59</sup> "*El alcalde intermedia*," said Javier, the mayor intermediates. What is of special interest here is that right from the start it was agreed upon by all parties that the conflict would be settled according to the

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<sup>58</sup> The local ombudsman for human rights (*Personero del pueblo*) is part of the national *Defensoría del Pueblo*, headed by the national ombudsman (*el Defensor del Pueblo*). Informal conversation with Enrique Barros Hernandez, *personero del pueblo* of the municipality of Uribia, 15-4. Next to the *personeros* on the municipal level, every department also has its own ombudsman.

<sup>59</sup> Informal conversation with Javier Podero 3-3.

*Sistema Normativo Wayú*.<sup>60</sup> This was stated by the *palabrero* at the beginning of the session, and was documented by Carlos Medero of the C.J., a document signed by the mayor, the police representative and both family heads.

The Podero vs. Jamaya case illustrates how the state is (nowadays) entangled with Wayú customary law. While the previous chapter gave insight in the indigenous legal norms and practices that have been legitimized in Uribia, this chapter examines Wayú dispute settlement in relation to the national law.<sup>61</sup> I argue that the relationship between the two legal systems is being formed by processes of legal hybridization. Within these processes, also known as *interlegality* (De Sousa Santos 2002: 437; Hoekema 2004: 19; Simon Thomas 2013: 4), the two differing legal systems mix, interpenetrate and influence each other, whereby ‘strange’ elements are threaded into one’s own legal system (Hoekema 2004: 19; Simon Thomas 2013: 4). This does not mean that the dividing line between national law and Wayú customary law is entirely blurred. Clear distinctions can be made, and they are, both by civilians and state officials. I have come to know the national law in Uribia mostly through the *Casa de Justicia*. On my first day of fieldwork I entered the C.J. building and told the receptionist something about my research and my interest in Wayú customary law. Her reaction told me I had come to the right place: “within this organization we practice both the *Sistema Normativo Wayú* and the national law.”<sup>62</sup>

### 3.1 Uniting legal pluralism: *La Casa de Justicia*

The Constitution of 1991 declared that Colombia is an *estado social de derecho* [welfare state].<sup>63</sup> This implies that [the state] must guarantee citizens a politically, economically and socially just order, for which it is essential that they shall have access to an effective justice system, based on equality and respect for difference and framed in a participatory and pluralistic field. In this sense, the Colombian government implements the National Houses of Justice Program.

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<sup>60</sup> Informal conversations with Javier Podero 3-3; Carlos Medero (C.J.)6-3.

<sup>61</sup> It can be argued that customary law should always be studied in relation to the national law, because it always exists “*instead of or in addition to national law*” (Simon Thomas 2013: 33; emphasis in original).

<sup>62</sup> Informal conversation with Andrea (C.J. receptionist) 17-2.

<sup>63</sup> *Estado social de derecho* can be translated into welfare state, or what Bauman (2011) calls a ‘social state,’ in which the state is responsible for the wellbeing of its citizens and protects them by “social rights” (ibid: 14).



Colombia's constitutional reform stated that indigenous communities may maintain their own legal norms and practices within their territories of jurisdiction, thereby creating a situation of (juridical) legal pluralism.<sup>65</sup> The official recognition of indigenous customary law is one element of what Van Cott (2000b: 257) calls "multicultural constitutionalism," in which politics of multiculturalism are part of constitutional transformations. The Wayú legal order is one of the many forms of indigenous customary law that are now officially recognized within Colombia.<sup>66</sup> As I stated earlier, within Uribia the state does not simply recognize the legitimacy of the SNW and then 'lets them be,' but is actively involved with Wayú conflict resolution. Regarding legal pluralism, Uribia's *Casa de Justicia* (C.J.) exemplifies how constitutional transformations are being implemented on a local level.

The *Programa Nacional Casas de Justicia* was born in the wake of the Colombian constitutional reform in 1991. In accordance with that Constitution (art 229<sup>67</sup>) the starting point of the C.J. program is to guarantee the fundamental right for all citizens to have access to Colombia's justice services.<sup>68</sup> What the program initially does is opening 'Houses of Justice' (*Casas de Justicia*) that function as inter-institutional centres that offer information, reference, orientation and capability (*prestación*) to resolve conflicts. Both formal and informal justice – i.e. customary law – can be applied. Their services are free, and are promoted as being comprehensive and timely.<sup>69</sup> Resulting from a collaboration between USAID and the Ministry of Interior and Justice,<sup>70</sup> the first *Casa de Justicia* was opened in 1995 in Ciudad Bolívar. In 2010 sixty six of these "one-stop legal shops" were operating throughout the country.<sup>71</sup> Uribia's C.J. opened its doors in April 2012.<sup>72</sup> Two years later Antonio, a 24 year old Wayú Uribian, would tell me:

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<sup>64</sup> Translation by author.

<sup>65</sup> Hoekema (2004: 6-7) distinguishes practical (*de facto*) from juridical (*de jure*) forms of legal pluralism (see also Van de Sandt 2003: 127 note 4), when multiple legal systems not only operate in practice, but are also legally legitimized then we may speak of juridical legal pluralism.

<sup>66</sup> There are eighty two indigenous groups living in Colombia (Sánchez Botero 2000: 223) and within the indigenous reserves (*resguardos*) these people may maintain their own legal norms and practices. The Kogui, the Arhuacos and the Nasa are just a few examples. See Perafán (1995) for more information on indigenous customary legal systems of four tribes living in Colombia.

<sup>67</sup> Constitution of Colombia, art 229.

<sup>68</sup> *Programa Nacional Casas de Justicia* (2012: 8-9).

<sup>69</sup> *Programa Nacional Casas de Justicia* (2012: 8).

<sup>70</sup> In 2011 the Ministry of Interior and Justice got cleaved, and the Ministry of Justice and Law was created (*Programa Nacional Casas de Justicia* (2012: 8)).

<sup>71</sup> Assessment of USAID/Colombia's Justice Reform and Modernization Program (2010: 25)

“The *Casa de Justicia* is great! It helps people to find solutions for problems, using both the national law and the *Sistema Normativo Wayú*. Because of the *Casa de Justicia* it is now a lot easier to solve problems. The process goes way faster than before. [...] And both parties sign an agreement. They [C.J.] make contracts, which makes it more official, more official for the state.”<sup>73</sup>

This statement, besides being remarkably positive towards the C.J. also shows the inter-institutional character of the program. It combines departments that apply customary law with others that operate within the national legal system.<sup>74</sup> Institutions regarding conflict resolution and legal matters that were formerly spread across Uribia (like *La Inspeccion de la Policía* and the local ombudsman for human rights) are now located in one *Casa*, thereby creating one centre that can provide the rapid and peaceful settlement of disputes. Because the program aims to respond at the particular local needs in terms of justice, not all of these centres are exactly the same.<sup>75</sup> This means that in Uribia, many cases that find their way to the C.J. will be treated within the *Sistema Normativo Wayú*. Uribia’s *Casa de Justicia* houses the offices of: a delegate of the *Personería* (local ombudsman for human rights), *Inspección de la Policía* (I.P.), a delegate of the Indigenous Affairs, and the *Comisaría de Familia*.<sup>76</sup> I will shortly describe each of these institutions before giving further analyses on how they give shape to the situation of legal pluralism in Uribia.

### *Personería*

The main office of the *Personería* is not located within the C.J. building, but found just around the corner. Enrique Barros (37) is the *Personero* of Uribia, who can be seen as the local ombudsman for human and fundamental rights. It is his job to guarantee the protection of these rights within the entire municipality.<sup>77</sup> The delegate of the *Personería* who has his office in the *Casa de Justicia* is especially concerned with the SNW, as he often goes to *arreglos* in order to guarantee human rights within such processes of

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<sup>72</sup> Informal conversation with Daiciria Padilla, coordinator of the C.J. in Uribia, 20-2

<sup>73</sup> Interview with Antonio 13-3.

<sup>74</sup> Informal conversation with Daiciria 17-2.

<sup>75</sup> *Programa Nacional Casas de Justicia* (2012: 6).

<sup>76</sup> This was the situation during my stay in Uribia.

<sup>77</sup> Informal conversation with Enrique (*Personero*) 15-4.

customary law. When an *arreglo* concerns a ‘truly’ severe conflict then Enrique will personally be present – as he was at the Podero vs. Jamaya *arreglo*.<sup>78</sup>

#### The *Inspección de la Policía* (I.P.)

Unlike direct translation would suggest, this institution is *not* part of the police force. However, it is part of the state apparatus with the main responsibility to ensure the compliance of *local* law.<sup>79</sup> They take on civil complaints and claims regarding cases like theft, small scale violence, debts and slander. When someone goes to the central police station in order to report a case, the police agents there will refer them to the I.P. at the *Casa de Justicia*. Interestingly, in Uribia the I.P.’s main priority is to threat cases within Wayú customary law (provided that the case concerns only Wayú people).<sup>80</sup> Like all C.J. institutions, the I.P. documents all its cases. I will elaborate on the I.P. and the processes of *interlegality* that relate to this institution in a following section.

#### *Asuntos Indígenas*

The delegate of the Indigenous Affairs is involved with the *Sistema Normativo Wayú*. He is present at *arreglos* in order to document what has been agreed upon. His presence and especially the fact that the processes are documented make *arreglos* more official, and also binding for the state. If someone does not live up to the agreement he has signed, the other party can go to the C.J. and claim on the documented agreement: *acto de acuerdo*.

#### *Comisaría de la Familia*

This department has the responsibility to protect the rights of children, for example the fundamental right to education (for minors). In addition, the *Comisaría* participates in the settlement of domestic conflicts, and it is their job to determine custody.<sup>81</sup> This means that this institution is concerned with the rights of children, and intra-family issues. The organization works within the domain of the national law (which within C.J. circles is often called the *ley ordinaria*).

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<sup>78</sup> Enrique gave me the example that if one of the parties within a conflict does not agree to certain terms but the palabrero goes and arranges anyway, the delegate of the *Personeria* steps up and guarantees that the other party will be heard (informal conversation 15-4).

<sup>79</sup> Assessment of USAID/Colombia’s Justice Reform and Modernization Program (2010: 25)

<sup>80</sup> Informal conversations with Daiciria 20-3, Rosá 17-3.

<sup>81</sup> *Plan Municipal de Desarrollo Comprometidos de Uribia* 2012, p. 24; Informal conversation with Daiciria 20-3; Interview with Victoria 22-3.

Apart from *La Comisaria de Familia*, each of these institutions had a delegate present at the *Podero vs. Jamaya arreglo*, which was also attended by the mayor of Uribia and representatives of the municipal and national police force. Strong state presence at an affair that is characteristically part of Wayú customary law points out that the two legal orders are entwined with one another. Carlos Medero (42), the Indigenous Affairs delegate at the C.J., showed me his documents on this specific *arreglo* and explained that roughly half of these state functionaries represents the national legal order (the police force, the mayor, the ombudsman for human rights), while the other half are mainly concerned with the SNW.<sup>82</sup> These differing legal systems are in a process of hybridization as both systems are adopting elements from one another. The mayor pursued the re-establishment of peace between two conflicting families and does so by conforming to Wayú norms. He instigated the *dialogue* –a crucial component of Wayú conflict resolution – and afterwards was present at the actual *arreglo*. The two Wayú families also adopted ‘strange elements.’ They allowed for state representatives to be present at the event and signed official paperwork regarding what took place that day. Although this *arreglo* concerns an extremely severe conflict, it does exemplify the *interlegality* that is clearly visible within Uribia. Especially through the inter-institutional *Casa de Justicia* we can see legal hybridization taking place.

### 3.2 Interlegality

The very existence of the *Casa de Justicia* in Uribia shows that processes of legal hybridization are happening in Colombia’s ‘indigenous capital,’ as both the national law and Wayú customary law are being applied here. When two Wayú families are in conflict in Uribia and, through a *palabrero*, arrange an *aggrelo*, it is increasingly common that they approach the C.J. because they want the Indigenous Affairs’ delegate, Carlos Medero, to be present at the *arreglo*.<sup>83</sup> It should be noted that his role is primarily to observe and not to actively influence the dialogue.<sup>84</sup> “He observes, but never intervenes,” said Daiciria Padilla, a 42 year old Wayú woman and coordinator of Uribia’s C.J. The

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<sup>82</sup> Informal conversation with Carlos Medero 6-3.

<sup>83</sup> Informal conversation with Daiciria 18-2; informal conversation Carlos Medero 25-2.

<sup>84</sup> Informal conversation with Daiciria 18-2; informal conversation Carlos Medero 25-2.

outcome of a settlement is based on a decision made between the families involved, and not affected by the Indigenous Affairs delegate.<sup>85</sup>

A crucial task of the observer is the documentation of the dispute settlements. When a C.J. deputy is involved in a case he or she always documents what took place and what was agreed on. Afterwards these documents are signed by all parties involved, sometimes with a fingerprint as many Wayú do not make use of a signature. This absence of signatures shows the oral nature of Wayú culture and by extension its type of dispute settlement. Many forms of customary law are strongly based on oral communication (Simon Thomas 2013: 27; Gabbert 2011: 281) and the SNW serves as a clear example. This legal order ‘traditionally’ does not apply any form of documentation, everything is done orally, through the use of *la palabra*.<sup>86</sup> Both Medero and Emmanuel see documentation as something *occidental*,<sup>87</sup> “from the *Arijunas*.”<sup>88</sup> In Uribia, *occidental* does not specifically mean ‘western,’ but is generally used to name influences from outside Wayú culture. Rosa, a 40 year old Wayú woman and administrative assistant at the I.P., simply explained it as: “occidental means that something is not Wayú,” and this resonates with other explanations I have been given.<sup>89</sup>

Although the distinction is made between what is considered occidental and what is Wayú, like the distinction that is made between the *ley ordinaria* and the *Sistema Normativo Wayú*, these people do value some occidental influences and some share the opinion that nowadays the SNW is part of the national legal order.<sup>90</sup> The fact that a state institution like the C.J. is increasingly being approached by Wayú people exemplifies this. Several Wayú agree that the observance and documentation by state functionaries make SNW processes “more official, more serious,” to use Jabobo’s words.<sup>91</sup> As Daiciria explained, the delegate for the Indigenous Affairs is present at *arreglos* in order to “guarantee that what will be agreed shall be binding for the state.”<sup>92</sup> This confirms Hoekema’s (2010: 259) statement that in Colombia the jurisdictions within customary law are legally binding, also within the national legal order. If someone does not hold up

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<sup>85</sup> informal conversation Carlos Medero 25-2.

<sup>86</sup> Informal conversation with Carlos Medero 25-2; Interview with Antonio 13-3.

<sup>87</sup> Informal conversation with Carlos Medero 25-2; Interview with Emmanuel 25-2.

<sup>88</sup> *Arijunas* is what the Wayú call people who are not indigenous. Generally the term is used to refer to non-Wayú living in ‘Wayú territory.’

<sup>89</sup> Informal conversations with Rosá 17-3; Emmanuel 13-3; Carlos Medero 25-2 & 6-3.

<sup>90</sup> Interviews with Emmanuel 25-2, Erick 27-2, Ramon 15-4, Amanda 11-4.

<sup>91</sup> Informal conversations with Daiciria 20-3, Medero 5-3; Interviews with Emmanuel 25-2, Antonio 13-3.

<sup>92</sup> Informal conversations with Daiciria 20-3, confirmed by Enrique (ombudsman for human rights) 15-4.

to his end of the bargain, if someone breaks the *acuerdo*, the other family can now go to the C.J. to show the documents and claim on the agreement.<sup>93</sup> Depending on the case, the circumstances, and the particular institution involved, the issue may be transmitted to the national legal order.

A lot of the ‘smaller’ cases, such as misdemeanours and property disputes get processed by the *Inspección de la Policía* (I.P.), whose main task is protecting the compliance of local law.<sup>94</sup> In Uribia, there are three I.P. employees: the head of the department (*inspector*), his administrative assistant, and the translator. They make use of a translator because a substantial part of the Wayú population, especially among the older generations, do not fully master the Spanish language or do not even speak it at all.<sup>95</sup> Given that an estimated ninety five percent of the people that fall under this institution’s jurisdiction is Wayú, most of the cases treated here concern two indigenous parties. If a case does not directly concern any non-Wayú (*Arijunas*) but solely indigenous people, then the I.P. first and foremost aims to make conflicting parties reconcile by way of Wayú customary law.<sup>96</sup> Rosa (40), the I.P. assistant, shed a little light on the work of her department:

“The *Inspeccion de la Policia* is mainly involved in smaller cases, not the big ones. Cases like debts, slander and small aggressions. Normally the families would arrange these things between themselves, they use a *palabrero* and talk about a *pago*. Most cases that come here [I.P.] is when there is no *acuerdo*. For example, if the offender’s family would not pay. The affected family then comes to the *Inspección*, which will try to mediate between the families.”<sup>97</sup>

She tells us that generally the I.P. is contacted when conflicting families do not get to an agreement.<sup>98</sup> If there is no *acuerdo*, the affected party may approach the I.P. claiming that the offenders do not want to settle, and that they want their help.<sup>99</sup> The *Inspección de la Policía* will try to open up negotiations (again), and they will really make an effort.

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<sup>93</sup> Interview with Erick 27-2.

<sup>94</sup> Assessment of USAID/Colombia’s Justice Reform and Modernization Program (2010: 25)

<sup>95</sup> Informal conversation with Pedro (I.P. translator) 17-3.

<sup>96</sup> Interviews with Rosa (I.P. assistant) 17-3, Victoria 22-3, Informal conversation with Daiciria 20-3. Rosa and Daiciria told me that when a case does directly concern a *Arijuna* then the national law would automatically be applied.

<sup>97</sup> Interview with Rosa (I.P.) 17-3.

<sup>98</sup> Interview with Rosa (I.P.) 17-3, informal conversation with Perdo (I.P.) 17-3.

<sup>99</sup> Informal conversations with Rosa 17-3, Pedro 17-3. The I.P. can also be approached within the previous process of dialogue and negotiation.

As Pedro (42), the I.P. translator, told me: “we also work to conciliate.”<sup>100</sup> This state institution is indeed intermediating between conflicting families.<sup>101</sup> Unlike the Indigenous Affairs delegate, the I.P. does actively influence conflict resolution in Uribia. The reason for this difference is mostly due to their job description. While the I.P. is expected to protect communal harmony by applying local regulations, the Indigenous Affairs delegate’s job is much more that of observation in order to guarantee the recognition of ethnic diversity – and in extension legal pluralism – on the ground.<sup>102</sup>

### 3.3 Distinguishing between the two systems

Hoekema (2004: 9) describes legal pluralism as the existence of two or more legal systems within one state that simultaneously have a compelling appeal onto the population. The “compelling appeal” the Colombian national law can have on Wayú Uribians is shown by Aarón’s (22) response when I asked him which legal system he prefers.

“I prefer the state system, sure! Yes, because the state law punishes. It is not correct when one murders someone and then remains free. If one kills someone, and he has to pay for it in prison, that is a better option. Instead, if it is left like that, this is bad. For me it [ the state system] is better, because if my family pays for the murder that I have committed this is not correct. But if I go to prison for 20 or 30 years, I am paying for my mistake.”<sup>103</sup>

Aarón does not find justice in Wayú customary law because offenders does not pay (individually) for their mistakes – because there is no punishment within the SNW. Although this young man was the only one who explicitly stated his preference for the national law to me in person, I did hear about other instances of people wanting *la ley ordinaria* to be applied.<sup>104</sup> But if a Wayú prefers the national law (in a particular case or in general), can he or she truly choose to do so? I had an interesting conversation with Daiciria, the C.J. coordinator on the work of the *Inspección de la Policía* and in extension the national law:

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<sup>100</sup> Informal conversation with Pedro 17-3.

<sup>101</sup> “*La inspección intermedia*,” informal conversation with Daiciria 20-3.

<sup>102</sup> *Programa Nacional Casas de Justicia* (2012: 12-13)

<sup>103</sup> Interview with Aarón 9-4.

<sup>104</sup> Informal conversations with Daiciria 20-3, Rosa 20-3; interview with Rosa 17-3,

- “So the I.P.’s main priority is the Sistema Normativo Wayú?” I asked
- “Correct. The I.P. always tries to make agreements, to conciliate. In doing so the I.P. also functions as an intermediary.” Daiciria responded.
  - “And if in the end they [the conflicting parties] do not reach an agreement, the case goes to the national law?” I asked.
  - “That’s right,” said Daiciria.
    - “Does that mean that if a Wayú wants to use the national law, he can realize that by refusing to make an accord?”
    - “Generally the Wayú do not want to use the national system. They are scared of it, they do not want imprisonment, they prefer the system of compensation. If a case is brought to the I.P. because someone wants to the national law to be applied, the I.P. says ‘no, you are Wayú, so we are going to try to solve this problem within the SNW.’ Only when a accord within the SNW appears absolutely impossible, the step will be made to the state law.”
    - “But theoretically, people can choose which system they want to be applied?”
  - “Yes.” said Daiciria.
    - “Does it occur in practice, that a Wayú chooses the national law?”
- “Yes, sometimes people really do not want to talk or negotiate, and then *la ley ordinaria* will be applied.”<sup>105</sup>

The coordinator of Uribia’s *Casa de Justicia* tells us that (especially regarding I.P. cases) if conflicting parties do not come to an agreement within Wayú customary law, the issue will become subject to the national law. Consequently, Wayú Uribians can choose between the two legal systems. When the I.P. is involved they will insist on customary forms of dispute settlement, but if someone persistently wants the national law to be applied he or she can make this happen. In principle both the party of the offender and the affected party can choose for the system they prefer, but when a process within the national legal order has started against the offender the choice is no longer his to make.<sup>106</sup> In explaining such choices, legal anthropologist Keebet von Benda-Beckman (1981: 117) speaks of “forum shopping” when disputants have a choice between different legal orders and “base their choice on what they hope the outcome of the dispute will be [...]”

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<sup>105</sup> Informal conversation with Daiciria 20-3.

<sup>106</sup> Interview with Aarón 8-4.



Technically speaking, within Uribia the state law is accessible to all. Such forms of accessibility of the state law are highly valued by political theorist Jacob T. Levy (2000: 319-322), who from a liberal standpoint argues that the recognition of customary law partially detaches indigenous peoples from the state, and therefore advocates a “general legal code accessible to all.”<sup>107</sup> The next chapter delves deeper into the issue of the accessibility of the national legal order, where the Uribian legal context will be analyzed in relation to the notion of citizenship. In the line of Kymlicka’s (1995) thoughts on group rights, Levy (2000: 322) worries that by officially recognizing legal pluralism the state may bind people to customary law (cf. Van Cott 2007: 138). In a way, we can see this happening when the I.P. is deliberately pushing for people to take on Wayú forms of conflict resolution. It has to be said that in a lot of cases there is no need to push, as many Wayú prefer the SNW over the national legal order.<sup>108</sup> To men like Javier Podero the I.P. would never have to make an argument in the line of ‘this is the Wayú way,’ because to him and, and others like him, the *Sistema Normativo Wayú* is indeed the way disputes are supposed to be settled.<sup>109</sup> The majority of the I.P. cases are therefore processed through customary law, in which a dialogue is opened, economic compensation is negotiated, and eventually reconciliation is reached. Such agreements are not always found though. In this scenario both parties would sign documents that they have not come to an *acuerdo*, and the case will indeed become subject to the national law. Before this happens, Rosa told me, the I.P. will try one more time: “are you sure you want to do this? This could mean prison...”<sup>110</sup>

### **3.4 The national law as a threatening force**

Indigenous customary law generally enjoys high legitimacy among the (corresponding) population (Van Cott 2007: 138), and so it does among the Wayú of Uribia. However, as shown by the statement of Aarón in the previous section, some people prefer to make use of the national law (either occasionally or in general). I have stated that when such instances occur in Uribia the Colombian state, in the form of the I.P., aims to push people

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<sup>107</sup> It has to be noted that Levy (2000:324) also points to the negative consequences [of forum shopping] that such a general legal code might bring with. At the same time, he seems to want indigenous people to have a choice regarding legal systems (cf. 2000: 320)

<sup>108</sup> Interviews with Emmanuel 25-2, Antonio 13-3, Victoria 22-3, Javier Podero 3-4, Amanda 11-4, Kayla 9-5.

<sup>109</sup> Interview with Javier Podero 3-4.

<sup>110</sup> Informal conversation with Rosa (I.P.) 17-3.

towards settling disputes within the SNW. One could wonder why this happens, and why the state would aim for such legal policy. First of all, we have to take into consideration that it is the I.P.'s task to ensure the compliance of *local* regulations,<sup>111</sup> which in Uribia means the SNW. Second, as Van Cott (2007: 138) points out, customary law is a quick and inexpensive way to resolve conflicts; and one of the benefits of its official recognition is that it provides for the cheaper and swifter administration of justice (Assies 2000: 13). The municipality of Uribia has a population of over 150.000, of which ninety five percent are Wayú.<sup>112</sup> Most legal issues among these people are settled by customary law, which therefore serves as a relatively cheap way (for the Colombian state) to settle disputes. Also, the aforementioned high legitimacy that customary law possesses among Wayú is fuelled by feelings of resentment and fear towards the state law, especially regarding the idea of incarceration. It is within this atmosphere that the *Inspección de la Policía* insists on settling disputes within the norms of Wayú customary law.

A big difference between the SNW and the national law is the absence of imprisonment within Wayú conflict resolution. Roughly taken, within this legal system there is no punishment – i.e. no offence-sanction method aimed at the individual – but instead it aims to compensate. Many Wayú hold a resentful position towards the *ley ordinaria*. “They are scared of it,” Daiciria told me, “They do not want imprisonment, but prefer to pay.”<sup>113</sup> Besides from the point that the affected party does not really gain anything from punishing the offender, people argue against incarceration because this form of punishment “changes the individual’s identity,”<sup>114</sup> and because they want their members to stay productive.<sup>115</sup> Institutions like the I.P. bring the state’s legal system close by, they make it real.<sup>116</sup> This real alternative of the ‘frightening’ national law works to fuel preferences for customary forms of conflict resolution. The *Comisaría de la Familia* is such a C.J. institution that represents the national law to Wayú Uribians. The department works on cases regarding the family, such as issues of custody and alimony, and is especially concerned with children’s rights. Victoria (54), who has been working

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<sup>111</sup> Assessment of USAID/Colombia’s Justice Reform and Modernization Program (2010: 25).

<sup>112</sup> *Plan Municipal de Desarrollo Comprometidos de Uribia* (2012:5).

<sup>113</sup> Informal conversation with Daiciria 20-3.

<sup>114</sup> Informal conversation with Gustavo 10-4,

<sup>115</sup> Informal conversation with Gustavo and others 2-3.

<sup>116</sup> Informal conversation with Daiciria 20-3.

at the *Comisaría* for several years and in the past has worked for the I.P., told me the following:

“For example, a fourteen year old girl gets pregnant from an eighteen year old boy. So the family of the girl wants the boy or his family to pay them. If they are both Wayú, the girls’ family uses a *palabrero*, sends a *palabrero* to the boys family. But if the family of the boy does not pay, if there is no agreement, they [the girls family] go to the *Comisaría*, at the *Casa de Justicia*. The *Comisaría* applies the *ley ordinaria*, and this girl is a minor. The boy is an adult, so this would be sexual abuse. The boy would go to prison. But many people know this, they do not want prison, and if they feel that pressure, they will pay.”<sup>117</sup>

This example contains a lot of interesting information concerning legal pluralism in Uribia. First of all Victoria tells us that if a social issue like a pregnancy causes dispute between two Wayú families, it would likely be treated within the *Sistema Normativo Wayú*. However, when the families cannot work it out, the affected family may well make use of the national law, in this example through the *Comisaría de la Familia*. This commissariat strictly makes use of the state law, and Omaria points out that the national law can put “pressure” on people. Viewing the relationship between the two systems in this manner the national law can become a threatening force, pushing people towards customary law. The I.P. anticipates these circumstances and acts ‘accordingly’ by actively putting this threatening force into work. But it is not just the I.P. that makes use of the national law this way, civilians do so as well. In some cases people threaten with the law,” Amanda told me, “now they say: ‘if you do not pay, I will report the case.’”<sup>118</sup> Indeed, the *Casa de Justicia* brings the national law close by, it makes it a real alternative. But within this (new) legal context of Uribia, a situation has emerged where the state’s legal system can be (used as) a frightening alternative, especially through the concept of prison, pushing people towards making agreements within the SNW.<sup>119</sup>

### 3.5 A new hybridized order

The C.J. project in Uribia provides insight into a local implementation of the official recognition of indigenous customary law within Colombia. Hoekema (2004: 7) states

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<sup>117</sup> Interview with Victoria 22-3

<sup>118</sup> Interview with Amanda 11-4.

<sup>119</sup> These conclusions were confirmed (and partially drawn from) conversations with Daiciria 20-3 & 14-4.

that the recognition of a different legal order means the existence of *juridical* legal pluralism, whereby a “legal unit” is created out of multiple legal systems. The *Casa de Justicia* shows how in Uribia the state is working to ‘unite’ a pluralized legal system, by applying both the national law and Wayú customary law through their inter-institutional organization. Especially within the C.J. the processes of legal hybridization are clearly visible. These processes give shape to a particular legal context, or what Hoekema (2004: 23) calls a “new hybridized legal order.” Uribia’s legal pluralism is marked by the constant interchange of influences between the two legal systems. It is within this new hybridized legal order that documentation is now (becoming) part of Wayú customary law. It is within this new order that state officials are actively involved with the SNW. We can see at least three ways in which such state involvement operates. First, state presence serves to guarantee that decisions made through Wayú customary law are binding (i.e. ‘to make it more official’). Second, state officials work to intermediate between conflicting parties. And third, the threatening force of the national law is used as a push factor towards the *Sistema Normativo Wayú*.

Processes of legal hybridization not only show the flexible and changeable character of customary law (Simon Thomas 2013: 28; Gabbert 2011: 283) but demonstrate that the national law (as a social construct) is subject to change as well (cf. Simon Thomas 2013: 28). Uribia’s interlegality denounces the idea of two strictly defined legal systems and points to the fluidity of their boundaries. In extension, this research stands in accordance with Hoekema (2011: 261) when he states that interlegality rejects the idea of closed and concealed (indigenous) communities and cultures. Legal hybridization in Uribia reaffirms that cultures should be thought of as relational and contested, with the continuous re-creation of their imagined boundaries (e.g. Benhabib 2002: 8; Modood 2007: 41 & 93; Parekh 2000: 152-3). Within this line of thought I hold that multiculturalism should *not* depart from the idea of cultures as clearly delineated and static entities that coexist in a ‘mosaic’ (Benhabib 2002: 8; Rattansi 2011: 1). Nevertheless, cultural differences are not to be eliminated. Although cultural boundaries are imagined, they are very real in that they guide human action (Benhabib 2002: 7; see also Anderson 2006: 36). My point is that the politics of multiculturalism should recognize the relational and hybrid character of cultures (e.g. Benhabib 2002: 25; Rattansi 2011: 153-4), and therefore not aim at specific cultural

preservation, but at expanding (democratic) inclusion, by making a (minority) group's cultural identity a positive feature of the bigger society (Modood 2007: 43).

This chapter has described and analyzed the situation of legal pluralism within Uribia, with extra focus on the relationship between the two legal orders. Departing from the *Casa de Justicia* I have argued that the local implementation of official legal pluralism has created a new legal context – what may be called a hybridized legal order (cf. Hoekema 2004: 20). I have spoken about ‘uniting a pluralized legal system,’ however at the same time we have seen that clear distinctions between the SNW and the state can and are made. In fact, the affected party of an abuse or an offense, at least theoretically, can choose the legal system they prefer. As far as people are aware of these options, forum shopping (Von Benda-Beckman 1981: 117) does (hypothetically) exist in Uribia. The next chapter will delve deeper into the accessibility of the state law, when the situation of legal pluralism in Uribia will be analyzed in relation to notions of citizenship and theories on multiculturalism.

# **Chapter 4**

## **Legal Pluralism and Citizenship**

**4.1**

**Differentiated citizenship**

**4.2**

**Turning point: the Constitution**

**4.3**

**Access to justice: the right to exit**

**4.4**

**Fundamental rights and individual autonomy**

## 4. Legal Pluralism and Citizenship

“Nowadays, the Wayú are doctors, lawyers, professionals of all kind, and sometimes they want to apply the *ley ordinaria*. [...] I prefer the system of the Wayú. We form a nation, a big nation, and we have our own laws. So we have our own [legal] system, but we also have to comply to the national law. We are Colombians too, people should know that. The Wayú Colombians have to abide the state law. We have our own laws here, but first there is always the law of the state, before *la ley Wayú*.”<sup>120</sup>

Amanda Salgado

This is what Amanda (35), a Wayú Uribian who works as a schoolteacher, told me when I asked her about the role of the national law within her community. In a few words, what she is saying here is that although the Wayú have their own legal system they are Colombian citizens, which means they should abide the national law. She hints at the ambiguous situation of legal pluralism – of belonging to the Wayú community and at the same time to the Colombian nation.

After elaborating on the meaning and experience of Wayú customary law in chapter 2, I have explored Uribia’s legal pluralism in chapter 3, mainly by analyzing the SNW in relation to the national law and by looking how state institutions are involved with the Wayú legal order. In this chapter I connect the specific context of Uribia’s legal pluralism with academic debates on citizenship and minority rights. I will start by framing the recognition of Wayú customary law into the notion of ‘differentiated’ citizenship (Young 1989: 251). The following section will elaborate on the broader set of indigenous rights, of which the recognition of customary is one aspect, that Colombia has adopted through its constitutional reform in 1991. It will be shown that the Constitution and the implementation of the reforms are very significant matters regarding contemporary Wayú Uribians and how they perceive their relationship with the state. The third paragraph of this chapter will examine Uribia’s context of legal pluralism in relation to the liberal argument made by several scholars that: the individual subjects of a minority right should *not* be forced to be part of a specific group, and therefore should have the right *not* to be subject to a group right (e.g. Eriksen 2001:

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<sup>120</sup> Interview with Amanda 11-4.

142; Kymlicka 1995; Benhabib 2002: 19). In the final paragraph I will discuss the issues of fundamental rights and individual autonomy.

#### **4.1 Differentiated citizenship**

In all liberal democracies, Colombia being one of these, one of the major mechanisms for accommodating difference is the protection of the civil and political rights of individuals (Kymlicka 1995: 26), thus the protection of equal citizenship. “However,” states Kymlicka (1995: 26), “it is increasingly accepted that some forms of group difference can only be accommodated if their members have certain group-specific rights.” By granting group rights a state is altering the meaning of citizenship: it becomes group differentiated. The idea is that the ‘traditional’ and universalist approach to citizenship, with its strong individual basis of equal rights, does not account for contextual limitations and (local) social realities (Assies et al 2005: 9; see also Sánchez Botero 2000: 229). Approaching citizenship in a universalist manner can thus end up disadvantaging minorities by reinforcing the values and power of the dominant group (Young 1989: 251; Postero 2007: 158).

The Wayú of Colombia and their way of conflict resolution exemplify how some forms of difference are more suitably accommodated through group rights, rather than on a pure individual basis of rights. In chapter 1 I have stressed the importance of the *family paradigm* for the Wayú of Uribia. This paradigm is a type of collectivism in which the (matrilineal) family forms a highly significant social unit for these people. It is the unit from which they think and from which they often operate socially; also regarding conflicts. The relevance of the extended family is displayed in Wayú customary law, in which legal responsibility is carried collectively by families. This means that instead of the individual offence-sanction method (state law), within the SNW the family of the offender compensates the affected family economically, whereby the details of such payments come about by means of dialogue and negotiation. The central aim of Wayú dispute settlement is to reconcile conflicting families, thus preventing acts of revenge and family wars (such as the Podero vs. Jamaya conflict that has been going on for 11 years). With a strong oral tradition, this legal system does not make use of strict rules that are written down. Another way in which the SNW differs from the Colombian national law are the absence of imprisonment – and individual punishment as a whole.



Wayú Uribians argue against incarceration because they want their family members to stay productive, and because they feel that this form of punishment changes the individuals identity.

The family paradigm as a type of collectivism is reflected strongly in Wayú customary law. Perhaps the most important reason for recognizing this indigenous legal system is the fact that forcefully implementing the national legal order among Wayú would not change their way of legal thinking all of a sudden. Collective responsibility would still be felt, surely by those who fall victim to acts of vengeance. With the constitutional reform of 1991 Colombia did officially recognize indigenous customary law, thus creating a form of group differentiated citizenship. Legal anthropologist Esther Sánchez Botero (2000: 229-230) explains this when she states that in Colombia it is recognized that some social units can collectively be the subjects of rights, thereby subverting the universalist notion of citizenship.

#### **4.2 Turning point: the Constitution**

Customary law is not the only way in which group differentiated citizenship came about in Colombia. Through the constitutional reform of 1991 Colombia granted several rights to indigenous groups based on their cultural identity.<sup>121</sup> In the first place this meant that big parts of land were given to indigenous communities which they now collectively possess. Furthermore, self-government rights have been granted to specific indigenous communities in defined ancestral territories: *resguardos* (Van de Sandt 2007: 17). Van de Sandt (2007: 19) states that 27,8 percent of the Colombian land is attributed to *resguardos*.<sup>122</sup> Within these territories indigenous peoples can govern themselves (to a certain extent) according to their own political and legal customs. Colombia also provides arrangements for fiscal autonomy, in the sense that *resguardos* can possess a certain share of state resource transfers to pay for public functions and development in accordance with their own uses and customs (ibid: 20). Concerning the Wayú of the *Resguardo Indígena de la Alta y Media Guajira*<sup>123</sup> the topic of fiscal autonomy takes on a different shape though. As mentioned, the Wayú do not have a central political authority

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<sup>121</sup> In addition to the indigenous rights, land rights were also granted to certain Afro-Colombian communities (see Chaves & Zambrano 2006 and Hooker 2005).

<sup>122</sup> See Appendix 1 for a map displaying Colombia's indigenous *resguardos*.

<sup>123</sup> This resguardo was officially created on 28-02-1984 (*Instituto Colombiano de la Reforma Agraria, Resolución Numero 015 de 19*).

(Watson 1967: 32),<sup>124</sup> and because of this the people of the *resguardo* are politically strongly connected to the municipality of Uribia. Administratively the municipality includes the *Resguardo de la Alta y Media Guajira*,<sup>125</sup> and it is mostly through the *Secretaría de los Asutons Indígenas* (SAI) that the state's resources get transferred to the communities.<sup>126</sup> I spoke to the head of this institution, Victor Hugo (40), and he explained that after the constitutional reform the relationship between the state and the indigenous people has improved a lot, "the state is doing well, they respect, they support."<sup>127</sup>

This was not the first time that a Wayú depicted the Constitution of 1991 as a turning point regarding Wayú state relations. When I asked him about this relationship and 'equality,' Emmanuel told me the following:

"Since the new Constitution of 1991 the Wayú are indeed treated with equality by the state. We got many privileges, for example about self-determination within Wayú lands. Since that constitution a lot has changed and the situation for the Wayú in Colombia has improved. The state treats us with respect and values us. Actually, in my opinion the state is doing what it needs to do for the Wayú. Today, there is nothing more I wish from them."<sup>128</sup>

Emmanuel strikingly starts by connecting the Wayú-state relationship to the constitutional reform of 1991.<sup>129</sup> The link he establishes with the Constitution is a direct connection with the politics of multiculturalism and group rights, what Van Cott (2000b: 257) calls "multicultural constitutionalism." To illustrate the improvements of their relationship with the state, Emmanuel takes the example of the privilege (group right) the Wayú have to self-determination (self-government). This points to the statement made by Kymlicka and Norman (2000: 37) that group rights have the potential to generate identification by minorities with the political unit. For Emmanuel at least, this seems to be the case. Many Uribians share the idea that regarding the Wayú the

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<sup>124</sup> This was confirmed by Carlos Medero (informal conversation 6-3), delegate of Indigenous Affairs within the C.J.

<sup>125</sup> *Plan Municipal de Desarrollo Comprometidos de Uribia* 2012, p. 24.

<sup>126</sup> *Ibid*, p. 49.

<sup>127</sup> Informal conversation with Victor, head of the SAI, 18-3.

<sup>128</sup> Interview with Emmanuel 25-2.

<sup>129</sup> I had never mentioned this topic before, this really is Emmanuel's 'own story.'

Colombian state is doing well – at least better than before.<sup>130</sup> Assies (2000: 19) speaks of a “new social pact” between indigenous peoples and their states that was instigated by constitutional reforms throughout Latin America. Uribeans, such as Emmanuel, affirm the idea that the Wayú-state relationship significantly changed since 1991.<sup>131</sup>

Kayla (28) is one of the people that explicitly pointed to Colombia’s constitutional reform as the pivotal moment in improving the (socio-political) situation for the Wayú. Kayla is a lawyer who works in Riohacha but spends most of her weekends with her family in Uribia. She is the granddaughter of the *palabrero* Saarakaana Pushaina who we know from chapter 1; this made her of special interest within my research because she stands in close contact with both legal systems. During our interview, we spoke a little about indigenous rights in Colombia, and I said to her that many of the Wayú people I have met told me that they feel like being Colombian, and I asked her if she felt the same way. This was her response:

“Yes I feel like I am a Colombian. But look, prior to the Constitution of 1991, the state did not recognize us. We were not recognized as being worthy. They told us we were not worthy because we were Wayú, because we were indigenous. Now, starting from the Constitution they have recognized us, and they have given us a space. They have opened up a space, by recognizing that Colombia is multicultural.”<sup>132</sup>

Statements like these confirm the idea that Colombia’s constitutional reform implicates a “fundamental change” in the relation between the state and its indigenous subjects (Van de Sandt 2007: 257). Kayla went on by associating the improved situation with the way the state is protecting Wayú culture. In doing so she reaffirmed what others had pointed out to me: people feel accepted by the state as being member of an indigenous group and connect such feelings to the ways in which the state is protecting Wayú cultural traits.<sup>133</sup> Another frequently mentioned issue regarding the improved Wayú-state relationship is that the state purposefully supports Wayú people economically by sending resources to the communities.<sup>134</sup> The support is partially directed to the *corregimientos* through the *Secretaria de los Asuntos Indígenas*, thus specifically aimed at

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<sup>130</sup> Informal conversations Javier Podero 3-3, Victor 18-3, Alfonso 5-3; Interviews with Antonio 13-3, Erick 27-2, Aarón 9-4, Amanda 11-4

<sup>131</sup> Interviews with Amanda 11-4, Kayla 9-5.

<sup>132</sup> Interview with Kayla 9-5.

<sup>133</sup> Interviews with Emmanuel 25-2, Amanda 11-4; informal conversation with Soe Podero 8-4.

<sup>134</sup> Interviews with Erick 27-2, Antonio 13-3, Aarón 9-4, Amanda 11-4; Informal conversation with Victor 18-3, Alfonso 5-3, Herero 27-3.

indigenous peoples. Both economic state support and the protection of Wayú culture can be seen as politics of multiculturalism – aimed at certain ethnic groups. The fact that Wayú-state relationships are positively experienced – at the very least *better than in the past* – leads to the assumption that the politics of multiculturalism have contributed, or are contributing, to making Uribians feel good about their state.

### 4.3 Access to justice: the right to exit

“The *Inspección de la Policía* brings the national law close by, they make it a real alternative.”<sup>135</sup>

Daiciria Padilla, C.J. coordinator

In settling their disputes, the Wayú of Uribia mostly apply customary law, but like Daiciria says, the national law is an existing alternative. The previous chapter showed how the state, in the form of the *Inspección de la Policía*, does not actively support the alternate option of the state law, but explicitly aims to make agreements within the SNW. Another example of state officials working to settle disputes within customary law is the mediating role of the mayor within the Poderos vs Jamaya conflict. However, we have also seen that the national law is indeed an existing option if one truly wishes to bypass customary forms of conflict resolution. From a liberal point of view, as stated by Levy (2000: 319-321), such *accessibility* of the state law should always be there for members of indigenous communities. Levy (2000: 317) argues that the recognition of customary law potentially detaches indigenous peoples from the state and the general law. In Uribia though, state institutions are actively involved with Wayú customary law, and such state presence “brings the national law close by.”

Wayú Uribians can choose the legal system they want to be applied. When people have such choices and base their decisions on what they hope the outcome will be, this can be called “forum shopping” (Von Benda-Beckman 1981: 117), in that subjects can ‘shop’ out of different legal orders (Hoekema 2004: 21). It has to be said though, that the decisions people make in this regard are not always the simple result of a rational deliberation, but are embedded in mechanisms of social control (Simon Thomas 2013: 40). In the Urbian context, one can imagine how the system of economic compensation –

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<sup>135</sup> Informal conversation with Daiciria 20-3.

carried out collectively to and from families – may inform peoples actions regarding conflict resolution. If a Wayú individually chooses for the national law this could disadvantage the collective. It is within this light that Levy (2000: 321) fears that the recognition of customary law may “bind people to old ways.”

Kymlicka (1995: 35-7) argues that when a group right has the effect of restricting the behaviour of the individual members of that group, then this form liberal multiculturalism is missing its goal – the accommodation of *difference* within a society (ibid: 26). He therefore advocates ‘the right to exit’ – the right not to be part of a group specific right although being a member of that group.<sup>136</sup> Several scholars stand in accordance with Kymlicka’s (ibid) premise that within a liberal democracy the state should first and foremost be concerned with protection of the freedom and autonomy of each individual (e.g. Levy 2000: 324; Benhabib 2002: 59). For these political theorists, the right to exit should prevail. In relation to indigenous customary law this means that indigenous individuals should have access to the wider state law, (at least in principle) they should have a choice (Levy 2000: 320). Wayú Uribians do indeed have the possibility of choosing for the national legal order, which means that the right to exit does exist for them. Many perceive the state law as an existing option, as a “real alternative.”<sup>137</sup> This is illustrated by Aarón when he told me of a case concerning one of his friends.

“[If] there is no *pago*, then the [national] law will be applied. Like a year ago, a friend of us, he is a little older than I am. He was drunk, hanging out on the main square and there was this girl who is mentally deficient. Sometimes she gets horny... Too horny, due to her illness, and the guy was drunk. She approached him, and they did it. This girl, she was 16, is retarded, and he was 26. The other day, she went to the hospital, saying that she was raped. There was no proof of this. The family of the guy wanted to arrange this through the Wayú system, but they [the girls family] did not want that. They went to the prosecutors. And she was a minor so the police started looking for the guy. He left though, he went to Venezuela. [...] For me this was not rape, I was not

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<sup>136</sup> The right to exit has also been named the right to ‘dissent,’ and the right to ‘being a minority within a minority’ (Modood 2007: 29), or the ‘freedom of exit’ (Benhabib 2002: 19). Eriksen (2001: 142) explains ‘the right to exit’ by stating that group rights should be thought of as individual rights: as an individual one has the right to attach oneself to a group and the right to detach oneself from the group.

<sup>137</sup> Interviews with Emmanuel 25-2, Rosa (I.P.) 17-3, Erick 27-2, Aarón 9-4, Amanda 11-4 ; Informal conversations with Miguel 26-2, Daiciria 20-3.

there that night, but I know how this girl gets, I know the stories. But this is a thing for the law, she is young and she is sick.”<sup>138</sup>

This is Aarón’s narration of a real life case that took place in Uribia which demonstrates that the national law is indeed a feasible option for Wayú, and that they are in fact making use of this option. It has been argued that group rights such as legitimizing customary law can contribute to the greater inclusion of minorities within the wider society (cf. Kymlicka & Norman 2000: 37), but that the accessibility to state law is a necessary condition for any sense of shared membership in a state (Levy 2000: 320). I argue that the Wayú of Uribia indeed experience the presence of the national legal system as a consequence of their Colombian citizenship. Sometimes the state law is perceived as threatening (chapter 3), other instances show how Wayú people use the national system as a form of protection, claiming on their Colombian citizenship. The following paragraph will start with a case that exemplifies such usage of the national law, when the issue of fundamental rights will be incorporated into the analysis of (differentiated) citizenship regarding the Wayú of Uribia.

#### **4.4 Fundamental rights and individual autonomy**

A conflict arose when a [Wayú] girl who had left her community to study was recalled by her uncle and her mother to live with her people when she reached adolescence and menstruated for the first time. Upon her return the girl rejected the impositions of her culture and evoked the right of *tutela*<sup>139</sup> (writ of protection) to protect her fundamental rights to education and free development of the person. [...] With the intercession of a *palabrero* the maternal uncle and the official for protection of the minor elaborated an agreement by which the girl would continue to be considered a minor for the next five years and could follow her education outside the community while making frequent visits to the settlement. Once she reached adulthood in terms of national positive law, she would have to renegotiate her status in relation to the community.

Sánchez Botero (2000: 228-229)

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<sup>138</sup> Interview with Aarón 9-4.

<sup>139</sup> A *tutela* is “an easy accessible and quickly-resolved writ for the satisfaction of fundamental rights” for all Colombian citizens (Delaney 2008: 50; see also Sánchez Botero 2000)

The case described above concerns a Colombian girl (13), who as a member of the Wayú community, was caught between the *Sistema Normativo Wayú* and the Colombian national law. Within Wayú cultural norms a woman is considered to have come of age, and therefore marriageable, when she first menstruates (Sánchez Botero 2000:228).<sup>140</sup> However, while this girl was regarded as a subject of Wayú norms, she was also considered a Colombian minor within the wider society. And as a national minor she has the fundamental right to education. The case exemplifies how the official recognition customary law can cause problems as indigenous cultural norms can clash with Colombia's national legal order (Rappaport 2005: 234). Eventually the issue was settled through the prevalence of the fundamental rights (of children) over the cultural rights of the Wayú.

Enrique Barros (42), Uribia's ombudsman for human rights, told me that clashes between Wayú customary law and the national legal system do occur in Uribia.<sup>141</sup> "When the two systems clash it almost always concerns cases that involve the rights of children," said Enrique. He went on explaining that regarding such clashes the fundamental rights of children always take precedence over the right for Wayú to maintain their own cultural norms and practices. "Indigenous rights need to be respected," the ombudsman pointed out, "but the rights of children have priority above all other rights."<sup>142</sup> The abovementioned case is not the first time we have seen how state institutions attach importance to the rights of children and minors. The (imagined) case told by Victoria about the unwanted pregnancy (p. 43) and Aarón's story about the mentally deficient girl (p. 53) both indicated that when the case concerns minors, state institutions 'strictly' apply the national law.

The importance of the rights of minors can be traced back to the Constitution of 1991 that guarantees a set of fundamental rights to all Colombian citizens. This declaration is put into practice by in the institutionalization of the Constitutional Court in 1991, aimed at protecting the constitutional rights (Hoekema 2010: 264; Delaney 2008: 50). The legal mechanism through which the Constitutional Court is addressed mostly is the *tutela*: "an easy accessible and quickly-resolved writ for the satisfaction of fundamental rights" for all Colombian citizens (Delaney 2008: 50; see also Sánchez Botero 2000: 229). In the daily practice of justice in Uribia though, the *Casa de Justicia*

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<sup>140</sup> Interviews with Javier Podero 3-4, Emmanuel 25-2, Kayla 9-4, Soe Podero 8-4.

<sup>141</sup> Informal conversation with Enrique (ombudsman for human rights / *personero*) 15-4.

<sup>142</sup> It is constitutionally declared that the rights of children have priority over the rights of others (art. 44).

(C.J.) is a much more commonly used institution that serves to make the justice administration more accessible for Uribians.

The Colombian Constitution expressively states that constitutional rights should be understood along the lines of international treaties and agreements on human rights that are ratified by Colombia (Delaney 2008: 51).<sup>143</sup> “These human rights are universal,” said Daiciria, “they are not different for Wayú.”<sup>144</sup> This means that just like the rights of children, human rights form part of the set of fundamental rights attributed to each *individual*, which prevails over the group specific rights granted to indigenous groups. Scholars have argued the need for some form of legal universalism that protects the individual members in relation to group rights (Levy 2000: 316; Benhabib 2002: 19). The fundamental rights as formulated in the Colombian Constitution, at least theoretically, serve as the “civil code” (Levy 2000: 16) that is accessible to all citizens. Through the *tutela*-system, the C.J.s and the local offices for human rights (*personerías*) Colombia is giving shape to a type of “legal universalism.”

However, many Wayú (living in the *municipality*) are not able to exercise their Colombian citizenship and access the universal legal framework. Especially in the rural communities people often are not familiar with the rights they have.<sup>145</sup> Daiciria stressed the importance of making people aware of their rights, and gave the example of the right citizens have to medical attention when needed: “People think that if they do not have money hospitals will refuse them their services, they do not know their rights.” The *Casa de Justicia* and the local office for human rights are working to making (rural) Wayú aware of their rights. In April 2014 the C.J. in cooperation with the *Personería* had planned a 3-4 day trip to several rural *corregimientos* in order to promote and talk about human rights and the C.J. at educational institutions. I was to join this fieldtrip but at that time the mayor’s office (*alcadía*) had not (yet) been able to come up with the required resources (especially food and money for gasoline).<sup>146</sup> In trying to inform (rural) Wayú on their rights and legal processes the *Personería* and the C.J. face several obstacles. First, there is the problem that often there is no money available for promotion projects and workshops. Second, if these institutions want to go to a school to give such a workshop they first need permission from the local ‘traditional’ authorities, who often

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<sup>143</sup> Text of the Colombian Constitution, article 93.

<sup>144</sup> Informal conversation with Daiciria (C.J. coordinator) 20-3.

<sup>145</sup> Informal conversations with Daicira 20-2, Enrique (*personero*) 15-4.

<sup>146</sup> Informal conversations with Daiciria (C.J. coordinator) 30-4, Enrique (*personero*) 30-4.



know that the basic norms of these state institutions do not always stand in line with their own cultural norms and practices. Finally, in order to promote something one must first actually reach people, and many of the *corregimientos* are located at great distance from the urban zone.<sup>147</sup> This problem of remoteness was mentioned by Soe Podero, who works at a health care organization, and is familiar with the difficulties of reaching large sectors of the rural region. When we were talking about the issue of equality she told me that “it is hard to create this, because the area many Wayú live in does not allow for equality. Here in Uribia, the urban zone, it can be done, but in the rural areas it is much harder.”<sup>148</sup>

These obstacles in promoting and talking about human rights and the work of legal institutions do not relate to the urban zone of Uribia where my research (mostly) took place. It is in this locality where I came to know a specific context of legal pluralism; where processes of (legal) hybridization became apparent; and where it was reaffirmed that cultures should not be understood as delineated and self-consistent, but as relational and hybridized. My time in Uribia has made me believe in Benhabib’s (2002: xi) statement that forms of legal and political universalism, when interpreted properly, are compatible with accommodating differences through minority rights. If we recognize the hybridity and ‘polyvocality’ of all cultures (ibid: 25), and we accommodate (cultural) difference by aiming at extending democratic rights (Turner 1993: 413-4; cf. Modood 2007; Benhabib 2002) – instead of cultural preservation – then multiculturalism does not confine minority members to a cultural tradition, but gives them the right to attach themselves to that tradition and the freedom to choose not to (Eriksen 2001: 142; Benhabib 2002: 82).<sup>149</sup>

Looking at Uribia’s contemporary hybridized legal order, we can see how legal pluralism and equal citizenship can indeed be synthesized to a considerable extent. One important way in which the process of interlegality manifests itself is the growing significance of the ‘set of fundamental rights’ within the ‘new’ legal order. This is shown, for example, by the presence of the local ombudsman for human rights (*personero*) at Wayú *arreglos*, and by the fact that the rights of children prevail over all other rights. Of course, in order to reconcile legal pluralism with equal citizenship it is crucial that Wayú Uribians can claim on their individual rights as Colombians. Therefore they must have

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<sup>147</sup> Informal conversations with Enrique (*Personero*) 13-4, Daiciria 20-3.

<sup>148</sup> Interview with Soe Podero 8-4.

<sup>149</sup> Turner (1993) calls this *critical* multiculturalism.

access to the universal legal framework, which in the first place means that they should know their rights. However, even if everyone is familiar with their legal possibilities, mechanisms of social control will always have the potential of (re-)generating inequalities *within* groups. Scholars have pointed out that minority rights can work to defend such intra-group inequalities in the name of protecting cultural difference (e.g. Okin 1999: 12; Shachar 2000: 368; cf. Van Cott 2007: 106-9).<sup>150</sup> Following Benhabib (2002: 82) I argue that by recognizing the contested and hybridized character of cultures whose boundaries are continually re-imagined, and by making multiculturalism about the extension of democratic rights, such politics will encourage minority members to develop their agency “vis-á-vis their ascribed identities.”

In Uribia this point – the combination of hybridization and individual autonomy – was descriptively illustrated to me by Kayla, a twenty eight year old Wayú woman who is the granddaughter of a *palabrero* (the SNW) and works as a lawyer (national law) in Riohacha. During our interview we talked about the *pago* Wayú men and their families ‘traditionally’ pay for their wives, whose families collectively benefit from these economic compensations (Aretz 2011: 36). Kayla is not married, and I asked her if she is pleased with the fact that her family never ‘married her off.’

“Let me explain you something. What happens is that the Wayú who live in the *rancherías*, who never leave their territory, for them when a girl first menstruates they start preparing her for marriage, for a man to buy her. This is the Wayú who has not left his territory, who has not left their customs. In contrast there are those who have left, who have studied, like me. I finished high school when I was 15, and obviously I was already acculturated. So I will never accept that they sell me. In the first place, I am not an object. This may be against my culture, but that is how I see it: I am not an object. It is my life”<sup>151</sup>

Kayla makes a distinction between Wayú people who have not “left” their communities and those who have. In her own words she tells us that Wayú who are in contact with other cultural norms and practices than their own are prone to cultural change and hybridization. In her view, it is the “acculturation” she went through that gave rise to her personal opinion regarding marital customs – one that she would later call “occidental”

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<sup>150</sup> Okin (1999) focuses on gender inequalities; Van Cott (2007:106-9) looks at how indigenous rights in Latin America can hinder democracy.

<sup>151</sup> Interview with Kayla 9-4.

(i.e. non-Wayú). Colombia's indigenous rights have not confined Kayla to a clearly demarcated and self-consistent Wayú culture. Instead, more than 20 years after the constitutional reform of 1991, she questions established Wayú norms, and expresses herself as an autonomous individual who has the freedom to make her own choices. Kayla's case brings us close to one of the central issues of political theory concerning multiculturalism: the balancing of individual autonomy with the recognition of cultural difference. Building on my findings in Uribia, I will elaborate on this discussion in the concluding chapter.

# Chapter 5

## Conclusions



Drawing by Marijn Gronert, illustrating the reconciliation of legal pluralism and citizenship.

## 5. Conclusions

In this thesis I have connected Uribia's specific context of legal pluralism with a certain political philosophical understanding of multiculturalism, in which multiculturalism stands for the political accommodation of cultural difference, that is aimed at the greater (democratic) inclusion of a minority group within the wider society. More specifically, this research is focussed on the official recognition of Wayú customary law and what this means to indigenous Uribians and their relationship with the state.

The recognition of customary law is one aspect of the politics of multiculturalism that Colombia adopted through its constitutional reform in 1991, a reform that implicated a "fundamental change" in the relationship between indigenous peoples and the state (Van de Sandt 2007: 257). As mentioned in the introduction of this thesis (chapter 1), one of my goals is to look beyond the "symbolic importance" (Assies 2000: 9) of Colombia's multicultural constitutionalism, and to examine how the national reform is implemented locally and how this is experienced by Wayú Uribians. In chapter 4 I described how more than 20 years after the constitutional change people feel accepted by the state as a member of the Wayú community. The Constitution is seen as a turning point in this regard, not just by academics and politicians, but by the inhabitants of Colombia's 'indigenous capital' as well. The politics of multiculturalism – e.g. the recognition of indigenous identities, the protection of cultural traditions, and economic support towards indigenous communities – to a large extent initiated in 1991, have a positive effect on the relationship between the Wayú and the state (and how it is experienced by Uribian citizens). This research shows that group rights can indeed work to encourage alienated minorities to come to identify with the larger political unit (Kymlicka & Norman 2000: 37).

The fact that people generally experience Wayú-state relations as something positive can be a sign of the *greater inclusion* of the Wayú within the Colombian society. However, as outlined in chapter 1, within this research 'greater (democratic) inclusion' means the accommodation of cultural difference on the *basis of equality*. Here, we touch upon a central theme within political philosophical debates on multiculturalism that evolves around the question how to balance the promotion of equality with the accommodation of difference, and if such a balance can even exist. Several influential theorists have argued, albeit on different terms, that the reconciliation of liberal

individualism with the recognition of cultural difference is indeed possible and should be pursued (e.g. Taylor 1994; Kymlicka 1995; Parekh 2000; Benhabib 2002). My personal philosophical view on multiculturalism is strongly influenced by Benhabib. Prior to my fieldwork I read *The Claims of Culture* (2002) and became convinced that 1) multiculturalism should be aimed at the democratic *inclusion* of minority groups; 2) groups should not have the right to preserve ‘their’ culture, individuals should have the right to express their cultural identity and attach oneself to cultural groups. If we acknowledge the hybridity and polyvocality of all cultures we can surpass the ‘freezing’ of cultures and ‘mosaic’ multiculturalism (Benhabib 2002). Instead of cultural preservation, multiculturalism and group specific rights can be aimed at including minority groups on the basis of equal citizenship. With their individual rights protected, minority members would have the right to attach themselves to a certain group and the freedom to choose not to – i.e. ‘the right to exit’ (cf. Kymlicka 1995, Benhabib 2002, Levy 2000, Eriksen 2001).

Regarding Wayú customary law, the right to exit would mean that Wayú individuals have access to the state law (Levy 2000). We have seen that in Uribia – at least theoretically – the state law is accessible to all, and the right to exit thus ‘prevails.’ The national law is a ‘real alternative’ to Wayú Uribians, who are aware of this option and at times apply it. The extent to which people make these choices and why has not been treated extensively within this thesis and is one of the possible themes for future research. It has been pointed out that the choices people make are always embedded in mechanisms of social control (Simon Thomas 2013: 40), and it requires further investigation to examine to what degree the principle of individual autonomy truly prevails in practice.

In the introduction of this thesis I have mentioned that, initially, Colombia (and several other Latin American countries) granted group rights to indigenous peoples so that they could retain their ‘traditional’ customs and institutions (Assies 2000: 3; Van de Sandt 2003: 128 note 5; Sieder 2002: 199). This does not match flawlessly with the acknowledgement of the relational and hybrid character of cultures. However, the local implementation of indigenous rights can indeed conform to these principles, as is shown by the way the state is involved with Wayú customary law in Uribia. Locally, state institutions like the C.J. do not deliberately work to preserve Wayú traditions but are actively influencing the ways in which these ‘traditions’ are practiced. The mayor, the

highest political authority within the municipality, intermediated between conflicting families, thereby conforming to Wayú legal norms. This is just one example of the (legal) hybridization that is taking place in Uribia, where people like Kayla and Aarón are questioning aspects of the *Sistema Normativo Wayú*, where people claim on their individual rights as citizens while also having the right to express ones cultural identity. I state that multiculturalism in Colombia's indigenous capital is contributing – the process is ongoing – to the inclusion of the Wayú Uribians within Colombia to the extent that the accommodation of cultural difference is balanced with the principle of individual equality. Notwithstanding, this is not a protocol for the successful accommodation of difference within multicultural societies in general. It is the specific context of Uribia that makes possible the delicate reconciliation of legal pluralism and equal citizenship.

Among other scholars, Benhabib is part of the 'sense-making' framework from which I interpreted legal pluralism in Uribia. In relation to this research, an important characteristic of my own "culturally mediated and historically situated" *self* (Rabinow 2007: 6) is the value I attach to individual freedom. Consequently, I do not support the state forcing individuals to adapt to certain 'cultural' standards, but neither do I wish for other collectives to restrict individual rights and freedoms. Off course, the lives and choices of individuals will always be embedded in certain mechanisms of social control, which makes it difficult to determine to what extent states can truly provide equality. Nonetheless, the *principle* of equality is a political premise within liberal democracies. Concerning group specific rights, the *principle* of the right to exit should be a premise. Liberal ideals such as individual autonomy should be defended, but at the same time we should acknowledge that "there are limitations to our ability to implement and impose liberal principles on groups [...]" (Kymlicka 1992: 54). Linking these thoughts to the recognition of customary law, I conclude that forms of legal pluralism are compatible with political liberalism when the principle of the right to exit prevails. The state is thus obliged to *offer* its subjects *access* to the national law – i.e. access to citizenship. Some individuals may simply refuse the *offer*, while others may not be able to take it. If we want minority group members to be(come) aware of what liberalism has to offer, I do not think forcing these principles on them is the correct strategy. A more appropriate starting point, I believe, would be to liberate ourselves from the idea of uncontested, static and concealed cultures and to recognize that cultural hybridization is an ongoing

process in all multicultural societies. In support of the hybridizing consequences of cross-cultural contact, I will end with some inspiring words from Bhikhu Parekh (2000: 167):

However rich it might be, no culture embodies all that is valuable in human life and develops the full range of human possibilities. Different cultures thus correct and complement each other, expand each other's horizon of thought and alert each other to new forms of human fulfillment.





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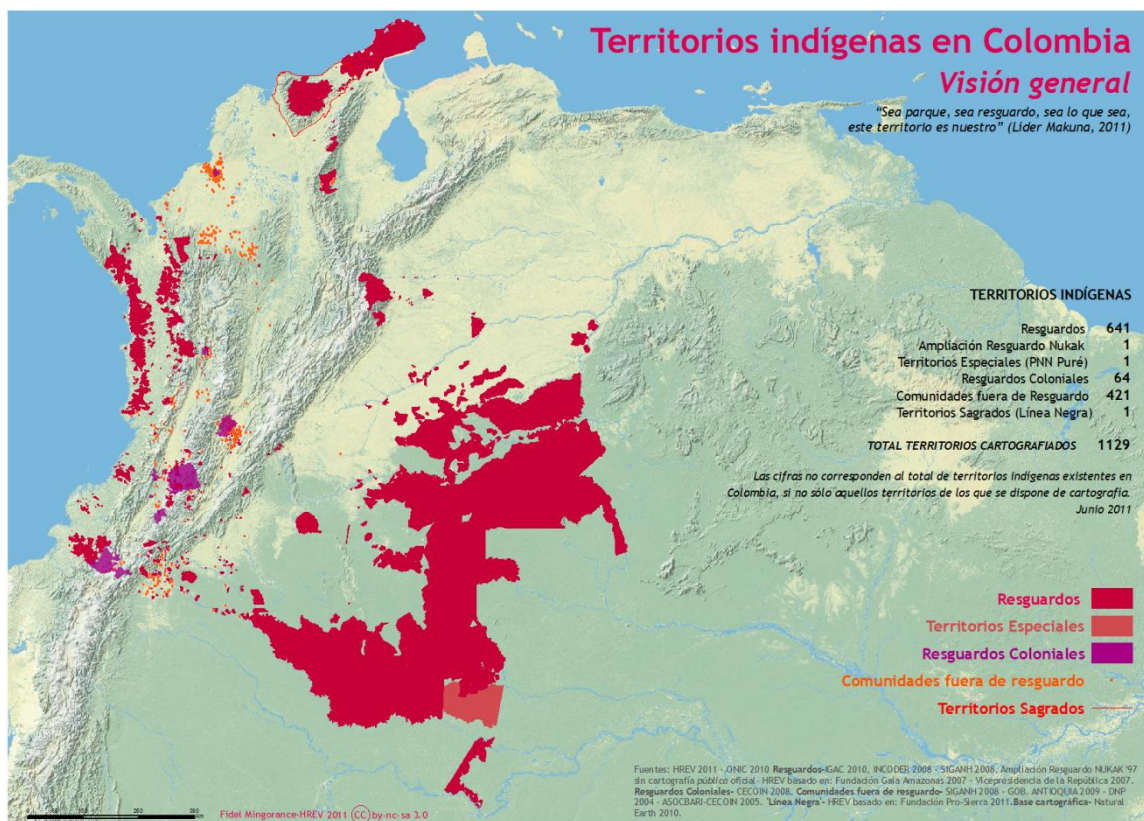
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## Appendix 1. Maps



Map 1 showing South America, Colombia highlighted



Map 2 Colombia's Indigenous territories, official *resguardos* are marked red





Map 3 showing Colombia, the department La Guajira highlighted



Map 4 showing most of the town Uribe (the 'urban' zone)

**Appendix 2. Photos**



**Photo 1 showing my Uribian "bedroom"**



**Photo 2 Welcome in Uribia, the indigenous capital of Colombia**

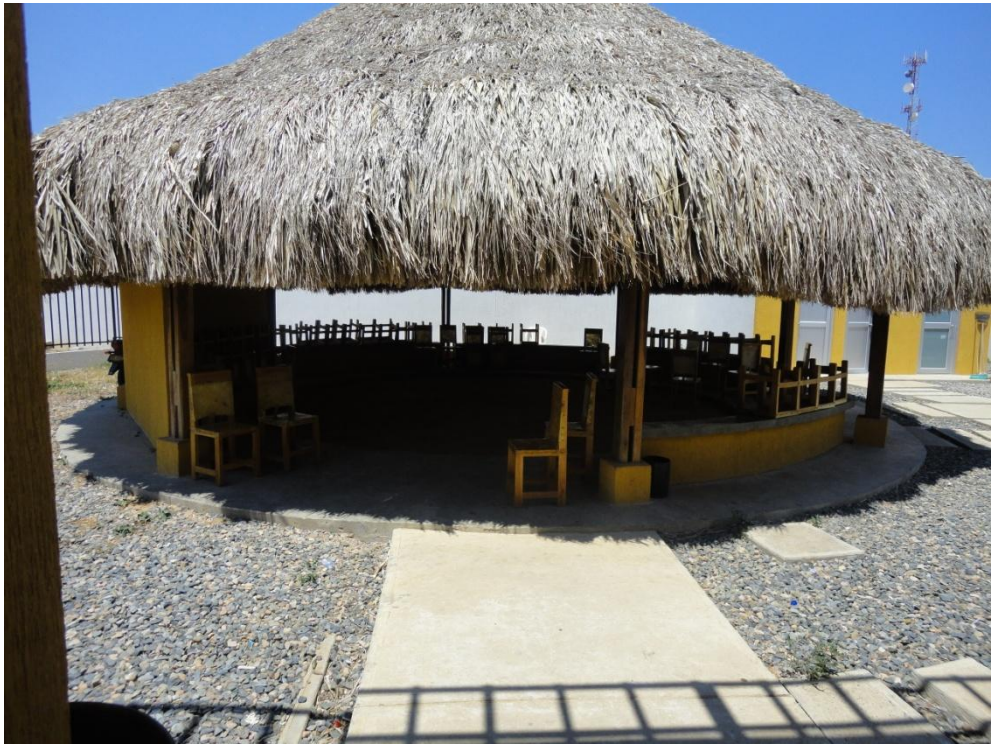


Photo 3 “Kiosco de Conciliación” at the Casa de Justicia, where arreglos take place.



Photo 4 A family gathering in the community of Lamalaa, in the Urban zone of Uribia.