

# Justice Administration based on Indigenous Law in the Miskito Community of Karata, North Atlantic Coast of Nicaragua



Sandra Carolina Rojas

Thesis Submitted for the Degree:

Master of Philosophy in Indigenous Studies

Faculty of Social Science, University of Tromsø

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Sincerely,

Sandra Carolina Rojas

## **Acronyms and Local Terms**

### **Acronyms**

CEDAW	Convention on the Elimination of all form of discrimination against Women
CEIMM	Centro de Estudios e Informacion de la Mujer Multiethnica – Center for studies and information of the multiethnic women
FGD's	Focus Group Discussions
ICCPR	International Covenant on Civil and Political Rights
OAS	Organisation of American States
FSLN	Frente Sandinista de Liberacion Nacional – Sandinista National Liberation Front
LOPJ	Ley Organica del Poder Judicial – Organic law of the judicial system
RAAN	Region Autonoma del Atlántico Norte – North Autonomous Atlantic Region
RAAS	Region Autonoma del Atlántico Sur – South Autonomous Atlantic Region
RJF	Rural Judicial Facilitator
UN	United Nation
URACCAN	Universidad de las Regiones Autonomas de la Costa Caribe Nicaraguense – University of the Autonomous Regions of the Caribbean Coast of Nicaragua
YATAMA	Yapti Tasba Masraka Nanih Aslatankanka – Descendants of the Mother Earth

### **Local Terms**

Dama Pain	Oldest person in the Council of Elders
Kaiki Ikras	Homicide
Ministerio Publico	Justice Department or Attorney General
Karata Luhpia	Child of Karata – Person born in Karata or one of his/her parents is a member of the Community
Pana – Pana	To work hand in hand
Sukia Mairin	Female traditional healer
Sukia Waitna	Male traditional healer
Talamana	Payment for blood
Tawan Almuka Nani	Elders
Wihta	Representative of the Community and Responsible of Justice Administration in the Indigenous System of Law

## Abstract

This thesis discusses the Justice Administration system in Karata and the influence of Positive law over the Indigenous law or vice versa. The research was based primarily on participatory observation, focus group discussion, interviews with key person and literature review regarding Indigenous law, legal pluralism and conflict resolution.

The conclusions reached was that Justice Administration in Karata is carried out by an administrative body composed by the Wihta, Elders, Communal Police, Religious leader and Director from the Primary School, with the responsibility to maintain peace and social harmony in the community by the use of sanctions and punishment based on their customs and traditions such as public shame, *talamana* – payment of blood and exile. The Indigenous system of law has experienced transformations that are evidenced during the oral hearing by the incorporation of elements from the Positive system of law such as the principles of orality, immediacy and publicity among others, that requires the Wihta to have basic legal knowledge, due to the coordination/collaboration existing between authorities of the Indigenous system and the Positive system of law.

In relation to the knowledge and understanding of the Indigenous system of law and the Positive system, the community members are aware of the existence of the Positive law and have basic knowledge of the human rights instrument. Yet, the members of the community prefer the Indigenous system of law and use the Positive system as a last resort when they claim that their standard human rights have been violated in the Indigenous system.





# **Chapter One**

## **Introduction**

The Indigenous system of law is an area of study that has not been researched on the Atlantic Coast of Nicaragua, even though the National Constitution recognized the existence of this system of law. As a legal remedy proposed in attempting to resolve the crisis of the relationship of Indigenous People with the justice system, one has to understand how it functions as a mechanism for the Indigenous People to gain control over their justice system and to support traditional laws and ways. This dual legal system is considered necessary and entirely appropriate within the general goal of an autonomously indigenous society like the Miskitos in Nicaragua.

### **1.1. Problem Formulation and Research Questions**

In Nicaragua, there is a favorable legal framework in terms of indigenous rights that recognizes legal plurality. The Political Constitution endorsed in January 1987, in articles 5, 180 and 181 contain a series of principles concerning individual and collective rights that guarantee the protection of Indigenous Peoples and Ethnic Communities on the Atlantic Coast of Nicaragua and recognized the nation as multicultural, pluriethnic and multilingual. In this context, the Atlantic Coast has by law a unique political, administrative and organizational structure that allows it to integrate different kinds of institutions from which power is exercised at various levels: Central government, Autonomous Region, Municipal and Communal government.

Legislation such as Law 28, Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua, recognizes the rights of Indigenous Peoples to their own norms, practice and self-government through a special regulation. This special regulation reflects the particularities of the communities of the Atlantic Coast of Nicaragua in accordance with article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Human Rights Declaration which has been ratified by the Nicaraguan State. The implementation of these practices has as an ultimate goal to restore the internal order of the community and the individual reinsertion into communal life.

The constitutional reforms related to the autonomy process, respect of indigenous rights and cultural diversity of the Indigenous Peoples and Ethnic Communities in the Atlantic Coast of Nicaragua is what motivated this investigation. The objective of the thesis is to obtain an in-depth analysis of administration of justice that is applicable in this unique cultural community based on their traditional system of law.

The administration of justice in the community of Karata is applied on the basis of Indigenous law, establishing norms and sanctions according to their traditional system of administration of justice, along with using elements from the Positive law. Despite defined fields of action, one might suspect some kind of coexistence or combined use of these two types of legal system that varies according to age, ethnic identity and attachment that the Indigenous Peoples have to their culture and community depending on the type of issue at hand.

In line with these assumptions, this study asks the following key research questions:

1. What is the traditional organisation that exists in Karata, and how is it organized?
2. To what extent does the Positive law influence the Indigenous law and vice versa?
3. What criteria do the Wihta use to impose sanction? And, in case of non – agreement with the parties, where do the plaintiff or defendant go as the next step?
4. Is there any coordination between the Indigenous and the Positive systems of law?
5. Is there any harmonization between the two systems of law?

## **1.2. Objectives**

### **General Objective**

To determine the form of Justice Administration based on Indigenous law and Positive law in the Miskito community of Karata.

### **Specific Objectives**

1. To describe the traditional organisation of justice that exists in the Indigenous Community of Karata.
2. To identify the form of Justice Administration in the Community of Karata based on Indigenous law.

3. To analyze the influence of Positive law on the Indigenous law in terms of application of norms and sanctions.
4. To analyze the knowledge and opinions that the Karata community members have on the two systems of law.

### **1.3. Significance of the Research**

This study will give an insight into the administration of justice based on Indigenous law, norms and practices. Also, it will be an important step toward understanding the importance of the traditional system of law for the Indigenous Peoples in Nicaragua. In addition to the legal importance of this subject, the result of this investigation can be useful to the Regional Council and other sectors interested in consolidating the autonomy process on the Atlantic Coast of Nicaragua and the development of their multiethnic and pluricultural population.

### **1.4. Methodology**

Methodologically, this thesis is based on a qualitative approach. In order to obtain and access both primary and secondary data sources, fieldwork was necessary. Different approaches have been used for the fieldwork part of data collection. Individual interviews, small focus group discussion (FDG's), informal conversations, and personal observations were employed. Informants were selected on the basis of their knowledge about the issues concerned, their positions as local leaders, as leaders of traditional social organisations, as heads of religious institutions, and government officials. While conducting fieldwork, the researcher must bear in mind one's own prejudices to ensure that they are not affecting one's study of the surroundings and the people (Yin, 1994:59). One way of handling bias is through preparation and understanding. This is essential in interpreting the information and of "staying on target" (Ibid). Fieldwork and data interpretation can be influenced by the researcher's social and cultural background. First and foremost, the researcher is a member of the community of Karata. This background might have influenced the data collection and interpretation in the sense that I might have taken some of the important things for granted. For example, I realized that throughout fieldwork, I viewed *talamana* practice from the Native's eyes and when analyzing the data, it struck me such that I had to contextualize it, how one would interpret it from the 'Western eye'. This is due to a bias that native researchers face an 'emic' perspective that creates expectations

by community members that the researcher knows cultural practices. The other aspect has to do with my gender. I am one of the few female researchers who conducted study in Karata. Although that was not a serious issue, I encountered some instances in which I was asked personal questions e.g., marriage status and age. My previous knowledge of the community and my father's role in the community helped me to have access to information and documents that would be difficult or impossible for an *outsider* researcher. The researcher might also have some bias due to her profession as a lawyer trained in the Positive system. This made me compare most of the things I learned in the Indigenous system with the Positive system and may have made me overlook some aspect of the Indigenous system though I tried to be open – minded. All techniques used for data collection is described below.

### **Participant Observation**

Miller and Brewer (2003: 222) define participant observation as a technique that involves research-led observation of the social world, while simultaneously participating in it. Good field researchers are intrigued about details that reveal “what is going on here” through careful listening and watching. Silverman (1993:30) noted, “if you go to the cinema to see action (cars chases, hold –ups etc), then it is unlikely that you will find it easy to be a good observer. As such, the researcher prepared a list of variables to observe. These includes procedures for handling cases, principles of criminal law applicable in Indigenous law system, existence of coordination and collaboration of the two systems of law and by observing the behavior of the complainant, defendants, the Wihta<sup>1</sup> as well as the Elders and Religious leaders during court cases and in everyday contact. Through this technique, I observed that summon is given out within twenty-four hours prior to the oral hearing. The other thing I observed is the fact that the church has an influence in the daily activities of the community members. Throughout the entire observation period, I noted things that I observed and considered would be important to remember in writing my thesis.

During fieldwork I participated directly in activities regarding religious aspects, education, and got together with the members of the communities, first as researcher and then as

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<sup>1</sup> The Wihta is the representative of the community and the responsible to administrate justice. In the exercise of his function he coordinates with the Elders and Advisory Board to solve conflicts that emerge between members of the community and surrounding, with the assistance of two members of the community elected in a General Assembly known as communal police. This position corresponds to the judge in the Positive system.

a member of the community. I used this method to collect information on the elements within the Positive system of law that influence the decision of the Wihta. By using this method, I observed similarities and differences of both systems, regarding the participation of plaintiff, defendant, and the use of principles of criminal law and the sanction that each system imposes on the offender.

In Bilwi, I had the opportunity to participate in a workshop, whereby the Supreme Court of Justice was training Wihta's from ten neighboring communities in gender, leadership, conflict resolution and basic aspect of the criminal law as part of the capacity building programme. The Rural Judicial Facilitators (RJFs) is a body to the service of the administration of justice. In the case of the Atlantic Coast of Nicaragua the Wihta holds the position of RJF. The RJFs programme is part of the cooperation agreement between the Supreme Court and the Organisation of American State (OAS) to establish the foundations of a program, which should focus on improving access to justice in rural areas. According to the laws, the Supreme Court of Justice carries out, coordinates, and supervises the system of RJFs. Currently, the coordination of this programme is assured by a representative of the OAS with whom I had an informal meeting.

## **Interviews**

Field interview is one of the techniques that have been used in this study. This involves asking questions in either unstructured or structured interviews. The latter is whereby questions are asked in a structured format and unstructured interview is whereby the aide-memoire is used to remind the researcher as s/he continues with the questions. Questions are generally open-ended in order to gain richer information about attitudes and behavior (Miller & Brewer, 2003:167). I planned to interview key persons in the community who would give me information. For example, I planned to interview the Wihta, the Religious leader and the President of Regional Court of Appeal. In order to cross-check data, I also interviewed an indigenous lawyer and a historian, though they were not on my initial list of respondents. They gave me much information through informal conversation and interview regarding my area of study. In addition, I conducted eight open-ended interviews (seven in Spanish and one in Creole). As stated above all the respondents are people active in the public debate, such as community leaders, including women. Each interview took place between me and the respondent. The majority of the

interviews were held at the respondents' places at their convenience. The interviews lasted from two to four hours.

### **Focus Group Discussion (FGDs)**

FGDs are defined as a research approach whereby some individuals are selected to discuss together, in a focused and moderated manner, the topic under research (Miller & Brewer, 2003:120). A total of three FGDs were conducted at different times and geographical locations. Each group had a different number of respondents due to the fact that some failed to turn up. For example, the first group was composed of five members, the second group of three members and the third group of seven members. I did not plan to categorize respondents in terms of gender and age, but rather positions held in the community. The participants were allowed to use the language which they were comfortable with (Creole, Miskito or Spanish) for the purposes of self-expression. As a semi-structured technique, I felt overwhelmed to keep the discussion on track, especially because it was among multilingualists. Here, I observed that some participants dominated the discussions, though unexpected. When this happened, other participants were invited to air their views.

I ensured that most of the aspects in my set of questions were answered as put in the FGD's guide. I took notes and used a tape recorder during each of the sessions so that I could transcribe after the session without missing information. This was crucial given the fact that I'm not fluent in the Miskito language, hence, got help in the evenings from the primary school teacher who served as my interpreter and helped in further clarifications.

### **Secondary Sources**

As part of the secondary data collection, the researcher accessed and reviewed newspapers, institutional publications, unpublished material, published and unpublished research material from Tromsø University (Norway) as well as URACCAN University in Nicaragua. Although I noted that there were few research projects conducted in this field of study, I accessed University graduates research that were useful for review. In these studies the researchers concerned themselves with the discussion of the cosmology of the Miskito nation and the importance of *talamana* - payment for blood in the Miskito culture. I also accessed an essay on the concept of mediation and conflict resolution. One text that I considered important to analyze was a report of

a symposium on the theme of Justice Administration in multicultural contexts in 2005. Two magistrates, Clarissa Ibarra and Rhina Mayorga (2005), presented on behalf of the Supreme Court the result of the diagnosis regarding the administration of justice and the relation of the communal authority with the Positive system. Their focus was on the North Atlantic Coast of Nicaragua.

For the purpose of data analysis, I started data translation and data recording into a matrices table based on the questions and answers from respondents with the objective to cross-check information and identify patterns of similarities and differences from the answers obtained from various respondents. This method gave me the opportunity to extract data interpretation while on the field and to make some follow up questions where I did not understand.<sup>2</sup> For example; during one of the Focus Group Discussions (FGD's) sessions, I observed that one of the respondents was a former *Wihta* and now an *Elder*, as such I interviewed him individually even though he was not on the initial list of respondents. Data translation from Spanish to English (primary and secondary), data entering, pre-data interpretation and preliminary data analysis was done simultaneously while on the field and continued in the writing process.

Translation from Spanish to English was done due to the fact that there is an abundant literature concerning the topic in Spanish and little in English. The theory of legal pluralism was also taken into consideration since the study concerns multiethnic and pluralistic approaches to identify the existence of relationships between Indigenous and Positive law. Two case studies will be presented to demonstrate the argument that the constitutive elements of a crime are different in the Indigenous and Positive systems of law. Extracts from the corpus of raw data from my fieldwork will be used to support my argument with different degree of explicitness and will be preceded or followed by a discursive commentary by the researcher.<sup>3</sup>

## **Challenges**

As a child of Karata, collecting the information that I needed was a challenge to me, because the members of the community assumed that I spoke the Miskito language. The first question they asked was, "*Miskito aisisma?*", "Do you speak Miskito?" Being a person of mixed descent (Creole-Miskito), at the beginning it was difficult for them to accept that I did not speak the

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<sup>2</sup> See Silverman, 2005:121

<sup>3</sup> See Holliday, 2002: 116 – 118

Miskito language, but I was able to understand certain things. The Elders claimed that I had assumed my Creole identity, because I grew up practicing the culture and tradition of the Creole's ethnic group. By doing the interview, I got an opportunity to improve my Miskito vocabulary and to learn about the traditions, communal organisation and livelihood in the Miskito community.<sup>4</sup> My status as a single female under the age of thirty, with a college degree, had an impact on my collection of data during my fieldtrip. The members of the community found it shocking that a single, young female would have a Bachelor's Degree in Law. They expected that "a young woman" should be focusing on establishing a family, since it is a custom and tradition in the region, especially in the Miskito ethnic group, where girls are engaged or married by the age of seventeen.

The time scheduled for my arrival to Karata was not the best, because three weeks before my arrival, the General Assembly of Karata approved their statute which decides the procedure to elect authorities and the way administrative issues are going to be carried out from that day forward. This created displeasure within some members of the community, specifically the young generation who did not agree with the procedures to elect their highest representative. Once I presented myself to the town of Karata with a letter from the Community of Karata Board of Directors, whose central office is located in the city of Puerto Cabezas, the community thought I was there to "spy" on them. However, I clarified this misunderstanding in the meeting and subsequently, during our focus group discussions and interviews. I explained to them the purpose of my work and that my visit had to do with my university study.

The mediation process held by the Wihta was in Miskito and Spanish. It was not difficult for me to understand the process and to observe the principles of law that were applied in this process. In terms of the existence of records by the Wihta, it is not part of the Indigenous law to have files or transcripts of cases solved by the Indigenous system, because of the predominance of oral system in Indigenous Law. There are referents from the Wihta to see that the plaintiff and defendant sign an agreement in the mediation process and that this is valid in the Positive system in case of non-compliance by one of the parties involved in the process.

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<sup>4</sup> See also pages 36 – 37 referring to the importance of ethnicity in a communal setting, which will give you a view of the ethnic complexity in the Atlantic Coast of Nicaragua.



## **Ethical Considerations**

During fieldwork, I informed interviewees and participants of the focus groups about the general purpose of the research. I informed them during a prior visit to the town of Karata when I contacted the town leaders. By contacting the possible participants beforehand, they would have time to reflect on any concerns they might have about my research topic. I guaranteed anonymity to the possible participants that would present their cases to the traditional authorities. This research was to analyze the Justice Administration based on Indigenous law. It was not to expose nor discredit the possible participants, nor to cause them embarrassment in their future life in Karata. The town of Karata is small and although I may not mention the names of the persons who presented their cases, it is possible to recognize the cases and the peoples involved in the process. However, even though the people involved in the process may be identified, that would not jeopardize my research, because one of the elements of the traditional system of law is public shame. In addition, public knowledge whereby the community is informed of what is happening in the community is another element of the traditional system of law in the town of Karata. With the Positive system, the newspapers, local radios and television inform the town by mentioning proper names when they are discussing legal processes, with the exception of minors involved in criminal activities.

## **1.5. Thesis Outline**

I have structured this study into five chapters. The first chapter sets an introduction to the thesis and outlines the themes and problem formulation of the study. The first chapter also articulates the methodology, thesis objectives, and legal and structural approach. Here, I discussed briefly the motivation for my topic in connection with my contact with elders, representatives of the Supreme Court of Justice, Indigenous Lawyers, Religious leaders and traditional Judge in the Community of Karata. In this chapter I also included the methodological part of the research – methods of data collection, challenges, strategies and methods of data analysis.

In the second chapter, I reflect and expand on the legal and social research techniques. These techniques are relatively broad in content and cover the theoretical approach concerning legal pluralism, theoretical approaches on ethnicity and ethnic relations, and literature materials on the administration of justice based on Indigenous law, legal framework and autonomy process in Nicaragua.

In chapter three, I employ some of the theoretical concepts and categories from chapter two. I also focus on the Social Organisation and Political Structure of the Indigenous Community of Karata, the background of the study areas, geographical setting, socio – economic dynamics and social organisation of the Miskito community, and their relation to the local, regional and national levels in a pluriethnic and multilingual context. This chapter gives vital information about the influence of the Church in decision-making processes, the organisation of the traditional system of law and political structure of the indigenous community. Also, I give an insight on the National and Regional discourse on ethnicity and local realities in a multiethnic society.

In chapter four, I will concentrate on the administration of justice and conflict resolution in a multiethnic and pluricultural context. This chapter again makes references to some of the conceptual and empirical issues contained in chapter two and three in detailing the form of the administration of justice based on the Indigenous system of law by analyzing case studies and the influence of Positive law in the resolution given by the traditional Judge. I also analyze in this chapter the relationship that exists between these two systems: Positive law and Indigenous law.

I conclude the last chapter with the main themes of the thesis with particular emphasis on Justice Administration based on Indigenous law. This chapter also provides some strategies that may contribute to strengthening the coordination and collaboration between the two systems, Positive law and Indigenous law, as an integral part of the autonomic process on the Atlantic Coast of Nicaragua.

In the following chapter the study will focus on the theoretical approaches and review and take in consideration other authors' point of view concerning the Indigenous law system.

## **Chapter Two**

### **Theoretical Approaches and Literature Review**

The term, legal pluralism, has been used for many years in various ways without a widely accepted definition. In this chapter, I will discuss Indigenous law based on legal pluralism's perspective and pinpoint certain views regarding this topic. I will also illustrate Indigenous law with cases from Africa, Europe and America and I will demonstrate that the unitary myth of law has been challenged by the coexistence of multiple systems of law, whereby Indigenous Peoples maintained social order without the intervention of Western law and in some cases managed to incorporate these practices in the National legislation.

#### **2.1. Legal Pluralism**

Legal pluralism is a situation where two or more legal systems coexist in the same social field, interacting, interpenetrating, mixing or overlapping. Sally Falk Moore (2005) claims that, "the social structure" is composed of many "semi-autonomous social fields", the definition and boundaries of which are not given by their organisation, but "by processual characteristics, the fact that it can generate rules and coerce or induce compliance to them". Firstly, Moore presents these fields as the fundamental unit of social control that is directly connected to behavioral norms of conduct. Secondly, every individual may simultaneously belong to many social fields, which account for social complexity and thirdly, a social field is autonomous. Thus, it can resist the penetration of external norm. Its capacity of resistance is a function of the degree of independence of its members and of its force of resistance to norms originated in other fields (Dupret, 2007:5).

Sight (n.d.) in his article entitled *Legal pluralism: The essence of India's classical legal ordering* states that a semi-autonomous social field is defined and its limits identified not by its type of organisation but a character of a processual type, residing in the fact that it gives birth to norms and by constraints or incentives ensures their application. The space within which a certain number of corporate groups are in relation to each other constitutes a semi - autonomous social field.

A large number of fields of this type may be connected to one another in such a way that they form complex chains, in the same way as the network of social relations which link

individuals, may be compared to chains that have no ends. The interdependent connections of a large number of semi-autonomous social fields constitute one of the fundamental characteristics of complex societies. As stated earlier, law and norm based frameworks in any society serve to mediate social life and social dispute. Without these, the level of cooperation necessary for every day life would be difficult for social harmony.

Hooker M.B. (1975) in John Griffiths (1986:9) article entitled, *What is legal pluralism?* defines “Legal pluralism as the existence of multiple systems of legal obligations within the confines of the State”. Further, he argues that legal pluralism generally exhibits in three features:

1. The National legal system is politically superior, to the extent of being able to abolish the Indigenous system (s).
2. Where there is a clash of obligations...the rules of the National system will prevail and any allowance made for the Indigenous system will be made of the premises and in the form required by the National system.
3. In any description and analysis of Indigenous systems (presumably he means, here, by lawyers and other agents of State law) the classification used will be those of the National system.

## **2.2. Indigenous Peoples, Norms and Customs**

The existence of Indigenous Peoples and their unique rights is not derived from legislation. They had a distinct form of self-governing society long before the arrival of Europeans to this nation. Therefore, the status of Indigenous Peoples is generally agreed to be pre - constitutional, because the Indigenous People existed prior to the establishment of the national state. In this regard Saugestad (2001:305) argues that there is a working definition that has stood the test of time remarkably well, as the one given by UN Special Rapporteur, Jose Martinez Cobo (1986)<sup>5</sup> who says that:

Indigenous peoples, communities and nations are those, which, having a historical continuity with pre – invasion and pre-colonial society that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or part of them. They form at present non – dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as people, in accordance with their own cultural patterns, social institution.

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<sup>5</sup> See Martinez Cobo report (E/CN.4/Sub.2/1986/Add.4); Anaya , 2005:62

Similar characteristics are found in article 3 of Law 445, Law of Communal Property Regime of Nicaragua, which states that:

Indigenous Peoples are the human collectivities preserving a historic continuity with the societies prior to the colonization whose social, cultural and economic conditions distinguish them from other sector of the national society and are governed fully or in part by their own customs and traditions.

Law and legal institutions both affect and are affected by social conditions that surround them. Selznick (2005) conceives law as contributing to the fulfillment of social needs and aspirations of a society. These days, legal pluralism is often used more broadly to describe the multiplicity of formal and informal obligatory rules that can coexist in a variety of social fields. It emphasizes the multiple sources of binding rules that exist and various social milieus in which they are operative. (Ibid: 245 – 247).

One of these systems is the Indigenous law or the traditional forms of law developed by Indigenous Peoples that have been in use for thousands of years before the arrival of Western Society and their system of law. Michael Asch and Colin Samson (2004) responded to Adam Kupers' (2003) article entitled, *The Return of the Native*, by stating that indigenous rights arise as a consequence of the recognition that peoples lived in a society prior to the European settlement and the acknowledgment that certain rights flow from that fact (Asch & Samson, 2004:261). Therefore, this system establishes law as regulations on usage and interaction with land, definitions of responsibilities of families, relatives and members of the community.

Guillermo Cabanellas de Torres (1992) defines Indigenous law as, “A source of law consisting in non written legal norms, imposed by the customs”, while International law conceive it as “Practices generally accepted as law”. Based on these definitions, one could say that Indigenous laws are legal norms born from the exercise of customs and establishes rules of conduct for specific social groups. Its application is based on the conscious appropriation by Indigenous Peoples.

*To sum up, Indigenous law is conceived as:*

1. A set of legal norms, since they establish rights and obligations for the members of the group, which are accepted and imposed socially.

2. It is born from the custom, and it must be followed continuously.
3. It is a mechanism that permits the members of the communities to resolve their conflicts in a communal scope.

The main element of the Indigenous legal system of conflict resolution are the administrative bodies composed by several peoples; legitimized norms of conduct; a system of sanction and action oriented to the rehabilitation and reintegration of the transgressors; oral norms, and procedures. For the enforcement of these norms and sanctions, the existence of a traditional organisation is necessary to ensure that rules and expectations are clear to all. Rules are learned from ritual ceremonies and community Elders who are considered to be the ultimate authorities in the communities and also the bearer or custodians of the law. These Elders serve as a valuable resource to the community with the responsibility to pass on their culture and tradition to future generations. Their duties are to get together, advise the Communal Judge, and resolve conflicts that affect the community or that arise between its inhabitants.

In indigenous communities the concept of justice is part of a worldview radically different from the Western tradition that involves a different way of conceptualising the relationship between the Supreme Being, the universe and the individual. The Western tradition regards humankind as the centre of the universe. In indigenous cultures the individual is just one other being, who is expected to live in harmony with other creatures and Mother Earth. As Dr. Armando Rojas, one of my key informants says: “Justice is a word that is absent in the culture of indigenous people and in this place they use the concept of equity and equilibrium”

It is, therefore, generally understood that justice in indigenous communities aims at the rehabilitation of the offender and her/his integration in the community. The indigenous worldviews will benefit all when promoting the responsibility and the healing of the victims, the transgressor and the communities. As we could see, this worldview places special emphasis on harmony and equilibrium. In the context of dispute resolution this is important; since the main objective of these communities is to restore equilibrium.

### **2.3.Conflict Resolution**

Administration of justice is a scope in which Indigenous Peoples and Ethnic Communities converge intimately and are bound to their traditions, their world perspective, and interaction with nature and the relationship with other peoples. It is a device for conflict resolution and maintenance of peace. Any dispute existing or arising between or among persons which cannot be settled by the parties affected may first be brought before the traditional authority who shall try to settle the matter at dispute. In case there is no agreement, the matter may be submitted to the leaders of the community in accordance with their traditions.

Mediation is one of the most important conflict resolution mechanisms used in traditional law. It involves two parties who jointly invite a third party to facilitate, with the intention of reaching an agreement. However, the principles of mediation expect the facilitator to be able to understand the objectives, beliefs and perceptions of the parties – and then facilitate mutual changes of position until the two parties can agree.

The process is non adversarial and the mediator facilitates discussion between the two parties in an environment that promotes resolution of underlying conflicts and keeping the relationship intact. The communication process is fluid and allows for discussion of multiple viewpoints of the problems or conflict from those directly and indirectly affected. The process is done in several stages, which are discussed below. The first stage is likely to enable each party to "hear and understand" the other. Very often, the problem is only real in terms of what the other party is assumed to think. Therefore, listening skills are crucial. When the parties understand each other's position, the next stage is to understand each other's objectives and in particular, what is important to them about those objectives. How the “real” objectives could be achieved in a manner acceptable to the other party. Although information is heard freely and discussed openly in setting, once a resolution is reached the matter is considered closed.

The exercise of these traditional practices belongs to an organized system with the responsibility to give an answer to solve the conflict presented to them, in a peaceful way, such as the traditional authorities. This organized system is composed by traditional authorities, who

hold important positions that contribute in the maintenance of harmony and peace restoration in the community.

Laura Nader (1990), who conducted a study about *Justice and control in a Zapotec mountain village*, states that harmony can come in many forms. This can be part of a local tradition or part of a system of pacification that has diffused across the world along the Western Colonialism, Christian mission and other macro scale systems of cultural control with emphasis on conciliation and the recognition that resolution of conflict is inherently good. The contemporary relationship of harmony ideology, local solidarity and resistance is embedded in the social organisation of the local community and reflected in the working of its court.

Nicaragua is not the exception in the application of this particular form of legal pluralism. Cases such as Sardinia's people in Italy (Moore, 2005) are excellent examples of this system; whereby two strong thriving legal systems operate within the same society, that of the Italian State and the Sard Shepherd. However, the legitimacy of the latter is not recognized by the State. They employ the mechanism of the State system in the effort to settle disputes, resolve conflict, and defend their interest and score against an opponent.

The Sardinian people avoid the legal system in favour of their own in cases related to theft, as an alternative form of conflict resolution and the creation of a number of institutions and processes within the Indigenous local political system to regulate livestock thefts and to minimize escalation. This system comprises a range of roles, mechanisms, procedures, norms, values, rules and agencies for dealing with disputes.

As noted above, traditional forms of administration of justice aim at solving conflicts between the parties, rather than deciding the legal aspects, in terms of law. Justice then becomes a process of persuasion with the emphasis on reasonable behaviour of all concerned in the spirit of give and take. The successful end of this process is a resolution, which both parties formally agree to accept and observe.

Today, Globalization and Development are both accompanied by efforts to expand Western information. They frequently encounter other forms of information, being influenced by both sides of these processes (Glenn, 2004:33).



One can also speak of legal pluralism in the English context, where two legal systems overlap. Findings from Yilmaz (2002), indicates that Muslim law in Britain exists both at official level, where recognition is given by the legal system, and at unofficial level which the official legal system does not recognize. Unofficial Muslim law has been applied in non-dispute situations of everyday lives of Muslims. Muslims arranged their marriages and divorces according to the rules of Muslims' laws and customs. Muslim individuals apply relevant law in various contextual situations aiming to meet the demands of different overlapping normative orderings. Although English law remains the official law of England, it is not the sole law that singularly governs and regulates all legal sides of familiar relationships and other legal relations. Unofficial Muslim law can exist where the state provides a parallel rule or has developed no rule concerning it. One can speak of legal pluralism in the English context since unofficial laws find ways to survive in an alien milieu whether the official law recognizes the reality or not. (1) In that context, keeping their own law unincorporated, Muslims have control over their own law without outside interference. Therefore, Muslim law in Britain exists both on an official level, where recognition is given by the legal system, and on an unofficial level where the official legal system refuses its recognition. The author further observed that Muslims, at the same time, use those aspects of the official law, which benefit or assist them in maintaining their unofficial law.

In Nicaragua, the Supreme Court of Justice is aware of the existence of a traditional system of administration of justice on the Atlantic Coast, and the use of this system by Indigenous Peoples. The Indigenous Peoples face challenges that hinder them from using the Positive System; consequently, due to the lack of finance for transport to the Court and money for food. The Indigenous system allows them to elect a community member who knows community customs and beliefs, and conflict resolution mechanisms to carry on the proceedings in their native language.

Integration of traditional systems of law into the formal system of law is carried out by the States around the World. In many parts of Southern Africa, including Botswana, Lesotho, and Swaziland, they are examples of the way these two systems of law function, where the courts of traditional chiefs are well integrated into the authority and power structure of government.

Chidi Anselm Odinkalu (2005), in his article entitled, *Pluralism and the fulfillment of need in Africa* states that in Botswana, dispute resolution in the traditional courts aimed at preventing the rupture of relations, in addition to righting the wrongs. The process starts at the family level where the families or relatives of the disputing parties try to prevent the dispute from getting out of control and becoming a matter of public knowledge. If the dispute cannot be resolved at family level, it goes to the ward *kgotla* that is the traditional court, which is a localized court in the area where the defendant resides. Most of the members are usually relatives of the disputing parties in the ward if the complainant and the defendant reside in the same ward. If the complainant comes from another ward, his own kindsmen will normally accompany him. In case the matter cannot be resolved at the ward *kgotla*, it goes to the main *kgotla* presided over by the chief. The *kgotla* exercises considerable statutory jurisdiction over criminal matters, extending to powers of imprisonment for up to four years.

In Sierra Leone, chiefdoms are recognized as the basic unit of administrative and judicial power within the State. Section 170(4) of the National Constitution of Sierra Leone states that the existing law shall comprise the written and unwritten laws of Sierra Leone as they existed immediately before the date of the coming into force of the Constitution and any statutory instrument issued or made before that date which is to come into force on or after that date. In most Common law African countries, customary arbitration is recognized as a mechanism of judicial settlement and the integrity of its decisions is preserved by the formal State system through judicial doctrine (*res judicata*) that precludes re-litigation of matters that have already been judicially settled (Ibid).

Similar features are observed in America with the Navajo political decision-making process at a local level. According to the Indian and Northern Affairs Canada Institute (n.d) this system began in 1892 and relied on Navajo common law and consensus-oriented judicial procedure with the aim to restore harmony. By the early 1980s, members of the judicial branch recognized that, in order for the court system to regain its legitimacy and effectiveness, it needed reform. In 1981, the Chief Justice of the Navajo Supreme Court began formally reintegrating traditional Navajo law into the Nation's court system, a policy which received official support with the Navajo Tribal Council's passage of the *Judicial Reform Act* four years later.

Navajo leaders created the Navajo Peacemaking Division, a forum for community-led consensus-based dispute resolution. Their goal was to provide an alternative forum for conflict resolution with techniques drawn from the Navajo philosophy of *K'e*, which values responsibility, respect, and harmony in relationships. Instead of a single judge adjudicating guilt or innocence and imposing a sentence, Navajo peacemaking is characterized by a participatory process in which the affected parties work with a peacemaker (a group of whom are assigned to each Navajo court district) to resolve their own problems. This unique integration of Navajo and Western laws occur on a daily basis. For instance, bar membership rules require formal training in Navajo common law as a condition for practicing in Navajo Nation courts. The Navajo courts' preference for indigenous law and traditions result in a focus on "equity", that is not necessarily synonymous with "equality." Rather, it focuses on the well-being of the parties to the suit and of their families and clans.

This legal pluralism in Canada is observed by Asch (1999:35). The author says that the Supreme Court has developed a test to ascertain how to balance Aboriginal rights with legislation coming from State law.

As Asch relates in the following way (Ibid: 42):

The Supreme Court is considering that the evaluation of evidence must become sensitive to cultural difference. And, as new litigation comes before the courts and as negotiation on relation with Aboriginal peoples continue, this contemporary approach to understanding aboriginal culture will be adopted more broadly as a means to reconcile Indigenous and State law.

These reforms are crucial. They recognize the importance of custom, and tradition orally transmitted as valid evidence in State Court such as in *Delgamuukw judgement vs. British Columbia* in 1997.

Like Canada, the Eastern Saami or Skolta Saami Community on the border of Norway and Finland have had their own court system so – called *Kotakäräjät*, Saami Court. Findings from Korpijaakko (1999:82) clearly indicate that the Saami Court System had administered justice among the Saami totally apart from the official Swedish system. The model for this Saami Court was indeed found in the beginning of the Twentieth Century. Among the Skolta Saami,

this court had jurisdiction over all possible court cases in the village, and it was naturally based on Saami Customary law, that is called Norraz, Sobbar.

In the Saami village of Rounala it is possible in many cases to reconstruct how this private settlement has been achieved. Sometimes one can notice that such settlement had been achieved just before the time for the court session. The villagers from different parts of the village had in good time come together to the market place because of trade and other activities. In some cases it was noticed, the villagers had their priest or some of the permanent jury members or also some highly respected older villagers to help them resolve their dispute. Anyway, such a settlement in principal had quite the same effect as if the official court had made the decision (Ibid: 72).

In some Saami villages beside Rounala, the existence of a “Saami Court” is however indisputable. The case is the Saami village of Inary. Priests also wrote in their memoirs from the Sixteenth century, that the villagers seldom appeared before the official court session but rather appeared in their own court session, the “Saami Tent”. The aim was to solve the dispute. If this did not succeed, the parties sent the matter to their priest for settlement. Lastly, if the priest did not succeed in resolving the case, it was brought before the official court. As Fellman - writes, the people of this village had been able to maintain peace and social order among themselves, thanks to “their own modest Lapp court” (Ibid: 73).

#### **2.4. Multiculturalism and Legal Pluralism**

Pluralism is gradually gaining recognition as an effective way to ensure justice and public order in indigenous territories while respecting their right to a degree of cultural and linguistic freedom. In the United Nations system there has been consensus about the importance of recognizing the negative impact of national criminal systems on Indigenous Peoples and the value of using plural legal systems as a way of addressing them. Two parallel exercises in the United Nations address this topic: ILO Convention No 169 dealing with indigenous policy generally and land rights specifically and the Declaration on Indigenous Rights, approved in September 2007. The Convention states that Indigenous Peoples have the right to maintain their own customs, institutions and the right to deal with crimes or offences according to their own

customary method and the right to have their customary laws taken into account in the application of any national laws.

It is necessary to mention that Nicaragua is one of the few Latin American countries that have not ratified ILO Convention No 169. In 1987 the country adopted a new constitution and an Autonomy Law (Law No 28), both of which were major steps in the formal recognition of indigenous rights on the Atlantic Coast.

The concept of legal pluralism and customary law has a prominent position in Latin American debates (as a system that applies norms/rules and whose source is primarily of non state origin) and, in particular about constitutional and legal reform. The National Constitutions of Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela recognizes Indigenous Peoples as distinct groups with specific constitutional rights such as article 246 of Colombian Constitution, article 149 of the Peruvian Constitution and article 181 of Nicaraguan Constitution. Although these constitutional provisions have not yet been fully implemented, the Indigenous system of law enjoys a level of legitimacy and in some cases are called upon by the Civil Procedure Code or Criminal Procedure to apply local practices and customs which are based on a restorative concept of justice, which places strong emphasis on confession and apology by the offender for harm inflicted on the victim or community. The implementation of this system of law presents a perfect paradigm of pluralistic governance in a country inhabited by a multiethnic population.

## **2.5. Legal Framework regarding Human and Indigenous Rights**

The Nicaraguan Political Constitution of 1987 and its reforms of 1995 and 2000 establishes the basis regarding the recognition and protection of human and indigenous rights. This results from the recognition and ratification of the majority of international treaties and the UN Millennium Declaration by the Nicaraguan State.

The treaties from the Inter - American System of Human Rights ratified by Nicaragua include the American Convention of Human Rights, ratified in 1979, Convention on Elimination of all forms of discrimination against women (CEDAW), ratified in 1995 and other treaties

regarding capital punishment. The value of these treaties in the domestic legislation is reinforced with article 46 of the Nicaraguan Constitution, which states that:

In the national territory everyone shall enjoy the state protection and the recognition of the rights as people, the unrestrictive respect, promotion and protection of their human rights and the validity of the rights established in the Human Rights Declaration, American Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Social and Economical Rights from the UN and the American Convention of Human Rights from the Organisation of American States.

Kymlicka (2001:77) argues that the state is to take on an active role in promoting ethnic and cultural diversity. A comprehensive theory of justice in a multicultural democracy therefore has to include both universal rights as well as certain group-differentiated rights for minority cultures. He defends three sets of group-differentiated rights: (1) self-government rights; (2) accommodation rights; and (3) special representation rights. These groups' rights are stated in articles 5, 89, 180 and 181 of the Nicaraguan Constitution that create the Autonomous Regime for the Indigenous Peoples and Ethnic Communities on the Atlantic Coast and recognize their right to live and develop their form of social organisation based on culture, tradition and the preservation of their language and religion. The rights further provide rights for the indigenous peoples and ethnic communities to benefit from their natural resources, through recognition of the effectiveness of their forms of communal property and the free election of their authorities and the members of the Parliament.

According to Gonzalez (2005: 2-3), speaking from the perspective of the Nicaraguan Government at that time, there were three elements that laid the basis for the autonomous regime:

1. The recognition of universal citizenship rights (civil, political, and social), as well as specific group-differentiated rights granted to the ethnic communities;
2. The recognition of the multiethnic and multicultural character of Nicaraguan society and of national unity as the condition to enable effective implementation of universal citizenship and groups rights; and finally;
3. The promotion of new social values such as fraternity, solidarity, equality, and respect among the ethnic communities, and between them and the rest of the national society in order to create an inclusive, democratic society.

***Law 28 of 1987 established central aspects of this regime:***

**Art. 4.** The Regions inhabited by the communities of the Atlantic Coast enjoy within the unity of the Nicaraguan State, the rule of autonomy that ensures them the effective exercise of their historical and other rights, as stated in the Political Constitution.

**Art. 6.** For the full exercise of the right to Autonomy of the Communities of the Atlantic Coast, two Autonomous Regions are established in the area making up the Department of Zelaya: 1.The North Atlantic Autonomous Region...2.The South Atlantic Autonomous Region...

**Art. 7.** The territory of each Autonomous Region will be divided for administrative purposes into municipalities to the extent possible, in keeping with community traditions, and they shall be subject to the laws established for this purpose. The administrative sub-division of the municipalities shall be established and organized by the corresponding regional councils, in accordance with their traditions.

**Art. 8.** The Autonomous Regions established by this statute will have legal personality in public Law, and are subject to the relevant aspects of their national policies, plan, and orientations. Through their administrative bodies they have the following general faculties:

1. To effectively participate in the preparation and implementation of plans and programs for national development within the region.
2. To administer programs for health, education, culture, supply and distribution, transport, community services, etc. in coordination with the corresponding State ministries.
3. To promote their own economic, social, and cultural projects.
4. To promote the rational use and enjoyment of the communal waters, forests, and lands and the defense of their ecological system.
5. To promote the study, fostering, development, preservation, and dissemination of information about the traditional cultures of the communities of the Atlantic Coast, as well as their historical, artistic, linguistic, and cultural heritage.

**Art. 11.** The inhabitants of the communities of the Atlantic Coast have the following rights:

1. To preserve and develop their language, religions, and cultures. This is also stated in article 1 of Law No162 of 1993 that refers to the use of Spanish as the official language.

On the Atlantic Coast the languages of the communities are used officially in the cases established by this law in connection with article 4, which states that, the Miskitu, Creole, Sumu, Garifona and Rama languages are for official use in the Region.

6. To elect their own authorities, or be elected as such in the Autonomous Regions.
8. To scientifically safeguard and preserve the knowledge of natural medicine accumulated throughout their history, in coordination with the National health system.

Article 18 of the Autonomy Law refers to the Administration of Justice in the Autonomous Regions. This is also stated in article 33 of the Decree No3584 of 2003 - Regulation of the Autonomy Law, which says that the Communal authorities shall administer justice in their communities according to their customs and traditions. The recognition of livelihood of the Indigenous Peoples and Ethnic Communities based on historical and cultural tradition must be taken into account by the national government.

Therefore, based on Law 28, articles 4 - 8, articles 11 and 18, the Autonomy Statute focuses on the community based organisation, as an expression of social harmony and gives the indigenous peoples the right to administer their internal affairs and decide the future of the community based on their customs and traditions, through their own mechanisms, institutions and practices that can help mediate conflicts by recognizing that the communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, that can differ from other approaches.

The principle of *unity in diversity* of the Autonomy Statute has an ethnic implication, whereby Indigenous Peoples and Ethnic Communities must respect cultural diversity in their relations with the members of their ethnic group and with others. The existence of groups that are ethnically and culturally distinct has powerful effects on the management of social life and a potential to create conflict between members of the society, regarding power relationships, recognition of the system of law, languages and religion. These aspects are demonstrated when the authorities decide which one of the indigenous group systems will prevail in a multiethnic and pluricultural society.



To summarize, legal pluralism leads to the examination of the normative order, because law is not just a system of thought by which certain forms and relations are viewed as natural and taken for granted. It offers not only a more comprehensive descriptive account of the world we live in, but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions and practices. Therefore this chapter has attempted to show that two systems of law coexist in different parts of the World as a multiplicity of formal and informal obligatory rules in a variety of social fields that include the Indigenous system of law, which differs from the formal law in a number of ways. The Indigenous system is unwritten and emerges from the exercise of customs and establishes rules of conduct for specific social groups.

Conflict resolution is one of the mechanisms that help maintain law and order, with considerable flexibility when applied to particular circumstances. Any dispute existing or arising between or among persons, which cannot be settled by the parties affected, may be brought before the traditional authority who shall try to settle the matter at dispute. There is always room for disagreement about particular legal outcomes, whereby Indigenous Peoples have the possibility to take a case to the judicial system in case of no agreement or non - compliance.

The following chapter will describe the social organisation and political structure that exist in the indigenous community of Karata and the influence of the Moravian Church in the life of the Miskito peoples. It also presents the different perspectives on ethnicity both in academic and sociopolitical context in Puerto Cabezas concerning the interaction between ethnically differentiated groups. Central to this discussion are the legal and socio – cultural concepts, processes, institutions and procedures examined in the preceding chapters.

## **Chapter Three**

### **Social Organisation and Political Structure**

In the previous chapter, I addressed some important arguments written by various scholars. I also demonstrated certain cases that exist across the globe concerning legal pluralism as a theory in this study. Legal pluralism has the potential to address the interaction between Indigenous and Positive law through consideration of cultural and historical heritage by promoting social harmony in multiethnic and pluricultural society by endorsing a legal autonomy in conflict resolution and by addressing certain aspects on universal rights. I will discuss the concepts of social organisation and ethnicity, based on the point of view of Rodolfo Stavenhagen (1996, 1998) and Fredrik Barth (1969). This I will use as my point of departure for this chapter. Stavenhagen (1996) and Barth (1969) argued that for one to be a member of a group s/he must have certain groups' characteristics. Therefore, I will apply this argument on the ethnic situation of the Atlantic Coast of Nicaragua. Subsequently, I will present several understandings of ethnic identity and ethnic group relations' perspectives in Nicaraguan context.

In this chapter, I will also demonstrate that understandings of ethnic identity, ethnic group, and culture are important in a multiethnic society. I will also address the implications the above understanding could have in the social organisation and political structure as they have emerged and evolve in the context of constructing a basis for Miskitos as a multi – ethnic society with indigenous life – ways and institutions whose preservation and promotion contributes to social harmony. Thus, these structures show the cohesive elements of the Miskito society, at the same time that they present challenges for conflict resolution using Indigenous law; thereby, necessitating some recourse from legal pluralism as a route to access the aspect of Positive law.

#### **3.1. Who are the Miskitos?**

The Miskitos are a binational population located on the Eastern Coast of two Central American Countries, Honduras and Nicaragua, identified as Moskitia. According to Stavenhagen (2003), the conception of nation is based on ethnic criteria in his discussion of *Ethnic Conflicts and the Nation – State*. Stavenhagen (2003:3) declared that the defining characteristics of membership

are shared cultural attributes, such as language, religion, and the idea of a common history and they are rooted in the myth of common ancestry.

The Miskitos represent the largest ethnic group<sup>6</sup> in the Region, followed closely by Mestizos (Ladinos) of European/Amerindian descent. They are concentrated in Puerto Cabezas and other towns and villages scattered across the North Atlantic Autonomous Region (RAAN). A number of Miskitos have also settled in areas of the South Atlantic Autonomous Region (RAAS).

According to Mattern (2003:21) the Miskito ethnic group comprises of 36, 35% of the total population on the North Atlantic Coast of Nicaragua and the 4.53% of the total population on the South Atlantic Coast of Nicaragua. They are considered as a seasonally mobile population. The Miskitos have a permanent link to their land and community to which they return after short periods of labour in fishing, lumbering and domestic activities in a minor degree. They have permanent residence by the sea band and spend much time on fishing activities.

The origin of the Miskitos name is not clear. Some people claim that it originates from the British weapon named *musket* that was used during the British Colonial processes on the Atlantic Coast of Nicaragua. According to Miskitos Elders, the Miskitos are descendents from a group of people who followed chief Miskut, and who outsiders referred to as people of Miskut or *Miskut uplikanani*. Another local indigenous group, the Sumus, shortened *Miskut uplikanani* to *Miskitu*. In relation to their language, the Miskitos language belongs to the linguistic family Misumalpa. Today, it is mixed with a large number of Spanish and English words. The majority of Miskitos are bilingual. They speak the Miskito language at home or in their villages and learn Spanish at school. They are five different Miskito dialects that are recognised; four of them are used in the Nicaraguan Moskitia. The five different dialects are Tawira, Baymuna, Honduran, Cabo and Wanki. Wanki is spoken mostly around Puerto Cabezas. Tawira, Baymuna and Cabo, are spoken in different settlements in the southwest part of the country. The fifth dialect, the Honduran Miskito is typical of the Honduran Moskitia.

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<sup>6</sup> Thomas W. Pogge (1997:193- 194) argued that to constitute an ethnic group, a set of persons must satisfy three conditions: commonality of descent, commonality of continuous culture, and closure. The members of the set must understand themselves as descendant of members of an historical society (in a broad sense, including tribes, principalities and the like, as well as system of interacting tribes or principalities). They must share a common culture, or partial culture, which they take to be connected, through a continuous history, with the culture of their ancestor. See also Barth (1969:15) who emphasizes that ethnicity have to do with social selection between peoples.

Zapata (2002:25) estimates that the Miskito population today is approximately 111,511 on the North Atlantic Coast and 14,358 on the South Atlantic Coast of Nicaragua.

### 3.2. Socioeconomic Dynamic of the Miskitos

Traditionally, Miskitos are subsistence farmers and fishermen. They are dependent on once abundant populations of sea turtles for consumption, which is considered as a key resource for them. Today, the Miskito economy has changed to some extent, even though most groups' still practice subsistence agriculture (cassava, banana, plantain, beans and rice) by clearing the area for temporary cultivation by cutting and burning the vegetation and also gathering forest products such as fruits. Hunting and fishing are still common activities. They commercialize their product in the local market and to the fish companies for exportation, but many families way of subsistence on the littoral area depends on diving in the keys for lobster and shrimp, which is their main source of income. Miskitos use a traditional system of inter - communal committee whose consensus and decision-making is used to establish the level and zones of harvesting food through the general assembly celebrated annually.

Nietschmann (1973:299) observed that the Miskitos livelihood depends on navigational and boating skills, especially on the type of sailing dugout known as *dori*. The land and the water area exploited by the villagers are determined by about six miles walking distance or of ten to fifteen miles if the *dori* is used.

In the majority of Miskitos communities, including Karata, the social division of labor in the household, agriculture and fishing activities are similar. The basic activity in Karata is fishing at commercial level; therefore, the commercialization of fish and other seafood. Most members of the family participate in this activity. Women and children prepare the fish and seafood before they are taken to the market. Children have a spiritual connection with Karata lagoon. From early ages they are trained to handle the canoe as part of their learning process, since



*Community members enrolled in fishing activities  
Photo: Sandra Rojas, Fieldwork 2007*

they are expected to contribute to the family economy by accompanying their father or brothers when they go fishing. With the income from the sale of fish and other seafood, they purchase the necessary material for fishing activity, food and clothing for their family.

Wilson (2007:53) states that it is a myth within the Miskito community that the man is the only one that contributes to the family household economy. Women participate actively in the agricultural and fishing activities and are responsible for the household, being an integral part of the Miskitos family.

### **3.3. Karata Units**

Karata is one of the oldest communities on the North Atlantic Coast of Nicaragua. It is located 17 miles from Bilwi's warf in Puerto Cabezas. Karata shares borders with Dakban Community in the North, Hallouver in the South, East with the Caribbean Sea and West with Kligna and Lapan community. Karata's history dates as far back as 1867, when 17 families, descendants of Miskitos from Cabo Gracias a Dios and Dakura arrived and inhabited the community. They were dedicated to hunting, fishing and preservation of their ancestral form of social organisation.<sup>7</sup> The Community of Karata is now formed by five communities: Dakban, Lamlaya, Wiwas, Bilwi and Karata. According to Lopez (2006), there is another neighbouring community, Wawa Bum that is in the process of becoming part of the Karata Unit.

One of the strongest instruments that the Miskitos in the North Atlantic Region of Nicaragua possess is the Harrison – Altamirano's treaty. This treaty was signed on April 19, 1905, between Great Britain and Nicaragua and it cancelled the 1860 Barcenas - Meneses treaty, known as Managua treaty. According to this new instrument, Great Britain recognized the absolute sovereignty of Nicaragua over the territory constituting the earlier Miskito Reserve. The Harrison-Altamirano Treaty states in its sub paragraph 3(b) that:

The Government shall allow the Indians to live in their villages in enjoyment of the concession granted under this convention, and in accordance with their own customs, insofar as they are not contrary to the laws of the country and public morality.

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<sup>7</sup> According to Stavenhagen (2003:29) Social organization is a technical social science term, which refers to the complex web of institution, and social relations that provide consistency to an ethnic group over and beyond the personal identity of its individual members. To the extent that the latter participate in the social organization of their ethnies, their dependency Vis a Vis the group and its collective values increases. Social organisation establishes the boundaries of groups; it is the framework within which "we" and "they", "insiders" and "outsiders" are distinguished. Barth (1969) also considers the (social) boundaries or limits of groups as a fundamental element in the definition of ethnicity.

Based on this treaty, on 9<sup>th</sup> September 1918, Karata received its title as communal property. This title comprises more than five thousand hectares of mainland, not including lagoons, swamps, and the marine strip (Lopez, 2006). The Harrison – Altamirano treaty is considered a crucial treaty that determines the rights of Indigenous Peoples in the North Atlantic Region of Nicaragua. It contains this territory's legal dispositions regarding the protection of indigenous rights that can be reinforced by Law 445<sup>8</sup>.

In 1921, the commerce of banana cultivation and lumber gave Puerto Cabezas its glory days. During a 40-year boom period, the town's dock was built a mile into the sea, sawmills and plantations dotted the region, and rail lines traverse the landscape. The Indigenous People migrated to Bilwi to work for the trans-national corporations, and Bilwi became a dynamic business centre. The land designated for pasture was leased, through the Karata Community office, to two transnational corporations, namely, The Standard Fruit Company, Inc. and Timber Company.

According to Rigby (2001:4), the population growth went from 20 people before 1921 to 250 in 1925. The 1940's was the decade when the population increased considerably with approximately 8,000 people due to the establishment of the trans-national corporations. By 1960, Bilwi population increased approximately to 16,000 inhabitants.

The migration of population from different municipalities of the Atlantic Coast and Nicaragua created a multiethnic and plurilingual society that influenced the lives of indigenous people on the Atlantic Coast in features such as language, tradition, livelihood and the establishment of an ethnic ladder.

Currently, the payment to Karata for land tenure is one of the basic incomes of Karata community, especially in Bilwi. The income from this lease is for the implementation of projects and scholarship programmes that benefit the members of the community of Karata.

Bilwi is the administrative centre of the Local Government and Regional Parliament and the most important city on the North Atlantic Coast of Nicaragua in economic and political terms.

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<sup>8</sup> Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Region of the Atlantic Coast of Nicaragua and the Rivers Bocay, Coco, Indio and Maiz.

### **3.4. East - West & Interethnic Relationships on the Atlantic Coast of Nicaragua**

Nicaragua is a nation, which was under two colonial masters' regime. The Pacific side of the country was under Spanish colonial regime, while the Caribbean was under Great Britain's. The Caribbean Coast represents 49.5% of the National territory and is divided into two political administrative Regions; the North and South Atlantic Region. The nation is multicultural and multilingual according to the Political Constitution; which is basically visible on the Caribbean Coast of Nicaragua where the diverse ethnic groups live. The indigenous groups are the Miskitos, Sumus – Mayagnas and Ramas and the Creoles and Garifonas are of African descent. These two ethnic groups were the last to arrive to the Region.

During the Sixteenth and Seventeen Centuries Spain imposed its religion, language, and oligarchic form of government and patterns of production upon the peoples of the Pacific. Many of the vital sources of these Indian cultures were extinguished. This imposition of Spanish ways of life upon an Indian cultural background that took place on the Pacific Region of Nicaragua and in most of Latin America has been one of the two conflicting sources of Nicaragua's nationhood.

The Spanish presence transformed the lives of the Indigenous Peoples. The most devastating effect was the immediate decimation of the Indigenous Peoples as a result of warfare, the forced transfer of the Indigenous People, contagious diseases, and enslavement in the mining areas in South America after 1540. The shape of this process can be described, in the Western part of Nicaragua, as a deliberate making of a national identity (Gonzalez, 1997: 46). Here the Spanish conquerors exercised a direct rule based on total domination. The Spanish deliberately sought assimilation into their culture through evangelisation and force, in order to consolidate the colonial state (Ibid: 43).

On the Atlantic Coast the situation was quite different. It appears that the Spanish attempts to conquer the Atlantic Coast of Nicaragua in the seventeenth and eighteenth centuries were either half-hearted or that the tropical area was not prioritized. The terrain made the area almost inaccessible. Furthermore, the missionary and military incursions were forced backward by the resistance and hostility of the local peoples (Ibid: 53). The Spanish conquerors never managed to obtain control of the Atlantic Coast. Whereas the Spaniards followed a model of direct rule, the British sought to rule indirectly, through local leaders. The first encounters took place between British colonizers and Miskitos around 1633 and 1634 and most likely in Cabo

Gracias a Dios. Hooker (2004:1) observed that the systematic extermination of people and culture carried out by the Spanish on the Pacific was widely known to the peoples of the Atlantic, where there was a clash of cultures with the British. In the process of cultural conflict, two of the three Indian tribes of the Atlantic, the Sumu-Mayangna and the Miskito, were able to preserve many of the fundamental characteristics of their culture such as language, mode of production and social organisation.

At the early stage of the Sixteenth Century the relation between the Miskitos and the British was that of commercial and mutual collaboration. The Miskitos acted as middlemen. They soon became allies with the colonisers and were equipped with weapons. Consequently, the Miskitos became the dominant group on the coast. An ethnic hierarchy was taking form with the British on top followed by the Miskitos and with the Sumu -Mayangnas at the bottom.

In 1787, as the result of the London Convention between Spain and Great Britain, the British withdrew from the Atlantic Coast of Nicaragua (Gonzalez, 1997:76). British interest in Nicaragua was renewed by the instability that followed Central American independence in 1821. A formal British protectorate was established on the Miskitu Coast (1824-1860). The power centre was thus moved from the North to the Creole dominated city in the South. The shift meant an increasing political role of the Creole population. The urban English-speaking Creole population soon gained a higher status than the indigenous peoples in the eyes of the British. Their ethnic position was further strengthened by the entry of the North American companies and the Moravian Church. As the Creoles spoke English, they generally held the best jobs (Buvollen 1986, as cited in Hotvedt, 2005:23).

Another reason why the Creoles occupied an important position, first among the local population in the Moskitia, was due to the existing racial hierarchy, which was stratified in terms of class and color. At that time one was considered Creole if one was of European descent, born in the Americas. Today, being Creole means being of mixed African descent (Woods 2005).

Racial discrimination and power differences between ethnic groups still remain. Socorro Woods (2005), who made a study of *Creole Women's experiences of racial and sexual discrimination and their need of self-recovery*, refers to her key informant Ashanti, as critical to the discourse on multiethnicity and highlighted the following regarding ethnic relations.

It depends on which ethnic groups you belong to, you have more or less opportunity in Nicaragua and on the Atlantic Coast, I don't know if say anywhere else, but I can give testimony on Nicaragua, we can talk about an ethnic ladder. Six ethnic groups and each ethnic group have its



place well defined on that ladder. And you know who is on the head of that ladder: the Spanish speaking population, they are at the very top of the ladder. We're (the Creole) on a second place on that ladder. And it is sad to say we look down on the other four groups too. The ladder is like this: the Spanish speaking then the Creole, then the Miskito, then the Sumus, then the Garifonas. The Ramas they are at the very end. That ethnic ladder exists. Your opportunities go according to where you are on the ethnic ladder (Woods 2005: 60 -61).

As stated by Hooker (2004), the Atlantic Region of Nicaragua remained a British Protectorate until 1894. The British deliberately instilled hatred and mistrust of Spain, of Spanish speaking peoples and of Catholicism in the collective mentality of the peoples of the Atlantic Region. It was not difficult to do this, in fact it was relatively easy to accomplish because the genocide, which the Spanish had inflicted upon the Indigenous Peoples of the Pacific at the moment of contact, was ever present in the minds of the Indigenous People of the Eastern part of Nicaragua.

After the Annexation of the Atlantic Coast of Nicaragua, Spanish was imposed as the official language of the Atlantic and all transactions, had to be carried out in said language. The abundant mineral and forestry resources of the region were given in concession to American companies. This experience (assimilation process) deepened the division between the peoples of the Pacific and the Atlantic.

In 1987, the Autonomy Statute was approved by the governing party FSLN (*Frente Sandinista de Liberacion Nacional* - Sandinista National Liberation Front) creating unique political – administrative organisational structures that permit the integration of institutions from which to exercise power at various levels: National, Autonomous Region, Municipal and Communal. Socially differentiated ethnic groups in political and ethnical counterpoised spheres in turn exercise these different powers. The central government representatives are mainly Mestizos<sup>9</sup> from the Pacific or *Ispail* as the Creoles and Miskitos call them. Even when the Mestizos are native to the East Coast they are representatives of a colonizing mentality. The Municipal Mayors and Municipal Council members as well as the Coordinator and Regional Council members of the Regional Government are locally elected position and; therefore, held by native politicians. Most of these leaders are increasingly members of the overpowering national parties, or regional parties in coalition with the national parties.

In these last years the ethnic ladder, which I mentioned earlier, has suffered variation on the North Atlantic Coast of Nicaragua. Based on my observations the Miskitos are the second on

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<sup>9</sup> Mestizos are the interbreeding of male Spaniards with female indigenous people and their descendents as a consequence of the Spanish Colonization in Central America region early in the 16<sup>th</sup> Century.

the ethno - political ladder since they have a large population of Indigenous People in the region, who are active in the ethno political movement, dominated by YATAMA (*Yapti Tasba Masraka Nanih Aslatakanka* – descendants of the Mother Earth) who concentrate power and resource allocation in the Region. This permits the Miskitos to occupy positions on the Local, Regional and National level and hence the promotion of their culture. Currently, it is necessary to speak the Miskito language and affiliate with their ethno political movement in order to work in public spheres. This behavior is further confirmed by Alba Rivera de Vallejo, Member of Parliament and former representative of the Regional Government on the North Atlantic Coast of Nicaragua. She declares that when the hurricane *Felix* affected the Northern Coast of Nicaragua in September 2007, she observed racist behaviors by those who always claimed that they were discriminated against. Miskito leaders such as Brooklyn Rivera and Steadman Fagoth, allies of the ruling party, according to different reports and interviews by the media, misled the population by informing them that only the Miskito families were affected in the region, when 80,000 of the population belongs to Mestizo ethnic group. She also claimed that the aid and resource allocation was concentrated in one ethnic group, the Miskitos. (Centeno, 2008).

Stavenhagen (1996) explains this situation based on the structuralist approach that would help us to understand the dynamics of society where ethnically distinct groups also become integrated differentially into new social and economic structures and are categorized racially and culturally. He states that:

We have here a cultural division of labor, that is, the pattern whereby cultural differences between ethnic groups determine the nature of their members' insertion in the labour market (and therefore their access to resource and economic and social process) in turn reinforces the cultural characteristic of the group (Stavenhagen, 1996:21).

This approach underlines the fact that ethnic identities and inter – ethnic relations depend to a greater extent on the structural context in which they occur. In my opinion, this process has some inconveniences because processes such as language and culture revitalization, development plans and programmes are focused on one particular ethnic group, the Miskitos, excluding other ethnic groups. This creates inequality of resource allocation and development. Therefore, ethnic conflict is expressed from individual behavior involving avoidance, exclusion, and hostility and discrimination at the level of interpersonal relationship to institutional political action such as the case illustrated above. As such these institutions do not take into account the principle of multi-

ethnicity of the region. This has created misunderstanding and intolerance towards each other and their culture, especially when there is conflict between members of different ethnic groups.

Stavenhagen (1998) states that ethnic stratification is also a phenomenon, which stands by itself, regardless of the class affiliation of an ethnic group member. In a stratified system, social and political conflict may be expressed as ethnic conflict, and it implicates the power of the state, threatening the institutional model up on which state power is based.

The Nicaraguan State's presence in the Caribbean is a very recent phenomenon and the Indigenous Peoples and Ethnic Communities consider both Autonomy and the Municipal governments as new arenas. We have six ethnic groups in the region that have been able to coexist. In the Pacific Region of Nicaragua there is only one hegemonic group who makes all the decisions, while in the Caribbean we are in the process of redefining our roles and identity and try to live according to the principle of "unity in diversity". *Costeño*<sup>10</sup> identity has been important since long before the incorporation of the Miskito kingdom into the Nicaraguan State. The geographical distance between the Mestizos dominated Pacific Coast and the Atlantic Coast, the colonial history of separation and affiliation to different colonial powers, cultural differences, and the continuing discrimination from the Pacific part of Nicaragua towards the inhabitants of the Atlantic Coast have been essential elements in the shaping of a *Costeño* identity. An example of this collective identity is the survey conducted by Hegg and Ortega (2001) that shows that the *Costeño* identity is an important source of identity. In 2001, 63.2% of those questioned felt as much or more *Costeño* than a member of their ethnic group (Creole, Garífuna, Mestizo, Miskitu, Sumu - Mayangna and Rama). Approximately 30% responded that they felt more *Costeño* than member of their ethnic group. Thirty-three percent felt that they were as *Costeño* as a member of their ethnic group while 29.7% felt more like a member of their ethnic group than *Costeño* (Hegg & Ortega, 2001:18-19). Thus, making use of the spaces created after decades of struggle and trying to sidestep the voracity of the parties, the coast people are creating a different way to solve their contradictions, both internal and with the state. Matilde Lindo, Creole and feminist leader activist in an interview to revista Envío, a Nicaraguan magazine, in 2003 states that: "the struggle for autonomy unites us today. But despite the racism and interethnic differences that may exist among us, it's also true now and forever that if you touch one *Costeño*, you touch the

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<sup>10</sup> In Nicaragua, *Costeño* is a person born on the Atlantic Coast or he is a child of a mother or father born in the Region and assumes his identity as one of us by identifying and practicing the culture of one of the six ethnic groups that exist there.

Coast, you touch us all”. This thought corresponds with what another *Costeño* person, Ray Hooker (2004), former member of the National Commission of Autonomy, refers to as seeking more unity and support from the National Government. He states that constant pressures are being exerted upon the Central Government and upon elected regional officials to make them do more in order to forward the cause of autonomy. As a result, of these pressures, major legislation has been enacted by the National Assembly of Nicaragua in protection of the right of the Indigenous Peoples and ethnic communities of the Autonomous Region.

### **3.5. The Importance of Ethnicity in a Communal Setting**

On the North Atlantic Region of Nicaragua is where the Community of Karata is located, as mentioned earlier. This community is composed of five smaller communities namely, (Bilwi, Dakban, Lamlaya, Karata and Wiwas). Bilwi is the administrative centre of the Regional Council and the principal city in the North Atlantic Coast of Nicaragua. Bilwi is situated in a unique setting for a pluricultural and multiethnic society that is transformed by inter - ethnic marriages and children of mixed descent (Miskito – Spaniard, Creole – Miskito) with limited rights, depending on which identity they assume, the language they speak and their physical features (physiognomy). The status within Miskito society is based on age, parenthood, and kinship categories. These cultural and symbolic features as part of ethnic identity are shared by Stavenhagen (1996:3) who states that: “membership in an ethnic nation is inherited, and though there may be some flexibility about how it is attributed or lost, it is cultural identity rather than formal citizenship that count”.

Children of mixed descent (*Karata luhpia - hijos de Karata - Karata Child*), who do not practice their Miskito identity, could still maintain the right to occupy land in an area designated by the Karata Community Board of Members. The *hijos de Karata* can claim her/his parcel of land rights based on lineage (*ius sanguinis*) and are exempted from paying yearly land rental fees; however, they are excluded from participating in the election of members in the Communal Assembly. Barth (1969) captures the membership roles of the *hijos de Karata*, in his introduction entitled *Ethnic Groups and Boundaries* by stating that:

Ethnic groups are not merely or necessarily based on the occupation of exclusive territories; and the different ways in which they are maintained, not only by a once and for all recruitment but a continual expression and validation, need to be analyzed. The ethnic boundaries canalizes social

life, it entails a frequently quite complex organisation of behaviour and social relation. The identification of another person as a fellow member of an ethnic groups implies a sharing of criteria for evaluation and judgment (Barth, 1969:15).

This phenomenon is common in Bilwi where there is a high rate of intermarriages, thus the Karata administrative office, governed by the board members, has started a registration process to keep track of the *hijos de Karata* for electoral and land ownerships' reasons to avoid ethnic conflicts.

As we could see, ethnic conflict is an expression of social and political conflicts that define the ethnic stratification phenomenon. This phenomenon usually implicates conflicts of interest, values and identity. Manifestations of ethnic identity, conflict and misunderstanding is based on a collective consciousness, a set of beliefs and sentiments, norms and ideas that all members share as part of their social values and ideas that have been internalized (Stavenhagen, 1998). Social values influence the way we understand the indigenous cosmology and the system of law, as a mechanism where these values are externally enforced, through the communal organisation and traditional authorities in Karata. The acceptance of this system of law depends on your ethnic background and social setting.

### **3.6. Influence of the Moravian Church in the Miskito Culture**

The Unitas Fratrum or The Moravian Church began in Bohemia, Germany in the year 1457. It was a product of the Great Revival of Faith at the end of the Middle Age, arising from the National Revival of Religion. Under the leadership of Gregory the Patriarch, the Unitas Fratrum was founded with a three-fold idea of faith, fellowship and freedom.

The Moravian Church was the first European religious entity that was established on the Caribbean Coast of Nicaragua. In 1849, the Atlantic Coast witnessed the first arrival of missionaries from the Unitas Fratrum Church, known as the Moravian Churches (originated in Bohemia and Moravia, Czechoslovakia) and later became a dominant influence in the area displacing the Catholic Church, which maintained its predominance in the Pacific Region.

These missionaries recorded much of the ancient cultures and history of the region, which was possible because of their early presence and influential position. The Moravian Church functioned as the National Church of the Moskitia (Downs, 2005).

The Moravian Church missionaries worked diligently within the Miskito community. Their missionary jobs were very difficult and slow until 1881; which is when a large number of people on the Atlantic Coast, was converted to Christianity and the missionaries denominated this phenomenon as, “The Great Awakening”. This mass phenomenon began when a Creole woman fell on the ground unconscious, and claimed to be possessed by spirits. The Moravian missionaries interpreted that happening as, “seized by an empowering sense of their sinfulness”. After three days, the cataleptic conditions disappeared. Following this experience, hundreds of Miskito people began to have similar experiences and they were required to be baptized. Establishing the church as a pre-condition to confess their sins, they received Christian instructions and accepted Christ as their Saviour (Wilson, 1965).

After the “Awakening,” the Moravian Church became a central part of the Miskito culture, maintaining a very prestigious and influential position on the Atlantic Coast of Nicaragua in areas such as language, culture, education, becoming an active part in the communal structures of indigenous communities in the Region. Church elders and pastors carried out regulations of the Moravian Church, and lay pastors ruled the village life to some extent.

By 1900, most of the Miskito and Sumu – Mayagna (another ethnic group of this region) communities had embraced the Moravian faith. Creole and Miskito pastors gradually replaced those of German and North American origins. At present, nearly all communities populated by Miskitos have a Moravian pastor who is trained at the Biblical Institute of Bilwaskarma, on the Coco River and Biblical Institute in Managua (Capital of Nicaragua, in the Pacific region). According to Wilson (2007:54) the presence of the Moravian Church in Karata has significantly influence the socio - cultural life of Indigenous People in Karata to the extent that no meeting or Communal Assembly is held without the guidance and blessing from the pastor. Wilson went on to say that to solve conflicts in the communal setting the religious leaders would usually intervene in these processes by giving spiritual guidance.



*Moravian Church in Karata  
Photo: Sandra Rojas, Fieldwork 2007*

The pastor, who is assigned by the Moravian Church to communities such as Karata, does not only comply with his duty as Religious leader, but also as a Communal leader. As a Religious and Communal leader, the pastor exerts power over the communities because he is sent directly by The Moravian Church. This organisation has a strong influence on the socioeconomic and administrative policies in the communities. The social and moral behaviors of the community members are based on biblical principles and are transmitted from one generation to another. This observation corresponds with Stavenhagen (1996: 27) who states that:

Religion has historically been an important marker of ethnic identity of a people. In those societies in which religion intervenes in the various spheres of public life, it may become a hegemonic factor and thus determinant for ethnicity. The more the religious factor is interwoven with other elements of social life, the more important does religion become a determining factor of ethnicity.

Concurrently, Wilson (2007:68) verbalizes that since the establishment of the Moravian Church in Karata, the application of sanction to communal members who have inflicted the law has changed; it is not as severe as before. Her key informant Ms. Hemsly Francis verbalized that: “First time, the Wihta would punish the thief by putting him in an ant nest, currently they just talk to him”.

The participation of the Religious leader as a representative of the Moravian Church in the communal structure and in the Indigenous system of law contradicts the Western system of law where the separation of powers and the separation of the church and state are essential doctrines to ensure that legal investigations occur uncontaminated by politics and religion. For Indigenous Peoples, law and justice are part of a whole that prescribes a way of law. Therefore, separation is difficult for them, and it is impossible to make such distinction.

### **3.7. Traditional Organisation and Political Structure**

The leaders of Karata Community took advantage of the 1914 Indigenous Community legislation to organize their community’s formal structure with the objective of improving communication with the State’s institutions, Indigenous Peoples and Ethnic Communities who were not part of the Karata Units. They introduced the position of “The Grand Leader” (*Sindico*), who is also the leader of the Directive Board. This Directive Board includes traditional forms in its communal

structure. Thus, the inclusion on the board of: a *Wihta*, as a community judge; *Almuk nani*, as elders/senior advisers; and *Sukia mairin* or *Sukia waitna*, as female or male traditional healer.

From the beginning of the Nineteenth Century, The Community of Karata already had its leaders and communal authorities, as stated in Ruiz and Ruiz report of 1925, during his visit to the Atlantic Coast of Nicaragua. Therefore, the organisational structure that developed within the Community of Karata, is part of their culture as Indigenous Peoples, and has prevailed until the present. Since the year 1917 up to the present, 2008, there have been 22 Karata Community leaders (*Sindico*) elected by the Community of Karata.<sup>11</sup> Most leaders were elected and served one year at a time. After one year of service, the community conducted an election (usually in April) to chose the same or another leader. Until 25 years ago, the present leader has been in office.

### **3.7.1. Election Process**

The community of Karata has been electing their traditional authorities from time immemorial through a Communal Assembly based on their customs and traditions. This election process experienced a transformation in 1997 when the responsibility to organize, observe, certify the election and designate the mandate of periods for traditional authorities was shifted to the Municipality of Puerto Cabezas. Subsequently to this date the elections were held each year on the third Sunday in April after the Sunday Church service. Those eligible to vote must be member of the community, aged 16 and over, as stated in the National Constitution. They have freedom of political rights and therefore to participate in electoral processes.

The election of indigenous authorities is based on articles 2, 3, 5, 8, 9 10 and 29 of the Indigenous Community Law, Statute of the Indigenous Community from 1918; article 1 to article 10 of the Decree No 491 of 1962 as well as stated in articles 67 and 68 and 69 of Law No 40 and 241. Municipal Laws state that the Secretary of the Municipal Council is the person responsible to give the Certification to the members of the community that are elected in the General Assembly. This certificate is valid for a period of one year.

According to the electoral process, a member of a focus group composed of elders during my interviews mentioned that: “For the first time when the *Wihta* was chosen he was an adolescent and he received training for this responsibility. Currently, there are open elections in

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<sup>11</sup>From these 22 Syndics, 20 men and 2 women.



the General Assembly for a period of one year”. This statement corresponds to the experiences of *Dama Pain* as an Elder of the community, who in Tecia Wilson’s study about *Gobernabilidad y Conflicto sobre Tierras Comunales en Karata* (2007) states:

Before we did not have communal election to choose our leaders, the elders would get together and decide who is the fittest person to assume this responsibility is and they would designate him for that duty. After the approval from the elders, they will present him officially to the members of the community to be accepted by the Communal General Assembly. (Wilson, 2007: 79-80).

Law 445 of 2003, articles 6, 7 and 8 regulate the election, re-election, and dismissal, duties and term of office of the communal and territorial authorities. The Regional Government administers the electoral process. Law 445 states that it is necessary that the indigenous authorities’ election be held in the presence of at least one representative of the corresponding Autonomous Regional Council. This person serves as a witness commissioned for that purpose by the Board of Directors of the Autonomous Regional Council. Law 445 further states that the secretary of the Regional Council’s Board shall issue due certification within a term not exceeding eight days following the election. Law 445 of 2005 creates a dependency of the Indigenous People with the Regional Government similar to the one that existed in previous years with the local government regarding the accreditation of indigenous authorities on the Atlantic Coast of Nicaragua.

### **3.7.2. Communal Organization of Karata**

The Communal Assembly is the meeting of the community members where they take decision about matters of interest to the community according to their customs and traditions. The Directive Board is elected with the responsibility to represent the Block of Karata, as a territorial unit. The president, who usually is the *Sindico*, precedes the Board and seven peoples compose it. They have the responsibility to discuss and approve policies regarding the use of land and natural resources, also to coordinate with the regional and local government in matters regarding strategic plans and projects where the territory of Karata is involved. For administrative purposes, consultative and decision-making processes the Karata Block or Unit is composed of the following units: Dakban, Lamlaya, Bilwi, Wiwas and Karata. Each territorial unit elects a representative to be a member of the General Assembly of Karata, which is supposed to be held once a year.

*Syndic or Sindico:* Is the legal representative of Karata Block with the responsibility to coordinate with external structures. This position was established in Bilwi in 1924. Bernard Nietchmann (1973:60–61) says: “the village political organization is enacted through a Community Board of elected members headed by a Syndic”. Nietchmann also states that the function of the syndic is similar to the mayor in the aspect that he is a political representative of an area. Even though the position of the Syndic was created as a response to external pressure, today the syndic position forms part of the traditional organization of the Miskito elected by the members of the community through a general assembly.

*Council of Elders:* Represents the most important position in the communal organisation. It is the position largely respected and recognized by members of other ethnic groups. The council is composed of elders of the community, considered as knowledgeable people “*sabios*” with a collective expression of wisdom, capable to lead, give spiritual advice to the community and share their experience accumulated during their life time. During my interview my informants stated that: “to be an Elder, you have to be 60 years old, male and a natural leader in the community”. When the Wihta solves a conflict or is involved in decision - making process, he is guided by the elders and the members of the community and parties involved in a conflict respect it. The Council of Elders is a position held for life, earn by personal merit and cannot be revocable or substituted by others.

*Wihta:* Is the representative of the Community, elected for a period of one year with the responsibility to solve conflicts that rise between the members of the community and sanction according to traditional law in coordination with the communal police. Karata has a surrogate Wihta, with the same function as the leading Wihta to solve conflict/ misunderstanding when the Wihta is not present or is coordinating activities regarding the communal life and also if the Wihta is ill or if there are other circumstances that prevent him from assuming his responsibilities.

#### *Requirements to be a Wihta*

One of the requirements to be a Wihta is that the candidate must be member of the community and have lived in Karata for a period of two years prior to the appointment or election. The Focus Group, during my data collection, affirmed this by saying that, “The Wihta has to be Miskito, male, over 25 years of age, a natural leader, with good behavior, with property in the

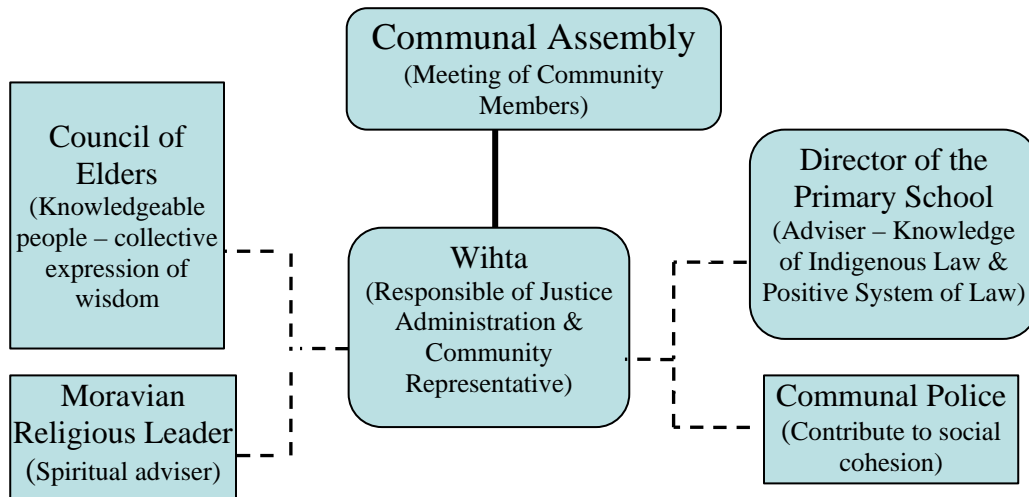
community, married, and the most important element or requirement is that he is a child of Karata (born in Karata or that one of his parents is/was from the Community of Karata).” Academic requirements are not necessary, but the Wihta has to demonstrate commitment to the community through the involvement in social and communal activities. He also has to be a role model to the members of the community. Some of the community members with whom I spoke, suggested that in a near future the Wihta should receive basic legal training, because his position expects him to work in collaboration with institutions involved in Justice Administration such as, Police Department, Judicial System, Lawyers and District Attorney.

My focus groups further confirmed this by saying that, “The Communal Organisation is made up of Karata Elders, Wihta and the Director of the Primary School. The latter held that position due to two reasons: Firstly, he is the school head and he had studied Indigenous Studies at URACCAN University. Therefore, he has the required knowledge to advice the judge and to elaborate the mediation act in case of non- agreement and if the case has to be transferred to Bilwi”.

Concerning the Wihta position, the *Sindico* of Karata, Mr. Rodolfo Spears said, “They do not have an income, it is voluntary. Regardless of this limitation, they try to do their best to keep the community in harmony. Their reward is the recognition and respect in the communal, local and regional setting.”

*Communal Police:* The function of the communal police is to contribute to the social cohesion in Karata. They are responsible to notify and detain members of the community who are presumed responsible for committing an immoral act and they must report the crimes to the Wihta for further prosecution.

The following is a diagram that represents the social and political structures.



During the General Assembly of The Karata Units celebrated on the 26<sup>th</sup> and 27<sup>th</sup> of April, 2007, the Statute of Karata territory, which ratified the territorial government created under an egalitarian system to decide matters inherent to the territory that they govern was approved. This traditional community authority represents the communities that form The Karata Unit. They conducted the last election (2007) according to the procedures adopted during the General Assembly. The objective of the statute is to create an institutional framework for the Territorial Government. This statute contains organisation, function, rights and duties of the members of the Community of Karata. The statute also includes aspects regarding the election of administrative authorities and the regulation for forest exploitation within communal land and timber exploitation for domestic use in the communities.

The statute establishes two types of elections:

1. The election of the Directive Board of the Territorial Assembly
2. The Election of the President of the Territorial Government, according to Law 445.

The communal election is for:

1. Wihta, who is the responsible of Justice Administration and is the representative of that community
2. The person that will form part of the territorial government.

The Directive Board of the Territorial Assembly is a body composed of communal authorities elected for a period of four years with the responsibility to call and conduct the election of Territorial authorities, declare the winners and give them their credentials that recognize them as Territorial authorities of the community of Karata. The Board's main function is to make sure

that the resolution is granted by the Territorial Assembly. The basic principles of the community of Karata's government are communal democracy, dialogue as a form to solve differences between members of the community and with other ethnic groups and coordination/collaboration with the community members of Karata Unit as the basis for good governance.

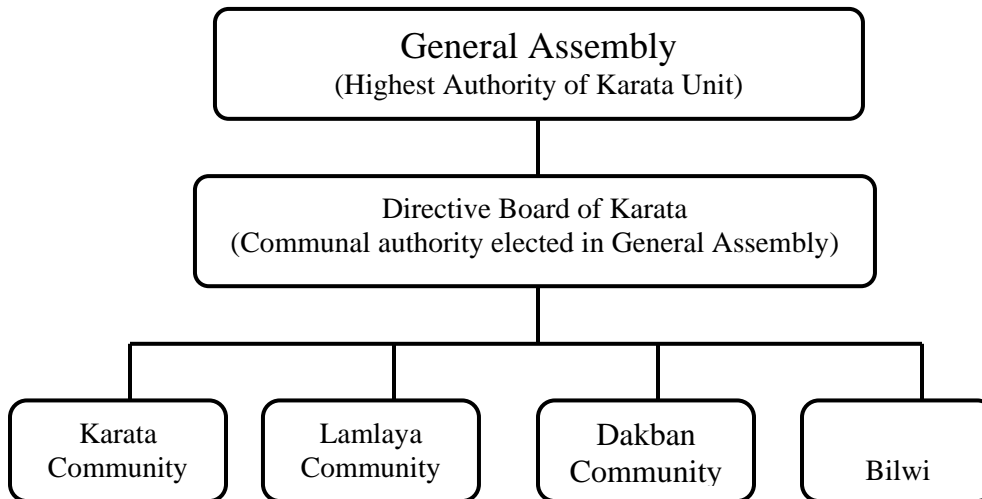
The president, known prior to March 2007 as the *Sindico* is the executive director whose primary duties are to allocate the community of Karata's land and manage their natural resources. The management of the resources also includes guaranteeing that the resolutions passed in the General Assembly are followed by the Board of Directors. The powers of the board members include approval of contracts and concession of land lease in Bilwi. This is the basic income of the Community of Karata. The President of the Board also participates in consultation and approval of plans and projects involving community land and in the use by other ethnic groups and Non Governmental Organisations' or Institutions.

According to the new statute, the election of a Wihta shall be held yearly, on the First Sunday of March. The elected Wihta is eligible for a one-year appointment, with the possibility for reelection. The Council of Elders has the authority to call a Communal Assembly that will be held according to their customs and tradition. Community members interested in running for this position and who meet the full requirements should make their intentions known in the General Assembly. During the election the community members will elect the Wihta.

The election of the Community Board Members is held 30 days prior to the Territorial Assembly in each community. Each community sends 20 members to participate in the Territorial Assembly for the Directive Board. In this process members of the community, government and NGOs representatives may participate as observers. The member of the community who has the most votes wins the election, majority rule. The president of the Territorial Government position is for a period of 4 years. The candidates have to register in the Community of Karata's office in Bilwi. The presidential election is held on the Third Sunday of April. Candidates must register within 15 days, while their campaigning is done for 27 days. Campaigning is banned 3 days prior to elections allowing communities members to prepare for the election. The board members have the right to evaluate the President of the Territorial Assembly after two years. They evaluate his administrative capabilities by examining financial records for the period he was in the position and that would determine if he is to continue to be president or not. If not somebody else will take his position.

This organizational structure summarizes the previous discussion on Karata Units.

### Current Karata Unit Organisational Structure



In summary, Nicaragua is a multi-ethnic country whereby the population is divided into groups, which are distinguished according to certain ethnic attributes or ethnies. Ethnicity as a collective group consciousness, a sense of belonging is derived from membership in a community bound by common descent and culture that serves as a badge of identity. Ethnicity and group rights are commonly discussed as sources of pride and conflict. Pride because we have a membership in a specific social setting with rights and responsibilities. Conflict because power and resource allocation is concentrated in one ethnic group: the Miskitos.

In Nicaragua, ethnicity is used as a strategy for individual and group survival and maximization of gain in a Local and National level. At the local level this strategy is focused on a particular ethnic group. At the national level we use ethnicity and group rights as an essential and rational link in claiming our rights as Indigenous Peoples and Ethnic Communities in Nicaragua by adopting our *Costeño* identity.

Regarding the Social Organisation in Karata, during the Focus Group Discussion, I learned that the Karata Community maintains its ancestral form of communal governance composed of the Directive Board of the Indigenous Community with its administrative position in Bilwi, Puerto Cabezas. The communal governance also includes the Sindico, the advisors, the Wihta (Communal Judge) and the Council of Elders with the incorporation of new positions such

as religious leaders of the Moravian Church, Directive Board, Women Organisation of the Moravian Church, Youth Association of the Moravian Church, the nurse and the Director of the Primary School, who plays a double role in the communal life. The current leader's credentials such as that of an educational leader, serves as an adviser in the Indigenous system of law. The involvement of these authorities and their coordination is essential for communal life. Even though the Wihta is the highest authority within his community, he coordinates and collaborates with the other members to solve conflicts and discusses matters that affect the well - being of the community.

Before 1980, the highest authority within the community was the Elders (*Tawan almukani*) and spiritual leaders known as *Sukia*, with the responsibility to advise the Wihta. Even though the name has changed, the position of adviser remains. Currently this position relies on the Council of Elders, represented by knowledgeable people of the community. A major breakthrough in the communal organisation structure of Miskito Communities on the Atlantic Coast is the establishment in the Community of Karata's Statute, is the inclusion of women's participation in the government structure, specifically the Directive Board with a quota of 40%; this was a space exclusive for men in the Miskito's culture.

In the next chapter, I will continue with the discussion on Justice Administration. This discussion will serve to demonstrate how the Indigenous system of law functions in a multicultural and pluriethnic society and the coordination between the Indigenous system and the State as provided for within legal pluralism and its supported processes.

## **Chapter Four**

### **Justice Administration and Conflict Resolution**

The coexistence of two legal systems was examined using legal pluralism theory. The issue of social organisation and political structure in Karata was discussed and demonstrated in the previous chapter. In this chapter my aim is to demonstrate the functional structure of the Indigenous system and Positive law in Karata. I will also use two cases to demonstrate practices and procedures followed in Indigenous law as well as Positive law with the goal to show how these two systems coexist and collaborate harmoniously.

#### **4.1. Criminal Procedure and Indigenous Peoples Rights**

Throughout Latin America, many countries have adopted extensive reforms in terms of criminal justice systems. These reforms impose time limits on investigations and establish more judicial oversight at all stages of the criminal process and the role of the key institutional actors such as judges, police and MP.<sup>12</sup> These transformations reflect a historic shift from an inquisitorial system of justice (the traditional model) to an accusatorial or adversarial one, which came into practice in Nicaragua on 24<sup>th</sup> December 2004 and derogated the Criminal Procedure Code of 1879. The replacement of a written and inquisitorial system with an oral and accusatorial procedure marked the transfer of the control over criminal prosecution from judges and the police to the MP. This effort was triggered by the needs to overcome the criminal procedures biases inherited with the European codes. Examples of possible “flaws” with the old approach to the criminal system was: a heavy reliance on written material slowing the process, a built – in bias case against defendants, poor representation and access of defendants to materials, absence of vigilant investigation by Judges and Police resulting in low due process standard and protection for the defendant.<sup>13</sup>

The accusatorial system establishes new roles for the police, the MP and the judges in the investigation and prosecution stages. The judge serves as an impartial decision – maker as s/he is

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<sup>12</sup> MP stands for *Ministerio Publico*, the Justice Department or Attorney General’s office responsible for prosecuting cases on behalf of the state.

<sup>13</sup> See Rojas (2004: 55 – 61)



relieved from the investigation process establishing defined roles among these institutions. The defence and prosecutor are now interested in assuring the best interest of the clients. Therefore, this system speaks of respect for the rights, freedom and dignity of individual, equality of all before the law, right to legal representation, the use of principles such as immediacy and orality and the presumption of innocent as the basis of criminal law. Even though these are constitutional rights, the previous criminal procedure code was not in line with the legal trends, specifically the treaties and covenants ratified by the Nicaraguan State, violating the human rights of the parties involved in the process.

*Respect for the Rights, Freedoms and Dignity of an Individual:* Article 3 of the Criminal Procedure Code establishes as mandatory for all bodies and persons participating in criminal proceedings to respect the rights, freedoms, and dignity of a person that faces trial. The court can warrant temporary limitation of the rights and freedoms of individuals as well as imposition of measures of procedural compulsion only in cases, where the necessity of such warrant is supported with appropriate legal grounds.

*Equality of all before the law:* Article 27 of the Nicaraguan Constitution states that all people are equal before the law and shall enjoy equal protection of the law, without any discrimination. The right to equality is one of the central standards of fundamental rights. It concerns the equality of persons in relation to each other and before the law. It is the "right to the equality of rights".

*Right to Legal Representation:* Apart from the provisions of the International Covenant on Civil and Political Rights (ICCPR) and other binding human rights instruments, article 1 of the Basic Principles on the Role of Lawyers<sup>14</sup> states that: "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings". This principle is stated in article 4 of the Criminal Procedure Code as a constituent of the right to a fair trial allowing the defendant to be assisted by counsel (i.e. lawyers) and if the defendant cannot pay her/his legal costs the government should appoint a lawyer, or pay her/his legal expenses. The defendant shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer without delay and in full confidentiality.

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<sup>14</sup> The Basic Principles on the role of Lawyers was adopted in the Eight United Nation Congress on the Prevention of Crime and the Treatment of Offenders celebrated in Havana, Cuba from the 27<sup>th</sup> August to 7<sup>th</sup> September 1990.

*Immediacy and Orality:* Two principles are especially relevant for trials before the judge. The principle of orality and immediacy contained in article 13 of the Criminal Procedure Code states that evidence must normally be given orally and subject to cross – examination. Although these principles were previously regarded as elements of the search for “truth” currently there is a significant connection between these principles and the accused right to defend the charges.

*In dubio pro reo:* Article 2 of the Criminal Procedure Code refers to the presumption that no person shall be considered guilty until finally convicted by a court. The burden of proof is thus on the prosecution which has to convince the court that the accused is guilty beyond reasonable doubt, and failure to prove beyond reasonable doubt results in the accused being discharged and acquitted. The other two principles of law to mention is *nullum crimen sine lege* and *nulla poena sine lege*, principles that would be necessary to keep in mind when we analyze the coordination existing between the Indigenous and Positive system in Nicaragua. *Nullum poena sine lege* principle states that a person can only be punished for a crime if the punishment is prescribed by law. *Nullum crimen sine lege*, states that conduct does not constitute crime unless it has previously been declared to be so by law, also known as the principle of legality.

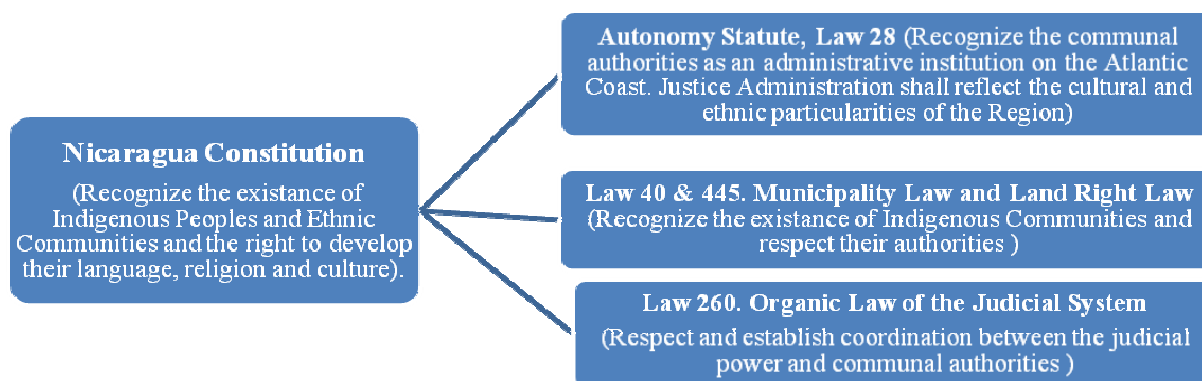
The language used in the courtroom is Spanish, regardless of what is stated in article 11 of the National Constitution and articles 1 and 4 of Law 162 which says that the official language on the Atlantic Coast will be the one of the Indigenous Peoples and Ethnic Communities who inhabits the Region. In practice, the judges and magistrates use an interpreter for oral hearing. In the case of the Atlantic Coast the Court of Appeal has one interpreter. This permits the plaintiff, defendant and witnesses to testify in their native language. Espinosa (2007:35) points out that 80% of the population that uses the Positive system speak Miskito and it is difficult to cover the demand with one person due to the fact that in Puerto Cabezas Municipality there are six courtrooms and usually the date and time for hearing coincides. In such situation an employee from the court system acts as interpreter to guarantee the parties’ constitutional rights.

In this regard, article 27 of the International Covenant on Civil and Political Rights (ICCPR) promotes respect for culture. It affirms in Universalist terms the right of persons’ belonging to “ethnic, linguistic or religious minorities..., in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.” Such rights are reaffirmed and elaborated upon in the 1992 UN Declaration on

the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities. (Anaya, 2004:132).

In relation to the coordination existing between the traditional authorities and the National State, the Organic Law of the Judicial System - Law 260 in article 55 stipulates that the Local Judges shall coordinate with the traditional judge (Wihta) aspects regarding Justice Administration on the Atlantic Coast and article 226, recommends the establishment of an Interdisciplinary Commission to investigate and formulate proposals regarding Justice Administration in the Autonomous Region, proposals that shall be approved by the Supreme Court of Justice. Chapter 5, article 200 of the Criminal Procedure Code states that the Rural Judicial Facilitator (RJF) constitutes a body at the service of the administration of justice, and the Supreme Court shall regulate its organization, functions, status, requisites, and system of admission and training. Article 57 of the Criminal Procedure Code, establishes the procedure of prior mediation, which is only possible before an indictment has been laid before the court. The mediation can be performed by a lawyer, an authorized notary, a public defender or a RJF accredited by the Supreme Court. In the case of the Atlantic Coast of Nicaragua the position of RJF relies on the Wihta.

The diagram below demonstrates the relevant law at different levels, i.e. State to local level.



It is important to mention that in Nicaraguan legislation certain articles regarding Justice Administration limit the exercise of the Indigenous Peoples rights contained in the National Constitution, Autonomy Statute and Municipal Law in favour of the Indigenous Peoples and Ethnic Communities such as articles 177 and 181 of the National Constitution, article 15 of the Autonomy Statute, articles 28 and 62 of Municipal law. Articles that have been previously

discussed in chapter two. I am of the view that these laws seem not to give the indigenous people the claimed justice given the fact that there is no clear procedure of how these laws are interrelated. In the case of the National Constitution regarding the regulation of autonomy process, article 181 states that the Nicaraguan State would guarantee an autonomous regime, through a specific law. The previous article claims that the autonomous regime and the functions of the institutions would be regulated by this body of law. Article 15 of the Autonomy Statute, states that the Regional Coordinator and Regional Parliament will be subjected to the Constitution and the Statute. Meanwhile, article 62 of Law 40, Municipal law, states that the Municipalities on the Atlantic Coast will be subjected to what is established in the Autonomy Statute and Nicaraguan Constitution.

As we can see, these articles create confusion and do not give a clear procedure of how the State institutions should function regarding Indigenous Peoples rights. There is a conflict of interest between the Municipal, Regional and National levels, being a clear violation of the rights of Indigenous Peoples and Ethnic Communities, because they cannot fully exercise their rights contained in the National Constitution, and this creates conflict between the State and Indigenous system.

State laws define conditions under which legal pluralism is said to exist, including the recognition of customary law and where there is a clash of obligation; the rule of the National system will prevail as argued by Hooker (1975) in chapter two. In many cases some of the procedures and sanctions established by the Positive system do not reflect the necessity and reality of the indigenous persons, because the procedure to follow up cases is too technical and this is carried out by a lawyer. In the Positive system, Indigenous Peoples are just “observers” of their own process and not participants like in their own system of law. My focus group with Elders reinforces this by saying that:

In the Indigenous system of law, the parties solve their misunderstanding before the Wihta, and they continue to be friends and good neighbours. In Bilwi, the parties do not speak to each other; they look for legal assistance, and in many cases, this creates a bigger problem between the communities’ members, because the lawyers would do and say anything to win the cases and from our own experience with the community members, this makes the matter worse, and it is difficult, not to say impossible to restore friendship between the parties.

Despite these limitations, the Supreme Court of Justice through the Local Judges is enrolled in the training of Wihta in conflict resolution methods and the establishment of network and

coordination between the traditional Judge and the Judicial system in criminal cases which demonstrate the relationship existing between these two systems, but we do not know to what extent it will affect the Justice Administration from an indigenous perspective and the influence of positive law in the resolution pronounced by the Wihta. Also the creation of Justice Commission on the Atlantic Coast in the year 1999 with the participation of NGO's, BICU and URACCAN University, and Governmental Institutions such as the Police and the Judicial system, show the interest of the authorities and civil organisation in the study, interpretation and implementation of justice based on Indigenous law by the communal authorities in coordination with the judicial system in the Atlantic Coast of Nicaragua. The commission worked on a diagnosis about Justice Administration with the participation of 600 communal leaders from six municipalities of the region. The purpose of these meetings was to collect first hand information about the Justice Administration and the relation of the communal authority with the State institution and to present the recommendation to the Supreme Court of Justice, which was done in 2002. Until today there has not been any answer or comments about this document by the Judicial system and the commission has discontinued their meetings since 2002.<sup>15</sup>

#### **4.2. Organisation of the Judicial System in Nicaragua**

Articles 158, 169 and 182 of the Constitution states that all laws, treaties, and legal instruments are subordinated to the Constitution. Justice derives from the peoples and it will be administrated in their name delegating the judicial system for this function. The Constitution guarantees the principles of legality, protection and respect for human rights through the implementation of the law in the processes that is of the competence of the Magistrates for the Supreme Court of Justice.

In 1994, the National Assembly approved the Organic law of the judicial system of Nicaragua Republic, Law No 260 known as LOPJ. It is the legal instrument that regulates the organisation and function of the judicial system composed of the Supreme Court of Justice, Court of Appeal, District and Local Court (article 22 LOPJ).

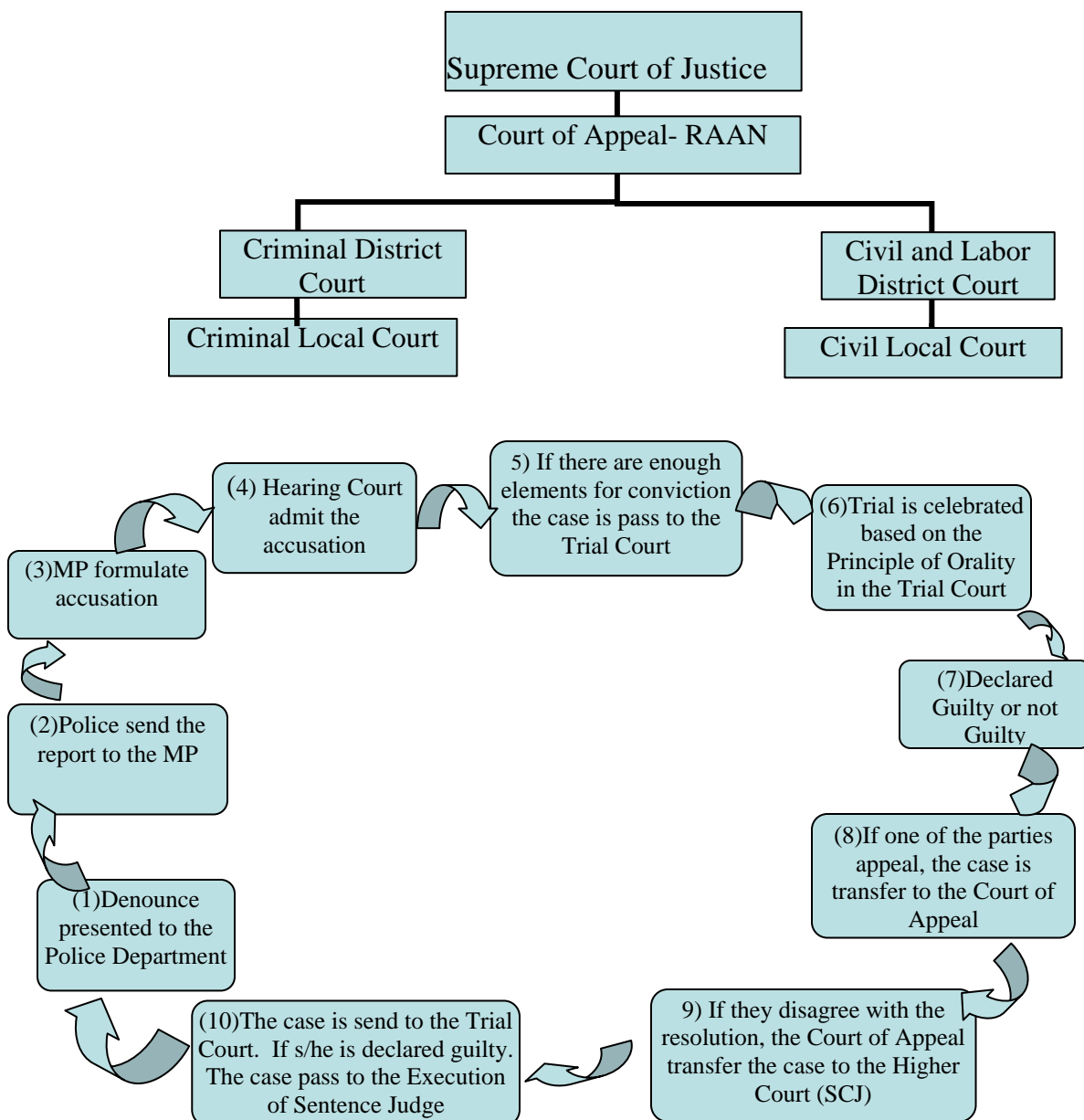
The Supreme Court of Justice as stated in articles 22 and 23 of LOPJ is the system's highest court. The Court of Appeal is established in every jurisdiction of Nicaragua, in compliance to articles 38, 39, 41 of LOPJ. The magistrates are competent to receive and solve in

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<sup>15</sup> See CEIMM – URACCAN, 2005:154 – 155.

second instance the sentences emitted by the District Court, Habeas Corpus petitions presented to the Court of Appeal and other aspects that law determine. Article 44 establish the creation of District Courts and authorizes the Supreme Court to create other district courts in places where it is necessary. Articles 52 and 54 of LOPJ state that there shall be at least one Local Court in each municipality. The Supreme Court could agree to create others if necessary. The classification of the areas that it attends is similar to the District Court with the particularity that the local court will coordinate with the Wihta's aspect regarding Justice Administration.

The following structures illustrate how the judicial system is structured in Nicaragua and the procedures to follow and institutions involved in criminal cases.



### **4.3. Justice Administration in Karata**

Indigenous jurisdiction is the legal jurisdiction for native communities, which allow their authorities to exercise legal functions. These functions correspond to those of the national judiciary; those is, to hear, judge and resolve conflicts, to define specific rights and obligations, to order the restriction of rights (whether through sanction or restitutive measures), community service, compensation for losses, and the confiscation of goods. This special jurisdiction is not bound by ordinary law but rather by customary law (Yrigoyen, 2002:169).

Before we analyze this system of law it is necessary to know the constitutive elements of this jurisdiction.

#### **4.3.1. Elements of the Indigenous Jurisdiction**

According to Colmenares (2005: 96-102) there are three basic elements in indigenous jurisdiction. These include:

1. *Indigenous authority*: Represented by a person (man or woman), groups or assembly designated by the members of the community according to their customs and traditions.
2. *The use of Customary or Indigenous Law*. This law is not written or codified and has existed from time immemorial, passed orally by members of the community and recognized by the group.
3. *Territory*: Is the geographical area where the Indigenous Peoples and Ethnic Communities live and develop their culture, known as habitat. The territory is defined as the space occupied by indigenous peoples, and where their physical, cultural, spiritual, social, economic and political life is developed. It consists of areas designated for harvesting, fishing, sacred sites for ceremonial and healing purposes, and other areas necessary to guarantee the development of their specific form of livelihood.

The author above (Ibid: 103 – 104) further argues that the indigenous jurisdiction is divided in territorial, material and personal competence with the objective to solve problems and conflicts that arise within the territorial space inhabited by Indigenous Peoples and constitute an illicit action or crime that is solved according to the community customs and traditions.

*Territorial Competence* is the local scope of each community. Material competence is whereby the traditional judge has the authority to receive and solve cases that are presented unto him, regardless of the matter (civil or criminal cases), amount and type of crime. The indigenous

jurisdiction could ask for collaboration from the ordinary jurisdiction (Positive system) and Police Department if necessary.

*Personal Competence* refers to the applicability of Indigenous law to the peoples that live in the community. A member of the community is a person, indigenous or non – indigenous who lives in the community and is related by lineage or any other relationship as long as s/he lives there.

There are some principles in the Indigenous system of law that is present in the every day life of the members of the community of Karata such as;

- The value of promise: In verbal agreements where there were no witnesses.<sup>16</sup>
  - No – imprisonment: The defendant should respond to his/her action before the Wihta, and be present in the community to comply with his sanction or obligation.
  - The use of customs and tradition as part of their daily lives.
  - *Talamana* - payment for blood, as a mechanism to perpetuate unity in the community. It is used to compensate an action considered as immoral and committed against a member of the community. This payment can be in money or goods and the amount is established based on the quantity of blood that the plaintiff or the person s/he represents has lost.<sup>17</sup>
- The participation of community members: Elders, Religious leaders, Director of Primary School and Wihta.

The practice of the Indigenous system of law at the Community level permits that:

- All individuals have access to justice. At the National level the access is limited by the high legal costs, poverty, discrimination, language barrier and geographical distance.
- The Indigenous People solve their conflict in their system of law.
- It is a reference to the legal plurality existing within the Nation State and, more important, it is part of their traditional practices.

To make use of the Indigenous system of law it is necessary to know what the considerations are that the Wihta takes into account at the moment a case is presented to him.

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<sup>16</sup>This differs from the Positive system whereby verbal agreements are valid for a maximum of One hundred Cordoba's (33 NOK).

<sup>17</sup> See also section 4.3.4. of this thesis



#### **4.3.2. Criteria to present cases**

The basic criterion is that the conflict or misunderstanding is between members of the community and cultural acceptance of the parties. Complaint can only be presented by the aggrieved party or her/his representative and not by a third party, in the following cases:

- Insult, verbal abuse, spreading false information, verbal threats or slight injury.
- Theft, breach of trust, fraud, or acquisition of items by these means.
- Damage to property or sabotage
- Violation of property sanctity by entering or passing through land that has been cultivated, prepared for cultivation or contains crops or allowing animals to go into such land.
- Rape, relationship with a minor or murder.

Any person against whom an offence is committed or any person, who learns that an offence has been committed, may inform the Wihta or the Elders of the Community. However, in the cases mentioned above, a third party cannot present the complaint.

This has been further confirmed by my focus group that the trial is carried out through an oral procedure. The case is presented before the Wihta who establishes a date for the hearing and the communal police notify the parties a day before the trial date. The hearing is carried out at the Primary School of the Community or at the Wihta's house. These are considered to be neutral places.

#### **4.3.3. Oral hearing**

The proceeding is held in Miskito and Spanish.<sup>18</sup> The Wihta speaks with the Elders, the Religious leader and the Director of Primary School in the Community to look for alternatives to resolve the conflict that is presented to them. The Wihta is the spokesperson responsible for the opening of the meeting; he welcomes the parties and gives a summary of the case.

The Wihta participates in the resolution process along with the offender, victim and their families; prayers are said at the beginning and closure. The Religious leader asks the parties and other people present in the oral hearing to close their eyes to pray asking God for guidance and wisdom when deliberating the case. Subsequently, the Wihta gives the plaintiff and defendant the opportunity to present their allegations. If there is agreement, and it consists in monetary

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<sup>18</sup> Spanish is used for words or terms that do not have direct translation in their native language.

payment the Wihta establishes a day to deliver the money. If there is no agreement in this part of the trial, he asks them to present their witnesses. The case can be solved in one or three hearings, which depends on the type of case and the parties' willingness to reach an agreement. Cases usually involve family problems, marital conflicts, juvenile misconduct, violent or abusive behaviour, parental misconduct, or property disputes.

The Religious leader's role is spiritual guidance. He uses scripture portion from the Bible and applies it to the case. He explains to the parties the importance of solving their conflicts according to Bible principles, with emphasis on the defendant to keep out of trouble. This method is effective in the Caribbean Coast of Nicaragua due the influence of the Moravian Church on the Indigenous Peoples and Ethnic Communities in the Region. The Elders are advisers in this process.

A community member could accompany the parties if they consider it necessary, and s/he will function as their representative by participating actively in the cross-examination process if the defendant does not plea guilty. Relatives often accompany defendants to the hearings. Anybody with a legitimate interest in the case is also allowed to participate from arrangement through sentencing. The Wihta decision is carried out immediately. In case involving monetary agreement whereby the parties need time to collect the money, the resolution is written out in form of a sentence, and each party receive a copy of the resolution.

#### **4.3.4. Forms of Punishment**

Sanctions and punishment under traditional law differ from place to place. Underlying traditional law is the concept of collective rights and responsibilities, which is different from the Western focus on individual rights. Offender compliance is mandated by the Wihta and monitored by the communal police with assistance from the families. Non-compliance to Indigenous law may result in punitive sanctions such as public shame, compensations and exile from Karata.

*Public Shame:* Is used to maintain order in the community. This involves communal work denominated *paplit o pablik*, which involve cleaning of communal areas such as church, primary school, communal cemetery, help in construction and cleaning trench.

*Compensation:* Is used in cases regarding goods and injuries, but its usage would not necessarily mean that other forms of punishment would not take place. This form of resolving disputes is known as *talamana* which consisting in payment of informal fines and goods.

Cox (1998:145) points out that *talamana* – *payment for blood* is part of the traditional system of law of the Miskito Communities in the Atlantic Coast of Nicaragua. It consists in compensating an action committed against a family or a member of the community. The Wihta, Elders and *Sukia* intervene and advise the parties to reach an agreement. The Wihta establishes the amount of money or goods that the defendant will pay for being responsible for an action considered immoral in the community such as statutory rape, injuries, and murder. This is done in a way that the families involved in the process are satisfied with the compliance of the sanction imposed. The Wihta measures the wound and according to the size and amount of blood that the victim claimed has been shed, the Wihta shall impose the sanction.

In sexual assault cases, the compensation varies according to the woman's status. If the girl is virgin, the amount of money or goods to pay is very high, and the possibility to be married to the defendant if the family and parties involved agree. If she is single, this same mechanism is applied, with the difference that the amount of money would be lower than the one a virgin would receive. When the victim is a married woman, if her husband agrees, the parties would reach to a monetary agreement, and in the majority of cases, the defendant would establish his residence out of the community setting, depending on the circumstances in which it happened.

In homicide (*kaiki ikras*) cases whereby the victim is male, good hunter, with a good social status in the community, the accused would compensate the family with many cows, pigs, chickens, dogs, fruit trees and plantation. If the victim had a wife and children they will receive the cows or goods. If the victim did not have children and wife, the compensation will go to the relatives. If necessary, the offender will be present in the agricultural activities as maintainer of the house assuming the responsibility of the victim. In case of non-compliance the Wihta takes away his properties including his house and expel him from the community. Cox (Ibid) observed that when the community members comply with the sanction they maintain community peace and family ties.

From the Positive system perspective, *talamana* practice is considered incompatible with social and civil rights, and the dominant notion of "justice" or Western law. In these cases, provision recognizing the rights of Indigenous Peoples to their own norms and practices (*usos y costumbres*) has, in practice, worked to the disadvantage of weak and marginalized groups within indigenous communities. Women's experiences as victims have revealed the inequalities of power that exist at the various levels of both justice systems. In the State system the woman is

re- victimized by the peoples involved in the process or the case is dismissed or acquitted due to the lack of evidence or the deficient performance of the *Ministerio Publico*. In the Indigenous system in the majority of cases involving sexual assault, the defendant claims that it was with the victims' consent, and therefore the victims relative, to avoid family "shame", would agree to solve the case through a mediation process or that the victim and offender get married to restore the family dignity. Even though victim, offender and the community participate in defining harm and potential repair, all complaints and all issues relevant to the case are openly discussed. It must be noted, however, that sometimes there are contradictions between the ideal and practice of the Indigenous law, as it relates to justice and human rights.

Cultural practices such as *talamana* deny individual's human dignity and human rights regarding the gender aspect and the value of man and women from an indigenous perspective. Nonetheless, the Moravian Church has been an important institution within the indigenous communities in regards to the promotion, preservation and in some cases transformation of traditional practices that are considered extreme, such as imprisonment and physical punishment.

*Fines*: Punishment generally involves reparation, either in the form of special community service and/or a fine. This sanction is often combined with the threat of more severe punishment in the event of non-compliance or repetition of the offence. In recent years, fines have become the most used punishments. They are often severe, especially in cases involving public scandals.

*Exile*: Is described as an extremely harsh punishment. The offender is prevented from entering certain areas where an aggrieved person may be and to participate in the communal activities as an active member or in some cases is expelled from the community. In Karata, the Council of Elders observed that the community applied the penalty of Exile as a last resort against a member who had systematically failed to fulfill his communal duties. This affects the loss of the membership in Karata.

#### **4.3.5. Criteria Used to Impose Sanctions**

Customary law is a means of self-governance and of dispute resolution – it is a way for communities to control their own lives. In the context of an Indigenous offender, it is relevant to consider whether the offender observes a traditional lifestyle and lives according to community customary law. In some cases, evidence of the customary background of the offender may mitigate the severity of the offence, and corresponding punishment. It may in some

circumstances also be a relevant consideration that the offender has undergone traditional punishment in accordance with customary law.

A basic criterion used is the defendant's behavior. For a first time offender, the Wihta uses mediation as a tool for conflict resolution. The parties reach an agreement through a mediation process and the parties would establish a date to comply with the agreement. In case of non-establishment of date by the parties, the Wihta will give the defendant a period of one month for the payment of money to the other party in case he cannot pay at that moment. If the agreement is non monetary, the Wihta imposes sanctions. This punishment has two main purposes:

1. To let the members of the community know that the defendant has committed an action that goes against the rules of the community. This would be known by the community implicitly because this person will have to do communal work in a different schedule established for this purpose. This is translated into public shame for the defendant.
2. Disciplinary action. The Religious leader is responsible to follow up the compliance of his sanction and give him spiritual guidance.

When the crime/offense is more than one thousand Cordoba's<sup>19</sup>, based on the inventory of goods given to the Wihta by the plaintiff the sanction that the Wihta impose is communal work for a period of four days and the payment for the cost of the product that the defendant have stolen, damages s/he caused and fees (for the Wihta). An example would be a case of robbery, where the defendant stole one thousand Córdoba. In this case s/he would have to pay back one thousand three hundred Córdoba's. One thousand that is the original amount that s/he stole, two hundred Córdoba's for damages and one hundred Córdoba's for the Wihta services. In minor cases, the cleaning of public places is equal to public shame plus services that s/he does in the community for a period of time. Public shame is used in cases involving scandals in public areas, neighboring conflict, animal trespassing, gossip, fight between young boys and theft paddles.

The sanction imposed has to do with the number of times s/ he has committed this action. If it is the first time the sanction is communal work, for the second time communal work plus fine is imposed. The third time, the Wihta refers the case to the Police Department in Puerto Cabezas. In case of non-compliance of an agreement, the Wihta would have a meeting with the defendant to review agreements and explain why s/he did not comply with her/his obligation. If

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<sup>19</sup> This is equivalent to 300 NOK approximately.

necessary the Wihta will confiscate the defendants' property and pay the plaintiff. The cost of the property that is restrained has to be equal to the damage s/he cost. In case the defendant does not have a property or he does not agree with this procedure, the Wihta will refer the case to the Police Department who will proceed to investigate and send the result to the *Ministerio Publico* who will present the accusation to the Local or District Court of Justice according to the crime that is investigated.

Concerning the criteria used to impose punishment, Mr. Javier Newball, Wihta of Karata said:

We take into account the defendant's prior behaviour, and if it is the first time s/he committed the action considered immoral in the community. For two consecutive times, s/he will be judged by traditional system of law. The third time, I refer the case to the police station for further investigation, because this person does not abide by the rule and regulation established in the indigenous community of Karata and does not respect the Traditional system of law.

In these cases, the Wihta and the teacher of the Primary School would send a report to the Police Station to inform that a crime has been committed in the community and provide information regarding the case. When necessary, the Wihta will accompany the claimant to the Police Department.

The sentencing process in the Indigenous system of law involves balancing the rights, interests and circumstances of the community, the victim and the offender. Culture and context are important aspects of mitigation. By ignoring *talamana* or other form of conflict resolution, Indigenous offenders can be put in a situation of double jeopardy. The offenders will likely face criminal charges in formal court processes. Court sentencing may cause the offender to be removed from his home community and transported to a secured correctional facility in another region. These matters are balanced against community concerns such as the importance of protecting vulnerable members of the community and providing a reasonable deterrence<sup>20</sup> against such behavior. As we could see, multiculturalism and legal pluralism aspects are present in the resolution of conflicts by taking into account our domestic legal framework regarding Human and Indigenous rights discussed in chapter two.

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<sup>20</sup> Theory of justice which says that punishment is a necessary consequence of a crime and should be calculated based on the gravity of the wrong done.

#### **4.4. Relationship between the Indigenous System and Positive System**

It is important to mention that collaboration establishes a horizontal relationship rather than one of control, revision, or some form of subordination. The point is to establish a system that allows a harmonious relationship between the Indigenous and the Positive system under democratic - not subordinate - conditions. One of the needs for coordination on the resolution of conflicts is the establishment of rules about competence, mechanisms for cooperation and mutual aid. Although indigenous communities have always been granted a degree of autonomy to run their internal affairs, Nicaragua legislation establishes a mechanism of coordination between the State law and the Indigenous legal system that give local authorities much more autonomy than before, in particular to adjudicate criminal cases. Certain fundamental rights must be observed: no executions, torture, or banishment. Nonetheless, there are contradictions in both the legislation and its enforcement with respect to indigenous authorities' right to judge, detain and establish sanctions in the communal setting.

The Indigenous system of law relies on methodologies legitimated by cosmological forces and sometimes requires shamanic consultations, assumptions and authorizations that differ fundamentally from Western notions of justice, due process, and conflict resolution. The interaction between the official juridical bodies and indigenous peoples produces transformations in both. On one hand, some customary law rulings are disputed within Indigenous Communities themselves, resulting in individuals appealing their sentence by turning to Western courts. Sometimes the Wihta decision is challenged as discriminatory, authoritarian, or intrusive into private space, challenges which lead to appeal to universal rights, and on the other hand, the Wihta would consider that the Judge is disrespecting his authority by ruling a case that already have been discussed and solved in the Indigenous system of law.

Findings from Sieder (2002:11) indicate that even when dominant political and legal authorities are open to intercultural dialogue, the balance between observing the group's collective rights and ensuring the individual human rights of its members is highly complex. This is because the legitimacy and nature of customary law or traditional dispute resolution practices is not only contested by non-indigenous authorities, but also often within indigenous communities themselves. In an increasingly globalised legal context, people on the group make appeals to the ideal of human rights in order to contest what they consider to be discriminatory or

authoritarian practices within their communities and increasingly, within their private, domestic space.

In the case of Karata Community, there is coordination between the responsible of the Littoral Sector from the Police Department and the Wihta in cases where the offender goes to Karata looking for refuge or a place to hide after s/he has committed a crime. The Wihta and the police officer will search for the offender and carry him to Puerto Cabezas to face trial.

Mr. Javier Newball, Wihta of Karata pointed out that when the defendant has committed more than two offenses or the case is severe; he refers the case to the police for investigation. The Judge (from the Positive system) respects the resolution that is taken in the community in cases related to neighbouring conflict, thieves/robbery and domestic abuse. When it comes to cases such as drug traffic, rape, homicide, even though we solve it based on *talamana* agreement, the Judge does not respect this.

Cases involving physical damage and drugs cannot be mediated. Therefore, even though there is an agreement signed before the Wihta it is not respected by the Judge in Puerto Cabezas. In other cases where the legislation permits prior mediation, the judges from both systems agreed that the best way to follow up the cases that could not be solved in the Indigenous system or that the monetary agreement is for subsequent date, a written agreement is necessary to prove the existence of an obligation and to avoid duplicity of process in the system and also to guarantee the compliance of the agreement in any one of the systems.

As previously discussed, *talamana* is widely used by the Miskitos in crimes against persons. In these cases, the Wihta does not give an in – depth analysis of the consequences of the defendant’s action, as for instance, whether the victim’s life was endangered, collateral damages were occurred, as the Positive system would have taken into account. In case the complainant does not agree with the payment or feel that the money was insufficient s/he will go to the Police Department and report the case. These crimes are considered public offenses and the *Ministerio Publico* will proceed to formulate accusation and present it to the Criminal Judge in Puerto Cabezas who will establish a date for oral hearing and the plaintiff and defendant will present their allegation based on our Domestic law.

Findings from Espinosa (2007:31) indicate that in the North Atlantic Coast of Nicaragua, the *Ministerio Publico* permits mediation in cases such as disorderly conduct, robbery, vandalism



and minor cases that do not involve violence or intimidation and in cases with penalties under three years imprisonment. They accept mediation as a tool to restore social peace.

Due to the lack of an effective coordination between the indigenous authorities and Positive system, the *Ministerio Publico* many times receives cases that have already been solved by the Wihta. The offender will inform the *Ministerio Publico* about the compliance of her/his responsibility in the Indigenous System. This office would send a letter to the Wihta, and if it is proven, the District Attorney would ask the judge to close the case due to the existence of a resolution given by the Wihta.

There is also coordination on aspects related to leadership training programs in mediation, Nicaragua Constitution, Autonomy law and principles of Criminal law as part of capacity building programme from the Organisation of American States (OAS) and the Supreme Court of Nicaragua. My key informant, Dr. Rhina Mayorga Paredes, President of the Court of Appeal in the North Atlantic Coast says that it is important to work hand in hand (*pana – pana*) and propitiate meetings and forum between Judges, Magistrates and Wihta to exchange experiences and knowledge.

My key informant, Dr. Rojas pointed out that despite the existence of a formal organic structure regarding coordination of the Indigenous authorities and the Judicial system, the Judges would take into account the agreement that is signed in the community or has been settled according to their custom and tradition, in cases allowed by the domestic law.

#### **4.5. Case Studies**

For a better understanding of the Indigenous system of law in Karata, I will present two cases that were resolved using the Indigenous system.

##### **Case No 1: Missing Child**

Plaintiff: Juan, Jose's Father  
Defendant: Rosa, Maria's Mother  
Date: March 25, 2006  
Venue: Community of Karata

*Fact of the Matter:* Jose, 18 years old and Maria, 16 years old, on March 21, ran away from Karata and spent three nights on the mountain. Mr. Juan, Jose's father, reported to the Wihta that

Maria was last seen with Jose. Before the judgement, the Wihta instructed the Communal Police to look for the young couple. Two days after, Maria and Jose were located and presented to the Wihta. The oral hearing was scheduled for the following day at ten o'clock in the morning in presence of the plaintiff, defendant, the young couple and the communal police.

*Oral Hearing:* During the oral procedure, the Wihta gave the plaintiff and defendant the opportunity to present their allegations. Mr. Juan's mentioned that his son, Jose is schooling and he does not have the economical means to support Maria. Despite this, Ms. Rosa is in favour of the relationship. Mr. Juan petition is that they should stop the relationship. The defendant Ms. Rosa (Maria's mother) accepted the relationship, but she did not encourage them to run away. She was particularly concerned of her daughter's wellbeing. After listening to the statements by the parties the Wihta interviewed Jose by asking him if anyone advised them to run away, he said that no one advised them, that it was a decision they took, because his father was against the relationship and that he (Jose) wanted to establish a family with Maria. (2) The Wihta asked if he could maintain Maria by his own means, he replied that he was a fisherman and in the process of buying a farm. (3) If there was any agreement with Maria to get married? He replied that there is an agreement between them, and that he was not going to leave Maria, regardless of his father's opposition. Subsequently, the Wihta interviewed Maria, asking her about the time they were in the Mountain and what did they eat? She replied that they were in the mountain for three days, and that they had eaten and slept in an abandoned farm, they ate rice, and carried matches, oil, pots and machete, for self-protection. From the abandoned farm they had cassava and plantain to complement their food. The Wihta asked her if they had lived as a married couple (if they had sexual intercourse) during those three days, she said yes. At this point the Wihta threw the matter out of court based on the criteria that Jose demonstrated to the Wihta that he is able to support Maria' with his income as a fisherman and that he had resources to buy a farm. Also his intention was to marry Maria.

*Decision:* The Wihta authorizes Maria and Jose's wedding, with the condition that this will be held during Christmas vacation, when they have finished their academic year. Because Jose ran away with Mary for three days, the Wihta imposed a sanction of three days of communal work that consisted in cleaning the trench and churchyard. He advises Juan not to go against the couple's decision and gave Ms. Rosa the responsibility to guide, support and advise them about the importance of marriage and family.

This case attempts to demonstrate that the constitutive elements of a crime are different in the Indigenous and Positive system of law. In Indigenous law, the Wihta typified the case as Missing Child and the defendant was declared not guilty by demonstrating that he was capable to support Maria financially and his will to marry her. In the Positive system, this case would have been classified as statutory rape according to article 196 of Nicaraguan Criminal Code that says; “Statutory rape is the crime of sex with a minor under the age of 14 to 16 years with/without her/his consent. This also covers adolescent over sixteen that has sexual intercourse with an adult being virgin.” The sanction for statutory rape varies from three to five years imprisonment. Nevertheless, if the victim pardons or marries the offender the case will be dismissed by presenting the petition of dismissal to the District Court accompanied by the wedding certificate or the letter of forgiveness signed by the victim.

**Case No2: Upla Aisasara – gossip**

Plaintiff: Rosario

Defendant: Juana

Date: May 2006

Venue: Karata Community

*Fact of the Matter:* Rosario’s friends heard Juana telling the members of the Community gathered in the Churchyard that Rosario goes to Bilwi to party with peoples and in places that are prohibited by the religious beliefs, then comes back to the community and take Holy Communion, as if nothing happened. Rosario was informed about this situation, and she went to Juana José to demand an explanation regarding this statement, a situation that ended in verbal aggression when Juana shouted at Rosario using obscene words, that she must mind her own business and keep her out of trouble. This incident was reported to the Wihta, who is Rosario’s uncle. Due to the fact that Rosario is the Wihta’s niece, in a preliminary hearing he decided that the Council of Elders should solve this problem in a private hearing. The Wihta requested that *Dama Pain*, the oldest elder, should lead the oral proceeding. *Dama Pain* sent the communal police to notify the plaintiff, defendant and witness about the celebration of oral hearing regarding the case that was presented unto him by Rosario.

During the oral hearing, Ms. Rosario refers that Marcela has gossiped her saying that when she goes to the City she misbehaves by going out to places where Christian peoples do not

go and that the religious leader should put her on discipline for that act. She demanded that Juana must prove her allegations and if she fails must be punished for her statements. Ms. Juana replied by saying that she did not talk wrong things about Rosario, claiming that Violet and Ana (witnesses) are lying. She recognised that she offended Rosario, but in self - defense, when Rosario shouted at her and she just defended herself from this aggression. Subsequently the Elder received the witness statements. Whereby Anna refers that at Sunday Church Service, a member of the community asked for Rosario and Juana responded by saying that: “I’m sure that she is in Bilwi enjoying freedom and having fun in Jumbo (dance hall) with her city boyfriends”.

*Decision:* After listening to the parties, the Council of Elders took the following decision: *Dama Pain* pointed out to the plaintiff, defendant and witnesses that gossiping about your neighbour is not good, and that they should respect their neighbour and learn to live in harmony according to the principles of God contained in the Holy Bible. He also reminded them that behaviour would have ended in injuries or death if the problem escalated. *Dama Pain* considered that she was a first offender and therefore her sanction would not be severe. The elders prohibited Juana to gossip members of the community, specifically Rosario. Because she used obscene words, the elders sanctioned her to public work and the cleaning of the churchyard. *Dama Pain* and the religious leader of the Moravian Church agreed that Juana would assist to two meetings for spiritual guidance and that the Church Committee would not put her on discipline, being authorized to receive Holy Communion once she comply with the sanction imposed by the elders.

In this case, I learned that coordination existing between the justice system and the religious institutions in the application of sanctions to members of the community is necessary. The religious leader gives the defendants spiritual guidance and the elders apply sanctions based on the elements presented in the oral hearings. The traditional authorities were competent to resolve this conflict, even though the misunderstanding that initiated the conflict happened in Bilwi, but the plaintiff and defendant were members of the community. Therefore, Indigenous law and jurisdiction can intervene, as the cultural and normative framework is still in effect for them. It was sufficient for the affected person to demand the intervention of his or her system. We can appreciate the involvement of elders in this case and the impact they have on an offender’s attitude and behaviour. The moral dialogue with the elders and religious leader is highly personalised, calling upon the offender’s obligation to family and community and seeking

to bring the offender back into the communal life. This case is a clear example that in the Indigenous system of law there are transgressions that are not considered crime in the Positive system, such as gossip and religious aspects. Contrary to the Indigenous system of law, it is sanctioned severely because it disrupts the social order.

The above cases demonstrate that perception of justice varies from one system to other. Actions that are considered crime in the Positive system and that may demand severe punishment in some cases are not considered as such in the Indigenous system of law and vice versa.

#### **4.6. Comparison between Indigenous Law and Positive Law**

During my fieldwork, I observed that there are some principles of criminal procedure that are applied in the Indigenous system of law. Therefore, it is necessary to analyze the similarities and differences between the Indigenous and Positive system of law.

##### **Similarities**

We can find common elements in the Positive and Indigenous systems of law. This section will analyze the principles of Criminal law applied in Karata, based on Karata's traditional system of law. During my fieldwork I observed the use of principles such as publicity, equality before the law, right to counsel/assistance by a member of the community, immediacy and orality, and the defendant's right to defend himself against charges.

One of the similarities is the role of the Police as the responsible to conduct most of the initial investigation in criminal offenses by identifying and gathering the evidence. In the Indigenous and the Positive system the plaintiff or claimant is the one that presents a case to the Judge who will open a process that involve the principles of orality, expeditiousness and effectiveness, presence of the judge, cross examination and publicity.

The presence of a Judge is necessary. Elements of conviction shall be presented to him with the participation of the parties involved in the process. After this procedure, the judgement is to be rendered immediately after the court closes its oral proceeding. In some cases, there may be a temporary delay in the delivery of judgments due to time-consuming procedural matters relating to judgment production (such as reviewing the text of judgment or obtaining opinions

from judicial committee persons). If the Judge considers it improper to render the judgment on that day, he can appoint another day on which to do so.

As a right of the plaintiff and defendant, cross-examination allows the accused to undermine the prosecution case, even adducing evidence of his own. This is a result of the two parties (plaintiff and defendant) vigorously defending their version of the fact from legally equal position and before a neutral and unprejudiced arbiter who will see to it that the “truth” comes out. The parties are also entitled to have access to just and fair treatment. The victims are entitled to access the mechanisms of justice and to prompt redress for the harm that they have suffered. In this part of the process, the victims are informed of the proceedings and the disposition of their cases, allowed to present their concerns at appropriate stages of the proceedings, obtain assistance throughout the legal process, and be protected from intimidation and retaliation.

In the Indigenous and the Positive system, fine is one of the sanctions imposed by the Judge. This is also in practice more often in the Indigenous system of law when members of the community have infringed some norms within the community. In the Positive system, the range of penalties varies from fines, probation, incarceration, restitution to split sentence. The ultimate goal of the penalties in both systems is to restore peace.

## **Differences**

The differences between Indigenous and Positive law among others include the principle of orality, content of resolution, time frame for cases, and the presence of the Judge in all the phases of the process and trial by Jury, among other. The principle of orality is applied exclusively for criminal cases in the State system, due to the fact that in civil, family, labour and business cases, the procedure is written. This is contrary to the Indigenous system where orality principles are applied in all the cases.

In both systems (Indigenous and Positive law) the investigation is initiated with a report by the plaintiff. In the case of Positive law the complainant does not have direct contact with the Judge and the plaintiff in coordination with the *Ministerio Publico* are responsible for finding evidence in his favour, and enough element of conviction to be able to present the accusation to the judge. This is contrary to the Indigenous law whereby the case is presented orally to the

Wihta by the complainant or plaintiff without formalities and the Wihta immediately investigates the case and solve the conflict in an oral hearing. In the Positive system, the Judge or Magistrate's decision should be motivated using domestic legislation and international treaties ratified by the State. In the Indigenous system, the Wihta uses logic, experience, knowledge and Council of Elders' advice. When it is determined that the defendant is guilty, the Judge in the Positive System would impose incarceration- physical confinement in prison, jail or other locked up facility. The term varies from six months to thirty years. The Wihta by contrary imposes fines, restitution or community service as sanctions.

Regarding criminal procedure, even though it is oral and expeditious, we must comply with terms that vary from case to case and take from three to six months. This is contrary to the Indigenous law whereby the Wihta does not have an established time frame for cases, solving the misunderstanding in one or three hearings, which make the procedure more expeditious than in the Positive system. Cases in the Positive system are solved through a trial, mediation process, agreement and extinction of the case's based on the death of the offender, because the plaintiff ceases to continue the case, victim pardon and amnesty, among others. In Indigenous Law, the cases are solved through the use of conflict resolution method basically mediation process.

The majority of offenders in the Positive system do not receive punishment for the crime committed, because it is necessary that the prosecutor has proved that the defendant is guilty beyond reasonable doubt and in many cases this is difficult due to the lack of sufficient evidence or high standard of proof. By contrast, in the Indigenous law, the Wihta with the collaboration of the community members and elders seeks for a solution to the problem presented.

The Judge in the Positive system is not present in all the phases of the process. An example of this is that the Judge may or may not the mediation between the parties involved in the process and decided before the Police, *Ministerio Publico* or a Lawyer through a pre – mediation, as established in article 57 of the Criminal Procedure Code. In the case of the Wihta, he is involved directly in all the stages of the process.

The *Ministerio Publico* must be notified of every offence where the police has taken written notice, and must receive the relevant file, and in coordination with the police and

forensic, he will gather evidence for and against the defendant in a neutral and objective manner, as the goal of the prosecution is not to obtain a conviction, but to discover the “truth” and to apply the law. The process also establishes defined roles and obligations for Judges, Prosecutors, and Defense or Council. In the Indigenous system, the parties do not need the presence of prosecutors and councils for the oral proceeding and to defend themselves from the allegation of the other party.

Trial by Jury in the Positive system is used for criminal cases that carries sentences three years or above and by request of the defendant, as a legal proceeding in which a jury makes a decision about a particular case. The juries weigh the evidence and testimony to determine questions of facts and generally do not determine questions of law. In the Indigenous system of law, this institution does not exist, but they have the Council of Elders, with the function to advice the Judge when the case is severe or in cases their assistance is required. It is important to mention that the Wihta does not make use of incarceration, contrary to the Positive system of law where the Judge issues provisional detention when it is presumed that the offender will evade justice.

Perhaps the most important contrast between the two systems is that the State does not demand compensation, but punishes the offender. Meanwhile the Indigenous system allows crime to be viewed as a natural human error that requires corrective intervention by the family, council of elders and Wihta. Thus, offenders remain an integral part of the community because of their important role in defining the boundaries of appropriate and inappropriate behaviour and the consequences associated with misconduct. Healing, along with reintegrating individuals into their community is more important than punishment. Retribution in the Positive system is focusing on the anonymous State, offended by the non - compliance of the law. In the Indigenous system, this retribution is focused on a family or community through the establishment of various sanctions such as public work and others that benefit the community and family members.

The Judges in the Positive system are appointed by the Supreme Court of Justice. In the Indigenous system, the Wihta is elected by the Community in a Communal Assembly. Despite these differences, both system goals are to maintain or restore harmony and balance.



The summarized table below illustrates the main difference regarding Justice Administration between the Positive and Indigenous law.

<b>Differences in Justice Administration</b>	
<b>Positive System</b>	<b>Indigenous System</b>
Vertical	Communication is fluid
Spanish Language is Used	Miskito language is used
Written statutory law derived from rules, and procedure, written record	Oral customary law procedure learned as a way of life.
Separation of Church and State	The spiritual aspect is present through the Religious leader.
Adversarial and conflict oriented.	Builds trusting relationships to promote resolution and healing.
Argumentative	Talk and discussion is essential
Limits participants in the process and solutions	No time limits on the process, long silences and patience are valued; inclusive of all affected individuals in the process and solving problems
Focus on individual rights	Focus on victim and communal rights
Vindication to the State	Reparative obligation to victims and community, apology and forgiveness.

The influence of one system of law over another is difficult to be determined. My key informant, Dr. Rojas argues that the State system is taking steps towards the recognition and incorporation of elements of the Traditional system of law such as the principle of publicity, immediacy and orality; the use of conflict resolution method such as mediation and Ombudsman in their National system of law by the establishment of the center for mediation, the creation of the position of RJF and capacity building programme for the training of Wihta on the Atlantic Coast. He argues that the mediation process permits the disputes to be solved within a day and is significantly less expensive than litigation, which takes months or years as well as the consequent fees of lawyers and experts.

This process of knowledge exchange in the system of law corresponds with Yrigoyen (2002:169) who argues that Indigenous law includes old and new features, native and adopted elements, but corresponds to the norms by which rules are created or changed. In other words, the recognition of customary law is not the recognition of a static body of rules, but rather of the rights of holders to create new norms for themselves.

#### **4.7. Which System do Indigenous People Prefer?**

Globalization reflects a dynamic process that embraces changing scales of human social organisation and the exercise of power so that the current forms it adopts create new approaches to legal aspect that need to be addressed. This raises questions about how to perceive Indigenous Law and its relationship with the Positive system, regarding the concept of legal pluralism. During fieldwork, the external influence and the impact of globalization was evident in the application of traditional law and transformed the communal setting.

In relation to the preference of one system over the other, the Wihta said that: the children of Karata use the traditional system of law. In case of no agreement they go to Puerto Cabezas. This is further confirmed by my focus group with elders who referred that: “Before the establishment of the Court of Appeal and the six Courtrooms, the cases would be solved in the communal setting”. This implies that in the present many of the cases that violate community practices are referred to the Local or District Judge, which create subordination by the Indigenous system of law to the National system. Another important factor that is emerging within Karata community is the non acceptance of indigenous jurisdiction by some members of the community partly due to external influence, such as media, drugs consumption and high mobility of community members to Bilwi, as pointed out by the elders of the community during my focus group discussion. They also mention individualism, as individualism is a serious problem in the community, because the members of the community at present put their individual interest before the wellbeing of the community.

I argue that globalization and acculturation processes have been important factors in the loss of communal values. The emigration of community members for further education or job opportunities during weekdays permits them to “live in two different worlds”. On one hand, they receive knowledge and experiences from the State educational system. On the other hand, this situation creates conflict within the communal setting because in many cases young people

and some adults challenge the indigenous authorities when they face trial, when they consider they will benefit from the Positive system and this create a conflict between the Communal Authorities and the victim or offender, who states that: “in Bilwi there are written law’s, the Wihta cannot make his own law”.

It is necessary to mention that conflicts or misunderstanding that arise between members of different ethnic groups (e.g. Miskito and Non-Miskito) are resolved in the Positive system of law due to the fact non-Miskito cannot be trial by the Wihta, since they do not share the same system of belief and practices.

Regardless of these conflicts in the community, the Council of Elders considers that the traditional system of law is better than the Positive law because it is more organized and they apply Christian principles/God’s Law; the conflicts and misunderstandings are resolved in one hearing. It is a free process, and they are attended by members of their community, who know the case first hand and also the community members know what is the sanction or punishment that will be imposed unto them in case they commit an action that is against customary law. The most important aspect of this system is that the community will benefit from the sanction that the judge imposes unto the defendant such as the cleaning of public places and establishment of fines to the community members that infringe the law.

To sum up, Justice Administration in Karata involves the victims, offenders and the entire community that participates actively in the search for resolution acceptable to all the peoples involved in the process, throughout procedures that respect and protect the rights and interests of victims, offenders, and the community. The Wihta’s decision is carried out immediately. As an exception, members of the community will use both systems. In these cases the defendant would inform the *Ministerio Publico* about the existence of an agreement in the Indigenous system of law; if it is proven that the offender has complied with her /his obligation the case will be closed, based on a prior judgment. The impact of Positive system and the extent of collaboration between indigenous authorities may vary. Even though there is a key normative to restore the harmony of the community this may infringe on the rights of the individual in the Indigenous system. In crimes against persons, mediation is not allowed by the domestic legislation, but it is still carried out by the Wihta. In such cases, the agreement between the parties is not valid, and the defendant faces trial in the Positive system even though s/he has complied with her/his obligation in his community according to their customs and tradition.

Therefore, the need to establish guidelines regarding competence, mechanism for cooperation and mutual aid is necessary. There is a necessity for an intercultural dialogue to establish procedures to resolve perceived conflicts between human rights and the special jurisdiction.

## Chapter 5

### Summary and Conclusions

In this thesis, I have used a multidisciplinary approach borrowing concepts and referring to writers from diverse disciplines in order to present a holistic understanding of the communal organisation and the administration of justice in the Community of Karata. This multidisciplinary approach permits me to understand certain characteristics regarding ethnicity, identity and cultural practices of the Miskito ethnic group. In this study, I used legal pluralism theory, Indigenous Peoples, norms and customs; conflict resolution, ethnicity and multiculturalism concepts; also international and domestic legal framework regarding Indigenous Peoples rights.

I applied legal pluralism theory to develop an analytical understanding of the recognition of the Indigenous system of law in the Constitution of Nicaragua, which have led to the rights through a rather slow legislative and judicial development. Legal pluralism theory refers to the situation where two or more legal systems coexist in the same social field, interacting, interpenetrating, mixed or overlapped. Nicaraguan Constitution recognizes multiculturalism and legal pluralism. Even though this element of multiculturalism is enshrined in the constitution, there are no specific administrative laws that set clear procedures of how these laws should function in practice. This creates confusion in the relationship between these two systems of law. As a consequence, courts have no substantive legislative guidelines on how to respond to the activities or decisions taken by the *Wihta*'s or traditional leaders.

Therefore, this study aimed to analyze the administration of justice's in the Community of Karata and the influence of the Positive law over the Indigenous law, or vice versa. It also aimed to study the existing relationship between the *Wihta* and the judicial system in Puerto Cabezas.

The thesis has so far examined and demonstrated the organizational structures of traditional authority procedures and sanctions applied by the *Wihta* to the offenders. Furthermore, the thesis reflected on the importance of ethnicity in a communal setting as a prerequisite for being accepted as a *Karata luhpia*. This condition was discussed as it sets a situation for the rights and benefits in the community.

I have argued that the Indigenous system of law in Karata is based on a conflict resolution method as a means to maintain peace and social harmony between the members of

Karata. The Indigenous system of law in Karata is an administrative body composed by the Wihta, Elders, and the Director of Primary School, the Moravian Religious leader and the Communal Police. The application or norms, procedures and sanctions by the Wihta is based on customs, traditions and cultural acceptance of the communal norms by the parties involved in the process.

Nevertheless, this system of law has experienced transformation as evidenced by the use of the Positive system by the Wihta in oral hearings and also by the elaboration of a mediation act as a guarantee of compliance with the agreement by the plaintiff and defendant. These new features present in the Indigenous system of law require the Wihta to have basic legal knowledge, due to the coordination/collaboration existing between the Indigenous system of law and Institutions such as Police Department, Judicial system, Lawyers and District Attorney.

I have also argued that the Indigenous system of law employs procedures and forms of punishment inconsistent with basic principles of human rights and legality. In this matter, the Moravian Church has played a fundamental role in the abolishment and in some cases transformed some traditional practices unacceptable in terms of Christian principles such as physical punishment. Although, the church has transformed some cultural practices, *talamana* practice resisted change overtime and has been accepted by the church to a degree. However, Positive law does not recognise and accept this cultural practise since the State claims that it is contrary to human rights standards. In this sense, the church played a significant role of bringing two systems of law closer to each other with the ultimate goal to resolve conflict and restore peace and social harmony. This would be done through investigation and clarification of facts and by determining the responsibility of the offender. As argued previously, cultural practices are transformed over time and space, affected by external factors such as globalization and acculturation. For example, the social status (respect) and expectation toward the Wihta and the Indigenous system of law have changed as observed by the new requirements of the position of Wihta. The point is that, one has to have basic knowledge of the Positive system of law and be able to communicate in Spanish, which is the language used by the State institutions.

In relation to the knowledge and understanding of the Indigenous and Positive system of law by members of the Community, I argued that the community members are aware of the existence of the Positive law and have basic knowledge of the human rights instruments.

Yet, the members of the community prefer the Indigenous system of law and use the Positive system as a last resort when they claim that their standard human rights have been violated in the Indigenous system. This has been claimed by the Wihta to create a situation of subordination since it disrespects the decision taken by the traditional authority. The Elders and the Wihta claimed that in the past their decisions were respected and complied with by the community members. Currently, some of them challenge decisions made by the Wihta and appeal to the State system. This creates conflicts between the two systems of law since the matter at court would be analyzed and solved by the two systems' of law with different consequences for the victim and the offender.

As argued earlier, the main objective of indigenous communities is to maintain tradition and culture practices, although to the interior of the Community, individual human rights are violated. In this aspect, Kymlicka's idea (2005:35) of external protection and internal restriction would apply to the Indigenous system of law that is carried out in Karata Community. On one hand, external protection involves the claim of a group against its own member; on the other hand, internal restriction involves the claim of a group against the larger society. In relation to the Indigenous system of law in Karata, internal restriction is a tool to protect the stability of the Miskito ethnic group and the practices of their customs and tradition that have been acquired and transmitted from generation to generation. Meanwhile, internal restriction is applied in practices such as *talamana*, to protect community members who consider that their individual rights have been violated.

The affirmation of the cultural integrity norm within the framework of human rights establishes a strong foundation for the norm within International law. However, it also means that the very same framework limits the exercise of cultural rights, so that certain cultural practices may not be protected. Accordingly, the Human Rights Committee has instructed that the rights of cultural integrity are not absolute when confronted with the interest of society as a whole (Anaya, 2005:136).

The possible mechanism through which the Positive System can undoubtedly bring about significant improvements to the way justice is delivered by some traditional leaders is by training courses, such as the one offered by the Organisation of American States (OAS). This is done through the Supreme Court of Justice and the establishment of guidelines of coordination between the Wihta and the judicial system in Puerto Cabezas. It is also undeniable that similar

policy interventions in other areas of human rights can, in the long term, bring about considerable gains.

The conclusion on indigenous rights and Justice Administration in Karata shows the need for a full recognition and respect of the Indigenous Law, customs and tradition perceived as an inheritance that truly protects the members of the community. Therefore, the Indigenous Peoples demand the State the effective implementation of the domestic legislation. In this situation, the main challenge here is that the State understands the way the Indigenous system functions. This is based on their historical and cultural context and the State should not pretend to impose the Western individualist conception. On the contrary, it should take into account that in an indigenous community the fundamental social units are not the individuals; rather it is composed by some form of collective social organisation to whom the identity of the people is tied.

As I argued earlier, the goal of the Indigenous system of law is the maintenance of their internal order, customs and tradition. At the same time, the respect of the fundamental human rights of the members of the community is essential in this process.



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## **Appendix No1**

### **Guide for Participatory Observation**

1. Traditional organisation that exist in the Community of Karata. How are they elected, by whom and for what period of time?
2. Organisation of the Indigenous system of Justice Administration in Karata. What are the criteria to present cases/conflicts to the Wihta
3. What is the procedure that the Wihta follows to resolve conflict/misunderstanding between the members of Karata.
4. Is there any elements from the Positive system of law that influence the decision of the Wihta?
5. Is there any principle of criminal law that is being applied in the Indigenous system of law?
6. What is the relation existing between the members of the community, Wihta and Elders at the moment of resolving conflict/misunderstanding
7. What are the sanctions that the Wihta or Elders impose to the defendant
8. Is there any coordination between the Indigenous system and Positive system of law?
9. Do these two systems (Indigenous and Domestic law) function in a harmonic way?

## **Appendix No2**

### **Questionnaire for Focus Group Discussion**

1. What is the traditional organisation that exists in the Community of Karata?
2. How the Indigenous system of Justice Administration is organised in Karata?
3. What are the criteria they use at the moment the case/conflict is presented to the Indigenous system of law?
4. What is the procedure to present complain/demand in the Indigenous system of law?
5. What is the procedure that the Indigenous system of law follows to resolve conflict/misunderstanding in Karata?
6. Are there any elements from the Positive system of law that the Wihta applied to solve conflicts/misunderstanding in Karata?
7. Are there any principle of criminal law that is being applied in the Indigenous system of Law?
8. What criteria the traditional leaders use to impose a sanction? In case of non-agreement with the parties, where do they go for help?
9. Is there any coordination between the Indigenous and Positive system of law in Puerto Cabezas? If yes, what kind of coordination.
10. Do you consider that both system (Indigenous and Domestic law) function in a harmonic way. If yes, give an example?



### **Appendix No3**

#### **Questionnaire for Interview to Key Persons**

1. What is the traditional organisation that exists in the Community of Karata? How are they elected, by whom and for what period of time?
2. How the Indigenous system of Justice Administration is organised in Karata. How many people administrate justice, what are their responsibilities and how they are elected?
3. What is the procedure to present complain/demand?
4. What are the criteria to present case in the Indigenous system of law?
5. What is the procedure that the Indigenous system of law follows to solve conflict/misunderstanding in the Community of Karata.
6. Are there any elements from the Positive system of law that influence the decision of the traditional leader?
7. Are there any principle of criminal law that is being applied in the indigenous system of law?
8. What is the relation existing between the community ,Wihta, Elders and Advisory Board at the moment of resolving conflict that has to do with members of the community?
9. What criteria the traditional leaders use to impose a sanction? In case of non-agreement with the parties, where do they go for help?
10. Is there any coordination between the Wihta and the judicial system in Puerto Cabezas? If yes, what kind of coordination.
11. Do you consider that both system (Indigenous and Domestic law) function in a harmonic way. If yes, give an example?

## Appendix No 5 Tables of Maps

*Map of Nicaragua*



Internet: <http://www.ired.com/pix/news/mkt/nicaragua-canal.jpg>, Retrieved on November 15, 2007

*Map of the Community of Karata*



Internet: <http://www.manfut.org/RAAN/karata.html>. Retrieved on November 15, 2007.

**Appendix No4**  
**Pictures from Fieldwork 2007**



*Mr. Javier Newball – Current Karata Wihta*

*Council of Elders – Karata 2007*







*Dori Tara*



*Primary School in Karata*



*View of Karata Community*



*Karata Livelihood*

*Workshop with Wihta as part of the Capacity Building Programme of OAS and Judicial System in Puerto Cabezas, RAAN*

