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## **Indigenous Women's Access to Justice in Latin America**

Rachel Sieder and Maria Teresa Sierra

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# Indigenous Women's Access to Justice in Latin America

Rachel Sieder and María Teresa Sierra<sup>1</sup>

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## Introduction

While women all over the world encounter barriers in accessing justice, there are particular challenges for indigenous women, most of whom face triple discrimination on the basis of their ethnicity, gender and class. Indigenous women in Latin America encounter a variety of alternatives when seeking redress, justice and guarantees of their human rights. These include different court and non-judicial conflict resolution forums within the formal state system, and a variety of non-state justice mechanisms, including community and sometimes regionally-based indigenous justice systems. In contrast to Africa and Asia, formal recognition of non-state legal systems is a relatively recent phenomenon in contemporary Latin America. This working paper aims to consider the impact of this process of recognition, and of legal plurality more generally, on indigenous women's prospects for securing greater access to justice. It considers the principal barriers to women's access to justice and rights in state and non-state justice systems, and also highlights the efforts of indigenous women in a range of settings to secure their rights and to challenge gender discrimination. Rather than deliberating whether legal pluralism is good or bad for indigenous women, we understand legal pluralism as a given empirical reality in Latin America - as it is in most parts of the world - and seek rather to analyze how the changing context of legal pluralities across the region is shaping their prospects for improved access to justice.

A number of preliminary points are in order. First, debates on the rights of indigenous women cannot be abstracted from the contexts within which those women live, for it is within those contexts that their rights are guaranteed or denied in practice. It is crucially important to analyze dilemmas and problems within the specific contexts within which they occur, and not to generalize about "indigenous women" as some kind of generic category. This report cannot be exhaustive, but the discussion presented here is based upon our own research findings and on other research that is grounded in detailed empirical and ethnographic data which pays due attention to context. Second, we insist that debates on how to guarantee rights and access to justice for indigenous women must be located within the broader discussion about how to guarantee the collective rights of indigenous peoples, as indigenous women themselves have demanded. An historical perspective is central to understanding the legitimacy of indigenous rights claims; the first part of this report therefore provides a brief historical outline of the place of indigenous peoples and their justice systems within Latin American states and societies, and charts the recent shift towards legal recognition of indigenous rights and autonomies. Third, in analyzing barriers to indigenous women's access to rights and justice, it is important not to exercise a "colonial gaze". Indigenous women are not only victims whose rights are being denied; they are also actors with agency and voice, who have developed diverse strategies to improve gender justice (some of which we will address in this report) within ongoing processes of political, socioeconomic and cultural change. Indigenous women and their organizations have been at the forefront of struggles for rights and justice in legally plural systems. Indigenous men and non-indigenous men and women are also supporting processes of critical reflection on gender relations which are, in turn, becoming more and more common across Latin America. Finally, we maintain that indigenous women's access to justice cannot be improved by institutional innovations alone, or by championing de-contextualized discourses of rights: the struggle to guarantee their rights in practice is inextricably linked to broader struggles against inequality, poverty, racism and discrimination.

This paper will give an overview of the challenges which indigenous women in Latin America face in accessing both formal state justice and indigenous legal systems, including a focus on normative frameworks, legal awareness, access to appropriate justice forums and the achievement of satisfactory remedies. In addition, it will highlight promising examples of how different actors

within civil society and governments are taking steps to improve indigenous women's access to justice in different contexts. Recognizing that each of these are likely to be very context specific, it will draw out the key lessons and challenges from these approaches, in order to make recommendations on how this work can best be supported.



## Part I: Legal plurality in Latin America: the colonial legacy

The legacy of colonialism and the persistence of semi-autonomous spheres of indigenous government has meant that legal pluralism – the existence of multiple norms, institutions, practices and beliefs for regulation and conflict resolution within a single jurisdiction- have long characterized Latin American societies. Indeed the majority of indigenous people have for centuries made recourse to semi-autonomous spheres of indigenous justice, on the one hand, and to state justice institutions on the other. Beginning in the mid-1980s, alternative justice systems began to be formally recognized within national law. This was a consequence of various factors: in part it was a response by governments to growing demands by indigenous movements for greater autonomy and recognition of their customary forms of governance. It was also part of broader efforts to redraw the region's nation-states in order to reflect the culturally plural nature of Latin American societies (Van Cott 2000; Sieder 2002; Yashar 2005). Additionally, it reflected efforts by multilateral agencies and international donors to strengthen non-state justice systems as a means to increase access to justice, particularly for the most marginalized sectors of the population (Domingo and Sieder 2000).

A multiplicity of parallel indigenous governance structures were an integral part of Spanish colonial rule for centuries and were formalized in the colonial *Leyes de Indios*. These established a separate, subordinate legal sphere or jurisdiction for indigenous subjects of the Spanish Crown within which indigenous *usos y costumbres* (uses and customs) prevailed. Such arrangements, a form of indirect rule, facilitated colonial domination of linguistically and culturally diverse indigenous populations. In some regions communal land grants were given to indigenous communities who, in line with the corporatist logic of the pre-enlightenment period, were conceived of as *collective* subjects subordinate to colonial tutelage. Within these semi-autonomous spheres indigenous leaders administered justice amongst their communities for minor disputes, and functioned as mediators between colonial administrators and their indigenous subjects.

Following independence and particularly after the triumph of liberal ideologies from the mid-nineteenth century onwards, unitary legal systems were established in the new republics based on the principle of legal monism. This effectively meant there was no de jure recognition of special regimes or semi-autonomous legal spheres for the indigenous population. While legal pluralism continued to exist de facto, with indigenous populations administering communal life through their customary governance systems across much of the continent, according to statutory law all inhabitants of the new republics were subject to the same legal regime. This privileged individual citizenship rather than recognizing collective subjects as part of the nation-state.

Legal equality of citizens was a fiction: indigenous people – in common with women of all ethnicities – were excluded from full citizenship, not obtaining the vote until well into the twentieth century (in Peru, for example, illiterates – a disproportionate number of who are indigenous- did not receive the franchise until 1979). At the same time, unitary property regimes facilitated the expropriation of their communal lands, whilst vagrancy laws and different forms of indentured labor and debt peonage (*pongueaje*, *mozos colonos*, etc.) secured the exploitation of the indigenous labor force for the development of agro-exports. Throughout the nineteenth century indigenous governance and justice systems were effectively tolerated by *criollo* elites as a necessary means to ensure the domination of the indigenous populations. However, while in many places a kind of unofficial indirect rule operated in practice, as non-state justice systems continued to attend to the needs of the majority indigenous populations, they were never formally recognized as semi-autonomous spheres of governance within the new republics. In contrast to the United States and Canada, indigenous peoples in Latin America were never conceived of as sovereign nations. Only

in the Chilean and Argentine south were treaties negotiated with the mapuche, pehuenches and others during the colonial and early republican periods, but by the second half of the nineteenth century these were superseded by a military campaign of “pacification”, involving extermination, occupation and dispossession.<sup>2</sup>

Throughout the twentieth century, indigenous justice systems continued to evolve in relation to changing state laws and transformations in the economic system. In some countries, such as post-revolutionary Mexico, they came to form an integral, albeit subordinate, part of systems of governance in predominantly indigenous regions of the country. Here hybrid forms of indigenous communal governance and justice administration evolved, combining elements of the colonial cargo system and incorporating the agrarian authorities of the post-revolutionary ejidos.<sup>3</sup> In the Peruvian and Bolivian Andes, indigenous communal governance and justice systems also combined pre-hispanic and colonial elements with the communal or cooperative authority structures and practices instituted during the agrarian reforms of the second half of the twentieth century. The influence of the Catholic Church, and latterly of evangelical groups, is also evident in indigenous justice practices in many parts of the continent, reflecting centuries of religious syncretism. In general, more intense interactions occurred between indigenous and state justice systems in the more densely settled parts of highland Latin America, reducing the autonomy of the former and resulting in highly dynamic, hybrid mixtures of pre-hispanic and republican norms and practices. Indigenous justice systems continue to incorporate a range of elements including, most recently, international discourses of human rights. Amongst more isolated lowland indigenous populations, particularly in the Amazon basin, indigenous justice systems were less affected by official law due to the minimal presence of state justice authorities. However, in recent years, indigenous autonomy in these regions has been seriously threatened by outside actors, such as migrant settlers, and national and international companies seeking to exploit natural resources. Indigenous justice systems have had to adapt to these threats to group existence and have often championed a discourse of rights as part of their strategies of defense. In short, whilst strategic and identity discourses deployed by indigenous movements may depict indigenous justice systems as millenarian or static distillations of distinct cultural worldviews, wholly separate from dominant forms of law, they are in fact highly dynamic and invariably internally contested. And in some contexts, the line between official and indigenous justice systems may in fact be quite blurred in practice. The norms, authorities and practices of indigenous justice systems reflect the changing relationships of indigenous peoples with dominant society, but they also reflect changes and tensions within indigenous communities and movements themselves, not least debates about gender roles.

## Constitutional recognition of legal pluralism

Full legal recognition of indigenous justice systems implies three things: recognition of indigenous *norms* as a source of statutory law; recognition of the indigenous *authorities* charged with applying and administering indigenous law, and; recognition of a specific *jurisdiction*, making it clear who indigenous law is to apply to, within which geographical area it is to be applied, and what kinds of matters or conflicts it can adjudicate (Yrigoyen 2010). During the 1980s and 1990s, advances were made in the constitutional recognition of legal pluralism and multiculturalism. These developments were unprecedented; by recognizing the right of indigenous citizens to apply their own forms of law they effectively broke with the tradition of legal monism which had prevailed since the nineteenth century. However, the constitutional reforms of the 1980s and 1990s invariably fell short of full recognition of indigenous peoples' collective rights to their own forms of law. It was not until the drafting of new constitutions during the 2000s that the recognition of indigenous norms, authorities

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<sup>2</sup> See Bengoa (2007), Mallon (1995). Such campaigns of military domination and extermination also occurred in the USA.

<sup>3</sup> See Cancian (1965).

and jurisdictions was specified, effectively codifying spheres of autonomy for indigenous justice systems.<sup>4</sup>

The 1980s was characterized by a turn towards “multicultural constitutionalism” in some Latin American countries, partly in response to growing indigenous organization and demands, and partly to crises of legitimacy affecting states (Van Cott 2000; Yashar 2005). The earliest constitutions that recognized the ethnically plural and multilingual nature of those nation-states were those of Nicaragua, approved in 1987 and Guatemala, in 1985.<sup>5</sup> This signaled an important departure from the previously mono-cultural character of the region’s founding charters. However, while these constitutions specified certain obligations of states towards their indigenous citizens, they did not explicitly recognize indigenous justice systems.

In 1989, the International Labor Organization approved Convention 169 on the Rights of Indigenous and Tribal Peoples in Independent Countries. ILO 169 was the first comprehensive international treaty specifying the rights of indigenous peoples, and had a significant impact on the second phase of constitutional recognition of legal pluralism in Latin America. Articles 8, 9 and 10 of ILO 169 set out states’ obligations to recognize and respect indigenous peoples’ forms of law, “where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights”.

During the 1990s a wave of constitutional engineering occurred, with new charters adopted in Brazil (1988) Colombia (1991), Paraguay (1992), Peru (1993), Bolivia (1994), Ecuador (1998) and Venezuela (1999). In addition, Mexico and Argentina both reformed their constitutions during the decade (1992 and 1994, respectively). These constitutions defined their respective nations as “multi-ethnic” or “multicultural” and the states as “pluri-cultural”. Pluralism and respect for cultural diversity became central tenets of constitutional law in the region, enabling the explicit recognition of special rights regimes for indigenous and afro-latin populations (Yrigoyen 2010: 8). This shift in Latin America occurred within a more general, global trend towards rights-based constitutionalism. In this respect the new constitutions reflected the international human rights commitments acquired by Latin American states following the transitions to electoral democracy. ILO Convention 169 was ratified by most Latin American states during the 1990s and significantly shaped constitutional provisions concerning indigenous peoples and their justice systems. The ongoing discussions within the UN Working Group on the Declaration on the Rights of Indigenous Peoples also influenced constitutional developments.

With respect to recognition of indigenous justice systems the picture was mixed, but in general terms the new constitutions accepted the principle of legal pluralism, explicitly recognizing indigenous authorities and their rights to apply their “customary” law within their own territories or communities, and to members of their own communities. In countries where previously the rights to make and to apply the law had been confined exclusively to the state executive, legislature and judiciary, this constituted a major shift away from nearly two centuries of legal monism.

However, the recognition of indigenous autonomy was limited in a number of ways. Firstly, not all constitutions recognized indigenous norms, authorities and jurisdictions. Some recognized

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<sup>4</sup> Yrigoyen (2010) identifies three phases of constitutional recognition of legal pluralism: “multicultural constitutionalism” in the 1980s; “pluricultural” constitutions in the 1990s, and; “plurinational constitutionalism” in the 2000s. Here we distinguish between the constitutional reforms of the 1980s and 1990s, and the new “pluri-national” constitutions of the 2000s, while recognizing that the evolution of statutory law towards legal pluralism and indigenous rights is a continuum.

<sup>5</sup> The fact that both of these constitutions followed a period of internal armed conflict partly explains their early emergence. The formulation in the Guatemalan constitution is relatively weak (the state “recognizes, protects and promotes” cultural diversity), while the Nicaraguan charter of 1987 recognized regional autonomy rights for the Atlantic Coast.

indigenous authorities and “customary law” or “usos y costumbres”, but failed to specify a territorial or jurisdictional remit within which that law would be applied and respected (as was the case in Mexico). In the Andean countries while the jurisdictional faculties of indigenous communal authorities, or their rights to exercise justice within their own communities, were recognized within the new constitutions, a number of restrictions were established to limit the scope of those jurisdictions (Yrigoyen 2010).

Secondly, all the constitutions of the 1990s limited the autonomy of indigenous justice systems in that they specified human rights limitations on the kinds of procedures and sanctions that indigenous peoples could apply. Evidently the collective exercise by communities of their own forms of law can limit the individual rights and autonomy of individuals within those communities, and in specific cases can result in abuses or the victimization of certain individuals by the collective. However, in most countries intercultural mechanisms for resolving such conflicts and tensions were not developed. In some constitutions (Ecuador 1998; Bolivia 1994), indigenous law was made subordinate to constitutional law as well as to international human rights. This effectively reinforced the subordinate status of indigenous justice systems and reserved the right of dominant society to decide which indigenous justice and governance practices are acceptable, and which are not. And although the new constitutions all promised that secondary legislation would be enacted to regulate coordination and conflicts of jurisdictional competence between indigenous justice systems and state law, no such laws were subsequently passed. This meant that although indigenous peoples' rights to exercise their own forms of law were officially recognized in the constitutions, those justice practices could still be condemned as “human rights abuses” and indigenous authorities imprisoned or threatened with prosecution for their exercise of customary law. Rather than acting to guarantee human rights, such interventions often occurred for political reasons in order to limit demands for greater autonomy (for example, of the *rondas campesinas* in Peru, or the *Policía Comunitaria* in Guerrero, Mexico).<sup>6</sup> Without adequate intercultural mechanisms to adjudicate between collective and individual rights when conflicts arise, claims by dominant sectors to be championing “human rights” could always trump indigenous law.

During the 1990s Colombia perhaps went furthest of all countries in recognizing indigenous peoples' rights to exercise culturally distinct forms of justice. The 1991 constitution explicitly recognized territorial jurisdictions (*resguardos indígenas*) for indigenous peoples who are explicitly deemed collective subjects of rights. It created a Special Indigenous Jurisdiction which enjoys a considerable degree of autonomy and protection from the intromission of the national legal system. Although no law was passed to regulate coordination between state law and indigenous law, over the course of the 1990s the Colombian constitutional court developed an extensive body of jurisprudence to resolve controversies arising between the exercise of individual and collective rights (Sánchez Botero 2010). The court developed a doctrine of “*mínimos jurídicos*”: indigenous authorities –like all national authorities– cannot kill, torture or enslave individuals and they must provide some guarantees of due process. Yet the court initially proved open to interpreting “due process” and certain practices according to cultural criteria, for example recognizing that the use of the *fuete* or whip as a sanction by the *nasa* or *paez* Indians can be interpreted as a culturally specific practice sanctioned by the collective, rather than as a form of torture. Nonetheless, non-indigenous judges still retained the power to decide which forms of indigenous law were acceptable or not. As Yrigoyen points out, even in Colombia recognition of indigenous justice systems was based on respect for cultural diversity, rather than on recognition of indigenous peoples' rights to autonomy and self-determination per se (Yrigoyen 2010: 20-21).<sup>7</sup> By de-linking the concept of cultural rights

<sup>6</sup> See Yrigoyen 2002 on the *rondas campesinas*, Sierra 2010 on the *policía comunitaria*.

<sup>7</sup> The court's criteria ultimately relied on notions of cultural “purity”; it tended to allow controversial culturally specific justice practices (such as the *fuete*) within indigenous group that had had less contact with dominant society, and to question arguments of cultural defense when the indigenous group in question had had more contact with dominant society.

from rights of self-determination, such multicultural approaches implicit in the pluricultural constitutionalism of the 1990s effectively denied full guarantees of indigenous rights as recognized under international law.

Thirdly, at the same time as the new constitutions recognized pluralism and cultural diversity, they also rolled back the social rights provisions of the previous corporatist model which had existed – albeit unevenly- in countries such as Mexico and Peru, and cemented a neoliberal economic paradigm. This shift proved particularly detrimental to the region's indigenous peoples. Reforms to individualize property rights removed the protections provided by the communal or collective land titles awarded through previous agrarian reforms. And the opening up of the region's economies to direct foreign investment and promotion of an export-oriented model of development meant that indigenous territories were increasingly subject to exploitation by outside interests prospecting for oil, minerals or natural resources. In short, while the constitutions of the 1990s constituted important steps forward in the recognition of indigenous rights and justice systems, in both normative and practical terms they set limits on indigenous peoples' rights to autonomy.

The current phase of recognition of indigenous justice systems, which Yrigoyen defines as “plurinational constitutionalism”, centers on two constituent processes, that of Bolivia (2006-2009) and Ecuador (2008) (Yrigoyen 2010). Both constitutions enunciate a new pact between indigenous peoples and non-indigenous peoples in countries where indigenous people are either a majority or a sizeable minority of the overall population. The emphasis is much less on recognition of indigenous peoples' by the state or dominant, non-indigenous society and is much more –rhetorically at least- on a redrawing of the state itself, emphasizing indigenous peoples' rights to autonomy and self-determination. Both constituent processes were highly influenced by the approval of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2006-2007. The Declaration emphasizes indigenous peoples' international rights to self-determination and sovereignty. The new charters in Ecuador and Bolivia initially recognized parity between indigenous justice systems and other forms of law, although the jurisdiction of indigenous law was subsequently limited to some degree in political negotiations to secure approval of the constitutions. In both countries, but particularly in Ecuador, the constitutions specifically state that indigenous governance systems must guarantee gender parity and indigenous women's rights to full participation within their governance systems (to be discussed further below).

Importantly, both constitutions also reject the neoliberal economic model, setting out a range of social rights and, in the case of Bolivia, nationalizing key natural resources. They also recognize new collective subjects of rights, such as nature and the environment. However, tensions persist: in Ecuador the protections and guarantees for indigenous peoples specified in the new constitution are at odds with the macroeconomic policies promoted by the government of Rafael Correa, which continues to promote extractive industries such as petroleum, mining, and forestry, at the expense of indigenous rights and autonomy (IGWIA 2010). In both Ecuador and Bolivia laws to establish mechanisms of coordination between indigenous justice systems and other forms of law are currently under discussion, but much remains to be worked out in practice.

**To summarize:** considerable advances have been made in the recognition of indigenous justice systems and legal pluralism during the last two decades in Latin America. Although in most countries the scope of autonomy of indigenous justice remains limited by law, the rejection and criminalization of indigenous justice systems which characterized the monist period has become the exception rather than the rule.<sup>8</sup> In general there is greater official acceptance of the right of indigenous communities to decide their own forms of law and conflict resolution, and a greater

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<sup>8</sup> Organized indigenous peoples' *movements*, however, are increasingly being criminalized in many countries – as are other social movements protesting against the dominant economic order.

openness of official judicial systems towards non-state forms of justice.<sup>9</sup> However, the state legitimates indigenous justice when those spaces are limited and ultimately subordinate to and controlled by the state. Whenever indigenous people demand broader jurisdiction of greater autonomy to decide about land, natural resources and so forth, then state responses are less tolerant.

At the same time as this process of official recognition of indigenous justice has occurred, a combination of indigenous mobilization and rights awareness, and strong transnational organizing has also contributed to a strengthening of indigenous justice itself. Indigenous movements have focused much of their energies on such processes, seeing robust indigenous justice systems as essential to projects to secure autonomy. In many places, the struggle for recognition and autonomy has led to the revitalization and reinvigoration of indigenous justice systems and to ever greater reflection on what they are or should be. In many cases, indigenous women's organizations have played an important role in these ongoing processes of reflection and revitalization of justice systems (as we analyze in section III, below), as they have in debates on recognition of indigenous autonomy and legal pluralism. At the international level, indigenous women have been at the forefront of the global indigenous movement, and have stressed that gender equality and increased political participation of indigenous women are essential aspects of indigenous peoples' human rights (FIMI 2006).

Paradoxically, advances in the national, regional and international recognition of women's rights and indigenous peoples' rights have generated new contradictions which in some cases have limited the official recognition of collective indigenous rights. In some national debates on recognition, for example in Mexico, women's rights and human rights have been specifically invoked by political elites in order to justify limits on indigenous jurisdictions and autonomy.<sup>10</sup> (The argument being that recognizing greater autonomy for indigenous jurisdictions would effectively "abandon" indigenous women to discrimination and violence at the hands of indigenous men). This signals the tensions provoked by liberal visions of rights centered on indigenous women that fail to take into account the broader context of the collective rights of the indigenous peoples to which those women belong, as well as their socio-economic situation. We address these tensions throughout our analysis.

However, it should also be noted that while many indigenous people demand their recognition both as individuals *and* as collectives with rights, this does not necessarily mean that all indigenous people –and particularly all indigenous women- exclusively favor indigenous justice systems. As we will see, plaintiffs often demand more effective state justice, or engage in "forum shopping", combining recourse to their communal authorities, to indigenous movements and to state justice institutions in order to try and secure redress. While indigenous jurisdictions and justice institutions continue to be the main point of reference for resolving conflicts in many communities, in some places women are resorting to state justice institutions when their own indigenous authorities fail to meet their demands or even to hear their complaints. Such tactical resort to state justice institutions by indigenous women is by no means new, but what is relatively novel is the way in which they are invoking international human rights and concepts of gender rights and gender parity in order to challenge inequitable power relations within their own communities, as well as within society at large. In addition, indigenous women are taking advantage, often in unexpected ways, of new access to justice institutions which have been created over the last two decades.

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<sup>9</sup> The greater openness to non-state forms of dispute resolution can be explained, in part, by the neoliberal policy shift towards privatization of service provision. Mediation, conciliation and other forms of non-judicial conflict resolution have been promoted in certain areas of law as a means to increase access to justice; indeed, such figures have been incorporated into the penal procedures codes in many Latin American countries.

<sup>10</sup> This tendency has been most evident in Mexico, where the presidency has championed paradigmatic cases of indigenous women denied access to public posts; for example, in March 2008 Mexican President Felipe Calderón strongly criticized community "usos y costumbres" in Santa María Quiegolani, Oaxaca, which prevented Eufrosina Cruz from being elected to municipal office. See <http://www.presidencia.gob.mx/prensa/?contenido=34259>

Indigenous women's re-signification and re-appropriation of human rights discourses and instruments within their own cultural and social frames of reference challenge simplistic dichotomies which counterpose "culture" and "rights". Culture is not static or homogenous, and does not exist outside of the forces of economic, politics and history. It is constantly shaped and reshaped by peoples' actions and struggles over meaning. However, this is not to deny that conflicts exist between recognition of group rights and the individual rights of women to protection against discrimination and violence. A report of the UN Special Rapporteur on violence against women in 2007 criticized the shortcomings of the (then) draft Declaration on Indigenous Peoples on the grounds that "it remains unclear, for instance, what legal recourse, if any, an indigenous woman would have, who is confronted by a male-dominated community council that exercises indigenous peoples' right to autonomy or self government in matters relating to their internal and local affairs" (A/HRC/4/34 cited in ICHRP 2009: 33). Women in all societies face patriarchal domination and violence, and indigenous justice systems can and often do discriminate against women and block their access to justice, just as official justice systems do. In the next section we analyze these impediments to access to justice, before turning to examine how indigenous women can access justice within plural legal systems in order to combat violence and discrimination.

## Part II: Indigenous women's access to justice in Latin America

Indigenous women across Latin America face significant barriers to accessing justice, both within indigenous systems and in the formal state sector. As has often been observed, the vast majority of indigenous women face **triple discrimination**: because of their gender, their ethnicity and their socioeconomic marginalization. While the reasons for lack of access to justice or the barriers involved are often highly context-specific, a number of common contributing factors can be identified:

### Poverty

Indigenous women are amongst the poorest and most vulnerable sectors of Latin American society. They shoulder a triple burden of reproductive, domestic and productive labor and, in common with most non-indigenous women across the continent, are concentrated in low income, low status and unstable forms of employment. Poverty affects indigenous households disproportionately and disproportionately affects indigenous women and children within those households. In Mexico some 13% of the population –or over 13 million people- are indigenous. Roughly 50% of the total Mexican population lives below the poverty line, but in 2009 the National Council for the Evaluation of Social Policy showed that 75% of indigenous people suffered from poverty and 40% from extreme poverty (cited in IGWIA 2010: 85). In Guatemala some 56% of the population or 6.4 million people live in poverty, while 16% live in extreme poverty. According to World Bank figures for 2000, while Guatemala's twenty-three indigenous groups represented 43 per cent of the population (a conservative estimate), they accounted for 58 per cent of the poor and 72 per cent of the extreme poor. Almost three-quarters of indigenous people in Guatemala live in poverty, as compared with 41 per cent for non-indigenous. One of the major factors behind indigenous poverty in Guatemala is lack of access to land; according to figures for 2000, whilst the indigenous sector of the population has an average of 0.25 manzanas per person, the non-indigenous sector has 1.5 manzanas, or six times as much land (cited in FIMI 2006: 8). In Ecuador, 43% of the population live in poverty according to 2006 figures; 39% of the urban population is poor and 49% of the rural population (12.8% of the urban population and 22.5% of the rural population live in extreme poverty) (CEPAL 2007: 74). The indigenous population is one of the poorest groups in Ecuador – in 1998 some 87% of all indigenous people lived in poverty, and 96% of all indigenous people in the rural sierra. Extreme poverty affected 56% of all indigenous people and 71% of those living in the rural sierra (Patriños and Hall 2004). In Peru in 2004 indigenous households made up 43% of all households below the poverty line and 52% of all household in extreme poverty (Patriños and Hall 2006:1). In Chile, figures for 2006 show that of the 6.6% of the population that identifies itself as indigenous, 19% live below the poverty line, compared with 13.7% of the non-indigenous population (IGWIA 2010: 253).

These patterns of ethnic exclusion and inequality are also reflected in gender differentials. Indigenous women are less educated and less likely to finish schooling than men, earn less and accumulate less property over their lifetimes than men, and are more likely to be the sole head of household and responsible for the care of children and elderly relatives. In 1989, a staggering 82 per cent of Guatemalan indigenous women were illiterate. By 2000 this figure stood at 62 per cent, but indigenous women still lagged far behind their non-indigenous counterparts: overall female illiteracy rates stood at 39 per cent (World Bank 2003). Not only do indigenous women suffer disproportionately from illiteracy, they are also more monolingual than indigenous men. In Ecuador, the 2007 employment survey found that 33.4% of indigenous women could not read and



write, compared to 19.4% of indigenous men, and that some 4.4% of indigenous women were monolingual, compared to 2.1% of indigenous men. Nearly all of these women worked in the informal sector, their lack of Spanish and formal education effectively preventing them from seeking other forms of employment (Chisaguano 2008). In Bolivia, according to 2001 data from the National Institute of Statistics, 37.9% of women in rural areas are illiterate, compared to 2.5% of the male urban population and 14.4% of men in rural areas (INE 2001).<sup>11</sup> Other statistics reflect the disadvantages of indigenous people and their impact on women. Guatemala has some of the worst indicators for child malnutrition in Latin America, but whereas chronic malnutrition affects 35.7% of non-indigenous children under five years old, it affects 68.8% of indigenous children of the same age. Indigenous women living in rural areas in much of Latin America face conditions of extreme material poverty and lack of opportunities. It is extremely difficult for women to break this cycle; thus their possibilities for personal autonomy are severely circumscribed.

The poverty affecting indigenous communities and households directly contributes to the kinds of conflicts that occur, which in themselves reveal the impact of poverty and marginalization on indigenous families, and on women and girls - the most disadvantaged of this disadvantaged sector. Women's poverty and marginalization directly and indirectly affects their prospects for accessing justice services. Illiteracy and lack of education reduces women's awareness of their rights and their ability to exercise or defend them. In family conflicts such as spousal separation or inheritance disputes, low literacy levels mean women are often defrauded of their statutory rights to child maintenance or property. For example, in 2008 a mixtec woman from the Montaña region of Guerrero, Mexico, was abandoned by her husband who then tried to force her to leave the family home, along with her five children. The man accused his wife of infidelity, when in fact it was he who was being unfaithful. He also took the credential that allowed her to receive monthly financial support from the Mexican government's poverty reduction program, Oportunidades, which specifically targets women with children, effectively leaving his wife and children destitute.<sup>12</sup> Women are often the least favored when inheritance of land is decided (usually by male heads of households), despite statutory laws in most Latin American countries which outlaw such discrimination on the grounds of gender.<sup>13</sup>

Lack of knowledge and understanding, combined with lack of disposable income also mean women often do not seek help in the official justice system, fearing they may have to pay lawyers' fees or bribes. For indigenous women particularly, seeking help outside their communities may also mean condemnation by relatives and community members who reject outside intervention, particularly in cases of intra-familial disputes. As an Aymara woman stated in a workshop on community justice and gender in Bolivia, "*It's better not to present a demand to the [state] authorities, because it can prejudice the family*".<sup>14</sup> Recent research in different communities of the Bolivian highlands has illustrated the ways in which ascribed gender roles reproduce gender inequalities and block access to justice. Women not only shoulder most domestic responsibilities, they are also subject to continuous control and correction, particularly by their mothers-in-law, which often makes it difficult for them to seek outside help in cases of domestic abuse (Coordinadora de la Mujer de Bolivia, 2009: 154). And even if their families do support them, the multiple demands on women's time, including income generation, child-rearing and domestic duties, often mean it is extremely difficult for them to take advantage of the justice services that do exist.

<sup>11</sup> See <http://www.ine.gov.bo/indice/visualizador.asp?ah=PC3020101.HTM> consulted May 2010.

<sup>12</sup> Case related by mixtec women during a workshop in the community of Buenavista, January 2009 (see "Diagnóstico Participativo: Derechos, costumbres y acceso a la justicia en mujeres de la Comunitaria en Guerrero", 2009, on file with authors).

<sup>13</sup> Land titling laws introduced in the 1990s have explicitly mandated gender equality although this has not necessarily guaranteed women's access to land in practice (see Crespo 2008 on Bolivia).

<sup>14</sup> Justicia comunitaria y género. 8 estudios de caso, (La Paz 2008).

Certain responses to poverty also create new conflicts: for example, in Mexico and Central America, research indicates that the migration of male heads of households to the USA has left many women in indigenous communities more vulnerable to physical and sexual assault, envy and gossip. Conflicts with in-laws are particularly frequent and women often suffer depression and loneliness, as well as increased workloads. While some men send remittances back to their families, others abandon their domestic responsibilities and find new partners in the USA (Camus 2008: 232-78). Women who migrate are also often subject to different forms of sexual violence and exploitation.

Within indigenous families, violence against women and girls, and particularly sexual violence, is also intimately related to conditions of poverty. Overcrowding is commonplace – whole families often sleep in one room or even in the same bed, with little privacy. This exacerbates the possibilities of sexual abuse and incest occurring. Such cases tend to be covered up by families because of shame, or because of the economic implications for the family if the male breadwinner is accused. The combination of poverty and patriarchal relations mean that men who are guilty of sexual violence against women and girls within their own family may never be sanctioned.

## Violence

Indigenous women face violence of many kinds – in addition to the multiple structural violences that marginalize them (as indicated above), they also suffer direct physical, psychological and sexual violence exercised by a range of state and non-state actors for many different reasons. However, perspectives which emphasize a narrow definition of “gender-based violence” – which tend to dominate the field and characterize most studies<sup>15</sup> – are, we argue, insufficient.<sup>16</sup> Rather, it is important to understand the intersectionality of violences affecting indigenous women. They are not subject to physical and sexual violence simply because of their gender, but because of their ethnicity, class and history. The International Forum of Indigenous Women, for example, has emphasized the need for a perspective on violence against indigenous women which studies violence “in relation to aspects of identity beyond gender, using an approach that accounts for the ways that identities and systems of domination interact to create the conditions of women’s lives”. The forum also insists that full recognition of indigenous peoples’ collective rights is the key to reducing violence against indigenous women (FIMI 2006: 12).

*Violence in the family and the community.* Physical violence is a common cause for women’s appeals to both state courts and community justice forums. Many indigenous women –in common with non-indigenous women- are subject to daily forms of domestic violence. Marital violence is related to male alcoholism, male adultery and jealousy, and also to patterns of patrilocal residence, which is a source of numerous conflicts and aggression (Baitenmann et al. 2007: 25; Chenaut 2001; Sierra 2004a). As a kichwa woman in Imbaburu interviewed by Andrea Pequeño stated, “*I was mistreated by my husband and by his family. Why? Because when I married I didn’t have anywhere to live, I lived in the same house as my parents-in-law*” (Pequeño 2009: 154, our translation). While such phenomena have existed for many years, they can be aggravated by changing economic circumstances – for example, joblessness, income insecurity, and increased

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<sup>15</sup> Aída Hernández questions the narrow perspective of what she refers to as “hegemonic feminism”: even if dominant feminist interpretations do take cultural and social contexts into account when discussing gender issues, they tend not to recognize needs of indigenous women that might contradict a feminist agenda, for example on issues of gender violence and reproductive rights (Hernández 2001).

<sup>16</sup> See, for example, González Montes 2009. As González Montes notes, the de-naturalization of violence against women was the first step in making it an object of study, leading to a wave of studies during the 1990s documenting gender-based violence. Initially studies of gender-based violence sought to demonstrate the links between violence and health problems; such research came to exercise significant influence in multilateral organizations influencing public health policies, such as the Panamerican Health Organization and the World Health Organization.

poverty may threaten prevailing models of masculinity and aggravate male alcoholism and violence. Economic migration, which divides families and couples, also contributes to accusations and instances of infidelity, in turn feeding gender-based violence. The 2008 Survey on Indigenous Women's Health and Rights in Mexico found that one third of women reported suffering violence at the hands of their spouses during the previous twelve months, and around 40% who had suffered physical or sexual violence had reported the crime to their local authorities (cited in González Montes 2009: 173). In Ecuador the 2004 Demographic and Mother and Infant Health Survey found that 45% of indigenous families were affected by domestic violence, but that only 6% sought institutional help and over 54% did nothing (ENDEMAIN 2004, cited in Picq 2009: 130). In cases of sexual and physical violence only 32% of indigenous women sought help (compared to 46% of mestizas) and only 4.5% resorted to those state institutions charged specifically with increasing women's access to justice in such cases (ENDEMAIN 2004, cited in Pequeño Bueno 2009: 156).

Naturalized gender ideologies and expectations of "appropriate" behavior contribute to such violence: husbands tend to justify violence on the grounds that women do not fulfill their roles as mothers and wives. Female spouses, in turn, may try to defend themselves from violence exercised by their male partners by appealing to community-sanctioned concepts of "acceptable" behavior. This often results in them playing on their victim status, rather than being able to demand their rights to live free from violence. Family members and community justice authorities invariably encourage women to reconcile with their male partners and forgive them, thereby reinforcing gender inequalities and privileging the maintenance of family life over women's wishes, if the women in question no longer want to live with violent men.<sup>17</sup> This is, in fact, often no different when women resort to state justice with mestizo authorities, who also tend to defend a male point of view, as Sierra has shown in the case of nahua women in Cuetzalan, Puebla (Sierra 2004a). However, it is also important to point out that while agreements mediated by community authorities tend to reinforce traditional gender roles - for example, entreating women to respect their husbands and meet their domestic obligations, they do include written commitments that male spouses will respect the physical and moral integrity of their female partners. If men are violent in the future, women can use these written agreements or communal *actas* as a mechanism to bring pressure to bear on them, or even to initiate penal proceedings in the official justice system (Chenaut 2001; 2007). Violent behavior has always been challenged by indigenous women. Today it is increasingly being questioned within indigenous communities, in part due to the efforts of organized indigenous women and men to combat patriarchal violence, and in part because of broader intergenerational and socioeconomic changes which have lead younger women to question male authority based on violence (Camus 2008; Pequeño Bueno 2009; Mejía 2006).

*Violence by state actors.* Violence by state actors against indigenous women occurs in a number of different contexts. Broadly speaking, three scenarios can be identified:

- 1) The violence and discrimination exercised on a daily basis within indigenous people's "everyday encounters" with the state, for example within the judicial system. For example, in her study of rape victims in Bolivian courts, Rosanna Barragán signals the psychological violence and discrimination which indigenous women plaintiffs routinely endure (Barragán in Calla et al. 2005). During workshops amongst indigenous women leaders in Mexico, women also complained about the different kinds of discrimination they encountered in everyday life; at healthcare institutions, in school, and in judicial and administrative offices (Gall 2003).

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<sup>17</sup> It should be recognized that while leaving violent male partners may be necessary, for indigenous women abandonment of their community may entail enforced cultural assimilation and -because of their highly disadvantageous position in society- may expose them to new forms of violence and inequality in urban settings (Collier 2009).

- 2) State violence exercised against indigenous peoples when they demand their collective rights, for example to territory and natural resources, or to challenge certain economic development projects, such as mining or hydro-electric dams. With the increasing profitability of extractive industries, such violence has become increasingly frequent, resulting in the deaths of indigenous people in protests in Guatemala, Peru and Colombia in recent years. This is a direct consequence of the lack of respect by states of indigenous peoples' collective rights to autonomy and free, prior and informed consultation, as specified in the UNDRIP. Such rights may be formally recognized, but in practice are routinely violated when powerful economic interests are at stake. Indigenous women are often at the forefront of such protests. For example, cucapá women fisherwomen in the Gulf of Baja California, Mexico, have suffered repression by state forces when they challenge environmental protection measures that restrict their traditional fishing rights (Navarro, in press). And in Cochabamba, Bolivia, mobilization by the women's federation "Bartolina Sisa" played a key role in the resistance to attempts by the government of Sánchez de Lozada to privatize water in the so-called "water wars" (Domínguez 2005).
- 3) The increased violence that occurs in zones of contention that have been militarized as a state response to armed conflict or organized crime. Systematic rape of indigenous women by soldiers was a feature of the counterinsurgency wars in Guatemala in the 1980s and Peru in the 1990s. Today in Mexico rape of indigenous women has occurred in the context of the government's militarization of certain regions of the country in response to organized crime. The case of the mepha'a women Ines Fernández Ortega and Valentina Rosenda Cantú, raped by soldiers in Guerrero in 2002, was recently taken to the Interamerican Court of Human Rights, which found that the Mexican state had failed in its obligations to protect their human rights (Hernández Castillo and Ortiz Elizondo 2010). Political intervention in such cases of military violence has occurred at the highest level: in 2007 Mexican president Felipe Calderón and the head of the government's human rights commission publicly denied that Ernestina Ascencio Rosario, a 73 year old indigenous woman from Zongolica, Veracruz, had died as a consequence of her alleged rape by soldiers from the 63<sup>rd</sup> Battalion (La Jornada, 7 April 2007).

*Violence exercised by non-state actors:* Indigenous men and women are particularly vulnerable to violence by non-state actors, such as paramilitary forces and private armies associated with powerful economic interests and organized crime. Paramilitary forces are used to force indigenous peoples off land, in order to secure deniability and impunity. Physical violence and the violence of prevailing forms of economic development are inextricably linked. States are directly responsible for the lack of protection of indigenous women (and all citizens) against such violence. Colombia has the highest rate of internally displaced peoples in the Americas and one of the highest in the world. Since 1985, somewhere between three and four million of the country's 40 million people have fled their homes and lost their livelihoods, family ties, and the social networks that engender security and stability. Indigenous peoples are vastly overrepresented amongst the internally displaced – together with Afro-Colombians they represent almost a third of all displaced peoples in the country, even though they constitute no more than three per cent of the Colombian population. For indigenous peoples, displacement means loss of territories, ritual practices and traditions that underpin their cultural identity. The violent displacement of indigenous peoples has accelerated significantly in Colombia during the last decade as extractive economic projects such as mining have been promoted in indigenous territories. Rape is a tactic commonly used by paramilitary groups against indigenous women in order to accelerate displacement. And internally displaced women are at far higher risk of being subject to rape and to being forced into prostitution (UNHCR 2009; Amnesty International 2004). Such paramilitary violence has also occurred in Mexico: the notorious case of the Acteal massacre in Chiapas in 1997 involved the murder of 45 tzotzil Indians belonging to the organization Las Abejas, including pregnant women and children, by a

paramilitary group. The Mexican government alleged the killings were the result of an interethnic conflict, while human rights organizations maintained it was part of a government strategy to target the social bases of the Zapatista guerrilla movement (Hernández 1998). Some 26 indigenous men were imprisoned for the massacre, but in 2009 were released on appeal by the Mexican Supreme Court on the grounds that they had not been guaranteed due process in the original trial.

## Discrimination and racism

Structural forms of discrimination against indigenous people, and particularly against indigenous women, are compounded within the **official justice system** by structural weaknesses and institutions deficiencies, and by the racist perceptions and discriminatory attitudes of many justice system officials.<sup>18</sup> Access to state justice services has marginally improved throughout the last decade as a result of different reforms and innovations, with new institutions –some aimed specifically at indigenous women- extending their reach to rural communities. However, as has been widely documented, indigenous people living in rural areas continue to face barriers of geographical distance, cost, language and discrimination when seeking to access the formal justice system.<sup>19</sup> Justice institutions are often physically distant (they are usually based in municipal capitals), hardly any justice system employees speak indigenous languages, there are few interpreters and employees may discriminate against indigenous people on the basis of racist attitudes.<sup>20</sup> For indigenous plaintiffs costs are high –for example, procedures that require numerous copies of documents and typed documents- and case resolution is notoriously slow, often taking months or years. One complaint may require numerous journeys to the court, involving transport, food and accommodation costs, lost production time and hours away from family. A recent study in Peru found that judicial procedures to deal with intra-familial violence invariably took years, with highly negative psychological impact on the victims. The governmental commission for justice reform (CERIAJUS) has presented a proposal for changing the procedures for initial declarations in cases of family violence so that the case files can have all the details necessary from the outset, thus facilitating speedier resolution, but this change has yet to be approved (Franco Valdivia and González Luna, 2009: 35).

Indigenous women's extreme poverty and illiteracy, and their consequent inability to navigate their way through the system and demand their rights, have meant frequent miscarriages of justice. Lack of interpreters and the fact that more indigenous women are monolingual also gravely prejudices due process guarantees in criminal cases. Like the majority of the poor, they lack adequate defense services when criminal charges are brought against them - despite state obligations to provide a criminal defense lawyer to those who cannot afford to hire one, the quality and performance of state defenders is often very poor. The recent case of Jacinta Francisca Marcial, an otomí woman from Santiago Mexquititlán, in the Mexican state of Querétaro, is illustrative in this respect. Jacinta was condemned in 2006 to 21 years in prison, accused of kidnapping six agents of the federal investigations agency in an incident where the agents were detained by market traders.<sup>21</sup> A mother of six who spoke only otomí at the time of her detention, which occurred some four months after the incident in question, Jacinta had no interpreter during the judicial process. The state-appointed

<sup>18</sup> As many have argued, this is a direct result of racist and patriarchal forms of domination in processes of state formation (Gall 2003).

<sup>19</sup> See, for example, OACNUDH 2007; ASIES/OACNUDH 2008.

<sup>20</sup> In one case in Guatemala, two indigenous women in Huehuetenango were imprisoned in 1996 when they went to help an elderly man who had been called to appear at court, after being insulted and physically assaulted by justice system officials. The Defensoría de la Mujer Indígena in Guatemala has documented a series of cases of discrimination, racism and violence against indigenous women who make recourse to the official justice system (Cumes 2009a: 41; DEMI 2007). For evidence of discrimination in the Bolivian justice system see research by Rossana Barragán in Calla et al. 2005.

<sup>21</sup> The temporary detention of government agents, a common practice in popular protests in Mexico, is now interpreted by the state as "aggravated kidnapping". This highly political and selective use of penal law to repress social movements is increasingly common.

defense lawyer never saw her to explain her right to defense. She was obliged to sign documents she could not read or understand, and was convicted on charges of aggravated kidnapping, which carry heavy penalties. Only when she arrived at the prison did she become aware of the charges against her. Jacinta spent three years in jail and was only released on the grounds of insufficient evidence to sustain a conviction after local and international human rights organizations drew attention to her case. According to Amnesty International, which adopted Jacinta as a prisoner of conscience, her case demonstrates the “second class justice” typical for indigenous people in Mexico.<sup>22</sup>

## Lack of women's voice and participation in decision-making forums

Women are underrepresented at all levels of political office across Latin America; national, regional, municipal and communal. Whilst the presence of indigenous women in both official and non-state governance systems has improved in recent years, spheres of political decision making still tend to be dominated by men. This lack of political representation is reflected in barriers to access to justice. The mere presence of women in political office does not guarantee more effective enforcement of women's rights or concerted attempts to reduce gender inequalities within society. However, the presence of indigenous women in public life is a powerful factor challenging traditional gender ideologies. This process is ongoing across Latin America, as women increasingly assume public office, both in official state and non-state systems of authority and at all levels. The role of indigenous women as leaders of local, regional and national social movements has been a crucial factor in women's gains in political and judicial spheres. For example, in Ecuador *kichwa* women have been active participants in the CONAIE (Confederación de Nacionalidades Indígenas de Ecuador), and in Pachakutik, the indigenous political party. Indigenous women have gained national and international prominence: CONAIE activist Nina Pacari was vice president of the national congress in 1998, named foreign minister in 2003 in the government of Lucio Gutiérrez and is currently a magistrate of Ecuador's constitutional court. In Guatemala Rosalina Tuyuc, leader of the *mayan* widows' movement CONAVIGUA (Coordinadora Nacional de Viudas de Guatemala) was one of the first indigenous women deputies elected to congress, and is currently the head of the National Reparations Program, which provides attention to victims of the armed conflict. In some contexts, women are also gaining a presence as authorities within indigenous justice systems: in Peru, *quechua* women are part of the authorities of the *rondas campesinas* in Cajamarca; in the Cauca, Colombia, *nasa* women exercise important leadership roles within the local *cabildos* and in the CRIC (Consejo Regional Indígena del Cauca); and in Guatemala *mayan* women have been elected as community mayors as well as municipal mayors, although they are still a tiny minority among men. Through their leadership roles, these women have pioneered changes in gender relations within their communities and societies in the face of persistent gender and racial discrimination.

These important gains have often been won at a high personal cost: women who assume public office within community life are often judged much harder than men in similar positions, and are the target of gossip by women and men in the community who tend to make far more judgments on the sexual propriety of women leaders than they do on their male counterparts. The power of gossip as a mechanism of social control is particularly strong within indigenous rural communities.<sup>23</sup> Women leaders usually face opposition and pressure from their families; their children are often left alone when they are engaged in tasks related to community service, increasing their vulnerability. They may also often suffer violence at the hands of their spouse (Franco Valdivia and González Luna 2009: 90). However, in other contexts men may actively support their wives' participation in

<sup>22</sup> See various reports on the case at [www.amnesty.org](http://www.amnesty.org)

<sup>23</sup> In a book edited by *amuzgo* leader Marta Sánchez, indigenous women leaders from Bolivia, Ecuador, Chile, México and Guatemala offer a personal view of their own process of political participation (Sánchez 2005).



communal authority and movement leadership. For example, in public presentations quechua leader Isabel Dominguez of the Bolivian national confederation of indigenous peasant women "Bartolina Sisa" routinely thanks her husband for supporting her organizational work by staying at home to look after their children, crops and animals. In Santa Cruz del Quiché, Guatemala, indigenous mayor María Lucas is supported by her husband Don Mateo, who stresses the importance of his wife's community service. Kichwa community activist Gilberto Grefa, an active supporter of community norms against domestic violence (the Reglamento del "Buen Trato") in Sucumbíos, Ecuador, refers to the criticism he receives from other men for supporting women's rights in his community, but insists he remains convinced of the importance of his work: *"It's hard for a man to start [this] work, we've been criticized...they say women order us around...but I like working together with women...because without women we men cannot live"* (cited in Lang and Kucia 2009: 145, our translation). In some contexts indigenous women leaders emphasize the primordial importance of securing collective rights for their peoples and do not enunciate a gender perspective as such; in other contexts women leaders also emphasize the importance of reflecting on gender relations within their communities. In both cases they are challenging traditionally ascribed gender roles and in so doing, indirectly and indirectly changing the nature of community justice systems.

## Indigenous justice systems: benefits and challenges for indigenous women

Patriarchal ideologies which reinforce gender inequalities are present in both official and non-state justice systems. However, clearly indigenous justice systems offer a number of benefits and challenges for indigenous women in Latin America. The nature of indigenous justice systems varies enormously according to specific historical, environmental, cultural and political contexts. Nonetheless, research on these systems has long emphasized a series of benefits they offer indigenous peoples, including linguistic and cultural accessibility, speed, cost, physical proximity and the absence of ethnic discrimination.<sup>24</sup> While women's voice is not guaranteed and gender bias remains, indigenous justice puts more emphasis on dialogue, listening to the plaintiffs and often to a broad range of parties involved in disputes, and tries to reach conciliated solutions. When indigenous women have access to their own justice systems they do not have to face the discrimination, racism and inefficiency they experience within the state justice system. Prevailing cultural models and interactive patterns within community justice forums are based on common discursive frames of references and in general women are aware of the norms, procedures, and authorities within their communities available to them in cases of disputes. Studies in Mexico, for example, show that indigenous women regularly seek the help of their community authorities to try and put a stop to mistreatment and domestic violence, punish the perpetrator, and renegotiate their domestic conditions (Chenaut 2001; Sierra 2004a and 2004b; Vallejo 2004; Hernández 2004). However, not all indigenous women can or do make recourse to communal authorities in cases of domestic abuse. Nonetheless, in communal justice proceedings authorities invariably place an emphasis on listening to the parties in a conflict and reaching conciliated settlements. In contrast to the official justice system, they also take into account the broader context within which a dispute takes place, and the deeper, more long-run underlying causes. In addition, the kind of resolutions deployed not only tend to involve different forms of compensation for the victim (monetary or otherwise), but also dignify them by insisting on the need for those guilty of transgressions to change their attitudes and behavior. In general indigenous justice systems emphasize the reparation of harm or damage. If a case is not resolved satisfactorily this affects not only the parties to a dispute, but their families and often the whole community. For this reason, the community as a

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<sup>24</sup> There is an extensive ethnographic literature on indigenous justice systems in Latin America. See for example: Nader 1990; Collier 1973; Stavenhagen and Iturralde 1989; Chenaut and Sierra 1995; Garza Galligaris 2002; Sierra 2004a; Sierra 2004b; Fernández 2000; Peña Jumpa 2004; Martínez 2004; Chávez and García 2004; García 2002; Orellana Halkyer 2004; Sieder 1996; Terven 2008; Sánchez 2010; Padilla 2008; Faúndez 2005.

whole often acts as a guarantor of the resolution or agreement reached in a settlement. Resolution within the community also ensures follow up of cases, and the continued accessibility of authorities for the plaintiffs.<sup>25</sup>

In a recent study in Guatemala, researchers found a plurality of indigenous authorities who intervened in justice procedures, including *cofradías*, elders (*principales*), spiritual guides, midwives, community auxiliary mayors, indigenous mayoralties, and representatives of community development councils (ASIES/OACNUDH 2008). The kind of disputes or issues they dealt with ranged from gossip, alcoholism, witchcraft accusations and spiritual protection, illness, threats, family disputes, debt, intra-family violence, rape, failure to meet family obligations, inter-communal conflicts, inheritance issues, robbery, and infidelity (ASIES/OACNUDH 2008: 52).<sup>26</sup> It is important to emphasize the plurality of options for plaintiffs which often exists within indigenous justice systems; a number of means of dispute resolution are open to them, and women can and do often seek the advice and counsel of other women (for example, of midwives). However, not all indigenous justice systems can or do deal with all kinds of conflicts. The practice of selecting new community authorities every year can mean that office holders lack sufficient experience to deal with complicated cases. While among some groups or in some regions, indigenous justice systems deal with issues such as murder or land conflicts, in many instances indigenous authorities are unable or unwilling to deal with such matters, seeing these as the remit of the official system. (This may be because they fear that charges will be brought against them if they exceed their jurisdiction, it may also be because they fear reprisals from the parties). Yet the greater openness to indigenous law on the part of state justice authorities has led to better coordination in some areas, improving prospects for access to justice. For example, in El Quiché, Guatemala, indigenous community mayors now coordinate with the police force in order to prevent possible lynchings of suspected criminals, and to hand suspects over to the state authorities (Sieder and Macleod 2009).

Ongoing developments within indigenous jurisdictions demonstrate the creativity of indigenous authorities in responding to conflicts within and outside their communities while vindicating their own cultural models of justice provision, often based on their *cosmovisión* or worldviews. For example, in the nasa communities of the Cauca, Colombia, communal authorities who are part of the Coordinadora Regional Indígena del Cauca (CRIC) are engaged in strengthening their own forms of law (or “derecho propio”), invoking nasa spiritual beliefs as central normative principles. In Guatemala, mayan intellectuals –men and women- and community authorities are also invoking mayan *cosmovisión* as a central element in the revitalization of community-based justice systems (Sieder 1996; Sieder and Macleod 2009). In Peru, the rondas campesinas have more than three decades of experience in exercising community-based justice. And in the coastal and mountain region of Guerrero, Mexico, the policía comunitaria have built a multiethnic system of security and justice that deals with all kinds of conflicts and offenses (Sierra 2009; 2010). These experiences vary enormously according to their different historical, cultural and political contexts. However, they share a conviction on the part of indigenous authorities to defend their autonomy and jurisdiction as a central part of their collective project, independent of the extent to which they emphasize ethnic identity as a central referent of their legal systems.

Evidently, recourse to indigenous justice systems offers significant benefits in terms of access to justice: procedures occur in the plaintiffs’ native language, and within their own communities and frames of cultural reference. Yet this does not of course guarantee harmonious inter-communal

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<sup>25</sup> Ibid. These general features are reported in most research on indigenous justice systems in Latin America. However, their specific nature depends on the context.

<sup>26</sup> Witchcraft accusations and illness, spirit fright and so forth are not addressed within the official justice system. However, they constitute a serious concern for many indigenous people and a source of tension and conflict; they therefore tend to be dealt with within indigenous justice systems which are based on more holistic understandings of conflict and harmony: see Collier 1973.



relations, or prevent gender bias and discrimination. Women are effectively being judged by the men of their communities, or on occasion of their own families, in accordance with patriarchal structures and ingrained gender ideologies. This tends to mean that certain violations of indigenous women's rights are not dealt with adequately by communal authorities. In cases of violence, sexual and non-sexual, available evidence suggests that the vast majority of indigenous women lack adequate access to justice both in state and non-state justice systems. Recent research in Quiché, Guatemala, found that although cases of rape, intra-familial violence and refusal of men to acknowledge paternity were extremely commonplace, indigenous community mayors were often unwilling to deal with such complaints from women (ASIES/OACNUDH 2008: 53). In cases of alleged rape, they often contended that the women plaintiffs had consented to sexual relations and were making an accusation in order to protect themselves against sanctions by their families. Yet the study found that rape of adolescent indigenous women was quite common, particularly during community festivals. Not only did these women not find recourse with indigenous authorities, they were also often blamed by their families and communities for "provoking" the rape.<sup>27</sup> Similar findings were reported in Bolivia, where economic dependence of families on men inhibited women and girls from speaking out against sexual abuse. In some cases where women had been abandoned by their partners, mothers colluded in the sexual abuse of their daughters in order to secure the presence of a man to guarantee the family's economic subsistence (Calla et al. 2005).<sup>28</sup> In many senses a culture of fear and silence prevails in cases of sexual abuse and rape, as it does in non-indigenous contexts the world over. Although it is difficult to generalize, indigenous justice systems generally do not adequately guarantee adequate access to justice for indigenous women and girls when such abuses occur. The study in Guatemala found that only when rape involves children do indigenous authorities intervene, and even then they do not always manage to resolve cases successfully in order to protect the victims (ASIES/OACNUDH 2008: 54; 88). In Bolivia, evidence from the community of Pucarani, in the province of los Andes in La Paz, suggests that cases of rape are seen by indigenous authorities as "matters of honor". Communal reparations or sanctions can include compensation in the form of cattle and land, and the marriage of aggressor to victim if the aggressor agrees. In the case of pregnancy through rape, the rapist must acknowledge paternity. Only if the victim of rape is a child is the matter handed over to the official justice system (Calla et al. 2005: 79). However, responses of indigenous justice systems vary. In an ayllu in the department of Potosí, indigenous communal authorities reported that if a rapist was a repeat offender he could be sentenced to death (Calla et al. 2005: 85).

Spousal violence and abuse is frequent and commonplace, but women victims of such abuse lack adequate access to justice within indigenous justice systems, for a number of reasons. First, economic dependence on men means that women are generally reluctant to denounce such violence. Second, the existence of a patriarchal culture where women are supposed to be submissive and obedient to their husbands also mitigates against their access to justice. Third, in addition, the social sanction against women who speak ill of their partner is strong – denouncing violence may mean women are signaled within the communities as "bad wives". The study in Guatemala concluded that women and girls tended not to denounce rape and intra-familial violence, and that "some local authorities who are aware of these cases, opt to abstain from taking action. This situation perpetuates power relations which disadvantage indigenous women and children within family and social settings, given that they are normally obliged to continue living in their community with the aggressor, making them more vulnerable to repeated aggressions which are socially tolerated" (ASIES/OACNUDH 2008: 90, our translation). Similar findings were reported in a recent study in Peru and Ecuador; in Peru indigenous women interviewed were of the opinion that the community

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<sup>27</sup> Interviews with state justice officials also confirmed that women often did not denounce rape, often because the rapist was a member of their family and the reputation and honor of the family is at stake. ASIES/OACNUDH 2008.

<sup>28</sup> The Bolivian research team referred to such dynamics as evidence of the "law of the provider": whoever guarantees economic subsistence exercises physical and sexual power over others (Calla et al. 2005).

justice authorities did not sufficiently involve themselves in women's problems. They also commented that severe cases, such as sexual violence and rape, tended to be covered up by male community authorities (Franco Valdivia and González Luna 2009: 95). The study also found that men and women *rondero* and communal authorities reacted differently to intra-familial violence: women leaders tended to take it more seriously in all cases, while male leaders tended to propose intervention only in cases where the violence was life-threatening or repeated, or when aggression between couples became highly public. Men also systematically demonstrated higher tolerance towards intra-familial and sexual violence, tended to underplay the extent of the problem, believe more in the possibility of aggressors changing their conduct, and emphasize external causes for violence, such as gossip, bad advice and poverty (Franco Valdivia and Gonzalez Luna, 2009: 94). Similar evidence exists for mixteco and tlapaneco women within the policía comunitaria in Guerrero, where numerous cases show how justice practices are marked by patriarchal bias (Sierra 2009). These factors all point to a profound lack of access to adequate recourse for women and girls suffering physical and sexual violence. Indigenous women activists and the movements they form are increasingly focusing on how to ensure that community justice systems ensure respect and protection for women and girls. In some places these efforts are supported by changes within the official justice system. It is to these initiatives that we now turn.

## Part III: Successful strategies to increase indigenous women's access to justice in the region

In this section we examine the responses of indigenous women and other actors to their lack of access to justice. In Latin America these initiatives are occurring within the context of multicultural judicial reforms that have recognized indigenous normative systems and different degrees of collective rights (see section one of this report). The fight for autonomy, the principal demand of indigenous peoples, has had different impacts on these legal reforms depending on the strength of indigenous movements, the support of civil society, and particularly the response of state actors. For the majority of indigenous women in Latin America the defense of indigenous peoples' collective rights is the framework within which they conceptualize their rights as women.<sup>29</sup> Indigenous women's demands are also occurring within the context of the promotion of rights consciousness by many actors – state, international NGOs and social movements.

Gender relations are socially and historically constructed within specific contexts and places. Across Latin America, at both local and regional levels, a culturally sensitive gender perspective and certain critiques of hegemonic liberal feminism are gaining ground (Sánchez, 2005; Cumes 2009b, Méndez 2009). Although different languages exist to talk about indigenous women's rights – from rights-based discourses to demands based on complementarity and *cosmovisión* – there is a consensus regarding the centrality of identity politics. The FIMI Report (2006) is especially clear in stressing, for example, the need to understand gender roles and indigenous women's perspectives when dealing with domestic violence and community discrimination towards women. Nevertheless, many of the programs developed by official institutions and NGOs that aim to promote women's rights in indigenous regions of Latin America tend to promote a liberal vision of rights without taking cultural values into account

It is not easy to understand that for indigenous women confronting gender oppression sometimes the best solution is not to leave the abusive husband; this could imply grave consequences for the woman and her family, for example to be subject to social ostracism or to lose access to land and the family home, and ultimately membership of her cultural group. Imprisoning men may in fact increase women's difficulties in maintaining their families. For these reasons women's organizations are looking for other legal remedies to confront domestic violence, drawing on their own cultural models based on conciliation and dialogue, and at the same time incorporating a critical view of some traditions and customs, drawing on the very language of rights (FIMI 2006: 32). A critical and culturally sensitive perspective on indigenous women's rights seems to be the only effective way to develop strategies to discuss violence and discrimination within communities and to guarantee women's access to justice, both to indigenous community and state judicial institutions.

Over the last 20 years international organizations have promoted a gender agenda to improve and recognize women's rights. Central to this process are: the CEDAW (Convention for the Elimination of all forms of Discrimination against Women (1979), the Interamerican Convention to Prevent and Eradicate Violence against Women, the Belem do Pará Convention of 1994; the Beijing Declaration on gender equity (1995). This international framework has influenced national legislative agendas in Latin American countries in order to respond to these standards. In fact most of the countries have approved reforms to strengthen guarantees of women's rights and particularly to a life without

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<sup>29</sup> See First Indigenous Women's Summit of the Americas 2002; the Complementary Report to the Study of Violence against Women "Mairin IWANKA RAYA" prepared by FIMI (2006); Cunningham (2003).

violence: for example, the Mexican federal law on women's access to a life without violence (2007); the Law 103 against gender and intra-familial violence in Ecuador (1995); The law on equal opportunities between women and men, Number 28983 (2007) in Peru; or in Guatemala the law against femicide and other forms of violence against women (2008).

Global discourses on gender rights have gained legitimacy at the international and national level (Merry 2006; Molyneux and Razavi 2002); nevertheless this recognition does not guarantee the respect for those rights in practice. The gap between recognition and implementation is particularly marked in the case of indigenous women's rights and access to justice, as it is more generally with indigenous peoples' rights (Stavenhagen 2006; CIDH 2007). Nevertheless it is important to recognize that at local, national and regional levels, women's rights are increasingly seen as something legitimate. It is also within this context that indigenous women from different latitudes have participated in continental and regional meetings since the start of the 1990s in order to discuss their demands and define their own agendas.<sup>30</sup>

Justice reforms to promote gender equity and governmental efforts to improve indigenous women's access to justice in Guatemala, Ecuador, Peru, Mexico, Bolivia and other countries have meant an increased number of forums to which indigenous women can make recourse, such as, for example, ombudsman's offices, the governmental Defensoría de la Mujer Indígena (DEMI) in Guatemala; Comisarías de la Mujer in Ecuador, Casas de Refugio in Peru, Defensorías de la Mujer in Bolivia, or Indigenous Women's Health Centers in Mexico (Franco Valdivia and González Luna 2009; Lang and Kucia 2009). However, while these institutions and other multicultural policies directed at indigenous women open alternatives to deal with gender discrimination and oppression, they do not necessarily guarantee indigenous women's access to justice in all spheres, particularly criminal justice. Miscarriages of justice against indigenous women are commonplace (as they are against many detainees within the criminal justice system). For example, Hernández has documented the case of a 70 year old mixteca women in Mexico, imprisoned for seven years accused of drug trafficking. A bag of marijuana was left near the woman's seat on a bus, yet she had no access to an interpreter or to a defense lawyer before her imprisonment (Hernández 2010). Lack of access to fair and adequate defense for woman accused of criminal offenses occurs in all countries across the continent (Barragán 2005). Reforms have been approved recognizing the right to an interpreter or to cultural defense, but these are not being implemented by judicial authorities, as the UN High Commission on Human Rights stressed in a recent report on indigenous peoples' access to justice in Oaxaca, Mexico.<sup>31</sup>

Social movements and indigenous organizations are also promoting new forms of access to justice offering conciliation services and legal aid or supra-communal justice forums that are not officially recognized by the state. These also provide new alternatives for indigenous women to seek justice within their communities or to navigate between different legal forums. This is the case of the *alcaldías indígenas* (non-governmental indigenous mayoralties) in Guatemala (Sieder and Macleod 2009), the Zapatista honor tribunals in the Juntas de Buen Gobierno, in zapatista communities in Mexico (Mora forthcoming), or the Regional Coordination of Indigenous Authorities in Guerrero (Sierra 2009; 2010). These efforts and initiatives to increase women's access to justice underline the fact that gender equity is a legitimate part of the agenda of indigenous movements, something which was not necessarily the case in the past.

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<sup>30</sup> See for example Indigenous Women Continental Meetings in Quito 1995, In Mexico 1997, in Panamá 2000, in Lima 2004 ([www.enlacecontinentalmujeresindigenas.org](http://www.enlacecontinentalmujeresindigenas.org)); First Indigenous Women's Summit of the Americas 2002, Oaxaca Mexico.

<sup>31</sup> Of 91 indigenous prisoners interviewed in Oaxaca, 84% had had no access to an interpreter, in violation of their constitutional rights. *Informe del Diagnóstico: El acceso a la justicia para los indígenas en México. Estudio de caso en Oaxaca*. OACNUR, Mexico 2007.

Violence against women has increasingly come to be seen as a problem both within the state justice system and indigenous justice systems. Different research and reports have indicated the high incidence of violence against indigenous women in crimes taken to court (Calla et. al. 2005; González 2009; Franco Valdivia and González Luna 2009; Pequeño 2009a, 2009b). As the recent national report on health and indigenous women's rights in Mexico stresses, legislation and discourses recognizing women's rights do not correspond with present practices (ENSADEMANI 2008). Violence continues to be an everyday reality for indigenous women. Discursive shifts and legal changes do not necessarily mean that gender ideologies and practices have changed, as these are deeply rooted amongst both state officials and indigenous authorities (Sierra 2008). Nevertheless, indigenous women are not only victims of domestic violence; they have also developed strategies to confront oppressive and intolerable conditions, as it is the case with legal remedies and new initiatives to confront gender violence (FIMI 2006). Some of these collective efforts have gained international recognition: for example, the Defensoras Comunitarias (community defenders) of Cuzco in Peru, who were awarded the international prize *Experiences on Social Innovation* for their important work in improving women's rights consciousness and alternatives to domestic violence.<sup>32</sup>

Another example of innovative practice regarding access to justice is the case of the organization Wangky Tangni ("Flower of the River") on the Miskito Coast in Nicaragua. According to the 2006 FIMI report, "Wangky Tangni offers women's leadership development programs that address violence against women, and promotes women's political participation and gender equity through sustainable development projects, human rights trainings, and healthcare programs that incorporate indigenous and western perspectives on medicine. Wangky Tangni recognizes that many indigenous women derive identity and power from their traditional roles as midwives, advisors, spiritual guides, and leaders who are principally responsible for transmitting knowledge, cultural values, and agricultural technology in their communities. Wangky Tangni works to preserve and develop these roles for women, thereby strengthening women's social status and confidence, which in turn fortifies their capacity to confront gender-based violence. All of Wangky Tangni's programs simultaneously promote women's human rights and the collective rights of the Miskito Peoples. Wangky Tangni runs a community-based conflict mediation program that offers recourse to survivors of gender-based violence. For most of these women, the state's legal system is neither accessible (the state does not provide translation services and many Indigenous women are not fluent in Spanish) nor accountable (facilities are located far from communities, and there are no reliable or affordable transportation or communication services)" (FIMI 2006: 48).

In the next section we refer to **three in-depth case studies** which illustrate successful strategies developed by indigenous women and men to confront violence, promote gender rights and access to justice.

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<sup>32</sup> This Prize was promoted by CEPAL and the Kellogg Foundation (2005-2006) ([www.eclac.cl/ddc/innovacionsocial](http://www.eclac.cl/ddc/innovacionsocial)), [web.www.cepal.org](http://web.www.cepal.org)

## The Casa de la Mujer Indígena (CAMI) and the Juzgado Indígena of Cuetzalan, Puebla, Mexico

Over the last 20 years a grass-roots process of organization has occurred amongst nahua women in Cuetzalan, in the northern Sierra of the state of Puebla: today Cuetzalan represents one of the most important experiences for indigenous women throughout Mexico. In this region, nahua women have successfully transformed their demands about indigenous women's rights into concrete alternatives and programs. Most notable is the role of the popular organization Maseualsiamej Monseyolchicauanij which, together with other organizations linked through the Casa de la Mujer Indígena (House of the Indigenous Woman, or CAMI), has managed to implement a gender agenda which has led to concrete initiatives to defend indigenous women's rights, especially with regard to gender violence and access to justice. Particularly novel has been the ability to influence official spaces within the state, on the one hand, and also indigenous institutions, on the other, such as the new Indigenous Court (Juzgado Indígena) in Cuetzalan. These gains have occurred within the broader context of marked tensions and problems within nahua women's families and communities, which reveal the complexity of advancing a gender agenda as indigenous women. However, they also indicate the organizational strength of women who are developing solutions to recurrent problems, concentrating their efforts on their everyday practices and organizational spaces. The organizational processes of indigenous women in Cuetzalan also reveal the important contribution of mestizo women, so-called "rural feminists", who have worked as advisors and supported nahua women in a manner that respects their organizational pace and needs, and without imposing their interests on them. As part of this process, the language of rights, human rights, indigenous rights and women's rights has been appropriated and redefined by nahua women in line with their own cultural contexts and needs. How did this organizational process emerge? What are the central demands of nahua women in Cuetzalan? And what strategies have they deployed in order to affect the field of rights and justice?

### The organizational context and rights disputes: building the road

The organization of indigenous women in Cuetzalan was initially driven by economic necessity. Women who were part of a mixed cooperative of coffee producers, Tosepan Titataniske, were forced to set up an independent, women-only organization in order to defend their own productive projects and interests, something which generated acute conflicts with their male comrades (Mejía 2008). The organization Maseualsiamej was the result of this process, an association of female artisans which quickly became the central point of reference for women's organizational processes in the region. Maseualsiamej promoted training in diverse activities in the fields of health, traditional medicine, production, human rights and women's rights. Amongst other projects, they built a highly successful eco-tourist hotel, Tazelotzin, managed by the women of the organization. This allowed women members of Maseualsiamej access to resources to contribute to their domestic economies, and provided them with a concrete justification when negotiating their participation in the organization with their spouses. This combination of economic activity and rights training meant Maseualsiamej became a collective space for nahua women to reconstruct their identity as women and as indigenous people. This participation led many women to reflect on their situation as women in their communities and to conceptualize what they understood by their rights:

"we started to have our workshops and meetings where we reflected on our rights as women, that it was also important to know that we had rights, and that it was not

normal to suffer violence, blows, mistreatment....that's how we came to know our rights" (Doña Rufina cited in Mejía 2006: 2).

The organizational panorama within Cuetzalan has also been marked by the presence of the Takachihualis Commission, an indigenous human rights organization which has played a central role in promoting and defending human and indigenous rights. Since the early 1990s a number of factors, including the Zapatista uprising in Chiapas and the government's move to legally recognize indigenous rights, led to the strengthening of local alliances. Maseualsiamej and Takachihualis began to work together and to influence each other: on the one hand Maseual opened up a space to rethink women's rights from their own cultural referents, whilst Takachihualis had to accept the importance of a gender discourse for thinking about indigenous rights, and to question harmonious visions of indigenous culture. Both processes have affected traditional ways of thinking about indigenous justice systems.

The population of Cuetzalan is 60% nahua and there is a marked presence in the municipality of state actors implementing indigenist policies in the fields of health, education and justice. Indigenous organizations have tried to influence official policies within these spaces. In contrast to other parts of Mexico, a region-wide social network has been consolidated which allows exchange between diverse actors and development programs, official and non-official, some of which are entirely under the control of indigenous organizations. These are part of regional networks of human rights and women's rights organizations, something which has allowed indigenous women to develop their own discourse and to have an impact on official spaces, such as the indigenous radio station, the local hospital and justice services. Together these efforts have promoted a climate favorable to indigenous rights and indigenous women's rights, which are officially endorsed by state actors. However, this alone is not enough to confront discrimination and gender violence within and beyond the communities.

Studies show that women in Cuetzalan suffer violence throughout their lives, violence which is framed by their structural conditions of marginalization and poverty and by traditional cultural frameworks of gender relations.<sup>33</sup> Nahua women also suffer different kinds of institutional violence and ethnic and gender discrimination, for example when they are discriminated against in health services because of their mono-linguism, when doctors fail to explain ailments or treatments to them, or when they try to make a complaint and the state authorities scold and insult them. Given the recurrent nature of gender violence and the lack of access to adequate justice services at community and municipal level, as various studies have shown (Sierra 2004; Martínez and Mejía 1997; Vallejo 2004), organizations such as Masuealsiamej, supported by human rights organizations, have developed a range of strategies to support indigenous women in confronting such situations. In this sense, CAMI and subsequently the Indigenous Court have opened options for indigenous women in the region to defend their rights.

## Building justice with gender equity

The House of the Indigenous Woman (Casa de la Mujer Indígena, CAMI) and the municipal indigenous court both emerged at the start of the 2000s in response to state multicultural policies generated by the reform of article 2 of the Mexican constitution in 1990, which recognized indigenous peoples' rights and forms of social organization based on their "uses and customs".

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<sup>33</sup> According to a study where 50 women in the municipality of Cuetzalan were interviewed, 54% confirmed they had suffered violence at different stages of their lives: 59% in their childhood at the hands of their father, mother or step-parents; 44% were witnesses to violence against their mothers, grandmothers or another woman in their household; 29% had been subjected to violence by their in-laws, and 68% had suffered violence at the hands of their first or second husband (González, cited in Mejía 2006: 3).

They also responded to policies of the Mexican state to promote gender equity, derived from the commitments assumed on ratification of CEDAW and the Interamerican Convention of Belén do Pará - most recently expressed in the approval in 2007 by the national congress of a law for a life free of violence for women.<sup>34</sup> As a result of this shift in policy, a Casa de la Mujer Indígena was opened in Cuetzalan and in four other indigenous regions of the country. The CAMIs were supposed to address indigenous women's health problems. At the same time an indigenous court was set up by the judicial authorities of Puebla in the Cuetzalan municipality, together with four other such courts in indigenous municipalities in the state. Both institutions were subsequently appropriated by indigenous organizations. The role of CAMI has been particularly important because of the impact it has had on the treatment of gender violence and access to justice for women. CAMI has also had a significant impact on the nature of the indigenous court.

CAMI (Maseuakalli) was created in 2003, with the support of Maseualsiamej which brought together a range of different indigenous women's organizations in the region.<sup>35</sup> Instead of focusing on healthcare, as had been officially planned, it was decided to privilege access to justice and domestic violence. Today CAMI is a space where nahua women who are victims of domestic violence can find help and accompaniment through the legal process with practical and psychological support. A methodology known as "intercultural conciliation with a gender perspective" has been developed, involving three areas: health, emotional support and defense, which are addressed in an integrated manner in order to support the victim and her family. Cases can be addressed via a legal process, or via conciliation, depending on the severity of the offense and the decision of the woman involved. Through CAMI they have the support of a lawyer and a psychologist. More recently CAMI has developed work on masculinities, with the aim of involving men in a reflection on violence and its implications, from a cultural perspective. Women are also trained as community representatives and promoters of CAMI, providing a permanent link between the institution and developments in the surrounding indigenous communities.

CAMI has organized workshops to help women victims of domestic violence decide how best to confront the problem. They try to combine emotional support with accompaniment and reflection on the conflict itself and what legal measures can be taken. CAMI coordinates with state justice officials and with indigenous justice system authorities, and has gained the recognition of both spheres, official and unofficial. It is now common for the municipal public prosecutor's office or the children's court –both official institutions- to send women who arrive with problems of domestic violence to participate in CAMI's workshops. According to Angélica, one of the coordinators of CAMI:

"The public prosecutor's office knows who we are and they know that we accompany women, that we run workshops to help them make a good decision. When women turn up at the public prosecutor's office they send them first to our workshops, so they can decide what they want to do. They come as a couple, on the recommendation of the public prosecutor's office. We treat the women together with other women, and the men with other men.....We know that in order to provide integrated support, healthcare, counseling, legal services, we need [their support and] the support of the health services and the indigenous court too. We also realized we have to use the radio, announcements and so forth, so that people can find out what we do and where to find us. We've also had joint forums on the radio....lots of

<sup>34</sup> The law "Acceso de las mujeres a una vida libre de violencia" was approved by the Mexican congress on 1 February 2007, <http://www.cddhcu.gob.mx/LeyesBiblio/pdf/LGAMVLV.pdf>

<sup>35</sup> The CAMI in Cuetzalan, like other CAMIs in Mexico, was initiated with funding support from the UNDP, channeled through the Comisión de Desarrollo Indígena (CDI) and the Health Secretariat.



people listen and learn what we do, that we're not alone, that we have the support of many other institutions." (cited in Terven 2009: 179 -180, our translation).

Recently one of the central focuses of CAMI's work has been their collaboration with the indigenous court. This is related both to the official recognition of the court as a space of "indigenous justice", and to the initiatives of the court and its governing council, which are aimed at strengthening the role of the court vis-à-vis official justice forums.

## The indigenous court of Cuetzalan: towards indigenous justice with gender equity

The indigenous court in Cuetzalan was initially created in 2003 by the state justice authorities as part of official multicultural policies, but has subsequently become highly relevant for local processes to strengthen indigenous justice (Terven 2009; Chávez 2008). Within the procedures of the indigenous court, indigenous women from CAMI and other organizations aim to raise awareness about women's rights with the court's indigenous authorities. Women from CAMI form part of the court's governing council and in this way have been able to accompany and participate in a number of cases. Their ongoing dialogue with the indigenous judges aims to ensure that they take women's rights into account in their conciliations, even if these contravene customs, for example in cases of alimony rights, abandonment or mistreatment. Revision of the records of the indigenous court show that in 2004 of 80 cases 40 involved women's affairs; in 2005 of 77 cases attended, 41 were initiated by women; in 2006 of 78 cases, 43 had women plaintiffs, demonstrating the importance of this institution for women in the municipality (Terven 2008: 199). The challenge of introducing gender equity within indigenous justice is complex, given that the indigenous judges often share discriminatory gender ideologies (Sierra 2008). In a case documented by Adriana Terven, a nahua woman was beaten by her husband and her father for going to sell handicrafts without their permission, disobeying the rules of the family. The woman's case went through various hearings before the community authorities and subsequently before the indigenous court, where CAMI intervened. During the sessions the indigenous judge and his assistant confronted the woman's father and challenged his behavior. They emphasized the rights of women to work to support their families, something which challenged local norms. In the end, the woman's father reluctantly accepted his error (Terven 2008: 249). These kinds of cases reveal how the indigenous authorities of the court are trying to develop a different kind of justice, one which takes women's views into account and questions their mistreatment at the hands of men. The weight of custom and traditional ideologies means that the judges don't always champion women's rights. Rather, this is an ongoing, long term process, but one in which women from CAMI, Maseual and other organizations have made significant gains. The experience of Cuetzalan shows how indigenous women are not only advancing in the construction of a gender agenda from their own daily practices and cultural processes, but also illustrates how they are achieving concrete outcomes to confront gender violence and inequity. This is particularly important in the spaces of indigenous justice, where indigenous women are gaining important influence, enabling them to address women's rights. In the process they are also affecting official institutions of the state, and transforming the lives of men and women in the region.

## Fighting for gender equity and access to justice: indigenous women's demands in Ecuador

Kichwa women of the Women's Network of Chimborazo province, Ecuador, came to play an important role in the Constituent Assembly of 2007-2008, promoting an agenda of gender equity from their position as indigenous women, and connecting to the national women's movement through the National Council of Ecuadorian Women CONAMU (Consejo Nacional de las Mujeres de Ecuador).<sup>36</sup> Their proposal included the demands of many other indigenous women who had taken part in meetings and workshops prior to the new constitution in order to discuss issues such as gender violence and rights to political participation. Their demands were successfully articulated with demands for indigenous peoples' collective rights, signifying important gains for women, but also generating tensions with the male leadership within the Consejo de Nacionalidades Indígenas de Ecuador (CONAIE), especially with those who thought that championing women's demands ultimately limited the rights of indigenous peoples to self-determination.

The new constitution of Ecuador, approved in July 2008, marked a high point in the recognition of pluri-nationality and the rights of Ecuador's indigenous peoples. It also represented an innovation in Latin American constitutionalism, making interculturality and gender cross-cutting themes that run throughout the charter. The 2008 constitution builds on the advances established in the 1998 constitution and incorporates new international rights frameworks, in particular the UN's Universal Declaration on the Rights of Indigenous Peoples (UNDRIP), on the one hand, and on the other refers to the rights of women to a life free from violence and to gender equity, as established by the CEDAW Convention and other international instruments prohibiting gender discrimination. The new constitution and international instruments constitute key referents in the struggles of indigenous women in Ecuador, both for their rights as women and for their collective rights as indigenous peoples.

Within this context it is important to analyze the strategies developed by indigenous women in Ecuador to support local and regional organizational processes, and the mechanisms employed to affect spaces of political participation and indigenous justice. More than a specific case as such, here we refer to the process of constructing an agenda as indigenous women, pointing to the importance of analysis and reflection on gender violence and exclusion and the promotion of greater awareness about women's rights. This section is based on academic studies and primary sources from indigenous women's organizations. These documents reveal that the work of indigenous women in Ecuador to construct a position promoting gender equity is relatively new, in contrast to the many years women have participated in the organizational spaces of the national indigenous movement, including the CONAIE. The role of kichwa women from Chimborazo, Cotacachi and Sucumbíos has been particularly important, even though it has been far from easy to open a space to discuss gender violence and discrimination. So far these efforts may be reflected more at the level of discourse than practice. Nonetheless, they appear to open new avenues for those indigenous women who have been brave enough to question naturalized views of gender relations and patriarchal communitarian social relations without breaking with their culture. These women seek to innovate and to construct their own language to fight for their rights, a struggle they share with many other indigenous women across the continent.

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<sup>36</sup> CONAMU is a government body that was created in October 1999 in response to the commitments acquired by the Ecuadorian government at the 1995 Beijing Conference. In May 2009 CONAMU was replaced by a new official institution, the Transitional Commission towards the National Commission for Gender Equality (Comisión de Transición hacia el Consejo Nacional para la Igualdad de Género). UNIFEM's Andean office has worked in coalition with CONAMU since 2006 to improve indigenous women's access to justice.

## Women's demands and strategies in Ecuador

Indigenous women's demands in Ecuador have focused on two elements: first, gender violence and exclusion within their communities and organizations, and; second, legitimating their rights as women and their rights to political participation within the framework of the collective rights of indigenous peoples. This has led women to organize within their communities and at regional and national levels. The approval of Law 103 outlawing violence against women and the family in 1995 has provided a central point of reference for Ecuadorian women's organization, both indigenous and non-indigenous.<sup>37</sup> The law generated a series of commitments on the part of the government, for example to create Women and Family Commissions (Comisarías de la Mujer y la Familia) in urban centers, which function as a kind of women's legal aid service (Pequeño 2009b:149).<sup>38</sup>

Different studies have illustrated the violence and exclusion suffered by indigenous women, as well as the diverse responses women have developed to confront these situations.<sup>39</sup> In her work on a kichwa community in the province of Imbabura in the Ecuadorian highlands, Andrea Pequeño (2009a; 2009b) has shown the recurrent nature of abuse within indigenous families and the relation of violence to women's life cycles. During their reproductive years, married indigenous women are most exposed to violence because of male attempts to control their sexuality and fertility.<sup>40</sup> She also shows the difficulties women face in denouncing abuse because of their own values and hegemonic gender ideologies, and also because of the mechanisms of community justice – for example, as shown in a survey of kichwa women from Cotacachi carried out in 2006 and 2007. According to Patricia, who in 2001 was the first female president of her community, all 58 women who made up the local organization of women had been victims of abuse (Pequeño 2009a: 152). Only 32% of women denounced the abuse, but most of them were too frightened and ashamed to do so (Pequeño 2009a: 157). Most cases of intra-familial violence were dealt with within the family and didn't even reach the communal assembly (Pequeño 2009a: 85). A similar investigation carried out by Jaime Vintinilla in Peru and Ecuador, involving the revision of 700 community acts (*actas*) in the provinces of Cotopaxi, Chimborazo and Loja in Ecuador, and Cajamarca, Cuzco and Puno in Peru, confirms Pequeño's findings that violence is a central mechanism in intra-familial conflicts, and also that community justice mechanisms tend not to deal with such issues. It also suggested that women who hold community office are also subject to worse kinds of violence (Vintinilla 2009; see also Franco Valdivia and González Luna 2009).

The forms of community conciliation which have been documented (García 2002) reproduce inequitable agreements for women in line with ascribed gender roles. Women often do not denounce maltreatment, and even if they do they are often not supported by communal authorities. Similar to other countries, most grave offenses, such as rape, are the remit of state jurisdiction, although this does not guarantee adequate access to justice. Many indigenous communities have developed written community regulations or statutes (*reglamentos comunitarios*) as part of their forms of justice administration. These regulations aim to transmit certain principles and norms (García 2002). However, they rarely contemplate issues of intra-familial violence, and if they do prescribe measures these are rarely fair for women. According to Pequeño (2009a: 85) eight out of

<sup>37</sup> Ley 103 contra la violencia a la mujer y la familia, approved by the Ecuadorian Congress on 11 December 1995: <http://www.uasb.edu.ec/padh/revista12/violenciamujer/ley%20103%20ecuador.htm>. The law defines family violence, establishes jurisdiction and regulates the processes to be followed in cases of intra-familial violence, incorporating the commitments set out in the CEDAW convention.

<sup>38</sup> There are currently 31 Comisarías de la Mujer y la Familia in Ecuador, these are part of the Ministry of Government and Policing, and are subordinate to the National Directorate of the Comisarías de la Mujer y la Familia (Pequeño 2009a: 149).

<sup>39</sup> See Lang and Kucia 2009; Pequeño 2009a and 2009b; UNIFEM 2009; Franco Valdivia and González Luna 2009.

<sup>40</sup> According to the national survey ENDEMANI (2004) cited by Pequeño, most married women suffer violence because of alcohol and jealousy, particularly related to women's presence in public spaces, malicious gossip and men's attempts to control their bodies.

nine community statutes made no reference to violence in order to define sanctions or proceedings, indicating the little importance afforded to this issue.

It is within this context that we must situate alternatives developed by some women's organizations to confront gender violence, with the support of official bodies such as the Comisarías de la Mujer and international organizations such as UNIFEM. Of particular interest are the so-called "Laws of Good Treatment and Good Living" (*leyes de buen trato y buen vivir*).

These are mechanisms which seek to address the problem of violence from indigenous languages and cultural frames of reference. Law 103 against violence against women and the family has proved fundamental in this process. The law permitted the establishment of Comisarías de la Mujer in urban centres and the development of support programs. Although these centers are not located within indigenous communities themselves, they still provide a point of reference for how to address questions of violence that occur within those communities.

Two kichwa municipalities, Cotacachi, in the highlands, and Sucumbios in the Amazonian region, have developed "statutes of good living" (*reglamentos de buena convivencia*) to address the issues of intra-familial violence and gender exclusion. Both statutes reveal the efforts of indigenous women to formalize their demands and wishes, which are in turn the product of discussions within assemblies and meetings in their communities.

## The Statute of Buena Convivencia in Cotacachi

The statute in Cotacachi was developed with the support of the Integrated Center for Women's Aid (Centro de Atención Integral de la Mujer). The center was promoted by the assembly of the canton, UNIFEM and CONAMU, and by the previous indigenous mayor of Cotacachi, Auki Tituaña (who held municipal office from 1996 until 2008, having been twice reelected). The canton is multi-ethnic in carácter; 50% of the participants in the center are mestizas, 45% indigenous kichwas and 5% afro-ecuadorians. According to Inés Bonilla y Rosa Ramos (in Lang and Kucia 2009: 136-8), the center has attended 4,800 cases, 49% of which are cases of indigenous women. The centers were created as a response to Law 103 and are funded by the state; they are also responsible for training local state justice officials in rural areas. The high incidence of intra-familial violence in the communities led to the development of a community statute to try and make gender justice more accessible within indigenous justice processes. The new statute has been supported by the indigenous mayoralty, and the 43 communities which make up the peasant union UNORCAC are also committed to developing similar community statutes (Lang and Kucia 2009: 136).<sup>41</sup>

The so-called statute on good living and good treatment - *reglamento de la buena convivencia y el buen trato* or *Sumak Kawsaipa Katikamachik* in kichwa (2008) - aims to regulate family and community life and establishes a series of sanctions which are increased whenever a person re-offends, thus recovering the custom of tougher and tougher sanctions for recidivists. It respects the principles of indigenous justice to the extent that it seeks to repair damage, but it also seeks to achieve a union between "ancestral" practices and human rights. It respects the jurisdiction of the state for particularly serious crimes, such as rape. Different types of violence that are condemned in the statute include physical, psychological and sexual violence, rape, forced marriage, gossip, infidelity, and the prevention of women from participating in public affairs or economic activities. These are identified as the main kinds of behavior which affect women and "good living" within the family and the community. In this way, the statute aims to promote a process of cultural change which confronts naturalized ideas about violence and aims to create new forms of behavior based on

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<sup>41</sup> UNORCAC (Unión de Organizaciones Campesinas Indígenas de Cotacachi) was established in 1977. <http://unorcac.nativeweb.org/>

respect between women and men. It involves men in the prevention of violence and seeks to promote non-violent masculinities. Male and female promoters have been trained to promote the statute, with the aim of improving access to justice in traditional and state justice, as well as respect for women's human rights. However, these are but the initial stages in an ongoing process: the statute has not been accepted by all communities in Cotacachi and remains under discussion throughout the municipality. We currently lack research exploring how the statute and the processes which have accompanied its elaboration and promotion have affected community justice practices; we do not know to what extent it has been accepted within communities, or whether it is actually helping to resolve women's problems. Nonetheless, the mere emergence of the statute is testament to the enormous efforts of indigenous women through their organizations to confront these problems. It also indicates the great degree of respect and care required in order for such complex issues to be addressed.

## The law of good treatment in Sucumbíos

The "law of good treatment" to prevent and sanction intra-familial violence was devised by kichwa women in the municipality of Sucumbíos, in the Amazon region of Ecuador. This was based on another initiative by women organized in AMNIKISE (Asociación de Mujeres de Nacionalidad Kichwa de Sucumbíos) to prevent and punish violence. The role of men as promoters of "good treatment" is a notable feature of this experience, as Gilberto Grefo, one of the male promoters, described it:

"AMNIKISE sought gender equity and wanted us [men] to work on the issue of violence too (...) we have worked to include men much more in these processes, to train more male promoters of good behavior" (cited in UNIFEM 2009: 145).

Dialogue with men has proved highly important in the support of the women's work; it is extremely difficult to make any progress if men are not involved in these processes. For this reason the efforts in Sucumbíos, as in Cuetzalan, are highly innovative in supporting the efforts of women to secure a better way of life.

These community statutes on "good behaviour" are responses on the part of indigenous women to the need to tackle intra-familial violence and gender exclusion, and represent attempts to find solutions within their own communities and models of justice. The importance of the written text or statute signals the significance of legal codification and the interlegality which characterizes these documents. The statutes are an effort to express women's demands in their own language and context. By questioning established gender orders they generate tensions and opposition, but they also represent an effort to promote cultural innovation. What has been the impact of these statutes? How have they affected access to community and ordinary justice? To what extent have they managed to conciliate demands for gender rights with discourses of collective rights? To what extent is *cosmovisión* a point of reference for new models of indigenous justice in Ecuador? Or is this not a primary concern? These are important processes of transformation which affect the internal dynamics of indigenous communities, but also affect the relationship between the state and indigenous peoples.

## Women's participation in the constituent assembly: other responses

The new constitution of 2008 has proved a particularly important space for building an Agenda for Gender Equity both at national level, and locally, as the experience of the Network of Kichwa Women in Chimborazo has indicated. In the words of Cristina Cucurí, kichwa leader of the network, this agenda seeks equality between men and women for good living ("*Warmindikarindi*

*pakta, pakta así kawsanspo*”). The Agenda became a key political document for indigenous women at national level because of its impact within the constituent assembly and on the text of the constitution itself. According to Cucurí, the participation of women in events before and during the constituent assembly demonstrated the importance of indigenous women's leadership and their ability to mobilize. As part of CONAMU, indigenous rural women made up 90% of the organizations present in different events. Indigenous women had to fight on two fronts to make their demands visible: first, within the feminist movement of CONAMU, which did not always take them seriously, and; second, within the national indigenous movement (CONAIE), which also initially ignored their demands.<sup>42</sup> Kichwa women's demands centered the pluri-national nature of the state, on collective and territorial rights, and on the defense of indigenous justice with full participation of women. The insistence on including gender parity at all the different levels of recognition of indigenous rights and jurisdictions was a constant demand. Article 117 of the new constitution refers specifically to indigenous justice and mandates guarantees of women's participation and decision-making.<sup>43</sup>

The Agenda of kichwa women in Chimborazo is evidence of a new discursive scenario where indigenous women are protagonists.<sup>44</sup> It also shows the discrimination that indigenous women experience because of their gender and ethnicity. They demand their rights to diversity, but they also problematize and politicize their identity as women. The importance of this document is that it made public the issue of violence within indigenous families, communities and organizations, topics which had previously been taboo. It also underlined the fact that spaces of community power and participation are dominated by men (Pequeño 2009b). In sum, indigenous women in Ecuador have faced significant challenges to defend their demands as women and as members of indigenous peoples. In this process they have gained important national and local spaces, fighting for the recognition of gender equity at the constitutional level and at the same time developing important efforts to transform indigenous community law. By appealing to human and gender rights discourses, indigenous women in Ecuador are arguing in favor of a more inclusive form of justice for indigenous women, questioning accepted discourses of complementarity and harmony. At the same time they are incorporating these references in order to defend indigenous rights to autonomy.

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<sup>42</sup> Today CONAIE's political and strategic agenda for peoples and nationalities includes five programmatic elements, one of which is directed towards sexual and reproductive health and a life free from violence.

<sup>43</sup> Various documents reveal women's participation in the constituent assembly. See Agenda de Equidad de Género (2008), Periódico La Prensa, Chimborazo 30 June 2008, which brings together interviews, declarations and the main points of the Assemblyists' demands.

<sup>44</sup> This agenda has been developed by community activists working in coordination with CEDIS, the Centro de Desarrollo, Difusión e Investigación Social, an NGO based in Chimborazo.

## Strengthening indigenous law and access to gender justice: Quiché, Guatemala

Indigenous women in the department of El Quiché, in Guatemala's highlands, face multiple forms of violence and discrimination. Over the last 30 years they have also pioneered grass roots organization, mobilization in defense of human rights, indigenous peoples' collective rights and women's rights. Since the end of the armed conflict in 1996, the region has become a center of efforts by grass roots indigenous social movements to strengthen, recuperate and "revitalize" indigenous – or mayan – law, reflecting similar processes taking place across the country. At the same time, national initiatives linked to the peace process have been implemented in Quiché in order to improve access to justice, and especially indigenous women's access to justice. How are debates around indigenous rights, and moves towards multiculturalization of the state justice system, affecting women's access to justice? What effect have different interventions by international development agencies to strengthen women's rights had on everyday practice? And to what extent are the reflections of indigenous women on their identity, gender and rights affecting the nature of indigenous justice today?

El Quiché is the third largest department in Guatemala, with more than 655,000 inhabitants, 90% of whom are indigenous, the majority maya k'iche'. It was one of the regions most affected by the 36 year armed conflict, having been a center for guerrilla mobilization in the late 1970s and subsequently a target of the military's counterinsurgency campaign, which led to thousands of deaths, disappearances and internally displaced. Some 626 massacres in Quiché were documented by the UN's truth commission, which also documented specific acts of genocide against the indigenous population (CEH 2000). In the wake of the armed conflict the department suffered from a high incidence of lynchings of individuals accused of robbery or other crimes. In common with other highland regions of Guatemala, Quiché suffers acute indices of social exclusion: 85% of the population lives below the poverty line and 33% live in extreme poverty.<sup>45</sup> Women in the rural communities of Quiché display some of the worst indicators for poverty, education and health in the country.

The national peace process, concluded in December 1996, placed particular emphasis on addressing the triple discrimination faced by indigenous women. For example, the agreements explicitly committed the government to eliminating all forms of discrimination against women in their access to land, housing, credits and participation in development projects.<sup>46</sup> The agreement on the rights and identity of indigenous peoples included a section specifically referring to the rights of indigenous women, which recognized the "particular vulnerability" of indigenous women in the face of gender and ethnic discrimination, and poverty and exploitation. It committed the government to criminalizing sexual abuse and to taking the ethnicity of the victim into account when sanctioning crimes of sexual violence; to setting up a Women's Legal Aid Office (Defensoría de la Mujer Indígena or DEMI); and to fulfill its commitments to CEDAW.

While implementation over the next decade and a half fell far short of the agenda set out in the peace agreements, a number of advances were made: the DEMI was finally set up in 2000 and slowly opened regional offices throughout the country to provide legal and social support to indigenous women, including an office in Santa Cruz, the departmental capital of Quiché. In 2008 a

<sup>45</sup> ASIES/OACNUDH (2008: 21), citing data from the 2002 National Survey and the UNDP's 2005 Human Development Report.

<sup>46</sup> Agreement for the Resettlement of Populations Displaced by the Armed Conflict (1994) III (8); Agreement on the Rights and Identity of Indigenous Peoples (1995) IV F, 9 vii).

law was passed criminalizing “femicide” and other crimes of violence against women, in the face of persistently high levels of violent crime against women.<sup>47</sup> In the UN truth commission investigating human rights abuses committed during the armed conflict (published in 2000) rape and sexual torture was significantly underreported. Yet a decade later hundreds of indigenous women from across the country took part in a special tribunal organized by civil society organizations to give testimony about their experience of rape and sexual enslavement by the army and paramilitary forces during the armed conflict.<sup>48</sup>

## Improving access to justice: non-state and state forums

Since the end of the armed conflict, indigenous social movements and community-based organizations throughout Guatemala have strengthened their efforts to revitalize and “recover” indigenous –or mayan- law.<sup>49</sup> In Quiché these efforts have been championed by different *defensorías indígenas*; grass roots indigenous defense organizations made up of local rights activists who work to provide conciliation services, improve coordination between indigenous law and state law, and strengthen indigenous communal authorities in villages and cantons across the department. The Defensoría Maya, Defensoría Wajxaqib’ Noj and the Defensoría K’iche’ all have offices in the departmental capital Santa Cruz del Quiché and have been in existence for over a decade. Some, such as the Defensoría Maya, employ a lawyer to accompany plaintiffs through the official legal process. Others, such as the Defensoría K’iche’, have no lawyers on staff but provide conciliation services and advice. The *defensorías* offer their services in the k’iche’ language –with both indigenous men and women trained as conciliators- accompanying plaintiffs and negotiating written agreements between the parties, which they then monitor over time. They all receive international development cooperation funding in order to provide conciliation services and rights training. In part as a consequence of aid conditionalities, and also in response to the participation of women, they have explicitly incorporated a gender dimension to their work.

In addition to providing conciliation services, the *defensorías* carry out a range of activities to raise rights awareness, constituting an important sphere where international rights discourses are appropriated and re-signified. These activities include training of communal authorities in international and national instruments, principally indigenous rights and women’s rights; the running of workshops on conflict and on the values of mayan law; and the production of visual materials and radio spots to address particular problems, such as domestic violence. These materials or socio-dramas typically explain different types of conflict and violence, present scenarios of intra-familial and gender violence, and set out the different remedies women can take, including how to take their case to the state justice system. In this way much of the work of the *defensorías* is focused on improving coordination between community and official justice systems, with the aim of improving access to justice for the indigenous population, and particularly for indigenous women. Through the work of these organizations, intra-familial and gender violence has been clearly identified as one of the most serious problems within indigenous communities. The naming of such violence, together with the increased possibilities women have to make a complaint in their own language,<sup>50</sup> constitute significant steps forward, even if they alone cannot guarantee more just resolutions.

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<sup>47</sup> Other laws outlawing violence against women include the Law to Prevent, Sanction and Eradicate Intra-familial Violence (Decree 96-97); the Law for the Dignification and Integral Promotion of Women (Decree 7-99).

<sup>48</sup> On the so-called “Tribunal de Conciencia”, see *La Cuerda: Miradas Feministas de la Realidad*, Guatemala April 2010. Many indigenous women present at the tribunal opted to wear white *huipiles* or blouses, so that they could not be identified by their regional dress.

<sup>49</sup> Mayan activists in Guatemala tend to refer to the “recuperación” or recovery of mayan law and cosmovisión, rather than the “reinvention” of indigenous law.

<sup>50</sup> Some 53% of women in El Quiché are monolingual k’iche’ speakers (DEMI 2007: 19).



As well as the non-governmental offices of different organizations of the mayan movement, women in Quiché also have recourse to governmental offices, including the police (which has a special section to attend women victims of crime), the public prosecutor's office, the family courts, the DEMI and the human rights ombudsman (Procuraduría de los Derechos Humanos). The DEMI provides legal services to indigenous women plaintiffs, employing indigenous women lawyers and social workers to assist them in attending cases. DEMI also develops policies and programs for the prevention and eradication of all kinds of violence and discrimination against indigenous women. Ever since it opened, DEMI has been inundated with claims presented by indigenous women, so much so that the institution has simply not been able to meet the demand.<sup>51</sup> The most common cases presented in Quiché are those of domestic violence, followed by claims for child maintenance. Of the 2,600 cases attended by DEMI in 2007, 85% reported family violence, 11% rape, and 4% ethnic discrimination (DEMI 2007: 25-7).<sup>52</sup> The access provided by new state institutions such as the DEMI stands in marked contrast to the lack of linguistic and cultural access, and discrimination indigenous women have traditionally faced in the official justice system.<sup>53</sup>

## Rethinking gender relations: *cosmovisión* and rights

While programs and training with a gender perspective have become a requisite for receiving international funding, indigenous organizations in Guatemala have developed their own perspectives for working on gender, drawing on diverse elements including international rights instruments, reflections on maya spirituality or *cosmovisión*, and the experiences of different grass roots organizations throughout the country who have tried to develop and systematize culturally specific methodologies for working on gender inequalities.

There is a long tradition of indigenous women's organizing and rights mobilization in El Quiché. Women took part in peasant organizations, and also in the guerrilla movement in the 1970s and early 1980s. In the 1980s, in response to massive state repression, indigenous women formed CONAVIGUA, the Guatemalan widow's association, and played an active role in GAM, the mutual support group of relatives of the disappeared, both of which demanded justice for victims of human rights violations during the armed conflict. Many women who are actively working to improve indigenous women's access to justice through the *defensorías* have a long history of such struggle. For example, Fermina López, whose husband was disappeared during the armed conflict, was threatened for her activism in CONAVIGUA. She also defended indigenous youth against forced military recruitment and participated in the exhumation of victims of massacres in clandestine cemeteries in search of her husband. Today she works in the Defensoría Indígena Wajxaqib' Noj (Oxfam 2008: 5). Indigenous leaders such as Fermina and others play an important role in advancing gender justice, either by directly addressing gender discrimination in their work in support of indigenous rights and strengthening indigenous and state justice systems, or simply by occupying spaces that were traditionally occupied by men, thus challenging ingrained gender ideologies. Within cantons and villages there are still relatively few women elected as communal mayors. Yet women increasingly take part in the community decision-making through community development councils (COCODES) established as part of the political and administrative

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<sup>51</sup> The non-governmental *defensorías* are also overwhelmed with cases, the number of which far exceeds their ability to accompany and monitor them.

<sup>52</sup> It is certainly true that "routine" domestic violence is normalized and taken for granted: cases where men beat their wives only tend to be brought to the attention of communal or state authorities when these are severe, sustained and life threatening. Nonetheless, the fact that denunciation of domestic violence figures so large in the caseload of state and non-state justice institutions also indicates that women view such practices as unjust and make recourse to whatever legal forums they can to try and secure protection for themselves and their children.

<sup>53</sup> Efforts have been made to improve linguistic access within the official justice system, with translators employed in the courts of first instance, and an indigenous lawyer employed in the offices of the criminal defense services (Instituto de Defensa Penal Público). However, demand far outstrips supply and the quality of interpreters is not always guaranteed.

decentralization process. They also play important roles in community dispute resolution as midwives and mayan spiritual guides.

In addition to histories of popular organization around human rights, the intellectual production of mayan women in Guatemala on the relationship between rights, gender and identity has been particularly salient. Mayan women are elaborating their own theories of gender using their own frames of reference and cultural languages. Significantly, they have made recourse to mayan *cosmovisión* as a means of reconceptualizing the relationship between gender and law (Grupo de Mujeres Kaqla 2004, 2009; Sieder and Macleod 2009). Groups of mayan professional women, such as Mujeres Mayas Kaqla, have produced important reflections on gender and mayan identity, and in recent years a growing number of women have drawn on mayan principles of complementarity, duality and equilibrium in order to promote greater gender equity (Macleod 2008). The concept of complementarity refers to the interconnection between all the elements of the universe, including – although not exclusively- the relationship between men and women. Indigenous women activists have invoked notions of complementarity in order to reject relations of power and domination and to try and transform gender relations, emphasizing the need for everyday practices to match mayan values and principles (Macleod 2008). The emphasis is on recovering ancestral values in order to live better today. This intellectual production has had an important impact on local organizational processes in some parts of the country. For example, Macleod has analyzed the work of community development organization ASDECO in Quiché, which has developed innovative methodologies inspired by the work of Kaqla, amongst others (Sieder and Macleod 2009). ASDECO and other organizations aim to strengthen women's participation and self-esteem, making recourse to different techniques focused on the spiritual, physical and emotional dimensions of processes of justice and healing (Sieder and Macleod 2009). We still lack systematic evidence to show how these different processes of reflection and rights claiming are affecting the nature of indigenous community justice. But organized mayan women's demands that their spiritual, emotional, physical and cultural integrity be respected are slowly changing the parameters within which gender relations are negotiated and generating new "cultures of legality" around women's rights, specifically emphasizing their rights to freedom from violence and to be treated with dignity.

## Coordination in the search for gender justice

Despite these advances, access to justice for indigenous women in Quiché remains highly limited in large part due to structural inequalities and continuing discrimination and violence. This is particularly marked for sexual violence (ASIES/OACNUDH 2008). Yet important paradigmatic cases reveal changes are underway. For example, Juana Méndez, a monolingual k'iche' woman from Uspantán in Quiché, became the focus of an innovative, region-wide campaign when she attempted to secure justice after being raped by two policemen while in police detention. She was supported by officials within the state human rights ombudsman's office, and her case was subsequently adopted as a case of strategic litigation by a human rights NGO based in Guatemala City. Juana's fight for justice galvanized a regional social movement in Quiché, where the memory of systematic rape of indigenous women during the armed conflict provided a point of reference for condemning rape and sexual violence, generally a taboo subject. Reframing rape as a violation of individual and collective rights provided a language for talking about these issues. Juana was supported by indigenous and non-indigenous organizations, who accompanied her and her family through the legal process, providing emotional and psychological support throughout, including mayan spiritual healing. Despite threats and the assassination of a key witness, convictions of the policemen guilty of the rape were eventually secured. However, the case also illustrated the enormous barriers to achieving justice within the Guatemalan legal system (Sieder 2010; Gaviola Artigas 2008).

The experience of Quiché combines a number of crucial elements: a long tradition of mobilization around rights, a highly dynamic network of indigenous social movements, and the support of international agencies to support the development of agendas to address gender discrimination within a broader context of state reform in the wake of the peace process. Yet although an active process of revitalization of indigenous law is occurring, gender discrimination continues to exist within community justice (Cumes 2009c; ASIES/OACNUDH 2008). At the same time, widespread impunity continues to characterize the state justice system, despite recent access to justice innovations. The legacy of the armed conflict and poverty pose enormous challenges to community organization and violence continues to be a part of everyday life. It is within this context that indigenous community activists struggle for recognition of their collective rights to exercise their own forms of governance and law. Drawing on elements of their *cosmovisión* and rights discourses, they are working to rebuild an ethical and moral order for communities to live together. At the same time, paralegals working in the different mayan *defensorías* are strengthening coordination between indigenous justice systems and state law, emphasizing ideas about gender justice and rights to a life without violence, and promoting recourse to state law for serious cases. By encouraging indigenous women to denounce gender violence, they are thus also bringing pressure to bear for a more effective state justice system. Such processes which link rights and identity offer important avenues for indigenous women to voice their demands and seek justice, even though they cannot guarantee that justice will, in practice, be delivered.

## Conclusions

In this working paper we have analyzed the range of challenges indigenous women in Latin America face when trying to access justice in state and indigenous legal systems. We have stressed the need to consider normative frameworks, legal awareness, access to appropriate justice forums and the achievement of satisfactory remedies. The gradual recognition of legal pluralism, as well as the incorporation of international standards on women's rights, is shaping the prospects for improved access to justice for indigenous women across the continent. The recognition of indigenous peoples' collective rights and particularly their rights to autonomy is the framework within which to advance indigenous women demands for gender equity and more dignified lives. As we have argued here, the struggle to guarantee indigenous women's rights in practice is inextricably linked to broader struggles against inequality, poverty, racism and discrimination. Indigenous women face multiple forms of oppression and discrimination (on the basis of their ethnicity, class and gender) and confront different obstacles in order to access justice. While the reasons for lack of access to justice or the barriers involved in specific cases depend on the context, we identified a number of common contributing factors: poverty, discrimination, violence exercised by state and non state actors and lack of women's participation in public life. We have also stressed that indigenous women are not only victims; they are also actors generating important and innovative social practices to combat gender oppression and access to justice. In conclusion, we would underline the following points:

- Indigenous women confront patriarchal gender orders in state and non-state justice spheres. These are legitimized by gendered ideologies and norms which justify the exclusion and subordination of women. Yet the forms of exclusion of women and the justifications for them vary according to context and different cultural frameworks, and their meanings differ significantly from place to place. For this reason "one-size-fits-all" models of gender relations developed from western liberal perspectives cannot be uniformly applied in public policies that aim to improve women's rights and access to justice in practice.
- Structural violence, discrimination, marginalization, and poverty cannot be changed quickly, but these are the root causes of women's lack of access to justice. If these structural inequalities are not addressed, then programs to improve indigenous women's access to justice, or to "empower" indigenous women, will not greatly change the panorama for the majority. This is because the factors driving conflict will continue and judicial remedies will necessarily remain limited: for example, it is important to enforce men's obligations to contribute to their children's maintenance, but if men have few employment options then such judicial decisions may have little effect in practice.
- Important legislative advances have been made in Latin America in recognizing women's rights and in recognizing indigenous peoples' collective rights. These two spheres of rights are not incompatible: in fact experience in Latin America demonstrates that they are intrinsically linked. Only by respecting indigenous peoples' collective rights will indigenous women's rights to justice and to their cultural identity be secured. Indigenous women have been at the forefront of demanding their collective rights and strengthening their identity as indigenous peoples. Yet this has not prevented them from developing a critical stance towards those aspects of "culture" or "tradition" that prejudice them as women.

- International human rights instruments on gender equity and the prevention of gender-based violence are important points of reference for indigenous women in the construction of their demands and platforms. These standards have been translated into legislation in most Latin American countries in recent years, criminalizing intra-familial violence that was previously considered a “private” matter.
- Such instruments have been appropriated from different cultural frameworks and languages, questioning universalist visions of women, and indeed the very meaning of “rights”. These processes have generated innovative ways of thinking about gender from a position that takes cultural diversity seriously, as well as new alternatives to try and ensure improved access to community and state justice – for example, the women’s *defensorías*, emotional support groups, and recourse to spiritual healers mentioned in this report.
- Constitutional developments in the recognition of indigenous peoples’ collective rights - such as the case of Ecuador analyzed here - have not excluded gender rights. Indeed the work of organized indigenous women has secured important normative guarantees of gender equity. Like all constitutions and human rights conventions, these are utopian standards, rather than reflections of reality. Nonetheless, they constitute an important marker and a resource for women and men working to secure more equitable gender relations in everyday practice.
- It is also significant that the codification of “rights” or good practice at national and international level is increasingly mirrored in grass roots instruments, such as the community statutes of *buena convivencia* discussed for the case of Ecuador. Throughout Latin America such codification of community law is part of indigenous movements’ efforts to strengthen their own forms of law. These ongoing processes of codification present important openings to discuss and transform existing gender relations.
- Indigenous women are not only victims but also actors who are developing innovative practices in order to address discrimination and different forms of violence, both within the state and within indigenous justice systems. The support of some indigenous men and of non-indigenous actors including social movements, NGOs, state bodies and international agencies has been a key resource in these processes.
- The role indigenous women have played in public life has been a fundamental factor in challenging gender discrimination and in the gradual transformation of state and community justice. In this respect the importance of the organized indigenous women’s movement throughout the region, and indigenous women’s participation in community, organizational and national life, cannot be over-emphasized. These processes challenge racist and sexist stereotypes about “indigenous women”, signaling the importance of women’s voice.
- In the last 20 years indigenous women have gained their own spaces within their organizations and communities, something which was unthinkable until relatively recently. Today women’s participation is undeniable across the continent, although their presence varies from place to place. The ways in which they construct gender discourses also vary – some emphasize complementarity and indigenous *cosmovisión* in an effort to decolonize debates about gender rights, others appropriate and reframe languages of rights, others deploy a combination of both. Yet significant advances have been made in developing their demands as indigenous women and these have, in turn, affected the nature of community and state justice and challenged violence and gender exclusion.

- Just as it is hard to generalize about indigenous women and access to justice, so it is difficult to prescribe general policy conclusions. We have emphasized here the need to pay attention to context, to cultural models, to process, and to the voices of indigenous women and men. Experience shows that the top-down application of gender rights and standards of gender equity fails to respond to the needs and demands of indigenous women. Only when their rights are defined and appropriated within the specific cultural and social contexts within which they live is sustainable change possible.
- Ideas of gender equality and the unacceptability of gender-based violence have gained ground amongst indigenous men and women and within the organized indigenous movement, even though this is not always reflected in practice. Nonetheless, discourses of gender equality can be used politically in order to disqualify indigenous struggles for autonomy. For this reason, indigenous women's demands cannot be separated from the collective demands of their peoples. Criticizing certain customs does not imply the disqualification of indigenous cultures: rather it reveals a creative capacity for cultural innovation.
- Research demonstrates the urgency of supporting efforts to find new mechanisms and languages to tackle problems of sexual violence; neither state nor indigenous justice systems provide adequate recourse to victims in such cases. Spaces for dialogue between women, between men, and between women and men are important elements of any solution.
- In some contexts coordination between state justice agencies and indigenous justice systems has improved. However, throughout the continent the quality of state justice services remains poor, discrimination persists, and demand for services far outstrips supply. The gap between the formal recognition of rights and their implementation and guarantee in practice prejudices indigenous peoples' prospects of securing access to justice, and especially prejudices indigenous women.
- Indigenous justice systems should be respected as a central aspect of indigenous peoples' rights to autonomy. However, we should also recognize that indigenous justice cannot deal with all the conflicts and challenges facing indigenous peoples today, including structural violence, militarization, paramilitarization and armed conflict, and assaults on their traditional lands and natural resources. Many of these threats are a direct result of government policies and of the policies of donor governments who also support improved access to justice for indigenous women.

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This paper gives an overview of the challenges which indigenous women in Latin America face in accessing both formal state justice and indigenous legal systems, including a focus on normative frameworks, legal awareness, access to appropriate justice forums and the achievement of satisfactory remedies. In addition, it highlights promising examples of how different actors within civil society and governments are taking steps to improve indigenous women's access to justice in different contexts. Recognizing that each of these are likely to be very context specific, it draws out the key lessons and challenges from these approaches, making recommendations on how this work can best be supported.