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Access to what?

Legal agency and access to justice for indigenous peoples in Latin America

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Abstract: In this paper I issue a call for a primary focus on expanding and strengthening alternative, community-based justice system, as a strategy for securing the full benefits of legal agency to indigenous and other culturally distinct groups. I do so because what lies within the formal justice system—the very system to which so many well-meaning programmes promise access—is, for these groups and their members, often partial justice at best. Many of the substantive justice claims of the indigenous are simply incommensurable with the substantive content of state-based law. Increasing access to that law, therefore, still falls short of legal agency. Efforts to increase the space governed by autochthonous justice are more likely to produce true legal agency for both the communities and their members, although they raise important issues for included subgroups, such as women or culturally nonconforming groups. Somewhat paradoxically, indigenous groups' engagement with the very apex of formal systems, through constitutional litigation, has been one avenue for increasing that space, thus reflecting the exercise of collective legal agency in the pursuit of collective and individual legal agency.

Keywords: access to justice, indigenous rights, legal agency, legal empowerment

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1. Introduction

Classic access to justice efforts sought to facilitate access to and use of the formal, state-based justice system by reducing barriers to entry, providing free legal assistance and translation where needed, creating small local outposts of that system in peripheral areas, and generally opening the door to the courts a little bit wider. More recent efforts have added a large measure of alternative dispute resolution mechanisms and paralegal services, primarily to handle small cases, reducing waiting times and cost by taking cases out of the courts and increasing informality. In either case, however, the expectation is that the poor will somehow secure the same substantive justice as the better off, by gaining entry into state-sponsored justice institutions and making use of concepts and procedures from state law. A review of the legal landscape in Latin America forces the conclusion that simply facilitating access to the standard legal venues has not brought significant, consistent, improvement in the ability of indigenous persons or indigenous peoples to deploy the law in the realization of their goals and aspirations, or the protection of their rights.

In this paper, I will argue that there are two problems with this model of access to justice, when applied to group-based exclusion in particular. First, "justice" is less like a fruit that can be picked by whoever manages to get "access" to it, and more like a terrain upon which contested notions of substantive justice get fought out. For individuals who bear the burden of social discrimination and prejudice the problem is not simply a lack of access but inequality within the system itself. As a result, the challenge is not simply to lower the bar to entry, but to equalize the conditions under which they can shape the landscape and contest the outcomes, once they have gained entry. Second, and perhaps even more importantly, it is clear that for many groups with a distinct cultural identity like the indigenous and many afrodescendants, the goal is not to secure

the same substantive notions of justice, but rather to pursue alternative ones altogether. Indigenous peoples and individuals often do not want a wider door into state-based formal justice systems, but the construction of an alternative justice system that more closely reflects their own normative framework. As a result, we also need to evaluate the extent to which individuals and communities bound by a common identity find agency within the formal system, and whether they can use their increasing access to formal, especially constitutional, justice systems to secure their ultimate goals.

In this paper I will evaluate the results of indigenous peoples' increased access to the formal justice system with roots in Western law – to which I will refer, for convenience, as the "state system," or "state law" – and the increasing role of customary law and non-state justice systems in providing justice. In addition, I will examine the (lack of) success of indigenous groups in one of the key arenas for struggle, the space defined by procedures for Free Prior Informed Consent (or Consultation) in connection with major projects that crucially affect their livelihood and cultures. I focus on indigenous peoples because, in regions like Latin America, they are the paradigmatic example of the intersection between social and economic exclusion and group identity. A legacy of prejudice and discrimination means that legal empowerment for these groups poses particular challenges that a focus on "the poor" alone will obscure.

The challenge, of course, is not simply to secure "access to justice" but rather to find that institutional, legal, and political arrangement that maximizes legal agency for the members of the group. By full legal agency I mean "a relatively low probability of being denied one's rights, a relatively high probability of securing redress when those rights are violated, and the capacity to make effective and proactive use of law and legal processes when and as desired in the pursuit of all legally sanctioned life objectives" (Brinks and Botero 2014: 218). By focusing on legal

agency rather than simply access to justice, we can draw attention to interactions and relationships, to the pursuit of objectives in the face of opposition and resistance. The concept also shifts the focus away from traditionally legal institutional settings like courts and lawsuits or criminal prosecutions, to emphasize that – when it works – law operates mostly through texturing people's daily experiences, often quite removed from any legal institution, although always in the shadow of those institutions. Full legal agency is something that is experienced daily, not merely when confronted with a judicial process.

I will use legal agency instead of the concept of "legal empowerment" for several reasons. In Making the Law Work for Everyone (2008:130), the UNDP's Commission on Legal Empowerment offers the following definition: "Legal empowerment is that process through which people are provided rights in an appropriate legal framework, which they can claim and understand, and which they can find useful in improving income and employment opportunities. It is a process recognised both formally (legally) and informally (legitimately)." This definition comes close to what I mean by legal agency, but falls short in a couple respects. First, although empowerment suggests many of the same things as legal agency, it is less explicit about the relational and extrajudicial operation of law. More importantly, it leaves the subject, the indigenous, as the passive recipient of some outsider's (the state?) effort to grant rights and thereby "empower." One of the points of this paper is precisely that a central element of legal agency is participation by the indigenous communities themselves in producing the necessary changes. Finally, legal agency, like moral agency, includes not only the potential of the subject to exercise legal power, but also the notion that they might be held properly accountable for their actions. Just like citizens in a democracy have agency even as they are subject to the decisions of

the person against whom they voted, individuals might have full legal agency even as they lose their freedom, if they have had the opportunity to deploy their full rights to a fair trial.

In short, individuals, and communities, have more legal agency to the extent they have some meaningful participation in crafting the rules that will be applied to them, and in operating the system that will apply those rules. They will have more legal agency to the extent they are able to make that system congruent with their own normative framework. And they will have more legal agency to the extent they can fluidly deploy the claims that are embedded in that normative framework in their everyday lives. The concept of legal empowerment suggests some but not all these things, so I will use the more expansive notion of legal agency to evaluate the effects of measures meant to increase indigenous participation in various legal and quasi-legal venues, and the effectiveness of rights for indigenous persons.

In recent decades, indigenous groups have secured impressive victories in terms of formal rights and formal legal recognition, within the framework of state law. In Latin America, beginning with Honduras' 1982 and Guatemala's 1985 constitution and culminating with the "plurinational" constitutions of Ecuador and Bolivia in 2008 and 2009, respectively, the region's charters have recognized the existence and aspirations of indigenous peoples in the region. The movement begins somewhat timidly with the Honduran constitution, which merely states, "it is the duty of the state to adopt measures to protect the rights and interests of the indigenous communities in the country, especially of the lands and forests in which they are settled" (Art. 346). The Guatemala constitution of 1985, in Articles 66-68, goes a bit further, promising to recognize, respect and promote indigenous culture and ways of life; to give "special protection" to indigenous communal land tenure regimes; to give special development assistance to indigenous communities; and to provide state lands to indigenous communities that might need

them for their development. The promises are fairly vague, and fall well short of indigenous autonomy. Most of the constitutions amended or written in the late 1980s and 1990s in Latin America adopt this model, recognizing and offering state protection to indigenous peoples and their alternative forms of land tenure.

In Colombia indigenous peoples get more sovereignty within their territories, but remain under the state's constitutional and legal authority: "The authorities of the indigenous peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures" – with the caveat "as long as these are not contrary to the Constitution and the laws of the Republic." Constitution of Colombia, 1991 (Art 246). As we will see, it remained for the Constitutional Court to actually turn this into a more robust protection of indigenous sovereignty, using a blend of domestic constitutional and international human rights principles.

By the end of the first decade of the twenty-first century, however, the set of rights has become more robust. The 2008 constitution of Ecuador and Bolivia's 2009 charter recast the state as a "plurinational" state, explicitly rejecting the idea that only one people make up the nation, and that all people are subject to the same system of laws and rights. Congruent with this declaration is a series of structures that provide for indigenous autonomy. The Bolivian constitution, for instance, establishes that "native indigenous rural peoples shall exercise their jurisdictional functions and competency through their authorities, and shall apply their own principles, cultural values, norms and procedures" (Art.190). Public authorities are required to "obey the decisions of the rural native indigenous jurisdiction" (Art.192). In Ecuador, indigenous peoples have the right to "conserve and develop their own forms of … generating and exercising authority" within their territories, and to "create, develop, apply, and practice their own

customary law, which may not infringe on constitutional rights" (Constitution Ecuador 2008, art.57(8, 10)). In these constitutions, indigenous peoples have shifted from being the beneficiaries of state protection to being treated very nearly as co-equal authorities with the state. Typically there is some reference to the fact that constitutional rights may not be infringed, but in cases like Colombia, Peru or Ecuador, this has been read in a relatively minimalist way, so that it constrains less than, say, the US federal constitution typically constrains US states.

Ordinary legislation adds another layer to this set of basic rights, which run from own-language education, to control over territories and natural resources, to the right to establish and run autonomous systems of customary justice (see, e.g., Van Cott 2000a; Sieder 2002; Yashar 2005). Much of the titling of indigenous lands, the work of coordinating indigenous legality with the state's, provisions for culturally appropriate education, and similar measures implementing these constitutional rights are the stuff of ordinary legislation. In some cases – as we will see in the case of Guatemala – legislative development lags constitutional changes by decades. In others, Mexico for instance, legislatures work more quickly, though not necessarily more robustly, to reduce broad constitutional principles to more concrete legislative plans.

Meanwhile, in the international arena, a series of UN initiatives and the International Labour Organization's (ILO) convention 169 (1989) were followed by the more expansive UN Declaration on the Rights of Indigenous Peoples (2007). We will return to these international norms in the discussion of free prior and informed consent, below. For now, suffice it to say that the international legal regime for indigenous rights has grown by leaps and bounds since the key convention in 1989. Domestic and international courts have shown varying degrees of willingness to enforce and even to expand these rights – and the presence of indigenous groups

in those spaces suggests that the conventional access problem has been at least partly overcome, even in the rarefied spaces of constitutional and international tribunals.

And still, in spite of a more inclusive, rights-rich normative framework, indigenous groups still experience the very opposite of legal agency: a high likelihood that the rights of indigenous peoples will be violated with impunity, and a concurrent inability to make effective use of this plethora of rights to pursue their most fundamental goals as peoples. Nothing exemplifies this more, perhaps, than the vulnerability of indigenous individuals who are fighting for the rights of indigenous peoples. The latest report by Global Witness notes that "2015 was the worst year on record for killings of land and environmental defenders – people struggling to protect their land, forests and rivers through peaceful actions, against mounting odds" (2016). Almost 40% of the 185 environmental activists killed in 2015 were indigenous. Given that indigenous peoples represent a relatively small percentage of the world population, they are shockingly overrepresented among those targeted for killing for their activism. Whether or not those killings eventually lead to effective criminal prosecutions is almost beside the point. This is, of course, just one indicator that the rights of indigenous peoples continue to be violated on a daily basis; as we will see in the following pages, there is ample evidence that law is just as often failing to serve as a means for pursuing their most important aims, either individually or collectively.

Given the group identity of indigenous peoples, and the fact that indigenous law and authority – not just indigenous rights, or indigenous access to state law – has been central to the politics of identity, we need to solve two basic problems of legal agency. The obvious focus, in thinking about access to justice for the poor, is on the legal agency of poor persons; the correlate would be legal agency for indigenous persons. But the indigenous have also been fighting for

legal agency for indigenous peoples – a collective claim to autonomy and self-determination that needs to be attended to. Moreover, given that group-based inequality is nearly impossible to root out of the formal system, but a far less serious issue in an indigenous-controlled one, it seems likely that the latter resolves one of the key obstacles to the effective realization of justice that faces indigenous persons. Throughout this paper, then, I will discuss both the individual problem of enabling indigenous *persons* to protect their rights and achieve legal agency, and the collective problem of empowering indigenous *peoples* to exercise their rights as a community.

In either case, efforts to address this lack of legal agency for persons and peoples in a holistic manner will need to integrate two separate paradigms. One is inclusion and success within the traditional formal, state-based legal systems – as most "access to justice" programs have done – but, I will argue, with a greater focus on collective, structural claims, claims that aim to expand legal agency outside the halls of justice. The second and more important one is to strengthen and expand the sphere of customary indigenous legal systems. As a recent study concluded, "the indigenous population … specifically demands to resolve its conflicts within the spectrum of its values and norms" (Brandt and Franco Valdivia 2006: xvii). At least in the short run, it is only within this second paradigm that indigenous persons *and* peoples can reach full legal agency. Access to the formal system, then, should also be oriented toward maximizing the relevance of traditional legal practices to the political, social and economic life of indigenous peoples. I will evaluate the ways in which indigenous groups have benefited or not from work done to improve access to justice within these two paradigms.

But some of the most important conflicts over the nature and implementation of the rights of indigenous peoples have been fought in a third, quasi-legal space. While not courts or even alternative dispute resolution processes, the consultations that are required by international law

before embarking on a project that affects indigenous territories and cultural values – usually referred to as Free Prior Informed Consent (or Consultation), or FPIC for short[1] – define a third paradigm within which indigenous peoples seek to make their rights effective and protect their interests. They are creatures of domestic and international state law, and are subject to oversight by state legal structures, but they are only quasi-legal in that they are spaces for negotiation rather than adjudication. And they are hybrid in that neither the claims of the indigenous, grounded in indigenous law, nor the claims of the project advocates, usually grounded in state law, have a priori precedence – in theory, at least. In thinking holistically about access to justice we cannot ignore the hybrid spaces that are these FPIC procedures – spaces not quite legal but structured by law; normative regimes not purely the realm of indigenous ontologies and normativity nor of state-based legality, but where these two come together; and yet spaces where critical issues of indigenous property and cultural rights are decided. We must pay attention to the ways in which indigenous peoples have been disadvantaged, but also empowered in these processes which have some features of negotiation and some of adjudication, some of equal bargaining and some of top-down governing.

In section 2.A I will clarify the conceptual framework for this piece, and explain why inequality is a fundamental obstacle to "legal empowerment" so that any access to justice project must attend to it, or fail. In section 2.B I will use three experiences with attempts to legally empower indigenous groups in Latin America, to illustrate the argument and evaluate the fairly dismal record of success to date. I conclude by drawing lessons from these experiences for efforts to increase legal agency for indigenous persons (and peoples).

[1] FPIC has come to stand for Free, Prior, Informed Consent or Consultation. Whether the former or the latter is required before engaging in projects and practices that might impinge on indigenous cultural practices, values, or property is the subject of much debate, as we will see below.

2. Discussion

A. Concepts and Theory

The fundamental puzzle is how indigenous peoples have come to own such a formidable arsenal of rights and yet seem unable – with limited exceptions – to use those rights to achieve their most basic goals. The result of this disjuncture between formal rights and their realization is what Hale (2005: 13) labels "neoliberal multiculturalism:" a "nightmare that settles in as indigenous organizations win important battles of cultural rights only to find themselves mired in the painstaking, technical, administrative, and highly inequitable negotiations for resources and political power [necessary to realize those rights] that follow." The key, as we argue in Brinks and Botero (2014), lies in the ways that inequality conditions the exercise of formal rights and the construction of lateral support for those rights. In the short run, substantial asymmetries between the indigenous groups that hold the rights on the one hand, and the many other social and economic actors who are burdened by them on the other, make it unlikely that there will be voluntary compliance or that self-help will work; and in the long run, those same asymmetries impede the construction of a robust system of lateral support, including third party enforcement and support mechanisms, that could make the formal rights effective on the ground. To solve the problem of legal empowerment we need to take seriously the existence and implications of group-based inequality – the fact that seemingly absolute concepts like exclusion, marginalization, poverty are rooted in the relational concept "inequality."

Why is this so? Rights of all sorts constitute a dyad in which the first party is obligated to the second party, who owns the right. And full legal agency, as the definition implies, relies in large part on voluntary compliance. By the time the state intervenes to enforce, it is usually too late: the violation has taken place, the damage has been done, and any remedial action is likely to be too little too late, and in any event less preferable than simple compliance would have been.

When it is the state that must comply, of course, the problem is compounded. Any new legal regime – and most especially one that seeks to grant important, often very costly, rights to groups marked by deeply held social prejudices – must displace rather than rely on the multiple layers of social norms and state institutions that support the existing social order. Specifically, in the area that concerns us here, the inequality that marks the relationship between indigenous peoples and the rest of society structures the relationship between the first and second party, when one is indigenous and the other not. Newly recognized indigenous rights are displacing deeply rooted social norms and legal structures that typically place indigenous peoples and people in a subordinate position. Whether on a large scale – say, a struggle between an indigenous people and a large multi-national corporation engaged in a state-sanctioned development project – or a small scale – an investigation of a potential crime between an indigenous person and a mestizo police officer or judge – that initial inequality matters for the likelihood that rights will be respected.

Prejudice, a habit of privilege, and the sense that the less powerful are less deserving of society's benefits or do not contribute to the common good, is likely to stand in the way of easy compliance. The ingrained feeling that the indigenous do not really deserve what they claim is likely to dominate the interaction. As Sieder and Flores relate, even in the first decade of the 21st century, it is inevitable that indigenous people "see going to the police or the courts as something expensive and inaccessible" and that they "frequently complain that they are not taken seriously" (Sieder and Flores 2012: 29). Crucially, "state law and procedures do not adequately reflect the moral and cultural values of the members of k´iche´ communities" (id.). The problem is not just that the physical installations are remote and the proceedings in a foreign language, but that their indigeneity identifies them as something less than full citizens and the justice that is on offer

does not fully match up with their substantive notions of justice. A recent analysis thus argues for the adoption of legal pluralism because of the "existence of cosmovisions and logics that are culturally determined and that differ from the official ones" that are entrusted to the formal legal system (Brandt and Franco Valdivia 2006: 8). "In spite of the constitutional recognition of indigenous justice, the government, judicial authorities and officials don't recognize it or value it, so they continue to distort and criticize indigenous justice practices as savagery, ignorance or brutality" (Brandt and Franco Valdivia 2006: ix).

Given that they are presenting normative claims that differ from those that inform the formal legal system, indigenous people are more likely than other, less marginalized claimants to need help from third party facilitators and controllers, whether in the state or in civil society. And yet the same inequalities that mark the original interaction also hamper attempts to build an effective network of supportive institutions. This is especially visible, as we will see in the next section, in the case of collective claims by indigenous peoples. From the police on up, state actors are less likely to care when an indigenous group is challenging a project that has the blessing of the state, even if it seems to violate the group's fundamental cultural values. And society at large often finds it incomprehensible that such small, socially insignificant groups should presume to stand in the way of the common good. Indeed the modal response in such cases seems to be a combination of denying the authenticity of the claims, finding them too radical and uncompromising to be taken seriously, and arguing that they are rooted in resentment rather than intrinsic justice (see, e.g., Hale 2005: 22-23). Cultural claims are fine, so long as the indigenous communities stay in their place and do not stand in the way of realizing the interests of the rest of society.

Within an indigenous, community-controlled legal system this group-based inequality disappears. While there may be other, within-community inequalities that need to be addressed, as we will see, the inequalities between the indigenous and the dominant groups around them largely disappear. This is true both for the individuals and the groups in question. The individuals who come before the law are judged by others who are – by virtue of membership in the same community – presumptively legitimated under a shared normative framework (for a discussion of the importance of a shared normative framework to the legitimacy of a dispute resolution and justice system, see Shapiro 1981; Stone Sweet 1999, 2000). While this idea of shared values is in many cases a fiction, it is actually less likely to be so in a small indigenous community than in the large impersonal democracies where most of us reside. Here, the operators of the system come from the same identity group, claim authority under shared norms, and share the basic normative framework of the disputants. By the same token, these normative assumptions are accorded full legal weight and legitimacy, rather than being considered atavistic, foreign, or pre-civilized, as in the formal system.

B. Approaches to legal empowerment

i. Approach number one: improve access to State law

Traditionally, "access to justice" for the poor, or the indigenous, or whoever, has meant ways to facilitate access to the state-based, monistic, legal system. That is, legal reforms meant to empower indigenous persons have sought to give them the tools they need to engage effectively on the terrain of the state justice system. These efforts focus on things like more lawyers, interpreters, justices of the peace, small claims courts and alternative dispute resolution procedures. Creating and funding NGOs that can effectively litigate *amparo* or *tutela* claims, and bring cases before constitutional courts, also falls in this category. But if inequality is as

pervasive and as important as we (Brinks and Botero 2014) have argued that it is, it seems likely for a number of reasons that simple access to these spaces will not be enough to overcome the disadvantages.

A recent experiment that aimed to make Guatemala's formal justice system and its operators more sensitive to indigenous people's claims and special needs highlights the difficulties of truly extending legal agency to the indigenous within the framework of state law and legal institutions. Guatemala included in its 1985 constitution a provision recognizing its ethnic diversity and the right of indigenous peoples to protect and practice their traditional cultures: "Guatemala is formed by diverse ethnic groups among which are found the indigenous groups of Mayan descent. The State recognizes, respects, and promotes their forms of life, customs, traditions, forms of social organization, the use of the indigenous attire by men and women, [and their] languages and dialects" (Article 66, Protection of Ethnic Groups). Ten years later, as part of the peace accords that ended a forty-year long civil war, Guatemala signed an Accord on the Identity and Rights of Indigenous Peoples. Neither this nor the Constitutional provision translated into concrete policies and programs to strengthen indigenous legal systems and practices. Guatemala also signed ILO Convention 169, but its provisions requiring Free Prior and Informed Consultation before doing something that impinges on indigenous rights or property remain the subject of considerable resistance and debate (Sieder and Flores 2012: 14-15). In spite of its constitutional provisions – among the earliest in Latin America – and these multiple recognitions of indigenous rights, indigenous rights in Guatemala had long suffered from neglect.

Recently, however, the judiciary organized a special unit, the Unit of Indigenous Matters (UIM) with a three-fold mission: to develop better judicial policies in regard to indigenous

peoples, to train judges and staff in matters relating to indigenous persons and peoples, and to carry out projects that would guarantee both the rights of indigenous peoples and the implementation of indigenous law itself (Braconnier De León 2015). Set aside for the moment the fact that it took nearly a quarter century to begin a serious attempt to implement this key aspect of the 1985 constitution. An evaluation of this effort, after roughly three years of operation, suggests that even this remarkable innovation will require continuing work to produce measurable results. The UIM depends directly from the Presidency of the Supreme Court and could, therefore, be dissolved at any time (Braconnier de León, p.21-23) but it represents the most important attempt to address the difficulties indigenous people have in accessing and navigating the formal justice system, as well as an attempt to foster legal pluralism – the freedom to resort to customary law and process in conflicts that affect indigenous peoples. The unit was created as a result of the determined efforts of a coalition of indigenous rights groups. These groups had repeatedly encountered roadblocks in their attempts to bring some cultural sensitivity into the administration of justice and decided they needed to address the problem in a more structural way (p.22). As a result of their efforts, the UIM was created in 2009, and began work in 2012.

The UIM has attempted a number of measures, from the very traditional to the more experimental. It has, for instance, worked to ensure that every jurisdiction has an adequate number of translators and interpreters (this and the following discussion draw on Braconnier De León 2015, 26-29). Perhaps more importantly, it has worked to establish training facilities around the country to ensure the interpreters have adequate knowledge not just of the language but also of indigenous culture and culture-specific issues relating to gender, childhood or family. Of all those judicial employees focusing on indigenous matters, the interpreters are the ones with

the greatest job security, and the ones considered most central to integrating indigenous people into the legal system. The emphasis on interpreters and their services is justified by the need to grant indigenous people access to justice in their own language, even if mediated by a third party. The interpreters themselves consider that the UIM's efforts have greatly improved their training and ability to ensure access to justice for indigenous people (p.31).

Clearly, if the proceedings are going to be in Spanish, then the services of an interpreter are crucial, not only for those people who do not speak Spanish, but also for those who simply wish to assert their indigeneity by addressing the court in their own tongue. At the same time, requiring indigenous people to rely on interpreters in order to interact with a system that carries out all its proceedings in Spanish is more likely to emphasize their subordinate, not-quite-citizen status than to put them on an equal footing. Indeed, Spanish-speaking officials complain that the interpretation and translation process is inefficient and a waste of time, suggesting that the key lesson for them is that the indigenous should learn to operate in the dominant language, and not that the system's operators should do the converse.

The fact that the UIM has made interpretive services a first priority has earned it the critique of some who argue that "interpretation services in judicial processes for indigenous peoples and people has existed since colonial times with the objective of maintaining domination and eradicating all indigenous forms from the administration of justice" (Braconnier De León 2015: 27). From the perspective of legal agency, the presence of an interpreter clearly grants more agency to an indigenous person who would otherwise be at a serious disadvantage. But the very need for an interpreter highlights the overall lack of legal agency for indigenous peoples who have long demanded a system that reflects their own values and traditions, and that operates in their own language.

Efforts to train judges to be more sensitive to cultural issues have also largely failed, for reasons equally tied to the perceived inferiority of indigenous normativity and culture. In spite of an ample series of activities put on by the UIM to sensitize sitting judges in this regard (Braconnier De León, pp.47-50), nearly half the interviewed judges had never heard of the UIM, and the remainder knew it primarily for its work with interpreters. When asked about the specificities of indigenous communities, most judges were aware of the high incidence of violence against women in those contexts, but it does not appear that they have developed any procedures to address this particularly prevalent problem. Indeed, the criminal statutes prohibit using cultural or religious values as an excuse, and judges appear to treat these cases the same as any others. This is not to suggest, of course, that judges should show greater leniency toward violence against women out of some sense of cultural sensitivity. Rather, it would seem important to devise culturally appropriate programs to reduce the incidence of violence in the first place. In any case, the judiciary does not seem to be doing either of these things.

The same lack of concern marks many other aspects of the treatment of indigenous persons within the state system. At the sentencing phase of criminal trials, and although Guatemala is bound by an obligation to ensure that penalties applied to indigenous people must take into account cultural values (ILO Convention 169, Art.10), judges and prosecutors strongly resist any individualization on the basis of ethnicity (Braconnier De León 2015: 68). The universities also assign little importance to the question of indigenous law and access to justice for indigenous peoples (p.46). The principal approach to indigenous people seems to be to pretend they are exactly the same as any others who find themselves caught up in the legal system, and to provide crutches, like translators and interpreters, to address the more obvious

differences. Little wonder, then, that indigenous persons continue to feel they are not taken seriously in the state system (Sieder and Flores 2012: 29).

As discussed in the introduction, this discounting of the indigenous experience, of indigenous claims and claimants, by the frontline operators of the state system is a predictable consequence of inequality, and not peculiar to Guatemala. A recent account of the situation in Paraguay comes to the same conclusion: "in practice, tribunals do not recognize indigenous communities' property rights over ancestral land when these communities lack a formal title [in spite of international jurisprudence]…. Nor does the Paraguayan judiciary interpret or apply another important standard established by the Inter-American Court: that the legitimate owners of traditional lands are indigenous peoples, even when these peoples may not currently possess these lands as a result of forced abandonment due to violent acts against them" (Mendieta Miranda 2015). As an Indian human rights professor and advocate writes, the state system is more often used to plunder, to enervate through endless litigation, and to render traditional livelihoods illegal, than to empower (Sundar 2015: 383). Even in a rights rich system, their vulnerability to violence, and the lack of respect and due regard by the actual operators of the state system, tends to void what formal rights indigenous peoples have, at least in the lower level courts where they are most likely to find themselves.

A parallel effort to provide culturally appropriate alternative dispute resolution within the existing judicial system has a similarly double-edged feel of inclusion at the expense of subordination. Historically, the judiciary in Guatemala has attempted to address the legal needs of the indigenous population through a series of less formalized dispute resolution mechanisms, beginning with Mediation Centers, then creating Community Justices of the Peace (Juzgados de Paz Comunitarios), and finally Centers for the Administration of Justice (Braconnier De León

2015: 42). These institutional innovations have even sought to include indigenous persons as mediators (p.43), something that feels culturally sensitive and empowering. And yet the end result was to bring officially sanctioned indigenous mediators and processes into the formal, state-based legal system, denying the authority of existing community-based, traditional forms of informal dispute resolution (Braconnier De León 2015: 43). For all the benefits of this approach for individual claimants, the judiciary was delegitimizing and denying agency, once again, to indigenous peoples in the name of providing "access to (state-based) justice" for indigenous persons.

In short, even the most progressive measures to enable indigenous persons to function effectively within the state system end up marking them at best as requiring special tutelage, almost like minors, and at worst as foreign and inferior. They replicate as much as address inequality for indigenous persons. Indigenous persons often feel that difference, and, as we will see, experience the foreignness as much as the operators of the system do. Moreover, these measures can substitute for and displace a more robust reliance on the kind of alternative community-based legal system that has been the demand of indigenous peoples across the region. When they become a palliative, they perpetuate inequality for indigenous peoples within the overall legal ordering of the state.

ii. Approach number two: empower customary law systems

In contrast, a true attempt to empower indigenous peoples of Guatemala and elsewhere would entail strengthening and engaging on an equal basis with traditional systems of authority and dispute resolution. Here, the UIM has done less, playing a mediating role that gets implemented on a fairly ad hoc and random basis. The UIM has no cooperation agreements with existing communal justice systems (p.51), in spite of the fact that they are active and influential

in many regions of the country. Nor have they crafted any formal guidance for judges attempting to coordinate with indigenous justice systems (p.56). UIM officials have, however, worked to mediate between existing indigenous authorities and the formal justice system. Their efforts appear most calculated to succeed when they put both systems on an equal footing. As one official of the UIM noted: "[The problem] is the lack of communication. There, we [in the UIM] come with our power to train people; we say, indigenous authorities: this is how the official system works; judges: the indigenous system works this way. And that has produced very good results" (quoted in Braconnier De León 2015: 53, my translation). On the part of the indigenous authorities, however, the work of the UIM has been little noticed and not very important, and the impression one gets is that the primary focus is, once again to bring indigenous people into the formal system, in the name of access to justice, rather than to craft an effective, autonomous set of indigenous justice institutions.

The more important efforts to improve customary law systems have come from outside the state. An ethnographic report by Sieder and Flores (2012) shows the potential to enhance legal agency of a move to a community-based system, not only for those who are caught up in a legal controversy, but also for the indigenous community and its leaders. The first thing to notice is that this more formalized customary legal system was established by and remained under the control of the traditional authorities of a network of communities in the Quiché region of Guatemala, rather than the UIM or some other state-based agency. The initial impetus in the Quiché to enhance legal agency within customary authority structures came from a series of indigenous advocacy centers ("*defensorías indígenas*"). According to Sieder and Flores, these are not professionalized NGOs but rather networks of community activists staffed by volunteers, often with prior links to the revolutionary left (2012: 32-33). Mirroring the work of UIM, these

community activists produce educational materials and train the decision makers – training that is oriented not only toward the indigenous leaders who will be the principal operators of this alternative justice system, but also toward judges and police in the state law system. In fact, they sometimes provide essential services for the latter, taking over the investigation of crimes and disputes in indigenous communities (Id., 33-34).

Many efforts to strengthen customary legal systems take as a first step the codification and formalization of a system of norms. State officials will retain outside anthropologists to identify and record the rules, mimicking the written system of laws in the state system. But many have made the point that customary law is not static and millenarian (see, e.g., Van Cott 2000b). Importantly, in contrast, the operators of the customary law system in the Quiché do not simply take existing norms for granted and seek to identify and preserve them unchanged. They have recently been working from within, for example, to transform attitudes and practices toward gender violence and women's rights (Sieder and Flores 2012: 33). They have undertaken efforts to identify and transmit knowledge of traditional Mayan principles, values and procedures, but not "a codification of indigenous law as such, rather emphasizing its flexibility, orality and specificity to the context and the case" (Id., 36). Although their normative agenda is often influenced by the international donors and activists who support them, generating some tension with the communities in which they operate (Id., 37-38), they appear to remain firmly in control of the process. Crucially, then, there is legal agency for the community from the very beginning, in the production of norms, in the design of the system and in its operation.

Similarly, the operation of the system in concrete cases is an exercise in legal agency for the indigenous communities. The indigenous advocacy centers themselves offer indigenous persons mediation services for ordinary, small-scale dispute resolution – in their own

communities and their own languages, by people who share their culture and their traditions, and who are recognized within that community (Id., 33). But the community's legal agency becomes most evident when a more serious issue arises, as shown in the ethnographic account of the "prosecution" of a case for car theft (Id., 39-55; the following discussion is entirely based on that account).

In this case, three young men from the community were suspected of having stolen a pickup to dismantle it and sell the parts. The owners of the pickup discovered the theft and the partially dismantled vehicle, and quickly identified the three suspects. They called in the community's traditional leaders, who worked all night to establish the facts. In the course of the initial investigation, the leaders talked to witnesses and to the three youths, who eventually admitted to the crime. The next day they called a formal community assembly to deal with the crime. Approximately 300 members of the community gathered to participate in a ritual of public investigation, confession, judgment, shaming and punishment. Traditional authorities from nearby communities came together to offer guidance and support. The ordinary members of the community participated at every step. They spoke publicly against the accused and the crime, repeatedly placing the young men's conduct and past behavior in the context of community norms. They called for different penalties to be applied and debated what was appropriate. They refused to be sidelined, when one of the leaders proposed a more representative form of deliberation in which twenty elders would take the main role. Decisions were ultimately taken by consensus.

In the end the community decided to apply two sanctions. First they forced the men to undertake a public march through the streets of the main city nearby, bearing their stolen goods and signs that indicated they were thieves. Then, after a further public event of confession and

community condemnation, they applied twenty *xik′a′y′* to each of the three – a penalty in which community leaders or the parents of the offenders whip them with branches while exhorting them to abandon their wicked ways and return to compliance with the good morals of their elders. Ultimately, two of the young men – according to their parents – were restored to the good graces of the community and to living within the community's norms. The parents expressed gratitude, years later, that their children had been corrected and turned away from their bad decisions. The third – the oldest of the three, who was apparently the ringleader – continued on a violent path, ultimately dying in a confrontation over a woman with someone from a neighboring village.

There are a number of ways in which the process of judging this case and others like it enhances the legal agency of the indigenous peoples of the Quiché. Most obviously, the initial public shaming march was very explicitly an assertion of legal agency by the indigenous community. The choice of location shows that the point was not to speak to members of their own small village, but to all the residents of the nearby municipal capital, Santa Cruz del Quiché. There were signs everywhere during the march that said "We demand that you value and respect indigenous law;" and "Yet another demonstration of the efficacy of indigenous law!" The young men were followed by a pickup with community leaders speaking about the important work that indigenous leaders were doing to bring peace and order to their communities. The ostensible goal – to correct the offenders and deter others through public shaming – was largely subordinated to the community leaders' assertion of authority over and capacity to manage their own affairs.

Second, several of the basic principles embedded in the system themselves aim to enhance the community's legal agency. The authorities emphasized the speed and immediacy of their response. They involved the community in evaluating competing versions of the facts and

proposing different punishments. The community decided by consensus rather than a simple majority vote, in a directly participatory way, rather than through some sort of representative arrangement. Members of the community participated directly in the application of the xik´a´y´. In general the system is imbued with principles and features that privilege the community and its values and interests, at times requiring the subordination of the individual (p.42). For indigenous communities emerging from the brutal repression of the recent civil war, and who have traditionally been marginalized, subordinated, and denied a voice, this is a powerful reaffirmation of authority and autonomy, a clear exercise of legal agency for the indigenous community.

Not only the way in which more conventional disputes are resolved, but the very nature of the disputes resolved in communal justice systems underlines how essential these systems are to collective legal agency. In the first place, the decisions often have objectives that are completely foreign to the state system (Brandt and Franco Valdivia 2006: 34). The goal of restoring harmony in the community, of reintegrating an offender into that community, of securing respect for elders and so on are central considerations in the customary system, and absolutely foreign in the state one. More radically, a significant minority of the disputes decided in the customary legal systems (as many as 7% in one sample (Brandt and Franco Valdivia 2006: 141)) literally have no normative basis in state law. The community may decide to punish adultery or witchcraft, it may engage in rituals to draw out the bad energy, it may punish the failure to meet community service obligations that can only be found in community norms (see, e.g., Brandt and Franco Valdivia 2006: 135-137). The community may also decide that domestic violence should be met with a lenient response or none at all. Many of these normative

objectives do not contradict the values of the larger community, but some, as this brief recitation suggests, do.

What about the indigenous persons who are caught up in this community justice? Are they likely to find more legal agency in this system than they would find in the state system or is agency for indigenous peoples inconsistent with agency for indigenous persons? Clearly, especially as things now stand in Guatemala, there is a lot to like about opting out of the state criminal justice system. For those who have been victims of crime, the state system offers few guarantees. Delays are endemic, impunity is rife, and few crimes are even investigated, let alone punished. For those who stand accused, it is equally unfavorable. In addition to the delays – during which they are most likely to be sitting in jail awaiting trial – legal assistance for those who cannot afford it is scant and poor, and prisons are wracked by violence. Human Rights Watch (2008) calls Guatemala's law enforcement institutions "weak and corrupt;" it notes that "Members of the national police still sometimes employ excessive force against suspected criminals and others" (Human Rights Watch 2008: 1). Moreover, the problem is likely worse for the indigenous than for the rest of the population. Indigenous people, as a result of hundreds of years of displacement and state neglect, tend to live in areas marked by the absence of state justice institutions (see, e.g., García Villegas and Espinosa 2014: 93).

Perhaps most importantly, as discussed above, the entire system is likely to feel foreign to an indigenous person, as it has a completely different approach to justice. Customary justice is said to aim at reintegrating the offender into the community. All its rituals and its content seek to restore the broken relationship and to reintegrate the defendant. In the state system, the focus is on punitive measures as much as on rehabilitation, and the penalty is served in a far-away prison or jail, from which defendants might return, years later, to find that they can no longer come

back into their own community. In the theft case detailed above, the entire investigation, trial and punishment took three days. At the end of those three days, the young men were free to return to their everyday lives.[2] As Brandt and Franco Valdivia (2006: 75) find in their study of communal justice in Peru and Ecuador, the outcomes of a communal justice process are more likely to be seen as "just" by the affected parties, in contrast to the results of the state system.

Indeed, as noted at the outset, legal agency is about realizing legal entitlements and being held to legitimate obligations, not necessarily about avoiding punishment. In this sense, too, the informal system seems to offer more than the state system would, although it is far from perfect. The state system is marked by arbitrariness – delays and violence for some, impunity for others. In the case of the community proceeding depicted in Sieder and Flores and its accompanying video documentary, a strong undercurrent of threat also comes through. The documentary records repeated talk of burning the young men alive, a relatively common practice in the Quiché after the end of the conflict. There is a constant emphasis on the fact that the customary law system prioritizes the search for truth, but its reliance on confessions under intense community pressure could easily lead to punishing innocents. For someone schooled in Western notions of due process, much of the proceeding and the punishments – the public shaming and the whipping – are troubling. But we must be careful not to compare this to some idealized vision of how the state system operates. The punishments and interrogations may well be less troubling than the violence and arbitrary behavior found in the state system, as it actually operates in Guatemala. And to the extent the processes and punishment mesh with the normative underpinnings of the

[2] As noted above, it is clear that one of them at least did not find the experience as restorative as it was intended to be – five years later he had died a violent death, after an interpersonal dispute with the member of another community. However, the other two had, according to their parents, been restored to correct behavior, and were productively employed, albeit not within that community, and were sending money home.

community to which all participants belong, they are far more likely to be accepted as just, even by the offender, regardless of how we as outsiders might react.

On balance then, certainly in the context of Guatemala, one is forced to conclude that for the indigenous people, the k´iche´, and for the indigenous persons – victims and offenders alike – the customary law system likely offers more legal agency than the state system. Partly this is due to the legal vacuum left by the absence of the state in many indigenous regions. But to some extent, it would remain true regardless of how many translators and culturally sensitive lawyers one might provide within the state courts, regardless of how many improvements one might make to the state criminal justice system, regardless of how much one might clean up the police and the prisons. A customary, community-based legal system simply provides a better platform for individual indigenous legal agency, because it is a more appropriate, culturally congruent, context-specific, system for indigenous communities. And it provides a better platform for collective legal agency, because it leaves control over the making, changing and application of the law in the hands of the community itself.

Having said this, there is an important caveat to this general conclusion. As already briefly mentioned, customary law systems do not always include a full panoply of individual rights, and are often marked by traditional values that include the subordination of women, limitations on freedom of religion, the exclusion of outsiders from communal goods, a reliance on corporal punishment and forced confessions, and so on. They may well be quite oppressive to people who are culturally non-conforming – non-indigenous peoples, converts to a new religion, members of the LGBTQ community. Obviously, this can detract from the individual legal agency of the affected individuals. Women are most often cited as an example of people disfavored within customary legal systems, but in a recent study (Brandt and Franco Valdivia

2006: 197-198) the authors concluded that there is a high likelihood that children also are not fully the subject of (constitutionally protected) rights in the communities they studied. Similarly, outsiders, people who adhere to a new religion for the community (evangelicals in particular), and others who may be an uneasy fit for the community, are likely to be seriously disfavored within the communal system. This has been repeated until it has become nearly a cliché, but it remains true that the greatest challenge for establishing agency-maximizing legal pluralism regimes lies in striking the right balance between legal agency for indigenous peoples and legal agency for indigenous persons. The balance seems especially hard to strike in cases that affect traditionally subordinate persons within the community.

Often for these reasons, and because indigenous customary authority threatens the internal sovereignty of the state, states resist the full implementation of these systems, and seek to limit their autonomy, power and application. These measures take various forms, but generally include a strict limitation in the nature of the cases that can be handled by the system, oversight grounded in state law and state judicial systems, and rules that subject customary law to constitutional and human rights principles. In general, these strategies detract from legal agency for the community while entrusting an already suspect state system with the task of improving it for the individual.

It seems more likely that the solution for finding the balance between collective and individual legal agency lies not in imposing control and subordinating indigenous authorities, creating a tutelary regime administered by an imperfect state justice system. Rather, one can work toward securing greater agency for both, by investing in training traditional authorities, and working with allies from the community who also wish to transform the system from within. Brandt and Franco Valdivia (2006: xxiv), for example, argue for an “intercultural dialogue with

communal and indigenous representatives regarding the universality of human rights" to overcome excessive reliance on corporal punishment. Complaints that these transformations will turn the system into something that is not "authentically Mayan" (Sieder and Flores 2012:42) are misplaced. From the perspective of legal agency, the question is not whether the norms and the system remain the same, year after year, or can be traced to some pre-Columbian practices, but whether the community is exercising agency in the administration and transformation of its own legal system. If that condition is met, "indigenous law" can be (at least) as dynamic and evolving as any system of state law, without losing its essential quality as both traditional and a source of legal agency.

One egregious example, the case of female genital mutilation among the Emberá peoples of Colombia illustrates how practices that appear unacceptable to the larger community can be addressed without a loss of legal agency for the community in question (MDG-Fund n.d.). The 2007 death of a newborn girl, after a botched operation to excise her clitoris, brought this issue to consciousness in Colombia. One could imagine a response in which the state would flood the community with outside law enforcement personnel, seeking to eradicate a practice that most of us would find unacceptable. Instead, the community, with the support of the UN and the Millennium Development Goals Achievement Fund and in cooperation with the government, opened a process of reflection and self-critique that ultimately led the traditional authorities themselves to outlaw the practice. In part this was because they concluded that the practice had been imported by Europeans five hundred years earlier, but it was also in part because the process helped to change the community's normative framework. It may be too soon to claim that the procedure has been eliminated altogether, but in certain communities it seems to have

disappeared, and it seems to be increasingly questioned as a practice even by traditional midwives (Cosoy 2016).

Importantly, the process had spillover effects into other areas of women's rights: "Many of us women have now woken up. We speak of things that we did not before. Now we have a voice and a vote, we are not afraid to talk, we have been training and learning more about the rights we have as women" (Solany Zapata, an Emberá woman, quoted in MDG-Fund n.d.). In some communities, it was the women themselves who took the lead in promoting the change (Cosoy 2016). The debate around the issue provided an opportunity for women to assert themselves as effective agents of change in the community's laws. It was the exercise of legal agency by the community and its members, then, that led to a significant increase in legal agency for the women in that community. The fact that the process was pursued in partnership with outside actors and the state simply shows that a process of engagement can be fruitful, when indigenous peoples are treated as equal interlocutors and not discounted as uncivilized.

Some level of oversight is inevitable, of course, and probably desirable, as it would be for any decentralized system for dispute resolution and the administration of justice. But given the distinct normative framework on which indigenous systems rest and the questionable legitimacy of the state system in indigenous communities, it seems best if the oversight in these cases is done with a light hand, and, most importantly, with full respect for the substantive justice principles of the indigenous system. Conflicts between the indigenous system and the perhaps non-negotiable – constitutional or human rights – norms of the state-based system can be addressed in collaborative, inclusive, community oriented processes. If done this way, community justice systems can begin to resolve both the individual problem of inequality that

disadvantages indigenous persons, and the collective one that makes indigenous groups subordinate to a state system in which they do not have full and equal participation.

Indeed, things seem to be moving in that direction, at least in some places. In 2005, traditional authorities in Guatemala complained that they were often prosecuted for practicing traditional law, but by 2009 that was no longer a problem (Sieder and Flores 2012: 65). Similarly, in Peru, customary systems have evolved from an object of criminal prosecution (Muñoz and Acevedo 2007) to a more accepted complement to the state systems, although the lack of a formal law coordinating their operation with that of the state system still generates opportunities for friction and conflict (Brandt and Franco Valdivia 2006). In Colombia, the Constitutional Court has laid out fairly minimal human rights standards that these systems must meet, erring on the side of deference, rather than assuming that indigenous leaders are prone to violate rights and must be kept tightly controlled (see, e.g., Rodríguez Garavito 2011: 271; Sieder and Flores 2012: 20). In Bolivia and Ecuador, efforts to formalize and specify the details of the legal pluralism promised in those constitutions are still in the works, and it remains to be seen whether they will fully respect the legal agency of the indigenous peoples of those countries. In all these cases, with due attention to the issues of coordination with the state system, training, and implementation, there is the potential to enhance the legal agency of indigenous persons and peoples. Importantly, in contrast to other promised improvements in access to justice and inequality, it appears that the potential is not merely theoretical but is being actualized in a variety of countries across the region.

iii. Approach number three: use constitutional courts and state law to create, expand and protect spaces in which to assert indigenous values.

As the reference to the Colombian constitutional court demonstrates, an essential element in the realization of indigenous legal agency has been the intervention of indigenous peoples and

their supporters in the constitutional courts and international forums of Latin America. Indeed, constitutional claims have addressed many of the shortcomings and triggered many of the advances in each of the prior two approaches, as well as other issues important to the indigenous peoples of Latin America. But perhaps the crucial claim being made in those spaces is also an autonomy claim – control, not over legal authority within the community but over territory and natural resources that are crucial to the preservation of culture and identity. Drawing on analyses of a Colombian indigenous community's struggle to safeguard its traditional territory (Rodríguez Garavito 2011) and other experiences, we can see the extent to which indigenous peoples have secured effective legal agency in the course of that struggle. And, when existing procedures and structures prove to be inadequate, we can see how they have used their access to constitutional and international courts to expand their procedural rights as well.

The framework for many of the debates is the set of procedures that falls under the shorthand label FPIC. Beginning with ILO Convention 169, in 1989, a series of international and domestic legal instruments have developed the requirement that, under given circumstances, governments and companies that contemplate a project that affects indigenous peoples in particular ways must secure the free, prior, informed consent of those peoples. Known as FPIC, this was initially framed as a right to prior "consultation," and explicitly denied the character of an indigenous veto over state-approved projects. Since its beginnings, however, it has gradually been gaining strength, through domestic jurisprudence and soft international law, until it has become – at least in limited circumstances – a right to "consent" and thus to veto developments that substantially affect the cultural interests and values of an indigenous group (for a more detailed development of the trajectory of FPIC, from a domestic and international perspective, see Rodríguez Garavito 2011: 268-272; for an extended critique by indigenous activists, see

Thompson 2016). At minimum, the standard has become a consultation "oriented toward" securing the free, prior, informed consent of the affected group.

FPIC, then, is the space where non-indigenous actors bring their economistic understandings of the world and their Western notions of property and contract, to interact with indigenous cosmology and culture, indigenous claims and understandings of the world. It is no surprise, as Rodríguez Garavito points out, that the conversation is often confused and confusing, competing monologues rather a dialogue (see the discussion of "the miscommunication effect" in Rodríguez Garavito 2011: 295-297). Indigenous groups have sought to leverage their access to apex courts to secure stronger rights within the FPIC process.

From the very beginning indigenous peoples have engaged in extensive legal battles to define FPIC — and what it might entail in particular circumstances. For purposes of this paper, the point is to evaluate to what extent the evolving notion of FPIC is both the result of access to justice in the form of constitutional and international litigation, and itself a justice mechanism, to which indigenous groups have secured access, that might enhance or detract from legal agency. The question is whether these spaces simply become where indigenous claims come to die or be bought out, or whether they are effective spaces for the exercise of legal agency – where indigenous peoples can use law and legal concepts to protect their most cherished interests.

As a tool for expanding the legal agency of indigenous peoples, FPIC did not have an especially auspicious beginning. Indeed, the initial concept coming from the ILO for dealing with the conflicting territorial and natural resource claims of indigenous peoples was to promote their eventual disappearance. ILO Convention 107 of 1957 opens by noting "that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation

hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population" (Preamble). Out of a desire "to improve the living and working conditions of these populations" (Preamble) it charges governments with the primary responsibility to achieve "their progressive *integration* into the life of their respective countries" (Art.1, emphasis added). Thirty years later, ILO 169 shifts from this integrationist model to a model based at least on the recognition of indigenous peoples' "aspirations … to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live" (Preamble) rather than to disappear into the dominant population groups.

But within a monist, hierarchical view of the state, these aspirations at most require "consultation" before the state makes the ultimate decision whether or not to proceed with a development project. At its inception, ILO 169 is far from embracing a vision of split sovereignty, in which indigenous peoples might actually have ultimate control over their communities and territories, or over projects that affect their cultural existence.

James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples identifies a right to (withhold) consent to extractive activities that take place within indigenous territory – that is, territory that is titled to the indigenous people, or "lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices" (Anaya 2013, para.27). But he also recognizes that this right to withhold consent can be overridden by the state for "a valid public purpose, within a human rights framework" (para.35). Even in its strongest form, then, FPIConsent is still firmly embedded in a hierarchical state structure that allows for overriding

indigenous autonomy on behalf of the common good. That, of course, is no different than the situation of any other property owner, similarly subject to eminent domain, taxation, regulation, and other state intrusions on private property on behalf of the public interest. The main difference is that the State is, in the indigenous case, legally required to consider the specifically cultural interests of the indigenous group and to weigh those against the public interest at stake.

By most accounts, however, states are not especially prone to giving much weight to indigenous cultural interests. A recent report from the Interamerican Human Rights Institute, based on information provided by indigenous advocates from across the region, notes that "States are rarely proactive in complying with their international obligations with regard to free, prior and informed consultation with indigenous and afrodescendant communities. As a result, [these communities] do not consider the state an [effective] guarantor of those rights" (Thompson 2016:88). "If the struggle does not originate with the indigenous, the state will not do it, because it does not understand them; doesn't want to understand them…" (Id., 56). As a result, states follow "a common practice of ignoring this obligation [to consider indigenous cultural interests] in the name of the so-called general interest and progress as a goad to development" (Id., 37). Instead of seeing FPIC as an opportunity to become informed about and fully take into consideration the views of indigenous peoples, states can see it simply as one of the required steps toward successfully issuing concessions and permits for corporate and state activity in indigenous territories (Id., 88). They come to ask "how we want to die, not how we want to live" (Id.), one group of activists noted. To use an analogy from state property law, without a stronger veto power, FPIC can simply become a process to clear the indigenous encumbrances from the title to territories the state wants to – and will – exploit anyway.

In response to this rather weak formulation and even weaker implementation of the right, indigenous groups have gone to constitutional courts to strengthen the standard, ensure the integrity of the process, and require that proper weight is given to their concerns. Here, helped along by generous constitutional provisions and activist courts, is where indigenous peoples seem to have exercised legal agency in the constitutional sphere to acquire some legal agency in the FPIC context. As César Rodríguez Garavito notes, in the case of the Embera people's resistance to expanding the Urrá dam in their territory: "following the 1998 Constitutional Court's decision, the Embera had incorporated legal strategies exploiting international and domestic norms on consultation into their political battle and their organizational alliances, in order to revive their substantive claims. [The] use of these norms … has allowed them to keep the plans for the dam's expansion at bay" (2011: 297). The Interamerican Institute for Human Rights's report concurs: at least in Colombia, "Strategic litigation as a tool for realizing the right to prior consultation … has allowed indigenous organizations to defend their collective interests" (Thompson 2016: 91). Clearly they are able to use legal claims and processes to pursue their interests, with some modicum of success.

And so, in places like Colombia and Peru, the right to prior consultation and consent has been strengthened and transformed through the decisions of constitutional courts – the apex of state legality. Relatedly, in Ecuador and Bolivia, two cases we have not discussed, indigenous peoples have won agency through constitutional changes, although it is still a bit early to tell to what extent these constitutional changes will be truly meaningful. As the Interamerican Human Rights Institute noted, "The development of the content and reach of the right to free, prior and informed consultation has taken place through jurisprudential means (Constitutional Court), following upon the recognition of the rights of indigenous peoples and afrodescendant

communities in the Constitution and the incorporation of international treaties in the text" (Thompson 2016: 91).

One effect of this – for good or ill – is that "Latin American indigenous leaders today have to spend as much time in indigenous territories as in key legal forums: human rights NGOs, government agencies, constitutional tribunals, the Inter-American Commission on Human Rights in Washington, and the offices of specialized U.N. bodies in Geneva" (Rodríguez Garavito 2011:281-282). Their rhetoric reflects this judicialization of their claims, and their expertise seems to be catching up to the legal opportunities available. An indigenous rights advocate from Paraguay says "I consider legal work to be an important tool…. Successful cases influence other cases; they inspire, show the way, and set important and indisputable precedents" (Rodríguez Garavito 2015: 304-305). Similarly, Rodríguez Garavito opens his account of an Emberá indigenous community meeting deep in the most conflictive parts of Colombia with a riveting discussion of how legal phrases, concepts, and procedures dominate the presentation of the indigenous leader (Rodríguez Garavito 2011: 265-266). This is nothing if not an acknowledgement of explicitly legal agency, although we may question its effectiveness when faced with violence and non-state actors.

Rodríguez Garavito is, therefore, justifiably critical of the turn to law, if seen as a panacea. Clearly, the indigenous leaders in question view the legal framework around FPIC as a source of legal agency, something that gives them at least some purchase on a process that otherwise transpires in government buildings and corporate boardrooms in far-away capitals. Just as clearly, for all the reasons Rodríguez Garavito (2011: 291-295) outlines, that purchase is tenuous and always in danger of slipping away, and sometimes does no more than distract attention from the true issues at stake. The same indigenous advocate from Paraguay quoted

above lists at least three decisions of the Interamerican Court of Human Rights currently being disregarded by his government. The Emberá, in their first round of fighting against a dam in their territory, won a decision from the Colombian Constitutional Court but only after it was too late, and the remedy ordered ended up destroying their way of life and making them dependent on cash payments by the multinational company that ruined their way of life (Rodríguez Garavito 2011). Paramilitary groups aligned with the dam builders continue to threaten and murder, while courts dither and delay.

When we use legal agency as a lens through which to evaluate the results, our final verdict on this avenue to legal agency – high-level constitutional litigation, often with the support of transnational actors and domestic NGOs – must remain deeply ambivalent. FPIC is the space where the most elemental claims of indigenous cosmogony, culture, religion, identity, economy, community, and basic norms and values meet with the equally basic claims of state sovereignty and state-based developmentalism, capitalist economy, and formal law. As Hale (2005: 16) points out in the context of the Awas Tingni's successful case before the Interamerican Court of Human Rights: "Whatever the community gains in the final analysis – and it is likely to be substantial – the cost will be an unprecedented involvement of the state and of neoliberal development institutions in the community's internal affairs: regulating the details of the claim, shaping political subjectivities, and reconfiguring internal relations." Engaging effectively on the terrain of FPIC can require indigenous groups to reimagine themselves and their claims in ways that can be recognized by their interlocutors – and perhaps in the process to denature those claims until they are no longer recognizable by their own communities. Converting the claims into constitutional language risks turning substantive claims into procedural ones, particularistic cosmological claims into universalistic rights claims.

For Rodríguez Garavito (2011: 298-301), FPIC is no more than an instrument of domination for indigenous groups, when it remains closer to the "consultation" model with which ILO 169 began. In this mode it reinforces the notion that the state and its delegates, the multinational corporations empowered to exploit indigenous lands, are the dominant actors in the dyad. They must consult, but the obligation is purely a procedural hurdle, dominated by the corporations, and often tinged with violence. A refusal to consent means nothing; the state-backed projects hold the trump card. In these circumstances, when the consultation is about "how we will die, not about how we want to live," some communities have simply refused to engage in the process at all. "Today, the more radical strategy is not to engage in prior consultations" (Thompson 2016: 57). Even Anaya concedes, in the end, that a group that is categorically opposed to a project under any circumstances – a project that is likely to take place anyway – should not be forced to participate in consultations that more than meaningless are demeaning. In those cases, he says, "the States' obligation to consult is discharged" by simply offering procedures that comply with international standards for FPIC. This is not legal agency; the only agency lies in refusing to submit to a rigged process.

The closer it is to a "consent" model, on the other hand, the more emancipatory potential FPIC has (Rodríguez Garavito 2011, 301-304). First, of course, the possibility of a veto dramatically increases the indigenous group's bargaining power, effectively putting it on an equal level with the state. Even short of an absolute veto, when the process has some teeth, purely procedural hurdles can be part of an overall strategy that grants indigenous peoples legal agency. Indigenous groups can fight guerrilla warfare in the thickets of FPIC – delaying and mobilizing, calling attention to their claims, making arguments and raising awareness, demanding more open processes and wider consultation – all the while fighting the principal

substantive battle in other spaces. Constitutional courts have been occasional allies in this, forcing work to be suspended while consultation takes place, requiring more meaningful processes, and holding out for meaningful consideration of the indigenous group's opposition to a project.

As the slowly strengthening trajectory of the international FPIC regime and its domestic cognates suggests, for indigenous groups to move strongly toward a more effective regime they will have to exercise legal agency in the constitutional and the international legal sphere. Many indigenous groups have moved toward increasing their capacity in this regard, including by encouraging indigenous people to become lawyers trained in state law and by training lay people in their state-guaranteed rights (see, e.g., Cárdenas Mendoza and Baquero Díaz 2015). As these authors note, without law to bridge the gap, decisions about sacred indigenous places are made "in two key spaces: the spiritual space and the political space," that are essentially incommensurable. The indigenous control the former, but are often marginal actors in the latter. FPIC and constitutional litigation can be the way to bring these two together: "With indigenous individuals trained in the law, the populations of the Sierra have been able to translate their ancestral claims into the legal language of the state" (Cárdenas Mendoza and Baquero Díaz 2015: 147), in a clear exercise of legal agency. Just how much is lost in translation, and the impact these claims will have on the political spaces where the compliance decisions are ultimately made remains to be seen. But the reality is that without that translation, the claims remain incomprehensible to and unacknowledged by the state's legal and political actors.

3. Conclusion

For indigenous and other culturally identifiable groups with longstanding claims to some measure of legal autonomy and self-rule, it is not enough to solve the legal agency deficit of the

individual members. In addition to agency for indigenous persons, the goal is to secure legal agency for indigenous peoples. Even the most effective measures promising full access to state law and state justice systems fall short in this regard. Indeed, efforts to increase the legal agency of indigenous persons within the state system have often depended on reducing the legal agency of indigenous peoples. The recognition and strengthening of community-based, alternative legal systems, on the other hand, responds to these collective claims for autonomy, providing legal agency for the community while at the same time – often but not always – offering the strongest institutional platform for the exercise of legal agency by the persons who are members of the collective. These systems can, at times, detract from the legal agency of particular subgroups within the community, but engaging with the community around these issues, rather than seeking to overrule it can lead to enhanced legal agency for the group and the individuals.

This is not to say that nothing should be done to make the state system more accessible to indigenous peoples, and to assist them in navigating the complexities of state law. For one thing, it is inevitable that indigenous individuals will become embroiled in questions of state law, when they travel outside their communities, deal with non-indigenous people, or are accused of crimes against the state. There is much that can and should be done to make the formal system less foreign and forbidding for indigenous persons. But in the vast majority of cases these actions will remain remedial, often perpetuating second-class citizenship. Any such efforts should pay close attention to the group-based inequalities that hamper the exercise of rights within the system, and not just at the difficulties of accessing the system.

Perhaps the greatest successes have come in the more structural constitutional cases. In many countries indigenous peoples have acted collectively, successfully exercising their legal agency within the formal state system to expand their individual and collective agency in

alternative spaces such as the community justice systems or the consultation processes that are required by international law. This dual action – enhancing legal agency at the very top by strengthening constitutional justice, and using that to enhance legal agency at the very bottom by strengthening community justice systems and the FPIC process, among others – has produced some notable advances in legal agency for indigenous peoples across the region. We should not overlook the many ways in which they have been denied the fruits of these advances, through violence and intimidation, lack of compliance and discrimination, but it is undeniable that indigenous groups in Latin America have made significant strides in securing greater legal agency over the last decades.

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