

# LEGAL PLURALISM AND INDIGENOUS WOMEN'S RIGHTS IN MEXICO: THE AMBIGUITIES OF RECOGNITION

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## I. INTRODUCTION

Conventional wisdom dictates that “custom” or customary law and regimes of legal pluralism are marked by patriarchal bias and discriminate against the equal enjoyment of rights for women. Yet historical and anthropological perspectives point to the enormous range of practices, institutions, and traditions that have been defined as customary, informal, traditional, or autochthonous law in widely differing historical, socioeconomic, and political contexts,<sup>1</sup> underlining the inherently

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1. See LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (1990) (suggesting that the harmony ideology of the Zapotec village of Talea reflects 500 years of colonial encounter and strategic resistance); *HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY* (June Starr & Jane F. Collier eds., 1989) (dis-

problematic nature of using a standard terminology to describe different forms of sub-national law and the dangers of deriving general conclusions from specific regional and historical contexts.

Legal discourses and mechanisms constitute resources for different groups within society, and clearly their uses and meanings vary across time, space, and politics. Human rights advocates face the challenges of how to understand power dynamics within legally plural constellations of governance,<sup>2</sup> and how best to support women—and men—in their struggles for more equitable and less violent relations and for human dignity.<sup>3</sup> Understanding how gendered rights claims are made and responded to within specific contexts and modes of governance is central to such efforts. In this Article, I discuss the effects of the ambiguous recognition of indigenous or “customary” law in Mexico on the struggle of indigenous women in that country to ensure that their rights are respected. Rather than focusing on institutions (“court-centric” approaches), or on rights (“norm-driven” approaches). I favour a more anthropological perspective emphasizing subjects’ understandings and negotiation of law, justice, rights and obligations, and the contexts in which disputes and negotiations over rights and obligations are played out.

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cussing legal anthropology in the context of power relations). *See generally* RODOLFO STAVENHAGEN & DIEGO ITURRALDE, *ENTRE LA LEY Y LA COSTUMBRE: EL DERECHO CONSUETUDINARIO INDIGENA EN AMÉRICA LATINA* [Between Law and Custom: Customary Indigenous Law in Latin America] (1990); SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: “CUSTOMARY” LAW ON KILIMANJARO, 1880* (1986) (suggesting that “customary law” is a colonial construct).

2. As Jean and John Comaroff have suggested, legally plural constellations of governance may be a more useful formulation than legal pluralism per se for analyzing the logics and effects of plural legal orders. *See* John L. Comaroff & Jean Comaroff, *Reflections on the Anthropology of Law, Governance and Sovereignty*, in *RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW* 31, 31–59 (Franz von Benda-Beckman et al. eds., 2009).

3. *See* INT’L COUNCIL ON HUMAN RIGHTS POLICY, *WHEN LEGAL WORLDS OVERLAP: HUMAN RIGHTS, STATE AND NON-STATE LAW* 135–36 (2009), at ii, ix, x (on the challenges human rights defenders face in conceptualizing and acting within legally plural contexts).

## II. LEGAL PLURALISM IN LATIN AMERICA

While in some regions of the world non-state forms of law constitute an important resource for dominant groups in society to structure patterns of governance (for example, the “traditional” or “customary” legal orders of particular tribal or ethnic groups, or religious laws such as Sharia),<sup>4</sup> in Latin America, the majority of non-state forms of law are generally understood to be subaltern expressions of historically marginalized groups, such as indigenous peoples<sup>5</sup> or marginal urban dwellers.<sup>6</sup> Legal pluralism was not formally incorporated until the constitutional reforms to recognize indigenous peoples’ rights began in the 1980s, a transformation some scholars characterized as a shift to “multicultural constitutionalism.”<sup>7</sup> Previously, indigenous peoples’ community-based governance systems and local forms of law were at best marginalized, and at worst criminalized by the monistic legal frameworks imposed in the nineteenth century following independence.<sup>8</sup> In contrast to much of Africa,<sup>9</sup> the formal legal recognition of ethnic or racial difference was not part of the structures of postcolonial governance and domination. Yet as in Europe, in practice legal systems based on liberal principles of formal equality excluded the great majority of the popula-

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4. See generally, e.g., *BESIDE THE STATE: EMERGENT POWERS IN CONTEMPORARY AFRICA* (Alice Bellagamba & Georg Klute eds., 2008) (on competing power foci and the mutable and unstable intertwining of state and non-state actors); *THE SHADE OF NEW LEAVES: GOVERNANCE IN TRADITIONAL AUTHORITY; A SOUTHERN AFRICAN PERSPECTIVE* (Manfred O. Hinz ed., 2006) (on legal pluralism and traditional governance in Southern Africa); *TRADITION AND POLITICS: INDIGENOUS POLITICAL STRUCTURES IN AFRICA* (Olufemi Vaughan ed., 2005) (on the interaction between indigenous socio-political structures and African state politics).

5. See, e.g., *HACIENDO JUSTICIA: INTERLEGALIDAD, DERECHO Y GÉNERO EN REGIONES INDÍGENAS [DOING JUSTICE: INTERLEGALITY, LAW AND GENDER IN INDIGENOUS REGIONS]* (María Teresa Sierra ed., 2004) (on the intertwined nature of state and non-state legal orders in Mexico and specifically how these affect gender dynamics).

6. Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 *LAW & SOC'Y REV.* 5, 51 (1977) (on non-formal law within low-income settlements in Brazil).

7. See DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA*, 257-81 (2000).

8. STAVENHAGEN & ITURRALDE, *supra* note 1, at 97.

9. MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM*, 16-18, 22-23, 33 (1996).

tion, including women, native populations, and illiterates, from citizenship rights until well into the twentieth century.<sup>10</sup>

Since the late 1980s, constitutional reforms and the ratification of international instruments, notably International Labour Organization Convention 169 on the Rights of Indigenous and Tribal peoples, have recognized indigenous peoples' rights to use their own forms of customary law.<sup>11</sup> Additionally, since the mid-2000s, the jurisprudence of the Inter-American Court of Human Rights has increasingly incorporated the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes indigenous rights to self-determination within existing nation states.<sup>12</sup> The shift toward multicultural and so-called pluri-national citizenship regimes has, at least in theory, implied greater autonomy for indigenous peoples' institutions of self-rule and the formal recognition of their different legal systems. These regimes are often criticized for discriminating against women. Indeed in some countries, such as Mexico, as I will discuss, the defense of women's rights has been used as an argument to limit indigenous peoples' autonomy claims.

It is certainly true that the efforts of indigenous women to secure greater voice and gender justice within their community-based governance systems for issues such as intra-familial violence, land inheritance, and political participation have

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10. See generally, e.g., Hilda Sabato, *On Political Citizenship in Nineteenth Century Latin America*, 106 AM. HIST. REV. 1290, 1290–1315 (2001); RACE AND NATION IN MODERN LATIN AMERICA (Nancy P. Applebaum et al. eds., 2003) (on the role of race in state construction); NATIVES MAKING NATION: GENDER, INDIGENEITY AND THE STATE IN THE ANDES (Andrew Canessa ed., 2005) (on the intersections of racial, ethnic, gender and other identities amongst Andean subaltern people); HISTORIES OF RACE AND RACISM: THE ANDES AND MESOAMERICA FROM COLONIAL TIMES TO THE PRESENT (Laura Gotkowitz ed., 2011) (on the interplay of race and racism with class, gender, nationality, and regionalism in Bolivia, Ecuador, Guatemala, Mexico, and Peru).

11. International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries arts. 8, 9, June 27, 1989, 1650 U.N.T.S. 384. See generally INTERNATIONAL LABOUR ORGANIZATION [ILO], *Indigenous and Tribal Peoples*. <http://www.ilo.org/indigenous/Conventions/no169/lang—en/index.htm> (last accessed April 16 2016).

12. Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281, 290–91 (2006); Mauro Barelli, *Development Projects and Indigenous Peoples' Land. Defining the Scope of Free, Prior and Informed Consent*, in HANDBOOK OF INDIGENOUS PEOPLES' RIGHTS 69, 69–82 (Damien Short & Corinne Lennox eds., 2014).

met with considerable resistance from indigenous men and male leaders.<sup>13</sup> Yet criticisms of indigenous governance systems and legal pluralism often pay little attention to the agency and strategies of indigenous women to gain greater political voice and gender justice, as well as ignore the inherent dynamism of indigenous law.<sup>14</sup> Contemporary understandings of legal pluralism point to its dynamic, overlapping and transnational characteristics. Boaventura de Sousa Santos' concept of "interlegality," with its emphasis on the role of human agency in the constitution of constantly evolving legal hybrids, has been particularly influential.<sup>15</sup> Rather than conceiving of state law and indigenous community law as fixed or static entities, anthropologists have analyzed how these laws evolve and change over time in relation to each other and to international law, giving rise to new legal hybrids.<sup>16</sup> Recent scholarship in Latin America has focused on the efforts of indigenous women and their male allies to transform community or cus-

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13. T. Rivera Zea, *Racismo y Discriminación contra las hijas de la madre tierra* [*Racial Discrimination Against the Daughters of Mother Earth*], ASUNTOS INDÍGENAS [INDIGENOUS AFFAIRS], May 2001, at 24–31; ANNA BARRERA, VIOLENCE AGAINST WOMEN IN LEGALLY PLURAL SETTINGS. EXPERIENCES AND LESSONS FROM THE ANDES 4 (2016) (on different experiences of addressing gender violence within community legal orders in Ecuador, Peru and Bolivia); Rachel Sieder & Maria Teresa Sierra, *Indigenous Women's Access to Justice in Latin America* (16-17) (Chr. Michelsen Inst., Working Paper No. WP 2010:2, 2010) (on gender, class and race discrimination within state and non-state legal orders and attempts to address this).

14. Rachel Sieder & Anna Barrera, Women and Legal Pluralism: Lessons from Indigenous Governance Systems In *The Andes* (2016) (unpublished manuscript) (on file with author) 16-21 (on the dynamism of indigenous law and the opportunities this has offered for women's organizing and claim-making); Sieder & Sierra, *supra* note 13.

15. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMONSENSE: LAW, GLOBALIZATION, AND EMANCIPATION 437 (2002).

16. See generally JUSTICIAS INDÍGENAS Y ESTADO: VIOLENCIAS CONTEMPORÁNEAS [INDIGENOUS JUSTICE AND THE STATE: CONTEMPORARY VIOLENCE] 14 (Maria Teresa Sierra, Rosalva Aida Hernandez Castillo & Rachel Sieder eds., 2013) [hereinafter INDIGENOUS JUSTICE] (on the relationship between changing state forms and indigenous justice); ROSALVA AIDA HERNANDEZ CASTILLO, MULTIPLE INJUSTICES: INDIGENOUS WOMEN, LAW, AND POLITICAL STRUGGLE IN LATIN AMERICA (forthcoming Nov. 2016) (on international law and indigenous justice as new spaces of struggle for indigenous women).

tomary governance and justice systems in order to enable greater gender justice within their specific cultural contexts.<sup>17</sup>

Criticisms of indigenous customary law as “bad for women” also tend to ignore the intersecting and structural exclusions of race, class, and gender affecting indigenous women—exclusions which mean that appeals to liberal and universal forms of legality are not necessarily the most effective or appropriate means for defending indigenous women’s interests. Both state justice and community-based legal systems discriminate against indigenous women.<sup>18</sup> Within their communities, women often face gender ideologies that justify their subordination to men and their exclusion from decision-making; and like non-indigenous women they also suffer mistreatment, sexual abuse, marital abandonment, and lack of child support.<sup>19</sup> Gender subordination is naturalized and women’s obligations are many. Yet when they try to access state justice services, indigenous women encounter racism, discrimination, and exclusion.<sup>20</sup> The overwhelming majority is poor and economic factors restrict their access to state justice, from not being able to afford legal counsel to the most basic costs associated with pursuing a legal claim, such as transportation (most indigenous women live in rural areas and work within the home).<sup>21</sup> Their structural lack of access to education also disadvantages them—women have significantly lower rates of schooling and higher rates of monolingualism and illiteracy than their male counterparts.<sup>22</sup> Despite gender discrimination, most women

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17. See generally INDIGENOUS JUSTICE, *supra* note 16; Sieder & Barrera, *supra* note 14; Sieder & Sierra, *supra* note 13; SARAH RADCLIFFE, DILEMMAS OF DIFFERENCE: INDIGENOUS WOMEN AND THE LIMITS OF POSTCOLONIAL DEVELOPMENT POLICY (2015).

18. See Sieder & Barrera, *supra* note 14, at 5, 15-16; Sieder & Sierra, *supra* note 13, at 18–20.

19. See Sieder & Sierra, *supra* note 13, at 11-13, 15.

20. *Id.* at 15.

21. CENTRO LATINOAMERICANO Y CARIBEÑO DE DEMOGRAFÍA [CEPAL] [LATIN AMERICAN & CARIBBEAN CENTER FOR DEMOGRAPHY], COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE [CEPAL] [U.N. ECON. COMM’N FOR LATIN AMERICA & THE CARIBBEAN] MUJERES INDÍGENAS EN AMÉRICA LATINA: DINÁMICAS DEMOCRÁTICAS Y SOCIALES EN EL MARCO DE LOS DERECHOS HUMANOS [INDIGENOUS WOMEN IN LATIN AMERICA: DEMOGRAPHIC AND SOCIAL DYNAMICS IN THE CONTEXT OF HUMAN RIGHTS] (2013) [hereinafter CEPAL], at 38, 94, 98.

22. *Id.* at 79.

prefer to appeal to their families and their communal justice authorities rather than to state law. Of course this varies according to context and the existence or not of legal support structures such as NGOs, but recourse to state justice authorities tends to occur only in cases of extreme violence or situations such as forced eviction from the family home.<sup>23</sup> Gender violence cannot be separated from the structural and racial discrimination and violence that indigenous women face.<sup>24</sup> For this reason, the International Forum of Indigenous Women (FIMI) and indigenous feminists in general have appealed for an intersectional approach to analyzing violence against indigenous women that does not underplay the ongoing practices and effects of colonialism.<sup>25</sup> They also argue that respect for indigenous peoples' collective rights is fundamental for protecting indigenous women's rights.<sup>26</sup> Indigenous men and women claim collective rights as peoples not simply to defend cultural difference and dignity, but also as part of their historical claims to land and territory and as a form of defense against the dispossession to which they are frequently and violently subjected.<sup>27</sup> Unsurprisingly perhaps, as indigenous peoples' claims for self-determination or sovereignty have gained ground across Latin America, "indigenous law" has become increasingly problematized and questioned; paradoxically, this has occurred at the same time as legal pluralism has been constitutionalized and indigenous peoples' collective

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23. See BARRERA, *supra* note 13, ch. 1; Sieder & Sierra, *supra* note 13, at 11, 13.

24. See Cheryl Suzack, *Human Rights and Indigenous Feminisms*, in *HANDBOOK OF INDIGENOUS PEOPLE'S RIGHTS*, *supra* note 12, at 146, 148; FORO INTERNACIONAL DE MUJERES INDIGENA [FIMI] [INT'L FORUM OF INDIGENOUS WOMEN], MAIRIN IWANKA RAYA: MUJERES INDIGENAS CONFRONTAN LA VIOLENCIA [MAIRIN IWANKA RAYA: INDIGENOUS WOMEN CONFRONT VIOLENCE] 6 (2006) [hereinafter FIMI].

25. See ENLACE CONTINENTAL DE MUJERES INDÍGENAS DE LAS AMÉRICAS [ECMIA] [CONT'L NETWORK OF INDIGENOUS WOMEN OF THE AMS.] & CHIRAPAQ [CTR. FOR INDIGENOUS CULTURES OF PERU], VIOLENCE AND INDIGENOUS WOMEN: DOCUMENT PRESENTED TO THE CSW57 3-4 (Mar. 2013); FIMI, *supra* note 24, at 14–15.

26. See FIMI, *supra* note 24, at 14–15.

27. See generally Anthony Stocks, *Too Much or Too Few: Problems of Indigenous Land Rights in Latin America*, 34 ANN. REV. ANTHROPOLOGY 85-104 (2005) (on titling processes related to indigenous lands and non-indigenous counterclaims).

rights to autonomy strengthened within international law.<sup>28</sup> Combined with the boom in extractive industries, the legal recognition of these rights has increased judicialized conflicts over the limits of indigenous jurisdictions and indigenous law.<sup>29</sup> In the following Parts, I discuss the ambiguous recognition of legal pluralism in Mexico and its impacts on indigenous women. I highlight three specific cases involving: (1) indigenous women's rights to political participation; (2) their rights to physical security in a context of growing militarization; and (3) the impact of the criminalization of indigenous autonomies on women. My aim in discussing these is twofold; first, to underline indigenous women's diverse strategies for seeking greater gender justice, and second, to emphasize the centrality of context and intersectional discriminations in discussions about legal pluralism and gender justice. By contrasting the three cases, I seek to underline the Mexican state's conflicting and inconsistent treatment of indigenous forms of governance and indigenous women's rights.

### III. RECOGNITION OF LEGAL PLURALISM IN MEXICO

Mexico has the largest indigenous population in Latin America: 17 million people, approximately 15% of the overall population.<sup>30</sup> In 1990, it was the first country in Latin America to ratify ILO Convention 169 on the rights of indigenous and tribal peoples.<sup>31</sup> Yet while the constitutions of the Andean countries of Colombia, Peru, Ecuador, and Bolivia introduced in the 1990s and 2000s recognized specific territorial jurisdictions for indigenous peoples' law,<sup>32</sup> in Mexico the process of indigenous rights recognition through constitutional reform was much more limited and ambiguous. An extensive process of consultation with indigenous organizations and social move-

28. See *INDIGENOUS JUSTICE*, *supra* note 16, at 16.

29. Rachel Sieder, *Indigenous Peoples' Rights and the Law in Latin America*, in *HANDBOOK OF INDIGENOUS PEOPLES' RIGHTS* *supra* note 12, at 414–24.

30. *Indigenous Peoples in Latin America*, ECON. COMM'N FOR LATIN AMERICA & THE CARIBBEAN, Sept. 22, 2014, <http://www.cepal.org/en/infographics/indigenous-peoples-latin-america> (noting the population as of 2010).

31. *Ratifications of C169 Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT'L LABOR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314) (last visited May 4, 2016).

32. BARRERA, *supra* note 13, at 13-14.



ments took place during the late 1990s to implement the San Andrés peace agreements which followed the Zapatista uprising in 1994.<sup>33</sup> Yet although the reform of Article 2 of the Federal Constitution recognized indigenous peoples' rights to exercise self-determination through community-based autonomous forms of governance, the form that autonomy arrangements were to take was left up to the legislatures of the thirty-one states in the Mexican federation. While specific clauses were included to ensure that the right to self-determination included guarantees for human rights, the "dignity and integrity" of women, and their equal rights to vote, the 2001 constitutional reform recognized neither indigenous territories nor specific jurisdictions, and rights of indigenous peoples to their ancestral territories as set out in ILO 169 were effectively subordinated to the existing regime of property rights.<sup>34</sup> Until the reform of Article 1 of the Federal Constitution in 2011,<sup>35</sup> which effectively incorporated international human rights instruments as constitutional law, indigenous peoples were not recognized as subjects of rights but rather as objects of state attention.

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33. GEMMA VAN DER HAAR, *The Zapatista Uprising and the Struggle for Indigenous Autonomy*, REVISTA EUROPEA DE ESTUDIOS LATINOAMERICANOS Y DEL CARIBE [ERLACS], 99, 100 (2004).

34. Constitución Política de los Estados Unidos Mexicanos, CP, as amended, art. 2, Diario Oficial de la Federación [DOF] 14-08-2010 (Mex.) ("This Constitution recognizes and protects the *indigenous peoples' right to self-determination* and, consequently, the right to autonomy, so that they can: . . . Apply their own legal systems to regulate and solve their internal conflicts, subjected to the general principles of this Constitution, respecting the fundamental rights, the human rights and, above all, the dignity and safety of women. . . . The foregoing rights shall be exercised respecting the forms of property ownership and land possession established in this Constitution and in the laws on the matter as well as respecting third parties' rights."). See also, M. Gómez Rivera, *Los Pueblos Indígenas y la Razón del Estado en México: Elementos para un Balance*, 78 NUEVA ANTROPOLOGÍA 43, 62 (2013).

35. Constitución Política de los Estados Unidos Mexicanos, CP, as amended, art. 1, Diario Oficial de la Federación [DOF], 10-06-2011 (Mex.) ("In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights.").

#### IV. INDIGENOUS WOMEN IN THE 2001 CONSTITUTIONAL REFORM DEBATES

In the political and legislative debates preceding the reform, politicians cited the rights of indigenous women amongst many reasons for not recognizing indigenous peoples' legal autonomy, alleging that so-called "uses and customs" (*usos y costumbres*) in communal governance systems violated women's rights to equality, and that approving the constitutional reform would effectively legalize discrimination.<sup>36</sup> At the time, indigenous women leaders demanded that the state recognize their collective rights as peoples; on the 28th of March, 2001, Zapatista commander Esther and, María de Jesús Patricio, a member of the National Indigenous Congress (CNI) addressed the Mexican national congress to call for territorial and political rights for indigenous peoples.<sup>37</sup> Both leaders referred to indigenous rights to culture, but also to the efforts of women within their communities to transform cultural traditions that oppressed and excluded them:

I would like to explain to you the situation of indigenous women living in our communities, considering that respect for women is supposedly guaranteed in the Constitution. The situation is very hard. For many years we have suffered pain, forgetting, contempt, marginalization and oppression.

. . . .

In addition to being women, we are indigenous, and as such are not recognized. We know which uses and customs are good and which are bad. The bad ones are hitting and beating a woman, buying and selling, marrying by force against her will, not being allowed to participate in assemblies, not being able to leave the house. That is why we want the indigenous rights and culture law to be approved. It is very important

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36. Martínez Veloz, *El pensamiento conservador frente a los derechos indígenas* [*Conservative Thought Against Indigenous Rights*], PROCESO, (Mar. 17, 2001), <http://www.proceso.com.mx/185119/el-pensamiento-conservador-frente-a-los-derechos-indigenas>.

37. Discurso de la comandanta 'Esther' en la tribuna de San Lázaro [Speech by Commander Esther in the Tribune of San Lázaro] (Mar. 28, 2001), ARISTEGUI NOTICIAS, Dec. 30, 2011, <http://aristeginoticias.com/3012/mexico/discurso-de-la-comandanta-esther-en-la-tribuna-de-san-lazaro-2001/>.

for us, the indigenous women of all Mexico. It [will mean we will] be respected as the women and indigenous we are.<sup>38</sup>

The Zapatista Women's Revolutionary Law (*Ley revolucionaria de mujeres*) was drawn up by women in the movement, setting out indigenous women's specific rights within their collective rights to autonomy as peoples.<sup>39</sup> The document specified women's rights to health, equal education and pay, to political participation and leadership, to freedom from violence and sexual violence, and to choose whom to marry and when to have their children.<sup>40</sup> It was accepted by consensus at a meeting of the Ejército Zapatista de Liberación Nacional (EZLN) in March 1993, and has since been influential amongst organized indigenous women in other parts of Latin America.<sup>41</sup> As María Teresa Sierra has observed, "the new context of legal pluralism in Mexico—established via constitutional reforms on indigenous issues approved in 2001— . . . opened up the possibilities for women to discuss the nature and limits of both state and indigenous justice systems."<sup>42</sup> As throughout the region, indigenous women in Mexico have mobilized to demand recognition of their collective rights as peoples, challenging the racism implicit in universalist frameworks and discourses. At the same time, many have worked tirelessly to challenge and transform their communal institutions and practices to ensure greater gender justice.<sup>43</sup>

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38. *Id.* (translated by author).

39. ZAPATISTA ARMY OF NAT'L LIBERATION, ZAPATISTA WOMEN'S REVOLUTIONARY LAWS (1994), <http://schoolsforchiapas.org/wp-content/uploads/2014/03/Zapatista-Womens-Revolutionary-Laws.pdf>.

40. *Id.* .

41. For the impact of the Zapatista Women's Charter on the Ecuadorean constitutional reform, see E. CERVONE & C. CUCURI, *Gender Equality, Indigenous Justice, and the Intercultural State: The Case of Chimborazo, Ecuador*, in DEMANDING JUSTICE AND SECURITY: INDIGENOUS WOMEN AND LEGAL PLURALITIES IN LATIN AMERICA (Rachel Sieder ed., forthcoming 2017).

42. María Teresa Sierra, *Indigenous Women Fight for Justice: Gender Rights and Legal Pluralism in Mexico*, in GENDER JUSTICE AND LEGAL PLURALITIES: AFRICAN AND LATIN AMERICAN PERSPECTIVES 56, 57 (Rachel Sieder & John-Andrew McNeish eds., 2011).

43. Sylvia Marcos, *The Zapatista Women's Revolutionary Law as It Is Lived Today*, OPEN DEMOCRACY (Jul. 22, 2014) <https://www.opendemocracy.net/sylvia-marcos/zapatista-women%E2%80%99s-revolutionary-law-as-it-is-lived-today>; BARRERA, *supra* note 13 (on women's efforts to transform indigenous

## V. SUBNATIONAL REFORMS

Some states in the Mexican federation had reformed their local constitutions prior to the 2001 reform in order to recognize a series of rights for indigenous people.<sup>44</sup> Some—most notably Oaxaca—went beyond the federal reform, recognizing “uses and customs” (*usos y costumbres*) for the purposes of electing municipal authorities, in effect establishing a plural electoral regime.<sup>45</sup> Other states modified their constitutions and passed new “pro-indigenous” laws after 2001,<sup>46</sup> yet the reforms were criticized by indigenous peoples’ organizations for failing to respect their rights to prior consultation (as clearly stipulated by ILO Convention 169), although a process of consultation with indigenous organizations did take place in some states, notably San Luis Potosí.<sup>47</sup> None of these state level constitutional reforms recognized indigenous peoples’ rights to territory and most only recognized indigenous law as a form of

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justice in the Andes); Sieder & Sierra, *supra* note 13 (on ways in which indigenous justice has constituted a new space for women’s claim-making).

44. See e.g., Constitución Política Del Estado Libre y Soberano de Oaxaca [State Const. of Oaxaca], 1995; Constitución Política Del Estado de Campeche [State Const. of Campeche], 1996; Constitución Política Del Estado Libre y Soberano de Quintana Roo [State Const. of Quintana Roo], 1998; Constitución Política Del Estado de Chiapas [State Const. of Chiapas], 1999 (years when reforms were approved incorporating references to indigenous people and state obligations towards them).

45. See generally DAVID RECONDO, *LA POLÍTICA DEL GATOPARDO: MULTICULTURALISMO Y DEMOCRACIA EN OAXACA* [GATOPARDO POLICY: MULTICULTURALISM AND DEMOCRACY IN OAXACA] (2007) (on the 1995 and 1998 reforms to the electoral regime in Oaxaca); A. Anaya Muñoz, *Explaining the Politics of Recognition of Ethnic Diversity and Indigenous Peoples’ Rights in Oaxaca, Mexico*, 23 BULL. LATIN AM. RES. 414, 433 (2004) (on the underlying political logic of the electoral reform).

46. See e.g., Constitución Política Del Estado de San Luis Potosí [State Const. of San Luis Potosí], 2003; Constitución Política Del Estado Libre y Soberano de Puebla [State Const. of Puebla], 2004; Constitución Política Del Estado de Chiapas [State Const. of Chiapas], 2009, Constitución Política Del Estado de Hidalgo [State Const. of Hidalgo], 2010; Constitución Política Del Estado Libre y Soberano de Guerrero [State Constitution of Guerrero], 2011; Constitución Política Del Estado Libre y Soberano de Michoacán [State Const. of Michoacán], 2011 (dates refer to reforms approved to respond to 2001 federal constitutional reform).

47. See Constitución Del Estado de San Luis Potosí [State Const. of San Luis Potosí], 2003; Ley De Justicia Indígena Y Comunitaria Para El Estado De San Luis Potosi [Indigenous Law and Community Justice fo the State of San Luis Potosi], 29-09-2014 (Mex.).

conciliation or alternative dispute resolution, or as a kind of “auxiliary” justice, subsidiary to state legal institutions.<sup>48</sup> In some states, so-called “indigenous courts” were established, which consisted of lower-level courts subordinate to the judicial hierarchy that featured lay judges who used mediation and conciliation techniques and worked in local indigenous languages.<sup>49</sup> Clearly, recognition of legal pluralism in Mexico is highly constrained and indigenous normative systems remain subordinate to national state law. This reality is very far from the claims made by indigenous peoples’ movements that their own forms of law and governance be recognized, or the rights to autonomy and self-determination specified in the UNDRIP.

At the same time that these ostensibly “pro-indigenous” reforms were approved, other structural reforms were approved to allow for the privatization of collective land ownership and facilitate international investment in the energy sector, paving the way to greater access to natural resources by transnational capital. Following the reform of the Federal Constitution in 2011<sup>50</sup> recognizing international human rights instruments as part of constitutional law, indigenous peoples’ organizations and NGOs have appealed to the national courts and the Inter-American system to try and secure greater autonomy rights. Most cases have focused on defense of territory and rights to land and natural resources, the selection of municipal authorities according to locally decided procedures, and violation of indigenous communities’ rights to prior consultation in cases of development projects such as large scale mining or hydroelectric dams.<sup>51</sup>

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48. Willem Assies, *Reforma indígena en Michoacán y pluralismo jurídico* [*Indigenous Reform in Michoacán and Legal Pluralism*] (Alertanet, Working Paper No. 02-09-2003, 2003), <http://www.alertanet.org/assies-6.htm>.

49. See, e.g., KORINTA MALDONADO & ADRIANA TERVEN, COMISIÓN NACIONAL PARA EL DESARROLLO DE LOS PUEBLOS INDÍGENAS [NAT’L COMM’N FOR THE DEV. OF INDIGENOUS PEOPLES], *LOS JUZGADOS INDÍGENAS DE HUEHUETLA Y CUETZALAN: VIGENCIA Y REPRODUCCION DE LOS SISTEMAS NORMATIVOS DE LOS PUEBLOS DE LA SIERRA NORTE DE PUEBLA* [INDIGENOUS COURTS OF HUEHUETLA AND CUETZALAN: EFFECTIVENESS AND PROPAGATION OF THE REGULATORY SYSTEMS OF THE PEOPLES OF SIERRA NORTE DE PUEBLA] 36 (2008). See also Sierra, *supra* note 42.

50. Constitución Política de los Estados Unidos Mexicanos, CP, as amended, art. 2, Diario Oficial de la Federación [DOF], 14-08-2001 (Mex.).

51. See generally FRANCISCO LÓPEZ BÁRCENAS, *EL DERECHO DE LOS PUEBLOS INDÍGENAS DE MÉXICO A LA CONSULTA* [THE RIGHT OF INDIGENOUS PEOPLES IN

Across the country, different indigenous women's initiatives have sought improved options for their legal defense, often in conjunction with NGOs, but also with specific institutions within the state justice and human rights apparatus. The institutionalization of international instruments through legislative and policy reforms has also provided new opportunities for reframing and "vernacularizing" universal women's rights—such as the right to a life free from violence or rights to participate in community politics.<sup>52</sup> Indigenous women's insistence that their struggles for gender justice cannot be separated from the defense of their collective rights as peoples have also opened new possibilities for alliances with men within their communities and movements.

## VI. CASE STUDIES

### A. *Rights to Political Participation: The Case of Eufrasina Cruz Mendoza*

In 1995 and 1998, constitutional and electoral law reforms in the state of Oaxaca allowed municipalities to choose whether to elect their authorities by "uses and customs" or through political party slates.<sup>53</sup> According to most analysts, these reforms—championed as a major advance for indigenous rights—were initially aimed at shoring up the declining vote of the hegemonic Partido Revolucionario Institucional

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MEXICO TO CONSULTATION] 79 (2013) (on the failure of the Mexican government to guarantee rights to prior consultation in line with ILO Convention 169).

52. Article 4 of Mexico's federal constitution specifies that women and men are equal under the law. *Constitución Política de los Estados Unidos Mexicanos*, CP, art. 5, *Diario Oficial de la Federación* [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.). The most recent federal reform for the promotion of gender equality, the 2007 *Ley General de Acceso de las Mujeres a una Vida Libre de Violencia* [General Law of Women's Access to a Life Free of Violence] [LGAMVLV], was preceded by the National Development Plan 2001-2006 (PND). The 2001 PND marked the creation of the Instituto Nacional de las Mujeres (INMUJERES) and aimed to address all issues regarding women's social, political and civil rights. On vernacularizing human rights see S. ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

53. María Teresa Valdivia Dounce, *Elecciones por usos y costumbres en el contexto de las reformas estatales oaxaqueñas (1990–1998)* [*Habits and Customs for Elections in the Context of the Oaxacan State Reforms (1990–1998)*], 23 ARGUMENTOS 247, 247-48 (2010).

(PRI) which was losing power in Oaxaca to opposition political parties.<sup>54</sup> Of the 570 municipalities in the state, 418 opted for elections via uses and customs and by 2015 a total of 435 municipalities had adopted this electoral regime.<sup>55</sup> Gender quotas—in force for the political parties—originally did not apply to the uses and customs municipalities. In nearly a quarter of the uses and customs municipalities, women were not considered for municipal office, nor were they permitted to participate in local assemblies; by 2008 only three women had been elected as municipal president in these municipalities.<sup>56</sup> In 2007, the case of Eufrosina Cruz Mendoza drew national and international attention to this discrimination. Eufrosina, a Zapotec teacher from the community of Santa María Quieloganí, was elected municipal president but subsequently denied access to political office because the caciques dominating politics in her community alleged their uses and customs did not permit women to participate in assemblies or to run for office.<sup>57</sup> The case was widely discussed in the local and national press, and used by different politicians and commentators to delegitimize indigenous communal justice and governance systems.<sup>58</sup> Eufrosina's defense was taken up by the state

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54. RECONDO, *supra* note 45; Anaya Muñoz, *supra* note 45.

55. Alfredo Mendez, *Invalida la Suprema Corte la Ley de Sistemas Electorales Indígenas de Oaxaca* [Supreme Court Invalidates the Act of Oaxaca Indigenous Electoral Systems], LA JORNADA, (Oct. 20, 2015), <http://www.jornada.unam.mx/2015/10/20/politica/013n1pol>.

56. Gloria Zafra, *Por la ley o la costumbre: obstáculos en la participación política de las mujeres en el sureste mexicano* [By Law or Custom: Obstacles to the Political Participation of Women in Southeastern Mexico], in FUNDACION PARA EL DEBIDO PROCESO LEGAL, DERECHO Y SOCIEDAD EN OAXACA INDIGENA: LOGROS ALCANZADOS Y DESAFIOS PENDIENTES [FOUNDATION OF DUE PROCESS, LAW AND SOCIETY IN INDIGENOUS OAXACA: ACHIEVEMENTS AND REMAINING CHALLENGES] 69 (2009) (providing a breakdown of women nominated and women elected to municipal office in Oaxaca between 2002 and 2011).

57. Jorge G. Castillo Vaquera & Mauricio I. Ibarra Romo, *Participación electoral femenina en contextos de usos y costumbres: el caso de Eufrosina Cruz* [Habits and Customs of Female Participation in Elections: The Case of Eufrosina Cruz], VEREDAS. REVISTA DEL PENSAMIENTO SOCIOLOGICO, no. 24, 2012, at 111; *La rebelión se llama Eufrosina Cruz* [The Rebellion Is Called Eufrosina Cruz]. MUJERES EN RED. EL PERIODICO FEMINISTA (Feb. 10, 2008), [https://www.nodo50.org/mujeresred/IMG/article\\_PDF/article\\_a1365.pdf](https://www.nodo50.org/mujeresred/IMG/article_PDF/article_a1365.pdf).

58. *Denuncia Eufrosina Cruz que fue expulsada de Santa María Quieloganí, Oaxaca* [Eufrosina Cruz Claims She Was Expelled from Santa María Quieloganí, Oaxaca], REVISTA PROCESO (June 25, 2008), <http://www.proceso.com.mx/>

human rights offices, the Oaxacan electoral authorities, the state congress, and different federal authorities.<sup>59</sup> In 2010, a new reform was passed to Oaxaca's electoral code, which mandated community assemblies to consider female candidates in line with quota requirements in place for the political parties.<sup>60</sup> Eufrosina was subsequently elected to the state legislature for Fox's Partido de Acción Nacional (PAN) and later became president of the state congress.<sup>61</sup> In 2012, she was elected to the national congress as a deputy for the PAN and was subsequently appointed the party's coordinator of indigenous affairs.<sup>62</sup>

While the case of Eufrosina Cruz Mendoza clearly signals gender discrimination within legal pluralism, it should be understood within the context of the increasingly conflict-ridden and judicialized electoral process in the state of Oaxaca, and the manipulation of the uses and customs regime for political advantage by different political parties and factions. Post-electoral judicial appeals have increased exponentially during the 2000s,<sup>63</sup> driven in part by groups such as women, young people, and migrants, who are excluded from participation in municipal politics in uses and customs municipalities. These con-

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199707/denuncia-eufrosina-cruz-que-fue-expulsada-de-santa-maria-quiologo-oaxaca.

59. *Se discriminó a Eufrosina Cruz en Oaxaca: CNDH* [*Eufrosina Cruz Was Discriminated Against in Oaxaca: CNDH*], REVISTA PROCESO (Mar. 7, 2008), [HTTP://WWW.PROCESO.COM.MX/197214/SE-DISCRIMINO-A-EUFROSINA-CRUZ-EN-OAXACA-CNDH](http://www.proceso.com.mx/197214/se-discrimino-a-eufrosina-cruz-en-oaxaca-cndh).

60. Código de Instituciones Políticas Procedimientos Electorales para el Estado de Oaxaca [Code of Political Institutions and Electoral Procedures for the State of Oaxaca], art. 153, 31-08-2008, últimas reformas 09-08-2012 (Mex.).

61. O. Rodríguez, *Designan a Eufrosina Cruz, coordinadora de Asuntos Indígenas del PAN* [*Eufrosina Cruz Appointed, Coordinator of Indigenous Affairs of PAN*], MILENIO, (Nov. 13, 2010).

62. *Designan a Eufrosina Cruz, coordinadora de Asuntos Indígenas del PAN* [*Eufrosina Cruz Appointed, Coordinator of Indigenous Affairs of PAN*], MILENIO (Dec. 14, 2010).

63. C. VELÁSQUEZ, *Violencia política en municipios indígenas de Oaxaca: Confrontación con el sistema de justicia electoral* (Political Violence in Indigenous Municipalities of Oaxaca: Confrontation with the Electoral Justice System) XXI CONFLICTO Y VIOLENCIA: OAXACA POBLACIÓN SIGLO 4, 4-15 (2013), <http://www.digepo.oaxaca.gob.mx/recursos/revistas/revista38.pdf>; Código de Instituciones Políticas Procedimientos Electorales para el Estado de Oaxaca [Code of Political Institutions and Electoral Procedures for the State of Oaxaca], 31-08-2008, últimas reformas 09-08-2012 (Mex.).



licts are linked to competition between the political parties. Women's legitimate demands for political participation within uses and customs municipalities have been used to question indigenous peoples' demands for their collective autonomy rights, and in this sense Eufrosina's specific case provided a rationale for racist denunciations of indigenous justice systems in general.<sup>64</sup> This is particularly marked in the context of increasing confrontation between indigenous people and state authorities over mining and hydroelectric developments in Oaxaca.<sup>65</sup> Notwithstanding the political complexities of conflicts around autonomy rights and uses and customs in Oaxaca,<sup>66</sup> women's equal rights to political participation and lead-

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64. For example, Diva Gastelum, Senator and head of the Partido de la Revolución Institucional's women's section stated:

"Nuestra normatividad garantiza el respeto a los sistemas de usos y costumbres de los pueblos indígenas, pero ¿hasta dónde el respeto a este sistema permite la violación de los derechos humanos de las mujeres indígenas? Los usos y costumbres constituyen uno de los principales obstáculos para la liberación-concientización-autodesarrollo de la mujer indígena, y permiten el sostenimiento de una situación de desventaja social y cultural que provoca discriminación y violencia hacia las mujeres. Podemos continuar empoderando a las mujeres y capacitándolas, pero si los hombres indígenas no comprenden la necesidad del respeto a los derechos humanos de las mujeres indígenas y su participación en el desarrollo de este país, difícilmente las comunidades indígenas lograrán un desarrollo sostenible. No queremos más casos como el de Eufrosina, ni mujeres indígenas que tienen que salir de sus comunidades para lograr ejercer plenamente sus derechos. En las próximas elecciones los partidos políticos tendrán la obligación de cumplir con la Paridad, y las mujeres debemos trabajar para que todos los grupos de mujeres estemos representados; las mujeres adultas mayores, jóvenes, con discapacidad y desde luego las indígenas, pues son ellas y solo ellas, quienes pueden lograr el cambio del futuro de sus pueblos, dar respuesta a sus demandas y mejorar el futuro de miles de niñas indígenas que esperan una mejor realidad".

Diva Gastelum, *La Participación Política de las Mujeres Indígenas* [*Political Participation of Indigenous Women*], OAXACA BLOG (Sept. 5, 2014), <http://www.pri-oaxaca.org.mx/Blog/Bloog.aspx?y=1348>.

65. J.C. Martínez, *The State in Waiting: State-ness Disputes in Indigenous Territories*, J. OF LATIN AM. AND CARIBBEAN ANTHROPOLOGY (forthcoming 2017).

66. Oaxaca's differentiated electoral regime is the focus of controversy: in October 2015 the Supreme Court overturned the Law of Indigenous Electoral Systems in Oaxaca on the grounds that it violated Article 2 of the federal constitution due to the absence of consultation with indigenous peoples and communities when the law was being drafted, and its creation of a state

ership have been consistently defended by indigenous women's organizations, and indigenous peoples' social organizations more generally. The case of Eufrosina Cruz demonstrates how those rights were defended by state institutions in Oaxaca. This is in line with the federal government's commitment to gender equity in electoral politics. In February 2014, Mexico passed a constitutional amendment to the Article 41 of the Federal Constitution requiring that that political parties develop "rules to ensure gender parity in the nomination of candidates in federal and local congressional elections."<sup>67</sup> This amendment marks a critical improvement over the requirement stipulated by the federal electoral code of a minimum 40% quota of either sex in the Assembly,<sup>68</sup> and requires parity and alternation between women and men on parties' candidate lists. However, while undoubtedly a major step for gender equality, such measures by themselves will not be sufficient to ensure improved political participation of indigenous women, who suffer racism and structural discrimination on the grounds not only of gender but also class and ethnicity.

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council for indigenous normative electoral systems to supervise elections (a kind of parallel body to the state electoral institute appointed by the local congress). See Mendez, *supra* note 55.

67. Constitución Política De Los Estados Unidos Mexicanos, CP, art 41 (I), Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10/02/2014 (Mex.) ("Los partidos políticos tienen como fin promover la participación del pueblo en la vida democrática, contribuir a la integración de los órganos de representación política y como organizaciones de ciudadanos, hacer posible el acceso de éstos al ejercicio del poder público, de acuerdo con los programas, principios e ideas que postulan y mediante el sufragio universal, libre, secreto y directo, así como *las reglas para garantizar la paridad entre los géneros, en candidaturas a legisladores federales y locales*. Sólo los ciudadanos podrán formar partidos políticos y afiliarse libre e individualmente a ellos; por tanto, quedan prohibidas la intervención de organizaciones gremiales o con objeto social diferente en la creación de partidos y cualquier forma de afiliación corporativa.") (emphasis added).

68. Código Federal De Instituciones Y Procedimientos Electorales [Federal Code of Electoral Institutions and Procedures] [CFIPE], art. 219, Diario Oficial de la Federación [DOF] 14-01-2008 (Mex.) ("1. De la totalidad de solicitudes de registro, tanto de las candidaturas a diputados como de senadores que presenten los partidos políticos o las coaliciones ante el Instituto Federal Electoral, deberán integrarse con al menos el cuarenta por ciento de candidatos propietarios de un mismo género, procurando llegar a la paridad. 2. Quedan exceptuadas de esta disposición las candidaturas de mayoría relativa que sean resultado de un proceso de elección democrático, conforme a los estatutos de cada partido").

B. *Rights to Physical Security: The Cases of Inés Fernández Ortega<sup>69</sup> and Valentina Rosendo Cantú*

Guerrero is one of the poorest and most violent states in Mexico. Guerrero was the site of the so-called “dirty war” waged in the 1970s by the army against a rural insurgency, and since then, it has increasingly been subject to militarization in the context of the federal government’s so-called war against drugs and organized crime.<sup>70</sup> Inés Fernández Ortega, an indigenous leader of the Organization of the Me’phaa Indigenous Peoples (OPIM) in Guerrero state, was raped in her own home, in front of her children, by soldiers from the Mexican army in 2002.<sup>71</sup> One month earlier, Valentina Rosendo Cantú, a 17-year-old mother, was also raped by soldiers when she went to a stream to wash clothes.<sup>72</sup> Initially, both women appealed to their community assembly to support them in filing a legal complaint, but the communal authorities’ support was at best conditional and was later withdrawn because of fears of army reprisals.<sup>73</sup> The state prosecutor’s office denied them a translator, established as a right by the 2001 reform to Article 2 of the

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69. This section draws extensively on the work of my colleague Rosalva Aida Hernández Castillo, an anthropologist working at CIESAS in Mexico who provided expert testimony in Inés’s case before the Inter-American Court of Human Rights. See Rosalva Aida Hernández Castillo & Héctor Ortiz Elizondo, *Asunto: Violación de una indígena Me’phaa por miembros del Ejército Mexicano* [Subject: Violation of Indigenous Me’phaa by Members of the Mexican Army], PERITAJE ANTROPOLÓGICO EN MÉXICO: REFLEXIONES TEÓRICO-METODOLÓGICAS Y EXPERIENCIAS [ANTHROPOLOGICAL EXPERTISE IN MEXICO: THEORETICAL AND METHODOLOGICAL REFLECTIONS AND EXPERIENCES] 67 (2012) [http://www.rniu.buap.mx/infoRNIU/nov12/2/rev\\_ceas\\_2012.pdf](http://www.rniu.buap.mx/infoRNIU/nov12/2/rev_ceas_2012.pdf); CASTILLO, *supra* note 16; Rosalva Aida Hernández Castillo, *Between Community Justice and International Litigation: The Case of Inés Fernández before the Inter-American Court*, in DEMANDING JUSTICE AND SECURITY, *supra* note 41.

70. On the impacts of the dirty war, see generally COMISIÓN DE LA VERDAD DEL ESTADO DE GUERRERO [TRUTH COMMISSION OF THE STATE OF GUERRERO], INFORME FINAL DE ACTIVIDADES [FINAL REPORT OF ACTIVITIES] (Oct. 15, 2014), <http://congresogro.gob.mx/files/InformeFinalCOMVERDAD.pdf>.

71. Fernández Ortega et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. c) No. 215 (Aug. 30, 2010).

72. Rosendo Cantú et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. c) No. 225 (Aug. 31, 2010).

73. CASTILLO, *supra* note 16, at 209.

Federal Constitution.<sup>74</sup> They were subjected to denigrating medical examinations, and in Inés's case the forensic evidence was subsequently lost.<sup>75</sup>

After eight years trying to achieve justice in the national courts to no avail, the two women and their families decided to take their appeals to the Inter-American human rights system with the help of the Tlachinollan Human Rights Center of the Mountain of Guerrero, one of Mexico's most respected human rights NGOs.<sup>76</sup> The judicialization of Inés and Valentina's cases before the Inter-American Court of Human Rights (IACtHR) strengthened alliances between men and women in the OPIM, their organization, and opened new spaces for women to address gendered forms of violence.<sup>77</sup> In her submission, Inés consistently argued that her rape was part of a wider chain of aggressions against her community and her organization; her brother Lorenzo Fernández Ortega, a member of the OPIM, was murdered in 2008. Lorenzo had translated for Inés during the first year of her legal action, so his death was a direct attack on her attempts to seek legal recourse. Also in 2008 five OPIM leaders were detained and others received anonymous death threats.<sup>78</sup> Inés Fernández's demands for reparations included the demilitarization of the state of Guerrero and prohibitions on the army coming anywhere near her village of Barranca Tecuani.<sup>79</sup> While in the end her lawyers failed to include demilitarization as part of their petition, they did

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74. Constitución Política De Los Estados Unidos Mexicanos, CP, art 2(VIII), Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10/02/2014 (Mex.) ("Have full access to State jurisdiction. In order to protect this right, in all trials and proceedings that involve natives, individually or collectively, their customs and cultural practices must be taken into account, respecting the provisions established in this Constitution. Indigenous people have, at all times, the right to be assisted by interpreters and counsels, who are familiar to their language and culture.")

75. Ortega, Inter-Am. Ct. H.R. (ser. c) no. 215.

76. Petition on Admissibility of Ines Fernandez Ortega and Other Mexicans, Inter-Am. Comm'n H.R., Report No. 94/06, Petition No. 540-04 (Oct. 21, 2006).

77. CASTILLO, *supra* note 16, at 206–217.

78. ROSENDO CANTÚ ET AL., REGARDING MEXICO, PROVISIONAL MEASURES, ORDER OF THE PRESIDENT OF THE COURT, "HAVING SEEN," (INTER-AM. CT. H.R. FEB. 2, 2010) AT 2, [http://www.corteidh.or.cr/docs/medidas/rosendo\\_se\\_01.doc](http://www.corteidh.or.cr/docs/medidas/rosendo_se_01.doc). (detailing death threats made against the leaders).

79. Castillo & Ortiz, *supra* note 69, at 81.

argue that any reparations awarded by the court should include the entire community.<sup>80</sup>

Drawing on witness testimonies and special anthropological expert reports which attested to the collective harm sustained by the entire community, the landmark decision of the IACtHR in August 2010 found against the state of Mexico.<sup>81</sup> The reparations mandated by the Court included not only financial compensation for the women and their families, but also an admission of guilt and public apology by the highest authorities of the Mexican government, legal reforms to military jurisdiction, improvements to indigenous women's access to justice, and a series of collective reparations including the construction of a women's rights center and shelter in the nearby town of Ayutla de los Libres so that girls did not have to travel long distances to and from school, exposing them to the risk of sexual violence.<sup>82</sup> The Court's ruling effectively re-framed Inés' and Valentina's rapes as a violation of the collective rights of the Me-phaa people. Judicialization in the Inter-American system led to landmark reforms to limit military jurisdiction in Mexico, mandating that human rights violations committed by military personnel must be tried in civilian courts.<sup>83</sup> In two separate events in December 2011 and March 2012, Interior Minister Alejandro Poiré publicly apologized to both Valentina and Inés and accepted the responsibility of the Mexican state for the violations they had suffered.<sup>84</sup> While community justice had proved unable to support both women in their fight for justice, the strength of their organization, OPIM, and the national and international links of solidarity they built with different NGOs and civic organizations were vital in their efforts to lay bare the violence, systematic racism,

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80. Ortega, Inter-Am. Ct. H.R. (ser. c) no. 215.

81. *Id.* ¶3.

82. *Id.* ¶. 245–293.

83. See Mauricio Torres, *El Senado Aprueba Una Reforma Que Limita El Fuero Militar* [Senate Approves Reform Limiting Military Jurisdiction], EXPANSION, (Apr. 24, 2014, 12:34 PM), <http://mexico.cnn.com/nacional/2014/04/24/fuero-militar-reforma-senado>.

84. *A 10 años de su violación, recibe Inés Fernández la disculpa oficial* [10 Years After Her Rape, Inés Fernández Receives Official Apology], LA JORNADO GUERRERO, (Mar. 7, 2012), <http://www.lajornadaguerrero.com.mx/2012/03/07/index.php?section=politica&article=003n1pol>.

and exclusion that indigenous women suffer at the hands of the Mexican state.

C. *The Criminalization of Indigenous Autonomies and the Spread of Organized Crime: The Case of Nestora Salgado García*

Nestora Salgado García is a member of the community police in the town of Olinalá, Guerrero.<sup>85</sup> The Olinalá community police are part of one of the most emblematic examples of indigenous autonomy in Mexico: the Regional Coordination of Community Authorities (CRAC). The CRAC has operated an autonomous system of security and justice for nearly two decades in the Mountain Region of Guerrero.<sup>86</sup> In addition to Article 2 of the Federal Constitution and ILO Convention 169, Guerrero state Law 701 allows for such indigenous autonomies,<sup>87</sup> including the ability to detain suspected delinquents, who are subsequently “re-educated” through an extended period of detention involving community service.<sup>88</sup> The government of the state of Guerrero supported the CRAC in Olinalá by giving them vehicles, registered arms, and funds to buy uniforms.<sup>89</sup> In August 2013, Nestora Salgado was detained by members of the Mexican army and accused on

85. Nestora Salgado García Regarding Mexico, Precautionary Measure No. 455-13, Order of the President of the Court (Inter-Am. Comm’n H.R. Jan. 28, 2015), <http://www.oas.org/en/iachr/decisions/pdf/2015/PM455-13-EN.pdf>.

86. MARIA TERESA SIERRA, *Indigenous Justice Faces the State: The Community Police Force in Guerrero, Mexico*, N. AM. CONGRESS ON LATIN AM. REP. ON AMS., Sept.–Oct. 2010, <https://nacla.org/article/indigenous-justice-faces-state-community-police-force-guerrero-mexico>; Maria Teresa Sierra, *Pueblos indígenas y usos contrahegemónicos de la ley en la disputa por la justicia: La Policía Comunitaria de Guerrero [Indigenous Peoples and Counterhegemonic Uses of Law in the Fight for Justice: The Community Police in Guerrero]*, 20 J. LATIN AM. & CARIBBEAN ANTHROPOLOGY 133 (2015).

87. *Ley 701 de Reconocimiento, Derechos y Cultura de los Pueblos Indígenas del Estado de Guerrero* [Law 701 Rights and Culture of Indigenous Peoples and Communities of the State of Guerrero], GUERRERO GOBIERNO DEL ESTADO, 08-04-2011, <http://www.iepcgro.mx/PDFs/MarcoLegal/Ley%20701%20PueblosIndigenas.pdf> (last visited January 2016).

88. M. T. Sierra, *Justicia indígena, violencia y Estado en Guerrero* [Indigenous Justice, Violence and the State of Guerrero] (2016) (unpublished manuscript) (on file with author).

89. B. Petrich, *Nestora Salgado: aún guardo pruebas sobre red de trata infantil [Nestora Salgado: I Still Have Evidence of Child Trafficking Network]*, LA JORNADA (Mar. 19, 2016, 7:25 AM), <http://www.jornada.unam.mx/ultimas/2016/01/>

charges of kidnapping related to her exercise of community justice as part of the CRAC in Olinalá.<sup>90</sup> In March 2016 Nestora was finally freed after three judges in Guerrero state determined she was innocent of the charges of robbery, kidnapping, and homicide which had been brought against her.<sup>91</sup> Nestora's release followed her detention for two years and seven months, first in a high security prison in the state of Nayarit and then (following a hunger strike by Nestora herself and the issuing of additional precautionary measures by the Inter-American Commission of Human Rights) in a prison in Tepepan, from where she was eventually released.<sup>92</sup>

Nestora, a Mexican-born U.S. citizen who returned to her native Guerrero after two decades in the United States, was one of Mexico's most visible political prisoners.<sup>93</sup> The legal case against her was full of irregularities and due process violations, and the CRAC and national and international human rights organizations campaigned for her release.<sup>94</sup> Her arrest

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19/nestora-salgado-aun-guardo-pruebas-sobre-red-de-trata-infantil-8234.html.

90. Sergio Ocampo Arista, *Ratifica tribunal de Guerrero prisión contra Nestora Salgado por secuestro* [Guerrero Court Ratifies Prison Order Against Nestora Salgado for Kidnapping], LA JORNADA (Jan. 8, 2016), <http://www.jornada.unam.mx/2016/01/08/politica/011n1pol>.

91. Nayeli Roldán, *Nestora Salgado sale libre luego de dos años y medio en prisión* [Nestora Salgado Goes Free After Two and a Half Years in Prison], ANIMAL POLÍTICO (March 18 2016, 10:30 AM) <http://www.animalpolitico.com/2016/03/nestora-salgado-saldra-libre-este-viernes-18-de-marzo-luego-de-pasar-dos-anos-y-medio-en-prision/>.

92. Nestora Salgado Garcia Regarding Mexico, Precautionary Measure No. 455-13, Order of the President of the Court (Inter-Am. Comm'n H.R. Jan. 28, 2015), <http://www.oas.org/en/iachr/decisions/pdf/2015/PM455-13-EN.pdf>; R. A. Hernández Castillo, *Activismo legal y talleres penitenciarios: Las paradojas de la antropología jurídica feminista y del trabajo cultural en espacios de reclusión* [Legal Activism and Prison Workshops: The Paradoxes of Feminist Legal Anthropology and Cultural Work in Spaces of Reclusion], in RESISTENCIAS PENITENCIARIAS: RESISTENCIAS ACTIVISTAS EN ESPACIOS DE RECLUSIÓN [PRISON RESISTANCE: RESISTANCE ACTIVISTS IN AREAS OF IMPRISONMENT] (2016).

93. Nayeli Roldán, *Nestora Salgado, la policía comunitaria presa como de "alta peligrosidad"* [Nestora Salgado, the Community Policing Is "Highly Dangerous"], ANIMAL POLÍTICO, (Jan. 16, 2015, 7:51 AM), <http://www.animalpolitico.com/2015/01/ella-es-nestora-salgado-la-comandante-que-lleva-18-meses-en-prision/>.

94. See Gloria Leticia Díaz, *Exigen a Gobernador de Guerrero intervenir para liberar a Nestora Salgado* [Demand on the Governor of Guerrero to Intervene to Free

followed actions by the community police in Olinalá to detain individuals allegedly linked to organized crime accused of grooming teenage girls for drug-dealing and child prostitution.<sup>95</sup> Four young women, allegedly forced into prostitution by their “boyfriends,” were located by members of the community police in the neighboring state of Puebla.<sup>96</sup> The mothers of three of the young women appealed to the CRAC in Olinalá to arrange for their daughters’ “re-education” in the CRAC’s office in El Paraíso, signing letters to that effect.<sup>97</sup> Nestora was subsequently accused of their kidnapping, and after her initial detention other criminal charges were brought against her, including homicide and robbery.<sup>98</sup> Guerrero has long been one of Mexico’s most violent regions, but the 2006 military led offensive against organized crime increased insecurity. The military campaign helped shatter the Beltran Leyva cartel, but one of the numerous splinter groups that subsequently emerged, Los Rojos, took over control of Olinalá. Kidnapping, extortion, disappearances, and murder became commonplace.<sup>99</sup> Nestora and other community activists accused local municipal authorities of being in league with Los Rojos.<sup>100</sup>

Nestora’s arrest occurred in the context of a growing campaign of intimidation and political division of the CRAC authorities.<sup>101</sup> This is directly related to the efforts of communities to resist predations by alliances between organized crime and the state, including robbery, extortion, and kidnappings; the increased presence of drug cartels in indigenous communities; and also the government’s efforts to facilitate mining prospection and exploitation within indigenous territories.<sup>102</sup>

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*Nestora Salgado*], PROCESO (Oct. 14, 2015), <http://www.proceso.com.mx/?p=418155>.

95. See PETRICH, *supra* note 89.

96. *Id.*

97. *Id.*

98. See Vania Pigeonutt, *Confía defensa que Nestora Salgado saldrá libre el 7 de marzo*, EL UNIVERSAL, Feb. 29, 2016, <http://www.eluniversal.com.mx/articulo/estados/2016/02/29/confia-defensa-que-nestora-salgado-salga-libre-el-7-de-marzo>.

99. See Jo Tuckman, *Mexican Woman Jailed for Combatting Cartels*, THE GUARDIAN (June 12, 2015), <http://www.theguardian.com/world/2015/jun/12/nestora-salgado-mexican-woman-cartels-jailed-kidnapping-charges>.

100. PETRICH, *supra* note 89.

101. Sierra, *supra* note 88.

102. *Id.*



These are the paradoxes of the Mexican state's stance towards indigenous governance and justice: whilst laws are emitted that partially recognize the legitimacy of such systems, communal authorities face constant efforts to co-opt and control them, or persecution and criminalization when they oppose powerful political and economic interests.<sup>103</sup>

## VII. CONCLUSION

Tensions between legal pluralism and women's rights, both perceived and real, certainly exist. However, as I have shown here, close analysis of the different strategies adopted by indigenous women reveals the insufficiency of simplistic readings that posit zero-sum trade-offs between male communal authority and women's claims. Rather, we need more nuanced interpretations that situate conflicts surrounding legal pluralism and gender within the broader political and socioeconomic context of relations between indigenous peoples, private interests, and the state—relations that are characterized by racism, violence, and dispossession. I have argued here that the formal legal recognition of indigenous autonomy and legal pluralism in Mexico is weak and ambiguous. As the discussion of the three cases presented has demonstrated, state authorities intervene selectively against indigenous authorities to champion universal human rights when it is to their political advantage, yet policies of economic development and security promoted by the federal and state governments violate indigenous peoples' fundamental rights and expose indigenous women to greater harm. The ambiguity of recognition means that indigenous women—and men—are increasingly subject to repression and criminalization for exercising their nationally and internationally recognized rights to autonomy. These efforts frequently aim to protect their communities against the predations of organized crime, often in league with state authorities, and the injurious effects of a highly militarized and racist form of public power. In the context of Mexico's ongoing human rights emergency, involving thousands of forced disappearances, extrajudicial executions, femicide, tor-

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103. R.A. Hernandez Castillo, *El racismo judicial y las policías comunitarias de Guerrero* [*Judicial Racism and the Community Police in Guerrero*], LA JORNADA (Aug. 3, 2015), <http://www.jornada.unam.mx/2015/08/03/opinion/019a1pol>.

ture, gross violations of human rights by the military, and systematic impunity,<sup>104</sup> indigenous women have adopted multiple strategies to defend their rights and those of their peoples, denouncing violations, defending legal pluralism, and working to change customs which discriminate against them.

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104. *See, e.g.*, U.S. DEP'T OF STATE, MEXICO 2014 HUMAN RIGHTS REPORT, <http://www.state.gov/documents/organization/236914.pdf>.