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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 systems, 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. 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.

1. Introduction

Classic access to justice efforts sought to facilitate access to and use of the formal, state-based justice system for disadvantaged individuals 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. However well this may work for the poor more generally, 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 individuals or indigenous peoples to deploy the law in the realisation of their goals and aspirations, or the protection of their rights. This article asks what legal empowerment or access to justice efforts must look like to truly address the needs of culturally distinct groups facing group-based inequality.

I will argue that there are two problems with the traditional 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 to a legal system, but rather to equalise the conditions under which they can shape the landscape and contest

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the outcomes, once they have gained entry. Second, and perhaps more importantly, it is clear that for many groups with a distinct cultural identity like the indigenous or afrodescendants, the goal is not to secure the same substantive notions of justice, but rather to pursue alternative ones altogether, ones that will more closely reflect their own normative framework. For indigenous groups and other communities bound by a common identity, this means not only finding ways to enhance agency within the formal system, but also expanding the reach of customary, indigenous legal systems.

I will evaluate the results of indigenous peoples' increased access to the formal state-based justice system – 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) and their efforts to improve the process by engaging in collective litigation on constitutional and international law grounds. 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.

In Section 2 I argue that, given this difference between culturally distinct groups and the poor more generally, the basic goal of legal empowerment is also different, requiring a focus not just on empowering indigenous persons as individuals, but also on empowering indigenous peoples, as communities; and not just on the ability to deploy rights and navigate the system, but also on the ability to shape the system itself. In Section 3 I 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.

2. The goal is legal agency for both indigenous persons and indigenous peoples

It is abundantly clear that indigenous groups have gained important new rights, but are not realising the benefits of those formal rights. In Latin America, beginning with Honduras' 1982 and Guatemala's 1985 constitutions and culminating with the 'plurinational' constitutions of Ecuador and Bolivia in 2008 and 2009, respectively, the region's charters have recognised the existence and aspirations of indigenous peoples in the region. Early in this period constitutions began recognising indigenous peoples, but stopped well short of granting territorial autonomy and some measure of self-rule (see, for example, Guatemala's 1985 constitution, Arts. 66–68). In Colombia, indigenous peoples secured 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 … as long as these are not contrary to the Constitution and the laws of the Republic' (Constitution of Colombia, 1991, Art 246).

By the end of the first decade of the twenty-first century, however, the rights had become stronger. The 2008 constitution of Ecuador and Bolivia's 2009 charter introduced the notion of 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, and creating structures that provide for indigenous autonomy. In Bolivia, for instance, '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' (Constitution of Bolivia, 2009, Art.190). Public authorities are required to 'obey the decisions of the rural native indigenous jurisdiction' (Art.192; see also Constitution of Ecuador 2008, art. 57, pars. 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. Similarly, in the international arena, a series of UN initiatives and the

International Labour Organisation's (ILO) convention 169 (1989) were followed by the more expansive UN Declaration on the Rights of Indigenous Peoples (2007).

This overall framework seems to give culturally distinct groups the ability to inhabit and shape their own legal systems. And yet, in spite of this rights-rich normative framework, indigenous groups still experience a high likelihood that their rights 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 than the vulnerability to physical violence of indigenous individuals who are fighting for the rights of indigenous peoples. '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' – 40 per cent of those killed were indigenous (Global Witness, 2016, p. 1).

The result of this disjuncture between formal rights and their realisation is what Hale (2005, p. 13) labels 'neoliberal multiculturalism:' a 'nightmare that settles in as indigenous organisations 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 realise those rights] that follow.' The key, as Brinks and Botero (2014) argue, lies in the ways that inequality conditions the exercise of formal 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 these rights will easily take root in social practices or state structures.

Prejudice, racism, 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, stand in the way of legal agency within the formal systems of law. As Sieder and Flores relate, even in the first decade of the twenty-first 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 & Flores, 2012, p. 29). Crucially, 'state law and procedures do not adequately reflect the moral and cultural values of the members of k´iche´ communities' (Sieder & Flores, 2012, p. 29). The problem is not just that the physical installations are remote and the proceedings in a foreign language, but that their indigeneity identifies people as something less than full citizens and the justice that is on offer does not fully match up with their substantive notions of justice. One 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 & Valdivia, 2006, p. 8). 'In spite of the constitutional recognition of indigenous justice, the government, judicial authorities and officials don't recognise it or value it, so they continue to distort and criticise indigenous justice practices as savagery, ignorance or brutality' (Brandt & Valdivia, 2006, p. ix). The modal response in such cases seems to be a combination of denying the authenticity of the claims and claimants, finding them too radical and uncompromising to be taken seriously, and arguing that they are rooted in resentment rather than intrinsic justice (see, for example, Hale, 2005, pp. 22–23).

Within an indigenous, community-controlled legal system this group-based inequality disappears. While within-community inequalities may still need to be addressed, the inequalities between the indigenous and the dominant groups become less the issue. This is true both for the individuals and the groups in question. When indigenous individuals come before an indigenous legal system, they 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). 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-civilised.

The challenge, therefore, in light of both the legal framework and its shortfall, is not simply to secure 'access to justice' but rather to find the institutional, legal, and political arrangement that maximises legal agency for the members of the group. To define the goal, I use Brinks and Botero's (2014) concept of legal agency:

> 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. (p. 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 emphasise 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, if not always consciously, and not merely when confronted with a judicial process.

Legal agency adds some concerns to the concept of 'legal empowerment'. In 'Making the Law Work for Everyone' (UNDP, 2008), 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). (p. 130)

Stephen Golub, who has advocated for the use of legal empowerment as a guiding concept, used it as a very welcome way to expand the focus of justice reformers beyond the narrow concerns that had theretofore shaped access to justice initiatives (see, for example, Golub, 2006, 2010). In particular, the notion of legal empowerment calls attention to the proactive use of law in everyday life, beyond courtrooms and lawyers, in a way that is very congruent with the points I want to make here.

I use the alternative formulation of legal agency not to disagree with the basic concerns that have animated the legal empowerment movement, but to call attention to a couple of elements that might otherwise seem less obvious, and to focus on the change in people's lives that legal empowerment is meant to secure, in particular in the context of indigenous peoples. First, legal empowerment brings a welcome focus on the rights bearer, as the focus of concern, but at least on first read seems mostly addressed to the third parties who will extend rights to the poor. Unintentionally perhaps, this definition of legal empowerment leaves the subject, the indigenous in this case, as the passive recipient of rights that 'are provided' by some outsider, perhaps the state. One of the points of this article is precisely that a central element of legal agency is participation by the indigenous communities themselves in producing the necessary legal changes, so that they are themselves implicated in the process of crafting and demanding the rights to which they feel entitled. We will return to this point especially in the discussion of the territorial autonomy that underpins many indigenous claims.

Vivek Maru (2010) uses the notion of agency to identify the main goal our reforms must pursue:

> Conventional legal aid is also ill equipped to deal with the plural legal systems prevalent in most countries. Perhaps most significantly, the solutions afforded by litigation and formal legal process are not always the kinds of solutions desired by the people involved, and they do not always contribute meaningfully to the agency of the people they serve. (p. 83)

The point here is that to truly contribute to agency, a legal framework must be congruent with the aspirations and normative understandings of those it governs; if it is not, it becomes more a means of social control than a source of agency. In the context of legal pluralism and multiple claims to normative and territorial autonomy that marks many indigenous communities, legal agency must include the ability to shape as much as to deploy rights and obligations.

Finally, legal agency, like moral agency, includes not only the potential of the subjects 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, particularly if they had significant input into the crafting of their legal system, the ability to make meaningful decisions about compliance with the law, and the opportunity to participate effectively in a fair adjudication process.

In short, individuals, and communities, have more legal agency to the extent they have some substantive participation in crafting the rules that will be applied to them, and in operating the system that will apply those rules. They have more legal agency to the extent they are able to make that system congruent with their own normative framework, their cultural practices and economic realities. And they have more legal agency to the extent they can fluidly deploy the claims that are embedded in that normative framework in their everyday lives. As a result, full legal agency for culturally distinct communities requires collective autonomy as much as individual legal empowerment. In many cases, this will require a measure of territorial autonomy as well – a space in which to exercise this collective self-rule.

Unlike most efforts aimed at empowering the poor, a focus on indigenous peoples requires us 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, and thus in large part the focus of access to justice for the indigenous, is 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, as recognised in the constitutional texts we reviewed earlier. 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 realisation 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 secure legal agency, in order to defend and extend their rights as communities.

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' programmes have done – but with a greater focus on collective, structural claims, claims that aim to protect and expand collective legal agency. The second and more important one is to strengthen and expand the sphere of customary indigenous legal systems themselves. As one study concluded, 'the indigenous population … specifically demands to resolve its conflicts within the spectrum of its values and norms' (Brandt & Valdivia, 2006, p. 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 towards maximising 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 – define a third

paradigm within which indigenous peoples seek to make their rights effective and protect their interests. FPIC procedures 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. In thinking holistically about access to justice we cannot ignore these hybrid spaces – 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 territorial control and cultural rights, and thus of legal agency, are decided. Indigenous groups have recently engaged in the terrain of FPIC and, frustrated by its shortcomings, have also used collective litigation in constitutional and international forums to reshape that terrain.

3. Three approaches to legal empowerment

3.1. A stopgap measure: improve *access to state law*

Traditionally, 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, but not on transforming the system itself, or giving the indigenous a voice in shaping or running it. But given the pervasive prejudice against the indigenous and the inequality that structures their relationship with the legal system, it seems likely that simple access to these spaces will not be enough to overcome the disadvantages. In this section I illustrate this difficulty using an extensive analysis that was done of an access to justice programme in Guatemala (Braconnier De León, 2015), then refer more generally to research that leads to the same conclusion in other systems.

Guatemala is an appropriate case to look at for several reasons. First, the country has a large number of indigenous communities, who continue to work with traditional authorities and justice systems in many parts of the country, and a large percentage of indigenous persons overall. Moreover, it has a marked but not unique history of racism and exclusion, which continues to shape social, political and economic outcomes for indigenous persons to this day. Third, it has experimented both with traditional access to justice programmes, and with empowering traditional legal systems to work in parallel, thus allowing a comparison between the two. Finally, the research cited at the end of this section demonstrates that Guatemala is far from unique in failing to provide adequate justice for indigenous persons within the formal system.

An 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. A coalition of indigenous rights groups who had repeatedly encountered roadblocks in their attempts to bring some cultural sensitivity into the administration of justice, decided they needed to address the problem in a more structural way (Braconnier De León, 2015, p. 22). As a result of their efforts, the Unit of Indigenous Affairs (UIA), located within the Guatemalan judicial branch, was created in 2009, and began work in 2012. The UIA has 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. The UIA depends directly from the Presidency of the Supreme Court and could, therefore, be dissolved at any time (Braconnier De León, 2015, pp. 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 UIA 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, pp. 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 interpreters themselves consider that the UIA'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 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 emphasise 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 UIA 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, p. 27). 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. For example, at the sentencing phase of criminal trials, although Guatemala is bound by an obligation to ensure that penalties applied to indigenous people take into account cultural values (ILO Convention 169, Art.10), judges and prosecutors strongly resist any individualisation on the basis of ethnicity (Braconnier De León, 2015, p. 68). The universities assign little importance to the question of indigenous law and access to justice for indigenous peoples (2015, p. 46). An earlier report on access to justice for indigenous persons in Guatemala notes that 97 per cent of indigenous users of the system interviewed for the report had little or no confidence in the system (Gómez, 2007, p. 19). Indeed, they found that the actual experience of indigenous persons within the system either reinforced or worsened their initial distrust in the official justice system (2007, p. 20). Little wonder, then, that indigenous persons continue to feel they are not taken seriously in the state system (Sieder & Flores, 2012, p. 29).

As discussed in Section 2, 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 prejudice, and not peculiar to Guatemala. A recent account of the situation in Paraguay comes to the same conclusion:

> in practise, tribunals do not recognise 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).

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.

It is probably unnecessary to note that racism and prejudice affect the operation of judiciaries across the world, as much as in Guatemala or Paraguay. Scholars have made the same point in the context of Australia, noting its effect on health outcomes in particular (Awofeso, 2011). And a more general analysis of access to justice for indigenous women in Latin America notes the difficulty of securing true justice in an official system that is infected with racism as well as sexism (Sieder & Sierra, 2010). An analysis of legal empowerment in Aceh province, in Indonesia, examined in more detail in the next section, comes to the same conclusion (Wojkowska & Cunningham, 2010). Justice systems more often than not incorporate the pathologies of their surrounding political and social systems, and it is difficult if not impossible to turn those who are second-class citizens outside the justice system, into first-class citizens inside.

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, and at worst as foreign and inferior. They replicate as much as they address inequality for indigenous persons. Indigenous persons often feel that difference, and experience the foreignness as much as the operators of the system do. Moreover, these measures can substitute for a more meaningful 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.

3.2. A better approach: empower *customary law systems*

In contrast, a more structural attempt to empower indigenous peoples would entail strengthening and engaging on an equal basis with traditional systems of authority and dispute resolution. In their analysis of legal empowerment for poor communities in Aceh, Wojkowska and Cunningham (2010) argue 'that activities that seek to legally empower the poor to better enable them to access "better" justice should also be located in the forums they themselves use' (2010, p. 94). Stephen Golub (2010, p. 11) calls this a 'common-sense but necessary argument'. Vivek Maru (2010) also notes that a focus on non-state systems is necessary in all societies with plural legal systems. In Aceh, Wojkowska and Cunningham (2010) find that

> community members felt more comfortable and confident bringing their grievances to *adat* mechanisms because they are generally more familiar with its procedures and sanctions, and with the *adat* leaders themselves, than they are with the analogous elements of the formal justice system. (p. 101)

Despite the many problems with *adat* justice – lack of understanding of its jurisdictional limits, male dominance, discrimination against outsiders, and more – this was the system most people chose to use when pressing their claims. As a result, they suggest improving it so that it becomes an even more effective mechanism within which to exercise legal agency.

An ethnographic report by Sieder and Flores (2012) on an effective traditional justice system in Guatemala 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. In Guatemala, customary authorities are active and influential in many regions of the country. The UIA itself has no cooperation agreements with existing communal justice systems (Braconnier De León, 2015, p. 51), nor have they crafted any formal guidance for judges attempting to coordinate with indigenous justice systems (2015, p. 56). This more formalised 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 UIA or some other state-based

agency, giving the communities legal agency from the very beginning, by allowing them to shape the system itself.

The initial impetus in the Quiché to enhance legal agency within customary authority structures came from a series of indigenous advocacy centres ('*defensorías indígenas*'). According to Sieder and Flores (2012, pp. 32–33), these are not professionalised NGOs but rather networks of community activists staffed by volunteers, often with prior links to the revolutionary left. Mirroring the work of UIA, these community activists produce educational materials and train the decision makers – training that is oriented not only towards the indigenous leaders who will be the principal operators of this alternative justice system, but also towards 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 (2012, pp. 33–34).

Many efforts to strengthen customary legal systems take as a first step the codification and formalisation of a system of norms. But many have made the point that customary law is not static and millenarian (see, for example, Cott & Lee, 2000), and that essentialising indigenous culture in a bid to empower indigenous peoples is problematic in its own right (Engle, 2010). In contrast, the operators of the customary law system in the Quiché do not seek to identify, codify and preserve existing norms unchanged. They have recently been working from within, for example, to transform attitudes and practices towards gender violence and women's rights (Sieder & Flores, 2012, p. 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 emphasising its flexibility, orality and specificity to the context and the case' (2012, p. 36). Crucially, then, there is legal agency for the community from the very beginning, in the production and reproduction 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. In small cases, indigenous communities have created centres that offer indigenous persons mediation services for ordinary, small-scale dispute resolution. In contrast to the mediation services in the state system, however (Braconnier De León, 2015, pp. 42–43), the indigenous advocacy centres provide these services in their own communities and their own languages, by people who share their culture and their traditions, and who are recognised within that community (Sieder & Flores, 2012, p. 33).

The community's legal agency becomes most evident when a more serious issue arises, as shown in one of the very few close ethnographic analyses of the operation of a customary justice system in the literature (Sieder & Flores, 2012, pp. 39–55). In this case, three young men from the community were suspected of having stolen a pickup. The owners of the pickup discovered the theft and called in the community's traditional leaders, who called a formal community assembly after securing a preliminary admission of sorts from the three suspects. Approximately 300 neighbours gathered to participate in the ensuing ritual of public investigation, confession, judgment, shaming and punishment. Traditional authorities from nearby communities came together to offer guidance and support. The members of the community spoke publicly against the accused and the crime, repeatedly placing the young men's conduct and past behaviour in the context of community norms. They called for different penalties to be applied and debated what was appropriate. They refused to be side-lined when one of the leaders proposed a more representative form of deliberation. Decisions were all 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 confession and community condemnation, each of the offenders received 20 *xik´a´y´* with *pixab´* – 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 were, according to their parents, restored to the good graces of the community. Years later, the parents expressed gratitude 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, dying in a fight with someone from a neighbouring village.

There are a number of ways in which this process shows legal agency for 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 point was clearly not to speak to members of their own small village, but to all the residents of the nearby municipal capital, Santa Cruz del Quiché, where the march occurred. 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. Second, the basic principles embedded in the system enhance the community's legal agency. The community as a whole weighed competing versions of the facts and proposed different punishments; it decided by consensus rather than a simple majority vote, in a directly participatory way, rather than through a representative arrangement or by delegation to outside authorities. The neighbours participated directly in the application of the *xik′a′y′*. The rules 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 marginalised, subordinated, and denied a voice, this is a powerful reaffirmation of authority and autonomy, a clear exercise of legal agency for the indigenous community.

What about the legal agency of indigenous persons caught up in this community justice? Does the system trade off agency for indigenous persons in order to secure agency for indigenous peoples? The appropriate comparison is to the formal criminal justice systems as they actually are in much of the developing world, not to some idealised version. In Guatemala (as much as in the rest of Latin America), the state system offers few guarantees for those who have been victims of crime. Delays are endemic, impunity is rife, and few crimes are even investigated, let alone punished. The owners of the pickup truck, as described above, found far more agency in the traditional system than they would have in the state-based system.

For those who stand accused, the formal system is equally unfavourable. In addition to pre-trial delays – during which they are most likely to be sitting in gaol – 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, p. 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, for example, García Villegas & Espinosa, 2014, p. 93). In the example we have been following, there is a sharp contrast between the swift, effective response of the community justice system, and what would have been the likely response of the state system. 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. In the formal system, they would most likely have served the penalty in a far-away prison or gaol, and returned, years later, marked by violence and absence to find that they no longer fit into their own community.

The very nature of the disputes resolved in communal justice systems across the world highlights how essential these systems are to collective legal agency. In the first place, as shown in studies of their operation in multiple countries, the decisions often have objectives that are foreign to the state system (Brandt & Valdivia, 2006, p. 34). The goal of restoring harmony in the community, of reintegrating an offender into that community, of securing respect for elders, of upholding the community's values, are central considerations in the customary system, and absolutely absent from 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 & Valdivia, 2006, p. 141]) simply 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, for example, 2006, pp. 135–137). Partly for this reason, as Brandt and Valdivia (2006, p. 75) find in their study of communal justice in Peru and Ecuador, and as Wojkowska and Cunningham (2010) find for Aceh, 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. While some of these normative objectives might contradict the values of the larger community, they are nonetheless self-generated.

On balance then, as shown by the Guatemalan example and the literature on other spaces, the customary law system seems to offer more legal agency than the state system for indigenous communities and for indigenous persons – victims and offenders alike. 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 insofar as it is self-generated it is a more appropriate, culturally congruent, context-specific, system for culturally distinct 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.

There is, however, an important caveat to this general conclusion. Customary law systems can be 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 (see, for example, Wojkowska & Cunningham, 2010). 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 disfavoured within customary legal systems, but Brandt and Franco's study (2006, pp. 197–198) concludes that there is a high likelihood that children also are not fully the subject of (constitutionally protected) rights in the communities they studied. This has been repeated until it has become a cliché, but it remains true that the greatest challenge for establishing agency-maximising legal pluralism 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 outsiders and traditionally subordinate persons within the community.

In the case of the community proceeding depicted in Sieder and Flores and its accompanying video documentary, these tensions are also visible. It is clear that at least one of the young men was a community outsider, viewed as a troublemaker. The documentary depicts repeated allusions to burning the young men alive, a relatively common practise in the Quiché after the end of the conflict (Mendoza Alvarado, 2007; Snodgrass Godoy, 2006). The traditional authorities emphasise that the customary law system prioritises 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. Wojkowska and Cunningham (2010) raise similar concerns about the operation of customary justice in Aceh, as do the results of Brandt and Franco's study in multiple countries (Brandt & Valdivia, 2006).

Often claiming these reasons, but at least in part because indigenous customary authority threatens their internal sovereignty, states resist the full implementation of these systems, and seek to limit their autonomy, power and application. Even in countries like Ecuador and Bolivia, whose constitutions are most generous, these rights have not been fully realised. Oversight measures usually include a strict limitation on 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 trusting an already suspect state system to improve agency 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 towards 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 Valdivia (2006, p. 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' are misplaced, as Sieder and Flores (2012, p. 42) have pointed out. 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 qualifications 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 (Millennium Development Goals Fund (MDG-Fund), n.d.). The 2007 death of a new-born girl, after a botched operation to excise her clitoris, brought this issue to consciousness in Colombia. Rather than flooding the community with outside law enforcement personnel to root out the practise, the community, with the support of the UN and in cooperation with the government, opened a process of reflection and self-critique that ultimately led the traditional authorities themselves to outlaw the practise (Cosoy, 2016). Importantly, the process had knock-on effects in 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). 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.

Some level of oversight is inevitable, of course, and probably desirable, as it would be for any decentralised system for dispute resolution and the administration of justice. We should not romanticise indigenous communities any more than we would any local community that has some measure of autonomy. 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 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 practising traditional law, but by 2009 that was no longer a problem (Sieder & Flores, 2012, p. 65). Similarly, in Peru, customary systems have evolved from an object of criminal prosecution (Muñoz & 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 & 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, for example, Rodríguez Garavito, 2011, p. 271; Sieder & Flores, 2012, p. 20). In contrast to the promised improvements in access to justice and inequality reviewed in the previous section, it appears that the potential of customary law regimes is not merely theoretical but is being actualised – unevenly and with exceptions – in countries in Latin America and elsewhere.

3.3. Using constitutional courts and state law to create, expand and protect spaces in which to assert indigenous values

Despite these advances, it is clear that territorial spaces for self-rule must still be carved out of what is, in theory at least, the universal application of state law. The mechanism for advancing collective legal agency in this regard has often been, somewhat ironically, engagement with the apex of state law – the constitution and constitutional courts. Collective 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 only 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 indigenous groups have sought to leverage their access to constitutional and international courts to expand their procedural rights as well. For purposes of this article, the point of this section 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 that might enhance or detract from legal agency.

The context for many of the debates around territorial control is the right to prior consultation enshrined in international and domestic law. Mapping onto a series of demands for a more multicultural approach to politics (see, for example, Eisenstadt, Danielson, Corres, & Polo, 2013), this right has its origins in international law. ILO Convention 169 shifted from the previous integrationist model to recognise 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; for a more detailed treatment of the trajectory of FPIC, from a domestic and international perspective, see Rodríguez Garavito, 2011, pp. 268–272). Within a monist, hierarchical view of the state, however, these aspirations at most require 'consultation' before the state makes the ultimate decision whether or not to proceed with a development project. UN 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, including areas that are of cultural or religious significance and that are 'important to their physical well-being or cultural practices' (Anaya, 2013, para. 27). But he also recognises 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, FPIC is still firmly embedded in a hierarchical structure that allows the state to override indigenous autonomy on behalf of the common good.

By most accounts, states are not especially prone to giving much weight to indigenous cultural interests. Research suggests FPIC works better in those spaces where indigenous communities have already secured a significant measure of political and legal agency (Falleti & Riofrancos, 2018). 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' (Thompson, 2016, p. 88). Echoing the argument made by Falleti and Riofranco, this report concludes, '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 ...' (2016, p. 56).

In response to this rather weak formulation and even weaker implementation of the right, indigenous groups have sought to strengthen the standard. Certainly, the purely political route has shown mixed results: as Carla Alberti (2015) shows for Bolivia, many communities are simply co-opted into dominant parties and party structures. As long as FPIC remains tied to the 'consultation' model with which ILO 169 began, it will remain no more than an instrument of domination for indigenous groups (Rodríguez Garavito, 2011, pp. 298–301). And, in fact, in many cases, FPIC has become simply a way for the local community to secure a payment in exchange for an extractive project that was always going to go forward, regardless of the wishes of the community (Eisenstadt, Leon, & Wong, 2017). The obligation to consult becomes a purely 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, p. 57).

The legal route, on the other hand, shows more promise.

> 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, p. 91)

At least in Colombia, 'Strategic litigation as a tool for realising the right to prior consultation ... has allowed indigenous organisations to defend their collective interests' (Thompson, 2016, p. 91). 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 organisational 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, p. 297). Helped along by generous constitutional provisions and activist courts, indigenous peoples appear to have exercised legal agency in the constitutional sphere to acquire some legal agency in the FPIC context.

These successes, partial as they might be, have pushed indigenous groups into the legal arena.

> 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 specialised U. N. bodies in Geneva. (Rodríguez Garavito, 2011, pp. 281–282)

As a result, many indigenous groups have moved towards 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, for example, Cárdenas Mendoza & Díaz, 2015). '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' (2015, p. 147), in a clear exercise of legal agency. 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, pp. 304–305).

It is not only in Colombia that this legal activity has often proven quite effective for expanding indigenous communities' legal agency. A recent report by the Open Society Foundation examined strategic litigation for land rights by indigenous groups in Kenya, Malaysia and Paraguay. The report concludes,

> an important non-material result of litigation was that the legal challenge supported the development of new power relationships between the concerned communities and other interests, notably private actors. It sometimes contributed to challenging the imbalance of power that the state and private companies uniformly enjoy over indigenous peoples. (Gilbert, 2017, p. 20)

Legal triumphs for indigenous groups established greater land rights, and led third parties from civil society and the government to collaborate more fully with these groups, although it did little to change overall social prejudice against them.

Not all the outcomes are positive. The indigenous leaders in the Urrá dam case 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. However, for all the reasons Rodríguez Garavito (2011, pp. 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 Embera, 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 judicial remedy ended up destroying their way of life, making them dependent on cash payments by the multinational company. Perhaps worse, paramilitary groups aligned with the dam builders continue to threaten and murder, while courts dither and delay.

Even as indigenous rights advocates struggle to translate their cultural claims into legal language, the very fact of engaging on the state's legal terrain can also be cause for concern. As Hale 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. (Hale, 2005, p. 16)

Engaging effectively on the terrain of constitutional and international law can require indigenous groups to reimagine themselves and their claims in ways that can be recognised by their interlocutors – and perhaps in the process to denature those claims until they are no longer recognisable by their own communities.

As a result, 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 ambivalent. On the one hand, the collective claims pressed in these venues have served to expand indigenous rights, bring the concerns of the communities into the halls of power, and secure some notable successes. In contrast to traditional efforts to improve 'access to justice for the indigenous' or campaigns to enhance indigenous autonomy, constitutional or international arenas have the greatest potential for indigenous groups to join forces with allies who have similar goals. A more pluralistic approach in this area would allow for cooperation with many different indigenous peoples, across countries and even regions, as well as with environmental groups and others who often have some of the same interests at heart. There is some risk that the effort will require indigenous peoples to recreate themselves in the image of indigeneity the state projects upon them. But if this can be avoided, collective constitutional and international litigation seems likely to continue as an important tool for expanding the legal agency of indigenous peoples. And in the process of preparing to wage this battle, indigenous peoples have

gone quite far in promoting the legal agency of indigenous persons, through legal education and training.

4. Conclusion

Access to justice has traditionally been understood in individual terms. The goal typically is to ensure that individuals who have a right can defend it using the justice system, that individuals who stand accused of a crime can defend themselves adequately. Legal empowerment goes beyond this narrow focus, calling attention to the need to endow individuals (especially the poor) with the rights they require affirmatively to pursue their life goals, and with the legal resources necessary to make those rights effective in everyday life. I have argued that legal agency goes somewhat further, calling in addition for the ability of individuals and groups to be able to shape and enforce these rights themselves, so that they have some say in shaping the legal landscape they inhabit, as well as in navigating that landscape effectively. Moreover, 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*. This is a call for a measure of autonomy, which depends in large part on securing territorial and political rights as well as the more purely legal tools.

Even the most effective measures promising full access to state law and state justice systems fall far short in providing full legal agency in this sense. 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. Moreover, the state system often pursues notions of justice that are inconsistent with – or at best indifferent to – the goals and values of particular 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 – though 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, indigenous individuals will inevitably 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, 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, especially issues of racism and prejudice, and not just address the difficulties of accessing the system.

Perhaps the greatest successes within formal legal systems have come in the more structural constitutional and international 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. In this arena, they are more able to act in concert with broader coalitions of groups – environmental groups and others – that have similar goals, thus enhancing their likelihood of success. 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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