

INDIGENOUS LAW IN CENTRAL AMERICA: A KEY TO IMPROVING LIFE AND JUSTICE

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ABSTRACT

Indigenous law provides accessible and expeditious dispute resolution in certain regions of Central and South America. Its focus is achieving solutions to a wide variety of problems through consultation and consensus in a manner that restores the harmony of the community. Sanctions, where applicable, seek to reintegrate and reorient the recipient to living a life that is consistent with the community's values. The formal justice systems of the Northern Triangle countries—Guatemala, El Salvador, and Honduras—face major challenges in providing their people with access to justice. However, unlike countries with significant indigenous populations in South America, they have not recognized that indigenous law and its accompanying social structure has the potential to address serious problems that the formal justice system cannot or does not reach. Indigenous law is a type of restorative justice and research indicates that where it is robust there is markedly less crime. Though its philosophy and approach differ from formal justice systems, participants find it fair and often prefer it even if they have access to the formal system. Recognition and support of indigenous justice would be a positive and humane response to some of the problems that prompt large numbers of Central Americans to live in despair or seek to leave their countries of origin.

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INTRODUCTION

For the last several years, the world has witnessed a flood of refugees seeking to escape war, poverty, and societal violence in their countries of origin. Most of us can barely imagine the circumstances that prompt this risky migration. Although recently the focus has been

refugees from Syria, Iraq, Afghanistan,¹ and Somalia,² we do not need to look across the ocean to find human beings fleeing from violence and poverty.³ Central Americans from the Northern Triangle—Guatemala, El Salvador, and Honduras—have been making their way through Mexico to seek a better life in the United States, including large numbers of unaccompanied minors who have made the dangerous trip alone.⁴ When asked why they have taken such risks, many refer to the gangs and violence that pervade society and the inability of the justice systems in their countries to respond effectively.⁵

While there are many factors that prompt immigration,⁶ the Central American migration crisis that has brought women and

1. See Karin de Grujil, *UNHCR Survey Finds Afghan and Syrian Refugees Arriving to Greece Are Fleeing Conflict and Violence*, UNHCR (Feb. 23, 2016), <http://www.unhcr.org/en-us/news/briefing/2016/2/56cc4b876/unhcr-survey-finds-afghan-syrian-refugees-arriving-greece-fleeing-conflict.html> [<https://perma.cc/V245-WULY>]; Michael Kaplan, *EU-Turkey Deal and Non-Syrian Refugees: How Afghans, Iraqis, Somalis, Others Could Be Hurt by Agreement*, INT'L BUS. TIMES (Mar. 24, 2016, 11:22 AM), <http://www.ibtimes.com/eu-turkey-deal-non-syrian-refugees-how-afghans-iraqis-somalis-others-could-be-hurt-2340449> [<https://perma.cc/2AB9-6NWR>].

2. See Nuruddin Farah, *This Is What Hunger Looks Like—Again*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/opinion/sunday/this-is-what-hunger-looks-like-again.html> [<https://perma.cc/VZW3-X2HM>].

3. See Eduardo Porter & Karl Russell, *Migrants Are on the Rise Around the World, and Myths About Them Are Shaping Attitudes*, N.Y. TIMES (June 20, 2018), <https://nytimes.com/interactive/2018/06/20/business/economy/immigration-economic-impact.html> [<https://perma.cc/L82K-BQE5>].

4. See Jie Zong & Jeanne Batalova, *Central American Immigrants in the United States*, MIGRATION POL'Y INST. (Sept. 2, 2015), <https://www.migrationpolicy.org/article/central-american-immigrants-united-states-3> [<https://perma.cc/25HT-GZ2E>].

5. See CRISTINA EGUIZÁBAL ET AL., CRIME AND VIOLENCE IN CENTRAL AMERICA'S NORTHERN TRIANGLE 26-28 (Eric L. Olson ed., 2015), https://www.wilsoncenter.org/sites/default/files/FINAL%20PDF_CARSI%20REPORT_0.pdf [<https://perma.cc/SRK4-4CCJ>].

6. These include poverty, inequality, and unemployment. However, experts do not believe these explain the intensity and dynamic of violence experienced in Central America. See PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO INFORME REGIONAL DE DESARROLLO HUMANO 15 (2013), <http://www.undp.org/content/dam/rblac/img/ / -AL%20Informe%20completo.pdf> [<https://perma.cc/T3X6-AALS>]. The World Food Programme's and the International and Organization for Migration's new exploratory study begins to consider food insecurity, violence, and migration as interrelated phenomena, though there is little research into how they relate to one another. See HUNGER WITHOUT BORDERS: THE HIDDEN LINKS BETWEEN FOOD INSECURITY, VIOLENCE, AND MIGRATION IN THE NORTHERN TRIANGLE OF CENTRAL AMERICA 7 (2017), http://documents.wfp.org/stellent/groups/public/documents/liaison_offices/wfp277544.pdf?_ga=2.205403480.915191070.1509323661-1959975984.1509323661 [<https://perma.cc/39LU-FEY6>].

children to the United States has shined a light on an endemic problem of violence in their countries of origin.⁷ This violence is of proportions that surpass even the crimes that occurred in the 1970s and 1980s as a result of civil wars and extreme political instability.⁸ Gangs like MS-13⁹ and organized crime operations¹⁰ dominate and terrorize people in these countries.¹¹ They are able to do so because the State has failed to address the factors that contribute to the continued escalation of violence.¹² One factor, though certainly not the only one, is the failure of states to hold accountable those who kill, extort, or commit other crimes with impunity.¹³

The United States and other countries have attempted to address problems of endemic crime by supporting the efforts of the

7. See Muzaffar Chishti & Faye Hipsman, *Increased Central American Migration to the United States May Prove an Enduring Phenomenon*, MIGRATION POL'Y INSTITUTE (Feb. 18, 2016), <https://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon> [<https://perma.cc/PG7N-FF7G>]. The three Northern Triangle countries are among the top five countries with the highest murder rate in the world. See Rocio Cara Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN REL. (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle> [<https://perma.cc/6EXE-EH7Q>].

8. See Zong & Batalova, *supra* note 4.

9. See Saul Elbein, *Guatemalans Aren't Just Fleeing Gangs*, NEW REPUBLIC (July 13, 2014), <https://newrepublic.com/article/118675/child-migrants-guatemala-are-fleeing-more-just-gang-violence> [<https://perma.cc/XM7X-MFJJ>].

10. Narco-trafficking is one type of organized crime. As an example, in two extremely poor cities, Ixiguán and Tajumulco, Guatemala, there has been rampant poppy and marijuana cultivation. The Guatemalan government declared a state of emergency there in 2017 and destroyed massive amounts of the crops. See Whitmer Barrera, *Erradican Q3 Mil Millones de Amapola en Zona de Conflicto*, PRENSA LIBRE 1, 3 (2017), <https://www.pressreader.com/guatemala/prensa-libre/20170605/281556585792868> [<https://perma.cc/GR45-8JHG>].

11. See James Fredrick, *Gangs Drive Hondurans from Their Homes and Land*, U.N. REFUGEE AGENCY (Sept. 8, 2017), <http://www.unhcr.org/afr/news/stories/2017/9/59b10d4f4/gangs-drive-hondurans-homes-land.html> [<https://perma.cc/5A9J-XF9Z>] (explaining how thousands of Hondurans have been threatened with imminent death and forced to leave their homes to avoid being killed).

12. See *Armed Gangs Force 'Growing Number' to Flee North and South, in Central America*, U.N. NEWS SERV. (May 22, 2018), <http://www.refworld.org/docid/5b83c611a.html> [<https://perma.cc/W354-H4PG>]. The United Nations Refugee Agency reported that during 2017, there was a 58% increase in the number of people from vulnerable populations fleeing from forced recruitment into criminal gangs. *Id.*

13. See CLARE RIBANDO SEELKE, *GANGS IN CENTRAL AMERICA 11-12* (2014), <http://www.unhcr.org/en-us/585a987a4.pdf> [<https://perma.cc/RFB5-U4JC>]. There have been numerous efforts to stem gang violence and the criminality that it generates. See *id.* The causes are so complex, the effects so pervasive, and the cost so high that governments struggle to find an effective policy. See *id.* at 11-13 (examining *mano dura* (heavy-handed) policies, military involvement, and "peace zones," none of which have been particularly successful).

governments and civil society in Guatemala, El Salvador, and Honduras to reform weak institutions of justice.¹⁴ However, as the migrant caravan proves, these efforts have not been nearly enough to modify the corruption that exists between criminal elements, the police, and members of the political and judicial systems.¹⁵ Recently, Mexico's incoming foreign minister indicated that a commitment equivalent in scale to the Marshall Plan to rebuild Europe after World War II would be required to address the root causes of violence and migration.¹⁶ While monies funneled into strengthening the justice systems have produced some gains, such as funding additional courts in some areas, the outcomes are insufficient.¹⁷ The justice systems are widely viewed as corrupt, infiltrated by organized crime, bribery, and cronyism.¹⁸ Resources siphoned off because of corruption leave even less for law enforcement and justice initiatives that are already underfunded.¹⁹ These factors, coupled with the existence of an oligarchic structure of elites and corporate interests that dominate the vast majority of resources, help to explain why people leave.²⁰

In recent years, the United States has focused on preventing migration to this country by greater investments in border security.²¹ Recognizing that Mexico can play a large role in deterring immigration, the United States has also invested funds in Mexico's multi-faceted Merida Initiative, which has led to greater interdiction of immigrants at Mexico's Southern borders, in great part through

14. See *id.* at 17-19 (stating that both the State Department and the Department of Justice assisted in providing advice on policing, investigative and legal capacity, and intelligence capacity and that USAID had funded numerous projects in municipalities and communities).

15. See Victoria Sanford, *'Criminals'? Hardly. That's Who the Caravan Flees*, (Nov. 9, 2018) <https://www.nytimes.com/2018/11/09/opinion/trump-caravan-migrants-criminals.html> [perma.cc/8RQX-CRM5] (describing the endemic violence that exists on a patronage basis).

16. *Massive Effort Needed to Deal With Migration: Incoming Mexico Official*, (Nov. 27, 2018) <https://www.nytimes.com/reuters/2018/11/27/world/americas/27reuters-usa-immigration-ebrrad.html> [perma.cc/JWA9-A6MJ].

17. See Jan Hessbruegge & Carlos Fredy Ochoa García, *Mayan Law in Post-Conflict Guatemala*, in *CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES* 106 (Deborah H. Isser ed., 2011).

18. See *id.* at 100.

19. See Azam Ahmed, *Guatemala's Corruption Investigations Make Swift Strides*, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/26/world/americas/guatemalas-corruption-investigations-make-swift-strides.html> [https://perma.cc/WGK5-6V8E].

20. See Elbein, *supra* note 9.

21. See Adriana Beltrán, *What's in the Administration's 2017 Central America Aid Request?*, WASH. OFF. ON LATIN AM. (Mar. 2, 2016), <https://www.wola.org/analysis/whats-in-the-administrations-2017-central-america-aid-request/> [https://perma.cc/2BU9-JMQ3].

militarization of the borders.²² The Trump administration has tried to deter immigration by separating families and placing children in detention.²³ Notwithstanding a court order to reunify the families, some parents who have already been deported to Guatemala and Honduras are refusing reunification for fear that their children will be recruited by violent gangs.²⁴ Efforts to repress or interdict migration are proving ineffective because conditions in their countries of origin are so deadly.

The purpose of this article is to call attention to the existence of an alternative system of community self-governance and dispute resolution existing among indigenous communities that can and does provide justice and process in rural and underserved areas.²⁵ I argue that support for its existence, or its re-creation where it has been disrupted through war and discrimination, is an important facet of any plan to try and improve conditions in the migrants' countries of origin. In formal Spanish, this legal tradition is termed *derecho consuetudinario*, which can mean either "customary law" or "common law."²⁶ In the context of this Article, it means "customary law" or

22. See Lauren Carasik, *Brutal Borders, Mexico's Immigration Crackdown – and How the U.S. Funds It* (Nov. 4, 2015) <https://www.foreignaffairs.com/articles/mexico/2015-11-04/brutal-borders> [perma.cc/UQ96-84A4]; Bill Frelick, *We Pay Mexico to Catch Refugees. Kids Suffer*, (Apr. 20, 2016), <https://www.hrw.org/news/2016/04/20/we-pay-mexico-catch-refugees-kids-suffer> [perma.cc/Q7P2-P9SH] (discussing monies spent to increase Mexico's migration control capacity); Adam Isacson, Maureen Meyer & Hannah Smith, *Increased Enforcement at Mexico's Southern Border, An Update on Security, Migration and U.S. Assistance* (Nov. 2015), https://www.wola.org/files/WOLA_Increased_Enforcement_at_Mexico's_Southern_Border_Nov2015.pdf [perma.cc/3DFW-AXJH].

23. See Tom Hals, *Migrant Families Separated by U.S. Are Refusing Reunification Over Dangers: ACLU*, THOMSON REUTERS (Sept. 7, 2018), <https://www.reuters.com/article/us-usa-immigration/migrant-families-separated-by-u-s-are-refusing-reunification-over-dangers-aclu-idUSKCN1LN2QL> [<https://perma.cc/9EJA-VBTJ>].

24. See *id.*

25. See ASIES/OACHNUDH, ACCESO DE LOS PUEBLOS INDÍGENAS A LA JUSTICIA DESDE EL ENFOQUE DE DERECHOS HUMANOS: PERSPECTIVAS EN EL DERECHO INDÍGENA Y EN EL SISTEMA DE JUSTICIA OFICIAL 30-32 (2008) (explaining that there are large portions of the Guatemala where the state justice system is unable to provide access to justice efficiently and in a manner than serves the country's multicultural population); Rachel Sieder, *The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition*, 18 BROWN J. WORLD AFF. 103, 103 (2012) [hereinafter *Challenge of Indigenous Legal Systems*] (stating that informal justice systems exist in many countries with indigenous peoples).

26. See THOMAS L. WEST III, SPANISH–ENGLISH DICTIONARY OF LAW & BUSINESS (2d ed. 2012) [hereinafter SPANISH–ENGLISH DICTIONARY]; STEPHEN M. KAPLAN, WILEY'S ENGLISH/SPANISH & SPANISH/ENGLISH LEGAL DICTIONARY 406 (1993) (defining "derecho consuetudinario" as "common law, unwritten law,

“indigenous law.” Indigenous people also refer to this as *derecho propio* (our own law), *derecho comunitario* (community law), or indigenous justice.²⁷ These terms refer to a group of legal norms derived from traditional practices that are not written or codified and are distinct from the “positive” or “formal” law in a given country.²⁸

Northern Triangle countries do not formally recognize or support indigenous law.²⁹ I argue that they would benefit by recognizing it as part of their formal justice system, respecting it, and encouraging it to flourish.³⁰ Even where the tradition is no longer widespread and robust, as in Honduras and El Salvador, the dispute resolution traditions of indigenous groups offer promise in maintaining social order and doing justice in at least some types of cases. Foreign support for these countries should bolster indigenous law.

Indigenous law is part of a structure for self-governance, community involvement, and dispute resolution that minimizes the likelihood that members will depart from community norms.³¹ While it can and does deal with crime,³² its primary approach is preventive,

consuetudinary law”). It bears resemblance to both common law and customary law. See KAPLAN, *supra* note 26, at 406. It is based on customary norms, but because they evolve and are not based on a legal code, they also resemble common law. *See id.*

27. See, e.g., AMÍLCAR DE JESÚS POP AC, PLURALISMO JURÍDICO Y DERECHOS INDÍGENAS EN GUATEMALA 49 (2015) [hereinafter POP AC]. In Guatemala, it is often referred to as *Derecho Maya*, since so many indigenous people there are of Mayan descent. *See id.*

28. See Rodolfo Stavenhagen, *Derecho Consuetudinario Indígena en América Latina*, in ENTRE LA LEY Y LA COSTUMBRE: EL DERECHO CONSUECUDINARIO INDÍGENA EN AMÉRICA LATINA 29-30 (Rodolfo Stavenhagen & Diego Iturralde eds., 1990) [hereinafter *Derecho Consuetudinario*]. Another expert explains it as a form of customary law that “derives from social practices that the community concerned accepts as obligatory.” See T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 1 (2004).

29. See *infra* text accompanying notes 85-89. This statement, while true, must be qualified because each country has constitutional provisions, other laws, departments within the government, or other mechanisms that reference indigenous people and their traditions and indicate at least an intent to do more than what already exists. See Hessbruegge & García, *supra* note 17, at 99-105.

30. See *infra* text accompanying notes 70-73. A number of countries with indigenous populations in Latin America—as well as elsewhere in the world—do recognize indigenous law in one manner or another as part of their formal justice system. *See id.*

31. See *infra* text accompanying notes 66-68.

32. See *infra* text accompanying notes 196-269 and 480-487. Hessbruegge and García indicate that some indigenous communities refuse to deal with perpetrators who are members of street gangs because they do not consider them to be members of the community. See Hessbruegge & García, *supra* note 17, at 91. However, this does not preclude actions to prevent recruitment into gangs. See *infra* text accompanying notes 496-505.

pedagogical, conciliatory, and rehabilitative.³³ In indigenous systems, law is embedded in the social structure of society, not separate like in many formal justice systems.³⁴ Because it is an integral part of indigenous culture, its persistence is essential to the survival of indigenous populations in the Americas.³⁵ Indigenous law reflects values such as respect for one's elders, observance of community norms, and work obligations to benefit the group.³⁶ In areas of a country where the formal justice system and police are viewed with suspicion, it provides a social structure to guide community life and a ready vehicle for dispute resolution.³⁷ The rules and the process of law are informal, approachable, and understandable for people who may not be literate and may not speak or read Spanish.³⁸ The desired outcome in indigenous law is resolution of disputes and reconciliation among members of the community.³⁹ The process of addressing violations and sanctioning offenders is structured to teach others the rules and values of the community and to prevent further offenses.⁴⁰ This benefits the community as a whole.⁴¹

The informal justice systems that indigenous people use are highly effective—both in terms of time and costs—in handling disputes that arise between individuals, including in cases of serious crimes.⁴² These justice systems operate with high degrees of citizen participation and provide rapid resolutions of problems by means that

33. See Hessbruegge & García, *supra* note 17, at 95-96.

34. See *Derecho Consuetudinario*, *supra* note 28, at 30.

35. See *id.* at 35-36.

36. See Raquel Yrigoyen Fajardo, *The Constitutional Recognition of Indigenous Law in Andean Countries*, in *THE CHALLENGE OF DIVERSITY, INDIGENOUS PEOPLES AND REFORM OF THE STATE IN LATIN AMERICA* 203 (Willem Assies, Gemma van der Haar, & André Hoekema eds., 2000) [hereafter *Constitutional Recognition of Indigenous Law*] (explaining that the classic model of authority systems found in Andean countries as well as in Mesoamerican areas is the cargo-system). Everyone is expected to assume positions in the community throughout their life cycle, so that eventually one would be prepared to assume responsibility as a respected community elder. See *id.*

37. See POP AC, *supra* note 27, at 59-72 (identifying the principles of indigenous law as a justice system and the process by which disputes are resolved).

38. See Hessbruegge & García, *supra* note 17, at 90 (explaining that proceedings are completely oral and the parties do not have to be literate in the Spanish language).

39. See *id.* at 95.

40. See *id.*

41. See *id.*

42. See *id.* at 90. Mayan law does not distinguish between torts and crimes. See *id.* The jurisdiction of the indigenous authorities is wider in civil matters than in what we know as crimes. See *id.* at 91. Indigenous authorities often defer to state authorities on certain serious criminal matters. See *id.*

participants view as fair, accessible, and effective.⁴³ In some cases, the use of indigenous law has averted self-help remedies such as lynching, which community members have undertaken because they lack confidence that the justice system can adequately respond.⁴⁴ Exactly how effective indigenous justice could be at handling some of the intractable crime problems that Northern Triangle countries face is a matter for debate.⁴⁵ Certainly in areas with large indigenous populations, indigenous justice has enormous potential to mitigate a society's violent influences and to resolve and heal conflicts. It can also resolve problems before they erupt. The benefits could extend even further if indigenous justice models are expanded under the guidance of indigenous leaders into restorative justice options available to indigenous and non-indigenous people within a country.⁴⁶

To begin the discussion, I provide an overview of indigenous law generally and in Central America with particular emphasis on Guatemala.⁴⁷ As I will explain, Guatemala is the easiest case for the strengthening of indigenous law.⁴⁸ Honduras⁴⁹ and El Salvador⁵⁰ are

43. *Id.* at 90 (“The legitimacy of Mayan law in the eyes of the rural indigenous population, therefore, follows from its accessibility and effectiveness.”).

44. See Danilo Valladares, *GUATEMALA: Lynching, Another Face of Impunity*, GLOBAL ISSUES (Dec. 23, 2009), www.globalissues.org/news/2009/12/23/4034 [<https://perma.cc/9L58-TSSY>]; *Five Burnt Alive in Guatemala Lynching*, BBC NEWS (Nov. 29, 2000), <http://news.bbc.co.uk/2/hi/681mericas/1046491.stm> [<https://perma.cc/C243-8EYY>].

45. See *infra* text accompanying notes 435-495.

46. See *infra* text accompanying notes 475-495.

47. See *infra* Part I.

48. See *infra* Part II.

49. See CULTURAL SURVIVAL, OBSERVATORIO DE DERECHOS HUMANOS DE LOS PUEBLOS INDIGENAS Y NEGROS DE HONDURAS (Sept. 15, 2014), https://www.culturalsurvival.org/sites/default/files/media/upr_honduras_0.pdf [<https://perma.cc/W8E7-GQD3>]. In Honduras, approximately 20% of the population is indigenous or descendants of African slaves. *Id.* Special legislation governing indigenous and tribal populations protects these populations. See *id.* However, Honduras has delayed compliance with ILO 169, which it ratified many years ago, and has no coordination between indigenous and tribal justice and the official legal system. See *id.*

50. See Guillermo Padilla Rubiano, *Coordinación Entre Sistemas Legales en CentroAmérica*, in LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS EN LA CONSTRUCCIÓN DEL PLURALISMO JURÍDICO EN AMÉRICA LATINA 109-10 (Eddie Córdor Chuquiruna ed., 2011), http://www.kas.de/wf/doc/kas_29169-1522-1-30.pdf?111020233423 [<https://perma.cc/QMH7-BS7N>]. In El Salvador, 30,000 indigenous persons and peasants were assassinated during the 1932 dictatorship of General Maximiliano Hernández Martínez, leading the remaining indigenous persons to try to hide their identities to survive. *Id.* However, their identities began to re-emerge in the 1970s and 1980s following the signing of the peace agreements, and today, indigenous organizations and people are finding their voices. See *id.*

harder because of historical events that reduced indigenous populations and caused them to lose or hide their identities. I then examine how the general attributes of indigenous law satisfy the attributes of fair and effective legal systems under theories of restorative and procedural justice.⁵¹ Of course, I will address the concerns such as whether indigenous law comports with modern values and international obligations to observe human rights and to protect the rights of women and children.⁵² Finally, I consider the future of indigenous justice, particularly in light of the diffusion of indigenous populations through migration or disruption and its applicability to very difficult problems like gangs and corporate exploitation.⁵³

I am not under the illusion that indigenous law will be a panacea for the social and legal problems that pervade Guatemala, El Salvador, and Honduras. Nor do I anticipate that it should replace the formal justice system or that it will prevent migration; there are too many other causes. However, I believe that indigenous law is a viable alternative to ineffective and corrupt justice systems, and that its social structure, values, and dispute resolution systems can be an enormous force for good if they can find support in the legal structure of the State and acceptance—or even tolerance—among the non-indigenous people.

I. INDIGENOUS LAW IN CONTEXT

Indigenous law as applied in many Latin American countries is a type of customary law, part of a “vast array of practices that vary from community to community”⁵⁴ throughout the world.⁵⁵ Depending

Nonetheless, the national census reports only 0.2% of Salvadoreños descend from indigenous people while other sources place it at 10-12% of the population. *Id.*

51. See *infra* Part III.

52. See *infra* text accompanying notes 344-433.

53. See *infra* Part V (detailing the future of indigenous justice). These are problems that the formal justice system finds very difficult to address or will not address. See Julie Davies, *The Impact of Mining on Self-Determination in Rural Guatemalan Communities*, in FROM EXTRACTION TO EMANCIPATION, DEVELOPMENT REIMAGINED 153-67 (Raquel Aldana & Steven W. Bender eds., 2018) [hereafter *Impact of Mining*]. Despite international and domestic protections of indigenous people’s lands and their rights of self-determination, governments often do little to enforce these rights from exploitation by large multinational corporations. See *id.*

54. See DEBORAH H. ISSER, CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR TORN SOCIETIES 7 (2011).

55. African customary law has received the most attention, but it also exists among many other groups of people throughout the world. See generally THE FUTURE OF AFRICAN CUSTOMARY LAW (Jeanmarie Fenrich, Paolo Galizzi, & Tracy E. Higgins eds., 2011); FRANCIS M. DENG, CUSTOMARY LAW IN THE MODERN WORLD: THE

on the formal legal system in place in a country, customary law supplements—or at times operates in lieu of—state laws.⁵⁶ This Section describes customary law generally and then focuses on its applicability in Latin America.

A. Customary Law Generally

Because customary law is a product of the practices of groups of people linked by a common history and tradition, “[t]here is no such thing as a ‘system’ of customary law, there is a flexible pool of shared values, ideas about right and wrong, and acceptable sources of morality that are commonly acknowledged and rooted in local cultural orientations.”⁵⁷ In societies where law is formal—stated in codes, statutes, or common law—it is relatively easy to determine what falls within the ambit of the legal order.⁵⁸ In societies that use customary law, it is more difficult to determine this, but as a general matter, any community will have rules and procedures that govern public behavior, internal order of the community, rights and obligations of the members, access to resources, interchanges of goods or wealth, wrongs and their remedies, dispute resolution, and obligations to the community.⁵⁹

The dispute resolution processes aim to resolve conflict and restore harmony so that the group may continue to coexist harmoniously.⁶⁰ Dispute resolution is informal with respected

CROSSFIRE OF SUDAN’S WAR OF IDENTITIES (2010); A.A. KOLAJO, CUSTOMARY LAW IN NIGERIA THROUGH THE CASES (2000).

56. See, e.g., GORDON R. WOODMAN, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 21-25 (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., 2011) (rejecting the contention that state laws have exclusive legal authority and describing the relationship between customary law and formal law as competitive but not in direct opposition. Woodman notes that “[g]enerally customary laws give institutional recognition to state laws in that customary law administrators and rulers accept that state institutions control certain processes. There is little normative recognition of state law, because customary institutions decline to deal with matters where claims are made or opposed under state law.” *Id.* at 25.).

57. See Barbara Oomen, *Legal Syncretism in Sekhukhune*, in THE DYNAMICS OF POWER AND THE RULE OF LAW 174 (Wim van Binsbergen ed., 2003).

58. See *Derecho Consuetudinario*, *supra* note 28, at 30-31. As Stavenhagen points out, in modern society, there is almost no sphere of human activity that is not governed in some manner by laws and regulations. Courts and administrative offices tell us the reach and limits of the law. *See id.*

59. *See id.* at 31.

60. *See id.* at 41.

community members as arbiters.⁶¹ Proceedings occur in the languages of the parties, which often is not the case in formal justice systems.⁶² Unlike formal legal systems that exclude evidence for reasons of relevance or in deference to legal norms, customary systems allow many members of the community to talk, discuss, and serve as witnesses with no apparent filtering.⁶³ Matters will typically be resolved over a course of days in close proximity to the event in issue⁶⁴ typically at no cost to the parties and with no need for attorneys or even representatives.⁶⁵ In keeping with the goals of reconciling an individual to the group and reintegrating him or her into society, any sanctions imposed are not “punishment” and are often different than we are accustomed to seeing in criminal cases.⁶⁶ Because incarceration is disfavored, the family of an accused will not suffer because of the loss of a provider.

Customary law is constantly evolving—perhaps even more rapidly than law in some formal systems. Stavenhagen explains that nothing could be more incorrect than to conceive of customary law as a group of norms that remain unchanged for centuries.⁶⁷ Customary law is influenced by the law around it. For example, in countries where it becomes subordinate to a dominant legal system—such as one imposed by a colonial power—it develops and changes in response to the dominant system.⁶⁸ It has also been influenced by international norms, particularly as indigenous people have come to appreciate that international law is useful in contesting the activities of states or corporate interests.⁶⁹ Because customary systems are

61. See BENNETT, *supra* note 28, at 2. Because customary law is overwhelmingly oral, it does not require literacy on the part of the participants. See *id.*

62. See U.N. WOMEN, INFORMAL JUSTICE SYSTEMS: CHARTING A COURSE FOR HUMAN RIGHTS-BASED ENGAGEMENT 76 (Danish Inst. for Human Rights ed., 2013) [hereinafter U.N. WOMEN], <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2013/1/informal-justice-systems-charting-a-course-for-human-rights-based-engagement.pdf?la=en&vs=5500> [<https://perma.cc/AZP7-PJT3>].

63. See Hessbruegge & García, *supra* note 17, at 86.

64. See U.N. WOMEN, *supra* note 62, at 77.

65. See *id.* at 76-77.

66. See Bruce L. Benson, *Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order Without State Coercion*, 9 J. LIBERTARIAN STUD. 25, 30 (1990).

67. See *Derecho Consuetudinario*, *supra* note 28, at 34.

68. See *id.*

69. See, e.g., *Impact of Mining*, *supra* note 53, 157-64 (discussing how indigenous communities have used international law obtained rulings from the Inter-American court to combat extractive industries seeking to exploit their lands without the required consultation and assent).

“embedded . . . in the local social context, they are contested spaces subject to continuous influence and change.”⁷⁰ In other words, the law that applied at the time of the Spanish Conquest is not what is used now in Latin America, though there are some aspects that remain the same.

People often prefer to utilize customary traditions to resolve disputes because they are considered more legitimate and trustworthy than the formal justice system.⁷¹ Participation in dispute resolution using one’s customary practices may also be viewed as a means of reaffirming and reasserting one’s cultural identity.⁷² This is particularly meaningful in countries where indigenous people have been subject to discrimination and persecution since colonial times under the authority vested in formal legal systems and leaders who they do not view as representing their interests.⁷³

B. Indigenous Justice in Central and South America

Many countries in Central and South America have large indigenous populations utilizing indigenous law.⁷⁴ There is great variance in their approaches to legal recognition and integration of indigenous justice.⁷⁵ The legal structures that exist came to the forefront in the aftermath of armed conflicts in some countries and in the wake of much greater international awareness of the marginalization and exclusion of indigenous people generally.⁷⁶

Countries in the Andean region of South America were among the first to adopt constitutional provisions that recognize indigenous justice and the right of indigenous people to administer justice in their own territories.⁷⁷ Ecuador and Bolivia, for example, amended their

70. ISSER, *supra* note 54, at 7.

71. See U.N. WOMEN, *supra* note 62, at 10.

72. See *id.* at 39.

73. See Rachel Sieder, *Building Mayan Authority and Autonomy: The “Recovery” of Indigenous Law in Post-Peace Guatemala*, in *STUDIES IN LAW, POLITICS, AND SOCIETY* 61 (Austin Sarat ed., 2011) [hereinafter “*Recovery*” of *Indigenous Law*] (explaining revitalization of indigenous law on three levels: as an attempt to reconstruct community norms of coexistence after the armed conflict; as a means of responding to high levels of insecurity, crime, and violence; and as part of a broader highly politicized struggle for ethnic identity).

74. See *Challenge of Indigenous Legal Systems*, *supra* note 25, at 103.

75. See *Constitutional Recognition of Indigenous Law*, *supra* note 36, at 198-99 (Willem Assies, Gemma van der Haar, & André J. Hoekema, eds. 1998); see also *infra* Section I.B (providing descriptions of different approaches in certain countries).

76. See *Challenge of Indigenous Legal Systems*, *supra* note 25, at 104.

77. See *id.* at 103. Colombia was the first country to recognize legal pluralism in 1991, followed by Peru, Bolivia, Ecuador, and Venezuela. See *id.*

constitutions in 2008 and 2009 to recognize ethnic pluralism and “plurinationalism.”⁷⁸ International human rights norms as embodied in a variety of agreements ratified by most of the countries in Latin America have had a large influence on these constitutional amendments.⁷⁹ The International Labor Organization Convention on Indigenous and Tribal Peoples (ILO 169)⁸⁰ and the United Nations Declaration on the Rights of Indigenous Peoples have been particularly important.⁸¹ However, even in the countries on the vanguard of protection of the rights of indigenous persons (and their justice systems), the legal structures take many forms,⁸² and sometimes implementation lags behind the law.⁸³

The countries in Central America, though parties to international agreements affecting the rights of indigenous persons, have not embraced indigenous law to the same extent as the Andean countries.⁸⁴ They have accepted virtually all of the same international norms as countries in South America, such as the American Declaration of the Rights and Duties of Man,⁸⁵ the American Convention on Human

78. See *id.* A legal system is pluralistic in the juristic sense when the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system. This situation creates a range of complex legal problems, such as the need to decide when a subgroup’s law applies to a particular transaction or conflict, to what group particular individuals belong, how a person can change which law is applicable to him or her (educated Africans in the colonial era, for example, chafed at being judged under African law rather than European law), choice of law rules for issues between people of different groups, and determinations of which subjects, particularly family law, and in which geographical areas subgroup law should be accepted. It is often difficult to determine what the subgroup’s rules are, particularly when they are not part of a written tradition. Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc’y REV. 869, 871 (1988) (internal citations omitted).

79. See *Challenge of Indigenous Legal Systems*, *supra* note 25, at 104.

80. See Convention for Indigenous and Tribal Peoples No. 169, June 27, 1989, 76 I.L.C. 169.

81. G.A. Res. 61/295, U.N. Doc. A/RES/61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

82. See *Challenge of Indigenous Legal Systems*, *supra* note 25, at 105.

83. See Horst Schönbohm, *El Pluralismo Jurídico—Una Comparación a Nivel de América Latina*, in *LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS EN LA CONSTRUCCIÓN DEL PLURALISMO JURÍDICO EN AMÉRICA LATINA* 35 (Konrad Adenauer Stiftung ed., 2011).

84. See generally Rubiano, *supra* note 50. Rubiano discusses Central American nations that minimize their indigenous populations and have not taken steps to legislate as their ratification of international agreements would indicate they should, with Costa Rica being identified as the most proactive despite its tiny indigenous population. *Id.* at 118.

85. See *id.* at 109; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States

Rights,⁸⁶ and the jurisdiction of the Inter-American Court of Human Rights.⁸⁷ The decisions of the Inter-American Court on issues regarding rights of indigenous people and, in particular, their right to effective participation and consultation,⁸⁸ have made these rights part of the common legal culture and tradition in Central America.⁸⁹ In addition, all of the countries have accepted various United Nations declarations and conventions dealing with human rights, indigenous people, and non-discrimination.⁹⁰

Indigenous people are recognized in the constitutions of Guatemala⁹¹ and El Salvador.⁹² Honduras does not specifically recognize indigenous people in the Constitution, though Article 346 in the Chapter on Agrarian Reforms imposes a duty to protect the rights and interests of indigenous communities with regard to lands and forests.⁹³ Honduras created a special unit of the Attorney

(1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc. 6 rev. 1 at 17 (1992).

86. See Rubiano, *supra* note 50, at 109; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 1.

87. See Rubiano, *supra* note 50, at 109.

88. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

89. This is because the countries have accepted the Convention and the jurisdiction of the court. Article 46 of the Constitution of Guatemala, for example, states that “[t]he general principle is established that in the field of human rights treaties and agreements approved and ratified by Guatemala have precedence over municipal law.” CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [CN.], Nov. 17, 1993, § 3, art. 66-70.

90. See Rubiano, *supra* note 50, at 109. These include the G.A. Res. 61/295, U.N. Doc. A/RES/61/295 U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); International Convention on the Elimination of All Forms of Racial Discrimination, Jan 4, 1969, 660 U.N.T.S. 195; and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3.

91. Section 3 of Guatemala’s Constitution deals with indigenous communities. Its various articles deal with protection of ethnic groups, indigenous agriculture, and lands. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, *supra* note 89, § 3, art. 66-70.

92. See, e.g., Jorge E. Lemus, *Los Pueblos Salvadoreños Siempre Han Existido*, EL FARO.NET (June 23, 2014), https://elfaro.net/es/201406/el_agora/15560/Los-pueblos-salvadore%C3%B1os-ind%C3%ADgenas-siempre-han-existido.htm?st-full_text=all&tpl=11# [<https://perma.cc/A4WK-33JZ>].

93. See CONSTITUCIÓN POLITICA DE LA REPUBLICA DE HONDURAS [C.H.] [CONSTITUTION], Jan. 11, 1982, art. 346. The new Article 63, which reads “El Salvador recognizes Indigenous Peoples and will adopt policies for the purpose of maintaining and developing their ethnic and cultural identities, cosmovision, values, and spirituality,” was adopted in 2014. CONSTITUTION OF THE REPUBLIC OF EL SALVADOR, art. 63 (1983).

General's office to protect access to justice for indigenous peoples collectively and as individuals.⁹⁴ Guatemala's Code of Criminal Procedure recognizes a defendant's right to an interpreter, and a 2003 law requires that public services be available in local indigenous languages.⁹⁵

Why, then, are indigenous people on the margins of the political, economic, and legal systems in these countries? Indigenous people are subject to discrimination. When he served as United Nations Special Rapporteur on Indigenous People, Rodolfo Stavenhagen identified four types of discrimination present in Guatemala: legal, structural, institutional, and interpersonal.⁹⁶ In the past, persecution and murder of indigenous people in Honduras and El Salvador led people to hide indigenous identity, making preservation of culture, resources, and inclusion all the more difficult to achieve.⁹⁷ In all three countries, the governments minimize the presence and needs of indigenous people by undercounting them.⁹⁸ El Salvador's census reported its indigenous population at 0.2% despite another study estimating it to be between 10–12% of the population.⁹⁹ The country projects a homogenous culture as if indigenous people no longer exist.¹⁰⁰ Honduras likewise projects a non-indigenous image even though it has seven distinct groups of indigenous peoples as well as two ethnic groups of Afro-Caribbean descent.¹⁰¹ Guatemala's indigenous people are estimated to

94. See *Diagnóstico Sobre la Situación de los Derechos Humanos de los Pueblos Indígenas de América Central Tomo II*, NACIONES UNIDAS DERECHOS HUMANOS 290 (2011), <http://www.oacnudh.org/wp-content/uploads/2012/10/TOMO-2.pdf> [<https://perma.cc/X7MN-2GR6>].

95. See Hessbruegge & García, *supra* note 17, at 103.

96. See Rodolfo Stavenhagen (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Addendum on Mission to Guatemala*, ¶¶ 15-20, U.N. Doc. E/CN.4/2003/90/Add.2 (Feb. 24, 2003).

97. See, e.g., CULTURAL SURVIVAL, *supra* note 49, at 6-8; see generally Rubiano, *supra* note 50.

98. See *Nota Técnica de País Sobre Cuestiones de los Pueblos Indígenas*, CENTRO PARA LA AUTONOMÍA Y DESARROLLO DE LOS PUEBLOS INDÍGENAS (2017) [hereinafter CADP], https://www.ifad.org/documents/38714170/40258424/honduras_ctn.pdf/32584900-04b1-4371-8a63-0a33133702cf [<https://perma.cc/U85Q-ZQVF>].

99. See *id.* (noting that indigenous organizations and academics estimate the population at between 12–17%).

100. See Rubiano, *supra* note 50, at 110. There are many organizations of indigenous people as well as projects, often sponsored by international organizations, that benefit indigenous populations in El Salvador. See CADP, *supra* note 98, at 13-14.

101. See PUEBLOS INDÍGENAS EN HONDURAS, UNIDAD COORDINADORA PUEBLOS INDÍGENAS EN AMÉRICA LATINA Y EL CARIBE 2-3 (Nov. 2010). These communities are distributed across the country. Only the Moskitia still speak their own language. See *id.* Indigenous persons total approximately 7-8% of the population

be between 50% and 60% of the population,¹⁰² but Guatemala has not conducted an official census since 2002.¹⁰³ In 2012, Guatemala's own statistics office reported that indigenous persons were only 40% of the population.¹⁰⁴ While Guatemala's indigenous people certainly cannot be overlooked, underestimation of their numbers minimizes their influence.¹⁰⁵

Another indication that indigenous populations are marginalized is that, despite the ratification of international declarations and conventions, implementation lags.¹⁰⁶ For example, Honduras ratified ILO 169 in 1995 but allowed fifteen years to pass before proposing legislation that would recognize indigenous and Afro-descendant systems of justice.¹⁰⁷ Guatemala lacks any structure for prior consultations on issues regarding the resources of indigenous people—as it agreed to when it ratified ILO 169—despite repeated

and many live in rural mountainous areas that are very poor and suffer from high rates of illiteracy. *Id.*

102. See *Indigenous Peoples in Guatemala*, INT'L WORKING GRP. FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/regions/latin-america/guatemala> [https://perma.cc/82WW-TNJA] (last visited Nov. 5, 2018).

103. See CENSOS NACIONALES XI DE POBLACIÓN Y VI DE HABITACIÓN 2002, INSTITUTO NACIONAL DE ESTADÍSTICAS, CARACTERÍSTICAS DE LA POBLACIÓN Y DE LOS LOCALES DE HABITACIÓN CENSADOS (2002) [hereinafter National Census of Guatemala 2002], <https://www.ine.gob.gt/sistema/uploads/2014/02/20/jZqeGe1H9WdUDngYXkWt3GIhUUQCukeg.pdf> [https://perma.cc/UJJ3-PM38].

104. See CARACTERIZACIÓN ESTADÍSTICA: REPÚBLICA DE GUATEMALA 2012, INSTITUTO NACIONAL DE ESTADÍSTICAS 13 (Nov. 2013), <http://www.ine.gob.gt/sistema/uploads/2014/02/26/5eTCcFIHERnaNveUmm3iabXHaKgXtw0C.pdf> [https://perma.cc/A2C8-RS9P].

105. See MINUGUA, *Verification Report: The Indigenous People of Guatemala: Overcoming Discrimination in the Framework of the Peace Agreements*, WIKISOURCE (Sept. 2001), https://en.wikisource.org/wiki/The_indigenous_peoples_of_Guatemala:_Overcoming_discrimination_in_the_framework_of_the_Peace_Agreements [https://perma.cc/3FV4-6FGP].

106. See U.N. Special Rapporteur on the Rights of Indigenous Peoples, *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Honduras*, ¶ 9, U.N. Doc. A/HRC/33/442/Add.2 (July 21, 2016) [hereinafter *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Honduras*].

107. See Rubiano, *supra* note 50, at 116-17; see also *Ratifications of CI69—Indigenous and Tribal Peoples Convention 1989 (No. 169)*, INT'L LAB. ORG. (Sept. 5, 1991), http://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 [https://perma.cc/EBM6-T9E2]; *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Honduras*, *supra* note 106 (“Honduras has ratified the main international and regional human rights treaties, in addition to ILO Convention No. 169 (in 1995), and voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples. However, there is no secondary legislation to ensure that the rights enshrined in these international instruments are actually implemented.”).

entreaties from its own Constitutional Court to develop a process.¹⁰⁸ Simply put, the governments do not see protection of indigenous people, their lands, or ways of life as a compelling imperative.¹⁰⁹

II. AN IN-DEPTH LOOK AT INDIGENOUS LAW IN GUATEMALA

Guatemala is an ideal venue to study indigenous law because of the large number of indigenous people and subgroups, the persistence of indigenous law in large parts of the country, and the largely undeveloped legal framework to navigate highly different types of justice.¹¹⁰ The history of indigenous people in Guatemala, and particularly the impact of the thirty-six year armed conflict, is important to understanding the role and viability of indigenous law.¹¹¹ This Section will review the landscape of the formal legal system as it pertains to indigenous law and finally will present an in-depth explanation of it and some examples.¹¹²

A. A Brief History of Indigenous Experience

Indigenous people in Guatemala utilize *derecho indígena* to varying degrees in the eight departments¹¹³ of the country where Mayan descendants make up a majority of the population.¹¹⁴ Guatemala's indigenous people are diverse, speaking at least twenty-one languages of Mayan origin in addition to Xinca and Garífuna.¹¹⁵ Because of persistent discrimination since colonial times, many live in remote communities in the Central Highlands and other discrete and often less-accessible parts of the country.¹¹⁶ The Mayans retreated

108. See *Expediente*, CORTE DE CONSTITUCIONALIDAD (Feb. 28, 2013), <https://gt.vlex.com/vid/-470266898> [<https://perma.cc/3AA9-4NEK>].

109. See MINUGUA, *supra* note 105.

110. See *id.*

111. See *id.*

112. See *id.*

113. Departments are the equivalent of states. There are twenty-two departments in Guatemala. See *Departments of Guatemala 2010*, GIFEX, https://www.gifex.com/detail-en/2011-11-16-14908/Departments_of_Guatemala_2010.html [perma.cc/8TL3-DPKJ].

114. See *id.* The most indigenous departments are Alta Vera Paz, Sololá, Totonicapán, and Quiché, followed by Chimaltenango, Huehuetenango, Quetzaltenango, Suchitepéquez, and Baja Verapaz. See *id.*

115. See MAUREEN E. SHEA, *CULTURE AND CUSTOMS OF GUATEMALA* 21 (2000).

116. See *id.* at 20.

there during the Colonial period in an effort to avoid contact with Spaniards and still remain there to a large extent.¹¹⁷

During the post-Independence era, both liberal and conservative governments took indigenous lands, enforced harsh peonage laws causing indigenous people to become semi-enslaved, and continued a practice of encouraging segregation of indigenous from *ladinos*.¹¹⁸ During the dictatorship of Jorge Ubico in 1931-1944, Mayans were exploited as a labor force to bolster the Guatemalan economy.¹¹⁹ They were forced to carry a passbook showing that they had worked 100 to 150 days on public projects or on estates of the elite, and if they could not, they were jailed.¹²⁰ Ubico removed the authority of the local Mayan mayors, who were largely responsible for administration of indigenous justice, appointing instead administrators who were usually from Guatemala City.¹²¹ At long last, Ubico was overthrown, and following two years of government by a military junta, Guatemala had a new President, Juan José Arévalo, and a very progressive Constitution.¹²²

Arévalo's successor, Jacobo Árbenz, attempted to encourage land reform so that lands that were not farmed or in excess of a certain acreage would eventually be redistributed to landless indigenous people to give them more opportunities.¹²³ Árbenz's proposal incensed wealthy landowners including the United Fruit Company.¹²⁴ The United Fruit Company led a campaign in the United States to label Árbenz as a communist.¹²⁵ A CIA-led coup overthrew the Árbenz government in 1954.¹²⁶ A series of dictators assumed power, and an armed conflict between the government and resisters began.¹²⁷

Indigenous populations suffered terribly during the Thirty-Six-Year Civil War.¹²⁸ After the overthrow of Árbenz, a group of *ladino* rebels headed out to the sparsely populated indigenous lands to

117. *See id.* at 6.

118. People who do not identify as indigenous are called *ladinos*. *See id.* at xiii. Most Guatemalans have a mix of Mayan and Spanish blood, so identity is more ethnic than racial. *See id.* However, various governments encouraged segregation in the post-Colonial era, and *ladinos* were considered superior to *indígenas*. *See id.* at 7-8.

119. *See id.* at 9.

120. *See id.*

121. *See id.* at 9-10.

122. *See id.* at 11.

123. *See id.*

124. *See id.* at 12.

125. *See id.* at 13.

126. *See id.*

127. *See id.* at 14.

128. *See id.*

organize a resistance.¹²⁹ Although Mayans were not initially involved in the conflict, they became a focal point of the government's efforts to suppress "subversives."¹³⁰ The military-led government commenced a scorched earth campaign, causing the deaths of at least 100,000 Mayans, obliteration of villages, rapes, murders, and the displacement of at least a million people—some to other countries and others to more remote places within the country.¹³¹ As the civil war dragged on, two new guerilla groups emerged in the 1970s, and, though not predominantly Mayan, the government initiated a counterinsurgency campaign that led to what many view as a genocide of indigenous people under the leadership of General Efraín Ríos Montt.¹³² Many thousands more indigenous people were killed and internally displaced, or they fled to Mexico.¹³³

During the counterinsurgency, the government rounded up indigenous people and forced them into "model villages" for indoctrination on the virtues of the military.¹³⁴ The military also set up army garrisons in the major villages to surveil the surrounding towns and to force people to relocate.¹³⁵ Perhaps the most devious developments were the Civil Self-Defense Patrols, which forced village males to patrol in search of subversives and report suspicious activities.¹³⁶ If a civil patrol member was not reporting enough, the military forced his family to accuse him of subversion.¹³⁷ The system pitted people against one another, fracturing the traditional ties of

129. *See id.*

130. *See id.* The government, assisted by the CIA, described its opponents as communists, who were subversive in their efforts to oppose the government. *See id.* In fact, anyone who opposed the government policies was deemed subversive. *See id.*

131. *See id.*

132. *See* SHEA, *supra* note 115, at 16; BETSY KONEFAL, FOR EVERY INDIO WHO FALLS: A HISTORY OF MAYA ACTIVISM IN GUATEMALA, 1960-1990 131 (2010) (quoting a statement by the Guatemalan Council of Bishops in May 1982). Ríos Montt later became President of Guatemala. *See* SHEA, *supra* note 115, at 16. He was convicted of genocide in 2013, but the conviction was overturned. *See* Sophia Menchu, *Genocide Trial Against Ex-Guatemalan Dictator to Restart*, REUTERS (Oct. 11, 2017), <https://www.reuters.com/article/us-guatemala-trial/genocide-trial-against-ex-guatemalan-dictator-rios-montt-to-restart-idUSKBN1CG2PR> [<https://perma.cc/GLY5-ATET>]. He is to be retried in a tribunal of the Supreme Court. *See id.*

133. *See* MARIA CRISTINA GARCIA, SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA 45 (2006). Mayan people fled to Mexico from the departments where the government had targeted the counterinsurgency campaign. *See id.* at 44. Entire families streamed into Mexico, beginning in the 1980s. *See id.*

134. SHEA, *supra* note 115, at 18.

135. *See id.*

136. *See id.*

137. *See id.*

villages and families.¹³⁸ Fundamentalist preachers entered towns with the goal of “de-Indianiz[ing]” the *indígenas*.¹³⁹ The Guatemala that emerged from the armed conflict was traumatized and divided.¹⁴⁰ Its indigenous people had borne the worst of the horrifying brutality.

During the conflict, Mayans had participated in both the *ladino*-led insurgency and in movements for indigenous rights; these groups were often in conflict with one another.¹⁴¹ According to one author, the divisions among Mayans became “exacerbated through a peace process where one form of activism was sanctified and supported and another form, in the eyes of the state and army, remained suspect.”¹⁴² For a brief period, indigenous groups united under an umbrella organization, Coordinación de Organizaciones del Pueblo Maya de Guatemala (COPMAGUA), but this unity shattered after the failure of a referendum that would have ensured administration of justice in accordance with the peace agreement pledge to administer “justice in accordance with . . . [Guatemala’s] pluricultural and multilingual nature.”¹⁴³ Guatemala’s powerful right-wing groups, including business leaders and evangelical sects, organized a strong opposition to formal recognition of indigenous rights.¹⁴⁴ Among other things, they alleged that indigenous law was anti-Christian, that it would promote disputes over precolonial land tenure, and that it would cause “reverse discrimination” against *ladinos*.¹⁴⁵ Eighteen percent of the electorate voted, and the reforms were rejected.¹⁴⁶ Because of this defeat, the reforms agreed to in the peace process were not fully implemented.¹⁴⁷

The vibrancy of indigenous law in Guatemala today depends to some degree on the extent of the disruption that occurred during the armed conflict and on whether efforts have been made in the

138. See *id.*

139. See *id.*

140. See *id.*

141. KONEFAL, *supra* note 132, at 144-46. In fact, there were many divisions among the various Mayan groups, some of whom urged the formation of a Mayan nation. See *id.* at 147-50.

142. *Id.* at 145.

143. Hessbruegge & García, *supra* note 17, at 83-84. Had the referendum passed it would have included the right to be subject to customary law as well as protections for communally held lands. See Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT’L J. CONST. L. 211, 218 (2007).

144. See Hessbruegge & García, *supra* note 17, at 85.

145. *Id.*; see also Sieder, *supra* note 143, at 219.

146. See Sieder, *supra* note 143, at 219; see also, KAY B. WARREN, *Voting Against Indigenous Rights in Guatemala: Lessons from the 1999 Referendum*, in INDIGENOUS MOVEMENTS, SELF-REPRESENTATION, AND THE STATE IN LATIN AMERICA 149 (Kay B. Warren & Jean E. Jackson eds., 2002).

147. See “Recovery” of *Indigenous Law*, *supra* note 73, at 45.

community to rebuild and revitalize it.¹⁴⁸ In their research, Hessbruegge and García report that Mayan systems of governance were seriously disrupted in the areas that suffered the worst atrocities.¹⁴⁹ The displacement of people, the suspicions among communities who were subject to the Civilian Self-Defense Patrol, the deaths of community leaders, and many other factors contributed.¹⁵⁰ However, “[t]o an astounding degree, displaced Mayans managed to preserve their own culture.”¹⁵¹

B. Guatemalan Law Pertaining to Indigenous People

As noted above, throughout the peace process, Guatemala committed itself to reforms that would promote the participation of indigenous people in all phases of life—economic, political, and legal.¹⁵² On the heels of the peace process, Guatemala recognized collective economic, social, and cultural rights of indigenous people when it ratified ILO 169 and the United Nations Declaration on the Rights of Indigenous People.¹⁵³ These agreements are considered part of the law of Guatemala and take precedence over internal laws.¹⁵⁴ The Guatemalan Constitution recognizes the right of all people to cultural identity in accordance with values, language, customs.¹⁵⁵ In addition, a section on indigenous people recognizes their rights to their customs, traditions, forms of social organization, use of indigenous attire, and to hold land in collective title.¹⁵⁶ However, Article 203 of the Constitution gives exclusive jurisdiction to the Supreme Court of Justice and other tribunals established by law and provides that no other authority will intervene in the administration of justice.¹⁵⁷ This has been interpreted to preclude any legal recognition of indigenous proceedings and judgments.¹⁵⁸ Article 2 of the Law of the Judicial

148. See Hessbruegge & García, *supra* note 17, at 96.

149. See *id.* The departments of Alta Verapaz, Baja Verapaz, and Quiché were hit very hard; almost a generation of Mayan leaders were killed. See *id.*

150. See *id.*

151. *Id.*

152. See ANALES, ACUERDO SOBRE IDENTIDAD Y DERECHOS DE LOS PUEBLOS INDÍGENAS 70 (1995), www.lacult.unesco.org/docc/oralidad_08_70-79-anales.pdf [<https://perma.cc/9PJ6-3UH3>].

153. See “Recovery” of Indigenous Law, *supra* note 73, at 45.

154. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, *supra* note 89, at art. 46; see also Raquel Aldana & Randall Abated, *Banning Metal Mining in Guatemala*, 40 VT. L. REV. 597, 626 (2016).

155. See *id.* at art. 58 (in the section on culture)

156. See *id.* at arts. 66-67.

157. See *id.* at art. 203.

158. See Sieder, *supra* note 143, at 219.

Organism provides that custom is a source of law only if there is no statute or if the law delegates the authority to regulate to custom.¹⁵⁹ In addition, the custom must conform to “morality and public order.”¹⁶⁰

While a complete description of the Guatemalan judicial system is beyond the scope of this Article, the *Organismo Judicial* has attempted to bring formal justice to rural areas in lieu of indigenous law through two mobile courts, justice centers, mediation centers, and the creation of community justices of the peace (*juzgados de paz comunitarios*) as judicial officers.¹⁶¹ Also, many governmental institutions have been created to include and serve indigenous people.¹⁶² The Guatemalan courts have also issued decisions that support application of Mayan law.¹⁶³ However, for many reasons, the efforts to replicate indigenous law have failed.¹⁶⁴ Hessbruegge and García describe the state of affairs as an unsuccessful effort to bring state institutions geographically closer to people and to integrate certain elements of Mayan law, such as mediation, into the formal system.¹⁶⁵ Justice Baquiáx of the Supreme Court of Justice explained that the individuals selected to serve in these courts did not have the stature of the community authorities and thus did not garner the respect of the people.¹⁶⁶ Rachel Sieder characterizes Guatemala’s efforts as “co-opting” multiculturalism rather than creating a true

159. See Hessbruegge & García, *supra* note 17, at 109.

160. See *id.*

161. See *id.* at 99-109; see also ASOCIACIÓN DE INVESTIGACIÓN Y ESTUDIOS SOCIALES/OFCINA DE LA ALTA COMISIONADA DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS EN GUATEMALA, ACCESO DE LOS PUEBLOS INDÍGENAS A LA JUSTICIA DESDE EL ENFOQUE DE DERECHOS HUMANOS 30-31 (2008).

162. ANA LUCÍA BLAS, ASOCIACIÓN DE INVESTIGACIÓN Y ESTUDIOS SOCIALES, INSTITUCIONES PÚBLICAS PARA ATENDER A POBLACIÓN INDÍGENA 10 (2014). Blas’s research lists the many public institutions that have been created to serve indigenous populations. See *id.* at 7-8. Blas interviewed indigenous people and members of civil society. Among her many findings, interviewees acknowledged progress but noted that the indigenous population continues not to be a priority and racism continues. *Id.* at 23. Many of the entities created lack a clear vision or a budget sufficient to support their activities. *Id.* at 24-25.

163. See, e.g., Poz Hernádet et al., Case No. 785.2003, Primera Instancia Penal de Totonicapán (2003). I discuss this case at length, *infra* Section II.C.2.a.

164. See Hessbruegge & García, *supra* note 17 at 109. The reasons include lack of funding, reluctance of the *juzgados* to use Mayan law despite being given the ability to do so, and suspicion amongst indigenous people that the state is trying to usurp and assimilate Mayan law. See *id.* at 109.

165. See *id.* at 106-07.

166. Justice Felipe Baquiáx of the Corte Suprema de Justicia stated that the courts failed because they became westernized and the people did not have confidence in them. Interview with Justice Felipe Baquiáx, Corte Suprema de Justicia, Guatemala City, Guatemala (April 6, 2018).

framework for indigenous participation.¹⁶⁷ She observes how problematic it is that institutions developed to facilitate indigenous participation in law and government are highly dependent on foreign funding.¹⁶⁸

Despite accommodations and small openings for indigenous law within the official system, community members are at risk of punishment for applying it.¹⁶⁹ A number of cases have reached the Guatemalan Supreme Court of Justice to appeal sentences against indigenous authorities for doing the work their communities commissioned them to do.¹⁷⁰ Public prosecutors and judges have charged indigenous authorities with criminal actions (*ilícitos penales*) like kidnapping or illegal detention when they detain wrongdoers and with imposing forced labor when a punishment is imposed involving community labor.¹⁷¹ Lorenzo Chávez, an indigenous lawyer from Quiché, confirms that community leaders fear punishment for their work in resolving disputes using indigenous law, and since they perform this service free of charge and are on-call twenty-four hours a day, they may decide it simply isn't worth the risk.¹⁷² Guillermo Padilla Rubiano believes that the lack of a law coordinating indigenous and official justice systems is an excuse many judges use to avoid recognizing indigenous justice, but that other judges recognize and apply indigenous norms and coordinate between the systems.¹⁷³ The truth appears to be that some of Guatemala's courts are protecting indigenous jurisdiction even in the absence of a firm and clear legal infrastructure. Indigenous authorities are handling many cases that would otherwise be funneled to the formal system or not dealt with at all.¹⁷⁴ However, indigenous law operates without

167. Sieder, *supra* note 143, at 218-19.

168. *See id.*

169. *See* Casación 01004-2012-01524, Corte Suprema de Justicia, Cámara Penal (Nov. 6, 2012).

170. *See id.* (discussing community authority charge with the crime of coercion for carrying out the community's decision to cut a resident's home from the water supply for non-payment). Ultimately, the Supreme Court of Justice reversed the courts below but only after multiple appeals had been filed and lost over a five-year period.

171. *See* Sieder, *supra* note 143, at 223.

172. *See* Interview with Lorenzo Seth Chávez Vásquez, Attorney, Antigua, Guatemala (June 7, 2017) (notes on file with author).

173. *See* Rubiano, *supra* note 50, at 119.

174. For example, the indigenous authorities in Sololá resolved 3000 cases in 2016. *Buscan Reconomiento de la Justicia Indígena*, PRENSA LIBRE, (Feb. 15, 2017), <https://www.prensalibre.com/guatemala/justicia/buscan-reconocimiento-de-la-justicia-indigena> [perma.cc/WAR2-9ZS6].

constitutional recognition, and indigenous authorities may spend time in jail while seeking to appeal charges against them.

C. Philosophy, Structure, and Examples of Derecho Indígena Maya

From colonial times, indigenous people resolved various problems that arose in their communities with their own systems of justice while larger problems were funneled to the Spanish justice system.¹⁷⁵ The Spaniards established a system of indigenous leadership and governance, which came to be known as *la Alcaldía Indígena*, to assist in colonial administration, such as the collection of tributes and distribution of work.¹⁷⁶ Derived from a system of direct democracy influenced by the Arabs, who controlled Spain in the eleventh and twelfth centuries, it took on characteristics of ancient indigenous cultures in Guatemala.¹⁷⁷ In this way, it developed into a system in which the indigenous people could “safeguard their own practices and interests.”¹⁷⁸ Upon independence from Spain, a succession of governments sought to integrate and unify municipal governments, eliminating the dual governance structure and placing *ladinos* in positions of power and dominance.¹⁷⁹ This did not occur precisely as the governments had planned, and, in many instances, indigenous governance persisted through dual governments or brotherhoods (*cofradías*).¹⁸⁰

Though suppressed during the civil war, the local indigenous structures resurged in the 1990s, particularly because the new Constitution designated monies for municipal development.¹⁸¹ Today, the indigenous structure of government exists in many forms. In some communities it is nearly unchanged from earlier times, and in others it has evolved with varying vestiges of the earlier structure.¹⁸² The duties of indigenous mayors and their auxiliaries serving in the community

175. See LINA EUGENIA BARRIOS ESCOBAR, *TRAS LAS HUELLAS DEL PODER LOCAL: LA ALCALDÍA INDÍGENA EN GUATEMALA, DEL SIGLO XVI AL SIGLO XX* ix (2001) [hereinafter BARRIOS] (Barrios provides an amazing and comprehensive history).

176. See *id.* at 140.

177. See *id.* at 9.

178. RACHEL SIEDER, *CUSTOMARY LAW AND DEMOCRATIC TRANSITION IN GUATEMALA* 10 (1997) [hereinafter *CUSTOMARY LAW AND DEMOCRATIC TRANSITION*].

179. SHEA, *supra* note 115, at 8.

180. See *id.*; see also Carlos Frey Ochoa, *Trayectoria Histórica de las Alcaldías Indígenas*, 28 *MOMENTO: ASOCIACIÓN DE INVESTIGACIÓN Y ESTUDIOS SOCIALES* 1, 1-18 (2013).

181. See BARRIOS, *supra* note 175, at 227.

182. See *id.* at 388-89.

differ from town to town, but they include administration of justice, retention of land titles, preservation of cultural traditions, and the administration of schools in cooperation with teachers.¹⁸³ One of the most unique characteristics of indigenous leadership is the way that it integrates those who have served their community in civic or religious capacities into service on a rotating basis, selecting them through Mayan traditions or more modern elections.¹⁸⁴ Indigenous governance thus provides a structure for administration of justice that supplements the official “elected” mayor, sometimes working in coordination with the official government and other times on its own.

An important function of the elected communal authorities is to apply indigenous justice.¹⁸⁵ There are normative rules among the communities, but they are “flexible and dynamic,” and the focus is to seek solutions to disputes that are just and reestablish stability and social cohesion.¹⁸⁶ Many of the cases handled in indigenous communities arise from family conflict of one form or another. In Totonicapán, the region discussed below,¹⁸⁷ the vast majority of disputes are resolved through consultations with the indigenous authorities rather than the formal justice system.¹⁸⁸ More than half of the cases tend to relate to family matters, while 11% relate to property disputes 9% to “robberies.”¹⁸⁹ If a problem cannot be resolved within the community—either because they choose not to handle it or because of some objections of the parties—it can be resolved by the formal justice system.

183. See Hessbruegge & García, *supra* note 17, at 87-89 (noting that some traditional responsibilities have been absorbed by state and local political leaders). However, in some indigenous communities, the indigenous leadership performs all of these functions. This is the case in Chuatroj, Totonicapán, as I learned when meeting with the community authorities. April 8, 2018.

184. See BARRIOS, *supra* note 175, at 388-89.

185. See Ochoa, *supra* note 180, at 15 (identifying two main functions: administration of justice and control of lands that are the property of the community collectively).

186. Hessbruegge & García, *supra* note 17, at 94 (containing some fascinating examples of the substantive rules).

187. See *infra* text accompanying notes 209-251.

188. See *See* ALCALDÍA COMUNAL DE CHIYAX, APLICACIÓN DE JUSTICIA EN UNA COMUNIDAD INDÍGENA DE TOTONICAPÁN: CASO DE ROBO AGRAVADO 19 (2005) [hereinafter ROBO AGRAVADO] (on file with author) (reviewing the data to conclude that the authorities handled 930 cases from January–June 2004, resolving 860, while the Justice of the Peace handled 329 and resolved 237).

189. See *id.* at 17. *Robo* in Spanish is a general term that, with modifiers, can include what we know in English as burglaries and robberies of various types. *Cf.* SPANISH–ENGLISH DICTIONARY, *supra* note 26, at 447-48 (defining the Spanish word “robo”).

1. *Structure and Philosophy of Mayan Law*

Mayan law protects life, human dignity, honor, and property—as do most legal systems—but it differs from the focus that characterizes “Western” legal systems in that it gives greater emphasis to harmony of the community, respect for the experience of elders, for the promises one has made, and for nature.¹⁹⁰ Mayan law does not divide the legal world into crimes and torts; rather, the system is based on a more holistic view of injuries and an expanded view of those affected by wrongs that encompasses both individuals and the collective community.¹⁹¹ A publication of the Defensoría Maya¹⁹² explains that Mayan law is based on the cosmovision of the people—their thinking, philosophy and spirituality.¹⁹³ It is a way of seeing the interrelationship of human beings with Mother Nature and the universe.¹⁹⁴ The Defensoría identifies three key attributes of its justice: flexibility (in methodology, steps to be taken, and the search for justice); dynamism (the involvement of many people, including family members, authorities, and the population generally in finding solutions to problems); and all-encompassing nature (meaning it is a preventative type of law applicable in every period of a human being’s life).¹⁹⁵ The principles that guide Mayan life are: duality of life in the universe (like yin and yang); the attitude that you must live life to learn its lessons (*procesualidad*); the complementarity of life (focusing on the relationships between men and women, which are like the sun and the moon); respect (hurting others or nature is hurting yourself and requires reparations); consensus (collective benefit comes before individual benefit); help or contribution (the obligation and

190. Lorenzo Seth Chávez Vásquez, *Análisis del funcionamiento del Juzgado de Paz Comunitario y la aplicación del derecho indígena en la resolución de conflictos*, 25-32 (2002) (unpublished thesis, Universidad de San Carlos de Guatemala, Quetzaltenango) (on file with author).

191. See Hessbruegge & García, *supra* note 17, at 90.

192. The Defensoría Maya is one of several organizations that are networks of community leaders helping people navigate legal matters with the formal justice system, as well as coordinating with community authorities and offering dispute resolution according to Mayan law. “*Recovery*” of *Indigenous Law*, *supra* note 73, at 52-55. They “produce materials and carry out workshops for members of the judiciary and the police” to inform them about Mayan law. *Id.* at 53.

193. TZUJNEL, TOB’NEL, K’ASTAJNEL DEFENSORÍA MAYA, NOCIONES DEL DERECHO MAYA, RI KI NO’JB’AL RI QA TIT OA MAM 8 (2000) [hereinafter TZUJNEL] (on file with author).

194. See *id.* For this reason, there are three different Mayan calendars that relate to one another. Every day in the calendar has its own name and number. The date of one’s birth determines one’s nahual. Birthdate is used to define leaders and responsibilities within the community. See *id.* at 9.

195. See *id.* at 10.

responsibility to contribute for community benefit); and listening (the value of listening, consulting, understanding so as to make individual and collective decisions).¹⁹⁶

When a problem arises, there is a process for resolving it.¹⁹⁷ In many instances the resolution may consist of counseling, as with family matters.¹⁹⁸ In the event of a serious conflict among community members or a crime, community authorities may arrange a public proceeding.¹⁹⁹ This is the stage that most resembles a trial or hearing. It is very different from a formal judicial proceeding in timing, in the involvement of the community and drive for consensus, in the lengthy discussions that take place with everyone involved, and in the focus on making reparations that cure the injury or make restitution but also restore the harmony of the community.²⁰⁰ Sanctions generally include community work and restitution (in the event of damage or loss of property) but can also involve shaming or ritual corporal punishment as a means of impressing the lesson on the perpetrator and teaching other members of the community.²⁰¹

2. Examples

To understand indigenous justice better, it is helpful to look at some examples of cases.²⁰² There should be a systematic and detailed study of the scope and scale of Guatemala's indigenous justice, but I have yet to find it. Anthropologists such as Rachel Sieder or Ekert Stern, who have spent time in field studies, provide the most comprehensive view. There are also studies of particular localities²⁰³

196. See *id.* at 10-12.

197. See POP AC, *supra* note 27, at 59-64.

198. See INSTITUTO DE INVESTIGACIONES ECONÓMICAS Y SOCIALES (IDIES), REFLEXIONES JURÍDICAS 8-11 (1996) (hereinafter REFLEXIONES JURÍDICAS) (describing the steps taken to resolve conflicts, indicating in the majority of the cases the authority counsels on the moral and spiritual values of the family and of the community).

199. See POP AC, *supra* note 27 at 63-64.

200. See *id.*

201. See REFLEXIONES JURÍDICAS, *supra* note 198, at 9.

202. There are articles, books, and videos that capture indigenous justice in action. See, e.g., Diario La Hora, *Justicia Indígena: Existe y Funciona, Pero No Es Reconocida*, LA HORA (July 23, 2016), <https://lahora.gt/justicia-indigena-existe-funciona-no-reconocida/> [<https://perma.cc/S4N6-GMQ8>]; *Justicia Indígena: Existe y Funciona, Pero No Es Reconocida*, YOUTUBE (July 23, 2016), <https://www.youtube.com/watch?v=PuL31mR0UvA> [<https://perma.cc/FG5M-PWY5>].

203. See, e.g., NACIONES UNIDAS DERECHOS HUMANOS, ACCESO DE LOS PUEBLOS INDÍGENAS A LA JUSTICIA DESDE EL ENFOQUE DE DERECHOS HUMANOS: PERSPECTIVAS EN EL DERECHO INDÍGENA Y EN EL SISTEMA DE JUSTICIA OFICIAL 21

as well as overviews by indigenous law scholars that provide excellent close-ups.²⁰⁴ The cases I have profiled here are representative in my judgment, though practices vary from place to place.

a. Aggravated Burglary in Chiyax

The case of an aggravated burglary in the Maya-k'iche community of Chiyax in Totonicapán was a time where a community rediscovered its traditions and applied them after the prosecutor, state judge, and local authorities agreed to try the case using indigenous law.²⁰⁵ In this highly indigenous area of Guatemala, more than 2,000 people are elected annually to represent the forty-eight “cantons” that comprise the Totonicapán community.²⁰⁶ These elected individuals form a board of directors that represents the indigenous communities in relations with the official municipal government.²⁰⁷ During the period in which the crime was committed, these directors reached an agreement with representatives of the official justice system that provided for cooperation in referring appropriate cases to the indigenous authorities and respecting their judgments once a matter concluded.²⁰⁸

In the case profiled, a family returned home from church to find a man in their home carrying a stereo system in his hands.²⁰⁹ The homeowner grabbed him and quickly summoned neighbors to

(2008), <https://www.oacnudh.org.gt/estandares/docs/Publicaciones/Acceso.pdf> [<https://perma.cc/X83F-VNEF>] (conducting field studies on indigenous rights in two municipalities of Quiché, Joyabaj and Santa Cruz del Quiché).

204. See generally, e.g., Hessbruegge & García, *supra* note 17.

205. See ROBO AGRAVADO *supra* note 188; see also Hessbruegge & García, *supra* note 17, at 111 (citing Poz Hernández et al., Case No. 785.2003, Primera Instancia Penal de Totonicapán (2003) (dismissing defendants on grounds of *ne bis in idem*)).

206. Cantons are subdivisions recognized by the people who live in the department of Totonicapán. ROBO AGRAVADO, *supra* note 188, at 9-11. Each canton selects a representative who serves as part of a larger body representing the people in the area in their interactions with various authorities, such as the city, with regard to issues that affect them. See *id.*

207. See *id.* at 11. Hessbruegge and García suggest that this is possible because decentralization of laws passed in 2002 that recognize local communities' right to elect or designate their own alcalde (mayor) as well as the alcalde's authority to mediate conflicts that the members of the community chose to submit. See Hessbruegge & García, *supra* note 17, at 110-11.

208. See ROBO AGRAVADO, *supra* note 188, at 106 (Acuerdo Marco entre las Autoridades Comunitarias Representadas por las 48 Cantones, Primera y Segunda Quincena De Alguaciles De Totonicapán y Autoridades Estatales y Operadores de Justicia).

209. See *id.* at 21.

surround the house.²¹⁰ There they caught another thief who had a bag of bread that he was using to distract the family's dogs. There was evidence of a forced entry into the house and some windows and mirrors were broken.²¹¹ Within minutes, dozens of neighbors surrounded the house and began to beat the men.²¹² At the same time, another group of neighbors spotted a seventeen-year-old who was waiting on the shoulder of the road in a get-away car.²¹³ The neighbors stopped the car and found a machete inside.²¹⁴ At that point, they burned the vehicle, stripped the driver's clothing and threw it into the fire, and threatened to lynch or burn him.²¹⁵

The community's reaction to this burglary was harsh and reflected its belief that official justice would do nothing to prosecute the crime or could not do it expeditiously.²¹⁶ The community mayor of Chiyax, seeking to avert violence, intervened on behalf of the accused and informed the community members that they could not burn the men but suggested they could be sanctioned according to their own laws.²¹⁷ The mayor took the youth around the community so that the people would see that he was in custody and later turned all three men over to the national police.²¹⁸

In the next couple of days, the people of Chiyax petitioned the authorities to allow the application of indigenous justice and to refrain from appointing a defense attorney.²¹⁹ Members of the official justice system saw this as a potentially explosive situation with the possibility of violence against the court system and its representatives.²²⁰ The Judge of First Instance notified the public prosecutor's office that the three men would be in prison in nearby Quetzaltenango on a preventive basis, fearing harm would come to them if released.²²¹ The prosecutor's office had three months to investigate.²²² This proved

210. *See id.* at 21-22.

211. *See id.* at 21.

212. *See id.* at 22.

213. *See id.* at 23.

214. *See id.*

215. *See id.*

216. *See id.* at 24.

217. *See id.* at 23.

218. *See id.*

219. *See id.* A community member informed the representatives that there had been five robberies in the first three months of the year and they suspected the individuals who had been apprehended. *See id.*

220. Members of the community had placed the youth's burned car in front of the court of First Instance. *See id.* Court personnel received some threats that made them believe it was possible that violence might result. *See id.* at 24.

221. *See id.* at 25.

222. *See id.*

difficult because various witnesses were contradictory, unwilling to come forward because of the possibility of retaliation against themselves and their families, and worried about being investigated for burning the car and their treatment of the men upon apprehending them.²²³ The prosecutor evaluating the case could conduct only a limited investigation and thought perhaps the men would have to be released for lack of proof.²²⁴

Meanwhile, the community in Chiyax was discussing alternatives to resolve the case before the period of the official investigation ended.²²⁵ As in other indigenous regions, disruption during the armed conflict, internal dislocation, and a fear of rebuke by the formal justice system led to uncertainty as to how to proceed.²²⁶ Ultimately, with the support of various indigenous organizations and the indigenous defender from the public defender's office, the community agreed to apply indigenous law and to seek guidance from a historic text of the Maya-k'iche dating from 1562—the *Título de Tonicapán*.²²⁷

Representatives of the Defensoría Indígena met with the prisoners who indicated they wanted to be tried under indigenous law. The men had already been in jail three months, and they faced six to fifteen years in prison if convicted by the formal system.²²⁸ They did not want to take their chances. As a result of cooperation between the judge, the prosecutor, and the Defensoría Indígena, the three men were released for trial under indigenous law. The community had to work out how it would proceed, how it would monitor compliance with any sanction, and what type of sanctions would be acceptable.²²⁹

A date was set for the trial in accordance with the *nahuals* of the accused and other spiritual principles.²³⁰ Thirteen individuals were

223. *See id.*

224. *See id.*

225. *See id.* at 26.

226. *See id.* (explaining that community members worried about the fact that 64% of the population were very young and had not grown up with the indigenous justice).

227. *See id.* at 27. The text did not specify how to apply indigenous justice but rather served as a symbolic guide in their efforts to do so in a legitimate way. *See id.* The Centro Pluricultural para la Democracia (CPD), which has been working to help strengthen indigenous authority in the altiplano since 1997, assisted them. *See id.*

228. *See id.* at 28.

229. *See id.* at 30.

230. *See* TZUJNEL, *supra* note, at 193, at 8. Everyone has a *Nahual* (spirit symbol) based on their birthday and year, as represented in the Mayan calendar. *See id.* Among the Mayas, the *Nahual* indicates the strengths and weaknesses a person could have. *See id.*

selected to form a Mesa de Honor.²³¹ The Defensoría Indígena began to investigate the case, learning in the process that the accused men lived in extreme poverty and in families with serious problems.²³² They came from outside of Chiyax, and the Defensoría sought to understand the indigenous governance structures, if any, where they lived.²³³ The indigenous community and the official justice system reached agreements as to the process to be used and the types of sanctions that might be imposed, and they agreed that the Judge of First Instance, the prosecutor, and all the representatives of the indigenous communities would attend the proceeding along with the people of Chiyax.²³⁴

The proceeding began with prayer followed by the victim's description of the crime.²³⁵ Then the accused men spoke; two accepted responsibility while one denied it.²³⁶ They asked the victims and the community to forgive them.²³⁷ The men's families then spoke and likewise asked for forgiveness.²³⁸ Then came the *p'ixab*,²³⁹ where a representative of the Mesa de Honor counseled the men to change their way of life.²⁴⁰ They were offered and accepted twenty grains of corn symbolizing the beginning of a new life, and they were sentenced to thirty days of community labor.²⁴¹ There was a public announcement of the judgment.²⁴²

231. See ROBO AGRAVADO, *supra* note 188, at 33. Some of the municipal authorities who were members of the Evangelical Church recused themselves from service, not wanting to participate in indigenous justice. See *id.* Others recused themselves out of fear, incapacity, or because they thought it might be dangerous. See *id.* In the end, the Mesa was comprised of an Aj a'ij, three women, a K'amlb'e, two representatives of the Yax clan, three communal authorities from Chiyax, and a Secretary. See *id.* at 34.

232. See *id.* at 31-32.

233. See *id.* at 32.

234. See *id.* at 35.

235. See *id.* at 40.

236. See *id.* at 41.

237. See *id.*

238. See *id.*

239. Rachel Sieder explains *p'ixab* as a code of behavior that is orally transmitted from generation to generation within the family and the community. See "Recovery" of Indigenous Law, *supra* note 73, at 60. In the context of an assembly imposing a sanction, its function is to spur those accused of wrongdoing to reflect and correct their behavior. See *id.*

240. See ROBO AGRAVADO, *supra* note 188, at 41.

241. See *id.* at 41.

242. See *id.* at 42. No press had been permitted during the trial. See *id.* Many members of the community, including children had attended, in keeping with the pedagogical aims. See *id.* At the conclusion, the sentence was submitted to the Judge of First Instance so that it could be incorporated in the official record as the sentence against the accused individuals. See *id.* The Judge of First Instance concluded that the

Shortly thereafter, the men began serving their sentences—carrying sand to a road being constructed, helping to tile a school, mixing concrete, and taking out garbage.²⁴³ They worked eight hours per day.²⁴⁴ One man ended up paying a fine rather than working, claiming health problems, while two traveled each day to Chiyax from their pueblos to work.²⁴⁵ The community members organized themselves to monitor the work and soon observed that the men had no food or drink during the day.²⁴⁶ The Chiyax community began to bring them food and drink at the worksite. The community of Chiyax split the cost of their transportation to and from the worksite with the men's families, reducing financial hardship on the men.²⁴⁷

At the end of the month, there was a reunion of all who attended the trial and judgment. The men who had fulfilled their sanction of community work spoke positively about the experience, stating that they could not have tolerated more jail time, that they were glad to have been working, and that they were pleased to have had the opportunity to decide to change their lives.²⁴⁸ They had not been treated like prisoners but, rather, like employees working an eight-hour day. One stated:

I have nothing against the people of Chiyax. It is sad to be in prison. I passed those days feeling desperate; in prison you only hear bad things. I tried to stay away from it I wanted my liberty. In reality, [the community work] was excellent I could not have tolerated staying in prison I was happy the first day when they put us to work. It made my body feel relaxed. All of this month was the most beautiful days when I was there to work.²⁴⁹

In an interview, the Aj'k'ij stated, “[The men] realized that even if one is bad, he isn't hated, but rather here in the community one tries to rehabilitate the person; they weren't put down by others but rather given attention like any other worker in our home.”²⁵⁰

sanction did not violate any international or domestic laws and, as such, recognized it as a legal judgment that would trigger the effect of *non bis in idem*, precluding a retrial for the same offense. *See id.* at 44.

243. *See id.*

244. *See id.*

245. *See id.* at 45.

246. *See id.*

247. *See id.*

248. *See id.* at 46.

249. *Id.* at 45-46.

250. *Id.* at 45.

b. Theft of the Pick-Up Truck in Santa Cruz del Quiché

Another detailed description of indigenous justice is found in anthropologist Rachel Sieder's description of the process that followed the theft of a pick-up truck in Santa Cruz del Quiché.²⁵¹ In 2006, three men were accused of robbery of a truck from outside the home of its owner.²⁵² A crowd of about 300 villagers surrounded them; some spoke of burning or lynching them.²⁵³ The *alcaldes indigenas*²⁵⁴ insisted that they would apply the law of their ancestors, which did not include burning or lynching.²⁵⁵ There was not much dispute that the three men had taken the truck.²⁵⁶ The indigenous leaders worked through the night to establish the facts, speaking to eyewitnesses and then with the young men, who admitted they had taken it from the owner's house.²⁵⁷ Within a very short amount of time, they had completed a very intense and exhaustive investigation after which a community assembly convened.²⁵⁸ There was a lot of discussion about the characteristics of the men accused, including the fact that the eldest of them did not work.²⁵⁹

Three days passed from the time of the crime to imposition of the sanction.²⁶⁰ A community assembly reached a consensus on culpability and determined the sanction.²⁶¹ The assembly determined that there must be full restitution of the truck with any necessary repairs.²⁶² Next, to demonstrate repentance, there would be public shaming, which would occur in the municipal capital, providing an opportunity to demonstrate the effectiveness of Mayan law to a broader audience, including government officials.²⁶³ Finally, there would be ceremonial lashes with a strip of wood cut from a quince tree.²⁶⁴

251. See Sieder, *supra* note 73, at 55-62. Sieder and Carlos Flores also produced a video of this event entitled K'ixba'l (Shame) in 2010. See *id.* at 68.

252. See *id.* at 55.

253. See *id.* at 55-56.

254. These are the community authorities, or community mayors representing indigenous towns. See *infra* text accompanying notes 185-188.

255. See Sieder, *supra* note 73, at 56.

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.* at 57. Eyewitnesses also expressed fear that the boys might take reprisals against them and their families in the future. See *id.*

260. See *id.* at 57.

261. See *id.* at 57-58.

262. See *id.* at 58.

263. See *id.*

264. See *id.* at 61. A ritual beating is controversial even among Mayan activists and spiritual guides. See *id.*

The next day, several hundred people from surrounding towns gathered to watch the three men place the tires from the stolen truck on their backs and walk through the streets of the town.²⁶⁵ The police and the indigenous authorities followed, the latter providing commentary through a bullhorn.²⁶⁶ After this, the three men stopped in a grassy field; the evidence was placed on the grass so that community could inspect it.²⁶⁷ The assembled villagers and the *alcaldes* gathered around the three men, questioning them and educating them about the community's code of conduct and values.²⁶⁸ Finally, the men received ritual lashes, the *xik'a'y* with thin branches from a quince tree.²⁶⁹ The parents were invited to apply the *xik'a'y*, and if they did not, then the *alcaldes* did so.²⁷⁰ Following prayers, the men received lashes on their wrists, back, and back of the knees.²⁷¹ The men were admonished again and again, and members of the crowd watched in concern.²⁷² Some children cried.²⁷³ Sieder followed up after four years and learned that the two youngest men were working and had not engaged in any criminal activity since that time.²⁷⁴ Their parents enthusiastically endorsed the effect of indigenous justice.²⁷⁵ The other man had been killed in a dispute in a neighboring village.²⁷⁶

These descriptions of indigenous law applied in Guatemala differ in some particulars from indigenous justice as administered in other parts of Central or South America, but they are representative of how other indigenous communities might approach the issues.²⁷⁷ News reports of recent sanctions corroborate the details.²⁷⁸

265. See *id.* at 58-59.

266. See *id.* at 59.

267. See *id.* at 60.

268. See *id.* This completed the part of the sanction known as the *p'ixab'*. The community was seeking to use the public shaming and the counseling to communicate the values and the behavior that would be expected from then on. See *id.*

269. See *id.* at 61.

270. See *id.*

271. See *id.* at 62.

272. See *id.*

273. See *id.*

274. See *id.* at 62 n.32.

275. See *id.*

276. See *id.*

277. See, e.g., U.N. WOMEN, *supra* note 62, at 223-43.

278. See, e.g., Héctor Cordero, *Mujer Recibe Nuevamente el Castigo Maya*, PRENSA LIBRE (Aug. 21, 2017), <http://www.prensalibre.com/ciudades/quiche/mujer-recibe-nuevamente-el-castigo-maya> [<https://perma.cc/4A33-YNQN>] (discussing an eighteen-year-old woman who committed a second theft offense by taking a cow. After four days, during which she was kept in custody, she was required to walk through the streets with the cow, and she received six blows with a peach twig; her father agreed with the sanction, but interestingly, a Quiché spiritual guide disagreed

III. THEORIZING INDIGENOUS JUSTICE

The examples above illustrate the successes of indigenous justice in handling two matters that could have resulted in lynching had the anger and frustration of the community been ignored. While clearly the participants (victims and perpetrators) viewed the process positively, the results are more than anecdotally good. When we view indigenous justice in the frameworks of restorative justice and procedural justice, it becomes clearer why it works.

A. Indigenous Law in the Restorative Justice Frame

Indigenous law practices fall within the framework of restorative justice though they precede the conceptual development of that area in academic research. Restorative justice “is the name given to a variety of different practices, including apologies, restitution, and acknowledgments of harm and injury, as well as to other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment.”²⁷⁹ As Carrie Menkel-Meadow recounts the history, the people who theorized and advocated for restorative justice in the United States believed that the criminal justice system was overly harsh and did not successfully rehabilitate or reintegrate people into society.²⁸⁰ It has been adapted to some degree in the criminal processes of various states and in other countries.²⁸¹ This includes its adaptation in the international law context, including

with the practice); *see also* Héctor Cordero, *Azotan a Menor y Advierten a Delinquentes Sobre Castigo*, PRENSA LIBRE (June 1, 2017), <http://www.prensalibre.com/ciudades/quiche/azotan-a-menor-y-advierten-a-delinquentes-sobre-castigo-comunitario> [<https://perma.cc/GQ8T-TRQR>] (discussing a seventeen-year old accused of stealing cellphones who received nine blows with a peach twig, had to walk on his knees around the park, and because he could not pay for what he had stolen, he was sentenced to community work until he paid off the debt).

279. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. & SOC. SCI. 161, 162 (2007).

280. *See id.* at 163 (citing JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 3 (2002); John Braithwaite, *Reintegrative Shaming, Republicanism, and Policy*, in CRIME AND PUBLIC POLICY: PUTTING THEORY TO WORK 191-205 (Hugh D. Barlow ed., 1995); JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 1 (1989); John Braithwaite, *Narrative and “Compulsory Compassion”*, 31 L. & SOC. INQUIRY 425, 425-46 (2006); John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 389-412; John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 1-127 (1999)).

281. *See id.* at 167.

in South Africa and in Rwanda with the *gacaca* process.²⁸² In Rwanda, *gacaca* was an indigenous process of conflict resolution where men came together to discuss conflicts among people in their own community and sometimes conflicts with outsiders.²⁸³ In the wake of the genocide in Rwanda, *gacaca* was transformed into a national system of participatory justice.²⁸⁴ In some countries, truth commissions seek to bring reconciliation to an entire nation, as occurred when the South African proceedings were broadcast on television to the entire country.²⁸⁵

Because indigenous practice falls so clearly within the ambit of restorative justice processes, it is important to know whether research substantiates its benefits. Proponents claim that restorative processes reclaim crime resolution and restitution from mismanagement of the state, can be tailored creatively to meet the needs of the situation, potentially lead to higher rates of compliance and greater satisfaction with outcomes, and lead to the repair of broken relationships.²⁸⁶ Critics claim that the success of restorative justice is disputable. They argue that human beings are inherently vengeful and resistant to transformation and forgiveness, participants are unfairly coerced into confessions and acceptance of harsher sentences than formal justice might deliver, restorative justice can be manipulated to produce oppression, and restorative justice can reduce transparency in the formal justice system.²⁸⁷ Some philosophers believe that compelled

282. *See id.* at 164.

283. The term *gacaca* refers to a soft type of grass where the participants sat. *See* Roeloff H. Haveman, *Role of Gacaca in Rwanda*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 387, 389 (Jeanmarie Fenrich et. al. eds., 2011).

284. *See id.* at 394, 409. It involved a confession, guilty plea, repentance, and an apology. *See id.* at 411.

285. *See* Menkel-Meadow, *supra* note 279, at 170. In Latin America—including Guatemala—the truth commissions worked privately. *See id.*

286. *See id.* at 165. The reasons to support using restorative justice, as developed in the literature, include that it enhances understanding of the root causes of crime and conflict, that outcomes are much more likely to be complied with, that recidivism will be reduced, that it offers the possibility of reclamation and reintegration of the person, that participants are more likely to develop empathy and a sense of moral responsibility, that it enhances community building and democratic participation by increasing the number of stakeholders who are involved, that it permits more real, less formal interaction, that it is a form of responsive justice that is richer at expressing competing justice values, that it is more likely to cause individuals to make voluntary commitments, that it promotes a positive receptionist view of human nature with a positive hope that the worst among us can be transformed, that it produces outcomes tailored to a specific community, that it is less costly than conventional penological practices, and that it could transform the criminal justice system. *See id.* at 170-71.

287. *See id.* at 171.

shaming, which occurs in indigenous justice, will cause degradation and loss of humanity.²⁸⁸ Others have expressed concern that victims will be retraumatized through the retelling of their injuries and that certain groups will gain control of the process and seek to repress individualism or divergent thought, such as if particular political or religious groups take over and dominate.²⁸⁹ Many of these critiques are broader than indigenous justice because they assume creation of a restorative justice alternative to the traditional justice system in a culture where reintegration and rehabilitation is foreign to the inhabitants. However, some of them could apply to indigenous justice and might be reasons to hesitate to support and expand indigenous justice in the manner I will suggest.

There has been a lot of research about whether restorative justice works, and according to Menkel-Meadow, the “greatest claims for restorative justice—that it creates greater compliance with agreements or judgments, reduces imprisonment (and therefore costs to the system), provides greater satisfaction for both victims and offenders, and reduces recidivism rates—have all been substantiated . . . on at least three continents . . .”²⁹⁰ Barton Poulson’s analysis of the data from seven studies showed that restorative justice practices “substantially outperformed court[s] on almost every item for both victims and offenders.”²⁹¹ The restorative justice studies that Poulson analyzed differed in some respects from indigenous justice.²⁹² Nonetheless, many of the findings are quite universal. For example, victims and offenders were substantially more likely to believe that the criminal justice system was fair than those who went to court²⁹³ and to be satisfied with the handling of their case.²⁹⁴ Victims and offenders were almost five times more likely to believe that the offender had been held accountable than in court proceedings.²⁹⁵ Often apologies are extremely important to victims, helping them gain closure.²⁹⁶ Poulson found that offenders are 6.9 times more likely to

288. See *id.* at 171 (citing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (2004)).

289. See Menkel-Meadow, *supra* note 279, at 171-72.

290. *Id.* at 174. See also Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201, 208 (2010).

291. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 177.

292. See *id.* A great majority of the cases involved relatively minor crimes and juvenile defendants. Also, culpability was not an issue, so the restorative practices were more akin to sentencing procedures. See *id.* at 200.

293. See *id.* at 178.

294. See *id.* at 182.

295. See *id.*

296. See *id.* at 189.

spontaneously apologize to the victim in restorative proceedings than in court proceedings.²⁹⁷ Satisfaction with restorative justice alternatives is not limited to victims; offenders are likewise satisfied.²⁹⁸

In terms of recidivism, as Menkel-Meadow observes, measurement requires distinguishing the types of offenders and types of offenses in ways that are often not reflected in studies.²⁹⁹ For example, juveniles may be different than adults, victimless crimes (such as drunk-driving) may be different from cases where the offender targeted the victim, and compliance in a regulatory context may differ depending on whether actors are engaged in discussion about compliance.³⁰⁰ However, a major study with 9,307 juvenile offenders found that participants in a voluntary restorative justice process were 33% less likely to reoffend.³⁰¹ Various other studies indicate statistically significant reductions in recidivism.³⁰²

There is room for more social science investigation of various aspects of restorative justice processes as they relate to indigenous justice, but the research substantiates its value as an approach to dispute resolution. In addition, many of the restorative justice critiques—especially as they relate to comparisons with a formal justice system such as that utilized in the United States—simply do not apply to the Northern Triangle countries. Their formal justice systems are not regarded as fair or very functional.³⁰³ Another difference is that, unlike many people who participated in studies of restorative justice alternatives, people living in indigenous communities are often comfortable and familiar with indigenous

297. *See id.*

298. *See* Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1103 (2008); *see also* MARK S. UMBREIT, ROBERT B. COATES, & BETTY VOS, CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, IMPACT OF RESTORATIVE JUSTICE CONFERENCING: A REVIEW OF 63 EMPIRICAL STUDIES IN 5 COUNTRIES 3 (2002), http://www.cehd.umn.edu/ssw/RJP/Projects/Victim-Offender-Dialogue/Restorative_Group_Conferencing/Impact_RJC_Review_63_Studies.pdf [<https://perma.cc/FE9P-PN2Y>]. For an interesting first-person account, *see* Herb Blake, *My Restorative Justice Experience*, 3 L.A. PUB. INT. L.J. 161, 163 (2010-2012).

299. *See* Menkel-Meadow, *supra* note 279, at 176.

300. *See id.*

301. *See id.* (discussing generally William R. Nugent, Mona Williams, & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137).

302. *See, e.g.*, Bloch, *supra* note 290, at 208; *see also* RESTORATIVE JUSTICE CONSORTIUM, THE POSITIVE EFFECT OF RESTORATIVE JUSTICE ON RE-OFFENDING 2 (2006), http://www.restorativejusticescotland.org.uk/RJ_and_the_Reduction_of_Reoffending_FINAL.pdf [<https://perma.cc/42SB-SMVF>].

303. *See Challenge of Indigenous Legal Systems*, *supra* note 25, at 107-08.

justice; it is a part of their culture.³⁰⁴ Finally, the evidence strongly supports its effectiveness. As Rachel Sieder states, the “available evidence indicates that where indigenous justice systems are strong, the incidence of . . . arbitrary violence is low.”³⁰⁵ A recent article on violence in Guatemala confirmed that Totonicapán and two other departments that utilize indigenous justice have the lowest levels of violent crime in the country.³⁰⁶

Another point to highlight is that the recognition and use of indigenous justice in populations with indigenous people is not inconsistent with formal justice systems. While until recently informal justice systems “were relatively invisible in development partner-assisted justice assisted interventions,” international organizations now recognize that, given their central role in delivery of justice, it is important that the governments and international donors understand them and engage with them to strengthen human rights, rule of law, and access to justice.³⁰⁷ In other words, to strengthen access to justice, it makes sense to pay attention to the value that indigenous justice adds.³⁰⁸

B. Procedural Justice vs. Formal Procedural Systems

Indigenous justice utilizes a process that is very different than one would see in the formal justice systems in Latin America or the United States.³⁰⁹ If one’s notion of fairness is limited to traditional attributes of due process, there may be concern about a system characterized by flexibility and no clear path to an appeal.³¹⁰ There is no right to counsel even in criminal cases, and while an accused may receive advice from a person from the *defensoría indígena*, there is no right to this, and few of the *defensoría indígena* are attorneys.³¹¹ The

304. See *supra* text accompanying notes 34-35.

305. *Challenge of Indigenous Legal Systems*, *supra* note 25, at 108.

306. See Evelyn Boche, *Totonicapán es el Departamento con Menos muertes Violentas de 2016*, EL PERIÓDICO (July 1, 2017), <https://elperiodico.com.gt/nacion/2017/01/07/totonicapan-es-el-departamento-con-menos-muertes-violentas-de-2016/> [<https://perma.cc/2CUE-CKQJ>]. The Human Rights Ombudsman and other governmental officials attribute this to the operation of indigenous justice as part of coordination between the justice sector and indigenous authorities. See *id.*

307. U.N. WOMEN, *supra* note 62, at 7.

308. See *id.*

309. *Challenge of Indigenous Legal Systems*, *supra* note 25, at 112.

310. See *id.* at 105.

311. *Recovery” of Indigenous Law*, *supra* note 74, at 52-54. Sieder explains that *defensorías* aim to coordinate between the formal and informal justice systems. They may employ indigenous attorneys, but do not necessarily do so. *Id.* at 69 n.21-22.

public forum, the speed of the proceeding, and the determination of the sanction are foreign to the way justice is delivered in a formal setting.

To understand whether indigenous justice meets basic requirements of fairness, it is informative to reference research on procedural justice, which analyzes how people experience interactions with legal, administrative, or other types of processes.³¹² Procedural justice “captures the *subjective* assessments by individuals of the fairness of a decision-making process.”³¹³ As Tom R. Tyler stated, “[J]ustice is a socially created concept that . . . has no physical reality. It exists and is useful to the degree that it is shared among a group of people.”³¹⁴ This research explores what is necessary for people to feel that they have been treated fairly regardless of whether they agree with the outcome.³¹⁵

The takeaway from various research studies is that there are four main criteria that inform whether people will perceive a process as just: (1) voice, also referred to as “representation” or “participation,” (2) neutrality, (3) trust or benevolence, and (4) “courtesy or respect.”³¹⁶ “Voice” means whether people have “the opportunity to tell their side of the story in their own words before decisions are made”³¹⁷ “Neutrality” means that arbiters act as “neutral, principled decision makers who make decisions based upon rules and not personal opinions, and who apply legal rules consistently across people and over cases.”³¹⁸ “Trust” or “benevolence” relates to perceptions of whether the authority is sincere and cares about the person.³¹⁹

312. Psychologist John Thibaut and legal scholar Lauren Walker were the first people to bring social science to bear on the question of what procedural justice means. See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 1 (1975).

313. Rebecca Hollander-Blumhoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3.

314. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCH. 117, 118 (2000).

315. Robert MacCoun explains the key innovation as being “the idea that information about process and information about outcomes serve to reduce uncertainty about others’ motives, and hence the two can substitute for each other. Procedural fairness serves as a heuristic substitute when outcomes are ambiguous or unknown” Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. SOC. SCI. 171, 185-86 (2005).

316. Hollander-Blumhoff & Tyler, *supra* note 313, at 9.

317. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30 (2007).

318. *Id.*

319. *See id.* at 31.

“Courtesy” and “respect” include “both treating people well . . . with courtesy and politeness, and showing respect for people’s rights.”³²⁰

Social science research suggests that participants in restorative justice systems are satisfied with its fairness because it satisfies the four criteria that people value. In one study of the satisfaction of victims of violent crime who participated in voluntary mediation (or a variant) with their offender, the victims praised some of the very characteristics that characterize indigenous justice.³²¹ They valued the opportunity to be heard and express their opinions, communicate with the offender without the barriers imposed by lawyers, and tell the offender the consequences of their victimization (as opposed to testimony or a more formal victim impact statement in court).³²² They appreciated it when an offender showed respect by listening to them, and they appreciated the respect of the mediator.³²³ The offender’s recognition of the consequences of the crime was “liberating” in the words of one victim.³²⁴ Offenders also developed empathy through hearing from the victim.³²⁵

The characteristics of indigenous justice—its flexibility, sense of fairness for the individual and the community, and potential to bring individuals back to the community—are part of what led non-indigenous communities to try to replicate the experience in their own judicial processes. For example, some court systems in North America became aware of First Nation peace circles and the Navajo “talking stick” used in leaderless meetings and incorporated them in more informal procedures used as alternatives to prosecutions.³²⁶ In New Zealand, family conferencing was modeled on traditional Maori and other practices.³²⁷

Although indigenous justice can satisfy the basic attributes of fairness that procedural justice research indicates are important, the lack of the procedural formalities that accompany formal justice systems may make it seem less predictable and consistent than a more formal process. Although indigenous justice gives people “voice,” “courtesy,” and respect,” it might or might not be “neutral,” and the indigenous authorities who serve as decision-makers might not be

320. *Id.* at 30.

321. *See id.*

322. *See id.*

323. *See id.* at 124, 126.

324. *See id.* at 126.

325. *See* UMBREIT, *supra* note 298, at 3 (citing MARK S. UMBREIT & ROBERT B. COATES, VICTIM OFFENDER MEDIATION: AN ANALYSIS OF PROGRAMS IN FOUR STATES OF THE U.S. (1992)).

326. *See* Menkel-Meadow, *supra* note 279, at 168.

327. *See id.*

“trustworthy or benevolent.”³²⁸ Stener Ekern’s study in Totonicapán found that people *did* complain occasionally about sanctions that the mayor imposed, perceiving that they were being treated unfairly.³²⁹ Ekern also observed a situation in Chuculjuyup where the president of the town’s rules committee appeared to “capture” the agenda.³³⁰ The president added obligations to the work of the communal mayors, which included supervising the work of midwives and supervising and controlling the pregnancies of women in the community with an eye toward avoiding forced abortions.³³¹ Ekern learned that these rules were not a reflection of patriarchal order among the K’iche’s; rather, the president of the committee was a Catholic pro-life activist.³³² Similar rules had been rejected in other cantons because of the belief that abortion is a family affair and none of the mayor’s business.³³³

Viewed in a broader frame, the objections Ekern documented are similar to complaints that can be made about every justice system. Decision makers are sometimes unfair, and at times people with their own agendas obtain power and influence. The K’iche, who elect their authorities annually and demand a high degree of community participation, seem to have the tools to deal with the possibility of bias as well as anyone, including communities in the United States.³³⁴

In addition, the adaptive characteristics of indigenous justice mitigate risks that the process or sanctions will be unacceptable to indigenous people or to the formal justice system. Indigenous law has had to adapt to modernization, voluntary and involuntary mass movements of people, and the influence of international norms embodied in the documents and decisions that seek to protect the rights of indigenous people. The very nature of indigenous justice is to evolve as society changes.³³⁵ Particularly in countries where indigenous identity has been shattered or displaced, the process of regaining cultural and legal traditions is undertaken in light of modern human rights norms even if it is not always in complete agreement with them. Just as the indigenous people in Chiyax consulted, researched, and discussed what the possible sanctions were for stealing a stereo, various groups of indigenous people in Ecuador have

328. See *supra* text accompanying notes 316-320.

329. See Stener Ekern, *Visions of the Right Order: Contrasts between Mayan Communitarian Law in Guatemala and International Human Rights Law*, 2003 HUM. RTS. DEV. Y.B. 265, 278.

330. See *id.* at 284.

331. See *id.*

332. See *id.*

333. See *id.*

334. See *id.* at 269.

335. See, e.g., *Challenge of Indigenous Legal Systems*, *supra* note 25, at 106.

modified certain sanctions to be more compliant with human rights laws.³³⁶

Countries with formal recognition of indigenous law navigate procedural differences in various ways that can modulate aspects viewed as troubling. Take, for example, the fact that, in indigenous processes generally, there is no right to appeal once the indigenous authorities have imposed a sanction, and that the judgment is implemented almost immediately, or at least very expeditiously. In Ecuador, there are appeals to the Constitutional Court in cases with constitutional ramifications.³³⁷ In Bolivia, the *Ley de Deslinde Jurisdiccional* seems to acknowledge the possibility of revision of a sanction among the indigenous authorities, though it provides that other courts may not revise them.³³⁸

Alternatively, a country concerned about process might circumscribe the types of cases that fall within indigenous jurisdiction or the sanctions that may be imposed. In Bolivia, indigenous jurisdiction attaches where there is concurrence of territorial, personal, and subject matter jurisdiction, and it specifically excludes certain subject matter.³³⁹ It applies only to members of an indigenous community or nation and is limited to acts or effects produced inside the jurisdiction. The exclusions from jurisdiction include subjects such as mining, forest, public international law, labor law, and social security law.³⁴⁰ Certain serious crimes are excluded.³⁴¹ Bolivia has thus decided that, as a country, it can best handle disputes that pertain to broader state interests such as resource allocation, foreign policy, or corruption in its formal justice system. This may make sense, provided the State actually carries through, because many of the parties to such

336. Fernando García Serrano, *Estado de Relacionamiento en Ecuador*, in ESTADO DE LA RELACIÓN ENTRE JUSTICIA INDÍGENA Y JUSTICIA ESTATAL EN LOS PAÍSES ANDINOS: ESTUDIO DE CASOS EN COLOMBIA, PERÚ, ECUADOR Y BOLIVIA 146 (2009) (discussing the Achuar people, where women brought about changes to the sanctions for polygamy and infidelity, and the Shuar Assembly which in 1969 eliminated the death penalty and other sanctions).

337. See Mirva Aranda Escalante, *La Coordinación Entre Sistemas de Justicia en Colombia, Ecuador y Perú*, in LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS 132-33 (2011).

338. LEY DE DESLINDE JURISDICCIONAL [LAW OF TERRITORIAL JURISDICTION OF BOLIVIA], ch. III, art. 12, § II (Dec. 2009), <http://tsj.bo/wp-content/uploads/2014/03/ley-073-deslinde-jurisdiccional.pdf> [<https://perma.cc/7Z6C-QZS4>].

339. See *id.* at art. 7-12.

340. See *id.* at art. 10, § II(c).

341. See *id.* at § II(a). Exclusions include crimes against international law and humanity; crimes against internal and external security; customs-related crimes; corruption; trafficking of persons, drugs, and arms; and, as concerns children and adolescents, the crimes of rape, assassination, and homicide. See *id.*

conflicts are powerful institutions or multinational corporations. Bolivia also limits sanctions, such as the loss of land or expulsion of disabled persons from the community on grounds of noncompliance with community work, corporal punishment of children, and conciliation in matters of violence against children.³⁴²

Finally, there are aspects of formal procedural systems that indigenous authorities welcome. *Ne bis in idem*³⁴³ is similar in concept to the prohibition on double jeopardy. In international law, it precludes the same tribunal from prosecuting twice for the same offense. In the context of indigenous law, it refers to the question of whether the official justice system can try and punish a person who has already been sanctioned using indigenous law. For obvious reasons, indigenous communities and the individuals who have been sanctioned under indigenous law seek to prevent retrial of an individual who has been disciplined by the indigenous authorities. To this end, elders in indigenous communities are creating logs of the cases resolved and the sanctions imposed.³⁴⁴

Even in a country like Guatemala with no formal recognition of indigenous law, there is coordination between indigenous authorities and the formal system. For example, the Guatemalan Supreme Court of Justice ruled in favor of the appellant in a case where he was sentenced to prison for robbery despite having sanctioned by his community, thus applying *ne bis in idem*.³⁴⁵ Also, indigenous authorities are willing to discuss sanctions with representatives of the formal justice system and sometimes enter into a settlement with a party who feels wronged.³⁴⁶ Thus, though the indigenous authorities in Chuculjuyup believed it was fair to cut a particular party off from the communal water supply, they were willing to explain why they had imposed the sanction and to discuss ways to solve the problem.³⁴⁷ The

342. See LEY DE DESLINDE JURISDICCIONAL, *supra* note 338, at ch. II, art. 5, §§ III, IV.

343. Also, in Latin, the term means “not twice for the same.” *Non bis in idem*, BLACK’S LAW DICTIONARY (10th ed. 2014).

344. See Ekern, *supra* note 329, at 287; Hessbruegge & García, *supra* note 17, at 94 (discussing community register called *libro de actas*).

345. See Casación 218-2003, Corte Suprema de Justicia, Penal (Oct. 7, 2004). In lieu of six years in prison, he had repented, promised not to reoffend, cooperated with the authorities by honestly responding to questions and providing the names of his accomplices, and received nine lashes.

346. See Ekern, *supra* note 329, at 286-87.

347. See *id.* In the case discussed, the man went to the Human Rights Ombudsman to complain and an investigation ensued. See *id.* The mayor agreed that the people collecting for the water needed to give receipts, and the Ombudsman acknowledged that the sanction was consistent with prior decisions and all in the community had affirmed it. See *id.*

indigenous authorities also defer to the formal justice system by sending crimes like murder on to the official justice system even though indigenous law could address them.³⁴⁸ As evidenced in Chiyax, the accused may also be given a choice of whether to be tried under the official justice system or indigenous law.³⁴⁹

No justice system is perfect, and, regardless of the rules in place, there is always a possibility of capture or bias. Indigenous justice meets many of the attributes of a system that procedural justice research tells us is fair. It is flexible, evolving, and preferred by participants over formal justice systems. Should there be major concerns, countries can define their jurisdictions by laws that exclude certain types of cases or sanctions. Differences from Western procedural norms should not be a concern in recognizing indigenous justice.

IV. IMPACT ON HUMAN RIGHTS AND WOMEN AND CHILDREN

Previous sections have described indigenous justice and presented evidence that it delivers benefits attributed to restorative justice systems and fulfills the important attributes of a fair justice system in the eyes of its users. Beyond the provision of dispute resolution in an expeditious and cost-effective way, indigenous law provides a means of continuing to communicate the particular values and identity that define many indigenous people: a focus on respect for others, community participation and labor, and the collective welfare. It offers a vision of rehabilitation of wrongdoers, healing of the community, and reintegration of individuals with hope for the future. Where it is robust, it minimizes violence.³⁵⁰ My own view is that the positives far outweigh any negatives, and that countries should support it and expand its reach.

This Section addresses two more issues of importance. First, whether indigenous practices in Latin America conform to human rights standards as interpreted in the international sphere as well as in the Constitutions of individual countries. Second, whether indigenous law harms women and children or subjects them to differential or worse treatment than men receive.

348. See Hessbruegge & García, *supra* note 17, at 91.

349. See *supra* text accompanying notes 209-240.

350. See *supra* text accompanying notes 312-313.

A. Human Rights Concerns

In some ways, it is ironic to ask whether indigenous justice is weak on human rights. Human rights laws plainly guarantee the right to indigenous identity, and if indigenous justice is disregarded or marginalized, that identity and culture will be imperiled.³⁵¹ Access to justice is also a human right and indigenous justice promotes access.³⁵² A further irony is that indigenous persons who defend human rights in their countries are targets of the endemic violence in their societies. The 2016 murders of Berta Cáceres and Nelson García, indigenous defenders of the human rights of indigenous people, women, and the environment in Honduras, prompted the United Nations Special Rapporteur to urge the government to take immediate steps to avert the risk of “turning the country into a lawless killing zone for human rights defenders.”³⁵³

Nonetheless, many governments—from the original colonial powers to the modern state—have expressed concern regarding the potential barbarism or immorality of customary law.³⁵⁴ Even when colonial powers chose to leave customary law intact, their interference and conditions on its applicability distorted it, reflecting the values and preferences of the dominant power rather than the colonized people.³⁵⁵ Today, international and domestic human rights protections have replaced colonial-era constraints on customary law. It is clear that indigenous law must bow to these national and international norms. What is less clear—and worthy of exploration—is whether indigenous

351. See *supra* text accompanying notes 33-35.

352. *Acceso de los Pueblos Indígenas a la Justicia desde el Enfoque de Derechos Humanos*, OACHNUDH, 11 (May 2008), <https://www.scribd.com/document/39671633/Acceso-de-los-pueblos-indigenas-a-la-justicia-desde-el-enfoque-de-derechos-humanos> [<https://perma.cc/9UTN-7MB2>] (study posits access to justice as a human right and compares access to justice under indigenous law and the formal justice system in two highly indigenous areas).

353. *Honduras Risks Becoming ‘Lawless Killing Zone’ for Human Rights Defenders – UN Expert*, U.N. NEWS (Mar. 18, 2016), http://www.un.org/apps/news/story.asp?NewsID=53486#.V4f_iKK1HK0 [<https://perma.cc/9KR3-SY6N>].

354. See, e.g., Julie A. Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective*, 26 ARIZ. J. COMP. & INT’L L. 303, 308 (2009) (discussing the existence of the “repugnancy clause” in Ghana when it was a British colony).

355. See *id.* at 306; see also Jacques Vanderlinden, *What Kind of Law Making in a Global World? The Case of Africa*, 67 LA. L. REV. 1043, 1048 (2007) (explaining that under British colonial rule, the Ghanaians had to give up “all mechanisms linked to the prevalence of social harmony for the benefit of the adjudicatory legal process favored in Europe”).

justice as it applies in Latin America pushes the boundaries of these laws.

1. *Domestic and International Constraints that Protect Human Rights*

Most countries in Latin America with indigenous populations provide in their Constitutions or laws that indigenous law must yield to human rights law.³⁵⁶ They differ in the means and specificity by which they provide this. Ecuador's 2008 Constitution is one of the most recent and most specific in its acknowledgement of the rights of indigenous persons, but it also sets limits, which the Constitutional Court has affirmed and expanded.³⁵⁷ In contrast, the Colombian Constitution of 1991 is very general and much like Guatemala's. Article 7 provides that "[t]he State recognizes and protects the ethnic and cultural diversity of the Colombian Nation."³⁵⁸

The Colombian Constitutional Court interpreted Article 7 to recognize and set the boundaries of indigenous jurisdiction.³⁵⁹ It held that indigenous authorities are competent to handle all types of cases, and they need only respect "the *fundamental minimums*: the right to life (no killing), physical integrity (no torture), freedom (no enslavement), and the predictability of the sanction as a principle of due process."³⁶⁰ This preserved a rather wide berth for the exercise of indigenous jurisdiction. Raquel Yrigoyen Fajardo explains that "the

356. See Gonzalo Aguilar et al., *The Constitutional Recognition of Indigenous Peoples in Latin America*, 2 PACE INT'L L. REV. ONLINE COMPANION 44, 56 (2010).

357. See CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [C.E.], Oct. 20, 2008, art. 171 (providing that indigenous communities will exercise jurisdictional functions based on their ancestral functions and law within their territorial area and with guaranteed participation of and decision by women). The authorities will apply their own norms and procedures so long as they are not contrary to the Constitution and human rights recognized in international instruments. See *id.* The state guarantees that it will respect the decisions of indigenous institutions and authorities, but they are subject to constitutional control. See *id.* The Constitutional Court of Ecuador has ruled that ordinary criminal courts may review decisions of indigenous authorities if they violate or jeopardize human rights of the right to personal integrity. María Dolores Miño, *UPDATE: The Basic Structure of the Ecuadorian Legal System and Legal Research*, HAUSER GLOBAL L. SCH. PROGRAM (May 2015) http://www.nyulawglobal.org/globalex/Ecuador1.html#_edn2 [<https://perma.cc/HB8X-DT5S>].

358. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], tit. 1, art. 7 (1991). See also Raquel Yrigoyen Fajardo, *Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries*, 27 BEYOND L. 32, 34 (2004).

359. See Yrigoyen Fajardo, *supra* note 358, at 40 (noting that indigenous jurisdiction is called "special" jurisdiction and is an exception to "ordinary jurisdiction").

360. *Id.* at 43.

exercise of jurisdictional functions [by indigenous authorities] can involve certain legitimate, legal restrictions on rights (detentions, investigations, sanctions, some forms of personal coercion . . .).”³⁶¹ As Rachel Sieder explains it, the Colombian court “emphasized the need to view human rights and due process through an intercultural lens.”³⁶² The United Nations Report on Informal Justice characterizes Colombia’s position as a version of federalism.³⁶³

Because international instruments become part of the law of Latin American countries that ratify them, they are a constraint on indigenous justice. ILO 169 stipulates that indigenous people have the right to retain their customs and traditions “where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.”³⁶⁴ The American Convention on Human Rights provides recognition of the rights to humane treatment (Article 5);³⁶⁵ freedom from slavery, including forced and compulsory labor (Article 6);³⁶⁶ personal liberty (Article 7);³⁶⁷ fair trial (Article 8);³⁶⁸ and judicial protection (Article 25).³⁶⁹ In a similar vein, the International Covenant on Civil and Political Rights³⁷⁰ requires States to protect people’s rights and to provide fair hearings.³⁷¹ Thus, signatories of these agreements—and the populations within them—are bound to respect human rights.

361. *Id.*; see also Sieder, *supra* note 143, at 221-22 (discussing Case No. ST-523/1997 and other cases from the Corte Constitucional (Colombian Constitutional Court)).

362. Sieder, *supra* note 143, at 221-22.

363. See U.N. WOMEN, *supra* note 62, at 93 (distinguishing Colombia’s federalism from a “delegation of some judicial powers to customary or traditional organs in accordance with the Human Rights Committee’s General Comments”).

364. Convention for Indigenous and Tribal Peoples No. 169, *supra* note 80, at 3.

365. See American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, 146.

366. See *id.*

367. See *id.* at 147.

368. See *id.* at 147-48.

369. See *id.* at 151.

370. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 167-77.

371. See *id.* (detailing that Article 14 obliges the State to treat those accused of crimes fairly, and Article 14.1 requires the availability of a fair hearing to determine civil rights and obligations).

2. Does Indigenous Law Violate Domestic and International Law Protections?

The real question is whether there is reason to be worried that indigenous practices somehow transgress human rights notwithstanding the formal legal structure in place to protect them. The United Nations Report on Informal Justice notes that, because informal justice systems typically impose sanctions that are less severe than punishments that the formal justice system provides, it is normally up to the states to determine if there is a problematic conflict.³⁷²

While my own view is that there is no problematic conflict between indigenous law and formal legal protections, there are certain practices that may raise questions worth analyzing. Drawing again from Totonicapán, Guatemala, Stener Ekern presents a vivid portrayal of indigenous justice drawn from a year of fieldwork and follow-up visits.³⁷³ According to Ekern, the concept of human rights is somewhat foreign to indigenous people because there are no inherent individual rights.³⁷⁴ Rather, there are community obligations.³⁷⁵ “The fundamental obligation of all canton-citizens is to watch over the well-being of the community”³⁷⁶ People earn respect by working, including in community work, and if they do not work, their behavior is met “with public shaming, forced [labor], or as a last resort the perpetrators will be cut off from the communal water system.”³⁷⁷ The last option, of course, would be a huge hardship.

The sanctions themselves, though imposed rarely, might be viewed as a departure from modern notions of humane punishment.³⁷⁸ In Ecuador, sanctions may include lashes with stinging nettles; cold baths; cutting of hair; and, in rare cases, confinement or banishment.³⁷⁹

372. See U.N. WOMEN, *supra* note 62, at 93.

373. See Ekern, *supra* note 329, at 267.

374. See *id.* at 274-75.

375. See *id.* at 274 (explaining that in the course of a lifetime, community members are expected to: (1) participate in communal works; (2) contribute money for construction of public infrastructure; and (3) in the case of men, carry out service through the community of auxiliary mayors at least three times during a married man’s lifetime).

376. *Id.* at 277-78.

377. *Id.* at 278.

378. See, e.g., Kimberly Inksater, *Transformative Juricultural Pluralism: Indigenous Justice Systems in Latin America and International Human Rights*, 60 J. LEG. PLU. 105, 120-26 (2010).

379. Jaime Vintimilla Saldaña, Milena Almeida Mariño & Remigia Saldaña Abad, *Derecho Indígena, Conflicto y Justicia Comunitaria en Comunidades Kichwas*

In Guatemala, the sanctions include lashes with quince limbs, public shaming, and mandatory community work.³⁸⁰ Lynchings, even if sometimes attributed to indigenous communities, are *not* indigenous practices.³⁸¹

In addition, one could make the case that, even if sanctions such as community labor or a cutoff of access to communal water do not violate human rights, people affected lack protections from the potential abuses of government. As discussed in Section III.B, above, this is fundamentally a complaint that procedural differences affect the justice and fairness of indigenous justice. As Ekern noted, occasionally indigenous people on whom a sanction is imposed complain to members of the state justice system when they believe their own mayor has acted unfairly.³⁸² They then look to the formal justice system to intervene on their behalf.³⁸³

There are a number of reasons that these critiques lack traction in my view. One is that indigenous justice is highly adaptable and amenable to incorporation of human rights norms.³⁸⁴ While indigenous justice in Totonicapán was once clan based and insular, today Mayan communities are now basically secular with leadership divided among people of differing faiths.³⁸⁵ They have brought more individuals—including women—into public service in the *Alcaldía Indígena*

Del Ecuador (2007) (comprehensive study of indigenous law as it applies in many communities).

380. Hessbruegge & García, *supra* note 17, at 95. The most severe sanction would be banishment, achieved through social exclusion, in the event that repeat offenders are incorrigible. *See id.* at 96. Mayans do not believe in incarceration or government fines. *See id.* at 95. They view prison as a training ground for hardened criminals and fines as a drain of family resources being funneled into the undefined coffers of the state. *See id.*

381. *See, e.g.,* Eddie Condor Chuquiruna, *Introducción y Explicación Previa, in LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS EN LA CONSTRUCCIÓN DEL PLURALISMO JURÍDICO EN AMÉRICA LATINA* 16-18 (Eddie Córdor Chuquiruna ed., 2011) (indicating that, despite discussion over whether lynchings are an act of collective justice, if they are not administered by the indigenous people or communities recognized by a group or the State, then they are not part of indigenous justice).

382. Ekern, *supra* note 329, at 278.

383. For example, the Criminal Chamber of Guatemala's Supreme Court of Justice reversed the conviction of a community authority who had been charged with "coacción" (coercion) for carrying out a decision of the community to disconnect one of the residents from the community water supply for non-payment. *See* Casación 01004-2012-01524, Corte Suprema de Justicia, Cámara Penal (Nov. 6, 2012).

384. For example, Kimberly Inksater notes that communities in Bolivia and Colombia now utilize economic sanctions, resorting to corporal sanctions only when compensation has been ineffective to achieve their goals. *See* Inksater, *supra* note 378, at 122.

385. *See* Ekern, *supra* note 329, at 279.

through development committees.³⁸⁶ Indigenous leaders are willing to cooperate with state actors, like the Human Rights Ombudsman in Guatemala, to come up with solutions—as they did in Chiyax or as in the case of individuals aggrieved by being cut off from the water system.³⁸⁷ Indigenous people are eager to record the results in their cases so that they can ensure consistency in other cases and to facilitate the formal justice system’s respect for the judgments they render.³⁸⁸ As Ekern states, the communal mayors and other leaders are very much aware that human rights are their ally in the struggle against the State to maintain communal sovereignty and to defend their lands and territories.³⁸⁹

Second, the focus on harsh sanctions is overblown.³⁹⁰ Indigenous justice solves many problems without resort to sanctions.³⁹¹ When sanctions are imposed, their goal is to teach a lesson and reintegrate a wrongdoer into society.³⁹² Shaming is regularly used in the international context to try to bring states violating human rights norms into compliance.³⁹³ Corporal punishment in the form of lashes does cause concern to some,³⁹⁴ including indigenous leaders, but “[i]t can also be [seen] as a means of containing popular demands for vengeance and more severe forms of punishment.”³⁹⁵

As indigenous lawyer Chávez states, it is hard to contend that these sanctions are worse than the punishments of the formal system, such as incarceration, or negative effects of the justice system’s absence or failure to intervene, such as lynching or burning of

386. *See id.* at 280.

387. *See id.* at 286-87.

388. *See id.*

389. *See id.* at 288.

390. *See generally* Inksater, *supra* note 378.

391. *See id.* at 122.

392. *See id.*

393. *See* U.N. WOMEN, *supra* note 62, at 49-50.

394. The Inter-American Court on Human Rights condemned the beating of a prisoner who, two weeks after undergoing surgery, was forced to lie naked in a spread eagle position while strapped to a metal structure and flogged with a “cat o’ nine tails.” *See* *Caesar v. Trinidad & Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 72 (Mar. 11, 2005). This was not an indigenous sanction and is far worse than sanctions applied in indigenous communities. *See* Inksater, *supra* note 378, at 122-26.

395. *See* “Recovery” of Indigenous Law, *supra* note 73, at 61. Sieder makes clear that, even amongst Mayan activists, there are differences of opinion about the essence of Mayan law. *See id.* at 63.

perceived wrongdoers.³⁹⁶ Prisons in Central America are terrible.³⁹⁷ They do permanent damage to those incarcerated and their families.³⁹⁸

In conclusion, indigenous law, as much as any legal system, concerns itself with protecting people, the environment, and other community values.³⁹⁹ While the vision of human rights may be different and collective, it is nonetheless focused on many of the same objectives.⁴⁰⁰ The formal justice system can moderate practices that are viewed as violating Western human rights requirements.⁴⁰¹ However, the Colombian Constitutional Court got it right when the court recognized that a light touch is best.⁴⁰² There are cultural and philosophical differences regarding issues such as sanctions.⁴⁰³ Unless indigenous practices infringe on the fundamental minimums, these differences do not offend human rights.⁴⁰⁴

B. Impact on Women and Children

As is the case with human rights guarantees, there are concerns that informal justice systems—including indigenous justice—treat women in a discriminatory manner or enforce policies that harm women and children. Examples of traditional practices that negatively affect women—at least through the focus of a Western lens—can be found if one studies customary practice as it applies around the world.⁴⁰⁵ Some countries require the payment of dowry or bride price

396. Interview with Lorenzo Seth Chavez Vasquez, Quetzaltenango, Guatemala, April 8, 2018 (on file with author).

397. See, e.g., Situation of Human Rights in Honduras, Inter-Am. Comm'n H.R., Report No. 42/15, OEA/Ser.L./V/II (2015), <http://www.oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf> [<https://perma.cc/J2EX-534P>]. The description of prisons in Honduras in a recent Country Report by the Inter-American Commission on Human Rights is chilling. Because of ineffective control by prison authorities, between 2013 to October 2014, there were thirty-eight violent deaths ranging “from homicides with firearms, to attacks between groups of inmates with explosives and military weapons, to deaths from prison police gunfire to prevent inmates from escaping.” *Id.* at 203.

398. See generally *id.*

399. See Inksater, *supra* note 378, at 114.

400. See *id.*

401. See *Indigenous and Tribal Peoples Convention*, *supra* note 107, at 3.

402. See U.N. WOMEN, *supra* note 62, at 93.

403. See *id.* at 43.

404. See *Indigenous and Tribal Peoples Convention*, *supra* note 107, at 3.

405. See *id.* at 107 (noting another example: in Papua New Guinea, women are often accused of sorcery when someone in the family dies, and unless a husband is very powerful, no one will defend them; village courts applying customary law have been unable to successfully address epidemic violence against people suspected of sorcery).

to a woman's family upon marriage; inability of the woman to pay it back in the event the marriage fails may mean the woman cannot leave or will lose her children.⁴⁰⁶ However, as discussed above, customary law is highly contextual, so an example from one tradition does not represent another. Ultimately, the question is whether the formal laws (domestic and international) moderate the informal justice system to guard against or remedy any negative impacts on women and children.⁴⁰⁷

International instruments specifically protect women and children in Guatemala, Honduras, El Salvador, and the other countries in Latin America. Within the Inter-American system, the Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem do Para"⁴⁰⁸ guarantees women basic rights, such as equal protection, and obligates States to protect women from violence.⁴⁰⁹ Latin American countries accept these obligations and make them part of their own law.⁴¹⁰

Each country's own constitution protects women and children, at least in theory. To use Honduras as an example, women are protected from discrimination and are equals before the law.⁴¹¹ There is a duty to protect children to the extent that international treaties protect them.⁴¹² Women and minors are to be protected from exploitation in the workplace and women from pregnancy discrimination.⁴¹³ All people are protected from torture or cruel,

406. See BENNETT, *supra* note 28, at 266.

407. See RACHEL SIEDER, DEMANDING JUSTICE AND SECURITY: INDIGENOUS WOMEN AND LEGAL PLURALITIES IN LATIN AMERICA 1 (2017) [hereinafter DEMANDING JUSTICE AND SECURITY] (noting indigenous women have played a leading role in the recognition of indigenous people's rights across Latin America as well as in developing strategies to address discrimination and violence in their communities).

408. See ORGANIZATION OF AMERICAN STATES, MESECVI, INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT, AND ERADICATION OF VIOLENCE AGAINST WOMEN ch. 2, art. 4 (1994), <http://www.oas.org/en/mesecevi/docs/BelemDoPara-ENGLISH.pdf> [<https://perma.cc/BCY9-TUFE>].

409. Earlier Conventions, such as those Granting Civil and Political Rights to Women, were ratified by Guatemala, El Salvador, and Honduras many years ago. See United Nations Convention on the Elimination of All Forms of Discrimination against Women, No. 20378, Dec. 18, 1979, 1249 U.N.T.S. 13 (showing another example of earlier conventions that all three countries also ratified); *Multilateral Treaties Deposited with the Secretary-General*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en [<https://perma.cc/K58H-NQRF>] (last visited Nov. 5, 2018).

410. See United Nations Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 409, 1249 U.N.T.S. at 14.

411. See CONSTITUCIÓN POLITICA DE LA REPUBLICA DE HONDURAS, *supra* note 93, at art. 60.

412. See *id.* at art. 119.

413. See *id.* at art. 124, 128.

inhumane, or degrading punishment.⁴¹⁴ Further steps to specifically guarantee and further women's status in indigenous systems could be taken. For example, Ecuador guarantees indigenous women's participation in decision-making.⁴¹⁵ But even without more provisions, there is a thick layer of formal legal protection for women and children across Latin America.

Unfortunately, formal legal protections are sometimes more theoretical than real in many countries in Latin America for both indigenous and non-indigenous people, men and women alike. It is not uncommon to see children working or to hear of women fired from their jobs because they are pregnant. These hardships reflect many factors that are difficult to untangle: (1) extreme poverty and wealth inequality; (2) years of Colonial and Post-Colonial government; (3) discrimination against indigenous peoples; (4) neoliberal political philosophies; and (5) trauma from extended armed conflicts; in addition to many other variables. One must be careful not to pin divergences from formal law on indigenous justice because the causes are far more complex.

Still, because indigenous women are one of the poorest and most vulnerable populations in Latin America, any negative impact must be considered carefully. Because of deficiencies in education and heavy childrearing responsibilities, indigenous women tend to work in unstable or low-wage jobs.⁴¹⁶ They are more likely to be illiterate than men and to be monolingual in their native language, precluding them from jobs where Spanish must be spoken.⁴¹⁷ In some communities where there is extensive immigration, women are likely to be the head-of-household.⁴¹⁸ As a result, they are poorer, as some men abandon the family and do not send remittances. Indigenous women are more prone to sexual assault and violence both from outside the family and within it.⁴¹⁹ Some studies report that indigenous authorities are at times

414. See *id.* at art. 68.

415. See CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 357, at art. 171; CÓDIGO ORGÁNICO DE LA FUNCIÓN JUDICIAL, Mar. 9, 2009, art. 343 (providing that one cannot invoke indigenous law to justify or fail to punish violation of women's rights).

416. See Rachel Sieder & María Teresa Sierra, *Acceso a la Justicia para las Mujeres Indígenas en América Latina* 11 (CHR Michelsen Inst., Working Paper No. 2011:2, 2011), <https://www.cmi.no/publications/file/3941-acceso-a-la-justicia-para-las-mujeres-indigenas-en.pdf> [<https://perma.cc/H6AB-GPCH>] [hereinafter *Acceso a la Justicia*].

417. See *id.* at 12.

418. See *id.* at 13 (explaining that women bear most of the domestic responsibilities).

419. See *id.* at 13-14 (discussing that women face direct sexual violence by a range of state and non-state actors). Some of this stems from high rates of alcoholism

reluctant to take up complaints of domestic abuse and gender bias.⁴²⁰ Women sometimes do not obtain the benefit of laws protecting them from sex discrimination. For example, despite laws precluding gender discrimination in the dispersal of land through inheritance, men usually are favored, and women are often reluctant to take a dispute to the formal legal system.⁴²¹ The difficulties women face in society are products of gender, class, history, ethnicity,⁴²² and many non-indigenous influences, such as the Catholic and Evangelical churches.⁴²³ Churches in particular have a huge impact on women's lives when they disapprove of birth control and influence the government to impose limits on family planning health services available to women.⁴²⁴ Guatemala and other countries have placed considerable emphasis on combatting gender violence, but often it has been ineffective or counterproductive.⁴²⁵

Apart from the many instances of gender inequity that pervade populations with indigenous women, it is possible to identify disparities in how women and men are treated under indigenous law that would not occur under a system of formal law that endorsed nondiscrimination principles. Some indigenous communities punish marital infidelity and impose different sanctions for men and

among men as well as tensions caused by living in very close quarters, often with the man's parents. *See id.* (explaining that overcrowding exacerbates the chances of sexual abuse and incest, and that conjugal violence is related to male alcoholism).

420. *See* DEMANDING JUSTICE AND SECURITY, *supra* note 407, at 82 (discussing the limited access women have to file complaints before authorities); *see also* ASIES/OACHNUDH, ACCESO DE LOS PUEBLOS INDÍGENAS A LA JUSTICIA DESDE EL ENFOQUE DE DERECHOS HUMANOS 56-57, 149-50 (May 2008) (describing how indigenous women and girls are unlikely to claim their rights and obtain protection). This is true in other countries as well. For example, women in Malawi preferred to take intimate matters to NGOs mediators than to present them to the village elders. *See* U.N. WOMEN, *supra* note 62, at 12 (explaining that women are more likely to bring certain cases to village mediators rather than traditional chiefs).

421. *See Acceso a la Justicia*, *supra* note 416, at 12 (describing how women often do not seek help in the official justice system).

422. *See id.* at 13.

423. *See id.* at 4. Rachel Sieder provides a detailed analysis of how neoliberal policies of governmental decentralization in Guatemala set up conflicts between communal authorities and local development. *See* DEMANDING JUSTICE AND SECURITY, *supra* note 407, at 82.

424. *See Acceso a la Justicia*, *supra* note 416, at 4 (explaining that Catholic and Evangelical churches have influenced practices of indigenous justice).

425. *See* DEMANDING JUSTICE AND SECURITY, *supra* note 407, at 80 (explaining that the creation of development committees as a result of decentralization strengthened male leadership at the village level and worsened the position of women).

women.⁴²⁶ Lourdes Tibán writes about Ecuador and poses the question of whether the difference harms women or violates their rights.⁴²⁷ For example, if a community sanctions marital infidelity, how does one compare the female sanction—cutting of hair and requiring the woman to ask for a pardon in a public forum—with the male sanction—cold baths or public lashes?⁴²⁸ Tibán also raises the issue of whether the indigenous emphasis on rehabilitation and reparation injures women in cases where a woman complaining of domestic abuse is counseled to return to her spouse because he gave a guarantee that he would change his behavior.⁴²⁹ Some indigenous communities formalize a marriage through a payment by the groom's family to the bride's family.⁴³⁰ In the Western world, this looks like purchasing a bride even though the indigenous people would not see it as that. But the fact remains that the payments do not flow in both directions.

Scholars who have thought deeply about issues of gender and indigenous women point to the fact that, although indigenous law does not treat men and women equally, in a Western sense, it acknowledges each as having a pivotal role in the collective whole. It is difficult to consider individual rights of anyone in isolation; the collective focus situates individuals within the group.⁴³¹ Many indigenous communities recognize marked differences in gender roles, as manifested by dress, work, and activities.⁴³² Stener Ekern recounts that service to the community is required only of married men in the K'iche communities of Guatemala that he observed,⁴³³ and that, while women

426. See Lourdes Tibán, *Los Derechos de las Mujeres en la Justicia Indígena*, LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS EN LA CONSTRUCCIÓN DEL PLURALISMO JURÍDICO EN AMÉRICA LATINA 98 (Eddie Córdor Chuquiruna ed., 2011) (describing the different punishments imposed on men and women).

427. See *id.* at 98 (explaining that the application of sanctions against women in the exercise of justice depends on legal custom because there are practices are there are "practices").

428. See *id.* (comparing the sanction of cutting women's hair and having them ask for forgiveness with the male sanctions of baths and whippings).

429. See *id.*

430. See INSTITUTO DE INVESTIGACIONES ECONÓMICAS Y SOCIALES (IDIES), REFLEXIONES JURÍDICAS 5 (1996). Among the Ixil, this is explained as a symbolic reimbursement for the costs incurred in raising their daughter. See *id.*

431. See Tibán, *supra* note 426, at 97.

432. See Margarita Calfio Montalva & Luisa Fernanda Velasco, *Mujeres Indígenas en América Latina: ¿Brechas de Género o de Etnia?*, in PUEBLOS INDÍGENAS Y AFRODESCENDIENTES DE AMÉRICA LATINA Y EL CARIBE: INFORMACIÓN SOCIODEMOGRÁFICA PARA POLÍTICAS Y PROGRAMAS 503 (2006), http://repositorio.cepal.org/bitstream/handle/11362/4129/S2006017_es.pdf?sequence=1&isAllowed=y [<https://perma.cc/YQ9B-KGAE>].

433. See Ekern, *supra* note 329, at 269.

may be elected to the *Alcaldía Indígena*, it is still rare and leaves women outside the most visible leadership roles.⁴³⁴

The differences do not mean that women's roles are unimportant in indigenous communities. To the contrary, women in many communities are the chief repositories and educators about traditional knowledge and the standards of behavior the community expects.⁴³⁵ The principle of complementarity that pervades indigenous cosmovision places men and women on equal footing.⁴³⁶ There are indigenous men who do not see complementarity in this light and oppose changes that would provide women with greater influence and leadership opportunities.⁴³⁷ Some justify discrimination on the pretext that it denotes respect for customs and traditions or defies their concept of a good indigenous woman.⁴³⁸ Sometimes non-indigenous politicians may seek to co-opt the issue of women's rights to justify limits on indigenous communities.⁴³⁹ As Sieder and other scholars report, indigenous women are working to redefine their roles in their own cultures in a way that rejects a narrative that seeks to paint them as victims.⁴⁴⁰ Their roles have changed. More women attend school, have greater contact with cities, and speak Spanish.⁴⁴¹ They have emerged as leaders in the post-conflict era in Guatemala, Honduras, El Salvador, and many other countries.

Indigenous women can redefine their own roles by rethinking them in relation to the values of their culture rather than hewing unwaveringly to traditional practices.⁴⁴² They need training to learn about the many forms of gender violence and spaces to heal. However,

434. See *id.* at 276.

435. See Montalva & Velasco, *supra* note 432, at 508.

436. See Ana Cecilia Arteaga Böhr, "Let Us Walk Together": *Chachawarmi Complementarity and Indigenous Autonomies in Bolivia*, in DEMANDING JUSTICE AND SECURITY: INDIGENOUS WOMEN AND LEGAL PLURALITIES IN LATIN AMERICA 154-55 (2017).

437. See *id.* at 158-59.

438. See Montalva & Velasco, *supra* note 432, at 505. The authors observe that these are myths created by men. See *id.*

439. See, e.g., DEMANDING JUSTICE AND SECURITY, *supra* note 407, at 9 (recounting incidents that occurred under the administration of President Calderon of Mexico where he criticized customs and usages in a pueblo in Oaxaca, helping to defeat the election of a woman as president of the municipality).

440. See Rachel Sieder & Morna Macleod, *Género, Derecho y Cosmovisión Maya en Guatemala*, in GÉNERO, COMPLEMENTARIEDADES Y EXCLUSIONES EN MESOAMÉRICA Y LOS ANDES 174 (R. Aída Hernández et al. eds., 2012) (2009), https://www.iwgia.org/images/publications//0572_Genero_complementariedades_y_exclusiones_en_Mesoamerica_y_los_Andes.pdf [<https://perma.cc/QV83-NP8P>].

441. See Montalva & Velasco, *supra* note 432, at 502.

442. See Sieder & Macleod, *supra* note 440, at 176 (referencing a quote from Maureen White Eagle, a North American indigenous woman).

as Sieder states, neither rights training nor better access to state justice institutions alone can solve the structural and historical problems that indigenous women face.⁴⁴³ Indigenous women can assert equality as part of the balance and harmony that characterizes the indigenous perception of the world as they work to change culture and tradition.⁴⁴⁴

In my view, the strengthening of indigenous justice benefits women and children. On a practical level, it provides access to justice for problems that the formal justice system struggles to handle. Respect for indigenous law and the communities from which it arises also strengthens indigenous identity and the ability to shape a communal life, which can help to bring improvements in education, health, and potentially economic opportunities.⁴⁴⁵ Clearly there is room for improvement, but unless indigenous justice violates clear, accepted human rights norms, it should be up to females of the community to decide how to express their cultural identities, including what is needed to make strides in problematic areas such as gender violence.

V. THE FUTURE OF INDIGENOUS JUSTICE

I have made the case for the value indigenous justice adds where it applies, but countries grappling with whether to recognize it will no doubt wonder whether it matters given the inexorable march toward a world united by technology. Certainly one might posit that technology will eventually enable formal justice systems to fill any void. A related question is whether indigenous people will continue to want a justice system with a very different worldview. Assuming they do, the Northern Triangle countries must decide how to support it and where it should fit, if at all, within their formal legal systems. As Guatemala considers constitutional reforms that could recognize indigenous law, it will need to address challenges with coordination between indigenous justice and formal justice systems.⁴⁴⁶

443. See Rachel Sieder, *Between Participation and Violence: Gender Justice and Neoliberal Government in Chichicastenango, Guatemala*, in DEMANDING JUSTICE AND SECURITY: INDIGENOUS WOMEN AND LEGAL PLURALITIES IN LATIN AMERICA 85 (2017).

444. See Sieder & Macleod, *supra* note 440, at 177 (referencing a quote from Carmen Álvarez, founder of Kaqla, a Mayan women's organization).

445. For example, Chuatroj, an indigenous community in Totonicapán, has used its indigenous leadership structures to build schools, start a bank, and provide bilingual education far beyond what the government can provide. This is very different from a model where NGOs or churches lay the foundation for change. Without question, funding is extremely important even from outside sources.

446. See, e.g., Henry Pocasangre & Manuel Hernández, *Congreso Evade Discusión de Derecho Ancestral*, PRENSA LIBRE (Mar. 8, 2017),

Beyond simply maintaining what exists, there are questions as to whether indigenous law will be relevant, accessible, and meaningful outside of predominantly indigenous communities to people who have lost identity through conflict, migration, or political suppression. Is it capable of addressing difficult problems such as the influx of gangs or the encroachment on sustainable development from multinational corporations? Could it offer benefits to non-indigenous people without losing the characteristics that make it indigenous? Inevitably, thinking about support of indigenous law raises issues about its political acceptability, as, despite what it offers, it may be viewed as a step toward political autonomy or power that threatens the status quo. This Section takes up some of these key questions, though each could no doubt be the topic of far more investigation.

A. Coordination with Formal Systems

No customary law will continue to exist if the people who administer it and live by it cease to find it valuable. At this point, indigenous people do find it valuable all over the world despite Internet connectivity, cable television, and other modern innovations. As noted earlier, indigenous justice is part of cultural identity even among communities that have been torn apart through conflict or discrimination.⁴⁴⁷ In addition, there are serious problems in delivering formal justice to underserved and rural areas.⁴⁴⁸ Among indigenous people, there is such mistrust of the honesty, competency, and capacity of the formal system that indigenous justice is highly attractive even where the formal system is accessible.⁴⁴⁹ That could change if many other factors fall into place, but it is not likely to change soon.

Even if Northern Triangle countries warm to the idea of formal recognition of indigenous law, it is unclear whether incorporation of indigenous law into a formal justice system would strengthen it. While a thorough exploration of this idea is beyond the scope of what can be covered in depth here, it bears noting that the relationship between formal and informal justice systems is complex and must be

<http://www.prensalibre.com/guatemala/politica/autoridades-ancestrales-desisten-de-la-aprobacion-del-articulo-203> [https://perma.cc/VA27-L2M5] (deciding to table a proposed amendment to Article 203 of the Constitution of Guatemala). There was a lot of support for the amendment to Article 203 of the Constitution of Guatemala but, ultimately, not enough to win approval. See Interview with Amílcar Pop, Cong. Member, Guatemala City, April 4, 2018) (on file with author).

447. See *supra* text accompanying notes 34-35.

448. See *supra* text accompanying notes 18-25.

449. See *supra* text accompanying notes 18-25.

considered in light of the cultural and political realities of a country.⁴⁵⁰ It is helpful to recognize that codification or incorporation into the formal justice system can ossify customary law, making it difficult to change and making changes contingent on approval by those who control the formal justice system.⁴⁵¹ According to the United Nations Report, weak legal pluralism frequently undermines the power and authority of the informal justice system and integrates it into the lowest tier of the state hierarchy of courts.⁴⁵² Even where informal and formal systems are distinct, “the jurisdictional boundaries are usually blurred in everyday case settlement. Linkages among different primary justice providers often involve an ambiguous relation of interdependence and competition.”⁴⁵³

Part of the difficulty in coordinating formal and informal justice systems arises because of the stark differences between them.⁴⁵⁴ Usually indigenous law is not written.⁴⁵⁵ In addition, when indigenous people have experienced armed conflict—such as in Guatemala—or a history of suppression of their identity through discrimination or genocide, there may be a question as to what their law is if it still exists.⁴⁵⁶ While there has not been a comprehensive study of the impact of armed conflict on indigenous justice in Guatemala, researchers have indicated that it was disrupted through the death of elders and the migration of people to escape the violence.⁴⁵⁷

Even in cases of severe interruption, indigenous leaders have been able to ascertain how to proceed. As the case involving indigenous justice in Chiyax revealed, elders in Totonicapán were unsure of exactly how to apply indigenous law in the case of the theft profiled earlier.⁴⁵⁸ The process they used is what customary law expert TW Bennet describes as *triangulation*.⁴⁵⁹ In essence, it entails putting the question to various constituents in a community, such as individuals, the community at large, and the traditional courts.⁴⁶⁰ There were meetings among the community leaders and the leaders representing ten sectors of the canton.⁴⁶¹ From there, the community

450. See Sieder, *supra* note 143, at 221 (noting that many Mayan activists prefer to approach coordination by a judicial rather than a legislative route).

451. See Sieder, *supra* note 143, at 228-29.

452. See U.N. WOMEN, *supra* note 62, at 72.

453. *Id.* at 73.

454. See *id.* at 35.

455. See *id.* at 21.

456. See Hessbruegge & García, *supra* note 17, at 96.

457. See *id.*

458. See *supra* text accompanying notes 209-254.

459. See BENNETT, *supra* note 28, at 11.

460. See *id.*

461. See ROBO AGRAVADO, *supra* note 188, at 29.

sought guidance from the ancient book from the K'iche Community in Totonicapán dating from 1582.⁴⁶² The larger group then met again to clarify the legal rules and to decide what sanctions would be available if the men were found culpable.⁴⁶³ They did so with a backdrop of human rights knowledge, assistance from experts in indigenous law and in consultation with the authorities of the formal justice system, who had agreed to release the men to them.⁴⁶⁴ They triangulated. While it is not common that indigenous people have a book to consult, they can teach others from examples of how cases have been resolved and share knowledge about indigenous law as well as human rights law and their country's law.⁴⁶⁵ They may even decide to write down their rules, as Ekern observed in Chuculjuyup.⁴⁶⁶

Prior sections of this Article have presented examples of how the formal legal system coordinates with indigenous jurisdiction in countries that declared themselves "plurinational."⁴⁶⁷ Representatives of a community or experts are available to help bridge cultural and legal gaps. The Mexican criminal code, for example, provides for the use of experts in cases where an indigenous person is being tried in the state criminal system to deepen the judge's understanding of the defendant's personality and to understand cultural differences.⁴⁶⁸ Bolivia provides for coordination and cooperation among courts exercising diverse jurisdiction through systems of recording information about people's acts and prior offenses and having interchanges among the authorities to discuss their respective experiences in conflict resolution and safeguarding human rights.⁴⁶⁹ In short, there are ways to know what the rules are, even if the rules are unwritten, so long as the interested parties cooperate.

462. See *id.* at 32-33. According to the person designated to read the book, it was not written like the penal code. See *id.* Rather, it was a narrative that described how they would have undertaken such a matter from the beginning to the end. See *id.*

463. See *id.* at 29-30.

464. See *id.* at 7-8 (crediting various individuals and groups), 21-25 (relationship with the formal justice system) 26-27 (a meeting with various representatives of the cantons, the Defensoría Indígena, and representatives of the formal justice system).

465. See Hessbruegge & García, *supra* note 17, at 97.

466. See Ekern, *supra* note 329, at 282-83. In that pueblo, the Rules Committee was meeting for two hours every Sunday night for years in an attempt to capture the rules of the community. See *id.* Ekern was aware of at least five other cantons engaged in the same process. See *id.*

467. See *supra* text accompanying note 78.

468. See Salvador Monsiváis Márquez & Instituto Nacional Indigenista, *El Peritaje Antropológico Juicios y Nociones Elementales para su Uso y Elaboración* 74-75 (Mexico D.F., Working Paper No. 5, 1998) (citing and explaining Código Federal de Procedimientos Penales, arts. 220-23).

469. See LEY DE DESLINDE JURISDICCIONAL, ch. IV, arts. 13-17.

Even if a country decides to recognize indigenous justice, there are complicated questions about what it means to accept and support it. First, even reforms that appear to be unrelated, such as the decentralization of government in Guatemala, can have negative impacts on indigenous justice systems.⁴⁷⁰ Second, the encroachment of modern norms, such as payment for service or monitoring of decision-makers, would cause indigenous justice as we know it to cease to exist. Indigenous leaders often feel disrespected by members of the formal legal system and fear government reprisals for fulfilling the roles that the community has given them. This lack of respect, taken together with all the other obstacles, could begin to extinguish people's willingness to serve even if governments recognize indigenous justice.⁴⁷¹

B. Relevance in Communities Lacking Geographic Cohesion and Common Tradition

Indigenous people in much of Latin America, and certainly in Northern Triangle countries, have experienced physical disruption because of armed conflict and internal migration.⁴⁷² Indigenous justice is so grounded in the larger social structure in which indigenous people live that the diffusion of indigenous people is likely to break the bonds that hold communities together. In addition, as people leave the community they become exposed to other influences that may

470. See DEMANDING JUSTICE AND SECURITY, *supra* note 407, at 75-78 (explaining how the "citizen participation" reforms of 2002 and foreign intervention have weakened or competed with the *alcaldía indígena* in Chichicastenango. Among Seider's conclusions, she states, "After the war, 'the local' became a fetish, but the control of public finances and policies remained in the hands of the national and international elites." *Id.* at 90.

471. See *id.*; see also Interview with Lorenzo Seth Vásquez Chávez, *supra* note 172.

472. See COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO, GUATEMALA MEMORIA DEL SILENCIO 43 (1st ed. 1999). The U.N. sponsored Commission for Historical Clarity (Comisión para el Esclarecimiento Histórico) (CEH) documented the destruction of indigenous life during the armed conflict in Guatemala, finding severe disruption of their system of community authorities, prevention of the use of their own standards to resolve and settle conflicts, and impairment of Mayan spirituality and the practice of Catholicism. See *id.* As regards other countries in Central America, see LYNN V. FOSTER, A BRIEF HISTORY OF CENTRAL AMERICA 225-254 (describing the Civil Wars occurring across Central America from 1975-1996). These conflicts occurred in countries in addition to those that are the focus of this article, such as Nicaragua. Honduras as a staging ground for UNITED STATES intervention in Nicaragua. *Id.* at 241. In El Salvador, a civil war broke out in the 1980's, and the UNITED STATES provided military aid to a reactionary government that utilized death squads, bombings, and assassinations of its people. *Id.* at 246-247.

weaken their respect for the elders of the community.⁴⁷³ However, there may be ways—even in modern and mixed societies—to cultivate the bonds that link people and to offer restorative justice options that are based on indigenous law even if not tied to a particular community.

Guatemala provides an example of how this can work.⁴⁷⁴ There, local and international nongovernmental organizations (NGOs) have worked with indigenous communities using restorative-justice-based strategies to address both land titling disputes and infiltration of gangs into their communities.⁴⁷⁵ After the armed conflict in Guatemala displaced so many thousands of people, indigenous communities in Guatemala had to restructure themselves when those who fled returned.⁴⁷⁶ In some cases this meant dealing with mixed communities of people who were not previously living together and might even have political animosity towards one another.⁴⁷⁷

When people who had fled during the civil war returned to previously held lands, they found that neighbors who may have served in the army or the civil defense patrols occupied them.⁴⁷⁸ This led to disputes that were exacerbated by discrepancies between the state titling procedures and indigenous titling, which relies on the knowledge of community elders, verbal agreements, and natural features of the land.⁴⁷⁹ Much of the land in rural areas is held in the form of *ejidos*, which are communal titles not to be sold or divided.⁴⁸⁰ However, poor records of land transactions have led to double and triple titling, and corporations have exerted their power to purchase land.⁴⁸¹ Local and international NGOs in the Ixil region joined to provide land mediation programs to make binding agreements outside the official justice system and to convene a forum where communities came together to discuss how to resolve disputes over ownership and

473. See U.N. WOMEN, *supra* note 62, at 136. For example, a study of youth in Somalia found that, while they were aware of the positive role the elders and customary law played in maintaining harmony among intertribal groups, the young people were more individually than collectively focused and tended to view the elders as out of touch. See *id.* In Papua New Guinea, young people defied traditional leaders and formed violent gangs that are not sanctioned by the informal justice system and are beyond their reach. See *id.*

474. See, e.g., Ami C. Carpenter, Anu Lawrence, & Milburn Line, *Contested Authorities Alternatives to State Law and Order in Post-Conflict Guatemala*, 4 J.L. & CONFLICT RESOL. 48 (2013).

475. See *id.* at 53, 60.

476. See *id.* at 52.

477. See *id.*

478. See *id.*

479. See *id.* at 52-53.

480. See *id.* at 52.

481. See *id.*

boundaries.⁴⁸² They are applying restorative justice methods to solve disputes despite the lack of a reliable state titling process.⁴⁸³

The same researchers also documented efforts to combat Zeta and Sinaloa gangs in the indigenous regions.⁴⁸⁴ Ixil communities organized themselves to try to dissuade youth from joining these gangs.⁴⁸⁵ Two major strategies were put in place: local security patrols and peace and justice workers (*trabajadores de paz y justicia*).⁴⁸⁶ The former are controversial because they resemble the civil patrols that operated during the civil war,⁴⁸⁷ and it is reported that they sometimes employ violence such as lynching or battery against those suspected of wrongdoing.⁴⁸⁸ The *trabajadores de paz*, in contrast, employ Mayan restorative practices to prevent involvement of youth in gangs, including peace circles, use of the *xicay*, and intervention with parents.⁴⁸⁹ The study found that the overlap of social networks, family members, indigenous authorities, and the municipal justice system were more effective than any sector working in isolation.⁴⁹⁰

The implementation of restorative-inspired solutions could be magnified if there were adequate government funding and if those responsible for carrying it out were part of the indigenous community and accountable to the people who live there.⁴⁹¹ In countries such as Honduras and El Salvador, where indigenous people are organizing to regain their identities, this would mean helping them recapture or relearn indigenous methods that correspond to their values. It could

482. See *id.* at 53.

483. See *id.*

484. See *id.* at 53-54, 56.

485. See *id.* at 54.

486. See *id.* at 54-55.

487. See *id.* at 57.

488. See *id.* at 52, 54-55. Many scholars view lynching as a legacy of the civil war. See, e.g., MARÍA CRISTINA FERNÁNDEZ GARCÍA, *LYNCHING IN GUATEMALA: LEGACY OF WAR AND IMPUNITY* (2004), <https://projects.iq.harvard.edu/files/fellows/files/fernandez.pdf> [<https://perma.cc/8J5V-NMML>].

489. See Carpenter, Lawrence, & Line, *supra* note 475, at 55; see also FERNÁNDEZ GARCÍA, *supra* note 489, at 61 (defining *xicay*). The researchers in this study also found that Mayan leaders disagreed about whether *xicay* should be viewed as a Mayan form of torture or a respected form of punishment. See *id.* at 56. They noted the ongoing discussions among Mayan communities about what constitutes authentic Mayan justice practices and an evolution of views. See *id.* at 57.

490. See FERNÁNDEZ GARCÍA, *supra* note 489, at 68.

491. In Guatemala alone, there have been many proposals that purport to improve the positions of indigenous people that were formulated without the input of indigenous people. See generally *Impact of Mining*, *supra* note 53. These types of proposals are completely unacceptable and unlikely to succeed for many of the same reasons that the formal justice reforms, such as mediation centers, have failed to replace indigenous justice. See Hessbruegge & García, *supra* note 17, at 108-09.

mean that the governments would actively encourage indigenous people to organize under a set of pan-Mayan principles that they can agree upon and begin to resolve issues in their own ways. While the logistics of this is beyond the scope of what I can cover here, success will require that indigenous people develop the solutions and select leaders that they believe in to carry them out.⁴⁹² In countries that have lost much indigenous tradition, the focus may be very different from the issues in areas where indigenous law is strong.⁴⁹³

C. Applicability to Non-Indigenous People and Non-Traditional Issues

Most countries that recognize indigenous jurisdiction seek to restrict it to indigenous persons by a variety of requirements.⁴⁹⁴ But if people were convinced of its merits, would it work with non-indigenous people? Again turning to Guatemala as an example, Rachel Sieder recounts an instance where, in 2004, three non-indigenous women enlisted the help of the indigenous leadership to redress the murders of their husbands the previous year.⁴⁹⁵ Even though indigenous authorities most often send serious crimes on to the formal system, the informality of the relationship between indigenous and non-indigenous justice permits indigenous leaders to adjudicate alleged murders.⁴⁹⁶ While the complainants had informed the police and prosecutor that they had received death threats and that they had even paid a bribe to a local judge to try to spur some action, there had

492. There have been many misguided attempts of western countries to help other countries institute the “rule of law,” sometimes by urging them to use restorative justice and customary law. *See, e.g.*, Cynthia Alkon, *The Flawed U.S. Approach to Rule of Law Development*, 117 PENN. ST. L. REV. 797 (2013). Cynthia Alkon has described and critiqued the United States’ efforts to train Afghan elders on Afghan customary law, Sharia law, and human rights. *See id.* at 818-19 (describing a process where foreign development workers were brought in to conduct the training, which Alkon viewed as inefficient and costly).

493. *See* Jorge E. Lemus, *Los Pueblos Salvadoreños Indígenas Siempre Han Existido*, EL FARO (June 23, 2014), https://elfaro.net/es/201406/el_agora/15560/Los-pueblos-salvadore%C3%B1os-ind%C3%ADgenas-siempre-han-existido.htm [<https://perma.cc/7ENQ-CLNV>] (explaining that contemporary indigenous people are distinct from prior generations and urging the state to respond to current issues regarding lands, education, language, and culture).

494. *See supra* text accompanying notes 339-342.

495. *See* Rachel Sieder, *Contested Sovereignties: Indigenous Law, Violence and State Effects in Postwar Guatemala*, 31 CRITIQUE ANTHROPOLOGY 161, 165 (2011).

496. Hesbruegge & Garcia, *supra* note 17, at 117 (“[T]here is no principled reason why even a murder case within the community should not be resolved by indigenous justice.”).

been no arrests.⁴⁹⁷ Therefore, they asked the community leaders to utilize indigenous justice to get to the bottom of it.⁴⁹⁸ The *Alcaldía Indígena* investigated and within a week had identified three people responsible for the deaths, even obtaining a confession from two of the three people.⁴⁹⁹ A hearing occurred in the Mayan tradition in front of fifty to sixty indigenous people where the motive became clear, and the plot of the crime was revealed.⁵⁰⁰

The indigenous sanction for murder was monetary compensation, but in the end, the three *ladino* complainants rejected that sanction and sought the death penalty.⁵⁰¹ The indigenous leaders informed them that there was no death penalty under Mayan law.⁵⁰² The Mayan authorities then coordinated with the public prosecutor's office and handed over all of the proof.⁵⁰³ Sieder recounts that the Mayans were chagrined to have invested the time only to have the sanction rebuffed, and they wanted the formal justice representatives to acknowledge their work.⁵⁰⁴ However, they were also willing to collaborate.⁵⁰⁵

This fascinating example gives reason to think that non-indigenous people might well welcome indigenous justice if it were an option. The rejection of the sanction reflects a mindset that differs from that of an indigenous person, but that may be because of a lack of education about the types of sanctions available. For many families, there would be logic to receiving reparatory compensation to help sustain one's family by keeping a guilty person working rather than languishing in jail, particularly in a society where the government will not step in to support the crime victims.

In Guatemala today, there is robust cooperation between the official government and the community authorities in some areas. During a recent visit to Sololá, a highly indigenous department, the official mayor stated that if the indigenous authorities were not there resolving matters, the city would need three prisons.⁵⁰⁶ He also described a case where an indigenous physician was sanctioned with community service, and the mayor was able to put him to work

497. See Sieder, *supra* note 497, at 165-66.

498. See *id.* at 166.

499. See *id.*

500. See *id.*

501. See *id.* at 167.

502. See *id.*

503. See *id.*

504. See *id.*

505. See *id.*

506. Interview with Andrés Iboy, Mayor of Sololá, in Sololá, Guatemala (Apr. 7, 2018).

providing health services for the city.⁵⁰⁷ I also had occasion to speak with a *ladina* woman who requested and received the assistance of the community authorities in dealing with a car repair issue.⁵⁰⁸ When she felt she had been cheated, she gave no thought to going to court, but instead went directly to the community authorities.⁵⁰⁹ Within twenty-four hours, the problem was resolved to her satisfaction.⁵¹⁰ Collaboration between the representatives of the local government and community authorities can produce progress if both sides are committed to it.

With regard to disputes between indigenous and non-indigenous people about matters like environmental degradation, corporate exploitation, and other often-intractable problems, solutions are less clear. Many modern problems have historical antecedents for which indigenous people have their own approaches, which may well be adaptable to different variations on the theme. Hessbruegge and García assert that notwithstanding the lack of a system to resolve intercommunity disputes, there is no reason in theory that Mayan groups could not resolve problems on a regional or national level.⁵¹¹ The resolution of the case from Chiyax involved application of justice to individuals from outside the community.⁵¹² Nonetheless, when government-sanctioned corporations come into indigenous communities to exploit resources, Mayan law does not provide a solution. Bolivia's approach was to remove these issues from indigenous jurisdiction,⁵¹³ in which case the indigenous people must depend on the force of the formal justice system and international influence for protection.⁵¹⁴ Representatives of the government would no doubt see the possibility of indigenous jurisdiction as a threat to development that they believe will make money for their countries.⁵¹⁵

507. *Id.*

508. Interview with Individual A, in Sololá, Guat. (Apr. 7, 2018).

509. *Id.*

510. *Id.*

511. *See id.* at 90-91. However, the authors do note that rifts between communities deliberately created to fragment Mayan units in the colonial era still exist and make cooperation very difficult.

512. *See supra* text accompanying notes 246-248.

513. *See supra* text accompanying notes 341-343.

514. In Guatemala, the government has generally been viewed as favoring big landowners. *See Hessbruegge & Garcia, supra* note 17, at 105. The Guatemalan courts have been uneven in protecting land from allegedly illegal corporate practices aimed at furthering extractive industries in the country. *Impact of Mining, supra* note 53, at 159-64.

515. *Id.* at 156-157.

Environmental exploitation, corruption, narcotics trafficking, and the other types of crimes that Bolivia excludes from indigenous jurisdiction challenge both the formal and the informal justice systems in the Northern Triangle countries and many others around the world. Even the explicit protections provided to indigenous people under ILO 169, entitling them to meaningful consultation prior to development of their lands and resources, do very little to stop the march of powerful companies and government officials who acquiesce in facilitating the sale of collective lands or defrauding people.⁵¹⁶ Guatemala has made progress in prosecuting corruption because of the CICIG,⁵¹⁷ not as a result of its ordinary justice system. Ultimately, indigenous and non-indigenous people confronting environmental degradation, labor violations, narco-trafficking, and many other ills of modern society are dependent on the good faith of their governments to respect existing laws, enact new laws, and enforce them. Restorative indigenous practices could add accessibility to justice but will not solve all the problems. No law can.

Ultimately support for indigenous justice in countries that have not formally recognized it will require support from the dominant

516. *Id.* at 161-167 (discussing the impact of ILO 169 on indigenous people).

517. The Comisión Contra La Impunidad en Guatemala (CICIG) operates under Guatemalan law with a mandate to help address corruption through prosecutorial functions and through forwarding policy proposals to strengthen the justice system. See *Mandato y Acuerdo*, CICIG (Mar. 5, 2018), <https://www.cicig.org/cicig/mandato-y-acuerdo-cicig/> [https://perma.cc/F9F6-S684]. The CICIG was created in 2006 through an agreement with the United Nations with a mission to address clandestine operations by security units, many with ties to the State, that were committing human rights violations and to help in investigating and prosecuting a limited number of complex cases. See *id.* Another part of its mandate is to make public policy recommendations that can strengthen the government and address longstanding weaknesses in the legal and political structure. See *id.* The CICIG has investigated and supported prosecution in high-profile cases, leading to the recent resignations of Guatemala's President and Vice President in connection with a scheme where importers of products paid bribes to customs officials to obtain discounts on the duty they owed. See Azam Ahmed & Elisabeth Malkin, *Otto Pérez Molina of Guatemala Is Jailed Hours After Resigning Presidency*, N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html> [https://perma.cc/6RU7-3GJZ]; see also Elisabeth Malkin, *Roxana Baldetti's Resignation as Vice President Shadows Guatemala Politics*, N.Y. TIMES (May 10, 2015), <https://www.nytimes.com/2015/05/11/world/americas/roxana-baldettis-resignation-shadows-guatemala-politics.html> [perma.cc/MP2E-J3RP]. Recently, the President of Guatemala, Jimmy Morales, ordered the CICIG to leave Guatemala by next year. See Associated Press, *Guatemala's President Shuts Down Anti-Corruption Commission Backed by U.N.*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/world/americas/guatemala-corruption-commission-morales.html> [https://perma.cc/WY3C-WWEK].

political groups in each country. This is particularly challenging in countries that have for decades, and even centuries, treated indigenous people as inferior.⁵¹⁸ Just as Guatemala viewed its indigenous people with suspicion during the armed conflict, the dominant voices in the current power structure may perceive greater validation of the indigenous world view and the non-Western approach to administration of justice as a threat. While it is unlikely that a non-indigenous outsider such as myself could convince the prevailing political and legal establishments that indigenous justice is not threatening, I hope that this research has made a convincing case for the benefits it offers.

CONCLUSION

Indigenous justice, though distinctly different in world view and application from Western legal systems, offers large benefits to the people who use it: access to justice in an inexpensive, approachable, and expeditious system that corresponds to their values and philosophy of life. Far from being a relic of the past, it has proven itself to be adaptable in the modern era and responsive to human rights norms. As applied in Latin America, it meets basic standards of procedural fairness and, as a restorative justice system, stands in stark contrast to the approaches of formal justice systems. Exactly how indigenous justice would be incorporated and supported would depend on the circumstances of each country and the individual communities within it. Indigenous people in Guatemala are in a different position from those in El Salvador and Honduras. Nonetheless, indigenous justice may provide valuable stability and conflict resolution in countries that are sorely in need of it.

518. See text accompanying notes 97-110, *supra*.