

National Law and Indigenous Customary Law:

The struggle for justice of indigenous women in Chiapas, Mexico *

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Introduction

During the course of the past two decades official projections of national identity in Mexico have undergone important changes. By the early 1990s a state discourse characteristic of post-revolutionary nationalism focused on the existence of a mestizo nation¹ was superseded as legislation was approved which recognized Mexico as a multicultural nation. This was considered by many as a victory for the Mexican Indian movement and was also claimed as a triumph by the Zapatista guerrillas. However, this supposed shift to official acceptance of multiculturalism is far from free of contradictions. In some cases, ‘pro-indigenous’ legislation – provisions recognizing the right of indigenous people to their own norms and practices (*usos y costumbres*) – has, in practice, worked to the disadvantage of weak and marginalized groups *within* indigenous communities. In particular, indigenous women now face the dual task of defending their rights to their own culture vis-à-vis the Mexican state, while at the same time questioning essentialist and static perceptions of ‘culture’ and ‘tradition’ within the Indian movement that have negative implications for the full realization of women’s rights. This paper analyzes some of the dilemmas facing indigenous women in Chiapas in their struggle for rights within the new macro-political context of multiculturalism.

Linked to this, it examines the ways in which certain academic paradigms used to analyze indigenous normative systems can impede the development of proposals for reform to ensure greater access to justice for indigenous women.

The political debate over the right of indigenous peoples to cultural difference, self-determination, and autonomy gathered new strength after 1 January 1994, when Mayan peasants in the South-East of Mexico rose up against a national project they considered centralist and exclusive. This indigenous movement, known as the Ejército Zapatista de Liberación Nacional (EZLN) (Zapatista National Liberation Army) violently rejected the neo-liberal policies promoted by the government of President Carlos Salinas de Gortari (1988-1994).² On the same day that the North American Free Trade Agreement (NAFTA)³ came into effect, the indigenous peoples of Chiapas called the world's attention to the failings of the new economic model. The reality on the ground in Chiapas was sharply at odds with the official version, promoted by Salinas, that poverty and marginality had been eradicated and that Mexico had become a 'first world' country.

Together with mestizo peasants, members of the Tzotzil, Tzeltal, Chol, and Tojolabal ethnic groups declared war on the 'illegal dictatorship of Carlos Salinas de Gortari and his official party [PRI]'. The political discourse of the Zapatistas identified as the immediate cause of the uprising the negative effects of neo-liberal policies on the lives of thousands of indigenous peasants in Mexico. At the same time they linked their struggle to the five-hundred-year-old resistance movement of indigenous peoples against colonial and post-colonial racism and economic oppression. In later statements, as their specific demands as 'indigenous peoples' became clearer, the Zapatistas began to appropriate and reinterpret the meaning of 'indigenous autonomy'.⁴ Their demands

for autonomy within the framework of a multicultural nation-state made evident the urgent need to recast the official centralized and culturally homogenizing national project. The Zapatistas took up the demands of other groups in Mexican society, and became the first guerrilla movement in Latin America to advocate and prioritize gender demands within their own political agenda. However, when the EZLN demanded both the right of indigenous peoples to form governments in accordance to their own normative systems,⁵ and the rights of indigenous women to hold local posts of authority, inherit land and have control over their own bodies⁶ they entered troublesome terrain. In many cases such rights for women were contrary to the traditional practices of indigenous communities, apparently making demands for indigenous self-government and for recognition of indigenous women's rights mutually exclusive.

Organized indigenous women have taken up the challenge of reconciling these two demands. On the one hand they are calling on the Mexican state to recognize indigenous peoples' rights to self-determination within the framework of a reformed nation-state; on the other they are struggling within their own communities and organizations for a critical re-thinking of their prevailing normative systems.⁷ In response both to autonomist/Zapatista and government discourses, organized indigenous women have pointed out that while gender inequalities exist within state law, they also exist within so-called indigenous law (or 'customary law'). They have confronted the essentialist perspectives of some sectors of the indigenous movement, which glorify certain cultural traditions, arguing instead in favor of change. As one document from the organized indigenous women's movement states: 'we want to find paths through which we may view tradition with new eyes, in such a way that will not violate our rights and will restore dignity to indigenous women. We want to change those traditions that diminish our dignity.'⁸

Such viewpoints were expressed at the negotiating table between the government and the EZLN, set up twelve days after the Zapatista uprising. Partly as a result of the pressure applied by the indigenous women's movement, the San Andrés Accords, signed both by the Zapatista commanders and by representatives of the government (see note 5) committed the government to respect indigenous autonomy in the following terms:

‘Indigenous peoples have the right to free self-determination, and, as the means of their expression, autonomy from the Mexican government to ... [a]pply their own normative systems in the regulation and resolution of internal conflicts, honoring individual rights, human rights, and specifically, the dignity and integrity of women..’.⁹

Much of the evidence presented in this paper derives from an investigation into the ways in which national law and indigenous customary law operates in response to indigenous women's demands for justice in Chiapas within this new political context. With the participation of Tzeltal, Chol and Tzotzil women, an interdisciplinary research team explored the extent to which both national law and indigenous customary law responded to women's denunciations of sexual and domestic violence.¹⁰ The experiences and concerns of indigenous women that emerged during the course of the research highlighted the dangers of affording primacy to idealized notions of ‘indigenous culture’ and indigenous customary law. Such dichotomized perceptions tend to understand ‘indigenous law’ as reflecting a completely different cultural logic to ‘national law’: the former supposedly being guided by an ethos of conciliation, rather than that of punishment, which is ascribed to the national legal system. However, by idealizing indigenous normative systems, such approaches singularly fail to recognize

the unequal power relations that exist *within* indigenous communities, particularly gender inequalities. In practice, leaving the resolution of conflicts over sexual and domestic violence to local indigenous authorities often means lack of access to justice for women.

Women's experiences with national and traditional authorities have revealed the networks and inequalities of power that exist at the various levels of *both* justice systems. Providing greater autonomy for indigenous communities is not in and of itself sufficient to ensure the 'dignity and integrity' of indigenous women. Proposals advanced by indigenous women proposals to 're-invent tradition' under new terms signal a need to re-define the traditional debate between cultural relativism – which puts a primacy on the need to respect cultural differences - and universal values, such as human rights and women's rights. Respect for the rights of indigenous people does not mean the abandonment of universal values in the name of 'respecting culture'. Rather we need to consider how universal values, such as human rights, are understood, translated and claimed in local contexts, and which political and legislative strategies will ensure the greatest access to justice for those to whom it has traditionally been denied.

Antecedents: the Constitutional Amendment and its Political Uses

On 28 January 1992, the Mexican government approved an amendment to the Fourth Article of the Constitution, which recognized the multicultural character of the nation.¹¹ This had been preceded by an important amendment to Article 220 of the Federal Penal Procedures Code, which recognized the validity of expert testimonies in reconstructing the cultural context in which a crime is committed. The amendment stated: 'when the

accused belongs to an indigenous ethnic group an effort will be made to follow expert testimony in order that the judge may...better understand [the] cultural difference [of the accused] to the national norm [*sic*].¹² The revision of the code of penal procedures allowed for certain sentences to be reduced in the light of what are perhaps best called 'mitigating cultural circumstances'. In other words, if an indigenous group's traditional norms and practices were in contradiction with federal law (such as, for example, detaining an offender until they pay compensation or obliging them to carry out community service) then these cultural differences could be taken into account by the sentencing judge.

At the time, proponents of the defense of cultural diversity welcomed this legislative change as a step towards a new relationship between indigenous peoples and the nation state. However, evidence soon emerged of the contradictory interpretations which could arise. In August 1993 a family of Lacandon Indians came to the Women and Children's Support Centre (Centro de Apoyo a Mujeres y Menores, CAMM) in San Cristóbal de Las Casas, Chiapas, seeking legal support to denounce the murder of a twelve year old Lacandon girl by her husband, the American anthropologist Leo Bruce. The victim's relatives recounted a history of domestic violence within the marital home that mirrored the accounts of many women, indigenous and non-indigenous, who came to the centre. However, they maintained they had not intervened on previous occasions because of the husband's 'right' to discipline his wife, a right that was recognized by the Lacandon community as a whole. This same argument was later adopted by Bruce's legal defense, which argued that he had been attempting to 'discipline' his wife according to Lacandon tradition.¹³ Taking advantage of the reform of the penal procedures code, Leo Bruce's uncle, the well-known linguist Robert Bruce, provided an anthropological expert testimony in which he demonstrated his nephew's attachment to indigenous norms and practices

(usos y costumbres). (Bruce had learnt the Lacandon language, changed his clothing and lifestyle to fit those of the Lacandon community, and identified himself as Lacandon). Although no cultural argument could be used to justify the killing, mitigating cultural circumstances could commute the crime from murder to accidental death, or homicide. The prosecution also prepared expert anthropological testimonies in order to counter the defense's arguments. However, before the complex legal and anthropological debate could take place, the Ejercito Zapatista de Liberación Nacional (EZLN) took the municipalities of Altamirano, Chanal, Huixtán, Las Margaritas, Oxchuc, Ocosingo and San Cristobal on 1 January 1994, opening the doors of the municipal jails in the process. Bruce escaped, together with many other prisoners.

Despite the lack of resolution of the case, the expert anthropological expert testimony made in Bruce's defense provides a clear example of the ways in which affording primacy to 'culture' can disadvantage indigenous women. Another example of the contradictory ways in which anthropological expert testimonies may use the 'cultural argument' against women was seen after 32 women and 12 men were murdered by paramilitary groups¹⁴ in the Tzotzil community of Acteal, in the municipality of San Pedro Chenalhó, Chiapas, on 22 December 1997. The government's Comisión Nacional de Derechos Humanos (CNDH) (National Human Rights Committee) asked specialists to elaborate expert anthropological reports for the defense of the Tzotzil paramilitaries accused of the massacre, exploring 'the cultural practices of the Tzotzil of San Pedro'. The implicit assumption was that the violence in Acteal, and the mutilations of pregnant women, children and elders that had occurred in the massacre, might somehow be 'explained' in cultural terms. Many anthropologists refused the CNDH's request and argued instead that prior to the appearance of paramilitary groups in the region, violence had not been a principal cause of death among the people of San Pedro Chenalhó.

Between 1988 and 1993 only 16 violent deaths were recorded in the municipality, yet following the Zapatista uprising and the ensuing militarisation of Chiapas they increased considerably and began to involve firearms. In addition, no previous record exists of mass aggression against women – violent deaths of women had previously occurred only as a result of domestic violence or witchcraft accusations. No mutilations of pregnant women had ever been recorded. In short, there was no evidence of cultural practices that would permit the Acteal massacre to be linked to indigenous world-views or to indigenous ‘rites of war’. Nevertheless, anthropological expert opinion is still being used in the defense of some of the 57 paramilitaries convicted of material responsibility in the massacre, who were sentenced to 35 years in prison [WHEN? ARE THEY MOUNTING A LEGAL APPEAL?]. While neither the contents of specialist reports nor the names of those who carried them out have been made public, the defense continues to argue that the massacre took place within a context of ‘customary interfamilial fights’ among the Tzotzil. Yet in fact the violence in Acteal has little to do with the way conflicts have traditionally been resolved among the highland Tzotzil, and is better explained as a consequence of the broader strategy of ‘low intensity warfare’ and paramilitarisation currently being applied in Chiapas in order to combat the Zapatistas (Hernández Castillo 1998a).

Paradoxically, expert anthropological testimony - originally conceived as a tool for the defense of groups especially vulnerable to the blindness of national law to cultural differences - has become a weapon wielded by powerful elites to protect their wider interests. The way in which the legal teams defending the San Pedro paramilitaries and Leo Bruce made recourse to the amendments to the fourth article of the Constitution and the federal criminal procedures code calls into question the utility of such legal reforms,

at least when they remain unaccompanied by additional measures to ensure that indigenous women and other vulnerable groups are able to use them to their benefit.

Voices of Women: Challenging ‘Culture’

During the 1990s Zapatista women became some of the most important advocates of indigenous women’s rights, through the so-called Women’s Revolutionary Law. This charter, created in consultation with Zapatista, Tojobal, Chol, Tzotzil, and Tzeltal women, was made public on 1 January 1994 and has been of great symbolic importance for thousands of indigenous women who are members of peasant, political and cooperative organizations. It contains ten articles, which enumerate a number of rights of indigenous women. These include, *inter alia*, the right to political participation and to hold leadership posts within the political system; to a life free of sexual and domestic violence; to decide how many children they want to have; to a fair wage; to choose a spouse; to an education; and to quality health services. Although many indigenous women are not aware of the detailed contents of the charter, its mere existence has become a symbol of the possibility of a fairer way of life for women. In a way, the Zapatista Women’s Revolutionary Law has helped create what Karl-Werner Brand calls a ‘cultural climate’ which allows the de-naturalization of women’s inequality and the questioning of existing social and political behavior (1992:2). Anna María Garza has observed this new ‘cultural climate’ among the Tzotzil women of San Pedro Chenalhó:

‘During the first months after the armed uprising, the debate in San Pedro Chenalhó about the new law seemed to be taking place in the fields and the hamlets, between relatives, couples, and neighbors: in places where there are no clear boundaries between private and public realms, between the political and

every-day activities. Discussions within the community were very different from those carried out in forums, round-tables, and workshops. While in the forums each article of the law was read and analyzed, and all sorts of proposals voiced and recorded, in the indigenous settlements of Chenalhó the image of revolutionary women and the idea of women's rights were enough to ignite a debate which was very much interpreted in the light of concrete situations and conflicts. In its Women's Revolutionary Law, the EZLN had succeeded in capturing the problematic of the daily lives of indigenous communities, and the need to break with the existing consensus around masculine authority'. (Garza Caligaris 1999: 40).

Since the EZLN uprising, indigenous women have met at local, regional, state and national gatherings. Under the pressure of their women members, the Indigenous National Congress and the National Assembly for Indigenous Autonomy have instituted national women's meetings. Similarly, special groups for the discussion of problems specific to indigenous women were created within the structures set up for dialogue between the government and the EZLN. Women have used these spaces to claim their rights to change those practices, customs and traditions that they consider unfair. Many of the documents produced in these forums have vindicated the right of indigenous women to national citizenship and have taken up the national indigenous movement's demand to maintain and recover their traditions. However, they also insist on women's rights to change certain customs and traditions while retaining full membership of their respective ethnic groups.

The re-conceptualization of community traditions and culture from a women's perspective has also influenced the political debate around autonomy. Organized indigenous women have appropriated the demand for autonomy made by the EZLN and other indigenous and peasant organizations, which proposes the establishment of a new political order to allow indigenous peoples to control their territories and resources. Since 1995, women from one of the oldest national organizations, The National Plural Indigenous Assembly for Autonomy (Asamblea Nacional Indígena Plural por la Autonomía, ANIPA), have played an important role in the re-conceptualization of a multicultural national project. In the Final Declaration of the First National Women's Encounter of ANIPA - which took place in San Cristóbal de Las Casas in December 1995, attended by 270 women from different indigenous groups - women explicitly demanded the inclusion of a gender dimension in proposals to form autonomous, multi-ethnic regions:

'We, the Yaqui, Mixe, Nahuatl, Tojobal, and Tlapaneca women....come from afar to speak our word in this land of Chiapas [...] During these two days we have talked about the violence we experience within our communities, at the hands of our husbands, the caciques, and the military; of the discrimination we are subjected to both as women and as Indians, of how our right to own land is denied us and about how we want women's opinions to be taken into account [...] We want an autonomy with a woman's voice, face, and consciousness, in order that we can reconstruct the forgotten female half of our community'. (cited in Gutiérrez and Palomo, 1999:67)

The demands of the women at ANIPA echoed the demands of Zapatista women. The latter, however, have concentrated their efforts on expanding the concept to include women's autonomy within the larger autonomy of indigenous peoples. This gender perspective was developed in a proposal read to the National Indigenous Congress (Congreso Nacional Indígena), in October 1996 by women from Chiapas, Oaxaca, Guerrero, Querétaro, Veracruz, San Luis Potosí, Estado de México, Mexico City and Puebla. This referred to economic autonomy (defined as the right of indigenous women to have equal access and control over means of production), political autonomy (their basic political rights), physical autonomy (to have control over their own bodies and to live without violence), and socio-cultural autonomy (defined as the right to maintain specific identities as indigenous people).¹⁵

Equality and the Recognition of Difference

Opponents of proposals for greater indigenous autonomy in Mexico have argued that the legal recognition of rights based on notions of cultural difference and tradition is unjustifiable because the colonial origins of many institutions and cultural traditions of indigenous people mean they are not 'authentic' or 'pure' (Viqueira, 1999). Adherents to a liberal discourse of universal rights have also opposed proposals for autonomy and the legal recognition of ethnic difference on the grounds that such measures will merely deepen inequalities between mestizo and indigenous societies (Bartra, 1992, Viquiera, 1999). However, indigenous women's efforts to critically reframe 'tradition' and to recast autonomy proposals in such a way that they guarantee the universal human rights of women has demonstrated that a multicultural project to recognize difference does not necessarily conflict with liberal notions of equality, rights and social justice.

Throughout the twentieth century the Mexican government's policies towards the indigenous population were influenced at different times by discourses promoting equality and discourses promoting difference. The historical record has shown that the promotion of equal treatment for those who stand on unequal grounds has, in practice, denied the indigenous population's access to justice. Paradoxically, however, the Mexican government's recognition of a different cultural logic has also served to justify the exclusion and marginalization of indigenous peoples in the name of culture.

After the 1917 Revolution Mexico's political class attempted to build a modern, homogeneous and mestizo nation. Spanish was imposed as the national language, denying indigenous peoples the right to use their languages. Laws were implemented which did not take the cultural context of plaintiffs and defendants into account, and which indigenous people did not understand. Indigenous political and religious institutions were disempowered, and new mestizo municipal authorities took over the political and economic power of entire regions.¹⁶ All these impositions took place in the name of the 'right to equality': all Mexicans had to be treated equally, despite the cultural, economic, and social differences that characterized this legally imposed citizenship.

However, the much sought-after *de jure* recognition of the right to cultural difference achieved in the 1990s has not meant improved access to justice for indigenous peoples. As indicated above, the practice of anthropological expert testimony by the Instituto Nacional Indigenista (National Indigenous Institute), INI,¹⁷ and by other government institutions such as the CNDH, can prove to be a double-edged sword that disadvantages those with least power within indigenous communities. In the past, the *de facto* recognition of 'culture' in certain regions of Mexico was used as a pretext to

justify the exclusion and marginalization of ethnic minorities, and to legitimize pro-government Indian *cacicazgos* and other practices. In effect, only those indigenous institutions useful for ruling elites were recognized as ‘traditional’. In the name of ‘respect for culture’, indigenous women continue to be denied their right to own land, to inherit family property or to have political power. Today in the name of ‘culture’ the existence of paramilitary groups, funded and promoted by mestizo elites, is justified. And in the name of ‘culture’ a sense of ‘otherness’ and of ‘difference’ is construed in order to distort and impede political alliances between indigenous and non-indigenous people. In sum, discourses which emphasize the right to equality and discourses which emphasize the right to difference can *both* be used to hide, reproduce, or deepen the marginalization and exclusion of indigenous peoples. Legal recognition of the right to difference that relies on dichotomized visions counterpoising ‘state law’ against ‘indigenous customary law’ can ultimately serve to reinforce such tendencies.

Anthropological Constructions of Law and Custom

The current debate between defenders and detractors of indigenous autonomy is but one more expression of the long-running debate over equality and difference which has marked the development of legal anthropology. Malinowski (1926) and Radcliffe-Brown (1952), considered by many to be the ‘fathers’ of legal anthropology, represent both sides of this debate. Malinowski believed in the universality of law, arguing that every society, including ‘primitive’ societies, establish rules of behavior. From his perspective, ‘aboriginal’ and ‘western’ normative systems were guided by the same logic, the ultimate goal of which was to respond to the economic and social interests of individuals. By contrast Radcliffe Brown, although he did not vindicate cultural

relativism (which would not become popular until decades later), referred to different cultural logics and developed the idea of conceptual difference between law and custom. For Radcliffe-Brown, law was a characteristic only of societies with a centralized government and its existence was an indication of a superior developmental level.

The famous debate between Max Gluckman (1955) and Paul Bohannan mirrored these earlier tensions. Gluckman was of the view that all human beings tend to resolve their problems in a similar fashion. In his opinion the Barotse judges of Rhodesia (where he carried out his fieldwork) and the judges of western societies would, if presented with the same problems, tend to create laws based on similar criteria. On the other hand, Bohannan believed in the existence of different cultural logics, which explained why what was considered a crime among the Tiv of Nigeria and what was against the law according to the judges of western societies was quite different. The political consequences of both discourses within the colonial context in which they were developed were significant. If aboriginal peoples had a legal system, then it could be used by the colonial administration in what was called 'indirect rule': using local indigenous authorities and institutions to control the colonized population. If, on the other hand, it were deemed that indigenous 'customs' could not be considered laws, then the legal system of the colonial power would be directly imposed. (See Collier, 1995).

As these early examples indicate, the context of domination from which discourses around equality and difference emerge determines the uses to which they are put, irrespective of the political intentions of those advocating one or the other position. Emphasizing equality can lead to an ethnocentrism, which imposes the western world-

view as the looking glass that colors the social processes, institutions, and cultural practices of other societies. Similarly, emphasizing difference can serve as an instrument to ‘orientalize’ non-western societies, to transform these societies into the ‘other’ and thus permit a definition of western culture based on discourses of rationality and progress.

The difference between ‘law’ and ‘custom’ developed by Radcliffe-Brown, and upon which much of the later development of legal anthropology was based, originated in the eighteenth century definition of law as a contract between individuals. The religious concept of ‘divine law’ that prevailed prior to the Enlightenment was replaced by the idea of law as a contract between free individuals that would help overcome the chaos of the ‘state of nature’. ‘Custom’ was subsequently conceptualized as that which opposed the free and rational contract of the ‘law’. Just as it is impossible to imagine civilized man without the opposing concept of the savage, so, it could be argued, the concept of law cannot be conceived without the concept of custom. Throughout different historical periods, a diversity of cultural practices enforced within different contexts and authority structures were lumped together under the category of ‘custom’ in opposition to (western, rational) ‘law’. In one sense then, ‘custom’ is the savage seen in the mirror of the – civilized – ‘law’.

In some contexts the discourse on cultural difference has obscured the relations of subordination that have given rise to and shaped the development of many of the cultural practices of groups considered ‘non-western’.¹⁸ Some of the pioneering works of legal anthropology in Chiapas suffer from this last failing (See Collier, 1973, Hermite, 1964). The analysis of dispute processes among Zinacantecans carried out by Jane Collier in the 1960s emphasized ‘folk’ concepts which related conflict to illness,

used to explain the Zinacantecan desire for reconciliation between conflicting parties rather than punishment of the offending group or individual. In her later work Collier recognized that the prevailing theoretical paradigms of the 1960s did not prompt her to explore either the relationship of Zinacantecan law to state and national law, or the power relations between local leaders and the regional and national power elite. (See Collier, 1995)

The functionalist conceptions of 'law' and 'custom' which prevailed in legal anthropology until the 1970s continued to conceive of the juridical realm as a sphere that could be analyzed independently of other social and economic processes.

Supporters of the analysis of normative systems, following the methodological tradition of Radcliffe-Brown, together with those who, in the Malinowskian tradition, advocated the analysis of juridical processes, effectively ignored the ways in which the systems or processes they analyzed functioned within colonial or post-colonial relationships of domination. In Mexico, the influence of Marxism and political economy in anthropology led to a questioning of these theoretical paradigms, and gave rise to a critical anthropology which pointed to the relationship between the analysis of power and the analysis of culture. For example, adopting the process methodology developed by Laura Nader among the Zapotecs (and used also by Jane Collier in her analysis of Zinacantecan Law), Teresa Sierra has analyzed dispute processes among the Nahuas of Puebla, and contextualized these processes in the framework of relationships of domination with the nation-state. Sierra advocates an approach which analyzes the relations between dominant and dominated normative systems, which are articulated through strategies developed by indigenous people when they recur to one or other legal authority (See Sierra 1993, 1995, Sierra and Chenaut, 1995).

Advocates of alternative theoretical currents who claim to defend indigenous peoples have not only presented their 'cultural logic' as isolated and in opposition to the dominant 'culture', but have often given in to the temptation of presenting indigenous peoples as homogeneous and harmonious. Many well-intentioned anthropologists in Mexico who became personally involved in the indigenous people's struggle thus tended to ignore internal contradictions within indigenous communities and restricted their criticism to the relationships of subordination that indigenous peoples are subjected to within the nation-state (Bonfil, 1987; Bartolomé, 1977; Stavenhagen, 1988; Varese, 1988). This tendency to overlook indigenous heterogeneity and ignore internal conflicts in order to construct a homogeneous and harmonious 'other' was questioned by later studies and is even considered by some to be a new form of colonialism. Said (1978) famously referred to this tendency as 'orientalism', and Mohanty (1988) has called it 'discursive colonialism'. Mystification of the 'other', however noble the overall objectives, merely serves to make the 'other' into a reflection of western aspirations: indigenous people are thus viewed as ahistorical objects, bearers of immutable 'tradition', rather than understood as historically constructed subjects.

During the 1980s and 1990s anthropological research developed historical perspectives on indigenous normative systems: for example Anna Garza for San Pedro Chenalhó (1999), Jan Rus for San Juan Chamula (1997), Peter Fitzpatrick for New Guinea (1980, 1991), John and Jean Comaroff (1985, 1991) and Cooper and Stoler (1989) for Africa. Such approaches have contested essentialist representations of indigenous normative systems as some kind of timeless relic of a pre-colonial past.¹⁹ Instead 'indigenous customary law' is analyzed as a social construction which has emerged within the context of power relationships, and which, like state law, has suffered constant modifications as a consequence of complex social processes.

Feminist anthropology has also contributed to a rethinking of the interplay between power, culture and legality. Many studies have indicated that law is important for women not only because it contributes to the construction of their identities as subordinates, legitimizing patriarchal culture, but also because in certain contexts it can be used by women themselves to construct spaces of resistance. (Fineman and Thomadsen, 1991; Lazarus-Black and Hirsch, 1994; Smart 1989). Through historical investigation, scholars have analyzed the ways in which the patriarchal system in Mexico was 'rationalized' with the establishment of laws which prohibited violence against women but justified other forms of control (Alonso 1995, Varley 2000). However, while recognizing that national law reproduces inequalities, feminist legal anthropology has also explored the ways in which women have used it to challenge decisions of indigenous customary law they consider unjust (Chenaut 1999, Moore 1994). Analysis of processes of dispute resolution in indigenous communities has shown that while conciliatory procedures may mitigate conflicts, more often than not they reaffirm the subordinate position of indigenous women (Collier 1995, Garza Caligaris 1999, Sierra n.d.). Many feminist perspectives are characterized by the tension between the analysis of normative systems as reproducers of gender inequality, and the recognition that some of these legal spaces are of strategic value to women for the construction of a more just life.

State Law vs. Indigenous Customary Law? The Many Faces of 'Custom'

An underlying premise of legal reforms to recognize indigenous norms and practices (*usos y costumbres*) is that state law and indigenous customary law are discrete, distinct systems informed by different cultural logics. This separation between 'state law' and

'custom' can be traced back to the very constitution of state law itself. In order to legitimate itself as a symbol of western rationality, national law has depended on 'custom' to represent backwardness and pre-modernity (see Fitzpatrick 1992). In the same manner 'custom', when constructed within legal and academic discourses as a homogeneous otherness, can only be imagined as an alter ego of western law. In other words, indigenous peoples' normative practices have been re-framed as 'customary law' in a continuous dialogue with colonial and postcolonial powers in order to legitimize the latter.

However, in contrast to supposed indigenous homogeneity, the politico-legal norms and traditions of indigenous peoples in Mexico are in fact highly heterogeneous. In some regions they reproduce concepts of justice and morality inherited from colonial religious authorities. In others indigenous world-views which link crime and conflict with illness, and conciliation and forgiveness with health are in evidence (see Collier 1973). Yet even though broad differences between the cultural logic underpinning indigenous and mestizo society can be discerned, indigenous law and national law are not isolated spheres: rather, the legal strategies of social actors who make recourse to both realms of justice means they are in continual interplay. Rather than the existence of two independent legal systems, the national and the indigenous, one dominant and the other subordinate, what in fact exists in practice is a mutual constitution of indigenous and national law. Instead of positing the existence of two separate legal systems guided by distinct cultural logics, it would be better to speak of a shared legal map onto which different, overlapping normative systems are traced in an interaction which necessarily affects the very substance of those legal systems themselves.²⁰

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The Mexican State legal system, represented in Chiapas by the district court of San Cristóbal de las Casas, belongs to the Roman civil law tradition. Complaints are presented before the public prosecutor's office (Ministerio Público), which is charged with representing society and ensuring justice in the enforcement of the law. Once charges have been made, an investigation takes place and the case is prosecuted via written documents without a public trial ever taking place. The accused usually contracts a defense lawyer who presents appeals and petitions. In the case of a guilty verdict, the criminal judge decides the sentence. The central objective of this process is to determine and punish the guilty parties. By contrast indigenous law, 'heir to pre-hispanic legal systems', is represented by indigenous town councils located in the municipal seats. Here municipal authorities established according to state law are combined with civic-religious authorities in which community elders play an important role. Council meetings to resolve conflicts are public, the parties to a dispute bring their respective witnesses, and an important role is afforded to elders in efforts to secure conciliation. The central object of this process is to arrive at an agreement and reconcile the parties in conflict.

According to the majority of studies comparing the two, the indigenous legal system is based on 'tradition', while the national system is founded on the federal Constitution. The former is administered by authorities appointed and controlled by the community, the latter by paid public functionaries; indigenous procedures are oral and flexible, in contrast to state legal proceedings which are written and schematic; lastly, indigenous law aims for conciliation, state law for punishment.²¹ Although these typologies are not entirely without justification, in general they have been used to oversimplify very complex processes. 'Custom' and 'tradition' are disputed terms and are defined differently by different sectors of the community.²² What is understood by the term

'traditional authorities' in each region ranges from civic-religious authorities to the new autonomous authorities formed by pro-Zapatista communities since 1994, with a multitude of new hierarchies and organizational structures created by Catholic and protestant groups in between. The problem of recognizing 'tradition' is thus much more complex than the amendment to the fourth article of the Constitution and the expert anthropological testimony of the INI would suggest.

Although a highly heterogeneous range of 'traditional' authorities and dispute resolution practices exist throughout indigenous communities in Chiapas, the common denominator which links them is the use of 'custom' to denote 'otherness' in contrast to state law. The meaning and content of 'custom' in each region, however, depends on the specific history of each community, their relationship with the state, and the way in which internal power groups have developed. The most striking differences are found between the highlands (Los Altos) and the northern and jungle areas. In most of the highland municipalities, civic-religious hierarchies have long been fused with republican structures of political power. These structures originated in the policies of President Cárdenas during the 1930s, policies which favored the emergence of a new form of indigenous *caciquismo* ('bossism') merging economic, political and ritual power, as exemplified by the case of San Juan Chamula, thoroughly documented by Jan Rus (1994). In the Chol region of northern Chiapas and the jungle communities, civic-religious authorities have all but disappeared. Where they still exist they have lost political power and their functions are confined exclusively to the ritual realm.²³

In practice, legal systems and justice administration agencies contribute to the creation of the very identities they are meant to represent (Foucault 1976, Collier, Maurer and Suárez-Navaz, 1995). By legitimizing or de-legitimizing certain norms and practices

within indigenous communities, the Mexican State has in fact contributed to their creation.²⁴ By treating cultural identities as essential constructs whose existence precedes their encounter with the legal system, what the law does is obscure the role that its own instruments play in the reproduction of those identities. In the current political context in Mexico, the importance of the state and state law in formulating a discourse on ‘custom’ and ‘tradition’ is increasingly evident. The productive capacity of the law is particularly clear in Chiapas. Here state law has been charged with recognizing and so constructing ‘legitimate’ indigenous law, at the same time as state violence is used against the indigenous Zapatista authorities of the autonomous regions, so creating the idea of an ‘illegitimate’ and ‘unauthentic’ indigenous law. Whereas ‘traditional’ civic-religious based authorities in the highlands are legitimized by the government as part of the ‘*usos y costumbres*’ recognized in the fourth article of the Constitution, autonomous authorities are persecuted, their members often imprisoned on charges of ‘usurpment of functions’ or ‘kidnapping’.

Clearly traditional authorities and practices are not defined by the temporality of their origin: rather than a descriptive term applied to some kind of ‘essence’, ‘tradition’ is an interpretative term used to refer to a process (Handler and Linnekin, 1984). Given that culture is constantly changing, conceptualizing something as ‘traditional’ affords it a specific symbolic value. As Linnekin states, ‘[c]ultural categories such as “tradition” have a reflexive character; we invent them as we live and think about them; people’s awareness of them as categories affects their meaning’. (Linnekin, 1982:250). In other words, ‘tradition’ is socially constructed. Placing these constructions within wider frameworks of power allows us to understand why certain inventions of ‘tradition’ are legitimized and others are not. (See Ulin, 1995). Yet ‘tradition’ is not only legitimized by the powerful. Some authors have analyzed how the past is re-invented in the historic

memory of marginalized peoples in order to legitimize their present struggles and diminish the homogenizing power of colonial and post-colonial governments. (Price, 1983 and 1990; Rappaport, 1990.) Nonetheless, such readings are in danger of creating new dichotomies: the traditions invented by ‘dominators’ to help them maintain their power, counterpoised against the traditions invented by the ‘dominated’ in order to resist. Perhaps it is preferable to view tradition and custom as concepts born of a dialectic process of resistance and reproduction in which the state and the law have a productive capacity which enables the construction of certain identities, which in turn challenge the very definitions that gave them life.

In this way, autonomous Zapatista authorities reproduce hegemonic discourses, presenting themselves as the bearers of ‘millennial traditions’ and ‘ancestral customs’. Yet through this discourse they vindicate new forms of conflict resolution, which draw on elements of national and international law and reinvent new traditions in which women in particular have a more active role in community life. This process of normative synthesis and critical reflection was described by a member of Tierra y Libertad (Land and Liberty), one of the autonomous Zapatista authorities:

‘When cases of domestic violence came before us, we referred first to the civil code and the penal code. [The cases] were interpreted according to national law, and then compared with our revolutionary indigenous law. We would then determine that national law wouldn’t be applied, because the law of the government is almost invariably made against women rather than in their favor. So we would set things straight, mainly by using the revolutionary law, which speaks of the rights of women. In this way people’s knowledge was broadened,

they were shown how women have just as many rights as men'.²⁵

Despite such evidence attesting to the innovative capacity of the autonomous authorities to reinvent 'customary law', in their political discourse indigenous normative systems continue to be labeled as ancestral traditions. In this way the Zapatista movement continues to uphold the officially engendered dichotomy between national law and indigenous law, although they use it in furtherance of indigenous demands for self-determination. Evidently, although 'custom', as much as law, is a social construction that legitimizes certain relations of domination, in some contexts it can play the role of resisting dominant powers. Nonetheless, as the case of San Juan Chamula and other highland municipalities indicates, we should not conclude that 'resistance' is always an element of indigenous 'custom' *per se*.

Constructing Subordinated Identities

As indicated above, significant differences exist throughout Chiapas in the way that 'traditional' indigenous authorities and 'custom' (*la costumbre*) deal with cases of marital breakdown and domestic violence. However, in general terms, both state law and custom demand that indigenous women affirm traditionally ascribed gender roles in order to gain legal support. It is all too easy to represent women suffering domestic violence as victims - the fact that many of them decide to denounce their situation is in itself an act of resistance and social agency that is important to recognize. Yet in order to gain access to justice, women invariably emphasize their role as passive victims. In this way the law contributes to the construction of women's identities as victims and subordinates. In their complaints to both the state public prosecutor's office and to

community authorities, women try to present themselves as 'good' women who comply with their domestic 'responsibilities'.²⁶ This signals an attempt to counter the masculine discourse which generally tries to justify violence as a way to discipline women who do not fulfil their domestic tasks or who talk with other men in the absence of their husbands ('bad' women).

A powerful idea exists that there is legitimate violence, violence that has a corrective goal, and that there are individuals who are authorized to exercise it. This idea is present both in state law and custom, and is indeed so widespread that it has become part of women's common sense throughout the region. Article 122 of the Chiapas Penal Code, recently modified to increase the penalization of domestic violence, specifies that there is a 'right to correct, and persons with the ability to enforce it', and that these persons may cause 'unintentional lesions' without being penalized. In the same manner, traditional and autonomous authorities ask men to explain the reason why they resorted to domestic violence, in order to see if its use was justified. Many 'traditional' authorities are of the opinion that women can 'provoke' episodes of domestic violence by not being punctual in the cooking, the laundry, or the house cleaning.²⁷ In such cases the indigenous authorities' public trials reprimand the battering husband and the 'irresponsible' wife alike. In other words, the conciliation arrived upon in 'traditional' courts legitimizes gender roles - women are asked to continue complying with their domestic and marital responsibilities, whereas men are asked only not to batter their spouses again. Re-analyzing her 1973 work from a gender perspective, Collier realized the profound inequalities that underlay the conciliation process among the Zinacatecans, and began to question the mechanisms she had formerly valued. '[T]he Zinacatecan authorities generally solved matrimonial disputes admonishing both the wife and husband and asking them to behave better in the future. But whereas women were asked

to comply with their conjugal obligations, men were only asked not to hit their wives again. In other words, the Zinacatecan solutions tended to confirm and reinforce the unequal relationship between men and women'. (Collier, 1995:10).

The notion that a woman can be 'eloped' against her will, and that this constitutes a minor offense, rectifiable by marriage, is another idea shared by positive law and indigenous customary law. In many cases of 'rape' where legal assistance was sought from women's legal defense NGOs in Chiapas, the parents of the victim asked lawyers to negotiate 'reparation' in the form of a promise of marriage and payment of a dowry. Cases tended to be pursued by the girls' (bilingual) fathers, and legal prosecutions for rape were often dropped if the accused agreed to the proposed settlement. Lawyers slowly came to understand that in many of these cases the feelings of the young victim were valued the least of all, and often her father did not even allow her to speak. In many instances, when they occurred beyond community boundaries, both the rapes themselves and the accusations of rape served as weapons in the hands of quarrelling political groups.²⁸ The situation, however, is not much better with state law, since Chiapas distinguishes between kidnapping and forced elopement, assuming the latter has a romantic intention in contrast to the former. Legislation regarding elopement was formulated in the nineteenth century, when it was a common practice, and remains on the books. The law describes forced elopement as something that happens to women, whereas kidnapping happens to men. The penalty in cases of elopement is less severe than it is for kidnapping, and can usually be mitigated by 'reparation' through marriage. Significantly, the law does not specify whether the woman needs to declare that she eloped intentionally in order to establish the crime as elopement.

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Clearly with regard to ideas about discipline, maternal responsibility, and the relations between men and women, law and custom overlap and mutually constitute each other. Indigenous women, both within their communities and from without, find themselves controlled and disciplined by both legal discourses. Legislative changes aimed at improving women's rights may have relatively little impact if they are not accompanied by comprehensive structural and ideological transformations. For example, although the new modifications to Article 122 of the Penal Code increase the punishment of domestic violence, as long as they have no possibilities of financial independence, these penalties negatively affect women, because they are left without the financial support of the husband while he is in prison. Alternatively, in the case of customary practices, women may demand their right to choose whom they will marry. But when they override paternal decisions and do not comply with 'tradition' they are cast out from the support network of the family, and their possibilities of receiving support in the face of domestic violence are reduced. Such women may become 'free' from community tradition, but they also lose the protections the community previously afforded them.

In short, legislating for equality or difference will not achieve a more just life for indigenous women if changes are not successfully implemented in the socio-economic and ideological structures that exclude women and construct them as passive victims.

The mechanisms that enforce these identities operate within families, in the educational system, the health system, the media, within religious institutions, and other forums.

The battle to improve indigenous women's access to justice and exercise of their rights is a battle with many fronts. It is a battle which organized indigenous women are only just beginning to fight.

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NOTES

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¹ The nationalism promoted by the state in post-revolutionary Mexico upheld the mixed-blooded Mexican as the foundation of national identity. The mestizo nation was the result of the union of two cultural traditions: the European, represented by Spain, and the Mesoamerican, represented by the Aztecs. This dichotomy reduced the spaces for indigenous peoples to engage in political action, and their presence was subsequently formulated as a national 'problem', to which anthropologists set to work to find a solution, creating the integrationist state policy known as *indigenismo*. Manuel Gamio, who studied with Franz Boas at Columbia University, was the first exponent of this movement, and is recognized as the pioneer of modern anthropological practice in Mexico. His book, *Forjando Patria (Forging the Fatherland)* set the ideological foundations for official nationalism. For an analysis of the transition from a mestizo to a multicultural Mexico, see Hernández Castillo and Ortiz Elizondo, 1993.

² The term *neoliberalism* is used in the Mexican context to refer to a set of policies based on the diminished importance of the state, privatization and economic and financial deregulation, together with the promotion of the export of manufactured goods. This economic model replaced the statist model, which was protectionist and based on import substitution industrialization, prevailing since the 1930s to the

beginning of the 1980s. In the economic terminology of international organisms, these policies have also been called ‘structural adjustment programs’ and became generalized throughout the developing world at the beginning of the 1980s.

³ NAFTA, known in Mexico as the TLC (Tratado de Libre Comercio), was one of the main initiatives promoted by Carlos Salinas’ government in order to lock in economic reforms, especially commercial and financial liberalization. It is the first agreement of commercial liberalization in the world signed between two developed countries, the United States and Canada, and a developing country, Mexico.

⁴ For a detailed analysis of Zapatista and non-Zapatista autonomy demands, see Mattiace 1997. The history of the EZLN and its impact on the lives of indigenous communities in Chiapas can be found in Collier 1995, Harvey 1999, and Rus, Hernández Castillo and Mattiace, forthcoming.

⁵ This demand is central to the *Acuerdos de San Andrés* (San Andrés Agreements), which were signed by representatives of the federal government and the EZLN on 16 February 1996. These were converted into proposals for a legal initiative by delegates of the different parties forming a body called the *Comisión de Concordia y Pacificación* (COCOPA) (Concord and Pacification Commission). On 19 December of the same year, President Ernesto Zedillo rejected the agreements that his own representatives had reached with the Zapatista command. This arbitrary decision closed the dialogue between the parties, and meant that the threat of war loomed in southeast Mexico.

⁶ These demands are contained in the *Ley Revolucionaria de Mujeres* (Revolutionary Law of Women). For a description of this law, see Hernández Castillo 1994.

⁷ For a history of the process of organization of indigenous women in Chiapas, and of the national indigenous women’s movement that emerged in 1994, see Hernández Castillo 1998b, Millán 1996, Rojas 1995.

⁸ *Propuestas de las Mujeres Indígenas al Congreso Nacional Indígena* (Proposals of the Indigenous Women to the National Indigenous Congress). From the seminar *Reformas*

Al Artículo 4to. Constitucional (Reforms to the Fourth Article of the Constitution). 8-12 October 1996, Mexico City.

⁹ A comparative analysis of the Acuerdos de San Andres, with the counter-proposal the government offered after breaking the signed agreements can be found at www.laneta.apc.org. Much of the government's rejection of the agreements was based on the way in which recognizing autonomy compromised the central power of the state. Government speakers argued that autonomy threatened 'national unity' and that autonomy would represent a step backwards in 'civilization'. The racist prejudices of government consultants were reflected in statements such as one that mentioned that there was a danger of indigenous peoples reverting to 'human sacrifices' if they were given autonomy (*La Jornada*, 4 March 1997). The Zapatistas and the indigenous independent movement declared on several occasions that they did not want to separate from Mexico, but rather to have a measure of autonomy within the nation. Adelfo Regino, a Oaxacan indigenous leader, stated: 'Politically speaking, the concepts of autonomy and sovereignty are radically different. It has been understood traditionally that sovereignty is an attribute of states... whereas autonomy is the ability of communities within the framework of the state – not outside it - to determine, together with agencies of the state and federal government, their general living conditions. When the indigenous peoples of Mexico claim our right to free determination in pursuit of autonomy, we are not challenging sovereignty'. (*La Jornada*, 9 January 1997, p. 10). For a detailed analysis of official speeches and of the indigenous movement towards autonomy, see Hernández Castillo 1998c.

¹⁰ The project was carried out in the framework of an agreement between the Grupo de Mujeres COLEM A.C., a non-governmental feminist organization formed of indigenous and mestiza women, and CIESAS, an anthropological research center. The collective project is entitled 'Positive Law and Customary Law in the Face of Sexual and Domestic Violence: A Co-participative Investigation in the Search of Legal Defense Alternatives for Indigenous Women'. The members of the research team were lawyers Martha Figueroa and Guadalupe Elizalde, pedagogue Guadalupe Cárdenas, and anthropologists Anna María Garza and R. Aída Hernández.

¹¹ The first paragraph now reads: ‘The Mexican nation has a pluricultural composition sustained originally on its indigenous peoples. The law shall protect and promote the development of their language, culture, ways, customs, resources and specific systems of social organization; it shall grant their members effective access to state law. In the trials and agrarian procedures in which they participate, customary law and practices shall be taken into account as prescribed by law’.

¹² Official Federal Journal, 8 January 1991.

¹³ In his initial statement, Bruce admitted to having argued with his wife and to having struck her with a bamboo cane, although he played down the severity of the blows. He subsequently retracted this first statement and presented his marital relationship as an harmonious one.

¹⁴ Paramilitary groups are formed of armed groups of civilians who receive training from active army members. Their links with the official party and with local power elites have been denounced by human rights organizations. (See Centro de Derechos Humanos Fray Bartolomé de las Casas, 1996).

¹⁵ See *Propuestas de las Mujeres Indígenas al Congreso Nacional Indígena*. From the seminar ‘Reformas al Artículo Cuarto Constitucional’ October 8-12 1996, Mexico City.

¹⁶ For a detailed analysis of the political and cultural implications that the national post-revolutionary project had for indigenous peoples see Hernández Castillo 2001.

¹⁷ The National Indigenous Institute, INI, is the government institution in charge of public policy towards indigenous peoples.

¹⁸ I do not mean to imply that culture and power are always mutually exclusive concepts; much has been written based on the works of Michel Foucault about the way in which discourses reflect culture and the relationships of power that exist in the context from which they spring. Nevertheless, many functionalist studies from the 1950s and 1960s that highlighted cultural analysis did so without recognizing how the construction of meaning is marked by power relationships.

¹⁹ In 1989 *History and Power in the Study of Law*, edited by June Starr and Jane Collier, was published, marking a new direction in North American legal anthropology. This volume highlighted the importance of considering power and historical perspectives in the analysis of any legal system.

²⁰ I take the term ‘legal maps’ from Boaventura de Sousa Santos, who refers to legal pluralism as ‘different legal spaces superimposed, interpenetrated and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life. We live in a time of porous legality and legal porosity’. (1987:289)

²¹ This contrasting characterization is present in the classical works for Oaxaca and Chiapas by Nader, 1966, 1969, and Collier 1973, and continues to hold sway in the anthropological debate, as shown in a recent paper by the Bolivian anthropologist Xavier Albó (2000).

²² The way in which various political sectors struggle for control of the ‘authentic’ tradition has been analyzed by George Collier (1994) in the case of the Zinacantán Tzotzil.

²³ In some areas, such as Simojovel, the Catholic Church, through its Indigenous Pastoral, created a new religious structure, which re-invented traditional posts, taking up such terms as ‘principals’ and ‘elders’ councils’. In contrast to pre-existing civic-religious authorities, women can occupy public office (although only married women who occupy them together with their husbands).

²⁴ Anna Garza (1999) has traced the formation of ‘traditional’ spaces for justice administration in the highland municipality of San Pedro Chenalhó and has noted the important role played by the Mexican government in the legitimization of some concepts of ‘tradition’ and the negation of others.

²⁵ Interview of Aureliano López by R. Aída Hernández, 8 May 1999.

²⁶ In her analysis of nineteenth century judicial records from Chihuahua, Ana Alonso (1992) has shown how legal reforms of the time aimed at penalizing domestic violence in fact served to ‘rationalize patriarchy’ by reinforcing gender roles. Only ‘decent and obedient’ women could count on the law to protect them from domestic violence, others could not.

²⁷ Both customary law and state law define the domestic space as a female space *par excellence*. Until 1998 the Chiapas State Civil Code established in its Articles 165 and 166 that the wife was responsible for the upkeep of the home, and could only have a job if it didn’t affect her domestic responsibilities. The same code established that wives required conjugal permission to work outside the home or to travel. These articles were modified in 1998 partly in response to an initiative presented to the state Congress by the lawyer of the San Cristóbal Women’s Group COLEM.

²⁸ One of the cases reviewed was that of a girl raped by the Municipal President of Chenalhó (in 1991) whose parents denounced the rape with the help of the COLEM lawyers, only to retract the charges later after a conciliation between the parties. Several indigenous women expelled from San Juan Chamula also denounced the use of rape as a form of punishment used against their parents or husbands who confronted local political bosses (*caciques*).