

# SEXUAL VIOLENCE AND THE FORMATION OF LEGAL CONSCIOUSNESS AMONG THE INDIGENOUS ARHUACO WOMEN

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## ABSTRACT

The field of legal anthropology has widely debated indigenous peoples' justice practices. However, the legal perspective of sexual offenses remains understudied. In this respect, this paper depicts the Arhuaco people's justice system, from the spiritual and political entities to the case and sanctions, touching upon how the homogenized society influences indigenous people's justice in Arhuaco society. Furthermore, this work explores how the Arhuaco people resolve cases in which community members are allegedly responsible for committing sexual crimes. It also highlights some challenges connected to the rise of this type of offense, such as its lack of trust in authorities, disregard for the victim's version, and difficulty in verifying these cases. During the fieldwork in the Arhuaco territory, the applied method follows some parameters of the procedural paradigm-legal conscience studies as an interpretive framework to understand how the Arhuaco women conceive the legal phenomenon. As a result, this study offers some insights into the Arhuaco women's perceptions of justice, specifically concerning sexual abuse cases. Such a perception is analyzed based on the Arhuaco women's political position and cultural and lineage origin, illustrating how they constantly go through inter-legality practices to claim justice for sexual offenses.

**KEYWORDS:** indigenous people's justice; customary law; sexual offenses; indigenous women; Arhuaco people; inter-legality.

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# A VIOLÊNCIA SEXUAL E A FORMAÇÃO DE UMA CONSCIÊNCIA JURÍDICA ENTRE AS MULHERES INDÍGENAS ARHUACO

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## RESUMO

O campo da antropologia jurídica tem debatido amplamente as práticas de justiça dos povos indígenas. Entretanto, a perspectiva jurídica dos delitos sexuais ainda é pouco estudada. Nesse sentido, este artigo descreve o sistema de justiça do povo Arhuaco, desde as entidades espirituais e políticas até o caso e as sanções, abordando como a sociedade homogeneizada influencia a justiça dos povos indígenas na sociedade Arhuaco. Além disso, este trabalho explora como o povo Arhuaco resolve casos em que membros da comunidade são supostamente responsáveis por cometer crimes sexuais. Ele também destaca alguns desafios relacionados ao aumento desse tipo de delito, como a falta de confiança nas autoridades, a desconsideração da versão da vítima e a dificuldade de verificar esses casos. Durante o trabalho de campo no território de Arhuaco, o método aplicado segue alguns parâmetros do paradigma legal estudos de consciência jurídica como uma estrutura interpretativa para entender como as mulheres de Arhuaco concebem o fenômeno jurídico. Como resultado, este estudo oferece algumas visões sobre as percepções de justiça das mulheres de Arhuaco, especificamente em relação aos casos de abuso sexual. Essa percepção é analisada com base na posição política e na origem cultural e de linhagem das mulheres Arhuaco, ilustrando como elas passam constantemente por práticas de interlegalidade para reivindicar justiça por ofensas sexuais.

**PALAVRAS-CHAVE:** justiça dos povos indígenas; direito consuetudinário; crimes sexuais; mulheres indígenas; povo Arhuaco; interlegalidade.

## 1 INTRODUCTION

To analyze indigenous peoples' justice in Colombia, the authors will present insights based on their continued experiences as legal advisors to the Arhuaco people and three years of field research. The Arhuaco people – *Iku* live in the traditional and sacred territory of the Sierra Nevada in northern Colombia. It is an isolated mountain range separated from the Andes chain that runs through Colombia, reaching an altitude of 5.700 meters, it is located on the Caribbean coast, composed of about 17.000 square kilometers (km<sup>2</sup>) and serves as the source of 36 rivers. The range is in the Magdalena, Cesar, and La Guajira departments. The territory is dwelled by four indigenous groups to the north: the Kogui to the east, Kankuamos, Wiwas, and the Arhuacos to the south (Duque Cañas, 2009).

The Arhuaco people comprise around 50.000 members and are organized in 60 communities throughout the Cesar, Magdalena, and La Guajira departments. To some extent, they preserved their language, *Ikun*, and they are known for their significant participation in political scenarios demanding recognition and respect for their rights. The Arhuaco People continue administering justice and thus enhancing their judicial system. The Arhuaco people have considerable political strength and strong cultural ties. However, due to state jurisdiction standards, the ethnic group has faced difficulties applying justice, respecting, and strengthening their culture. As a result, the Arhuaco community members also backed the pressure to follow these criteria.

They expect offenders to admit their accountability and receive the same punishment the ordinary jurisdiction adopts. Some of them, especially women, do not see their traditional practices as an effective path to obtaining justice. Therefore, they demand that the State's ordinary jurisdiction assumes the competence of specific cases. Such a scenario forces the Arhuaco people to either follow the State's demands and keep a pleasant relationship with it or contest that coercion, aiming to exercise autonomy over their affairs and enter conflict with the Colombian State. Against this background, this paper examines how Arhuaco people resolve cases whereby community members are allegedly responsible for committing sexual offenses. In this line, the authors highlight the challenges faced

by the Arhuaco community arising in connection to offenses such as sexual crimes for high impunity, the lack of trust in their male authorities that overlook those cases, disregarding the version of the victim, and the difficulty of verifying these cases by its own characteristics in both jurisdictions.

While the research on indigenous peoples' legal systems is broad, the legal perspective of sexual offenses remains understudied (Deer, 2004; Marchetti & Downie, 2014; Marchetti & Daly, 2016). The existing literature deals with rights to a fair trial and access to justice (Ruiz-Chiriboga, 2017); lack of autonomy, legal, political, and social obstacles of indigenous peoples' jurisdictions; and some case studies of indigenous jurisdictional functions within their communities (Goodale, 2007; Cornel, 2004; Sierra, 2004; Yrigoyen, 2004; Santos, 2012).

Scholars likewise engaged in how indigenous peoples' jurisdiction is achieved and structured by the communities and how it is coordinated with the ordinary jurisdiction (Trujillo, 2012; Caicedo, 2012; Viaene & Fernández-Maldonado, 2018). Empirical research on indigenous peoples' experiences of autonomy in Latin America also abounds (Blaser *et al.*, 2010; González, Burguete, & Ortiz, 2010; Gutiérrez, 2008; Postero, 2007; Rengifo, Gonzales, & Costilla 2014; Tomaselli, 2016). In Colombia, publications on ethnic rights that revolve around the decisions of the Colombian Constitutional Court are frequent: Bonilla (2006), Borrero (2014). However, literature on violence against indigenous women continues to be a marginal issue, except in several works, such as González (2011), Bidaseca (2011), Piñacue (2015), Ulloa (2016), and Santamaria *et al.* (2019).

Nevertheless, academicians have not addressed how complex it is for indigenous peoples to administer their own justice in cases related to sexual offenses. They must negotiate between the State's coercion, which community members support, and their customary law.

The article presents new insights into the Arhuaco people's perception of justice regarding grave offenses, mainly focusing on the Arhuaco women. This work will also touch upon how indigenous peoples' justice in Arhuaco society is influenced by a part of Colombian society, which has somewhat delegitimized the Arhuaco people's judicial practices. This work presents how some Arhuaco women perceive their own justice based on their political, cultural, and lineage origins. The

authors draw special attention to how Arhuaco women reflect on applying their own justice to sexual offenses. Thus, it is a priority that anthropology appeals to a legal sensibility (Geertz, 1994) to the extent that it is important to recognize that the Arhuaco justice system is an intricate, non-hierarchical intercultural relationship between one's own knowledge and that learned from the majority society.

The paper first exposes the method applied to this study. Second, it examines the spiritual and political entities, cases, sanctions, and imprisonment of the Arhuaco people. Third, it describes the ongoing political confrontation among the Arhuaco people, affecting their justice system. Fourth, it presents the Arhuaco women's perception of participation in their society and some women's insights into justice, specifically about sexual abuse cases. Last, it illuminates how the Arhuaco Women constantly go through inter-legality scenarios to claim justice regarding sexual offenses.

## 2 METHOD

The article adopts the procedural paradigm to understand the legal conscience of indigenous women concerning sexual abuse. The procedural paradigm approach focuses on the contexts of the dispute process carried out by litigants, highlighting the interest in the strategies of social actors to analyze how conflicts are resolved, managed, and confronted. In this vein, the law is not conceived as a system of society or culture. Still, both are mutually interwoven, and disputes and their resolution process have a cultural component where the values and attitudes of the litigants are expressed. Also, all societies offer individuals various alternatives to resolve grievances, such as avoiding confrontation, persuasion, and forms of mediation, arbitration, and adjudication.

The latter idea lies with legal consciousness studies (LCS), which emphasizes an interpretive theory of law based on the scenarios that culturally determine the actors involved in legal conflicts. This method prioritizes the empirical-individual,<sup>3</sup>

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<sup>3</sup> It can be characterized within the micro-interactionist sociological theory Collins (1994), which is focused on scientific observation and the way in which individual consciousness becomes a social

especially those who are relegated to legal systems. Therefore, the legal consciousness approach analyzes legality and inter-legalities as a social phenomenon made up of what several community members say and do. In turn, such a theoretical construction is essential to comprehend the legal conscience implemented by the community members, which adopt mutable and interchangeable strategies of acceptance, negotiation, and resistance.

In the course of the present work, we resorted to both frameworks, the procedural paradigm and legal consciousness, to illustrate the legal conscience of the Arhuaco women since it reflects the intricate perceptions and practices advanced by women in the state and indigenous jurisdictions. In this paper, we consider Ewick and Silbey's (2009) classification when talking about legal conscience: a) before the law, this position implies recognition of objectivity and neutrality to the law. People truly consider laws to be fair and equal for all. In other words, there is trust and legitimacy in the legal system; b) with the law: the law is perceived as a game of skills, where the most cunning triumphs. Thus, the perception is that the legal phenomenon is neither good nor bad, and people must survive through implementation strategies, practices, adaptations, and so forth; c) against law: the actors assume the law has several internal and insurmountable structural flaws. In this way, people manifest an open contradiction with the law that governs them. However, people's expressions can be very diverse. They can generate collective processes, collective emancipation on a smaller scale, or individual or nonconformity. These categories shall be illustrated particularly in the "inter-legality processes among Arhuaco women" section.

During our fieldwork, to understand the legal conscience of the Arhuaco Women concerning sexual abuse, we held extensive conversations and provided legal advice in which we shared their day-to-day political and spiritual scenarios, mainly by attending the community's word circle ceremonies and assemblies. In those meetings that were carried out at least twice a month during the six months, we conducted discussions revolved around the following substantial issues: a) the

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phenomenon. However, the version of LCS has a critical component, Trubek and Esser (1989), where its focus is directed to subaltern places and subjects.

*Law of Origin*,<sup>4</sup> its nature and source; b) the judicial situation of violators of the *Law of Origin*; and c) cultural and political guidance for preserving their sacred territory. The places where assemblies were held and where this work took place are Nabusimake, Jewrwa, and Simonorwa, which are known as centers of the most significant spiritual, political, and cultural importance among the Arhuaco people. Such encounters took place from June to September 2017. In 2020, to complement our work, we returned to the territory (Valledupar-Pueblo Bello) to conduct interviews with four Arhuaco women to deepen the intricate political, social, and cultural relationships that sexual crimes incite in the community. Even though our physical presence in the territory no longer takes place, we continue to have a firm commitment and close relationship with the Arhuaco people, supporting them professionally in their ongoing struggles. The results of this paper surge from two physical stays in the Arhuaco territory (2017-2020), multiple conversations via online with Indigenous leaders, women, and lawyers involved in the Arhuaco Commission of Justice (2018-2019), and a thorough bibliography review of the text elaborated by Arhuaco authorities, and national and international scholars.

### 3 SPIRITUAL AND POLITICAL AUTHORITIES IN THE ARHUACO SOCIETY

Among the Arhuaco people, there are two types of authorities: the spiritual and the political. They denominate the first as “*Mamos*” and preserve the traditional knowledge and assure compliance with the *Law of Origin*. On this basis, the *Mamos* serve as traditional healers, spiritual guides, and community public affairs consultants. In the first capacity, they conduct healing processes by investigating the causes of the disorder according to the *Law of Origin*. The *Mamos* have a crucial mission of restoring this equilibrium (the *Law of Origin*) when their people breach its precepts, as it generates a spiritual disharmony transcending the

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<sup>4</sup> *Law of Origin* is the natural and ancestral laws in which every natural element has its place established. It is the foundation of the Arhuaco people. The *Law of Origin* comprises all the knowledge of the world, grants functions, rights, and co-responsibilities to all beings, and guides the management of the ancestral territory and the preservation of cultural knowledge. The transgression or breach of the *Law of Origin* causes the weakening of the natural functions of the universe, the territory, and the practices given to compliance with ancestral laws.

material world in Arhuaco's cosmovision, the material world replicates the spiritual one ("*Anugwe*"). They associate committing prohibited acts with negative energies called "*Anugwe Gunsinna*" (Zalabata, 2010)

As spiritual guides, the *Mamos* provide spiritual appraisalment over political, social, and cultural decision-making processes based on consultations with their gods and Mother Earth. They likewise determine the ritual of payments ("*pagamentos*") that the Arhuacos should carry out to comply with the *Law of Origin*, and they prepare the future *Mamos* to assure their cultural survival by transmitting the traditional knowledge between generations. It identifies future *Mamos* among newborns by checking the child's navel. Once the infant is recognized as *Mamo*, they wait until he ages seven or eight to perform an initiation ceremony. In doing so, *Mamos* present several sacred objects to the child, expecting him to choose the correct objects to show his nature as a *Mamo*. Afterward, the child will learn that innermost knowledge lives within stones, forests, lagoons, and high mountains (Nevada, 1997). As community public affairs consultants, the *Mamos*' role comprises participating as representatives of the Arhuaco people in meetings with national authorities, the private sector, international agencies, and others. Currently, the *Mamo*'s role serves mainly as a counselor in the Arhuaco society thus serving as a bridge between the spiritual world and the physical world grounded in interpreting the *Law of Origin*. However, one of this institution's significant criticisms is the impossibility of objecting to its decisions because they are based on the immutable Arhuaco ancestry and spirituality. In addition, the *Mamosian* condition is exclusive to other men recognized by the community, accompanied by men only.

The political authorities among the Arhuaco people hold a different authority within the community than the *Mamos*. Their role derives from the Colombian government's adoption of the modern conception of Indigenous Peoples reservations ("*resguardos*")<sup>5</sup> and the imposition of a legal entity and a political-administrative structure model in 1974. It divides such political authority into two

<sup>5</sup> The *resguardos* are the official delimited and titled territory granted to indigenous peoples in Colombia. Most times, indigenous peoples have used, occupied, and possessed such territory for a long time, which drives them to ascribe sacredness and ancestral to their territory.



administrative levels. The first is the board of directors, commonly known as “*las directivas*”, elected by consensus between the *Mamos* and the remaining community members. It comprises the board of a legal representative (so-called “*cabildo gobernadora*”) of the entity of the reservation (*resguardo*), the general secretary, the prosecutor, and the accountant. The second administrative level relies on the 60 councils replicating the same board structure. Such councils respond to a geopolitical distribution of the Arhuaco territory by villages or settlements throughout the departments of Cesar, Magdalena, and La Guajira. Here, remarkably, the participation of women in this political institution is null.

The political and spiritual organization of the Arhuaco people, including how conflicts are solved within their society and the different dynamics of authority and kinship, is crucial to gaining a nuanced understanding of the proposed case study related to sexual offenses. In both agencies, political and spiritual organizations, women are not included in the justice resolution in Arhuaca.

With the knowledge about the Arhuacos presented in this section, we present other relevant central features to comprehend the Arhuaco justice system. These include the case of judging and the regime of sanctions spanning imprisonment to measures to restore the natural balance. As we will see in the following sections, they all combine the *Law of Origin* and external institutions and features.

#### 4 REGIME OF SANCTIONS OF ARHUACO PEOPLE

The Arhuaco people have adapted their legal system to the state’s requirements with two mechanisms of judging reprehensible conduct, the Tina and Tikrinu. Both operate simultaneously to investigate cases. The Tina mechanism is a physical investigation conducted by the political authorities. This process does not drastically differ from the national legal systems of investigation. The offended person or close relatives inform Zakuku (local authority) of the situation. If this authority cannot solve it, the case is brought as a “second instance” to the members

of the board of directors (“*las directivas*”) that have as advisors to the major *Mamos*,<sup>6</sup> elder representatives, local leaders, and the Commission of Arhuaco Justice.<sup>7</sup> The board of directors is responsible for collecting enough evidence and testimonies from those involved and subsequently ruling the case. To impose a sanction, besides considering the results of the Tikurigun investigation, they also analyze aggravating circumstances, such as the use of weapons.<sup>8</sup>

Conversely, the Tikurigun mechanism is a spiritual investigation that emerged from the *Law of Origin*. A *Mamo*’s mandate is to identify what is causing territorial disharmony carries out this investigation. Once the offender is identified, they conduct him/her to a Kunkurwa,<sup>9</sup> where the investigation is performed. The *Mamos* believes offenses happen because both the victim’s and victimizers’ families broke the *Law of Origin*, so they examine the families’ past to establish what led to those situations.

Such exercise will help *Mamos* understand how to repair the fissure caused by the *Law of Origin* to recover its harmony and consequently the well-being of the families and the community. This family-based investigation is an important feature that differs from the methods of the punitive state system, which individualizes the aggressor’s responsibility without considering the social context that underlies a case. Predicaments and serious questions arise in this justice system. In several cases, the *Mamos* consider factors influencing their decisions, such as family lineages, gender status (the voice of men prevails over women), and kinship relationships. Women interviewed alleged that most of the time, the kindred bond of the *Mamos* with offenders causes biases in the judicial investigation.

Regarding the Arhuaco people’s sanctions regime, they merge positive and customary law. In this context, they uncover first the results of the spiritual

<sup>6</sup> The major *Mamos* are the sixty-four. The *mamos* are considered the wisest in the territory, responsible for maintaining the natural balance and preserving the Arhuaco’s *Law of Origin*.

<sup>7</sup> The Commission of Arhuaco Justice comprises indigenous leaders with experience in investigation and sometimes lawyers with expertise in indigenous peoples’ jurisdiction. Created in the 1980s, this commission fostered Arhuaco’s self-righteousness by investigating and analyzing the clash of jurisdictions and adapting punitive sanctions.

<sup>8</sup> Using weapons within the Arhuaco territory is considered an action that affects the territory’s harmony.

investigation (Tikrinu) that form the foundation of the decision adopted by the political authorities based on the physical investigation (Tina). Commonly, minor offenses are interpreted only by the Mamo, while serious offenses involve the competence of both jurisdictions (physical-spiritual) (Gomez, 2015).

When violating the law of origin, the responsible person falls into darkness. To interpret this assertion, amid cases related to homicide and sexual offenses within the Arhuaco territory, *Mamos* resorted to the metaphor of human birth as an avenue to unveil their decision. Following the outcome of the Tikurigun investigation, sometimes related to serious offenses, authorities have determined nine years of confinement in a house of reflection ("*casas de reflexión*" or GWAMŦNMŦKE) as punishment. This sanction matches with their analogy by assuming that nine years (representing nine months of pregnancy) is the period an Arhuaco offender needs to move forward from darkness to return to light again. Notwithstanding the sanction imposed, the Arhuaco people face some difficulties enforcing such sanctions as imprisonment, which may be against their customs and uses, as explained below.

## 5 HOW DO ARHUACO PEOPLE FACE IMPRISONMENT?

Implementing the Indigenous Special Jurisdiction has shown that it has filled some gaps with Western-imposed influences. For instance, imposing detention centers solved the lack of physical enforcement of sanctions in several Colombian Indigenous Peoples territories as a figure equivalent to prisons. Even though detention centers are presented as less invasive and assimilationist institutions, they perform the same function as penitentiaries; what varies is the name. Some indigenous peoples, such as the Nasa people from the southwest of Colombia, call these places of confinement "houses of harmonization". In the country's north, the Kogi, Kankuamo, Wiwa, and Arhuaco peoples refer to them as "houses of reflection". In presenting detention centers as entities closer to indigenous peoples' values than penitentiaries, authorities pretend those centers result from an intercultural exercise that prompts the building of a harmonious

relationship between introduced external figures and indigenous peoples' customs, traditions, and uses. However, our research shows that the prison system within the indigenous peoples' territory is inconvenient and leads to other difficulties they have to face.

First, although the penitentiary is a recent institution imposed by the state, the Arhuaco, among other indigenous peoples, has interrelated this alien institution with its customs and traditions. Second, the so-called houses of reflection do not have proper ventilation, lighting, or an adequate place to sleep. Such a situation breaks the relationship between prisoners and their communities, which could be interpreted as violating international human rights standards for ordinary prisons, which are also violated in many prisons worldwide, including Colombia and the United States.

Second, these detention centers are in indigenous peoples' territories. Although they get some funds from the Ministry of Justice, this economic support is not permanent, and they usually connect it to short-term projects. These circumstances cause difficulties, such as:

- The Arhuaco authorities cannot afford to maintain and manage the houses of reflection because they lack economic resources.
- No one is responsible for guarding the prisoners. Only some part-time volunteers work on their crops simultaneously to provide for their families. As a result, prisoners frequently escape from detention centers.
- Prisoners are not guaranteed a daily food supply and basic needs. The family or community is in charge of providing what they need. This situation is more challenging when they have to serve a long period in prison. As a paradoxical result, the government does not fund detention centers within indigenous territory as it does with the state penitentiary system.

Third, prison as a political strategy. Some interviewees affirm that the use of the reflection houses depends on the political interests of the local authorities of each community. Therefore, one of his criticisms is directed to the fact that confinement sentences do not reflect transparent judicial processes, nor would the penalties be proportional to the crimes. For example, no prisoner has been found

guilty of sexual crimes within the *resguardo* mainly because this leads to a social, cultural, and political loss of prestige in the community.

We found a very insightful declaration made by an Arhuaco woman in an interview. She stated that houses of reflection did not work as expected because they do not contribute *per se* to restoring natural harmony and to the Arhuaco justice. While it locks Arhuaco persons in those places, they may not have the opportunities to reflect on the consequences of the action committed. She explained that when a negative mechanism, such as the houses of reflection, is incorporated within their territory, her people must counterbalance the negative results: the lack of reflection. To counteract, a positive reaction may forward the Arhuaco people's aim to reach an equilibrium. Therefore, houses of reflection must be accompanied by thoughtful physical spaces where the Arhuaco society traditionally reconsiders and meditates about the life world, the garden for men, and the weaving of bags (*mochilas*) for women.

## 6 TYPOLOGY OF CASES THAT CHALLENGE THE ARHUACO JUSTICE

Under Arhuaco culture principles, there are two categories of infractions of the *Law of Origin* based on the behavior's severity: those considered minor infractions and those that undermine the *Law of Origin* by breaking its cultural, social, and spiritual balance. In 2017, the Arhuaco Justice Commission conducted quantitative research to identify the infractions committed by the Arhuaco people from 2000 to 2017. Based on 94 registered cases, the study showed that the most recurring infractions are crimes against physical integrity, 44% (42 cases); sexual offenses, 23% (22 cases); and unethical Arhuaco behavior, 13% (12 cases) and other cases 20%. Although sex crimes are not statistically the most recurrent cases, one can predict the existence of a considerable under-registration. It also occurs in the majority society, a homicide or personal injury, which can be evidenced with the naked eye, and does not involve moral dilemmas of the denunciation of indigenous women, who are in a patriarchal society that condemns public complaints.

For the general difficulties and cultural barriers to addressing sexual offenses in the general society and among the Arhuaco people, the latter's authorities have had to deal with discord coming from both the community and governmental institutions. Sexual offenses cases have provoked quarrels among several Arhuaco members, who do not trust the impartiality of Arhuaco justice, believe that their justice system leads to higher rates of impunity, and denounce *machismo* and kinship predisposition among leaders and the *Mamos* in charge of the investigation, arguably to the benefit of the offenders. Based on those grounds, some women leaders have requested that the prosecutor's office investigate sexual offenses. In response to those requirements, some judges and prosecutors have argued that the indigenous peoples' justice system may not comply with the right of due process. It threatens Arhuaco governance. In the next section, we will introduce a case study on sexual offenses, pointing out how these mainly make up a challenge for the Arhuaco people to administer justice autonomously using their customary system.

## 7 CASE STUDY OF SEXUAL OFFENSES COLLECTED IN 2017

This section will show how Arhuaco justice operates when solving a sexual case through two emblematic cases registered during fieldwork and present its significant strengths and weaknesses from the perspective of some Arhuaco members. Among the Arhuaco people, there are subtle classifications to differentiate those members of the community who strictly obey the *Law of Origin* from those who are more flexible with it. The first ones are part of the strong core of the Arhuaco culture. In contrast, the second group is more likely to be closer to Western customs and practices because of the proximity between cities and the Arhuaco territory.

In 2015, a 12-year-old Arhuaco girl and her family accused the girl's uncle, who is an Arhuaco far from the strong core of the Arhuaco culture, of having raped the girl several times. The girl's uncle and aunt lived in Valledupar when the girl was sent to live with them because her parents could not offer her educational

opportunities in their village. When the family members realized the situation, they brought the case to the authorities in Jewrwa as they belonged to this ancestral territory. Here, the authorities and local *Mamo* established the trial's rules to find the truth. The authorities in charge of the physical process ("*Tikrinu*"), all men and some of their relatives of the defendant, activated the procedure by receiving the girl's declaration. Afterward, the authorities manifested their skepticism regarding the girl's story, considering that it had manipulated her to discredit the good name of the accused man. They stated this situation would obey old family quarrels. Therefore, the *Mamo* subjected the girl to a process to decipher the truth of her testimony, and they sent her to a house of reflection and could not eat for four days.

Meanwhile, two of the girl's other uncles complained about this procedure. The authorities' response was to send them to different houses of reflection. At the end of the fourth day, the girl admitted that her version of the events was false. Subsequently, the authorities issued an acquittal in favor of the defendant and later determined that the other uncles created chaos within the community. Thus, they were condemned to bring several objects to repair their "*bunignmu*" (creating chaos and disorder within an Arhuaco community). Initially, the girl's relatives aspired. They reviewed the decision in Nabusimake as a second instance. However, for the development of the initial investigation, they concluded they did not have sufficient guarantees to get a fair trial; therefore, they brought the case before the prosecutor's office.

From this case, some reflections arise. First, applying the principle of a fair trial within the Arhuaco cosmovision is challenging, considering the rooted parameters to solve a case, such as kinship, family ties, culture, and political, traditional, and economic power relations. Second, sexual crimes are a taboo issue; neither the authorities nor *Mamos* specifically mention the term. Instead, they come to express it through other words, such as negative energies and spirits that break the balance. Finally, those who resort to the Arhuaco justice system conclude that spiritual reparation is not enough; they aspire to a process that ends with an exemplary physical punishment against sexual aggressors.

The second emblematic case concerns a 14-year-old Arhuaco girl who attended a bicultural high school in Pueblo Bello. For several months during 2014,

the teacher, a recognized leader of the region, was having sexual encounters with the young woman. According to her family, he had sex with the girl. When her family noticed the situation, they reported the case to the Arhuaco authorities of Pueblo Bello. In response, the indigenous leaders opened the procedure and heeded the teacher's testimony, who pleaded guilty. The Arhuaco leaders imposed a punishment of eleven years of imprisonment in a house of reflection. They decided that, as long as he fulfilled the mandates established by the *Mamo* in charge, the first two years of sanction would be in absolute confinement as a way of regaining freedom. However, Pueblo Bello is a mestizo town, and the Arhuacos are not in most societies here. Therefore, they face serious challenges when exercising their justice in terms of autonomy, economic capacity, and logistics. It reflects this in the impossibility of administering houses of reflection in the municipality, which leads to non-compliance with the decision of the indigenous authorities. To date, the teacher still lives freely in the town. Given this situation, a woman Arhuaco leader persuaded the girl's family to bring the case to the local municipal prosecutor, proposing that the Colombian State should inquire about all sexual crimes.

It would lead to more recognition of the rights of Arhuaco women, which, from her perspective, were not considered by the *directivas*. Several local prosecutors who advise Arhuaco women victims of sexual crimes to denounce indigenous aggressors support this point of view. Although prosecutors must send communications to settle legal jurisdiction of this type of case, surreptitiously, they promise better results than those achieved by the special indigenous jurisdiction. In this specific case, the offender remains free without significant progress.

The cases illustrate how consent and sexual maturity are interrelated in Arhuaca society. In the first one, the 12-year-old girl is perceived as immature and incapable both by most societies and by most community members to be aware of beginning sexual activities. In the opposite sense, in the second one, the indigenous peoples largely assume that a 14-year-old girl is an adult to have consensual sex. This attitude would be reproached by Colombian society mostly (Sánchez, 2010). These complex situations raise a new challenge for Arhuaco justice because they must deal with the claim of women's rights within the indigenous



peoples. This might imply dramatic changes in how they conceive their justice, for instance, allowing women's participation in physical justice processes (*Tina*). Indeed, the Arhuaco people are facing challenges in administering justice regarding sexual offenses because some members oppose macho and kinship patterns reproduced in the decision of some serious cases. To address these difficulties, we will now foster the legitimization of cultural practices, institutions, and customs.

As described, the exercise of indigenous peoples' jurisdiction leads to many challenges, such as the distrust of the Arhuaco justice by some members based on their sense of justice influenced by the homogenized society. In this context, especially in cases of sexual crimes, their acute perception of a lack of justice, truth, and reparation motivates them to resort to ordinary justice, which ultimately delegitimizes their justice system. That some Arhuaco members do not accept the justice system is quite concerning, making it difficult to defend and protect the latter before external pressures. Another challenge is the distinct gaps between formal and indigenous peoples' justice. Some of those gaps arise because of a lack of understanding and acceptance by the state that indigenous peoples have their own cosmovision, laws, customs, and traditions as distinct peoples. In this respect, to tackle those barriers and difficulties, especially the ones regarding sexual offenses, a suggested solution might be built by the community based on their values, culture, traditions, worldview, customs, and uses, which make up an autonomous exercise of self-government and self-determination.

## **8 THE ONGOING POLITICAL CONFRONTATION AMONG THE ARHUACO PEOPLE AFFECTS THEIR JUSTICE SYSTEM**

Before presenting the women's original positions regarding the Arhuaco justice, particularly about sexual abuse cases, in August 2020, it appointed a new board of directors. For the discussion, it is pertinent to mention that they sanctioned the new Arhuaco chief for presumably abusing his underaged sister-in-law. Such an election has divided the Arhuaco people into two sides. One side is the

new board of directors headed by the new chief and his allies. They assert that the majority did the nomination, recognizing themselves as the legitimate political representatives of the Arhuaco people.

The other side is the former new board of directors and some traditional leaders. They argue that it suspended the new board of directors' election until the Covid-19 pandemic is over to guarantee the participation of all 60 communities. However, such an agreement was infringed. They state that elections of representatives in the Arhuaco society are not by the majority but by consensus among *Mamos*, *Zakukus*, and local authorities. Therefore, the nomination of the new board of directors should be redone, assuring the participation of most communities in the General Assembly. As the new chief of the Arhuaco people was involved in a case related to sexual abuse, such an appointment has emerged or, probably, has made more clear unique positions that some Arhuaco women have regarding their own justice and sexual crimes. We say more noticeably as those positions transcended the sphere of internal affairs when two videos and news were published in the mainstream newspapers and social media.

The Arhuaco women who rejected the nomination of the new chief as he presumably committed a sexual abuse crime made the first video. The video was made in Spanish. They argue that the Arhuaco women are the fundamental axis of the survival of their people and culture. They represent the territory, nature, knowledge, and life bearers under the *Law of Origin*. Therefore, they consider that having a chief who violates the *Law of Origin* poses a threat to their people's governance and women's integrity. Such non-legitimate nomination delegitimizes *per se* their indigenous peoples' jurisdiction. As a result, they note that sexual abuse will continue growing in their society and impunity. We classify this legal conscience against the law.

The Arhuaco women who support the new chief's appointment in response to the video described above made a second video. While they speak in *Ikun*, adding subtitles in Spanish, they refer to themselves as the legitimate women leaders of the Arhuaco people and representatives of the Arhuaco Women Council. These Arhuaco women disregard the women's voices who did the first video, framing them as non-legitimate leaders. This group of women asserts by

publicly denouncing internal matters of the Arhuaco people, and they discredit themselves and their people, which ultimately breaches the *Law of Origin*. They resort to elements of the indigenous tradition to legitimize their discourse, claiming to respect the *Zaku*<sup>9</sup> and the dialogue in the *Ka'dukwu*, places where the Arhuaco people debate, talk, agree, and decide. Consequently, they assume one legal consciousness before the law.

Such events coincided with the time we interviewed various Arhuaco women leaders recognized for defending the repositioning of women's role within the political, social, and cultural spheres. Based on open dialogues and interviews with some Arhuaco women and those videos, we observe three distinct poses regarding the Arhuaco justice and sexual abuse offenses within their society.

## 9 INTER-LEGALITY PROCESSES AMONG ARHUACO WOMEN

We incorporate the term inter-legality as a way of understanding the perception of Arhuaco women regarding sexual offenses. This concept shall be interpreted as the empirical dimension of legal pluralism (Sierra, 2004). One in which there is no duality of legal systems but the coexistence of the same phenomenon that occurs at different scales (local, national, and global). Besides, this view privileges the actors' practice to make up multiple dimensions of the legal phenomenon. These practices should be conditioned by the social, political, and cultural structure that leads to the generation of acceptance, negotiation, and resistance processes to the different justice systems.

We observed that depending on the women's political position and cultural and lineage origin, they may have different perceptions of their participation within the Arhuaco society and justice system. We grouped such perceptions into three categories, following Ewick and Silbey's (2009) classification of legal conscience. The first is *women before the law*. This category relates to the Arhuaco women

<sup>9</sup> A *Zaku* means Mother of Earth. *Zaku* represents the spiritual and material Mother of all existing beings: trees, water, wind. *Zaku* symbolizes fertility and femininity, which hold the planet in equilibrium. *Zaku* is sacred territory.

primarily raised in a *Ka'dukwu*<sup>10</sup> and immersed in the Arhuaco cosmovision and livelihoods. They also are part of a lineage that traditionally has posed spiritual and political influence over the Arhuaco people. Such a status backs the preeminent position they have within their society. They speak *Ikun*.

Interestingly, the women interviewed assert that they have a crucial role given by the *Law of Origin*. Thus, women actively take part in their community. As for their participation in the imposed administrative-political organization general assembly or board of directors, these women claim they take part but still need to engage in a political role entirely, which is new for them. Notwithstanding, some Arhuaco women are increasingly taking part by having relevant places within the administrative organization of the Arhuaco people. The group defends the harmonization of the man-woman relationship from a cultural perspective. Such a premise endorses women's empowerment without a spiritual confrontation against Arhuaco men, as there is a clear definition of the roles of each sex drawing on their *Law of Origin*. Such a stance has implications for the legal conscience of the Arhuaco women: they abide by the directives of the Arhuaco's spiritual and political authorities. Therefore, they are inclined to advance their claims within the parameters of self-righteousness.

The second (*women with the law*) and third (*women against the law*) categories are associated with some Arhuaco women raised inside and outside the Arhuaco territory. They have been more in contact with non-indigenous people and further exposed to Western discourses of feminism and conception of justice that differ from the concepts emanating from the *Law of Origin*. Some of these women do not speak *Ikun* because of growing up outside their territory, non-intercultural education, or evangelization.

In the second category, *women with the law*, some Arhuaco women are mainly concerned with obtaining justice and expanding their participation regardless of jurisdiction. They sail in intermediate positions before and against the

<sup>10</sup> A *Ka'dukwu* is a sacred space where the *Mamos* make the spiritual connection and consultation with the spiritual parents of each element in nature and the universe. The *Mamos* connect spiritual and material signals with the beings of nature. Based on this spiritual consultation, the *Mamos* determine the guidelines for the people, the communities, and the people. The *Ka'dukwu* comprises stones where the *Mamos*, the authorities, and the other members of the Arhuaco people sit.

law. Their political and legal position defended, in principle, the strong core of the culture of Arhuaca. They reject some maneuvers when administering justice and more with cases of sexual abuse. However, on the one hand, sometimes, their position is non-confrontational because they try to reach higher levels of power and participation within the political structure of the *resguardo*. They favor the efficiency of the judicial system, which generates less impunity. They surf between the narratives and judicial practices that best suit their interests.

Moreover, in the third category, *women against the law*, some Arhuaco women claim women's participation in political, judicial, and administrative organizations. They argue that Arhuaco women do not have a voice in the political sphere, and they do not take part but are mere spectators or relatives of the victims or offenders in the justice system. They attempt to make women visible by incorporating themselves in decision-making in the community and integrating into their discourse the Western gender approach reinforced with some values and principles of the *Law of Origin*.

In this section, different legal consciences adopted by some Arhuaco women were identified based on women's reasoning about their justice, particularly in cases of sexual abuse; the political, social, and cultural position within the Arhuaco society influences that. The different legal consciences among the Arhuaco women show how inter-legality operates either by endorsing their justice system being faithful to their *Law of Origin*; resorting to the more effective avenue to ensure justice but maintaining their own cultural and spiritual values; and openly alleging their lack of engagement in internal participation and claiming for more inclusive decision-making processes founded on Western gender discourse.

## 10 THE URGENT ASPIRATION FOR JUSTICE AMONG ARHUACO WOMEN

The case study and the original insights from Arhuaco women's perception of their own justice and their role within it show how complex administering justice within indigenous peoples' territory is, mainly when sexual abuse offenses occur. Interestingly, among Arhuaco women, we have observed that, on the one hand,

there is a position that shields and adheres to their own law and justice systems founded on the *Law of Origin* mandates and its interpretations from legitimate authorities. They conceive their justice as a complex and holistic response involving cultural recovery, spiritual-physical sanitation of the territory, and strengthening harmony between Arhuaco men and women. They uphold that all matters should be of the Arhuaco authorities' competence.

We have proposed an analysis of the legal conscience of indigenous women in the face of sexual crimes. This approach fluctuates and crosses both jurisdictions (law-self-righteousness) and implies certain practices that we characterize as inter-legalities. This article attempts to identify the relationship between the social, cultural, political, and gender conditions that produce this legal conscience and the ways justice is claimed (inter-legality) to achieve mechanisms against impunity for these crimes (in both jurisdictions)

Two positions argue that the Arhuaco justice properly functions when resolving minor conflicts related to the land, family matters, and thefts. However, when there are sexual abuse cases, the Arhuaco justice does not have the means to resolve them. They believe that the offender and authorities hide behind being indigenous peoples to have the competence to handle the cases internally. They conceive that sexual abuse and rape are not part of the Arhuaco people. That cannot be normalized. Hence, it is not proper to behave in such a manner. Precisely, sexual crimes are among the most serious offenses. They argue that such misconduct is a consequence in most cases of the indigenous peoples' and non-indigenous worlds' interaction. They appeal to the state's jurisdiction to resolve the lack of justice, specifically in cases of sexual abuse because of the high impunity rate, and offenders are a threat to the communities. Some male authorities state that women are guilty of inducing males to rape them. They stress that this will increase mistreatment, violence, and abuse if those cases are not stopped. They know that cases are difficult to prove because there is insufficient evidence.

They encourage Arhuaco women to restore the state jurisdiction to investigate sexual abuse as a last resort due to the lack of results within Arhuaco's justice system. They both agree that when a sexual abuse case is properly resolved within the Arhuaco system, meaning there is justice for victims, it will help them

regain confidence and belief in their own justice system. This account of the Arhuaco women's perception of and claim for justice allows us to observe some difficulties when exercising justice. However, it also represents an opportunity to consider that all three positions have something in common: the respect for the *Law of Origin* and the aspiration to obtain justice from their legitimate authorities. Indeed, it is impossible to avoid external influences that shape their discernment about justice. Still, it is workable to construct more solid avenues founded in inter-legality practices that intertwine with the Arhuaco justice. The state and indigenous people are essential in strengthening the autonomy and justice system. According to some Arhuaco women, the state could prevent some causes from disrupting their justice.

## II CONCLUSIONS

This article has focused on the Arhuaco people of Colombia and their use of their customary law to address sexual offenses. We have discussed, on the one hand, how the Arhuaco people's justice system has been reshaped because of either the direct legal-institutional imposition or influence by the dominant society. We have looked at how such syncretism has brought about clashes of jurisdictions when administering justice, as some members have a hegemonic perception of justice.

Further, we addressed that with the Arhuaco people, these counter-intuitive measures led to internal and external discord, as they are incompatible with their cosmovision. The Arhuaco people have struggled to preserve their identity and to administer justice while attempting to respond to the external imperative requirements. For instance, the traditional figures of *Mamos* believe accurate judges live in nature. However, we also highlight the predicaments and questions raised by the Arhuaco jurisdiction regarding the biases of power, gender, and kinship that their judicial decisions entail. Additionally, Arhuaco authorities have faced pressure from their members and the local prosecutor's office to comply with

the right to due process, especially in cases related to serious crimes, such as rape and homicide.

As a result, although indigenous people's authorities want to preserve their identity and traditions as distinct people, they have yielded to the demands of the state in some aspects. For instance, in terms of justice, as long as they adopt and naturalize external institutions into their customary practices, indigenous peoples expect the state to legitimize their self-governance. However, this cannot represent a space of complete impunity-invisibility of cases of sexual violence against Arhuaco women. therefore, indigenous peoples and the state must understand inter-legality and consequently eliminate impunity in both jurisdictions.

The case study reveals how the Arhuaco people administer their customary system concerning sexual offenses. Cases show how the different approaches to justice have led to clashes of jurisdiction. Specifically, in terms of sexual abuse, we cataloged three legal consciousness perspectives in Arhuaco women. First, *before the law*, the Arhuaco women obey the law and trust their political and spiritual authorities. The second, *with the law*, we distinguish some women promoting a conciliatory, non-confrontational position, enhancing the notions of communal feminism.

In comparison, other women invoke hybrid feminism, combining Western theories, values, and principles of the *Law of Origin*. The third, *against the law*, relates to women who consider sexual abuse cases serious offenses to the Arhuaco people. Therefore, they demand justice, resorting to the state jurisdiction because of the lack of trust in the Arhuaco system. The second group is the law. These categorizations are changing, and the practices implemented by women can circulate these three perceptions, but there could also be other additional ones. This evidence of the mutability and fluctuation of legal consciousness raises the intricate forms of inter-legality within the Arhuaco. Such legal consciousness of the Arhuaco women's perception of justice reflects some difficulties when exercising justice and some opportunities considering the common aspiration of justice and endorsement of their *Law of Origin*.



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