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**RECOGNITION OF INDIGENOUS JURISDICTION
(RECONOCIMIENTO DE LA JURISDICCIÓN INDÍGENA)**

CASE: *Amparo Directo 6/2018*

REPORTING JUDGE: Juan Luis González Alcántara Carrancá

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF DECISION: November 21, 2019

KEY WORDS: indigenous law, normative systems and jurisdiction of indigenous people and communities, legal pluralism, limits on the exercise of indigenous special jurisdiction, constitutional and conventional obligations of the States, principles that govern the indigenous special jurisdiction.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo 6/2018*, First Chamber, Juan Luis González Alcántara Carrancá, J., decision of November 21, 2019, Mexico.

The full text of the decision can be consulted at the following link:
https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AD%206-2018_0.pdf

SUGGESTED CITATION FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo Directo 6/2018*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO* 6/2018

BACKGROUND: This matter arose when Juan was grazing his livestock in an area of an indigenous community of Oaxaca that is protected. Members of the community had complained to the competent authorities several times. The authority in question sanctioned Juan for the damages caused. Consequently, Juan and his wife María went before the Public Prosecutor to sue the municipal authorities, an investigation was opened and then it was taken to the courts before a control judge. The members of the indigenous community asked the criminal authorities to refrain from hearing the matter, arguing that the sanctions they issued did not fall under the criminal sphere since they were issued according to their usage and custom. The judge and the prosecutor dismissed the petition of the community. The representatives of the community filed an indigenous lawsuit [*Juicio de Derecho Indígena*] (JDI) before the Indigenous Justice Chamber and Criminal Chamber of the Superior Court of Justice of the State of Oaxaca (Indigenous Chamber) in an attempt to validate their determination. The Indigenous Chamber issued a decision in which it recognized the jurisdiction of the community and validated the internal normative system and its procedure. Juan filed an *amparo directo* arguing that his rights had been violated, which the First Chamber of the Mexico's Supreme Court of Justice (this Court) heard.

ISSUE PRESENTED TO THE COURT: To determine whether the Indigenous Chamber has legal competency by reason of time and subject matter to hear the events judged by the indigenous community and, if so, determine if it was correct for the Indigenous Chamber to consider that the events judged by the indigenous community correspond to the special indigenous jurisdiction.

HOLDING: The *amparo* was denied essentially for the following reasons. It was decided that the guarantee of non-retroactivity of the law was not violated, since it involved procedural norms, applicable at the time a proceeding is activated. In addition, the fundamentals of the special indigenous jurisdiction were addressed and it was determined that the Indigenous Chamber was

competent by reason of subject matter. Then the parameters were developed that must be observed to differentiate indigenous forum cases, created in compliance with the constitutional and conventional obligation that the State has to promote, respect, protect and guarantee the free determination and autonomy of the indigenous towns and communities; from these guidelines, it was affirmed that the matter corresponded to that forum. Therefore, the decision of the Indigenous Chamber was considered correct regarding dismissing the actions taken by both the public prosecutor and the judge, in relation to the original events, in order to respect the autonomy of the community authorities. Therefore, this Court decided to deny the *amparo* filed by Juan.

VOTE: The First Chamber decided this matter by a majority of three votes of the judges Norma Lucía Piña Hernández (issued her vote against considerations), Alfredo Gutiérrez Ortiz Mena and Juan Luis González Alcántara Carrancá. Judge Jorge Mario Pardo Rebolledo voted against (issued a dissenting opinion). Judge Luis María Aguilar Morales was absent.

The votes can be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=231746>

EXTRACT OF THE AMPARO DIRECTO 6/2018

p.2 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of November 21, 2019, issued the following decision.

BACKGROUND

p.2 On June 10, 2015, members of the Commissionship of Communal Assets of San "X", Oaxaca, went to a reforested and prohibited zone of the community, in response to a local complaint. There they observed a herd of approximately fifty goats belonging to Juan.

p.2 The Municipal Council decided to sanction the infringer with a fine, and to warn him that if he repeats the infraction a complaint would be filed against him before the Federal Environmental Prosecutor.

p.3 On June 22, 2015, the members of the Commissionship found María -wife of Juan- grazing a herd of 100 goats in the mentioned reforested area.

Before the municipal Comptroller, María admitted that she had grazed their goats in the prohibited area, and had assaulted the representatives of the community, and therefore they imposed a fine on her. She stated that she did not have any money and refused to sign a promissory note for the respective amount and the corresponding administrative act. At that same time, María verbally assaulted the Municipal Comptroller and threatened physical assault. The municipal council ordered the arrest of María for twenty-four hours, according to the norms that sanctioned infractions committed by members of the community.

p.3-4 On June 27, 2015, neighbors informed the Office of the Commissioner of Communal Assets that there were goats causing damages in the reforestation zone. It was confirmed that the goats were destroying trees and vegetation in general.

p.4 The General Assembly of the Indigenous Community established that the goats would be held by the municipal authorities, while they sought advice to denounce the infringer before the corresponding authority and a solution to the conflict was found.

On January 23, 2016, it was ordered to summon both Juan and his wife María, to urge them to comply with their obligations in the town and communal assets. They were warned that if they did not appear at the summons in question, a new assembly would be called to sell the goats being held and with the proceeds obtained to cover the cost of the municipal enclosure and the expenses generated by the care of their animals.

Finally, on February 13, 2016, without the attendance of Juan and María, the communal authority held a new session in which they determined to impose sanctions on Juan: two hundred forty-nine thousand nine hundred twenty pesos (\$249,920.00 MN). This amount was the result of adding the use of land, crops and damages caused to eighty-four tree plantings; and if they did not pay it, the municipal authority was authorized to sell the goats.

p.5 Simultaneously with the above, María presented a complaint in an Agency of the Public Prosecutor's Office of Oaxaca (PP), by filing of July 1, 2015, against the President, Comptroller and Third Councilman, respectively; as well as various members of the Commissionership and a member of the Oversight Board; all authorities of the municipality of San "X". They were accused of the crimes of abuse of authority, illegal deprivation of personal freedom, unlawful entry, theft of livestock and those resulting therefrom, in relation to the facts.

During the preliminary investigation, the municipal authorities requested the declaration of invalidity and the closing of the investigation. When they did not receive a response, they insisted, indicating to the prosecutor that the events involved a conflict that corresponded to the indigenous community to resolve, according to their internal normative system, and therefore they asked the PP agent to decline his competency in favor of the community. The PP dismissed their request and took the investigation to the courts before a control judge to be able to bring charges.

p.6 The municipal president and Comptroller filed an Indigenous lawsuit [*Juicio de Derecho Indígena*] (JDI), which was heard by the Indigenous Justice Chamber and Criminal Chamber of the Superior Court of Justice of the State of Oaxaca (Indigenous Chamber).

Juan and María were defendants, and the PP agent and the *Amparo* Judge were also informed of the proceeding.

- p.6-7 The Indigenous Chamber issued a decision on September 9, 2016, in which it declared itself legally competent to hear and resolve the proceeding. It validated the internal normative system and the indigenous judicial proceeding that resolved the dispute. Juan filed an *amparo directo* against that determination, which a Collegiate Court admitted.
- p.8 The municipal Comptroller and the Commissionership requested that this Court exercise ex officio its authority to assert jurisdiction. This Court decided to exercise its authority to assert jurisdiction and sent the case to judge Juan Luis González Alcántara Carrancá.

STUDY OF THE MERITS

- p.18-19 In this case the legal competency by reason of time and subject matter of the Indigenous Chamber will be examined, seeking to determine whether or not such authority had competency to validate the determination of the cited community; then, in order to respond to whether or not the hearing of the events originating this matter truly corresponded to the special indigenous jurisdiction, this Court will develop the elements that potentially activate such jurisdiction, the principles of interpretation that support its resolution and the limits thereof.

This Court will develop for the first time the constitutional doctrine by which it will give content and scope to the indigenous special jurisdiction, establishing the criteria, principals and rules that will guide the rest of the courts of the country when they resolve any future conflicts of norms and forums, which may arise from the content and scope of the constitutional protections contained in article 2 of the Constitution.

I. Constitutional and conventional obligations for the Mexican State in matters of indigenous special jurisdiction

- p.23 Various constitutional and conventional provisions obligate the Mexican State to implement efficient mechanisms or proceedings, with the judicial bodies to hear them, that recognize the right of indigenous communities to be governed by their customary legal

systems, which means by their own law and to obtain the validation of their decisions by the authorities of the central State, it being essential that the law establish the corresponding cases and procedures for validation.

- p.25-26 All states of our country have the obligation constitutionally and conventionally to establish in their secondary norms effective proceedings through which, individually or collectively, indigenous people have the real and effective possibility of achieving the validation of their decisions issued under their normative systems. This means that they are able to enforce those decisions, through mechanisms that the secondary laws should establish, so that it can be determined that certain events or conflicts will not be heard by the ordinary jurisdiction but by the indigenous special jurisdiction.
- p.27-28 The indigenous special jurisdiction is the authority or right indigenous people or communities have to judge their internal conflicts according to their own indigenous law, which is understood as the group of traditional norms and customary practices, not necessarily written or codified and different from the law in force in Mexico, that organize the internal life of the indigenous people or communities. Indigenous people or communities, according to article 2 of the Constitution, are those who descend from populations that inhabited the country at the beginning of colonization and that keep their own social, economic, cultural and political institutions, or part of them.
- p.28-29 The indigenous special jurisdiction is not only an individual right to be judged according to the usage and customs of the indigenous community to which the person belongs, but also constitutes a collective right in favor of indigenous groups, due to their need for survival. It is a consequence of the autonomy that the Constitution grants to the indigenous communities to resolve their internal disputes according to their worldview and understanding of rights and how they should be guaranteed to ensure that the community endures. Both jurisdictions –indigenous and ordinary–, are part of the recognition of the legal pluralism that characterizes the Mexican nation.
- p.30 The above allows this Court to hold that the absence of those mechanisms obstructs the recognition by the central State authorities of the usage and native customary laws of the

indigenous communities, as well as their right to exercise their own jurisdiction, which ultimately result in a violation of the human rights of such people. This omission has resulted in abuses in the administration of justice, specifically in the application of criminal norms, when it is not possible to differentiate the ordinary jurisdiction from the indigenous special jurisdiction.

p.34 The Indigenous Chamber is a body specialized in indigenous justice matters of the Superior Court of Justice of the State of Oaxaca, initiated on March 1, 2016 with competency to hear, among other matters, those related to the decisions issued by the authorities of the indigenous people and/or communities in exercise of their judicial function upon applying their normative systems; in other words, to validate decisions issued by the indigenous communities when judging or hearing particular facts or events.

The above is in order to verify that the principles and human rights protected in the Federal Constitution, the international treaties and the particular State Constitution have been respected in the respective proceeding, and therefore for purposes of such function the Indigenous Chamber can validate the determinations issued by the indigenous authorities when judging a specific fact or matter or, with justification, entirely or partially invalidate their decision, and order the community to issue a new decision if appropriate.

p.34-35 The creation of the cited Indigenous Chamber and the JDI constitutes compliance with the constitutional and conventional mandate that requires not only the recognition of legal pluralism, but the creation of the judicial bodies that make it possible to validate such determinations, through the corresponding legal mechanisms or proceedings, thereby guaranteeing and ensuring that such recognition is not dead letter.

II. Legal competency by reason of time and subject matter of the Indigenous Chamber

p.36-37 Does the Indigenous Justice Chamber lack competency by reason of time and subject matter to hear the events judged by the indigenous community? The response to such question must be no, since it was the indigenous community that judged the events according to its normative systems, and therefore the Indigenous Chamber only issued a

determination where it partially validated, through the corresponding mechanism, its decision, with respect to which it did have legal competency by reason of time and subject matter, and therefore the violation alleged by Juan does not exist.

p.37 This Court, first of all, does not see any violation of the principle of legality regarding the non-retroactivity of the norm, since the Indigenous Chamber is legally competent to decide the community dispute heard originally through the JDI and the municipal authorities. Secondly, the Indigenous Chamber does not lack legal competency by reason of subject matter to hear and decide the JDI.

a) Legal competency by reason of time

p.45-46 The decision the Indigenous Chamber issued in the JDI, where it explained whether or not it validated the determinations reached by the indigenous community according to its usage and customs, with respect to events prior to the initiation of the judicial functions of the above referenced Chamber, did not imply that the principle of legality regarding the non-retroactivity of the norm established in article 14 of the Federal Constitution was violated in prejudice of Juan.

p.46 This is so first of all because the one who first judged the events was the indigenous community according to its usage and customs and its own normative systems. The Indigenous Chamber, as a body of the central State and court of second instance on the organizational chart of the Federal Judicial Branch of the State of Oaxaca, through the indigenous rights proceeding, issued a resolution in which it reviewed whether or not the determinations made by the indigenous community could be validated. In other words, it analyzed whether the decisions adopted by the indigenous community on the events in dispute, with their respective sanctions, should be validated or not.

p.46-47 Secondly, although the Indigenous Chamber was created subsequent to the majority of the events and decisions the indigenous community made regarding such events, the validation proceeding before the Indigenous Chamber was developed in light of procedural provisions in force at the time the JDI was filed. The non-existence of the Chamber and Indigenous Rights Proceeding at the time the first events took place and decisions were

issued by the indigenous community, does not imply, in light of the constitutional doctrine, a violation of the principle of legality in relation to non-retroactivity of the norm, since such principle only applies to the norms or measures that define the types of crimes and penalties or their scope, not to procedural norms that govern the proceeding. The latter take as a reference the moment when the procedural act commences or activates, and not the date on which the events occurred, and therefore in this respect there has not been any violation of article 14 of the Constitution.

p.47 Thirdly, the JDI and the creation of an Indigenous Chamber were a response to the historic debt the Mexican State owes the indigenous people regarding the recognition of their usage and customs, as well as their normative systems, which existed long before the events in dispute occurred.

p.50 Therefore, this Court determines that the principle of legality, regarding the non-retroactivity of the norm, established in article 14, first paragraph of the Federal Constitution, was not violated in prejudice of Juan, since in light of the constitutional doctrine the Indigenous Chamber is legally competent by reason of time to resolve the original community dispute.

b) Legal competency by reason of subject matter

p.54-55 The responsible Indigenous Chamber also has competency by reason of subject matter to hear and resolve the JDI, in accordance with the Organic Law of the Judicial Power of the Free and Sovereign State of Oaxaca [Ley Orgánica del Poder Judicial del Estado Libre y Soberano de Oaxaca] (LOPJESO). The competency is the power a judicial body has to exercise its jurisdiction in specific matters within a certain territory; the subject matter is a factor that determines the competency based on the legal nature of the dispute, which is based on the legal aptitude that is attributed to a judicial body to hear the disputes related to a specific branch of law.

p.56-57 The desire of the local lawmaker was to establish the jurisdiction of the Indigenous Chamber to hear matters related to decisions issued by the authorities of the indigenous people and communities in exercise of their judicial function when applying their normative

systems. Similarly, the purpose of the Chamber is to verify that the principles and human rights protected in the Federal Constitution, the international treaties and the particular Constitution of the state of Oaxaca were respected in the proceeding. The specialized Chamber can also validate the determination issued by the indigenous authority or, if appropriate, order it to issue a new decision. According to the above, it is clear that the Indigenous Chamber is competent by reason of subject matter to hear and decide the original dispute.

p.60-61 In that regard, it is determined that the JDI is valid when it is the authority of the community itself that validates or confirms its own determination. Therefore, the responsible Indigenous Chamber is legally competent with regard to subject matter in this case, since it has competency to hear any matter related to a decision issued by the indigenous authorities, regardless of whether or not it is the indigenous authority itself that goes before the central justice to validate its decision or determination, since that requirement is not established in the LOPJESO.

p.62-63 A systematic interpretation leads to the conclusion that the JDI is an efficient or effective mechanism for the authorities of the central State to recognize and execute the decisions of the authorities of the indigenous communities in exercise of their special jurisdiction. Thus, this Court concludes that the Indigenous Chamber is legally competent by reason of subject matter to hear the JDI, and that the municipal authorities could present the decisions adopted by the authorities of the indigenous communities regarding the events in dispute to be validated or confirmed by the Indigenous Chamber.

p.63 Now that this Court has decided that the Indigenous Chamber is legally competent by reason of forum and subject matter, it must be asked whether it was correct for the Indigenous Chamber to consider whether the events judged by the indigenous community correspond to the indigenous special jurisdiction? The response to such question must be yes.

p.63-64 This Court finds that the Indigenous Chamber did not violate the rights of Juan when determining that the events submitted to JDI are among those to be heard by the

indigenous special jurisdiction. Therefore, it acted correctly when ordering the Control Judge and the PP to be prevented from hearing those events, and as a result, that such judge dismiss the criminal cause of action.

p.65-67 It is recognized that one of the principal problems related to the system of justice of indigenous people is the applicability and recognition by the central State authorities of the rights the indigenous people or communities have to a special jurisdiction. Therefore, in order to eliminate the barriers impacting indigenous groups historically, both individually and collectively, the elements, principles and limits will be developed that in the judgment of this Court govern the indigenous special jurisdiction, which, in addition, will permit the authorities of the central State to evaluate when they have a case that should be heard by the indigenous special jurisdiction instead of the ordinary jurisdiction.

III. Factors judges should consider when determining that the indigenous special jurisdiction is competent to hear certain events or disputes

p.70 This Court determines that the criteria or factors that should be analyzed in a specific case by the authorities of the central State –ordinary jurisdiction– in order to determine that we have a case that should be heard by the indigenous special jurisdiction are the following:
a) personal, b) territorial, c) objective and d) institutional.

a) Personal factor

p.70 The judge must first study whether or not the person to whom an act or crime is attributed belongs to an indigenous community or people. It must also be determined whether or not all the persons involved belong to the indigenous community.

p.72 For this purpose, the following central points will guide the operators of justice when making these determinations: 1) the usage and customs of the cultures involved, 2) the degree of isolation of the indigenous person and/or of the community in relation to the majority culture, and, 3) the effect of the sanction on the individual. These parameters must be evaluated in detail by the judges within the limits of equity, reasonability and healthy criticism.

When in a dispute or conflict an indigenous person or community and a non-indigenous subject are implicated, this element will be evaluated by the judges in concordance with the rest of the factors and according to the following circumstances, among others: whether the situations of fact are protected in both legal systems, whether the non-indigenous subjects implicated in the dispute have basic knowledge of the customs of the indigenous community in which the events occurred and finally, whether the non-indigenous subject wishes to submit to a special jurisdiction, when the conduct is regulated in both jurisdictions.

b) Territorial factor

p.72-73 This element implies evaluating whether the events in question occurred within the territorial sphere of an indigenous people or community, since to determine the judicial power of the indigenous authority, the particular connection the people have with their territories is also decisive.

p.73-74 The territory is the geographic space where the indigenous communities or people have standing to exercise their authority, and therefore this comprehends all of the region that the people occupy or use in some way, and including territorial rights to lands that are not exclusively occupied by them, but to which they have had access for their traditional and subsistence activities. The notion is not exclusively the geographic aspect, but must be understood as the sphere where the indigenous community displays its culture. This means that the vital space of the communities in some situations will not coincide with the geographic limits of their territory, and therefore an act occurred outside of those limits could also be decided by the indigenous authorities for cultural reasons.

c) Objective factor

p.74-75 This factor considers whether the legal asset presumptively affected is related to an interest of the indigenous community or one of its members or to the majority society or one of its members.

d) Institutional factor

- p.76 This factor involves studying the existence of authorities, usage and customs, as well as the traditional proceedings within the indigenous community. In other words, the judge must verify that there is customary indigenous law in force in the community.
- p.77 The judge must take into consideration that the institutional factor has three fundamental aspects that must be taken into account in each case: 1) the existence of the norms of customary law, in order to preserve due process in benefit of the person accused of engaging in certain conduct; 2) the conservation of the ancestral customs and instruments of each community in matters of resolving conflicts and, 3) the satisfaction of the rights of victims.
- p.77-79 Such elements or factors must be evaluated jointly by the judges and be proven in the specific case. This Court, in the *Amparo Directo en Revisión 5465/2014*, when evaluating the applicability of indigenous customary law to a specific case, held that it was necessary for the judicial authority to document, through an anthropological expert or any licit means, the culture of the persons, people or communities involved; the form in which they are governed; the norms that govern them; the institutions that support them; the values they hold; the language they speak and its meaning, in order to be able to apply them in the respective proceeding. Such guidelines are applicable for determining whether or not a case is the competency of the indigenous special jurisdiction.

IV. Principles or criteria of interpretation that govern the indigenous special jurisdiction

- p.79-80 The following criteria will assist the judges in finding legitimate solutions to jurisdictional conflicts without incorporating principles of the central State: i) Principle of greater autonomy of the usage and customs of the indigenous communities; ii) The human rights established in the Federal Constitution and the international treaties in such matter constitutes the mandatory minimum for deciding each specific case and; iii) Principle of maximization of indigenous autonomy or of minimum restrictions on their autonomy.

V. Limits on the exercise of the indigenous special jurisdiction

- p.81 From the content of article 2, part A, sections II and VIII, of the Federal Constitution, it is seen that such jurisdiction is limited to respecting the general principles contained in the Federal Constitution, its individual rights, the human rights and, especially, the dignity and integrity of women.
- p.82-83 When deciding the *Amparo Directo en Revisión* 5465/2014, it was determined that indigenous law can be applicable in specific cases, including those processed in the central State jurisdiction when it establishes a broader protection and does not violate any human right contemplated in the Federal Constitution or any international treaty. It was specified that the only exception or limit on the applicability of indigenous law by the central State authorities is when the usage and customs of such people directly threaten the human rights of the *ius cogens*, such as torture, forced disappearance, slavery and discrimination; or that eliminate the possibility of access to justice of its members. Therefore, if any of such threats exist with respect to certain facts or events, it would not be the indigenous special jurisdiction that decides or judges such events, but rather the ordinary jurisdiction.
- p.83-84 In effect, the application of the usage and customs of the indigenous people, as well as their normative systems, or the exercise of their special jurisdiction, cannot be an excuse for intensifying oppression, including inside the communities, of those members traditionally excluded, such as women, children or disabled persons; among other historically disadvantaged groups.
- p.89-90 From the facts of the case and the evidence in the case file, which were correctly evaluated by the authority, including an anthropological opinion, in this case it can be held that all the factors this Court considers must concur to activate the indigenous special jurisdiction exist.
- p.102 In this regard it is shown the matter is related to various events that occurred in the Municipality of San “X”, Oaxaca (territorial element), that gave rise to a conflict between a member of its community –Juan “N”– (personal element) and the community authorities, which was resolved by the Community General Assembly based on the solution methods

recognized by the community (objective element), in light of the rules contained in the Police Band and Good Government of the Municipality of San “X” Oaxaca, which law contains the minimum elements for the right to due process, in the right dimension (institutional element).

Due to the above, this Court determines that the responsible Indigenous Chamber was correct in determining that the events under debate corresponded to the indigenous special jurisdiction, since they resulted from an event between persons of an indigenous community, in a territory that corresponds to those people, which has traditional authorities, who exercise their authority in a specific territorial scope; based on existing traditional usage and practices, both substantive and procedural; and, that these usages and practices are not contrary to the human rights and the guarantees for their protection established in the Federal Constitution and the international human rights instruments that the Mexican State is party to.

p.106 This Court also considers the determination of the Indigenous Chamber to order the dismissal of the criminal cause of action was correct.

p.106-107 With this outcome the international human rights standards for systems of justice, both ordinary and indigenous, and the recommendations directed especially to the Mexican State are met. Those recommendations indicate that it must be guaranteed that the criminal justice system is not used to criminalize the indigenous people or the organizations that assist them in the legitimate defense of their rights, which is accomplished with the indigenous justice system, from a pluralistic perspective, in the case of indigenous jurisdiction that should not be judged by the central authority.

p.112 Regarding the principle of maximization of the autonomy of the indigenous communities, it is concluded that the challenged decision was correct to consider that the PP agent was mistaken when that central authority overlooked the characteristics of the internal normative system of the community applied to the original conflict that Juan initially accepted, and therefore the fact that he no longer agreed with the sanction imposed

should not lead to a failure to recognize the system that governs the community to resolve conflicts such as this one.

DECISION

p.114 Since the concepts of violation stated by Juan are unfounded, it is appropriate to deny the *amparo* requested against the act attributed to the Indigenous Justice Chamber.