

Mayan Law in Post-Conflict Guatemala

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In 1996, Guatemala's internal armed conflict of 36 years that caused an estimated 200,000 victims came to an end with the conclusion of comprehensive Peace Accords. The Accords set out a vision of a democratic, socially equitable and, perhaps most importantly, pluricultural State. Although the peace has held, the implementation of this vision continues to be the subject of a political and social contest of the highest stakes. The relation between Mayan Guatemalans, Mayan Law and the state, lies at the heart of this contest and is accordingly a highly politicized issue – so politicized that even the term “Mayan Law” is contested. Some people refer to the institutions, processes and substantive rules indigenous Guatemalans recognize as their own as “customary,” “indigenous” or “Mayan Law,” others speak of “customs and practices” (*usos y costumbres*). Guatemalan statutes consistently opt for the latter term. Legally, this has the purpose of clarifying that indigenous custom is subordinate and auxiliary to state law.¹ Philosophically, the term invokes the positivist, Hobbesian notion that law cannot exist outside the realm of the state. It is the State of Law that replaces the pre-existing anarchy and therefore only the State creates law through predetermined, formalized processes. However, this ideology is at odds with Guatemala's social history prior to the armed conflict, which is characterized by an almost complete absence of the State in the life of many indigenous Guatemalans. Contrary to the Hobbesian assumption, this absence of the State did not mean an anarchical legal vacuum but the indigenous social order continued to function. Since law is made by people and not the abstract entity of the state, there can and will always be non-state law where state and people are not two sides of the same coin. Leopold Pospisil law has determined four defining characteristics of law: the intention of univer-

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¹ Article 2 of the Ley del Organismo Judicial (Decreto 2-89) provides that custom is a source of law only if there is no applicable law or if the law specifically delegates the authority to regulate a matter to custom, always provided that the custom is in conformity with morality and the public order.

sal application, relations of obligations, sanctions and authority.² Within its self-determined ambit of application Mayan Law fulfils all four characteristics, which is why its terminological degradation to mere custom is inappropriate and we will abstain from it. This is not say that Mayan Law is not a *customary* law. Mayan Law is preserved through oral tradition and its validity is continuously reaffirmed through practical application, which makes it customary in nature. Nevertheless we will refer to it as Mayan Law rather than to use the more generic terms customary or indigenous law, since this paper does not deal with the specific situations of Guatemala's numerically insignificant Xinca and Garifuna populations.

Taking into account the historical, political and normative background of the debate, this paper seeks to assess the capacity of Mayan Law to resolve conflict in an efficient, fair and human rights-compliant. The approach to the assessment is a comparative one – the benchmark of comparison being the degree of effective fair and culturally adequate access that Mayan Guatemalans have to the state justice system. The State's efforts to come to terms with the country's pluricultural nature in its ambitious post-conflict justice reform program will also be discussed. The conclusion is drawn that the State has neither lived up to the promise of legal pluralism that it gave during the peace process, nor managed to provide adequate access to justice itself.

I. Political and Historical Background

Unlike those in other Latin American countries, Guatemala's indigenous peoples have managed to preserve their ethnic identity and culture since the Spanish *conquista*. Today 21 linguistically distinguishable indigenous groups of Mayan descent live in Guatemala. The largest group are speakers of K'iche' (approximately 900,000 members), followed by Kakchiquel (700,000), Mam (600,000), and Q'eq'chi' (300,000). In addition, to the Mayan groups there is a small indigenous group of Xinca (10,000). Furthermore, there is the ethnic group of the Garifuna (5,000), who descend from liberated African slaves and the native population of the Caribbean island of St. Vincent. According to a 2000 government survey, 40,5% of Guatemala's 14 million inhabitants self-identify themselves as indigenous.³ The 2004 UNDP Hu-

² Leopold Pospisil, *Kapauka Papuans and Their Law*, (New Haven: Yale University Publications in Anthropology, 1958), 257-272; *Anthropology of Law: A Comparative Theory*, (New Haven: Harper & Row Publishers Inc., 1971).

³ Instituto Nacional de Estadística, *Encuesta Nacional de Condiciones de Vida 2000-2001*, (Guatemala: INE, 2001).

man Development Report sets the figure notably higher at 66%.⁴ Indigenous Guatemalans would therefore outnumber the ethnic group of the *Ladinos*, who are mostly of mixed European and indigenous descent but identify themselves as non-indigenous. Four out of Guatemala's twenty-one provinces have more than 75% indigenous people, five others between 50 and 75%.⁵

Guatemala continues to have one of the most uneven distributions of wealth in the world. The richest 10% of households earn 46% of the national income, the poorest 10% a mere 1.6%.⁶ The United Nations Verification Mission in Guatemala (MINUGUA) has estimated that 80% of all arable land is in the hands of a mere 4% of the population. Despite their numerical majority, indigenous Guatemalans constitute the most marginalized group in the social pyramid. 80% of the indigenous population live in poverty; 40% even in extreme poverty. Large parts of the rural indigenous population, particularly women, are unable to speak or understand the official language Spanish. Even of the young generation (15-24 years), 30% are illiterate.⁷

Discrimination against indigenous people remains a defining characteristic of Guatemala's society along with its political and economic order. The United Nations Rapporteur on Indigenous People, Rodolfo Stavenhagen, has distinguished four forms of discrimination that are present in Guatemala.⁸ There is tacit *legal* discrimination, *institutional* discrimination in the distribution of public expenditure and social goods, and historically rooted *structural* discrimination. Finally, there is also *interpersonal* discrimination as attitudes of ethnic superiority and racism are widely held among the non-indigenous population. "Seré pobre pero no indio" (I might be poor, but not an indio) is a common saying among of many *Ladinos*, who thus deny part of their own heritage.

The marginalization of indigenous peoples and institutions is not only a consequence of the colonial conquest but also results to a large part from Guatemala's attempt to build a unitary nation-state beginning with the liberal revolution of 1871. The rapidly growing coffee

⁴ United Nations Development Programme, *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (New York: UNDP, 2004), 92.

⁵ Misión de Verificación de las Naciones Unidas en Guatemala [MINUGUA], *The Indigenous Peoples of Guatemala: Overcoming Discrimination in the Framework of the Peace Agreements*, (Guatemala: MINUGUA, 2001), para. 16.

⁶ CIA, *World Factbook: Guatemala* (accessed 7 April, 2004); available at: <http://www.cia.gov/cia/publications/factbook/geos/gt.html>.

⁷ Land, poverty and literacy statistics according to United Nations Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, paras. 11 & 22 [hereinafter Stavenhagen].

⁸ Ibid., paras. 15-20

industry, which eventually came to dominate the economic and political life of the country, faced pressing needs of new land and labor. Using the ideology of formal legal equality, the new elites espoused assimilationist policies and abolished colonial norms that specifically protected indigenous people such as the inalienability of communal indigenous land. Supposedly unproductive indigenous lands were expropriated. The *Ley de Vagancia*, which penalized indigenous Guatemalans that could not show proof of having worked a certain number of days, forced them to toil in public infrastructure projects or plantations.

From 1944 to 1954 Guatemala experienced a period of government-led social reforms such as the introduction of a social security system, the establishment of a bank to support social housing, and a land reform. Forced labor for indigenous people was abolished and they were constitutionally guaranteed inalienable rights over their communal lands. The municipalities were granted municipal autonomy. This period, and with it most of the achieved social progress, came to an abrupt end with the U.S.-supported overthrow of President Jacobo Arbenz in 1954. The coup brought to an end the attempt of democratic reform and initiated an internal armed conflict that would last for over three decades. Believing a continued reform process by peaceful means had become impossible, supporters of Arbenz started to organize resistance against the new military government. Former military officers founded the first guerrilla movement in 1961. Several new guerrilla movements emerged in the 1970s. The various guerrilla groups eventually combined their efforts and formed a joint movement in 1982, the *Unidad Revolucionaria Nacional Guatemalteca* (URNG).

From the late 1970s, the armed confrontation intensified due to various reasons. The first was the growth of social protest against poverty and social injustice, which also included indigenous communities. This movement was well organized and received growing popular support. The State did not react with political reform but with a campaign of selective repression that almost eradicated the leadership of many progressive social groups, political opposition parties and community organizations. During this period, many young Mayan activists were driven into the arms of the Guerrilla, which had by then adapted its ideological foundations to accommodate potential recruits from all marginalized sectors of society. Although relatively few indigenous people became armed fighters, many gave other forms of support. Furthermore, the polarizing climate of the Cold War triggered the emergence of revolutionary movements in four of the five Central American countries and militarized societies as radical counterinsurgency doctrines were implemented. The successful Sandinista Revolution of 1979 in Nicaragua and later the seemingly imminent triumph of the leftist *Frente Farabundo Martí para la Liberación Nacional* (FMLN) in El Salvador, encouraged Guatemala's guerrilla

movement to change its strategy to a more open, nation-wide military campaign. By the end of 1981, the guerrilla consisted of an estimated 6,000 armed fighters, had 276,000 non-armed supporters and was operating in 16 out of 21 departments.⁹

The Guatemalan military reacted with a brutal and indiscriminate counter-insurgency campaign. From the early 1980s, indigenous rural communities were first purified of opposition leaders and then heavily militarized. Military commissioners that had long existed in the country assumed ever more civilian functions. Civil Self-Defense Patrols (*Patrullas de Auto-defensa Civil: PACs*), paramilitary groups composed of the local population, were established throughout the countryside. The atrocities that these groups were made to commit, continue to divide the indigenous population in Guatemala up to this day. The worst period of repression against the civilian population, with hundreds of massacres in the rural indigenous communities of the western highlands, took place between 1980 and 1982, during the military governments of Lucas García and Ríos Montt, who applied scorched earth tactics in order to eradicate any possible civilian support for the guerrilla movement. The U.N.-sponsored Historical Clarification Commission found that 83.3 % of the victims of all documented human rights violations were indigenous people, while 97% of all atrocities were committed by the Guatemalan military, the PACs and other state security forces.¹⁰ Driven by a racist ideology mixed with fundamentalist evangelical elements the military waged an extermination campaign against the indigenous population's identity, organization, and culture. In its final report, the Historical Clarification Commission found that "[t]hrough the militarization of the communities, the creation of the indigenous 'Civilian Self-Defense Patrols' (PACs) and the military commissioners, the legitimate system of community authorities was destroyed, the use of their own standards and procedures to regulate their social life and to settle conflicts was prevented; the exercise of Maya spirituality and the Catholic religion was made difficult, prevented or repressed..."¹¹

The Guatemalan military's offensive of the early 1980s almost completely defeated the URNG guerrilla movement, laying the basis for a change in the armed forces tactics. In the meanwhile, a political process of return to civilian, democratic rule was initiated. A new Constitution was drafted and approved leading to general elections in 1985 and the transfer of power to a civilian government in early 1986. By the end of 1993 all other Central American

⁹ Proyecto Interdiocesano Recuperación de la Memoria Histórica, *Guatemala, Nunca Más*, vol. 3, *El entorno histórico* (San Jose [Costa Rica]: Oficina de Derechos Humanos del Arzobispado de Guatemala/Lill SA, 1998), 119.

¹⁰ Statistics according to Comisión para el Esclarecimiento Histórico [CEH], *Guatemala: Memoria del Silencio*, vol. 2 (Guatemala: CEH, 1999), 321-322 (para. 1745) & 324 (para. 1752).

¹¹ *Ibid.*, vol. 5, at 43 (para. 88).

countries had arrived at a negotiated solution to their own armed conflicts and international pressure on Guatemala was increasing. Finally, the Government and the URNG accepted to meet in January 1994. With the help of the United Nations, three accords were reached between the conflict parties in the first half of 1994: on human rights, on the reintegration of displaced persons, and on the installation of the said Historical Clarification Commission. Human rights organizations strongly criticized the last item fearing impunity for human rights violators. As a result, the URNG slowed down the speed of negotiations and only resumed talks after MINUGUA had begun its human rights verification work. The peace negotiations entered another temporary impasse over socio-economic reform. A agreement on this issue was finally signed in May 1996 paving the way for the signing of the final Peace Accord in December 1996. Overall the Peace Accords were (and are) very ambitious. They foresaw an extensive reforms in key state institutions, the demobilization and reintegration of the guerrilla forces and support for the war-affected population. The power of the armed forces was curbed by limiting the size and budget of the military and dissolving the PAC auxiliary forces. In addition, a civilian police force replaced its militarized predecessor organizations and it was agreed to clean up the ranks of the armed forces by purging officers accused of corruption and human rights abuses.

II. The Promise of Legal Pluralism

In an irony of history, the military's deliberate repression of indigenous identity of the 1980s sparked an indigenous, pan-Mayan counter-movement that constituted itself during the peace process of the 1990s. Indigenous activists realized that their campaign against social and economic marginalization had the best chances of achieving crucial international support and interethnic unity, if it took the form of a strife for a limited Mayan self-determination. In order to reconstruct the war-torn fabric of their communities that had suffered intense violence and widespread displacement, Mayan intellectuals effectively reaffirmed (some say constructed) a common Mayan identity based on existing overarching cultural, spiritual, social, and institutional paradigms.¹² From the early 1990s, the term Maya was increasingly used to refer to today's indigenous Guatemalans and not only to their ancient Mesoamerican ancestors. The Mayan movement reached international prominence in 1992, when the indigenous Guatemalan activist Rigoberta Menchú was awarded the Nobel Prize of Peace – exactly 500 years after

¹² Cf. Rachel Sieder & Jessica Witchell, "Impulsando las demandas indígenas a través de la ley: reflexiones sobre el proceso de paz en Guatemala," in *Los Derechos Humanos en Tierras Mayas*, ed. Pedro Pitarch & Julián López García (Madrid: Sociedad Española de Estudios Mayas, 2001), 55, at 66-68.

the Spanish *conquista* began with the Columbian expedition. Led by the powerful umbrella organization *Coordinadora de Organizaciones del Pueblo Maya de Guatemala* (COPMAGUA) Mayan activists achieved their greatest substantive success on March 31, 1995 when the Government and the URNG signed the Agreement on Identity and Rights of Indigenous Peoples, which forms an integral part of the Peace Accords. The Agreement sets forth measures in a range of areas with a view to tackle the entrenched forms of discrimination that affect the indigenous population.

For Guatemala's justice sector policy, the Agreement on Indigenous Peoples, read together with the Agreement on the Strengthening of Civil Society and the Agreement on Constitutional Reform, marks a paradigm shift. Besides a thorough reform of the state justice system itself, the Peace Accords envisage changing the overall structure of Guatemala's justice system. The monist state justice system is to be replaced by a pluralist national justice system resting on three pillars: the state judicial system, alternative dispute resolution mechanisms and indigenous justice systems. While the inclusion of the second pillar was primarily included to make justice generally more accessible and to help overcome the culture of violence created by decades of armed conflict, the indigenous justice pillar satisfied one of the key demands of the indigenous movement. In order to strengthen this third pillar, the Government promised to push for the statutory recognition of the right of indigenous communities to solve internal conflicts in accordance with indigenous customary norms provided that these norms are in conformity with fundamental rights flowing from domestic and international law.¹³ Moreover, the Government assured that indigenous law would be fully taken into account in matters requiring the intervention of state courts, especially in criminal matters.¹⁴

In addition, the Agreement on Indigenous People also obliged the Government to promote the ratification of the International Labour Organisation's Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169). In June 1997 Guatemala acceded to the Convention. Article 8 of the Convention gives indigenous peoples the right to retain their own customs and institutions as long as they are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. The Convention explicitly extends this right to a limited legal autonomy in the resolution of criminal matters. Article 9 of ILO Convention 169 obliges State Parties to respect the methods that indigenous people customarily apply in dealing with of-

¹³ *Agreement on Identity and Rights of Indigenous Peoples between the Government of Guatemala and the URNG*, 31 March 1995, section IV.E.3.

¹⁴ *Ibid.*, IV.E.4.

fences committed by their members to the extent that these methods are compatible with the national legal system and internationally recognized human rights. These collective rights and their corresponding obligations bind Guatemala not only as a matter of international law, but also alter domestic Guatemalan law. Article 46 of the Guatemalan Constitution of 1985 stipulates that international human rights treaties to which Guatemala is a party take precedence over internal Guatemalan law. This allows Guatemalan courts to directly apply ILO Convention 169.¹⁵

As the cornerstone of the paradigm change from legal monism to pluralism, the Government promised to push for the passage of a constitutional amendment ensuring administration of justice in accordance with the principles of “respect for the country’s multi-ethnic, pluricultural and multilingual nature” and “free access to the administration of justice in the person’s own language.”¹⁶ As a result, the Guatemalan Congress eventually passed constitutional amendments according to which the State would have explicitly recognized the traditional authorities of indigenous communities to the extent compatible with the principles of national unity, territorial integrity and indivisibility of the Guatemalan State. More specifically, the constitutional amendment would have recognized the validity of decisions by Mayan authorities in their communities’ internal matters provided that the conflict parties had voluntarily submitted to the jurisdiction of the Mayan authorities and that the decisions complied with fundamental rights and did not affect the interests of third parties. To complement these fundamental reforms, the Congress approved a further change to the constitutional text that would have recognized Guatemala’s indigenous languages as official languages in their respective regional ambit of application.

A public referendum was held to confirm these and a range of other constitutional amendments including some deeply unpopular ones unrelated to the peace process such as an increase in the number of Members of Congress. Altogether 50 amendments were approved. They were grouped into four thematic blocks: amendments concerning social reform, concerning the executive, concerning the legislative and concerning judicial reform. The last block included the issue of recognition of indigenous law among other things. Voters were asked to either accept or reject each block of amendments. In a badly organized referendum characterized by an extremely low voter turn-out (18%), all four blocks of amendments were

¹⁵ However, the Guatemalan Constitutional Court has clarified that this principle does not apply to the Constitution itself. To the extent that the Constitution and ILO Convention 169 were to contradict each other, the Constitution would prevail. See Corte Constitucional de Guatemala, *Opinion consultativa relativa al Convenio 169 sobre Pueblos Indígenas y Tribales en Países Independientes*, May 18, 1995, Expediente 199-95.

¹⁶ *Agreement on Constitutional Reforms and the Electoral Regime between the Government of Guatemala and the UNRG*, 7 December 1996, at para. 16.

rejected. 53% of voters voted against the judicial reform amendments with larger majorities of no-voters in the capital and other non-indigenous areas. Numerous reasons account for the referendum's failure.¹⁷ The two major conservative parties, the *Partido de Avanzada Nacional* of then President Alvaro Enrique Arzú and the *Frente Republicano Guatemalteco* of his successor Alfonso Portillo, reluctantly supported the constitutional amendments in parliament but many local party leaders openly opposed them in the referendum stage. Furthermore, a strong, well-financed rejection-campaign coordinated by various right wing groups, business leaders and evangelical sects mobilized constituencies through misinformation and prejudiced populism arguing e.g. that indigenous law was equal to lynch justice or that the constitutional recognition of heathen practices posed a danger to the Christian faith. Among big landowners there was also the fear that a recognition of Mayan Law would pave the way for the recognition of pre-colonial land titles. On the other end of the political spectrum COPMAGUA and its progressive civil society allies failed to bring the indigenous majority to the ballot box. The attempt to constitutionally entrench the political promise of legal pluralism had failed. The negative consequences for the indigenous population went much further than that. The referendum's failure marked the beginning of the end of COPMAGUA. Today, the indigenous organizations continue to be a very influential social force but their effectiveness is hindered by the lack of a strong coordinating institution.

III. Local Expressions of Mayan Law

Contrary to what the term "Mayan Law" might suggest, there exists no uniform Mayan system of law that applies to all 21 linguistic communities and the thousands of local communities. Mayan Law is as heterogeneous as Mayan culture. Due to its inherent pragmatism and flexibility, its concrete local manifestations are incredibly diverse and shaped by local needs, preferences and history. This being said, these local expressions are nevertheless all based on common institutional, procedural and substantive paradigms. Secondly, the term "Mayan Law" is not to imply that today's Mayan Law is identical to the Mayan Law that existed at the time of the Spanish *conquista*. While preserving key paradigms, Mayan Law has significantly adapted in the face of outside influences and continuous to do so. Therefore we use the term with reference to the set of local legal orders that Mayan Guatemalans consider to be their own at the current point in time.

¹⁷ Cf. Raquel Yrigoyen Fajardo, "El debate sobre el reconocimiento constitucional del derecho indígena en Guatemala", 58 (1-2) *América Indígena* (Jan.-June. 1998).

1. Mayan Cosmovision and Mayan Law

Mayan Law can only be understood in the context of the Mayan Cosmovision according to which the universe, nature and the human community are all part of an integrated order. Other than, for instance, by the Christian tradition, the human being is not considered to be superior to other creatures and elements, which form part of the divine creation. The human race does not exist but coexists, which is why animals, plants or even non-living things must be no less respected than fellow human beings. By the same token, the earth does not belong to the human being. Instead, the human being forms part of the “mother earth,” which provides his nourishment. To preserve this order of universe, nature, and human being, harmony and equilibrium have to be maintained within and between its parts. Law is an expression of this order. Its primary purpose is therefore to maintain communal harmony and equilibrium and not to guarantee the enjoyment of individual rights and entitlements.

Conversely, conflict is seen as a threat to the cosmic order. This is also reflected in Mayan languages. The word for conflict or fight in the Mayan languages belonging to the Ki'che branch is *ch'o'j*. The word is onomatopoeic: It mimics the sound made by fighting mice. This is a deliberate metaphor.¹⁸ Mice are associated with misery, destruction, illness and disorder. Clandestinely, they constantly seek to penetrate the human space and take away what humans need to survive. Unresolved conflicts carry similar negative connotations in Mayan culture. They pose a threat to the cohesion and order of the community as a whole since they eat away the communal fabric if they are left unresolved. Conflicts that evolve unnoticed by the community are considered an especially dangerous threat as they may fester and produce vicious rivalries that may even transcend into the next generation.

The Mayan civilization's extraordinary mathematical and astronomic achievements are integrated into its spirituality and are attributed symbolic significance. Of particular importance are the two main Mayan calendars, the spiritual lunar calendar of 260 days (*Cholq'ij*) and the agricultural solar calendar of 365 days (*Haab*). Concrete and binding legal rules are associated with these calendars that determine, for instance, in what month and lunar phase corn may be planted. More often than not these rules are not only of a spiritual character but the normative reflection of a careful observation of nature. Many Mayan communities prohibit, for example, the cutting of trees in phases of new moon. During this phase, there is

¹⁸ Cf. Carlos Ochoa García, *Derecho Consuetudinario y Pluralismo Jurídico* (Guatemala: Cholsamaj, 2002), 292-304.

more rosin in the stem of the tree making its wood more susceptible to be infested by certain types of pests.

2. The System of Mayan Authorities

That Mayan forms of governance and spirituality are connected is also evidenced by the fact that Mayan authorities and institutions are considered to be sacred. Mayan Law knows a diverse range of authorities with governance or conflict resolution functions. On the surface, these authorities are a product of the country's colonial history, since they draw on the historic forms developed in the colonial municipality and its local sub-units. To exploit the subjugated territory and population with the least administrative and military expenditure the Spanish colonizers employed strategies of division and indirect rule. The colonizers physically and legally segregated the Spanish and the *Mestizos* from the supposedly inferior and therefore exploitable indigenous population. The policy of the two republics created two separate administrative structures: the Republic of Spaniards and the Republic of Indios.

In addition, the colonizers subdivided larger indigenous groups into smaller, more easily controllable town units, which form the historic root of today's rural municipalities. A Catholic priest was assigned to each of these towns with the task of fostering the local indigenous community's evangelization and controlling its agricultural output. Existing rural indigenous authorities were integrated into the local governance structure as auxiliary administrators (*alcaldes auxiliares*).¹⁹ They had to ensure that their communities worked, paid tribute and progressed in their evangelization. Although the imposition of grave penal sanctions remained the prerogative of the Spanish authorities, the *alcaldes auxiliares* were also permitted to administer justice in minor conflicts between indigenous persons. The use of indigenous "customs and practices" continued to be allowed as long as they did not contravene "divine and natural law" (as interpreted by the colonizers). Pre-colonial councils of notables or elders also survived the *conquista*, albeit in a distinct form. Their members usually assumed the leadership of the Catholic brotherhoods (*cofradías*), which the priests had founded following the Spanish example. An ostensible success of the evangelization effort, the *cofradías* became the surreptitious recluse for the indigenous system of governance as well. In other words, the municipal structure was imposed upon, but at the same time appropriated by the local indigenous population, who used the limited political space it was given to preserve its culture and

¹⁹ Whereas "*alcalde*" signifies "mayor" in present-day Spanish, it had a much broader meaning in the 16th century, when it generally referred to persons in positions of authority with the power to administer justice. Accordingly, there were also *alcaldes* of prisons, of rivers etc.

indigenous identity. Larger indigenous societies, which had been fragmented during the period of conquest, reconstituted themselves on the municipal level.

These spaces of indigenous autonomy and authority at the municipal level survived Guatemala's independence in 1821 and continued to exist until the beginnings of the armed conflict. In indigenous municipalities, the municipal mayor (*alcalde municipal*) would not be elected by popular vote, but selected through customary practices by the municipality's *cofradia* in accordance with the traditional Mayan system of incremental responsibilities. A man had to prove his merit and trustworthiness by serving in posts of increasing importance inside the *cofradia*, before he could finally expect to be appointed municipal mayor by his brethren. In most places this system of selection continued to exist until well into the 20th century.

From the 1970s the armed conflict seriously debilitated the traditional indigenous municipality since the military systematically murdered many indigenous leaders and forcefully replaced others with candidates that suited the military regime. During the same period, massive forced displacement, the rapid growth of evangelical churches and later economic migration transformed previously homogenous towns into multiethnic, multilingual, and religiously diverse entities, which could no longer be controlled by the Catholic, indigenous *cofradias*. The municipality increasingly transformed itself from an autonomous local entity into an organ of the state, which gave those, who could speak Spanish and were literate, an edge over the traditional indigenous elites. With the general enforcement of municipal elections during the democratization period of the mid 1980s, the *alcaldes municipales* finally could no longer be considered to be traditional indigenous authorities. Since then, national political parties have become the brokers of municipal power.

Today, there are hardly any traditional Mayan authorities left at the municipal level. A number of municipalities still have *alcaldias indígenas*. These collective indigenous organs are composed of the mayors (*alcaldes comunales*) of all indigenous hamlets (*aldeas*) belonging to the municipality. Historically, they are remnants of the colonial policy of segregation according to which a municipality with a mixed population had two administrations. In principle, the *alcaldias indígenas* claim and exercise the competence to get involved in all municipal issues. However, due to the general loss of indigenous influence at the municipal level, their actual power has been severely curtailed and many have become mere annexes to the elected municipal mayor. In practice, a number *alcaldias indígenas* maintain islands of administrative competence e.g. in the organization of religious festivities or the control of the *cofradias*. Traditionally, the *alcaldía indígena* has also held a judicial function since both the municipal and

the indigenous mayor used to serve as justices of the peace in the municipality prior to 1985. Even though the constitutional reform of 1985 followed by the Municipal Code Reform of 1988 formally transferred these competences to the judicial branch, leaders of the *alcaldías indígena* continue to be involved as mediators and arbitrators in conflicts involving indigenous parties.

- With the state and political parties gradually taking over the municipal level, indigenous authority has been relegated more and more to the level of the indigenous hamlets that make up a rural municipality. The indigenous governance structures within these hamlets consist of multiple levels and centers of power. While the expressions of local autonomy naturally differ from place to place, a few common paradigms and commonly found institutions can be sketched out.
- Perhaps the defining characteristic of the indigenous hamlet is its social cohesion and solidarity attained through the firm amalgamation of the individual into the community structure. Linguistically, this is manifested in the K'iche term *komon*, a generic term referring to any form of human settlement that is composed of the words *ko* (firmly) and *mon* (to tie together). At the heart of this cohesive structure lies a system of community chores (*Ke'kol*), which follows the same philosophy as the chores system of the *cofradías* in the traditional indigenous municipality. Every adult (and still in many places male) community member is assigned such a chore that is non-delegable and not remunerated. Typically, the community leadership (e.g. a council of elders) distributes the chores in a deliberative process involving an assembly of the whole community. In some places the community assembly itself distributes the chores among its members. Often the designation process is ritualized. For instance in Cajolá, Quetzaltenango the hamlet's mayor will leave a yellow rattle flower and a cypress twig at his designated successor's doorstep.²⁰ By keeping flower and twig the designated successor signals acceptance of the nomination. Returning them would signal rejection of the nomination and imply sanctions. Once a chore has been assigned, the selected candidate can not refuse to fulfill it without facing sanctions. A typical method of enforcing compliance with the assigned chores is social exclusion. The community member in question will not be allowed to approach the community assembly with a problem. If one of his family members passes away, the community will not become involved in the burial because his denial to fulfill his chore is considered a rejection of the community's customs. In some places the community will temporarily interrupt his family's access to drinking water until the member agrees to fulfill the chore.

²⁰ See E. Cupil, *Derecho consuetudinario en Cajolá* (Quetzaltenango, 1999 [unpublished university thesis]).

The degree of responsibility that comes with the chores that a community member is assigned gradually increases so that the core system can be characterized as a life-long communal apprenticeship. The types and titles of the chores varies from community to community. Typically, a recently married man will start his career of chores as a *alguacile* (also called *ministrel* or *ajch'ami'y*). The *alguaciles* work for the community leadership and can be called upon 24 hours a day. They serve as messengers, inform the community about important activities and keep the community clean and orderly. More responsibility is associated with chores in one of the community committees that fulfill key functions such as ensuring access to drinking water or electric energy, maintaining communal roads or guarding and managing communal forests. Only after having proved himself in the lower echelons of community chores, can a community member raise to the level of the community leadership.

The community leadership is entrusted to various organs. Almost every community will have a communal mayor (*alcalde comunal* or, more traditionally, *alcalde auxiliar*), who usually serves in this post for one year. The community will also have a collective leadership organ such as a council of elders or a principal community committee. In addition, there is the assembly of the whole community, which is convened in frequent intervals. This community assembly can concern itself with all matters involving the community and is the forum where a community consensus on vital issues is established. In an increasing number of communities, the *alcalde comunal* and the leadership council are directly elected in the community assembly rather than being determined through the general chore system. These three organs share the management of the community with the *alcalde comunal* implementing the strategic decisions of the other two organs and making sure that all designated community chores are fulfilled. The *alcalde comunal* is also in charge of the resolution of conflicts between individual community members.

Since the 1970s, a number of indigenous communities also have agricultural cooperatives. Due to their broad membership and overall success they have often assumed control of managing the community's economic matters. In a number of places, there are also powerful *parcialidades*, which are kinship-based associations that manage forests and other lands belonging to extensive family clans. In addition to these institutions there are always specific community members that have disproportional political influence due to their moral authority or function such as spiritual guides, midwives or certain elders.

In view of the dispersion of leadership functions, the meritocratic idea of the chore system and the important role of the community assembly, functional indigenous community

structures cannot be called authoritarian – even where the chore system is still applied in its most traditional form. However, they tend to be patriarchal not least because the community chore system will be controlled by the community's accomplished members. More importantly, the patriarchal nature also expresses itself through the continued exclusion of women from the chore system and public life in general. Even though there are communities in which women participate in public chores and a number of communities have introduced specific committees representing women,²¹ this is still the exception and not the rule. Men also dominate the proceedings in the community assembly even though in most places women are nowadays allowed to attend, speak, and vote. The practice of making accords through, if necessary, hours of deliberation rather than putting contested matters to the vote, tends to sideline women who are culturally expected not to be too vocal in public.

3. The Ambit of Application of Mayan Law

Mayan Law does not distinguish between the legislative, executive or judicial realm, since all levels of conflict, whether they concern large groups or only individual community members, threaten the harmony and equilibrium of the community as a whole. Therefore, Mayan authorities do not only concern themselves with the general administration of their communities, but also with the resolution of concrete conflicts that in the state system would be resolved by a judge. The indigenous population in rural areas generally prefers the resolution by indigenous authority to the state judicial system because the indigenous system, where it is functional, operates locally, promptly, free of charge and produces results that accommodate the people's cultural preferences and specific needs. Mayan Law is, for instance, willing to resolve cases that would be unvaryingly dismissed as frivolous in the state system such as accusations of causing physical harm through witchcraft. Because the process is completely oral and conducted in the local language, the parties also do not have to be literate or be able to speak Spanish.

Although some moral failings (e.g. violence, adultery, or disrespect for elders) are considered much more severe than others, Mayan Law does not strictly distinguish between civil and criminal matters. Instead, both have to be resolved in the interest and, if necessary, through the involvement of the community. The distinction between the interests of the state and those of private individuals, which lies at the base of the distinction between criminal and

²¹ See J.A. González Jacobo, *Formas de organización y participación políticas en comunidades mayas. Estudios de casos en municipios seleccionados* (Guatemala: Nexus Municipal. Serviprensa Centroamericana, 2000), 179.

civil matters in western law, appears arbitrary in Mayan communities. In the interest of the community all types of conflict between community members must be resolved lest the social cohesion of the community will take damage. However, in practice, the jurisdiction that indigenous authorities exercise in civil matters is wider than in civil matters. Civil disputes e.g. over contested property boundaries will be attempted to be resolved within the community provided that all parties belong to the community. Only if this fails, it becomes socially acceptable to approach the state authorities.

In criminal cases, the indigenous authorities have to fear criminalization for usurpation of state functions if they intervene. Therefore, they shy away from dealing with cases of violent or other serious crime. If an apprehended perpetrator refuses to submit to the application of indigenous justice, he or she would also be turned over to the state authorities. However, the latter case is rare due to the more serious sanctions imposed by the state system. In addition, indigenous authorities refuse to deal with cases of perpetrators that are not or no longer considered to be members of the local community. For instance, if a member of one of the criminal street gang (that also exist in rural municipalities) is apprehended he or she will unvaryingly turned over to the state, even if the perpetrator is originally from the community.

The indigenous justice resolution system can also function in disputes involving members from different indigenous communities provided that both communities have functional governance systems and the relations between the communities are reasonably amicable. Since Mayan Law is inherently flexible and pragmatic and the underlying values that guide the decision-making are common to all Mayan groups, there is hardly ever a problem of a conflict of laws. However, in practice, the numerous rifts that exist between Mayan communities tend to make inter-communitarian conflict resolution next to impossible. These rifts are historically rooted in the colonial strategy of deliberately subdividing Mayan societies into local units. As a result there are no traditional authorities that operate on the regional and national level. The armed conflict has exacerbated the divisions, as many displaced communities find themselves today in regions that are ethnically and linguistically different. Furthermore, adversarial relationships between communities that sided with the guerilla and those that were fully incorporated into the auxiliary military structures continue to exist. In some cases *Defensorias Mayas*, non-governmental indigenous rights groups, have overcome these problem by brokering solutions between the authorities of the conflicting communities but these cases are still the exception.

4. Making Agreement: The Conflict Resolution Process in Mayan Law

The spoken word is of a tremendous significance in Mayan culture and spirituality. According to the *Popol Vuh*, the famous creation history of the Ki'che Mayans, the word stood at the beginning of the creation of the world. The creator deities talked and consulted with each other until they could finally come to an agreement on how to proceed.²² The process of conflict resolution in Mayan Law is built around similar modes of oral deliberation. A conflict resolution process can be initiated by the parties to the conflict themselves or by other persons that are directly affected by the conflict such as family members or neighbors. It is possible as well that the eventual mediator him-/herself himself initiates it. If a conflict becomes publicly known an intervention by other community members is even socially expected.

The circumstances of the specific case determine who will be called upon to mediate between the parties. If the parties to the conflict cannot agree on a community authority trusted by both they will turn to the *alcalde comunal*. Depending on his evaluation of the nature and severity of the case he will either seek to resolve the conflict himself (often involving others that can provide creative ideas or specific expertise), or he will delegate the case to another community authority taking into account the circumstances and repercussions of the case. For instance, each family clan has one elder called the *chuch qajaw*, who serves as the family's representative in marriage proceedings and as a witness to sales or purchases of family land. Due to his knowledge of the family history, wisdom, and eloquence he will be called upon to arbitrate in cases of divorce or other family matters. In the not uncommon cases of accusations of witchcraft, the *alcalde* will usually turn to the Mayan spiritual guide (*ajq'ij*) who has the expertise and standing to confirm or refute allegations of a supernatural character. Usually, several authorities will be concurrently involved in a conflict resolution process.

Once the process is initiated and the mediators selected, there are no specific procedures which have to be followed. The process is flexible and dynamic, though nevertheless solemn. It is characterized by three types of oral deliberation: consultation, dialogue and the making of consensus.²³ The mediators will thoroughly question both parties – if necessary separately from one another – to determine the facts, positions and interests of the case. Witnesses and community members with an interest in the case may be questioned for further clarification. The mediators will also seek to initiate a direct dialogue between the parties to give them opportunity to exchange their opinions and feelings about the conflict and suggest

²² *Popol Vuh: Las antiguas historias del Quiché*, trans. Adrián Recinos, 2nd. ed. (Mexico City: Fondo de Cultura Económica, 1960), 23-24.

²³ Amalcar de Jesus de Pop Ac, *Orden Social Maya o Derecho Mayan* (Guatemala, 2004 [unpublished]).

possible solutions. Whenever they deem it appropriate, the mediators will intervene and recall the traditional practices and teachings applicable to the case. Once the facts of the case and the interests and positions of the parties are established, the mediators will try to build a consensus between the parties. In principle, a case can only be resolved if both parties agree on a solution. However, that does not mean that the parties are completely free to reject any resolution to the case that suggests itself after a lengthy dialogue and consultation. Since both depend on the solidarity and support of the community, more or less subtle forms of pressure can be brought to bear so that the parties come to an agreement and the community's social peace is restored. For instance, if one party stubbornly refuses a solution that the other side and the mediators deem to be fair and reasonable, the refusing person can expect to look in vain for a mediator in a future conflict. These tacit limits to the consensus principle are also revealed by the fact that rural Mayans often speak of *making* an agreement (*hacer acuerdo*) rather than *reaching* an agreement (*alcanzar acuerdo*). Once an agreement has been made, the *alcalde comunal* will record each party's commitments in a specific community register called the *libro de actas*. The *alcalde comunal* is also responsible for monitoring the compliance with the agreement.

Because Mayan Law resolves conflicts through deliberation and consensus-making rather than through firmly binding decisions, its substantive rules are generally rather flexible and dynamic. Mayan authorities will seek to find a pragmatic solution for a conflict bearing in mind the specific circumstance of the case and the parties involved. The goal is not to enforce rights and obligations but to find a just solution that re-establishes harmony and maintains stability. Values that are rooted in the Mayan Cosmvision, and therefore common to all Mayan groups, give limited guidance in finding the solution. These values are, for instance, respect for nature, respect for children and the elderly, hard work, solidarity, sincerity, obedience, marital fidelity, respect for the creator and the understanding that oral promises are binding. Contrary to that egoism, arrogance, envy, lies, crime, ungratefulness, ignorance and exaggerated pride are considered anti-values.²⁴

That is not to say that firm substantive rules do not exist at all. For instance, many Mayan communities and *parcialidades* will have very specific environmental protection norms for their communal forests or sources of water.²⁵ These norms, which derive their le-

²⁴ Ibid.

²⁵ Cf. Eliás Gramajo, *Autogestión comunitaria de recursos naturales: Estudio de caso en Totonicapán* (Guatemala: Facultad Latinoamericana de Ciencias Sociales, 1997); Enrique Virgilio Reyes, *Poder local y bosques comunales en Totonicapán: Estudio de un Caso* (Guatemala: Facultad Latinoamericana de Ciencias

gitimacy from the Mayan Cosmovision's special respect for nature, serve to protect the sustainable use of these resources. For instance, trees that have not attained a specifically determined size may not be cut. These rules, which have protected the communities' basis of subsistence for generations, are often stricter than those established by the State. Nevertheless there exists ample friction between the indigenous authorities and the State's Environmental Protection Service that more and more attempts to assume control over issues of environmental protection. In 2001, for instance, two Mayan spiritual guides were detained by agents of the Environmental Protection Service in Santa Lucia Utatlán, Sololá. A considerable quantity of rosin that the two carried was confiscated. In a remarkable 2003 decision, a judge ordered the rosin to be returned, after expert witnesses had testified that the rosin was used in Mayan ceremonies and that the traditional method of extracting the resin did not have a negative environmental impact.

5. Compensate, Conciliate, and Teach: The Mayan Criminal Process

The different finality of Mayan Law becomes particularly obvious in criminal proceedings. The goal is not to prove the guilt or innocence of the perpetrator and then to punish him or her. In the eyes of many Mayans the results of a criminal process in the state justice system are deeply unsatisfying. Fines imposed do not benefit the community that suffered the criminal harm but go to the inscrutable coffers of the state justice system. If the perpetrator is sent to jail, everybody loses. An community built on social cohesion loses one of its parts. The family of the perpetrator is bereaved of a breadwinner who now even has to be financially supported to survive the corrupt, extortionate reality of Guatemalan prisons. The victim can no longer hope that the incarcerated perpetrator earns money and pays compensation for the harm done. Finally, the perpetrator can be expected to return as a hardened criminal from a penitentiary system that produces shocking rates of recidivism due the total lack of a rehabilitative approach.

By way of contrast, the Mayan criminal process aims at compensation, conciliation and prevention through teaching. If indigenous authorities decide to try an apprehended perpetrator, the perpetrator will be promptly brought before a community assembly that is managed by an *ad-hoc* tribunal of community leaders and other notables. The apprehended perpetrator has to confess his/her guilt in front of the whole community, express his/her shame and

Sociales, 1998); Estuardo Secaira, *Tierras comunales, derecho consuetudinario y espiritualidad maya* (Guatemala: WWF, 2000).

ask the victim, his/her own parents and children, the whole community, and god for forgiveness. Every community member is given the opportunity to express his or her opinions and feelings about the case. The consequences for the perpetrator suffers are twofold. First and foremost, the *ad-hoc* tribunal will decide in consultation with the community assembly how the perpetrator or his/her family can compensate the tangible harm the victim and the community has suffered due to the crime. In addition, sanctions may be imposed if the crime is considered to be a severe transgression of sacred duties. This has been observed, for instance, in cases of robbery or domestic violence. Possible sanctions include temporary exclusion from community events, fines or community work such as repairing a community road or cleaning up a public place. In addition, corporal punishment (typically using rods made from tree branches as a whip) may be imposed. The purpose of these sanctions, as of the criminal process in general, is not understood as retaliation for the crime. Instead, the public confession and the sanction serve as a lesson for the perpetrator as well as for the community as a whole. All persons involved are to reflect upon what is wrong and what is right.

Only in extreme cases of repeat offenders who appear incorrigible the sanction may be banishment (*destierro*) from the community. The banishment does not have to be affected by force but is achieved through the complete social exclusion of the offender. No one will communicate with, sell goods, or otherwise lend help to the offender until he or she agrees to leave. From a human rights perspective this may cause problems since this frequently also means that the perpetrator's family has to leave with him or her resulting in collective punishment. One exemplary, documented case occurred in Fray Bartolomé de Las Casas, Alta Verapaz in early 2004. A young community member had stolen money from the community cooperative's cash register and fled from the community. After the father successfully pleaded for forgiveness and compensated the community for the loss, the thief was allowed to reintegrate into the community after two years of exile. Shortly thereafter, the son stole again and it was furthermore found that he had planted Marijuana on the family property. Arguing that the father was unable to control his son, the community demanded that the family sell their property and move away.

Problematic in the human rights context is furthermore that the maintenance of a high degree of social cohesion requires a high degree of social control, which is why moral failings such as adultery or disrespect for elders are considered offences that can result in sanctions.

6. The Effects of the Armed Conflict on Mayan Law

It is a well-documented phenomenon that an internal armed conflict tends to result in the deterioration, delegitimization, and corruption of the state justice system. The case of Guatemala demonstrates that the same may also apply to non-state justice systems. There exists no comprehensive assessment of the state of indigenous justice systems after the armed conflict, especially not in the areas most affected by the armed conflict. The Inter-American Bank for Development plans to sponsor such a study starting in late 2004. However, our field studies in the provinces of Quiché, Baja Verapaz and Alta Verapaz as well as those of other researchers in other localities indicate that the Mayan systems of governance and conflict resolution have been weakened, distorted and corrupted in the areas that suffered the worst atrocities of the armed conflict.

A number of factors account for this phenomenon. In some areas, the Guatemalan military eradicated almost a whole generation of indigenous leaders in the early 1980s. This did not only cause a temporary weakening of the indigenous governance and justice system. Today, almost a quarter century after the major atrocities occurred, the atrocities of the armed conflict continue to have negative consequences with regard to Mayan Law. As a customary law, Mayan Law thrives on the oral tradition, which uses special techniques of oral communication to transmit and store information about the social order and its underlying cultural values. Therefore the system of Mayan Law can break down if one generation is taken out of the oral transmission chain. With every Mayan elder, a whole library died, as one observer explained.

In addition, the military's atrocities of that period also led to massive displacement of an estimated one million, mainly indigenous, persons. Hundreds of thousands sought refuge across the Mexican border and many returned only a decade later. To an astounding degree displaced Mayans managed to preserve their own culture. However, the special social cohesion, on which the application and enforcement of Mayan Law depends, has been lost to a certain extent in the communities that were rebuilt or newly created after the armed conflict. Deep rifts often exist between those people that fled and those that stayed, especially if the latter had formed part of the army's counterinsurgency groups.

Perhaps most importantly, Mayan Law also suffers from a crisis of confidence as a result of the brutal repression of Mayan culture. Out of a continued fear of severe sanctions, Mayan leaders still hesitate to apply their own law. The isolated incidents of recent years, in which indigenous leaders have been criminalized for intervening in criminal cases, add to that insecurity. Currently, a number of indigenous organizations supported by the United Nations

Development Programme and several bilateral donors are attempting to recall the content and merit of the indigenous justice systems and seek to encourage elders to take responsibility once again. These efforts have resulted in some notable successes but much more remains to be done.

The armed conflict did not only weaken Mayan Law in a number of ways, it distorted it. After disposing of the traditional leadership, the military appointed military commissioners and commanders of the Civilian Self-Defense Patrols from among the indigenous population. As part of the counterinsurgency strategy, the displaced population was resettled into so-called “model hamlets” (*aldeas modelo* or *polos de desarrollo*) under military control. Today, many of the Mayan auxiliary leaders in these authoritarian structures continue to hold leadership positions in their communities. Moreover, they rely on the same authoritarian practices of control that they learned during the counterinsurgency campaigns. For instance, some *alcaldes comunales* in Ixcán, Quiché are said to operate clandestine jails in their hamlets, a practice that clearly has its origin in the practices of the armed conflict.

The most shocking expression of the legacy of the armed conflict’s atrocities in Mayan communities is the widespread practice of lynchings. Suspected murders, rapists, robbers or even mere thieves are frequently burnt, beaten or shot to death, if the community apprehends them before the police can intervene. In its efforts to prevent future cases MINUGUA has closely studied the phenomenon of lynchings in Guatemala. Between 1996 until 2001, MINUGUA documented 421 cases of lynchings with 217 of the total 817 victims killed.²⁶ The real number is probably significantly higher. 55 % of these lynchings occurred in response to allegations of mere crimes against property.²⁷

On the surface, these lynchings are a popular reaction to a combination of an extremely high crime rate and an inefficient, slow criminal justice system. However, if one takes a closer look it becomes clear that the lynchings are a continuation of the armed conflict’s strategies of social control through terror. Lynchings occur throughout the country in rural and urban areas, Mayan and Ladino communities alike. However, certain rural areas with indigenous majorities are much more affected than the rest of the country. MINUGUA found that there is a positive correlation between a high rate of lynchings and two other factors.²⁸ First, areas that suffer from high rates of extreme poverty are disproportionably affected. Sec-

²⁶ Misión de Verificación de las Naciones Unidas en Guatemala, *Los linchamientos: un flagelo que persiste*, (Guatemala: MINUGUA, 2002), para. 7.

Cf. Defensoría Indígena Wajxaqib’ Noj, *La Ley de Xibalba o Linchamientos* (Guatemala: UNDP, 2003).

²⁷ MINUGUA, *ibid.*, at para. 12.

²⁸ *Ibid.*, at paras. 9-11 & 16-30.

only, those areas that suffered the highest numbers of human rights atrocities during the armed conflict, also suffer the highest numbers of lynchings. The parallels between the atrocities of the past and the present are striking. The lynching techniques used, e.g. dousing the victim with gasoline before setting him or her on fire, are often the same as those employed in the human rights atrocities of the armed conflict. In many cases the ringleaders of the lynching mobs are former members of the Civilian Self-Defense Patrols. What makes the phenomenon particularly worrisome is that the lynchings are not always the spontaneous deeds of enraged mobs. They are often planned, calculated acts executed in cold blood and with plenty of time. Large parts of the local population accept them as a successful and therefore legitimate crime fighting strategy. Not infrequently, local notables are benign bystanders, participants or even instigators. Nevertheless, it would be wrong to conclude that lynchings have become a part of contemporary Mayan Law. Instead, they are the result of the replacement of traditional Mayan authorities with authoritarian structures. Traditional Mayan authorities generally reject lynchings as inherently contradictory to the Mayan Cosmovision's respect for life. Their interventions have saved the lives of captured suspects in a number of cases. Nevertheless, in some regions one has to acknowledge that, in view of their frequency and the degree of their social acceptance, they have become a local custom of cruelty.

By way of contrast to the generally devastating effect of the armed conflict on Mayan Law, it is worth mentioning that the social upheaval caused by the armed conflict led in some exceptional circumstances to positive changes of Mayan Law when traditional patriarchal structures were altered. The situation of gender equality in the hamlet of Primavera (Ixacán, Quiché) is an illustrative example. During the armed conflict, the community that today lives in Primavera was part of the "Communities of Populations in the Resistance" (CPRs) and resisted the Guatemalan military for 12 years in the mountainous border region with Mexico. With themselves and their young children suffering most from the military's constant pursuit, the community's women organized themselves into a self-help organization. This organization has continued to be an influential organ since Primavera was founded. During the period of resistance the community also adopted the guerilla's egalitarian ideology. As a result of these two factors, Primavera has achieved significantly higher than average levels of gender equality and female involvement in the leadership structures. This is not least evidenced by the fact that the current *alcaldeza comunal* is a woman.

7. Mayan Law and Modernity

While Guatemala's tragic past continues to cause problems for Mayan Law, modernity that is entering many rural indigenous communities in the wake of the armed conflict is perhaps posing an even bigger threat. Phenomena like temporal economic migration to the capital erode the base of traditional values on which Mayan Law is built. For example, the system of non-remunerated community chores that forms the basis of the authority selection process, suffers a crisis where the capitalist equation that time is money is introduced. When asked what has complicated the application of Mayan Law, local indigenous authorities will often point to the school system of all things. However, in the Guatemalan context they have a point. Monolingual education in Spanish is all too often still the norm in Guatemala's indigenous areas. With it goes a monocultural curriculum. As a result, there is a divide between the values that the communities' governance and justice systems are based upon and those that the young generation learns in school. Projects that could overcome this divide, e.g. the integration of educative tales from the Mayan oral tradition into bilingual schoolbooks, are still all too rare.

III. The Mayan Population's Access to the State Justice System

In 1996, the Guatemalan Peace Accords diagnosed that the administration of justice was "one of the major structural weaknesses of the Guatemalan State" and demanded to make reform of the justice system a priority "to put an end to inefficiency, eradicate corruption and guarantee free access to the justice system, impartiality in the application of the law, judicial independence, ethical authority and the integrity and modernization of the system as a whole."²⁹ The Guatemalan public concurred with this diagnosis. 88% of all participants in a 1997 survey found that the country's administration of justice was inadequate. 75 % considered the problems in the justice sector to be "very grave." 25 % mentioned corruption as a specific problem.³⁰

The justice sector reacted with an ambitious reform program. In Guatemala, the administration of the justice system is distributed between four different institutions. There is the court system, called the *Organismo Judicial*. It consists of four layers. The Justices of the Peace (*Juzgados de Paz*) are competent to deal with smaller civil claims and criminal misdemeanors. Above them there are the Courts of First Instance, the Court of Appeal, and finally the Guatemalan Supreme Court, which is not only the highest court (apart from a specialized

²⁹ *Agreement on the Strengthening of Civil Society and the Role of the Military in a Democratic Society, Agreement between the Government of Guatemala and the UNRG*, 19 September 1996, at paras. 8 & 10.

³⁰ See Comisión de Modernización del Organismo Judicial, *Plan de Modernización del Organismo Judicial*, 1997-2002, 3rd ed. Guatemala 2002, at 15.

Constitutional Court) but is also responsible for administering and controlling the whole court system. The *Ministerio de Gobernación* is in charge of the police and the penitentiary system. The Proescutor's Office is part of the *Ministerio Público*. In accordance with a requirement contained in the Peace Accords, the Public Defender's Institute (*Instituto de Defensa Pública Penal*) has been set up as a separate, independent entity. In 1998, these four institutions created a Coordination Instance for the Modernization of the Justice Sector (ICMSJ) and managed to secure a loan of US\$ 25 million from the Inter-American Development Bank for their joint and individual reform efforts. A year earlier, the *Organismo Judicial* had already announced its own specific *Plan de Modernización del Organismo Judicial*, which the World Bank helped finance between 1999 and 2004 with a loan of US\$ 33 million. The Modernization Plan, which was created without much input from civil society,³¹ formulates five strategic objectives. The *Organismo Judicial* committed itself to improve the functioning of the tribunals, upgrade the institutional management, better the public outreach and image of the court system, and combat corruption within the *Organismo Judicial*. The most resources were dedicated to the fifth objective, strengthening the population's access to justice. This objective also promised the greatest benefits for the indigenous populations, who suffered most from a lack of access to the state justice system.

1. Barriers of Access for the Indigenous Population

Different types of access barriers can be discerned that specifically hamper the Mayan population's access to the state justice system. For one, there is a geographical barrier resulting from the fact that the courts and other institutions of the justice sector are hard to reach for rural Mayans since many rural hamlets are remote and the transport infrastructure system underdeveloped. In the past this problem was exacerbated by the fact that the state judicial system was simply not present in large parts of the country. In 1997, more than one third of all municipalities (119 out of 331) did not have even have a justice of the peace.³² Instead, big landowners often seized judicial and policing functions in a self-serving manner and indigenous communities continued to resolve their internal conflict themselves.

³¹ The specific focus of the modernization plan was worked out in a consultation process of six rounds. In the first four rounds only judges participated, the fifth was for other operators of the judicial sector. Only in the sixth round input from representatives of other state institutions (police, public defenders), the bar association, academia, the business sector and the press was gathered. Only half a dozen participants represented NGOs and only one representative came from an organisation specifically focusing on indigenous rights. See *ibid.*, 55-63.

³² *Ibid.*, at 67-68.

Furthermore, there are linguistic, educational and economic barriers. The justice system operates in Spanish. In principle, the Code of Criminal Procedure now recognizes the defendant's right to an interpreter. In addition, the 2003 *Ley de Idiomas Nacionales* generally provides that public services generally, including those of the justice sector, must be made available in the local indigenous language as well. The introduction of these rights mark a tremendous legislative progress. However, there is not enough bilingual justice sector personnel to guarantee them in practice. According to the *Organismo Judicial's* own figures only 13% of judges are bilingual.³³ Moreover, judges are not appointed to their municipality of origin to avoid conflicts of interests. For this reason, it frequently happens that bilingual judges are posted to areas in which other Mayan languages are spoken than the ones they know. At the same time there are still not enough interpreters. An exemplary study in two provinces with indigenous minorities found that 45 out of 53 municipalities had neither bilingual judges nor interpreters. Four had translators but no bilingual judges and another four had bilingual judges but no translators.³⁴ The Prosecutor's Office in the *Ministerio Público* suffers from a comparable lack of bilingual personnel. Only the Public Defender's Institute has created ten *Defensorías Indígenas* that are staffed with bilingual personnel. These offices, which are financed with Norwegian and Spanish development aid funds, specifically aim to protect the rights of indigenous defendants in the penal system. Beyond their core mandate, they also try to help coordinate the coexistence of the state justice system and Mayan authorities.

Furthermore indigenous people, particularly if they are illiterate, often struggle with the formalized nature of the justice process. Court proceedings in Guatemala rely heavily on written documents making it often unavoidable to retain the costly services of a lawyer. For criminal cases, this problem was supposed to be ameliorated by the 1994 Reform of the Code of Criminal Procedure. The Reform was meant to change the criminal process from an inquisitory, written process of the classic Spanish model to an accusatory, oral process more akin to the procedure in Common Law jurisdictions. However, once more the normative command is not being respected and the Reforms have not been implemented in most places. The Guatemalan Institute of Comparative Penal Sciences has concluded that a lack of political will on behalf of the state authorities coupled with stiff resistance from conservative circles accounts

³³ Cf. Unidad de Modernización del Organismo Judicial, *Reporte de Avance : Reforma Judicial (2003-2004)*, (Guatemala: Unidad de Modernización del Organismo Judicial, 2004).

Some observers point out that the number of personnel that is actually functionally bilingual is probably lower since proficiency levels were tested.

³⁴ Comisión Presidencial contra la Discriminación y el Racismo contra los Pueblos Indígenas en Guatemala, *Informe público semestral sobre el avance en el respeto y ejercicio de los derechos de los pueblos indígenas en Guatemala (01/2004)*, (Guatemala, 2004 [unpublished]) (citing a study by Luis Mezquita of MINUGUA in the provinces of Quetzaltenango and San Marcos).

for this shortcoming.³⁵ For court proceedings in civil or labor cases an oralized process is not yet even foreseen as a matter of law.. The General Code of Procedure, which is an ambitious draft piece of legislation, would have brought the necessary legal changes. But the project has been politically sidelined and will not reach the Guatemalan Congress anytime soon.

Finally, there is a huge barrier of distrust. Mayan Guatemalans still refuse to confide in the institutions of the State, which persecuted them during the armed conflict. In addition, the daily experience of ethnic discrimination causes them to expect the same from a justice system that is still dominated by Ladinos. Unfortunately, these expectations are not infrequently justified. Cultural misunderstandings also make it hard for indigenous people to build up trust in the state justice system.. In criminal cases, for instance, unrepresented indigenous defendants often assume that it is their duty to confess rather than to leave it up to the State to prove their guilt, because admitting one's deed and pleading for forgiveness are indispensable elements of the criminal process in Mayan Law. Likewise the concept of bail tends to be misunderstood by rural indigenous communities since crimes are expected to be dealt with promptly. With the average criminal process taking 841 days from the commission of the crime to the final sentence,³⁶ indigenous communities are often left to assume that bail means impunity. The experience that the organizers of the major human rights atrocities of the armed conflict are still not punished gives this assumption a sturdy factual base.

2. The State's Access Strategy of Approximation and Integration

Based on case studies of México and Peru, Marzal has distinguished three phases in the indigenous policy of Latin American states.³⁷ A segregationist period is characterized by a separation of the indigenous and the non-indigenous population allowing for the exploitation of the former by the latter. The next phase is an assimilationist one, in which one uniform national society of *Mestizos* is sought to be created. The third, integrationist phase, is characterized by the attempt to integrate the indigenous population into the national society while permitting them to preserve some of their distinctive cultural and social traits. With regard to the Guatemalan case, Yrigoyen has distinguished a fourth phase, the project of pluralism. She expressed the expectation that the vision of legal and cultural pluralism in the Peace Accords

³⁵ See Instituto de Estudios Comparados en Ciencias Penales de Guatemala, *Procesos de Reformas Judiciales en America Latina: Informe Guatemala*, (Guatemala: Instituto de Estudios Comparados en Ciencias Penales de Guatemala, 2004). The study also points out that six amendments have been passed since 1994, which constitute steps backward towards the inquisitory, written system of procedure.

³⁶ Ibid.

³⁷ Manuel Marzal, *Historia de la antropología indigenista: México y El Perú*, (Lima: Pontificia Universidad Católica del Perú, 1981), 44.

would advance Guatemala into this fourth place.³⁸ However, in the implementation of the Peace Accords, the State has not lived up to the expectation of legal pluralism. It has tried to seek solutions inside the state system, rather than to grant space to the Mayan authorities and establish modes of harmonious coexistence. The State's concept can be summarily characterized as a strategy of approximation and integration. The idea has been to bring state institutions closer to the people and at the same time integrate elements of Mayan Law into the state justice system. The concept is rooted in the State's interpretation of the Guatemalan Constitution of 1985. Article 66 of the Constitution stipulates that the State recognizes, respects and promotes indigenous styles of living, customs, traditions, and forms of social organization. According to the state's interpretation this norm does not provide for a recognition of Mayan Law dispensed by Mayan authorities though since it is superceded by Article 203 of the Constitution. Article 203 provides that the "judicial function is exercised with absolute exclusivity by the Supreme Court of Justice and the other tribunals established by law" and that "no other authority may intervene in the administration of justice."

As a result, creating access to justice in Guatemala has primarily meant creating access to state justice through physical approximation of state justice institutions.³⁹ With World Bank funds, the State has built the infrastructure necessary for the introduction of justices of the peace in every single municipality of the country, a feat that has since been achieved. In addition, two mobile courts of conciliation (*juzgados móviles*) were financed. However, so far they have only operate in marginalized urban areas. Furthermore, *Centros de Administración de Justicia* (CAJs) were set up in five municipalities with large indigenous populations. More are planned. The CAJs house a Justice of the Peace, a Court of First Instance, the Prosecutor's Office, the Public Defender's Institute, a *Bufete Popular* providing legal aid in family and labor cases, a Mediation Center (discussed *supra*) and the National Civilian Police. The CAJs bring institutions like the Prosecutor's Office or the Public Defender's Institute that had previously existed only in provincial capitals to the municipal level, where they are made available in one central place. The second stated purpose of the CAJs is to facilitate the coordination between the state justice system and the local communities. For this purpose bilingual *Promotores Jurídicos* have been employed. These promoters do not understand themselves as go-betweens that would arrange modalities of coexistence between state and indigenous au-

³⁸ Raquel Yrigoyen Fajardo, *Justicia y Pluralismo Legal en Guatemala*, Dissertation, Especialización en Derecho Consuetudinario Indígena con énfasis en lo Penal, UNAM & USAC. (Guatemala 1998). Cf. also Raquel Yrigoyen Fajardo, *Pautas de coordinación entre el derecho indígena y el derecho estatal* (Guatemala: Fundación Myrna Mack, 1999).

³⁹ See also Raquel Z. Yrigoyen Fajardo & Víctor Ferrigno Figueroa, *Acceso a la justicia en Guatemala: situación y propuestas* (Guatemala, May 2003 [unpublished study for the Swedish International Development Agency]).

thorities. Their mission is to enhance the local communities' understanding and acceptance of the state justice system.

Furthermore, the *Organismo Judicial* has set up *Centros de Mediación* in 23 municipalities (including in all CAJs). These Mediation Centers are staffed with professional mediators and offer their services free of charge. According to the *Organismo Judicial's* own figures roughly 50 % of its clients are indigenous.⁴⁰ The Mediation Centers have been accepted by many indigenous people because their integration into the *Organismo Judicial* gives them an air of state authority (although the mediated agreements are not directly enforceable legal titles) while still providing prompt and free service. Some also prefer the Mediation Centers to indigenous conflict resolution mechanisms because they promise confidentiality. The Mediation Centers make no effort (and have no resources to do so) to reach out to the local indigenous authorities in order to coordinate their efforts with the gratuitous conflict resolution potential and experience that exists within the local communities. That this would have been possible is demonstrated by the *Centros de Mediación Comunitarios* set up by the USAID Justice Program and local partners. Provided that the respective local indigenous authorities give their consent, these aid projects train members of local hamlets to become honorary mediators within their community.⁴¹ Each trainee will be elected for this purpose by his/her own community. Other organizations, e.g. the Catholic Church, have successfully set up similar programs.

It is not the major problem of the *Organismo Judicial's* Mediation Centers that they duplicate conflict resolution services that could be provided by local indigenous authorities. In Guatemala there are enough unresolved conflicts to occupy a range of institutions. The problem is that a free service provided by paid professionals is unlikely to be sustainable – like most of the new initiatives in the judicial sector. In the first five years after the conclusion of the Peace Accords the *Organismo Judicial's* budget grew substantially and reached US\$ 115.5 million in 2001. However, since then the budget has suffered severe cuts. In 2004, the *Organismo Judicial* received only US\$ 97.5 million – 16% less (in nominal terms!) than in 2001 and 40% less than it required according to its own calculations.⁴² The *Ministerio Público* received 11% less in 2004 (US\$ 50 million) than in 2002 (US\$ 56 million) and 43%

⁴⁰ Unidad de Resolución Alternativa de Conflictos [RAC], *Población por etnia y género atendida en los centros de mediación: enero – diciembre 2003* (Guatemala: 2004 [unpublished]).

⁴¹ Initially, the local mediators in some of the *Centros de Mediación Comunitarios* received monthly salaries. This may have had a negative effect on community structures in which community work is traditionally expected to be fulfilled free of charge. There are also questions about these specific Centers' sustainability now that the practice of being salaries has generally been discontinued.

⁴² Figures based on *Organismo Judicial, Presupuesto del Organismo Judicial: Años 2001 al 2004* (Guatemala: 2004 [unpublished]).

less than the requested US\$ 87.5 million.⁴³ Since Guatemala's new Government has announced to embark on an austerity course, this situation is only going to get worse. So far the inflow of US\$ 58 in loans from the international banks has kept the justice sector afloat. But once these funds run out, the justice sector can be expected to concentrate on what its leading figures consider to be its core institutions: Courts, prosecutors, and police. It is very likely to discontinue novelties such as the Mediation Centers, the *Promotores Juridicos* or even the Interpreter Programs. A troubling precedent is the fate of the Public Defender's Institute, which suffered crippling budget cuts in 2003, after the initial funding from the Inter-American Development Bank for a major part of its program had been phased out.

In addition to its strategy of physical approximation, the state justice system has also been experimenting with a limited recognition of the substantive rules of Mayan Law. The 1994 Reform of the Code of Criminal Procedure introduced the opportunity principle into the criminal process.⁴⁴ According to this principle, the prosecutor, acting with the consent of the judge and the victim, can refrain from prosecuting an offender provided that the crime in question does not carry a maximum penalty of more than five years, does not involve drugs and is not carried out in an official capacity. The offender must compensate the victim for the harm done. In striking a compensation agreement "the practices and customs of the various [indigenous] communities" can be applied.

The most ambitious, and at the same time criticized, attempt to integrate Mayan Law into the state justice system has been the creation of *juzgados de paz comunitarios* in five indigenous municipalities. The decision-making body of these courts consists of three members. Two judges are elected by the local community from among its members and then appointed by the *Organismo Judicial*. These two judges have to be bilingual, literate and of honorable standing but do not have to have a legal education. Contrary to the wording of the enabling statute, the third judge, the *Secretario*, is in practice directly selected by the *Organismo Judicial* and has to have a legal education.⁴⁵ As a matter of law, these courts only have jurisdiction over criminal misdemeanors with a maximum penalty of three years or less. In practice, they often intervene in family or other purely civil matters as well. Thereby, they respond to the demands of the local indigenous population to whom the strict distinction between criminal and civil cases is a foreign concept.

⁴³ Figures based on Evidencia, "MINUGUA y el Ministerio Publico," December 2003, at 11.

⁴⁴ See Código Procesal Penal Oral, Decreto No. 51-92, artículos 25 – 25 quinquies.

⁴⁵ See Amilcar Pop, *El papel de la ley indígena en sociedades post-conflicto: El caso de Guatemala*, (Guatemala, 2004 [unpublished]).

The *juzgados de paz comunitarios* are allowed to apply Mayan Law provided that it not does contravene state law. However, in practice they do not make much use of this option.⁴⁶ For one, the lay judges are in constant fear of contravening state law if they turn to Mayan Law. More fundamentally, Mayan Law cannot be transplanted into a formalized state process administered by state-appointed authorities. Its very essence is its participatory, flexible, and deliberative process involving authorities that are accountable to the community alone and that are not paid and controlled by the State. While appreciating the appointment of state judges that understand the local language and culture, Mayan authorities and organizations have therefore generally nevertheless rejected the *Juzgados de Paz Comunitarios* as a State attempt to usurp and assimilate Mayan Law. Somewhat more diplomatically in his choice of words, the U.N. Rapporteur on Indigenous People has observed that the *Juzgados de Paz Comunitarios* might be an alternative to the general state system, but that they are not Mayan justice.⁴⁷

It is very unlikely that more *Juzgados de Paz Comunitarios* will be created. More pedestrian reasons than the institution's conceptual shortcomings account for this. First of all, ordinary justices of the peace are already appointed in all other 326 municipalities of Guatemala. They cannot simply be recalled. More importantly, a *Juzgado de Paz Comunitario* consists of three judges, which makes the personnel costs for one of these tribunals three times higher than for one ordinary justice of the peace.

IV. Emerging Arrangements of Coexistence

While the State officially still refuses to recognize Mayan Law applied by Mayan authorities, the reality on the ground is changing. Tacit arrangements of coexistence are emerging now that the state justice sector is expanding into areas that have previously been the exclusive realm of Mayan authorities. Some state judges will only accept dealing with a case involving indigenous parties if the plaintiff demonstrates that a resolution before indigenous authorities has proven to be impossible. Other judges will give tacit recognition to an agreement reached in Mayan Law by treating the agreement as a valid contractual settlement of the dispute that precludes further action in a state court.

⁴⁶ Cf. Jorge Murga Armas, *Juzgados de Paz Comunitarios: Reconocimiento o Absorción del Derecho Indígena. La experiencia de Cinco Comunidades Mayas de Guatemala*. (Guatemala: Talleres Caudal, S.A., 2000); Antonio Mosquera Aguilar, *Recreación cultural del Derecho en Guatemala*, (accessed 28 May 2004), available at <http://www.monografias.com/trabajos14/tribun-comunit/tribun-comunit.shtml>.

⁴⁷ Stavenhagen, *supra* note 7, at para. 32.

More and more, the state's non-recognition of Mayan Law applied by Mayan authorities is also openly challenged. The State's interpretation of Articles 66, 203 of the Constitution is increasingly called into question. A number of scholars have been advocating a plausible alternative view.⁴⁸ The starting point of this interpretation is the principle that the Constitution has to be interpreted so that each single provision is given a meaning while contradictions between provisions are avoided. The argument is that the State cannot recognize, respect, and promote indigenous forms of social organization as required by Article 66 of the Constitution without allowing the resolution of conflicts by Mayan authorities. After all, the maintenance of harmony through community internal conflict resolution processes is the defining feature of the Mayan social organization. The position is taken that this interpretation of Article 66 does not contradict the wording of Article 203, which entrusts the judicial power exclusively to the Supreme Court "and the other tribunals established by law." The Mayan authorities could be regarded as "tribunals" when they intervene in conflicts. Tribunals do not have to be state tribunals – otherwise Guatemala could never have submitted to the jurisdiction of the International Criminal Court. The recognition of Mayan authorities as judicial organs follows from Article 66 of the Constitution. Thus, they are also tribunals "established by law." This interpretation would not render Article 203 without a purpose either, since the provision would still serve to preserve the separation of powers between the tribunals (state courts and Mayan authorities) and the executive branch. The alternative view is also indirectly supported by a decision of the Guatemalan Constitutional Court, which held that ILO Convention 169 does not contravene the Constitution and could therefore be ratified by the Guatemalan Congress.⁴⁹ Since ILO Convention 169 requires the recognition of indigenous law by indigenous institutions, the Constitutional Court's decision logically implies that it is not a contravention of Article 203 to recognize Mayan Law applied by Mayan authorities.

This alternative view is also gathering more and more support among operators of the state justice system. This can be attributed to a considerable extent to the introduction of cultural sensibilization programs in the justice sector, which have received funds from the loans of the World Bank and the Inter-American Development Bank. Since 1998, judges and other justice operators have taken part in these training seminars, which were meant to raise their understanding of the needs and preferences of the rural Mayan population. Since then, indigenous organizations have become more and more involved in the organizations of the semi-

⁴⁸ See e.g. Facultad Latinoamericana de Ciencias Sociales [FLACSO], *Recomendaciones sobre como viabilizar el respeto y reconocimiento del Derecho Consuetudinario –Derecho Indígena*, (Guatemala: FLACSO, 2002).

⁴⁹ See Corte Constitucional de Guatemala, *Opinion consultativa relativa al Convenio 169 sobre Pueblos Indígenas y Tribales en Países Independientes*, May 18, 1995, Expediente 199-95.

nars. They emphasized a rights-based approach to the status of Mayan Law centered around ILO Convention 169. The most visible success of this advocacy strategy was achieved in the unprecedented resolution of a case of burglary in Chiyax, Totonicapán in 2003. In this case, the local Mayan community almost lynched three Mayan burglars that had been caught red handed. After the local Mayan authorities intervened, the three were handed over to the state authorities and detained. With tensions in Totonicapán still running high, the competent state judge, the prosecutor and the local indigenous authorities agreed that the three detained Mayan burglars were to be handed back over to and tried by the indigenous authorities. The community of Chiyax an *ad-hoc* tribunal composed of 13 local notables including a spiritual guide, a midwife, a teacher, and a mother. In the course of the Mayan trial, the accused admitted their wrong doing, asked the community for forgiveness, and swore to be honest from that point on. In the end, the Mayan tribunal ordered them to compensate the community through 30 days of community work. In the subsequent trial before the state court, the judge invoked the right of indigenous people to resolve their own criminal matters according to ILO Convention 169. Holding that the same crime must not be punished more than once (*ne bis in idem*), the judge ordered the defendants to be released.

Apart from these emerging modes of coexistence between indigenous authorities and state judges, a sea change in the legislative realm might be on the horizon. In 2002, the Guatemalan Congress passed a package of decentralization laws. Among other things the Municipal Code (*Código Municipal*) was reformed. The Municipal Code now recognizes the right of the local communities to elect or designate their *alcalde comunal* in accordance with their own principles, values, procedures and traditions; i.e. the community chore and designation system seems to be legally recognized. Moreover, the Municipal Code recognizes the *alcalde comunal's* competence to mediate in conflicts that community members bring to his attention. These legal changes are still new and it remains to be seen how extensive or narrow an interpretation they will be given by the courts and other state authorities. In any case, they are significant. For the first time since the Peace Accords, a domestic statute has recognized that traditional Mayan authorities have a role in the judicial realm.

IV. Conclusions and Recommendations

Mayan Law applied by Mayan authorities still plays a significant role in Guatemala, albeit only on in rural hamlets and, to a lesser degree, at the level of the rural municipality. However, it has severely suffered in an armed conflict that turned against the culture of which it is

an expression. In addition, the forces of modernity slowly chip away its fundamentals. The reaction of the State has been to discount Mayan authority as a factor in its post-conflict effort to make justice accessible to all Guatemalans. It was assumed that Mayan Law was irrevocably lost and that the State would have to fill the law and order vacuum that was left behind.

In principle, the decision to expand the state justice system deserves support. First of all, not everywhere in Guatemala are there functional Mayan authorities. If there is no state to step in, self justice controlled by self-serving dominant local groups – in the worst cases lynch justice – will be the inevitable result. In addition, even functional Mayan authorities will not intervene in conflicts involving people that are not or no longer considered part of their communities. or in matters that are not considered community matters. No one but the State can deal with cases of organized rural crime or resolve the grave conflicts arising between big landowners and indigenous communities over the question of land.

One can even say that instead of getting too close, the State has so far approximated itself too little to its people. With the physical expansion well in progress, the state justice system still has not done enough to accommodate Guatemala's linguistic and cultural diversity. In the short run, interpreters and the use of expert opinions on indigenous culture in court proceedings can help. In the long run, it is indispensable that the country's demographic composition is reflected in the number of Mayans among justice sector officials. This does not have to be achieved through ethnic quotas or similarly blunt affirmative action measures. Knowledge in a Guatemalan language other than Spanish could be considered as one bonus skill that is taken into account in the decision who gets appointed to the bench of a multilingual country. Special scholarship programs for students of law that are bilingual or make an effort to become bilingual would be another option, if donors help with the funding.

While the expansion of the state justice system in various dimensions is therefore necessary, it is not sufficient. Rather than to replace Mayan authorities, the state justice system has to find modes to coexist with them. Yet, the State has not embraced the legal pluralism to which it has politically and legally committed itself with the Peace Accords and the ratification of ILO Convention 169. In an attempt to reconcile indigenous demands with a continued judicial monopoly of the state, efforts were made to integrate a truncated Mayan Law deprived of its essential features (process and authority) into the proceedings of state courts – efforts that were bound to be unsatisfactory for all sides.

It is still erroneously assumed that the State on its own can provide indigenous Guatemalans with an access to justice that is fair, efficient, affordable and culturally adequate. For

one this shows a blatant overestimation of the State's budget and legitimacy. More importantly, it reveals a fundamental lack of understanding of how law and order is upheld. In every society, social control is the primary guarantor of law and order. Intervention by state authorities is only the *ultima ratio* when mechanisms of social control have failed. In Mayan communities, the processes and institutions of Mayan Law are identical to the mechanisms of social control. Where community institutions are dysfunctional, the State will have a hard time maintaining law and order – hence the fact that most lynchings occur in the areas in which the Mayan authorities have been the most severely weakened. Rather than to seek to replace Mayan authorities, the State ought to seek to strengthen them and thereby help to reconstruct the social fabric of the war-torn communities. Mere recognition of Mayan authorities is not enough in this regard. The State has to accept Mayan culture, the basis of Mayan Law, as an equal part of the national culture. This entails, for instance, a unambiguous political and financial commitment to bilingual and pluricultural education.

Guatemala has yet to develop a concrete formula of how to partition the realm of conflict resolution between the state courts and Mayan authorities. Not even the indigenous movement has formulated a coherent demand. In our opinion the formula contained in the Draft Constitutional Amendments, which were rejected in the 1999 Referendum, should be revisited. The proposed amendment to Article 203 of the Constitution would have given indigenous authorities the jurisdiction to resolve all conflicts arising within their communities. No specific areas would have been carved out. Instead, any type of dispute within the community, ranging from property disputes between neighbors to a communal case of murder, could be principally resolved through indigenous law applied by indigenous authorities. Conversely, matters that a community does not consider to be its own, e.g. criminal acts of rural gang members, are left to the state. The proposed constitutional amendment contained three appropriate limitations to the jurisdiction of indigenous authorities:

- (1) The parties have to voluntarily submit to the jurisdiction of indigenous authorities.
- (2) Third parties must not be affected by the decisions of indigenous authorities.
- (3) Fundamental rights in domestic and international law must be strictly adhered to.

In accordance with these criteria, agreements that are made through Mayan Law in non-criminal matters can be regarded as arbitrated settlements that preclude further action in a state court unless the agreement, or the process applied in reaching it, violate human rights standards.

These three limitations also guarantee a satisfactory distribution of competences between state and community in criminal matters. In this context, the requirement of voluntary submission has two dimensions: Both the perpetrator and the victim have to voluntarily submit to indigenous justice. If the victim is unsatisfied with a resolution in Mayan Law, e.g. if the perpetrator is a seemingly unassailable local notable, he/she has to be free to approach the State. The State also has to step in, where the victim cannot give his/her informed consent (e.g. children), particularly in serious matters such as cases of sexual abuse. That the perpetrator has to voluntarily submit to indigenous justice as well, does not give him/her a choice of impunity. If the perpetrator rejects being tried within the community, he/she will be dealt with in the state justice system, where the perpetrator will usually face even harsher sanctions. Furthermore, the perpetrator must accept that the refusal to stand in front of the community and plead for forgiveness will likely result in his/her social exclusion.

Because third parties must not be affected, Mayan Law must not be applied if the perpetrator or one of the victims is not a community member. Furthermore, third parties are affected where the consequences of the crime are a threat to Guatemalan society as a whole. Therefore, drug offenses or politically motivated crimes would remain under the exclusive jurisdiction of the state. Conversely, there is no real reason why even a case of murder between community members should not be resolved by indigenous justice, if human rights standards are upheld and the community, the victim's family and perpetrator agree that the interests of justice and prevention are best served through this type of resolution. Punishment or vengeance as the sole justification for harsh prison sentences ought not to be forced upon a culture that decides to set other priorities in penal matters. In this context, one might be tempted to raise concerns about equality given that a Mayan and a Ladino might thus face different consequences for the same criminal deed. However, the principle of equality also demands not to indiscriminately treat persons alike that come from fundamentally different cultural backgrounds.

The greatest challenges result from the third limiting criterion, adherence to human rights standards. While Mayan Law is not inherently irreconcilable with international human rights standards, it does not fully comply with them either. One area in which there are shortcomings is the area of sanctions. In view of the awful alternative of the state prison system, the relatively mild forms of physical punishment known by Mayan Law can still be considered acceptable. In this context one has to bear in mind that beatings, unlike prison sentences, do not prejudice the victim's human right to receive compensation for the criminal harm suffered. Mayan Law and Human Rights Law clash, however, where the group orientation of the

former cannot be reconciled with the individual orientation of the latter. This is the case where moral failings such as adultery or disrespect for elders are criminalized to protect the social cohesion of the community or where collective sanctions are imposed against an offender's family.

Mayan human rights organizations often hesitate to correct these deficiencies by introducing human rights values into Mayan Law, because the legitimacy of the very customary law they defend derives from the successful claim of an age-old, unchanged tradition. For this reason their discourse in matters involving human rights problems tends to be rather essentialist. This is still fine, and indeed politically effective, when there is e.g. almost universal agreement among Mayan organizations that lynchings or similarly atrocious practices must be rejected as "un-Mayan." The problems begin if the issue is more contested than that. An example is the second big human rights problem of Mayan Law: its lack of gender equality. In an entirely essentialist debate some will claim that a "traditional" distribution of roles between men and women is an essential feature of the Mayan social organization. Conversely, more progressive activists often denounce gender inequality as foreign to traditional Mayan culture arguing that it has been later introduced with the conservative Catholicism of the Spanish conquistadors. In practice, the dominant groups within Mayan communities will tend to prevail in protecting the former position in this type of empirically indissoluble debate. To avoid this result, progressive Mayan activists have to make the effort of introducing a human rights and equality discourse into their own law. This is not an impossible feat given the extraordinary degree of adaptability that Mayan Law has shown in its history without perishing. Besides, the effort to advocate *for* Mayan Law on a human rights platform loses credibility, if adherence to the same universal standards is not exacted *from* Mayan Law.

By the same token, the Guatemalan case elicits that decision-makers considering the role of non-state justice systems in pluricultural societies must also think about human rights on two levels. They must not only think of human rights as a constraint but also as a demand. Indigenous peoples have a collective right to a degree of normative and institutional autonomy. This right is rooted in their limited right to self-determination as a people and specifically elaborated in ILO Convention 169. Mayan Law applied by Mayan authorities has to be given space, not only because it is functional or inexpensive, but because it is an indispensable element of the identity and collective dignity of the Mayan peoples.

In this regard, the Guatemalan case also invites a critical comment about the role of the International Banks in the Guatemalan justice reform process. The Banks financed an ex-

pansion of the state justice system that ended the institutional *de facto* institutional and legal autonomy of many indigenous communities and created realities on the ground, which prejudiced the chances of realizing the promise of legal pluralism set out in the Peace Accords and ILO Convention 169. Their loans coincided with and contradicted efforts of other international donors to improve the status of Mayan Law. Even Bank officials are willing to concede these points. In their defense, they argue that the alternative would have been to leave the state justice system in its horrific post-conflict state and that at least a fraction of the loans were earmarked for programs benefiting the causes of pluralism (e.g. the funds for the cultural sensibilization programs). It is also pointed out that the local Mayan stakeholders groups were unable to formulate, let alone significantly support, coherent demands that the Banks could have translated into conditionality requirements. However, the incapability of indigenous groups to organize themselves into a decisive political force in order to protect their rights, is neither unique to this case nor news to the Banks. The World Bank has long committed itself in its operational directives to ensure “that the development process fosters full respect for [indigenous peoples’] dignity, human rights, and cultural uniqueness” and, more specifically, “that indigenous peoples do not suffer adverse effects during the development process.”⁵⁰ The Inter-American Development Bank’s Operational Policy on Indigenous Peoples has an equivalent content.⁵¹ Both Banks seem to have neglected their own commitments in the Guatemala case.

⁵⁰ World Bank Operational Manual, *Operational Directive on Indigenous Peoples*, OD 4.20 (September 1991), para. 6.

⁵¹ See Inter-American Development Bank, *Operational Policy on Indigenous Peoples*, GN 2296 (March 2004).