Customary Law
and
Democratic Transition
in
Guatemala

Rachel Sieder

CUSTOMARY LAW

AND

DEMOCRATIC TRANSITION

IN GUATEMALA

Rachel Sieder

Rachel Sieder is Lecturer and ESRC Post-Doctoral Fellow in Latin American Politics at the Institute of Latin American Studies.

Acknowledgements

CONTENTS

Customary Law and Democratic Transition in Guatemala

Introduction

This paper examines issues of democratic transition, legal reform and customary law, focusing on the case of Guatemala. The Accord on the Identity and Rights of Indigenous Peoples, signed by the Guatemalan government and the URNG (*Unidad Revolucionaria Nacional Guatemalteca*) in March 1995 as part of the peace process, commits the government to incorporating the customary law of the country's indigenous Maya population into the design of the state via legal reforms. Here the importance of customary law for democratic transition in Guatemala is emphasised and a critical perspective for its study and analysis in this context is developed. The second half of the paper presents preliminary results of a study in the department of Alta Verapaz applying the methodological approach proposed here. It should be stressed that this paper is by no means exhaustive in its scope; its principal aim is to stimulate debate around the theme of customary law and to encourage similar studies both in other regions of Guatemala and through comparative work.

The organisation of the paper is as follows: the first section discusses democratic transition and the role of law in this process. The second and third sections present a definition and discussion of customary law, together with a brief review of the relevant literature on customary law and legal pluralism. The fourth section discusses how customary law and 'law' itself should be conceptualised for the purposes of research. The argument is made in favour of a critical, historical approach to analysing customary law, indigenous community and culture. The fifth section discusses how such a research agenda might be developed and applied in Guatemala. The sixth section presents preliminary results of research into customary law in the department of Alta Verapaz. Finally, some of the problems inherent in trying to incorporate aspects of customary law into the national system are signalled.

1. Law and state reconstruction in the current transition

The purpose of law is to facilitate and enable the effective functioning of society, establishing and enforcing certain norms which limit and regulate human activity. Legal instruments provide the blueprint for the exercise of mutual obligations between citizens, and between citizens and the state, establishing the ideal principles and framework of 'good government' in any given polity. Law is particularly central to democratic forms of rule, setting limits on individual and governmental exercise of power. As Philippe Schmitter and Terry Lynn Karl have pointed out (1993, pp. 46-7), 'The uncertainty

embedded in the core of all democracies is bounded....there are previously established rules that must be respected. Not just any policy can be adopted – there are conditions which must be met. Democracy institutionalises 'normal', limited political uncertainty.'[1] Law, therefore, provides the formal mechanisms and ground-rules for 'bounded democracy'. In experiences of democratic transition, the construction of the 'rule of law' is central to counterposing a democratic to an absolute or authoritarian order.

If the 'rule of law' in a democracy is understood in ideal terms as a system of rights and obligations which apply universally to all citizens, then the democratisation of government in the period of transition from authoritarian rule necessarily involves the extension of rights and obligations to all within a given polity. In the late twentieth century, the universalisation of liberal democratic constitutionalism – and consequently efforts to construct the 'rule of law' – has become a global phenomenon. However, in practice the rule of law is far from neutral: since the Enlightenment, different legal orders within the framework of liberal democracy have been developed to protect different sets of interests throughout the world. It should be emphasised, therefore, that the *construction* of the rule of law in any society is an ideologically contested process. And it is during the phase of democratic transition, or political restructuring that are fought out questions of which rights are granted and to whom, and which obligations are enforced and on whom. In recent years, an observable trend towards the globalisation of socio-economic and political structures has been accompanied by the emergence and reevaluation of pluralism and local specificity. The tension between these two tendencies lies at the heart of the current democratic transition in Guatemala.

Despite the existence since independence of liberal constitutional orders, Central America has typically been characterised by acute socio-economic inequalities together with exclusive and authoritarian forms of government. Although elected government is now the norm throughout the region, historically elections alone have rarely equated with democracy. Prior to the 1990s, military rulers tended to rely on electoral fraud, official parties and semi-constitutional mechanisms to legitimate their rule. In turn, weak civilian elites depended on the military (and the USA) to keep them in office. Elections were about legitimising those already in power, rather than selecting a government by popular mandate. Developments in recent years have meant that elections are now more genuine competitions for office – that is, competitions in which outcomes are uncertain rather than predetermined – and are contested by a wider spectrum of political opinion. However, although advances have been made in terms of electoral institutions and practice, accountability and the rule of law remain weak.

---

[1]   'Uncertainty' here refers to the democratic principle that the outcome of electoral contests is not predetermined.

Throughout the region – and in Guatemala in particular – the gap between *'hecho y derecho'* – that is between the legal order in theory and in practice – has been and continues to be particularly marked. In general, those with little socio-economic and political power exercise few rights and are subject to multiple obligations, while a powerful military and civilian elite acts with impunity, in effect operating 'above the law'. Indeed the phenomenon of impunity has had a profound impact on perceptions of the politico-legal order and is a central feature affecting current prospects for democratic transition.[2] To the extent that fundamental rights, such as the right to life, are not protected and obligations, such as being sanctioned for a crime, are not enforced, the 'rule of law' – and the very notion of citizenship, so central to democracy – will remain little more than a juridical fiction for most Central Americans. The subordination of military to elected civilian power, and the construction of effective mechanisms to ensure accountability and the 'rule of law', are therefore central to the success of the current democratic transition in the region.

The development of democratic institutions, practices and values will vary from country to country. In Guatemala, reform of the legal system in the current transition is a complex, multi-dimensional phenomenon. In addition to addressing the deficiencies of the existing judicial system and tackling the problem of impunity, the construction of the rule of law necessarily involves a cultural dimension.[3] Legal orders throughout the world are vehicles for the creation, affirmation and contestation of national identities. Perhaps the principal challenge of the democratic transition in Guatemala is to transform the identity of the nation by effecting the change from an exclusionary to an inclusionary system of government. This implies overturning centuries of discrimination and marginalisation of the indigenous Mayan majority and the construction of a truly pluri-cultural, multi-ethnic state. Such a process of democratisation necessarily excludes strategies of assimilation and integration of the Maya on the terms of traditionally dominant groups and involves the construction of institutions which decentralise power and enable different groups to coexist on equal terms, while maintaining their different ethnic identities.[4] A key policy focus in Guatemala in the current period, therefore, is how to make the forms and methods of political administration – including the legal system – more functionally multicultural, participatory and socially pluralistic.

---

2   See Sieder (1995).

3   On the deficiencies of the existing legal system and the problem of impunity see: Misión de las Naciones Unidas para Guatemala (MINUGUA) (1994-96); Fundación Myrna Mack (1994); Rachel Sieder and Patrick Costello (1996).

4   Many countries throughout the world, in their efforts to democratise, have had to recognise the existence of diverse cultural and ethnic groups within their boundaries (for example, linguistic plurality was explicitly recognised in the Spanish Constitution of 1978). Much current debate in the established democracies centres around appropriate political reforms to extend greater rights to ethnic, linguistic or territorial groups pressing for greater autonomy from central government: for example, Quebec and Canada; Euzkadi and Spain; Scotland and the United Kingdom.

As Larry Diamond has noted (1993, p. 95), democracy is perhaps the most difficult of political systems to maintain, relying as it does on 'a minimum of coercion and a maximum of consent'. The active consent, representation and participation of the Mayan majority is essential to ensuring the successful development of democracy for the whole of Guatemala. This will involve a profound process of national reform, necessarily affecting indigenous and non-indigenous Guatemalans alike. In a recent essay, Héctor Díaz Polanco maintains that indigenous demands for increased autonomy in Latin America are rarely conceived as part of a wider platform for national reform (1995, p. 232). However, in Guatemala, Mayan organisations are proposing not just increased autonomy for rural indigenous communities, but rather an integral solution for the whole of Guatemalan society; a new democratic pluralism based upon the recognition of the Mayan people and their rights. As Raquel Yrigoyen has observed for comparative cases: 'It is not simply a case of championing the rights of certain 'minorities' to a quota of power, but rather the right of the entire society to diversity, and that this right be recognised, protected and reflected in the democratic structuring of the state, the law and justice' (1995, p. 18). Evidently, granting a series of rights to indigenous populations is easier in countries where they are numerically few and live relatively isolated from the majority of the population. This situation does not prevail in Guatemala, where the extension of rights to the majority Maya – some 60% of the total population – implies a changes in the existing balance of power and society as a whole.

Mayan demands and the Guatemalan transition

In recent years, an active and diverse Mayan movement has become a significant force for national political reform in Guatemala, proposing a transformation of the traditionally exclusive – and fundamentally anti-democratic – state.[5] In the wake of the genocidal military counter-insurgency campaigns of the early 1980s, whose principal destructive effect was on rural indigenous communities, Mayan organisation has gained in strength and unity. The continental campaign for '500 Years of Resistance', in protest at the official celebrations of the quincentenary of the 'discovery' of the Americas in 1992, and the award of the Nobel peace prize in the same year to an indigenous Guatemalan woman, Rigoberta Menchú Tum, focused national attention on the issue of indigenous rights. Subsequently, popular organisation in repudiation of the attempted '*auto-golpe*' by President Jorge Serrano in May 1993 provided an increased presence for Mayan organisations in the national political sphere: in June 1993 the Asamblea del Pueblo Maya (APM) was formed to ensure and promote Mayan participation in ongoing political discussions to ensure the transition to democratic rule. The presence of a number of Mayans in the government of Ramiro de León Carpio (1993-96), such as Alfredo Tay Coyoy

---

[5]   Much of this section draws on Bastos and Camus (1995), the best published source to date on the Mayan movement in Guatemala.

as education minister (the first indigenous person to hold such an important cabinet post) also had the effect of furthering indigenous demands, particularly within the area of bilingual educational provision. Official human rights bodies have also begun to take up indigenous demands.[6] However, it was perhaps the demands of civil society for inclusion in the peace talks between the URNG (*Unidad Revolucionaria Nacional Guatemalteca*) and the Guatemalan government that provided the means to articulate Mayan demands for increased rights and political autonomy in the broader process of national political and institutional reform. New fora, the most important of which was COPMAGUA (*Coordinación de Organizaciones del Pueblo Maya de Guatemala*), were formed to elaborate a common position within the consultative body, the *Asamblea de Sociedad Civil* (ASC), with regard to the envisaged accord on indigenous rights (see below).[7]

Yet by 1994 it was evident that Mayan organisations were demanding participation not just in the peace negotiations, but in all political developments within the country. As Santiago Bastos and Manuela Camus (1995) note, a number of factors have contributed to this increased protagonism: the first is the return of over 30,000 indigenous refugees from Mexico since 1993. The active stance of refugee organisations within the national political sphere and their fight for full citizenship has been a feature of Guatemalan politics since the first return to the Ixcán region in January 1993. The massacre of eleven indigenous campesinos, including two children, by an army patrol at Xamán, Alta Verapaz in September 1995 has involved both refugee organisations and the Nobel laureate Rigoberta Menchú in what has become one of the most controversial legal cases in the country, focusing attention on demands for reform of the judicial system.

Secondly, the negotiation during 1996 of the two final accords in the peace process – on the socio-economic and land situation, and on the role of the military in a democratic society – has put Mayan demands at the top of the national political agenda. Insufficient land resources and militarisation continue to constitute the two principal problems affecting indigenous rural communities. Throughout 1995 and 1996, Mayan *campesino* organisations, such as CONIC

---

[6]   In 1994, the Procuraduría de Derechos Humanos (PDH) announced the creation of a programme to provide attention to indigenous people. This aims to promote, publicise and protect indigenous rights, basing itself around the provisions contained in the 1985 Constitution and international legal conventions to which Guatemala is a party. Through the programme, the PDH aims to establish permanent relations with representatives from local indigenous and linguistic communities, together with indigenous non-governmental organisations and human rights groups. For more detail see Willemsen (1996).

[7]   Bastos and Camus (1995, pp. 27-30) identify two broad types of indigenous organisations in Guatemala: those which they term 'popular', which concentrate on denouncing state violence; and those which they term '*mayista*', which give priority to cultural demands. See Bastos and Camus (1995) for detail on the development of a common platform between these groups.

(*Coordinadora Nacional Indígena y Campesina*) have been active in organising land takeovers in an effort to force progress on the land question, whilst numerous Mayan human rights organisations – such as CONAVIGUA (the *Coordinadora Nacional de Viudas de Guatemala*) and CERJ (*Consejo de Comunidades Etnicas 'Runujel Junam'*) – together with representatives of refugees and internally displaced peoples, have stepped up their demands for an end to forced conscription, participation in the civil defence patrols (*patrullas de autodefensa civil*, known by their Spanish acronym PACs), and the withdrawal of military bases from areas of refugee return.

Thirdly, the unprecedented Mayan involvement in electoral politics since 1993 provides a hopeful sign that political renovation of the electoral system is at last beginning to occur. One of the fundamental weaknesses of the Guatemalan political system has long been the irrelevance of electoral politics for most of the Mayan majority. However, since 1993 the increased participation of numerous indigenous civic committees, independent from the political parties, in municipal elections has been an important development.[8] In the run-up to the November 1995 national elections, Rigoberta Menchú headed an extensive campaign to promote electoral registration in indigenous communities, organised by the non-governmental organisation, the *Fundación Rigoberta Menchú Tum*. In the same year, a new left-wing political party, the *Frente Democrático Nueva Guatemala* (FDNG), fielded a number of prominent Mayan human rights activists as congressional candidates, and indigenous leader Juan de León as their vice-presidential candidate. The FDNG subsequently became the third largest party in the new Congress. Mayan involvement in electoral politics is at an early stage, but the protagonism in Congress of indigenous deputies such as Rosalina Tuyuc and Manuela Alvarado of the FDNG, together with Marina Otzoy of the FRG (*Frente Republicano Guatemalteco*), provides a hopeful sign. Lastly, the ratification of the International Labour Organisation's (ILO) Convention 169 by the Guatemalan Congress in March 1996 following a long and – at times – acrimonious public debate, has given a boost to Mayan organisations, even though ratification was subject to a number of legal caveats.[9]

However, perhaps one of the most important advances made to date was the signing by the government of Guatemala and the URNG on 31 March 1995 – as part of the ongoing peace process – of the Agreement on the Rights and Identity of Indigenous Peoples. As Larry Diamond has noted (1993, p. 105), in ethnically divided societies the effective decentralisation of power and the

---

[8]   A significant number of municipalities are now controlled by civic committees; in November 1995, a Mayan activist, Rigoberto Quemé, was elected mayor of Guatemala's second largest city, Quetzaltenango, heading the civic committee *Xel-Jú*.

[9]   Convention 169 of the ILO proposes in broad terms the recognition of territorial, economic, cultural, social and political rights for indigenous peoples. It also stresses that indigenous customs and forms of law should be taken into account and recognised by national governments, when the former do not conflict with fundamental human rights.

construction of strong local forms of government are central to ensuring the stability of democracy. If Mayan identity remains rooted in rural communities throughout Guatemala, then measures which afford greater local autonomy and participation in decision-making affecting those rural communities will be essential to ensuring greater self-determination for the different Mayan groups and changing the traditional configuration of the state towards the indigenous population. This premise is explicitly recognised within the March 1995 Accord. The Accord acknowledges the traditional lack of recognition of customary norms which regulate the life of indigenous communities, and commits the government to developing legal mechanisms to give greater recognition to customary law and traditional local authorities within indigenous communities, where these do not conflict with national and international standards of human rights.[10] The document also includes a number of commitments to increase the access of indigenous communities to the national legal system,[11] and to increase awareness within that system of indigenous culture and legal norms.[12] In the context of democratic transition in Guatemala,

---

[10] Section IV, sub-section B, paragraph 2 states: 'Teniendo en cuenta el compromiso constitucional del Estado de reconocer, respetar y promover estas formas de organización propias de las comunidades indígenas, se reconoce el papel que corresponde a las autoridades de las comunidades, constituidas de acuerdo a sus normas consuetudinarias, en el manejo de sus asuntos.' A reform of the Municipal Code to provide greater local autonomy in legal affairs will focus (paragraph 5 i) on the 'definición del estatus y capacidades jurídicas de las comunidades indígenas y de sus autoridades constituidas de acuerdo a las normas tradicionales; ii) definición de formas para el respeto del derecho consuetudinario y todo lo relacionado con el habitat en el ejercicio de las funciones municipales....'. (COMG, 1995, pp. 97-8).

[11] Section III, A iv) commits the government to 'informar a las comunidades indígenas en sus idiomas, de manera acorde a las tradiciones de los pueblos indígenas y por medios adecuados, sobre sus derechos, obligaciones y oportunidades en los distintos ámbitos de la vida nacional.'....v) 'promover los programas de capacitación de jueces bilingües e intérpretes judiciales de y para idiomas indígenas' (COMG, 1995, pp. 87-8). The Penal Process Code (introduced in 1995) makes the use of indigenous languages in judicial proceedings official for the first time.

[12] Section IV, E (Derecho Consuetudinario) reads as follows: 1. 'La normatividad tradicional de los pueblos indígenas ha sido y sigue siendo un elemento esencial para la regulación social de la vida de las comunidades y, por consiguiente, para el mantenimiento de su cohesión. 2. El gobierno reconoce que tanto el desconocimiento por parte de la legislación nacional de las normas consuetudinarias que regulan la vida comunitaria indígena como la falta de acceso que los indígenas tienen a los recursos del sistema jurídico nacional han dado lugar a negociación de derechos, discriminación y marginación. 3. Para fortalecer la seguridad jurídica de las comunidades indígenas, el Gobierno se compromete a promover ante el organismo legislativo, con la participación de las organizaciones indígenas, el desarrollo de normas legales que reconozcan a las comunidades indígenas el manejo de sus asuntos internos de acuerdo con sus normas consuetudinarias, siempre que éstas no sean incompatibles con los derechos fundamentales definidos por el sistema jurídico nacional ni con los derechos humanos internacionalmente reconocidos. 4. En aquellos casos donde se requiera la intervención de los tribunales, en particular en materia penal, las autoridades correspondientes deberán tener plenamente en cuenta las normas tradicionales que rigen en las comunidades. Para ello el Gobierno se compromete a.....i) proponer, con la participación de representantes de las organizaciones indígenas, disposiciones legales para incluir el

therefore, an examination of the nature and content of customary law in indigenous communities throughout the country has become a political priority. It is this issue – customary law, its conceptualisation, and approaches to its research in Guatemala – which provides the focus of the remainder of this paper.

2. Customary Law: definitions

Customary law is generally understood (Stavenhagen and Iturralde, 1990, p. 29) to mean a set of unwritten, uncodified traditional legal norms and practices which are distinct from the positive law in force in any given country. ASIES (1994, p. 47) provides a useful working definition of customary law as 'the concepts, beliefs and norms which in the given culture of a community denote or define...harmful or unlawful actions; how and before whom the injured party should seek satisfaction or reparation; the sanctions for these harmful or unlawful actions; how and by whom these sanctions should be applied.'

Guisela Mayén (ASIES, 1995, p. 7) includes two additional elements in her definition of customary law: first, that these norms and practices be widely recognised as obligatory by the community in question (that they be socially accepted, respected and complied with); and secondly that they have been practised for various generations. Similarly, Yrigoyen (1995, p. 26) defines customary law in terms of its legitimacy – that is, the extent to which it is accepted as a valid, culturally appropriate mechanism by the group in question, and its effectiveness at regulating social action and resolving conflict. It is maintained here that while social recognition (legitimacy) constitutes an operational necessity for customary law, the fact that certain norms and practices have not been in evidence for generations, or indeed the fact that their effectiveness is limited, does not necessarily exclude them from the sphere of 'customary law'. A relevant example for the Guatemalan case would be the new normative orders and structures developed during the 1980s and 1990s among the internally displaced Communities of the Population in Resistance (CPRs), or among the refugees who have returned from Mexico.[13] Such practices as have developed within these communities cannot be considered 'traditional', given that they have not been practised for generations. However, to the extent that they constitute efforts to build autonomous and culturally appropriate conflict resolution mechanisms at local level they *can* be understood as part of customary law in Guatemala. In many cases, the 'efficiency' of customary law is limited in practice by state law or the aftermath of the civil war. Similarly, 'legitimacy' is something which needs to be empirically tested and not assumed

---

peritaje cultural y desarrollar mecanismos que otorguen atribuciones a las autoridades comunitarias para que señalen las costumbres que constituyen su normatividad interna'.(COMG, 1995, pp. 101-2).

[13]   On the CPRs see EPICA (1993), Falla (1995) and Williams (1996); on returning refugees see Sams (1995).

as an inherent characteristic of customary law; as will be argued in the following sections, gauging the extent of 'community consensus' is highly problematic in a post-civil war setting.

Customary law then is a distinct set of legal norms and practices used by subordinated indigenous groups instead of – or in addition to – state law. It is open to question whether it can accurately be described as a 'legal system' or 'legal order'; each case needs to be examined in turn according to the empirical evidence. In Guatemala customary law is perhaps best understood as a series of norms and practices which varies both between and within different communities of the same ethno-linguistic group.

3. Customary law and legal pluralism: development of the literature

Colonial origins

Ever since the nineteenth century, when interest first arose to study legal processes and concepts in so-called 'primitive peoples', various methodologies and concepts have been used to analyse customary law. Initially, its examination was expressly tied to the enterprise of colonial administration. In Africa and India, the British used customary law in order to administer and exploit their colonial subjects more efficiently. The colonising powers lacked sufficient staff and funds to administer a completely new political and administrative system; in such a context the use of the customs of indigenous populations became a major component of colonial rule. In the post-colonial period, a number of efforts were made throughout Africa and Asia to codify the oral rules of particular ethnic groups. This usually occurred in conjunction with plans to codify the legal system at national level in an effort to unify the nation within a unitary legal framework. While taking into account the plurality of legal expressions and practices encountered within national boundaries, the approaches adopted in such endeavours implicitly favoured state law.

These applied studies of customary law constituted the beginnings of the sub-discipline known as legal anthropology. The principal methodological approaches developed during the first decades of the twentieth century were the use of ethnographic case studies and analyses of conflict resolution. Llewellyn and Hoebel's pioneering method – developed in the 1930s – of analysing the case histories of legal disputes soon became a standard approach. The underlying logic of the case study approach was the belief that precedent is more determinant for the nature of law than written (or orally expressed) norms and codes. By studying legal disputes in practice, researchers were able to see principles and norms in action within a specific social, political and cultural context.

Early monographs on customary law were dominated by those adopting a structural-functionalist analytical framework which emphasised social order and the way in which social structure contributed to its maintenance (Gluckmann 1955, Bohannan 1957). Customary law was understood, therefore, as a homeostatic mechanism employed within a given social group to manage conflict and maintain harmony and order. This was an implicitly conservative approach which tended to romanticise 'tribal' societies – viewed as inherently harmonious. In addition, most writers tended to rely – explicitly or implicitly – on Western conceptions of law. Structural-functionalism was essentially an ahistorical analysis; as Laura Nader notes (1990, p. xvii) these early writers 'examined communities as microcosms of connected social activity as if they were autonomous and unconnected to global networks'. The historical and structural context within which customary law operated – often one of colonialism – was rarely alluded to.

Legal pluralism

The tendency to see customary law as something entirely distinct and separate from state law was reflected in early approaches to the phenomenon known as legal pluralism. John Griffiths (1986, p. 1) describes legal pluralism as 'the presence in a social field of more than one legal order', whilst Hooker (1975, p. 2) describes it as the existence of 'multiple systems of legal obligation... within the confines of the state'. However, any notion of dual or plural legal systems which imply an *equality* of systems is inherently flawed. As Starr and Collier point out (1989, p. 9), 'legal ideas and processes maintained by subordinated groups are constrained in ways that the legal orders of dominant groups are not'. Legal pluralism is better understood as a relation of dominance and of resistance: state law often (although not *always*) sets the parameters for what local communities can and cannot define as 'local law and practice'. Indeed certain aspects of the latter are often absorbed and legitimised by state law. For example, as Flavio Rojas Lima (1995, pp, 12-3) notes, the *alcaldía indígena* in Guatemala was a politico-legal institution developed under colonial rule as a mechanism to facilitate control over the *pueblos de indios* for the purposes of tribute collection, labour service obligations etc. However, over time it also became a relatively efficient means by which indigenous communities could safeguard their own practices and interests. Today the existence of *alcaldes auxiliares* in indigenous communities throughout Guatemala constitutes both a means by which those communities maintain a degree of self-administration, and an essential part of the administrative mechanisms of the national state. Such examples illustrate that indigenous rural communities are not 'closed corporate' entities; rather their structure and practice has evolved as a consequence of local, national and international socio-economic and political relations of power. It also demonstrates that the imposition by the state of legal structures is never completely hegemonic; the models imposed may establish types of authority but cannot control entirely their functions in practice, the latter tending, in most cases, to adjust to pre-existing practices. A central

analytical task for any scholar of customary law is to identify when and how small-scale or local developments are more (or less) influenced by wider hegemonic forces.[14]

Such a theoretical approach has been developed by Moore (1978), whose conception of plural legal orders has proved one of the most influential and enduring in the literature. Moore developed the concept of the 'semi-autonomous social field'; the idea that a small field, such as a community, 'can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded' (1978, p. 55). The idea of the semi-autonomous social field leads to the notion that there is no *a priori* state monopoly on the production of legal norms and practices; subordinated groups can develop alternative mechanisms. As Sally Merry (1988, p. 878) states, 'the outside legal system penetrates the field, but does not always dominate it; there is room for resistance and autonomy'. If we accept this premise, we can recognise that state laws are not simply transmitted and absorbed: rather the ways in which national legal norms are made operative at local level (and their resulting effectiveness or ineffectiveness) must be explained in terms of the wider social structure affecting the community in question.

Conceptions of legal pluralism today are very different from those of fifty years ago, which focused primarily on the relation between indigenous and colonial law in colonial and post-colonial societies.[15] As Chris Fuller (1994, p. 10) has noted, Merry's focus on the interaction between state and non-state law, or more precisely 'the dialectic, mutually constitutive relation between state law and other normative orders' (Merry, 1988, p. 880) best defines the current research agenda in relation to legal pluralism. The way state law penetrates and restructures other normative orders, and the way in which those orders resist and adjust to that penetration is now the main focus of research in legal anthropology. The new legal pluralism, then, is focused on questions of dialectic relationships and of resistance.

Law vs. Order

During the late 1960s and 1970s, legal anthropology became immersed in a debate about the appropriateness of using western legal categories to analyse

---

[14]   In the collection edited by Rodolfo Stavenhagen and Diego Iturralde (1990), nearly all the contributing authors agree that customary law is more consistent and organised in communities which have managed to counterpose a long cultural tradition against a prolonged state of subordination.

[15]   Some of these older monographs are drawn on today for new readings, such as Sally Falk Moore's work on the Chagga of Tanzania (1986), or Francis Snyder's work on Senegal (1981b), both of which show how 'customary law' was in large measure an historical product of colonialism. The importance of work such as Moore's is the way in which it demonstrates the constructed nature of so-called 'traditional' law.

non-western legal systems, a debate which had its origins in the different positions adopted by earlier researchers, Paul Bohannan and Max Gluckman (Bohannan had argued it was inappropriate to use western legal concepts to analyse non-western societies, whereas Gluckman had maintained such an approach was permissible). To some extent, the criticisms raised then still have salience for researchers today. Roberts (1979) has criticised legal anthropology for its 'law-centred' perspective and argued that 'law' is not a universal category. Researchers, he maintained, narrowed their approach excessively by looking in non-western societies for legal norms and institutions which matched occidental legal models. Instead, research should aim to uncover how *order* is maintained in a given society. Often the mechanisms employed – such as kinship networks, or witchcraft – have little correspondence with western notions of 'legal systems'. As Roberts noted (1979, p. 26), 'even where judicial institutions are found they do not always enjoy the unchallenged pre-eminence in the business of dispute-settlement which our courts claim and manage to exercise. Fighting, and other forms of self-help, resort to supernatural agencies, the use of shaming and ridicule, or the unilateral withdrawal of essential forms of co-operation may all constitute equally approved and effective means of handling conflict.'[16] The point here is that within indigenous communities order may be maintained as much by seemingly 'extra-legal' as by 'legal' means. Studying customary law necessarily involves examining the functions of and relationships between these different spheres.

Most subsequent research in the field of legal anthropology moved away from what came to be recognised as the excessively legalistic focus on rules and procedures of earlier work. Recognising that rules alone rarely determined outcomes, anthropologists turned to analysing the broader phenomenon of 'dispute processes' over time using extended case methods (e.g. Collier, 1973) and examining the role of litigants as well as that of judges. Others moved away from an exclusive focus on dispute situations, and concentrated on situating legal processes in small-scale societies within their wider context. A number of features therefore became the focus of research, such as: networks of individuals (with the aim of situating disputes in the ongoing relations between people); the role of political brokers in influencing individual choices; individual perceptions, cultural meanings and rationalisations of social actions; the impact of state law; the role of economic factors; and the national and international context. More materialist interpretations gave greater emphasis to economic factors, social inequality and forms of domination. The earlier separation between the 'legal' and the 'political' was widely recognised as

---

16   Sierra (1995b, p. 107) makes a similar point in the case of Mexico: 'Different spheres and agents of conflict resolution exist in indigenous communities and towns; these extend from the family, religious and supernatural spheres, to the courts and the local municipality. All these spheres and agents...intervene in the maintenance of local order. Formal and informal mechanisms, such as gossip, criticism, witchcraft and reminders of mutual norms and duties overlap, together with recourse to dominant legal norms and structures.'

inadequate, and a focus on power, its structure and deployment became central to analysis. A more critical approach towards the analysis of non-western societies emerged in the process; as Nader (1975) pointed out, the view that people in all non-western societies have access to public forums for resolving grievances was little more than mere romanticism. At the same time, much research in the field of legal anthropology became concerned with the study of legal processes in advanced capitalist societies (e.g. Nader, 1980). Since 1980 much important new work in legal anthropology has been published – for example Moore (1986), Merry (1988), Nader (1990) and the edited volume by Starr and Collier (1989) – which has adopted more holistic, integrated approaches to analysing law and legal change.

Any research on local custom needs to have reference to the wider historical social, political and economic context; it is now widely recognised that it is not possible simply to analyse customary law in terms of jurisprudence and modes of dispute settlement. Since the 1980s, the development of ethno-historical models of law has been an important feature of the literature. Researchers now endeavour to situate conflicts in their historical and structural contexts and use a mixture of ethnographic, comparative and historical analysis to understand processes of legal change. Law then is understood as an historical product rather than a universal category.[17] The ways in which changing power relationships over time affect legal norms, behaviour, processes and institutions are a major focus of research. The role of human agency, as Starr and Collier (1989, p. 12) have argued, is also realised as central; legal rules, procedures and concepts only exist if they are invoked by people. What research should aim to do then, is to trace the historical processes which condition people's actions by shaping both their material interests and cultural understandings.

4. Approaches to analysing law: understanding customary law

Before specifically discussing the phenomenon of customary law, it is important to reflect on different conceptualisations of law in general and the ways in which distinct approaches can contribute to an integrated, critical research perspective.

Law as power – Most researchers examining legal processes have identified systematic outcomes and structured inequalities which illustrate the ways in which law and legal orders are responsive to power. As Foucault (1977) observed, power is organised and deployed through law, and through that organisation and deployment provides the inescapable fabric of social life. Foucault focused attention on the ways in which judicial processes distribute power unequally, by means of moulding cultural understandings of everyday

---

[17]   Francis Snyder (1981a), for example, has persuasively argued the need for a greater emphasis on the historical relativity of legal forms.

life. The point to stress here is that law is not a natural occurrence, but rather 'a thing constructed by human agency that is advantageous to some at the expense of others' (Starr and Collier, 1989, p. 3). Law implies a system of norms and limits, sanctions and controls. It is important to understand the legal system not merely as a collection of statutes and codes, but rather as a dynamic process reflecting power differentials and changing political relations between groups. Typically, those with power tend to monopolise legal knowledge and manipulate the law to their advantage. Daisy Dwyer (1992, p. 54) has described this phenomenon as a 'cognitive' law model: 'Misinterpretation, error, and ignorance about substantive law often constitute major components of the cognitive "law" model according to which diverse peoples manoeuvre in the judicial sphere and outside of it.' Any critical research focus should dispense with idealised conceptions of the legal order and adopt an approach which conceptualises law primarily as a reflection of power structures and dynamics.

Law as ideological resource – Accepting that law is a reflection of power relations does not, however, mean adopting a reductionist approach. Law is not an autonomous entity, but neither is it a simple representation of crude class interests. For a more nuanced understanding, law needs to be examined in its ideological dimension. Adopting such an approach allows us to view law as a resource; a resource which generally favours the hegemonic interests of those controlling the state, but one that can also be mobilised by dominated groups in counter-hegemonic social struggles. For example, in the case of Guatemala, the 1985 Constitution was part of a limited transition largely controlled by the armed forces. Nonetheless, popular organisations and human rights groups have demanded compliance with the constitutional order as part of a wider movement to press for improvements in human rights. To give another example: today indigenous groups throughout Latin America challenging the legitimacy of existing liberal democratic states have incorporated elements of discourse based on notions of rights (central to liberal democratic ideology) to press home their claims for a different conception and practice of rights to those traditionally found within state and society. Such initiatives represent examples of the counter-hegemonic use of law. However, it should be remembered that the dominant powers almost inevitably set the terms of the debate by prescribing law; as Merry (1995, p. 20) notes, 'the law provides a place to contest relations of power, but it also determines the terms of the contest'. Nonetheless, resistance through law can be significant in its emancipatory effect. Law, then, reflects power relations and dynamics and can be used as a counter-hegemonic resource by dominated groups.

Law as cultural system – All judicial processes are, to a greater or lesser extent, characterised by distinctive systems of thought pertaining to particular cultural environments. In one important sense then, the legal system can be understood as a cultural system. One of the principal proponents of a cultural reading, Clifford Geertz has argued that legal reasoning is one of the most significant ways in which people try to make explicit sense of their world, and is itself partially constitutive of that world. He emphasises that legal 'facts' are

not some neutral 'given'; rather, they are socially constructed. Law, according to Geertz, is 'part of a distinctive manner of imagining the real' (1983, p. 184). Therefore by examining legal thought and practice we can glean something about the culturally specific relationships between facts and norms, rights and duties, truth and justice: that is, about culturally specific moral and operative worlds. The importance of a cultural reading of law is that it can help us to appreciate both the culturally specific nature of western law and the range of ideological and practical legal alternatives which have been tried and tested in non-occidental contexts. It is important to stress here that law can be studied from the perspective of consensus as well as conflict: the study of beliefs and social practices with regard to ritual, religion and myth can often tell us as much about the nature of normative systems in a given community as can the study of conflict and dispute. Clear dividing lines between religious, moral and legal orders within indigenous communities are often difficult to determine in practice.

In her work on customary law in Zinacantan, Mexico, Collier (1973, p. vii) has also employed a cultural definition of law. Taking her cue from Barkun (1968) she conceives law as a system of symbols or language used by individuals to conceptualise and manage the social environment. However, as Collier herself has noted, the language of law – such as, for example, notions of gender equality or of universal rights within liberal occidental legal systems – generally fails to correspond to the empirical reality. Chenaut (1995, p. 87) makes a similar point when she states: 'Every legal order is structured on the basis of a system of values which are considered as ideal citizen conduct, the deviation from which implies punishment and sanctions. These moral values advanced by the law, however, are continuously violated in practice.' It is therefore essential to situate a cultural reading of law within an understanding of the different power relations at play within a given group or society, and indeed to locate that group or society within the wider network of international power structures and dynamics.[18] The advantage of recognising law as a symbolic language is the insight such an approach provides into the way in which legal language is often used as a means to rationalise shifts in power relations; continuity in terms of the legal concepts employed in any one society does not necessarily reflect continuity of legal practice and may often mask changes in the distribution of power.

In analysing law, therefore, should we focus on cultural meanings or on power differentials in society? Is law a 'symbolic system' (Geertz) or an 'encoding of asymmetrical power relationships'? (Starr and Collier, 1987, p. 371). It is perhaps best conceived as both. All legal orders reflect dynamics of

---

[18]   Law (as a product of power relations) is perhaps a more globalised phenomenon than many others; disputes may stretch beyond the boundaries of a nation-state and unite different groups within and between countries. Transnational legal dynamics have certainly been important in the promotion of indigenous rights in Guatemala, as evidenced by the debate around and subsequent ratification of Convention 169.

power. They also represent distinct symbolic languages specific to particular cultural contexts. However, legal systems are not closed cultural systems imposed by one group on another; they can be better understood as codes and languages of hegemonic groups, aspects of which can be mobilised by subordinated groups in pursuit of their claims and interests. Such an approach views legal rules as systemic resources which can be used to maintain or challenge systems of inequality within given societies. We need to pay attention to the way in which social structure and historical dynamics condition the kind of ideology represented by legal systems, the types of claims which come before them and the choices of procedure open to different participants. Rather than analysing law as a collection of statutes and processes, we should ask: Who decides the law? Who has knowledge of the law? Who has the power to enforce the law?

Recourse by subordinated groups to customary law can be understood in many instances as a means of resistance in the context of asymmetric and uneven power relations. However, although we accept that customary law is a legal resource utilised by dominated groups in the pursuit of their interests, it is essential to dispense with the idealised vision of customary law prevalent in some of the debates over indigenous rights in Latin America. While it is true that in many parts of the world, certain modes of imparting justice exist which are distinct from those specified by the state, the empirical record demonstrates that customary law is not a self-contained system with its own norms and procedures, separate and distinct from the state legal system.[19] Customary and state law should be understood as constituting a dynamic, asymmetrical relationship. Such an approach has been the guiding focus of much important recent work cited above (Moore 1986; Merry 1988, 1991; Starr and Collier 1989) and – as Sierra points out in her excellent recent article (1995a, p. 229) – is a standard understanding of customary law in the recent English-language literature.

Rather than trying to identify some pristine body of customary law uncontaminated by state law, research should focus on the way in which customary and state law conflict, interact and are mutually constitutive, and – giving due emphasis to the role of human agency – the ways in which people actively articulate state law and custom throughout different historical periods. This is the approach adopted by Chenaut and Sierra (1995, p. 14) who analyse for the case of Mexico what they term the 'strategic use which social actors make of law within and outside of indigenous communities'. We need to understand perceptions of customary law and of the national judicial system; when and why social actors resort to customary law; when and why they utilise national legal resources; the nature of the dynamic and mutually constitutive relationship between the two systems; the limits of autonomy of local legal

---

19   This point is emphasised by Stavenhagen and Iturralde (1990) in the introduction to their edited volume.

practice; the way in which individuals internalise and utilise both kinds of law; and the manner in which they are disadvantaged by the confrontation of two different normative systems. In any analysis, it is essential to examine state law in terms of its practice, rather than its declared and codified principles: as noted above, what state law says and the way in which it operates in practice rarely correspond. As Chenaut and Sierra (1995, p. 27) emphasise: 'This approach allows us to detect *in situ* the plurality of juridical systems articulated and imbricated in a given space, without losing sight of the power relations which define them.' It is precisely the dominant relation of state law with regard to customary law which permits the strategic use of both by social actors.

Historical analysis of customary law has revealed its dynamic and composite nature by demonstrating the ways in which it was reconstructed and enforced by colonial powers, calling into question the view of customary law as a continuation of ancient traditions. Customary law, then, is 'not a survival from a traditional past, but an integral part of an ongoing asymmetrical [political] order' (Starr and Collier, 1987, p. 371). The important point to recognise is that customary law is constantly renegotiated according to changing political and economic circumstances. A principal focus of research should be the way the state has adapted and moulded local belief and practice and the ways in which institutions and practices have been created, imposed and in some instances reappropriated by indigenous communities. The key focus in any analysis should therefore be on the dynamics of power and social change; *on the contexts in which rules are constructed, rather than on the persistence of traditions*. While the past may often be invoked to legitimise the present, practices in themselves may reflect more change than continuity. By merely focusing attention on the expressed norms which regulate the life of a given society and defining these as 'customary law', researchers run the risk of 'freezing' methods and customs particular to certain historical circumstances and of reifying traditions which may no longer be applied in practice, or which may not be shared by the entire group.

Such caveats notwithstanding, Sierra (1995a, p. 229) makes the important point that 'Whether or not a "pure" Indian tradition can ever be identified, it is important to recognise that customs and practices identified as "indigenous" continue to have meaning in the lives of Indian grou,ps.' Stavenhagen and Iturralde (1990, pp. 27-8) also stresses that customary law is considered an integral part of a community's structure and cultural identity and notes (1990, p. 34) that, while it is subordinate to state law, it can be understood as an attempt by the communities in question to adapt the positivist legal norms of the state to their own needs, values and structures. However, a critical analysis of customary law does not preclude an understanding of it as a means of counter-hegemonic resistance; indeed, such an approach should enrich the debate on customary law and indigenous rights in general.

Community and culture

There exists a tendency in the literature to emphasise the 'harmonious' or consensual nature of customary law: for example, Humberto Flores Alvarado (1993, p. 22), referring to Guatemala, defines customary law as 'a system of consensually accepted judicial norms', in contrast to state law which – he argues – is 'imposed in an authoritarian manner'. Similarly, in a recent document, the Guatemalan Assistant Human Rights Procurator with responsibility for indigenous affairs observed that: 'the enormous efficiency of the opinions, dictamens, decisions, judgements and sentences of indigenous legal entities has been recognised [as essential] in preserving equilibrium and peace, and in reestablishing and restoring harmony within these communities' (Willemsen, 1996, p. 18). The notion of customary law as intrinsically consensual and effective is inherently problematic. There exists profound disagreement between scholars as to whether social cohesion originates primarily in the presence of mutually accepted rules (consensus), or whether it is due to the exercise of power (coercion). Evidently fear of sanction – natural or supernatural – may be a powerful force for securing compliance with rules which appear on the surface to be socially accepted. When examining the content and practice of customary law in indigenous communities, a critical analysis of local belief, custom and practice itself is essential. Researchers need to be just as sceptical about the supposed virtues of customary law as they are about state law.

Both informants and the researchers dependent on them can give an ideal, abstracted vision of customary law and local conflict resolution, emphasising the consensual nature of the latter. Many positivist approaches have relied too heavily on observable behaviour or on the explanations given by social actors themselves. This excessive empiricism has often resulted in the ignoring of wider socio-economic structural constraints on the behaviour of both individuals and communities. Researchers should not merely rely on what their informants tell them about their customs, but should examine other factors, such as networks of influence, coercion and power for explanatory frameworks. All dispute processes are centred around individuals who are part of networks of relations which are often expressed not only in political and social, but also in ideological and cultural terms. In examining any system of law, we need to identify both its manifest and its latent functions; in other words the functions of law that are generally agreed by the members of a given society, and those functions which may or may not be recognised. The aim of research should be that of uncovering the power relations and dynamics which underpin belief systems and expressed cosmovisions in any given society. Chenaut and Sierra (1995) have advocated a research methodology which focuses attention on the intersection (and conflict) between norms and practices of power and social control. It is essential to contrast expressed local norms of customary law with local practice: the way in which people describe their local processes of law and conflict resolution and the way in which these

processes function in practice.

In an important contribution to the debate, Laura Nader's work on the Zapotec in Mexico (see Nader, 1990) has theorised that harmony ideologies – cosmovisions stressing harmony and consensus within a given society – can also be understood as counter-hegemonic strategies by dominated groups. Nader stresses the way in which missionary Christianity propagated and diffused an ideology of harmony amongst colonised indigenous groups in the Americas. She hypothesises (p. xxiii) that 'harmony ideology has been an important part of social transformation through law under Western political and religious colonization and a key to counter-hegemonic movements of autonomy as well'. Nader details the way in which Zapotec self-representation to outsiders stresses harmony; customary law is described by the Zapotec themselves as a regulating mechanism. However, Nader argues that in a context where increased conflict means increased state intervention, this indigenous community uses harmonious self-representation as a means of securing continued local autonomy. Harmony ideology then, has developed historically as a means of resisting the state's political and cultural hegemony. Nader therefore understands local compromise models of legal norms as a counter-hegemonic political strategy employed by the Zapotec. Elements of her analysis could usefully be applied to analysis of customary law in Guatemala – in certain historical periods, harmonious representations of Mayan cosmovisions can be understood as a means to circumscribe the power of the state to intervene in indigenous communities. However, it should also be remembered that in a context of post-civil war where fear continues to exercise a preponderant influence over individual and group actions, the self-representation of local conflict resolution systems as inherently 'consensual' can have a much more sinister underlying logic.

A central focus for analysis of customary law within indigenous communities should be the resources available to individuals and the way in which rules are used by different parties within a given society or group. We need to examine the range of options open to litigants and analyse the constraints and incentives that influence the choices they make. A number of questions are therefore essential: What is it *possible* for people to dispute about? Where does an individual stand in 'fields of social relations'? (Collier, 1973, p. 224). How does culture mediate legal ideas? How do power relations shape the culturally relevant ideas contained in a legal system? Which mechanisms challenge and which legitimate the existing distribution of power within a community? Who controls dispute mechanisms and access to them?

Different individuals have different abilities to manipulate legal and normative systems. As Sierra (1995a, pp. 248-9) cautions, 'attempts to define one set of norms as "legitimate traditions" that should be imposed on everyone in the group reproduce...an ethnic absolutist discourse that hides contradictions and constitutive differences within the group. In this sense, a discourse in terms of custom risks reproducing and naturalising existing inequalities, particularly those of gender'. Indeed the subordinate position of women within many

customary practices has been signalled by many researchers (Sierra 1995; Hernández and Figueroa, 1994). In her research on Zinacantan, Collier noted that – in the case of domestic disputes – the conciliatory solutions which predominated in customary modes of conflict resolution tended to maintain and reinforce the subordinate position of women: 'whilst officials told women they should comply with their obligations as wives, men were only given instructions to stop beating their wives. In other words, the arrangements between zinacantecos tended to confirm and reinforce unequal relations between husband and wife' (1995, p. 56). The gender implications of legal practice should be an integral component in any study of customary law.

Any simplistic interpretations of the 'customary law good, state law bad' variety should be avoided. In many instances, the dominant (state) legal order may actually help community members resist oppressive relations within their group or community. In Guatemala, for example, national and international human rights law has enabled the victims of violence in some communities to demand the exhumation of those murdered in past massacres, and to challenge the local power of the ex-military commissioners and civil patrollers, many of whom are responsible for carrying out the killings.[20] Merry (1995, p. 14) has noted the way in which the 'language and categories of the law' can be mobilised by social movements, and the powerful impact that such mobilisation can have, even if the litigants are unsuccessful in their claims. Evidently, however, recourse to national and international law will depend on many factors, such as: knowledge of alternatives, the physical accessibility of courts, physical safety (in many cases) of the plaintiffs, bilingualism as opposed to monolinguism, and economic cost factors. The point to be stressed here is that no one set of laws is intrinsically 'good' or 'bad': both within and outside indigenous communities, laws and customs, rights and traditions, are constitutive aspects of power relations and of the negotiation of justice.

5. Law and violence: counter-insurgency and legal change

In Guatemala there currently exists a great need for more research into customary law and the presence of plural legal forms in different historical periods. Padilla (1990) has hypothesised the existence in Guatemala of a parallel yet subordinate system of customary law, but emphasises the need for detailed empirical research, particularly in rural areas where the mechanisms of state arbitration are weak or non-existent. He also stresses the need to assess the effect of violence and civil war on customary law in Guatemala. This element is critical: as Nordstrom and Martin (1992, p. 5) have noted, 'repression and resistance generated at the national level are often inserted into the local reality in culturally specific ways'. In one sense, the civil war and its aftermath can be understood as an extremely violent integration of indigenous rural communities, a compressed assault on their relative autonomy which dates from the time of

---

[20]   See for example EAFG (1995) on the case of Rabinal, Baja Verapaz.

the colonial *pueblos de indios*. The processes of conflict, displacement, refuge and return have profoundly affected local power relations throughout the country and it is hypothesised here that these will be reflected in patterns of legal change.

The effect of repression and random violence had a particularly destructive effect on organised local systems of conflict resolution. As Zur (1994, p. 13) writes: 'For victims, the world has become a more punitive and less predictable place; one of the effects of terror is the destruction of networks of stable expectations concerning what other people will do which lie at the core of any set of organized human relationships.' During the last two decades, state law – or rather state law in the form of organised state terror – penetrated and shaped many spheres of indigenous life, challenging customs and imposing limits on customary practices, destroying much of what previously constituted 'customary law'. For example, while *alcaldes auxiliares* were traditionally a customary means of conflict resolution, the counter-insurgency involved the imposition of new forms of authority, such as military commissioners and civil patrols.[21] As Rojas Lima notes (1995, p. 10), the administrative and jurisdictional role of the *alcaldes auxiliares* was greatly weakened during the last few years. It is important for current research to examine whether and how customary law was 'refunctionalised' or altered by the military during the war and how the violence and counter-insurgency has affected legal concepts and practices within indigenous communities. For example, the notion of 'truth' became a highly contingent one during periods of acute violence and terror, when 'not knowing' became a means of ensuring individual and community survival.[22] Understanding the experience of *la violencia* is central to understanding the nature of customary law in Guatemala today. As Robben and Nordstrom (1995, p. 5), writing about violence, have stated: 'It is...the everyday, the mundane and the not so mundane spheres of life that are the social field of violence expressed – the targets of terror, the templates on which power contests are carved, the fonts of resistance and the architects of new social orders and disorders....[violence] cast[s] ripples that reconfigure lives in the most dramatic of ways, affecting constructs of identity in the present, the hopes and potentialities of the future, and even the renditions of the past.' In addition to direct violence itself, other factors are equally important to examine: for example, the growth in strength of protestant sects which has occurred

---

[21] At the height of the civil patrols in the mid-1980s, the number of men was estimated at 850,000. In 1993, the United Nations independent human rights expert for Guatemala, Mónica Pinto, estimated the PACs had an overall participation of approximately 537,000. Recent army figures place the number still organised in patrols at less than 400,000 (Procurador de los Derechos Humanos, 1994, p. 16; RFK Memorial Center for Human Rights, 1996, p. 1).

[22] In her work on victims of violence in Quiché, Judith Zur details the way in which truth itself had become a casualty of terror: she argues that shared denial was employed by entire populations as a psychological coping mechanism in response to arbitrary terror (Zur, 1993 and 1994). On 'not knowing' as a coping mechanism in the case of Argentina see Suárez-Orozco (1992).

throughout Guatemala since the time of *la violencia* has profoundly affected the social fabric of indigenous rural communities, many of which are now divided along religious lines with little evidence of the social cohesion required for more consensual forms of local conflict resolution.[23]

Any research which involves the collection of empirical data in individual indigenous communities should analyse local power relations and the way in which these are codified and represented in legal concepts and practice. The use of an historical perspective will provide insight into the way in which these power relationships have changed over time and the means in which the law (state and customary) has been employed by different groups and individuals as a resource to better their position. Ideally, researchers should employ a broad multi-disciplinary approach which examines social, cultural and political aspects, rather than simply employing a strictly juridical focus. A number of research questions could fruitfully be employed to structure any analysis of law and customary law in Guatemala: first, the way in which changes in power relations have affected changes in the legal system and dispute resolution over time; secondly, the way in which normative practices within indigenous communities have been transformed by state law and the manner in which these local norms and practices have adapted to, challenged or reconstituted themselves in relation to state law; thirdly, the way in which different individuals and groups – both with and without power – employ certain legal and cultural concepts in different times and circumstances; fourthly, the circumstances in which members of indigenous communities use or do not use state legal resources; fifth, the relationship between socioeconomic and political changes – at both macro and micro level – and legal change; and lastly, the relationship between changes in material conditions, cultural understandings and continuities and discontinuities in the legal system. This brief outline of possible avenues of research is by no means exhaustive, it merely aims to indicate some themes and lines of investigation which could help explain the nature of customary law and legal change in Guatemala today.

6. Customary law in Alta Verapaz

The following section presents part of the initial results of fieldwork on customary law in various Maya-Q'eqchi' communities in the Guatemalan department of Alta Verapaz (see Map 1), carried out over a period of seven months during 1995 and 1996. Various research questions informed the fieldwork itself: first, the way in which historical and structural changes had influenced the conformation of customary norms and practices among the Q'eqchi' communities studied; secondly, the way in which these norms and

---

[23]   For the case of San Juan Chamula, Chiapas, Gómez Rivera (1995) has demonstrated how the penetration of evangelist sects led to a rejection by converts of participation in cargo-cults and religious festivals, previously central to community norms and practices of mutual obligation.
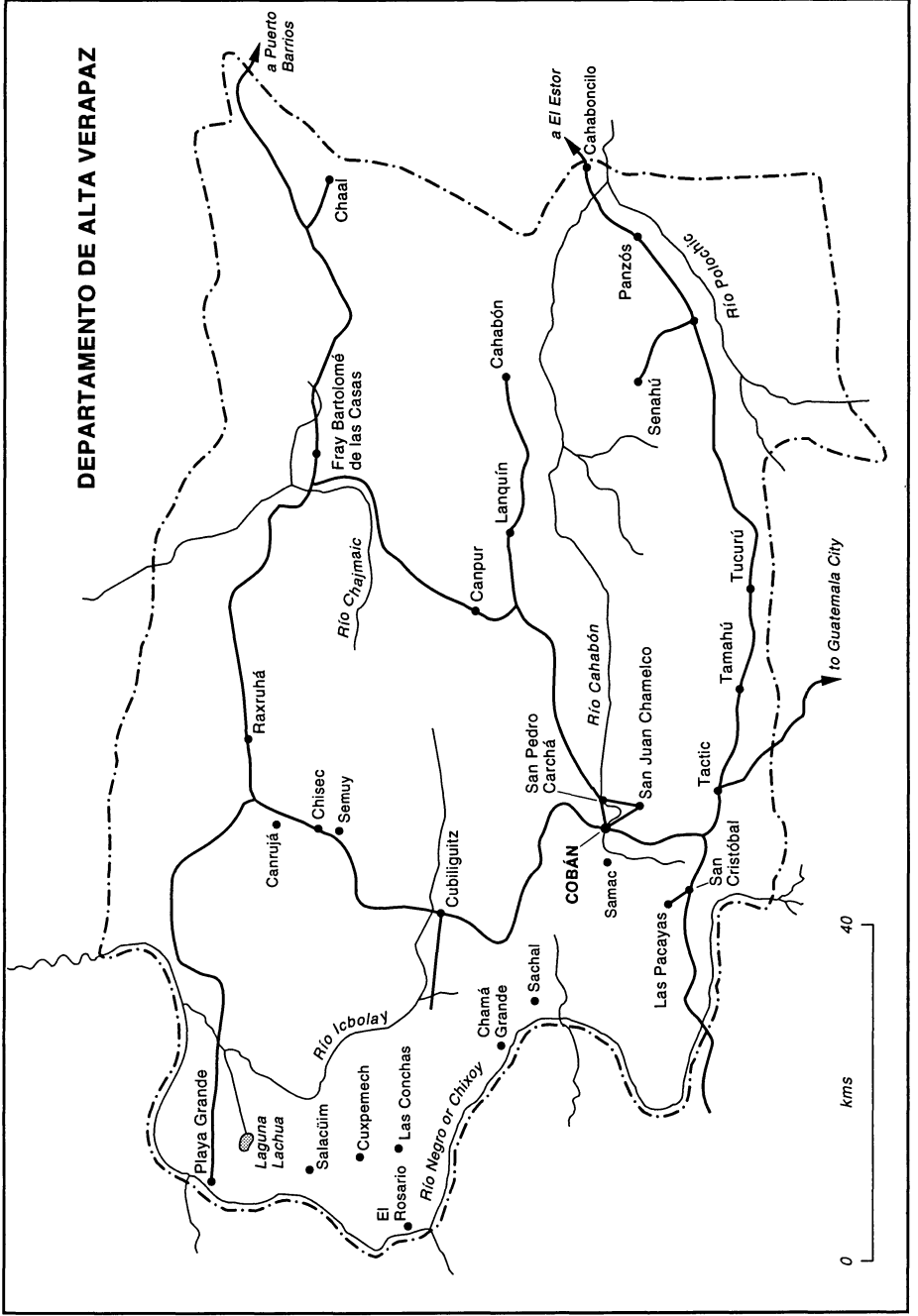
practices had changed during and subsequent to the years of acute violence in the 1980s; thirdly, the relationship between Q'eqchi' cosmovision and legal norms and practices; and lastly the ways in which the 'strategic use of law' is manifested – that is, the relationship between local and state law and the use of both by members of the communities in question. The methodology employed was one of participant observation and semi-structured interviews with groups and individuals, which included elders, auxiliary mayors (*alcaldes auxiliares*), members of the various improvement committees (*comités pro-mejoramiento*), civil patrollers, ex-military commissioners and villagers in general. Undoubtedly, the subject is deserving of a much broader empirical analysis than that presented here. However, it should be emphasised that this is a qualitative survey, and as such does not pretend to be representative of the entire region.

Historical background

In historical terms, the Verapaz region has been relatively isolated from the rest of the country since the colonial period. Only after the mid-nineteenth century was it definitively incorporated within the national economy. In contrast to the rest of Guatemalan territory, *la Verapaz* was not conquered by Spanish military forces, but rather by the Catholic Church: in August 1550, in response to the petition of the Dominican friar Bartolomé de las Casas, the Spanish Crown officially gave its approval that the region come under the exclusive jurisdiction of the Dominican friars. Alta Verapaz was peripheral to economic activity during the Colony, which was concentrated in the central region of the country; there was minimal Spanish presence until 1821 and indigenous communities were generally able to meet their needs through subsistence agriculture. Compared to the central and western regions of Guatemala, relatively few *reducciones* or *pueblos de indios* were formed in Alta Verapaz. Apart from the few towns established by the Dominicans in the sixteenth century, such as Cobán, San Pedro Carchá, San Juan Chamelco, Lanquín and Santa Cruz Verapaz, indigenous settlement patterns continued to be highly dispersed. Internal migration within the area was – and continues to be – common practice for the Q'eqchi'.

The indigenous population of Alta Verapaz therefore continued to be relatively isolated from western culture until the mid-nineteenth century. It was only after the development of export agriculture that the Q'eqchi' found themselves subject to pressures similar to those which had affected many Mayan populations since the start of the colony. One can hypothesise that, as a consequence, the Liberal Revolution of the last century had a much more destructive impact on customary norms and practices in Q'eqchi' communities than in other parts of the country. These communities had little tradition of resistance to Spanish *hacendados* or of adapting colonial mechanisms as means of communal self-defence (such as, for example, the *reducciones* or *pueblos de indios*). In other words, there was relatively little practice or historical memory of the 'counter-hegemonic use' of colonial law. The imposition of a regime of large coffee plantations, which developed in a highly concentrated form in Alta Verapaz, constituted a frontal assault by liberal reformism on the Q'eqchi' people's traditional way of life.

Map 1

DEPARTAMENTO DE ALTA VERAPAZ

a Puerto Barrios

Chaal

a El Estor
Cahaboncilo

Panzós

Cahabón

Lanquín

Senahú

Río Polochic

Canpur

Fray Bartolomé
de las Casas

Río Chajmaic

Raxruhá

Río Cahabón

Tucurú

Tamahú

Chisec
Semuy

Canrujá

San Pedro
Carchá

San Juan Chamelco

Tactic

to Guatemala City

Cubiliguitz

COBÁN

Samac

San Cristóbal

Las Pacayas

Sachal

Río Icbolay

Chamá
Grande

Playa Grande

Laguna
Lachua

Salacüim

Cuxpemech

El
Rosario

Las Conchas

Río Negro or Chixoy

kms

0   40

As coffee production for export developed in the final decades of the nineteenth century, extensive regions previously marginal to the colonial enterprise were incorporated into the national economy. The growth in coffee exports during this period was rapid: in 1860, coffee exports generated 15,350 pesos; seven years later they yielded 415,878 pesos, continuing to rise constantly (Cambranes 1996, p. 89). Alta Verapaz became a centre of coffee development in late nineteenth century, a process which involved many Q'eqchi's being deprived of their lands, a considerable number of whom became *mozos-colonos* (permanent labour within the plantations), or forced and bonded labour on the new coffee farms. The most important plantations were owned by German immigrants, who established their centre of activities in the department. After 1880, these immigrants began to arrive in Alta Verapaz to buy or simply occupy large extensions of land previously cultivated by indigenous people. German capital was a central factor in the development of agro-export activity: by the end of the nineteenth century, two thirds of coffee production in Alta Verapaz was controlled by Germans, and some 80% of exports were administered through German-owned firms (King, 1974, p. 32). With the establishment of coffee production, the farm-owner or *patrón* became the dominant figure in the rural environment. This had a determinant effect on indigenous judicial norms and practices in the region.

The expropriation of indigenous lands in Alta Verapaz was openly promoted by the Guatemalan state with the aim of stimulating agro-export development. After 1871, the Liberal governments of Miguel García Granados and Justo Rufino Barrios implemented a number of measures to abolish communal landholdings. This process was enthusiastically supported by departmental authorities, who tricked or forced indigenous *campesinos* to leave their homes in order to work on the coffee plantations (Cambranes, 1996, pp. 62-5). In this manner, the agricultural frontier was extended to areas previously used only for subsistence cultivation. By the end of the century communal lands had almost completely disappeared in the department. However, the principal factor in appropriation of indigenous lands in Alta Verapaz during this period was the high proportion of so-called 'untitled lands' (*tierras baldías*) in the department. After 1860, all lands without formal title had been denominated *baldíos* by the government. Although a few indigenous communities had preserved titles from the colonial period, most land in Alta Verapaz was considered *baldío*, very few *campesinos* in the region holding documents for the lands they occupied (Núñez Falcón, 1970, p. 83). One hypothesis is that this state of affairs derived, in part, from the distinctive nature of the colonial experience in the region, although the historiography is inconclusive in this respect. The formal denunciation of untitled lands constituted the basis for the formation of coffee plantations in Alta Verapaz, and became the principal mechanism by which foreigners accumulated land. According to Regina Wagner, 'the availability of lands and the ease with which they could be acquired to initiate coffee plantations was one of the main incentives for German immigration to Alta Verapaz' (Wagner, 1991, p. 181). In general, lands which were legally without owner were 'denounced' by individuals before the district authorities, declared untitled or

baldío and, after being announced in the official newspaper for a period of thirty days, subsequently sold to the highest bidder at public auction. In theory, indigenous communities enjoyed equal rights to purchase these untitled lands, but in the majority of cases – due to ignorance of the process and inability to pay for the land, its measurement or the lengthy legal procedures which followed sale – they lost the opportunity to acquire title. Many German settlers were able to purchase land thanks to the credits which were extended to them by German firms or banks. *Baldíos* were much cheaper in Alta Verapaz than in other areas of coffee production, such as the Costa Cuca in the south (Wagner, 1991, p. 186). According to Cambranes (1986, p. 189), by the end of 1879 it was no longer possible to find *baldíos* in the area of Cobán and neither was it easy to acquire second or third-hand lands in a considerable area surrounding the departmental capital. In 1889, the German farm-owner Erwin Paul Dieseldorff wrote that it had become very difficult to find *baldíos* which were not owned by individuals or claimed by them (cited in Cambranes, 1996, p. 224). Following allocation of title, the indigenous inhabitants of these lands became *mozos-colonos*, treated as part of the farm's inventory. The logic underpinning this was economic: in order to be profitable, a coffee plantation needed sufficient indigenous population to provide labour. This double appropriation of land and people was particularly marked in the region of Alta Verapaz (Cambranes, 1986, p. 193).[24]

The development of the plantation system was supported by the legal framework of the state. With the expansion of coffee production, as Cambranes notes (1996), the farmers' need for labour reactivated the colonial system of *mandamientos* (forced labour in particular periods of the year). State authorities ordered departmental officials (known as *corregidores*) to form *mandamientos* or work-details of indigenous workers from the towns and villages nearest the plantations and put them at the disposition of the farm-owners. Residence in an indigenous community therefore provided no protection whatsoever for its inhabitants. In the majority of cases the state legal apparatus favoured the interests of capital and acted in a highly arbitrary and prejudicial fashion towards indigenous people. For example, bribery of local state authorities was common practice among farm-owners, the former forcibly recruiting work-details on demand (Cambranes, 1996, p. 82). Such were the demands for labour and the extent of state corruption that indigenous people were often unable to work sufficient hours on their own plots to guarantee traditional communal agricultural production. Although the much-criticised system of *mandamientos* was abolished in 1894, in practice farm-owners continued to solicit and receive the men they needed from the municipal authorities. In addition, by the 1890s most farm-owners had secured sufficient permanent resident labour to guarantee the operation of their plantations.

---

[24]   According to the 1880 census, 95% of the population of Alta Verapaz was indigenous (Wagner, 1991, p. 173).

Wages paid on the coffee farms were very low. Farm-owners tended to pay workers in advance in order to command a monopoly on their labour; they also imposed fines for 'infractions' in the plantations and defrauded workers with over-inflated prices charged at plantation stores. Many workers became permanently indebted to the farm-owners, forced to live on the plantations in a state of servitude for debts which were practically impossible to clear. If a worker had not cancelled outstanding debts on his death, then these was passed to his children, who continued to work for the *patrón*.

After the Liberals assumed power in 1871, farm-owners lobbied for guarantees for the *mandamiento* system and punishments for *mozos* and workers who failed to observe the labour laws. The government extended considerable civil, police and military authority to the plantation owners (Cambranes, 1996, pp. 104-5), who became the principal legal authority in the countryside. In many plantations, workers were organised in a quasi-military fashion; the *patrón* had the right to punish *mozos* when they 'shirked' work or ran away, often imprisoning them in make-shift jails within the plantation, administering corporal punishment or handing them over to the state authorities. The forced work regime on the farms was institutionalised by legislation passed in April 1877 regulating day workers (*Reglamento de Jornaleros*). This consisted of measures against 'vagrancy' which allowed farm owners to control poor landless rural workers. Every man fit for work had to carry a booklet where records were kept of his productivity and outstanding debts towards farm-owners. These documents had to be presented to police authorities in towns or to mobile armed patrols. Any person not carrying documentation was detained, imprisoned and later sent to work on road construction. Workers were also legally obliged to carry out military service and to contribute to public works. These measures generally favoured plantation owners; for example, each worker had to pay ten pesos ($10.00 US dollars) per annum to exempt themselves from active military service, but if they lived and worked on a plantation, certification from the owner (who paid a stamp duty of 1.00 peso to guarantee the indebted status of his worker) was sufficient (Cambranes, 1996, pp. 106-7). Many *campesinos* preferred to live as *mozos-colonos* on the plantations under the 'protection' of the farm-owner rather than do military service or work in road construction (which often meant death due to the harsh labour conditions). However, it was also common practice for farm-owners not to pay the road construction or military service exemption taxes, or simply not to sign the work booklets, as a form of coercion against workers who were then forced to obey the farm-owners or risk the possibility of being sent to the state authorities for punishment (Cambranes, 1996, p. 294).

This new legal regime was resisted by the Maya-Q'eqchi'. For example, in 1864 an indigenous rebellion, led by the Q'eqchi' Melchor Yat, occurred in the area of Cobán and Carchá. However, given their military disadvantage, this and subsequent rebellions were put down. Some municipal authorities responded to the 1877 Regulation by refusing to send workers in *mandamientos*, although their negotiating power *vis-à-vis* the plantation owners was always very weak.

The most common response of the Q'eqchi' was the time-honoured practice of internal migration to remote areas of the region and to neighbouring departments. Huge numbers of *campesinos* from Alta Verapaz fled their communities and escaped to the virgin forests of Izabal, El Petén or even to Belize, where they lived a semi-nomadic existence as fugitives from state justice. State authorities frequently resorted to drastic measures to force *campesinos* to take part in the work details, such as the imprisonment of the women-folk of men who had fled (Cambranes, 1996, p. 166). However, while many Q'eqchi's fled the dominion of the plantations, many others became *mozos-colonos*, consenting to live on the lands which farm-owners offered them within the plantations. Evidently the imposition of the plantation system had a highly destructive impact on Q'eqchi' communities in Alta Verapaz, where a large percentage of the departmental population was tied to the coffee farms and subject to their internal rules and regulations.

Emphasis is given here to the coffee plantations because of their impact on the consciousness and historical memory of the Q'eqchi', a feature evident from fieldwork. It is maintained here that the forced expropriation of indigenous lands and the submission of the local population to a coercive labour regime on the farms had a significant impact on their customary norms and practices. The plantations were separate judicial spaces with their own legal regime; they were, in effect, sources of a highly authoritarian and discriminatory legal order. During the 1860s, plantation owners requested state authority to put police on the farms. After 1871 a system was instituted wherein every village, farm or hamlet on private property would have an auxiliary mayor (*alcalde auxiliar*) and a further ten or twelve individuals denominated '*mayores*'. These authorities had to serve the owner of the property (normally without pay) for a period of one year and were responsible for organising workers and ensuring that the plantation-owner's demands were met. These *mayores* or *capataces* were also charged with maintaining order in religious festivals; for example, if fights broke out they restrained the guilty parties. Nonetheless, it was the *patrón* who represented absolute law within the farms; he imposed fines, incarcerated workers, measured and valued work and effectively constituted judge and jury. Dissenting workers were left with few options apart from flight. The acute disadvantage of indigenous workers is illustrated in a document written in August 1892 by one Santa Cruz, at that time Political Chief of Alta Verapaz, who unusually argued that 'in verbal hearings in which farm-owners judge their workers, indian testimonies be admitted as proof as are those of any *ladino*; they are as much citizens under the law as the latter, and only due to a complete aberration has it become practice to reject indian testimony, leaving these poor wretches without means of defence before the tribunals' (cited in Cambranes, 1996, p. 164). Wagner (1991, p. 186) cites another case in Campur, where indigenous mayors were imprisoned when they protested at the poor treatment received by workers on a German-owned coffee farm. The farm-owners' control over the *mozos* was all but total and the state authorities – in the few instances when they tried to oppose the plantation owners' power – were generally ineffectual. To such a degree did this control extend that, as

Cambranes (1996, p. 164) notes, it was common for farm-owners not to register the births of children of their workers in an attempt to limit state control over their subject labour power.

During the 1920s and the 1930s, German interests strengthened their economic power in Alta Verapaz. They had consolidated their land-holdings to such a degree that it was very difficult for indigenous people to find land to which an individual did not already hold title on which to sow their crops; they therefore had to sublet and work on the plantations. Under the dictatorship of General Jorge Ubico (1931-1944), the labour laws were reformulated, many in response to the petitions of German coffee farmers. The Law Against Vagrancy (*Ley Contra la Vagancia*) passed in 1930 was modelled on a similar law in a German African colony and was proposed to Ubico by the Cobán-based plantation owner Edwin Paul Dieseldorff (Cambranes, 1996, p. 15). Under this legislation, a worker whose services were not contracted to a farm-owner or who did not own a given extension of land (a quantity which hardly any indigenous people owned) was declared a 'vagrant'. In order to avoid committing the crime of 'vagrancy' – which carried a penalty of thirty days in prison – *campesinos* were obliged to lend their services on the plantations and farms. Workers had to carry a booklet in which farm-owners confirmed they had worked the number of days required by law: one hundred days a year if they had sufficient lands planted with their own crops and a hundred and fifty days a year if they did not (De León Aragón, 1995, p. 45). In this manner workers, the majority of whom were illiterate, were kept at the mercy of the farm-owners who could send them to prison for whatever reason by not signing the booklet. The forced labour obligation for public works was also reinforced by the Highways Law (*Ley de Vialidad*) passed in October 1933, which decreed that all those fit were obliged to work for two weeks a year on road construction if they did not pay the highways stamp (*boleto de vialidad*) (De León Aragón, 1995, pp. 41-3). This mechanism also tended to reinforce the dependency of *campesinos* on the farm-owners, who generally paid the exemption stamp.

During the Ubico dictatorship, political power was concentrated in the hands of the Executive. In the municipalities of Alta Verapaz, municipal mayors were replaced by an *intendente* directly named by Ubico. Overall, the department was subject to the authority of a Political Chief, also named by the Executive. Judicial independence was further restricted after 1936, when Ubico retained the power to name Supreme Court judges and even to appoint, transfer or sack local justices of the peace. All municipal appointments were made directly by the President of the Republic. Cabarrús (1979, p. 115) notes that this concentration of powers in the Executive had the effect of reducing the political power of local *ladino* and German landowners. However, this process rarely favoured the interests of indigenous *campesinos* in the department. In comparison with the western highlands, indigenous representation in local government had traditionally been low in Alta Verapaz. Silvert (1969, p. 206), writing in the 1950s, observed that 'the indigenous people of Alta Verapaz generally have little more than a ceremonial voice in the administration of their

local government. The *ladinización* of local government in the west of the country can be unequivocally attributed to the pressures from political parties which have emanated from departmental capitals in recent years. However, in Alta Verapaz political parties continue to be weak and it is evident that *ladino* control over the political structure has existed for many years. The institution of the *principales* either does not exist or is very weak among the indigenous inhabitants of Alta Verapaz, which indicates that their function as a nominative body of the elders has long since disappeared. Although the term is still occasionally used, it currently refers only in a vague manner to the most influential members of an indigenous community and not to a stable social institution which exercises power'.

In 1943 German properties in Guatemala were expropriated and thousands of acres became part of state patrimony, much of which was directly administered by the state. Although during the reformist period 1944-54 some farms were divided and titled in favour of indigenous communities, or constituted as state cooperatives or national farms, years later much of this land passed into the hands of corrupt state officials. In addition, in the 1960s, military officers laid claim to huge extensions of uncolonised land in the department, particularly in the region known as the *Franja Transversal del Norte*.

Large land-holdings continue to dominate the department of Alta Verapaz and constitute a judicial sphere on the margins of the national legal order. In effect, they operate under conditions of 'extra-territoriality'; they have their own internal norms and are barely penetrated by national or international legal norms, such as those pertaining to human rights. *Mozos* effectively live in a state of servitude; in many farms in the Polochic valley farm-owners restrict hours of access to the farms, and the inhabitants cannot receive visits or attend meetings without the owner's prior consent (MINUGUA, 1996, p. 2). In many cases, workers who demand the legal minimum wage are expelled.[25] On a number of farms in the department, workers have been prevented from setting up schools. The conditions of exploitation to which they are subjected range from corporal punishment (beatings) to the rape of female workers (personal communication, Legal Section, Pastoral Social, Alta Verapaz Diocese, June 1996). There is evidently a need for more detailed studies of the impact of the plantation system on Q'eqchi' customary norms and practices in Alta Verapaz, and also on the relationship between systems of authority developed on the plantations and the imposition of counter-insurgent authorities during the 1980s. In the area in which fieldwork was carried out, many of the elders had previously worked as *mozos-colonos* on the farms, a factor which had profoundly influenced their vision of 'the law' and 'justice'. Undoubtedly the

---

[25]   In 1996 the official minimum daily wage for an agricultural worker was Q15.95 (less than three US dollars). However, on the majority of farms in Alta Verapaz an average of between eight and nine quetzales a day was paid and in some cases only two quetzales per day (Comisión de Pastoral de la Tierra, Diócesis de la Verapaz, 1995).

plantation system has had a far-reaching impact on Q'eqchi' cosmovision: for example Cabarrús (1979, p. 29) cites the revealing testimony of a man who describes God by comparing him to a farm-owner: 'God knows. He's like a *patrón*. He tests you. He gives you a hard job and easy jobs. If you choose the hard job, well then the *patrón* will tell you: yes, you *do* work. And if you only do the easy jobs, the *patrón* will tell you: you can't work. And if you work when your *patrón* is there, so too should you work when he's not there. That's how God wants it to be.'

Studies on customary law have demonstrated that many norms and ideas about punishment are transferred through myths. Cabarrús also signals the impact of the farm system on Q'eqchi' myth, describing the figure of *K'ek* or *'el Negro'*, whose appearance coincides with the introduction of coffee cultivation. *El Negro* is perceived to be a highly malignant spirit at the service of the farm-owner, capable of bewitching both people and crops. He punishes all those who try and steal from the *patrón*'s land, thus constituting a powerful moral sanction against such 'transgressions' (1979, pp. 31-3). In summary then, it is maintained here that this semi-feudal plantation system is a structural and historical factor which has significantly conditioned the nature of law, both state and customary, in Alta Verapaz.
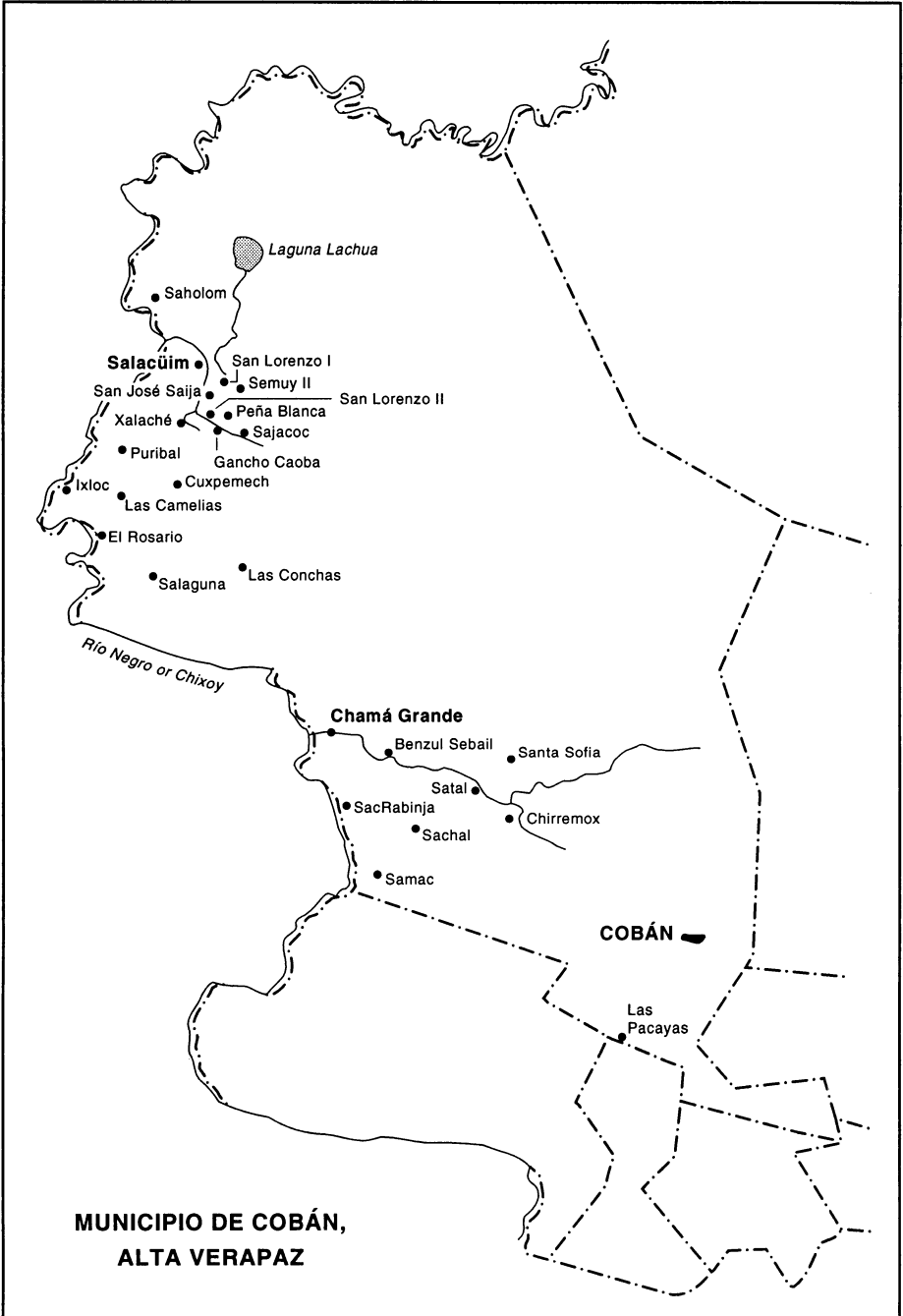
Fieldwork area

The data presented here was collected in the municipality of Cobán, the largest of the fifteen municipalities which make up the department of Alta Verapaz, with a territorial extension of 2,132 km², covering 25 per cent of the department (see Map 2). According to the last national census, 92 per cent of the municipality's population is indigenous, the majority Q'eqchi'. Road communications are poor, the area is predominantly monolingual and has historically been characterised by the existence of large farms and conditions of rural employment which constitute little more than servitude.[26] Shortage of land continues to be one of the principal problems for rural communities and land conflicts are common in the region. At approximately 74 per cent, the department has one of the highest illiteracy levels in the Republic. The main crops are basic grains (corn and beans), coffee, cardomom and cacao.

---

[26] Land distribution is highly unequal in Alta Verapaz; a 1979 study showed that 1.5% of the total number of farms occupied 73% of all cultivated land, whilst 97.5% of rural properties occupied just 25% of cultivated land (CUNOR 1979, cited in AVANCSO, 1990, p. 47).

Map 2

Laguna Lachua

Saholom

Salacüim San Lorenzo I
San José Saija Semuy II
  San Lorenzo II
Xalaché Peña Blanca
  Sajacoc
Puribal Gancho Caoba
  Cuxpemech
Ixloc Las Camelias

El Rosario

Salaguna Las Conchas

Río Negro or Chixoy

Chamá Grande
  Benzul Sebail Santa Sofia
  Satal
SacRabinja Chirremox
  Sachal

Samac

COBÁN

Las
Pacayas

**MUNICIPIO DE COBÁN,
ALTA VERAPAZ**

Fieldwork focused on a number of rural villages and farms in the west and north-west of the department, in a strip adjacent to the department of El Quiché, around the settlements of Salacüim and Chamá Grande. The communities where fieldwork took place were those of Cuxpemech, Gancho Caoba, Las Conchas, Las Pacayas, Nimlasa'chal, Peña Blanca, Puribal, Semuy II, Sajacoc, Saholom, San José Saija, San Lorenzo I, San Lorenzo II, San Pedro Ixloc, Santa Anita-Las Camelias, Santa Sofía, Sacrabinja, Sesaha'pur and Xalaché. These communities are almost entirely Q'eqchi', although a few people from the Poqomchi' ethno-linguistic group have also settled in the area. *Ladinos* are hardly present and tend to live in the larger settlements (such as Salacüim), rather than in the very isolated rural communities. The majority of these villages are accessible only by foot or mule across mountain trails. Nearly the entire population is monolingual and Q'eqchi' is the main language. The average size of communities is between thirty and forty families, although Salacüim and Chamá Grande are settlements of more than a hundred families.

In the early 1980s the municipality of Cobán – in common with most of the department – was a zone of acute military conflict: this generated huge numbers of displaced people. The area studied was one of the most affected by counter-insurgency violence during 1980, 1981 and 1982. Although the guerrilla EGP (*Ejército Guerrillero de los Pobres*) was active in the area at the start of the 1980s and undoubtedly enjoyed considerable support, relatively few sympathisers became active guerrilla combatants. The full weight of military violence fell on the civilian population: as a consequence of the army's counter-insurgency operations, whole communities were destroyed or abandoned by their inhabitants who fled to the mountainous jungle.[27] Thousands of people lived a nomadic existence in the jungle and in the most extreme cases survived in this clandestine fashion for up to seven years. Those who remained in their villages often collaborated with the military and were forced to participate in the civil patrols to pursue those who had fled. Reports concerning atrocities and massacres committed by civil patrollers in Chamá and Salacüim during the 1980s are numerous. During the years of *la violencia* Catholics were particularly persecuted: hundreds of catechists were assassinated and churches burnt and for many years it was impossible for clergy or pastoral agents to visit the area.

Following the 1982 amnesty decreed by the *de facto* government of General Efraín Ríos Montt, many displaced people gave themselves up to the army. Others were captured by military or civil defence patrols.[28] Displaced people

---

[27]   Between a million and a million and a half people were displaced in Guatemala between 1980 and 1981 (AVANCSO, 1990, p. 19). The Catholic Church estimates that nearly a hundred villages in the Verapaz Diocese (which covers the departments of Alta and Baja Verapaz) disappeared over three years (AVANCSO, 1992, p. 176).

[28]   AVANCSO (1990, p. 19) calculates that 70% of the displaced population throughout the whole country returned to their place of origin after the amnesty decree by the Ríos Montt government.

were concentrated in huge camps administered by the army on the plantations of El Rosario, La Esperanza and Las Conchas, or in the camp at Acamal, where they were completely dependent on the army for food supplies (AVANCSO, 1992, p. 177; CIEDEC, 1990). Here they were 'reeducated' and indoctrinated into new forms of organisation, such as nucleated villages (based on the 'strategic hamlets' used in the Vietnam war), civil defence patrols, and improvement committees. Patrols had to provide regular reports to the local military base. Towards the end of 1984, permission was extended to the displaced – many of whom had previously been *mozos-colonos* on the farms – to leave the camps. They were encouraged by the military authorities to settle on untitled land in the area around Salacüim, with the hope that one day they would be able to secure legal title. However, little or no official aid was received for resettlement. In 1986, the first return of internally displaced people via the offices of the Catholic Church took place: between March 1986 and January 1988, six groups of between 13 and 100 people returned in a process parallel to the returns and resettlements controlled by the army.[29] By the mid-1980s, most of Alta Verapaz was considered a zone of low intensity conflict in military terms. All returns of internally displaced people in the area were completed by the beginning of 1988 (AVANCSO, 1992, p. 194).

In the area around Salacüim, the majority of communities are composed of internally displaced people, often originally from other areas within the municipality (many are displaced from Chamá). Although much diversity exists within the region, few communities have maintained their original social composition, the majority having been formed or reconstituted after the worst years of the violence. In the Chamá area, sources within the Catholic Church estimate that up to 50% of the original population were killed or displaced during the 1980s (personal communication, June 1996). Both preexisting communities which were reorganised as part of the military's strategy and the displaced communities which were created after the violence now have a new pattern of spatial distribution: prior to the war, Q'eqchi' houses were normally very dispersed, sometimes a distance of up to half an hour's walk separating two houses. During the 1980s, dwellings were 'nucleated' and people currently live in much greater physical proximity to one another. This has had an important effect on the frequency and nature of local conflicts, as well as on methods of conflict resolution.

Many of the villages and hamlets studied are located on untitled (*baldío*) or national lands and community members lack title secure to their property. In

---

29   Alta Verapaz was the only department in the whole country where internally displaced people were able to come out of hiding in the mountains under the protection of the Catholic Church instead of giving themselves up to the army. In contrast to the experience in El Quiché, where the Diocese was closed in the early 1980s, in the Verapaz Diocese the Catholic Church was able to maintain a sizeable part of its infrastructure and personnel, despite the impact of the violence on catechists and pastoral agents (AVANCSO, 1990, p. 29).

some villages title is in dispute, with landowners laying claim to the land. Many communities have been pursuing legal claims for years with the state land agency INTA (*Instituto Nacional de Tierras*), a slow, difficult and frustrating process.[30] Some communities, with the support of the pastoral offices of the Catholic Church, have acquired title to the *baldío* lands which they occupy. Others, such as Las Conchas, are situated on lands bought by the Church in the late 1980s for the purposes of resettling the displaced people under its protection. However, even given the difficulties encountered in obtaining secure title, people living on *baldíos* prefer their current position to their prior status as *mozos-colonos*. In the area of Chamá a number of the communities studied are located on lands belonging to the Samac cooperative – formed in 1943 from expropriated German lands – and land conflicts with the directorate of the cooperative are commonplace. Infrastructure in the villages is minimal: there is no electricity, roads are in a poor state and are only passable on foot or by mule; some communities have a school, but others do not despite repeated petitions to the state authorities. Mechanisms of state intervention and arbitration in the area have historically been weak or inexistent. From many communities people still have to travel for more than two days to reach the municipal capital Cobán. However, although the presence of the state has traditionally been negligible, military power was decisive in the area during the 1980s.

At present marked divisions continue to exist within the villages between those who took refuge in the mountains and those who stayed behind, often collaborating with the army in its counter-insurgency operations. The latter continue to accuse the former of being guerrillas or of having sympathies with the guerrilla. Villages whose members coexisted together as 'communities in the jungle' appear to demonstrate higher levels of social cohesion. Although it is widely recognised that political conditions have improved compared to previous years, many of these communities continue to be riven by fear and suspicion. Lack of available land also provides a source of conflict, as do religious divisions between Catholics and Evangelicals. The presence of various evangelical sects such as the Assembly of God and the Nazarenes significantly increased during the years of *la violencia*. For many, religious conversion represented an effective means of guaranteeing physical security at a time when catechists were being targeted by the repression.[31] All these communities are

---

[30]   A recent analysis carried out by Pastoral Social of the Catholic Church stated: 'It is difficult to pursue an ordered legal claim for untitled land because of the structure of the state and its service institutes; generalised corruption in the INTA and other agencies resulting in the claims becoming bogged down; non-compliance in the execution of resolutions as indicated by law; discrimination towards the indigenous population by INTA staff; those handling the claims taking advantage of lack of knowledge on the part of the representatives of the untitled communities; because of their inability to understand Spanish and read and write community representatives are tricked; the delay in pursual of claims by INTA employees results in such frustration on the part of community representatives that they arrive at the extreme of abandoning their claims' (Verapaz Diocese, November 1994).

[31]   Wilson (1995, p. 168) affirms that approximately 20% of the inhabitants of Alta

engaged in an extended process of reconstruction after the years of civil war, a fact which is widely reflected in their customary norms and in ongoing processes of legal change.

Community authority systems

At present, community authority systems are immersed in a complex process of reconstruction in the wake of the civil war involving the reconfiguration of local power. The effects of the violence continue to be evident, and in many cases 'overlaps' exist between power structures formed during the counter-insurgency period and 'civilian' authorities. However, some efforts to construct more autonomous spheres of authority based on a particular vision – and often an idealised projection – of the past and of 'traditional Q'eqchi' values' are also in evidence.

In previous decades local authority structures underwent considerable changes. As noted above, in the case of ex-*mozos-colonos* the plantation constituted a universe where the figure of the *patrón* was the ultimate authority. Auxiliary mayors were generally appointed by the farm-owner and their responsibilities included ensuring that all the *mozos-colonos* reported for work. Problems between workers were resolved directly with the farm-owner whose word was absolute. No notion of appeal or possibility of dialogue existed, as one elder in Salacüim remembered: 'There was no-one, only the supervisor who checked up on people. But he didn't really do anything, only the *patrón* because he was the owner. We were like slaves there. There was no council of elders, only with the *patrón*...no-one was supposed to complain...[if you did] you were thrown off the land at once'. If the *mozos-colonos* had problems with the owner their only recourse was to leave the farm and seek work elsewhere. Many of those interviewed in communities located on *baldíos* recognised that they now enjoyed more autonomy with regard to community definition of modes of conflict resolution than previously. In this sense then, many of the customary norms and practices currently employed are not derived directly from repeated practice over generations or from 'traditional' forms. In communities which previously existed outside the farm system, auxiliary mayors were generally perceived as the principal figures of authority prior to the civil war. However, many remembered that community elders had previously enjoyed a more central role in interpersonal conflict resolution, at the same time as acknowledging that this had declined over previous decades.

During the 1980s, counterinsurgency mechanisms promoted by the army afforded considerable power to certain individuals within rural communities who were named chiefs of the civil patrols (PACs) or military commissioners.

Verapaz are evangelicals. However, the majority of communities where fieldwork was carried out were predominantly Catholic.

These authorities were not selected by the communities themselves but imposed from outside. The PACs were directly organised by the military commissioners or by army officers and operated under the command of D-5 (Directorate of Civilian Affairs), whose policy was actively to seek out community leaders and incorporate them into the patrols (Procurador de los Derechos Humanos, 1994, p. 36). Military commissioners were widely feared within the communities: often they were the authority which intervened in local conflicts such as marital disputes, land conflicts and fights and petty thefts, even though their power derived directly from their military connections rather than any consensus on behalf of the community. During the most acute period of militarisation the authority of auxiliary mayors was weakened – many auxiliary mayors were direct victims of the violence – and the centre of local power was located in military rather than civilian authorities. Counter-insurgent structures also changed organisational patterns and values within these rural communities, legitimising the use of authoritarian methods; this had a generalised effect, leading to more hierarchical, vertical and authoritarian decision-making processes overall. Given the amount of time that such counter-insurgent structures have existed as central elements in rural communities, their influence continues to be considerable and will almost inevitably continue far beyond the formal abolition of the military commissioners and the PACs.

Undoubtedly the abolition of the military commissioners in September 1995 has had a significant impact. While in many villages the ex-commissioner continues to exercise considerable *de facto* power, they have generally never been recognised as an appropriate authority for local conflict resolution. The majority of people contrasted the methods used by the PACs, the army and the military commissioners with those currently employed within the community. However, in practice the divisions were not always so clear-cut: in a number of instances the ex-chief of the civil patrol had been elected as auxiliary mayor and in others ex-military commissioners continued to exercise considerable authority over the mayor or within the local improvement committees. In many communities, people were still afraid of ex-military commissioners and patrol chiefs, who exercised an indirect influence over conflict resolution mechanisms and the kind of disputes taken to public forums.

Civil patrols continue to operate in the area, although their presence is much reduced compared to previous years and they appear to operate with relative autonomy from the army. Alta Verapaz ceased to be a high conflict zone in about 1988 and military control over the PACs is by no means total. In some communities villagers had dissolved the patrol; in others they still select the patrol chief who continues to report to the local military base once a month, but villagers no longer carry out patrol duty. The patrol chief is not generally identified as an appropriate authority for conflict resolution, although it is widely recognised that they exercised considerable authority in previous years. However, in some villages – particularly those that had been or continue to be part of a plantation, such as Santa Anita-Las Camelias or Sacrabinja – the patrol committee constitutes the principal forum for conflict resolution, albeit renamed

at the army's behest as a 'voluntary committee for peace'.[32]

At present it appears that civilian – and in many cases religious – authority is gaining ground against the military counter-insurgency apparatus in the area; however, considerable diversity of structures and practices exists. In terms of civilian authorities, the auxiliary mayors have regained importance and are now central figures in community conflict resolution. Their authority is partly traditional and partly derived from their status as delegates of the regional municipal authorities in Cobán. Most people emphasise the legitimacy of the auxiliary mayor, given his status as elected representative of the whole community; others link his legitimacy to his role in conflict resolution prior to the civil war. However, the acceptance of the auxiliary mayor's authority depends to a large extent on his performance in the post. For the Maya – at least as expressed in ideal terms – individual authority derives from a person's ethical behaviour within the community and from their accumulated life experience. This notion of authority and the source from which it derives is perhaps one of the major differences between national political and Mayan customary authority systems; the management of such contradictions between these and western notions of democracy and representation may yet prove one of the principal challenges of democratic transition in Guatemala.

Another element in local conflict resolution structures is the improvement committees, and other sub-committees responsible for such things as education, potable water and roads. These structures are relatively new and were initially introduced by the army in the mid-1980s into 'pacified' communities.[33] However, where they are elected, these committees appear to have acquired considerable legitimacy and are recognised as an appropriate mechanism for the resolution of various conflicts, often constituting – together with the auxiliary mayor – a forum for community negotiation. In the majority of cases, committee leaders are young men with organisational abilities and they exercise an important leadership role. To a certain extent it would appear that these Q'eqchi' communities have 'appropriated' the committees, which are becoming a space for local expression and representation. Here the manner in which indigenous communities have adapted structures imposed by the state and have converted them into more autonomous spaces of local power is evidenced, a phenomenon which signifies the counter-hegemonic use of state law, providing an example of community resistance. However, in some villages the division between civil and military authority is far from clear. In one village, for example, the ex-commissioner was the (apparently self-appointed) president of the improvement committee and was a source of much discord. However, in

---

[32]   Former President Ramiro de León Carpio (1993-1996) suggested that civil patrols would be transformed into 'peace and development committees' and army sources estimate that more than 127,000 Guatemalans are already organised in such groups (RFK Memorial Center for Human Rights, 1996, p. 3).

[33]   In 1988, Wilson (1995, p. 240) noted a high degree of collaboration between the improvement committees and the army in Alta Verapaz.

another community the ex-commissioner exercised a leadership role in various improvement committees and was generally recognised as a force favouring reconciliation and unification of the village. In a further settlement where religious divisions and land conflicts were particularly acute, committee leaders were self-appointed instead of being elected and their legitimacy was not universally accepted. Evidently, while the improvement committees can exist as a space for community self-determination with regard to local conflicts, their legitimacy and *modus operandi* depends on the particular circumstances, levels of consensus and power relations found within each village.

The opinion of the elders has a particular resonance for the Q'eqchi'; they are the guardians of history and ritual specialists. In contrast to some areas in western Guatemala, the authority of the elders among the Q'eqchi' has generally not existed as a formal structure, such as the council of *principales* or the *alcaldía indígena*. However, many of those interviewed agreed that in previous years people had tended to seek out the advice of elders in cases of intra-familial or neighbourhood disputes. The elders' authority was considerably reduced in recent decades, firstly due to the influence of catechists of the Catholic Church in the 1970s who contributed to their marginalisation in ritual and religious matters, and secondly during the years of the civil war when their authority was supplanted by the military commissioners and civil patrol chiefs. Many elders died during the violence of the early 1980s and traditional ritual observances were severely disrupted. As one elder put it: 'With the war, we lost our memory.'

Within the military camps, the counter-insurgency strategy was calculated to destroy elders' authority. As one interviewee in Peña Blanca remembered: 'we lived for a time on the plantation at Las Conchas, we were organised into civil defence committees or groups. The elders were formed into separate groups, not out of respect but so that they could collect rubbish...for example, when the latrines filled up the elders were sent to clean them...anyone who refused was harshly punished. When the soldiers saw a bright young kid (*un "patojo" listo*) they would put them in charge of the civil patrol and teach them to be strict and not to be afraid of the elders.'

With respect to traditional religious authorities, the *cofradías* were weakened in the 1970s due to the opposition of the catechists and the Catholic Church in general to traditional rituals, especially those involving the veneration of images of saints and the use of the traditional alcoholic beverage *boj*. Subsequently, during the civil war, the *cofradías* were practically destroyed in most of the area. It was impossible to maintain the complexity of ritual offerings to the saints – which required much costly paraphernalia, such as candles, incense, rockets, costumes and masks – when fleeing from the patrols and the army in the mountains. The catechists, by contrast – generally the only literate members of the community – were able to rely on the biblical texts. During the period of refuge in the jungle the catechists therefore preserved and reinforced their leadership role in religious affairs while the authority of the *mayordomos*

of the *cofradías* was weakened. *Cofradías* are currently regaining their presence within the communities and festivals for the patron saints are now taking place for the first time in over a decade. However, the role of the *mayordomos* tends to be more a ritual and religious one, and in general they have little direct involvement in community conflict resolution.

Catechists continue to exercise an important leadership role, especially in settlements where all the people are nominally Catholic. Often in very small communities, the weekly celebration of the 'Word of God' (*celebración de la palabra*) constitutes the main forum for discussion and resolution of personal and communal conflicts. Overall the role of the elders and catechists in conflict resolution depends on the degree of religious homogeneity. Evangelicals reject traditional Mayan religious rites and therefore tend to have less respect for the authority of the elders (which derives in considerable measure from their ritual functions). In communities characterised by religious division, such as Salacüim, problems between members of the same religious denomination tend to be discussed initially within their respective churches.

Direct participation of elders in conflict resolution forums varies; sometimes the community or the parties in conflict seek the advice of an elder, but in many villages the elders do not take part in meetings with the auxiliary mayor and the improvement committees and appear to have little direct involvement in conflict resolution within the community. In some places leaders (mostly young men) of Mayan organisations such as *Xch'ool Ixim* (which forms part of the umbrella organisation *Majawil Q'ij*) or the catechists are presently encouraging the elders to take a more active role in these affairs. However, the preeminence of the elders in ritual matters and the centrality of the ritual offering (*mayejak*) in Q'eqchi' conceptions of harmony means that community elders play an important role, albeit an indirect one, in the maintenance of harmony and consensus within the villages (see section below, 'Customary law and Q'eqchi' cosmovision').

In contrast to past practice, the pastoral work of the Catholic Church in the region is attempting to unify the work of catechists and elders; this appears to be contributing to a strengthening of the elders' authority, at least in the spiritual and religious dimension. In addition, Mayan organisations such as *Xch'ool Ixim* are working to recover the role of the elders in community organisation. The formation of councils of elders (supported by the Catholic Church and by Mayan organisations) is a new phenomenon which could eventually lead to a strengthening of the elders' role in local conflict resolution. Representatives of *Xch'ool Ixim* interviewed stressed that elders often had more authority to mediate in conflicts between people than elected representatives because of their life experience: 'sometimes they elect a youngster [as auxiliary mayor] who doesn't have the ability to solve these cases...he doesn't know anything and has no ideas about how to solve problems; [in contrast] the elder has lived for a long time, he's lived many things, he knows many things, people pay attention to him because he knows about what he advises from direct experience.' A new

process of reconstruction of community authority based on a particular vision of 'Mayan authority' is in evidence here, an authority and legitimacy which derives from lived experience and the behaviour of an individual within the community rather than from popular sovereignty.

Resolution and sanctioning processes

Customary law is generally characterised by flexible processes of negotiation and conciliation between the parties to a conflict, and tends to emphasise restitutive measures as a solution. López Godínez (1994, p. 12) has noted that a characteristic of customary law is 'the use of persuasive resources, resort to religious and moral aspects and to reasonable treatment'. When people live in close proximity – and have to continue to live side by side – community conflict resolution mechanisms generally emphasise the reestablishment of good relations between villagers and the search for means of resolution acceptable to both parties. These broad procedural features were repeatedly encountered in the fieldwork area, but many changes in procedure in recent years were also in evidence.

As noted above, methods of conflict resolution before the 1980s depended to a large extent on whether or not people lived on plantations. For ex-*mozos-colonos* the farm-owner was the arbiter of conflicts and the intermediary with state authorities. As one interviewee noted: 'if the *patrón* had enough of a conflict, anyone who had committed a grave offence was sent to the courts. Only the *patrón* knew if he would stand trial or go straight to prison.' Others remembered the direct application of 'justice' by the farm-owners themselves: 'The *patrones*, they punished people for a week, sending them to carry [sacks of produce] to Cobán.' In communities outside the plantation system, disputes tended to be resolved directly between the parties in conflict, sometimes with the help of an elder or the auxiliary mayor. As the auxiliary mayor in Xalaché stated: 'Before the war, people sought advice among themselves if there were problems...any offence was discussed, that was the function of the auxiliary mayor before.'

During the 1980s, military influence over forms of conflict resolution was particularly marked in the area. Often the role of the local military base was decisive. The practice was established of taking complaints about petty theft, demarcation disputes, and even marital conflicts to the military authorities. This represented a particularly sinister form of the 'strategic use of law' which Sierra (1995b, p. 102) has defined in the following terms: 'it has to do with the judicial options open to members of an ethnic group, the possibility to manipulate these is linked to the power structure and conflicts which divide them.' People within the villages who had links to the military were able to employ this 'strategic resource' (albeit an extra-judicial one) and petition the army directly to intervene in their favour. As one leader in Peña Blanca recalled: 'Any error, any offence whatsoever was taken to the military base ... accusing them, threatening

their own indigenous brothers and sisters that they were going to send them to
the military base to be punished.' Normal practice was for the military to call
the parties in conflict into the base to sort out the problem; this was usually
effected in a highly authoritarian fashion. As one interviewee from Sajacoc
remembered: 'the [military] base forced us to go to them if we had a problem,
but all they ever did was threaten people so that they would stop making
problems...that was the only solution they gave, but that is not the solution.'
Today many people continue to take their problems to the military authorities
for resolution, and the threat of denouncing someone at the military base is still
used. However, it appears that civic consciousness is gaining ground and people
widely acknowledge that resort to such tactics is not as common as in previous
years. As one of the auxiliary mayors in Salacüim stated: 'Before people went
to the military base, now they don't, the base is not the right place. If there's a
problem we try to reconcile [the parties] and if we can't then we leave it in the
hands of the courts, this is what we have learnt.' It appears that little by little
these communities are losing their dependence on the military for conflict
mediation. However, it also seems that the military authorities themselves no
longer have such a strong disposition to involve themselves in community
conflicts; undoubtedly this is an important structural factor in the changes
currently occurring at local level.

The main procedural element in customary forms of conflict resolution
among these Q'eqchi' communities was the use of extended discussion. The
discussion of problems was used to try and arrive at a mutually satisfactory
solution for parties to a dispute. The *process* is often as important as the final
result and constitutes a corrective space, a form of mediation and a moral
sanction in itself. Dialogue was repeatedly referred to as essential if problems
were not to fester.[34] The motive of the offending party is an important factor in
the customary resolution of conflicts; normally who an offender is and why they
have committed an offence is taken into account, and this influences the final
sanction applied. This contrasts with the national legal system, where penalties
for certain offences are relatively fixed. Sometimes dialogue takes place only
between the parties to a dispute or within the family; in other instances with the
additional presence of community representatives (auxiliary mayors,
improvement committees, catechists etc.); sometimes, when the dispute affects
everyone, it is discussed among the entire community. The active participation
of the community varies from village to village; in general villagers stressed
that community-level meetings were a relatively new practice. This was related
to the changes in the geographic and spatial configuration of these communities
which occurred during the 1980s; the fact that people now lived in much closer

---

[34]   Rebecca Cox similarly emphasises dialogue as a form of conflict resolution in the
case of Sololá, citing an interviewee who said, 'we come to think with the auxiliary
mayor' (Cox, 1996, unpaginated). Guisela Mayén (ASIES, 1995, p. 19) concludes that
discussion and extended analysis are important mechanisms of conflict resolution for the
Q'eqchi', methods which she contrasts with more 'summary' forms of justice meted out
by the military commissioners and the civil patrols.

physical proximity had increased the frequency of local conflicts (for example, problems with domestic animals), but had also facilitated the consolidation of community mechanisms of conflict resolution. As the auxiliary mayor in San Pedro Ixloc observed: 'If we have problems now it's because we're living so close together, for this reason we have meetings every so often to calm the problems.'

The participation of women in forums for conflict resolution varied considerably. In some villages women never took part in meetings, in others both male and female members of the community were present. If the disputes directly involved women then they would take part in the resolution process. While many people signalled the division of labour as the main reason why women did not attend meetings (they were generally engaged in food preparation or childcare when the meetings took place), others claimed that women were afraid or ashamed to participate. As one woman from Sajacoc maintained: 'the women who were born here...when they're called to a meeting they're afraid. They think it's going to be like it was during the violence. Sometimes they would call people to a meeting and they would kill them.' Some women expressed a desire for greater participation: a woman from San Lorenzo II complained that 'the men don't take us into account...they don't tell us anything about the meetings. They think that because we wear *cortes* [the traditional women's skirt] we don't know anything, because we don't know how to read and write, they think we have no wisdom but that's not true.' The example of nearby Communities of the Population in Resistance (CPRs) or returned refugees in the neighbouring department of El Quiché, where it was perceived that women had a more active role, were also mentioned by some of the women interviewed, who remarked on the contrast between the role of women in these communities and their own. The gender dimension of customary law in Guatemala is little studied and undoubtedly more detailed studies are needed to increase awareness of these issues.

In nearly all cases, those interviewed emphasised the legitimacy of the auxiliary mayor in conflict mediation. Many contrasted their current position as members of a community able to select its own representatives with the situation they previously experienced as *mozos-colonos* on the plantations. As one interviewee in Gancho Caoba put it: 'now we have our own mayors, now we don't have *patrones*'. The function of community representatives is to give advice and calm down heated tempers. However, a frequent complaint was that offenders often paid no attention to the auxiliary mayor and disputes remained unresolved. In certain cases, when elected representatives could not provide an adequate solution, a third party with moral authority within the community was sought to intervene (sometimes this would be an elder). For example, a case was reported from the village of Peña Blanca where many disputes occurred between neighbours because of widespread pig-raising (the pigs tended to trespass on other people's territory). Neither the auxiliary mayor nor the improvement committee were able to come up with a solution, so the parties in dispute sought the aid of another person who reached a satisfactory agreement

together with the entire community in a general assembly (a solomonic solution wherein everyone was obliged to sell their pigs).

Current modes of conflict resolution within the villages are characterised by the relative absence of punitive sanctions. These tend to be associated with the period of militarisation, when moral sanction was replaced by physical punishment. The hardening of sanctions has been signalled by some authors (Jan de Vos, cited in Gómez Rivera, 1995, p. 214) as a sign of loss of consensus. In this region of Alta Verapaz, during a period of acute divisions among community members, the idea of punitive sanctions undoubtedly gained currency, fomented by the military's counter-insurgency strategy. The use of clandestine jails in the villages was quite common; one interviewee from Chamá Grande remembered: 'There were "people's jails", a hole in the ground where the civil patrol chiefs or military commissioners would send people for minor offences. They spent a whole day or a night tied up down there.' However, it is interesting to note that the idea of punitive sanctions dates back to the plantation system, and particularly to the period of the Ubico dictatorship. One ex-*mozo-colono* nostalgically recalled the time of Ubico as one when the national system of 'justice' functioned: 'in Ubico's time it was really good. Whoever committed a crime, killed or did something very bad, was sent to be shot. In those times things were sorted out properly.' However, the idea of punitive sanctions appears always to have been an imposed idea linked to an external power (the *patrón*, the state or the army). Today many communities are attempting to construct more consensual modes of conflict resolution. Whilst there were some reports that offenders were made to clear land or pathways as a form of sanction, most people stressed this was not a common practice, and others directly linked it to the influence of the military commissioners. As one interviewee from Sajacoc stated: 'Here we don't punish that way any more. That was to do with the military, that's where it came from. [For a time] we still used to sanction people like that, we made them dig the football pitch. But now we hardly work like that, we try and find alternative solutions to the problems.'

Flexible solutions to various kinds of dispute are developed through dialogue; as is characteristic of customary law, each conflict can be resolved in a different manner. Common mechanisms employed include: calling to attention; the acknowledgement of wrongdoing or lack of respect on the part of the offending party; pardon; restitution (where possible) or compensation in cash or in kind; and reconciliation. Calling the offender to attention is an important mechanism in itself and constitutes a moral sanction based on shame, as one interviewee stated: 'they are called to attention so that they feel punished'. Often the guilty party is verbally chastised and warned not to repeat their offence. Sometimes the auxiliary mayor – if literate – will record the dispute in the municipal register (*libro de actas*) which is eventually deposited with the regional municipal authorities. In most cases this only occurs once the person concerned has been called to attention three times and has failed to change their behaviour or make good their error. The use of the municipal register is considered a moral sanction based on shaming the offender before the

community. As one interviewee from Las Conchas stated: 'You can easily tell who doesn't behave well, because the story is preserved in the municipal register, it is never erased.' However, it was also noted that persistent offenders rarely pay any attention to this mechanism. The importance of restitutive sanctions was emphasised by many; in rural communities where labour power is vital for material survival, imprisonment is often not seen as the most adequate means of sanction, given that such an outcome fails to compensate the damage suffered by the injured party (for example, crops damaged by animals) and involves the punishment not just of the offender but of all their family. The main idea, therefore, is that the offender should acknowledge and make good their error before the community, not that they should be punished *per se.* Solutions should ideally be acceptable to the parties to a dispute and to the community as a whole.

The concept of pardon, like that of acknowledgement of error, is particularly important in customary conflict resolution. A man in Las Conchas stated that: 'advice is only given so that people can right their wrong, but we don't do anything, we can't harm anyone, so that's how it stays and we forgive them.' The idea that it is wrong to make someone suffer is linked to the notion of punishment expressed in Q'eqchi' cosmovision, wherein the divinities and nature, not human beings, are responsible for meting out punishment (see following section, 'Customary law and Q'eqchi' cosmovision').). There is also a strong perception, undoubtedly linked to Catholic doctrine, that punishment and conflict are against the will of God, and that wrongdoings should be forgiven. As one elder from Semuy II put it: 'God wants us to live in harmony. We want peace, peace with God and peace with the law.' Another man from Las Conchas commented: 'we believe in God and he doesn't like it if a person who commits a wrongdoing is sent before the courts, knowing that they will suffer a lot'.

In the event that the offending party fails to correct their behaviour or heed advice, one moral sanction frequently mentioned was exclusion from community life. During the punishment, the community ceases speaking to the individual concerned and stops collaborating in their agricultural endeavours, such as the clearing and planting of corn. Given that individual identity is inextricably linked to the community, exclusion from community life is a very strong moral sanction.[35] As one leader from Peña Blanca described it: 'The only sanction that the community imposes is to separate these people from community life. That is, not talk to them, you have to leave them alone if they won't listen to anyone, if they won't make amends. They are left all alone, no-one visits them, no-one helps them with their work. In that time they must feel what they have done, they must reflect upon it and think about how to return to community life.' This kind of moral sanction therefore provides a space for

---

[35]   For a particularly extreme case of exclusion from community life in Bali, see Geertz (1983, pp. 175-9).

reflection and self-correction. As stated above, in customary conflict resolution it is essential that the offending party recognises their error and makes good their wrongdoing in the eyes of the community. However, it was also reported that in extreme cases, such as when a person was accused of causing the death of another through witchcraft, the generally adopted course of action was to expel the accused and their family from the community.

All those interviewed concurred that community means of conflict resolution were voluntary in nature; local authorities had few coercive resources except the threat to take the offending party to official state justice. Many linked the increase in conflicts and the inefficiency of customary solutions to what they identified as a growing lack of respect. Solares (1995) has suggested that, for the Maya, the concept of respect is the nearest thing that exists to the western concept of human rights. Here 'respect' is understood as a normative ideal, a historical memory and a projection of how people should interact and behave towards each other in the community, which encapsulates a series of moral codes and prohibitions based on Maya-Q'eqchi' cosmovision. 'Respect', therefore, constitutes the moral 'glue' binding the normative order and implies that every person in the community knows their role and the way in which they should behave. Respect was acutely disarticulated by the violence of the 1980s; for example, many teachings traditionally passed from one generation to another were no longer transmitted because of displacement, separation or the death of family members. In addition, counter-insurgency mechanisms and the experience of living within military camps damaged preexisting behavioural codes; as one interviewee from Peña Blanca recalled: 'in [El Carmen] where the army had us grouped together, people lost all respect...for example, before the violence unmarried young women were not allowed to dance with young men. Dances were women with women and men with men...but what did the army do? They arranged dances and forced the young men and women to dance together, close together, and whoever refused was punished...At the beginning it was really difficult for them, they couldn't do it, but then the custom of *machismo* began to take hold, when a young kid thinks he's better than an elder.' Undoubtedly another key factor in the breakdown of the preexisting normative order is socio-economic change. In many cases younger generations no longer pay attention to the elders because they value western education above traditional oral history. In other instances, the experience of military service has radically changed their outlook and behaviour.

The idea of equality is a central element in Q'eqchi' cosmovision, but in practice this has been slowly eroded as economic differentiation within the communities has advanced, particularly in the larger settlements such as Chamá Grande and Salacüim where cardamom production has significantly expanded in recent years. As one Catholic priest in the Diocese noted: 'Before people respected each other more and there were fewer problems..the problem now is that as development, or social promotion, has been introduced in many communities people are opening up to outside influences and this is increasing inequalities...such differences cause envy (*envidia*).'

The question of how to construct community norms based on the fundamental values of Mayan cosmovision in the wake of the civil war and in such a transformed socio-economic environment is something that leaders of these communities are currently trying to address. However, it is possible that current efforts on the part of both Mayan popular organisations and sectors of the Catholic Church to reevaluate and 'recover' Q'eqchi' culture will contribute to the construction of new normative models based on a particular, idealised vision of the past, which has the potential in turn to strengthen the capacity of these indigenous rural communities for self-definition and self-regulation.

Customary law and Q'eqchi' cosmovision

Evidently, as was emphasised in the first section of this paper, culture is historically constructed and does not exist separately from social structure. However, certain elements of existing Maya-Q'eqchi' cosmovision can be understood as an *ideological manifestation* of a culturally specific normative order, and should be afforded due attention given the relationship that such elements have, albeit indirectly, with community systems of conflict resolution (here we refer to the idea of 'law as cultural system' indicated above in section four, 'Approaches to analysing law: understanding customary law'). In order to understand the specificity of customary norms and practices in these Mayan communities, it is essential to analyse cultural ideas expressed in the local cosmovision pertaining to concepts of order, transgression and sanction. In this sense it is impossible to separate the legal and spiritual spheres. It should be emphasised that this section does not pretend to present an exhaustive survey of Q'eqchi' cosmovision, but rather to signal avenues for further consideration and research.

For Mayan people in general, as Edgar Esquit and Carlos Ochoa (1996) have noted, the world is composed of three basic elements: society (individuals, community, family); nature (physical spaces or territory); and the sacred (perceptions of the divinities, ritual, and forms of describing the relationship between people, nature and the divine). In general, regulatory mechanisms seek a balance between these three elements. For the Q'eqchi', the importance of customary mechanisms of conflict resolution and solutions which emphasise reconciliation can be linked to the importance which the reestablishment of harmonious social relations occupies within their cosmovision. This is characterised principally by the reciprocal relationship which is seen to exist between people, the land and the mountain-valley divinities, the *tzuultaq'as* (see Wilson, 1995; Cabarrús, 1979).

In Q'eqchi' cosmovision, the success of agricultural production and the preservation of individual health are intimately linked to observation of the rituals which regulate the relationship between people, nature and the *tzuultaq'a*. The *tzuultaq'as* are the owners of the earth and people have to carry

out ritual offerings (*mayejak*) and *tz'amaank* (the requesting of permission) in order to sow and reap their crops and receive plentiful harvests. As Cabarrús (1979, pp. 40-2) notes: 'For the Q'eqchi' the *Tzuultaq'a* is the owner and master of all things. People have no option but to ask for his 'permission' and his 'licence' in order to work, be that on the land or in hunting activities...to sow or harvest without 'permission' implies a sin or blame for the Q'eqchi'. This is the case even if the individual is not aware of this or – as in the case of the younger generation – do not want to [carry out the ritual offerings]. Irrespective of this they are guilty to some extent...and this will bring consequences.'

The concept of *maak*, which for the Q'eqchi' includes notions of crime, omission, fault or blame and sin, involves the idea of moral transgressions and offences. Examples include maltreatment of wives or husbands, the lack of respect towards elders, as well as the failure to ask permission of the *tzuultaq'as* through the appropriate mechanisms for the sowing of crops. It is believed that such transgressions are punished by the *tzuultaq'as* in the form of sickness, poor harvests or spirit loss (Wilson, 1995, p. 145). Relevant also here is the concept of *awas*, something which Esquit and Ochoa (1996) have indicated exists in similar form for the K'iche' and Kaqchikel Maya. *Awas* is a difficult concept to translate and includes the dual notion of prohibition and punishment. Father Stephen Haeserijn has described it as 'the positive effect produced when a thing is used or treated according to its nature...and the bad effect, the punishment which that thing gives, when it is used against its nature. People generally judge "*awas*" according to its negative effect.' Haeserijn has pointed out: 'the pedagogic effect...of the concept of '*awas*' is very broad. Man learns that, in his actions, he must take into account the rights of others and of things, because, if he does not, the '*awas*' is there to punish the transgressor' (1995, p. 51). It is maintained here that the relative absence of punitive sanctions among Q'eqchi' communities studied is – at least in part – linked to this concept. According to the cosmovision, people are not those charged with carrying out punishment; instead the *awas* will resolve matters. *Awas*, therefore, constitutes a kind of ethical and moral code which implies a series of prohibitions, taboos and ritual obligations in order to avoid punishment. Cabarrús has a very critical view of this symbolic order, arguing that: 'Q'eqchi's live in a state of fear and proof of this is the excessive ritualisation which surrounds their lives' (1979, p. 55). It should be emphasised that these notions of prohibition and guilt are not merely 'autochthonous', a product of some primordial essentialist order, but have historically been manipulated by external forces, be they the Catholic Church, German plantation owners at the end of the nineteenth century, or the army during the height of the civil war. The notion of *maak* was particularly manipulated by the military during the 1980s, as they tried to convince the indigenous population that the violence they had suffered was their own fault.

In Q'eqchi' cosmovision, ritual is something which unifies community life and reaffirms the reciprocal relationship between people, the earth and the *tzuultaq'as*. The majority of symbolic and ritual structures reaffirm ideas of reciprocity and mutual labour obligations, of thanksgiving or of asking

permission of the land itself. Unity between the members of a community is perceived as particularly important for the successful performance of the offering or *mayejak*, particularly in the case of the sowing and harvest of corn (which implies considerable reciprocal labour obligations).[36] According to beliefs expressed through the cosmovision, if harmony does not exist within the community then good crops will be obtained with great difficulty.

During the peak of the violence, many traditional rituals were interrupted and reciprocal norms and obligations fatally weakened. As one elder from Semuy II remembered: 'before we just carried out the *mayejak*. After the violence the soldiers came and they changed us. What did they say in the evangelical temples? They said "we are the only ones who will be saved, those who burn incense and candles will die." So people were afraid to perform the *mayejak*.' In many interviews with elders the idea of sin or wrongdoing was often linked to the failure to observe and respect such traditions within the community. Restitutive measures suggested focused on correct ritual observance in order to reestablish harmony with God and the *tzuultaq'as*. As one elder in San Lorenzo II stated, when they reinitiated *mayejak*, 'little by little we began to have peace and little by little our ancestors began to be with us'. The continuity of these rituals is perceived by the majority of elders – and now also by many catechists – as something essential for harmonious relations and social peace within the community. As another elder from Puribal put it: 'we have to make peace as God demands in order to avoid problems. Now we elders are working with the ideas and thoughts that our forefathers left us. We are performing the *mayejak*, because our forefathers made offerings with the *mayejak*, they observed the festivals, *they knew how to understand each other*.' (Emphasis added.) In recent years, with the support of more progressive sectors of the Catholic Church and Mayan popular organisations, a resurgence of traditional ritual is taking place, such as festivals of the patron saints and the *mayejak de la siembra* or offering at the time of corn planting. It may be that this phenomenon is reinforcing community norms of reciprocity and conciliation, although religious division in some villages means that not all members of the community are involved in such observations. In addition many young people no longer practise or participate in traditional rituals. Consequently, the idealised normative order expressed in the cosmovision only pertains to parts of many communities, and is not binding for all village members.[37] Its observance depends on a number of factors, including levels of

---

[36]   Wilson (1995, p. 93), writing about the Q'eqchi', affirms that: 'Involvement in labor reciprocity is both a defining feature of indigenous identity and a criterion of community membership.'

[37]   In many cases young people complained that the elders no longer passed on their knowledge, while some elders said they didn't speak 'because people don't want to listen, they no longer think it's important'. It can also be hypothesised that many ritual aspects of Q'eqchi' norms and practices retain their strength precisely because of their secretive quality and that making them public would cause them to lose much of their power. Such factors must be a methodological consideration for any research into customary law.

community cohesion, the degree of religious division and the extent of socio-economic development or state intromission.

An essential part of any research on customary law must therefore be an exploration of the links between local means of conflict resolution and the particularities of the local cosmovision in particular historical periods. Here it is suggested that a significant, albeit indirect, relationship exists between the cosmovision and legal norms and practices in Q'eqchi' communities studied. It is also proposed that elements of this cosmovision can provide important components for the reconstruction of more autonomous normative systems of organisation and conflict resolution in rural indigenous communities.

The 'strategic use of law'

This paper has emphasised the dialectical relationship which exists between customary norms and state law. Within this relationship of domination and resistance, the indigenous community can be understood, as Moore (1986) has suggested, as a 'semi-autonomous social field'; that is, a generator of its own legal norms and practices. However, state law and practice continues to define the limits of what communities can and cannot determine as local practice. Sometimes this occurs by default, where the inefficiency or lack of coverage of state law encourages indigenous communities to develop their own methods of conflict resolution. In the wake of the period of acute militarisation, a certain relaxation of direct military control has occurred, permitting greater space for self-definition of authority structures and mechanisms of conflict resolution in the Q'eqchi' communities studied. However, as noted above, considerable fear still exists as a consequence of the violence and the imposition of military structures. Militarism has permeated these communities in many subtle forms and continues to be a fundamental conditioning factor.

Chenaut and Sierra (1995, p. 14) have highlighted the 'multiple relations of mediation and transaction' which exist between the customary legal system and state law. This relationship between local and national law was evident during fieldwork, as was the strategic use of both legal spheres by individuals and communities. In contrast to the 1980s, when certain community members capitalised on their military connections to resolve disputes in their favour, the strategic use of law is currently expressed in an 'operative division' of conflicts and cases. The kind of offences which are generally resolved within the community include petty thefts, damage to another's property, problems with domestic animals, disputes over land boundaries and rights of access, insults, matrimonial problems, fights and problems with children. Such cases tended to be resolved through the previously described processes of dialogue, restitution or compensation. However, customary mechanisms were not always characterised by their efficiency and were often unable to secure a satisfactory solution to local conflicts.

In cases where resolution was not possible two options were open: no action was taken and 'things stayed as they were' (a common outcome), or the dispute was taken to the regional mayor or state tribunals in the municipal capital of Cobán. The regional mayor was generally recognised as the next appropriate step when community efforts at mediation failed to reach an acceptable solution. However, many of those interviewed also acknowledged that this was not always particularly desirable or efficient, given that externally imposed solutions generally failed to provide restitution or compensation to the offended party. Some observed 'the first thing the regional mayor does is impose a fine.' However, other people indicated that punitive sanctions applied by the state authorities were appropriate if the offender was very obstinate and would not heed communal mediation. As one interviewee in Xalaché stated: 'if they don't respect community leaders, they should go to the courts'. Lack of respect towards the community in this sense was often interpreted as a transgression in itself which merited sanction. In general, however, minor disputes tended not to be taken to Cobán, principally because of reasons of distance and cost, in addition to generalised perceptions that the national judicial system was slow and rarely provided solutions.

However, in areas of the department where rural communities have easier access to the courts, recourse to state justice is much more common. As Chenaut and Sierra (1995, p. 27) have indicated: 'social actors make strategic use of different legal levels, recurring to them or not recurring to them according to convenience and the interests and values at stake in a conflict, as well as the practical ends they pursue'. In the Chamá region, greater state intromission since the early 1980s appears to have contributed in part to a growing tendency for people to take their grievances before state tribunals. As one interviewee in Nimlasa'chal stated: 'now we don't like to resolve our own problems among ourselves and sometimes we like to make them worse with the law'. It remains to be seen whether greater socio-economic development in the region in future years will reinforce the tendency observable in more urban areas for indigenous communities of increased use of the state legal system. In part this will depend on the conscious efforts of local Mayan leaders and of the communities themselves to value and reinforce community norms and practices of conflict resolution, in addition to the presence of changes at national level which afford greater opportunities to Mayan communities for increased autonomy and self-determination.

Offences or problems which could not be resolved within the community included homicides, serious physical harm to people or property and land conflicts. A generalised perception exists that such problems should not be the responsibility of community authorities but rather should be taken to the regional mayor, the courts or the INTA. In some cases, conflicts between neighbouring communities over land boundaries were resolved without the external intervention of third parties. However, land conflicts generally required intervention on the part of state authorities. Sometimes the entire community sought external mediation; for example, the village of San Pedro Ixloc was

pursuing legal measures in the courts to resolve a land conflict which had previously resulted in intra-communal violence. However, many people commented that in the case of serious crimes the offenders often acted with total impunity, a fact which some interviewees explicitly linked to existing relationships between transgressors and members of the military. Others attributed impunity to the inefficiency of the state judiciary. In cases where it was perceived that offenders enjoyed the support of military officers people were often frightened formally to accuse them before the courts.

Perceptions of the deficiencies of the national judicial system were widespread. State legal authorities were seen as inefficient – 'if you go to the courts, it never gets anywhere..the authorities don't investigate properly' – or corrupt: 'now you can buy and sell the authorities...the judges themselves deceive and rob people. Lawyers and judges are always happy when someone arrives because they can get money out of them.' For many of those interviewed recourse to state justice often meant the complication of a problem rather than its resolution. As one man from Las Pacayas stated: 'if you go to the courts it just complicates matters, you lose time, money and then there's the distance between our community and the courts'. Solutions administered by the national judicial system – fines or imprisonment – were generally contrasted with more considered and consensual forms originating within the community. The barriers of illiteracy and monlinguism were often cited as further disincentives to seeking redress within the national legal system.

All those interviewed agreed that the efficacy of local norms and practices depends on the will of those involved and the consensus of the community itself. Many observed that local conflict resolution methods often failed to exercise sufficient pressure against persistent offenders who refused to recognise local authority. However, the overwhelming majority expressed a preference for a system where culturally appropriate norms were applied by local representatives via oral proceedings carried out in their own language. Many of those interviewed indicated a desire to recover 'past' forms of community conflict resolution; as one interviewee in Nimlasa'chal stated: 'it would be good if we stopped this way of solving problems [taking them to the courts] and went back to living as our forefathers did'. Such phenomena evidence a process by which collective imaginings of past customary norms form part of a wider process of Maya-Q'eqchi' identity construction in the present. Historical narrative can here be understood as a form of resistance; as Nordstrom and Martin (1992, p. 12) have noted: 'forms of resistance may be encoded in practices that nourish a consciousness of history even in the face of structures of domination'. The use of certain norms and practices of local conflict resolution therefore constitute a form of cultural expression and resistance which plays a central role in the strengthening of community self-definition. In this sense, it also represents an example of the counter-hegemonic use of law, strengthening the position of Mayan peoples in the national sphere. Members of these communities generally identify with local forms of conflict resolution and feel alienated from the national legal system, where many

experience discrimination and racism. However, it was also widely emphasised that many problems affecting the villages – such as the lack of secure land title and basic service provision – cannot be resolved via customary mechanisms by the communities themselves.

In summary, then, this brief analysis of customary law in Alta Verapaz has illustrated some elements of continuity and change in local customary practice, while trying to situate these within their historical and structural context. The norms and practices of conflict resolution described here demonstrate the active and dynamic interaction between state law and customary law on the one hand, and the connections between local modes of dispute settlement and Q'eqchi' cosmovision on the other. An attempt has been made to present a critical analysis of local authority structures, signalling some of the power dynamics and external links which are superimposed onto local customary processes.

7. Customary law and legal reform

A critical, historical examination of customary law and legal pluralism highlights the fact that not all forms of legal (or political) order originate in state power. The existence of legal plurality means we need to examine the different ways in which indigenous groups conceive of ordering social relationships and ways of determining truth and justice. A central challenge in the current transition towards the creation of an inclusive, pluralist state in Guatemala is the development of a new relationship between traditionally subordinated groups, their legal thought and practice, and the state. Equality before the law must encompass cultural diversity and difference, or it risks being discriminatory by failing to recognise that cultural diversity. Agents of the national judicial system need to increase their knowledge of Mayan norms and practices, become familiar with rural indigenous communities and work to strengthen the internal mechanisms, methods of dialogue and participatory spaces so that local people themselves can arrive at consensual settlements which reincorporate offenders into the community. At the same time, any judicial order must respect universal norms of human rights and cannot accept practices which violate this in the name of accepting cultural diversity. Some customs may conflict with universal standards of human rights, such as expulsion from communities, or persecution of individuals because of witchcraft accusations.[38] However, it should be stressed that customary law does not mean summary justice: numerous studies of customary law reveal the existence of complex systems to tackle and resolve social conflict. As Yrigoyen has argued (1995, p. 16): 'Contrary to the idea that systems of popular justice consist in "lynchings" or "excessive violence", research has described diverse systems of social control and regulation which,

---

[38] One example is the notorious case of San Juan Chamula, Chiapas, Mexico, where members of protestant sects were violently expelled after 1992 by so-called 'traditionalists' within the Chamula community. For an excellent analysis of the Chamula case, see Gómez Rivera (1995).

in general, display symbolic and instrumental mechanisms to channel, level or resolve social conflict.' The public lynchings and beatings which have occupied the headlines in Guatemala over the past two years are better understood as a desperate response to impunity and the failure of the national legal system to deliver justice, than as customary law.[39] Customary legal practice in indigenous communities constitutes a rich and varied alternative normative and organisational structure, whose greater recognition can enrich and strengthen the democratic and plural nature of the Guatemalan state.

Although customary and state law share the characteristics that they both aim (at least in theory) to limit individual behaviour for the collective good and ensure the accountability of both rulers and ruled, in policy terms the task of integrating western and non-western legal cultures is far from easy and may often involve clashes. The western legal system is one of 'rule-based adjudication'; that is, one in which, in general, little element of compromise is encouraged.[40] Once a dispute comes before a court, the judge is expected to decide the matter rather than try to mediate between the two parties. Here the role of the defendant and accused – and of motive – is minimised, whereas in non-occidental legal systems the focus of the legal (or conflict resolution) process tends to be on the parties involved and the reasons why a given dispute occurred. Judicial outcomes in western legal systems are based around the notion of sanction. Micro-level 'legal systems', that is systems constructed within communities where most people know each other, are – almost inevitably – predicated on a greater role for reaching compromise between disputing parties (who have to continue living side by side). Local conflict resolution mechanisms are often designed to accommodate and solve specific problems. Different cultural perceptions of truth, guilt and confession also exist: in the national legal system, confession is an indicator of guilt and is followed by sanction. For the Maya, the acknowledgement of guilt or blame is generally a mitigating factor and forms an important part of conflict resolution. As López Godínez (1976) has demonstrated, this difference often prejudices indigenous people within the national legal system.

As Laura Nader (1990, p. 108) has stated, local legal resolution is 'an interactional process framed by cultural experience'. As emphasised above, views of compromise and adjudication will depend to a large extent on the local cosmovision and cultural understandings of conflict. For example, Jane Collier's study in Zinacantan (Collier, 1973) showed that the Zinacantecos

---

[39]   In the case of Sololá, Cox (1996, unpaginated) noted that people's desire for sanctions and punishment had increased over the last twenty years, a result of the spread of ideas contained in the national judicial system (which gives priority to sanction) and of the period of acute militarisation. In the absence of an effective response by the national judicial system, she noted that acts of violence and vengeance were increasing, but stressed that such practices were contrary to customary norms.

[40]   However, the phenomenon of 'plea-bargaining' within the US judicial system demonstrates that this is not always the case in practice.

aimed principally to end conflicts in order to prevent supernatural vengeance, rather than to punish crimes. Zinacantecos believed that disputes caused illness, and that conflicts could not be considered 'resolved' until all parties to a dispute (victim and transgressor) had regained 'harmony'. Collier also discovered that conflicts were seen in a long-term perspective – one which examined the past relations between the disputing parties – rather than as the result of a single crime. In small-scale societies and communities, then, specific cultural understandings and relationships between individuals are the important factors and for this reason conflict resolution mechanisms tend to favour compromise settlements.

Many other differences exist between the two spheres of legal practice. Within occidental, constitutional democracies, the theoretical premise exists that legal and political processes should be separate. This is often not the case in small-scale societies, where legal and political authority is often invested in the same individual or group. The difference between Mayan conceptions of authority, which derive from behaviour within the community and lived experience, and western understandings of authority have been highlighted here. Other differences may have to do with cultural perceptions rather than structure; for example verifiable facts and the notion of evidence may have quite different weight in different legal systems (see Geertz, 1983). In non-occidental societies, the concept of ownership and use is often collective, rather than privatised. Therefore, conflicts are common between what is recognised by the state as 'ownership' (title) and what is viewed by the community as traditional usage rights (of land, water, forests). Mediating such differences constitutes the current challenge of legal and political reform in Guatemala.

Perhaps one of the greatest strengths of customary law in indigenous societies throughout the world has been its flexibility. If custom is codified the danger exists that this flexibility in local conflict resolution will be lost and that codified custom will reflect a particular set of interests within a community. The example of British colonial attempts in India to 'reinstitutionalise' local customs into law is salutary: these attempts, which imposed new procedures, actually forced a change in the meanings and effects of customs. Custom, a constantly changing phenomenon, cannot be frozen in time or legislation; it is therefore more useful to concentrate on procedural rather than substantive norms. Examples of procedural norms currently being deployed which draw on elements of customary practice include oral court hearings, which are being introduced across Latin America by way of reforms to the penal procedures codes; and the use of conciliation which decides flexible forms of recompense for certain lesser crimes within the community.[41]

---

[41] The Guatemalan Penal Process Code (introduced in 1995) proposes using tribunals made up of a criminal judge and two 'community judges' (selected by the community) to try cases when accused and victim both belong to the same indigenous community. It also proposes the use of an auxiliary investigator from indigenous communities to aid in judicial investigation (Binder, 1995, p. 33). For more detail on the

It should be recognised that while local communities or indigenous groups may demand recognition of customary law for one set of purposes (local autonomy, cultural identity), the set of social factors facing the national government are much broader, including the consolidation of the state, social peace and the unity of the national legal order. The key perhaps lies in a full discussion of the most appropriate place for state institutions in the politico-legal system: the idea is not to restore some artificial notion of 'legal autonomy' to local communities, rather it is about developing culturally appropriate, accessible and participatory legal institutions in a modern, democratic and pluralist state. Gómez Rivera (1995, pp. 212-3) has signalled that 'the need to assume the principle of legal pluralism in all its implications demands the creation of a legal order of sufficient diversity to afford indigenous peoples the capacity and legitimacy to settle within their communities a number of dynamics which are specific to them. [This] must be duly regulated in such a way as to achieve a balance between the legal rights and attributes of those peoples and the individuals which make them up.' In other words, autonomy for indigenous communities must not preclude recourse for individuals against oppressive local relations and practices. Access to, and the functioning of, the national judicial system must be improved at the same time as customary norms and practices are afforded greater recognition. However, in practice Guatemalan state law is often highly inefficient and violates individual and collective human rights. The lack of legitimacy and credibility of the law is therefore part of the context within which efforts to construct a new pluri-cultural legal order are taking place.

It is maintained here that current efforts at legal and institutional reform should concentrate primarily on strengthening participatory community processes, spaces and spheres of self-definition for Mayan communities. This, rather than the 'codification' of customary law, should form the focus of national legal reform. Instead of searching for 'authentic' customary law, the critical point is to strengthen the spaces available to Mayan communities for self-determination of their legal norms and practices. In this sense, constitutional recognition of customary law is a means of guaranteeing the Mayan peoples' right to diversity.

At the same time as reforms are drawn up at national level, it is essential that a broad process of critical reflection and reassessment take place within Mayan communities about the nature and origins of their customary norms and practices, their efficiency and legitimacy, and the prospects for their future development. In a post-war situation where counter-insurgency structures have penetrated indigenous communities so deeply, the danger exists that without this process of self-reflection certain authoritarian or repressive practices will be reproduced as part of 'customary norms'. This process of reflection and analysis should form an essential component of the current process of politico-legal

---

Penal Process Code see Barrientos Pellecer (1995).

reform, constituting as it does part of the broader process of reconciliation with the past and construction of new Mayan identities, processes which will undoubtedly strengthen the capacity of indigenous communities to demand their right to difference and diversity within a new pluralist state.

Conclusions

Historically, the dominant legal order in Guatemala has been the expression of an authoritarian and exclusive political and social system. The challenge for institutional reform in the current political transition is to transform that system, making it more inclusive, democratic and participatory. This necessarily involves recognising that the occidental legal model is not universal within Guatemalan society, and that democracy requires the construction of a pluri-cultural legal apparatus. The pluralism of different legal and normative orders is a universal fact of the modern world, requiring the understanding of other cultural and normative frames of reference. Any attempt to build a democratic state in a multi-ethnic and pluri-cultural society must take this into account.

The framework for such efforts in the Guatemalan case is provided by the peace accords signed between successive governments and the URNG.[42] The signing of the final settlement in Guatemala City on 29 December 1996 brought an end to over nine years of negotiations and thirty years of civil war. Taken together, these accords hold out the possibility of constructing a new social pact and addressing the historical legacy of socio-economic and political exclusion of the majority of the Guatemalan population (Palencia, 1996). They represent a negotiated agenda for democratisation and the basis for building a new concept and practice of the nation state, rooted in an understanding of citizenship which includes indigenous peoples on their own terms – breaking an historical pattern whereby indigenous peoples were systematically denied the benefits of citizenship and were merely the subjects of highly discriminatory state policies. The lengthy negotiation process has opened up new spaces for participation by

---

[42] These include The Global Agreement on Human Rights, signed 29 March 1994; The Agreement on Resettlement of Populations Displaced by the Armed Conflict, signed 17 June 1994; The Agreement on the Establishment of a Commission for the Clarification of Human Rights Violations and Acts of Violence which have caused Suffering to the Guatemalan People, signed 23 June 1994; The Agreement on the Rights and Identity of Indigenous Peoples, signed 31 March 1995; The Agreement on Socio-Economic Aspects and the Agrarian Situation, signed 6 May 1995; The Agreement on Strengthening Civilian Power and the Function of the Army in a Democratic Society, signed 19 September 1996; The Agreement on a Definitive Cease-Fire, signed 4 December 1996; and The Agreement on Constitutional and Electoral Reforms, signed 7 December 1996. The Agreement on National Reconciliation (the restricted amnesty allowing for reinsertion of guerrilla combatants in civilian life) was signed on 12 December 1996, in Madrid. The signing of the final peace accord and the timetable for its implementation took place on 29 December 1996 in Guatemala City. For an excellent discussion of the accords up to August 1996 see Palencia, 1996.

indigenous peoples' organisations; the immediate challenge now is to build the institutional framework which will allow for greater participation by indigenous peoples at local, regional and national level in the implementation of the agreements signed.

The peace accords advance policies of decentralising administrative power and emphasise the importance of participatory local decision-making. For example, the Socio-Economic Accord, signed 6 May 1996, proposes a strengthening of the role of regional development councils (*Consejos Regionales de Desarrollo*) and of municipal autonomy. The country's 330 municipal mayors are to have a central role in distributing the ten per cent of the national budget now allocated to local governments (Palencia, 1996, p. 23; RFK, 1996, p. 51). However, many questions remain about the nature of institutional mechanisms required to advance effective decentralisation and increased participation. There is a pressing need to ensure greater transparency and guarantees to ensure that different communities get their due share of resources. Inevitably the strengthening and democratisation of municipal structures will also depend on wider processes not directly contemplated in the peace accords, such as the internal democratisation of the political parties.

A further priority set out in the accords is the need to strengthen civilian structures of governance and demilitarise Guatemalan society, an issue specifically addressed in the accord on Strengthening Civilian Power and the Role of the Army in a Democratic Society, signed on 19 September 1996. Army-sanctioned demobilisation of the civil patrols has been advancing since mid-1996, and constitutes a necessary but not sufficient condition for local democratisation. National and international human rights organisations – who continue to receive complaints about abuses committed by civil patrollers or ex-military commissioners – have repeatedly expressed concerns that the civil patrol structure could be reactivated or assimilated into 'traditional' community structures (RFK, 1996). Targeted policies will therefore be required to strengthen the role of such institutions as the auxiliary mayors and representative improvement committees and overcome the legacy of counter-insurgency structures, particularly in remote areas of the country where the state has traditionally been weak and military presence was decisive during the 1980s.

Harmonisation of customary law and state law will not be easy, and depends on changes in wider social, economic and political relations between Mayan peoples and Guatemalan state and society. Jorge Dandler (1996, p. 15) has noted that throughout Latin America, legal experts have been slow to build a new framework for cultural diversity in law and justice administration. It has been argued here that in Guatemala the incorporation of respect for customary norms and practices into the national legal system can best be achieved by strengthening mechanisms for greater local participation and decision-making autonomy, and advancing effective demilitarisation. Such a framework will allow for the existence of legal pluralism, recognising cultural diversity, while

insistence on respect for national and international human rights provisions and improvement of the existing judicial system will provide for a unitary national legal framework. Some commentators have raised fears that granting greater local autonomy will lead to calls for self-determination and secession by Mayan groups. However, throughout Latin America the prevailing tendency is towards greater local and regional autonomy rather than secession. Through their organisations, Mayan peoples are fighting for greater space within the structures of the existing nation state and it is the extent to which the latter is able to become more representative of and responsive to Mayan peoples which will ultimately determine future political developments.

Judicial restructuring is essential if Guatemala is to meet the dual challenges of democratisation and globalisation. Greater recognition of customary norms and practices provides a means to reform the legal system in a manner which is rooted in national experience and existing, culturally appropriate forms of conflict resolution, holding out the prospect of making the legal system overall both more efficient and accessible for those traditionally excluded from it. Only through improving access and performance will the judicial system gain the legitimacy essential for the effective functioning of the rule of law.

In some instances, customary fora can act as small claims courts or alternative (non-judicial) means of conflict resolution. Such reforms have been successfully advanced in Peru, for instance, where a programme of lay justices of the peace has increased indigenous peoples' access to the judicial system. However, wider structural inequalities are unlikely to be resolved in local customary fora: therefore, in addition to recognising and strengthening local conflict resolution mechanisms it is also essential to devise the means by which the collective interests and rights of indigenous peoples – such as land claims – can be effectively advanced.

It has been stressed here that customary law is not static, but rather constantly changing in a dialectical relationship with state law and external influences. Customary norms and practices within Mayan communities are likely to undergo significant changes in the forthcoming period. The issue of gender rights is of particular interest in this respect: the peace accords advance the position of women in Guatemalan society and are premised on the basis of gender equality, raising questions about the compatibility between local customary norms and practices and women's rights. Here it is perhaps instructive to note current developments in the Mexican state of Chiapas. The peace agreement signed between the Federal Government, the Chiapas State Government and the EZLN (*Ejército Zapatista de Liberación Nacional*) in San Andrés on 16 February 1996 includes provision for more adequate definitions of sexual crimes and sanctions in the penal code and procedural law, and for the recognition of the specific gender and labour rights of indigenous women. Indigenous women's organisations in Chiapas have successfully campaigned for respect for customary norms and practices *together with* full respect for women's rights, demonstrating that respect for universal human rights and local

cultural specificities can be creatively combined.

Developments in customary norms and practices in Guatemala over coming years will depend both on national and international influences and changing local dynamics. Critical self-examination of local norms and practices by Mayan communities themselves will form an essential part of the broader processes of healing, reconciliation and demilitarisation. Coming to terms with the violence of the past, through such mechanisms as the exhumation of massacre victims, is part of an ongoing effort to rebuild the local ethical and moral order. Such initiatives form an essential part of overcoming the legacy of counter-insurgency and ensuring truly democratic and participatory local structures and practices. Academic research on customary law can support this process by adopting a critical, multi-disciplinary, historical approach to provide insight into both the nature and development of local forms of legal thought and practice, and prospects for reform. In addition, government and donor policies should not idealise an abstract notion of 'community', but rather examine practical ways to support local communities in their struggle to demilitarise and create conditions for more inclusive and democratic structures. In this sense decentralisation may initially require increased support and intervention from central government or development agencies. In the medium term sustained efforts such as these are likely to encourage an increasingly proactive role on the part of indigenous people and communities in securing respect for cultural diversity and building the mechanisms and institutions of a multi-ethnic and pluri-cultural nation state.

Bibliography

Allot, Antony and Gordon R. Woodman (eds.) (1985), *People's Law and State Law: The Bellagio Papers*, Dordrecht, Holland and Cinnaminson, USA, Foris Publications.

ASIES (1994) (Asociación de Investigación y Estudios), *Estudio etnográfico sobre derecho consuetudinario: informe final*, Guatemala, ASIES.

AVANCSO (1992), *¿Donde está el futuro? Procesos de reintegración en comunidades de retornados*, Cuadernos de Investigación No. 8, Guatemala.

Barkun, Michael (1968), *Law without Sanctions: Order in Primitive Societies and the World Community*, New Haven, Yale University Press.

Barrientos Pellecer, César (1995), *Derecho procesal penal guatemalteco*, Guatemala, Magna Tierra.

Bastos, Santiago and Manuela Camus (1995), *Abriendo Caminos: las organizaciones mayas desde el Nobel hasta el Acuerdo de derechos indígenas*, Guatemala, FLACSO.

Binder, Alberto (1995), 'Proceso penal y diversidad cultural: el caso de las comunidades indígenas', *Boletín: publicación de información, análisis y apoyo a la reforma penal*, Año 1, No.1, Guatemala, CREA – Centro de Apoyo al Estado de Derecho, pp. 26-34.

Bohannan P. (1957), *Justice and Judgement among the Tiv*, London, Oxford University Press for the International African Institute.

Cabarrús, Carlos (1979), *La cosmovisión K'ekchi' en proceso de cambio* (San Salvador: Universidad Centroamericana).

Cambranes, J.C. (1986), *Introducción a la historia agraria de Guatemala: 1500-1900*, Guatemala, Serviprensa Centroamericana, 2a edición.

Cambranes, J.C. (1996), *Café y campesinos: los orígenes de la economía de plantación moderna en Guatemala, 1853-1897*, Madrid, Editorial Catriel, 2a edición.

Chenaut, Victoria and María Teresa Sierra (coords.) (1995), *Pueblos indígenas ante el derecho*, Mexico, Centro de Investigaciones and Estudios Superiores en Antropología Social (CIESAS) and Centro Francés de Estudios Mexicanos y Centroamericanos (CEMCA).

Chenaut, Victoria (1995), 'Orden jurídico y comunidad indígena en el Porfiriato', in Chenaut and Sierra, *Pueblos indígenas ante el derecho*, pp, 79-100.

CIEDEC (1990), *Guatemala: polos de desarrollo: el caso de la desestructuración de las comunidades indígenas*, Vol. II, Mexico, Editorial Praxis.

Collier, Jane (1973), *Law and Social Change in Zinacantan*, Stanford, Cal., Stanford University Press.

Collier, Jane (1975), 'Problemas teórico-metodológicos en la antropología jurídica', in Chenaut and Sierra, *Pueblos indígenas ante el derecho*, pp. 45-76.

COMG – Consejo de Organizaciones Mayas de Guatemala (comp.) (1995), *Construyendo un futuro para nuestro pasado: derechos del pueblo Maya y el proceso de paz*, Guatemala, Cholsamaj.

Comisión Pastoral de la Tierra de la Diócesis de la Verapaz (1995), *Comunicado de Prensa, 29 de marzo de 1995; Aclaración Pública, 31 de mayo de 1995*, Cobán (mimeo).

Cox, Rebecca (1996), *Derecho consuetudinario en Sololá*, unpublished document, MINUGUA (Misión de las Naciones Unidas para Guatemala), unpaginated, Guatemala, (mimeo).

CUNOR, Centro Universitario del Norte (1979), *La Verapaz, estructura y procesos*, Guatemala, Universidad de San Carlos.

Dandler, Jorge (1996), 'Indigenous Peoples and the Rule of Law in Latin America: Do they have a Chance?, *Paper presented at the Academic Workshop on the Rule of Law and the Underprivileged in Latin America*, Kellogg Institute, University of Notre Dame, November 9-11.

De León Aragón, Oscar (1995), *Caída de un régimen: Jorge Ubico – Federico Ponce, 20 de octubre de 1944*, Guatemala, FLACSO.

De Sousa Santos, Boaventura (1987), 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', *Journal of Law and Society*, Vol. 14, No. 3, pp. 279-303.

Diamond, Larry (1993), 'Three Paradoxes of Democracy', in Diamond, Larry and Marc F. Plattner (eds.), *The Global Resurgence of Democracy*, Baltimore and London, Johns Hopkins University Press.

Díaz-Polanco, Héctor (1995) 'Autonomía, territorialidad y comunidad indígena. La nueva legislación agraria en México', in Chenaut and Sierra, *Pueblos indígenas ante el derecho*, pp. 231-60.

Diócesis de la Verapaz (1994), Pastoral Social, Departamento de Formación, *Evaluación de actividades año 1994*, Cobán, Guatemala (mimeo).

Dorotinsky, Deborah (1990), 'Investigación sobre costumbre legal indígena en los Altos de Chiapas (1940-1970)', in Stavenhagen and Iturralde, *Entre la ley y la costumbre*.

Dwyer, Daisy Hilse (1992), 'Substance and Process: Reappraising the Premises of the Anthropology of Law', in Sack and Aleck (eds.), *Law and Anthropology*.

EAFG (Equipo de Antropología Forense de Guatemala) (1995), *Las masacres en Rabinal: estudio histórico antropológico de las masacres de Plan de Sánchez, Chichupac y Río Negro*, Guatemala, EAFG.

EPICA (Ecumenical Program on Central America and the Caribbean) (1993), *Out of the Shadows: The Communities of Population in Resistance*, Washington D.C., EPICA.

Esquit Choy, Edgar and Carlos Ochoa García (1996), *El respeto a la palabra: el orden jurídico del pueblo maya*, Guatemala, CECMA-Editorial Cholsomaj.

Falla, Ricardo (1995), *Historia de un gran amor: Recuperación autobiográfica de la experiencia con las Comunidades de Población en Resistencia Ixcán, Guatemala*, Guatemala.

Flores Alvarado, Humberto (1993), *El derecho de la costumbre: ensayo sobre la normatividad jurídica consuetudinaria en Guatemala*, Guatemala, Instituto de Investigación y Autoformación Política (INIAP) and Fundación Friedrich Ebert Stiftung.

Foucault, Michel (1977), *Discipline and Punish*, New York, Pantheon Books.

Fuller, Chris (1994), 'Legal anthropology, legal pluralism and legal thought', *Anthropology Today*, Vol. 10, No. 3.

Fundación Myrna Mack (1994), *Intimidación y corrupción en la administración de justicia*, Guatemala, Fundación Myrna Mack.

Geertz, Clifford (1983), *Local Knowledge: Further Essays in Interpretive Anthropology*, New York, Basic Books.

Gluckman, Max (1955), *The Judicial Process among the Barotse of Northern Rhodesia*, Manchester, Manchester University Press.

Gómez Rivera, María Magdalena (1995), 'Las cuentas pendientes de la diversidad jurídica. El caso de las expulsiones indígenas por supuestos motivos religiosos en Chiapas, México', in Chenaut and Sierra, *Pueblos indígenas ante el derecho*, pp. 193-219.

Griffiths, John (1986), 'What is Legal Pluralism?', *Journal of Legal Pluralism and Unofficial Law*, No. 24, pp. 1-55.

Haeserijn, Padre Esteban (1975), 'Filosofía popular de lo K'ekchi' de hoy', *Guatemala Indígena*, Vol. X, No. 3-4.

Hernández, Aída and Martha Guadelupe Figueroa (1994), 'Entre la violencia doméstica y la opresión cultural: La Ley y la Costumbre a los ojos de las Mujeres', in *Américas y Latinas: A Journal of Women and Gender*, Stanford, Center for Latin American Studies, Stanford University, pp. 16-19.

Hooker, M.B. (1975) *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws,* Oxford, Clarendon Press.

Hunt, Alan (1993), *Explorations in Law and Society: Toward a Constitutive Theory of Law*, New York and London, Routledge Press.

Kidder, Robert I. (1983), *Connecting Law and Society: An Introduction to Research and Theory*, Englewood Cliffs, New Jersey, Prentice-Hall Inc.

King, Arden R. (1974), *Cobán and the Verapaz: History and Cultural Process in Northern Guatemala*, New Orleans, Middle American Research Institute, Tulane University.

Llewellyn, Karl and E. Adamson Hoebel (1941), *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Oklahoma, University of Oklahoma Press.

López Gódinez, Rolando (1976), *La discriminación de la población indígena en el ordenamiento jurídico de Guatemala*, unpublished thesis, Facultad de Ciencias Jurídicas y Sociales, Universidad de San Carlos, Guatemala.

López Godínez, Rolando (1994), 'El derecho consuetudinario', *Siglo Veintiuno*, Guatemala, 30 de junio, p. 12.

Malinowski B. (1926), *Crime and Custom in Savage Society*, London, Kegan, Paul, Trench, Trubner and Co.

Merry, S.E. (1988), 'Legal Pluralism', *Law and Society Review*, Vol. 22, pp. 869-96.

Merry, S.E. (1995), 'Resistance and the Cultural Power of Law', *Law and Society Review*, Vol. 29, No. 1, pp. 11-26.

MINUGUA (1994-1996), Misión de las Naciones Unidas para Guatemala, *MINUGUA Informes* (various), Guatemala.

MINUGUA (Mayo, 1996), *Servidumbre en las fincas del Valle de Polochic*, unpublished document, Cobán, Guatemala.

Moore, Sally Falk (1978), *Law as Process: An Anthropological Approach*, London, Henley and Boston, Routledge and Kegan Paul.

Moore, Sally Falk (1986), *Social Facts and Fabrications: Customary Law on Kilimanjaro, 1880-1980*, New York, Cambridge University Press.

Nader, Laura (1975), 'Forums for Justice: A Cross-Cultural Perspective', *Journal of Social Issues*, pp. 151-70.

Nader, Laura (ed.) (1980), *No Access to Law: Alternatives to the American Judicial System*, New York, Academic Press.

Nader, Laura (1990), *Harmony Ideology, Justice and Control in a Zapotec Mountain Village*, Stanford, Stanford University Press.

Nordstrom, Carolyn and JoAnn Martin (1992), 'The Culture of Conflict: Field Reality and Theory', in Nordstrom and Martin (eds), *The Paths to Domination, Resistance and Terror*, Berkeley, Los Angeles and Oxford, University of California Press.

Nuñez Falcón, Guillermo (1970), *Erwin Paul Dieseldorff, Entrepreneur in the Alta Verapaz of Guatemala, 1889-1937*, Unpublished PhD thesis, Tulane University.

Padilla, Luis Alberto (1990), 'La investigación sobre el derecho consuetudinario indígena en Guatemala', in Stavenhagen and Iturralde, *Entre la ley y la costumbre*.

Palencia, Tania (1996), *Construyendo la paz: Nuevas relaciones ciudadanas en Guatemala*, London, Catholic Institute for International Relations.

Procurador de los Derechos Humanos (1994), *Los comités de defensa civil en Guatemala*, Guatemala, PDH.

RFK Memorial Center for Human Rights (1996), *Civil Patrols and their Legacy: Overcoming Militarization and Polarization in the Guatemalan Countryside*, Washington D.C., Robert F. Kennedy Memorial Center for Human Rights.

Robben, Antonius G.C. and Carolyn Nordstrom (1995), 'The Anthropology and Ethnography of Violence and Sociopolitical Conflict', in Nordstrom and Robben (eds.), *Fieldwork under Fire: Contemporary Studies of Violence and Survival*, Berkeley, Los Angeles, London, University of California Press.

Roberts, Simon (1979), *Order and Dispute: An Introduction to Legal Anthropology*, Harmondsworth, New York, Victoria and Ontario, Penguin Books.

Rojas Lima, Flavio (1995), *El derecho consuetudinario en el contexto de la etnicidad guatemalteca*, Guatemala, Procuraduría de Derechos Humanos.

Sack, Peter and Jonathan Aleck (eds.) (1992), *Law and Anthropology*, Aldershot, Hong Kong, Singapore and Sydney, Dartmouth Press.

Sams, Samantha (1995), *Transcending Borders: Refuge, Return and Transition in Guatemala*, Unpublished MA thesis, Institute of Latin American Studies, University of London.

Schapera, I. (1938), *A Handbook of Tswana Law and Custom*, New York, Oxford University Press.

Schmitter, Philipe C. and Terry Lynn Karl (1993), 'What Democracy is...and is not', in Diamond and Plattner (eds.), *The Global Resurgence of Democracy*,

pp. 39-52.

Sieder, Rachel (ed.) (1995), *Impunity in Latin America*, London, Institute of Latin American Studies.

Sieder, Rachel and Costello, Patrick (1996), 'Judicial Reform in Central America: Prospects for the Rule of Law', in R. Sieder (ed.), *Central America: Fragile Transition*, Basingstoke and London, Macmillan Press.

Sierra, María Teresa (1995a), 'Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla', *Law and Society Review*, Vol. 29, No. 2, pp. 227-56.

Sierra, María Teresa (1995b), 'Articulaciones entre la ley y costumbre: estrategias jurídicas de los Nahuas', in Chenaut and Sierra, *Pueblos indígenas ante el derecho*, pp. 101-23.

Silvert, Kalman H. (1969), *Un estudio de gobierno: Guatemala*, Guatemala, SIECA.

Snyder, Francis G. (1981a), 'Anthropology, Dispute Processes and Law: A Critical Introduction', *British Journal of Law and Society*, Vol. 8, No. 2, pp. 141-80.

Snyder, Francis G. (1981b), 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal', *Journal of Legal Pluralism*, Vol. 19.

Solares, Jorge (1995), *Derechos humanos desde la perspectiva indígena en Guatemala*, Guatemala, FLACSO.

Starr, June and Jane Collier (1987), 'Historical Studies of Legal Change', *Current Anthropology*, Vol. 28, No. 3, pp. 367-72.

Starr, June and Jane Collier (1989), *History and Power in the Study of Law: New Directions in Legal Anthropology*, Ithaca and London, Cornell University Press.

Stavenhagen, Rodolfo and Diego Iturralde (comps.) (1990), *Entre la ley y la costumbre: el derecho consuetudinario indígena en América Latina*, Mexico and San José, Instituto Indigenista Interamericano e Instituto Interamericano de Derechos Humanos (IIDH).

Suarez-Orozco, Marcelo (1992), 'A Grammar of Terror: Psychocultural Responses to State Terrorism in Dirty War and Post-Dirty War Argentina', in Carolyn Nordstrom and JoAnn Martin, *The Paths to Domination, Resistance and Terror*, Berkeley, Los Angeles and Oxford, University of California Press.

Terga Cintron, Rev. Ricardo (1991), *Almas gemelas: un estudio de la inserción alemana en las Verapaces y la consecuente relación entre los alemanes y los k'ekchíes*, Cobán, Guatemala, Imprenta y Tipografía 'El Norte'.

Wagner, Regina (1991), *Los Alemanes en Guatemala, 1828-1944*, Guatemala, Editorial Idea, Universidad Francisco Marroquín.

Willemsen Díaz, Augusto (1996), *Programa de atención a los pueblos indígenas*, Publicación Extraordinaria, Procuraduría de los Derechos Humanos de Guatemala (mimeo).

Williams, Joanne (1996), *Community Responses to Warfare in Guatemala: The Communities of Population in Resistance*, Unpublished MA thesis, Institute of Latin American Studies, University of London.

Wilson, Richard (1995), *Maya Resurgence in Guatemala: Q'eqchi'*

Experiences, Norman and London, University of Oklahoma Press.

Yrigoyen, Raquel (1995), *Un nuevo marco para la vigencia y desarrollo democrático de la pluralidad cultural y jurídica: constitución, jurisdicción indígena y derecho consuetudinario*, Comisión Episcopal de Acción Social del Perú (CEAS), documento de reflexión (mimeo).

Zur, Judith (1993), *Violent Memories: Quiché War Widows in Northwest Highland Guatemala*, unpublished PhD dissertation, University of London.

Zur, Judith (1994), 'The psychological impacts of impunity', *Anthropology Today*, Vol. 10, No. 3, pp. 12-7.