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Access to justice in Guatemala
-with the focus on indigenous law

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Summary

The purpose of this thesis is to explore whether access to justice in Guatemala can be provided for the Mayan population by the use of their own justice system and what the consequences of its application would be. Prohibiting factors are economical, geographical, linguistic, cultural and institutional in nature. It is clearly the indigenous people that suffer most from the lack of the basic right to justice, which is why I have concentrated my investigation on this group. In my study of the topic, I have come to the conclusion that the barriers to access to justice can be overcome by the official recognition and application of the Mayan law and that the indigenous legal system provides a number of advantages that can improve the justice situation in Guatemala. In addition to improved access to justice, some further positive effects of indigenous justice include the following: community based sanctions which would ease the burden of the state penitentiary system, a decrease in the number of lynchings, crime prevention resulting from the educational aspect of Mayan law. Furthermore, regarding small claims Mayan law is a much more cost-effective solution. There are, however, some problems that challenge the use of indigenous justice. The fact that practically all Mayan authorities consist of men and that the opinion of the community often is taken into consideration in legal proceedings means that women may be at a disadvantage. Moreover, the Mayan law sometimes violates human rights, usually by administering corporal punishments. Among the most pressing challenges facing widespread use of the system are a need for the restoration of the traditional law, as it has suffered from the effects of the civil war, and a lack of cooperation and coordination between the different Maya organisations. Mechanisms for the coordination between the indigenous and the official justice systems have to be established in order to assure mutual respect and efficiency in the administration of justice. Finally, there is a need to inform the public, the police and the judicial authorities about the contents of Mayan law and its authorities. The problems and challenges mentioned above are not to be seen as reasons to dismiss indigenous justice as of no use, but rather areas that have to be dealt with and improved before the system can be fully implemented. By doing this, the indigenous law would pose a stronger alternative to the official judicial sector, which would amount to a well functioning justice system as well as increased possibilities for the citizens to obtain justice.

Abbreviations

CACIF	<i>Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras/Chamber of Agriculture, Commerce, Industry and Finance.</i>
DEMI	<i>Defensoría de la Mujer Indígena/Organisation for the Defence of the Indigenous Womens' Rights.</i>
FRG	<i>Frente Republicano Guatemalteco/Guatemalan Republican Front.</i>
ICCPG	<i>Instituto de Estudios Comparados en Ciencias Penales de Guatemala/Institute for Comparative Studies in Penal Sciences in Guatemala.</i>
MINUGUA	<i>Misión de Verificación de las Naciones Unidas en Guatemala/United Nations Verification Mission in Guatemala.</i>
URNG	<i>Unidad Revolucionaria Nacional Guatemalteca/Guatemalan National Revolutionary Unit.</i>

1 Introduction

1.1 Presentation of the topic

Guatemala is a country of contrasts and complexity. This country that emerged from the triumph of liberal forces in Central America can boast the largest indigenous populations on the continent, the ancient Maya culture. However, pages have also been written of shame and infamy, disgrace and terror, pain and grief, as products of hundreds of years of repression, and later 34 years of civil war¹. The magnitude of the violence during the civil war exceeds that of the human imagination. With the signing of the peace accords in 1996, the government undertook responsibility to consolidate peace and strengthen democracy. Both Guatemalans and the international community felt optimistic about the future of the country. Seven years later, however, many problems still remain and essential parts of the Peace Accords have yet to be fully implemented. The Peace Accords and the commitments derived from them have established the reform of the judicial system as one of the chief objectives in order to eradicate its inefficiency and guarantee free access to its services. In the Accords, the government also expresses its recognition of and respect for both the indigenous population's identity and its rights. Moreover, it commits itself to the provision of an efficient defence of these rights and to raising the awareness regarding such defence through education and mass media. Unfortunately, the justice sector of today remains shadowed by serious problems. An increasing amount of lynchings, impunity, corruption, the widespread distrust in the legal system and the lack of social integration, which has its background in the historical exclusion of the indigenous population, all continue to impede the process of judiciary reform.

A primary weakness of the Guatemalan judicial system is a lack of access to its institutions which is geographic, cultural, linguistic, economical and institutional in nature. It is, without contest, the members of the various indigenous groups, which constitute the majority of the population, who generally find themselves marginalised by the judicial system. Insufficient public service, geographic distances and a lack of recognition for indigenous judicial norms function to maintain and reinforce the exclusion and hinder effective access to justice. The question is what can be done to open the indigenous population's ways to justice.

¹ "*Memory of Silence*", Report of the Commission for Historical Clarification, Guatemala, p. 11.

1.2 Purpose and problem

The lack of access to justice in Guatemala affects the indigenous population to the greatest extent as they are among the poorest, and because of the deep-rooted racism in the society and the cultural and linguistic differences between the indigenous communities and the State justice system. Since long before the arrival of the Spanish conquistadors in 1524, the Mayan law has been in use, but it has never been officially recognised by the State. According to studies by various academic centres, the majority of the Mayan population in Guatemala still uses their traditional methods of conflict resolution². The purpose of this thesis is to find out if an extended application of these legal traditions can improve access to justice for the Mayan people, and what advantages and disadvantages this system has. Furthermore, I would like to recommend measures that need to be taken in order to avoid clashes between important principles of the indigenous and Western systems.

1.3 Method and material

This thesis is a minor field study carried out in Guatemala with the economical support of Sida (the Swedish International Development Cooperation Agency) through the MFS-scholarship. The material used is comprised of various documents, information from the Internet and interviews. There are quite a few books written on Mayan law, but unfortunately, they are often only written from an anthropological perspective and with a very general approach to the subject. Therefore, was it imperative to complete the written material with interviews. As it was hardly possible, however, within the timetable for a thesis to conduct a greater amount of interviews, I sometimes had to rely on merely a few sources. When such was the case, I asked indigenous people with extensive experience and knowledge in the field whether these sources gave an accurate portrayal of the subject. From May 15 to May 30, 2002, I took part in an investigation about the legal situation of juveniles that had been involved in a criminal case. The investigation took place in the countryside and was run by a Guatemalan NGO called ICCPG. It made me get a good understanding of the rural population's relation to both the judicial system and to their traditional methods for conflict resolution. In order to avoid that the words only stay on paper, more investigations with a legal perspective and a more concrete approach need to be done on the subject. Preferably they should be carried out by the indigenous population themselves or in cooperation with non-indigenous people.

² "Los pueblos indígenas de Guatemala: la superación de la discriminación en el marco de los Acuerdos de Paz", verification report by MINUGUA, Guatemala City, 2001, p. 25.

1.4 Delimitations

Due to limitations of time and resources I have, in chapter **5.8**, decided to focus on the Quiché Mayans, as they make out the biggest group of indigenous people in Guatemala. For the same reasons, when describing the authorities of the Quiché, I decided to focus on the system of one community (San Pedro Jocopilas), which I was told constitutes a representative system. Although there are two more indigenous but not Mayan groups (Xinca and Garífuna), these represent a very small percentage of the total population, and they have generally not suffered from discrimination in the same way as the Mayans who were the direct target of the army during the civil war. This is why I limit the study to the situation of the Mayans.

As it was my wish to add a more in-depth analysis of access to justice in indigenous law, I had to limit the scope to one aspect. I have chosen to focus on *the right to a fair hearing* as it lies at the heart of the concept of a fair trial, which in turn might be the most important guarantee for access to justice.

The angle of approach of this thesis is the legal one, more precisely that of international human rights, as this thesis is written as part of studies in international public law.

1.5 Terminology

As mentioned above, the Mayans are not the only indigenous group in Guatemala, but they are by far the biggest. This is why I use the term “indigenous” when referring to the Maya Indians. By “indigenous law” or “Mayan law”³ (or sometimes *justice* instead of *law*) I refer to their traditional legal rules that have existed-although with changes-outside the state justice system since pre-Colombian times. Consequently, these terms should neither be confused with the rights of the indigenous people nor with specific laws concerning the indigenous population. By the term “authority”, I refer to the person or persons of authority in the indigenous communities who can make decisions on behalf of others and to whom the inhabitants turn for advice. The term indigenous/Mayan justice involves the system for resolving a conflict or carrying out other legal tasks, even though the distinction between what concerns the legal area and what does not is sometimes hard to make.

³ In Spanish: Derecho Indígena, Derecho Maya or Derecho Consuetudinario.

1.6 Disposition

In order to understand why the situation looks the way it does today, it is necessary to at least have some basic knowledge about the history of Guatemala, which is provided in the first chapter. After that, I will describe the definition of access to justice as well as the obstacles to this right in Guatemala. The legal framework of access to justice is then dealt with, including the right to a fair hearing. In chapter 4, the recognition of indigenous law is studied and includes the national and international legal framework. Thereafter follows a description of the indigenous law and the indigenous authorities with the focus on the Quiché community. In chapter 6, I deal with the aspects that need to be solved if an application of Mayan law is going to work efficiently in the future. Furthermore, I provide answers to the questions that I raise in the present chapter, i.e. whether or not the application of indigenous law can improve the access to justice for the Mayan population in Guatemala and what advantages, disadvantages and challenges it entails. In the final chapter, I provide the conclusions to which I have come and recommendations on what needs to be done in order to make an official application possible and efficient.

2 Historical and political context

2.1 The colonisation

Guatemala's long history of violence has its roots in a repressive and semi-feudal system of power that did not tolerate any kind of participation on the part of the indigenous people, whether political, socio-economical or cultural. Ever since the arrival of the Spanish conquerors in 1524 the social structures that strengthened the ethnic discrimination of the Maya people have grown more and more apparent.

The establishment in Guatemala of the administrative centre of the Central American colonies initiated the emergence of a society based on hierarchies. At the very top of the pyramid were the European-born Spaniards who were the officials of the Spanish crown, next were the creoles,⁴ below them were the "ladinos"⁵. At the base of the pyramid was the indigenous population, which was considered by the Spanish conquistadors to be an inferior race. With time this attitude developed into a deep-rooted racism manifested not only by the social behaviour of the creole of "pure race", but also by the ladinos. This discrimination, materialised and reinforced over centuries, has provoked chronic and permanent tensions between social layers and was the prominent cause of the violence against the indigenous population, which culminated in a civil war from 1962 to 1996, a war with all the characteristics of genocide⁶.

2.2 Independence

As the Crown continued to appoint only Spanish-born Guatemalans to important posts, at the expense of Guatemalans born in the New World, the creoles felt anger at being passed over for advancement. Thus, they took advantage of a weakened Spanish Empire after Napoleon's invasion and in 1821 successfully rose in revolt. Independence, however, changed little for the indigenous population, which continued being exploited by the country's land-owning elite⁷.

⁴ Guatemalan-born people of Spanish blood. Today it refers to the dominant population. It also refers to anyone who is not indigenous.

⁵ People of mixed Spanish and indigenous blood.

⁶ Molkenstin, Gudrun: *"Los difíciles senderos de la paz en Guatemala"*, FLACSO, Guatemala City, 2001, p. 33-34.

⁷ Ibid, p. 34.

2.3 The Democratic Spring

In the context of successive dictatorships and the economic and social crisis caused by the world depression of the 1930's, Guatemala's neocolonial order cracked in 1944, when a broad middle- and working-class coalition overthrew military dictator Jorge Ubico. Thus began what is called the "Democratic Spring", which lasted from 1945 to 1954. The two governments of Juan José Arévalo (1945-50) and Jacobo Arbenz (1951-54) guaranteed basic democratic liberties -including free elections- abolished forced labour -which had been almost universal for the indigenous population- granted minimum wages and basic rights for workers and peasants and increased social welfare and equality⁸. In 1952 Arbenz decreed a far-reaching -but capitalist- agrarian reform that was perceived as a serious threat to the interests of the foreign investors, especially the US-based United Fruit Company, the largest landowner in Guatemala. The US Government claimed that the Arbenz regime was a prime example of "the brazen attempt of international communism to establish a Soviet satellite in the Western Hemisphere"⁹.

During the governments of Arévalo and Arbenz, political organisations of both the extreme left and the extreme right were allowed to function, and one of the supposed proofs of the communist intervention was the legalisation of the Guatemalan Labour Party¹⁰, also known as the Communist Party of Guatemala. In June 1954, with strong support from the CIA, Colonel Carlos Castillo Armas led a coup d'état against Arbenz. In order to "fight international communism" Castillo reinstated many elements of the previous authoritarian governments such as widespread repression and lack of social equality. With the violent fall of the Democratic Spring, many political actors lost faith in the possibility of transforming Guatemala through electoral means¹¹.

2.4 In the aftermath of the Democratic Spring

The Democratic Spring was followed by hard-line regimes that faced constant challenges to their authoritarian approach to governance. The anti-democratic nature of the Guatemalan political tradition since colonisation has its roots in an economic structure which is marked by the concentration

⁸ Jonas, Susanne: *"Of Centaurs and Doves: Guatemala's peace process"*, Westview Press, Colorado, 2000, p. 18.

⁹ Forsberg, Tuomas and Teivainen, Teivo: *"The Role of Truth Commissions in Conflict Resolution and Human Rights Promotion: Chile, South Africa and Guatemala"*, Helsingfors, 1998, p. 78-79.

¹⁰ Partido Guatemalteco de Trabajo, PGT.

¹¹ Ibid, p. 79.

of capital in the hands of a social and racial minority-the ladinos¹². Two percent of the population controlled 67 percent of the arable land. The ongoing social exclusion of the indigenous majority, a situation approaching de-facto apartheid, created a cocktail of class and ethnic tensions¹³. These social injustices led to protests and subsequent political instability to which there were always only two responses: repression or military coups. Faced with movements proposing economic, political, social or cultural change, the State increasingly resorted to violence and terror in order to maintain control. Political violence was thus a direct expression of racial and social inequalities¹⁴. Out of these tensions grew a revolutionary guerrilla movement that saw no alternative to reactionary violence “within the system”. In the 1960’s the first wave of guerrilla insurgency emerged. It was primarily composed of ladino-peasants without a coalition of the indigenous population.

2.5 The civil war

The escalating tragedy of the civil war, however, was not solely the result of Guatemalan national history. The cold war also played an important role. Anti-communism, promoted by the United States within the framework of its foreign policy of containment, received firm support from the right-wing political parties and from various other powerful actors in Guatemala. The United States demonstrated that it was willing to provide support for strong military regimes located within its strategic backyard. In the case of Guatemala, American military assistance focused on reinforcing the national intelligence apparatus and training the officer corps in counterinsurgency techniques; both were key factors which had significant bearing on human rights violations during the armed confrontations¹⁵.

The ensuing counterinsurgency effort, organised, financed, and run directly by the United States, subdued the first wave of guerrilla insurgency. This was a turning point in Guatemala, with U.S. military advisers transforming the army into a modern, disciplined, brutal counterinsurgency force that subsequently came to dominate the Guatemalan state directly¹⁶. Various right-wing death squads were formed, and a system of military commissioners was established in rural areas to identify potential targets for repressive actions¹⁷. The guerrilla forces were able to reorganise and reinitiate their struggle in the early 1970’s, this time in the western indigenous highlands, with some Mayan communities becoming central participants. The active involvement of up to half a million Mayas in the

¹² *“Memory of Silence”*, p. 17.

¹³ Jonas, Susanne, p. 19-20.

¹⁴ *“Memory of Silence”*, p. 18.

¹⁵ *Ibid.*, p. 19.

¹⁶ Jonas, Susanne, p. 21.

¹⁷ Forsberg and Teivainen, p. 81.

uprising of the late 1970's and early 1980's was without precedent in Guatemala, as well as in the entire hemisphere¹⁸.

The guerrilla military offensive reached its height in 1980-81, amounting to 6000 to 8000 armed fighters and 250 000 to 500 000 active collaborators and supporters and operating in most parts of the country. In 1982, all of the guerrilla organisations united in a coalition- URNG^{19 20}. The army, however, initiated an unprecedented counteroffensive and unleashed a virtual holocaust upon the indigenous communities, seen by the army as natural allies of the guerrillas. As the insurgents did not anticipate the scorched-earth, genocidal war led by the Guatemalan security forces, they were defeated once again and did not recover the capacity to take new initiatives until the late 1980's. From mid-1981 to 1983 alone, 440 villages were wiped off the face of the map; up to 150 000 civilians were killed or "disappeared"²¹. From 500 000 to a million and a half people were displaced between 1981 and 1983²². The aim of these genocidal policies was not only to eliminate the guerrilla and their supporters but also to destroy the culture, identity, and community structures of the indigenous population. These goals were carried out through scorched-earth warfare and through the imposition of coercive institutions throughout the countryside, designed to consolidate military control over the population. Among these institutions were mandatory paramilitary "civil self-defence patrols"^{23 24}, which were responsible for a significant amount of human rights violations²⁵.

2.6 Peace in sight

By 1984 the largest-scale massacres were generally over, and the army controlled most of the country. Even though the army had been unable to defeat the URNG, the guerrilla was severely weakened and already considering the winning of state power through armed struggle to be no longer a viable option. Because of both the diminished danger of a URNG take-over and the international pressure towards democratisation in Latin America, important sectors of the army felt it was strategically useful to return to civilian rule²⁶. In 1985, a new constitution containing basic guarantees of citizens' rights, at least on paper, was written and Presidential elections were held. Nevertheless, the governments that followed did little to transform Guatemala into a democratic state and, in some respects, they

¹⁸ Jonas, Susanne, p. 21.

¹⁹ Unidad Revolucionaria Nacional Guatemalteca

²⁰ Jonas, Susanne, p. 23.

²¹ Ibid, p. 24.

²² "Memory of Silence", p. 30.

²³ Patrullas de Auto-defensa Civil, PAC.

²⁴ Jonas, Susanne, p. 24.

²⁵ Forsberg and Teivainen, p. 82.

²⁶ Ibid, p. 82.

were civilian versions of the counterinsurgency state²⁷. The URNG began pressing for political negotiations with the government and army to end the war. In 1990, serious discussions about peace were finally initiated, and on December 29, 1996, the long and difficult process culminated in the signing of the final peace accord, thereby putting an end to the 34 years of brutal civil war²⁸. Some 200 000 civilians had been killed or were “disappeared” in the war that was the longest and bloodiest in the hemisphere. The main responsibility for the atrocities lay on the State, and especially on the army, having committed 93 percent of all violations of human rights. The guerrilla, however, also committed atrocities, though to a much lesser extent; 3 percent of the violations²⁹.

2.7 Peace – but what has improved?

After the signing of the Peace Accords a new chapter in Guatemala’s history was opened, and people felt a wave of optimism for the future. Nevertheless, six years later, essential parts of the twelve peace agreements still have not been implemented. The situation of the country continues to be shadowed by violence, corruption, persecutions of human rights activists, extra-judicial killings, impunity, and threats and violence coming from clandestine groups suspected to have strong ties to the army³⁰. Taking into account the past months’ escalating spiral of violence and the threats that the human rights activists live under during the time of writing, the future does not look very bright for Guatemala. Much will probably depend on the outcome of the elections that are going to be held in November 2003, as the country has suffered serious deteriorations since the ruling party FRG³¹ came into power in 2000.

²⁷ Jonas, Susanne, p. 26.

²⁸ Ibid, p. 31.

²⁹ “*Memory of Silence*”, p. 42.

³⁰ See for example “*Séptimo Informe del Secretario General de las Naciones Unidas sobre la verificación de los Acuerdos de paz de Guatemala*”, summary, MINUGUA, Guatemala City, 2002.

³¹ Frente Republicano Guatemalteco.

3 Access to justice

3.1 A general problem in Latin America

Any system of judicial administration system ought to fulfil the duty of offering all citizens efficient mechanisms for the resolution of conflicts between individuals, thereby guaranteeing peaceful co-existence in the society. To avoid abuses of power and impunity there should also be a way of handling conflicts between individuals and government institutions. It is not possible to construct a democratic society if the judicial administration does not fulfil its obligations or if the citizenry does not believe in its role either as a peaceful means by which to resolve conflicts or as a guardian of individual rights. In other words, in a democratic society it is imperative to provide access to justice for all citizens so that the democratic system legitimises itself. The poor state of the justice sector is, however, a widespread problem in Latin America. The judicial systems are in deep crisis and represent one of the Achilles' heels of the democratic situation in the region. Even though the quality of the justice administration varies according to the national and regional context, it is in general terms hierarchic and bureaucratic, lacks independence from other governmental bodies and suffers from extensive problems of corruption. Finally, it is also absolutely incapable of facing impunity and the new challenges of more modernized crime. Since the existing system does not respond to the population's requirements of justice and security, it is regarded as corrupt and illegitimate. The limited access to justice in Latin America perpetuates what can be called a "low intensity citizenship"³².

3.2 The concept of access to justice

In order to know how to remedy the lack of access to justice in Guatemala, it is of fundamental importance to know what this concept means.

The words "access to justice" are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system - that system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially fair. Both of these components are equally important, for we assume that as

³² Sieder, Rachel in "*Pluralidad Jurídica en el Umbral del Siglo*", ed: Jorge Solares, FLACSO, Guatemala City, 2000, p. 37-38.

a basic premise social justice, as sought by our modern societies, *presupposes* effective access³³.

3.2.1 The development of the concept

The concept of access to justice has been undergoing an important transformation, corresponding to a comparable change in civil procedural scholarship and teaching. In the liberal, “bourgeois” states of the late eighteenth and nineteenth centuries, a right of access to judicial protection meant essentially the aggrieved individual’s *formal* right to litigate or defend a claim. The theory was that, while access to justice may have been a “natural right”, natural rights did not require affirmative state action for their protection. These rights were considered prior to the state; their preservation required only that the state did not allow them to be infringed upon by others. The state thus remained passive with respect to such problems as the ability, *in practice*, of a party to recognise his legal rights and to prosecute or defend them adequately. Relieving “legal poverty” – the incapacity of many people to make full use of the law and its institutions – was not the concern of the state. Justice, like other commodities in the *laissez-faire* system, could be purchased only by those who could afford its costs, and those who could not were considered the only ones responsible for their fate. Formal, not effective, access to justice – formal, not effective, equality – was all that was sought. As the *laissez-faire* societies grew in size and complexity, the concept of human rights began to undergo a radical transformation. Modern societies had to adjust to the increasingly collective rather than individual character of actions and relationships, and recognise the social rights and duties of governments, communities, associations, and individuals. The focus was put on making human rights effective, i.e. accessible to all people. It has become commonplace to observe that affirmative action by the state is necessary to ensure the enjoyment of these basic social rights. It is therefore not surprising that the right of effective access to justice has gained particular attention as recent welfare state reforms have increasingly sought to arm individuals with new substantive rights in their capacities as consumers, tenants, employees, and even citizens³⁴.

In recent years, critics have argued that access-to-justice reform has largely seen access to justice as access to the courts. Some try to turn the debate from procedural access to substantive justice, shifting emphasis from guaranteeing the availability of lawyers or court procedures to producing more fair and equitable social outcomes. Greater access to the courts, they argue, will not help the poor in a country where the laws consolidate their social and economic exclusion³⁵. Thus, while earlier reform programs have

³³ Cappelletti, Mauro and Bryant Garth: “*Access to Justice-a world survey*”, volume 1, book 1, Sitjhoff, Nordhoff and Alphenandendrijn, Milano, 1978, p. 6.

³⁴ Cappelletti and Garth, volume 1, book 1, p. 6-8).

³⁵ www1.worldbank.org, April 17, 2002.

focused on aspects like infrastructure, reforms of the legislative bodies and training of the staff within the judicial system, the focus today is placed more and more on improving access to justice for the groups that historically have been deprived of this right³⁶.

The right of effective access is increasingly recognised as being of paramount importance among new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication. Effective access to justice can thus be seen as the most basic requirement – the most basic “human right” – of a modern, egalitarian legal system which seeks to guarantee, and not merely proclaim, the legal rights of all³⁷.

3.2.2 Access to justice seen as a path to fair results

Access to justice is a phenomenon with both legal and social implications. Quite frequently, the exercising of rights and the consequences of the different structures of inequality are at conflict. The word “access” in this context refers to the action all citizens can undertake to contact the legal system so that by means of the structures and processes the state offers they can exercise their legally recognised rights. The concept of “access” becomes problematic because the likelihood of access is not the same for all individuals and groups given the unequal distribution of resources in society. While some can enjoy more and better access, others need to confront obstacles that restrict and even preclude free access to justice. The word “justice” is not always used with the same meaning. In general terms, this word is used to mean the group of state institutions that enforce law, referring to the administration of justice. The stress is put upon the organisational characteristics both structurally and, above all, upon the processes it entails. “Access to justice” thus means the extent of citizens’ ability to make use of the mechanisms and structures belonging to the state judicial system for the defence of legal rights. Nevertheless, this concept of access to justice is insufficient to describe modern social/legal realities. Contacting the system entails a previous process that is prolonged after the initial contact and does not only condition access to justice by facilitating or hindering it, but becomes a continuity without which access does not really take place in spite of having been able to initiate the process. Thus, the idea of access to justice can be seen as a *path*. It concerns the different conditions to be met, first in order to reach the legal system and then to remain in it long enough to exercise the corresponding rights. The formal guarantee of equal access must necessarily be extended over all the stages that make up the legal sequence. Seen in this way, the word “justice” does not only refer to the legal system, but to the results the implementation of the legal system brings about. This is what Cappelletti and Garth talk about when they state

³⁶ Sieder, Rachel in “*Pluralidad Jurídica en el Umbral del Siglo*”, p. 42.

³⁷ Cappelletti and Garth, volume 1, book 1, p. 8-9.

that one of the main dimensions of access to justice means that the legal system should lead to individually and socially fair results. Such a definition reflects the need to limit the object of this analysis because an investigation into the real fairness of the results should be a separate object of study³⁸. Most importantly, one must bear in mind that access to justice does not necessarily mean access to the state justice system. Remedies outside the legal system can sometimes provide the same results, but with greater efficiency³⁹.

3.3 The barriers to access to justice

In order to know how to improve the lack of access to justice in Guatemala, it is first necessary to first establish the barriers to this basic right of citizens.

3.3.1 Economical barriers

Formal dispute resolution, particularly in the courts, is very expensive in most societies. While the government typically pays the salaries of the judges and other court personnel and provides the building and other facilities necessary to try cases, the litigants must bear the great proportion of the other costs of settling a dispute, including attorneys' fees and some court costs. Claims involving relatively small sums of money suffer the most from the barrier of cost. If the dispute is to be resolved by formal court processes, the costs may exceed the amount in controversy or, if not, may still eat away so much of the claim as to make litigation meaningless⁴⁰. Without a doubt, the economical aspect is one of the major reasons why a significant amount of the Guatemalan population lacks access to justice⁴¹.

3.3.2 Geographic barriers

The great majority of the courts and the judicial resources is concentrated in the urban centres, which obstructs access to justice for the rural population which constitutes the majority of the population⁴². As can be seen, the geographic barriers are linked to the economical ones, as the distance entails

³⁸ Begala, Silvana: "Access to justice of the urban poor: a field study in Córdoba, Argentina", Faculty of law and social sciences, National University of Córdoba, Argentina, paper delivered at the 2001 Meeting of Latin American Studies Association, September 6-8, 2001, in Washington DC, USA.

³⁹ www1.worldbank.org, April 17, 2002.

⁴⁰ Cappelletti, Mauro, volume 1, book 1, p. 10-13.

⁴¹ Sieder, in "Pluralidad Jurídica en el Umbral del Siglo", p. 41

⁴² Ibid.

the dual problem of lack of money to pay for transport and loss of income, as well as other difficulties involved in leaving the village for a long time, such as inability to carry out duties and protect the family, dangers on the road, etc. It is not uncommon that people have to walk several hours to get to the nearest court. “When a serious problem has occurred we have to go to the Peace Court in Santa Eulalia, and it takes about 10 hours to walk there”⁴³.

3.3.3 Linguistic barriers

The right to a trial in a language that the litigant understands is a fundamental part of the fair trial. In Guatemala this right has been permanently denied the Maya population and is maybe the most obvious barrier to access to justice. The right for a person who does not understand or speak Spanish to be assisted by an interpreter in penal cases is stated in national legislation as well as in the international conventions ratified by Guatemala. However, this right is generally not observed, and if it is, then the interpreters often lack professionalism⁴⁴. The case of Pedro Rax Cucul is an illustrative example. This man of *q'eqchi'* ethnicity, who did not speak Spanish, was accused of murder and sentenced to death. The defence claimed that he suffered from paranoia and hence was mentally ill. In major parts of the legal process he was not assigned an interpreter and the language barrier influenced the psychiatric examination of his mental state negatively. After having exhausted all procedural resources before the highest judicial instances, including a complaint against the Guatemalan state before the Inter-American Commission of Human Rights, Pedro Rax Cucul was sentenced to death. Finally, his defence filed a petition for mercy, which was granted by the President of Guatemala. This does not change the fact that he was sentenced after a process that ignored his right to an interpreter and by pardoning him the state never acknowledged its mistakes, since the pardon is an institute giving mercy to people considered guilty⁴⁵.

3.3.4 Cultural barriers

In addition to often being unfamiliar with the laws and rules of the official justice, the Mayans generally have problems identifying themselves with this system, as it is has totally different ideological foundations than indigenous law and therefore proves to be incomprehensible for them. For example, a process where the individual stands all by himself and where his

⁴³ Interview with a man in Quixabaj, department of Huehuetenango, May 16, 2002. As the interview was conducted on the account of ICCPG I had to keep the person anonymous.

⁴⁴ Morales Laynez, Benito: “*El Acceso a la Justicia en el Propio Idioma*”, AVANCSO, Guatemala City, 2001, p. 104-105.

⁴⁵ *Ibid*, p. 99-101.

family cannot participate is for the indigenous people an intimidating element that does not follow the community logic that they are used to⁴⁶.

The cultural barrier is closely related to the linguistic one, as the use of only Spanish is one of the means by which cultural distance is created. Other means are the symbols and procedures of the official justice system. As a result of this situation, the judicial system is regarded with significant mistrust. The law is seen as something that only benefits the rich and not as justice or defence for the citizens. The problem of cultural distance is obviously of greatest significance for the indigenous population, which is among the poorest groups and the one most excluded from the judicial system. Additionally, the official system discriminates by the fact that it does not recognise their culture and languages⁴⁷.

3.3.5 Institutional barriers

The official justice system is characterised by excessive formalism and bureaucracy, marked by slowness and delays, which make evidence out of date. Offenders go free from punishment, and people live in uncertainty about the legal outcome of disputes. The lawyers have also come up with innumerable ways of delaying the process. There are courts that have rejected a plea due to a missing accent on a name⁴⁸. Today, there are so many pending cases in the courts and in the Public Prosecutors Office⁴⁹ (PPO) that it is not even possible to solve them within reasonable time. The PPO merely covers 10 percent of the national territory due to lack of financial resources. Due to the overcrowded authority and the inability to solve all cases, the Attorney General, Carlos David de León Argueta, describes the situation for his own institution as a disaster⁵⁰. Regarding civil matters the situation is even worse. An example is a case where the lawyer delayed the process for 18 years by using all available resources in the law⁵¹.

Time is a factor contributing to the costs of a procedure. In Guatemala, it is not uncommon that people seeking a court remedy must wait over two or three years for an enforceable judicial decision. The effect of this delay, especially given rates of inflation, can be devastating; it increases the parties' costs and puts great pressure on the economically weak to abandon their claims or settle for much less than that to which they are entitled. As

⁴⁶ Interview with Carlos Fredy Ochoa, July 17, 2002.

⁴⁷ Sieder, Rachel in *"Pluralidad Jurídica en el Umbral del Siglo"*, p. 41.

⁴⁸ *"Construyendo el Pluralismo Jurídico-experiencias de sensibilización"*, Defensoría Maya, Guatemala City, 2001, p. 78.

⁴⁹ In Spanish: Ministerio Público.

⁵⁰ Carlos David de León Argueta, Attorney General and Head of the Public Prosecutors Office, in supplement in *Prensa Libre*, Oct 10, 2002.

⁵¹ *"Construyendo el Pluralismo Jurídico"*, p. 80.

the European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 6, paragraph 1, explicitly recognises, justice that is not available within a “reasonable time” is, for many people, inaccessible justice⁵². The consequence of these problems is impunity, which is a serious problem in Guatemala and is one of the major reasons why people choose to solve their conflicts themselves with violent methods. Corruption is another side effect of the infected features of the system. In order to get anywhere it may be necessary to bribe the court personnel⁵³.

3.3.6 Racist barriers

When the Mayans come into contact with the ladino-dominated judicial system, they often face racist attitudes by the judges, lawyers, prosecutors and other judicial personnel. The indigenous persons may be regarded as stupid and uncivilized, which makes their possibilities to obtain justice more difficult, and in the worst case, completely blocked. The racist attitudes contribute to the Mayans’ feeling of intimidation by the judicial system and induce them to settle their disputes in their own way⁵⁴.

3.3.7 Conclusions

An examination of these barriers reveals that the Guatemalan judicial system does not provide access to justice to its citizens and that it is the indigenous population that has to fight more obstacles than any other faction of Guatemalan society. Not only do they face barriers that are connected to their ethnic identity, but their situation is aggravated by their position as among the poorest in the society, and by the fact that the great majority of them live in the countryside. Without a doubt, is it necessary in Guatemala to promote reform models that increase access to prompt and efficient justice for the most disadvantaged parts of the society.

3.4 Improving the situation

Lasting improvement to the citizenry’s access to justice is evidently no easy task, and the fundamental question is how it can be done. Perfect effectiveness in the context of a specific law could be expressed as complete “equality of arms” – the assurance that the ultimate result depends only on the legal merits of the opposing positions, unrelated to differences which are

⁵² Cappelletti and Garth, volume 1, book 1, p. 14.

⁵³ Prophette, Albane, evaluation of the Administration of Justice Centre in Santa Cruz del Quiché, unpublished report from USAID, p. 5.

⁵⁴ Sieder, Rachel in *“Pluralidad Jurídica en el Umbral del Siglo”*, p. 41.

alien to legal strength. This perfect equality is, of course, utopian; the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal, and at what cost⁵⁵. A complicating factor in the efforts to attack barriers to access is that it must be emphasised that these obstacles cannot simply be eliminated one by one. Many access problems are related, and changes aimed at improving access in one way can make access barriers worse in another. For example, one approach to reducing costs is simply to ban legal representation in certain proceedings. Clearly, however, since low income, relatively uneducated litigants are more likely to lack the capacity to present their own legal cases effectively, they might suffer more than benefit from such a “reform”. Without some compensating factors, such as a very active judge or other forms of legal assistance, plaintiffs could now *afford* to carry a lawsuit but would lack the kind of help that may be essential for them to litigate *effectively*. Therefore, the quest for improved access to justice cannot neglect the interrelationship of access barriers⁵⁶.

3.5 Providing access to justice in multicultural societies

When trying to understand what “access to justice” might mean and what might practically be required to provide it in a society, a primary question is: access to justice *for whom* – for what constituency, group, class, or segment of society? In hardly any part of the contemporary world are societies and nations uniform, homogenous masses, but heterogeneous aggregations of groups and entities, large and small. Values, needs and social structures differ, often widely, from sector to sector within a single society. In short, it may be said that the societies of today are characterised by their *pluralistic* views and shapes. The phenomenon of societal pluralism has an important bearing on the question of access to justice. The concept of justice itself has often been framed in universal or absolute terms, and this continues to be true in many respects. In the context of pluralistic societies, even if access to justice is considered a fundamental and universal right, it must be recognised that there is no fundamental and universally applicable means of satisfying this right in practice, – nor can there be a singular meaning for “access to justice”. Therefore, if implementing the principle of equal access to justice is desirable, and if the premise is accepted that the societies are pluralistic in varying degrees, it is necessary to develop a pluralistic understanding of access to justice. This means first of all a recognition that social pluralism calls for institutional pluralism; otherwise what is called “access to justice” may simply be a one-dimensional response that, in the pluralistic context, is unnecessary, unjust and ineffective. Consequently, it is important to explore the range of needs that exists among citizens seeking

⁵⁵ Cappelletti and Garth, volume 1, book 1, p. 10.

⁵⁶ *Ibid*, p. 20-21.

justice, and the range of action and institutions capable of meeting those needs, from direct government agents to publicly sanctioned, voluntary non-governmental arrangements⁵⁷. The area of law has generally been at the centre of the attempts to struggle with societal pluralism and integrate the traditional and the modern, especially in the developing countries. The political unity of these countries has often been realised before their social unity. The result is an obligation for governments that have attained *political* unity to continue to take account of the specific character of the societies they govern-since they have not attained *social* unity-or else risk seeing a unitary law and legal system rendered totally ineffective. In Africa, for example, the “access to justice” developments have in great part been the result of a tension between the profound desire for a unitary justice based on universal procedural guarantees and the recognition of the need for, and the value of, a pluralistic structure of justice responsive to the pluralistic character of the society. While it has been said that this tension is a major problem in the developing countries, it is equally felt in the so-called developed countries where social pluralism, if somewhat less marked, is nonetheless pervasive. Immigrants, poor people and other socially weaker groups constitute entities that encounter impediments to access to justice in developed societies and therefore need to be integrated into the society. These countries may thus have much to learn from the experience of the Third World⁵⁸.

3.6 Can the recognition and application of indigenous law provide the solution?

Because the Guatemalan social structure is characterised by an ethnical mix, it is imperative that the state recognises these multicultural features in order to assure equal rights and respect between all citizens. One step towards this goal would be to fully recognise the indigenous law and to respect the decision-making of the indigenous authorities⁵⁹. The problems of access need to be tackled in a pluralistic way if this right is to be granted to the majority of the population: the indigenous people. By doing so the improvements of access to justice would correspond to the Guatemalan multicultural reality, which is the only way to combat the fact that it is the indigenous population that to the greatest extent lacks access to justice. In light of the need for a pluralistic understanding, the recognition and application of indigenous law may be one way to improve the situation. Obviously, access to justice in this context is not to be understood as access to the State justice system, which is the most common definition of the

⁵⁷ Cappelletti, Mauro and Bryant Garth: “*Access to Justice-emerging issues and perspectives*”, volume 3, Sijthoff, Nordhoff and Alphenaaandenrijn, Milano, 1979, p. 261-262.

⁵⁸ *Ibid.*, p. 263.

⁵⁹ “*Una Nueva Justicia para la Paz*”, final report of the Commission for Strengthening of the Justice, Guatemala City, 1998, p. 117-118.

concept. As mentioned earlier, the definition that I am using is wider than that. (see **3.2.2**).

3.7 Legal framework concerning access to justice

As this thesis treats the concept of access to justice as an international human right, it is quite natural to focus on the international treaties and conventions that deal with this right. In this chapter, I will study those of importance for my topic, i.e. the conventions ratified by Guatemala. Afterwards, I will briefly deal with the Guatemalan constitution regarding the right to access to justice, as it is subordinate to the international legislation. As I have chosen to use the definition of substantive justice rather than procedural access to justice, there is a wide range of articles concerning the topic.

3.7.1. Universal Declaration of Human Rights

The right to recognition as a person before the law is stated in article 6, and according to article 7, everyone is equal before the law and entitled to equal protection of the law without any discrimination. Everyone has the right to an effective remedy by the courts for acts violating his fundamental rights, article 8. The prohibition of arbitrary arrest is found in article 9. The guarantees of a fair trial are dealt with in article 10 and 11. The latter also contains the prohibition of retroactivity of the law. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, honour and reputation, and has the right to the protection of the law against such attacks, article 12⁶⁰. In cases concerning children, the UN Convention on the Rights of the Child may be invoked; its articles 37 and 40 are of primary interest for the topic⁶¹.

3.7.2 International Covenant on Civil and Political Rights

The first article of interest for the topic is number 9 which concerns the prohibition of arbitrary arrest and the rules that have to be followed when a person is arrested, as well as the necessity for a detention to be conducted according to procedures established by law. Article 13 concerns the need to follow the law when expelling a foreigner from a country. Without any doubt, article 14 is the most important one concerning access to justice and deals with equality before the courts and the criteria for a fair and public

⁶⁰ www.un.org/Overview/rights.htm, April 17, 2002.

⁶¹ www.unhchr.ch/html/menu2/6/crc/treaties, February 4, 2003.

hearing by an independent tribunal. I will look closer at this article under **3.7.5**.

In article 15, the prohibition of retroactivity of the law is dealt with, and in article 16 every person's right to be recognised everywhere as a person before the law. The most important part of article 17 is its second paragraph which states the right to the protection of the law against unlawful interference with a person's privacy, home, correspondence, honour and reputation. Finally, article 26 grants the entitlement of equality before the law and equal protection of the law without any discrimination. "...the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"⁶².

3.7.3 American Convention on Human Rights

The rules concerning detention and arrest are expounded in article 7. Article 8 is about the right to a fair trial, which is almost identical to article 14 of the ICCPR. Article 9 echos the prohibition of retroactivity in article 15 of the ICCPR, and article 11 reiterates ICCPR's article 17. The right to equal protection of the law is stated in article 24. A very relevant article is the 25th about the right to judicial protection, which grants everyone the right to a simple and prompt recourse to a competent court for protection against acts that violate fundamental rights. The states hereby undertake to ensure that every person shall have the proper judicial remedies to such a process and that the authorities enforce these remedies when granted⁶³.

3.7.4 The Convention on the Elimination of All Forms of Racial Discrimination

Given the racist attitudes that hinder the Mayan people's access to justice (see **3.3.6**) the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) may serve as an instrument to oblige the Guatemalan State to take measures to improve the situation. It should be pointed out that the following is not an exhaustive list of all the articles but those most relevant for the Guatemalan case. Moreover, the Convention is not solely relevant concerning the aspects of access to justice but also regarding the discrimination of the Maya people's legal system. According to article 2 (a) of the Convention, the State Parties undertake to ensure that all public authorities and public institutions shall act in conformity with the obligation not to engage in any act or practice of racial discrimination

⁶² www.unhchr.ch, Treaty Bodies Database, June 18.

⁶³ www1.umn.edu/humanrts, June 18.

against persons, groups of persons or institutions. Furthermore, each state shall take effective measures to review governmental, national and local policies. They shall also amend, rescind or nullify any laws and regulation which have the effect of creating or perpetuating racial discrimination-article 2 (c). Article 5 concerns equality before the law without distinction as to race, colour, or national or ethnic origin. This is further developed in the subdivisions (a) to (f), for example the right to equal treatment before the tribunals and all other organs administering justice is dealt with. The member states are obliged under article 7 to adopt measures, “particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination”⁶⁴. The vehicle for implementation is the Committee on the Elimination of Racial Discrimination, which consists of 18 experts⁶⁵. The states’ obligation to submit reports is described in article 9 and under article 11-13 there is an interstate complaints procedure. Article 14 provides another procedural possibility, whereby a State Party “may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention”. Without a doubt, the Mayan people of Guatemala are victims of racism and discrimination in their contact with the administration of justice as well as through the official treatment of the indigenous justice system. They should make use of the Convention as a means to force the Guatemalan State to prevent discriminatory actions, especially by the State organs themselves. The attempts are, nevertheless, shadowed by the in practice limited possibilities for the Mayans to make complaints individually or in groups of individuals. Unfortunately it is not likely that the Guatemalan State would recognize the competence of the Committee to consider communications from individuals or groups of individuals. However, the interstate complaint procedure remains as a weapon as does the Committee’s examination of the reports and information received from the State parties⁶⁶.

3.7.5 The Guatemalan Constitution

In the constitution of Guatemala, article 2, the general duties of the state consist in guaranteeing the inhabitants life, liberty, justice, security, peace and integral development. Article 29 guarantees the right to free access to the courts and other state institutions. According to article 46, the international human rights treaties ratified by Guatemala have pre-eminence

⁶⁴ www.unhchr.ch/html/menu3, February 4, 2003.

⁶⁵ Thornberry, Patrick: *International Law and the Rights of Minorities*, Oxford University Press, New York, 2001, p. 269.

⁶⁶ www.unhchr.ch/html/menu3, February 4, 2003.

over the national laws, just as the constitution has pre-eminence over other laws and treaties, article 204⁶⁷.

3.7.6 The right to a fair hearing

In order to add a more in-depth perspective on access to justice in indigenous law, I have had to limit this study to on one of its aspects. I have chosen to focus on *the right to a fair hearing*, as it lies at the heart of the concept of a fair trial, which in turn might be the most important guarantee for access to justice. There are various international documents guaranteeing the right to a fair hearing, such as article 14(1) of the ICCPR, article 10 of the Universal Declaration on Human Rights, article 16 of the American Declaration on Human Rights, etc. I have decided to focus on article 14 in the ICCPR, as I consider this convention to be comprehensive, explicit and internationally well recognised. Furthermore, it has been ratified by Guatemala.

The second sentence of article 14, paragraph 1, provides that “everyone shall be entitled to a fair and public hearing”. Paragraphs 2-7 and article 15 elaborate on the requirements of a “fair hearing”. However, it is wider in scope, as can be deduced from the wording of Article 14(3) which refers to the concrete rights enumerated as “minimum guarantees”. Therefore, it is important to note that despite having fulfilled all the main procedural guarantees laid out in paragraphs 2-7 of Article 14 and the provisions of Article 15, a trial may still not meet the fairness standard envisaged in Article 14(1)⁶⁸. It deserves to be pointed out that article 14 not only applies to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law⁶⁹.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of “equality of arms” between the parties in a case. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case⁷⁰. It would be difficult to identify in advance all of the situations that could constitute violations of this principle. They might range from denying the accused and/or counsel time to prepare a defence to excluding the accused and/or counsel from an appellate hearing when the prosecutor is present⁷¹. Finally, if a case concerns a child, the UN

⁶⁷ www.cidh.oas.org/countryrep/Guatemala01sp/cap.4.htm, February 9, 2002.

⁶⁸ www.lchr.org/pubs, June 18, 2002.

⁶⁹ www.unhchr.ch, Treaty Bodies Database, general comment 13, June 18, 2002.

⁷⁰ www.amnesty.org/ailib/intcam/, June 18, 2002.

⁷¹ www.lhcr.org/pubs/fairtrial2.htm, June 18, 2002.

Convention on the Rights of the Child could be invoked. In its article 40, the right to a fair hearing is dealt with⁷².

⁷² www.unhcr.ch/html/menu2/6/crc/treaties, February 4, 2003.

4 Recognition of indigenous law

4.1 Legal framework concerning the recognition of indigenous law

Within the 20th century, there have been significant advancements in the structure of world organisation and shifts in the international attitude on human rights and state sovereignty. These changes have engendered a reformed system of international law and the reformed system, in turn, has provided fertile ground for social forces to further alter and for international law to change its position towards indigenous peoples⁷³. As an essential part in this development there has, during the last 15 years, been a general tendency in Latin America to recognise states as multicultural and multiethnic entities. The recognition of indigenous law, i.e. the authorities, legal norms and practices of the indigenous population could make it easier for this group to identify itself with the judicial sector, and at the same time, increase the legitimisation of it. In Guatemala, the recognition of indigenous law was stipulated in the Peace Accords and strengthened by the nation's ratification of the Convention 169 of the International Labour Organisation (ILO). Recognition of indigenous law is a way of guaranteeing the participation of the communities in the construction of a new national judicial system. One of its advantages is that the population that historically has been marginalized from the judicial system can hereby "adapt" to and make use of the system. Most important is the achievement of a creative response to the lack of appropriate official justice in the communities, and the promotion of the development and re-enforcement of more efficient and legitimate mechanisms for conflict resolution⁷⁴.

4.1.2 The national level

On the national level, Guatemala's Constitution of 1985 and the secondary legislation set the legal framework for the recognition of indigenous law. The constitution recognises the right of people and communities to their cultural identity according to their customs in article 58⁷⁵. In article 66 concerning ethnic groups, it is also stated that "*The government recognises, respects and promotes their form of lives, customs, traditions, forms of social organisation,...*". The forms of organisation constitute part of the

⁷³ Anaya, S. James: "*Indigenous peoples in international law*", Oxford University Press, New York, 1996, p. 39.

⁷⁴ Sieder, Rachel in "*Pluralidad Jurídica en el Umbral del Siglo*", p. 43-45.

⁷⁵ Yrigoyen Fajardo, Rachel: "*Pautas de Coordinación entre el Derecho Indígena y el Derecho Estatal*", Fundación Myrna Mack, Guatemala City, 1999, p. 51.

indigenous law. The indigenous people administer justice by applying their norms and procedures as a part of practising their “*customs and traditions*”. On the other hand, the Constitution establishes in its article 203 that the Judiciary branch⁷⁶ has the exclusive right to carry out jurisdictional duties, indicating that no other authority can interfere with the justice administration. This regulation specifically refers to the municipal mayors that constitutionally had this attribute. The Judiciary Law⁷⁷ and the Municipal Code, which were elaborated before the 1985 constitution, have expressly withdrawn the judicial function that the municipality and its officials used to have. As can be seen, the respect, recognition and promotion referred to in article 58 and 66, stand in contradiction with article 203 that indicates that only the Judiciary may administer justice. As both sets of articles are of constitutional rank and of specific character, a conflict of rules can be interpreted. Articles 58 and 66 are specific concerning the rights of indigenous and ethnic groups, and recognise their customs and forms of organisation; which includes the indigenous law and administration of justice. Article 203 is specific concerning the administration of justice, which marks that this task is to be handled exclusively by the Judiciary. There is no possibility to solve this conflict of rules within the national legislation. Guatemala has, however, signed international documents on human rights, whose ranks are superior to the national legislation according to article 46 of the Constitution. This opens up interpretative possibilities to solve such conflict of rules⁷⁸.

In article 2 of the Judiciary law, it is pointed out that “the custom” may be a source of law, provided that there are no rules and it is not *contra legem*. Hence, even though the custom is being recognised, it is limited to mean that which does not contravene with the law and public and moral order.

Before the signing of the peace accords, the Penal Procedural Code was reformed, introducing the community peace courts. These take local ways and customs into account when solving penal cases. A system for recognition of the settlements undertaken by the community authorities is also established, as well as mechanisms for the official approval of the community decisions. However, the reformed text establishes that the judges cannot contravene the Constitution or the law when recognising and applying the ways and customs of the communities.

Stated as criminal conducts in the Penal Code are the following: usurpation of duties, abuse by authorities, kidnapping, assault, etc. Some attorneys and judges have prosecuted indigenous authorities (auxiliary mayors as well as other municipal authorities), for the above mentioned offences when these indigenous authorities have administered justice, ordered the detention of individuals or determined certain forms of community sanctions: community

⁷⁶ In Spanish: Organismo Judicial.

⁷⁷ In Spanish: Ley del Organismo Judicial.

⁷⁸ Yrigoyen Fajardo, Rachel, p. 52.

work, cut of public services (for example water), corporal punishments, etc⁷⁹. Article 203 of the constitution serves as the legal authority for these accusations.

In short, the constitution recognises, respects and promotes the form of organisation, the customs and the traditions of the indigenous population in art. 58 and 66, where “customs” can be interpreted as including administration of justice and indigenous law. On the other hand, it grants exclusive rights to the Judiciary branch to exercise jurisdictional functions and administer justice in art. 203, hereby creating a conflict of rules.

4.1.3 International human rights law and indigenous populations

It should be pointed out that an exhaustive list of all the international human rights conventions on the subject will not be provided herein, as this is beyond the scope of this thesis. What follows is the most important legislation regarding the Guatemalan situation.

4.1.3.1 The International Covenant on Civil and Political Rights

ICCPR is a benchmark text as it explicitly refers to the independent rights of minorities⁸⁰. Guatemala ratified this convention in 1992. Its article 27 guarantees the indigenous people’s right to practice their own culture. International organs like the United Nations Human Rights Committee and the Inter-American Commission of Human Rights have held “the right to enjoy their own culture” to cover all aspects of an indigenous group’s survival as a distinct culture, understanding culture to include forms of organisation and control over resources like land, as well as the right to elect authorities, which constitutes a component of indigenous law⁸¹. The case law developed regarding article 27 is in line with this extensive view of the cultural integrity norm, (see for example *Ominayak v. Canada* and *Kitok v. Sweden*)⁸². Traditional forms of dispute resolution are thus included in the definition of culture in article 27.

4.1.3.2 The Convention 169 of the ILO

The International Labour Organisation has exhibited an interest in the condition of indigenous peoples since its inception, as in many countries they have been exploited as cheap labour by the dominating population. In

⁷⁹ Ibid., p. 53.

⁸⁰ Thornberry, Patrick, p. 285-286.

⁸¹ Anaya, S. James, p. 100.

⁸² www.unhchr.ch/tbs/doc.nsf, February 4, 2003.

1957 the ILO adopted Convention no. 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-tribal Populations in Independent Countries⁸³. This convention was regarded as antiquated, and in 1989, Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries of the ILO (hereafter “ILO 169”) was developed. ILO 169 represents international law’s most concrete manifestation of the growing responsiveness to indigenous peoples’ demands and is the strongest weapon in the fight for improved respect for their rights. Since 1996, Guatemala has been a part of this convention, which establishes a vast number of rights for the indigenous people concerning their identity and the protection of their integrity and culture, the right to participate in local and national development, the rights before the law, recognition of indigenous law and their languages, etc⁸⁴. Regarding the judicial area the Convention establishes rights for the indigenous people in two situations: a) before the official administration of justice, and b) the recognition of indigenous law. The rights of the indigenous people before the official justice are a respect for their culture, the use of their languages (through interpreters and other instruments), the right to legal defence, alternative measures in prison, etc. (art. 8.1, 9.2, 10.12)⁸⁵.

Regarding indigenous law and relevant topics, the convention establishes the following rights:

- a) *The right to be consulted.* Whenever consideration is being given to legislative or administrative measures which may affect the indigenous peoples directly, the government shall consult them through appropriate procedures, art.6.1⁸⁶.
- b) *The right to a cultural identity.* This constitutes the basis for the respect of indigenous law. Measures should be taken to promote the full realisation of the social, economic and cultural rights of the indigenous population with respect for their social and cultural identity, their customs and traditions and their institutions, art. 2b. The respect for the customs and the institutions is part of the inherent right to a cultural identity for the indigenous people.
- c) *The right to respect of indigenous law.* “In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws”, art 8.1⁸⁷. This means that the national legislative sector has to stop interfering with the indigenous law in any way, e.g. neither criminalising it, nor manipulating it.

⁸³ Thornberry, Patrick, p. 334-336.

⁸⁴ Ibid., p. 56.

⁸⁵ Ibid., p. 57.

⁸⁶ www.ilolex.ilo.ch, July 8, 2002.

⁸⁷ Ibid.

- d) *The right to preserve the indigenous law.* “These peoples shall have the right to retain their customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights...”, art. 8.2, paragraph 1⁸⁸. Through this convention the indigenous peoples have the legal authority to maintain their institutions and legal procedures. These are, however, not allowed to violate the fundamental and human rights. It is important to highlight that the convention does not limit the indigenous law with legislation or interests of third parties, but only with the prohibition of human rights violations.

Given that this convention concerns human rights, it has a superior rank to the national laws according to art. 46 of the Guatemalan constitution. Therefore, the convention stands above the laws limiting the customs to what does not affect the laws and the constitution. This means that the convention recognises the administration of justice if it is part of the indigenous customs and institutions⁸⁹.

- e) *Respect for the penal control.* “To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected”, art. 9.1⁹⁰. The application of the convention is not limited to civil matters or those of minimum quantity; it expressly includes penal material. According to the convention, the limit of indigenous penal law is not drawn by the types or seriousness of the crimes that can be handled, but by the non-violation of human rights.
- f) *Mechanisms to resolve conflicts between indigenous law and the human rights.*“(...) procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle”⁹¹, (in order to avoid incompatibility between the indigenous law and the human rights), art 8.2. This means that if someone argues that human rights are violated when applying indigenous law, this does not authorise the government institutions to automatically hand over the case to the ordinary tribunals, or to subordinate the indigenous authorities to the official judicial system. What the convention requires is a measure of precaution concerning procedures aimed at solving conflicts but it does not express how. Such a measure could be constituted by a constitutional or legal norm. In order not to impose a new cultural dimension to the official justice, a presumed violation of the human rights by the indigenous law could be solved by means of an intercultural procedure. A mixed tribunal, formed by judges from the official justice system and indigenous authorities could for example fulfil this aspect of the

⁸⁸ www.ilolex.ilo.ch, July 8, 2002.

⁸⁹ Yrigoyen Fajardo, Rachel, p. 58.

⁹⁰ www.ilolex.ilo.ch, July 8, 2002.

⁹¹ Ibid.

procedure. If the cultural integrity is not respected, the rights in the convention (art. 8.1, 2b, etc.) are not being fulfilled.

- g) *Adaptation of the national laws to the ILO 169.* The convention indicates that the government shall “(...) ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have means necessary for the proper fulfilment of the functions assigned to them”, art. 33.1⁹². These programmes concerning the indigenous population shall include “the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in cooperation with the peoples concerned”, art. 33.2 b⁹³. Changes in the national legislation is an unavoidable task as the convention recognises several rights for the indigenous peoples whose national implementation requires an adaptation of the legislation and the institutions to the convention.
- h) *Supremacy of the most favourable laws* (art. 35). It is established in the convention that the laws granting the indigenous population the most advantages shall have supremacy, even though they might spring from rules of a lower rank or from political agreements.

In summary, ILO 169 recognises and respects the indigenous law, limiting the recognition to the non-violation of human rights. In order to avoid discrepancies between the convention and the internal laws, an adaptation of the national laws is being called upon. This could be achieved by changes of the constitution and the secondary laws⁹⁴.

4.1.3.3 What can be done if a State does not follow ILO 169?

Being a ratified convention Guatemala is bound to follow its regulations. As has been shown, Guatemala is not fulfilling its obligations, which is to a great disadvantage for the indigenous population. This convention is the strongest weapon that the indigenous people possess, which is why they should take advantage of its potential to force the Guatemalan State to act.

ILO lacks coercive faculties and has no jurisdictional power over the member states. Its actions are based on persuasion and dialogue in order to make the governments fulfil the commitments to which they are bound through the ratification⁹⁵. However, it is regarded as a sanction to be mentioned in the list of the member states that have not fulfilled the convention, which ILO presents at their annual meeting and in their Global

⁹² www.ilolex.ilo.ch, July 8, 2002.

⁹³ Ibid.

⁹⁴ Yrigoyen Fajardo, Rachel, p. 60.

⁹⁵ Tzaquitzal, Efraín, Pedro Ixchú and Romeo Tíu: “*Alcaldes Comunales de Totonicapán*”, Guatemala City, 2002, p. 124.

Report⁹⁶. The governments have often been willing to correct the observed flaws, as otherwise they risk having their image and national credibility stained⁹⁷. In the case of Guatemala, where the state clearly does not fulfil its obligations, the indigenous people should make use of these possibilities by communicating directly with the ILO office in Geneva to present complaints or cases where the contents of the convention have been openly violated. There are two distinct complaint procedures, both of which are designed in accordance with the ILO's central focus on labour unions, employers' organisations and governments. Consequently, neither complaint procedure can be invoked directly by an indigenous people or community. Under article 24 of the ILO Constitution, an association of workers or employers can make a "representation" to the ILO that a country "has failed to secure in any respect the effective observance within its jurisdiction of any [ILO] Convention to which it is a party"⁹⁸. This procedure represents the most plausible course of action in the Guatemalan case, as it is more direct than the second alternative. It would not be easy to obtain the financial resources, the legal advice and the organisation of legal action but it could be facilitated through the cooperation with non-governmental human rights organisations⁹⁹. Article 26 of the ILO Constitution establishes a second complaint procedure, which may be filed by any ILO member state that has ratified the same convention or by a delegate to the annual International Labour Conference. Conference delegates include employers and workers as well as government representatives. In addition, the Governing Body of the ILO may initiate the procedure on its own motion. Usually, a commission is appointed which may make recommendations for corrective measures if a state is found to have problems complying with its obligations according to a convention. The two ILO complaint procedures have been used relatively sparingly, indicating a preference within the ILO for less defiant or less formal means of securing compliance with the conventions. It should be noted that there is no requirement that a party initiating a complaint under article 24 or 26, or the party's constituency, be directly affected by the alleged infraction. Thus, other people could file complaints on behalf of the indigenous people. Labour unions are especially likely surrogates to carry out this task, given the demographic overlap and political alliances between indigenous and labour sectors¹⁰⁰. Apart from joining or cooperating with an already existing labour union, it is also possible for the indigenous people to form their own union, which may give them more freedom when presenting their demands. As can be seen, there is a range of options waiting to be used by the Guatemalan Maya people and their sympathizers.

4.1.4 ILO 169 and the national legislation

⁹⁶ Gómez, Magdalena: "*Derechos Indígenas-lectura comentada del Convenio 169 de la Organización Internacional del Trabajo*", Instituto Nacional Indigenista, Mexico City, 1991, p. 24-25.

⁹⁷ Tzaquitza, Ixchú and Tíu, p. 125.

⁹⁸ Anaya, S. James, p. 161.

⁹⁹ Gómez, Magdalena, p. 25.

¹⁰⁰ Anaya, S. James, p. 161-162.

Indigenous law has been expressly recognised in the Guatemalan legal order ever since the ratification of ILO 169. This instrument obliges an adaptation of the national legislation according to the rules and norms contained in the convention, so that normative consistence can be guaranteed. This adaptation would imply a recognition in the Constitution of indigenous law and of the faculty of the indigenous population to administer justice. On the other hand, ILO 169 also indicates that in case of a conflict of norms or laws the one most favourable to the indigenous population ought to be applied, without paying attention to the rank of the norm, disposition or national agreement in which the right is established. As long as the mentioned adaptation is not being fulfilled, ILO 169 permits the resolution of conflicts between laws in the constitution excluding indigenous justice (art. 203) and the ones endorsing it (art. 58 and 66), by making an interpretation favourable to the indigenous population. The Constitutional Court of Guatemala has expressed that a ratification of ILO 169 is not incompatible with the constitution. Regarding article 46 of the constitution, which says that international treaties ratified by Guatemala have primacy to the national laws, the Court indicates that the international conventions should be interpreted in harmony with the constitution. The focus of the discussions is art. 203 in the constitution that gives the sole authority of justice administration to the Judiciary branch, while the convention empowers the indigenous population with this responsibility. The confusion that could arise from this incompatibility makes it clear that a constitutional reform is necessary which would recognise the indigenous law and the faculty to administer justice. In short, despite the laws and norms not recognising indigenous law and the lack of an explicit recognition of it in the constitution, the government has by the ratification of ILO 169 recognised indigenous law in its national legal order¹⁰¹.

4.1.5 The Peace Accords

The Peace Accords signed by the Guatemalan government and the guerrilla movement URNG constitute a framework of political compromises assumed by the government. Two fundamental obligations stand out a) the agreement to constitutionally recognise the multicultural, multilingual and multiethnic character of the nation and the government. This includes the recognition of the indigenous population and their rights and b) the recognition of indigenous law.

These obligations can basically be found in:

- *Agreement on Identity and Rights of the Indigenous Population (AIDPI)*
- *Agreement on the Strengthening of Civil Power and the Role of the Armed Forces in a Democratic Society (AFPC and FESD)*

¹⁰¹ Yrigoyen Fajardo, Rachel, p. 61.

- *Agreement on Constitutional Reforms and Electoral Regime* (ARC and RE)
- *Agreement on Socio-economic aspects and the Agrarian Situation* (ASESA)
- *The Calendarisation Agreement*¹⁰².

In AIDPI institutional reforms are recommended in order to characterise Guatemala as a multiethnic, multicultural and multilingual state that recognises the identity of the Maya-, Garífuna- and Xinca peoples¹⁰³. The Accords express the importance of indigenous law and the need for its recognition in the national legislation, considering the problems of exclusion and denial of rights that have been caused by the ignorance about indigenous law. The recognition includes its system of norms, authorities, institutions and procedures to regulate the social life, resolve conflicts, organise their internal order, improve the development and participate in the political life of the country. An equally important part of indigenous law is the respect for their own methods for the appointment of authorities and decision-making¹⁰⁴.

4.1.5.1 The Commission for the Strengthening of Justice

For the development of the Peace Accords concerning justice, the Commission for the Strengthening of Justice was created through the AFPC and FESD. One of its assigned tasks was that of access to justice. With the participation of the indigenous population they were to give continuation to the Peace Accords concerning the administration of justice for the Mayans with a view to facilitate easy and direct access to justice¹⁰⁵. In its reports, the Commission firmly expresses the need for a constitutional recognition of legal pluralism and indigenous law, calling for a modification of article 203 in the present constitution that gives the Judiciary the exclusivity of jurisdictional functions. The reports also call upon the elaboration of a coordination law between the state justice and the indigenous law¹⁰⁶.

4.1.5.2 The Commission for Historical Clarification

The Commission for Historical Clarification (CEH) was also created through the Peace Accords and presented its conclusions and recommendations in a report called “Memory of Silence” in 1999. Among its conclusions, it points out the effects of the civil war in damaging the systems of indigenous authorities and their procedures for decision-making and conflict resolution. The militarisation of the communities, the death and

¹⁰² As there had been few advances made in fulfilling the peace accords a new timetable had to be set for 2000-2004, which was made through the this agreement

¹⁰³ Ibid., p. 63.

¹⁰⁴ Ibid., p. 67.

¹⁰⁵ “Una Nueva Justicia para la Paz”, p. 117.

¹⁰⁶ Yrigoyen Fajardo, Rachel, p. 69.

persecution of indigenous authorities, the establishment of military commissioners and members of PAC, seriously damaged the indigenous authorities and their forms of dispute resolution introducing illegitimate authorities and violent mechanisms¹⁰⁷. In its recommendations, the CEH repeats questions already raised, concerning indigenous law, by the Commission of Strengthening of Justice¹⁰⁸.

¹⁰⁷ Ibid., p. 69-70.

¹⁰⁸ "Memory of Silence", p. 59.

5 Indigenous law

5.1 Introduction

In order to know whether the increased application of indigenous law can improve the access to justice for the Mayan people and what advantages and disadvantages it has, it is necessary to have some knowledge about its contents and legal authorities.

5.2 Definition

The definition of indigenous law¹⁰⁹ can be expressed as follows: The traditional not codified norms that are recognised widely by the community and that have been practised for generations, as well as the sanctions and authorities included in the traditional system¹¹⁰.

5.3 Does a legal system exist?

Some jurists, for example Kelsen, argue that a society only has a legal system if it has judicial courts as well as codes and laws approved by a politically organised state. Others claim that the social rules of the non-western societies have legal character and that there therefore exist legal systems in every society. A third opinion on the one hand agrees that not all norms are legal, and therefore there are not legal systems in all societies. On the other hand, they do find legal features and systems in societies that lack written codes, administration of justice and a state in current, western terms. The ethnology has been able to confirm that the majority of non-western societies have certain legal features, that these are not the same everywhere and that the level of development of the features are not necessarily equal within each particular society nor between the different non-western societies. According to this last approach, a society has a legal system if it contains the following elements:

- 1) Defined norms that regulate social behaviour and that, if infringed, are followed by secular sanctions.
- 2) The community's own authorities, with people in charge of applying the sanctions.

¹⁰⁹ In Spanish: Derecho Indígena, Derecho Maya or Derecho Consuetudinario.

¹¹⁰ "Taller de Capacitación, Tema 5: Interculturalidad", report from UNDP regarding the project "Jueces de Paz, PNUD-GUA-00-010", p. 23.

3) Systematic forms of applying sanctions¹¹¹.

When applying these prerequisites on the Mayan society in Guatemala, it becomes clear that it indeed possesses a legal system.

5.4 The impact of the colonial power

It should, however, when studying the legal systems of the Mayans in Guatemala, be taken into account that the impact of the colonial domination over the indigenous legal structures shifted from place to place as well as in time. In some communities and during certain times, the indigenous legal systems were totally eliminated; in others, they kept regulating certain activities or types of relations, and in further communities, they were able to survive almost entirely. Furthermore, during the last 500 years the Mayas adopted some European structures: economical, social, political, legal and religious. In this adaptation process elements and features of the pre-Columbian institutions have survived (for example, Spanish/Western features like *cofradías*¹¹² and indigenous, auxiliary and municipal mayors). In addition, the hegemonic authorities – the colonial as well as later the republican – issued special laws for the oppressed people. Bearing this background in mind, we can conclude that the Mayans have lived in complex legal situations that have original and ancestral elements, laws created specifically for them by the colonial and republican dominants, as well as the ruling power's own laws and institutions¹¹³.

5.5 The Cosmvision

By *cosmovision* is understood the perceptions and the elements that make up the Maya Indians conception of life. Out of this vision of life a system of values, norms and principles emerge around which the people organise and lead their life. The cosmvision is based on the interrelation and dependency between human beings, nature and the cosmos. Therefore humans must respect nature and the universal elements like water, sun, air and rivers¹¹⁴. From generation to generation it has been passed on that between all these elements there is order, respect and harmony, and if this balance is broken it has to be re-established¹¹⁵. From the values of the *cosmovision*, particular norms are derived for the different spheres of community life, including the

¹¹¹ IDIES: "El Sistema Jurídico K'iche'-una aproximación", IDIES, Guatemala City, 1999, p. 25-27.

¹¹² Religious brotherhoods.

¹¹³ "El Sistema Jurídico K'iche' ", p. 27.

¹¹⁴ "Administración de Justicia Maya-experiencias de Defensoría Maya", Defensoría Maya, Guatemala City, 1999, p. 35-37.

¹¹⁵ Ibid., p. 46.

legal area¹¹⁶. Thus, the *cosmovision* is closely related to the indigenous law. Since childhood, the Mayans are taught how to live according to the norms and principles. This is why one of the most important purposes of the Mayan law and the administration of justice is to educate the new generations about peaceful co-existence and prevent them from breaking rules¹¹⁷. The Mayans very much value the unity of the community, the peaceful co-existence, the solidarity of the people towards their community, the respect for nature and the respect towards people and their belongings¹¹⁸.

5.6 Settling a dispute

In order to restore peace and harmony in the community, one of the Mayan law's main objectives is to ensure that the disputants and their respective supporters are reconciled. The task of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts, than to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored unless the parties are satisfied that justice has been done. Thus the party at fault must be brought to see how his behaviour has had negative consequences, and he must come to accept that the decision of the arbitrator is a fair one¹¹⁹. He then needs to have the assurance that once he has admitted his error and made recompense for it, he will be reintegrated into the community.

Regarding the proceedings there is significant variation between the different communities. Nevertheless, they are all characterised by a moralising feature in order to achieve reconciliation. Embarrassment/shame is an important factor that puts pressure on the parties to come to an agreement¹²⁰. The forums for the conflict resolution are diverse and range from a solution within the family sphere to a court proceeding in the official judicial system. Usually, people first try to find a solution to the problem in the family, and if this fails to resolve the situation, the dispute is brought to the attention of the indigenous authorities. If a solution cannot be achieved within the community, or if the offence is serious (see **5.8.1**), the case is transferred to the state courts. However, all indigenous instances try to avoid allowing the conflict to get to the courts¹²¹ as this is seen as only aggravating the dispute¹²². The decision to turn to a certain instance is not fixed by any rule but it is up to the parties involved to choose¹²³. When the indigenous

¹¹⁶ "El Sistema Jurídico K'iche' ", p. 28.

¹¹⁷ "Experiencias de Aplicación y Administración de Justicia Indígena", Defensoría Maya, Guatemala City, (undated), p. 45.

¹¹⁸ "El Sistema Jurídico K'iche' ", p. 28.

¹¹⁹ Interview with Luís Quiché Batz, July 3, 2002.

¹²⁰ Interview with Maria Tuyuc, November 14, 2002.

¹²¹ Esquit, Edgar and Iván García: "El Derecho Consuetudinario, la Reforma Judicial y la Implementación de los Acuerdos de Paz", FLACSO, Guatemala City, 1998, p. 102.

¹²² Ibid., p. 104.

¹²³ Ibid., p. 99.

authority deals with a case, the process starts by summoning the involved persons to a hearing. For example, in a dispute between husband and wife these are called, and usually the parents of the couple intervene in the discussions. Each person who in some way is involved in a conflict has the opportunity to give his opinion and be heard. After this, people start proposing solutions to the problem and, if necessary, possible sanctions. The indigenous authority clearly has the most important role and acts like a mediator/arbitrator in the discussions¹²⁴.

When trying to reach a solution to a conflict, the indigenous arbitrator may take many factors into consideration. A decision is more in nature of a compromise which takes into account not only the specific charge of the complainant but also any indirect and underlying causes of the dispute and factors which may have an impact on successful reconciliation, such as the history of the relationship between the parties. In the official justice system, on the other hand, following the rules is indispensable, and as a result, a dispute may be redefined to fit a narrow category of rules. The parties have little control over the final outcome, which is dictated by the rules, and one party tends to win or lose according with those rules. This is one of the reasons why the Mayans have problems identifying with the Western system¹²⁵. For them it is odd that what seems to be preferred is not to know *why* anything has happened, but rather what occurred, or even more narrowly, *what can be shown* to have occurred. The Mayan law, on the other hand, seeks a solution through consensus that re-establishes social harmony or avoids tension in the community. In order to achieve this it is important to find a settlement mutually acceptable between the parties. Thus, the concept of justice is derived from what the society considers to be fair and just in light of the overall context, and not what is fixed in advance by law. This does not mean that there are no rules. Rather, the rules are seen as a framework for the discussion when trying to reach an outcome; they do not necessarily determine the outcome. The emphasis on solving the entire conflict means that there is little, if any, difference in the approach to civil or criminal cases. The same set of facts can be the base for civil as well as criminal matters in a procedure.

5.7 Societal norms maintained through oral tradition

In the Maya communities there are no written codes that indicate what is allowed and what is not. Their legal practices just like their moral and social practices, are based on values and principles passed on orally from generation to generation¹²⁶.

¹²⁴ Interview with Maria Tuyuc, November 14, 2002.

¹²⁵ Interview with Luís Quiché Batz, July 3, 2002.

¹²⁶ Esquit, Edgar and Carlos Ochoa García: "*El Respeto a la Palabra-el orden jurídico Maya*", CECMA, Guatemala City, 1995, p. 48-49.

5.8 Legal norms of the Quiché community

There are many variations within the legal systems of the different Maya groups in Guatemala, all of which cannot be dealt with in this thesis. Therefore, I will in the following part (**5.8.1-5.8.3**) look closer at the justice system of the Quiché Indians, as this represents the biggest indigenous group in Guatemala-one million persons in 1981¹²⁷. After this, I will again deal with the common features and issues of the various Mayan groups.

In the Quiché community, as among the rest of the Maya communities, the borders between religious, legal, moral and social spheres are not strict. There is neither a systematisation nor a classification of the legal norms like in the official legal system. However, in order to facilitate the comprehension of the topic, the legal norms will here be classified in:

- Rules concerning penal cases corresponding to the penal sphere in the official legal system.
- Rules concerning family matters corresponding to the civil sphere in the official legal system.
- Rules concerning land and other natural resources, also corresponding to the civil sphere in the official classification¹²⁸.

5.8.1 Penal cases

Generally the serious and minor acts are divided up in the following way:

- 1) Serious acts: rape, murder, abduction of children, theft of horses and cattle, and assault and battery. In addition, slander is considered a serious offence as it divides the population and creates hostility between the inhabitants. Generally, the serious acts are not handled or resolved by the community authorities, which usually limit themselves to transfer the cases to the Peace Courts^{129 130}. The serious acts used to be dealt with in the Mayan law but with the influence of the State and the weakening of the indigenous system the authorities stopped handling such cases, which is why the Mayan law today is very limited regarding penal matters¹³¹.

¹²⁷ "El Sistema Jurídico Maya-una aproximación", IDIES, Guatemala City, 1998, p. 130.

¹²⁸ "El Sistema Jurídico K'iche' ", p. 28.

¹²⁹ In Spanish: Juzgados de Paz. The first legal instance, similar to a District Court.

¹³⁰ "El Sistema Jurídico K'iche' ", p. 29.

¹³¹ Dary F., Claudia: "El Derecho Internacional Humanitario y el Orden Jurídico Maya: Una perspectiva histórico-cultural", FLACSO, Guatemala City, 1997, p. 251.

However, in some places serious offences are handled and resolved in the community itself, but they are exceptions to the rule¹³². Defensoría Maya, the biggest Maya organisation, has in all their years of experience with conflict resolution only heard of one case of murder that has been resolved according to the indigenous law. The offender was obliged to support the wife and the children of the victim until the children turned 18 years of age¹³³.

- 2) Minor acts: fights and theft of poultry, animals and agricultural products. These are the acts that are solved by the local authorities¹³⁴.

As can be seen, the penal cases that the Mayan law solves are few. People who have committed theft are brought straight to the auxiliary mayor, who together with collaborators decides how to proceed with the case¹³⁵. Witnesses are called and evidence is needed. It is not possible to resolve robbery cases in the family sphere as a mediator or a sanction is regarded as necessary¹³⁶.

5.8.2 Family disputes

The concept of a family¹³⁷ among the Quiché refers to the persons who are related by blood: grandparents, parents, children, grandchildren, aunts, uncles and cousins; and those that are married into the family: mothers-, fathers-, sons- and daughters-in-law. Every member of the family is called *achalik* or *wachalal* that roughly can be translated with “familymember” or “brother”, but with a more affectionate emphasis than in English. The family conflicts usually derive from one of the following problems: alcoholism, incomprehension resulting in fights between husband and wife, the husband’s failure to provide for the family, the wife’s non-fulfilment of her domestic duties, infidelity, disputes between parents and children due to inheritance distribution, and the childrens’ refusal to carry out their agricultural duties. These are acts that break the harmony in the family and the norms that the Quiché value; responsibility, comprehension, obedience and fidelity. However, these values are derived from another value, which is even higher in hierarchy among the Quichés: the unity of the family. Because of this, the man is responsible for providing for the family, and the woman for the domestic duties. The same can be said about the children, of whom obedience towards their parents is expected in order to carry out their assigned duties. In this way they collaborate with their family and learn a trade so that they can survive. Lack of understanding and fights between

¹³² “El Sistema Jurídico K’iche’ ”, p. 29.

¹³³ “Construyendo el Pluralismo Jurídico”, p. 102.

¹³⁴ “El Sistema Jurídico K’iche’ ”, p. 29.

¹³⁵ Esquit, Edgar, p. 115.

¹³⁶ Ibid., p. 117.

¹³⁷ In Quiché: *achalaxik*

couples are acts that harm the unity of the family and destroy the harmony of the social order, which should be restored with the help of the conciliation and agreements. The unity of the family is important to create a sense of harmony in the community, essential for the creation of a new generation of religious and civil servants, as these are picked from among the well-integrated families¹³⁸.

How a matrimony is conducted depends on the religion of the couple: the Catholics and the Evangelics turn to the official legal system to perform the civil marriage and then to their respective church for the religious aspect. Others, who practice a mixture of ancestral and Christian elements, get married according to “the custom”, which in the Quiché context is just as legitimate as a religious wedding. In a matrimony according to the custom there is no separation in terms of civil and religious. It should be pointed out though, that the great majority of the Christians also adopt some elements of the custom into their wedding procedure. Regarding a marriage according to the custom, the matrimonial process begins when the families of the two parties involved initiate stronger ties to each other through scheduled meetings where discussions about the marriage are conducted¹³⁹. These discussions have the purpose of making the couple aware of the responsibilities that a marriage involves. Generally, the families of the couple take help from a mediator, or a *pedidor* (a person leading the engagement process), who takes responsibility for the process of making the two families forming stronger ties¹⁴⁰. It should be pointed out that even the people who are not getting married according to the custom generally use a mediator who is a Maya priest, although for the Evangelics it tends to be less common. In this last case, it is not the role of a Maya priest that is in demand, but rather the character of a person with experience, who is respected in the community¹⁴¹.

In a marriage according to custom, the mediator leads the engagement and witnesses the act where the parents of the future bride deliver her to the parents of the future groom so that she will be treated like another daughter in his family. The parents of the couple conduct the wedding, not the mediator, but without his presence there will be no matrimony. Concerning this ceremony nothing is put on record: all information is oral¹⁴².

Even though this type of matrimony is legitimate among the people practising the custom, it is not recognised by the official legal system. In addition, for example in San Antonio Ilotenango, the Catholic Church does not allow baptism of children whose parents were only married according to

¹³⁸ “El Sistema Jurídico K’iche’”, p. 30-31.

¹³⁹ In Spanish: pedidas.

¹⁴⁰ The *chuchkajaw* en San Pedro Jocopilas; the *k’amalb’e* or *n’ab’e kulel* in San Antonio Ilotenango; and the *xenimatal* in Santa Maria Joyabaj.

¹⁴¹ “El Sistema jurídico K’iche’”, p. 31-32.

¹⁴² *Ibid.*, p. 32.

the custom. For these reasons there are not many people who get married solely in this way¹⁴³.

Immediately after the marriage, the mediator is instilled with the authority to resolve conflicts that may occur between the couple, for example infidelity and non-fulfilment of duties. Like one mediator expresses it: “I am the first that attends a conflict between a couple, to calm them down and to dispense justice between them”¹⁴⁴. Many indigenous people see a divorce as a factor that only complicates the situation as the children, the couple and the extended family will suffer from a greater crisis. For the Mayans the only solution is to conciliate. In some communities, the fighting couple is forced to temporally separate so that they understand how difficult it is to live without their partner¹⁴⁵.

When the Municipal Mayor carries out the civil matrimony he uses the official laws secondarily, and gives more importance to the words and advice of the ancestors. In this way, the Municipal Mayor’s Office¹⁴⁶ is used by the Quiché to pass on their traditions, especially the understanding that the contracting parties will follow the advice of their ancestors¹⁴⁷.

5.8.3 Matters concerning land and natural resources

According to the Mayan *cosmovision*, human beings must show respect for nature. The *necessity* of the individual, the family, the community or the ritual is the moral guideline when using natural resources. However, there are also some regulations that need to be respected¹⁴⁸. The topics dealt with here are related to the possession of land: the forms of acquisition through buying and selling, as well as through inheritance; boundary problems; and the access to the use of natural resources, for example water and firewood¹⁴⁹. Unlike matrimonial cases the conflicts concerning land are probably the most difficult to solve by using Mayan law as there are few mediation instances in the communities¹⁵⁰.

The dominating form of possession of land is private property. There is also, however, municipal land (in San Pedro Jocopilas and San Antonio Ilotenango) administered by the Municipal Corporation and communal land (in Santa Maria Joyabaj) administered by the Indigenous Mayor’s Office¹⁵¹,

¹⁴³ Ibid., p. 32-33.

¹⁴⁴ Ibid., p.33.

¹⁴⁵ Esquit, Edgar, p. 105.

¹⁴⁶ In Spanish: Alcaldía Municipal.

¹⁴⁷ “El Sistema Jurídico K’iche’ ”, p. 33.

¹⁴⁸ “Más allá de la Costumbre: cosmos, orden y equilibrio”, COPMAGUA, 2nd edition, Guatemala City, 2000, p. 101.

¹⁴⁹ “El Sistema Jurídico K’iche’ ”, p. 33.

¹⁵⁰ Esquit, Edgar, p. 110.

¹⁵¹ In Spanish: Alcaldía Indígena.

an authority not recognised by the official legal system. In this last case, approximately 1500 families are renting the land. Private property is to a high extent based on the right to possession, and to a lesser extent on deeds registered in the Property Register. It is becoming much more common though, to authenticate the property using a lawyer, as this gives the owner safety and makes the property easier to sell. If the property has a registered deed, buying and selling is managed through the official legal system and the Quiché authorities are not intervening. When land is inherited, it is common that the father of the family does not leave any official documents, which can result in conflicts between the children. The conflicts are solved within the family, often under the supervision of the oldest brother and with intervention by the uncles. Usually, some neighbours are called in as witnesses to the family's settlement, and the heirs decide if they want to authenticate the resolution through a notary. If the problems cannot be solved within the family, the matter is brought to the auxiliary mayor, and if this does not help, the parties turn to the Peace Court. This last resort is not common, as people prefer turning to the legal instances mentioned first¹⁵².

With regard to boundary disputes, the involved neighbours prefer to solve the problems between themselves. If necessary, they summon witnesses who know the history of the land. To have this kind of witness is a great advantage, as the land law dates back to previous generations. If the problem is not solved in this sphere, the neighbours turn to the auxiliary mayor, who tries to reconcile them. The next legal instance is the municipal mayor, who can appoint a commission to inspect the place of the conflict and find a solution to the problem. Just like the instances mentioned before, the municipal mayor tries to make the parties arrive at an amicable settlement¹⁵³.

Concerning water sources, the general opinion is that “the water belongs to God”, which means that it can be shared. If the water is running through private property it is sufficient to ask the landlord for permission and maintain cleanliness. Anyone breaking these rules is prohibited from further use of the water. Regarding the forests, there is a general awareness that they need to be preserved. Usually it is acceptable to extract firewood from the forests for domestic use, but not for commercial purposes¹⁵⁴.

5.9 Indigenous authorities

In the Maya communities it is a great honour to be elected to a position of authority, and normally it requires 20 to 22 years of previous community service. Many start when children, accompanying their parents or grandparents in their community work, thereby learning the important duties

¹⁵² “*El Sistema Jurídico K'iche'*”, p. 34-35.

¹⁵³ *Ibid.*, p. 35.

¹⁵⁴ *Ibid.*, p. 35.

and earning respect in the village¹⁵⁵. Any person, from any community and of any age, can access the positions of authority given that the internal hierarchy of the positions is followed. However, only if a person has carried out his duty well may he move up to the next position that involves more responsibility¹⁵⁶. Furthermore, it is a prerequisite that the persons of authority are characterised by: experience, respect, honesty, moral principles, responsibility and good behaviour. They must also be sensible, of older age, be collaborators, have no vices and have done community service¹⁵⁷. As will be shown in the text about the authorities in San Pedro Jocopilas, these are of higher social status than the disputants.

As traditional arbitrators are not strangers to the parties, they cannot be regarded as impartial in the formal sense. However, their impartiality is secured by crosscutting ties, which link them to both parties. Thus, by not acting impartially the arbitrators would risk making enemies with one of the parties, including supporters, lose the community's respect and not achieve the purpose of the process, since social harmony would not be restored¹⁵⁸. In addition, their personal knowledge of the community, the dispute, the nature of previous settlements, and the disputants -including personal histories and reputations- is vital to their ability to resolve cases, and they are expected to use it in doing so. This is one of the main differences between the state justice systems and the indigenous law and stands in stark contrast to the notion of impartiality and separation of powers in Western law.

5.9.1 Delimitation to the authority of one community

What has been said so far is valid on a general level in all Mayan communities. The characterisation of the positions do not change, but the authorities have many local differences in their *structure*, which are not all possible to deal with in this study. I have chosen to look closely at one authority, which is typical in its structure and therefore poses a representative model for all the authorities of the Quiché¹⁵⁹: the authority in San Pedro Jocopilas. The reasons why I have decided to focus on a Quiché authority are the same as in the text about their legal system: because it is the largest group of Mayans in Guatemala.

This study covers the functions and requirements of two groups of positions: the religious and the civil authorities. One of the objectives is to determine whether these authorities carry out some kind of legal function, or if elements of a legal system can be identified in the community's requirements or in the ways of appointment to a position. Generally, it was

¹⁵⁵ "Administración de Justicia Maya-experiencias de Defensoría Maya", p. 132.

¹⁵⁶ Esquit Choy and Ochoa García, p. 88.

¹⁵⁷ "Experiencias de Aplicación y Administración de Justicia Indígena", p. 94.

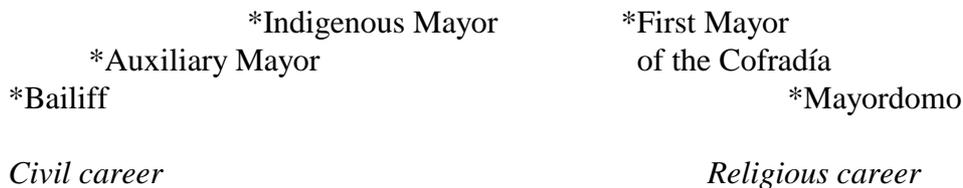
¹⁵⁸ Interview with Maria Tuyuc, November 14, 2002.

¹⁵⁹ According to Luís Quiché Batz, interview October 16, 2002.

found that the religious authorities in addition to religious, spiritual, moral and social duties fill a position in the legal system of the Quiché. In some occasions they participate in legal activities or in conflict resolution. An example is when a Mayan priest, in his function as mediator of a marriage, intervenes to resolve a dispute between a couple. Some of the civil authorities are recognised by the official legal system, especially in the Municipal Code (municipal and auxiliary mayors), but in practice these are a part of the Quiché legal system as they, especially the auxiliary mayor, have judicial or conflict solving functions¹⁶⁰.

Structure of the Quiché authority in San Pedro Jocopilas¹⁶¹

The elders (Ajawab')



5.9.1.1 The elders in the municipality of San Pedro Jocopilas

The elders¹⁶² represent the top of the political, religious and cultural power in the community of San Pedro Jocopilas. They are a group of 15-20 persons, who are between 70 and 80 years of age. Some of them are Mayan priests. The mediator or leader¹⁶³ of this group is the oldest person, who directs and coordinates the others. The elders keep their position for life and are respected by everyone. They run the whole village, the indigenous and the auxiliary mayors, as well as the *cofradías*¹⁶⁴. To be part of this elite on the political side, one is required to have done community service in the positions of bailiff¹⁶⁵, auxiliary mayor and indigenous mayor. On the religious side, one is required to have served from *mayordomo*¹⁶⁶ of the *cofradía* to first mayor of *cofradía*, (see graphic).

The functions of this group are as follows: electing the indigenous mayor and the first mayor of the *cofradía*, proposing suitable people for the positions in the *mayordomo* of the *cofradía* and the first mayor of this

¹⁶⁰ "El Sistema Jurídico K'iche'", p. 36.

¹⁶¹ Ibid., p. 39.

¹⁶² In Spanish: *principales*, in Quiché: *ajawab*

¹⁶³ In Quiché: *k'amalbe'*.

¹⁶⁴ Traditional religious brotherhoods.

¹⁶⁵ In Spanish: *alguacil*.

¹⁶⁶ Assistant of the *cofrade*.

institution, giving advice to the indigenous mayor and dismissing him if he fails to carry out his duties. By carrying out these duties the elders have legal functions, and therefore they have a place in the legal system of the Quiché. However, the judicial functions and the resolution of conflicts are carried out by others¹⁶⁷.

5.9.1.2 The indigenous mayor

As indicated earlier, the indigenous mayor of San Pedro Jocopilas is elected by the elders or *ajawab'*. He is the link between them and the municipal mayor. To become an indigenous mayor, the following personal attributes are required: honesty, dedication, knowledge of the community and past experience of having served as bailiff and auxiliary mayor. In addition, it is required that he be married. The administrative functions consist in coordinating the auxiliary mayors and the bailiffs when they are repairing infrastructure, and organising security patrols, as there is no police in the village. In San Pedro Jocopilas, the judicial functions and conflict resolution are not responsibilities of the indigenous mayor, since this is handled by the bailiffs and the auxiliary mayors, although these are advised when necessary by the indigenous mayor. It should be noted that in many Mayan communities, it is the indigenous mayor who solves conflicts. In spite of the position of indigenous mayor being an heritage of the colonial system, the Quiché adopted it and incorporated their own values and practices into it, thereby making this position a part of their own legal system¹⁶⁸.

5.9.1.3 The auxiliary mayors and the bailiffs

These groups are in charge of looking for their successors, who -if they accept- then propose their names to the elders. The elders summon the men of the canton, whom take the decision to approve or disapprove of the candidates. For these positions, the same characteristics are required as for the indigenous mayor, with the difference that the auxiliary mayor and the bailiff do not need to be as old. The auxiliary mayors can be around 30 years old and the bailiffs have to be at least 18, given that they are married. The position of bailiff is one step below the auxiliary mayor, which means that his duties are of less importance. The service is one year of duration. Normally they carry out duties related to maintaining roads, bridges, chapels and temples. In addition, they are in charge of delivering the mail and taking care of the canton. The auxiliary mayors, in practice, carry out judicial functions, as they are responsible for resolving penal lawsuits like theft of agricultural products and domestic animals, physical injuries and fights. Moreover, they are in charge of trying to find solutions to problems regarding land boundaries and family lawsuits¹⁶⁹.

¹⁶⁷ "El Sistema Jurídico K'iche'", p. 38.

¹⁶⁸ Ibid., p. 38-40.

¹⁶⁹ "El Sistema Jurídico K'iche'", p. 40.

5.9.1.4 The *cofrades*

As mentioned earlier on, the *cofradías*¹⁷⁰ are traditional religious brotherhoods, and they were brought to America by the Spanish conquistadors. Half a century after the conquest, they were already established within the indigenous communities. The *cofradías* were not of a beneficial social character, instead their function was to spread the Catholic faith among the indigenous population¹⁷¹. Today, membership is still an honourable civic duty, leadership the greatest honour. *Cofrades* are the members or leaders of the brotherhood. In San Pedro Jocopilas, there is currently only one *cofradía*, which consists of six *mayordomos*¹⁷² and one first mayor. To be the first mayor of the *cofradía* one is required to be economically solvent, to practice the custom and to have been indigenous mayor of the village. Thus, in order to occupy this position, it is necessary to first complete the whole prior civil career of community service.

The elders suggest the persons suitable for the positions as *mayordomos* to the first mayor of the *cofradía*, who then take a consensus decision.

The *cofrades* have religious types of obligations, especially to organise the patron saint's day of the village. Even though they do not fill a judicial function they are a part of the authority system of the population as servants of the community: *aj'patan*. It is an honourable post, since it is the one before being admitted to the group of elders¹⁷³.

5.9.1.5 The Mayan priests

The inhabitants of San Pedro Jocopilas respect the Mayan priests¹⁷⁴ to a high extent, as they traditionally are responsible for preserving the knowledge of the ancient Mayan calendar system. Their intervention is often requested in matters concerning sacrifices to *Ajaw* (God) for the protection of family, health and harvest.

Regarding matrimonial matters, both the people practising the custom and the Catholics require that the mediator¹⁷⁵ be a Mayan priest. The priest has, when acting as a mediator in matrimonies according to the custom, both legal functions, in that a marriage cannot take place without his presence, and judicial functions, as he is the first authority that the couple turns to when experiencing matrimonial problems. In penal and land cases, the Mayan priests are not involved judicially, and when he is consulted about these issues, it is to identify the facts, for example, since priests are thought to have divine powers.

¹⁷⁰ No translation possible.

¹⁷¹ "Más allá de la Costumbre: cosmos, orden y equilibrio", p. 235.

¹⁷² A type of assistants. No translation possible.

¹⁷³ "El Sistema Jurídico K'iche' ", p. 40-41.

¹⁷⁴ In Spanish: *sacerdotes*, in Quiché: *ajq'ij*

¹⁷⁵ *K'amalbe'*.

The Mayan priests that have fulfilled the civil and religious careers of community service are part of the group of elders, which as indicated, is the elite group with the greatest political, religious and cultural power in the municipality¹⁷⁶.

5.10 Community or group involvement

The indigenous law is generally practised in the rural countryside of Guatemala, in small communities dominated by relationships between the inhabitants that are based on past and future economic and social dependence and which intersect ties of kinship. In such communities a dispute between individuals is perceived as not only a matter of curiosity regarding the affairs of one's neighbour, but in a very real sense a conflict that belongs to the community itself. Each member of the community is tied to varying degrees to each of the parties and, depending on the extent of these ties, will either feel some sense of having being wronged or some sense of responsibility for the wrong. Whereas in Western law the individual is the focus as bearer of rights and claims, the indigenous law values the group over the individual. The indigenous society is based on the conception of a collective identity, with the family representing the first collective unit¹⁷⁷. A law-breaking individual thus transforms his group into a law-breaking group, for in his dealings with others he never stands alone. Whereas under the official legal system, where the victim is effectively relegated to the status of a mere witness in criminal cases, under Mayan justice systems, the victim is central to the decision-making process.

It must be pointed out though, that this community involvement is not the same as granting everyone the right to participate in an arbitration. The public participation in a process depends on each case. If it is a serious case that is believed to affect the entire community the inhabitants ring the church bells to announce that the whole village should gather to solve the conflict. In a case regarding for example a family dispute, on the other hand, only the family members participate. The arbitrators ask the people involved what persons they should summon as witnesses or if the parties accept that certain people should be called¹⁷⁸.

5.11 An educational, preventive and transforming base

One of the pillars of Mayan justice is to prepare the members of the community for life. This is done by educating them from childhood onwards

¹⁷⁶ "El Sistema Jurídico K'iche' ", p. 41.

¹⁷⁷ "Más allá de la Costumbre: cosmos, orden, equilibrio", p. 45.

¹⁷⁸ Interview with Maria Tuyuc, November 14, 2002.

about the rules and principles that have to be followed in dealing with other people. Hence, the Mayan people are informed of the legal rules and principles, unlike many citizens of Western countries, which creates foreseeability. Because of this educational feature, the individual is taught how to lead his life, which prevents problems, conflicts, difficulties and even diseases. Another part of the orientation of individuals is that a person who has broken the rules is corrected, reoriented and re-incorporated back into the society¹⁷⁹. Juana Catinac, DEMI, gives an example of a woman who had been caught drinking inappropriate amounts of alcohol at a village festivity and was brought to the elders. During the process it was explained by the relatives of the woman that she had been raised without a mother and with little guidance and that her husband, who worked outside the community, was away more than at home. The elders settled the matter by deciding that she should be given guidance by them on how to behave. They also told her husband to stay at home more¹⁸⁰.

5.12 A voluntary process

Social harmony cannot be restored in the community if both parties of a conflict do not submit themselves voluntarily to arbitration, as the whole point of reconciliation would be undermined. The great majority of indigenous people prefer, however, a settlement within their own system rather than in the courts. In order to put pressure on parties unreceptive to arbitration the alternative of turning to the courts is used as an efficient threat¹⁸¹.

5.13 Flexible rules of evidence and procedure

Because the traditional arbitrator has intimate and direct knowledge of the dispute, a detailed system of rules of evidence, procedure and pleading is unnecessary. This makes it possible to use a wider definition of what is considered relevant evidence.

In an indigenous procedure, disputants and the public simply tell their stories in terms they believe to be relevant. This does not mean that the arbitrators are indiscriminating in their reception of evidence. Their desire to stay impartial -or at least not to appear to take sides- explains their willingness to listen to the lengthy statements, and is also necessary as the parties lack trained counsel's advice and therefore may not be able to present their grievances in coherent, logical, and relevant form. Thus, the

¹⁷⁹ "Fuentes y Fundamentos del Derecho de la Nación Maya K'iche' ", Oxlajuj Ajpop, Guatemala City, 2001, p. 126-128.

¹⁸⁰ Interview, with Juana Catinac, July 17, 2002.

¹⁸¹ Interview with Maria Tuyuc, November 14, 2002.

arbitrators

reserve to themselves the right to decide what weight they will attach to any piece of evidence¹⁸².

5.14 Absence of professional legal representation

To be assisted by a professional legal counsel is not part of the indigenous law, nor is it required. However, the families, usually the fathers, of the disputants have the role of giving assistance to their son or daughter and defending their case before the arbitrator. The family members also serve as a sort of witnesses, as he or she may give the arbitrator important background information to the case, for example family history and personal characteristics. The arbitrator carries out the work normally performed by judges and lawyers, i.e. to listen to the whole story as it is poured out, to ignore what is irrelevant, and then to analyse the legal issues involved, and to put the evidence in order¹⁸³.

5.15 Like cases need not be treated alike

Due to the flexibility in the application of Mayan legal norms which is necessary to achieve a solution based on compromise, like cases may be treated differently. Out of a Western perspective this is contrary to the concept of justice, which demands equality before the law based on due process including legal certainty. It is important to note that the concept of like cases is quite different when dealt with by the official legal system than it is when dealt with by the indigenous legal system. In reaching a solution, the indigenous justice forums consider a wide range of issues focusing on the underlying reasons for any conflict or criminal intent, with a view to preventing a reoccurrence of the problem in the future. From this point of view, there are no cases alike¹⁸⁴. Furthermore, the needs for legal certainty and due process are less acute in the indigenous system as the process is voluntary in the sense that a party is not forced physically to appear or to abide by any agreement. Another form of protection against legal inequalities is the high degree of influence that the arbitrators have in the process. They are persons of high status elected by the community and may use their influence to persuade a disputant to accept no more than what is fair and just, which turns out to be very important when the parties are of unequal bargaining strength. Despite these checks and balances, the appearance of consensus may well be a mask for domination. Members of weaker sections of the community, for example women and young people,

¹⁸² Interviews with Juana Catinac, July 17, 2002, Maria Tuyuc, November 14, 2002 and Luís Quiché Batz, October 16, 2002.

¹⁸³ Interviews with Luís Quiché Batz, July 3 and Carlos Fredy Ochoa, July 17, 2002.

¹⁸⁴ Interview with Maria Tuyuc, November 14, 2002.

are likely to be put at a disadvantage in relation to more powerful members such as older men, particularly since the arbitrators themselves may be elders, and religious leaders. This is a major weakness of the indigenous process. The element of compromise in the system may reinforce existing social attitudes whether desirable or not. These attitudes include actual customary and religious norms, which may discriminate on the basis of social status including gender, age and marital status (see also **6.7.1**).

5.16 Past conduct of the accused person taken into account

The fact that the past conduct of the accused, or that of the accused's family, may be taken into account may compromise the principle that one is innocent until proven guilty. Sometimes it is argued that indigenous law, if not presumes, than *assumes* the guilt of the accused person. Such an assumption by the public may reduce the bargaining strength of the party in question. Nevertheless, the point of view of the indigenous people is different regarding this topic. Taking a person's past conduct -or that of his family- into account is regarded as a way to understand the reasons for the behaviour rather than something held against him. If it is revealed during the process that, for example, the parents of the accused person have been lacking in their parental guidance, this is seen as an extenuating circumstance¹⁸⁵.

5.17 Punishments and sanctions

As mentioned earlier, the main purpose of indigenous conflict resolution is to restore social harmony and reconcile the parties. Therefore, the penalties usually focus on compensation or restitution in order to restore the *status quo*, rather than punishment. Imprisonment has never existed as a penalty for any offence. Corporal punishment, however, has been and continues to be administered by some communities¹⁸⁶. Usually the punishment is to give the offender a certain amount of whiplashes. This issue will be dealt with in **6.7.2**. When sanctions are applied, it is with the purpose to correct the perpetrator, make him reflect on his mistakes and repair the damage done. The motive is to restore social balance, and this is why the Mayans regard the Western penalty system as strange. In their eyes, the Western system is only punishing for the sake of vengeance, which does not have any good effects for the victim or the society¹⁸⁷. An apology from the perpetrator is worth a lot more to a Mayan victim than having this person punished

¹⁸⁵ Ibid.

¹⁸⁶ Esquit, Edgar, p. 130.

¹⁸⁷ "Experiencias de Aplicación y Administración de Justicia Indígena", p. 45.

according to Western standards¹⁸⁸. In Quixabaj, department of Huehuetenago, a mother whose 10-year old daughter had been raped said that she did not care about economical compensation, or if the rapist was punished, “All I want is an apology”.¹⁸⁹

The process culminates when the parties promise before the entire community to follow the settlement of the arbitrators. This public promise is one of the guarantees that the persons involved will keep their word. In some occasions, they have to sign a document that is given official validity by the Peace Court, and that can be used if one party does not keep his promise. In such a case, the state justice can intervene and carry out the right of the offended party. However, in the great majority of cases people abide by the sanctions¹⁹⁰.

As mentioned earlier, (see **5.8.1**) serious cases are generally submitted to the state courts. Nevertheless, there are cases where the perpetrator has been expelled for life from the community, for example in a rape case in Alta Verapaz¹⁹¹, or, concerning a homicide case, was forced to support the family of the victim¹⁹². Expulsion is seen as the only way of assuring re-established social harmony, since in such cases the perpetrator is regarded as too much of a danger to the community.

5.18 Social pressure

Social pressure plays a powerful role in achieving compliance with Mayan justice and the settlements of disputes. One very important element is the embarrassment, a very degrading feeling for the Mayans. It is common that the villagers on market day put up the name of a criminal on a board so that he or she will feel embarrassed and stop committing crimes¹⁹³. In addition, social pressure prevents people from breaking the rules of the community. It is also likely that a person who continues to disrupt the social harmony is regarded with disrespect by the community, which is feared by the Mayans.

¹⁸⁸ Esquit, Edgar, p. 99.

¹⁸⁹ Interview, May 16, 2002. As the interview was conducted on behalf of ICCPG I had to keep the person anonymous.

¹⁹⁰ “*Construyendo el Pluralismo Jurídico*”, p. 102-103.

¹⁹¹ Interview with Fredy Ochaeta, July 17, 2002.

¹⁹² “*Construyendo el Pluralismo Jurídico*”, p. 102.

¹⁹³ Interview with Maria Tuyuc, November 14, 2002.

6 The challenges and the future of indigenous law

6.1 Introduction

When studying the Mayan law, it becomes clear that some aspects are uncertain, such as its coordination with the official legal system, the critique the Mayan law arises from some people and what position it will have in the future, etc. In this chapter, I deal with the topics of whether indigenous law can improve access to justice, the advantages and disadvantages of indigenous law, as well as the problems that need to be solved in order to make it a strong and efficient alternative to the official justice system.

6.2 Incorporation

Sometimes it is argued that the Mayan justice systems, or parts of them, should be incorporated into the state court system. Thereby, it is argued that the advantages of the indigenous forums (accessibility, informality, economy of time and money, and familiarity of legal norms) would be combined with those of the state legal system (impartiality, uniformity of law and procedures and state legitimacy). However, most Maya organisations in Guatemala do not regard this as a solution. In the interviews pessimism towards incorporation could be detected due to the fear that an incorporation would not go further than putting nice words on the paper just like the words of the constitution and the ILO Convention 169¹⁹⁴. Some persons prefer the incorporation of not the entire system but parts of it. For example, the culture of the community in question might be taken into account in court proceedings, in order to better understand the behaviour of the people involved and the reasons why the conflict occurred¹⁹⁵. Furthermore, mediation would be a useful part, the incorporation of which the state legislators are already considering¹⁹⁶. Nevertheless, a complete incorporation of the Mayan law into the state justice system is not what the people interviewed want. There is a fear that the positive sides of indigenous law would be “eaten up” by the slowness, the bureaucracy and the corruption that characterises the formal system¹⁹⁷.

¹⁹⁴ Interview with Fredy Ochatea, July 17, 2002.

¹⁹⁵ Interview with Juana Catinac, July 17, 2002.

¹⁹⁶ Interview with Luís Quiché Batz, July 3, 2002.

¹⁹⁷ Interviews with Luís Quiché Batz, July 3, Carlos Fredy Ochoa, Fredy Ochaeta, July 17 and Jesús Gómez, July 18, 2002.

One example of an attempt to incorporate the indigenous law into the state judicial system is the Community Peace Courts. In 1998, these were established in five municipalities that lacked normal Peace Courts and where the majority of the inhabitants were indigenous. The purpose was to improve the access to justice in remote areas. Every court consists of three judges who are elected by the community and who can speak the dominant language of the region as well as Spanish. The judges solve conflicts in conformity with the customs of the community in question without violating the constitution or the laws¹⁹⁸. The opinions on the impact of the Community Peace Courts are markedly divergent. Without a doubt, they are a step towards improved access to justice, as these courts allow resolution of conflicts in the language of the community, and by taking the customs of the area into account¹⁹⁹. Moreover, in 1999 the Supreme Court of Justice carried out an evaluation that revealed generally positive attitudes towards the Community Peace Courts²⁰⁰. Still, the critics are of another opinion. To begin with, the procedure of election was criticised by some for not having involved the entire community and for electing judges who were friends of politicians²⁰¹. Furthermore, the critics argue that the Community Peace Courts deprive the traditional indigenous arbitrators of their authority, which places the state in the role of destroying the indigenous culture just as it has so many times in the past²⁰². One of the most serious complaints is that the Community Peace Courts in their application of the customs have created or will create confusion about the rules, which will in turn distort the indigenous law. The judges are not persons who have done community service and thereby won the inhabitants' respect, which is why they may lack the legitimacy, the necessary knowledge, as well as the experience to be able to solve a conflict in a satisfactory manner²⁰³. In addition, the auxiliary staff at the Community Courts is appointed by the Supreme Court in the capital and may not be able to speak the local language or know the customs of the community²⁰⁴. Thus, the Court's application of indigenous customs and rules may be done incorrectly and lead to the wrong interpretation, which may have very negative effects on the indigenous law that is already weakened in many areas²⁰⁵. This is an example of an incorporation model with the purpose of recognising the indigenous law, but which instead may have a more negative than positive impact on traditional forms of justice.

¹⁹⁸ "Acceso a la Justicia y Equidad-estudio en siete países de América Latina", Inter-American Institute of Human Rights, San José, 2000, p. 190-191.

¹⁹⁹ Ibid., p. 192.

²⁰⁰ García Blas, Montserrat, Rachel Garst and Silvia Vásquez de León: "Hacia el Estado de Derecho en Guatemala-guía sobre compromisos, recomendaciones y nivel de cumplimiento", WOLA, Guatemala City, 2001, p. 13.

²⁰¹ "Memoria II Seminario Internacional sobre Administración de Justicia y Pueblos Indígenas", Inter-American Institute of Human Rights, San José, 1999, p. 337.

²⁰² Ibid., p. 335-336.

²⁰³ Ibid., p. 331-332.

²⁰⁴ "Acceso a la Justicia y Equidad-estudio en siete países de América Latina", p. 193.

²⁰⁵ "Construyendo el Pluralismo Jurídico", p. 76.

6.3 The coordination issue

If a strong and widely used Mayan justice system is wanted, it is absolutely necessary to deal with the coordination between this system and the official one. There is little or no information that can give guidelines on how to find a solution to this question, which makes it difficult to provide any certain answers. Much is left to research and debate for dealing with these uncertainties and coming up with lasting solutions.

A problem that needs to be solved is the question under which system a conflict or legal matter that involves both indigenous and non-indigenous persons shall be handled. Neither ILO 169 nor the Peace Agreements limit the application of indigenous law to only the indigenous people. Therefore, would it be natural if Mayan law was applicable in cases where a non-indigenous person has done a harmful act towards indigenous people or goods within Mayan communities. This would prevent the indigenous people from being left vulnerable to an illegal attack of outsiders and to avoid the intervention of the state apparatus that historically has damaged the Mayan culture and law. In this kind of cases, the outsiders must be able to demand that their rights are equally observed and that the events, as well as the rights, should be interpreted in an intercultural manner²⁰⁶. However, as the Mayan system is based on the parties' respect for the legal competence of the authorities and voluntary submission, is it not possible to force anybody to appear in a traditional process. It should be open to anyone though, to take part in an indigenous arbitration. In a case solved in San Lucas Tolimán, a non-indigenous farm owner submitted himself voluntarily to an indigenous process, and at the end he accepted the decision, which consisted in returning a part of land and pay damages to the 46 families that he had expelled from his property²⁰⁷. If a case involves people from different Mayan communities it is common that the indigenous authorities from both places solve the case together. For example, in a case where a thief from one community has stolen something in another community, the auxiliary mayor of the place of the robbery summons his colleague in the native village of the thief to form a council wherupon they will solve the issue together²⁰⁸.

If an indigenous person were involved in a dispute in a non-indigenous area, it is more realistic that the issue should be solved under the state system as happens today, since few ladinos would agree to participate in an indigenous procedure. It is imperative, however, that the Mayan person is assured equal treatment in the court including an intercultural interpretation of the act.

²⁰⁶ Yrigoyen Fajardo, Rachel, p. 91-92.

²⁰⁷ "Construyendo el Pluralismo Jurídico", p. 95-96.

²⁰⁸ Esquit, Edgar, p. 132-133.

Once a case has been solved according to the Mayan law, it should not be permitted to be referred to the state courts, as this would leave the recognition of indigenous law empty. If, on the other hand, a case has been dealt with in the official system, and the parties then agree to refer it to their own indigenous system, this would be legitimate due to the legal recognition of indigenous law²⁰⁹.

One of the most urgent demands for coordination between the systems is that the state justice system stops to criminalise and penalise: 1) the indigenous cultural and legal practices that are considered punishable acts and offences (for example forms of young marriages, use of medical plants, etc.) and 2) the use of indigenous justice in itself. Mayan law is criminalised as only the Judiciary has the jurisdictional function according to the constitution (art. 203), which makes the indigenous authorities violate the constitution when they are administering law. Therefore, all forms of persecution and stigmatisation of the Mayan administration of justice and the authorities should be abolished. This should be assured through changes in the constitution, a specific coordination law and/or changes in the Penal and Procedural codes. In the Penal Code of Peru, for example, some acts are not punishable -even though they normally would be- if they are based in the indigenous culture and custom²¹⁰.

Mechanisms for assuring the respect for indigenous legal acts -marriage according to the custom, forms of contracts, transfer of land, etc.- have to be established. It has to be possible to register these acts without forcing them to follow the prerequisites of the state law, otherwise it would mean that the Mayan law is not recognised. For example, is it a common problem that the Mayans lose land disputes with non-indigenous persons, as they have no documented proof of ownership despite the fact that they have acquired the land in a fair and legal way²¹¹.

Defensoría Maya has had positive experiences of the attempts of coordination that have been run so far. In their Centres for Mediation and Conciliation, Mayan authorities solve conflicts according to indigenous law. After that, the Defensoría Maya completes filing the solution according to state law and gets the official approval of the Peace Court. In doing so, the decisions of the Mayan authorities obtain an official character, which is of great importance. There are also other cases of coordinatio. For example, when a case is not recognised by the official justice system, it is solved within the indigenous system, and vice versa. Serious offences and difficult cases are transferred to the courts²¹².

In places where there is no cooperation between the Mayan and the official justice systems, the coordination procedures could be encouraged through

²⁰⁹ Yrigoyen Fajardo, Rachel, p. 92.

²¹⁰ Yrigoyen Fajardo, Rachel, p. 93.

²¹¹ Ibid., p. 94.

²¹² "Construyendo el Pluralismo Jurídico", p. 95.

dialogues with the judiciary and the police forces about the advantages of the Mayan conflict resolution in order to make them realise the necessities of coordinated actions. Information about indigenous law and proposals of coordination need to be given to judges, lawyers, etc, with the purpose of creating mutual respect between the systems²¹³.

6.4 A fair hearing in indigenous law?

As mentioned in chapter 3.7.5 I have decided to include a more in-depth analysis of one element of access to justice, that is, the right to a fair hearing.

Through the ratification of the ILO Convention 169, Guatemala is obliged to accept the indigenous peoples' law and their judicial systems, where these are not incompatible with internationally recognised human rights, article 8 and 9²¹⁴. When looking closer at the human right of a fair hearing, the question arises whether the indigenous judicial system follows this principle. If not, this means that the indigenous system violates the international human rights standards.

Firstly, it has to be pointed out that an analysis of whether the indigenous law respects the criteria of a fair hearing as in ICCPR, article 14, is not meaningful when bearing in mind that the indigenous and the Western judicial systems have totally different legal foundations. The indigenous law lacks these sort of procedural rules. However, some of them have similarities with the Western ones, even though they are neither fixed nor inflexible. For example, it can be said that the right to be presumed innocent also is a part of the indigenous law. Some of the persons interviewed argued that the opportunity of the accused to defend himself and the way all parts involved are able to give their version of the story before a settlement is finally achieved, is similar to the presumption of innocence²¹⁵.

Concerning the minimum guarantees in criminal proceedings prescribed by subparagraph 3 (a) of ICCPR, the accused person in the indigenous judicial system is without doubt informed promptly and in his own language of the charges against him. Two of the main advantages of the Mayan system are its immediate dealings with the problems, and the fact that the process is conducted in the mother tongue of the accused person. This makes the right to an interpreter in subparagraph 3 (f) irrelevant. The immediacy of the indigenous process is also applicable to the requirement of a trial without undue delay, 3 (c). However, the rules about preparation of defence, 3 (b) are not compatible to the indigenous system, as everything is dealt with

²¹³ Ibid., p. 113.

²¹⁴ www.unhchr.ch, June 18, 2002.

²¹⁵ Interviews with Luís Quiché Batz, July 3, and Jesús Gómez, July 18, 2002.

immediately and without lawyers. For example, if during the process, it occurs to an accused person that he might have a witness in his favour, the arbitrator calls for a break in order to go and search this person. Lawyers are not used, but the family of the litigants are always present at the arbitration, defending, accusing or giving their version of what has happened, acting in a role as a cross between lawyers and witnesses²¹⁶. Regarding subparagraph 3 (e), which addresses the right to examine witnesses under equal conditions, the indigenous law with its generous application regarding this matter can be said to observe this guarantee²¹⁷. In the indigenous process, the witnesses are not called to the trial and then asked a series of questions like in the official system; instead, the witnesses decide themselves (or are influenced by one of the parties) whether they want to participate in the arbitration. The definition of a witness is also different in the Western system, since most people who are present at the Mayan trial can argue against or in favour of one party or give testimony without being asked to do it²¹⁸.

In Mayan law, the accused may not be compelled against himself or to confess guilt,²¹⁹ thereby fulfilling the provisions of subparagraph 3 (g). Subparagraph 4 concerning juvenile cases, is observed by the Mayan law in the sense that the age of the child and his or her family situation is taken into account. In this type of cases, the parents plead their childrens' cause. Subparagraphs 5-7 and article 15 also concern the right to a fair hearing but have no parallel in the indigenous judicial system.

Rachel Yrigoyen, lawyer and anthropologist, addresses the limitation of indigenous law in terms of human rights in the following way: "If the indigenous law cannot break either human rights, or the constitution, or the secondary legislation, in effect it is rendered meaningless. Because if the indigenous people want to administer justice and the international laws or the constitution say that lawyers have to be used, rules about detention have to be followed, etc, the indigenous law will end up violating all laws"²²⁰. The Constitutional Court of Colombia has therefore expressed that the prohibition of violations of the human rights should be interpreted as only referring to the most fundamental human rights. This means the rights that the entire world should respect are as follows: the right to life, the prohibition of torture and inhumane or degrading treatment or punishment, the prohibition of slavery, and, as an inherent integral part of the right to a fair trial: foreseeability. Foreseeability is the application of rules that are known beforehand to the individuals in order to prevent arbitrariness of the authorities. What is foreseeable or not, varies according to the judicial features of the indigenous system in question. "The purpose of the rules about a fair trial is to assure that justice is done and that the individual does

²¹⁶ Interview with Luís Quiché Batz, July 3, 2002.

²¹⁷ Interviews with Luís Quiché Batz, July 3, and Jesús Gómez, July 18, 2002.

²¹⁸ Interview with Jesús Gómez, July 18, 2002.

²¹⁹ Interview with Luís K'iche', July 3, 2002.

²²⁰ Speech by Rachel Yrigoyen Fajardo at the course before the 3rd International Meeting of the Legal Anthropology Network, Quetzaltenango, Guatemala, August 8, 2002.

not suffer his rights to be abused by the system, which is why the Constitutional Court has the foreseeability as the one and only procedural prerequisite²²¹. Yrigoyen asserts that there is no need for the indigenous law to adopt the Western provisions about a fair trial -given that the prerequisite of foreseeability is respected- as the purpose of these rules -to assure justice and to avoid abuse by the system- are observed in the indigenous systems. It would only be absurd to enforce requirements about lawyers, detention, etc. that fill a purpose in Western justice but make no sense in the indigenous system, which already assures a fair hearing, though by other principles. Thus, “the logic of the rules on fair hearings requires that every place follows these rules and that the process -indigenous, Anglo-Saxon or other- is not violated, which is avoided if people know and participate within their own respective systems²²². Hence, the purpose of the rules regarding fair hearing is what is of importance, which is why the Mayan law does not break international human rights standards. The wording of the Constitutional Court has filled what used to be a vacuum and is regarded as a guiding-star in the field where indigenous law meets human rights standards.

In Guatemala, there is a strong need to establish some sort of mechanism that can deal with presumed violations of human rights perpetrated by the indigenous law. This could be a separate entity or an entity within, for example, the Constitutional Court or the Supreme Court of Justice. Most important is that this mechanism be constituted of indigenous as well as non-indigenous people, so that a multicultural perspective can be provided²²³.

6.5 Can the application of indigenous law improve the access to justice?

In chapter 3.3 I outlined the barriers to access to justice that affect the indigenous population to the greatest extent. In the following chapter, I will provide the answers to my initial question of whether the extended application of indigenous law is a means to overcome these access barriers.

6.5.1 Economical barriers

One of the major barriers to access to justice for the indigenous population is the economical aspect. The costs of litigation -the remuneration for a lawyer, the transport to the courthouse, etc.- are simply too high for a great number of people, which is why the official justice system remains out of

²²¹ Interview with Rachel Yrigoyen Fajardo, August 8, 2002.

²²² Interview with Rachel Yrigoyen Fajardo, August 8, 2002.

²²³ Interview with Maria Tuyuc, November 14, 2002.

reach for this group. Indigenous justice provides an alternative free of charge and is therefore accessible to the poor. In cases regarding small claims, the Mayan system provides a cost-effective means by which people can voluntarily choose to settle their disputes, thereby reducing court congestion, as well²²⁴.

6.5.2 Geographic barriers

The great majority of the indigenous people in Guatemala live in rural communities, far away from the courts. Often there simply is no means of transport, so people might have to walk an entire day to reach the nearest courthouse. Other relevant inconveniences include the dangers of travelling in Guatemala, especially for women, the loss of income while away and the inability to carry out responsibilities in the village. These problems are all eliminated through the application of Mayan law, since the proceedings are carried out in the community that the people involved come from²²⁵.

6.5.3 Linguistic barriers

The right to a trial in a language that the litigant understands is a fundamental part of a fair trial. In Guatemala, this right has permanently been denied the Maya population and is perhaps the most obvious barrier to access to justice. The right for a person who does not understand or speak Spanish to be assisted by an interpreter in penal cases is stated in national legislation, as well as in the international conventions ratified by Guatemala. However, this right is generally not observed, and if it is, then the interpreters often lack professionalism²²⁶. Since the process within the Mayan system is carried out in the local language, the linguistic barrier is torn down, leaving the door open for justice to be done.

6.5.4 Cultural barriers

The barriers caused by the symbols, rules and procedures of the state justice system alienate the indigenous population. Their own rules, on the other hand, are known and accepted by the people, unlike in Western justice where many laws are unfamiliar to the citizens. An important aspect of indigenous law is the education of the members concerning the rules to be followed, the circumstances which may lead to them being broken, and how subsequent conflicts may be peacefully resolved. This increases the

²²⁴ Interviews with Luís Quiché, July 3, Juana Catinac, Carlos Fredy Ochoa, Fredy Ochaeta, July 17, Jesús Gómez, July 18, 2002.

²²⁵ Ibid.

²²⁶ Morales Laynez, Benito, p. 104-105.

possibilities to prevent potential conflicts and maintain social harmony among its members. It is also well known who the authority is in charge of certain issues, and that everyone in the community can turn to these persons to ask them for help. Thus, the cultural obstacle to access to justice is further eliminated by means of the use of indigenous law²²⁷.

6.5.5 Institutional barriers

The official judicial system's characterisation of excessive formalism and bureaucracy, slowness, delays, and corruption has no similarities within the Mayan system. The indigenous conflict resolutions are immediate. A case may be solved within 2-3 hours. The high percentage of illiterate persons is benefited by the oral rules and procedures, as opposed to the official system, wherein it is necessary to know how to read and write. Corruption is unlikely, as the matters involved usually concern small sums of money, which renders corruption a futile endeavour²²⁸. In addition, the Mayan authorities are chosen for their personal qualities of respectability and honesty, which prevents corruption. Finally, an unfair settlement of the dispute would make one party, probably even the whole community, discontent and hence social harmony would not be achieved. The arbitrator would lose all respect from the village and would not be able to keep his position²²⁹. Thus, Mayan justice provides an effective alternative to the troubled State judicial system.

6.5.6 Racist barriers

The unfortunate racist attitudes that indigenous persons often face when in contact with the official judicial system will obviously not be present within their own methods for dispute resolution.

6.6 Further advantages of the application of indigenous law

6.6.1 Preventive, educational and transforming characteristics

The indigenous systems employ a non-repressive approach, which addresses the underlying causes of crime and solves minor conflicts before they escalate to the point at which the state may need to get involved. The root of

²²⁷ Interviews with Carlos Fredy Ochoa, July 17, and Jesús Gómez, July 18, 2002.

²²⁸ Interview with Romeo Tíu, November 19, 2002.

²²⁹ Interview with Maria Tuyuc, November 14, 2002.

the problem is dealt with, hereby decreasing the risk of future conflicts with similar factors. Another important element of the Mayan culture is to educate the community members from their childhood on about the norms they must adhere to follow. Thus, all people are familiar with these norms, which has a preventive effect regarding criminal acts. When a problem occurs, the Mayan law seeks to correct, reorient and re-integrate the individual back into the society, thereby creating long-lasting solutions for the society²³⁰.

6.6.2 The sanctions

In the Guatemalan prisons the ethnic discrimination by the penitentiary authorities as much as by other prisoners, is very palpable. The fact that the majority of the indigenous people come from poor families aggravates their penitentiary situation even more. It is common that the indigenous prisoners have to work more or under worse conditions than the rest of the inmates. In addition, as most of them come from the countryside, far away from the prisons, they are almost never visited, which makes them lose the vital connections with their communities that are highly valued among the indigenous. According to the ILO Convention 169 the economical, social and cultural characteristics should be taken into account when penal sanctions are imposed on the indigenous people. Furthermore, sanctions others than imprisonment should be given preference to. Following this principle, the Guatemalan Supreme Court of Justice has recommended that special attention be given to the sanction of community work, which is one of the pillars of the indigenous legal tradition²³¹. The Guatemalan system relies heavily on imprisonment, which in effect discriminates against the poorer members of the society. It is the poor who are unable to raise bail or to pay fines and who are forced to pay by the loss of their liberty. Furthermore, human rights violations are common in Guatemalan prisons, including disease and death associated with prison overcrowding. The maximum capacity of the prisons is officially 6 859 persons, whereas the real capacity under humane conditions is only 3 920 inmates²³². Another adverse effect is that the imprisonment of the offender means economic losses for the family, whereas he can continue working if punished under the Mayan system. Imprisonment may consequently affect the victim's family, to whom the offender would have paid compensation according to the indigenous law. Bearing all these factors in mind, it is not difficult to see that community based sanctions are by far more cost-effective than the usual imprisonment. The non-custodial sentences effectively reduce prison overcrowding, which may allow the prison budget to be diverted towards

²³⁰ "Fuentes y Fundamentos del Derecho de la Nación Maya K'iche' ", p. 126-128.

²³¹ "La Situación Penitenciaria en Guatemala", MINUGUA verification report, Guatemala City, 2000, p. 12-13.

²³² Pásara, Luís and Karin Wagner: "La Justicia en Guatemala", MINUGUA, Guatemala City, 2000, p. 257-261.

social development purposes. It is also more humane and gives a much better prospect of the offenders' re-adapting to society after having served their punishment. The economic and social displacement of the family is also prevented, and the offender can continue to contribute to the economy and to pay compensation to the victim. It should be noted that corporal punishments - that also are part of the Mayan sanctions- not are included among the sanctions referred to here, but under **6.7.2**.

6.6.3 A decreasing amount of lynchings

In Guatemala, there is a powerful urge to take justice into one's own hands because of the inability of the judicial system to maintain public order and punish the offenders²³³. Since MINUGUA began tracking lynchings in 1996, it has recorded a total of 337 cases²³⁴. It is a common mistake by people without much knowledge of the Mayan system to think that lynchings are part of the indigenous law. Lynchings have nothing to do with Mayan law and are a heritage of the militarisation of the communities during the civil war when both the army and the guerrilla replaced indigenous authorities with their own people. One of the fundamental principles of Mayan law is the respect for life, which works as a preventative measure against lynchings²³⁵. If the application of Mayan law and their authorities would be strengthened and people brought to use their own justice system there would not be the same need for taking justice into one's own hands.

6.7 Disadvantages and weaknesses

While looking at these factors, it becomes quite clear that the application of indigenous law can improve access to justice in Guatemala and has a number of other positive effects on present forms of justice that ought to be taken advantage of. There are, however, some problems that challenge Mayan justice, and it is important to study these as well, in order to get a complete picture that hopefully can serve as a basis for future development.

6.7.1 Womens' roles

It is sometimes argued that various dispute resolution schemes around the world that are based on traditional social relationships may reduce women's access to justice when prevailing norms discriminate against women²³⁶.

²³³ Torres-Rivas, Edelberto and Bernardo Arévalo de León: *"From conflict to dialogue: the WSP Guatemala way"*, UNRISD/FLACSO, Guatemala City, 1999, p. 35.

²³⁴ www.state.gov/g/drl/rls, August 27, 2001.

²³⁵ *"Construyendo el Pluralismo Jurídico"*, p. 85-86.

²³⁶ www.worldbank.org, April 17, 2002.

Without a doubt, the Guatemalan indigenous societies are conservative in their view upon the roles of men and women. At first it should be noted that there is one indigenous authority that is made up by women only: the *comadronas*. These are a type of midwives who after the birth, keep playing the important role of advisers to the parents of the child²³⁷. The fact that all the rest of the Mayan authorities consist of men, including the arbitrators, and that the opinion of the community is taken into consideration when reaching a compromise, means that less powerful members, such as women, may be at a disadvantage. Even though checks and balances do exist, especially public participation, prevalent social attitudes may in fact reinforce inequalities on the basis of age, status and especially gender. The lack of female presence in local decision-making is partly a heritage of the civil war, as women used to participate in a greater extent before the war²³⁸.

There are, however, different opinions on this matter, for example Juana Catinac, director of DEMI²³⁹ argues that women have influence in legal decision-making, through their role of wives of the men of authority. These men ask their wives for advice and listen to their opinions, thereby giving women an indirect influence. “The majority of the knowledge that the men use when carrying out their judicial duties has been acquired through the experience of their matrimony and of having lived with their wives”²⁴⁰. In Totonicapán the mayors are not elected as an individual but as a part of their family. Thus, the wife has influence over the decision-making in the community²⁴¹.

Justice is nowadays applied in an equal way between men and women. For example, men are punished as severely as women if they have committed adultery, because this manner of breaking the social harmony is regarded as just as despicable no matter who commits it. The official law, on the other hand, is much more severe towards women than men according to Juana Catinac²⁴². Nevertheless, it is common that the wrongful behaviour of the men is justified by people whereas this is not the case if it is a woman who has acted wrongly²⁴³.

Many investigators have, however, pointed out the subordinated position of women in Mayan society. For example, it is not uncommon that the arbitrators tell the wife that she must fulfil her duties as a wife, whereas they only tell the man to stop beating his spouse. Thus, the conciliatory

²³⁷ Interview with Maria Tuyuc, November 14, 2002.

²³⁸ Interview with Romeo Tíu, November 19, 2002.

²³⁹ In Spanish: Defensoría de la Mujer Indígena. A civil organisation that promotes the rights of the indigenous women.

²⁴⁰ Interview with Juana Catinac, July 17, 2002.

²⁴¹ Interview with Romeo Tíu, November 19, 2002.

²⁴² Interview with Juana Catinac, July 17, 2002.

²⁴³ Interview with Maria Tuyuc, November 14, 2002.

settlements that dominate the indigenous process tend to maintain and reinforce unequal relations between husband and wife²⁴⁴.

If women feel they are at a disadvantage under the indigenous justice systems, they may take their problems to the formal court system. However, women face even more problems than men if they approach the State courts, as they usually have less education, less money and poorer knowledge of Spanish (as they generally do not leave their neighbourhood). In addition, they may feel intimidated by the predominantly male court personnel.

After having read this critique it is easy to assume that the problems women face could be solved by the abolishment of indigenous law and the imposition of legislation that defines the rights of women and prohibits discrimination. I believe that this would be neither a realistic nor a sensible way to deal with the problem. Just as the past 500 years have shown in Guatemala, it is not possible to completely eradicate the indigenous law. Therefore, the aim must be to tackle the root causes of discrimination and not simply its consequences. Forceful measures taken from outside the community will not lead to any real change. Instead, the changes must be welcomed by the indigenous people themselves. One vital desolution would be to integrate gender awareness training in the assistance to indigenous justice systems²⁴⁵. Defensoría Maya, for example, is working with the Mayan authorities, communities and families to support female participation in community decisions and to promote balance in the relationships between men and women²⁴⁶. Greater participation of women and other disadvantaged groups in the decision-making process should be encouraged. If women move into leadership positions, other women may become more assertive and men may find it easier to accept women with power. Therefore, promoting women to positions of indigenous authority may indeed lead to changes in gender relations. This could be done by, for example, organisations conducting legal education and rights awareness seminars for both men and women, especially in rural communities²⁴⁷. The organisations could also act as mediation centres, and if mediation fails they could inform women of how to take a case to the formal courts and give them legal aid if this path is taken. Knowing that the woman might take the case to the court would give the other party to the dispute enhanced respect of her demands. These mediation centres could invite the other party to come to mediation or issue a document stating the formal law. The latter may be sufficient to repair the inequality in negotiating strength and allow the parties to settle the dispute without third-party mediation.

In Guatemala it would be natural if the organisations that would take care of these issues would be DEMI or/and Defensoría Maya, as they have many

²⁴⁴ Sieder, Rachel: *"Derecho Consuetudinario y Transición Democrática en Guatemala"*, FLACSO, Guatemala City, 1996, p. 51.

²⁴⁵ Interview with Otto Rivera, November 14, 2002.

²⁴⁶ *"Construyendo el Pluralismo Jurídico"*, p. 97.

²⁴⁷ Interview with Otto Rivera, November 14, 2002.

years of experience of working with indigenous matters, and in DEMI's case in particular with indigenous women. It is, of course, also possible to create new organisations. Preferably, the organisations -already existing or new ones- should also offer to train organisations and individual women within the community so that they can be consulted when basic advice is needed. The dual aspect of organisations that not only offer the possibility of mediation but also access to formal courts, can be very useful and may in the long run help change social attitudes that negatively affect the equanimity of decisions under the Mayan justice systems. Knowledge of equal rights by both men and women alike will give women greater negotiating power in these forums.

6.7.2 Violations of human rights

According to the ILO convention 169, indigenous law may not violate the human rights. Some Mayan communities administer punishments that are regarded as such violations. Since it usually, but not always, is a matter of corporal punishments such as whiplashes, here I will deal primarily with this sanction. Physical punishments are generally seen as inhuman and degrading treatment and are prohibited under various international human rights conventions that Guatemala is part of. However, it is important to bear in mind that human rights is a Western concept that emerged in a context very different to the American reality at the time²⁴⁸. Although there is a similar concept in the Mayan languages, which can be translated as "respect" (meaning respect for life, for other people, for a peaceful coexistence between human beings, etc)²⁴⁹, there are different opinions concerning what is regarded as violations of these fundamental rights. Many people argue that being whipped a few times is much more humane than suffering under the horrible conditions of the Guatemalan prisons²⁵⁰. "If people were to be asked if they would prefer 5-10 whiplashes or to spend a year in prison, they would choose the first alternative"²⁵¹. "The concept of human rights should be analysed from a multicultural point of view"²⁵². For example, physical punishment does not have the purpose of harming the individual but rather that of encouraging him not to commit crimes again. Moreover, the main emphasis of the sanctions is not put on the corporal punishment, which is given in combination with other sanctions, for example community work²⁵³. Another question that is often raised is why the state is allowed to use the death penalty, whereas the indigenous population cannot even use corporal punishments within their system²⁵⁴.

²⁴⁸ Interviews with Maria Tuyuc, November 14, and Romeo Tíu, November 19, 2002.

²⁴⁹ Interview with Otto Rivera, November 14, 2002.

²⁵⁰ Interviews with Fredy Ochaeta, July 17, Luís Quiché Batz, October 16, and Maria Tuyuc, Nov 14, 2002.

²⁵¹ Interview with Maria Tuyuc, November 14, 2002.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Interview with Romeo Tíu, November 19, 2002.

The Colombian courts have dealt with the problem by not considering a corporal punishment a violation of human rights if it is imposed by an indigenous authority and in the indigenous community. “Of course the line must be drawn in cases of extreme violence, which cannot be accepted under any circumstances”²⁵⁵. It is important that any excess of the application of indigenous law be avoided. In order for corporal punishments to be acceptable there have to be certain rules on the matter, for example that they only may be imposed by an indigenous authority, within the community and accepted by the community as a type of sanction²⁵⁶. As always, the process has to be of voluntary character, meaning that the offender may choose to turn to the State courts instead.

The ILO Convention 169 indicates that procedures for resolution of conflicts between indigenous law and human rights should be established, (article 8.2). It neither specifies the type of procedures nor whether a new organ should be created or an already existing organ should be responsible for these issues (in Colombia, the Constitutional Court sees to this). Many people argue that the procedure has to be characterised by intercultural comprehension in order to avoid an ethnocentric and monocultural interpretation of events and rules. One culture alone cannot decide when human rights are violated or not. Rachel Yrigoyen argues that one solution could be to establish tribunals integrated with State judges and members of the indigenous community in question. The aim would be to create a better understanding of the events by taking the cultural context into account and to solve the conflicts in a fair way. If the cultural diversity is not respected, absurd cases could occur that instead of protecting people, would victimise them. Indeed, it is common for the Mayans to use sanctions like community work or to require that the offender work for the victim. If the same case were to be passed on to the State courts, it is likely that the penalty would be harsher for the offender and less beneficial for the victim²⁵⁷.

As mentioned in the chapter on the right to a fair hearing, the Constitutional Court of Colombia stated the prohibition of torture as one of the minimum guarantees that must be respected universally, including by the Mayans²⁵⁸. Many people argue that all corporal punishments are torture, whereas others argue that by looking at this issue from a multicultural perspective, some Mayan physical punishments are acceptable. One way of applying this last perspective might be to allow only a restrictive use of corporal punishments. Only milder punishments would be allowed, and a comparison would be conducted with similar alternatives within the State system. If the State sanction would be imprisonment, it makes more sense to tolerate the application of corporal punishments, as long as they are mild. The multicultural view on alleged violations of human rights –including others

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Yrigoyen Fajardo, Rachel, p. 97-98.

²⁵⁸ Speech by Rachel Yrigoyen Fajardo in Quetzaltenango, Guatemala, August 8, 2002.

than corporal punishments- by the Mayan law could, for example, be provided by an organ within the Constitutional Court, integrated with indigenous and non-indigenous experts, similar to the procedure which exists in Colombia. Once this organ has established that a certain case does not constitute a violation of the human rights, the decision must be respected by all official authorities.

Corporal punishments are, however, not the focus of the Mayan sanctions, and they are no longer applied to the same extent as they used to be, which implies that they are losing ground as a means to sanction crimes. Furthermore, it is not a sanction of as great importance as are, for example, community work and restitution. It would be useful to support this growing tendency towards the use of non-violent sanctions, in order to prevent cases of cruel and degrading treatment. It should not be forgotten that the people defending corporal punishments are never the ones who have been the subjects of it. A drastic measure would be to use State enforcement, i.e. that the State system intervenes by, for example, imposing fines on the illegal use of such sanctions. However, the State today already has possibilities to intervene, and has not had a major impact on the use of corporal punishments. Moreover, the multicultural perspective may not be provided, and the history of distrust towards the State authorities will probably not make it easier to achieve lasting changes. Instead, a better way of dealing with the issue would be to provide human rights education and information campaigns about the degrading element of corporal punishment with the purpose of creating positive attitudes towards the non-use of physical punishment and opening discussions on viable alternatives.

6.7.3 The destruction of the Mayan justice system

One of the weaknesses of indigenous law is that some communities have stopped using it partly or completely and have forgotten the rules and principles that had been passed on from generation to generation before the civil war. During the 34 years of armed confrontation, the cultural rights of the Mayan people were violated. The Army destroyed ceremonial centres, sacred places and cultural symbols. Through the militarisation of the communities, the establishment of the PAC and the military commissioners, the legitimate authority structures of the communities were broken down and the use of their own norms and procedures to regulate social life and resolve conflicts was subverted²⁵⁹. The regions that suffered most from the armed conflict correspond to the ones where today the indigenous justice systems are the weakest or have completely vanished. Long before the civil war, the Catholic Church tried to eliminate the indigenous religion and culture in order to grow its members. Today, this is done with less violent

²⁵⁹ *"Memory of Silence"*, p. 35.

measures, but Churches, especially the Evangelic, still treat the indigenous culture with great intolerance²⁶⁰.

Obviously, the indigenous communities have to decide for themselves whether they think that it is worthwhile to restore the Mayan justice system. Many advantages can be won though, and even where the system is still functioning it would be very useful to reinforce the legal area. Therefore, it is necessary to evaluate the old principles and collect information about the contents of the norms and the function of the authorities, without losing respect for the fundamental rights of the people or using excess the application of indigenous law²⁶¹. Public policies regarding the respect for the indigenous law, institutions and authorities all have to be elaborated by the State with the participation of the indigenous people. The information about Mayan law and Mayan peoples' right to carry out legal duties has to be spread to all sectors of the society, especially the judicial ones, in order to enhance respect and knowledge of the matter²⁶². Throughout the process of informing people about the contents of Mayan law, it is essential to include the indigenous youth so that they will carry the heritage of their legal traditions into the future²⁶³. Mayan parents should transmit the values and principles of their lifestyle as well as the forms of organisation and authorities of their community to their children, in order to encourage the youth to continue to recuperate and reconstruct the Mayan traditional system²⁶⁴.

6.7.4 Lack of representation and internal controversies

In the 1960's and 1970's, different Maya movements emerged that fought to be recognised and to make themselves heard on a national level. Maya organisations were thereby created that today serve as models. However, these organisations did not return their accumulated experiences and lessons learned to the places they came from, and now have little contact with the people that they originally represented. Thus, the organisations do not represent anybody, just themselves. "The organisations with offices in the capital say that they have local offices in various departments. For example Defensoría Maya says that they are present in Petén, but I have never ever seen a single office of theirs in Petén, and the same thing goes for Alta Verapaz"²⁶⁵. The organisations should work where most of the people that need them live: in the rural communities. An optimal management would exist if there were representatives for every linguistic community and for every region, but with a local focus, and with delegates in the capital²⁶⁶.

²⁶⁰ "Fuentes y fundamentos del Derecho de la Nación Maya K'iche' ", p. 55.

²⁶¹ Interview with Luís Quiché Batz, July 3, 2002.

²⁶² Yrigoyen Fajardo, Rachel, p. 99-100.

²⁶³ "Construyendo el Pluralismo Jurídico", p. 100.

²⁶⁴ Ibid, p. 110.

²⁶⁵ Interview with Fredy Ochaeta, July 17, 2002.

²⁶⁶ Interview with Fredy Ochaeta, July 17, 2002.

Unfortunately, there are generally quite a lot of controversies in and between the various Mayan organisations. These can be caused by rivalries between the different ethnic groups, struggles for the leading position, political disagreements, etc. If the organisations could cooperate to a greater extent, they would have much better possibilities to achieve common goals, including making the indigenous law stronger and more accepted.

6.8 Information to the judiciary and the police

Because the Guatemalan justice sector is almost entirely dominated by the Ladino population, the ignorance about alternative systems is appalling. Many lawyers, judges and prosecutors do not even know about the existence of Mayan justice. The judiciary, especially the Peace courts that constitute the first instance, and the police should be made aware of these systems, how they operate, and what authorities have legal functions. With the agreement of both parties they should refer appropriate cases to the indigenous system. If the Mayan process fails, either party should be allowed to return to the courts. It is important that it remain voluntary to turn to the Mayan authorities, as it otherwise would be a meaningless alternative and, at worst, another obstacle to justice. A more extensive use of the indigenous system would ease the burdens of the economically strained courts, thereby increasing the celerity of the procedures and avoiding settlements that are culturally inappropriate.

7 Conclusions and recommendations

7.1 Conclusions

Without a doubt, an improvement to access to justice in Guatemala is of fundamental importance to the amelioration of general living conditions. Access to justice is a basic right for every citizen and should be a central element of any modern democracy. The construction of Rule of Law continues to be a priority for the international financial institutions and other intergovernmental and non-governmental organisations in the region²⁶⁷. At present, access to justice is becoming more and more prioritised. The transformation process towards this goal is inevitably long, and it is not going to be easy to combat decades of distrust towards the official judicial system. Due to these prevailing historically reinforced negative attitudes, it is essential to incorporate civil society into judicial reform processes in order to generate proposals and alternative forms of justice. In Guatemala, this dynamic began to evolve together with the peace process, but must remain constant in order to improve the justice system as a whole. A lasting change, of course, cannot be achieved if it is elitist and lacks transparency.

Even though the reforms of the judicial systems throughout Latin America have many elements in common, the developments over the last 15 years have shown that it is impossible to apply international recipes in a mechanic manner to different national contexts. A successful judicial reform has to be rooted in the conditions of the country in question; i.e. it has to fit the needs of the society. In multicultural countries like Guatemala, the incorporation of legal authorities, norms and practices of indigenous populations represent a key element in the global judicial reform, given the legitimacy, acceptance and level of participation that these have won among the majority of the population. A strengthening of the justice administration in Guatemala should be based on a decentralisation of the judicial system and a strengthening and recognition of the Mayan law²⁶⁸. This would make possible the improvement of the settling of disputes and of the control of criminality, as it is based on many elements that constitute an important contribution to the redesign of the judicial system, i.e. mediation, reconciliation and compensation. This could represent a method to develop Rule of Law that proves suitable for the history and cultural pluralism of the country and that is capable of fighting the legitimacy crisis that the judicial system currently suffers from.

²⁶⁷ Sieder, Rachel in *"Pluralidad Jurídica en el Umbral del Siglo"*, p. 48.

²⁶⁸ *Ibid.*, p. 49-50.

Indigenous law already represents a very useful alternative to the state justice system, which can improve access to justice. Clearly, it has a range of advantages that should be made the most of, and that could help the state judicial system overcome its serious problems with case inundation, impunity and unfair judgements (due to lack of comprehension of the system by the Mayans), etc. As has been established above, however, problems and weaknesses exist within the indigenous justice system and when applying the indigenous law. It is my firm opinion that these disadvantages can be overcome through various means, for example through education and information, investigations, support to weaker and more progressive groups, establishment of mechanisms for coordination and for avoiding human rights clashes, etc. By making these improvements, the Mayan law can become an even stronger system, which it must be if a wider application is to work in practice and in order to win the acceptance and respect of the non-indigenous population. Doubtless, it will require financial resources to transform these measures into reality, but it will be worthwhile, as many advantages are to be won. Economically, the state would gain savings, as fewer cases would be handled in the courts, and thus there would be less impunity, which would lead to less crime being committed (as people know they will be punished). Moreover, if community based sanctions were to be used instead of imprisonment, the state would save a significant amount of money. In addition to the economical perspective, another advantage would be that a stronger and well-respected Mayan justice system would strengthen the Maya culture as a whole. If the indigenous population were socially more powerful, they would be able to overcome the barriers of discrimination and racism that for hundreds of years have blocked their possibilities to development and improved living standards.

If Guatemala ever is going to emerge from the debilitating swamp of underdevelopment, the ethnic tensions and the discrimination against the indigenous population have to be tackled. One of the key issues on the way to reaching this goal is assuring them equal access to justice, both in the official system and through the recognition of their own legal system. In this thesis, I have dealt with the latter alternative, which I believe improves access to justice but at the same time needs to be modified and strengthened in order not to suffer from legitimisation problems. To talk about a fair hearing in indigenous law according to the Western concept of international human rights is not a compatible comparison. Like Rachel Yrigoyen says (see chapter 6.4), the indigenous law shall only be forced to respect the most fundamental guarantees. This means the rights that the entire world should respect: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery, as well as the foreseeability, as an integral part of the right to a fair trial. Some sort of organ that can deal with presumed violations of human rights by the indigenous law needs to be established in Guatemala. This could be a separate entity or one within the state context, for example, the Constitutional Court or the Supreme Court of Justice. Most important is that

it should be constituted by indigenous as well as non-indigenous people so that the multicultural perspective can be provided.

It should be noted though, that the matter of recognition and application of Mayan law not should be regarded as a question of two opposite systems, but rather as two parallel ones that need each other's help and whose appropriateness vary according to every case and the people involved. The Mayan justice system is best suited to conflicts between people living in the same community who seek reconciliation based on restoration. In urban communities it is less likely to work, as people there usually are not interwoven by social connections and therefore do not feel the encouragement or social pressure to obey the Mayan law²⁶⁹. The State courts, on the other hand, provide the only option in more serious cases, as the indigenous authorities no longer deal with such matters. Moreover, the courts provide the solution if the parties are unwilling or unable to reach a compromise within the Mayan legal framework. Both systems need to function beside each other with due respect for the authorities, decisions and legal contents of the other. If the indigenous law is recognised entirely and if the improvements recommended in this text are put into effect, not only will the access to justice be increased but several other advantages can be won.

7.2 Recommendations

7.2.1 A full recognition of indigenous law in the constitution and in the rest of the national legislation.

In order to avoid breaking the international conventions, Guatemala has to implement these in the national legislation. Article 203 of the constitution, concerning the sole power of the Judiciary²⁷⁰ to administer justice, has to be changed if Mayan authorities are to be given the right they have according to international conventions, especially ILO 169, to resolve conflicts.

7.2.2 Use of international organs

If the indigenous authorities and organisations cannot obtain justice within the Guatemalan legal system they should present their complaints before the organs of the United Nations, the International Labour Organisation or the Inter-American Court of Human Rights. This last instance has recently been solving more and more cases of violations of the collective rights of the indigenous people. One example is the *Awas Tingni* case in 2001, where the

²⁶⁹ Esquit, Edgar, p. 155.

²⁷⁰ In Spanish: Organismo Judicial.

Court came to the conclusion that the Nicaraguan state had violated the rights of the members of the Awas Tingni community when granting a timber concession on their territory without previous consultation or consent²⁷¹. The Maya people may also make use of the Convention on the Elimination of All Forms of Racism, to force the Guatemalan judicial system to stop discriminating against the indigenous people as well as their legal system.

7.2.3 Further investigations on Mayan law

Due to the devastating effect that the many years of repression, especially during the civil war, have had on the Mayan culture and society, there is an urgent need for investigations and subsequent reinforcement of the rules and procedures of the Mayan justice system. If this system is to be applied to a greater extent, it has to be strong and clear so that the official system and the public in general do not lose confidence in it.

7.2.4 Improving womens' situation

Any attempt to improve the weaknesses or disadvantages of Mayan law has to come from the Mayans themselves, otherwise it will never lead to lasting changes. Thus, projects with the purpose of improving the situation of the indigenous women must be either lead by Mayans or, at very least, integrated by them. There are various Mayan women who work, in groups or individually, to gain more influence in the decision-making processes of their communities and to eradicate the inequalities between the sexes. These women could play a key role in the work of changing prevalent social attitudes. Development agencies could make the situation of women change by supporting these groups or by integrating the expertise of these women into their projects. Organisations should conduct legal education and rights awareness training for both men and women, especially in the rural communities. They could also act as mediation centres, and should mediation fail, they could give legal aid to the women in the courts. It would be most natural if the organisation dealing with these issues were DEMI or Defensoría Maya, due to their long experience and good name within the field.

7.2.5 Non-violation of human rights

²⁷¹ *"Recomendaciones para viabilizar el Respeto y Reconocimiento del Derecho Indígena"*, report presented by FLACSO and the National Commission for the Follow-up and Support of the Strengthening of Justice, July 4, 2002, p. 32.

The presumed violations of human rights by the indigenous law have to be considered from a multicultural point of view. For example, a body within the Supreme Court or the Constitutional Court, integrated by indigenous as well as non-indigenous experts, could do this. As a more economical alternative, an authority from the indigenous community in question could be asked to give his “expert’s report” on the topic in the judicial process²⁷². Simultaneously, the ongoing tendency of not using corporal punishments should be supported. This could be done through human rights education and information campaigns about the degrading element of corporal punishment in order to make the indigenous authorities and individuals prefer non-violent sanctions.

7.2.6 Establishment of mechanisms for coordination

It is imperative that mechanisms be set up to assure respect for Mayan legal acts and to make the indigenous and the official systems cooperate efficiently. To emit a coordination law, like the one in Peru, is one way to deal with the problem. Another is to change the Constitution and the Penal and Procedural codes. Coordination procedures should be encouraged through dialogues with the judiciary and the police forces in order to help them realise the advantages of coordinated actions and see how these could be put into reality.

7.2.7 Information to the judiciary branch, the police and the public

In order to increase its usage, the current ignorance about indigenous law, especially on the part of the police and the judiciary branch, has to be combatted. Prejudices like the belief that lynchings are part of the Mayan law must be eradicated. By spreading information concerning its practices, the indigenous law would grow stronger. To inform the young Mayan people is very important, as they would consequently be more inclined to maintain their traditional ways of solving conflicts.

7.2.8 Increased cooperation between the Maya organisations and more coverage in the countryside

Stronger cooperation between the various Maya organisations would give their projects and efforts a greater impact on the society and make positive changes more likely. This should not only be an aim for the organisations in the capital but also for the local groups. Given that most of the indigenous

²⁷² In Spanish the concept of “peritaje cultural”.

population lives in the countryside, organisations on a local level and the extended presence in these areas by the national organisations should be encouraged. Development agencies could make this change possible by supporting local Maya groups.

7.2.9 Increased usage of community based sanctions

To choose traditional community based sanctions for the indigenous population would lead to more culturally appropriate punishments that do not tear apart the families and increase the possibilities of readjustment to the society. In addition, it would mean less crowded prisons, which in turn implies more humane conditions and increased cost-efficiency.

7.2.10 The indigenous population as protagonists

It is imperative that all efforts and projects, which share the purpose of strengthening Mayan law, consider the indigenous people as main protagonists and be carried out by or with the participation of this group. This is the only way that the projects will be viable, realistic and able to achieve their objectives.

The development agencies in Guatemala today are working separately and without coordination with most of their projects, which often do not lead to any real improvements for the indigenous people. In order for the projects to have a greater impact, the development agencies should coordinate their efforts and evaluate the plans and results together. A board integrated by indigenous persons or organisations and representatives from the development agencies could handle this responsibility. The equal status of the members of such a board is imperative so that an open discussion can be held. Unfortunately, some NGO:s today are so desperate for funds that they do not dare to object to potential weaknesses of a development agency's project plan. The agencies, on the other hand, are sometimes more interested in fulfilling initial project objectives than in actually achieving real improvements²⁷³.

²⁷³ Interview with Romeo Tíu, November 19, 2002.

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²⁷⁴ National organisation that promotes the rights of Mayan women.

²⁷⁵ Mayan NGO, Guatemala City.

²⁷⁶ United Nations High Commissioner for Human rights.

²⁷⁷ Mayan NGO based in Quetzaltenango, Guatemala.

²⁷⁸ United Nations Verification Mission in Guatemala.

Maria Tuyuc, coordinator of the Centro de Administración de Justicia de Chimaltenango²⁷⁹, November 14, 2002.

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²⁷⁹ The Administration of Justice Centres exist in various parts of the country. Their purpose is to bring the legal system closer to the people in the countryside and to coordinate the efforts of the administration of justice. Therefore, do the police, prosecutors, judges, lawyers and other court personnel work in the same office, which improves the cooperation and the efficiency of the system.