

**Legal Globalization and Human Rights:  
Constructing the ‘Rule of Law’ in Post-Conflict Guatemala<sup>1</sup>**

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Focusing on the case of Guatemala, this paper focuses on the impact of legal globalization on national legal systems. In particular, it considers the interplay between transnationally promoted institutional reform, state legal formations and practices, and historically shaped expectations of ‘law’ and ‘justice’. I raise a number of broad, overlapping questions about legal globalization, the rule of law and human rights, considering particularly the implications of contemporary trends towards ‘legal decentralization’: First, what do globally dominant trends in ‘rule of law construction’ mean for human rights and access to justice, especially of the most vulnerable and excluded sectors of society? Second, how do judicial reform initiatives supported by international donors re-shape state-society relations in the legal terrain and with what implications? And, third, what role do different local and international understandings of ‘human rights’ and ‘rule of law’ play within such processes? I argue that any attempt to answer these questions necessitates a focus on the historical development of the nation state, because transnationally promoted legal reforms have different effects in different national and local contexts, depending on the type of state and legal system in question and the kind of legal interactions that have historically characterised state-society relations.

**Legal globalization**

Legal globalization involves the transnationalization of certain legal models, frameworks and ideas (Dezalay and Garth 2002a, 2002b; Merry 1988, 1997, 2001; Santos 1998; Trubek et.al 1994; Wilson 1997, 2001). It is not a new phenomenon and indeed constitutes a central pillar of imperial systems – one only needs think of the spread of Roman law or English common law across large parts of the world to understand the power and enduring nature of legal transplants. However, during the second half of the twentieth century, and particularly during its last two decades, the pace of transnational exchange on the legal terrain markedly accelerated. This occurred principally in the economic sphere, as globalized patterns of capitalist

production and consumption generated new forms of legal regulation and favoured the spread of transnationalized forms of law making, such as the private law of business sectors (*lex mercatoria*), which appeared to operate almost independently of nation states (Teubner 1997; Appelbaum, Felstiner and Gessner 2001). However, other forms of legal globalization also had a profound impact on states and on relations between states and their citizens. One of these was the spread of human rights doctrine.

Human rights can be understood as an international legal framework of treaties and conventions that codify the inherent rights of human beings and the obligations of states towards them. Since the 1948 Universal Declaration of Human Rights and the 1966 International Covenants on Civil and Political, and Economic, Social and Cultural rights, there has been a marked trend towards the increasing codification of rights of specific groups within the human rights framework. So, for example, the rights of indigenous peoples have been codified in the 1989 International Labour Organisation Convention 169 and the draft UN Convention on the Rights of Indigenous People (Plant 1998; Sieder and Witchell 2001), the rights of women have been laid down in a universal standard for the global community in the 1979 UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) (Agosin 2001), and the rights of children have been codified within the Convention on the Rights of the Child (CRC), approved by the UN General Assembly in 1989 and subsequently ratified by most states in the international system (Green 1998). These trends have enmeshed states within an ever-more complex web of international legal obligations.<sup>2</sup>

Anthropologists have placed particular emphasis on the ways in which human rights are understood, interpreted and contested in particular contexts. While the legal doctrine of human rights is based on their universalism, there is no universal or standard understanding of what 'human rights' actually mean in practice (Wilson 1997; Speed and Collier 2000). Nonetheless, 'human rights' is an idea that mobilises individuals and groups across the world to press specific claims against the state. Indeed it is precisely the global power and purchase of the idea of human rights that leads so many to present their claims in that language in order to mobilize

international opinion and actors on their behalf. Many of these attempts to secure rights in practice represent examples of Keck and Sikkink's 'boomerang effect'; when local actors are part of transnational advocacy networks which attempt to secure respect for human rights by bringing pressure on states not only 'from below' but also 'from without' (Keck and Sikkink 1998).

While social movements have long used the idea of human rights to oppose and resist state violence and oppression, since the end of the Cold War human rights has also become one of the central concepts in the legal reorganization and reform of the state in the wake of armed conflict or authoritarian regimes. In this sense it constitutes a fundamental component of the globalization of certain politico-legal norms, values, institutions and models (Donnelly 2002). A range of international organizations and powerful states in the international system now promote the spread of liberal legal norms, such as the inalienable human rights of the individual, and western legal institutions in the name of strengthening democracy and peace and nation-building. Within a variety of different national contexts, the notion of 'rule of law construction' is used as a kind of shorthand to refer to a multiplicity of efforts to secure reformed and improved legal systems. As in the 1960s, law has once again come to be seen as central to efforts to secure development.<sup>3</sup> 'Strengthening the rule of law' within individual nation states is prescribed as a means to ensure effective and democratic governance and, in turn, to underpin peace and security within the international system. Reform of judicial systems is a currently a major concern of both governments and donors in Latin America and some \$1 billion has been spent on judicial reform in the region since the 1980s. A variety of donors including the World Bank, the Inter-American Development Bank (IDB), the United Nations Development Programme (UNDP), individual country donor programmes such as USAID and NGOs support reform of the justice sector under the broad remits of promoting of democracy and advancing market reform. As Dezaley and Garth observe, there is now a burgeoning global industry dedicated to the import and export of the 'rule of law' (Dezaley and Garth 2002a; see also Domingo and Sieder 2001, Carothers 1999). The promotion of human rights is just one dimension of this industry. Donors have different aims and motivations for supporting judicial reform; some may seek to improve human rights,

some to guarantee greater security for private investment, others to tackle transnational crime. Unsurprisingly, their agendas often conflict (Carothers 2001).

### **Legal reform and legal pluralism**

Across Latin America, legal orders have historically been characterised by an enduring legal pluralism – the overlapping coexistence of different legal and regulatory orders (Santos 1995).<sup>4</sup> Yet in contrast to, for example, post-colonial legal systems in Africa, legal pluralism in Latin America operated *de facto* as opposed to being recognised *de jure* until the 1990s. Throughout the nineteenth and twentieth century state builders insisted on the unitary, centralised nature of the legal system, following British, French and North American models of liberal constitutionalism. Law was a marker of modern statehood; there was one law and all citizens were to be subject to it without exception. However, in practice entire areas were characterised by a weak state presence and subjected to the ‘private law’ of powerful social actors. Deploying a mapping metaphor, Guillermo O’Donnell has famously referred to these as the ‘brown areas’; territories and institutions where neither reasonably effective state bureaucracies nor properly sanctioned legality operate (O’Donnell 1993; 1999). In the past this was most common in rural areas, where the power of the *cacique*, *finquero* or *gamonal* was often sovereign. However, in the second half of the twentieth century much of urban Latin America also effectively came to operate outside properly sanctioned legality; for example poor neighbourhoods subject to the regulatory orders instituted by drug barons rather than to national law. In the 1980s and 1990s the spread of transnational, organized crime combined with the historical lack of legal protections and rights guarantees extended by the state to increase the vulnerability of most Latin Americans, particularly the poor, marginalized and underprivileged.

Much of present-day Latin America is characterised by the weak legal presence of the state and a high degree of legal pluralism. However, a diversity of legal conditions exists across the region linked, in turn, to different legacies of national and regional state formation. Guatemala, the country I focus on here, has never enjoyed anything approaching a legally embedded state, much less a democratic legality. Extreme levels

of state repression and violence against the civilian population, the colonization of the state by predatory elite groups and the exclusion of the majority of the population from the most commonly accepted measures of 'development' have meant that the idea of the rule of law has little resonance for most Guatemalans. The protection of fundamental human rights has been conspicuously and disastrously absent and 'brown areas' constitute enduring features. During 36 years of armed conflict over 200,000 people were killed (some 2% of the population in 1980), the great majority of them civilians murdered by the Guatemalan military and paramilitary forces allied to the armed forces. Over 50,000 of these were 'disappeared', more than in any other country in the region during the twentieth century. Following the peace settlement between the government and the insurgent Unidad Revolucionaria Nacional Guatemalteca (URNG) in 1996, international donors focused their efforts on attempts to strengthen the domestic justice system and 'construct the rule of law'. The idea of human rights was at the heart of post-war attempts to reform the justice sector; however, international trends in rule of law construction have had paradoxical effects on human rights in practice. I suggest here that this is partly because the 'rule of law' means very different things to different national and international constituencies, and partly because of certain trends in state-society relations in the legal terrain. The following sections analyse the historical development of the state in Guatemala; detail the nature of post-war reforms of the justice sector and different discourses on 'human rights' and the 'rule of law'; and consider the implications of internationally promoted reforms of the justice system for the prospects of securing human rights.

## **Law in Guatemala**

A number of features have historically characterized Guatemalan state formation and society, all of which have profound implications for current attempts to reform the country's justice system. First, racism and systematic discrimination against the majority indigenous population are endemic, together with acute and persistent levels of socio-economic inequality. Second, and linked to the first, the legal terrain is characterized by a marked and enduring distance between popular mechanisms for conflict resolution and the state's judicial apparatus. Certain sectors, particularly indigenous communities, were effectively abandoned by the state and relied predominantly on their local, customary law to mediate communal disputes.

Third, the military have tended to dominate the political and legal institutions of the state, where civilian governance is correspondingly weak, and fourth, there exists a historical pattern of extremely high levels of state violence against the civilian population.

During the colonial period semi-autonomous and subordinate legal spaces existed for the majority indigenous population who were subject to the laws of the *República de Indios*, which provided for their segregation and limited protection at the same time as they guaranteed their continued exploitation. A dual legal system operated, with non-indigenous governed by the laws of the *República de Españoles*. Legal interactions and mediation between Crown, *peninsulares*, criollo elites and the indigenous populace were central to the reproduction of colonial society. Traditions of legal engagement were as deeply rooted as the existence of separate legal spheres for Indians and non-Indians. In the early republican period attempts to raise taxes and introduce liberal reforms and legal institutions, such as trial by jury and a new penal code, contributed to a Conservative-led indigenous revolt in 1837 that initiated three decades of Conservative rule (Woodward 1993). The Conservatives restored the *Leyes de los Indios* and a paternalistic attitude of the state towards the indigenous population prevailed. After the victory of the Liberals in 1871, the dual legal system was abolished in the name of universal citizenship and state laws were used to aggressively promote the production of coffee for agro-export. Forced labour arrangements were intensified and the consolidation of a professional army allowed for their more rigorous policing by an increasingly centralized state. While communal land titles were not subject to the kind of wholesale assault that occurred elsewhere in the isthmus during the 1880s and 1890s, state law actively promoted the privatization of so-called *tierras baldías* in favour of new coffee elites. However, at the same time as the liberal legal order in Guatemala became highly centralized and militarized, subordinate semi-autonomous legal spheres for local conflict resolution continued to exist within indigenous municipalities, particularly in the western highlands. Whilst it declared an ideology of assimilation, in practice oligarchic liberalism in Guatemala continued to segregate the population along ethnic and class lines (Taracena Arriola 2002). New vagrancy laws were introduced to ensure a supply of un-free labour for coffee production and road construction and the role of the military became ever more central in underpinning the economic order. Under the dictatorship of General Jorge

Ubico (1931-44) the state's coercive and administrative apparatus was extended to more remote rural areas and increasingly also to the private sphere (Sieder 2000).

A ten-year experiment in social democracy known as the 'Guatemalan Spring' (1944-54) was cut short by a US-supported military coup in 1954. The subsequent rollback of the 1952 agrarian reform involved both the legal restitution of expropriated lands and high levels of extra-judicial violence against peasant organizers and political activists. During the following decades the military consolidated their control over government, which was increasingly organized according to a national security, counterinsurgency logic. Following the emergence of a guerrilla in the 1960s levels of state violence rose steadily, culminating in the genocidal campaigns against the indigenous rural populations carried out in the early 1980s under the military regimes of Generals Lucas García and Ríos Montt (Ball, Kobrak and Spierer 1999, ODHAG 1998, UN 1999). During the armed conflict the judiciary was entirely subordinated to the military and disputes were resolved by parallel, extra-judicial mechanisms with resort to extreme levels of violence.<sup>5</sup> According to the Commission for Historical Clarification (CEH), the UN-backed investigation into human rights violations that occurred during the armed conflict, the singular failure of the judicial system to act as a check on the *de facto* exercise of power and the systematic abuse of human rights by the state was a key factor that actively facilitated the violence. The armed forces' control over government also sharpened the authoritarian character of law and its arbitrary application. Civilian elites tended to rely on the military to mediate disputes, further weakening the judicial apparatus. However, following the militarily orchestrated transition to elected civilian government in 1985, citizen demands for a more effective rule of law increased. This was an effect of multiple factors, including increased awareness among organized civil society groups of international human rights law and (latterly) international legislation on the rights of indigenous peoples, the focus of the donor community in the 1990s on strengthening state institutions and rising levels of crime and insecurity.

### **Human rights, the rule of law and the peace accords**

Although attempts were made in the early 1990s to modernize the judiciary, at the end of the armed conflict it continued to lack legitimacy for the majority of the

population. Ten years after the transition to elected government most Guatemalans rightly tended to see the law as something that operated to the benefit of powerful individuals and groups rather than as something to which they could make effective recourse to protect their fundamental rights. Analysts listed a catalogue of problems: the justice system was under-resourced, inefficient, inaccessible -particularly to indigenous people, women, children and the poor, plagued by corruption, lacking independence from other branches of state, staffed by poorly trained, mediocre and under-motivated professionals, and subject to the *de facto* power of elite groups. Opinion polls taken in the late 1990s indicated extremely low levels of citizen confidence in the judiciary.<sup>6</sup>

'Human rights' was at the heart of the international community's post-war project to strengthen the rule of law. The UN-sponsored peace settlement advocated democratic modernization of the justice system, particularly of the criminal justice system, through institutional reform. It aimed to encourage the peaceful resolution of conflicts via the courts, secure accountability of state officials and institutions, ensure respect for human rights and due process guarantees in the judicial process, and improve access to justice for the majority of the population. Such changes implied a root-and-branch transformation of legal culture: rather than simply a means to punish or to protect privilege, it was hoped that the courts would come to be seen as a means for all citizens to secure accountability and restitution. The peace accord which dealt most comprehensively with reform of the justice sector was the Agreement for the Strengthening of Civilian Power and the Function of the Army in a Democratic Society, signed in September 1996, but in total five of the thirteen peace accords signed between the government and the URNG made express reference to the justice sector.

Reform of the criminal justice system was based on what was referred to as a *garantista* model; one in which guarantees for the fundamental human rights of the accused were made central to legal procedures. Considerable advances in this direction were made throughout Latin America during the 1990s and in Guatemala some incipient moves towards reform preceded the 1996 peace settlement. In common with other countries in the region, Guatemala reformed its Penal Procedures Code (*Código Procesal Penal* or CPP). A new law entered into force in 1994 and

Congress subsequently approved a series of amendments in 1996, introducing a framework for criminal justice based on ensuring human rights guarantees for detainees. This emphasised the rights of the accused to due legal process, particularly the presumption of innocence, habeas corpus guarantees and the right to legal defence. This last was advanced through the creation of a state Public Defence Institute. Past practices, such as the use of confessions as the sole basis for convictions, were no longer legally admissible. Other important measures included the separation of investigative and adjudicative functions in the judicial process – previously judges had investigated crimes and issued sentences, making them in effect prosecutors and judges and raising potential conflicts of interest. Criminal investigations were delegated to a separate institution, the Public Ministry, in the expectation that judges' independence would be strengthened.

The peace accords mandated a doubling of budget allocations to the justice sector by the year 2000 (compared to the 1995 dispensation) and a massive extension of its institutional coverage throughout the country. In 1997 the multi-sector Justice Strengthening Commission was set up according to the terms of the September 1996 *Agreement for the Strengthening of Civilian Power* and subsequently undertook a unique process of consultation on reform of the justice system with different civic and professional groups throughout the country. The Commission's comprehensive and broad-ranging recommendations, published in April 1998, included a series of measures to increase judicial independence and reduce corruption, professionalize the judiciary, guarantee basic rights, increase access to justice and make it more multicultural (Comisión de Fortalecimiento de la Justicia 1998). Many of these recommendations were subsequently incorporated into the judiciary's five year Plan for Modernization (*Plan de Modernización del Organismo Judicial*), approved in mid-1997 and supported by the World Bank, the Inter-American Development Bank (IDB), the UNDP, USAID, the UN verification mission in Guatemala MINUGUA, and the governments of Sweden, Japan, Switzerland and Canada, amongst others.

The focus of the peace settlement on human rights meant that during the years immediately after the signing of the accords, strengthening the rule of law was on everyone's agenda. However, the 'rule of law' meant significantly different things to different sectors. For the panoply of international donors supporting implementation

of the peace accords and reform of the Guatemalan state, the 'rule of law' came to be seen as a panacea for many things. It was championed as a central part of democracy promotion and strengthening, for example by USAID, proposed as fundamental to strengthening national economic performance by the World Bank, among others, and advocated as an essential component of post-conflict reconstruction by the UNDP, the UN verification mission MINUGUA and a host of bilateral donors.

For Guatemalan human rights activists, such as the indigenous Mayan widows' association Coordinadora Nacional de Viudas de Guatemala (CONAVIGUA) or the families of the detained-disappeared the Grupo de Apoyo Mutuo (GAM), the 'rule of law' meant an end to impunity and the trial and sanctioning of those individuals responsible for gross violations of human rights during the armed conflict. This implied putting military officers on trial, making them accountable for their crimes, and also providing material and symbolic restitution for the victims of those abuses. Such demands were supported by the peace settlement, which had included a mandate for a UN-led investigation into past violations, or 'truth commission'. The results of this commission, made public in 1999, found the Guatemalan state guilty of gross human rights violations, including genocide, and recommended judicial prosecutions of those responsible (CEH 1999).<sup>7</sup> A variety of different national NGOs and civil society organizations, including local associations of Mayan survivors of the state repression of the 1980s, continued to press for justice in human rights cases in the wake of the peace settlement, campaigning for an end to military impunity. These groups provided evidence and witness testimony for a number of paradigmatic cases pursued before the national tribunals. When these efforts were frustrated or blocked within the domestic sphere, victims' groups and NGOs took the cases to the Inter-American Court of Human Rights (IACHR) and third country courts, for example in Spain and Belgium (Sieder 2001).

However, for many ordinary citizens –who were not part of the vocal, but relatively small sector which constituted organized civil society- the 'rule of law' increasingly meant tough policies on law and order. While violations of civil and political rights by the state declined relative to the 1980s and early 1990s, new forms of insecurity became generalized towards the end of the decade. Armed robbery, car-theft, kidnapping,<sup>8</sup> child abduction for illegal adoption, drug trafficking, homicides and

rape, gang-related violence and money laundering became commonplace (Vela, Sequén-Mónchez and Solares 2001). Official figures are notoriously unreliable, but one study estimated that the total number of reported crimes increased by 50% between 1996 and 1998 (Call 2000: 9). Rising levels of crime undermined citizen confidence in the legal system, as this, in turn, proved unable to tackle the public security problem. The new Penal Procedures Code appeared to have particularly contradictory effects: in the face of the post-war crime wave the rights protection afforded to detainees by the *garantista* model became the subject of acute public criticism, with calls for more hard line measures and revisions to the code increasingly gaining ground. Paradoxically many citizens blamed 'human rights' for crime and impunity; they were widely viewed as something that gave too many protections to suspected criminals, many of who were routinely released after arrest due to lack of evidence. Tough law and order policies became increasingly popular. In 1995 the government of Alvaro Arzú extended the death penalty to anyone convicted of kidnapping. Subsequently the Frente Republicano Guatemalteco (FRG), led by former military dictator Ríos Montt (whose regime was accused by the UN's Historical Clarification Commission of perpetrating acts of genocide against the indigenous population in 1982 and 1983), was elected to office in 1999 on a law and order platform. In May 2000 Congress rescinded the law allowing the President to grant pardons in capital cases, bringing Guatemala into violation of both the American Convention on Human Rights and the International Covenant on International and Civil Rights (HRW 2001: 4). In addition, citizens increasingly took 'justice' into their own hands, as the incidence of lynchings of suspected criminals increased after 1996 (MINUGUA 2002, Godoy 2002, Gutiérrez and Kobrak 2001). In short, the legacy of the armed conflict and authoritarian government, combined with increased insecurity in the wake of the war, had contradictory impacts on popular expectations about 'human rights'. Although the UN verification mission MINUGUA placed great emphasis on educating citizens about their human rights as a fundamental part of post-conflict reconstruction, this did not lead automatically to a greater respect for human rights in practice.

## Multiculturalizing justice

In addition to guaranteeing human rights and due process, the other central aspect of the post-conflict reforms to the justice system was the attempt to 'multiculturalize' Guatemalan justice. The peace settlement had identified the historic exclusion of Guatemala's majority indigenous population as one of the causes of the conflict and advocated a series of measures to make state institutions reflect the cultural diversity of the country and reduce discrimination. Such initiatives also reflected the tendency in international human rights thinking towards recognizing the collective rights of indigenous peoples as human rights, together with regional trends in reform of the state. Since the mid-1980s a number of Latin American countries had initiated constitutional and secondary reforms to reconstitute themselves as 'pluri-cultural' and 'multi-ethnic' nations (Van Cott 2000; Assies et.al. 2000; Sieder 2002). The partial nature of this recognition of indigenous rights continues to be hotly contested by indigenous groups across the region. However, it is evident that a key feature of the reforms was the legalisation of greater *de jure* legal autonomy for ethnic groups. Across Latin America, a variety of indigenous forms of justice were recognised as part of the multicultural reforms of the state. As Willem Assies has noted, referring to indigenous forms of justice in the Andes, 'what was once considered marginal, if not illegal, has...become a right' (Assies 2003: \*\*). Such legal de-centering was at the heart of the legal reconstitution of the neo-liberal state in the 1990s.

The peace accords underlined the need to ensure access to justice for Guatemala's majority indigenous population; some 50-60% of the overall population of twelve million, comprising 23 different ethno-linguistic groups - 21 of these of Mayan descent - and including the most impoverished sectors of the populace.<sup>9</sup> 'Multiculturalizing' the justice system aimed to provide effective and culturally appropriate means to protect rights, resolve conflicts and control abuses of power. Improving access to justice for the indigenous population involved three dimensions: the ordinary court system, indigenous customary law and alternative dispute resolution mechanisms (ADR) (Yrigoyen and Ferrigno 2003). A number of initiatives were projected; in the ordinary courts an increase in the numbers of justices of the

peace and state legal aid counsels for criminal defendants, together with the provision of judicial interpreters who could work in different Mayan languages. In addition, the use of community-based indigenous customary law to resolve conflicts outside the courts was initially encouraged. Indeed in the early 1990s formal state recognition of indigenous peoples' internationally recognised right to their own legal norms and practices was a key demand of indigenous activists in Guatemala. The Accord on the Identity and Rights of Indigenous Peoples, signed as part of the peace process in 1995, committed the Guatemalan government to constitutionally recognize indigenous peoples' right to use their traditional forms of justice ('customary law').<sup>10</sup> However, according to the terms of reference of the peace negotiations all reforms to the constitution had to be approved by congress and subsequently ratified in a popular referendum. In the event a controversial package of some fifty reforms was defeated in a referendum held in May 1999.<sup>11</sup> The defeat of the constitutional amendment meant that the decisions of indigenous authorities continued to be subject to possible challenges in the ordinary courts, restricting their autonomy. Instead justice reform initiatives in the late 1990s concentrated on expanding the physical coverage of the ordinary justice system - by 2000 every municipality boasted an office of justice of the peace or *juzgado de paz*, compared to only two-thirds at the end of the armed conflict.

In some areas indigenous authorities and community-based informal mechanisms of conflict resolution were partially incorporated into the lower rungs of the justice system as a form of alternative dispute resolution (ADR). In line with the peace agreements, and the recommendations of the 1998 Justice Strengthening Commission, international donors supported the increased use of ADR mechanisms as complements to the formal justice system. Forms of ADR include negotiation, conciliation, mediation and arbitration.<sup>12</sup> Such measures are generally aimed to remove minor legal claims from the courts, freeing up the latter and increasing the efficiency of the judicial process. In Guatemala they are also intended to achieve more culturally appropriate and accessible forms of justice and conflict resolution for the majority. The promotion of ADR is a key feature of legal globalization and transnationalized forms of 'rule of law construction' (Salas 2001). Not all ADR concerns the poor – indeed a major area of ADR expansion is that of arbitration in commercial law,

promoted in particular by the World Bank. However, many donors support ADR under the broader remit of furthering greater access to justice for underprivileged groups. In theory, informal dispute resolution processes are more accessible in terms of the language they employ. Procedures are often lauded as simpler, cheaper, more flexible and faster than those deployed in the courts and as involving a greater degree of participation by the parties to a conflict, who are encouraged to reach consensual settlements. Such 'alternative remedies' were also strengthened in the penal procedures codes introduced throughout Latin America in the 1980s and 1990s. In September 1997 the Guatemalan Congress passed a series of amendments to the 1994 Penal Procedures Code, which aimed to promote greater use of conciliation and mediation. USAID has been one of the main donor agencies supporting the strengthening of community-based dispute settlement in Guatemala. In 1998 USAID initiated a programme that resulted in the establishment of seven community-mediation centres in predominantly indigenous rural areas; further centres were opened in 2001 and 2002, established via local agreements between community actors, the municipal authorities and USAID's Justice Programme. These centres featured local mediators trained by USAID in dispute settlement techniques who serve on an ad honorem basis. USAID has judged the centres in Guatemala a success, underlining the celerity of the processes and high levels of compliance with settlements, and are seeking to extend the experiment to other communities (Hendrix and Ferrigno 2003: 7). The multilateral banks have also supported the promotion of ADR: for example, a major loan approved by the Inter-American Development Bank (IDB) in 1998 intended to strengthen judicial institutions and improve access to justice in deprived communities included plans to finance eight Justice Administration Centres (CAJs) (Beibersheimer 2001: 119-20). The Justice Centre Model was originally promoted by USAID as a means to strengthen inter-institutional coordination and aimed to 'decentralize and integrate justice sector services in an efficient, low-cost way' (Hendrix 2000: 861). Alternative dispute resolution was also seen as 'key to the success of the CAJ model' (Ibid.) International donors' promotion of indigenous forms of conflict resolution and ADR also reflected their declared commitment to incorporate the views of civil society into proposals for judicial reform proposals (Domingo and Sieder 2001). The World Bank cited Guatemala's judicial reform project as 'noteworthy for its achievements', underlining the participation of civil society. The Bank supported different measures aimed at

increasing indigenous people's access to justice, including strengthening the ordinary courts, specifically by expanding the number of justices of the peace in rural areas, encouraging the use of local languages in the judicial process and promoting respect for indigenous customary law (World Bank 1999, cited in Thome 2000: 699). However, in practice these different elements were sometimes in contradiction with each other: while the community mediation centres could apply non-judicial mechanisms and locally-defined mechanisms to resolve conflicts, many of the 300 plus justices of the peace have stuck resolutely to the letter of the law, with all its attendant formalities (Yrigoyen and Ferrigno, 2003: 18). Although efforts have been made to train justice sector employees and make them more sensitive to indigenous rights, a great number continue to view indigenous peoples and their practices with suspicion and even outright hostility. Certain indigenous organizations, most notably the Defensoría Maya, continue to actively lobby in favour of the strengthening of greater legal autonomy for indigenous people, promoting and strengthening various forms of community-based forms of conflict resolution through their network of local paralegals.<sup>13</sup> However, these initiatives are not an integral or coordinated part of justice sector reform.

Promotion by international organizations of different models of community-based conflict resolution should be understood within the overall context of transnational trends in 'rule of law construction' and current donor preferences for decentralization of the state. In effect, the partial incorporation of indigenous authorities and practices into state legal structures and the promotion of different forms of ADR represents a process of legal decentralization. While to some extent this strengthens local indigenous autonomies (with positive and negative effects in practice), this 'de-centering' of state law also reduces the direct responsibilities of the state for legal redress in certain spheres, in effect 'privatizing' law by devolving responsibility for dispute resolution to local communities. What are the implications for human rights of the ways in which the state is being legally reconstituted within the broader context of legal globalization?

## **Legal decentralization – towards illegal pluralism?**

In Guatemala initiatives to decentralize the legal system aimed at making justice more accessible and multicultural were implemented within a highly problematic environment. Despite the changes heralded by the peace process, the justice system continues to be highly ineffective and injurious to fundamental human rights. This is partly a consequence of institutional shortcomings and weaknesses, some of which are slowly being addressed by the reforms advanced by the Justice Strengthening Commission. Other more intractable factors, however, include the singular lack of will among political and business elites and justice sector employees to support fundamental reforms and secure effective legal accountability and the increasingly effective colonization of the Guatemalan state (and particularly the judicial apparatus) by organized crime.

Judges, lawyers and public prosecutors continue to be highly vulnerable to internal and external intimidation, interference and corruption. Powers to promote, discipline or dismiss judges and public prosecutors are concentrated in the Supreme Court. In a study carried out in 2001, some 25% of judges interviewed and 87% of public prosecutors acknowledged they had been the target of pressure either from their superiors or interested parties to alter the course of investigations and cases.<sup>14</sup> Low salaries and poor training also fomented corruption. Disciplinary procedures remain inadequate and officials charged with malfeasance rarely faced criminal prosecution. In addition to bribery, justice officials are also subject to intimidation. Constant harassment and threats mean that many are scared to testify, investigate or judge impartially. Private insurance companies in Guatemala consider judges and magistrates to be such a high risk that they cannot obtain life insurance and in 2001 the Supreme Court declared it lacked the funds to pay for an insurance scheme for its employees.

The public prosecutor's office, or Public Ministry (MP) is undoubtedly one of the weakest links in the judicial process. In 1999 one study for USAID found that in Guatemala City alone of approximately 90,000 criminal complaints filed in a year, success in prosecution in statistical terms approached zero (Hendrix 2000: 837). In the

face of the manifest failure to deliver results and the personal danger often involved in making a legal representation, most victims of crime do not file complaints with the MP and those that do tend to drop them after a short time. The continued influence of military intelligence and powerful elite groups over judicial institutions has meant that powerful individuals and groups who break the law continued to enjoy impunity. These forces operated to prevent thorough criminal investigations and bring pressure to bear in trials to protect the guilty, particularly -though not exclusively- in cases where military officers were implicated in human rights violations. Human rights activists have repeatedly signalled the existence of an extensive clandestine network operating throughout state institutions in the justice sector and the public security forces that works to systematically obstruct the course of justice. This network, often referred to as 'parallel powers' (*los poderes paralelos*), originated in military intelligence structures and is led by members of the armed forces and supported by members of the PNC, the Public Ministry and the courts. Its multiple activities include: carrying out parallel investigations;<sup>15</sup> manipulation of crime scenes; mislaying, altering or inventing evidence and testimonies; hiding crucial information; bribing police, prosecutors and judges; finding 'fall guys' to take the rap (usually a lower ranking military officer); and, when necessary, threatening or murdering witnesses and officials. These networks have entrenched interests in criminal gangs: a number of high profile cases indicated the ways in which they use common criminals to gather information and threaten and attack their targets.<sup>16</sup> After years of campaigning by human rights activists, in March 2003 an independent investigative commission into clandestine, parallel groups in Guatemala was set up under the auspices of the Organisation of American States (OAS) and the United Nations. The commission, which was granted a two-year mandate, was charged with investigating organizations tied to narco-trafficking, arms trafficking and human rights violations and was given the right to subpoena police and judicial archives.<sup>17</sup> The abject crisis of the criminal prosecution services was revealed in March 2003 when, following the change of government, the head of the Public Ministry (*Fiscal General*) was suspended from his post following accusations of gross corruption. At the time of writing he remains a fugitive from justice.

It is clear that much of the impetus for reforming the justice system in Guatemala comes from international donors or embattled human rights organizations and civil society groups. In contrast to other countries in Latin America, the domestic private sector has not been a major player promoting justice reform efforts. Guatemalan business elites have traditionally relied on informal mechanisms to secure their ends, including different forms of 'co-government' with the armed forces. Only recently have private sector associations begun to bring pressure to bear in favour of more independent checks and balances in government, in part in response to the FRG's open manipulation of state institutions (such as the packing of the Constitutional Court in 2003 in order to secure the lifting of the constitutional ban on Ríos Montt's presidential candidacy).<sup>18</sup> Neither have the main political parties prioritised justice reform as part of their programmes: political parties in Guatemala are weak and fragmented, often grouped around personalities rather than policies or programmes. While calls for 'law and order' are popular for electoral purposes, few of the parties have a sustained commitment and clear plan of action for reform of the judiciary. In other words, during the last decade the reform of the justice system has constituted part of the conditionality for funds from international donors to support the peace process, yet the domestic demand for reform from political elites and citizens in general has remained weak. In addition, the judiciary itself displayed considerable resistance to change. Despite institutional advances, judicial training remained poor, selection and appointment by merit is still not general practice and the tendency to make appointments on the basis of clientelism or nepotism persisted. Neither periodic purges of incompetent or corrupt personnel nor improved training and institutional reform proved sufficient to secure meaningful improvements in judicial performance and credibility. Some observers criticised the emphasis justice reform programmes placed on institutions, pointing out that it was justice operators themselves who have proved some of the main obstacles to successful, 'nationally-owned' processes of reform (Pásara 2002).

By 2003 the peace process was winding down. MINUGUA had entered its 'transition' phase and was preparing its departure from the country. The popular lack of faith in the justice system combined with certain 'donor fatigue' in the face of poor results suggested that the post-conflict window of opportunity to reform the legal system was

closing. Citizen mistrust of the justice system and the resort to extra-judicial and violent means of conflict resolution has deep historical roots in Guatemala. Overhauling the justice system and changing popular attitudes in just five years was an almost impossible task. Nonetheless, the failure to deliver more effective justice through the courts since the end of the armed conflict, combined with continued and in some senses growing disregard for the law on the part of domestic elites dangerously eroded confidence in state institutions. A 1998 survey found that 94% of the population thought that the justice system only favoured the rich and powerful, while another survey conducted by ASIES in 2000 concluded that only six per cent of the population felt their basic rights were fully protected by the legal system (Pásara 1998: 4; PNUD 2001b: 112). The credibility of the judiciary was greatly undermined by popular perceptions of widespread corruption and the ability of politicians to avoid accountability by securing favourable rulings through the courts. Such perceptions, in turn, further encouraged preferences for unofficial, punitive and authoritarian mechanisms to provide security and resolve conflicts.

A widespread sense of insecurity continues to characterize daily life for Guatemalans. Surveys conducted in 17 Latin American countries revealed that the Guatemala had by far the highest rate (55%) of those polled who declared that a member of their family had been a victim of crime at some time during the previous year (IDB 2001: 14-15). The failure of government to implement co-ordinated policies to improve public security and the inability of the courts to effectively sanction criminals led people to turn to a range of private solutions. These include a growth in vigilante activities, the use of private security firms and an increase in private gun ownership, together with a rise in extra-judicial executions, so-called 'social cleansing' and lynchings. In June 2001 the Association of Private Security Firms reported that some 85 private security firms were legally registered, comprising some 45,000 agents;<sup>19</sup> in 1999 MINUGUA estimated that some 200 private security firms were in operation throughout the country (MINUGUA 1999). This means that for every serving police officer in Guatemala there is now three private security guards.<sup>20</sup> These individuals often lack adequate training or supervision by state authorities and have sometimes been involved in acts of violence themselves. In addition, the fact that their services are only available to those who can pay for them makes access to security even more

unequal, reinforcing existing socio-economic inequalities. Those who can afford such private services are less and less willing to contribute economically towards improving state security services. The rate of reported homicides -which includes revenge killings and 'social cleansing' of suspected criminals- has continued to rise. One comparative study estimated that the annual rate of violent deaths in Guatemala reached 77 per 100,000 inhabitants in 1998, second only in the region to El Salvador (82 per 100,000) and compared to approximately 10 per 100,000 for the USA (Call 2000: 9).<sup>21</sup> Only ten per cent of all homicide cases are sent to trial, and very few of these results in convictions (HRW 2001).<sup>22</sup> All social classes use extra-judicial executions as a means of conflict resolution. Yet collective mob executions of suspected criminals by indigenous communities have dominated the headlines. According to MINUGUA's figures, the average rate of lynchings and attempted lynchings is now roughly two per week. Between 1996 and December 2001 some 421 lynchings and attempted lynchings occurred, involving 817 victims and leaving 215 people dead (MINUGUA 2002). Commonly cited reasons for lynchings include the breakdown of community structures and cohesion resulting from the armed conflict, lack of confidence in state institutions and lack of understanding by the population of existing due process guarantees. (Popular expectations of justice seem to demand the immediate incarceration of the accused or their public sanction and repentance, whereas recourse to the courts often involves the release of the accused for lack of evidence or on bail). During the armed conflict authoritarian and violent means, such as torture and summary execution, were used to resolve disputes and whole communities were obliged to bear witness to and participate in atrocities. In addition, an entire generation of Mayan men were militarised through the civil patrol structure and schooled in the immediate, violent and summary resolution of conflicts, a function that was effectively delegated to them by the armed forces. Many instigators of lynchings have been identified as former paramilitary heads, who are now community leaders, and in some instances reports indicate that attacks were premeditated rather than spontaneous. The municipalities where lynchings have occurred most frequently are also amongst the poorest and most disadvantaged in the country, where the impact of robberies characterised as minor by the state legal system is keenly felt (MINUGUA 2002).

The rapid privatisation of justice and security is not exclusive to Guatemala, nor even are its most spectacular manifestations, such as lynchings (Caldeira 2000; Vilas 2001). Across much of Latin America the weakness of the rule of law and the rise in crime during the 1990s has made such responses a regional trend. However, the enduring disregard of elites for the rule of law, combined with the increasing 'privatization' of conflict resolution and security provision and the de-centring of state law which has featured in recent internationally promoted judicial reform initiatives raise serious questions about the state's ability to protect the basic human rights of its citizens in the future. It could be argued that through strategies of legal decentralization the neo-liberal state sheds its central responsibility for guaranteeing and enforcing the pact of common citizenship. Through such strategies certain social spaces and actors are effectively abandoned, as the state renounces its traditional coercive and protective functions. This allows other actors to assume these functions: for example, indigenous communities engaged in local conflict resolution procedures, private security firms engaged in protecting the private property of the wealthy, or international law firms offering commercial arbitration services to business sectors. The effects of such privatization, fragmentation and decentralization of law are multiple and contradictory: on the one hand it allows greater space for local autonomies. On the other, however, such restructuring of the legal functions of the state often serves to aggravate existing inequalities and social exclusion. The rich and privileged can invariably secure greater protection for themselves; the poor are vulnerable to the predatory actions of powerful individuals and groups within officially sanctioned 'semi-autonomous spheres'. Evidently local legal autonomies of indigenous communities are evidently very different from vigilante activities and need to be carefully distinguished. However, the point I want to emphasise here is that donor-promoted trends towards legal decentralization can have perverse effects in environments dominated by the '(un)rule of law' (O'Donnell 1999). More broadly, they reinforce the more general features and effects of the neo-liberal state: the privatization of state functions, increased inequality, and a reduced institutional capacity to intervene in society to address those inequalities. The state in Latin America has never, in practice, been able to create and secure unified legal orders. However, the privatization of law that is occurring as a consequence of neo-liberal reordering poses new and complex challenges to those seeking greater access to justice and democratic forms of citizenship. Certain international trends in efforts to

‘strengthen the rule of law’ may, paradoxically, be contributing to a more fragmented and weaker rule of law in the future. The combined effect in a context such as that encountered in Guatemala, where -despite the negotiated end to the armed conflict- a historically rights-abusive justice system has been colonized by military intelligence and organized crime, may be to consolidate a kind of ‘illegal pluralism’ which ultimately prejudices the most disadvantaged groups in society. Evidently not all forms of legal decentralization are the same and not all automatically result in illegal pluralism and a weaker rule of law. Yet we need to pay attention to the historical and political context within which such initiatives are promoted and to focus on whose human rights are strengthened or weakened as a consequence of such reforms.

## **Conclusions**

In the late twentieth century states were rightly condemned for abusing human rights. Yet today as human rights violations are increasingly carried out by a multiplicity of actors, our focus needs to be on what kind of institutions and practices and what kind of state can guarantee human rights for the most vulnerable sectors of society, among them the indigenous population. In this paper I have emphasised the ways in which the law is reconstituted within a global context and argued that analysis of processes of legal globalization and particularly of internationally promoted models of justice reform is vital for understanding post-conflict processes of legal change. Negotiated settlements to armed conflicts offer important opportunities to reshape state institutions and challenge existing practices and attitudes. However, such possibilities are constrained by long-run processes of state formation and the ways in which law has historically been configured, exercised, engaged with and understood by different groups. The Guatemalan case illustrates that donor promotion of judicial reform and increased awareness of human rights does not necessarily translate into effective respect for the human and constitutional rights of all citizens, especially where powerful groups resist all attempts to make them accountable for illegal acts. In addition, in certain contexts claims for the ‘rule of law’ can mean advocating highly authoritarian measures. Social pressure from below for due process and the rule of law is weak in Guatemala – what is demanded instead is rapid and invariably highly punitive forms of justice. Despite increased public concern with the law, the judiciary’s legitimacy is low and perhaps even declining. Moves to tackle

discrimination and increase sensitivity within the justice system to cultural differences are undoubtedly a positive feature of the peace process. Yet strengthening ADR and similar measures cannot be separated from the question of how to build a strong and legitimate state that provides effective protections for all citizens, particularly those who are most disadvantaged and marginalized. The decentralization of law has advantages and disadvantages – it brings law closer to everyday lived experience, but in the context of a weak state colonized by criminal groups it can also open greater spaces for abuses by powerful actors and further marginalize the poor. In contrast to the rational spread of law so widely presupposed by classic paradigms of state modernization, what we may in fact be seeing in post-conflict Guatemala, and many other parts of the world, is the consolidation of illegal pluralism as part and parcel of the neo-liberal restructuring of the state.

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<sup>1</sup> A version of this paper is forthcoming as a chapter in Shannon Speed and Xochitl Leyva (eds.), *Human Rights in the Maya Region. Politics, Interpretations, and Moral Issues* (University of Texas Press). Some of the material draws on that contained in “Renegotiating “law and order”: judicial reform and citizen responses in post-war Guatemala”, *Democratization*, Volume 10, No. 4 (December), pp.137-160. I have greatly benefited from the opportunity to discuss the ideas developed here provided by the Institute of Latin American Studies London, the 2003 Congress of the Latin American Studies Association in Dallas, the University of Bergen in Norway and the London School of Economics. I am particularly indebted to Maxine Molyneux and Carlos Flores for their comments and encouragement and gratefully acknowledge the support of the British Academy for fieldwork.

<sup>2</sup> As Kathryn Sikkink has observed, compared to Africa and Asia, Latin America has a dense normative framework of human rights obligations, with the inter-american system reinforcing wider international obligations through the development of conventions and treaty law (Lutz and Sikkink 2001).

<sup>3</sup> For an excellent discussion and bibliographical review on law and development since the 1960s see Salas 2001.

<sup>4</sup> Contemporary research on legal pluralism focuses on the imbrication of different legal orders in a given field, territory or space, and is particularly concerned with the ways in which the legal ideas and processes of subordinate groups are constrained and shaped by dominant legal frameworks. Legal pluralism is understood not as a plurality of separate and bounded cultural systems, but rather as a plurality of continually evolving and interconnected processes enmeshed in wider power relations. For discussions of legal pluralism see Merry 1988, 1992, 1997; Moore 1986; Griffiths 1986; Starr and Collier 1989; Fuller 1994; Santos 1987, 1995, Benda-Beckmann 1997.

<sup>5</sup> A thorough analysis of the legal apparatus of the counterinsurgency state is set out in Alberto Binder et al., ‘Informe sobre la participación del sistema judicial en la violación de los derechos fundamentales durante el enfrentamiento armado’, draft document prepared for the UN Comisión de Esclarecimiento Histórico, on file with author.

<sup>6</sup> A poll commissioned by the Supreme Court in 1997 revealed that 88% of those surveyed considered the justice system to be ‘inadequate’; four out of five admitted they had little or no confidence in the system; see Pásara 2002.

<sup>7</sup> An amnesty law was passed in December 1996, as part of the peace negotiations. However, this specifically exempted amnesty for crimes against humanity (genocide, torture, and forced disappearance).

<sup>8</sup> One UNDP study indicated that in 1997 the rate of kidnappings in Guatemala was similar to that in Colombia; approximately 17 per 100,000 inhabitants per year; see PNUD 2001a: 45.

<sup>9</sup> The 21 Mayan groups include the Achi, Akateco, Awakateco, Chorti, Chuj, Itza, Jakalteco, Kanjobal, Kaqchikel, Kiche, Mam, Mopan, Poqomam, Poqomchi, Q’eqchi, Sakapulteco, Sikapakense, Tectiteco, Tz’utujil and Uspanteco. The two non-Mayan indigenous groups are the Garífuna and the Xinca.

<sup>10</sup> Indigenous peoples’ right to their customary law, including their authorities, norms and procedures, was internationally recognised by ILO Convention 169, ratified by Guatemala in November 1995.

<sup>11</sup> The referendum was marred by low turnout (a mere 18%) and a strident campaign by elite business sectors against the constitutional recognition of indigenous rights.

<sup>12</sup> Mediation does not necessarily involve third parties, but is focused on aiding parties to a dispute to reach a resolution between themselves; arbitration involves the intervention of a third party. The third party can be a lower level judge –such as the justice of the peace- or a lay justice operator. Arbitration is particularly common in commercial disputes.

<sup>13</sup> In 1999 Defensoría Maya published a study, financed by USAID’s Justice Programme, in an attempt to systematize and promote their work (Defensoría Maya 1999). Indigenous organisations continued to call for the constitutional recognition of indigenous peoples’ right to customary law at the same time as they promoted its use in practice.

<sup>14</sup> *Central America Report*, 17 August 2001.

<sup>15</sup> The existence of investigative structures parallel to the official judicial process came to light when families of kidnap victims, frustrated with the inability of the police and criminal justice system to secure their release, turned to military intelligence, revealing a network run out of the Presidency that co-ordinated operations between the Public Ministry and the Estado Mayor Presidencial (EMP). See *Prensa Libre*, 13 August 2000.

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<sup>16</sup> Francisco Goldman, 'Victory in Guatemala', *The New York Review of Books*, 23 May 2002.

<sup>17</sup> *Central America Report*, 21 March 2003.

<sup>18</sup> Following the defeat of the private sector Partido de Avanzada Nacional PAN in the 1999 general elections, the FRG's arbitrary actions and manipulation of state institutions led the private sector to add its voice to calls for respect for a democratic rule of law. However, although such a shift is welcome it may yet prove to be largely conjunctural.

<sup>19</sup> *Prensa Libre* 17 June 2001.

<sup>20</sup> In June 2001 the PNC had 18, 314 operatives (UN 2001).

<sup>21</sup> The overall homicide rate (which includes intentional and unintentional killings) for Latin America in the 1990s was 30 per 100,000, making the region the most violent in the world. Call 2000: 9.

<sup>22</sup> Report of the UN Special Rapporteur on the Independence of Judges and Lawyers Param Cumaraswamy, March 2000, cited in Human Rights Watch 2001.