

# Rethinking Democratisation and Citizenship: Legal Pluralism and Institutional Reform in Guatemala

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*The December 1996 peace settlement in Guatemala agreed a series of institutional reforms in order to recognise the rights of the country's indigenous peoples; some 23 different ethno-linguistic groups which make up 60% of the overall population. This article explores the relationship between pluriculturalism, citizenship, democracy and law in the contemporary politics of Guatemala. While territorially autonomous regions or separate legal jurisdictions are often proposed as a means to ensure indigenous rights, I argue that within a framework of post-conflict reconstruction, integration with a measure of autonomy for democratically organised communities is the ideal. This is linked to development of an integrative form of citizenship which combines both social membership and identity and rights. Finally, I argue that support for pro-active efforts to challenge the legacies of authoritarianism, militarisation and inequality will be necessary in order to strengthen democracy, build a culture of citizenship and increase justice.*

## Introduction

In the wake of prolonged authoritarian rule or armed conflict, construction of the rule of law and citizenship are central to processes of democratisation. After more than three decades of civil war, institutional reform in Guatemala to strengthen the rule of law not only has to address the legacy of an ineffectual, partial and corrupt judicial system and the perennial problem of impunity, but also to encompass a plurality of legal orders. This premise is specifically stated in the Agreement on the Rights and Identity of Indigenous Peoples, signed by the Guatemalan government and the Unidad Revolucionaria Nacional Guatemalteca (URNG) in March 1995 as part of the peace process. This document explicitly commits the Guatemalan government to developing the legal mechanisms necessary to afford greater recognition to indigenous customary law (*derecho consuetudinario*) and traditional community authorities, where these

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do not conflict with national and international legal norms of human rights (MINUGUA, 1995).<sup>1</sup> Recognition of the right of indigenous groups to use their traditional legal practices to resolve conflicts within their communities is also clearly set out in articles 8 and 12 of International Labour Organisation's Convention 169 on indigenous and tribal peoples, ratified by the government of Guatemala in March 1996.<sup>2</sup> In the wake of the peace settlement, policy makers are confronting the complex challenge of integrating international legal instruments (such as Convention 169), national state law and indigenous customary law. This will involve developing an efficient, equitable and unitary politico-legal system which is able to encompass different conceptions of the appropriate balance between the universal rights and obligations of all individuals, and the special rights of indigenous communities or ethno-linguistic groups. Such rule of law construction forms part of the wider challenge of building the basis for a multi-ethnic and pluri-cultural form of citizenship.

With reference to the case of Guatemala, the first section of this article discusses a number of conceptual and analytical issues related to democratisation and citizenship formation in pluri-cultural nation-states. The second and third sections analyse some of the challenges involved in the construction of citizenship and a pluri-cultural rule of law in the light of Guatemalan historical experience. The final section is more prescriptive in nature, advancing a number of propositions for institutional reform which could contribute to the development of a pluri-cultural and non-authoritarian rule of law and citizenship in the wake of the armed conflict.

### **Rethinking Citizenship**

The development of citizenship in Latin America today is not following the pattern described in T.H. Marshall's (1964) classic work of expansion from civil and political to socio-economic dimensions. Indeed, while the formal political attributes of citizenship are now largely in place after more than a decade of democratisation throughout the region, civil rights are far from consolidated and the socio-economic dimensions of citizenship appear ever more unattainable for the majority. In many instances, even the accepted political dimensions of citizenship are being profoundly questioned by the emergence of indigenous peoples' movements. Such movements have challenged classical liberal ideas of citizenship, where rights and obligations are focused exclusively on the individual, arguing that the existence of universal human rights alone is insufficient to protect and advance the rights of indigenous peoples. Writers such as Iris Young (1990, 1995), who has advanced the concept of 'differentiated citizenship', and Will Kymlicka (1995) have argued that the classical liberal idea of a rule of law encompassing universal rights and obligations that apply to everyone in the same way may both suppress the specificities of identity, by not recognising difference, and also fail to correct historical wrongs which have denied rights to oppressed or marginalised groups of the population. Addressing discrimination therefore requires special or exceptional rights.<sup>3</sup> Highlighting the ethnic and cultural biases of predominant conceptualisations of democracy, indigenous movements throughout Latin America advocate a combination of universal

human rights *and* group-specific rights in order to achieve increased recognition and respect for cultural diversity and a greater degree of justice overall. Within this context, discussion of the cultural dimensions of citizenship and the institutional ramifications of cultural pluralism has become central to debates on democratisation in Latin America. Indeed some commentators, such as Guillermo de la Peña, have argued that in pluri-ethnic societies the recognition of ethnic rights in order to reverse historical legacies of discrimination and racism is the necessary first step in the construction of citizenship.<sup>4</sup>

Political claims by oppressed groups based on notions of rights to identity or ethnicity constitute one of the major challenges to the existing configuration of the nation state in the late twentieth century. A range of strategies can be identified which have been employed by ethnic groups. One option includes demands for *greater inclusion and integration*, focusing on securing increased participation and rights within the existing political and socio-economic system, such as the right to vote or the right to hold property. A second strategy is to press for reform of the state in order to secure respect for their different identity and the *political recognition of difference*; for example, the right to bilingual education or to religious pluralism. A third set of claims relate to the desire for *greater political autonomy*, in most cases within the boundaries of the existing nation-state (for example, through federal power-sharing arrangements), but in some cases extending to secessionist demands.

In the case of Guatemala, indigenous peoples' demands during the last decade have encompassed all three of these options. However, as is common throughout the rest of Latin America, secessionist aspirations have not been in evidence. Guatemala's indigenous population, which constitutes 60% of the national total, does not reside in discrete geographical areas of the country. Although some of the highland departments are over 90% Mayan, the 23 ethno-linguistic groups which make up the indigenous population live throughout the national territory. While claims for land rights are a common feature of indigenous political movements, in Guatemala these have tended to be framed in *distributional* not territorial terms. Rather than demanding the right to self-government of a particular region, indigenous organisations have called for a reduction in the acute inequalities which characterise national resource distribution.<sup>5</sup> Indeed many indigenous leaders reject the strategy of claiming geographically circumscribed indigenous lands, arguing in the first instance that the entire national territory belonged to indigenous peoples before the Spanish conquest, and secondly that the most productive agricultural lands have historically been monopolised by dominant non-indigenous elites. Instead of pressing for self-determination through territorial and political independence, indigenous groups in Guatemala have campaigned for what Rodolfo Stavenhagen has referred to as 'internal self-determination' (1996, p. 300).<sup>6</sup> This includes calls for reforms to the existing nation-state, the redistribution of socio-economic resources and the creation of a new basis for citizenship which respects ethnic diversity.

The peace settlement concluded in December 1996 addresses all three categories of ethnic demands identified above. It formally recognises the legitimacy of claims for the recognition of indigenous peoples' identity and rights, through such measures as a commitment to bilingual education, religious tolerance, and

respect for indigenous customary law. It also endorses the principle of special rights and positive discrimination for historically discriminated against and disadvantaged groups in order to achieve greater justice within society overall.<sup>7</sup> In addition, the peace agreements envision an increase in local autonomy through the decentralisation of politico-administrative structures and the strengthening of municipal autonomy.<sup>8</sup> However, these measures are located within an overall conceptual framework which aims to guarantee increased indigenous *participation* within the national socio-economic and political system, giving historically disadvantaged groups a greater stake in the affairs of the nation-state as full citizens. In the wake of the armed conflict, government and civil-sector groups face the challenge of reaching some broad national agreement on the basic principles of democracy and social justice, and agreeing mechanisms to ensure the participation and integration of groups which have been the object of historical discrimination and racism. The 1996 peace agreements represent the starting point for this discussion.

The imbrication of a project to democratise the state with claims for rights based on ethno-linguistic identity could lead to a deepening and strengthening of democracy in Guatemala. However, given the historical legacy of racism and entrenched discrimination, it could alternatively lead to cultural separatism, division and renewed conflict. Elite groups in the country, ever fearful of a 'caste war' and a loss of their historical privileges, have repeatedly raised the spectre of ethnic separatism as a consequence of indigenous demands for political reform and increased autonomy.<sup>9</sup> However, Mayan demands to date have been focused on reforming, rather than replacing, the existing structures of the nation-state, respecting existing territorial boundaries while calling for greater participation, respect and autonomy for indigenous peoples within them. Nonetheless, while reforms to redress historical inequalities between indigenous and non-indigenous groups hold out the prospect of strengthening democracy, a strategy of basing rights and obligations on ethno-linguistic identity alone could reinforce structures of oppression, such as gender discrimination, if men define 'tradition' by stereotyping the role of indigenous women with little reference to women's views. As Kymlicka (1995, p. 7) has argued, group rights cannot be endorsed if they are oppressive of the individual rights and freedoms of their members. Achieving an adequate balance between group rights for indigenous peoples, universal human rights and a greater measure of integration and justice overall is the central post-conflict challenge for policy makers and civil groups in Guatemala.

How do processes of democratisation in multi-ethnic, pluri-cultural contexts affect our understandings of citizenship? Citizenship is often conceived of as a fixed and non-negotiable set of rights and obligations, such as those embodied in a written constitution. However, it is perhaps best understood as a process rather than as a static juridical construct: in addition to the formal, legal set of attributes for inclusion as a national, citizenship also refers to practices which define membership in society. Both in terms of its legal attributes and its social content, citizenship is contested and constantly renegotiated, not an unproblematic or transcendental shared given. Bryan Turner notes that it is a 'dynamic social construction ... which changes historically as a consequence of historical

struggles' (1993, p. 2). Similarly, Joe Foweraker and Todd Landham observe that citizenship 'invokes rights but is conformed by power ... its constitutional and procedural codes are constantly changing and contested, negotiated and interpreted' (1997, p. 5). A useful contribution to the debate has been made by Ann Mische (1996), who argues for a move beyond idealistic or formalistic conceptions 'towards a view of citizenship as a historically contingent, interactive vehicle of articulation, conflict and dialogue' (1996, pp. 157–8). Mische's theorisation takes into account multiple appeals to citizenship coming from different and often conflicting social sectors; it also recognises 'the potential dynamism of such appeals in reshaping relationships between state, societal and economic actors' (1996, pp. 157–8). Exploring what 'being a citizen' means in the midst of a process of democratic restructuring, she highlights a process wherein distinct social actors advance different demands and aspirational projections of citizenship. Citizenship formation is then best understood as a contested and dynamic struggle of hegemonies and counter-hegemonic actions of resistance between dominant and subordinated actors.<sup>10</sup> Such an approach is particularly fruitful for the study of processes of democratisation in pluri-cultural societies such as Guatemala, where forms of political and legal organisation and practice are distinguished by their heterogeneity, and where differing conceptions and practices of the balance between rights and obligations, and between individual and community, are often so marked.

Evidently inclusion as a 'citizen' means different things to different groups and sectors (such as, for example, indigenous peoples or religious groups), who may have quite distinct 'citizenship aspirations'. The nature of these claims depends on a number of factors, including the organisational structures of the groups themselves, power relations within those structures, and their historical experiences of interaction with the state and elite interests. The way in which national citizenship develops in any given state is in large measure dependent on the interaction of three factors: first, the state's legal infrastructure; second, the capacities for participatory association of different communities and groups;<sup>11</sup> and, third, changing relations between different sectors of civil society—particularly between elites and non-elites. A focus on the wider historical process of citizenship formation suggests a number of questions for the case of Guatemala: how has the armed conflict and the subsequent peace settlement affected the 'citizenship aspirations' of different groups? How have these processes affected relations within civil society? What are the implications of the existence of a plurality of dynamic and contested cultures for efforts to construct a national legal framework for pluri-cultural citizenship? How does identity formation as 'citizens' interact with other historically constructed identities? For example, how does identity based on gender, which may determine women's place as the private sphere, interact with conceptions which stress the primacy of the public sphere as the principal forum for the exercise of citizenship?<sup>12</sup> How does identity defined on the basis of ethnicity, which emphasises difference, interact with a national citizenship based on liberal universal notions of equality? And how does identity commonly based on immediate locality, wherein people identify themselves by their place of birth or residence ('*soy sacapulteco/a*' [from Sacapulas] or even '*soy refugiado/a*' [a refugee]), interact with citizenship as defined by

nationality? These questions suggest the need for research which analyses the interplay taking place between multiple forms of identity construction in the current phase of citizenship formation. Ideally such research would also assess the wider implications of such processes for efforts to restructure the political apparatus in a period of democratic transition.

Developing a democratic polity in a multi-ethnic context involves respect for pluralism and appropriate institution-building. However, while the constitutions of many Latin American countries now declare them to be 'pluri-cultural', political mechanisms to strengthen ethnic and cultural pluralism are largely absent throughout the region.<sup>13</sup> In the current process of post-conflict reconstruction in Guatemala, changes in state practice which encompass diversity have the potential to articulate different forms of participation in a developing project of *integrative citizenship* and thus to refashion a more inclusive nation-state than has existed in the past. As Mische has cogently argued, citizenship can 'serve as a universalizing courier for many particularistic relations and projects' (1996, p. 136). A fully integrative citizenship would combine universal human rights and common membership of the nation-state with measures to ensure respect for cultural diversity and an end to historical disadvantage for discriminated sectors. In a multi-ethnic and pluri-cultural nation such as Guatemala, the notion of integrative citizenship could function as the 'glue' to bind the nation together in the wake of the armed conflict. A unitary institutional framework which guarantees universal rights while at the same time encompassing cultural differences within the nation would ideally allow for the development of new and diverse possibilities of democratic construction, facilitating the evolution of citizenship as a *dynamic process* rather than conceiving of it merely as a fixed end in itself.

### Imagining Citizenship

Many Guatemalans, however, do not yet 'imagine' themselves as citizens of the nation. Their inclusion will require profound changes in the institutional structures and practices of political and civil society. The national project of the country's dominant civil and military elite during the nineteenth century did not include the indigenous majority as citizens with equal rights. Following independence, the conservatives proposed a new status for indigenous people, in effect recreating the colonial '*república de indios*' wherein a separate, subordinate legal jurisdiction existed for indigenous people. As Arturo Taracena Ariola (1995, p. 47) has observed, although this in practice meant some protection for those communities, the consequence of their ethno-juridical exclusion was isolation from the process of nation-state construction.<sup>14</sup>

Following the Liberal Revolution of 1871, the triumph of universalist ideals did not imply the extension of full citizenship status to all groups. In the context of the late nineteenth century agro-export boom, liberal ideals of equality before the law and positivist doctrine became the ideological apparatus for the exploitation, expropriation and assimilation of the indigenous population, which remained subject to forced labour requirements. By the end of the century indigenous representation was present in the municipalities, through such institu-

tions as the '*alcaldías indígenas*' (indigenous mayoralties). However, municipal affairs overall continued to be dominated by non-indigenous groups or by local indigenous *caciques*. The majority of the indigenous population invariably had little say in questions related to land distribution and land was steadily 'privatised' in favour of non-indigenous groups. Until 1944, when forced labour requirements were legally abolished, the overwhelming majority of indigenous people lacked even the right to control their own labour power (McCreery, 1994).

During the 1944–1954 period of reformist government, political parties, voting and an agrarian reform programme were introduced throughout rural Guatemala, giving many younger, literate and Spanish-speaking Mayan men access to political office and providing a more nationally focused counterweight to traditional religious authority within indigenous towns and villages.<sup>15</sup> Although these changes did not result in the development of a Mayan citizenry in Guatemala, they did indeed lay the basis for the emergence of one. However, the CIA-backed overthrow of the Arbenz government in 1954 and the subsequent counter-revolution effectively halted the consolidation of local political power and reasserted centralist tendencies.

Formal institutional features of citizenship, such as universal suffrage, have been no guarantee, then, against the exclusion and acute marginalisation of the majority of the Guatemalan population from political and civil society. The specific forms this exclusion has taken are the product of a highly coercive state and also, paradoxically, of its absence and weakness, which has facilitated other forms of domination and exploitation. Indeed government 'by the centre for the centre' in Guatemala has long coexisted with the absence of the state in many parts of national territory (Demyk, 1995). This is particularly true for the outlying highland departments of greatest indigenous concentration, such as Huehuetenango, Alta Verapaz and Quiché, where elite groups have traditionally used force to secure their access to labour and land. Jean Piel has elegantly described the situation faced by the majority of the rural Quiché population as one of being '*coercitivamente encuadrado por un aparato de estado insuficiente*' (coercively boxed in by an insufficient state apparatus) (1995, p. 192), a description which could easily apply to many other parts of the highlands where the local population has historically been most subject to arbitrary local powers and clientelist networks. The majority of these rural inhabitants have had, at least until very recently, little or no conception of themselves as citizens with universal rights and obligations.

During the 1980s, the counter-insurgency project of the armed forces extended the clientelist networks of a highly militarised and authoritarian state throughout the rural highlands. This enforced incorporation of the indigenous population into the military's national project in no way represented an extension of citizenship. Extreme repression was combined with a number of institutional mechanisms, including forced resettlement in some areas, and paramilitary civil defence patrols and military commissioners in every village. Long-standing inter- and intra-community conflicts over land were often played out through the lethal prism of counter-insurgency structures and practices, and an authoritarian political culture was consolidated, characterised by impunity, corruption and

often extreme violence. The longer-term effects of insurgency and counter-insurgency on political and legal practices in the rural areas are only now beginning to be researched.

In the wake of the armed conflict, a pan-Mayan movement has emerged in Guatemala which is contesting existing conceptions of citizenship in fundamental ways (Cojtí Cuxil, 1996). This movement has drawn inspiration and support from an increasingly transnationalised indigenous peoples movement in the Americas, which emerged onto the world stage around the 1992 quincentenary of the Spanish Conquest. Its growing strength also reflects the fact that indigenous rights have increasingly occupied the agenda of non-governmental and inter-governmental organisations in the international arena, not least the United Nations which, since 1994, has operated an observer mission in Guatemala to monitor human rights abuses and verify the peace accords.<sup>16</sup> Demands for indigenous rights and idealised projections of 'Mayan values' constitute a newly articulated discourse affecting social relations and framing much of the current debate around democratic consolidation and citizenship.

### **A Pluri-cultural Rule of Law?**

Alternative normative orders have long been present within rural communities in Guatemala. This legal pluralism is partly a consequence of the spatial organisation of indigenous peoples in the colonial *pueblos de indios* or their post-independence equivalent, and also in part a reflection of distinct Mayan worldviews. In one sense customary law can be understood as a counter-hegemonic strategy used by indigenous communities to protect their limited and conditional autonomy from the central state.<sup>17</sup> However, semi-autonomous local jurisdictions have also constituted, *de facto*, part of the apparatus of governance since the colonial period. In this sense, the incorporation of local difference into the institutionality of the state is not a new phenomenon: state power has long depended on complex negotiations with local interests (indigenous and non-indigenous), which have in turn co-opted others by extending often highly coercive clientelist networks down to village level. This conditional incorporation was not premised on the basis of extending citizenship to the majority of the population. In contrast, the underlying logic of incorporation of local indigenous authorities and legal practices into the national politico-legal system since the signing of the 1996 peace settlement is quite distinct, the wider aim being to democratise the nation-state and construct pluralist practices of citizenship which include indigenous people within state and society on the basis of equality and respect for cultural diversity.

Most of the population in rural Guatemala continues to see state law and state institutions as arbitrary, distant and ineffective. Although a formal basis of citizenship exists, civil rights are rarely upheld. Judicial inefficiency, impunity and corruption prevent the full exercise of rights or the enforcement of obligations, generating a situation for most of the population which approximates to what Guillermo O'Donnell has termed, 'low intensity citizenship' (1996, p. 166). The highly deficient legal system and a generalised culture of impunity provide the context for current efforts to construct a more pluri-cultural rule of law and



may explain, to a significant extent, the reason why recognition of customary law is such a prominent demand of the indigenous movement. The inability of the state to deliver justice, indeed its historical role in visiting *injustices* on large sectors of the population, have led to a circumspect attitude towards state law among many sectors and to political demands for the recognition of alternative legal forms.

Many indigenous people and Mayan organisations perceive the strengthening of local mechanisms for conflict resolution and the recuperation of the beliefs and practices of their Mayan ancestors as part of an overall strategy to reinforce indigenous identity, to achieve a more efficacious judicial system and to promote greater justice. This active reconstruction of a Mayan past involves collective imaginings of foundational myths and shared histories, or 'imagined communities' (Anderson, 1991). In the context of efforts to build a more culturally appropriate and responsive rule of law in Guatemala, this reinvention of tradition is an example of what David Slater (1997, p. 63) has pointed to as the use of 'submerged signifiers, meanings and practices of previous periods' as a starting point for rethinking justice and democracy. In this sense, the political discourse of Mayan essentialism in Guatemala—which emphasises the harmonious nature of pre-hispanic Mayan society—is best understood as what William Roseberry (1996) has described as a 'language of community and contention'; that is, a 'social and discursive construction and imagination' (1996, p. 83) which subaltern groups use as a counter-hegemonic mechanism to contest domination.<sup>18</sup> Attempts to strengthen 'traditional' customary norms and practices can be understood in this context as part of the wider struggle of indigenous groups for their own memory and history: they constitute both a mechanism of resistance against historical oppression and discrimination, and part of current efforts to build a more democratic and pluri-cultural state.

However, essentialist approaches emphasising the inherently 'harmonious' nature of indigenous customary law fail to situate attitudes and beliefs either perceptually, by asking what people mean and understand by these concepts;<sup>19</sup> or structurally-historically, by asking how historical processes and power structures have generated particular attitudes and beliefs in specific contexts. During the 1980s, military counter-insurgency strategies radically altered the relationship between indigenous people and the state. For the former, war and massive displacement prompted a fundamental transformation of understandings and practices of 'rights' and 'obligations'. In the early part of the decade many were displaced from their original place of residence, either temporarily or permanently; some, accused of being insurgent sympathisers, were hunted down by the army after fleeing to remote mountainous areas to escape raids by the military. Thousands were subsequently 're-educated' in military-run camps and forcibly resettled. Village structures throughout the country were reorganised by the army who enforced participation in paramilitary civil defence patrols. The obligations of this 'law of the army'—as many still refer to it—were onerous, involving regular patrol duties for all men between the ages of fifteen and sixty and in the most extreme cases the execution of fellow villagers suspected of being guerrilla members. Today many communities remain divided by the legacy of violence,

military imposition and fear; in such circumstances, local norms and practices can contain highly oppressive features and state law can in fact provide a resource to combat authoritarian local practices. Given the extent to which counter-insurgency structures and ideologies permeated rural communities during the 1980s, attitudes to authority (local or national) merit deconstruction and detailed analysis. For example, the authority of a village *alcalde auxiliar* (auxiliary mayor) may derive more from the fact that he is a former civil patrol head and continues to inspire fear in many of his neighbours than from respect for his authority as a representative of the community.

During the 1980s other indigenous people escaped army control by becoming guerrilla combatants, going into exile as refugees in Mexico, or by remaining as internally displaced leading a nomadic existence in hiding in the jungle. Through their experiences of internal displacement and refuge, many transcended traditional local boundaries and gained an increasingly autonomous view of themselves *vis-à-vis* the state. Extreme circumstances necessitated a reorganisation and strengthening of structures of community solidarity, and through these mechanisms and processes large numbers of indigenous people experienced increased participation in wider communities—both ‘imagined’ and real—*outside* the parameters of the Guatemalan nation-state. Many previously monolingual refugees and displaced people learnt Spanish and became increasingly literate in order to facilitate communication between different ethno-linguistic groups and present their demands on the international stage. Interaction with church agents and human rights non-governmental organisations encouraged a greater awareness of national and international norms of human rights. Women’s perception of their rights was also radically transformed by the war: the large number of widows left by the armed conflict organised to provide for their families and to demand to know the fate of their relatives, with the consequence that women increasingly occupied public spaces traditionally reserved for men. Many indigenous women now question their traditionally subordinate and marginal role in community decision-making and conflict resolution processes. Some view increased access to state law as fundamental to improving their individual and collective rights (for example in order better to resist domestic violence). Like most indigenous people, they choose strategically between local customary conflict resolution processes and external fora according to their perceived interests.

Examples such as these underline the fact that there is no single static or hegemonic form of indigenous customary law within Mayan communities. Customary law is a historically bounded construction, the nature of which is dependent on contested power relations both within indigenous communities, and between those communities, the state and dominant interests. Like citizenship, it is dynamic, contingent and contested and ethnographic research indicates its highly heterogeneous nature.<sup>20</sup> Legal reform to recognise customary law in the wake of the 1996 peace settlement therefore needs to avoid the danger of freezing custom as law, essentialising what are in effect a highly relational and dynamic set of institutions and practices.

### **Post-conflict Institutional Reform**

For those legal experts currently grappling with the complexities of building a new framework for cultural diversity in law and justice administration, the wider issue of *equality in the law* remains problematic for post-conflict democratisation. The implications of recognising legal pluralism are far from clear in this respect. The challenge is to elaborate strategies for institutional development which encompass cultural diversity at the same time as providing for a unitary rule of law which provides equality of treatment and due process guarantees for all citizens.

The strengthening of local mechanisms of conflict resolution and the constitutional recognition of customary law are essential elements in the construction of a pluri-cultural rule of law. However, the establishment of 'separate but equal' jurisdictions of state courts and indigenous courts would run the risk both of marginalising indigenous groups even further from the national polity, and also of prejudicing the human rights of individual members of indigenous groups, particularly in the wake of the armed conflict. In addition, given that ethnicity is above all a dynamic and socially constituted category (rather than a fixed biological characteristic), the existence of 'separate but equal' jurisdictions would inevitably raise the problem of which system of law was to apply to whom and when.<sup>21</sup>

The combination of universal citizenship with group rights requires a unifying, integrating framework for cooperation which strengthens the national rule of law *and* guarantees respect for cultural diversity. This suggests the need for better articulation of state law and customary law as part of the overall reform of the national judicial system which, to date, has been characterised by its highly inefficient and discriminatory nature. One means forward would be to establish clearer judicial domains to protect and strengthen local semi-autonomous spaces for self-definition and cultural self-determination. This would avoid the risk of essentialising indigenous customary law, providing rather for a judicial sphere in which historically discriminated against indigenous communities could develop their culturally preferred legal procedures in a dynamic fashion. Such a domain would not be hermetically sealed: individual members of the indigenous group would have rights of appeal to higher courts if they felt their human rights were being abused (for example, in the case of women who felt they were denied fair and equal treatment in instances of domestic abuse). The higher courts could be composed of indigenous and non-indigenous judges or lay persons. This would allow for inter-cultural debate and discussion on the appropriate balance between the rights of the individual and the rights of the community or collectivity. It could also permit the procedural norms of customary law (which tend to stress restitutive measures) to permeate state law (which tends to favour highly punitive sanctions). In addition to encouraging such 'bottom-up' influences, these kinds of institutional arrangements could also aid the permeation of more just (in liberal terms) constitutional rights, such as rights to gender equality, down to the local level. At the same time as protecting semi-autonomous local spaces for cultural self-determination, institutional structures should therefore be designed to facilitate movement and exchange between

customary and constitutional systems of law without automatically privileging one over the other. In this respect customary law would become a *source* of law, contributing to the overall development of Guatemalan national law.

Ultimately, however, only if such institutional reform is accompanied by the nurturing of non-authoritarian and participatory political cultures at both national and local levels will a pluri-cultural form of citizenship be possible. In addition to recognising cultural difference, reform to build an effective rule of law in Guatemala necessarily involves demilitarising both state and society. Demilitarisation and reconciliation, part of a protracted and by no means guaranteed process of social reconstruction, are integral to any proposal to strengthen local semi-autonomous spheres for indigenous participation. This involves supporting efforts to challenge and transform political cultures marked by fear, violence and exclusion and to guarantee the universal human rights of all individuals. Democratisation is contingent on efforts to reinforce spaces for critical dialogue which are respectful of diversity and difference; both between different communities and groups and also *within* those communities and groups. What is particularly important is the extent to which political and legal norms and practices are *participatory*. For example, in some villages women are largely excluded from formal decision-making processes, while in others divisions between civil patrollers and formerly displaced populations have generated separate and often conflicting normative 'orders' within the same village. When examining legal norms and practices we need to ask: are they inclusive or exclusive? Do they, for example, encourage the participation of women on their own terms? Do they include all members of a given community? Institution-building which creates spaces for cultural pluralism holds out the possibility of strengthening a political culture of rights and obligations and respect for difference at grassroots level by strengthening local capacities for participatory association (Somers, 1993). Ultimately, however, an end to the elite culture of impunity which continues to characterise Guatemala remains perhaps the most essential factor in building an effective rule of law and citizenship. The recognition of indigenous norms and practices is an essential part of democratising the legal structures of the pluri-cultural nation-state, but it is a *component* of the rule of law, not an alternative to it. Redressing historical inequalities and securing a greater measure of justice for marginalised groups requires that the rule of law extend to those sectors of Guatemalan society which have traditionally considered themselves 'above the law'. Elite political culture has long been characterised by an acute degree of 'caste consciousness'; the exclusionary political practices of elite groups are based on deep social polarisation and historically racist attitudes towards the indigenous population (Casaús Arzú, 1995; Vilas 1996). Such authoritarian attitudes, and the enduring political culture of elite impunity, implying the *absence* of legal equality, will be far from easy to change. There is some evidence of resolve on the part of the current administration of Alvaro Arzú (1996-) to end the prevailing culture of impunity, such as the moves against corruption networks within the state which took place during 1996. However, judicial inefficiency and powerful vested interests mean that impunity persists.

## **Conclusions**

Strengthening the rule of law and democracy in Guatemala involves a complex balancing act of extending the reach and efficacy of state law at the same time as affording greater autonomy to local mechanisms for conflict resolution. The ideal is to develop more equitable means of integration combined with a greater degree of autonomy for democratically organised communities. However, although indigenous activists recognise that the peace agreements represent a 'historic compromise', the question of *how much autonomy* should be granted to indigenous groups may resurface if the commitments of the peace agreements to ensure greater indigenous participation and socio-economic justice are not fulfilled. Exclusionary or paternalistic modes of state interaction with indigenous people have historically been linked to a highly unequal and exploitative economic system. There is little indication at present that this is changing to a more inclusionary form; for example, many large farms in the highlands continue to pay workers less than the official minimum wage of approximately Q16.00, or just under US\$3 a day, and in some farms remuneration is as low as Q7.00 or Q8.00. This inevitably raises wider questions about the extent to which it is or is not possible to democratise political structures without democratising the socio-economic order. In a society characterised by acute socio-economic inequality, with some 80% of the population (most of whom are indigenous) living below the poverty line, future debates around control over resources and particularly over land could be increasingly framed in terms of claims for recognition of greater ethnic regional autonomy if the peace agreements fail to deliver a tangible improvement in the lives of the indigenous population. Indeed the failure of the peace accords significantly to transform the distributive order in Guatemala may ultimately prove the most substantive limitation to developing a political culture of integrative citizenship.

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## **Notes**

1. Customary law is not explicitly defined in the peace agreements themselves. For the purposes of research my working definition is that of the uncoded concepts, beliefs and norms which, within a given community, define prejudicial actions or crimes; the processes by which these should be resolved; and the

sanctions or resolutions decided and applied (Sieder, 1996, pp. 27–8). Such a definition necessarily involves an examination of structures of authority in indigenous communities within which customary law operates, the ways in which customary law interacts with state legal structures or national authorities, and the form in which these change and develop over time.

2. The 1989 International Labour Organisation (ILO) Convention 169 is the only statutory international instrument on the rights of indigenous peoples. It establishes indigenous rights to natural resource use, traditional lands, customary law, traditional authorities, bilingual education and policy decisions over development priorities. It was ratified by the Guatemalan government in March 1996 after a protracted political battle, and then only conditional on its subordination to the 1985 Constitution.
3. For a Guatemalan version of this argument see Demetrio Cojtí Cuxil, 'La cantaleta de los privilegios indígenas', *Prensa Libre*, 30 April 1997. For a discussion of 'differentiated citizenship' in the Mexican context see Harvey (1997).
4. Guillermo de la Peña, 'Notas sobre la ciudadanía étnica', paper presented to the Latin American Studies Association conference, Guadalajara, Mexico, April 1997.
5. On the development of the Mayan movement in Guatemala see Bastos and Camus (1995).
6. Stavenhagen defines internal self-determination as 'the right to equal participation, to manage their own affairs and to preserve their cultural identity within existing state structures' (1996, p. 300).
7. The peace agreements include a number of specific affirmative action measures, such as the heavier penalisation of sexual crimes committed against indigenous women.
8. Indigenous claims for greater regional autonomy for specific ethno-linguistic communities were not secured in the negotiations. Efforts by some indigenous activists to secure proportional representation in Congress on the basis of ethno-linguistic identity were similarly unsuccessful. For a discussion of the indigenous movement's position on autonomy during the peace negotiations see Cojtí Cuxil (1997); for an earlier position of the Mayan movement on the autonomy question see COMG (1991).
9. See for example the comments made by General Mario René Enríquez, cited in Adams (1995, p. 178).
10. For a discussion of the importance of citizenship construction 'from below' and its interaction with institutional structures in the process of democratisation, see Jelin (1996).
11. For a stimulating discussion which develops this approach for citizenship formation in eighteenth-century England see Somers (1993).
12. On gendered citizenship, see Jelin (1997).
13. As Linz and Stepan (1996, p. 29) observe,

the more the population of the territory of the state is composed of pluri-national, lingual, religious or cultural societies, the more complex politics becomes because an agreement on the fundamentals of democracy will be more difficult. Although this does not mean that democracy cannot be consolidated in multinational or multicultural states, it does mean that considerable political crafting of democratic norms, practices and institutions must take place.

14. However, this exclusion did not mean indigenous communities escaped exploitation. As Héctor Díaz Polanco has pointed out, the so-called Indian republic in the Americas was in fact 'an immense archipelago of communities, converted for the most part into payers of tribute, exploitable labor, and a captive market' (1997, p. 57).
15. For the impact of the 1944–1954 revolution in the countryside see the excellent study by Jim Handy (1994).
16. For a discussion of international frameworks for the recognition of indigenous rights and the Guatemalan case, see Plant (1998).
17. For a seminal analysis of customary law as counter-hegemonic strategy in the Zapotec region of Oaxaca, Mexico, see Nader (1990).
18. Roseberry (1996, p. 83) maintains that

As such communities are imagined, symbols of distinctiveness and authenticity are selected and appropriated, within a social field marked by inequality, hierarchy, and contention. Languages of ethnicity, religion, and nationalism draw upon images of primordial associations and identifications, but they take their specific and practical forms as languages of contention and *opposition*.

19. See Clifford Geertz (1973) on 'thick description'.
20. Comaroff and Roberts (1981, p. 14) summarise the process-focused approach to examining law as follows:

indigenous rules are not seen a priori as 'laws' that have the capacity to determine the outcome of disputes in a straightforward fashion ... rather ... rules may themselves be the object of negotiation and may sometimes be a resource to be managed advantageously. This in turn reiterates the self-evident need to regard the cultural logic of such rules and precepts ... as problematic.

21. Opposition parties in Congress have advocated reforming the 1985 Constitution to recognise indigenous community authorities as judicial bodies. The proposed formula is that the resolutions and dispositions of these authorities be of a mandatory character for those individuals who voluntarily opt to accept their jurisdiction, as long as they are not in contravention of their constitutional and human rights. The governing Partido de Acción Nacional (PAN) has opposed such a formula to date. See 'El PAN adversa derecho consuetudinario indígena', *Prensa Libre*, 18 April 1998.

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