

The judiciary and indigenous rights in Guatemala

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5 *In Latin America, indigenous peoples constitute a marginalized group that is using the*
 courts, increasingly, as one means by which to pursue and defend its rights. In part,
 this is a result of the juridification of its collective rights through processes of
 constitutional reform across the region during the 1980s and 1990s. It is also a
 10 *consequence of the very limited advances that have been made to date in guaranteeing*
 these rights in practice. The enlarged legal recognition of indigenous autonomy has
 occurred at the same time as judicial reform in implementation of economic policies
 promoting free trade and accelerated natural resource exploitation—policies that affect
 indigenous communities negatively and disproportionately. This combination of factors
 has meant that indigenous movements more and more have called on the judiciary in
 15 *defense of their collective rights, albeit often with limited tangible effects.*

1. Introduction

In Latin America, indigenous people are highly marginalized and excluded in political, socioeconomic, and cultural terms; moreover, in many countries, they are numerically weak.¹ They therefore face significant obstacles in

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¹ Indigenous people now number approximately 40 million people in Latin America—roughly 8 to 10 percent of the region’s overall population. The vast majority, some 85 percent, are concentrated in Mesoamerica and the central Andes. In Bolivia and Guatemala, indigenous people constitute over 50 percent of the population; in Ecuador and Peru between 30 and 40 percent; and in Mexico between 10 and 15 percent. Absent a single commonly accepted definition of “indigenous” in international law, the international community generally recognizes three broad criteria for defining who is indigenous: self-definition as a member of an indigenous community; subordination to a dominant society; and historical continuity with precolonial societies. See, e.g., the Inter-American Development Bank’s Strategy for Indigenous Development (extrapolating these criteria from the provisions of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries), available at <http://http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=691275> (last visited Jan. 21, 2007).

20 assembling and consolidating organizations capable of mounting a sustained
legal defense of their rights. Nonetheless, in recent years, in many countries
across the region, a number of groups have defended indigenous peoples'
claims for legal and political autonomy, for freedom from discrimination, or for
protection of their historic territories and natural resources before the
25 national—and regional—courts.² These groups include indigenous communi-
ties, indigenous legal-defense organizations, nongovernmental organizations
(NGOs) or alliances of NGOs, and, on occasion, government institutions—such
as human rights ombudsmen or special prosecutors.

In a few exceptional cases, elements of the judiciary have taken a proactive
30 role in defending the collective rights of indigenous people to—for example—
territory, jurisdictional autonomy, or prior consultation in major economic
development initiatives.

The prospects for securing the full range of indigenous peoples' rights in
practice through such actions is highly limited. Their effective guarantee
35 depends on a range of factors, including alternate models of social and
economic development, changes in social attitudes, and a commitment to the
redistribution of resources. These are not issues that can be decided by the
judiciary via test cases. However, the courts' proactive defense of indigenous
rights to difference, autonomy, and protection can be an important factor in
40 the broader struggle to change both government policies and societal
attitudes.

This symposium asked how we explain cases where judiciaries defend the
rights of marginalized groups and cases where they do not. This article exam-
ines the instance of Guatemala, where the judiciary has largely failed to
45 defend the collective rights of indigenous peoples, despite reforms to the legal
system that ostensibly were aimed at ensuring respect for indigenous peoples
and their fundamental rights.³ Within the legal field, there has been some
greater recognition of indigenous rights, but this has been isolated and

² A number of petitions signaled in this paper have been taken before the Inter-American human rights bodies. See notes 83–85, *infra*.

³ Reforms included: the recruitment and training of court interpreters for indigenous languages; creation of five indigenous community courts (*juzgados de paz comunitarios*) mandated to use customary law in the resolution of certain conflicts; creation of an indigenous defense office within the public prosecutors service; the establishment of the office of the ombudsman of indigenous women (Acuerdo Gubernativo No. 525-1999); the creation of a department of indigenous peoples within the Ministry of Labor (Acuerdo Ministerial No. 364-2003); the creation of a presidential advisory commission on indigenous peoples and plurality (Acuerdo Gubernativo No. 96-2005); and reforming the Penal Code in 2002 to make discrimination on the basis of race or ethnicity a criminal offense (Decree No. 57-2002). For more detail see GUATEMALA COUNTRY REPORT (Inter-American Commission for Human Rights, OEA/Ser.L/V/II.111, doc. 21 rev. (2001) (especially ch. XI), and RAQUEL YRIGOEYEN FAJARDO & VÍCTOR FERRIGNO, ACCESO A LA JUSTICIA EN GUATEMALA: SITUACION Y PROPUESTAS [ACCESS TO JUSTICE IN GUATEMALA: SITUATION AND PROPOSALS] (Swedish International Development Agency 2003).

extremely incremental. In no sense has a “rights revolution” occurred with
50 respect to the relationship between indigenous peoples and the law.⁴
Although the analysis concentrates on Guatemala, the last part of the article
contrasts that country’s experience with the case of Colombia—where the
Constitutional Court has engaged in a creative and proactive defense of
indigenous collective rights since 1991. By noting the similarities and
55 differences between the two cases, I hope to highlight the factors that
explain the relatively weak role of the courts in Guatemala in defending mar-
ginalized groups, in general, and indigenous people, in particular.

In Latin America, three region-wide factors are particularly relevant in
explaining the general context in which courts do or do not take an active role
60 in protecting indigenous rights. First, official multiculturalism, which we could
refer to as the *normative framework*; second, judicial reform, which refers to the
institutional environment; and, third, trends toward the judicialization of
politics, used here to refer to the *actors driving the process*.

In the 1980s and 1990s, many Latin American states reformed their
65 constitutions in order to recognize their societies as “multicultural,” extending
a series of recognitions and collective entitlements to indigenous peoples
living within their borders, such as rights to customary law, collective
property, and bilingual education.⁵ A series of policies were subsequently
implemented to advance the new multicultural model.⁶ Many states also
70 ratified the International Labour Organization’s Convention 169 concerning

⁴ Epp defined a “rights revolution” as “a sustained, developmental process that produced or expanded the new civil rights and liberties. That process has had three main components: judicial attention to the new rights, judicial support for the new rights, and implementation of the new rights.” CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 7 (Univ. Chicago Press 1998).

⁵ While a detailed comparison of these reforms is beyond the scope of this paper, they included recognition of the official and public nature of indigenous customary law and the jurisdiction of indigenous authorities over internal community affairs in Bolivia, Colombia, Mexico, Nicaragua, Paraguay, and Peru. Six constitutions in Latin America explicitly guarantee rights to bilingual education (other countries provide some provision without an explicit constitutional mandate). New constitutions containing specific provision for indigenous rights included Nicaragua (1987), Brazil (1988), Colombia (1991), Peru (1993), Bolivia (1994), Ecuador (1998) and Venezuela (1999). Other constitutions (such as those of Mexico and Guatemala) were modified to take greater account of indigenous claims. For an overview, see Donna Lee Van Cott, *Latin America: Constitutional Reform and Ethnic Rights*, 53 *PARLIAMENTARY AFFAIRS* 41 (2000). The nature and extent of the constitutional rights extended to indigenous peoples through this first round of “multicultural reforms” continues to be a matter of controversy across the region.

⁶ For example, reforms to facilitate bilingual education or more culturally appropriate health care provisions in indigenous areas, and administrative decentralization reforms, which provided a greater role for indigenous community authorities in the provision and regulation of local services. See *THE CHALLENGE OF DIVERSITY: INDIGENOUS PEOPLE AND REFORM OF THE STATE IN LATIN AMERICA* (Willem Assies, Gemma van der Haar & André Hoekema eds., Purdue Univ. Press 2000); *MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DEMOCRACY AND DIVERSITY* (Rachel Sieder ed., Palgrave 2002).

Indigenous and Tribal Peoples in Independent Countries (ILO 169 hereafter).⁷ Latin American states parties to the convention include Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Honduras, Guatemala, Mexico, Peru, Paraguay and Venezuela.⁸ ILO 169 is currently the only binding international instrument dealing with indigenous peoples' rights.⁹

Despite representing an important step forward in the legal recognition of indigenous collective rights, the paradigm of official multiculturalism has been much criticized. Many rightly view it as a mechanism for re-constituting the hegemony and legitimacy of weak states and fragile democracies, rather than signifying a genuine governmental commitment to guarantee rights to indigenous peoples. It has been condemned as "neo-liberal multiculturalism"—a project that recognizes certain aspects of cultural difference while advancing economic policies that contradict indigenous rights to autonomy in practice.¹⁰ Others have criticized it as an "additive" project that essentially treats indigenous peoples as minorities whose rights can be added on—as it were—to existing frameworks of citizenship, in contrast to a more radical or intercultural model whereby the recognition of indigenous peoples' rights would imply more profound changes to society as a whole.¹¹ Nonetheless, whatever the broader political motivations for the wave of multicultural reforms advanced during the 1990s, the fact that indigenous peoples'

⁷ INTERNATIONAL LABOUR ORGANISATION CONVENTION (No. 169) CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES, Sept. 5, 1991, available at <http://www.unhchr.ch/html/menu3/b/62.htm> (last visited Jan. 22, 2007) (hereinafter ILO 169).

⁸ ILO 169 has been ratified by more states in Latin America than in any other region of the world. This perhaps indicates the relative acceptance of the concept of indigenous peoples in Latin America, compared to Africa and Asia, where the term is more problematic. It can also be explained as part of the "rights cascade" that followed the region's return to constitutional democracy in the 1980s and 1990s, which involved the ratification of numerous human rights treaties. On the expansion of human rights norms in Latin America, see Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Human Rights Trials in Latin America*, 2 CHICAGO J. INT'L L. 1 (2001).

⁹ A draft Declaration on the Rights of Indigenous People (U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994)) has been working its way through the United Nations legislative process for over a decade and in June 2006 was approved by the newly formed UN Human Rights Council. In November 2006, however, the UN General Assembly voted to delay its adoption. Meanwhile, in the Organization of American States, negotiations continue at the time of writing on a proposed American Declaration on the Rights of Indigenous Peoples (OEA/Ser/L/V/II.95 Doc. 6 (1997)).

¹⁰ See Charles R. Hale, *Rethinking Indigenous Politics in the Age of the 'Indio Permitido'*, 38 NORTH AMERICAN CONGRESS ON LATIN AMERICA REPORT ON THE AMERICAS (2004); PATRICIA RICHARDS, POBLADORAS, INDÍGENAS AND THE STATE: CONFLICTS OVER WOMEN'S RIGHTS IN CHILE (Rutgers Univ. Press 2004); Shannon Speed, *Dangerous Discourses: Human Rights and Multiculturalism in Mexico*, POL. & LEG. ANTHRO. REV. (PoLAR) 29–51 (2005).

¹¹ Catherine Walsh, *Interculturalidad reformas constitucionales y pluralismo jurídico [Interculturality, Constitutional Reforms, and Legal Pluralism]*, 36 INSTITUTO CIENTÍFICO DE CULTURAS INDÍGENAS (2002) (Ecuador).

collective rights are now recognized as part of the block of constitutional norms in many countries has potentially opened up a new role for the judiciary in the defense of those rights.

The second contextual factor pertinent to an assessment of the role of the judiciary, with respect to indigenous rights, is judicial reform or institutional change. During the last two decades, the region has witnessed attempts to overhaul and reform justice systems. Many of these efforts are linked to the post-Washington Consensus agenda, so called, which seeks more effective institutional means for ensuring accountability, democratic rule, and the functioning of the market.¹² The nature and extent of the reforms has varied from country to country and across time,¹³ but three elements—judicial independence, efficiency, and access to justice—have featured in most programs. Some of these changes have improved the prospects for the defense of indigenous rights by the courts. For example, measures to ensure greater independence of the judiciary have sometimes involved the creation or strengthening of constitutional chambers or courts,¹⁴ which, at least in principle, favors a more proactive defense of rights by reinforcing powers of judicial review. Other measures include the establishment of entities such as judicial councils (as in Argentina, Colombia, Bolivia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, and Paraguay),¹⁵ which aim to

¹² The term “Washington Consensus,” originally coined by economist John Williamson, is used to refer to a package of reforms including trade liberalization and structural adjustment. See John Williamson, *What Should the World Bank Think About the Washington Consensus?* 15 THE WORLD BANK RESEARCH OBSERVER 251–64 (2000), available at [http://www.worldbank.org/research/journals/wbro/obsaug00/pdf/\(6\)Williamson.pdf](http://www.worldbank.org/research/journals/wbro/obsaug00/pdf/(6)Williamson.pdf) (last visited Jan. 22, 2007).

¹³ Some judicial reform initiatives have involved a greater role for multilateral agencies than others. For example, in the 1990s, judicial reforms in Venezuela and Peru were promoted by the World Bank, whereas reforms in Brazil were much less driven by external factors. See HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM (Lawyers Committee for Human Rights & Programa Venezolano 1996); BUILDING ON QUICKSAND: THE COLLAPSE OF THE WORLD BANK’S JUDICIAL REFORM PROJECT IN PERU (Lawyers Committee for Human Rights 1998). For an excellent regional overview of recent judicial reform processes see EN BUSCA DE UNA JUSTICIA DISTINTA: EXPERIENCIAS DE REFORMA EN AMERICA LATINA [IN SEARCH OF A DIFFERENT JUSTICE: REFORM EXPERIENCES IN LATIN AMERICA[0]] (Luis Pásara ed., Consorcio Justicia Viva 2004), available at <http://www.bibliojuridica.org/libros/libro.htm?l=1509> (last visited Jan. 23, 2007).

¹⁴ The most notable cases in the region are Colombia, where the 1991 Constitution created a new constitutional court, and Costa Rica, where a constitutional chamber of the Supreme Court was created in 1989; see Bruce Wilson, *Enhancing the Constitutional Rights of Marginalized Groups: Opportunities and Limits of a Judicial Strategy in Costa Rica*, pp XX in this issue. Constitutional courts also exist in other Latin American countries, including Bolivia, Ecuador, and Guatemala. For a detailed comparative analysis of judicial review provisions across the region see Patricio Navia & Julio Rios-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189 (2000).

¹⁵ For further detail see Margaret Popkin, *Efforts To Enhance Judicial Independence in Latin America: A Comparative Perspective* (Due Process of Law Foundation 2001), available at http://www.dplf.org/JIT/eng/la_jit01/la_jit01_comparative.pdf (last visited Jan. 22, 2007).

increase the political independence of the judicial branch, or a human rights ombudsman, or other institutions (such as the Brazilian Ministerio Público) that have a mandate to bring cases before the courts in defense of collective rights. In Guatemala, for example, services to provide translations of judicial documents and legal defense were instituted in an attempt to make state justice more accessible, culturally and economically, to minority and marginalized groups.¹⁶ Various initiatives to increase access to justice have brought indigenous people closer to the legal apparatus of the state than ever before and have increased the presence of state judicial authorities in indigenous communities. In some cases, this has encouraged greater recourse to the law in pursuit of individual or collective demands.¹⁷ The impact of these highly varied programs of judicial transformation on the prospects for some stronger guarantee of indigenous rights by the courts is hard to measure, much less generalize about. Nonetheless, the process of institutional change is a central element in any analysis.

The third factor, intimately linked to the previous two, is that of the growing trend toward the judicialization of politics in the region.¹⁸ A range of social and political actors, including, of course, a more activist judicial branch, can drive processes of judicialization “from above,” “from below,” and sometimes “from outside.”¹⁹ However, it is the resort by social movements to the courts in defense of their rights that is a notable feature of many contemporary processes of judicialization in Latin America. Such measures may include common legal strategies developed by social movements to defend their individual members

¹⁶ However, provision remains acutely inadequate and court proceedings continue to be carried out exclusively in Spanish. See Report of the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in Guatemala, U.N. Doc. E/CN.4/2003/90/Add.2 (Feb. 24, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G03/111/33/PDF/G0311133.pdf?OpenElement> (last visited Jan. 23, 2007).

¹⁷ To my knowledge, no longitudinal studies have been carried out to explore the impact of improved court provision on indigenous peoples' recourse to the courts, but anecdotal evidence from Guatemala and Mexico suggests that the increased presence of small claims courts in indigenous regions may be one factor encouraging indigenous women to take cases of intrafamilial violence to court. On the impact of the introduction of small claims courts in Brazil on domestic violence cases see Fiona Macaulay, *Private Conflicts, Public Powers: Domestic Violence and the Courts in Latin America*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 211 (Rachel Sieder, Line Schjolden & Alan Angell eds., Palgrave 2005).

¹⁸ See *THE JUDICIALIZATION OF POLITICS*, *id.*; Rodrigo Uprimny & Mauricio García Villegas, *Corte constitucional y emancipación social en Colombia [The Constitutional Court and Social Emancipation in Colombia]*, in *DEMOCRATIZAR LA DEMOCRACIA: LOS CAMINOS DE LA DEMOCRACIA PARTICIPATIVA [DEMOCRATIZING DEMOCRACY: THE ROADS TO PARTICIPATORY DEMOCRACY]* 255 (Boaventura de Sousa Santos ed., Fondo de Cultura Económica 2005). This has now been published in English as *The Constitutional Court and Social Emancipation in Colombia*, in *DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON* 66–100 (Boaventura de Sousa Santos ed., Verso, 2005).

¹⁹ See *THE JUDICIALIZATION OF POLITICS*, *supra* note 17.

when they are indicted in criminal or civil cases (for example, in cases of land
135 occupations or protests against natural resource exploitation). They can also
include attempts to prosecute individuals, private entities, or institutions for
the violation of collective rights (for example, discrimination cases).²⁰ Such
legal strategies often aim at wider political and social goals. These can include
140 securing greater publicity for a movement's claims and changes in public
opinion, or bringing pressure to bear on the executive branch in order to
change policies. In most successful cases of the judicialization of rights claims,
social movements are aided by networks of lawyers and judges concerned with
issues of social justice who help to generate and socialize progressive jurispru-
145 dence among the legal profession.²¹ Additionally, these networks are often part
of transnational advocacy networks, which has the further effect of familiariz-
ing and, thereby, amplifying the experience with the judicialization of rights
claims across borders. Such networks are well established for other kinds of
social movements, such as human rights organizations, and during the late
1990s they came to represent a significant region-wide phenomenon in the
150 field of indigenous rights.²²

2. Guatemala

2.1. The normative framework

In Guatemala official multiculturalism is weak. Rather than an organic
national process generated in response to a crisis of governmental legitimacy
155 or to the sustained demands of indigenous organizations, it is best understood
as a consequence of the highly internationalized peace process. This process,
which was concluded in 1996, brought an end to thirty-six years of armed
conflict.²³ Local indigenous rights organizations had begun to emerge only
during the late 1980s, years after the state-perpetrated violence and genocide

²⁰ See, e.g., on Brazil, Peter Houtzager, *The Brazilian Movement of the Landless and Legal Change*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 218 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., Cambridge Univ. Press, 2005); on El Salvador, Richard F. Klawiter, *!La Tierra Es Nuestra! The Campesino Struggle in El Salvador and a Vision of Community-Based Lawyering*, 42 *STAN. L. REV.* 1625 (1990).

²¹ See Cesar A. Rodríguez & Luis Carlos Arenas, *Indigenous Rights, Transnational Activism and Legal Mobilization: The Struggle of the U'wa People in Colombia*, in *LAW AND GLOBALIZATION FROM BELOW*, supra note 20, at 241; Omar Arach, *Ambientalismo, desarrollo y transnacionalidad: las protestas en torno a la represa de Yacyretá [Environmentalism, Development, and Transnationalism: The Protests Around the Yacretá Dam]*, in *MAS ALLA DE LA NACION: LAS ESCALAS MULTIPLES DE LOS MOVIMIENTOS SOCIALES [BEYOND THE NATION: THE MULTIPLE SCALES OF SOCIAL MOVEMENTS]* 105 (Elizabeth Jelin ed., Libros del Zorzal 2003).

²² See ALISON BRYSK, *FROM TRIBAL VILLAGE TO GLOBAL VILLAGE: INDIAN RIGHTS AND INTERNATIONAL RELATIONS IN LATIN AMERICA* (Stanford Univ. Press 2000).

²³ See SUSANNE JONAS, *OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS* (Westview Press 2000); and *NEGOTIATING RIGHTS: THE GUATEMALAN PEACE PROCESS* (Jeremy Armon, Rachel Sieder & Richard Wilson eds., Conciliation Resources 1997).

160 of the early part of the decade, which had decimated the broad-based popular
movements, leaving over 200,000 people assassinated or disappeared.²⁴ The
counterinsurgency violence and its aftermath also meant that indigenous
rights organizations in Guatemala tended to be smaller, NGO-type bodies,
rather than the mass-based organizations active in, for example, Ecuador or
165 Bolivia. Nonetheless, their demands were amplified by the peace process and
significant agreements were reached between the government and guerrillas
designed to respect indigenous rights and identity. In addition, following the
peace negotiations, the demands of international agencies, multilateral banks,
and donors involved in the postconflict peace implementation also meant that
170 the Guatemalan state was, to a degree, “multiculturalized,” even in the face of
opposition from local elites.

The Agreement on the Identity and Rights of Indigenous Peoples, signed by
the government of Guatemala and the guerrillas of the Unidad Revolucionaria
Nacional Guatemalteca (URNG) in May 1995, committed the Guatemalan
175 state to implement a series of constitutional reforms recognizing indigenous
peoples’ collective rights.²⁵ These included the right to be subject to customary
law, the right to bilingual education, and protections for communally held
lands but excluded territorially based autonomy arrangements. After the final
signing of the peace agreement in December 1996, a number of indigenous
180 organizations began to draft proposals for constitutional reform. The purpose
of these was to ensure the protection of the right of indigenous peoples to select
their own authorities and to develop and apply their own forms of law within
their communities. Following the terms of the peace agreement and the 1985
Constitution itself, proposals for constitutional reform had to be agreed to first
185 by Congress and subsequently approved in a popular referendum. Following
long and complex negotiations between political parties, a package of constitu-
tional reforms was finally approved by Congress in October 1998, nearly two
years after the peace settlement was complete.²⁶

190 The proposed revisions to some fifty articles of the Constitution covered an
extensive range of topics, although indigenous rights proved to be one of the
most controversial aspects. In May 1999, this package of reforms was presented

²⁴ See the report of the UN truth commission for Guatemala established under the 1994 Oslo Ac-
cords (*Comisión para el Esclarecimiento Histórico*, or CEH), GUATEMALA MEMORY OF SILENCE: REPORT OF THE
COMMISSION FOR HISTORICAL CLARIFICATION (Feb. 1999), available at [http://shr.aaas.org/guatemala/ceh/
report/english/toc.html](http://shr.aaas.org/guatemala/ceh/report/english/toc.html) (last visited Jan. 21, 2007).

²⁵ Agreement on Identity and Rights of Indigenous Peoples, Mar. 31, 1995, Guat.-URNG, UN Doc.
A/49/882--S/1995/256, 36 ILM 285 (1997), available at <http://www.usip.org/library/pa.html>
(last visited Jan. 24, 2007).

²⁶ *Reformas a la Constitución Política de la República de Guatemala* [Reforms to the Political Con-
stitution of the Republic of Guatemala], Acuerdo Legislativo No. 41-98 (Oct. 16, 1998). For full
text (in Spanish) see http://www.congreso.gob.gt/gt/mostrar_acuerdo.asp?id=3461 (last visited
Jan. 23, 2007).

to the electorate for approval. Elements of the private sector orchestrated a virulent campaign against formal recognition of indigenous rights, appealing to racist sentiments and raising fears that this would balkanize the country and encourage “reverse discrimination” against the nonindigenous.²⁷ The proposed constitutional reforms were eventually rejected, based on an 18 percent turnout of the electorate.²⁸ The defeat seemed to show that the rights of indigenous people to exercise their own forms of authority and law remain unrecognized. Decisions by indigenous authorities could be overturned by the courts on the grounds that indigenous law was unconstitutional, since the Constitution gives exclusive jurisdiction to the judiciary.²⁹ In a number of other countries in Latin America, such as Bolivia, Colombia, Ecuador, Mexico, and Peru, indigenous law was recognized via constitutional reforms during the 1980s and 1990s.³⁰ These reforms promised the subsequent approval of so-called coordinating laws, which would specify jurisdictions, competencies, and procedures to be followed in cases of conflicts between state law and indigenous law, and between individual rights and collective rights. However, such legislative proposals met with little success across the continent, partly because of their controversial subject matter and partly because indigenous peoples’ organizations invariably lacked the political allies necessary to ensure the adoption of such legislation. The rejection of the constitutional reform in Guatemala in 1999 effectively made such legislative proposals superfluous.

In the absence of constitutional reform, the juridification of indigenous rights is, as a result, extremely weak in Guatemala; this is in contrast with other countries in the region, such as Colombia, Ecuador, or Bolivia. Some of the commitments on indigenous rights made in the peace agreements, for example, those to bilingual education, were subsequently advanced via ordinary legislation

²⁷ A series of paid advertisements were placed in the national press urging a “no” vote. For more detail on the ethnic dimensions of the referendum, see Kay Warren, *Voting Against Indigenous Rights in Guatemala: Lessons from the 1999 Referendum*, in *INDIGENOUS MOVEMENTS, SELF-REPRESENTATION, AND THE STATE IN LATIN AMERICA* 149 (Kay Warren & Jean Jackson eds., Univ. Texas Press 2002).

²⁸ See *id.* and Jonas, *supra* note 23, at ch. 8.

²⁹ GUAT. CONST. art 203 (1985) states, *inter alia*, that “[t]he jurisdictional function is to be exercised, with absolute exclusivity, by the Supreme Court of Justice and by the other courts established by law. No other authority may intervene in the administration of justice.”

³⁰ The constitutions refer to indigenous law in different ways: “costumbres” [“customs”] or “procedimientos” [“procedures”], “autoridades” [“authorities”] or “normas indígenas” [“indigenous norms”]; some refer specifically to territorial jurisdictions or competencies, while others recognize norms and procedures but not the authorities who exercise them. The subject of recognition also varies from “pueblos indígenas” [“indigenous peoples”], “comunidades indígenas” [“indigenous communities”], or, in the case of Peru, “comunidades campesinas” [“campesino communities”]. See Raquel Yrigoyen Fajardo, *Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries*, 27 *BEYOND LAW: INFORMAL JUSTICE AND LEGAL PLURALISM IN THE GLOBAL SOUTH* 32 (2004).

without the need for specific constitutional reform.³¹ However, the issue of recognition of indigenous customary law has proved much more controversial and, indeed, has become one of the key issues around which legal battles for the recognition of indigenous rights have subsequently centered. Indigenous activists and some jurists have argued that two articles of the 1985 Constitution provide a basis for recognizing indigenous authorities, their norms, procedures, and decisions. Article 58 states that “the right of people and communities to their cultural identity in accordance with their values, language and customs shall be recognized.”³² Article 66 states that “Guatemala is formed by diverse ethnic groups amongst whom are indigenous groups of Mayan descent. The state recognizes, respects and promotes their ways of life, customs, traditions, forms of social organization, use of indigenous dress by men and women, languages and dialects.”³³ Activists argue that “recognizing, respecting and promoting” should imply a proactive stance by state authorities in acknowledging the autonomy of indigenous authorities and their right to exercise customary law.³⁴

In addition to these constitutional articles, in March 1995, Guatemala ratified ILO 169—on the rights of indigenous and tribal peoples—one of eleven Latin American states to have done so by December 2006.³⁵ The convention finally entered into force in the country in June 1997. ILO 169 includes three articles (8, 9, and 10) providing indigenous peoples with the right to administer their own forms of justice, as long as these respect fundamental and internationally recognized human rights.³⁶ At the same it obligates

³¹ For example, the General Directorate of Bilingual Intercultural Education (La Dirección General de Educación Bilingüe Intercultural, or DIGEBI) was established as an administrative technical wing of the Ministry of Education, by Acuerdo Gubernativo No. 726-95 (Dec. 21, 1995). DIGEBI is the government agency charged with effecting curriculum change to advance the commitments to bilingual bicultural education set out in the peace accords.

³² GUAT. CONST. art. 58 provides: “Identidad Cultural. Se reconoce el derecho de las personas y de las comunidades a su identidad cultural de acuerdo a sus valores, su lengua y sus costumbres.”

³³ GUAT. CONST. art. 66 provides: “Protección a grupos étnicos. Guatemala esta formada por diversos grupos étnicos entre los que figuran los grupos indígenas de ascendencia maya. El estado reconoce, respeta y promueve sus formas de vida, costumbres, tradiciones, formas de organización social, el uso del traje indígena en hombres y mujeres, idiomas y dialectos.”

³⁴ Author’s interviews with Amilcar Pop and Guillermo Padilla, Defensoría Indígena del Instituto de Defensa Penal Público, Guatemala City, April 2005 (both were employed within the special section of the public defenders’ office charged with advancing coordination between indigenous law and state law and ensuring government compliance with ILO 169).

³⁵ For a list of ratifications, see <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (last visited Jan. 23, 2007).

³⁶ “In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary law. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, wherever necessary, to resolve conflicts which may arise in the application of this principle.” ILO 169, art. 8.

240 states parties to respect the decisions reached by indigenous peoples and their
specific forms of justice (in all fields of justice—civil, criminal, family, labor,
and so forth).³⁷ It also specifically mandates states to give preference to noncus-
todial forms of sanction for indigenous people.³⁸ The ratification of ILO 169 by
245 the Guatemalan Congress was highly controversial, and a number of attempts
were made to block its adoption. Several legislators requested a consultative
opinion from the Constitutional Court, claiming that the convention was
incompatible with the Constitution. However, Court held that ILO 169 did not
contradict the Guatemalan Constitution.³⁹ Some jurists argue that article 46 of
250 the Constitution, which gives international human rights conventions and
treaties ratified by Guatemala preeminence over domestic law, means that, in
effect, ILO 169 is superior to internal legislation.⁴⁰

Many Mayan rights activists now prefer to approach the issue of coordina-
tion between indigenous law and state law by a judicial rather than legislative
route. This implies that when conflicts of competencies and jurisdiction
255 between state law and indigenous law occur that they should be approached
on a case-by-case basis, with the goal of forcing the government to uphold its
international commitments by respecting the collective rights of indigenous
peoples to legal autonomy.

Such an approach has been successfully applied in Colombia for over a
260 decade. There, the Constitutional Court has played a central role in advanc-
ing indigenous peoples' rights to jurisdictional autonomy via its decisions

³⁷ "To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offenses committed by their members shall be respected. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases." ILO 169, art. 9.

³⁸ "In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics. Preference shall be given to methods of punishment other than confinement in prison." ILO 169, art. 10.

³⁹ In its opinion the Court stated that no incompatibility existed between the 1985 constitution and ILO 169: "As is evident, there are no dispositions within Convention 169 of the International Labour Organization that could be considered incompatible with the constitutional text. [Indeed] if those norms are considered within the general framework of flexibility within which [the constitution] was conceived, the aforementioned Convention can only produce the favorable consequences foreseen to promote respect for the culture, religion, social and economic organization and identity of the indigenous peoples of Guatemala, as well as their participation in the process of planning, discussion and decision making about the affairs of their own community." *Opinión consultiva relativa al Convenio 169* (Case file 199-1995) (Constitutional Court of Guatemala).

⁴⁰ For a more extended discussion of the constitutional position of indigenous law, see GUILLERMO PADILLA, *EL ESTADO DE DERECHO Y EL SISTEMA JURIDICO PROPIO DE LOS PUEBLOS INDIGENAS EN GUATEMALA* [THE RULE OF LAW AND THE LEGAL SYSTEM OF INDIGENOUS PEOPLES IN GUATEMALA[0]] (2005) (unpublished manuscript on file with author).

in *tutela* cases (specific appeals against alleged violation of fundamental rights).⁴¹ The Constitutional Court has developed a doctrine of “minimum legal requirements” (*mínimos jurídicos*) that must be met by indigenous
265 authorities in their exercise of customary law—guarantees of the right to life, to physical integrity, the prohibition of enslavement, and certain guarantees of due process, for example.⁴² However, once these minimum requirements are guaranteed, the Court has consistently defended the collective right of indigenous people to autonomy and has strongly
270 discouraged any state intervention to limit it.⁴³ This stands in contrast to the more conservative judicial stance, common in many other countries in the region, which disqualifies indigenous legal proceedings on the basis that they do not meet due process requirements and, therefore, violate human rights.⁴⁴ In its practice, the Colombian Constitutional Court has
275 emphasized the need to view human rights and due process through an intercultural lens. Its judgments have often been controversial, but it is notable for its desire to apply the Constitution in a progressive fashion. It

⁴¹ *Tutela* appeals can be heard by any court and presented by any person without the need for a lawyer or written documentation. On the Colombian experience, see Mauricio García Villegas & Rodrigo Uprimny, *La acción de tutela [The Tutela Writ]*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA [THE KALEIDOSCOPE OF JUSTICES IN COLOMBIA]* 423 (Boaventura Santos & Mauricio García Villegas eds., Univ. de los Andes 2004); Uprimny & García Villegas, *supra* note 18); Willem Assies, *Indian Justice in the Andes: Re-Rooting or Re-Routing?* in *STUDYING THE ANDES: SHIFTING MARGINS OF A MARGINAL WORLD?* 167 (Ton Salman & Annelies Zoomers eds., Centre for Latin American Research and Documentation (CEDLA) 2003); Esther Sanchez, *The Tutela-System as a Means of Transforming the Relations Between the State and the Indigenous Peoples of Colombia*, in *THE CHALLENGE OF DIVERSITY*, *supra* note 6, at 223; Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 *J. LAT. AMER. STUD.* 207 (2000).

⁴² On indigenous autonomy and due process requirements, see, e.g., case no. ST-349/1996; on indigenous autonomy, sanctions and intercultural definitions of torture see, *inter alia*, case no. ST-523/1997.

⁴³ Case no. ST-523/1997 provides a particularly clear statement: “In the view of the court, the limits that indigenous authorities should respect in the exercise of their jurisdictional functions with respect to human rights correspond to an intercultural consensus about what is really intolerable because it threatens the most precious things of man, that is, the right to life and the prohibition against slavery and—by express constitutional requirement—the legality of criminal and civil procedures, this [last] to be understood to mean that all judgments should be carried out in accordance with the norms and procedures of the indigenous community, in line with the specificity of the social and political organization in question, as well as the characteristics of their juridical order ... what is required is for the accused to be able to predict [the indigenous authorities’] actions and that [those actions be] close to the traditional practices that provide for the basis for social cohesion.” See also the opinions of the court expressed in, for example, case nos. ST-380/1993, SC-058/1994, ST-254/1994, SC-139/1996, ST-349/1996, ST 380/1993, ST-496/1996, and ST-523/1997.

⁴⁴ On Peru, see Raquel Yrigoyen Fajardo, *Peru: Pluralist Constitution, Monist Judiciary—A Post-Reform Assessment*, in *MULTICULTURALISM IN LATIN AMERICA*, *supra* note 6, at 157.

has also tended to favor religious and ideological pluralism together with ethnic pluralism.⁴⁵

280 In Guatemala there is no clear policy forthcoming from the Guatemalan
Supreme Court, Constitutional Court, or the head of the public prosecution
service (Fiscal General) with respect to the application of ILO 169 or, indeed,
with regard to the legal implications of articles 58 and 66 of the Constitution.
Many lawyers tend to view constitutional articles and international conven-
285 tions as abstract statements of principle rather than justiciable rights, arguing
that secondary legislation is required to make the principles into binding law.⁴⁶
Some past and current magistrates of the Supreme Court and Constitutional
Court are quite open to recognizing indigenous legal autonomy if certain basic
guarantees are observed, while many others remain steadfastly opposed to
290 the recognition of legal pluralism.⁴⁷ The result is the judicial authorities' failure
to recognize fully the validity of the decisions of indigenous authorities, as
explicitly provided for in ILO 169. Certainly, justice officials are now more
aware of the convention, having received training and talks on the subject,
often provided or funded by international cooperation agencies.⁴⁸ Yet many
295 are either unclear as to exactly how it should be applied, or they simply ignore
it altogether.⁴⁹ Many of the measures taken by indigenous authorities are
condemned by public prosecutors and judges as criminal actions (*ilícitos
penales*).⁵⁰ For example, when indigenous authorities detain suspected
miscreants, they are charged with illegal detention or kidnapping; and when
300 community authorities impose communal labor obligations, they are accused
of imposing forced labor.⁵¹ In addition, lawyers working in private practice

⁴⁵ Cesar Rodriguez, Mauricio García Villegas & Rodrigo Uprimny, *Justice and Society in Colombia: A Sociolegal Analysis of Colombian Courts*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE* 157 (Laurence M. Friedman & Rogelio Pérez-Perdomo eds., Stanford Univ. Press 2003).

⁴⁶ Interviews with Otto Marroquin and Oscar Pacay, Magistrates of the Guatemalan Supreme Court, Guatemala City (April/May 2005).

⁴⁷ *Id.*

⁴⁸ See generally the reports of the UN observer mission for Guatemala (MINUGUA) (U.N. docs. A/49/856 and Corr.1, A/49/929, and A/50/482). For a critical appraisal of international involvement in the Guatemalan peace process, see LUIS PASARA, *PAZ, ILUSION Y CAMBIO EN GUATEMALA: EL PROCESO DE PAZ, SUS ACTORES, LOGROS Y LIMITES* [PEACE, HOPE AND CHANGE IN GUATEMALA: THE PEACE PROCESS, ITS ACTORS, ACHIEVEMENTS AND LIMITATIONS] (Instituto de Investigaciones Jurídicas 2003).

⁴⁹ Author's interviews with personnel, United Nations Development Programme and Office of the UN High Commissioner for Human Rights in Guatemala, Guatemala City (May 2005) (anonymity requested).

⁵⁰ Author's interviews with personnel, Instituto de Defensa Penal Público, Guatemala City, Cobán, and Totonicapán (March–May 2005).

⁵¹ *Id.* Not all detentions of indigenous authorities result in charges being brought, much less convictions, making it difficult to obtain precise documentation of the number of cases involved. As far as could be ascertained, no national records were kept of incidents of this type.

tend to oppose any community-based resolution of conflicts outside the formal judicial apparatus on grounds of self-interest, because it reduces their prospects for securing fee-paying clients.⁵²

305 **2.2. The institutional environment**

Attempts to reform the Guatemalan judicial system date back to the transition to electoral democracy in the mid-1980s. While historically the judiciary has been extremely subordinate to executive power, the 1985 Constitution strengthened the Constitutional Court and extended its powers
310 of judicial review.⁵³ The Court has played an important role in guaranteeing the constitutional order at critical junctures, for example, in opposing the attempted *autogolpe* (executive coup d'état) by President Jorge Serrano in 1993.⁵⁴ However, during the early 2000s, the government of the Frente Republicano Guatemalteco (FRG) manipulated nominations to the Court,
315 and, in 2003, the Court's reputation for independence suffered when it ruled to allow the presidential candidacy of former dictator Efraín Ríos Montt.⁵⁵ On some collective rights issues the Court has adopted an independent stance vis-à-vis the executive, as in, for example, ruling certain increases in taxes or public utility charges unconstitutional.⁵⁶ However, it

⁵² *Id.*

⁵³ GUAT. CONST. arts. 268 & 272 (1985), together with Law of Amparo, Habeas Corpus and Constitutionality (National Constituent Assembly Decree 1-86/1984). Together these define the Court's essential function as the defense of the constitutional order and specify the circumstances in which it can exercise abstract and concrete review.

⁵⁴ When, Serrano, facing gridlock and extensive opposition in Congress, attempted to dismiss the legislature, the Supreme Court, the Supreme Electoral Tribunal, the Human Rights Ombudsman, and the Constitutional Court and to suspend more than forty constitutional norms via executive decree, the Constitutional Court declared the presidential decrees unconstitutional.

⁵⁵ General Ríos Montt was de facto military ruler of Guatemala between 1982 and 1983. He had attempted to stand for presidential office since 1989, but the Supreme Court had held he was prohibited from so doing by GUAT. CONST. art. 186 (1985), which explicitly states that those who have mounted a coup d'état cannot run for the presidency. In July 2003, a new ruling by the Constitutional Court, in response to an *amparo* writ presented by Montt, overturned the previous Supreme Court ruling, thus permitting his presidential candidacy for the November 2003 presidential elections. See Supreme Court resolution 0121-2003).

⁵⁶ For example, on increases in fuel taxes (Supreme Court resolution 361-2003), on increases in social security contributions (resolutions 1632-2003 and 1597-2004), on increases to the age for eligibility for state pensions (resolution 2765-2004), on medical provision for minors (resolution 123-2004), and on energy tariffs (resolution 2287-2004). These actions of unconstitutionality were lodged by the human rights ombudsman. Details can be found in the ombudsman's annual reports. See, e.g., INFORME ANUAL CIRCUNSTANCIADO AL CONGRESO DE LA REPUBLICA DE LAS ACTIVIDADES Y SITUACION DE LOS DERECHOS HUMANOS EN GUATEMALA DURANTE EL AÑO 2004 [ANNUAL REPORT TO THE CONGRESS OF THE REPUBLIC ON THE HUMAN RIGHTS SITUATION AND ACTIVITIES OF THE HUMAN RIGHTS OMBUDSMAN IN GUATEMALA DURING 2004], available at <http://www.pdh.org.gt/html/Informes/anuales/Informe2004.pdf> (last visited Jan. 23, 2007).

320 has not taken a consistent stance in defense of fundamental rights, much
less the collective rights of indigenous peoples.

As a consequence of the peace process, a number of new institutions were created with a mandate to defend indigenous peoples' individual and collective rights.⁵⁷ These included offices or departments devoted to the
325 indigenous within the state criminal defense services, the human rights ombudsman's office, the public prosecutor's office, and the creation of a special indigenous women's defense office. The Indigenous Defenders' Offices of the state criminal defense service (Defensorías Indígenas del Instituto de Defensa Penal Público) were created to defend indigenous
330 defendants in penal cases. In addition, the offices worked to improve coordination between state law and indigenous customary law. The national office has lodged appeals in defense of collective rights to exercise indigenous law against certain judicial decisions. However, it is not officially mandated to initiate legal actions in defense of collective rights. Another institution with
335 a remit to defend indigenous people and monitor abuses of collective rights is the Indigenous Ombudsman's Office within the office of the Human Rights Ombudsman (Procuraduría Indígena de la Procuraduría de Derechos Humanos). This group receives individual complaints and decides whether the collective rights of indigenous peoples protected under Guatemalan law
340 have been infringed. If such is found to be the case, the ombudsman issues condemnations and provides a detailed legal analysis. However, the office can only recommend prosecutions to the state prosecutor's office (Ministerio Público), not initiate them.⁵⁸ The office of Indigenous Rights Prosecutor (Fiscalía de Derechos Indígenas) was created in 2002 as a subsection of the
345 state prosecutor's office, but in 2005 it had yet to begin operations, and much confusion persisted about precisely what its functions would be.⁵⁹ Indigenous rights activists hoped that it would prosecute cases of racial discrimination and generally act to defend indigenous peoples' collective rights via paradigmatic prosecutions, but privately they held out little hope
350 of swift action.⁶⁰

⁵⁷ See Acuerdo Gubernativo No. 525-1999 (on the office of the ombudsman of indigenous women); Acuerdo Ministerial No. 364-2003 (creating a department of indigenous peoples within the Ministry of Labor); Acuerdo Gubernativo No. 96-2005 (creating a presidential advisory commission on indigenous peoples and pluralism).

⁵⁸ Decree Law 32-1987, Ley del Procurador de los Derechos Humanos y la comisión de derechos humanos del congreso de la república [Law of the Human Rights Ombudsman and Human Rights Commission of the Congress of the Republic], approved May 1987, art. 275.

⁵⁹ Author's interviews with personnel, United Nations Development Programme and Office of the UN High Commissioner for Human Rights in Guatemala, Guatemala City (May 2005) (anonymity requested).

⁶⁰ Author's interviews with members of the Mayan Lawyer's Association (Asociación de Abogados Mayas) and the Mayan legal services NGO Waxaqib Noj, Guatemala City (May 2005).

Measures to tackle the double discrimination faced by indigenous women were promised, as well, by the peace accords and, in 1999, the Defensoría de la Mujer Indígena (DEMI) was established under the auspices of the presidential commission for human rights. In addition to providing legal advice in specific cases, mostly regarding intrafamilial violence and abuse or alimony payments, DEMI also works to promote the collective rights of indigenous women more generally—for example, through publishing periodic reports and lobbying Congress for particular legislative reforms.⁶¹

Together these new state institutions constitute important mechanisms for putting indigenous rights on the judicial agenda. However, they are highly dependent on international development funds, and it is doubtful whether the government and judiciary will continue to support them after those funds dry up. Although in different ways, they all monitor compliance with collective rights commitments for indigenous people, it is notable that none of them has a specific mandate to defend and advance collective rights through strategic litigation.

Despite the denial of constitutionally specific rights to indigenous autonomy, certain aspects of the exercise of indigenous community authority and customary law were strengthened during the 1990s by a number of initiatives for reforming and multiculturalizing the justice system.⁶² These were advanced as part of the peace process, which provided a massive increase in funds for justice reform. Donations and loans to the sector between 1996 and 2001 totaled over US\$188 million (of nearly \$1.9 billion in overall foreign aid promised to support the peace process).⁶³ Reforms were supported by international donors and agencies such as the World Bank, the Inter-American Development Bank, the U.S. Agency for International Development, the United Nations Development Programme, and a wide range of bilateral donors. While domestic actors generally agreed that the justice system was

⁶¹ DEMI's institutional goals include: protecting indigenous women; promoting and developing initiatives to counter violence and discrimination against them; identifying violations of their rights; and proposing programs and initiatives to promote their rights. See Acuerdo Gubernativo No. 525-1999. Its social unit addresses issues related to conflict resolution and mediation. See DEFENSORIA DE LA MUJER INDÍGENA, SITUACIONES Y DERECHOS DE LAS MUJERES INDÍGENAS EN GUATEMALA [INDIGENOUS WOMEN'S DEFENSE OFFICE, SITUATION AND RIGHTS OF INDIGENOUS WOMEN IN GUATEMALA] (DEMI, Guatemala 2005).

⁶² See, e.g., Acuerdo Gubernativo No. 79-1997 (creating five indigenous justice-of-the-peace courts). See also RAQUEL YRIGOVEN FAJARDO, JUSTICIA Y MULTILINGÜISMO: PAUTAS PARA ALCANZAR UNA JUSTICIA MULTILINGÜE EN GUATEMALA [JUSTICE AND MULTILINGUISM: GUIDELINES TO ACHIEVE MULTILINGUAL JUSTICE IN GUATEMALA] (Programa de Justicia Checchi/USAID, Guatemala 2001); JORGE MURGA ARMAS, ANÁLISIS DEL FUNCIONAMIENTO DE LOS FUZGADOS DE PAZ COMUNITARIOS [ANALYSIS OF THE FUNCTIONING OF THE INDIGENOUS JUSTICE-OF-THE-PEACE COURTS] (UNDP, Guatemala 1999).

⁶³ LUIS PASARA, *Reforma judicial: el caso de Guatemala* [Judicial Reform: The Case of Guatemala] (2002) (draft paper on file with author).

weak, they advanced few concrete proposals for change through the peace negotiations.⁶⁴ The reliance of the Guatemalan state on external donor funds meant that justice system reform became highly transnationalized in practice.⁶⁵ International donors supported measures to increase awareness among indigenous people of their rights and to improve their access to justice. The number of lower courts was increased by a third and extended to predominantly indigenous regions of the country that had previously lacked any judicial presence.⁶⁶ Efforts were made to provide more-adequate legal services, both for those accused of crimes and, to a lesser extent, for victims and plaintiffs.

Yet despite some notable advances, the quality of ordinary justice remained extremely poor and highly likely to exclude indigenous people. The majority continue to lack access to the official justice system in their own language. Very few judges or lawyers are Mayan or speak indigenous languages. Litigation is not permitted in indigenous languages, and the numbers of interpreters employed in the justice system is nowhere near sufficient to meet demand.⁶⁷ Most indigenous people lack the economic resources to defend themselves before the courts—as do most Guatemalans—many of whom are also often unable to follow judicial proceedings, seek appropriate remedies, or defend their fundamental rights because of linguistic and cultural barriers. In short, the peace process brought the judicial apparatus of the state closer to indigenous people; it raised their hopes of receiving more-adequate treatment and a defense of their rights through the state institutions and by the courts. Yet these expectations have been largely frustrated. Within such a context, and given the ongoing efforts by numerous actors to raise awareness of collective rights, demands that the state respect indigenous peoples' rights to jurisdictional autonomy have only increased.

⁶⁴ In 1998, a broad set of reform proposals was published by a multisectorial commission, the Comisión para el Fortalecimiento de la Justicia, charged with developing measures to strengthen the justice system on the basis of the commitments set out in the peace agreements. See UNA NUEVA JUSTICIA PARA LA PAZ, RESUMEN EJECUTIVO DEL INFORME FINAL DE LA COMISION DE FORTALECIMIENTO DE LA JUSTICIA EN GUATEMALA [A NEW JUSTICE FOR PEACE, EXECUTIVE SUMMARY OF THE FINAL REPORT OF THE COMMISSION FOR STRENGTHENING JUSTICE IN GUATEMALA] (PDH 1998).

⁶⁵ On UN peace missions and "institutional strengthening," see STEPHEN BARANYI, THE CHALLENGE IN GUATEMALA: VERIFYING HUMAN RIGHTS, STRENGTHENING NATIONAL INSTITUTIONS AND ENHANCING AN INTEGRATED UN APPROACH TO PEACE (Centre for the Study of Global Governance, London School of Economics 1995).

⁶⁶ There were 242 justice-of-the-peace courts (*juzgados de paz*) in 1977 and 353 by 2003. See COMISION DE MODERNIZACION DEL ORGANISMO JUDICIAL: PLAN DE MODERNIZACION DEL ORGANISMO JUDICIAL 1997–2002 [JUDICIAL MODERNIZATION COMMISSION: PLAN FOR THE MODERNIZATION OF THE JUDICIARY 1997–2002] (Organismo Judicial 1997); MINUGUA, INFORME FINAL, AREA JURIDICA [FINAL REPORT, JUDICIAL AREA] (MINUGUA 2001); Fajardo & Ferrigno, *supra* note 3.

⁶⁷ See Fajardo, *supra* note 62; Fajardo & Ferrigno, *supra* note 3, at annexes 22–23.

2.3. Actors driving indigenous rights issues to the courts

By the early 2000s, the principal issues in contention, with respect to the collective rights of indigenous peoples in Guatemala, were, first, the legality and jurisdictional autonomy of customary law and, second, the right of prior
410 consultation on development projects and, specifically, the exploitation of natural resources in indigenous areas. Both issues are explicitly dealt with and guaranteed by ILO 169.⁶⁸ Notably, in the nongovernmental sphere and at the national level, there are no consolidated indigenous rights organizations or social movements mounting sustained programs of strategic litigation
415 in defense of these rights. In this sense, a process of judicialization of indigenous rights is not in evidence. However, the grassroots efforts of local communities, in asserting their rights to jurisdictional autonomy and prior consultation, have increasingly brought these issues before the courts.

2.3.1. Legality and the jurisdictional autonomy of customary law

420 During recent years, indigenous authorities throughout the country have become more assertive of their right to resolve disputes and conflicts without the intervention of the state. This is partly because of the ongoing work of indigenous rights activists to strengthen local forms of indigenous authority. It also reflects the immense frustration with the inability of the official justice
425 system to resolve the problems affecting individuals and communities throughout the country. In the face of high levels of crime, widespread impunity, insecurity, and an acute lack of public confidence in the judicial authorities, local indigenous authorities, are increasingly demanding their right to deal with more serious crimes, such as rape, aggravated robbery, or murder.⁶⁹ Their
430 interventions often are aimed at preventing violence and the summary executions—or lynchings—of suspected criminals by local inhabitants, a practice that has become widespread in Guatemala since the end of the armed conflict.⁷⁰

⁶⁸ ILO 169, arts. 5, 6, 7, 8, 9, & 10.

⁶⁹ Author's interviews with indigenous authorities, El Quiché and Totonicapán (May 2005). See, e.g., Case No. 587-2003, Juzgado de Primera Instancia Penal, Totonicapán (a case of aggravated robbery where the judge ruled in favor of indigenous authorities' right to resolve, citing ILO 169), and Velasquez, Case No. 218-2003, *infra* (case of aggravated robbery in El Quiché province which led to a test case before the Supreme Court).

⁷⁰ Between 1996 and 2002, some 482 lynchings and attempted lynchings occurred, involving 913 victims and leaving 240 people dead: see MINUGUA, LOS LINCHAMIENTOS: UN FLAGELO QUE PERSISTE [LYNCHINGS: A SCOURGE THAT PERSISTS] (MINUGUA 2002) and GUATEMALA COUNTRY REPORT, *supra* note 3. In 2005 newspapers reported thirteen deaths due to lynchings between January and May: EL PERIÓDICO, Guatemala, May 24, 2005, available at <http://www.elperiodico.com.gt/look/article.tpl?IdLanguage=13&IdPublication=1&NrArticle=16305&NrIssue=467&NrSection=1> (last visited Jan. 23, 2007). According to author's interviews carried out in April and May 2005, some local human rights organizations estimate that there is one lynching attempt every week in Guatemala.

Yet when they exercise customary law, the indigenous authorities are often threatened with prosecution, for example, for illegal detentions, when they
435 have supervised community assemblies in trying alleged delinquents.⁷¹ Public prosecutors and judges have argued that community-based procedures violate individual due process rights.⁷² Officials tend simply to ignore or to override the procedures employed or settlements arrived at by indigenous authorities. For example, the state might intervene to detain those accused of crimes when
440 the matter may have already been resolved locally without the intervention of the state authorities.⁷³ Criminal charges against indigenous authorities are likely to increase unless the Supreme Court adopts a clearer position on interpretation of ILO 169 and the legal status of customary law.

A watershed case occurred in October 2004 when the Supreme Court
445 upheld an appeal lodged by the national Indigenous Defenders Office of the state criminal defense service against the imprisonment of an indigenous man for robbery.⁷⁴ In mounting the appeal, the Defenders Office appealed to the principle of *ne bis in idem*—that no one should be tried twice for the same crime. It argued that the man had been effectively tried by the indigenous
450 community authorities prior to the intervention of state officials, and that his subsequent trial and sentencing were therefore illegitimate. The Supreme Court accepted this argument and freed the man, Francisco Velásquez, on appeal. Velásquez had admitted his part in the armed robbery of a vehicle, and in May 2002 he was tried and sentenced by indigenous
455 authorities in a community assembly in the village of Panajxit, in the province of Santa Cruz del Quiché. In addition to promising to compensate the victim financially, he also received a symbolic public whipping (*azotes*). Following an inflammatory report by a local television station, alleging that a lynching was about to occur, the police and public prosecutor intervened.
460 While the other members of the gang were subsequently released for lack of evidence, Velásquez was sentenced to six years in prison, largely on the basis of his confession—despite the fact that the offended party and the community had accepted the resolution reached by the community

⁷¹ As far as can be ascertained, there are no nationally collated figures to illustrate trends on this matter (see also footnote 52 and text thereto). However, anecdotal evidence and interviews with representatives from the different *defensorías indígenas* [indigenous defenders' offices] seemed to suggest that such accusations against indigenous authorities and activists were on the increase in 2004 and 2005.

⁷² See, e.g., discussion of the Panaxit case in GUILLERMO PADILLA, *EL ESTADO DE DERECHO Y EL SISTEMA JURÍDICO PROPIO DE LOS PUEBLOS INDÍGENAS EN GUATEMALA* [THE RULE OF LAW AND THE LEGAL SYSTEM OF INDIGENOUS PEOPLES IN GUATEMALA[0]] (2005) (draft document on file with author).

⁷³ *Id.* Author's interviews with indigenous authorities (*Alcaldía Indígena*), Totonicapán (May 2005); with Juan Zapeta López & Juan Tipaz, Defensoría K'iché, Santa Cruz del Quiché, (May 2005).

⁷⁴ Case 218-2003, Francisco Velásquez López, Oct. 7, 2004 (Supreme Court of Guatemala (Penal Chamber)).

authorities.⁷⁵ He spent nearly two and a half years in jail before his release.
465 The Supreme Court's decision was seen as an important gain for collective
rights, as it effectively recognized indigenous peoples' rights to jurisdic-
tional autonomy.⁷⁶ It also reinforced the earlier consultative opinion handed
down by the Constitutional Court in 1996, which stated that according to
article 46 of the Constitution, ILO 169 (in common with other human rights
470 treaties ratified by Guatemala) is superior to domestic legislation.⁷⁷

In some instances, local judges have proved more receptive in recogniz-
ing the jurisdiction of indigenous authorities, provided that certain funda-
mental guarantees are in place for those accused. In one important case in
2003, a local judge in Totonicapán agreed that, on the basis of ILO 169,
475 indigenous community authorities could judge three individuals accused
of robbery in a communal assembly so long as they respected guarantees of
due process and presumption of innocence.⁷⁸ The following year indige-
nous authorities in Totonicapán signed an agreement with local justice
officials that reaffirms the right of indigenous authorities to issue decrees
480 and carry out sanctions within the community and recognizes the validity
of these decisions as long as they do not violate fundamental human
rights.⁷⁹ Such initiatives represent an important change in the attitude of
justice system officials and are the fruit of the ongoing work by activists to
sensitize judges to indigenous authorities' rights to adjudicate. They have

⁷⁵ The other gang members, who did not openly confess to participation in the robbery, were not tried. However, following the intervention of the Indigenous Defenders Office of the state criminal defense service and Defensoría K'iché, a local Mayan rights NGO, and extended negotiations with the local public prosecutor, an informal mediation occurred in the public prosecutor's office between those accused, the victim, and the indigenous authorities. The other individuals accused admitted their culpability and promised to compensate the victim. *See* Padilla, *supra* note 72.

⁷⁶ Author's interviews with personnel of Defensoría Indígena, Defensa Penal Pública (May 2005).

⁷⁷ Case No. 199-1995. GUAT. CONST. art. 46 states: "[t]he general principle is established that in human rights materials, the treaties and conventions accepted and ratified by Guatemala have preeminence over domestic law." The court held that "the Constitution should be interpreted as a harmonious whole, in which each part is interpreted in line with the rest, no disposition should be considered in an isolated manner, and those conclusions [that] harmonize and [that] do not set different constitutional precepts at odds with each other should be favored." It further stated that ILO 169 "does not contradict the Constitution, as it does not regulate any matters which are in conflict with [the Constitution] but rather, to the contrary, deals with aspects which have been considered in constitutional terms in order that they be developed through ordinary legislation."

⁷⁸ This case was important as it went beyond a mediation under the "criterio de oportunidad" provided for in art. 25 of the penal procedures code (allowing mediation when the maximum penalty for the crime charged does not exceed five years). The maximum sentence for aggravated robbery is fifteen years. *See* Penal Procedures Code, Decree No. 51-1992.

⁷⁹ Author's interviews with Consejo de las alcaldías indígenas de los 48 cantones de Totonicapán [Council of indigenous mayoralties of the 48 villages of Totonicapán], Defensoría Indígena de Totonicapán [Indigenous Defense office, Totonicapán], and CPD, Totonicapán (April 2005).

485 generated unprecedented experiments in the coordination of indigenous law and the official justice system. Yet they remain the rare exception rather than the rule and depend on the openness of local judicial personnel to alternative procedures, rather than on the policy of the highest judicial authorities.

490 In general terms, ordinary justice in Guatemala continues to be corrupt and inefficient. Nowhere is the law rigorously enforced, and most social and political actors expect the justice system to be ineffective. The landmark ruling of the Supreme Court in the Velásquez case remains relatively unknown among lower court judges, who are often poorly trained and little interested
495 in jurisprudential innovations or international human rights conventions. Although a handful of judges are more willing to accept indigenous peoples' rights to exercise their customary law, the courts still singularly fail to defend these populations, whether in cases concerning individual or collective rights.

500 **2.3.2. Prior consultation**

International Labor Organization Convention 169 specifies that indigenous peoples have a right to prior consultation on development proposals affecting their livelihoods:

505 In applying the provisions of this Convention, governments shall: consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly. (Art. 6.1.a)

510 The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them
515 directly. (Art. 7.1)

520 Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. (Art. 7.3)

525 In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which

they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities. (Art. 15.2)

The issue of precisely what constitutes adequate consultation with indigenous people with regard to development projects is highly controversial. While the majority of Latin American countries have ratified ILO 169, hardly any have articulated, in legal terms, what prior consultation means in practice.⁸⁰ Indigenous organizations have denounced the frequent manipulation of the process: indigenous peoples and communities may be “consulted,” but their input is rarely taken into account, and if they reject proposed development projects this is invariably ignored. Sometimes talks are carried out with local groups favorable to a project so that companies can maintain they have met international obligations. There have also been accusations of the creation of parallel organizations specifically for this purpose. In the face of such manipulation, indigenous peoples have resorted, with increasing frequency, to legal means to try and secure their rights. In Colombia, indigenous rights activists in alliance with environmentalists have challenged the legal validity of contracts between the Colombian government and transnational oil companies, centering on the issue of due consultation. In one landmark case, the Colombian Constitutional Court revoked a concession for oil exploitation, ruling that the indigenous peoples affected had not been duly consulted prior to the signing of the agreement.⁸¹

Oil concessions were overturned on similar grounds in Costa Rica, after rights activists lodged petitions with the Sala IV, Costa Rica’s Constitutional Court.⁸² Ecuadorian indigenous rights activists have filed complaints with the

⁸⁰ A particularly controversial case concerns the U’wa indigenous groups in Colombia, Case No. SU-039/1997 (Constitutional Court of Colombia), which for more than fifteen years fought a complex legal battle against oil exploration in their territories, involving complaints before the Supreme Court, the Constitutional Court, and the Inter-American Commission of Human Rights. In each case, the key issue was whether the government had undertaken adequate consultation with indigenous groups prior to granting licenses for exploration. In the face of continued protests by U’wa groups, in January 2006 a decision by the Council of State (*Consejo de Estado*) held that the government had met its legal obligations with respect to prior consultation, that the lack of agreement between the government and the affected communities and the latter’s refusal to take part in a consultation process, did not affect the legality of the initiation of oil exploration. For full text of the decision, see http://www.ramajudicial.gov.co/csj_portal/assets/consejoestado/1708.htm (last visited Jan. 23, 2007).

⁸¹ *Id.*

⁸² Oil Exploration Case, Case No. 2019/2000. For background see <http://www.elaw.org/partners/elaw-cr/oil%20exploration%20article.asp> (last visited Jan. 23, 2007).

555 Ecuadorean Supreme Court, alleging the government's violation of ILO 169 by
failing to ensure that oil companies consulted with the Shuar and Achuar
peoples before beginning exploration on their lands.⁸³ Cases have also been
taken before the human rights system of the Organization of American States.
560 Since 1997, the U'wa people, in alliance with a group of NGOs, have been
pursuing claims before the Inter-American Commission for Human Rights
aimed at enjoining the Colombian government from allowing the Oxy and
Shell oil companies to drill on U'wa land. As a result of this ongoing process,
they have succeeded in compelling acknowledgment of their right to be
involved in genuine consultations on the matter.⁸⁴ In 2001, in the celebrated
565 Awas Tingni case, the Inter-American Court of Human Rights confirmed that
indigenous peoples have collective rights not just to the land they occupy but
also to its resources.⁸⁵ The judges declared that the community's rights to
territory and to judicial protection had been violated by the Nicaraguan
government when it granted concessions to a Korean lumber company to log
570 on the community's traditional land.⁸⁶

Such examples indicate how indigenous communities and their allies across
Latin America are judicializing their claims, resorting to national and transna-
tional legal resources to contest the accelerating exploitation of natural
resources in their territories, which is part and parcel of the neoliberal develop-
575 ment model. As indigenous peoples' right to due consultation is confirmed in
different legal forums, more and more activists are resorting to such abstract
principles in an effort to protect their environment and livelihoods.

⁸³ Federación Independiente del Pueblo Shuar del Ecuador [Independent Federation of the Shuar People of Ecuador] (FIPSE) c. Arco Oriente s/ Amparo; for an account of the case see http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=406016 (last visited Jan. 23, 2007).

⁸⁴ Case 11.754, Inter-Am. C.H.R no. 83 (2005). Report not available; for an account of the case, see http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=414389 (last visited Jan. 21, 2007).

⁸⁵ Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Case 11.555, Inter-Am. C.H.R no. 79 (2001), available at <http://www.worldlii.org/int/cases/IACHR/2001/9.html> (last visited Jan. 21, 2007).

⁸⁶ *Id.*, note 25, paras. 143–148. An extensive bibliography exists about this case. See particularly Claudio Nash Rojas, *Los derechos humanos de los indígenas en la jurisprudencia de la Corte Interamericana de Derechos Humanos [Indigenous peoples' human rights and the jurisprudence of the Inter-American Court of Human Rights]*, and Luis Rodríguez-Pinero Royo, *El caso Awas Tingni y el régimen de derechos territoriales indígenas en la Costa Atlántica de Nicaragua Nicaragua [The case of Awas Tingni and the indigenous territorial rights regime on the Nicaraguan Atlantic coast]*, in *Derechos Humanos y Pueblos Indígenas: Tendencias Internacionales y Contexto Chileno [Human Rights and Indigenous Peoples: International Tendencies and the Chilean Context]* 29–43, 218–233 (José Aylwin O. ed., Instituto de Estudios Indígenas/Universidad de la Frontera 2004). See also S. James Anaya & Todd Crider, *Indigenous Peoples, The Environment and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua* 18 Hum. Rts. Q. 345–367 (1996).

Faced with the inability or unwillingness of the legislature or the judiciary to protect their internationally recognized right to prior consultation, more and more indigenous actors in Guatemala are adopting paralegal means to assert this right. Linking different communities and indigenous authorities across the country, indigenous rights activists have mobilized together with other popular organizations and NGOs in opposition to the exploitation of natural resources, such as oil and minerals, by multinational companies.⁸⁷ A recent example illustrates the ways in which national legislation and transnational interchanges are being pursued in defense of local interests. In 2004 and 2005, indigenous community activists in the department of San Marcos mobilized to call on the government to annul the Marlin project, a concession for opencast gold and silver mining and processing in the municipalities of Sipacapa and San Miguel Ixtahuacán supported by the World Bank.⁸⁸ The license had been granted in 1996 to Montana Exploradora S.A., a subsidiary of Canadian mining company Glamis Gold, although the company only began operations in 2004. Protests soon gained pace and drew support from environmentalists, the Catholic Church, and indigenous and popular organizations in other departments of the country. The issue of due consultation was put to the test in a contest between Montana Exploradora and local activists. When Glamis applied to the World Bank's International Financial Corporation for support for the Marlin project, it had to organize consultations as a requirement to receive the loan. The company claimed it had spoken to around 3,000 people in San Marcos. However, many of the people supposedly consulted claimed that the mine had been presented as a *fait accompli*, that little information was given about the environmental and health impact it might have, and that they were given no chance to make any decisions about the project. In June a public consultation was announced by the municipal authorities of Sipacapa, San Marcos, to be held via community assemblies in different villages. Montana Exploradora immediately tried to impede the vote, seeking a legal injunction to order the municipality to suspend proceedings and forcing the municipal mayor to back down. However, the local Community Development Council, a body set up as part of the ongoing process of municipal decentralization, held the consultation regardless. In all, eleven out of thirteen villages voted against the mining development, most unanimously.

⁸⁷ When interviewed by author in April 2005, representatives of the Consejo de los 48 cantones de Totonicapán said they aimed to build a regional Consejo de Autoridades Indígenas in the western departments of the country, with the aim of coordinating lobbying on mining, environmental, and other issues affecting the communities. They were seeking support from the Asociación de Abogados Mayas to help them refine their legal arguments.

⁸⁸ The Marlin project has received some \$35 million in loans and \$10 million in equity investment from the World Bank via its International Financial Corporation. See IFC FACT SHEET ON MARLIN PROJECT, available at <http://siteresources.worldbank.org/INTOGMC/Resources/marlinfactsheetenglish.pdf>.

The legality of the popular consultation was debated in the national press for weeks.⁸⁹ The Ministry of Energy and Mines sought an injunction from the Constitutional Court, claiming that the popular vote was unconstitutional.

615 However, the Court upheld the villagers' right to vote, citing ILO 169 and article 65 of the 2002 municipal code, which states that when an issue particularly affects the rights and interests of indigenous communities, municipal councils will carry out consultations at the request of those communities or authorities.⁹⁰

620 The Sipacapa consultation was the first time that an exercise of this type was held in Guatemala with the aim of both supporting ILO 169 and strengthening its general application. Additional quasi-legal actions against the Merlin mining concession were filed outside Guatemala by popular organizations and NGOs. A Guatemalan trade union confederation filed a complaint with the ILO
625 itself, alleging that the government had failed to meet its obligations to ensure due consultation. In addition, a local environmental NGO, together with representatives from Sipacapa, filed a complaint with the Compliance Advisory Ombudsman, the office that investigates complaints funded by the World Bank's International Financial Corporation. In August 2005, the World Bank's
630 Compliance Advisory Ombudsman issued a report stating that the bank had failed to consult adequately with the local community or to evaluate properly the environmental and humanitarian impact of the mine.⁹¹ While the outcome

⁸⁹ See, e.g., Alberto Ramírez, *Sin consulta en Rio Hondo y Sipacapa [Without Consultation in Rio Hondo and Sipacapa]*, PRENSA LIBRE, Guatemala, June 16, 2005, available at <http://www.prensalibre.com/pl/2005/junio/16/116742.html>; Sonia Pérez, *Habitantes de Sipacapa tiene vía libre para consulta [Inhabitants of Sipacapa Have Way Free for Consultation]*, PRENSA LIBRE, Guatemala, June 17, 2005, available at <http://www.prensalibre.com/pl/2005/junio/17/116815.html>; Carolina Escobar Sarti, *Aleph. Sipacapa hizo historia [Aleph. Sipacapa Made History]*, PRENSA LIBRE, Guatemala, June 23, 2005, available at <http://www.prensalibre.com.gt/pl/2005/junio/23/117211.html>; Marielos Monzón, *Punto de encuentro: En defensa de Sipacapa [“Meeting Point: In Defense of Sipacapa”]*, PRENSA LIBRE, 28 June 2005, available at <http://www.prensalibre.com/pl/2005/junio/28/117578.html> (all visited last on Jan. 23, 2007).

⁹⁰ The Constitutional Court revoked the provisional suspension of the consultation by the lower court and dismissed Montana's *amparo* claim that the villagers' consultation was unconstitutional. In affirming the right of the villagers to organize such a vote, the Court relied on arts. 6–15 of ILO 169, arts. 65 and 66 of the Guatemalan Municipal Code, and art. 2 of the Law of Urban and Rural Development Councils (*Ley de Consejos de Desarrollo Urbano y Rural*). It also cited arts. 66, 97, 140, 141 and 253 of the Constitution (referring to municipal autonomy), and art. 18 of the Law of Decentralization. For background see Sonia Pérez, *CC valida consultas ambientales: Declara improcedentes tres recursos de minera e hidroeléctrica*, PRENSA LIBRE, April 5, 2006, available at <http://www.prensalibre.com/pl/2006/abril/05/138643.html> (last visited Jan. 23, 2007).

⁹¹ See COMPLIANCE ADVISOR/OMBUDSMAN, ASSESSMENT OF A COMPLAINT SUBMITTED TO CAO IN RELATION TO THE MARLIN MINING PROJECT IN GUATEMALA (Office of the Compliance Advisor/Ombudsman International Finance Corporation/Multilateral Investment Guarantee Agency, Sept. 7, 2005), available at <http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment-English-7Sep05.pdf> (last visited Jan. 23, 2007).

of these transnational actions and of the consultation itself remains uncertain, they represent a watershed in the recourse to national and international legal institutions in defense of indigenous peoples' natural resources and territories.⁹² Subsequent to the Sipacapa poll, other local communities have followed suit, organizing similar consultation processes in opposition to proposals for natural resource exploitation.⁹³

Nonetheless, compared with other cases in Latin America, the judicialization of indigenous rights claims via processes of legal mobilization remains weak in Guatemala. There is currently much discussion about how best to defend the collective rights of indigenous peoples, such as rights to land, natural resources, or due consultation as specified in ILO 169.⁹⁴ While there is little confidence in the national justice system, many indigenous rights activists argue that taking cases to court can play an important role in raising awareness about collective rights and may contribute to changes in government policy.⁹⁵ Some NGOs are discussing the development of programs of strategic litigation, but they face serious financial and logistical constraints.⁹⁶ Nonetheless, it is clear that indigenous activists, communities, and organizations are seeking, with ever greater frequency, new ways of mobilizing domestic and international legal resources and rights frameworks in defense of their interests.

3. Conclusions and comparative reflections

Despite the important precedents established by higher and lower courts, discussed above, the judiciary in Guatemala has not defended the collective rights of indigenous peoples with any great consistency. In this final section I want to compare briefly Guatemala with the (perhaps exceptional) case of Colombia.

⁹² The results of the consultation were presented to the Guatemalan Congress in June 2005. Congress promised to investigate whether or not the results are binding, a process which could take months or even years. As far as could be ascertained, no congressional response has been published to date. In the meantime construction of the mine and plant for cyanide processing of the ore continues.

⁹³ In August 2006 five municipalities in the San Marcos province rejected proposed opencast mining operations in a popular plebiscite, *CENTRAL AMERICA REPORT*, Oct. 13, 2006; similar consultations were reportedly planned over proposed hydroelectric projects in the Ixcán province, *CENTRAL AMERICA REPORT*, Nov. 17, 2006. In March 2006 the International Labour Organization upheld a complaint lodged by a trade union federation alleging the Guatemalan government's failure to ensure consultation, as stipulated by ILO 169, over nickel mining operations in El Estor, in the department of Izabal. *CENTRAL AMERICA REPORT*, March 31, 2006. See <http://www.inforpressca.com/CAR/> (last visited Jan. 23, 2007).

⁹⁴ Author's interviews, Asociación de Abogados Mayas de Guatemala (May 2005).

⁹⁵ *Id.*

⁹⁶ *Id.*

How do we explain the relative absence of judicial action to defend indigenous rights in Guatemala and the progressive and activist role of the Constitutional Court in Colombia? Obviously what follows does not in any way pretend to be a comprehensive comparison. Yet some reflection on the Colombian case can help highlight, perhaps, the specificities in Guatemala and the prospects for a greater judicial defense of indigenous peoples' collective rights in the future. Four elements seem to be particularly relevant: (1) the political context within which rights become justiciable norms; (2) institutional factors, particularly the mechanisms available for the judicial defense of rights; (3) judicial culture and the relationship of the judiciary to the executive and legislature; and (4) the nature and strategy of social movements.

3.1. The political context within which indigenous rights become justiciable norms

In Guatemala the process of attempted constitutional reform and judicial transformation in order to recognize indigenous peoples' collective rights was highly transnationalized and closely bound up with the peace process. It is notable that domestic elites displayed little or no political will to ensure that these commitments were successfully incorporated into national law. This situation contrasts with that of Colombia, where the 1990–91 constituent assembly may be seen as an attempt to reconstruct and broaden the national democratic pact in the face of extreme political violence and corruption. While indigenous peoples' organizations and other social movements played a significant role in the Colombian constituent assembly,⁹⁷ in Guatemala the involvement of the indigenous movement in drafting the proposed constitutional reforms (following the signing of the final peace agreement in 1996) was extremely limited. Indigenous organizations had focused their energies on securing agreements on collective rights within the peace negotiations. This was largely facilitated by the balance of forces and the highly international nature of the peace process. However, their leverage with regard to the subsequent process of constitutional reform was negligible.⁹⁸

One of the most obvious differences between the two countries lies in their respective constitutions. The 1991 Colombian Constitution includes not only individual civil and political rights but also collective social and economic rights. The constituent assembly, which included a number of sectors previously excluded from power, raised expectations that the Constitution would be effectively enforced and new rights guaranteed in practice. By contrast, the

⁹⁷ Three indigenous delegates were elected to the Constituent Assembly out of seventy elected from lists presented by parties and social movements. For discussion of their influence in the assembly, see DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST* 67–68 (Univ. of Pittsburgh Press 2000).

⁹⁸ See KAY WARREN, *INDIGENOUS MOVEMENTS AND THEIR CRITICS: PAN-MAYAN ACTIVISM IN GUATEMALA* ch. 2 (Princeton Univ. Press 1998).

1985 Guatemalan Constitution was drafted in a constituent assembly that
695 was largely orchestrated by the outgoing military regime. Although it did pro-
duce articles recognizing indigenous cultural rights, there was little room set
aside for the representation of social movements or indigenous groups in the
drafting process. Important advances were subsequently made in the recogni-
700 tion of indigenous rights through the peace process. However, the defeat of the
constitutional reform package in 1999 meant that the juridification of the per-
tinent articles remained weak. In the absence of strong constitutional guaran-
tees, indigenous communities and activists have looked to the international
instruments ratified by the Guatemalan state to guarantee their rights, specifi-
cally to ILO 169. However, the legal status of indigenous rights to jurisdictional
705 autonomy and to due consultation remains highly controversial.

3.2. Institutional factors, particularly mechanisms available for the judicial defense of rights

In Colombia, the 1991 Constitution established not only a wide range of
rights but also legal mechanisms for their protection. Direct popular access to
710 judicial review is provided for through the mechanism of *tutela*.⁹⁹ The
Constitutional Court's jurisprudence on *tutela* appeals has defended indigenous
rights and, more generally, interpreted rights guarantees in a progressive
fashion.¹⁰⁰ *Tutela* writs are cheap, easy to lodge, and widely used by different
sectors of the population. In the first ten years of the new Constitution over
715 450,000 *tutela* actions were brought before the courts. By contrast, direct pop-
ular access to judicial review in Guatemala—the mechanism of *amparo*—is not
so citizen-friendly.¹⁰¹ Whereas the *tutela* can be used by anyone to protest a
violation of their constitutional rights before the courts without the need for a
lawyer or written documentation, it is impossible to file an *amparo* writ without
720 the support of a lawyer.¹⁰² In fact, it is notorious that recourse to *amparo* tends
to be used more often as a delaying tactic by those attempting to evade justice

⁹⁹ COLOM. CONST. art. 86.

¹⁰⁰ Rodríguez et al, *supra* note 21, at 158. In Guatemala a total of 18,144 claims of unconstitutionality were filed with the Constitutional Court between 1996 and 2004. See, e.g., children's fundamental right to health (Case No. SU-043/1995); rights to minimum subsistence income (Case No. T-426/1992); labor union rights (Case No. SU-342/1995); personal appearance (Case No. SU-642/1998); homosexual couples (Case No. SU-623/1997); right to education (Case No. SU-624/1999); equality of religions (Case No. C-027/1993); abortion (Case No. C-647/2001); euthanasia (Case No. C-239/1997). For an excellent discussion of the Court's most controversial decisions, see Manuel Jose Cepeda Espinosa, *The Judicialization of Politics in Colombia: The Old and the New*, in *THE JUDICIALIZATION OF POLITICS*, *supra* note 17, at 67–103, esp. 80–88.

¹⁰¹ *Id.* In Guatemala the total number of claims of unconstitutionality filed with the Constitutional Court between 1996 and 2004 was 13,463. See <http://www.cc.gob.gt/docs/expedientes.htm> (last visited Jan. 24, 2007).

¹⁰² Colom. Const. art. 272; Ley de Amparo, Exhibición Personal y de Constitucionalidad [Law of amparo, habeas corpus and constitutionality], Decree No. 1-86.

than as an accessible means for the underprivileged sectors to defend their fundamental rights. Defense lawyers frequently abuse the *amparo*, alleging a violation of constitutional rights of due process, in an attempt to delay or prevent criminal prosecutions of their clients.¹⁰³ In Colombia, *tutela* writs must be decided by the courts within ten days¹⁰⁴ and are generally dealt with quickly. In Guatemala, the average duration of an *amparo* appeal is over three months, even though the law expressly sets shorter time requirements.¹⁰⁵ Repeated attempts have been made to reform the *amparo* law to prevent its abuse by litigants, but, to date, these have met with little success in Congress.¹⁰⁶ In short, not only are the collective rights guaranteed by the Constitution weak in Guatemala, so too are the mechanisms for popular access to constitutional review. Whereas in Colombia the *tutela* is now firmly established as an important resource for social movements to advance their demands through the courts, the same cannot be said of the *amparo* in Guatemala.

3.3. Judicial culture and the relationship of the judiciary to the executive and legislature

In Colombia, the progressive stance adopted by the Constitutional Court with respect to the defense and guarantee of indigenous peoples' collective rights can be partly explained by broader historical trends in the relationship between the judiciary and the other branches of government. The judiciary has traditionally played an important role in national political life. Indeed, as a number of analysts have argued, the hyperlegality of institutional life in Colombia is related not only to strategies adopted by elites to secure their legitimacy but also to a deep-rooted historical tradition of relative judicial independence from executive power and judicial review.¹⁰⁷ In Guatemala, by contrast, the judiciary has historically been subordinate to executive and, specifically, to military power. This partly explains its singular failure to defend the fundamental rights of citizens in the face of grave and systematic violations of human rights perpetrated by the state during the counterinsurgency war. The transition to constitutional rule in the 1980s and the peace process of the 1990s introduced a number of mechanisms to increase judicial

¹⁰³ See MINUGUA, Eighth Report, para 72, U.N. docs. A/49/856 and Corr.1, A/49/929, and A/50/482 (criticizing this abuse and citing statistics from the Court for 1996 and 1997 indicating that some four out of five *amparo* applications were dismissed).

¹⁰⁴ COLOM. CONST. art. 86.

¹⁰⁵ GUATEMALA COUNTRY REPORT, *supra* note 3 at ch. IV, para 41.

¹⁰⁶ Author's interview with Luis Ramírez, Instituto de Estudios Comparados en Ciencias Penales de Guatemala (April 2005). For procedural requirements, see Ley de Amparo, Exhibición Personal y de Constitucionalidad [Law of amparo, habeas corpus and constitutionality], Decree No. 1-86, arts. 33–41.

¹⁰⁷ See Manuel José Cepeda, *supra* note 100; Uprimny & García Villegas, *supra* note 18.

independence, and the opposition of the Constitutional Court to the attempted *autogolpe* of President Serrano in 1993 constituted an important watershed. However, during the FRG government of Alfonso Portillo (1999–2003) the executive exercised considerable behind-the-scenes pressure to secure a more pliant Constitutional Court.¹⁰⁸ Rather than a sustained trend toward the judicialization of collective rights claims, Guatemala has experienced a creeping politicization of the judiciary in recent years. In addition, a conservative, formalist ethos continues to characterize the legal profession—judges tend to focus on applying the letter of the law, rather than on the creative interpretation of existing statutes and constitutional articles.¹⁰⁹ In fact, most judges and lawyers are unwilling to accept abstract constitutional principles as law, arguing that implementing or secondary legislation is necessary in order to make them justiciable.¹¹⁰ This stance, combined with the innate racism that pervades the profession—as it does most of Guatemalan society—means that the judiciary has not taken a proactive role in defense of indigenous rights.

However, it should also be emphasized that a progressive, proactive jurisprudence regarding indigenous rights developed by the higher courts can coexist with the routine abuse of collective rights and fundamental human rights by the ordinary justice system. This is the certainly the case in Colombia. As César Rodríguez, Mauricio García-Villegas, and Rodrigo Uprimny have pointed out, it is perfectly possible, it seems, to have an activist judiciary in the high courts that defends collective indigenous rights but, at the same time, a very weak culture of judicial defense of rights in general.¹¹¹

3.4. Nature and strategies of social movements

In Colombia, a number of reasons have been given to explain the widespread recourse to judicial resources by a broad range of social movements and what some have referred to as the hyperlegalization of collective rights claims. In a context of extreme violence linked to the armed conflict, strategies of legal mobilization are a less lethal form of trying to secure collective entitlements than mass mobilization.¹¹² The progressive stance of the Constitutional Court on indigenous rights has also reinforced the tendency of indigenous social

¹⁰⁸ The decision of the Constitutional Court in July 2003 to admit the *amparo* presented by Ríos Montt, which opened the way to his presidential candidacy, was widely attributed to pressure from the executive branch. See *supra* note 55.

¹⁰⁹ See Coralia Orantes, *Eliú Higueros ofrece cambiar imagen del organismo judicial [Eliú Higueros Offers to Change the Image of the Judiciary]* (interview with Eliú Higueros, president of the supreme court), *PRENSA LIBRE*, Guatemala, Oct. 18, 2006, available at <http://www.prensalibre.com/pl/2006/octubre/18/154245.html> (last visited Jan. 23, 2007).

¹¹⁰ Author's interviews, Asociación de Abogados Mayas de Guatemala and Instituto de Estudios Comparados en Ciencias Penales de Guatemala (May–April 2005).

¹¹¹ Rodríguez, García Villegas & Uprimny, *supra* note 45, at 173.

¹¹² Uprimny & García Villegas, *supra* note 18, at 262.

movements to judicialize their claims. This is not so much the case in Guatemala.

785 In addition to the normative and institutional impediments to judicializing
indigenous collective rights, there is less consensus within the organized indig-
enous movement that a judicial strategy is the best option. The chance of
securing significant gains through the courts is slim. In addition, the resource
constraints facing indigenous organizations are huge. In contrast to Colombia,
790 there is no one element of the judiciary that is widely perceived as a champion
of collective rights. Nonetheless, human rights organizations have pursued
their demands against impunity through the courts for many years and in
increasingly innovative ways including, for example, the current attempts to
secure prosecutions of former military officers for genocide.¹¹³

795 The strategic use of law by social movements remains incipient, but it is a
growing trend. The indigenous movement in Guatemala faces a structural
problem: its leaders tend to be educated, urban elites who confront major diffi-
culties in convincing the majority of indigenous people—most of whom are
poor, illiterate peasants—of the utility of adopting strategies of legal mobiliza-
800 tion. Yet recent developments indicate that indigenous activists and communi-
ties throughout the country are starting to employ appropriate legal instruments
in new and creative ways. Ultimately, the judiciary in Guatemala has adopted
a reactive rather than a proactive stance on indigenous collective rights.
Nonetheless, in the medium term, the courts may yet prove to be a forum for
805 advancing a new conception of rights.

¹¹³ In 1999, Guatemalan Nobel Peace Prize winner Rigoberta Menchú and a group of Spanish and Guatemalan nongovernmental organizations filed a petition before the Spanish Audiencia Nacional seeking the prosecution of people involved in abuses during the armed conflict, including a 1980 military assault on the Spanish Embassy, which killed thirty-seven people. The petition was initially dismissed on grounds of nonadmissibility, but in September 2005 Spain's Constitutional Tribunal ruled that Spanish courts could exercise universal jurisdiction over war crimes committed during Guatemala's armed conflict, as universal jurisdiction outweighed national interests in cases of genocide. See Audiencia Nacional, judgment of 13 December 2000; Tribunal Supremo, judgment of 25 February 2003. Both decisions are available at <http://www.derechos.org> (last visited Jan. 23, 2007). See also Guatemala Genocide, Judgment No. STC 237/2005 (Tribunal Constitucional Sept. 26, 2005), at <http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html> (last visited Jan. 23, 2007). In June 2006, Spanish judge Santiago Pedraz traveled to Guatemala to interview former military rulers for their roles in suspected genocide, torture, and illegal detention. Two of eight former military officers named in the petition were subsequently arrested, although at the time of writing none has been convicted. See *Spain judge begins investigation in Guatemala genocide case* (JURIST, June 26, 2006), available at <http://jurist.law.pitt.edu/paperchase/2006/06/spain-judge-begins-investigation-in.php> (last visited Jan. 23, 2007); *Crimes against humanity remain unpunished in Guatemala*, AMNESTY INTERNATIONAL, Nov. 17, 2006; available at <http://web.amnesty.org/library/Index/ENGAMR340352006> (last visited Jan. 24, 2007).