MAYAN SPIRITUALITY AND LANDS IN GUATEMALA

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I. BACKGROUND

In order to understand the issue of Mayan spirituality and land rights in Guatemala, it is important to know the contextual background of the people. Before the Spanish Conquest, the Mayas occupied an extensive territory, covering what is now known as Chiapas and Yucatan in Mexico, Guatemala, and Belize. According to archaeological investigations,[1] the Mayan territory that occupies parts of these three countries includes a number of linguistic territories that are still used and one that has died out (*Chikomuselteko*).

There are twenty-one territories settled in Guatemala today defined by language, and they are: *Achi*, *Akateko*, *Awakateko*, *Chorti*, *Cluj*, *Itza*, *Ixil*, *Popti*, *Kanjob'al*, *Kaqchikel*, *K'iche'*, *Mam*, *Mopan*, *Poqomam*, *Pocomchi*, *Q'eqchi* (which extends up to Belize), *Sakapulteko*, *Sipakapense*, *Tektiteko*, *Tz'utuhil*, *Uspanteco*. But in Chiapas and Yucatan there also exist *Teko*, *Mocho' Tjolab'al*, *Tzotzil*, *Tzleltal*, *Chol*, *Chontal*, *Maya*, *Lakantun*, *Wasteko*.[2] As well as language, there are other features that provide strong identity bonds, for instance, clothing, social organization, traditional authorities, spirituality, and other elements.

Although there are Mayas living in three different nations, Mexico, Guatemala, and Belize, their economic situation is similar. They suffer quite strong discrimination as a result of the loss or negation of their rights. In the case of Guatemala this situation can be easily seen in the vestiges of an internal armed conflict that lasted more than thirty years and whose victims were almost all Mayan – 83.33% according to the February 1999 report of the Commission for Historical Clarification of Human Rights Violations and Violent Acts which have Caused Suffering to the Guatemalan Population (CEH), "Guatemala, Memory of Silence" (*Memorias del Silencio*).[3] In the conflict that began in Chiapas in 1994, and lasted for nine years, the largest number of victims were also Mayan. The conflict is currently under a ceasefire agreement.

Although there is no civil war in Belize, there is a territorial dispute between Belize and Guatemala, and this has repercussions for the Mayas living along what is now known as the "imaginary line," as well as those

1. NORA C. ENGLAND, INTRODUCTION TO LINGUISTICS – MAYA LANGUAGES 8 (1988).

2. Without the completion of proper research or linguistic studies having been completed, as a response to party politics rather than linguistic criteria, in May 2003, the Republic of Guatemala's Congress decreed Chalchiteko (which is a variation of Awakateko) another official Maya language. This was without opposition from Guatemala's Academy of Maya Languages, which in this respect is the authority charged with the relevant studies and research.

3. U.N. VERIFICATION MISSION IN GUATEMALA (MINUGUA), VERIFICATION REPORT OF SEPTEMBER 2001: THE INDIGENOUS PEOPLES OF GUATEMALA: OVERCOMING DISCRIMINATION IN THE FRAMEWORK OF THE PEACE AGREEMENTS.

living just within the boundaries of the two countries. On several occasions, the Belizean Army killed *Q'eqchi* people and justified it as a territorial invasion into Guatemalan territory. This has been vehemently opposed by the indigenous peoples on a number of occasions. The Mayas living in Belize do not appear to have any major complaints about their situation at present.

There are definite socioeconomic characteristics today that go beyond identity and culture, and are common to all indigenous peoples such as extreme poverty, exclusion, discrimination, lack of respect, as well as the need for promotion and recognition on the part of the states to serve as the framework for awareness of the reality in which they exist. The development of new state policies on lands and natural resources, agro-industrial businesses, tourism, pharmaceutical companies, and drug trafficking (i.e., modernization) threatens to result in the extinction of culture in its most diverse forms – social, cultural, and economic. Traditional territories, lands that once belonged to indigenous people, are now passing, with or without authorization, into private hands for the purpose of making them "productive." Although in some cases indigenous people assent to this alienation, in many cases, these transfers occur as a direct result of pressure on or threats against the indigenous person, authorities or communities that have had possession of these territories for hundreds of years.

The importance of confronting these situations on the part of the State on one hand, and the indigenous organizations or authorities themselves on the other, is a complex issue. Although one of the major commitments of the State is to guarantee equality among its citizens, what is established in law is not carried out in actual practice. This basic principle of co-existence must be reinforced with greater effectiveness by the States. The right to equality should not necessarily be interpreted on biological or physical grounds, but through conceptions that go beyond the over simplifications frequently used by those who endorse the idea that to exercise, respect, recognize, defend, or promote indigenous rights will result in the creation of one state within another. For this reason, the right to be different is of vital importance for indigenous peoples. The Constitutional Court indicated the following within the context of the question whether or not International Labor Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples, 1989, violates the Constitution of Guatemala:

> Guatemala has endorsed, approved and ratified several international legal instruments on the recognition, promotion and protection of human rights of the inhabitants in general and of those who are nominally designated as indigenous peoples on previous occasions. Nevertheless, taking into account the rules of democracy which are formal and valid for all, in actual reality there exists an evident inequality for indigenous peoples in relation to other sectors of the population. For this reason, the Convention was designed as a legal mechanism especially directed towards eliminating some of the obstacles that prevent these peoples from the real and effective enjoyment of fundamental human rights, so that at

> the very least, indigenous peoples can enjoy these rights on an equal basis as the other members of the society.[4]

And with reference to the principle of equality:

> [T]he principle of equality, stated in Article 4 of the Political Constitution of the Republic requires that equal situations should be substantively dealt with in the same manner; but for this principle to go beyond a purely formal meaning and to be really effective, it is also required that different situations be treated in unequally, in accordance to their differences.[5]
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> [F]requently this Court has opined that the recognition of different conditions does not imply violation of the equality principle whenever such differences are based on reasonable grounds.[6]

In the case of the indigenous peoples the situation becomes particularly complex because laws change arbitrarily. The Political Constitution of the Republic used to regularly change in Guatemala, whenever there was a *de facto* government as a consequence of the so-called *coup d'etats*. Thus, while Article 96 of the 1945 Constitution of Guatemala stated that indigenous lands are inalienable and indefeasible, subsequent constitutions omitted that provision, allowing many arbitrary actions to take place to such an extent that one of the dominant aspects of the internal conflict was the dispossession of indigenous lands (both private and collective) at the hands of the military and of civilians occupying influential government positions.

At present, the original owners are trying to regain possession of these lands but face difficulties, as the present occupiers had the lands registered in their names and have title deeds as evidence. As these persons were the ones in power at the time of the dispossession, there were no questions asked when registering the land in their names. At that time, any land owned by a person without power could pass without any explanation whatsoever to the hands of someone who was in a position of power, or who had connections to those who did.

Things do not change much with regard to spirituality. With the arrival of the Spanish, Catholicism was imposed. Since then, many religions have emerged which, as a whole, have exerted a great influence on indigenous

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4. Consultative Opinion issued at the request of the Congress of the Republic, Gazette No. 37, File No. 199-95, 9. Resolution No. 18-05-95: *Political Constitution of Guatemala and its interpretation by the Constitutionality Court*, Aug. 2002, 63.

5. Gazette No. 24, File No. 141-92, 14, op cit.

6. Consultative Opinion issued at the request of the President of the Republic, Gazette No. 59, File No. 482-98, Resolution 04-11-98, op cit.

peoples and have served as instruments of domination. The indigenous peoples were taught not to protest, and if they did, then they were then severely punished. In this situation of slavery, there was little allowance for the exercise of indigenous rights.[7]

While it is unnecessary to make a chronology of religious events, one of the cruellest periods was during the civil war (which ended in 1996), when many people were forced to either accept Christianity or face death. Evangelical churches mushroomed in far away communities, where the violence and cruelty of the civil war was at its most extreme. The churches had orders to monitor and control the movement of the local population, and this provided the perfect means for the dissemination of their religion. In colonial times, too, indigenous authorities were coerced into accepting the colonial religion and offered privileges for their compliance, or punished for their rejection. Thus, what happened during the internal armed conflict (i.e., between 1962-1996, but especially from 1982 onward) was a repetition of the policy practiced by the conquistadores, in different forms and manifestations whenever deemed necessary.[8]

In spite of the imposition of Christianity, the indigenous peoples in Guatemala, as in other parts of America, managed to retain their spiritual practices. This is gradually coming to light. This does not mean that indigenous spirituality, as in the case of Guatemala, was not influenced by Christianity. However, the essence was preserved, and neither Judaism nor Christianity was able to erase it completely, despite the zealous stigmatism of indigenous spirituality as being associated with satanic practices and witchcraft. This accusation has no basis, and indigenous spirituality cannot be judged of something it does not practice, and it cannot be criticized from the perspective of religious bias. Also, it cannot be stated that all Mayas in Guatemala practice Mayan spirituality; there are many who reject and

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7. In the cases when peasants refused to be exploited that way, colonizers resorted to force and brutality to persuade them otherwise. Thus, although in theory community peasants were the owners of the land they tilled and had local authorities elected by them, the fact that they had to pay taxes and were recruited as forced labor for public works, building churches and homes for the colonizers, made them veritable vassals of the Crown and of the colonizers. J.M. FERNÁNDEZ & J.C. CAMBRANES, SOCIOECONOMIC ASPECTS OF AGRARIAN OWNERSHIP. 500 YEARS OF STRUGGLE FOR LAND 179 (1992).

8. Thus, Colonization and Christianization must be understood as a single undertaking by virtue of the inextricable alliance that existed at that time between the political power of the State and the religious power of the clergy. As a result of a policy of expansion of the Spanish state, the lands and the inhabitants of the New World inevitably fell under the control of the Spanish Crown; on account of missionary action, the invaded peoples remained, for that same reason, subjected to Christianization. This is why, when talking about missionary action it should be understood that this practice represents an ideological dissemination, an ideology that involves the entire political, economic, social and religious Western European universe. Since then until today, and despite the schism between the powers of Church and State, both – each according to its own interests – continue to tread the same, still unfinished, road of the horrendous adventure of Judeo-Christian and colonial aggression. ANTONIO POP CAAL, 30 (citing Guzmán Bockler).

stigmatize it.

The spiritual dimension of indigenous lands is very important for indigenous peoples, and the major centers for spirituality are located in indigenous territories. In Guatemala there are sacred places where indigenous rituals are performed, sometimes in order to maintain a link to nature, for the use of land, for natural phenomena, as a way of thanksgiving for the produce received during a specific season, or generally for giving people the opportunity to live, that is, the gift of life.

Religious persecution has also been associated with dispossession of indigenous lands, both individually owned and those belonging to the community. The loss of lands causes a weakening of spirituality. This is the result of a policy that has always been supported, as mentioned earlier, and that is difficult to override. Why should something that is working and gives such good results be discarded? That could be the question that technocrats, politicians and those in power in Guatemala ask themselves. It is not difficult to answer either: the best results are gained by keeping people from understanding the language of power, to keep them immersed in poverty and illiteracy, but well trained in obedience through religion. This is the message, the policy and the situation, which leaves in its wake the marks of destruction and of poverty. In conclusion, the linkage of the issue of lands with an attack on indigenous spirituality, in Guatemala as in many others parts of America, aggravates the problem for indigenous peoples, who strive to maintain these among other elements of their rights and identity as indigenous peoples.

II. SPIRITUALITY

This Article explores indigenous spirituality as an important factor in the development of communities and for the practice and enjoyment of their rights. However, this is a subject that is not easy to address, especially when considering that there are many religions involved with dogmas that have deeply permeated people and communities.

The problem becomes even more complex when trying to address indigenous spirituality as a pure, untouched religion, without any external influences. However, it is not necessary to relate it with concepts, which although of influence, did not infiltrate the foundations. Only through the resolve of many persons, especially the elders, has it been possible to maintain and transmit traditional spirituality to new generations.

Indigenous spirituality, especially that of the Maya in Guatemala, is based on the Mayan calendar, a complex system of counting time with a year or agricultural cycle of 360 days, with an additional five days at the end of each cycle to balance positive and negative issues that have occurred, and to set priorities for the future. This type of counting has fallen into disuse and is currently unknown, although it has recently sparked the interest of some indigenous and non-indigenous specialists.

There is also a calendar denominated as Sacred, and related to the human being. It has approximately 260 days, the average length of human gestation. Because it is associated with human beings, this calendar closely

governs Maya conduct, illnesses, attitudes, interests, etc. It is, therefore, not surprising that this type of counting is associated with the practice of magic rituals, while in reality it seeks the balance between nature and all beings, including humans. The Mayan calendar governs the agricultural cycle, the regime of nature and the seasons, solstices, equinoxes, etc., while the sacred calendar is associated with the human life cycle. Thus, calendars represent a constant search for the balance between humans and nature, a balance that is always being disrupted by human beings themselves.

In indigenous spirituality, especially Mayan, nature is seen as a component of the collective life, while the Christian religion individualizes the relationship of man with nature, and perceives Nature as resources for the use of mankind, some renewable and others non-renewable. In this situation we cannot hide the fact that some indigenous peoples also visualize the relationship between nature and man in an individualistic way and view this relationship from a less traditional perspective. More and more Mayans are losing their perspective of the cosmological relationship with nature, and of collective rights.

Within the broad spectrum of religious-economic relationships, it is also important to analyze the role of the Christian churches in the persecution of and aggression toward indigenous spirituality. Before doing this, however, it is important to ask oneself: in the 21st century, why is indigenous spirituality still being discredited and exterminated? Why do State and Church continue to promote the disappearance of indigenous spirituality? Why are indigenous elders, shamans, and indigenous spiritual guides being annihilated? Why are modern structures being built in sacred places that destroy indigenous spirituality? And finally, if religion is protected under many national and international instruments as one of the basic human rights, why is it that indigenous spirituality is still being persecuted, defamed, destroyed, and desecrated?

It is important not only to answer these questions, but also to answer many others that emerge from the practice of indigenous spirituality under disadvantaged conditions and abuse from followers of the Christian church. The first two questions are associated with policies or preservation of a colonial state, which continues to grant privilege and attempts to subjugate everyone by any means possible. The most effective method from colonization to today has been "Christianization." Perhaps one of the most important elements of the Christian faith for the oppression of indigenous people was its premise that suffering on earth is rewarded in an eternal paradise.[9]

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9. The leaders of the Catholic Church, within the Latin-American Bishopric Council (CELAM), have recently issued a statement specifying their strategies to eventually implement total Christianization of Indigenous peoples, under the banner of a "New Evangelization." They say: "[T]he Bishops assembled herein, faced with the urgent challenges that confront evangelization, at the present historical juncture, share our reflections and the commitment we assume to firmly persist in our endeavor to replace pastoral care for Indians with pastoral care by Indians, which can lead us to the rise of autonomous churches in the region. A necessary condition to tread this long road is true love for our indigenous communities, variously reflecting the image of

Christianity was instrumental in keeping the colonizers in power. This is the basis for the motivation of Christian churches to redouble their efforts to continue with their 'evangelical mission' or in other words, to continue with their colonizing work which does not accept anything other than their language, their religion, their priests, and their dogmas. Thus, the Church has actively pursued the annihilation of any other form of religion that could prove damaging.

Within this context, Mayan Spirituality suffers from a strong Christian intervention in some aspects, while it is free from its influence in others. This does not necessarily exclude the coercion exerted on the practice of Mayan spirituality, both in private and public, or on the freedom of religious practice per se. This relationship is described by Antonio Pop Caal in J.M. Ots Capdequi in *El Estado Español en las Indias* ("The Spanish State in the Indies") as follows:

> In these territories, the conversion of Indians to the Christian faith and the defence of the Catholic religion, was one of the principal concerns of the policy of colonisation of the Spanish monarchs, an attitude that was reflected extensively in the denominated "Law of the Indians."[10]

The subtlety of evangelization, the work that was carried out and is yet not concluded, endorses a regime of exploitation of indigenous peoples. Although it has encountered resistance, and the strategy has been changed, the indigenous peoples have had painful experiences in this process evidenced by massacres, land dispossession and religious persecution such as that taking place in Chiapas, Mexico (from 1994), and the recently concluded civil war in Guatemala, which are graphic demonstrations of this crude reality.

In compliance with the Agreement on Identity and Rights of Indigenous Peoples (a component of the Peace Agreements of 1996), a commission for sacred places with representatives of the government and of indigenous peoples was established. Its main responsibility was to identify sacred places existing in Guatemala. This committee's work proceeded without major difficulties until 1998, when it included major tourist attractions such as Tikal, the Atitlan Lake, and other such sites as sacred places. These places are part of the tourism economy sector (hotels, restaurants, airlines) and represent some of Guatemala's major sources of foreign currency. The definition of these areas as sacred also meant that several laws would have to be amended, particularly the legislation on cultural

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Christ like numerous branches and leaves that grow from the same trunk of the same history of Man's salvation. In this thought, which we share with other members of the pastoral care movement, we further pursue our endeavors to grasp indigenous realities and promote their evangelization, to learn what the Lord demands from us, as pastors of these peoples and to find the elements of this New Evangelization that the Pope is asking from us in this critical juncture of History." POP CAAL, 38 (citing from the First Bishopric Meeting of Pastoral Care for Indians, Mexico, 1989).

10. J. M OTS CAPDEQUÍ, 29.

heritage. When the committee could not reach agreement on the issue, the committee was dissolved. The main issue of disagreement was the participation of the indigenous peoples in the co-administration of the sacred places, although this condition is already included in the aforementioned Peace Agreement.

In October 2000, the Committee was re-instated, but has made no significant decisions since the objectives stipulated under the Peace Agreements need to be implemented through legal reforms, a difficult task contingent on government commitment. The indigenous representatives of the committee also appear to be detaching themselves from the initial proposal and are now promoting a proposal to regulate the sacred places, which they will continue to negotiate with the government members. No significant progress is foreseen for the near future.

III. LANDS

A socioeconomic aspect of great significance in Guatemala that has not yet been resolved is that of lands, in its diverse forms of ownership, individual, private and collective. The aim of analyzing this issue is to find solutions, for the medium- and long-term, as short-term solutions, are generally merely superficial. Private ownership of lands appears to be gaining ground with the adoption of laws that neither respect nor recognize the lands of indigenous communities. There is an ongoing process of divesting indigenous communities of their rights to their ancestral lands and converting them into private property. This task is usually done by *Ladinos* or *Mestizos* who today hold power in the three principal branches of government, the executive, the legislative and the judiciary, and at all levels in the local and national institutions.

Generally, without entering into details on each aspect, this situation can be divided into two time periods: (1) that linked to old and recent history, and (2) the various solutions chosen depending on the moment in time and the means. It would be too lengthy to undertake an exhaustive account of the early history of Guatemala, and that is not the objective of this Article. However, it is important to know some key events in order to understand the roots of the problem and the basis for the current situation of land tenure in Guatemala.

A. Pre-Hispanic Period

During this period, the lands that were inhabited in America were those of the indigenous peoples. In this context, this was present-day southern Mexico, Belize, and Guatemala, countries that were originally the lands of the Maya, and it was not until the arrival of the Spanish conquistadores that the lands changed hands. Some studies put forward the argument that at this period in time, land was not perceived as a means of production, and it was only when the lands passed to the Spanish Crown as "conquered lands" that they gained this status.

However, some other authors, such as J. C. Cambranes, when referring to the work of Friedrich Katz, indicates that in Aztec society there were diverse and sophisticated forms of land ownership including the following: (1) the lands of the *calpullis* or communities; (2) private property which could be divided into that of (a) the nobles, (b) the peasants called *teccállec,* (c) the warriors or *tectecuhtzin*, (d) the slaves or *mayeques*, and (e) for leasing; (3) public property lands divided into that of (a) sovereign lands, (b) temple, (c) the palace or *tecpantlalli*, (d) the judges, and (e) for war or *milchimalli*; and (4) the lands for the subjugated peoples. Cambranes also cites the work of Alfonso Villa Rojas, which indicates that at the beginning of the 16th century there were different modalities for land ownership among the Mayas in the Yucatan which included: (1) the lands of the state or province; (2) the lands of the peoples; (3) the lands of the *calpulli* or small holdings/plots; (4) lands of the nobility; and (5) private lands.[11]

In Carmack's *The Evolution of the Quiche Kingdom*, Carmack is more cautious in his approach when dealing with the issue of land ownership among the Quechua/Quiches. According to him, Quechuan nobility had three types of territory under its control: (1) *Tinamit*, where the urban centers were settled; (2) *Chinamit*, the area surrounding the urban centers and administered by the most important leading families; and (3) *Calpulles*, the larger, more dispersed territories administered by confederated families.[12]

These classifications, although important as background knowledge, bear little relevance to the current forms of indigenous land ownership because, at that time, it dealt with members belonging to the same indigenous peoples. The *Creole*s and the *mestizos* had not yet formed a socio-economic relationship with the indigenous peoples, as is the situation today where they are in a dominant position and continue to prevail over the indigenous peoples. This supremacy also led to the process of land dispossession of the indigenous peoples, a process that continues to this day.

Even when such studies indicate that the indigenous peoples too had a land use system, there was no clear evidence of an irrational use of land, and nature was part of human existence. Some other studies reveal that the Mayas established commercial relations with other peoples, but did so without exploiting natural resources the way it is done today, with almost uncontrollable use by industry and big businesses.

Research on land tenure of Mayan territories during pre-Hispanic times were conducted by adapting them to the current forms of land tenure, and, in some cases, by comparing them to feudal or monarchical forms. However, these studies also indicate that the same land tenure system is in use but with different characteristics and rules, especially those of a collective nature, and this regulatory framework is in reality customary law. In this regard, Cambranes documents:

> Three decades ago it was considered regrettable that, after more than a hundred years of scientific investigations on

11. FERNÁNDEZ & J.C. CAMBRANES, *supra* note 7, at 20-21.
12. *Id*. at 22.

> civilisation, the most elemental study on rural property does not yet exist, despite the great importance that land had in that agrarian society. That error has been ascribed to the lack of interest shown on the topic of land by the first journalists and historians who wrote about the existing socio-economic and political conditions in Yucatán Peninsula during the pre-Hispanic period. Diego de Landa – the Spanish bishop who, in his personal ideological warfare against Mayan religious beliefs, destroyed and burnt inimitable documentary treasures written about ancient civilisation – referred to the topic of land ownership among Mayas in an ambiguous manner in his work, *Relationship of Items of Yucatán*, limiting his references to state that the fields they cultivated "were common."[13]

From the above it is worth noting the following. First, Cambranes puts rural connotations on a conceptualization of social classes, but he does not state clearly the moment when Mayan lands or territories were divided into rural and urban. This methodology was also used by the Spanish when they built the "Indian Towns" where indigenous people were settled far from the urban centers where the church, the colonial authorities and the *mestizos* (then and *Ladinos* now) lived. This is when the concept of the "rural" inhabitants was established, and associated with the Mayas, and even today in Guatemala, the Mayas represent a high percentage of rural dwellers. What needs to be examined in greater detail is whether in essence Mayan society was really an agrarian community as indicated in the study as it seems to confuse pre-Hispanic Mayan society with current concepts of what is "rural." Second, the lack of interest of the early journalists and historians in the topic of land during the pre-Hispanic period, sets certain margins for speculation on what they wrote. Third, the text also highlights the sanction of religious persecution through ideological warfare against Mayan religious beliefs, which was as inconceivable as the burning of valuable scientific documents.

Without discarding the terminology used in pre-Hispanic times, it should be dealt with carefully in order not to associate what is pre-Hispanic Mayan with the form and ownership of lands these days. It can serve as a framework for comparison, but without it being taken as confirmation that this is how it was, for example in the case of the urban and rural lands. However, it is clear that, as Alberto Ruz Lhuillier wrote:

> We should not succumb to the sentimental and false attitude of thinking that Mayan society was an idyllic society where everyone was happily working for the sole purpose of serving their gods, as written by some distinguished Mayan experts. The brilliance of Mayan civilisation is not a unique case in world history; it is not a noble phenomenon, the price the Mayan people paid, for centuries, with hunger and misery, from ignorance of the tremendous exploitation imposed as a

13. FERNÁNDEZ & J.C. CAMBRANES, *supra* note 7, at 7.

> consequence of religious dogmas . . . .[14]

Finally, although, in essence, the practice of land possession is not the same and there are only some remnants of collective lands left. Collective ownership is presently maintained, but it was also strategically used before by colonizers, then by the owners of ranches and currently by those who have abused their power. Thus, collective ownership of lands is not something derived from colonization only; it was used as a means to their ends, servitude and taxation, among others. That could explain some of the land conflicts that Guatemala has had since colonization and most surely in many other places where there are indigenous peoples, in America and in other parts of the world.

B. The Colonial Period and Independence

Although the dominant characteristics changed, it can be said that indigenous subjugation and subordination policy continued after independence. With regard to lands, when passing from one time period to another, feudal possession of lands passed through *Creole* families whose lineages still continue. These periods are characterized by the regulation of lands in favor of indigenous people, but aimed at controlling population as labor, and by the land taxes that were to be paid first to the Crown and later to the government. They began by regulating lands by means of contracts that were later included in the Compilation of Indians. By that time there was a colonizing law that facilitated emigration from Spain and granted unlimited powers to invaders and to the first settlers so that they could distribute lands among themselves.

> Before the abuses of the colonizers, a number of laws were established which regulated this, however in reality, when conquerors arrived, land possession, which had initially been performed without control whatsoever, meant in fact seizing properties from indigenous people. At the same time the king hoped to defend this group from the unjust acts committed by the conquerors.[15]

Paradoxically, that trait prevailed and is still maintained at present. The proof is that regulations in defense of indigenous rights are systematically ignored by the very people who endorsed them. This topic will be discussed in more detail below.

What was stated above demonstrates that there was not actually a clear policy of protection or defense of indigenous rights for their lands and territories, but a mockery to their interests expressed by laws that did not exert influence on those violators who knew precisely the distance between where the laws were made and where they would be enforced. For example, the

14. *Id*. at 11.
15. *Id*. at 75.

Spanish Crown issued bonds that were meant to regulate the purchase of lands by the Spanish from indigenous people, and to control the movement of lands during the 16th century by means of title deeds. Later, with new regulations and knowing of the abuses by the Spanish who occupied lands that way, this was labelled the *composición*.[16] It consisted of the payment of a reasonable price for lands that were held illegally in exchange for a title deed. As previously stated, lands were the means to obtain funds using this mechanism.

It could be hoped that things would change for the indigenous people in the era after independence from the Spanish Crown, since independence was declared in order to stop paying taxes to Spain and to become a completely free nation and not a colony. But this did not happen. For indigenous people, the proclamation of independence meant only a change of regime and of those in power. Perhaps what the *Creole*s really feared was that one of the attempts, termed "Indian rebellions" in those days, would be successful and bring about changes that were to their disadvantage. There are studies recording more than three hundred incidents of indigenous "insubordination," or rebellion against the Spanish settlers during that period. Of these, an 1820 rebellion led by Atanasio Tzul and Lucas Aguilar against taxes imposed on indigenous peoples, one year before the independence of Guatemala, had major impact. It is evident that indigenous people passed from being owners of the lands to being serfs. Even in this difficult situation, they managed to keep not only the lands of indigenous people during the colonial days and the following period, but also some collective lands used for different purposes, which gave a certain level of subsistence to indigenous peoples.

C. The Liberal Period

The "Liberal Reform" took place in the 1871, under a military regime. There is no doubt that this was the worst period for indigenous lands since, although the Maya had had a number of difficulties, many of those lands had been able to be preserved in previous times. During this period, indigenous lands were expropriated by the government on the grounds that they were wastelands. The holders would have to pay very high taxes, otherwise they would be expropriated and sold. This interpretation appears as a consequence of the disarticulation of cooperative or communal goods of lands and this also gave broad access to the privatization of these lands and of others considered wastelands. There was also legislation to make use of compulsory labor; the laborers were usually the indigenous people who lived on the land.

The subterfuge was actually not only expropriation, but also the sale

16. One of the purposes of this movement was to change the prevailing system of production by implementing a number of legal instruments that facilitated access to land ownership – especially land suitable for growing coffee – and the availability of a labor force, especially an indigenous one. Indeed, the social force behind the liberal rebel movement was made up of "Westernized" *mestizo* landowners and peasants of western Guatemala. PALMA MURGA & TARACENA ARRIOLA GUSTAVO, AGRARIAN PROCESSES – FROM THE 16TH CENTURY TO THE PEACE ACCORDS 49 (2002).

of those lands to *Mestizo* and *Ladino* families, who are currently owners of the largest landholdings of productive and cultivable lands in Guatemala and, therefore, have great influence and power. As Jose Aylwin Oyarzun notes, four percent of commercial producers control seventy percent of agricultural lands.[17] The main objective of land tenure during liberal times was the accumulation of large parcels in order to cultivate coffee and achieve agricultural modernization. Although a number of laws were later passed to avoid this accumulation by a small number of people, this has been one of the greatest difficulties due to the political power that large landowners have in Guatemala.[18]

IV. RIGHTS RELATED TO LANDS

Rights related to lands are probably the most difficult to deal with, in many parts of the world and particularly in Latin America. When this topic is set out from indigenous peoples' point of view, results are even more significant. This is due to the fact that indigenous people have historically been dispossessed of their lands in different ways. There are documents written during colonial times that show dispossession already established at that time and later, the claims of some of those lands also appear. In certain cases, there have been minor achievements regarding the restitution of collective property to indigenous peoples as well as to others with respect to recognition of lands before contentious situations arise such as in the case of mining or hydrocarbon explorations.

The land situation has not been any less complex in Guatemala. Many, if not the majority of communal lands, have been misappropriated or divested without giving any compensation in exchange. Even in many places, as in the Verapaces,[19] as well as finding the formula to divest the legitimate owners of their lands, indigenous people were also obliged to work on their own lands as laborers. In other cases, as in Totonicapán, indigenous people managed to protect their lands from dispossession by putting them under the

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17. It is logical that there arose a multitude of conflicts under this proceeding, and this explains that those who had the resources to pay for lands found better conditions than those with stronger claims but without resources. ROMEO TIU & PEDRO GARCIA, *LOS BOSQUES COMUNALES DE TOTONICAPÁN,* DINÁMICAS AGRARIAS IV 34 (Flasco, Minugua, & Contierra eds., Feb. 2003).

18. The new coffee plantations need large expanses of land and an abundant supply of labor. They chose to divest communities of their lands and to dismantle the "ejidos" in such manner that the indigenous peoples had no other option but to seek survival on the same plantations.

19. The Verapaces are lands located in the north of Guatemala, where a great number of large ranches of coffee and cardamom are registered. This region had a large number of land dispossessions in the liberal period of the indigenous Maya *Qeqchi'* peoples.

protection of the Municipality, which at the time this measure was taken, represented the indigenous peoples of that place.[20]

Things are different now. The municipality does not represent the interests of the community anymore. On the contrary, it represents the interests of the State as it is an institution of the State. The persons in charge of the municipality, in addition to being unaware of the basis for the preservation of communal lands, manage them as if they belonged to the municipality or to its representatives or directors. Thus, indigenous people are being divested of their lands by arbitrary actions taken outside the community. In recent years, there have been a number of demonstrations to protest and reject this practice, not only because of the irregularity and inequality in land ownership, but also due to the various maneuvers and manipulations being carried out to dispossess and misappropriate indigenous lands, both individual and collective.

In many cases this misappropriation and dispossession of lands has required State approval, and in many others they took place by force. This can be illustrated by mentioning some examples. The El Jaibal ranch located in the municipality of San Jorge de la Laguna of the Department of Sololá was the reason for the loss of many lives during a prolonged period of conflict. The struggle of Cajolá people in the fight for their lands has also had significant social and human costs. Land dispossession and misappropriation carried out in El Peten and the Franja Transversal Norte, and in Panzós, Alta Verapaz have all involved massacres of indigenous people. Within the framework of the internal armed conflict, the fact that many people had to flee from their villages and houses in order not to be involved in the fighting is no less dramatic. These people have returned, years later, to find that their lands and houses were already in someone else's hands. Nowadays, this phenomenon takes place through land taxes or charging that indigenous communities are responsible for plundering woods, reasons that allow the State to declare communal lands as protected areas.

This new strategy of appropriating communal lands can be interpreted in different ways, starting from the relation made between woods and poverty, protected areas and indigenous communities, natural resources and indigenous peoples, indigenous participation with regard to communal territories, etc. There is as yet no satisfactory explanation why the concept of protected areas should dispossess indigenous people of communal lands. What is the political backdrop for this ruling? Why are indigenous communities not consulted although this measure is established in ILO Convention No. 169? On the other hand, haven't indigenous communities protected their natural resources for hundreds or even thousands of years?

When trying to find an answer to these questions, the conclusion is usually reached that the rules on protected areas in indigenous territories do attempt to protect the lives of indigenous community inhabitants not only in

20. There are some references to this in the Governing Accords of November 15, 1892, October 24, 1893 and January 27, 1894. ROMEO TIU, PEDRO IXHIU, & EFRAIN TZQUITZAL, *Los Alcaldes Comunales de Totonicapán, in* INDIGENOUS LEGISLATION OF GUATEMALA 91-92 (Jorge Skinner Klee ed., 2000).

national but also international laws on the subject such as the Political Constitution of Guatemala and ILO Convention No. 169. In the case of Guatemala, the situation violates the Peace Agreements in general, and the Agreement on the Identity and Rights of Indigenous Peoples in particular, agreements that are not excluded from the ambit of Article 35 of ILO Convention No. 169 for being national accords that are based on rights.

This situation has begun to be cleared up in the framework of a recent discussion about a bill to be undersigned by the National Council for Protected Areas – CONAP – and the National Institute for Tourism – INGUAT. There is an idea to implement a policy of eco-tourism in protected areas, and the discussion also refers to the cultural protection of these areas. However, there is no reference to the economic benefit that indigenous people should have, as they are the majority inhabiting these areas. In fact many of those areas belong to indigenous communities or people. What will happen to these communities? Will they be wiped out as during the armed conflict, or is this currently occurring because landowners are settling near lakes and rivers that are considered exploitable for eco-tourism? Will they have to emigrate to other places or countries? Clearly, there are still many questions about the issue. But the bill proposes a granting of licenses to private and legal entities to exploit these lands for eco-tourism. There is no doubting the legal cynicism, since they are taking the administration, use and control of indigenous lands and granting them to private owners in order to exploit them. Is that another form of dispossession? Most probably, since as time goes by more laws will appear that will legalize the private holding of lands, and collective ownership will disappear.

A. Collective Lands

Although the majority of lands have passed into private hands, there are still significant pieces of lands administered, controlled and used collectively. These lands have been conserved by indigenous communities and their authorities for centuries, as is documented in ancient books or historical documents, such as, *Popol Wuj*, Title of the Lords of *Totonicapán*, Annals of the *Cakchiquels*, etc. However, there is no progress in constitutional rules about indigenous peoples, and, as a consequence, there is no progress with regard to the recognition that indigenous peoples have collective rights or that they should be holders of this kind of rights. Usually in the land registration office, communal lands appear registered under the municipalities since the legislation makes the acquisition of legal status very difficult for indigenous communities.

Along those same lines, such laws oblige indigenous communities to become statutory associations whose forms are defined by law. As a result, on one hand, statutes curtail indigenous organizations, and on the other hand, they fail to recognize the nature of organizations distinctive of indigenous communities, which is incompatible with constitutional norms that do acknowledge their legitimacy. Laws should conform with constitutional rules and with the development of indigenous rights stipulated in international instruments.

In addition, very recently legal authority passed from the State to the departmental government, and now, the municipalities are in charge.[21] Although the cost to obtain a legal land title is lower, it is necessary for people to hire notaries to carry out the procedure. This is a requirement until the acquisition of the resolution. This probably increases the costs because the fees and rates are at the notary's discretion. On the other hand, collective lands have been transferred to private ownership of lands, with different justification. Some people have managed to appropriate lands that were collective in the past. The Municipality has also contributed to this, ceding the rights on those lands, handing them over in usufruct or donating them to public or charitable organizations, without taking into account the opinion of the people who own them. Those lands that had once been considered either urban or rural collective properties have now been transferred to state institutions, post offices, telegraph, telephone and electricity agencies, or electric and hydroelectric constructions, dams, etc., in agricultural or forest communal lands in areas, as is the case of the administrative centers of Totonicapán, Sololá, El Quiche and Las Verapaces.

Those examples are useful to show the vulnerability of indigenous communities' collective rights with regard to their territory and lands, something that should not be set aside when it comes to law treatment, considering that they only contain and protect private property. Not even in laws passed as a consequence of Peace Agreements have indigenous territories been recognized as one of the expressions of indigenous peoples' collective rights. Such is the case of the Land Fund Bill that will be discussed later.

B. Private and Collective Land Conflicts

The problem of land conflicts does not only relate to private lands, it also relates to collective lands, which are even more complex. As mentioned above, those are the lands that are the most vulnerable these days because there is no specific regulation to protect them. On the contrary, new laws are passed every day that seem to foster the disappearance of collective ownership of communal lands.

The conflicts over lands in general, and particularly collective lands, have diverse origins: those of political and economic nature and also of ethnic, historical, and religious nature. It is said that the essential causes are political and economic because, by making a superficial analysis that makes reference to Guatemalan history, it can easily be understood that during the pre-Hispanic period all lands belonged to native peoples. The conquest and colonization have changed the ownership of those lands, and probably the period in which the greatest dispossession of collective lands took place was during independence and the so-called 'Liberal Reform' initiated in 1871.

After that period, there were different methods and almost all governments through all the periods of history managed to create land conflicts as a pretext to expropriate them, without compensation or valuation

21. Representation of the Executive Agency in the country's various districts.

to their owners in return. On the other hand, because indigenous culture and their socioeconomic conditions were not understood, resolutions were taken from the Capital that granted lands that historically belonged to a community, to others. In many cases this is what caused individuals, families or neighbors to be in conflict for long periods of time; many of those conflicts persist today, some of them public knowledge and others underlying. The danger that these underlying conflicts could cause is that they may not be treated appropriately, and may have far-reaching social and economic consequences. Such is the case of the conflict *Barraneche Argueta* and also that of *Nahualá-Santa Catarina Ixtahuacan.*

The U.N. Verification Mission in Guatemala (MINUGUA) records (in the second brief of the Secretary-General for the United Nations) that the Presidential Department for Legal Assistance and Conflict Resolution of Lands (CONTIERRA) began working in June 1997, and by December 2003 had received 134 applications for settlements land conflict. Some eighty percent of the cases were being either investigated or were in the initial evaluation stage by February 1998 (the date of the brief). This brief also points out that these land conflicts had a variety of causes including community or municipal, title deals, land claims, labor conflicts, etc.

In MINUGUA's regional supplements on verification of peace agreements there is direct reference to some land conflicts and their treatment on the part of State institutions, especially CONTIERRA. Here, the regional office of Quetzaltnango and the sub-regional office of San Marcos indicate that, out of the seventeen land conflicts known in Quetzaltnengo, Totonicapan, and Retalhuleu, only ten are dealt with by the CONTIERRA, and almost all of them are in the investigation stage.

The main concern here is that this intervention has been limited to minor conflicts, whereas those recent dramatic events and more serious conflicts like that of Barraneche-Argueta have not received the attention that they should have had. The same release also points out that the urgency for institutional intervention in the area is justified due to the violence caused by the conflicts over land. Also, in some conflicts between communities, like Ixchiguan-Tajumulco and Barraneche-Argueta, or in the case of violent evictions, for example that of the ranch El Tablero and that of the land division in La Blanca in Ocos. In conflicts among individuals, it can be seen that fundamental rights have been affected.

Although in the MINUGUA report there is mention of a direct agreement, it is important to note that the most serious problems have not had satisfactory resolutions so far, due to conflicting interests, lawsuits, and the lack of effective external support that communities receive (e.g., in the Barraneche-Argueta conflict). In this sense, a verification brief of ASESA of MINUGUA, dated November 2000, points out that most of the cases that CONTIERRA classifies as concluded have not been necessarily solved but transferred to another government authority. Others have been rejected and many were claims and not land conflicts. This serves to support the previous argument with regard to land conflicts.

Other conflicts that fuel this situation are those mentioned in the Regional Office of El Quiche and the Sub-regional Office of Nebaj, especially

in *Ixil* communities, indicating that in this area the agricultural situation has very particular characteristics. Almost 95% of the population is indigenous people who have historically subsisted on small pieces of land, and who did not have title deeds properly registered. As a consequence of the armed conflict, hundreds of families abandoned their lands. After the signing of the peace agreements, these families returned to find their lands occupied by other persons that were also victims of the confrontation or by direct or indirect actors of that confrontation such as members of the PAC (Civil Self Defense Patrol). This produces a number of community conflicts whose common factor is expulsion due to the armed conflict. The lack of access to lands causes higher levels of poverty since in the *Ixil* areas there are no other sources of work. Thus, families are forced to immigrate to other regions of the country to work on big plantations, subject to inadequate labor conditions.

Another important issue that is highlighted in this brief is the problem of legal security for lands. In this situation, as well as other conflicts over private lands, it mentions the importance of the fact that the conflict originated as a consequence of proclaiming of the *Visis Cabá* communal lands as protected area. This problem still persists. Although legal appeals have been presented to abolish this decree of Congress that creates the concept of protected areas, they have all been resolved negatively. One example is the case of an appeal regarding the unconstitutionality of the law, which was rejected. Therefore, confrontations between neighbors and State institutions continue as well as the confrontations among neighbors themselves. Very little, if any, progress has been made in this conflict. It is also likely that no progress was reached in the conflicts about private lands except by selling the land.

Other important data that appear often about the conflictive situation of communal lands is found in the verification supplement of ORGUA, when indicating that in the case of the *Xinca* community of Jutiapa, which demands communal lands on the basis of title deeds of the 19th century, no State authority has yet established a proper procedure to provide a solution to this conflict. In practice, civil courts throughout the country authorize extended titles, but there are more cases in the areas where private property encroaches on indigenous territory. In relation to the land conflict, the Regional Office of Huehuetenango (ORHUE) and the Sub-regional Office of Barillas (SORBAR) indicate that, with regard to the commitment about the resolution of land conflicts, out of seventeen cases the department submitted to CONTIERRA, four were already concluded, and thirteen are still in process. The greatest difficulty in reaching a solution in some of the cases is the confrontation that exists between the parties involved, especially those related to inter-municipal borders, such as in Chiantla, San Juan Ixcoy and Todos Santos, and occupations as in the case of the ranch Chaculá/El Aguacate.

The Regional Office of Zacapa (ORZAC) points out that the main obstacles to organised land claims in Izabal are the ignorance of the possibilities offered by the institutions created under the Peace Agreements, the isolation of towns, the limited use of the Spanish language on the part of *Queqchi* people, and the lack of organizations. The ORZAC report also refers to indigenous community properties that have been affected by individuals,

for instance, in the case that took place to the north of the Izabal Lake, in the Estor, where there are *Queqchi* communities. This report mentions that the government knew of cases of certain families who had private properties in the area, who trespassed beyond the limits of their properties and seized state lands that were inhabited by indigenous people. These families then registered their lands under their own names for cattle raising and agricultural purposes. Their objective was facilitated by the isolation of the place, the lack of knowledge of the Spanish language on the part of the rebels, and the fear to denounce these families because of the reprisals they would suffer. Later, indigenous communities were denounced for seizing territories.

That same verification brief indicates that close attention should be paid to the lack of legal security for land ownership for the *Garífuna* population, accentuated by the lack of registration of the properties in various communities of the municipality of Livingston. Further, the same report also points out that other conflicts, such as those of Sepos and Chegoyo in the Estor or between Santa Rosalía, Zacapa and Maroxco, Chiquimula, and eight other villages, originated as a consequence of disputes among communities with sufficient land for agricultural activities.

All the conflicts mentioned above are examples of the different faces of land conflict in Guatemala. However, it is known that conflicts are more serious nowadays, especially those that have had costs in terms of human lives and others that have received no attention but have similar sources of disagreement, waiting for the moment of their activation. The lack of attention that has been paid on the part of the State to the Political Constitution of the Republic of Guatemala (Article 67 and Article 68 referring to communal lands)[22] and to the Peace Agreements on that same subject, increases the tension between communities, municipalities, and departments, and motivates confrontations that are then transformed into centers of instability in the present and the future.

We should not forget that indigenous peoples and their communities have, for a long time, opposed the violation to their rights (especially to the collective rights). There appears to be an increase in claims for usurped lands, or illegally invaded lands, with or without authorization of the State of Guatemala, and using ancestral titles, as the case of the *Xincas* in Jutiapa, without paying attention to it. Similar situations, although in different circumstances and with different elements, could be now taking place throughout the nation.

Although the presidential department of lands, CONTIERRA, has been created, different factors reveal its fragility: economic, structural, but most importantly, the fact that CONTIERRA is directed by people who do not know the cultural elements that are key factors for the resolution of land conflicts. For example, the language is an important element of

22. The indigenous communities and others that occupy land that historically has belonged to them and has been administered in a special traditional form, shall maintain this system. Article 67, ¶ 2. Through special programs and the adequate legislation, the State will make available state-owned lands to the indigenous communities that require the lands for their development. GUATEMALA'S POLITICAL CONST. art. 68 (1985).

communication because the negotiations are carried out in Spanish (without recognizing the multilingual nature of the nation). Negotiations also do not take into account the participation and performance of indigenous authorities who are the decision-makers, the cultural nature of lands for indigenous communities, communal land possession, the importance of nature preservations, the natural life cycles, the relation of the four natural elements, etc.

C. Communal Lands and Protected Areas

> *Visis Cabá, Chajul, Quiche, Los Altos, Totonicapán, Laguna de Chicabal, San Martín and Sacatepéquez, Quetzaltenango (sacred places).*

In other circumstances or contexts, protected areas would constitute a positive achievement for the preservation of the existing natural resources in territories with particular ecological characteristics. There is no clear policy in Guatemala with regard to communal lands – at least that is how it appears from the analysis of the laws and regulations of the CONAP (National Commission for Protected Areas).

The Congress of the Republic of Guatemala has currently declared certain lands protected areas. Some are properties of the State, some are private, and others are municipal. However they have not recognized that, in the case of municipal lands, many of the private lands are communal. This shows an obvious deficiency in protected area laws and regulations, and it is contradictory to Article 67 of the Political Constitution of the Republic of Guatemala, which makes reference to communal land administration, even those registered on behalf of the State or municipalities. In addition, the ancestral knowledge of the management of wooded areas is ignored. These areas have abundant natural resources and were administered for hundreds of years by indigenous peoples and their communities.

The experience in Guatemala has demonstrated that the institution CONAP, and other institutions responsible for the protection and control of forests and natural resources, do not have the appropriate structure nor sufficient economic resources to meet the objectives for which they were created. Nevertheless, they have also rejected the participation of the indigenous people in the administration and control of natural resources. On the other hand, many conservatives reject the idea of using areas with natural resources, while also opposing the indigenous system of management of their own resources, considering the communal lands as a whole (something that not only includes lands as such, but also the idea of territory and natural resources: air, forests, water, animals, places for ceremonies, etc.).

The argument that indigenous peoples do not have any idea about the management of natural resources is used regularly, as well as the argument that "modern" technical elements are needed to preserve the resources mentioned. Therefore, natural resources stop being accessible for the population that has preserved or protected them for a long time. It is also clear that the inefficient control of natural resources by the State, for example

of forests, has meant that instead of protecting "protected areas," destroyers are now devastating even those areas declared untouchable within protected areas, also known as "nucleus zones."

Support of the indigenous communities for the management, control, use and administration of protected areas that are not communal lands is very important. With regard to communal lands consultation with communities is essential, considering that they have had communal lands under their administration for long periods of time. It is even more important when it comes to declaring them protected areas but must always be done in good faith and by means of its representative institutions. The rupture of the collective land system represented by communal lands could bring even more serious consequences than declaring those lands as protected areas. Three examples are sufficient to illustrate the problem of declaring lands that are used collectively (communal lands) as protected areas: (1) *Visis Cabá*; (2) communal forest of Totonicapan; and (3) Chicabal Lagoon.

1. *Visis Cabá* (Also Called *Biosfera Ixil*)

There is no doubt that the case of *Visis Cabá* represents the vulnerability of collective rights, especially those on communal lands to which the Agreement on Identity and Rights of Indigenous Peoples refers. With regard to this agreement, in the supplement of the fourth report on the verification of the Peace Agreements in Guatemala presented in November 1999 (covering the period from August 1, 1998 – October 31, 1999 on the status of the commitments on Socio-economic and Agrarian aspects, Settlement and Incorporation, paragraphs 22-28), MINUGUA makes an analysis of this situation which reveals the vulnerability of the collective ownership of lands of indigenous peoples in Guatemala. It also gives a general opinion on the non-fulfilment of Peace Agreements, especially on the lack of a legislative development of constitutional rules that prevent indigenous communities from having collective rights. This does not mean that general indigenous rights or the specific ones in Guatemala cannot be exercised even if they have not had greater constitutional development since they are guaranteed under ILO Convention No. 169 and other laws in national and international jurisprudence. Something that was not clear in the brief is that the Agreement on Identity and Rights of Indigenous Peoples (Paragraph 3, subsection F) should be considered as an additional supportive element for the complaint that should be made about the problem that originated with the declaring indigenous communities' lands as protected areas.

The argument used by some conservatives that communal lands were going to be made into agricultural lands and, as a consequence of that, it was suggested they be declared protected areas. This could have some credibility, however, the argument shows the lack of knowledge about the methods used by indigenous communities to protect their territory even in difficult situations, for instance, the situation they faced during the internal war (to cite the most recent example).

In the case of *Visis Cabá*, the greatest complaint on the part of *Ixil* communities of Chajul was not the preservation of the mountain itself, since it

has been preserved by the communities for many years. What makes communities suspect that there is something that threatens what they have been able to preserve for so long is the absence of consultation with, and participation of, these communities in the process of decision-making about something that belongs to them. As a consequence, when it comes to declaring these lands as protected areas, what they actually see is the danger of being deprived of those lands, which are apparently rich in natural resources.

Before this situation, indigenous communities in Guatemala started asking questions: What is the real intention of declaring communal lands as protected areas? Indigenous communities usually understood this as a different way of misappropriating their ancestral lands in order to privatize them or parcel them out for agricultural uses. On the other hand, they did not understand why government institutions intended to protect those areas considering their limited financial and human resources. In such cases, protected areas would, in fact, become unprotected, since indigenous communities could not act to stop depredation as those lands are the institution's responsibility. As a result, these areas end up being uncontrollably exploited, even in the nucleus zones.

With regard to this, the Inter-American Court on Human Rights has related the full recognition of indigenous customary rights in the management of their natural resources.[23] Presently, even some of the officials of the National Committee for Protected Areas have admitted that they lack the capacity in terms of human and economic resources to meet their functions, and that has caused depredation in protected areas. Thus, consultation with indigenous communities that are affected by these protected areas declarations, especially in indigenous territories that were, in other times, also misappropriated and usurped, is crucial. In the situation where the institution in charge does not have the appropriate infrastructure, which direction will those decisions take in the future? The situation is very complex, but as institutions continue to make decisions without including the communities themselves, conflicts could become more serious as has already happened in Chajul between the communities supporting and those opposing the Mayor in charge before January 2000. This situation can be avoided depending on the will of the institutions in charge and the respect they have for the decisions of the communities and their authorities, the way the communities see natural resources as life itself, as well as for traditional administration, control, use and management of natural resources.

2. Communal Forests of Totonicapán

Many specialists consider the best preserved forests are Totonicapán's, in spite of the density of the population in the surrounding area. Given the circumstances that surround this indigenous territory and its history, it is also important to know its current situation, especially its social,

23. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Iner-Am. Court H.R. (Ser.C) No. 79 (judgment on merits and reparations of Aug. 31, 2001).

cultural, and legal treatment. It is critical that one understands the interrelationship of the communities that surround the forests, the indigenous authorities, the state institutions, the national and international projects, and the externally financed non-governmental organizations.

Nowadays there is an "organization coordinator" for communal forests, whose job description includes a duty to supervise the projects related to communal forests in Totinacapán. This coordination has been somehow limited by declaring the woods as municipal forests (protected area), although this has yet to be put into law to be administered by CONAP. However, these entities, both municipal and national, have fought to decree those communal lands as national parks.

This proposal has not yet received the support of the community structures of *Totonicapán*, with the exception of the Association *Ulew Che' Ja*,[24] recently created (approximately four years old) and which has, for the last few years, taken charge of the preservation of the forests as it affects the community's drinking water and not for general issues that other communal authorities have. Such is the case of the Principals, Community Mayors, and Officers.

In spite of their limited expertise and jurisdiction, many non-governmental organizations have supported the idea of turning the *Ulew Che' Ja'* Association into a corporation with the objective of providing them with funding. Community Mayors, for instance, do not agree with this idea, and they have so far acted as authorities with a strong legitimacy before communities, without the need of controlling funding.

There have been many occasions when the *Ulew Che' Ja'* Association has exercised powers that were not bestowed on them by the communities, and this has caused fissures in its relationship with communities. For example, they have assumed as theirs the treatment of problems with forest infringers, something that concerns other authorities. This assumption has caused the loss of credibility of that association within the context of community structures performing activities that traditionally concerned other authorities, such as Community Mayors, Officers, Principals (who usually are the elders in the community), community assemblies, etc. Without this legitimacy it is very difficult for a structure that was recently created, which does not consult other authorities to get the strength needed. Thus, instead of making progressing in a positive direction, their actions give rise to confrontations.

Another factor that is currently obstructing the strengthening of indigenous communities and their authorities' control over natural resources is the attitude of municipal authorities toward the forests. Those authorities do not have any knowledge on the history of woods. Usually, when the Mayor or municipal organizations change, they ignore or pretend that they do not know about the subject and they take actions to suit the interests of their municipal management. For example, they authorize the felling of trees or the acquisition of water from the foot of the mountain, make decisions about

24. Association of Committees for Piped Water to Community Homes in Totonicapán. The name in the K'iché language means Earth, Forest, Water.

other resources without consultation with indigenous communities. This is what causes conflicts that could actually be avoided.

The communal lands of Totonicapán appear to be unimportant to the central government authorities and municipal authorities, unless there is political advantage to be gained from it. During the last few years, there has been a growing pressure on these forests. However, this pressure is based on interests that appear to turn into serious conflicts, for example the situation of the canton of Chiyax and the situations of four cantons located in the north (Chimente, Pachoc, Maczul and Tzanixnam). Also the situation of the plots of land located in the south, and also the conflicts between the inhabitants of Chuipachec and the inhabitants of the municipal seat, which are, as mentioned above, avoidable if the government developed a real policy for recognition and registration of ownership of indigenous communities in Totonicapán and the forty-eight cantons of communal lands – in other words, give the indigenous people legal security and reassurance.

Therefore, not only is this recognition important but it is also important to take into account the opinion and determination of indigenous communities in policy-making with regard to the environment, natural resources, lands, etc., as well as to show respect for their method of administering, managing, and using natural resources. That is to say, their consuetudinary right, supported and recognized in the decision of the case of *Mayagna Awas Tingni vs. Government of Nicaragua*, pronounced by the Inter-American Court of Human Rights, as well as in national regulations and ILO Convention No.169.

The biggest problem for indigenous communities in this case is not only the loss of communal territory, as a physical element, but also the loss of community structures, and with that, of their traditional authorities who have for a long time been dedicated to defending their heritage, identity and way of living, all of which are closely related to their territory. This is without taking into account that they also have ritual places that have a very important cultural value.

The Municipality of Totonicapán seems to be completely uninterested in this situation and instead, by turning a blind eye to it, they are taking imprudent, though popular, measures to break up indigenous authorities by manipulating the subject. Instead of obtaining everyone's support, they are seeking the support of their unquestioning followers who are currently occupying positions in indigenous organizations. The situation creates a serious problem within indigenous structures in Totnicapán, which feel keenly that to defend their territory could have high social costs, both in indigenous authorities and in human lives.

3. Chicabal Lagoon

The Chicabal Lagoon, to the west of Guatemala, represents one of the most important places for performing Mayan ceremonies. Turning it into a protected area for tourism purposes may have serious consequences in the future, although this impact may be not perceived in the present. The problems could be the following:

(a) Higher environmental pollution, due to the massive flow of people ignorant of the natural environment, and who have no previous knowledge of or connection with nature.

(b) Neither state institutions nor non-governmental organizations can, with their limited resources, provide them with a proper control program on natural resources plundering in general, and specifically on forests.

(c) Pollution is a problem that should be clarified if that space is, as environmentalists accept, special for Mayan ceremonies. If people ignorant of Mayan culture get near sacred places, and especially near those where rituals are performed, their actions could desecrate the meaning of these rituals. One of the things which shows a lack of courtesy is the painting of names or shapes on places that are sacred to Mayas. This is a demonstration not only of the disrespect on the part of the people, but is also a kind of pollution.

(d) Loss of the collective responsibility for a territory that has been managed communally for centuries, and if it is not like that now, it is because of external factors and not because persons choose to give up their responsibility for their natural resources.

(e) If the trip includes going through ceremonial places, then it would constitute a violation to the freedom of religion established in the Political Constitution of Guatemala since, by going to places like Chicabal which represent an encounter with nature, quietness and peace, people who prejudice rituals, as well as ceremonial places, intrude on the concentration of the persons who worship those places, an attitude that is incorrect.

(f) There is no doubt that another consequence is that the community structure is transformed or eliminated, making people forget about the collective nature of these territories and about their responsibility and particular ways of seeing natural resources, and instead to see nature as an economic means for subsistence, not minding if others take advantage of it. In this sense, sharing the benefits and responsibility of forests and other natural resources is one of the main objectives of collective rights.

V. RULES WITH REGARD TO LANDS

The Political Constitution of Guatemala contains two articles on communal lands: Article 67 refers to land protection and to indigenous agricultural cooperatives, and Article 68 refers to lands for indigenous communities. Nevertheless, it can be said that there are other articles that, although not directly related, have some connection with indigenous lands. These are, among others, Article 58, which touches on cultural identity, Article 66, which refers to the administration of social organizations and indigenous languages of indigenous communities. Article 58 also states indigenous communities must be respected, recognized and promoted by the State of Guatemala. Finally, Article 69 deals with the removal of agricultural workers, because this is a contradiction because it is the sanction of colonial intentions.

It is important to highlight what is stated under Article 67 because although it is established in the Constitution of Guatemala, the policy on lands is not clear, even after the signing of the Peace Agreements. This lack of clarity causes communal lands, one of the indigenous collective rights in Guatemala, to be one of the most vulnerable, in tenure, in use and in administration. In other words, the lands do not possess real legal security. Real evolution of the constitutional provisions would offer legal assurance to indigenous lands and would normalize ownership, use and administration.

The Peace Agreements, signed during the 1990s, established a landmark in the implementation of important measures to change a nation state of exclusion into one of inclusion.[25] Certain characteristics of the country make this a very difficult task. In spite of the difficulty, the direction of government policy discussions is changing. For instance, there is a trend toward open-minded measures, especially within the centralized framework of the capital of Guatemala. This discussion, which began during the times of the Spanish incursions and was followed by the colony and then by the Republic, has always been exclusive and has not included a great majority of the population, especially Mayas, Garifunas, and Xincas.[26]

That situation is also true for most natural resources, and many of them are controlled, administered, and used by indigenous peoples. In recent years, many of the errors in policies of relocation of internal immigrants and of those who returned after the internal armed conflict have allowed for devastation of agricultural lands, turning them over to grain producers. This has affected the collective land holdings of those towns and community

25. The Peace Accords in Guatemala were signed by the belligerent parties after thirty years of internal war which caused a considerable number of fatal casualties, orphans, and widows. According to the Commission for Historical Clarification, 83.33% of the victims of that conflict were indigenous Maya people. To neutralize the causes that gave origin to that conflict, among them land tenure, specific accords were signed which were linked in their content. There is an Accord on the Identity and Rights of Indigenous Peoples that, for various reasons, is the least honored, especially in regard to indigenous collective lands and consequently the rest of the natural resources that exist within them, which makes these resources, as well as the lands, highly vulnerable.

26. Mayan Peoples are a majority, representing more than sixty percent of the population, although official data show lower percentages. On the other hand, a large majority of Guatemala's population lives in the so-called "rural areas."

authorities.[27] For a number of reasons, the people who returned after the war forgot many of these, and several years passed before the memory of some communities was refreshed.

This also creates an important dilemma because land claims, lack of work opportunities, lack of educational opportunities, lack of health services, and other factors continue to seriously affect the relationship and participation of indigenous peoples within Guatemala. But the solution should not be based on land and indigenous territories because instead of being a solution, this would increase social dissatisfaction.

However, this is not the main cause of the problem. The main cause is the different policies implemented from the government, which are neither clear nor accurate, have often been short-term, and have thus intensified the legal insecurity about land ownership. These circumstances have allowed foreign and national investors, to take advantage of the lack of knowledge of indigenous community landholders with regard to their rights, and to convince them to sell their lands for eco-tourism projects that deprive them of their natural resources. Those actions constitute clear violations of ILO Convention No. 169, ratified by Guatemala by Decree 9-96 of the Congress of the Republic.

This trend reappears when declaring indigenous community lands "protected areas." Many indigenous villages have directly or indirectly stated that they do not object to protecting these areas since they have always been protected by the indigenous people themselves. What they object to is the loss of their rights as a consequence of the declarations and the granting of those lands to others without their approval, which causes even more serious problems for these villages. It may sound repetitive, but it is a fact that many of those areas that still have plenty of natural resources are found under the collective system of property and ownership of indigenous peoples.

Significant international projects have also been the cause of devastating incursions, not only to indigenous peoples but also to the whole population, since they weaken the balance of natural resources by felling trees to build new roads, or by flooding these areas to build electric dams. One of those plans is the one that is being carried out by the Mexican government with the governments of several Central American countries, called Plan Puebla Panama (PPP), which begins in the south of Mexico and culminates in Panama.

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27. Quite the opposite is true, as there are other local instances that form a network of power relationships because these are, precisely, a reflection of the specificity of the current social organization which is closely linked with a given form of appropriating nature. In the cases of several communities in Totonicapán, this relationship is visible due to the existence of properties registered in the colony as communal. In its present dynamics, this relationship not only exists in everyday life with the utilization of products and byproducts of the forest, but also it highlights the fact that these are exploited and owned. This makes the value assigned to the forest by these communities to be focused on the use of natural and socio-cultural resources, which relates to the social conception of the environment, symbolized and expressed in the idea of the mountain. ENRIQUE VIRGILIO REYES, LOCAL POWER AND COMMUNAL FORESTS: CASE STUDY: TOTONICAPÁN 13 (1998).

Plan Puebla Panama (PPP) affects indigenous territories in several countries, and raises some serious questions: Is the PPP the continuation of the annihilation of indigenous cultures in Mexico and Central America? Are stringent population controls being introduced? Who receives the most benefit from these projects? These questions and many more are very difficult to answer, but taking into account the results of similar projects implemented in other countries, they are obvious and the answers almost clear: the effects, both in terms of culture and of the sustainability of natural resources, are fatal.

The relationship between indigenous people and the State is not taken responsibly or clearly by the government in Guatemala as well as in the rest of Central America and other countries of the continent. Those relations are approached from a position of inequality and with the excuse that indigenous collective lands do not contribute to the economic development of countries. Thus, what they create is greater inequality and a larger gap between the rich and the poor. This makes the implementation of the Peace Agreements in Guatemala impossible. These had been seen as a light at the end of the tunnel, but if complying with these agreements is going to take this long, then this light will be reached only after several decades of real will to comply with them.

VI. THE NEW LEGISLATION, JURISDICTION, AND LIMITS

From an ambitious and optimistic point of view, or maybe with a small assessment of the competence and limits, these agreements create a need to reform the juridical framework including:

> (1) Constitutional changes that guarantee the exercise of indigenous peoples rights;
>
> (2) Codes and law reforms to introduce indigenous participation;
>
> (3) Ratification of international agreements and treaties that embrace the implementation of those rights;
>
> (4) Efforts on the part of the State to end inequality between indigenous and non-indigenous people within the framework of a multicultural relationship.

Another topic that should be dealt with by legislative reforms is the treatment that should be accorded to collective lands, maintained by indigenous peoples for hundreds of years, and, of course, to the natural resources in them. To do this, focus should be placed on indigenous participation in management of natural resources, land, forests and water, and people should inquire, what does the new legislation propose?

Along these lines, and within the framework of the Peace Agreements, especially the Agreement on Identity and Rights of Indigenous

Peoples, there is also a need to revise the legislation in force:

> (1) the ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples in 1996;
>
> (2) the approval of the Land Fund Bill by the Congress of the Republic of Guatemala;
>
> (3) the Municipal Code; and
>
> (4) the Urban and Rural Development Council Act.

Each one of these will be dealt with separately, as it affects the State-Indigenous Peoples relationship in Guatemala.

A. ILO Convention No. 169

Because ILO Convention No. 169 is law in Guatemala (ratified by Legislative Decree 9-96), it is of great importance in terms of administration, use and control of natural resources, and especially for woods, water, earth and indigenous territories. However, very little has been done to apply it. On the contrary, it seems as if state practice tends to violate its contents. In order to understand this, some of its provisions must be analysed and contrasted with some examples.

> Article 4.1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
>
> Article 4.2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

If a quick analysis of this provision applied in reality to Guatemalan indigenous peoples is made, it becomes clear that no special measures have been implemented to safeguard people, goods, institutions or the environment, except for a few isolated cases that do not constitute a comprehensive policy of compliance with the agreement. However, that criticism could be also applied to indigenous representatives and leaders who only comply with its content when it comes to satisfying union, organizational or association needs, without really embracing important matters such as the discussion of the national budget, or the discussion about administrative approval, legal resolutions and legal approval.

The wishes of the indigenous peoples should be respected – a rare occurrence when communal lands are declared "protected areas." Their will should be determined through an obligatory process of consultation with these communities. One example of this concept is that of the Biosphere Reserve on

the mountain *Visis Caba*, which is of great importance to *Ixil* territory[28] in Guatemala. It has been administered by the indigenous peoples of that community for hundreds of years, but was declared a protected area approximately six years ago. In that case, the government did not respect the rule of prior consultation with the community to evaluate if they wished to turn *Visis Caba* into a protected area under the administration of the state, thus the indigenous people lost not only their rights to administer this land but also those rights to the resources which are, for them, sources of work and therefore, sources of life and spiritual relationship for the indigenous people.[29]

> Article 6 (a) 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.

It is also clear that this Article has not been implemented in relation to indigenous peoples. Nevertheless, this article gained great importance in 2002, when the President of the Republic cited it to cancel a concession for oil exploration and exploitation in the Izabal Lake (the largest in Guatemala). The indigenous communities that surrounded the lake were completely opposed to the oil development and were later supported by ecologists and local authorities.

But it is also important to note that, although the citing of the competence of this rule to maintain the natural balance of the place and therefore sustain natural resources has been a major advance, the governmental decree referring to the cancellation of the oil concession stated it was because there was no consultation with the people in general, while the

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28. The Ixil territory that is home to over 135,000 inhabitants; its present townships are currently Nebaj, Chajul and Cotzal.

29. The relationship of the Ixil Mayan People with their mountains has a cultural and spiritual dimension whose comprehension is still limited for non-Ixil people. The Mayan *Weltanschauung* and their idea of the human being as part of Mother Nature, both involves a privileged relationship with the jungle that goes far beyond the activities related to forest economy. Mount Juil, perhaps the best known of Ixil sacred places, is only one among many ceremonial altars, mountains, caves – natural cathedrals where they practice the rites involving offerings and prayers. But the forest territory is not neutral; it is a wild world full of spirits, where one walks reverently and silently. In Ixil territory, quite apart from the sacred dimension of the mountain, the jungle cover has been more than once a shelter from the persecution of a violent and abusive State. Already in the times of the Spanish Conquest, migrating to the hills made it possible for the Chajul population to elude the colonial power. And, more recently, during the last armed conflict, the Communities of the Peoples in Resistance (CPRs) found a safe haven from bombings and ambushes under the forest canopy. The gratitude of those who were uprooted from their homes and found shelter in the mountains is great, and it is still fresh in their memories. The mere possibility of losing a refuge of last resort, which has saved the lives of thousands of their brothers has an emotional dimension that cannot be ignored.

ILO Convention No. 169 refers specifically to the need for consultation with indigenous peoples. There is no doubt that this is an incorrect interpretation of the law and, although in the end it had positive results, the danger arises when, with all bureaucracy of this kind of cases, there is a possibility of impugning the decree if they do not agree with the rule.

Indigenous peoples have made constant efforts to focus on this issue in press releases, in speeches, and in an alternative brief presented by an indigenous organization about the State's non-compliance with the Agreement. Although one can be critical about the lack of consistency on the part of indigenous communities and the lack of responsibility in the treatment of unconstitutionality and indigenous representation, it is important to understand that indigenous leaders constitute just one part (important, but not broad) of that representation. Regarding unconstitutionality, it is important to observe that it falls on the indigenous authorities of the indigenous peoples (ignored, but in force).

With regard to this, there is now a rule in the amendment to the Urban and Rural Development Council Act that states:

> Until there is a law to regulate consultation with indigenous peoples, consultations with Mayan, Xinca and Garifuna Peoples about development measures issued by the Executive and which directly affect these peoples, can be made by means of their representatives at the development councils.[30]

There is no doubt that this is a legal incongruity and violation of the rule because ILO Convention No. 169 applies directly to these situations and states that these consultations must be made through indigenous peoples' representative institutions which, in this case, are indigenous peoples' community authorities. This rule is not being applied in good faith, as it is stipulated under Article 6 of the Agreement. In the end it can be said that instead of adapting the rule of the Urban and Rural Development Council Act to ILO Convention No. 169, it distorts, diminishes and restricts it. Therefore, the rule contributes to its violation since the representatives before the development councils are not only very few but are not necessarily representatives of the indigenous peoples. They represent diverse interests and particularly those of political parties. Nothing has been done or said on this aspect, although an indigenous reaction would have been expected. On the contrary, some indigenous leaders take it as a "great advance."

> Article 7.1. 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 well-being 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

30. URBAN AND RURAL DEVELOPMENT COUNCILS LAW art. 26.

> programs for national and regional development which may affect them directly.

This article applies to the Plan Puebla Panama (PPP), which claims that the PPP will bring development to the towns where the projects are applied. All governments should apply this article, and, therefore, indigenous peoples should be consulted whenever the PPP projects affect them directly. And, if so, the question must be asked, what is the agreement, the sanction, or the benefit these peoples obtain which addresses their priorities for development? The answer is straightforward: if these peoples are not consulted prior to development, there is a violation of the norm and of the rights previously established and guaranteed not only by national but also by international norms. There has been no effort on the part of the governments involved to consult with the indigenous peoples, who will be the most seriously affected, about their willingness to accept or reject the projects in their territories. It is quite possible that the magnitude of opposition could gain more strength in the future.

It is important to point out that there have been efforts among ecologists, indigenous union leaders, and others to oppose the implementation of the plan. One of the protests was presented by the coordinator of the populations located in the valley of the Usumacinta River, which crosses part of Guatemala and Mexico, who have opposed the flooding of a large part of the lands and sacred places (also archaeological centers) chosen as the site to build a hydro-electric dam. The Inter-American Development Bank (IADB) had to withdraw financial support for that project as a result. There are many organizations that oppose this kind of project, especially to the northeast of Guatemala.

Among the arguments used against the implementation of this plan is that, although these projects would generate employment for the population, the number of jobs would be insignificant compared with the destruction that they would cause. The income and benefits that few people would receive are also minimal, considering the strategic geopolitical value of the plan.

> Article 13.1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

This article covers two important aspects: spiritual value and collective ownership. These aspects, unfortunately, are not respected in any of the projects. The cases where construction projects are planned on places considered sacred to indigenous people are not few; however, there are international instruments that guarantee the protection of these rights. These instruments are the Universal Declaration of Human Rights, the American Convention and most of the Constitutions of American countries. The case of *Visis Caba*, mentioned above, could serve as a reference.

> Article 14.1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized.

With the excuse of protecting these areas, they are currently unjustly depriving entire communities of their lands. Those arguments still have some colonizing characteristics. There is one case, in the north of Guatemala, in which a lawyer stated, when presenting a complaint before a court, that collective land holding represents "backwardness" regarding land ownership and threatens the principle of private property. This argument has neither legal nor ethical support and actually constitutes a flagrant negation of human rights. It also has racist features because the lawyer is L*adino* and denies the existence of indigenous peoples.[31]

Compliance with those norms, as well as other national and international norms, means that the maintenance of the management and administration of natural resources should remain within the propriety and in the possession of indigenous peoples, making an interesting change in the relationships studied here. In a critical analysis of the situation, the participation of indigenous peoples in the management of the natural resources, forests, earth, and water among them, as fundamental elements for life, should not only pass through law approvals, but should also be accompanied by clear and evident economic reforms regarding rural development. The respect and recognition of their consuetudinary rights are also very important.

B. Municipal Code of Guatemala

Guatemala's Municipal Code has been recently revised and offers some possibilities for improved relations, but it also shows some signs of interfering with the relationship between indigenous peoples and the State. To understand it, some articles from the Code are useful:

> Article 2. Paragraph 20. The local council stands up mainly by its permanent relations of vicinity and ethnical, cultural and linguistic diversity . . .

This paragraph should be taken as a reference to the declaration of the Constitution of Guatemala, from a local point of view and not necessarily from a law, which directly influences the social, cultural, economic and political constitution of the country, although it also refers to the relationship among neighbors.

31. This makes reference to Xinca people, based in San Juan Yupiltepeque, township of Jutiapa.

> Section 8. Elements of the local council.
>
> (f) The authority exercised in representation of the inhabitants, both by the Local council and by the traditional authorities of the communities in the district. The local juridical code and the common law of the place.

It appears that this section tries to strengthen the image of traditional authorities, which should be understood in the light of ILO Convention No. 169 as the indigenous community, but the norm is not clear enough.

In the second case, recognition of common law seems to be of great importance. However, valuable studies have shown that not only natives apply common law, thus, common law is not always natives' law, nor is the inverse true. That norm finds its main obstacle under Section 162, which says that the judge in charge of local matters exercises jurisdiction and authority; therefore, he can apply, among other things, the corresponding common law.

Analyzing this norm, another misinterpretation is found in what should be understood by native common law, since it is not clear if it is the one used by natives. It is also a close interpretation and is completely out of place, since it leaves the application of common law in the hands of one person who, in the light of the law, does not refer to the natives, but rather to a local common law, which is not necessarily related just to natives. In the case of Guatemala, judges and the other administrative authorities should not change any decision made by indigenous authorities; they should respect it, recognize it, and promote it in the light of Section 66 of the Political Constitution of the Republic of Guatemala.[32]

> Section 55. Indigenous Mayoralties. The local government should recognise, respect and promote indigenous Mayoralties . . .

This is a very important measure, but in many of the Councils in Guatemala no attention is being paid to this norm, which coincides with Section 66 of the Political Constitution of the Republic of Guatemala (which states that the State, recognizes, respects and promotes, among others, the forms of social organization in indigenous communities). It appears that no attention is being paid to this regulation because, although indigenous mayoralties do exist, local mayors do not respect those authorities, and, on the contrary, they treat them as inferior and minimize their presence and activities. On this subject, it is significant that some of these indigenous authorities have begun lately (for example in Totonicapán and

32. Protection of Ethnic Groups. "Guatemala is home to various ethnic groups, among them the indigenous groups of Mayan descent. The State recognizes, respects, and promotes their lifestyles, customs, traditions, forms of social organization, and their men's and women's right to use their indigenous attire, languages and dialects." GUATEMALA'S POLITICAL CONST. art. 66.

Chichicastenango) to strengthen their knowledge of their structures and their roles regarding the lands, their organization, and the knowledge of both indigenous norms and state norms.

Another important section is Section 56 of the same piece of legislation, which deals with the recognition of local mayors in their roles as authorities in the communities and as links to the local government. Its importance lies in the fact that, although many experts confuse them with the remnants of colonization, the importance of redefining their roles is that they recognize themselves as one of the focal points of their communities in any kind of development. A criticism of these authorities is that (except for some circumstances) they do not realize the role of women in the decision-making process in indigenous communities, which is an outstanding issue but not an impossible one. To achieve this, the joint work made by the organizations of the civil society is very important, as well as the work the women do and should continue to do.

> Section 109. Community Lands. The local government, will establish, prior consultation with the community authorities, the mechanisms necessary to guarantee the members of the community the use, conservation and administration of the community lands whose administration has been traditionally commended to the local government; in any case, the mechanisms should be based on the information given in Title IV, Chapter 1 of this Code.[33]

This section, although close to what is specified in Section 67 of the Political Constitution of the Republic of Guatemala at first sight, contradicts what is stipulated in ILO Convention No. 169, and, if it conflicts with this convention, it also conflicts with the Constitution because the Court of Constitutionality has explained that the Agreement is not incompatible but complementary to the Constitution.

To explain this situation briefly, in paragraph 2 of the Constitution, Section 67 establishes that both indigenous and other communities, which have lands that belong to them historically and that they have traditionally administered in a special way, will continue to be administered by that system. Moreover, Section 68 of the same Constitution establishes that by means of special programs and appropriate legislation, the State will provide the indigenous communities with state lands if they need them for their development.

Following dispossession, which was concealed behind laws, and which now takes more subtle forms, already at an early stage, the indigenous communities opted to preserve their lands under the legal structure of municipalities. This, however, did not entail a transfer of title to property, domain, or possession of such lands to the municipalities and even less to the hands of the Local Authorities. For those reasons, local governments should refrain from taking control of indigenous communal lands; they should leave

33. This provision refers to Open Town Meetings.

no doubt that the juridical security of those lands is in the hands of indigenous people, in this case represented by its communities. What is stipulated in the Local Code once again leads to a misrepresentation of the right of consultation that indigenous peoples should have, and changes it to another type of consultation that is not necessarily the same as that mentioned in the Agreement in the sense that it should be done in good faith, and by their representative institutions.

VII. THE URBAN AND RURAL DEVELOPMENT COUNCIL ACT

This is another piece of legislation that was recently reformed. What is innovative about this law is that it allows other actors to participate in government development policies: women, medium-sized companies, farmers, and indigenous representatives. But this representation is still negligible in practice. Time may show some changes, but some development councils in different areas, from communitarian to national, are very much influenced by the official political party. This is an evil that persists in the different governmental regimes. That is probably one of the greatest obstacles in terms of the environment and natural resources, which is also mentioned in the law although in a tangential and superficial manner (when indicating the need for the preservation of the balance between the environment and human development in the section stating the general principles of the development council system).

A. The Land Fund Bill

When passed by the Congress of the Republic, the Land Fund Bill was interpreted as an accomplishment derived from the Agreement on Identity and Rights of Indigenous Peoples (Indigenous Agreement). However, even though it represents visible progress in terms of fulfilment of the Peace Agreements, it is not yet close to the expectations of indigenous peoples as established under the Indigenous Agreement. Congress wants to make people believe that argument rather than deal with the problem of lands in depth. The reasons for this are set forth below.

> (1) The Land Fund is outlined within the Agreement on Social and Economic Aspects and Agrarian Situation. Although it is true that one paragraph of the Indigenous Agreement makes reference to the Agreement on Social and Economic Aspects and Agrarian Situation, this does not mean that all the provisions established in the Indigenous Agreement regarding indigenous lands, both as collective and individual right, are captured in the Land Fund Bill.
>
> (2) The fact that the Land Fund was discussed at the Comisión Paritaria de Tierras Indígenas (COPART – Management and Workers' Committee on the Land Rights of Indigenous

> People) does not mean that they are in compliance with said Agreement regarding Indigenous Rights upon lands.
>
> (3) The Socioeconomic Agreement, paragraph E, makes specific reference to the topics that should be considered as legal framework and security to put an end to the vulnerability and divestitures that have affected farmers and particularly indigenous peoples. In paragraph E, there is a marked differentiation between farmers and indigenous peoples (the latter as the most affected by divestitures and lack of legal protection), which is why the Land Fund Bill is inconsistent with what is set out under the Agreement on Social and Economic Aspects and Agrarian Situation.
>
> (4) The Land Fund Bill should have covered the five subsections of paragraph E of the Agreement on Social and Economic Aspects and Agrarian Situation, but it did not although that paragraph indicated that:
>
> taking into account in all cases the provisions of the Agreement on Identity and Rights of Indigenous Peoples, the Government undertakes to:
>
> (a) Promote legal reform which will establish a juridical framework governing land ownership that is secure, simple and accessible to the entire population.
>
> (b) Promote the establishment of an agrarian and environmental jurisdiction.
>
> (c) Promote the revision and adjustment of the legislation on undeveloped land so that it conforms to the provisions of the Constitution.

On provision (a), there has yet to be any progress, and the jurisdiction described in provision (b) has yet to be created. Provision (c) probably refers to the legal adaptation of Article 68 of the Constitution, which states that Guatemala will provide state lands to indigenous communities that need them for their development by means of special programs and proper legislation. In this regard, there is nothing stipulated in the Land Fund Bill either. On the contrary, in the exceptions contained in the law under its Article 45, what refers to indigenous communities is left aside. Thus, both collective and private indigenous lands are left without protection.

B. Protect Common and Municipal Land

Earlier, it has been mentioned that, to avoid a declaration that indigenous lands are empty and unused, many indigenous communities placed

them with local authorities constituted for such a purpose. Now these lands are considered municipal lands and negotiated as such. In this case, they are in violation of Article 67 of the Constitution and of the Agreement on Social and Economic Aspects and the Agrarian Situation (ASESA).

> (e) With respect to community-owned land, to regulate participation by communities in order to ensure that it is they who take the decisions relating to their land.

This is probably one of the most violated provisions; it is never respected, and it is not even established in the Land Fund Bill. As was mentioned above, in the law its treatment is excluded. The reason is not known: whether it is due to ignorance about communal lands, which is unlikely, or to postpone discussions on a topic that is responsive to power and individual interests.

From the analysis above, the acquiescent attitude of the indigenous representatives at the *Comisión Paritaria* (Negotiating Committee) becomes quite clear, as does the course of the applicable state policy when it comes to land problems, especially that of the indigenous peoples. For this reason, the Land Fund Bill leaves the treatment of individual and collective indigenous lands, as well as everything related to their legal security, for another time.

This is one of the laws that could be called "controversial," because the government has attempted to solve the land problem with a kind of land market where lands are sold to farmers but then they are not supported with the financial credit and technology necessary to make them productive. Therefore, the "beneficiaries," in order to subsist, alter the natural resources that are within reach, and this causes the loss of the main objective of providing land to people who do not have it.

It is also worth mentioning that this law keeps indigenous peoples hidden behind the word "farmer," and here it must be noted that not all indigenous people are farmers and, therefore, backward. The law could cause some features of imbalance in the future, something that is already set in motion by wrongly guided policies regarding natural resources, thus, putting these natural resources in danger, especially those in indigenous hands.

Finally, it is important to mention that, in the legislative agenda, in terms of lands, the government is developing legislation that promotes land registry, land regularization, and an agrarian code. The agrarian code's norms still diminish the importance of the relationship between indigenous peoples and the State, and the obligation on the part of the State to adapt its domestic legislation to the international laws that it, as a nation, has ratified. The State also has an obligation to adapt resolutions of a different nature to those international instruments, be they administrative, judicial, or legislative.

VIII. THE PEACE AGREEMENTS

A. The Agreement on Identity and Rights of Indigenous Peoples

The Agreement on Identity and Rights of Indigenous Peoples (under the Peace Agreements of 1996) clarifies many issues concerning the rights to indigenous peoples' lands. However, in some cases, especially as it relates to natural resources, it is quite weak in creating clear policies regarding their administration, use, control, and legal status. The Indigenous Agreement, as it is usually called, does not adequately meet the demands of indigenous peoples and does not advance indigenous rights in terms of the international laws that aim at improving indigenous peoples' land conditions as well as natural resources, and that smooth, to some extent, the normalization of their legal situation.

But if the Indigenous Agreement just complied with the commitments made in the other sections, it would be able to clarify many of the other provisions regarding natural resources, because it is very difficult to deal with the topic of natural resources outside the context of territory, lands, and their legal status. Although the Agreement contains norms to give legal security to indigenous peoples' lands, thus far, the will to fulfil those commitments has not been demonstrated.

Reviewing the commitments made by the Indigenous Agreement, it could be said that only the commitment that refers to the implementation of the Comisión Paritaria de Tierra Relativo a los Pueblos Indígenas (COPART) was met. While the Land Fund Law could be considered fulfilled, it does not regulate indigenous peoples' lands, but, instead, concentrates on the purchase and transfer of lands to farmers, something that makes this law quite popular both in its conception and implementation. It is again important to emphasize that, in this law, indigenous people are called farmers, something that should be reviewed because, by this means, they are intending to solve the partnership debt, on behalf of farmers, with lands of indigenous people. The development of legislative and administrative measures is necessary for the recognition of those rights, something that has not occurred since the signing of the Peace Agreements in December 1996. There truly is a constitutional enunciation that has not yet been fulfilled.

Indigenous lands, instead of having sufficient legal security, have presented a higher number of conflicts placing indigenous individuals and communities in very difficult situations because they are not able to present title deeds. It is amazing that any private person willing to use any approach to gain titles and deeds or to submit documents that facilitate the procedure to win a case over indigenous lands – be they private or communal – eventually becomes the owner of those lands. This is a clear violation of ILO Convention No. 169 concerning indigenous lands.

Neither is there any protection for indigenous lands. It should be recognized that declaring a communal forest of collective property or possession a protected area is not necessarily protection on the part of the State. On the contrary, it aggravates the situation because, by declaring it a protected area, the State would actually be leaving those lands with less protection. Protection should not be subject only to laws, but to actions of a wider scope. In this sense, the State has always shown itself to be ineffective. This protection can only be reached by meeting with the owners of those lands under their own consuetudinary norms, and with their authorities under

whose administration, possession, property, use, and control the lands are kept.

There may have been some favorable resolutions in the restitution of some indigenous lands, but, if so, it does not imply a state policy. These are isolated events in the administration of justice and only on individual lands. There is no news of development of administrative or legislative measures with this regard. In fact, there is not a single case known of restitution of communal lands and compensation to indigenous communities – no case in which the rule of dispossession has been changed by that of restitution, by economic compensation, or by replacement with another piece of land. The only cases known are those of the urban properties of Sololá and Totonicapán that belonged to indigenous communities but, after building state dependencies, were given away to individual owners as a consequence of a recent privatization policy. The most famous are the cases of *Telgua* and *Correos*. In those cases, the indigenous people of those municipalities have been neither restituted nor compensated; and with so many legal traps, the demands of any nature that could be presented are much disfavored. In general, Guatemalan legislation does not regulate much of what it refers to as indigenous communal lands.

Within the Agreement on Identity (which emphasises the lack of legalization of said lands in favor of indigenous people as individual or as a collective) the lack of protection of the rights related to land and natural resources is recognized by the State. There is also a reference to how difficult the defense of those rights is when they have already been acquired. But the Agreement delegates the treatment of the subject to the Agreement on Social and Economic Aspects and Agrarian Situation (ASESA), where the problems of indigenous communities' lands and individual indigenous lands later merge. The Land Fund Bill is one of the "most important achievements" of the Indigenous Agreement, but, in that law, they refer to indigenous peoples as farmers, thus avoiding the problem mentioned under the first subsection on the awarding of title, protection, recovery, restitution, and compensation for those rights relating to the lands of indigenous peoples. The Agreement is apparently clear when mentioning that the problem is not exclusive to the indigenous population although the latter has been *particularly affected*. In its interpretation it could be said that the problem should be tackled in general, not particularly as it relates to indigenous people. However, the last phrase reading "particularly affected" is placed aside, although attention should be paid to this phrase since, under it, the land rights of the whole population will continue to be unprotected.

Further on, the same Agreement seeks to redefine the issue in terms of an indigenous problem that should be solved in favor of these peoples, especially regarding compensation and restitution, because, as pointed out earlier, there have been many instances of dispossession of lands that belonged to indigenous peoples or communities. However, what is related to legal security of those lands should also be kept in mind to avoid new divestitures.

Although the lack of protection and dispossession of communal or collective indigenous lands is recognized in the Indigenous Agreement, there

is double non-compliance in this sense: (1) on the part of the Political Constitution of Guatemala; and (2) on the part of the Identity Agreement itself. When disposing of communal lands for other ends (e.g., *Visis Caba*) instead of compliance there is a violation of both what is established in the Political Constitution of the Republic of Guatemala and in the ILO Convention No. 169. This case, as well as others, could serve as clear examples of the non-compliance with the obligation on the part of the State to protect communal lands to prevent them from being taken away from their owners. In another constitutional article, the State has committed to provide state lands to indigenous communities. But instead of providing them, they are modifying their obligation, something that in the future could end up in the closing of the legal insecurity circle communal lands have undergone, holding up the progress of said communities.

Summarizing, there has been non-compliance with the Agreement on Identity and Rights of Indigenous Peoples regarding the issue of lands, be it because of lack of interest, lack of will or just due to the large number of laws, behaviors and attitudes encumbering its observance. Therefore, the following have not been observed:

> (1) Regularization of the land tenure of indigenous communities, or in other words, regularization of their legal situation.
>
> (2) Regularization of the use and administration of the natural resources found within communal and individual lands.
>
> (3) Restitution of communal lands and compensation for rights. These make land recovery permanent and have not had any treatment whatsoever in this context. It is important to point out that what is set down in the Land Fund Bill does not meet the expectations on rights relating to indigenous lands (the Bill's provisions could operate merely as palliative measures to the needs of some indigenous persons).
>
> (4) Nor have indigenous communities been provided with state lands. On the contrary, it seems as if they had taken measures to facilitate land dispossession, by changing the use and administration of natural resources, for example.
>
> (5) As for legal protection, the State has also failed to implement subsection 9 on rights relating to indigenous lands.

B. The Agreement on Social and Economic Aspects and Agrarian Situation

This is another of the agreements that was not met, although much

importance was given to the Land Fund Bill, because the latter states that the Land Fund will be made up of:

> uncultivated state lands and state-owned farms, illegally settled public lands, lands acquired with the resources allocated by the government, lands purchased with grants from friendly governments and international non-governmental organizations, expropriated undeveloped lands, lands purchased with loans secured from international financing agencies, lands acquired from the proceeds of the sale of excess land in private properties, lands which the State may purchase pursuant to Decree No. 1551, Article 40, lands which the State may purchase for any purpose or donations and miscellaneous grants.

As can be seen, the Land Fund Bill corresponds to the Agreement that is being analysed in this Article. In the course of this analysis, out of the ten subsections on lands that would initially make up the land fund, very few have been dealt with. One in particular that has been dealt with is lands purchased with loans secured from international financing agencies, and it appears as if what the institution in charge of this subject is actually doing is acquiring the lands in order to later pass them over to organized groups, that is to say that what they are actually doing is carrying out a bureaucratic procedure.

It is common for people who acquire lands by means of CONTIERRA to find it very difficult to pay the fees later, since the prices are very high and there is no assistance to provide indigenous people with the means to make them productive. In order to make them productive, they would have to resort to loans, but also need a minimal knowledge of production. Thus, land acquisition is not the only answer to this need, there are other elements that in the end only intensify the worries of the individuals who are involved in land acquisition.

IX. FINAL COMMENTS

To conclude, it can be said that the Mayan people have gone through very difficult periods in Guatemala, from the Conquest, through the colonial times, independence, the "Liberal" Reform, and finally through dictatorships including the internal armed conflict, which ended in 1996. During all these periods it is important to point out that indigenous lands and indigenous spirituality, or its practice, have been strongly attacked. The objective was to destroy the basis of their economy, and now, their subsistence.

For the Mayan Peoples in Guatemala, the hardest period regarding land, after dispossession on the part of the Spanish Crown, was the Liberal Reform whose effects are still detected in the making of policies that instead of facilitating, actually hinder the exercise of the individual and collective rights of the members of the indigenous community.

During the internal war, communal land tenure was reduced by legal

or factual dispossession carried out by authorities with political, military, or economic power, and there are still no policies designed to end those practices. Although the Peace Agreements (signed in 1996, including the Agreement on Identity and Rights of Indigenous Peoples) establish the commitment on the part of the government to give legal security for lands, in order to regularize, indemnify, provide restitution, or compensate the persons and communities that were deprived of their lands, the commitment itself has engendered a seemingly infinite number of obstacles in favor of the persons that have taken possession of those lands.

Now, there is a market system in which the State promotes a fund for some families to have land. However this fund is very small and does not meet the needs of the individuals and/or communities. As a result, people end up in debt, especially since the lands are over-valued and those sold are the least productive tracts. Guatemala has no agricultural training programs to offer the beneficiaries of land. Even if they did have this kind of program, if lands are unable to be cultivated and overexploited, they will hardly be able to produce optimally, which in the end increases debt for indigenous peoples and therefore, increases poverty.

In terms of spirituality, it can be seen that is has been one of the most vulnerable Mayan rights throughout history, although it did not disappear completely. Freedom of religion, as one of the fundamental Human Rights, should be protected both in its individual or collective practice and in public as well as in private. If this is put into practice, persecution of indigenous spirituality by persons or groups, or persons belonging to other religions or religious sects would cease, especially persecution of Mayan spirituality, which has been tolerated by the State of Guatemala.

It is also important to keep in mind that policies about Mayan spirituality and land rights do not just come through lawmaking. This should be highlighted because international cooperation organizations usually emphasize lawmaking without taking into consideration whether the laws are actually observed or not. Within the framework of the Peace Agreements, laws have been dictated and amended. However, seven years have passed since the signing of this peace and very few concrete results and objectives have been reached that benefit the majority of the population of Guatemala, the Mayan People. In other words, the results of going from a state of war to a state of peace are yet not known. Of course there are some limited achievements, but the structure of Guatemala continues to exclude a large part of the population from meaningful political, economic, and social participation (although there have been some advances in terms of culture).

It is highly recommended that national and international courts take particular interest in the protection of human rights in general and indigenous rights specifically, applying the norms on the issue with legal certainty and reasoning and putting emphasis on the laws applied in several places to set the bases for respect, development, promotion, and exercise of indigenous rights. The resolutions taken by international committees and courts have produced international laws that show pronounced improvement. National courts should adopt these laws to truly improve the treatment of indigenous peoples in different places.

Nevertheless, as has already been demonstrated, it is hoped that states would comply with the commitments made by means of different national instruments (e.g., Peace Agreements in Guatemala) and international instruments, such as international agreements, and honor those commitments made to their peoples. Instruments without a real will for enforcement are mere good intentions. Peoples' rights, besides being clearly identified, should be effective and operative, and should serve every situation. Peace consolidation must also recognize and respect the rights of indigenous peoples.

APPENDIX

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