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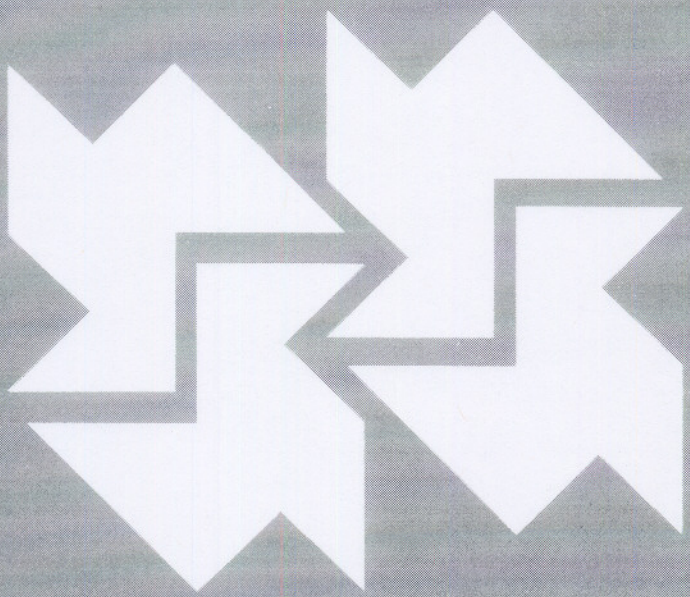
# Sistemas Judiciales

## Una perspectiva integral sobre la administración de justicia



## Los Jueces y la Información

# INDICE



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# Dispute Settlement and Customary Indigenous Legal Practice in a Multicultural Guatemala:

## Empirical Data on Conflict Resolution and Strategies to Advance Access to Justice in Rural Areas

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Opinions expressed here represent those of the authors and do not necessarily represent the opinions of the U.S. Agency for International Development.

* Luego de 36 años de una guerra civil que dejó más de 200 mil muertos, los acuerdos de paz en Guatemala intentaron avanzar en la resolución de conflictos, entre otros objetivos. La población rural guatemalteca es mayormente pobre, de origen maya y está marginada de las vías formales de acceso a la justicia. Sin embargo, la población indígena tiene una larga historia en la utilización de mecanismos de resolución de conflictos basados en la tradición y en la autoridad. De todas formas, la intolerancia oficial refleja un profundo problema de discriminación étnica y discriminación que data de cientos de años.

Este documento presenta un estudio empírico centrado en cinco grupos lingüísticos con el objetivo de evaluar cómo son resueltos los conflictos en la mayor parte de las zonas de población indígena. Curiosamente, los "mediadores naturales" de conflictos a nivel local no son autoridades religiosas, ancianos o policías , sino que los datos empíricos muestran que los mediadores ideales son personas de entre 30 y 39 años. Pocos son los que utilizan los mecanismos de la justicia de paz, las mujeres raramente son vistas como potenciales mediadoras y los conflictos más comunes giran en torno a las disputas por tierras, al alcohol, robos, violencia doméstica y los problemas entre vecinos. El sistema formal es visto como menos capaz de dar respuesta a estos problemas, al no poder superar las dificultades del lenguaje y las flaquezas del servicio.

La información recolectada es importante porque señala cómo los donantes deberían refocalizar sus esfuerzos para atender los conflictos en Guatemala. El trabajo con alcaldes y gobiernos locales, más que las cortes o los concejos de ancianos, puede ser la vía más efectiva para expandir el camino del acceso a la justicia para aquellos que han estado tradicionalmente excluidos, especialmente los pobres, las mujeres y los niños.

In December 1996, Guatemala signed the last of a series of Peace Accords to end a 36 year civil war. Conflict resolution was seen as an important element of those documents. In fact five separate Accords, with forty different commitments, address dispute settlement. Since Guatemala has twenty-three indigenous languages in addition to Spanish, any public service delivery must recognize ethnic diversity. As a result, today's discussion of conflict resolution in Guatemala must address the historic roots of conflict in a multicultural context. This article examines Guatemala's context for dispute resolution. It then examines empirical data on how conflicts get solved, and concludes with recommendations for future action.

## The Guatemalan Context

Guatemala is wonderfully culturally diverse. The descendents of the ancient Maya represent about half of Guatemala's population. A mountainous terrain has meant that communication and travel are difficult. This in turn has worked to preserve many century-old traditions. In a formal sense, Guatemala's

rich diversity is recognized in the Peace Accords themselves.

While diversity represents a cultural heritage and wealth, it has also been the source of conflict. In the recent civil war, 200,000 Guatemalans died, most of them among the indigenous. While the war was fought between guerillas and the army, both sides were comprised of mostly indigenous soldiers. This context of a history of conflict is often the subtext or underlying current to present disputes. True conflict resolution must recognize this nature and history if a solution is to be found. Further, while diversity may be formally recognized in the Peace Accords, in fact its nature and value is constantly questioned. This in turn creates a perception of an overlay of illegitimacy for an intolerant, western system of government. Institutional rejection of indigenous values, practices and traditions itself is a strong, permanent element of an overarching conflict between the indigenous and their non-indigenous European-descendent, known locally as "ladino"[1] compatriots. Ladino strategies to help the indigenous, from "development poles" to "model villages," have likewise been summarily rejected by the indigenous as not being respective of the multicultural needs of the indigenous population. Historically, indigenous reorganization processes have had as their primary goal the control and subjugation, dismantling institutions, nullifying regulations and authority systems, and modifying social organization to resist all political and cultural forms of resistance.[2]

Discrimination against Mayan culture is pervasive in Guatemalan history. Prior to 1965, the Guatemala Constitution officially promoted a policy of assimilation of the Maya population into the "national culture." Even earlier, the historian Guy Heraud points out that only some dictatorships or totalitarian regimes forbid at least once, the use of certain languages.[3] Such a statement, although generally valid, is not enough descriptive for Guatemalan case. The Constituent Congress in 1824, responding to its ethnocentrism ideology, established in its Legislative Decree No. 14, that:

> *...considering that there should only be one national language, and as long as the languages that original indigenous peoples keep are diverse, and they are few and not perfect...resolves that persons, in agreement with municipalities, will try by all analogous, cautious and effective means to suppress the original indigenous language...*
> (the underline is from the authors).

Then dictator Justo Rufino Barrios, the hero of the "Liberal Reform" in Guatemala, signed a decree (Acuerdo Gubernativo) to cease recognizing the mam indigenous group, one of the largest populations of the Maya. Decree No. 165 dated October 13, 1876, stating that that mam indigenous group from San Pedro Sacatepéquez, San Marcos should be declared as "ladino", and had legal effect only within that village. This was, in legal terms, the death of a people, language and culture. Maya were detained by police for things like not wearing shoes. Children were forced to speak Spanish, much the way General Franco in Spain forced Spanish on Catalonia, or the U.S. government made the Sioux to speak only English in schools.

Official intolerance of indigenous practice is one problem. How that indigenous practice is manifest complicates matters further. In a western system of social custom and law, if one breaks a law, there is a consequence or sanction. In the Mayan culture, laws are not written down. How do the "ladinos" know what the rules are? What are the sanctions for breaking a Mayan law? Similarly, if one breaks a social norm in western society, there is also a sanction. In Guatemala City, it is common for men to shake each other's hand upon entering the room, for men to kiss women on the cheek, and for women to kiss each other on the cheek. It is considered impolite not to do so. However, the indigenous from rural areas do not kiss each other. They have a different culture. In the ladino society, under Constitutional government, it is fairly easy to distinguish law from social norms. In rural areas, where local residents have never been allowed to form a nation, distinction between social customs and laws is much more problematic. It is worthwhile noting that the Mayan "cosmovision" integrates rather than separates human, in contrast with a sterotype of activities from the Judeo-Christian perspective.

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1 The identity and idiosyncrasy of the Guatemalan "ladino" cannot be defined nor understood, unless contrasted with the term "indian" (and vice-verse) because historically they were defined way. At every step of Guatemala's process of becoming a nation, the "ladino" has been composed by two different social-cultural groups. The term "ladino" has not had a constant meaning: In Spain of the Catholic Kings, by the Sephardim Jewish and Muslims converted to Catholicism; by the end of the conquest period, by Spanish-speaking indigenous and Christians; at the beginning of the colony, by biologic half-breed and immigrant Spanish who arrived late for booty distribuiton; then, by individuals whose identity was based -increasingly- in the fact of **not-being-an-indian**; and currently, in Guatemala, indistinctly includes foreigners, indigenous, half-breed and even transculturalized indigenous. So, the racial origin cannot be used to define "ladino"; it is very complex and mainly involves the subjective relationship of each individual. Not depending on its composition, the "ladinos" (as a whole) have characterized themselves -among others- by three factors:
a) By their role of mediators at different levels, between the Government and indigenous;
b) By the discrimination and domination relationship that has been established toward indigenous groups at different levels;
c) By obtaining a number of rights, priviledges and advantages based on the facts stated above.
This situation promotes the "ladino" tendency of establishing their identity on a **not-indian** basis. As a result, the "ladino" identity is closer to the **what-it-is-not** way of thinking instead of affirming any historical cultural values.
This strange identification via exclusion started during the colony, by an historical group that pretended to occupy a privileged place in social status. That is why the "ladinos" have rarely married outside their social grouping, since "crossing races" might limit social mobility.
2 This was set forth in the "Capitulaciones" (set of three basic norms to rule invasion) during the Conquest; in the Distribution of Indigenous in the Colony; and in Government Decrees that create Pilot Villages and Development Centers during the regimes against contemporary insurgents.
3 Heraud, Guy, *Pour un Droit linguistique comparé*, en ARev. Int. Droit Comparé, 1971, No. 2, pages 321-322.

In some places and cultures, including in some areas of Guatemala, midwives play a key role as natural judges in their community. They are responsible for sorting out family disputes, enforcement of phyto-sanitary regulation and other local conflicts. They do so without formal recognition of authority by the state. Are they guilty of usurping governmental authority? The Guatemalan Criminal Procedure Code authorizes Justices of the Peace to solve minor disputes. But this does not cohere with the traditional legal systems. Which should govern?

Perhaps the broader question asks how Guatemala became so hostile to local, customary legal practice. At the time of the conquest, Spain itself was emerging from 400 years of war against the Arabs. The Spanish government was bankrupt and in ruin. Thousands of ex-combatants were now displaced. As part of a broader transition strategy, the Spanish government sent these soldiers to be the vanguard of the conquest in the new world, attracting them with the promise of land. German commercial interests financed the endeavor, and new world governance took a back seat to the personal interests of the ex-combatants. First, a new spirit of self-enrichment emerged as the Spanish promoted the policy of the "Quinto Real," in which part of land taken by the invading army would be passed on to the Spanish crown. Second, the Spanish changed indigenous social organization for ease of administration. Third, the Spanish brought Christianity, representing a break from the indigenous world religious view, often referred to as their "cosmovision," a complex, spiritual definition of the relationship between man and creation. From the date of Spanish conquest, indigenous law began to fall.

After the conquest, Francisco de Vitoria, a Spanish cleric, noted the natural superiority of the Spanish and the Europeans to the indians. He asserted that the indians were not human beings, asserting that they are <u>almost</u> without mental capacities - meaning that they think with difficulty. And they certainly were not capable of governing themselves. Under these circumstances, self-government was out of the question. The indians needed Spanish rule. Under such a world view, at the time a Christian view, as found in the writing in St. Thomas Aquinas, a craftsman of Christian philosophy) people in general were ranked according to station. At the top were men, next women and at the bottom children. Indians were added to the list in fourth place.

The thought of racial superiority was carried forward in Guatemala to its very Act of Independence. In fact, the prejudice was still broader among the founding fathers because they did not recognize anyone's free determination (indigenous or not), but rather thought that all should be ruled by the elite group. The very first clause, the document states that Independence must be proclaimed before the fearful case in which the people take it upon themselves to declare independence in their own right. While it did not specifically refer to the indigenous, since the indigenous were the majority, they represented "the people."

> *That being the general desire of the Guatemalan people to be independent from the Spanish government, and without prejudice of what the Congress that shall be formed might determine upon it, the Political Chief orders to publish to prevent any consequences <u>that would be dreadful if it is declared by the people itself.</u>*
> (The underline is from the authors).

Still, indigenous law has survived, at least in some fashion, at least in some parts of Guatemala. And, the western "conquest" of indigenous legal practice continues to try to stamp it out. Transitionary Article 16 of the present Guatemalan Constitution is a remarkable example. During the 1980s, when Constitutional law and order were suspended in favor of military dictatorship, the military government introduced a number of measures to stamp out ethnic culture and practice. Development poles and model villages are some examples. The most egregious is perhaps the special tribunals, in which civilians were tried by military authority, without right to counsel or due process. Often the result was summary execution. The current Guatemalan Constitution actually provides retroactive cover for these practices, legitimizing and recognizing their legality in Transitionary Article 16.

Language is another area where indigenous culture has been marginalized. In 1879, dictator Justo Rufino Barrios carried out a mapping exercise (cadastre) to adjudicate titles to land. The entire effort was done only in Spanish. Indigenous groups that did not speak Spanish simply lost their land. Worse, indigenous groups often did have property titles of their community lands, issued by the Spanish Crown, thanks to the intervention of Fray Bartolomé de las Casas. But the titles were not recognized as valid because the indigenous groups did not explain it in Spanish. In effect, they were expropriated without compensation. More recently, discrimination continues. A 1999 constitutional reform effort was rejected that would have allowed for official use of languages other than Spanish. Even today, land transactions must be carried out in Spanish.

In a real-world look at how the Judeo-Christian belief structure has played out in Guatemala, real conflict emerges with the Maya "cosmovision." Under the European belief structure, again in practice as opposed to theory, in Guatemala there

emerged a compartmentalization of ethics. There is nothing unethical or incongruent in social terms about owning a sweat-shop *maquila*, abusing a spouse, while being a devout member of the church. In fact, at times, honesty itself comes off as foolish. Appearances are often very important. Meanwhile, the Mayan belief structure traditionally has been very integrated, with a very different view of authority. A spiritual guide may also be a judge. A system of positions and authority ("sistema de cargos") dictates civil as well as religious authority and responsibility. Mayans typically do not separate civil and religious responsibilities.

This same story of marginalization of indigenous people is told from the perspective of Guatemalan Constitutional legal history. All of Guatemala's constitutions have followed some sort of armed internal conflict. In this sense, all have reflected in large measure the opinion of those who were winning or had won a conflict. The 1824 Constitution followed independence. Left out were indigenous groups and royalists (who had been loyal to Spain). The 1879 Constitution left out both indigenous groups and the conservative movement (mainly Catholics). In 1945, an anti-dictatorial Constitution left out groups that had been loyal to the dictator Jorge Ubico. The 1956 Constitution, reacting to the Arbenz government, sought to exclude labor leaders, and anyone suspected of having sympathy with leftist groups. Under Arévalo and Arbenz, electoral law reform eliminated the formal communist parties, so these groups adopted the name of Guatemalan Party of Labor. This same exclusion is reflected in the 1965 Constitution. In 1985, the current Guatemalan Constitution was drafted, again reflecting a very conservative approach.

In general, constitutions embody general principles of law, social organization and fundamental rights. In Guatemala, given proclivities for exclusion in citizen participation in the legal process, the Constitutions have represented a manner of political organization in terms of a deal among the politicians and those with real power. It has not necessarily meant that the governed have deliberated and consented to a new legal framework. The process is one of racial, political and religious exclusion. In that sense, unfortunately, parallels can be drawn with the exclusion of African-Americans in the US.

Legal discourse further clouds the ability of Guatemalan indigenous groups to engage in political process and enjoy self-determination. The Guatemalan state is not necessarily the same as a nation in terms of ethnicity, language and culture. To deny indigenous groups a sense of nation further excludes them from participation in the state. In other words, indigenous groups end up belonging neither to a state or a nation. It is important to note that Guatemalan indigenous groups do not consider themselves as minorities, groups or tribes, but peoples ("pueblos") with right to their free determination. Today, not one groups has made any claim fore a division of the national territory, although at time some try to approximate certain autonomous characteristics within Guatemalan state.

The consequences indigenous people not feeling ownership or participation in "Guatemala" means that they sometimes do not buy into or accept formal legal authority. According to a 1996 survey of Guatemalans, a survey taken just three months before the signing of the final Peace Accord, 75% said that extra-judicial killings were acceptable. Incredibly, 58% thought burning a suspect to death was acceptable. When asked why extra-judicial killings were justified, 74% blamed the state. It appears that Guatemalans feel justified in breaking the law and carrying out extra-judicial killings, and rejects any personal responsibility for this. To this date, extra-judicial killings continue. This survey documented that the jurisdiction of the State is not recognized neither by indigenous nor non-indigenous groups. The Law's lack of legitimacy comes not only from ethnic discrimination but also from social exclusion and lack of effective citizen participation.

Guatemala's most monolingual, non-Spanish speaking Department is Alta Verapaz. There, language is a particular barrier to justice. In a 1998 survey by MINUGUA, 91% of citizens there were identified as indigenous, with 89% of the population speaking Q'eqchi.[4] Of the judges in the Department, 29% claimed to be bilingual, while 57% reported only speaking Spanish. Of public governmental offices there, only 23% had any form of translation services. The majority, 69%, had no services for persons unable to speak Spanish. Curiously, the survey found that 8% of public institutions were not even open when the survey was carried out.[5] 67% of the indigenous in Alta Verapaz questioned ethnic discrimination in the justice system as being a major barrier, while 58% added monolingualism. Another 42% asserted impunity, 33% corruption, and 30% not knowing the law. The universe of the survey consisted of indigenous leaders from different regions in Alta Verapaz; in hierarchical order they identified the main problems by giving them a score; that is the reason why adding percentages is higher than 100. The top two concerns, discrimination and monolingualism, converge on one level in terms of the state's unwill-

4 Population and language data are from the Statistics National Institute; justice operators data are from MINUGUA
5 This was due to a permanent assault post on the road. They could not participate in the survey since the National Civil Police were not able to control crime.

ingness or inability to provide services to the citizenry in terms that respect local language and culture. Incredibly, corruption comes well down on the complaint list. It may be that the indigenous are treated so badly by the official actors, that they do not even get a chance to bribe them. Perhaps if corruption were perceived as an issue, it would actually represent an advance in access to justice! The indigenous are even barred from corruption.

To begin to address these barriers, USAID initiated a program in 1998 that led to creation of seven community-mediation centers in rural areas near Quetzaltenango and the Boca Costa[6]. These centers had mediators trained by USAID in dispute settlement techniques through a grant to the National Center for State Courts. The community leader themselves then set up the Mediation Centers, again with USAID support. And they have been very successful. Mediators resolve 73% of all cases that enter the door, whether they be civil, commercial, family or criminal. Of the cases settled, 73% of settlements are fully complied with in less than one month. Non-compliance with settlement terms occurs in just five percent of cases. Mediators have served on an ad honorum basis, and the Centers have survived on community support and participation. The initial success of this strategy gave rise to new questions. How could mediation be extended to other communities? What were the secrets of success? To answer these questions, USAID commissioned a study leading to definition of a strategy to further mediation and access to justice in indigenous areas.

## Empirical Analysis

USAID set out to determine how in fact conflicts get resolved in indigenous areas. The study, carried out by Checchi and Company Consulting, sought to identify the kinds of conflicts being presented for settlement, the institutions involved in conflict settlement and their characteristics, and how they actually settle cases. It was also hoped that a profile might emerge regarding who would be an ideal mediator or problem-solver in indigenous areas, and what policies might be needed to help advance conflict resolution in those geographic areas. All this information feed the design of a plan to promote community-based dispute settlement.

In the context of the study, the term "mediation" and "mediator" were not used in the formal sense of pure Mediation. Rather, community-level mediators and mediation refer to any non-formal system leading to settlement, including giving advice or counsel.

The study focused on five linguistic groups: (1) mam, (2) k'iche', (3) kaqchikel, (4) qe'qchi' and (5) poq'omchi, the first four representing the majority of non-native Spanish speakers in Guatemala. In each linguistic area, four villages were selected for study: two villages where traditional values and practices remained in tact (including local language use), and two where the traditional ways had been largely lost or abandoned. Linguistic coverage is not identical to a court jurisdiction or jurisdiction of a justice of the peace. That being the case, USAID also decided to take a political jurisdiction, the Department of Quiche, as an administrative division of study. Between the two reviews, real insight was gained as to how communities perceive the justice sector and dispute settlement.

Traditional communities, for purposes of the study, were those defined as meeting the following criteria:

- Continued use of traditional social and cultural structures
- Continued presence of traditional organizations, including traditional religious orders ("cofradias"), elder council ("Consejos de Ancianos") and indigenous mayoralty ("alcaldia indigena").
- Predominant or exclusive use of a language other than Spanish
- Indigenous identity
- Cosmovision
- Use of indigenous law

A non-traditional communities were those defined as having:

- Weakened or ruptured social fabric
- Outside organizations or authorities, including having had Self Defense Patrols (PACs) and military presence in the past.
- Spanish speaking
- Loss of indigenous identity
- Catholic or Evangelical
- No use of indigenous customary law
- Migration in and out of the area.

Communities Selected for Study:

Traditional Communities:

**Mam**

San Juan Atitlán (Huehuetenango)
San Miguel Ixtahuacán (San Marcos)

**K'iche'**

San Andrés Xecul (Totonicapán)
Xejuyub (Sololá)

6 Name given to the region where the highlands join the coast.

**Kaq'chikel**
San Andrés Itzapa (Chimaltenango)
San José Poaquil (Chimaltenango)
**Q'eqchi'**
Panzos (Alta Verapaz)
San Pedro Carchá (Alta Verapaz)
**Poq'omchi**
Santa Cruz (Alta Verapaz)
San Cristóbal Verapaz (Alta Verapaz)

Non-traditional Communities
**Mam**
Santa Barbara (Huehuetenango)
Tajumulco (San Marcos)
**K'iche'**
Momostenango (Totonicapán)
Cantel (Quetzaltenango)
**Kaq'chikel**
Patzún (Chimaltenango)
Comalapa (Chimaltenango)
**Q'eqchi'**
Samac (Alta Verapaz)
Chisec (Alta Verapaz)
**Poq'omchi**
Tactic (Baja Verapaz)
Tucurú (Baja Verapaz)

The framework of the empirical review was the peace process. Five separate Accords mandate the use of alternatives to the formal justice process. Similarly, recommendations from the Justice Commission and the Historical Clarification Commission also call for increased use of alternative dispute resolution mechanisms and indigenous customary law as complements to the formal justice system. Survey instruments were developed for interviews with local institutions, with local decision-makers ("mediators") and local users of dispute resolution services. In every community, interviews included at least two institutions, two community mediators, and four dispute resolution system customers. Of these four customers, two had to be community leaders, and at least one had to be a woman. Ten focus groups (two focus groups in each linguistic community) were convoked to validate and pre-test the survey instruments. Five teams, with four persons to a team, then went to the five linguistic areas. Interviews were conducted in the local language. It was critical to get the consent of community leadership in each location to allow participation, since there is a general resistance to such surveys and studies (the principle objection is the number of donor-supported projects that continually show up to do studies).

So who are the natural judges or natural community mediators in the Mayan culture? Who in fact decides cases and controversies? For most indigenous citizens, the natural judge is the mayor or one of the mayor's staff. A separate, USAID-financed study found that traditional leaders in the Mayan system have become, in many instances, the formal municipal officials. In this case, the formal and traditional systems merge, and distinction becomes impossible.[7] Separate traditional authority figures, the so-called indigenous mayors ("alcaldes indígenas") are not formally recognized by the state, but exist nevertheless. Where an "alcalde indígena" is the actual mayor, he performs a dual role as both formal mayor and traditional, indigenous authority. Interestingly, traditional police, the "policía cantonal," continue to enforce traditional law, but again, have no recognized legal authority for their actions. To the extent that the formal justice system extends into traditional, indigenous land, it risks running over indigenous customary law.

**WHO THEY GO TO**

| | MEDIATORS |
|---|---|
| Assistant Major | 65% |
| City Major | 47,50% |
| Justice of the Peace | 32,50% |
| Relatives | 25% |
| Traditional Authorities | 22,50% |
| Priests | 15% |
| National Police | 10% |
| Protestant | 5% |

Communities do not necessarily submit their disputes to the elders, as is hypothesized most often in the literature. It is very important to be clear that at the interpretation of results workshop, indigenous experts coincided that this preference is a result of the nature of conflicts reported -all of social issues- that require actions between the community and the State, which must be implemented by relatively young, bilingual leaders. The interviewed persons excluded those conflicts of "cosmogonic" nature, very common within the communities; these conflicts are submitted to the elders or spiritual guides.

7 Since the Colony, the State of Guatemala has impossed institutions on indigenous groups who have formally adopted them to survive. They have often changed the institutions to meet their own cultural values. Thus, many authors coincide that an Auxiliary Major is a "bisgra" institution that makes operational the indigenous and "ladino" worlds, by adopting in each community their own characteristics.

| Elder men and spiritual guides' interventions in villages | |
|---|---|
| Family problems/advise | 60.7% |
| Mayan spirituality | 42.9% |
| Community problems/activities | 25% |
| Health | 10.7% |
| Nonexistence of these authorities | 10.7% |
| No intervention | 3.6% |

Result of diagnostic performed in 1997 by the Justice and Multiculturalism Project

As noted above, most seek conflict resolution at the mayor's office. However, participants in the survey noted several options (and so the graphic sums up to more than 100%). If forced to pick among options, 69% would go first to either the mayor or assistant mayor. Only 2% go to the police or the church. Only 27% would go to a justice of the peace.

If disputes do not necessarily go to the elders, what is the ideal age of a mediator? 64% of respondents put the ideal age between 30 and 49 years old. We might hypothesize that litigants want a younger, but still experienced person to promote resolution of the conflict, reserving only really contentious problems for the elders.

| | |
|---|---|
| 18-29 | 13% |
| 30-39 | 27% |
| 40-49 | 37% |
| 50 and over | 13% |
| No response | 10% |

Those who resolve conflict or serve as the natural community "mediators" or problem-solvers nearly always have some sort of institutional affiliation. Reflecting the preferences of people to go to the mayor's office, as we might anticipate, most mediators, 62.5%, are either mayors or assistant mayors. Only 5% are justices of the peace, and only 2.5% are municipal representatives, the "síndicos municipales," in whom the Public Ministry (public prosecution) relies on for local representation. Between both the courts and prosecutors, both from the formal system, we see that they represent a mere 7.5% of the true mediators of conflict in rural, indigenous Guatemala. This in turn implies that international donor and formal government strategies to extend effective access to justice, which to date have focused on the justices of the peace and the "síndicos," need revisiting.

| | Position title |
|---|---|
| Deputy Mayors | 42,50% |
| City Mayor | 20,00% |
| Top council member | 7,50% |
| Justice of the Peace | 5% |
| Mayoral Assistants | 7,50% |
| President Committee | 5% |
| Mayan Priest | 2,50% |
| City secretary | 7,50% |
| City Advisor | 2,50% |

System users thought that the number one criterion for selecting a mediator was that he spoke the local language. Alarmingly, one criterion cited in the study as a qualification for a mediator was that the people feared him. Quiche is the only community were this response occurred, a place of terrible atrocities during the armed internal conflict.

| | |
|---|---|
| Representative of an institution | 3% |
| One who represents an authority for the community | 16% |
| One who are awareness of the theme | 6% |
| One who knows laws | 6% |
| One with a Lawyer degree | 1% |
| One who speaks an indigenous language | 19% |
| One who works for the community | 18% |
| One that villagers respect | 15% |
| An elderly man | 2% |
| One who is a nice person | 10% |
| One that villagers feared | 4% |

Interestingly, of the 40 communities evaluated in the empirical study, not one community identified a woman as being a mediator. From separate literature reviews and experience, we are aware that women serve as community dispute resolution practitioners. However, it is remarkable that in the sample studied, not one surfaced, implying that at least for these communities, the preferred mediator is a man.

In terms of what gets settled by the community mediator, land disputes, alcohol-related conflicts, theft and intra-familiar violence appear as top issues. According to local institutions, "projects" are a source of local conflict in 11% of the cases. This should raise concern among donor agencies and governmental institutions trying to help communities by supporting projects in communities.

| Problems according to system customers/users: | |
|---|---|
| Land | 17% |
| Alcohol | 13% |
| Robbery | 11% |
| Domestic violence | 10% |
| Neighbors | 8% |
| Family matters | 8% |
| Gossip | 7% |
| Inheritance | 6% |
| Water | 6% |
| Youthful | 5% |
| Projects | 4% |
| Religion | 3% |
| Children | 1% |
| Others | 1% |

| Problems addressed according to the mediators surveyed: | |
|---|---|
| Land | 12% |
| Alcohol | 12% |
| Robbery | 11% |
| Domestic violence | 10% |
| Neighbors | 11% |
| Family matters | 7% |
| Gossip | 9% |
| Inheritance | 7% |
| Water | 3% |
| Youthful | 3% |
| Projects | 5% |
| Religion | 5% |
| Children | 3% |
| Others | 1% |

| Problems according to the institutions surveyed: | |
|---|---|
| Land | 14% |
| Water | 11% |
| Domestic violenc | 11% |
| Projects | 11% |
| Gossip | 8% |
| Economic issues | 8% |
| Neighbors | 7% |
| Family matters | 7% |
| Crime-related issues | 6% |
| Fight | 5% |
| Labor | 4% |
| Alcohol | 4% |
| Others | 3% |
| Religion | 1% |

How does the "mediation" take place? Regardless of the community, whether it retained its indigenous roots, or had lost that tradition, the process was the same. After being presented with a case, the mediator would cite the parties to appear. The parties would lay out their argument and discuss the case. Then, unlike formal mediation, community mediators would then often give advice and counsel to the parties to help them reach a settlement. In fact, this should really be referred to as a conciliation process, within a general theory of alternative dispute recognition. As such, it is recognized as a Judge's function under the Guatemala Civil Procedure Code. This practice of conciliation often included reference to traditional or community values. Finally, there would be a search for common ground and an agreement.

What happens after a deal is reached does depend on local culture. In the Quetzaltenango Mediation Center located in a non-indigenous area, nearly 100% of claimants want a settlement document that is enforceable by the courts. Mediators are trained in how to prepare a document that the local justice of the peace can certify. In contrast, in indigenous areas, the survey did not find any claimants needing court certification to the settlement. After the survey, focus group discussion of this issue centered around the notion that, among indigenous people, the word of a party was considered a reliable promise. No further backing from the formal, western legal system was considered necessary.

When do the indigenous seek help from the formal system? According to focus groups that followed the USAID dispute resolution empirical review, indigenous citizens only go to the justice of the peace when all other options are exhausted. An actual case from a Mam region of Quetzaltenango is illustrative of this point: Through one man's negligence, another man completely lost the use of two fingers. If the plaintiff complained to a justice of the peace, the defendant might go to jail, and the plaintiff would never receive any compensation. Both families would suffer, and the conflict would not be resolved. Instead, both sides submitted the dispute to indigenous law. The defendant admitted his guilt publicly. The defendant was required to perform certain works in benefit of the plaintiff's family for the rest of his/her life. A sense of community was enhanced. Key to the efficient process of indigenous justice was a common sense of integrated values and "cosmovision." Without a compelling, legal mechanisms for enforcement, absent a sense of community or shared values, the defendant might simply have skipped town.

For the formal system, the positive news is that most indigenous citizens have access to a Justice of the Peace, and most of them go, although they do not necessarily find a solution to the problem. According to an empirical study by USAID only 30% of residents in the five major linguistic communities did not have access to a local Justice of the Peace.

| Communities with Access | |
|---|---|
| Yes | 65% |
| No | 30% |
| No response | 5% |

Of those indigenous citizens who had access to a Justice of the Peace in the community, most consult with the judge.

| Go to the Justice of the Peace | |
|---|---|
| Yes | 52% |
| No | 28% |
| No response | 20% |

For those that do not go to the Justice of the Peace, language and cost rank as top concerns. Cost is a factor in terms of taking time off of work, travel, having to wait, and so forth. Distance and slowness of response are separately cited by some, as is the insulting treatment the indigenous sometimes receive.

A prior survey, carried out in 1997 by the Justice and Multiculturalism Project, in part financed by USAID, showed that in the Western region of the country, the indigenous experienced similar problems in filing a complaint with the formal state judicial system:

| Troubles Mayan people experience when submitting a claim | |
|---|---|
| Language and communication troubles | 42.9% |
| Lack of service and disrespect of rights | 32.1% |
| Claimant's fear/unfamiliarity with rights | 10.7% |
| Corruption | 7.1% |
| Slowness | 7.1% |
| No response | 25% |

## Policy Significance of the Data and Future Plans:

Rural indigenous women are more likely than their male counterparts to be monolingual in a language other than Spanish. They also have less access to justice, in the sense that they have fewer opportunities to travel to where a court might be located and have fewer resources to engage a lawyer or formal justice sector actor. To reach the indigenous rural poor, especially women and children, it is clear that any dispute resolution strategy has to work with municipal government. That is not to say that municipalities need run resolution centers. It does mean that local governments be involved to some degree. Advancing a strategy to provide access to dispute resolution at the community level provides benefits to all the poor, but in particular for indigenous women who have few or no alternatives.

While formal justice institutions may have a monopoly on court settlement of disputes, they remain at a comparative disadvantage to local, natural dispute settlement mechanisms in terms of ability to settle conflict and to do so swiftly. Local mediation effort should not be seen under any circumstances as a replacement for the formal system. Instead, they should be viewed as a complement to formal access to justice, another option available to the citizenry to solve conflict efficiently at the local or community level.

The study has resulted in a plan of action under which USAID, together with local community groups and leaders, is advancing dispute settlement centers. Nineteen such Centers already exist. Together with additional local currency funding from USAID and the Secretariat of Peace (SEPAZ), USAID has supported another seventeen Centers, for a total of thirty-six Community Mediation Centers.

Each of these Centers began with local institutional agreements among community actors, the municipality and the USAID Justice Program. A micro-regional planning effort followed, with workshops to develop action plans and the design of locally-appropriate training programs. Next, the groups worked together to raise consciousness about the program and training in mediation techniques. Only as a final step were dispute resolution centers inaugurated.

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