

**Basic Elements of the Legal System of
Guatemala.**

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1) Some historical perspective.

a) *The encounter of two worlds*

The territory that today occupies the Republic of Guatemala was mostly populated by the Maya prior to the arrival of the Spanish *conquistadores*. The Maya civilization flourished in most of the Guatemalan territory, the Yucatan peninsula, and part of Honduras and El Salvador, from about _____ BC to about 1524. Most historians divide the Mayan history in three periods: the Pre-classic going from about _____ BC to about 250 AD; the Classic going from about 250 AD to about 900 AD; and the Post-classic, going from about 900 AD to about 1524 AD.

During these three periods the Maya developed several political and legal institutions, mostly based on a theocratic notion. However, by the arrival of the Spanish *conquistadores* the descendants of the Maya of the Classic period had become several different peoples, often times at war with each other, and their political and legal institutions were a matter of customary oral traditions, enforced by the rulers in a manner little known today. However, as of lately several anthropologists, historians, sociologists and other scholars have undertaken some significant research as to the customary legal practices of the descendants of the Maya presently living in relatively small and rural communities. This research has shown that in some of those communities there remain several customary rules that, probably, still reflect some aspects of the pre-Columbian legal system of the Maya.

Although the population of Guatemala of Maya descent, that has not become mixed ethnically or culturally, is about half of the total population it would be unrealistic to argue that the so called customary legal system of the indigenous peoples conforms a primary legal system in Guatemala. This is to say that, as a general rule, customary rules generally apply in (a) geographical areas where the formal institutions of the State have a weak presence; (b) matters closely related to social conventions and traditions, as for example in family relations; (c) in relatively small and circumscribed areas (these customs are not uniformly enforced across the national territory or any substantial part of it, but within the framework of closely knit communities). Thus, where the formal legal system of the Republic is enforced either through administrative agencies or the court system, the customary rules of the indigenous peoples are not the primary source of law, but only complementary. Given the remarkable variety of ethnical and linguistic indigenous groups and their different specific circumstances relative to the formal legal system, this degree to which one system is primary and the other complementary, is also at variance.

Additionally, it is important to remark that many of the issues relating to the positive or actual set of rules that govern the lives and relations of the Guatemalan population are now subject to intense revision, particularly as regards the rural population descendant from the Maya, and there are strong voices in favor of a more explicit and formal recognition of the validity, on equal grounds with the official legal system of the Republic, of those customary rules. Thus, it is quite possible that the basic outlook of the legal system of Guatemala may evolve to a more sort of plural system in a few years from now. It is certainly a matter in a state of flux.

All of the above notwithstanding, it is clear both as a matter of express assertion in the Political Constitution of the Republic¹ and as a matter of fact, that the

predominant legal tradition in Guatemala is that of Continental Europe, with a number of elements peculiar either to Latin America in general, or to Guatemala in particular.

Coming back to the historical process, once the process of the Spanish conquest gave way to the establishment of colonial rule, it was the laws and political institutions of Spain, mostly from the Kingdom of Castille, that were promulgated and begun to be enforced. The new laws and political institutions of the colonial period did not, obviously, spread immediately or automatically to every region of the country or became enforceable in every case falling under their provisions or powers, respectively. As a matter of fact and as has been mentioned above, even today the laws and institutions of the Republic do not effectively reach every corner of our territory, neither every dispute or relation that are supposed to fall under their rule.

However, every society needs a set of rules to abide by and one of the major consequences of the Conquest was the removal from power, and on occasion the beheading, of the rulers and principal authorities of the conquered nations. Thus, with the very important landmark of the promulgation in 1542 of the New Laws of the Indiesⁱⁱ, the laws and institutions of Spain, as modified or adjusted by this enactment, gradually spread throughout the then Kingdom of Guatemala over a period of about three hundred years.

The specialists generally distinguish between the institutions of the Habsburg's and the Bourbon's dynastiesⁱⁱⁱ, as they became predominant in Spanish America over those approximately three centuries. For the purpose of this brief historical sketch it is not necessary to go into any detail. It is important to mention, however, that by the end of the 18th century and beginning of the 19th the political and legal ideas of the American and French Revolutions had become part of the public debate in Spanish America in general and in Guatemala in particular. As a matter of fact, many of the people who championed the independence of Guatemala from Spain had been influenced by these ideas.

In as much as there were debates over the colonial legal order it was mostly about the rules and institutions of public law. This is mostly Constitutional and Administrative Law. There were some matters of Civil and Family Law, such as the equality of children in inheritance matters or the abolition of the distinction of wedlock as opposed to "natural" sons that were debated, but the heart of the matter was whether the citizens of the Spanish colonies should be ruled from Madrid, and in such case, under what circumstances.

In 1808 Spain became occupied by Napoleon's army and the Bayonne Constitution was imposed upon it. But shortly after the Spaniards regained their independence and, in the King's absence, with the presence of deputies sent by the several provinces of the Empire, approved the Cadiz Constitution in 1812. This was an attempt to organize a constitutional monarchy where the Metropolis and the provinces would be equally subject to the same rules and their citizens entitled to the same rights. It ignited much enthusiasm in many of the American colonies, including Guatemala.

The King was liberated and welcome back. Facing turbulent circumstances at home and ever stronger movements for independence in Spanish America, he agreed to uphold the Cadiz Constitution. Not only is this a historically significant document because it reflected the core of the liberal doctrines of the time, but also because it became a source of inspiration for subsequent developments.

It would be an exercise in imagination to wonder whether the Cadiz Constitution would have been a strong enough basis for most of the Spanish Empire to remain united for the ages to come. King Ferdinand however choused to reject it shortly after and thus provided additional and abundant reasons for those in favor of independence in Spanish America to call for immediate emancipation. It was thus that the Kingdom of Guatemala, then comprising mostly what today is Central America, declared independence in 1821.

By 1823, after a short lived annexation to the Iturbide Empire in Mexico, Central America gave itself a Federal Constitution. Its framers drew heavily on both the Constitution of the United States and the Cadiz Constitution. In this way this latter managed to outlive the monarch who had buried it.

Each one of the States, Guatemala being one, gave itself a Constitution of its own but civil war erupted and ended up with the destruction of the Federation in 1839. Although some three decades of conservative rule followed in Guatemala, a good part of the basic principles of the State and Federal Constitutions remained in place. Then, the 1871 Liberal Reform gave way to the 1879 Constitution that, with numerous amendments, remained in force until 1944.

ⁱ Article 153 of the Constitution of The Republic clearly asserts that the rule of law extends to all persons within its territory.

ⁱⁱ Christopher Columbus believed that he had arrived to the Indies, following the rout of the west, and thus the Americas were initially called “the Indies”.

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