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After Judicialization?

Law, Authoritarian Regression, and the Defense of Indigenous Life-Worlds in Guatemala

RACHEL SIEDER

10.1 Introduction

> [C]ertain histories of juristocratic reckoning are imbued with what might be thought of as an "iconic indexicality," in which their supposed historical significance itself enters into the process of juristocratic elevation and then unraveling.
>
> (Goodale and Zenker, Introduction, this volume, p. 4)

The late-twentieth-century recognition of indigenous peoples as collective subjects of human rights would seem to represent a textbook case of what the editors of this volume term "iconic indexality." International human rights instruments approved at the turn of the twenty-first century held out promises of recognizing difference, repairing colonial harms, and reckoning with the slow violence of environmental damage that has translated into genocide for so many indigenous peoples. A paradigm shift occurred as struggles that had been fought out over centuries, first through colonial legalities and later through the laws of nation-states, were transposed to the idiom of human rights. A shared transborder language for framing "indigeneity" and indigenous claims coalesced as international human rights law steadily codified and

Rachel Sieder is Senior Research Professor at the Center for Research and Graduate Studies in Social Anthropology, CIESAS, in Mexico City. She is also an Associate Research Professor at the Chr. Michelsen Institute, Bergen, and a Global Fellow at LawTransform, The Center for Law and Social Transformation, Bergen. This chapter is part of the project "PluriLand: Theorizing Conflict and Contestation in Plural Land Regimes" (project number 300851).

expanded the collective rights of indigenous peoples, first through ILO Convention 169, approved in 1989, and then the 2007 UN Declaration on the Rights of Indigenous and Tribal Peoples. In the Americas the evolving jurisprudence of the Interamerican Court of Human Rights and the American Declaration on the Rights of Indigenous Peoples, approved in 2016, came to be central to indigenous peoples' juridified struggles for self-determination. Their resort to law generated new legal principles and hybrid judicial interpretations in domestic and international law, through iterative processes that Stuart Kirsch has termed "looping effects" (Kirsch 2018). In diverse processes of norm creation and diffusion,[1] indigenous individuals, communities, and their allies in civil society organizations lodged multiple appeals before national courts and the Interamerican system in ever-expanding processes of judicialization aimed at turning the human rights promises of indigenous and native peoples' self-determination into concrete guarantees and policies.

Judicialization was accompanied by broader dynamics of juridification, as sociolegal mobilization encouraged many individuals and communities to see themselves as part of broader collectives united across ethno-linguistic communities and national borders by the novel legal category of "indigenous peoples." However, the judicial expansion of indigenous peoples' rights faltered by the second decade of the twenty-first century. In addition to the "implementation gap" pointed to decades earlier by the first United Nations special rapporteur on indigenous rights (Stavenhagen 2002), powerful elites across the region increasingly turned to law and "lawfare" to systematically criminalize indigenous territorial defenders and their allies and renew processes of legalized and violent dispossession.

Yet rather than seeing indigenous rights as a case of juristocratic excess and failure, in this chapter I argue that processes of defense against old and new forms of colonial dispossession and erasure, and the complex roles that law plays in these, should be understood in the *longue durée*. Indigenous people have engaged with hegemonic forms of law in different ways since conquest and although these engagements acquired new dimensions and intensity during "the age of human rights" (Goodale 2022), rarely was law viewed as a panacea or an alternative to political

[1] On iteration, see Eckert et al. who suggest that all situated forms of engagement with legal norms and institutions are necessarily interpretative acts that constitute both self and law (Eckert et al. 2012: 11–13).

organization or other forms of resistance. The strategic resort to law is accompanied by a keen awareness of its historical role in old and new forms of colonial violence and dispossession. Colonial laws remade indigenous worlds by constituting land as an alienable object – "property"– displacing alternative understandings to justify racialized inequalities grounded in systemic violence. The late-twentieth-century turn to law by indigenous peoples never supplanted other horizons of justice premised on alternative lifeworlds; indeed, the juristocratic shift and its centering of "self-determination" served to amplify claims and histories conceived prior to and beyond human rights law. In other words, human rights constitute one more phase of this *longue durée*, wherein dominant forms of law shape but never completely define indigenous subjectivities.

In this chapter I draw on my ongoing collaborations with Mayan lawyers' organizations that have litigated key cases of indigenous peoples' collective rights in Guatemala to consider the uses of law in an increasingly hostile context of state capture and authoritarian regression. In the first section, I briefly discuss the role of the courts and law in ongoing processes of authoritarian regression and state capture, pointing to the links between indigenous peoples' legal mobilization, court decisions to uphold their constitutional and human rights, vested interests in extractive "development" projects, and the current wave of criminalization and violence unleashed upon territorial defenders. In the second section, I engage with recent theoretical discussions on competing ontologies of land or territories, and the enduring connections between racialized imaginaries, the making of property rights, and colonial dispossession of indigenous people. In the third section, I consider the generative possibilities of judicialization initiatives that seek to challenge these racialized imaginaries and dominant forms of property or "legal land ontologies" (Di Giminiani 2018). I argue that even though litigation may stand little chance of success in the courts, it represents an attempt to inscribe alternative understandings and historical claims within the judicial-political sphere, potentially shaping broader political imaginaries. I describe a specific claim for ancestral land rights to the territory of Los Copones, in the Ixcán region of Guatemala, to show how judicialization linked to processes of community political organization can strengthen localized forms of self-determination, defeat in court notwithstanding. I conclude by suggesting that even in a context of renewed authoritarianism and "juristocratic reckoning," the legal defense of indigenous lands and territories continues to hold emancipatory potential.

10.2 Authoritarian Regression, Violence, and Criminalization

In their edited volume, *The Limits of Judicialization: From Progress to Backlash in Latin American Politics*, Sandra Botero, Daniel Brinks and Ezequiel González-Ocantos consider why the judicialization of politics in Latin America has generally failed to guarantee greater rights protection. They observe that the late-twentieth-century project of progressive constitutionalism based on multiple international human rights treaties represented, in effect, a revolutionary charter. Given the acute levels of socioeconomic inequality and ingrained structural racism across the region, the belief that equality and democracy could somehow be engineered through constitutionalized human rights seemed utopian at best. Yet sustained efforts to combat corruption, racism, and impunity through strategic litigation led to significant victories in court, which social movements and progressive forces leveraged in attempts to achieve broader political change. Pro-rights rulings were a result of various factors. These included sustained social mobilization, the consolidation of legal expertise within social movements, donor support for legal services NGOs, "rule of law" institutional reforms in the 1980s and 1990s, and an incipient transformation of judicial culture whereby some judges and public prosecutors came to see themselves as defenders of human rights (González-Ocantos 2016). In numerous high-profile cases, courts in Latin America were instrumental in the impeachment of incumbent presidents, they convicted former military rulers of genocide and gross violations of human rights and confirmed same-sex marriage rights and women's sexual and reproductive rights. And as I underline in this chapter, they also endorsed – at least in declaratory terms – the collective rights of the region's indigenous peoples to preserve their distinctive ways of life. However, in many contexts, progressive legal victories – or processes of juristocratic reckoning – have contributed to a sustained backlash.

Botero, Brinks, and González-Ocantos explain how the institutional and cultural changes that empowered the courts and placed them at the heart of political disputes in the 1980s and 1990s – what they call the "judicialization superstructure" – often fell short of the promise of greater accountability and rights protection. They signal various reasons: first, progressive court rulings failed to take persistent state weakness into account, meaning that policy changes recommended by the courts often exceeded state capacity to implement them. Second, judicial corruption, nepotism, and other "intra-institutional pathologies" diminished the

transformative potential of courts and public prosecutors' offices. Third, the inability of courts and activists to embed change in strong support structures sometimes generated political and social backlash that frustrated efforts at social transformation. This was particularly the case where social movements had become "NGO-ized" and successful litigation was disconnected from broad-based popular support. As a result, and despite notable and rightly celebrated successes in court, the impact of judicialization across Latin America has been relatively limited and has provoked aggressive responses from conservative forces. This is clearly the case with respect to the judicialization of indigenous peoples' collective rights claims to resist the encroachments of extractive development projects within their ancestral territories. Botero, Brinks, and Gonzalez-Ocantos conclude that in some cases judicialization has done more harm than good, especially when the expectations of those who promote it have been fulfilled too well, specifically in fighting corruption. This has hastened the (re)capture of judicial institutions by conservative forces.

10.2.1 Human Rights, Extractive Industries, and the Criminalization of Protest

Rural Maya, Xinca, and Garifuna communities in Guatemala facing the socioenvironmental consequences of mines, hydroelectric dams, or monoculture crop expansion have mobilized through networks of legal professionals and civil society organizations to defend themselves and their territories before different courts and administrative instances. For nearly two decades, in common with indigenous peoples throughout Latin America, they resorted to the figure of free, prior, and informed consultation (FPIC) to juridify and judicialize their resistance to extractive projects. FPIC was established as a collective human right of indigenous peoples in ILO Convention 169 (ratified by Guatemala in 1997) and extended to a formulation of "FPIC for consent" by the UN Declaration on the Rights of Indigenous and Tribal Peoples. Litigation initiatives before the courts appealed to the international standards for FPIC established through the jurisprudence of the Interamerican human rights system, which has confirmed, inter alia, that all consultations should be carried out according to the self-determined governance procedures of the affected peoples (IACHR 2021). The first cases of FPIC were presented to Guatemala's constitutional court in 2007, and after 2008 the court issued several rulings ordering the temporary suspension

of large-scale extractive projects until consultation was carried out.[2] In some instances, these rulings were issued after the license to the company in question had been issued by the Ministry of Energy and Mines but prior to the project's initiation, in other cases the extractive project was already in operation when the court ordered its suspension.

These legal victories for the indigenous rights movement failed to change governmental development policies, but they did temporarily delay the implementation of important extractive projects, seemingly providing at least some respite for communities under threat and sending a signal to others that litigation in defense of collective human rights could have concrete effects. Yet in practice, the right to consultation proved largely declaratory. Guatemala's constitutional tribunal has always insisted that indigenous consultations are not binding and do not entail a right to veto. Consultation is effectively understood, at best, as an administrative requirement for the installation and operation of projects, rather than as a mechanism to ensure consent or much less "self-determination," the principle and promise which lies at the heart of the 2007 UN Declaration on the Rights of Indigenous and Tribal Peoples and the jurisprudence of the Interamerican system of human rights (IACHR 2021). Most nominally "pro-rights" sentences issued by the constitutional court failed to even stipulate that the mandated consultations be carried out in accordance with the self-government arrangements of the affected communities, in line with international standards. In her research on courts and indigenous peoples in Guatemala, Braconnier has argued that a distinction should be drawn between progressive and transformative court judgments (Braconnier 2021). As she notes, there is no contradiction between apparently progressive court rulings that formally recognize indigenous peoples' rights to FPIC and the continuation of the colonial project of racialized extractive capitalism. Few effective mechanisms exist to ensure that government institutions and private companies comply with judicial decisions. Mineral extraction has continued notwithstanding temporary suspensions of mining operations ordered by Guatemala's constitutional court. Despite doctrinal and jurisprudential advances, in practice, domestic and international legal systems protect private contract rights between

[2] The most significant FPIC rulings include: La Puya (795-2016, 1380-2016); San Juan Sacatepéquez (1031-2009, 1925-2014); Oxec (90-2017, 91-2017, 92-2017), and the San Rafael mine (4785-2017).

governments and corporations more than the collective rights of indigenous peoples to self-determination.

Legal attempts to uphold indigenous peoples' human rights have run up against transnational webs of corruption involving government elites and companies, which in turn have fueled increased confrontations and the murder, harassment, and criminalization of indigenous community leaders, a pattern repeated across Latin America and indeed worldwide.[3] For example, in March 2022 a leak of thousands of documents shared by the hacking collective Guacamaya Roja revealed the operations of the Russian-owned, Swiss-incorporated mining giant Solway Investment Group, whose subsidiary CGN-Pronico has long operated a controversial nickel mine (named Fenix) in El Estor in the department of Izabal, an area predominantly inhabited by Q'eqchi' Maya fishermen and peasants. The leaked company documents showed how CGN-Pronico had bought off local police, paying for their gasoline, vehicle repairs, food, rent of local offices, and "violence prevention programs." The company also monitored and tracked journalists, categorized local leaders and communities according to whether they were in favor or against the mine, and repeatedly tried to expel Q'eqchi' communities from their ancestral lands. The documents also revealed that CGN-Pronico hid negative scientific studies showing high levels of heavy metals in lake Izabal and surrounding soil, something residents had long pointed to as the probable cause of numerous health problems. The company brought pressure on successive presidents and government agencies to ensure favorable environmental assessments and secured political loyalties through donations and kickbacks.[4]

In 2018 Q'eqchi' members of the local artisanal fisherman's union filed a constitutional action of *amparo* against the Ministry of Energy and Mines for failing to guarantee the right to FPIC prior to issuing the original mining license in 2005. In 2020 the constitutional court ordered that a process of pre-consultation be carried out, reaffirming in principle the rights of indigenous peoples to participate in the formulation, application, and evaluation of development projects directly affecting them. The court also reduced the territorial circumscription of the original

[3] See, for example, A/HRC/39/17 Report of the Special Rapporteur on the rights of indigenous peoples presented to the 39th Session of the Human Rights Council, September 2018. Available at: www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.pdf. Last consulted November 1, 2023.

[4] See https://forbiddenstories.org/case/mining-secrets. Last consulted November 1, 2023.

license and ordered the suspension of CGN-Pronico's operating rights until the full consultation process was concluded. It was not until the following year that the Ministry of Energy and Mines initiated administrative measures to give effect to the judicial ruling, and in any case – as the leaked documents later confirmed – the mine continued to operate. In October 2021, following several weeks of a blockade organized by Q'eqchi' villagers at the mine's entrance to protest the lack of implementation of the court's ruling, the Guatemalan congress ratified a state of siege in the municipality of El Estor, allowing the government to suspend constitutional guarantees of freedom of action, legal detention, and rights to assembly and demonstrations. During the month of the state of siege, and the following month's "state of exception," community leaders and local journalists were harassed, threatened, detained, and their houses ransacked.

The case of CGN-Pronico in El Estor is just one example among many of the juridification of socioenvironmental conflicts, characterized by the increasingly repressive use of law to systematically displace indigenous peoples and peasants and criminalize protests by people, groups, and organizations that question the operations of extractive industries (Montoya, Sieder & Bravo 2021). Companies and their allies in government promote legal actions against activists for moral or material damages supposedly sustained by the companies and their representatives. Indigenous authorities and community members are subjected to systematic campaigns of defamation and harassment, including sexual violence against women, and indicted on charges of terrorism and illicit association to commit crimes. Criminalization involves extended periods of pre-trial detention, high bail requirements, and the constant postponement of hearings, only for many cases to eventually be dismissed on the grounds of insufficient evidence, sometimes years after the initial arrests. The suspension of fundamental rights of participation, association, and expression through the declaration of localized states of siege facilitates the militarization of indigenous territories, as demonstrations and protests are violently suppressed by the police or members of the armed forces under the cover of the "rule of law."[5] A combination of legality and militarized violence guarantees the functioning of extractive industries,

[5] See Report of the UN Special Rapporteur on the rights of indigenous people on her mission to Guatemala, A/HRC/39/17/Add.3, September 10–28, 2018. https://undocs.org/en/A/HRC/39/17/Add.3. Last consulted November 1, 2023.

revealing the networks and overlaps between state and private actors that facilitate dispossession.

Persecution of indigenous activists and journalists in Guatemala has extended to the entire judicial apparatus. Since 2015, when former army general President Pérez Molina was forced to resign by massive anti-corruption demonstrations, and subsequently imprisoned on charges of illicit association and corruption following investigations supported by the United Nations International Commission against Impunity in Guatemala (known as CICIG), powerful political and economic sectors redoubled their efforts to secure a pliant a judiciary and public prosecutors' office (Braconnier 2021). The CICIG was eventually forced out of the country by President Jimmy Morales, who had been investigated by the commission and accused of accepting a million dollars in illegal campaign donations. The constitutional court prevented Morales' efforts to expel the head of the CICIG, Ivan Velásquez, from the country in 2017. But when Guatemalan prosecutors from the office of the special prosecutor against corruption (known as the FECI), which had been created to work alongside CICIG, successfully petitioned the supreme court in 2018 to authorize a congressional vote to remove the president's legal immunity so he could stand trial, Morales immediately revoked the CICIG's mandate and by 2019 its operations had ceased (Bowen 2022). The country's corrupt and criminal political elite captured the processes of nomination to the high courts to guarantee impunity – operations documented by the FECI in the judicialized cases known as "parallel commissions."[6] In April 2021 Gloria Porras, the constitutional court justice who ordered the suspension of CGN-Pronico's operations in El Estor, fled the country after congress refused to renew her mandate. Justice Porras was known for her stance in favor of indigenous peoples' collective rights and the fight against corruption. Once she lost her immunity she was effectively forced into exile, like many other Guatemalan judges and public prosecutors who face criminal charges because of their efforts to defend human rights and secure accountability.[7] In short, backlash and authoritarian regression is directly related to attempts by citizens' groups and members of the judiciary to hold the

[6] See Adriana Beltrán, "Detrás de la lucha por secuestrar el sistema de justicia de Guatemala," WOLA – Washington Office on Latin America, July 20, 2020. Last consulted November 1, 2023.

[7] See Jonathan Blitzer, "The Exile of Guatemala's Anti-corruption Efforts," *The New Yorker*, April 29, 2022.

powerful to account and guarantee human rights in the postwar period. In the case of indigenous peoples' collective rights, the backlash reflects long-run patterns of the defense of property regimes established through violent racialized dispossession.

10.3 Indigenous Territorial Defense: A Long Game

The juridification of socioenvironmental conflicts in the ancestral territories of native and indigenous peoples involves the mobilization of conflicting imaginaries and legalities. States claim permanent sovereign rights to adjudicate subsoil resources and land, rights grounded in legacies of colonial dispossession and legalities that negate the legitimacy of legal orders whose origins lie in the precolonial period (González-Serrano, Montalván-Zambrano & Viaene 2022). By contrast, indigenous people claim rights to their ancestral territories, to determine their own forms of government, development, and life, and protect themselves from the devastating environmental and cultural impacts of extractive projects. As signaled above, these rights are set out in international human rights instruments and multiple claims have been codified in these terms. As Bens and others have underlined, when native communities engage postcolonial states through dominant forms of law, they effectively "become indigenous," insisting that their rights originate from their own systems of law (Bens 2020). While they do not exist outside of colonial and capitalist dynamics, indigenous peoples have always exercised and defended different sovereignties over their territories.

Judicialized disputes over indigenous peoples' human rights highlight the gaps between hegemonic capitalist frames of land-as-property, and alternative understandings or ontologies of land and territory. In addition to highlighting the gaps between "the *experience-near* formulation of indigenous knowledge and practices and the *experience-distant* language of jurisprudence" (Kirsch 2018: 23), judicialized socioenvironmental territorial disputes reveal the limits and frictions of legal translation. Di Giminiani has referred to the different understandings mobilized in these contexts as "land ontologies"; his research on land titling programs in Mapuche territories in Chile suggests that interactions between different frames expose the limits of commensuration between territories inhabited in multiple ways by different groups and actors, and the hegemonic legal framework of property, which constructs an abstract thing called "land" as something alienable which can be bought and sold (Di Giminiani 2018).

> Indigenous land ontologies are predicated upon an intersubjective relation – in other words, a relation between two subjects, land and people, both endowed with sentient abilities. Legal land ontologies, in contrast, are founded upon the principles of property theory according to which land is an object of possession that can be standardized within a regime of value. (Di Giminiani 2018: 9)

In contrast to binary readings of state domination versus indigenous resistance, Di Giminiani emphasizes the complex ways in which indigenous politics are enmeshed in state forms of ordering – including different forms of property law – and at the same time informed by alternative understandings of the relations between humans and nonhuman entities, in turn shaped by histories longer than those of the nation-state and capitalism.

> Territories undergo continuous cycles of regeneration put in motion by political action as much as embodied experiences in the environment, two actions that are enmeshed since dwelling in specific ways is a political act itself and politics is also made of affects and bodily experiences. (Di Giminiani 2018: 8)

The political actions and embodied experiences of many grassroots indigenous activists engaged in territorial defense in Guatemala are shaped by three factors: First, the climate of criminalization, dispossession, and authoritarian backlash described in the previous section; second, human rights discourses which over three decades have reaffirmed indigenous peoples' rights to self-determination and ancestral lands; and third, accelerating climate change which increasingly threatens the very viability of rural life in many parts of the country, fueling accelerated out-migration. These contentious dynamics are underpinned by historical patterns of state formation forged through racialized structural violence.

In *Theft is Property: Dispossession and Critical Theory*, Nichols builds on the theoretical contributions of North American, Canadian, and Australasian indigenous scholars who analyze the nature and effects of settler colonialism. Land is a central element in the material constitution of group differences, and its legal ordering is central to colonial patterns of appropriation and capital accumulation. Focusing on North America, Nichols analyzes the historical constitution of "land" as an alienable object ("property") codified in law, and the ways this has displaced alternative ontologies of territory.

> "Land" is not a material object but a mediating device, a conceptual and legal category that serves to relate humans to "nature" and to each other in a particular, proprietary manner. (Nichols 2020: 83)

Nichols' central point is that "It is thus not (only) about the *transfer of* property but the *transformation into* property. In this way, dispossession creates an object in the very act of appropriating it." (Nichols 2020: 31). Specific racial subjectivities and forms of ordering have underpinned the development of property law in colonized territories, something Bhandar conceptualizes as "racial regimes of ownership." In her book *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*, she signals the need to interrogate, deconstruct, and historically contextualize property laws, stating that:

> Laws of property . . . reflect and consolidate language, ways of seeing, and modes of subjectivity that render indigenous and colonized populations as outside history, lacking the requisite cultural practices, habits of thought, and economic organization to be considered as sovereign, rational, economic subjects. (Bhandar 2018: 3)

By inviting us to denaturalize "land" and property law, Nichols and Bhandar underline the fact that prior to conquest, indigenous and native peoples never "possessed" (or therefore conceived of) *land* in the sense of capitalist commodification. While territory was often the focus of disputes between competing groups, it was animated by multiple ontologies and understood as a complex sentient landscape involving obligations and duties on the part of human beings, rather than something that one has a proprietary *right* to. Anthropologists have long documented the ways in which indigenous epistemologies and ontologies regarding territory tend to be relational, forms of documentation which have acquired a new urgency in the face of accelerated extractivism and climate crisis (de la Cadena 2015; Li 2015). Today, elements of such relational ontologies animate legal disputes over territory and extractive projects, even as conflicts are framed in dominant legal languages, including property and human rights. As I have argued elsewhere, indigenous rights juridification necessarily involves multiple, overlapping, and conflicting frames which may or may not be commensurable (Sieder 2020a).

Colonial orders of dispossession operate in both material and conceptual registers (Nichols 2020). The judicialization of indigenous rights claims has raised important questions about the ways in which alternative understandings of territory are mobilized, disputed, translated, and truncated in legal encounters, as well as how these legal encounters in turn shape political actions and embodied experiences within the territories in dispute. In the following section I discuss legal actions taken by Mayan lawyers' collectives in Guatemala in defense of indigenous

peoples' collective rights. I then focus on a specific land claim presented on behalf of the Maya Q'eqchi' communities of Los Copones, Ixcán. I highlight how processes of judicialization have sought to unpack the ways in which certain notions of property and race have been historically co-produced in Guatemala, naturalizing both territorial dispossession and the enslavement of Mayan people during the development of the agro-export economy in the late nineteenth and early twentieth centuries (McCreery 1994). Although constrained by the legal forms of Guatemalan constitutional and civil law, the judicialization processes I describe here go beyond human rights, constituting attempts to destabilize dominant racialized frames that derive from historical and ongoing processes of colonization. The contestations and frictions produced by the interaction of different forms of knowledge point to the limits, but also the politically generative possibilities of such legal encounters.

10.4 Litigating Alter-Worlds?

Is it possible to contest extractive projects through sociolegal mobilization without accepting dominant legal ontologies of private property and state control over subsoil resources? Can indigenous people and their representatives use state law and at the same time dispute legal land ontologies grounded in colonial dispossession? And what does it mean to attempt such actions through the courts in a time of authoritarian regression? One of the most notable features of counterhegemonic legal action in Guatemala is the role of different associations of Mayan lawyers, including the Association of Mayan Lawyers and Notaries of Guatemala Nim Aipu, the Indigenous Peoples Chambers (*Bufete de los Pueblos Indígenas*), and the Association of Popular Legal Chambers of Rabinal (*Asociación Bufete Jurídico Popular de Rabinal*). These collectives were formed in the first years of the twenty-first century, following earlier initiatives in the wake of the 1996 peace accords to open spaces for indigenous people within the legal academy and judiciary.[8] While they litigate to guarantee rights to FPIC and defend criminalized community leaders, they do not limit their arguments to state law and human rights but rather defend indigenous peoples' rights to self-determination, including that of exercising their own forms of law – or land ontologies, in Di Giminiani's terms. By insisting on the prior existence and legitimacy of

[8] For the antecedents of these associations, see González-Serrano and Vaiene (2022).

indigenous peoples' governance systems, and their prior occupation of disputed lands, Mayan lawyers question the legitimacy of the prevailing property regime, putting critical and decolonial perspectives on law into action. As Maya-Kaqchikel lawyer Wendy López, of the *Bufete de los Pueblos Indígenas* told me: "we want to show the state that indigenous peoples are the owners of the earth, we don't need (formal title)."[9]

In contrast to most nonindigenous lawyers, these legal professionals continually experience structural and interpersonal racism in their engagements with the state legal system. Several Mayan women lawyers who have increasingly assumed a prominent role in strategic litigation for indigenous peoples' rights observed that their very presence in the courts revealed the workings of structural racism and gender discrimination. For example, when they appear at state tribunals in indigenous dress, court officials often mistake them for victims, seemingly unable to conceive of the fact that indigenous women can be legal professionals. The lawyers understand their litigation initiatives as just one element of long-running political struggles. In 2019 one colleague told me:

> By this point I'm tired and frustrated. We've been working since 2007 for the defense of territory using the figure of [free, prior, and informed] consultation. The good thing is that people are often very clear about how to defend their territory, they see legal action as a form of support, but not as the end of their processes.[10]

She reflected:

> I don't see what else we can do, the space [for litigating] consultation has been reduced, we need to explore other options. The thing that renews my energies is the reconstitution of [ancestral] authorities and territorial recovery. We need many resources, but we are moving forward.[11]

While indigenous peoples' collective action in recent decades has been at least partially focused on the national courts, it frames a set of claims and arguments based on alternative conceptions of sovereignty that question capitalist understandings of property and Westphalian notions of sovereignty. Through legal battles articulated in the languages of human rights, transnational moral grammars of indigenous lifeworlds have been

[9] Prensa Comunitaria 169 and Fundación MAG, forum: "Los abogados y la múltiple acción jurídica," July 15, 2021.

[10] Interview with Lucía Xiloj, Asociación Bufete Jurídico Popular de Rabinal, November 2019.

[11] Ibid.

mobilized in struggles against environmental and cultural destruction. These struggles are being amplified by global efforts to confront the climate crisis, at the same time as they are a response to the drastically reduced prospects for the physical survival of many communities.

Indigenous lawyers' associations in Guatemala conceive of litigation as just one element in claiming collective rights. Strategic litigation is always viewed as part of broader political processes to strengthen community defense and collective organization for self-determination in everyday lived practice. Well beyond claiming "recognition" from states within neoliberal multicultural models (Povinelli 2002; Hale 2005), the aim of litigation is twofold: to denounce the colonial bases of the dominant economic, political, and legal system, and to contribute to building alternative futures that go far beyond specific legal actions. In their analysis of the work of indigenous lawyers in Guatemala, González-Serrano and Vaiene describe "a dialectical exercise and an ontological encounter within law" in which indigenous lawyers act as bridges between the state's legal institutions and codes, on the one hand, and indigenous practices and concepts on the other (González-Serrano & Vaiene 2022: 101).

While litigation mobilizes arguments framed in terms of constitutional and human rights law, and in some cases civil law, the use of special expert witness reports represents an attempt to place alternative worldviews within the state legal arena. These reports include anthropological or cultural interpretations, but also historical analyses; for example, detailing the processes whereby indigenous peoples were dispossessed of their territories when legal title was granted to nonindigenous settlers. Grounded in specific localized contexts, these analyses acquire broader resonance through the legal category of indigenous peoples. By foregrounding alternative understandings of history and the relationship between human beings and their lived environments, the deployment of special expert witness reports before the courts constitutes what might be best understood as moral pedagogies with political effects that extend far beyond the judicial arena. Irrespective of the outcome of litigation, special expert reports have often placed radically different histories and ontologies within the public sphere.

While I and other nonindigenous professionals have provided such reports to the courts, Mayan lawyers' collectives in Guatemala have prioritized collaborations from Mayan professionals, including several distinguished anthropologists, who have assumed a central role in legal and political battles to defend indigenous people. In one well-

documented example Maya K'iche' anthropologist and journalist Irma Alicia Velásquez Nimatuj provided a key report for the case of Sepur Zarco, which set a global precedent wherein a domestic court found members of the military guilty of the crime against humanity of forced sexual slavery during an internal armed conflict (Crosby & Lykes 2019; Posocco 2022). Velásquez Nimatuj's collaborative research with Maya Q'eqchi' women survivors of Sepur Zarco explored the relationship between the community's struggle for land title and security of tenure in their ancestral lands, the forced disappearance of the women's husbands, and the women's subsequent enslavement and sexual torture over many years. By documenting the cultural and economic impacts of these intersectional forms of violence, Velásquez Nimatuj's legal deposition clearly underlined the relationship between racialized land dispossession and gender violence (Velásquez Nimatuj 2019).

10.4.1 The Reaffirmation of Ancestral Presence: The Copones Case

Collective rights litigation in defense of indigenous self-determination involves extended collaborative processes between communities resisting different forms of colonial violence, indigenous lawyers' associations, and allied indigenous and nonindigenous professionals. Through the systematization of community histories and collective memory, preparing documentation for legal cases has strengthened political processes of community defense. Anthropological and psychosocial special expert witness reports tend to privilege the voices of indigenous community members, and the litigation strategies of Mayan lawyers also foreground the testimony of affected community members. This emphasis on the experiences and worldviews of indigenous plaintiffs counterbalances the need to recur to state property records to document indigenous territorial dispossession. As Di Giminiani notes, in claims for ancestral land, claimants are:

> paradoxically, forced to prove the consistency of demanded territories as property through technologies of legal documentation, such as deeds of property, archival sources, and maps, initially designed to validate land dispossession. (Di Giminiani 2018: 5)

Los Copones refers to a judicialized claim for recognition of collective title to ancestral indigenous lands, a right guaranteed in general terms by article 67 of Guatemala's Constitution, ILO Convention 169, and the UN

Declaration on the Rights of Indigenous Peoples, but which to date has not altered Guatemala's highly unequal and racialized land tenure regime.[12] The thirty-six communities of Los Copones are Q'eqchi' Maya, located in the northern municipality of Ixcán. Q'eqchi' Maya have inhabited this region for over two centuries. The *amparo* writ presented to the constitutional court in 2015 against the national property registry was a test case which sought recognition of these communities' ancestral possession of the lands known as the finca Patio de Bolas Copón.

The legal claim was supported by several special expert witness reports and amicus curiae. An anthropological-historical special witness report reconstructed the history of Los Copones, demonstrating that the form of community organization in evidence among the Q'eqchi' inhabitants of this region represented a continuity with a prehispanic form of supra-communal governance in the Mayan altiplano, the *amaq'* (Vásquez Monterroso 2017). The study showed how over the course of two centuries the geographical and social conformation of the *amaq'* changed in response to shifting ecological conditions and external threats. The dispersed settlements at the edges of the Chixoy and Copón rivers multiplied and expanded to become the thirty-six communities that today make up Los Copones.

During the late nineteenth century, decentralized and dispersed forms of Q'eqchi' territorial organization in these lowland regions facilitated the absorption of entire communities within the agro-export plantation model. However, what Vásquez Monterroso defines as the *amaq'* of Copones predated the colonization of those lands for the coffee economy. In his report for the court, Vásquez Monterroso drew on oral histories, details of visits of nineteenth century surveyors contained in the land registry, and the writings and maps of settler landowners, ethnographers, and explorers of the region to establish the continuous occupation of Q'eqchi' Maya in the area since around 1760 and possibly even earlier.[13] Effective indigenous possession meant that the denunciation in the late

[12] The Constitution of the Republic states that the lands of indigenous communities "shall enjoy special protection from the State, preferential credit, and technical assistance, which guarantee their possession and development, in order to ensure a better quality of life for all inhabitants . . . indigenous communities and others that have lands that historically belong to them and that they have traditionally administered in a special way, will maintain that system" (Article 67).

[13] Diego Vásquez Monterroso (unpublished 2015). "Antigüedad de la presencia Q'eqchi' en la región de 'Los Copones,' Ixcán, Guatemala." Anthropological special expert report presented as part of the litis. Document in authors' archives.

nineteenth century of these lands as "*tierras baldías*" or unclaimed and un-utilized land, was false. The report included an official document of one of the engineers originally sent to measure the territory, who noted the presence of Q'eqchi' peasants and their dwellings. It also included maps published in 1900 by the German ethnographer and landowner Karl Sapper, which indicated that the Q'eqchi' population in the region inhabited territories that were not yet included in the state's property register.

Guatemalan government policies at the end of the nineteenth century promoted a form of racial capitalism that favored commercial export agriculture over indigenous subsistence production, allowing individuals and municipalities to lay claim to untitled lands – evidently, indigenous communities' ancestral lands had never been registered as property. In 1893 the militias of Chinique in the department of Quiché lodged a claim for title of the finca Patio de Bolas Copón, comprising some 356 *caballerías* (16,425 hectares). At the start of the twentieth century title was awarded to the municipality of Chinique and its neighbors ("*vecinos*") in recompense for the support that Chinique's *ladino* (nonindigenous) militias had given to the revolution of Justo Rufino Barrios which cemented the hegemony of the Liberal agro-export model after 1871.[14] The titling process signaled the importance of the Chinique militias to departmental and national politics: In effect, following the denunciation of lands as "*baldías*" (unoccupied and unproductive) the recognition of these claims depended on the executive (the *Jefe Político* of the department, and the president), who rewarded their allies.[15] Previously autonomous indigenous communities were thereby converted into "*fincas de mozos colonos*" or plantations with indentured labor, with inhabitants subjected to forced labor requirements to benefit those who were awarded formal land title,[16] even though all the existing evidence points to the prior and historical occupation by Q'eqchi' Maya. As the historical expert witness report presented to the court stated:

[14] The first land grant of 200 caballerías was made in 1904; the remaining 165 caballerías in 1905.

[15] Juan Carlos Sarazúa Pérez (unpublished 2015). "Titulación y condiciones sociales. Patio de Bolas Copón, 1871–1906." Historical special expert report presented as part of the litis. Document in authors' archives.

[16] The 1877 *Reglamento de Jornaleros* obligated peasants to work for large landowners in productive activities, and in roadbuilding for the state; the 1934 *Ley contra la Vagancia* strengthened the forced labor regime.

> The titling of lands to militias was ... a political recognition of their members to the cost of populations whose ancestral lands [used for] crop rotation or religious centers, were taken away. This [legal] recognition shows how violence is deeply inscribed in contemporary state institutions, as well as state bias to ensure the titling of many territories.[17]

The most influential nonindigenous family of Chinique, the Urizars, and other prominent militia families now converted into landed local elites, periodically demanded agricultural labor from the Q'eqchi' inhabitants of Los Copones and payment to occupy their subsistence plots. This prompted further displacement of Q'eqchi' peasants, some of whom moved north to try and escape the forced labor regime.[18] The Urizars exercised absolute power over the indigenous inhabitants of the region during the most lethal years of the internal armed conflict in the early 1980s; acting as military commissioners in support of the army they were implicated in the murder of numerous community leaders.[19] Conflict between the Urizars and the municipal authorities of Chinique continued throughout the twentieth century and into the twenty-first. By the mid-1980s, the inhabitants of Los Copones discovered that the legal owners of their lands were not in fact the Urizars but the municipality of Chinique. The families in the community of Margaritas Copón refused to continue working for the Urizars, who sent armed men to threaten them. The community authorities subsequently came to an agreement with Chinique's municipal authorities to leave 30 caballerías (1350 hectares) to the Urizars and pay rent to remain on their lands. The special expert reports detailed the trickery involved: instead of legal rental agreements, the Q'eqchi' Maya peasants handed over "rent" in exchange for worthless pieces of paper which stated they had made voluntary contributions to the festivities of Chinique's patron saint.

Around the time of the peace settlement in 1996, the communities of Los Copones formed an association to negotiate purchase of the finca Patio de Bolas Copón with Chinique's municipal authorities. Yet despite more than a decade and a half of negotiations, and considerable sums of money spent, their efforts came to nothing. By the twenty-first century

[17] Juan Carlos Sarazúa Pérez (2015). Document in authors' archives: 29 (my translation).
[18] Ruth Del Valle Cobár (unpublished 2015). "Efectos psicosociales de las violaciones de derechos humanos de las comunidades de Patio Bolas Copón," Psychosocial special expert report presented as part of the litis. Document in authors' archives.
[19] Ibid.

corrupt state officials and organized crime also began to dispute their territories, located as they are within regions now subject to intensive development of megaprojects, particularly hydroelectric dams. These new threats, combined with a growing awareness of their collective rights as indigenous peoples, prompted the Maya Q'eqchi' inhabitants of Los Copones to seek out the Association of Mayan Lawyers and Notaries of Guatemala Nim Aipu and to judicialize their struggle for territory, seeking legal recognition as indigenous communities with a claim to their ancestral lands.

10.4.2 Legal and Other Framings

On behalf of the communities of Los Copones, Nim Ajpu presented an *amparo* writ to the constitutional court against the national property registry, alleging that the process whereby the finca Patios de Bolas Copón had been titled was based on false claims that the lands were "*baldío*" or unoccupied. As part of the process of preparing the legal submission, representatives of the different communities legally registered themselves before the local municipal authorities as a Great Council of Ancestral Authorities, further cementing supracommunal coordination and collective identity as indigenous peoples. The ancestral authorities in each of the thirty-six communities oversee the internal boundaries of the territory, which is divided into family plots which can only be passed down to future generations, not sold. While the ancestral authorities originally dealt only with matters pertaining to territory, by 2022 they were resolving all kinds of problems and disputes, strengthening powers of self-governance.

As part of the preparation for litigation, the centuries-long historical battle by the Q'eqchi' Maya inhabitants of Los Copones for title to their lands was inscribed not only in special expert witness reports, but also in a book entitled *Aquí nacieron mis padres, y aquí vivirán mis nietos. Historia de las comunidades Q'eqchi' de Los Copones* (My parents were born here, and my grandchildren will live here. History of the Q'eqchi' communities of Los Copones), published in 2016. Mayan lawyers and anthropologists had organized numerous workshops since 2010, and in 2015 community researchers carried out interviews in Q'eqchi' with the elders of all the thirty-six communities. The results were translated into Spanish and written up with the support of a members of a local NGO. As members of the Great Council of Ancestral Authorities insisted, the aim of this publication was for the new generations of Los Copones to

know the history of their ancestors' struggle. Local teachers now use the book in community schools, with children enacting dramatizations of the fight for land and the racial violence suffered by their parents and grandparents. Legal discourses form part of this narrative, but the principal emphasis is on historical constructions of justice:

> We know that it is not easy for a State that has been neglecting us for more than 500 years to recognize our rights as indigenous peoples, but we are not discouraged, because we know that we are right. Our Mayan grandparents and grandmothers always lived on these lands. Here they built their great cities. Here they created science and technology. They taught us to plant corn, beans, squash, chili. They left us a spirituality that makes sense only if it is related to nature. We have the right to these sacred lands because we work, suffer and care for them.[20]

The constitutional writ cited violation of the Guatemalan Constitution, the International Convention on the Elimination of All Forms of Racial Discrimination, the American Convention on Human Rights, ILO Convention 169, and the UN Declaration on the Rights of Indigenous Peoples. It extensively referenced the jurisprudence of the Interamerican Court of Human Rights, including the 2006 sentence of *Sawhoyamaxa* v. *Paraguay* which stated: "The members of indigenous peoples who have left or lost possession of their traditional lands due to causes beyond their control, maintain rights to property of those lands even if they lack legal title."[21] The claimants argued that their right to file for a constitutional writ of protection was justified by the "permanent and ongoing violation of the rights of indigenous peoples to the access, use, enjoyment, possession and dominion of their property."[22]

The legal action called for the cancellation of the original registry of the property made to the municipality of Chinique, and any subsequent registration of the lands in question deriving from this original action. It stated that "the lack of effective, specific, and regulated procedures for the titling of indigenous communal lands causes generalized uncertainty which is incompatible with the standards set out in article 25 of the American Convention on Human Rights [citing the 2001 case *Comunidad Mayagna (Sumo) Awas Tigni vs. Nicaragua*]."[23]

[20] Puente de Paz et al. (2016: 77) (my translation).
[21] Acción Constitucional de Amparo, p. 5.
[22] Acción Constitucional de Amparo, p. 6.
[23] Acción Constitucional de Amparo, pp. 8–9.

Running to seventy-three pages, the *amparo* writ referred extensively to the three special expert reports presented to the court (anthropological, historical, and psychosocial). The plaintiffs directly appealed to the magistrates, stating:

> The judicialization of our demand for the recognition of our ancestral property is a defense mechanism and an exercise of our human rights that have been systematically and permanently violated by the State, and we seek in this way to reestablish those rights, trying to demonstrate the historical truth of our being a community, of our spiritual relationship with Mother Earth, of that deep love we have for the abundant life with whom we share that space. We have carried out several studies and we have legal certainty of our property.[24]

In effect, the *amparo* writ called on the Guatemalan state not only to void the original grant of property rights made at the turn of the nineteenth century, but to make effective its constitutional and treaty obligations to respect and protect indigenous peoples' collective human rights to their land and territories by issuing a title of collective property to the communities of Los Copones. Referring to a thematic audience at the Interamerican Commission of Human Rights held in 2011, when the government of Guatemala had recognized the absence of agrarian legislation referring to the ancestral collective property rights and therefore the absence of this figure within the country's civil code, the petitioners argued that the matter could not be resolved within civil law procedures.

The *amparo* writ was first admitted by the Appeals Court in the city of Quetzaltenango, where the representative of the property registry asked that it be dismissed as inadmissible, arguing that the registration of the finca Patio de Bolas Copón had met the legal requirements at the time of its inscription. The official also argued that the claim was a matter for civil, not constitutional law.[25] The *amparo* writ was subsequently rejected. In its sentence the court recognized the lack of legislation to

[24] Acción Constitucional de Amparo, p. 31. "La judicialización de nuestra demanda por el reconocimiento de nuestra propiedad ancestral, es un mecanismo de defensa y un ejercicio de nuestros derechos humanos que han sido vulnerados de forma sistemática y permanente por el Estado, y buscamos por esta vía reestablecer esos derechos, tratando de demostrar la verdad histórica de nuestro ser comunitario, de nuestra relación espiritual con la madre tierra, de ese profundo amor que le tenemos a la abundante vida con quien compartimos ese espacio. Hemos realizado varios estudios y tenemos certeza jurídica de nuestra propiedad." (Original in Spanish.)

[25] Informe circunstanciado emitido por la autoridad impugnada, October 5, 2015. Expediente 09002-141934103.

uphold the state's obligations to guarantee indigenous peoples' constitutional rights and human rights as defined by the Interamerican system, but affirmed that remedy lay exclusively with the national legislature. It also argued that the fact that the Maya Q'eqchi' inhabitants of the finca Patio de Bolas Copón had entered negotiations to buy the land from the municipality of Chinique meant that they accepted the latter's legitimate title. The court called on the parties to continue with these negotiations.

The plaintiffs appealed and the case was sent to the constitutional court. In its sentence of November 9, 2020 the court stated that constitutional writs were not the appropriate route to denounce violations of rights to property caused by supposedly illegitimate administrative acts. The court's judgment mentioned ancestral indigenous land rights but defined these as rights to private property and determined that the case should be processed through civil law channels, arguing that these constituted the most effective mechanisms for resolving property disputes. The Association of Mayan Lawyers and Notaries Nim Aipu has sent the case to the Interamerican Commission of Human Rights, arguing that domestic remedies have been exhausted and the collective human rights of the indigenous communities in question to their ancestral lands have not been guaranteed.

10.5 Conclusions

In this chapter I have suggested that the current "juristocratic reckoning" with the promise of indigenous rights should be understood as part of a much longer story of indigenous engagements with racialized colonial legalities. In the late nineteenth and early twentieth centuries, Q'eqchi' Maya in Guatemala engaged with dominant forms of law when they had no rights as citizens and were legally inscribed by dominant elites as forced labor for the agricultural export economy. In the late twentieth century their engagement with dominant legalities coincided with the codification of indigenous peoples' collective rights in international and domestic law. As I have indicated, judicialization to demand indigenous rights to self-determination expanded in Guatemala in the first two decades of the twenty-first century, spearheaded by indigenous lawyers' associations. Yet recent experience has shown that judicial decisions affirming indigenous rights are not transformative of the underlying structures of racial capitalism and dispossession. The resort to hegemonic forms of law to dispute existing understandings of property poses complex challenges, particularly in a context of authoritarian regression and

backlash. In the face of state capture and systematic repression, indigenous lawyers hold out scant hope of securing progressive decisions through the courts. Yet they argue that law and legal categories still matter for the ongoing struggles of indigenous peoples, even if the prospects for winning in court are narrowing or disappearing. This is because legal engagements and framings form part of much wider and long-run processes of territorial defense, community organization, and subject formation. Judicialization processes such as the case of Los Copones described here open new possibilities for critically interrogating colonial histories of dispossession as part of a broader emancipatory politics. In this sense, the impact of indigenous lawyers and special expert reports resonate beyond the judicial arena. As I have argued elsewhere (Sieder 2011, 2020a, 2020b) juridification is much more than the use of state law or international human rights law against the state – it also includes the ongoing mobilization, reframing, and continuity of legal and political orders that go beyond racialized colonial legalities, envisioning justice in different registers.

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