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INDIGENOUS AFFAIRS

DEVELOPMENT AND CUSTOMARY LAW



IWGIA

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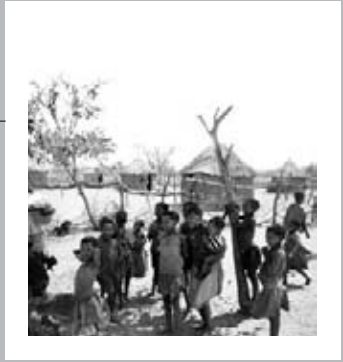
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In many parts of the world, indigenous peoples suffer from a history of discrimination and exclusion that has left them on the margins of the wider societies in which they exist. For this reason, they face great difficulties in maintaining and developing their own models of development and are disproportionately affected by poverty and exclusion. Under the basic principles of universality, equality and non-discrimination, indigenous peoples are entitled to the full range of individual human rights established in international law. However, in order to be able to enjoy equal rights as compared with other collectivities, and in order to be able to assert their self-determined development, special measures are required.

This issue of Indigenous Affairs is a combined issue that brings together a mixture of different articles and perspectives on development, self-determination and the role of customary law. The articles touch upon indigenous peoples' economic, legal, social and political development.

Self-Determination and Development

Indigenous peoples, as collectivities, have distinct and unique cultures, systems and world views, and their current needs and aspirations for the future may differ from those of the mainstream population. Indigenous peoples' lives and futures can only be assured through the recognition and protection of not only their individual rights but also their collective rights as distinct peoples. It is thus when their right to self-determination, as enshrined in the UN Declaration on the Rights of Indigenous Peoples, is asserted that indigenous peoples' collective rights can be realized in a meaningful way.

During the whole negotiation process for the drafting of the UN Declaration on the Rights of Indigenous Peoples, indigenous peoples consistently defended recognition of their right to self-determination as a prerequisite to the protection and promotion, as well as exercise and enjoyment, of all their rights. Indigenous peoples insisted that, besides individual human rights, collective rights are a cornerstone of indigenous communities and cultures. Communalism and collectivity permeate their spirituality, relationship with the land, ways of resolving conflict, their view on the environ-

ment and their development aspirations. Indigenous peoples' views on the future and desires for increased well-being are, first and foremost, of a communal orientation and linked to the collectivity more than to the individual human being. Increased well-being and control of one's future is the epitome of indigenous peoples' development, whether the emphasis is on economic prosperity, customary laws, conflict resolution or spiritual relations. In this volume, Dalee Sambo illustrates how development is an inalienable right and an integral part of indigenous peoples' self-determination, as stipulated in the Declaration, by using the example of the Alaska Native Claims Settlement Act.

As Victoria Tauli Corpuz¹ has stated on several occasions, there is a need for a human development model that provides indigenous peoples with the possibility of continuing to live on their lands and decide how their natural resources are going to be used, and this means that it has to be indigenous peoples themselves who should decide what kind of cultural, economic, legal and spiritual development they want. Such self-determined development would respect indigenous peoples' culture and identity and would reflect indigenous peoples' own visions, perspectives and strategies.

Most recently, the communalism or collectivity of indigenous peoples has been revived within the celebration and respect of "Mother Earth". The concept of Mother Earth as used by indigenous peoples in the Americas contains religious elements but, first and foremost, it represents cultural values and a desire to take care of future generations. Linked to the concept of Mother Earth is the notion of Living Well. Living Well expresses the close relationship between living beings and nature and it links to the historic past of indigenous self-determination before invasion and conquest. It is the opposite of resource exploitation, commercialization and oppression and gives priority to subsistence, and the renewable and sustainable use of nature. In this way, it represents an indigenous form of development as an alternative to Western dominated capitalist development. There are reasons to be cautious, however, with regard to the increasing use of references to the *rights of Mother Earth* within or inter-related to the international human rights framework.

¹ Member of the United Nations Permanent Forum on Indigenous Issues (UNFPPII) and Executive Director of the Tebtebba Foundation, an indigenous peoples' policy research center based in the Philippines.

Although such language may better reflect an indigenous worldview than the language of human rights proper, there is still the question of who the legitimate spokesperson of Mother Earth is. It is therefore important to be wary of the potential implications. The new discourse on Mother Earth Rights must contribute to reinforcing the integrity of the international human rights framework. If it is instead to be used to question the validity of those human rights, this will be a grave setback for respect for human rights, indigenous peoples' rights included. The concepts of Mother Earth and living well are summarized and debated in the articles of Mirna Cunningham and Efrain Jaramillo.

The insistence on collective rights and their linkage to indigenous cultures and traditions is, to a large extent, a survival mechanism. It is an attempt to counter dispossession when constantly under threat from mining, logging, oil palm plantations, etc. In this volume, John Bamba, an indigenous leader from West Kalimantan, Indonesia, gives an important example of how establishing community-based credit unions unites the necessary communal linkage with individual needs for loans.

The Importance of Customary Law for Indigenous Peoples' Development

The indigenous cultures contain strong collective traditions such as sharing, solidarity and community-owned land. Indigenous peoples need to control their own future and development and, to do so, they need to have their customs and traditions recognized. In this respect, customary law is primordial for indigenous peoples' development.

In this volume, the articles on Malaysia (by Jannie Lasimbang), Bolivia (by Elba Flores Gonzales) and Russia (by Natialia Novikova) provide examples of the importance of customary law for indigenous peoples. In Sabah, Malaysia, encouraging moves have been taking place to promote and protect indigenous peoples' traditional system of governance known as *adat* (which includes customary law and the traditional institutions). This can help indigenous peoples in Sabah to retain their traditional ways of life and social traditions. In Bolivia, legal pluralism is now recognized and steps are being taken to legalize the indigenous peoples' justice system. This creates some challenges but also opportunities to develop a new system, which the author sees as characterized by "mutual respect, reciprocity, coordination and complementarity". As for Russia, the author argues that the existing legal system offers room for the inclusion of indigenous peoples' customary

laws and traditions. This could be relevant, especially for traditional forms of natural resource management and regulation of local issues.

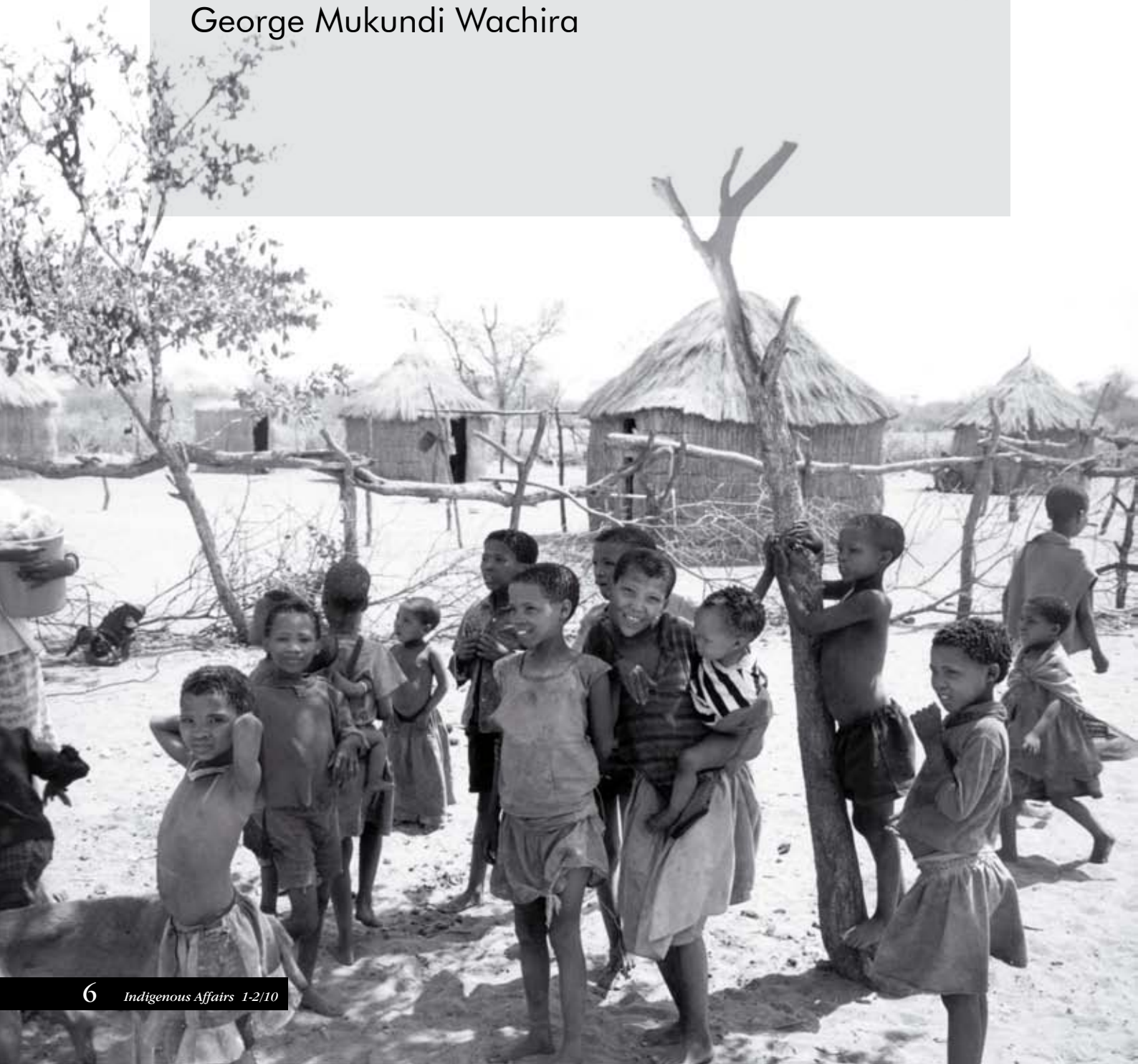
In his article, Sing'oei Korir argues that, for indigenous peoples, traditional practices and customary law may be better suited to resolving conflict than the statutory norms. He illustrates this point through the conflict resolution process among pastoralist communities in northern Kenya. As he emphasizes: "Given the non-atomization of individuals in African states and the fact that belonging to groups is still a salient reality, there must be a place for the deployment of community mechanisms in addressing disputes that transcend the individual and have pervasive impacts on the group". In the same line, the article by George Mukundi illustrates the importance of indigenous peoples' laws, traditions and customs for their rights to land and natural resources. The article shows how indigenous peoples' customary laws can protect and promote collective land ownership, control and management, in accordance with their cultures and traditions.

The adaptive and evolving nature of customary law can sometimes be a disadvantage given that, through history, the colonial legal system has occasionally distorted it. The article by Asoka Kumar Sen presents the example of India, where the British colonial system manipulated indigenous customs. As he puts it himself: "...both internal and external forces invented and recreated [customs] from time to time to suit the exigencies of the given community and the imperatives of the colonial state...". However, as Wilmien Wicomb points out in her article, customary law – and the adapting nature of customary law – can also be used by women to promote and protect their rights to access land. According to the author and other researchers, the fact that customary law is not a static body of law and the fact that it is always evolving and adapting to the environment gives women an opportunity to "negotiate change within their communities in order to advance their own position". This mutable nature of customary law can thus also be an asset and contribute to the development of particular groups, such as women or indigenous peoples.

This combined issue of Indigenous Affairs offers a general discussion on possible development models that respect indigenous peoples' rights to self-determination and a specific focus on indigenous peoples' customary law and how such customary law can be built upon in indigenous peoples' pursuit of self-determined development, self-governance, control and management of their territories, and even help them in addressing their own internal challenges, such as resolution of conflicts and women's rights. ○

Applying Indigenous Peoples' Customary Law in Order to Protect their Land Rights in Africa

George Mukundi Wachira



Introduction

The recognition and protection of indigenous peoples' land rights is at the core of their struggles. The centrality of land to indigenous peoples in Africa stems from the fact that they rely on traditional lands and natural resources for their livelihood and economic sustenance, as well as their religious and cultural life.¹ "Indigenous peoples' rights over land and natural resources flow not only from possession, but also from their articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits".² The rights to access, control, utilize and own traditional lands and natural resources are therefore critical to the survival of indigenous peoples all over the world.

Ownership, access and use of indigenous peoples' land rights have, since time immemorial, been governed by well-developed customs, practices and traditions. Indigenous peoples have cultivated and developed a special relationship with and connection to their lands as the basis of their existence.³ They are therefore attached to specific traditional lands and not just any piece of land.⁴ These are lands where they have lived for generations and the attachment is linked to the fact that the lands have a cultural and spiritual meaning.⁵ Indeed, while most other communities may still view land as being more than a means of production, to those self-identifying as indigenous peoples in Africa, their land and natural resources epitomize their unique culture and collective nature, and are usually their only means of survival.

Indigenous peoples' - especially pastoralists' - preference for collective land rights is due to the fact that an individualized land tenure system is often neither a viable option nor compatible with their cultural aspirations and way of life.⁶ On that basis, indigenous peoples seek communal land ownership as opposed to individual land tenure systems.⁷ Apart from cultural and traditional reasons for seeking collective recognition of indigenous peoples' land rights, these groups inhabit territories that may only be suitable for communal sharing of resources.⁸ Pastoralists, for instance, who self-identify as indigenous peoples, occupy lands in arid and semi-arid regions, including savannahs, which are mainly suitable for livestock keeping.⁹ Whilst these lands are expansive, they are not viable for sedentary small-scale agricultural farming and nature demands that these resources are utilized and managed in sustainable ways, failing which serious adverse repercussions are experienced, including drought and environmental degradation.

Indeed, despite concerted efforts and attempts by various African states to individualize land tenure, customary and communal concepts of land ownership are still alive in a number of indigenous peoples' communities. Additionally, States' constitutions - which are the supreme laws - often subjugate African customary law to written laws.¹⁰ The failure to recognize indigenous peoples and their aspirations, which include the ownership, control and management of their lands in accordance with their culture and traditions, continues to exclude and entrench the historical discrimination that has pervaded these populations for generations.¹¹ Such exclusion mainly takes the form of laws and policies that do not reflect indigenous peoples' proprietary rights.¹²

The recognition of indigenous peoples' laws, traditions and customs is therefore crucial to the protection of indigenous peoples' rights to land and natural resources.¹³ This contribution seeks to highlight the importance of legal recognition of customary laws in order to guarantee and protect indigenous peoples' land rights in Africa. By recourse to a comparative analysis of select progressive legal developments in Africa, the article argues that indigenous peoples' customary laws accord protection to their collective rights to land and deserve promotion and legal recognition.

Key Challenges Faced by Indigenous Peoples Seeking to Apply their Customary Law to Protect their Land Rights

One of the main challenges to relying on indigenous peoples' customary law to protect their land rights is the existence of repugnancy clauses in laws, which limit the application of customary law in relation to protecting land rights. Such clauses, present in States that have a common law heritage, stipulate that rules of customary law are only valid insofar as they are not inconsistent with the constitution and other written laws.¹⁴

The other related and equally difficult challenge to indigenous peoples' land rights on the basis of their customary law is proof of ownership. Indigenous peoples in Africa mainly rely on oral traditions and their connection to culturally-significant places such as graveyards to make claims and prove ownership. The majority of indigenous peoples' laws, customs and traditions in Africa are unwritten. They have been passed down orally from generation to generation. In such circumstances, indigenous peoples are faced with the daunting challenge of ensuring that their

lands are recognized, properly demarcated and protected in accordance with their customary laws and traditions.¹⁵

In order to effectively protect indigenous peoples' land rights in Africa, it is imperative that States acknowledge and give regard to indigenous peoples' traditions and customs.¹⁶ This could entail ensuring that the legal framework redresses historical injustices and guarantees equal recognition and application of indigenous peoples' traditional legal systems.¹⁷

Contemporary Application of Indigenous Peoples' Customary Laws in Africa

Africa is as diverse as her peoples and, accordingly, a comprehensive review of the application of customary law on the continent is not feasible within the limited scope of this contribution. An elaborate examination of such laws would require a survey of the different legal systems and traditions as influenced by common law, civil law and Islamic law. This survey seeks to illustrate the application of African customary law for the protection of indigenous peoples' land rights by recourse to three country case examples that the author is familiar with: Kenya, South Africa and Namibia. Admittedly, the three-country analysis is not necessarily representative of the continent with regard to the situation of indigenous peoples in Africa. However, it does illustrate the extent to which African customary law applies in terms of vindicating indigenous peoples' land rights that would equally and generally be obtained in the rest of the continent. The application of indigenous peoples' customary law in Africa was also reaffirmed by a recent jurisprudential development within the African human rights system whereby the African Commission on Human and Peoples' Rights recognised the land rights of an indigenous community - the Endorois of Kenya - on the basis of their African customary law.¹⁸

Kenya: the Promise of a New Constitutional Dispensation

In Kenya, until the recent - August 2010 - promulgation of a new Constitution, the application of African customary law was limited by the repugnancy and inconsistency clauses.¹⁹ The repealed Kenya Constitution of 1963 provided that "no right, interest, or other benefit under customary law shall have effect ...so far as it is repugnant to any written law".²⁰ This limitation restricted the applicability of communal land

tenure under customary law when such tenure conflicted with individualised land tenure.²¹ Although that Constitution made express provision for protection of trust lands according to community needs and aspirations,²² the existing legal frameworks "facilitated the erosion of communal land tenure rights".²³ This situation arose from the fact that indigenous peoples' traditional lands and territories are not registered to an individual but are instead held in trust by county councils, which can part with the lands to individuals upon registration.²⁴

An attempt by Kenya to provide for communal land tenure through the group ranches scheme, ostensibly on the basis of the Maasai - an indigenous pastoral community - customary laws, eventually backfired when the group ranches scheme largely collapsed.²⁵ The conversion of communal land holdings - at the time governed by Maasai traditions, customs and practices - to group ranches was facilitated through legislation. The adaptation was done through enactment of the Kenya Land Adjudication Act of 1968, which provided for the recording of rights and interests in customary lands, and their assignment to their customary users, and the Land (Group Representatives) Act,²⁶ which provided for the governance and administration of group ranches.²⁷

However, while the group ranches scheme was anchored in the written legal framework, it has been decried for its resultant conversion of otherwise harmonious community land relations to a statutory regime that ignored community traditions and the Maasai's preferred way of life.²⁸ The failure of the group ranches scheme, which culminated in the widespread subdivision of Maasai land, provides strong evidence of the lack of appreciation and regard for Kenya's indigenous peoples and the fundamental principles of justice, non-discrimination and equality prevailing at that time.²⁹ Indeed, experts contend that, "although the Maasai did not accept or even understand some features of the group ranch such as grazing quotas, boundary maintenance and the management committee they accepted the idea of group ranches primarily because it afforded them protection against further land appropriation from government, against the incursion of non-Maasai and from a land grab by the elite Maasai".³⁰

The real culprit though was the fact that the Supreme Law - the 1963 Kenya Constitution - and other written laws gave primacy to individual land tenure.³¹ Accordingly, the attempt to legislate for communal land rights in the form of group ranches on the basis of customary law still failed to accord protection of indigenous communities from incursion by individu-

als. In fact, the introduction of the group ranches scheme can be summed up as a roundabout way of entrenching individualized land tenure amongst these communities in order to conform to the land law regime of the time, which subsists to date.

South Africa's Constitution, on the other hand, accords African customary law equal status with written laws when dealing with issues relevant to the applicability of customary law, which is subject only to the values and norms of the Constitution.³² However, Namibia's Constitution, like the recently repealed Kenya Constitution, still subjugates African customary law to all other written laws.³³ It is interesting to note though, that Namibia reserves the administration of all communal land rights in Namibia to African customary law. However, in the face of a lack of constitutional guarantee of equitable treatment and application of African customary law in Namibia in relation to written laws, the state is not likely to offer much protection for indigenous peoples' land rights.³⁴

While the new 2010 Kenya Constitution retains the inconsistency clause, its application is now commendably only limited to the Constitution.³⁵ That provision is now similar to the South African Constitution clause

on supremacy of the Constitution.³⁶ Indeed, and of notable and commendable progress, in the new 2010 Kenya Constitution, indigenous peoples' land rights can find equitable protection of their land rights on the basis of their customary laws. The new Constitution's Bill of Rights for the first time provides that "a person belonging to a cultural or linguistic community has the right, with other members of that community, to enjoy the person's culture..."³⁷ and further the "state shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups develop their cultural values, languages and practices".³⁸ Arguably, these new constitutional provisions should translate into the protection of indigenous peoples' land rights on the basis of customary laws. The jury is therefore out in terms of reviewing the extent to which implementation of the new Kenya Constitution, which has begun in earnest, will give meaning to indigenous peoples' land rights.

Additionally, section 63 of the new Kenya Constitution has elaborate provisions on community land.³⁹ Section 63(1) provides that community land shall be vested in and held by communities identified on the basis of ethnicity, culture or similar community interest - which would undoubtedly include indigenous

Richtersveld community after winning their court case at the South African Constitutional Court. 2003 – Photo: IWGLA archive



communities. These provisions are a marked departure from the repealed 1963 Constitution which vested community land in the community but said land was then held in trust by local authorities. This situation often led to abuse of the trust relationship since it was common for the county councils to dispose of indigenous peoples' lands in total disregard of community interests.⁴⁰ It is expected that, with the promulgation of the new Constitution, such abuse will become history since the community will hold title to their lands in their own right, based on their customary laws.

South Africa: Express Legal Recognition Coupled with a Progressive Interpretation of the Constitution

Indigenous peoples in South Africa have invoked the restitution clause in the Constitution and statutory processes to regain their ancestral lands on the basis of their customary law.⁴¹ Restitution of land rights was one of South Africa's attempts to restore land and provide for remedies to individuals and groups who were dispossessed of their lands as a result of the racially discriminatory apartheid laws and policies.⁴² According to the Restitution Act, the relevant dispossession is one of a "right in land", which need not be registered.⁴³ It is instructive that the "right in land" in South Africa can be of a customary law nature.⁴⁴

While express provisions in the Constitution and legislation in South Africa provide a clear route for restitution of lands through the courts, the country's indigenous peoples - the most notable being the Richtersveld community - have explored alternative claims based on their African customary laws.⁴⁵ Although the Richtersveld community abandoned the aboriginal rights claim they had launched at the Cape High Court in favour of their restitution claim, it is instructive that the Constitutional Court went to great lengths to illustrate the applicability of African customary law in proving indigenous land rights.⁴⁶ Indeed, while the Constitutional Court found that the community was entitled to their right to land through the more direct route of the Restitution Act, it acknowledged that the community's rights to the land in question were based on their indigenous law.⁴⁷

In particular, the South African Constitutional Court found that the indigenous Richtersveld community had a right to the land not by virtue of the common law but by virtue of the Constitution.⁴⁸ In what can be termed an affirmation of the independent

status of African customary law under the South African Constitution, the Court held that:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution . . . [T]he Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system . . . [I]ndigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.⁴⁹

It is also worth noting that the Constitution of South Africa limits the applicability of African customary law only insofar as it comports with the purpose and values set forth in the Bill of Rights.⁵⁰ Importantly for indigenous peoples in South Africa who rely on African customary law, the South African Constitution recognizes rights emanating from this system of law.⁵¹ Such rights would likely include the land rights of indigenous peoples based on African customary law. The recognition of African customary law by the South African Constitution and the affirmation by the Constitutional Court that it forms part of the South African legal system is significant. The fact that, unlike in Kenya, African customary law in South Africa is not subjugated to other written laws or limited by repugnancy clauses is important for groups and individuals relying on that law to claim their fundamental human rights.⁵²

The South African Constitution further obliges courts of law to apply African customary law whenever it is applicable, "subject to the Constitution and any legislation that specifically deals with customary law".⁵³ This means that African customary law in South Africa has equal force alongside other sources of law, such as legislation and common law, as long as it is in conformity with the Bill of Rights.⁵⁴ A similar provision in other African countries would guarantee indigenous peoples' rights to their traditional lands since they mainly rely on African customary law to prove these rights.

The express acknowledgement that indigenous laws form part of the constitutional framework of South Africa's legal system⁵⁵ is particularly useful for a comparable argument in other African countries where such is absent. Indeed, it has been argued that, for those who cannot meet the requirements of the



Charles Kamuren from the Endorois Welfare Council, Kenya, after the ruling of the African Commission for Human and Peoples' Rights in their favor, 2010.
Photo: Endorois Welfare Council

Restitution of Land Rights Act, aboriginal title could provide an alternative ground of action.⁵⁶ Proof of aboriginal title is dependent on the traditions and customs of indigenous peoples.⁵⁷ South Africa's Constitutional Court cited the observations of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*,⁵⁸ which held that native title required a determination based on the evidence of indigenous law.

The applicability of African customary law has also found legislative validation in South Africa through the country's security of land tenure reforms, which are aimed at improving the "tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure".⁵⁹ The South African Constitution guarantees land tenure security or equitable redress for persons or communities whose land tenure was insecure as a result of racially discriminatory laws and policies.⁶⁰ It is important to note that land tenure security for indigenous peoples in South Africa, as is the case in most other colonized states across the globe, was affected by the imposition of colonial laws that subjugated African customary laws.⁶¹

One of the important pieces of legislation enacted in post-democratic South Africa to enhance land tenure security for its historically marginalised communities was the Communal Land Rights Act of 2004.⁶² The Act seeks to provide legal "security of tenure by

transferring communal land to communities, or by awarding comparable redress".⁶³ The majority of rural communities in South Africa, hold land communally,⁶⁴ which means that the Act is relevant to a wide cross-section of South Africa's population beyond indigenous peoples. The Nama (Khoe), for example, "particularly the Richtersveld communities, have managed to maintain communal land for grazing. This extends into the Richtersveld National Park".⁶⁵ However, traditional communal landholding during apartheid was largely unregulated, and this left most community members dependent on the whims of the tribal authorities.⁶⁶ "At the root of the problem is the fact that during the apartheid era, customary law was interpreted so as to give legal land ownership to traditional leaders, rather than to community members".⁶⁷ The Communal Land Rights Act sought to rectify that misinterpretation of customary law since, traditionally, community land rights were vested in the community and not traditional authorities, whose role was purely to manage the resource.⁶⁸

Communal lands during apartheid were equally plagued by weak and insecure tenure and inequitable distribution.⁶⁹ The Act therefore sought to rectify that situation by promoting security of tenure, equitable access and fair use, as well as an open and just land administration system of communal lands.⁷⁰ Of key significance to indigenous peoples in South Africa,

particularly for those who continue to hold such lands on the basis of African customary law, is the requirement in the Act that community land shall be allocated and administered in accordance with the "community's rules".⁷¹ Although such rules are required to be registered with the Director General of Land Affairs,⁷² adoption of such rules is a community affair that is governed by the customary laws, traditions and values of the community. Such rules can be amended or revoked by the community in a general meeting, to reflect the changing needs of the community. This possibility is very important given the fact that culture is not static.⁷³

Namibia: the Struggle Continues

In Namibia, the Communal Land Reform Act⁷⁴ was enacted to regulate the administration of communal lands and allocation of communal land rights, which is subject to the approval of the Land Board.⁷⁵ The Act is an important development since it allows indigenous peoples to access, control and utilize their traditional lands in accordance with their African customary law. Namibia's Constitution recognises and gives legitimacy to traditional authorities that govern on the basis of African customary law and traditions. The authorities advise the President on control and utilisation of communal lands.⁷⁶ Traditional authorities in Namibia also exercise various powers, including allocation of access to and control of communal lands in accordance with the community's customary laws and traditions.⁷⁷ Accordingly, traditional leaders, who would also include those from indigenous communities, have some influence over issues related to their peoples' ancestral lands.

However, it is important to note that, during the colonial and apartheid regimes, the San and Nama indigenous peoples in Namibia did not have State-recognised traditional authorities.⁷⁸ Indeed, "while all other communities enjoyed some type of recognition in the apartheid-bound constitution of so-called separate development, a representative authority was never established in Bushmanland, the home of some San groups and earmarked for the whole Namibian San population by the apartheid administration".⁷⁹ The San traditional authorities and form of governance were therefore not recognized, which meant that their issues, including land concerns, were neglected and remained largely unaddressed. It is therefore not surprising that the colonial regime continued to alienate the San and Nama lands as if they were owned by no-one.⁸⁰

The establishment of a Council of Traditional Leaders in 1997 through an Act of Parliament⁸¹ addressed the issue of official recognition of the traditional authorities of some of the indigenous peoples, particularly the San groups. Pursuant to this Act, three San communities have been accorded traditional authority status.⁸² The Council of Traditional Leaders in Namibia comprises two representatives of each of the 42 officially recognised traditional authorities pursuant to the Traditional Authorities Act of 2000,⁸³ which amended an earlier similarly named Act.⁸⁴ However, some of the indigenous groups, including some San groups, such as the Khwe, continue to face reluctance on the part of the State to recognise their traditional authorities.⁸⁵ Consequently, such indigenous communities encounter numerous hurdles in the administration of their communal land rights.⁸⁶

Of note is a recent decision by the Council of Traditional Leaders to require traditional communities in Namibia to restate their African customary laws.⁸⁷ According to Manfred Hintz, who is a member of the team that assists traditional communities in Namibia to restate their laws, the restatement of customary laws is not an attempt to codify the laws but rather to put in writing what a community considers important for its future generations, in accordance with constitutional requirements, and for the benefit of persons who deal with these laws outside the community.⁸⁸ The restatement project, which is being carried out in collaboration with the University of Namibia's Faculty of Law, is expected to document and publicise these laws for future reference.⁸⁹ The importance of the African customary restatement project cannot be overemphasized given the historical marginalisation and exclusion of these laws from the mainstream legal framework. It is expected that, by documenting these laws, disputes will be resolved expeditiously in line with the Bill of Rights, especially in view of the establishment of Community Courts.⁹⁰ The establishment of these courts is bound to have positive ramifications for indigenous peoples in relation to their indigenous land rights since the courts will adjudicate matters on the basis of African customary law.⁹¹

Conclusion

Indigenous peoples in Africa continue to hold and claim their land rights based on their customary and traditional laws.⁹² This is notwithstanding numerous attempts to suppress and subvert African customary law through the elevation of written laws.⁹³ However, due to the imposition of colonial and post-colonial

land laws, most indigenous communities remain deprived of their lands.⁹⁴ The destruction and exclusion of African customary law from the land law regime in various African states has had the effect of dispossessing indigenous peoples of their lands. To indigenous peoples, customary land tenure provides tenure security to members of the group.⁹⁵ Where African customary land tenure is not accorded legal recognition or is subjugated to other forms of property regime, these communities suffer some of the greatest land injustices, legitimized through foreign-imposed land laws. Consequently, they face insurmountable legal challenges in realizing their land rights. This is due to the fact that, while legally one may rely on African customary law, its application is limited.

In order to accord indigenous peoples equal protection of the law in relation to their land rights, it is imperative that their customary laws are treated on a par with other written laws. The justification for equating African customary law with other written laws, rather than subjugating it, is because it would eliminate discrimination and ensure equality as enshrined in the constitutional bill of rights and values as well as international norms and standards.⁹⁶ Indeed, according to the Committee on the Elimination of Racial Discrimination, failure to recognize and respect indigenous customary land tenure is a form of racial discrimination incompatible with the Convention.⁹⁷ The Committee has called upon states “to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories”.⁹⁸

While constitutions are the supreme law, they should take account of the fact that certain communities are still governed by African customary law. To this extent, indigenous peoples’ preferred laws should not be subjugated to other written laws, inasmuch as these laws must be consistent with the principles and values of the Constitution. This would entail indigenous peoples owning lands on the basis of their African customary laws, provided the interpretation of those laws conforms to the values of the Bill of Rights. For instance, in the event that customary laws discriminate against women owning or accessing traditional lands, such laws could be found to be inconsistent with the Constitution.⁹⁹ Indeed, the South African Constitutional Court has held that the customary law rule of primogeniture is unjustifiable due to its unfair discrimination against women.¹⁰⁰ An indigenous

woman who, as a result of such discrimination, is denied the right to own or be involved in the management of the traditional land resources on which she depends would find recourse in the constitutional provisions.¹⁰¹

To give effect to recognition and protection of indigenous peoples’ land rights on the basis of African customary law would inevitably require a review of relevant customary laws and practices related to land tenure systems.¹⁰² This may entail constitutional amendments to purge any ambiguities regarding the equal status of African customary law when dealing with specific indigenous peoples’ issues. It is therefore imperative that the Constitution of African countries explicitly provides that African customary law shall apply with equal force to issues relating to their ancestral lands, where the relevant communities so elect. ○

Notes

- 1 See Study on Indigenous People and their Relationship to Land, by Daes EI, UN Doc.E/CN.4/Sub.2/1999/18, 3 June 1999, para.18 (Daes study); see also Anaya, SJ (2004) *Indigenous peoples in international law*: New York: Oxford University Press, 141. J Asiema & FDP Situma “Indigenous peoples and the environment: The case of the pastoral Maasai of Kenya” (1994) 5 *Colorado Journal of International Environmental Law and Policy* 150; R Hitchcock R & D Vinding (2004) “Indigenous peoples’ rights in Southern Africa: An introduction” in R Hitchcock R & D Vinding (ed) *Indigenous peoples’ rights in Southern Africa* 11.
- 2 Anaya 2004, 141; see also See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problems of Discrimination Against Indigenous Population, UN ESCOR, 1986 UN Doc E/CN4 Sub2 1986/7/Add 1-4, para 379 (Cobo’s Report).
- 3 Cobo’s Report paras 196 and 197.
- 4 Working Group on Indigenous Populations, Working Paper by the then Chairperson-Rapporteur, EI Daes on the Concept of “Indigenous People”, U.N ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess, U.N.Doc.E/CN.4/Sub.2/AC.4/1996/2, 1996, 5 (Daes Concept paper), para 64; Brownlie, I (Brookfield, FM (ed) (1992) *Treaties and indigenous peoples*: Oxford: Clarendon Press, 39.
- 5 HJ Deacon & J Deacon *Human beginnings in South Africa: Uncovering the secrets of the Stone Age* (1999) 132; Hitchcock & Vinding 2004, 11.
- 6 See Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa Adopted by the African Commission on Human and Peoples’ Rights (African Commission) at its 28th Ordinary Session, ACHPR & IWGIA (2005) (ACHPR & IWGIA) 24.
- 7 Advisory Committee on Human Rights and Foreign Policy “Indigenous Peoples” (1993) 16 *Advisory Report, Netherlands*, 4 (Advisory Committee, Netherlands).
- 8 Ibid.
- 9 ACHPR & IWGIA 2005, 17.

- 10 See, for example, L Juma "Reconciling African customary law and human rights in Kenya: Making a case for institutional reform and revitalization of customary adjudication processes" (2002) 14 *Saint Thomas Law Review* 505.
- 11 See report prepared by El Daes "Indigenous peoples and their relationship to land: Final working paper" UN Doc E/CN.4/SUB.2/2001/21(Daes final working paper), 144 para 40-48.
- 12 Anaya 2004, 142.
- 13 See part II ILO Convention No 169; Art 26 UN Declaration on the Rights of Indigenous Peoples; see also *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992, para 9.5; see also Human Rights Committee, General Comment 23, Art 27 (55th session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 (1994) 38, para 7.
- 14 See, for example, sec 115(2) and 117(5) of the repealed 1963 Constitution of Kenya; See also sec 69 Kenya Trust Land Act (Cap 288).
- 15 ACHPR & IWGIA 2005, 21.
- 16 Anaya 2004, 142.
- 17 Daes final working paper, 78; see also "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Kenya" by Stavenhagen, R., Special Rapporteur of the Commission on Human Rights, submitted in accordance with General Assembly Resolution 60/251, U.N. Doc. A/HRC/4/32/Add.3, 26 February 2007 (Stavenhagen Kenya Mission Report) para 25.
- 18 See the recommendation of the African Commission on Human and Peoples' Rights on the case of the *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community versus Kenya*, Communication 276/2003, (Endorois case); Endorois case, para 238.
- 19 Sec 115 (2) of the Repealed Constitution of Kenya 1963; see also sec 3 Judicature Act Laws of Kenya Cap 8: The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.
- 20 Ibid.
- 21 The only law purporting to legitimize communal land tenure is the Land (Group) Representatives Act which, as will be illustrated in the next section, is in real terms a formal extension of the individualization of land tenure in the name of group ranches.
- 22 Sec 114-120 of the repealed Kenya Constitution of Kenya.
- 23 See I Lenaola, H Hadley H. Jenner & T Wichert "Land tenure in pastoral lands" in C Juma and JB Ojwang (ed) *In land we trust, environment, private property and constitutional change* (1996) 242.
- 24 Sec 115-116 of the repealed Constitution of Kenya.
- 25 See J Kieyah "Indigenous peoples' land rights in Kenya: A case study of the Maasai and Ogiek people" (2007) 15 *Penn State Environmental Law Review*, 2007 406; see also S Coldham "Land-tenure reform in Kenya: The limits of law" (1979) 17 *Journal of African Modern Studies* 620.
- 26 Land (Group Representatives) Act (Cap 287).
- 27 See J Ngugi "The decolonization-modernization interface and the plight of indigenous peoples in postcolonial development discourse in Africa" (2002) 20 *Wisconsin International Law Journal* 345; see also Lenaola 1996, 245.
- 28 See J Kieyah "Indigenous peoples' land rights in Kenya: A case study of the Maasai and Ogiek people" (2007) 15 *Penn State Environmental Law Review*, 2007 406; see also S Coldham "Land-tenure reform in Kenya: The limits of law" (1979) 17 *Journal of African Modern Studies* 620.
- 29 Ngugi 2002, 347; see also Lenaola 1996 247.
- 30 Mwangi "The transformation of property rights in Kenya's Maasai land: Triggers and motivations" (2005) 35 *International Food Policy Research Institute, CAPRI Working Paper* 11, 7.
- 31 SC Wanjala "Land ownership and use in Kenya: Past, present and future" in SC Wanjala (2000) *Essays on land law: The reform debate in Kenya*: University of Nairobi. Nairobi, 35 citing sec 27 and 28 of the RLA and *Obiero v Opiyo* (1972) EA 227; and *Esiroyo V Esiroyo* (1973) EA 388; see also L Cotula and B Neve "The driver of change" in L Cotula (ed) *Changes in customary land tenure systems in Africa* (2007) 33.
- 32 See sec 211(3) Constitution of South Africa.
- 33 See art 66 of the Constitution of Namibia.
- 34 See Communal Land Reform Act No 5 of 2002.
- 35 See Constitution of Kenya, 2010; section 29(4): Any law, including customary law, which is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- 36 South African Constitution Act 108 of 1996, section 2; This Constitution is the Supreme law of the Republic: law or conduct inconsistent with it is invalid, and the obligations by it must be fulfilled.
- 37 Constitution of Kenya 2010, 1 article 44.
- 38 Constitution of Kenyan 2010, article 56.
- 39 Section 63 Constitution 2010.
- 40 See Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Government Printer, Nairobi, 2004, 16.
- 41 See section 25(7) of South Africa's 1996 Constitution; "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: South Africa" by Stavenhagen, R., Special Rapporteur of the Commission on Human Rights submitted in accordance with Commission on Human Rights resolution 2005/51, U.N. Doc. E/CN.4/2006/78/Add.2, 15 December 2005, para 37:
- 42 See T Roux "The Restitution of Land Rights Act" in G Budlender, J Latsky & T Roux *Jutas new land law* (1998) chapter 3.
- 43 See sec 1 of the Restitution of Land Rights Act; see discussion of the impact of the expanded definition of a "right in land" in the Act in Van der Walt, A J (2005) *Constitutional property law*: Cape Town: Juta & Company Ltd, 292-293.
- 44 Ibid.
- 45 See also *Richtersveld Community and others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC) para 6; see also T Roux "Pro poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court" (2004) 20 *South African Journal of Human Rights* 522.
- 46 *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC) (South Africa) para 50-82.
- 47 Ibid para 62 & 64.
- 48 Ibid para 51.
- 49 Ibid para 51.
- 50 See sec 39 (2) Constitution of South Africa; see also *Ibid* para 51 (referring to customary law) see also para 7 n.8 stating that customary law is synonymous with indigenous law.
- 51 Sec 39 (2) Constitution of South Africa.
- 52 See *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) para 32.
- 53 Sec 211 (3) Constitution of South Africa.
- 54 Sec 39 (3) Constitution of South Africa.
- 55 *Alexkor v Richtersveld community* (CC).
- 56 TW Bennett *Human rights and African customary law* (1995) 148; see also *Richtersveld v Alexkor Ltd* (LCC) para 48 where the Court intimated that the doctrine of indigenous title was an alternative remedy to restitution under the Restitution Act but fell outside the LCC's jurisdiction, a position since overturned by the SCA and the CC.
- 57 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1(Australia), 58.

- 58 *Amodu Tijani v The Secretary Southern Nigeria* cited in *Alexkor v Richtersveld* community (CC) para 56.
- 59 See South Africa's White Paper on Land Policy para 2.3.
- 60 Sec 25(6) Constitution of South Africa.
- 61 See C Toulmin & J Quan, *Evolving land rights, tenure and policy in Sub-Saharan Africa* in C Toulmin & J Quan (Ed) *Evolving land rights, policy and tenure in Africa*, DFID/IIED/NRI, London, 2000, 9-10.
- 62 Communal Land Rights Act No 11 of 2004; for a critical expose of this Act see B Cousins "More than socially embedded: The distinctive character of 'communal tenure' regimes in South Africa and its implications for land policy" (2007) 7(3) *Journal of Agrarian Change*, 281-315.
- 63 Communal Land Rights Act sec 1; see also Cousins, 2007 287; see also T Bennett & C Murray "Traditional leaders" in S Woolman et al *Constitutional Law of South Africa* (2005) 26:56.
- 64 See Cousins 2007, 283.
- 65 See N Crawhall *Indigenous peoples of South Africa: Current trends project to promote ILO Policy on Indigenous and Tribal Peoples* (1999) 8.
- 66 Van der Walt 2005 334; see also C Toulmin & J Quan, Registering customary rights in C Toulmin & J Quan (Ed) (200) *Evolving land rights, policy and tenure in Africa*, DFID/IIED/NRI, London, 225.
- 67 Toulmin & Quan 2000, 225 citing A Classens & S Makopi "South African proposals for tenure reform: The draft Land Rights Bill - key principles and changes in thinking as the bill evolved". Paper presented at the DFID workshop on Land rights and sustainable development in Sub-Saharan Africa: Lessons and ways forward in Land tenure policy, Sunningdale, UK, 16-19 February 1999.
- 68 Bennett, T W (1995) *Human rights and African customary law*: Cape Town: Juta & Company Ltd. 152.
- 69 Van der Walt 2005, 334.
- 70 See sec 14-18 of the Communal Land Rights Act of 2004.
- 71 See sec 19 Communal Land Rights Act of 2004.
- 72 Communal Land Rights Act of 2004, sec 19(4).
- 73 See contrary views that suggest that customary law once recorded loses its dynamism in Bennett, T W (1991) *Source book of African customary law for Southern Africa*: Cape Town: Juta & Company Ltd, 139.
- 74 See Communal Land Reform Act No 5 of 2002.
- 75 *Ibid*, sec 20 & 24.
- 76 *Ibid*, sec 102 (5).
- 77 MO Hinz "Traditional governance and African customary law: Comparative observations from a Namibian perspective" in N Horn & A Bosl (Ed) (2008) *Human rights and the rule of law in Namibia* Windhoek: Human Rights and Documentation Centre (HRDC), Faculty of Law, University of Namibia, Windhoek, 76.
- 78 *Ibid* 70.
- 79 *Ibid* (footnotes omitted).
- 80 See Harring, SL "Indigenous land rights and land reform in Namibia" in Hitchcock, R K and Vinding, D (ed) (2004) *Indigenous peoples' rights in Southern Africa*: Copenhagen: (IWGIA) International Work Group for Indigenous Affairs, 71-81.
- 81 Council of Traditional Leaders Act, 13 of 1997.
- 82 Hinz 2008 74.
- 83 See Traditional Authorities Act, 25 of 2000.
- 84 See Traditional Authorities Act, 17 of 1995.
- 85 Daniels, C "Indigenous rights in Namibia" in Hitchcock, R K and Vinding, D (ed) (2004) *Indigenous peoples' rights in Southern Africa*: Copenhagen: (IWGIA) International Work Group for Indigenous Affairs, 50.
- 86 *Ibid* 56-58; see also Hinz 2008, 81.
- 87 See Hinz 2008 85.
- 88 *Ibid*, 85.
- 89 *Ibid*.
- 90 See Community Courts Act No 10 of 2003.
- 91 *Ibid* sec 19.
- 92 See HWO Okoth-Ogendo, *The tragic African commons: A century of expropriation, suppression and subversion*. Keynote Address delivered at a workshop on Public Interest Law and Community-Based Property Rights organized by the Lawyers Environmental Action Team, Tanzania and the Centre for Environmental Law, USA, in collaboration with the World Resources Institute, and the International Association for the Study of Common Property, held at the MS-TSC DC Danish Volunteer Centre, Arusha Tanzania, August 1-4, 2000, 7 (In file with the author).
- 93 *Ibid*; see also P Kameri-Mbote "Righting wrongs: Confronting dispossession in post-colonial contexts" Key note speech at a conference on land, memory, reconstruction and justice: Perspectives on land restitution in South Africa, 13-15 September 2006, Cape Town, 4, available at <<http://www.plaas.org.za/events/Past-Events/landmemory/papers/Kameri-Mbote.pdf>> accessed 20 October 2010) 7.
- 94 See HWO Okoth-Ogendo (1991) *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya* (1991) 63-65.
- 95 See World Bank, *Land policies for growth and poverty reduction* (2003) 54.
- 96 See United Nations Committee on the Elimination of Racial Discrimination (CERD) *General Recommendation XXIII: Rights of Indigenous Peoples*, U.N. Doc. A/52/18 Annex V (Aug. 18, 1997). para 5.
- 97 *Ibid*.
- 98 *Ibid*.
- 99 See *Bhe & others v Magistrate, Khayelitsha; Shibi v Sithole and others; SAHRC & another v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('Bhe'); see also *Tinyiko Shilubana & others v Sidwell Nwamitwa & others* Case CCT 03/07(2008) ZACC 9, <<http://www.constitutionalcourt.org.za/uhtbin/cgi-sirsi/20080605083932/SIRSI/0/520/J-CCT3-07C>>. In this case, the Constitutional Court of South Africa upheld the legitimacy of traditional authorities to develop their customary laws in conformity with the principles and values of the Constitution.
- 100 *Ibid*, para 179-191.
- 101 *Ibid*.
- 102 See, for example, Para 68 of the Kenya Draft National Land Policy which calls on the Kenyan Government to (a) Document and map existing customary land tenure systems in consultation with the affected communities, and incorporate them into broad principles that will facilitate the orderly evolution of customary land law; and (b) Establish a clear legislative framework and procedures for recognition, protection and registration of customary rights to land and land-based resources. The envisaged legislative framework and procedures will in particular take into account multiple interests of all land users including women.

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Customary Law and Conflict Resolution among Kenya's Pastoralist Communities

Abraham Korir Sing'Oei



Camels fetching water for a nomadic camp of Gabra people in Marsabit, Northern Kenya – Photo: Sue Cavanna



Introduction: the Inevitability of Legal Dualism in Africa

Law is the main device used by a state to regulate the affairs of its population in order to facilitate the orderly conduct of both public and private spheres. By historical circumstance or reasons of limited capacity, Africa's post-colonial states have, by design, left certain areas of citizens' behaviour outside the reach of formal law. Similarly, in some parts of the country where the state's presence is minimal, traditional systems are permitted by default to exist side by side with a state-run justice system in order to reduce transaction costs. Historically, many African states, including Kenya, have permitted the intermediation of customary law when redressing matters of a personal nature, notably marriage and devolution of property upon death, while matters criminal remained the exclusive jurisdiction of formal legal systems. This is largely explained by the fact that imported colonial laws were at such great variance with the norms of African communities that their imposition would lead to more conflict and would further increase the cost of enforcing compliance. Hence, dualism, a hybrid legal space where more than one legal or quasi-legal regime occupies the same social field, is a key feature of most African legal fields, including Kenya's.

While many legal positivists do not admit it, customary law in Africa has a stand-alone basis for its existence beyond merely filling in the gaps left by states' legal devices. Customary law's intervention is seen as addressing an area where ordinary criminal or civil sanctions have failed. This becomes particularly relevant in African society which, while increasingly individualized, continues to exhibit a collective impulse. Given the non-atomization of individuals in African states and the fact that belonging to groups is still a salient reality, there must be a place for the deployment of community mechanisms in addressing disputes that transcend the individual and have pervasive impacts on the group. Statutory law has appeared quite incapable of providing redress for matters relating to the collective. It is this area of intersection between the group and the state (Adejumobi, 2001) that is mediated by norms of customary law. Rather than appreciate the robustness of customary law in the African context, its place has always been subordinated not only to statutory law but also to the edicts of an amorphous matrix of "public policy, health and morality". Regrettably,

customary norms remain a lesser child of the law, a position that undermines their growth, adaptability and resilience.

Conflict, particularly mass violence, has been addressed poorly by statutory law. This is largely because mass violence generates a complex matrix of breaches of criminal and civil law - land and political issues - the sheer scale of the consequences of which always leaves a residual effect that most legal systems cannot adequately address. Moreover, although capable of being resolved through notions of individual culpability, conflicts also destroy community cohesion, a domain that written law cannot adequately nor immediately confront.

In what ways, then, have the customary norms of indigenous communities contributed to conflict resolution in Kenya, an area in which statutory norms have been an abysmal failure?

Northern Kenya: Incomplete Statehood

The colonial government instituted the original policy framework segregating the northern rangelands from Kenya proper, creating the Kenya of the South and North. The nomads of northern Kenya were seen to be antithetical to the colonial enterprise because of their geographic distance from the centre in Nairobi as well as their livelihoods, which clashed with the colonial imperative of settling communities in order to extract value through modern agriculture and taxation. In northern Kenya, the colonial government legalized the use of military muscle and administrative fiat to quell any pastoralist resistance to the *Pax Britannica*, setting the foundation for the instrumentalization of violence as the ultimate arbiter in the region. Emergency laws passed immediately after independence to quell the pro-Somali militia, the *Shifita*, gave the new African-led government legal *carte blanche* to combat the *Shifita* insurgency. What began as a legitimate struggle for self-determination quickly degenerated into widespread banditry. The firearms remaining after the rebellion officially ended, and the need to restock depleted herds, accounted for the high levels of ensuing cattle raiding and highway robbery. North-eastern Province has been synonymous with insecurity ever since. Although civil and political rights were enshrined in the independence constitution, including freedom from arbitrary arrest, torture and extra-judicial killing, communities in Kenya's northern frontier were exposed to flagrant abuse of these rights. Because of the Indemnity Act enacted in the wake of the *Shifita*

war, action by security officials in the closed districts of northern Kenya could not be challenged in the courts.

During the 1990s, it became clear that conventional methods of addressing conflict, through the use of either brute force or formal judicial means, were no longer capable of containing the north's intensifying conflicts. The opening up of the democratic space in the country provided opportunities for communities in the north to rethink new ways of addressing entrenched inter-tribal/clan conflicts. The answer was to seek resolution through the timeless customary norms of these communities which, although heavily undermined or manipulated during the immediate colonial and post-colonial era (Mamdani, 1996; Joireman, 2008), still remained relevant as a legitimate means for resolving intractable conflicts. In the case of northern Kenya, recourse to either pure forms of or re-imagined customary institutions appears to have been the only choice, given the sheer non-existence or total unresponsiveness of state-led dispute resolution mechanisms. Recent studies indicate that formal courts in northern Kenya are few, bureaucratic and often seen to dispense a type of justice that is either too long in the coming or has a retributive rather than a reconciliatory impact on the individuals and communities in question (Chopra, 2009).

Seeking Pure Customary Justice: the Borana and Gabra Model of Peace

The Borana and Gabra pastoralist peoples of northern Kenya and southern Ethiopia were engaged in a violent conflict with each other that reached its peak in the atrocities of 2005, even though these peoples are closely linked linguistically, territorially and socially. In what has become known as the Turbi massacre, 100 members of the Gabra community were killed on the morning of July 12, 2005. During this incident, attributed to the military wing of the Borana community, hundreds of men armed with an assortment of weapons, ranging from AK-47s and grenades to machetes and spears, descended on the village of Turbi with the aim of slaughtering as many people as possible. Three days after the massacre, with ethnic tensions still running high, the Roman Catholic Bishop of Zica, Luigi Locati, was shot dead in Isiolo, 300 kilometres from Turbi. With this conflict taking on legal, political and economic dimensions, political leaders from the region who had hitherto been reluctant to engage each other launched



a peace campaign. Unfortunately, this campaign was cut short exactly a year later when a Kenyan army plane carrying six members of parliament crashed before landing in Marsabit.

Shocked into action by the painful events of the previous year, the Gabra and Borana communities

launched a peace process through their traditional systems. Peace was finally restored in 2009 after a process that drew on a combination of tradition and innovation. The peace was formally initiated by the customary councils of the Borana and Gabra – the *gada* and *yaa* – which sent out messages reminding

the people of the ancient laws that relate to peace. Customary law (*aada*) encompasses religious, judicial and cultural aspects of Borana and Gabra life and is widely respected. The messages of peace travelled from the councils to spiritual leaders, judges and clan leaders (*jalaab*), and on to men and women, herders, townsfolk, elders and youth. The messages moved from one person to another in the form of *daimtu*, a conversation the basic form of which is to ask "Do we have peace?" in order to remind the other that, "We should have peace" and to ask, "How can we have peace?" (Pastoralist Shade Initiative, 2010).

Among the indigenous pastoralist communities of northern Kenya, elders have unarguably been the vanguards of peace. The elders are able to hold this position because of their control of access to resources, being part of a network of clan/ethnic structures and because they command respect and legitimacy on account of their age (Kratli & Swift, 2000). Elders are still regarded as the custodians of cultural norms/practices as well as being the depository of knowledge and cultural heritage (Makumi Mwangi, 2001). Among the Oromo, of which the Borana are a part, elders form a dominant component of the customary mechanisms of conflict management (Watson 2001).

Over a four-year period, as part of the Pastoralist Shade Initiative (a peace-building NGO registered in 2008 whose Board comprises nine elders representing pastoral communities), elders from the Gabra and Borana communities continued to pass on messages and hold meetings, including in places where people did not want or believe in peace. Finally, when they were confident that agreements had largely been reached, they called pastoralists, politicians and officials to public peace gatherings. The gatherings were held on pastoralist terms, according to traditional rules. One by one, in a series of meetings, each built on the last to confirm and expand the area that was at peace. By June 2009, the fighting between Dillo and Dukana villages had come to an end. By July, the peace had extended across Chalbi and North Horr, in a meeting at Maikona. By August, it had embraced Turbi, Rawan, Walda and Sololo, places where politics and insurgency had complicated the situation and weakened leadership.

The "Maikona Declaration" is a short agreement prepared at Maikona, a small dusty town about 700 kms north of Nairobi, and signed by Gabra and Borana representatives. It sets out the specific laws that relate to keeping the peace. After agreeing to accept *ebb*, a blessing that permits an amnesty for the traumatic histories of the war, the people agreed to re-

vive the implementation of traditional laws. This involves a combination of traditional and state justice systems in which thefts and injuries are dealt with by both systems of law, operating in agreement. At the Walda gathering, the last in the series, District Commissioner Chalbi had the Declaration written in English and ordained that copies be pasted on administration office walls across the district.

Social contracts such as the Maikona Declaration and its predecessor, the Modagashe Declaration, signed in 2001 between the Borana and Somali communities, have had a great impact in terms of mitigating conflict, in spite of the fact that they are not legally binding. According to Chopra, "The declarations and the work of the peace committees have had a positive impact in solving persisting conflicts in their areas. In Isiolo, for example... the number of conflicts since 2001 has decreased due to these agreements. The amount of cattle raids are said to have decreased, more cattle are returned and less killings occur" (Chopra, 2009). The dilemma presented by traditional peace models is that, under indigenous customs, some crimes - cattle rustling, revenge killings or child abduction - are not necessarily individual wrongs. Such crimes instead implicate the whole community or clan of which the individual perpetrator is a member. In ascribing punishment or recompense, the community is therefore culpable and is expected to compensate the offended individual through his/her community structure. While this communal responsibility is an important factor of internal social control, implementing it under the declarations is at odds with the norms of official laws.

The Re-imagined Traditional Model: the Wajir Peace Committee

Given the perceived non-compliance with formal law of pure customary models of justice such as that employed by the Borana and Gabra, more integrated systems have been attempted. The Wajir Peace Model that emerged out of the internecine resource-based inter-clan conflicts of the 1990s was one such model. Given the context in which this model was tested, it was much less structured because of the immediacy with which it needed to be deployed. The severe drought of 1992 had decimated over 70% of the cattle and 30% of the camels of the Somali community in northern Kenya. Natural resource conflicts became increasingly violent, with each clan seeking to safeguard the fragile water or grazing resources.

Deaths followed incidents between the Ogaden and Degodia clans over alleged land encroachment and violation of political space. Women from the Ogaden clan refused to sell or buy food items from women of the Ajuran clan, and would not allow them entry to the market, resulting in heightened tension.

With the help of Kenya's provincial administration and police, Somali women leaders and professional women from all the clans met and formed a Joint Committee of all the clans to act as a vigilante body to forestall the violence. The normative framework that defined the soon to become Wajir Peace and Development Committee (WPDC) was a combination of Somali norms and state-sanctioned guidelines. The Wajir peace initiative's main success has been its ability to revive basic Somali traditional methods of conflict resolution used in pre-colonial times in order to encourage equitable sharing of and access to the region's limited resources. Another notable achievement has been the ability to harness energy and resources (that would have otherwise been used in conflict) for development. The initiative has also promoted the use of traditional early warning systems to forestall conflicts in the region. Most importantly, the WPDC has been able to "export" this peace model to other districts of the region, and to Kenya as a whole. Where other initiatives have failed, the Wajir peace initiative has managed to create and sustain the vertical and horizontal integration strategically necessary for implementing long-term peace-building.

Infrastructure support was provided with help of the donor community. Public meetings and discussions involved a full range of community leaders. A new, more consultative atmosphere prevailed. Workshops delved into the roots of the conflict, and how it related to the actual economic conditions facing the people of the region. Within five years, the WPDC had touched almost everyone's heart in the region and beyond, especially for its use of community resources and constant dialogue as tools for conflict resolution and peace-building.

The resulting structure, the Wajir Peace Committee, brought together community elders and government officials as well as civil society with the aim of providing a safe space for mitigating conflict. In its deliberations, the committee deployed customary praxis as the most important foundation for creating dialogue and paving the way for trust-building. So popular did this model become that, by 2004, when the Kenya government began to formulate a peace-building policy, it was adopted as the structure whose replication across the country should be sup-

ported. The post-electoral violence of 2007-8 in Kenya which resulted in the deaths of 1,500 people and displaced over 300,000 more provided an opportunity to do just that and, now, nearly all districts in Kenya have district peace committees. The resilience and adaptability of customary structures seem clearly vindicated.

Conclusion

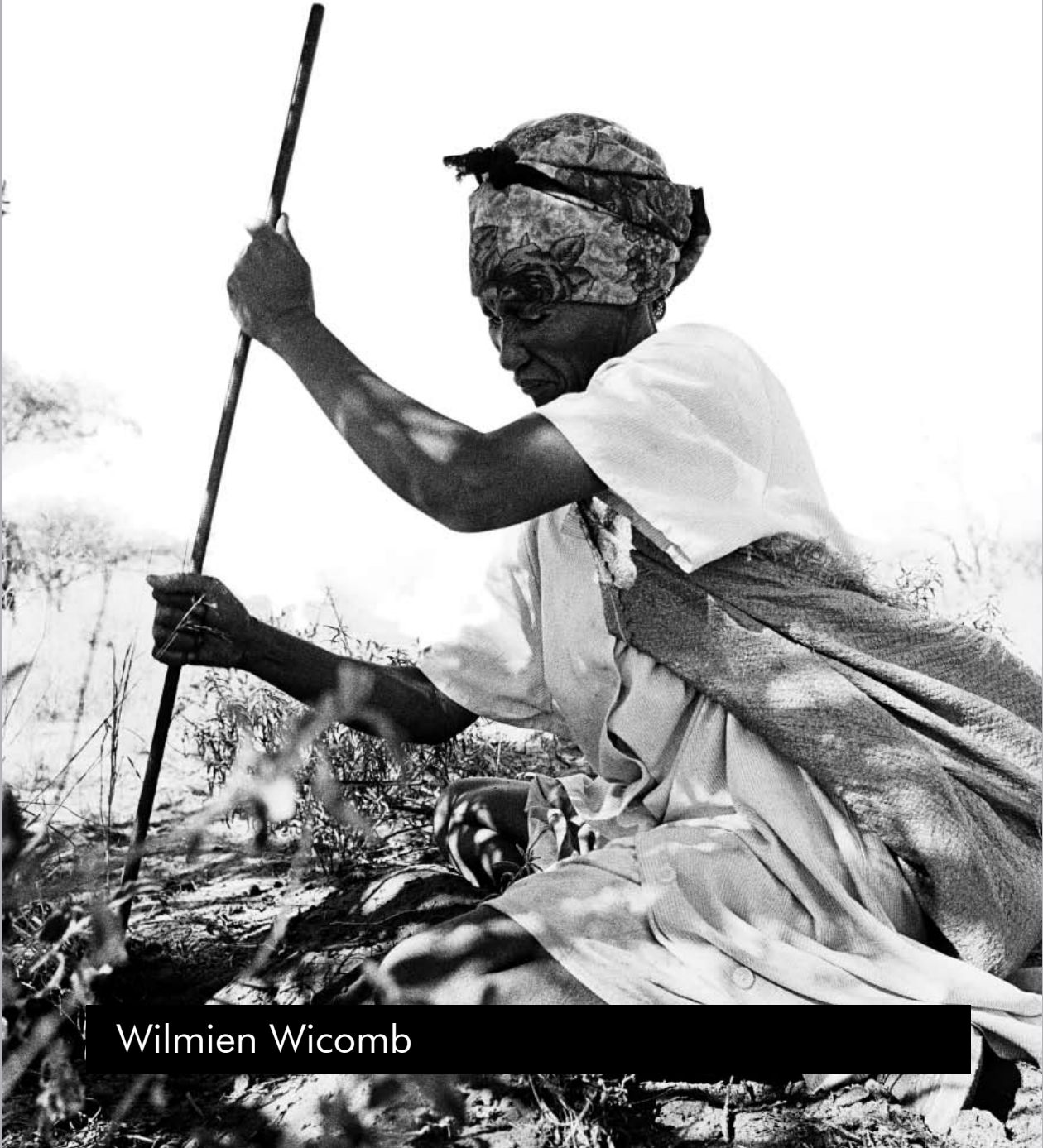
Elinor Ostrom, the 2009 Nobel Peace Prize laureate has noted that with "simple, local mechanisms to get conflicts aired immediately and resolutions that are generally known in the community, the number of conflicts that reduce trust can be reduced" (Ostrom 2000). Such collective action regimes, as represented by both the Borana-Gabra model on the one hand and the Wajir Peace Committee on the other, cannot be ignored. This is particularly so where the transactional costs associated with formal justice systems in Kenya, whether they relate to cost, delay, relevance or corruption, are prohibitively high. ○

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The Emancipatory Potential of Customary Law for the Rights of Women to Access Land



Wilmien Wicomb

One of the key issues facing the continent of Africa is the problem of equitable access and use of land. The issue is a complex and layered one, greatly informed by the persistence of customary law systems of landholding even despite the severe distortion of these systems by colonial and apartheid impositions and the fact that some post-colonial African governments have proceeded to repeal customary law. The result is that, today, the majority of Africans (including all indigenous groups) live on land held under the terms of a customary system, while no African country has arguably managed to grapple successfully with the difficult relationship between state law and customary law, thereby ensuring the security of tenure of these customary communities.

Despite this problem, international and regional human rights institutions are increasingly moving towards the idea that proper recognition of customary law tenure systems may be a solution to Africa's problems of poverty and unequal resource distribution – and indeed to realising the right to land.² An emphasis on customary principles is also found in many international, regional and sub-regional soft law documents promoting sustainability. Significantly, in its recent Framework and Guidelines on Land Policy in Africa, the African Union Commission, the African Development Bank and the UN Economic Commission for Africa encouraged countries to “acknowledge the legitimacy of indigenous land rights” and “recognize the role of local and community-based land administration/management institutions and structures, alongside those of the State”.

This article seeks to illuminate the important documented evidence of the emancipatory potential of customary law for rural African women, including indigenous women, as written up by Aninka Claassens and Sindiso Mnisi.² While this article illuminates the positive potential of customary law systems for women's rights, it is not an attempt to ignore or negate the very real dangers of inequality, marginalisation and elite male capture that are often inherent to customary law systems. The argument is rather that a simple rejection of customary law systems based on their dangers is not an approach useful to rural South African women.

In the first section, the nature of customary law systems and the broad significance of their accommodation alongside state law systems are discussed in order to contextualise Mnisi and Claassens' argument that the protection of the land rights of rural women in Africa requires the direct engagement of state law with living customary law systems. The second sec-

tion focuses specifically on the victories that rural women have had in using customary law systems to improve their own livelihoods, as documented by these authors.

The Accommodation of Customary Law Systems

The discussion of the nature of customary law and the possibility of state law accommodating this system alongside it as its equal is simultaneously a very important and very difficult one.

It is important not only because of the persistence of customary law tenure systems in Africa. On a practical level, it has been observed that an insensitive imposition of state law onto customary law communities leads to one of two outcomes: on the one hand, the fixed, hierarchical system of state law that is intolerant to negotiated rules has sometimes stifled communities' customary law into obscurity. On the other, the irreconcilability between the two systems often leads to a complete lack of local engagement with state law beyond the strictly formal, with communities choosing to ignore the state's “rules” as far as possible. In countries such as Ethiopia, where customary law was entirely repealed, rural communities are forced to regulate their lives outside the only legal system that can provide recognised and regulated protection through formal courts.

There is also a purely ethical reason for redefining the relationship between state and customary law. A number of post-structural and post-colonial philosophers – including philosophers of law – have redefined the ethical relation as one that attempts to regard the difference of the other³ completely and equally. The other is not reduced to an object (in terms of my subjectivity) but there is regard for its subjectivity and otherness. This is the basis of a non-violent relation to the other. Violence itself is defined as any action that attempts to reduce the other and its identity, in other words, any attempt to assert a description of the other upon it.

State law cannot accommodate customary law by understanding it in terms of its own concepts of, for example, ownership, thereby denying the customary law system its “otherness”. Worse still, state law often reduces its interpretation of customary law to a few common denominators and devises a workable relationship on that basis. To be ethical, state law must be able to accommodate customary law *in its difference*.

Finally, strong evidence has emerged pointing to the emancipatory potential of customary law for

women at a local community level, which include many indigenous women. This is a seemingly counter-intuitive position, as Claassens and Mnisi⁴ point out:

Women's rights activists and lawyers in Africa have tended to treat the customary arena as inherently dangerous to women's interests, pointing to the frequency and regularity with which the discourse of the customary is used to disempower women and bolster patriarchal interests. [...] In this context, strategies to secure women's land rights in Africa have tended to avoid the customary law arena in favour of formal legal initiatives such as the registration of joint land titles for both spouses. However, these legal strategies have also proven to be problematic. Titling programmes are often captured by elites and used to entrench the position of those with formal rights (mostly men) at the expense of overlapping 'secondary' entitlements vesting in women, especially unmarried women. Further, strategies that focus on attaining individual ownership for women have been criticised as relevant only to small numbers of middle class women and for failing to articulate with the concerns of women whose survival is embedded within a web of reciprocal family and community relationships, for whom the protection and preservation of the land rights vesting in the family or group may be a priority.

The significant difficulty of accommodating customary law systems alongside state law has to do with the nature of these systems. Customary law is not a unified and static body of law that existed at a certain point in history but rather a system constantly evolving and adapting to its environment – which is precisely why these systems have been so resilient in the face of colonial and apartheid distortion.

Mnisi and others have acknowledged that “living customary law” must be seen as distinct from official customary law. To quote Mnisi,⁵ living customary law is a “manifestation of customary law that is observed by rural communities, attested to orally. Although the term ‘living customary law’ gives the impression of a singular, unified legal system being the referent, this term actually points to a conglomerate of varying, localised systems of law observed by numerous communities”. Official customary law, on the other hand, is that which is denoted by state law. She further argues that customary law, as protected by the South Africa Constitution, refers to both official and living customary law.

Significantly, a discussion on the nature of customary law and its relation to state law has been opened in the South Africa courts in the context of land ten-

ure, starting with the *Richtersveld*⁶ case and recently furthered in *Tongoane*⁷ where the Communal Land Rights Act was found unconstitutional in its entirety in May this year.

In *Richtersveld*, the Supreme Court of Appeal held that:

It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. ... In applying indigenous law, it is important

San woman speaking in a south African village – Photo: Paul Weinberg



*to bear in mind that, unlike common law, indigenous law is not written.*⁸

In the *Tongoane* judgment, the Constitutional Court pointed out clearly and specifically that the presence of living customary law as a form of regulation on the ground was not equivalent to a legal vacuum. It was rather a genuine presence that had to be treated with due respect, even if it was to be interfered with.⁹ The “field ... not unoccupied” with “living indigenous law as it evolved over time” includes all communal land in South Africa:

Originally, before colonisation and the advent of apartheid, this land was occupied and administered in accordance with living indigenous law as it evolved over time. Communal land and indigenous law are therefore so closely intertwined that it is almost impossible to deal with one without dealing with the other. When CLARA (Communal Land Right Act 11 of 2004) speaks of land rights, it speaks predominantly of rights in land which are defined by indigenous law in areas where traditional leaders have a significant role to play in land administration.



The evolving nature of customary law as an adaptive system and the damage done by the distorted codification of the colonial legal systems have also been acknowledged by the South African Constitutional Court. In *Shilubana*,¹⁰ the Court held that:

As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.

The judgment also noted that:

'Living' customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.

The Emancipatory Potential of Customary Law for Women

Claassens and Mnisi¹¹ report that their consultations with rural women in South Africa, including indigenous women, indicate the extent to which, on the one hand, customary law systems adapt as the environment changes and, on the other hand, women are able to negotiate change within their communities in order to advance their own position.

During the meetings, women explained the 'rule' that residential land should be allocated only to men, and only when men marry and establish families. The underlying rationale is that only families (and not individuals) are entitled to establish themselves as separate units within the community. The women in the meetings described the uneven processes of change underway that challenge these rules. They explained the changes as arising from the large numbers of unmarried women who have children and need residential sites to establish homes for their children. At Mpindweni in the Eastern Cape, they said that unmarried mothers are now allocated resi-

dential sites, although the land is often allocated in the name of a male relative. In many KwaZulu-Natal areas women described that only unmarried women with sons were allocated residential sites. Participants at the Sekhukhuneland meetings said stands were routinely allocated to established single women who were older and had children.

With regard to the change negotiated by the women themselves, Claassens and Mnisi write:¹²

In our experience, women use a range of arguments to advance their claims. Many are couched in terms of 'customary' values. One such value is that all members of the community are entitled (by birthright) to land to fulfil their basic needs and support their children; women point to the fact that men are entitled to land only when they marry and establish families. Now that the structure of the family is changing and women are fulfilling the role of providing for the family, often without men, they are entitled to be allocated land on the same basis as men with families to support.

Often the principle of equality is asserted, and women refer to 'democracy' and the Constitution. They say that the times and the laws have changed, and that discrimination is no longer legal. In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.

Another form of agency is that of women living on family land who resist being evicted by male relatives and assert that they must be accommodated within the family land. Often they, too, rely on arguments that combine both custom and equality. Claassens and Ngubane tell the story of a woman who successfully challenged her brother's attempts to evict her, on the basis that as a family member she had a 'birthright' to belong. They refer to widows and divorcees who had managed to hold on to their married homes despite attempts to evict them.

There are increasing numbers of women whose parents have bequeathed them (not their brothers) control of the family home and land in recognition of the role they have long played in supporting their parents and in balancing the interests and needs of other family members. A striking feature of anecdotal stories about how changes come about – particu-

larly in relation to women being allocated residential sites – is how often they are described as starting with a particular woman’s brave attempts to challenge the status quo. Time and again when asked to date the changes the answer includes a specific woman’s name, and the phrase ‘after 1994’. Another striking feature of stories of change is the supportive actions of key men in the community.

The reference to 1994 indicates the strong symbolic significance that the country’s first democratic elections and the adoption of the Constitution have for these women.

Based on these findings, they argue that legal strategies to support women’s rights to access land should not – and indeed cannot – evade the customary law arena. There should thus rather be a concerted effort to facilitate direct engagement with these systems.¹³

Rural women have no option but to grapple with issues of rights and custom in local customary law arenas. The perils associated with the discourse should not blind us to the democratic and transformative possibilities inherent in the contestations taking place in these arenas. It is these contestations that, when brought to light, are the most effective rebuttal to the distorted versions of custom that dominate the national level discourse.

The South African Constitution facilitates this engagement by giving proper recognition to customary law¹⁴ and the Constitutional Court has taken an important step in affirming this recognition. The ball is now in the court of the legislators, lawyers and women’s rights activists to redefine the discourse on customary law not in terms of the rights versus custom dichotomy but as a discourse of great emancipatory and empowering value for rural women, including indigenous women. ○

Notes

1 This move towards the recognition of customary law tenure systems alongside that of Western models of private ownership is also in line with the UN Committee on Social, Economic and Cultural Rights’ longstanding emphasis on the appropriateness of measures taken to achieve the progressive realisation of rights. In their General Comment on the right to adequate housing, for example, they add, “The way housing is constructed [...] and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing”. The Committee on the Convention to Eliminate all Forms of Discrimination has declared a failure to recognise indigenous forms of land tenure as contrary to the Convention (General Recommendation 23).

2 In Claassens, Aninka and Mnisi, Sindiso 2009 “Rural women redefining land rights in the context of living customary law” in *South African Journal of Human Rights*. Claassens and Mnisi are both senior researchers at the Law, Race and Gender Research Unit of the University of Cape Town, South Africa.

3 The Other as a philosophical term is often associated with the work of Emmanuel Levinas. Once the subject lost its central position, the subject-object relation became problematic. The object could no longer be understood in terms of the subject. This led Levinas to call the object the “Other”, to articulate his understanding of this object as being completely other and therefore outside the system. As Gibson explains, “...the other whom I encounter is always radically in excess of what my ego, cognitive powers, consciousness or intuitions would make of her or him. The other always and definitively overflows the frame in which I would seek to enclose the other”. Seeking to enclose the other in such a frame is committing violence and thus being unethical.

4 Claassens and Mnisi (see 2 above), p 491-516.

5 Mnisi, S 2007 *[Post]-colonial culture and its influence on the South African legal system – exploring the relationship between living customary law and state law* Unpublished PhD Masters thesis, Cape Town: University of Cape Town.dissertation, Oxford University.

6 *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community and Others*, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), para. 62.

7 [2010] ZACC 10; 2010 (6) SA 214; 2010 (8) BCLR 741 (CC).

8 *Alexkor* at paras 52-3

9 Tongoane at para 90 reads: “Whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community.” Also see para 79 (as well as para 89): “The field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend.”

10 *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC).

11 Claassens and Mnisi (see 2 above), p 499.

12 As above p 500.

13 As above p 493.

14 Section 211(3).

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Self-Determined Development of Indigenous Peoples

John Bamba

“... the word “development” in its Pali equivalent means “disorderliness” or “confusion”. ... Ivan Illich once told me that the Latin word *progressio*, which is the root of “development”, can also mean “madness.”...”

Sivaraksa, 1992

Ever since the word “development” was introduced and became common jargon in international affairs and diplomacy following World War II, it has become a dominant term with effects perhaps comparable only to the spread of a religion. Development has been used by several dictatorships, such as Soeharto in Indonesia, to suppress any criticism of their anti-democratic policies. Questioning any government projects or activities carried out in the name of “development” thus became a subversive act against state and government, resulting in a potential jail term.

Experts the world over have tried to define “development” and clarify what Ivan Illich believes “can also mean madness”. Amartya Sen, winner of the 1998 Nobel Prize for Economic Science, among others, suggests that we should accept “development as freedom” (Sen, 2000). On the other hand, “freedom without opportunities”, according to Noam Chomsky, “is the devil’s gift.” (Chomsky, 2000:135)

If we take the case of Indonesia as an example, the 1945 Constitution recognizes indigenous peoples (termed as “Customary-law Communities in the Constitution) on four conditions:

1. that they still exist;
2. that they are in accordance with the development of societies, times and civilizations;
3. that they are in accordance with the principles of the Unitary State of the Republic of Indonesia; and
4. that they are regulated by law.

This recognition, itself set out in the State constitution, is undeniably an advanced “development” that has given Indonesia’s indigenous peoples some freedoms. However it is, at the same time, a conditional recognition that has left them with no opportunities to exercise those freedoms. Such legal recognition, even when it is set out in the State constitution, is therefore rendered useless. It is, after all, a “devil’s gift”.

As indigenous peoples, we have been experiencing, witnessing and falling victim to this so-called “devil’s gift” of developmentalism. In the name of “development” our lands are taken over, our homes

destroyed, our mother earths raped and stripped bare. In many places in the past, our brothers and sisters, including women and children, have even been killed or tortured, kidnapped and brainwashed. Perhaps the most recent shocking case was that reported from Peru by The Guardian about “A Peruvian gang that allegedly killed people and drained fat from their corpses ...and exported the amber liquid to Europe as anti-wrinkle cream.”¹ The gang have been dubbed the “Pishtacos” after an ancient Peruvian myth about white colonialists who killed indigenous people and quartered their bodies with machetes before extracting the fat and turning it into a range of perfumed soaps.² This situation was best described by Boris Pasternak as, “... the bare, shivering human soul, stripped to the last shred...” (Pasternak, 1958:394)

And yet the world has also been witnessing a constant and uncompromising commitment to struggle for change on the part of indigenous peoples and their non-indigenous supporters. For more than two decades, our struggles have been able to achieve the most important thing real “development” should be able to offer: “opportunities”. Opportunities that challenge us to exercise our “freedom” and thus bring us the real fruits of “development”. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples on 13 September 2007 by the 61st Session of the UN General Assembly provides vast “opportunities” through which to exercise our “freedom” and our own “development” model — self-determined development.

Besides being an achievement of our struggle, however, the Declaration on the Rights of Indigenous Peoples (Declaration) also poses challenges. It is an undeniable fact that the Declaration was not supported by all member countries of the United Nations. It is obvious that the United States of America, as the country with the most important role to play in current world affairs, together with Canada, Australia and New Zealand (also known as the CANZUS group), did not support the Declaration. At the national level, each of us is also experiencing a number of challenges even if our governments did support the Declaration. While the issue of the “right to self-determination” (Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples) remains “a pain in the neck” for most of our governments, indigenous peoples welcomed it as the most important “opportunity” to push for the kind of development they wanted.

“Development with Culture and Identity”: Philosophies and Spirituality

The Seven Fortunes

“Development” is undeniably a foreign concept to indigenous peoples. It is something we have to approach with extra care, with critical minds and determination, for one simple reason: to make sure that it brings us the “freedom” it encompasses and the “opportunities” it is capable of offering. We have to avoid accepting any form of “development” that initially or eventually has the opposite effect: exploitation, destruction, appropriation of our lands and natural resources and cultural genocide of our indigenous identities, in most cases for the sake of economic and political interests alone. Even with the concept of “Sustainable Development”, we always have to make sure that the economic, ecological, social, cultural and spiritual benefits are taken into account. None of these benefits can be sacrificed or neglected for the sake of economic benefits alone because this is in contradiction with the real meaning of “sustainability”.

“Lands, Territories and Other Resources” are indeed the three most important elements that determine the indigenous peoples’ culture and identity. However, at the same time, they also become the three

most important in terms of the interests and objects of “development”. And this has become the heart of the matter, a source of conflict and an everlasting challenge to indigenous peoples everywhere on this planet, past, present or future.

Drawing on lessons and experiences in Asia, especially among Kalimantan’s (Borneo’s) indigenous peoples, I have summarized what I usually call the “Seven Fortunes” (Bamba, 2008:241-249) received by the Dayaks (Kalimantan’s indigenous peoples), which cover the main principles and philosophies of their natural resource management. These seven principles and philosophies could offer us some criteria and indicators for our Self-Determined Development or Development with Culture and Identity concept. Unfortunately, these principles and philosophies are often in direct contradiction with the activities of the “Global Development Model” implemented by most governments and development agencies around the world.

1. SUSTAINABILITY (BIODIVERSITY) versus PRODUCTIVITY (MONOCULTURE)

It is hard to reach a compromise between sustainability and productivity. Sustainability demands biodiversity, resulting in relatively lower production outputs, while productivity requires massive,



The 7 principles and philosophies

	Dayaks' Self-Determined Model		Global Development Model
1.	SUSTAINABILITY (BIODIVERSITY)	versus	PRODUCTIVITY (MONOCULTURE)
2.	COLLECTIVITY (COOPERATION)	versus	INDIVIDUALITY (COMPETITION)
3.	NATURALITY (ORGANIC)	versus	ENGINEERED (UNORGANIC)
4.	SPIRITUALITY (RITUALITY)	versus	RATIONALITY (SCIENTIFIC)
5.	PROCESS (EFFECTIVENESS)	versus	RESULT (EFFICIENCY)
6.	SUBSISTENCE (DOMESTICITY)	versus	COMERCIALISM (MARKET)
7.	CUSTOMARY LAW (LOCALITY)	versus	STATE LAW (GLOBAL)

large-scale, mono-cultures to flood the market in order to generate cash incomes. The Dayaks' commercial rubber gardens and rice fields (indigenous farming system) are two examples of how this biodiversity principle is a top priority in their philosophy. The rubber gardens are very rich in biodiversity since the rubber trees grow alongside other trees in the forests. They do not have to clear an area to plant rubber trees, thus reducing environmental loads and preserving the biodiversity. This biodiversity priority can also be seen in the rice fields where they grow hundreds of different local crops, not only paddy rice fields. Both Dayak rubber gardens and rice fields are under massive attack from monoculture plantations such as palm oil and industrial tree plantations. The main argument of the government, which is developing these huge monoculture plantations and adopting the Global Development Model, is that the rubber gardens and rice fields are "unproductive".

2. COLLECTIVITY (COOPERATION) versus INDIVIDUALITY (COMPETITION)

The philosophy behind this principle is that the world is home to all beings, not only humans, animals and plants but also the spirits. There is an inter-dependence and co-existence not only among human beings but also with the non-humans as well. Nature is managed by taking this co-existence into consideration. Making space for human interests and their needs should be done by considering and respecting the interests of other beings. Before the Dayaks clear an area for their rice fields, they perform a ritual to ask the permission and agreement of the spirits that they believe might exist in that area. Omens and auguries are their methods of communication. On the other hand, working in a rice field, building a house,

dealing with sickness, death and wedding are all done collectively by the whole community. This is one of the reasons why the Dayaks live in long-houses. They are not used to competition and working individually. They live in a collective spirit of cooperation in order to manage their well-being. This is why they are not the best choice for working on plantations or for mining companies because the companies complain that the Dayaks are less disciplined, less intelligent and do not meet the criteria they require through lack of a formal education. So the companies employ migrant workers and, the more companies operate, the more migrants flow into the Dayaks' villages and territories. Indeed, indigenous peoples, including the Dayaks, are bad competitors and they are always left behind in the competitions over natural resource uses.

3. NATURALITY³(ORGANIC) versus ENGINEERED (INORGANIC)

"Naturality" here should be understood as a philosophy of interacting with nature on the basis of its laws and carrying capacity. The ethics and morals behind it are that human beings should not exploit nature over and above its capacity, no matter how sophisticated and mighty the technologies and knowledge that human beings may have achieved, because human beings cannot live without nature. The key words are "to manage and maintain/preserve" nature at the same time and these two actions are inseparable as pre-requisites for avoiding over-exploitation and trespassing the limits of nature's laws and capacities. This philosophy rejects over-exploitation, which is based on greed rather than mutual benefits and co-existence. It rejects any form of genetic engineering both of human and non-human beings as well as



Dayak woman and child, west Kalimantan, Indonesia – Photo: Christian Erni



House in west Kalimantan, Indonesia – Photo: Christian Erni

the “green” revolution, which pollutes nature with man-made chemical substances such as fertilizers and pesticides. Indigenous peoples believe that human suffering in the form of natural disasters, the spread of new and incurable diseases, extreme hunger and poverty are the result of humankind’s failure to “manage and maintain” nature on the basis of its capacity.

4. SPIRITUALITY (RITUALITY) versus RATIONALITY (SCIENTIFIC)

Spirituality is manifested in various rituals performed to maintain human beings’ connection with nature and other beings. By performing rituals regularly, human beings tell, teach and remind themselves of their interconnectedness and interdependence with nature. It also serves as a medium to enhance their capacity and understanding of “the way of nature.” In the face of the Global Development Model, this is perceived as extravagant, irrational and a sign of backwardness. In the face of Global Development belief, nature is to be conquered through the advancement of science and technologies and rationality is glorified as the symbol of modernization and an educated, civilized society.

5. PROCESS (EFFECTIVENESS) versus RESULT (EFFICIENCY)

Their consistency in performing various rituals shows how “process” is a top priority for the Dayaks. Effective results are obtained through consistent process. The process sometimes goes

through long and complicated steps to maintain the connection with nature and other beings. What is done should therefore be effective. The effectiveness is determined by the process being carried out. In the Global Development belief, it is the result that matters. Results should be achieved as efficiently as possible in order to boost production. No wonder indigenous peoples’ natural resource management systems, as well as their way of life, is under massive attack and destruction the world over due to Global Development activities.

6. SUBSISTENCE (DOMESTICITY) versus COMERCIALISM (MARKET)

The Dayaks believe that living in prosperity means living in harmony with nature. Over-exploitation and mistreatment of nature will cause suffering, misery and disaster for human beings. So the possession of wealth must have its limits. Money is a tool, not the goal, in life. The goal in life is quality of life not quantity. Human beings have four main needs on earth: survival, sustainability, social and spiritual needs. Natural resource management should be limited to fulfilling these four basic needs. Life should not be based on or driven by greed. The decision to live a subsistence way of life in which the use of natural resources is limited to domestic needs is a manifestation of this philosophy. Although some local products are also produced for sale through barter with other villages, production is limited and controlled by the principles and philosophies they believe in. When com-



Dayak village, west Kalimantan, Indonesia – Photo: Christian Erni

mercialism is adopted to fulfil global market demands, as demonstrated by the Global Development system, over-exploitation of natural resources is unavoidable and the earth's carrying capacity is broken, resulting in humanity suffering one problem after another.

7. CUSTOMARY LAW (LOCALITY) versus STATE LAW (GLOBAL)

Customary laws (*Adat* Laws) serve as the basis for controlling and safeguarding harmonious relationships between human beings and their relationship with other beings and nature. Customary laws not only involve penalties and sentences for the wrongdoers but a process of reconciliation and healing of the disturbed relationship with nature due to the breaking of the commitments to principles and philosophies. Customary laws are therefore not universal laws and do not deal with universal norms and values. Customary law is thus regulated by the local context and driven by local needs. On the other hand, State laws are not only meant to protect national interests but are also influenced by global interests. Some national laws on forestry, investment and trade tend to protect global interests rather than the local people's interest and these are fine examples of how State laws are not dependent. Customary laws also have their weaknesses, however. When an authoritarian ruler is in power, justice will be in the hands of that ruler or Chieftain. Non-members of the specific community, or outsiders, also tend to underestimate customary laws. Since the fines imposed by

customary law are relatively low, non-members tend to undervalue them. On the other hand, some community members may also commercialize them for their own benefits, neglecting the moral value of punishment by customary law.

The above seven principles or philosophies are under massive attack from the Global Development System and may soon be resigned to the history books of school and university libraries. As we are witnessing and experiencing on a day-to-day basis in our own communities, the struggle is a "David and Goliath" one. Most governments support the multinational corporations and financial institutions in wresting natural resource management from indigenous peoples, with the full back up of the police and military forces. Three major development activities are now found on indigenous peoples' territories: monoculture plantations (for biofuels and pulp/paper), mining and logging. "David" is in a continual fight against "Goliath".

However, as opportunities now open up for indigenous peoples through various achievements at international level in particular, it may be possible to further explore, promote and exercise the concept of the Self-Determined Development Model. Drawing on the above seven principles and philosophies from the Dayaks in Kalimantan, we can clearly see how Self-Determined Development differs from the Global Development Model. These philosophies could be further enriched with the wealth of knowledge and experience of other indigenous peoples around the world.

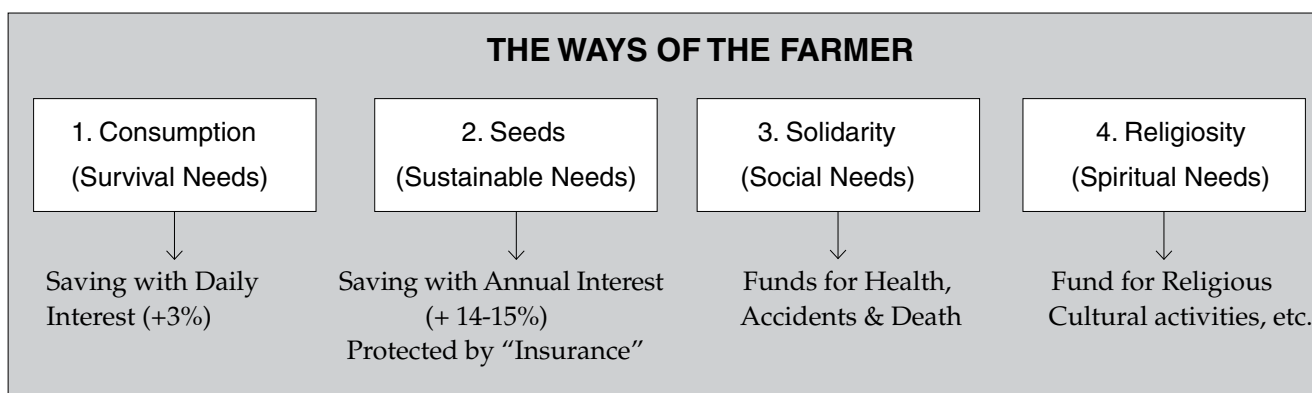
The Dayak Credit Union Movement: empowering and liberating

Self-Determined Development can only be achieved if it is rooted in and emerges from the indigenous peoples themselves. It has to be an initiative undertaken by, from and for the indigenous peoples themselves. Outsiders can provide support by offering alternatives, shared experiences or facilities. A fine example of this harmonious collaboration and initiative is the Credit Union Movement implemented by the Dayaks in Kalimantan since 1987. The movement has grown impressively and spread all over Indonesia while various groups from overseas have also come to learn about it.

Similar to Development itself, a Credit Union is not originally a Dayak concept. The urban credit union was first developed in Germany by Franz Hermann Schulze-Delitzsch in 1852, and the rural credit union by Friedrich Wilhelm Raiffeisen in 1864. It is this latter who is also known as the father of credit union.⁴ The Dayaks simply borrowed the credit union's financial management system to create their own model, based on the Dayaks' cultural values and principles. Credit unions were first introduced to the Dayaks by the Catholic Church in the early 1970s. By 1975, there were 95 credit unions established all over West Kalimantan and yet only five were still in operation a year later! The credit unions at this time were based on the original model and the Dayaks had to adapt to it. The failure of the first Credit Union Movement in the 1970s shows how a foreign development model has a slim chance of succeeding when introduced and implemented without consideration for the local culture and identity.

In 1987, an NGO called PancurKasih established its own credit union with a totally different approach and philosophy. Credit unions were now seen as a tool and, as it is a tool, it can be "adapted" to the needs of the users and the purposes to be achieved. PancurKasih believes that money is not the goal of a credit union. It is the human beings (the members of the credit union) that are the target. Credit unions are seen as a tool for the empowerment and liberation of the Dayaks from the many serious problems they are facing, such as poverty, lack of education and healthcare, as well as a way of investing in their own and future generations.

The philosophies adopted in the PancurKasih Credit Union are drawn from the Dayak farmers themselves. According to AR. Mecer, Founder and Chairperson of the PancurKasih Movement, they are based on four main obligations that the farmers must fulfil in order to secure their livelihood within the community (GPPK, 2009: 127-128). First, they have to secure their daily basic consumption needs (Survival Need); second, they have to secure seeds for the next season (Sustainability Need); third, they have to show solidarity (Social Need) with their fellow farmers; and fourth, they have to perform rituals as an obligation to nature and the other beings that co-exist with them (Spiritual Need). The Dayaks believe that these four obligations are the four basic needs that no-one can avoid in order to live safely and peacefully. These Four Needs are then implemented through various products or services they provide in the credit union, as shown in the following figure: And yet the question remains: why credit unions? Why should it be something originally from Germany? A quick and simple answer is that credit un-



ions offer "freedom" and "opportunities" to the Dayaks. They give them the freedom to exercise their cultural knowledge and explore new possibilities in order to respond to new challenges while at the same time giving them opportunities to manage their resources independently and collectively. In the credit union, the Dayaks find a way of exercising their self-determined development model on

the basis of their own culture and identity. Although they are using foreign systems of organization and management, they have the freedom to choose which ones are beneficial and contribute to their empowerment while at the same time gaining independence by altering the model to suit their needs and local context.



Dayak children , west Kalimantan, Indonesia – Photo: Christian Erni



Within the Pancur Kasih Movement, credit unions are all about making changes. Changes in the circle of impoverishment, desperation, in feelings of helplessness and hopelessness, in dependence on outsiders, all of which are the result of centuries of oppression and marginalization. And these changes have to be made by changing oneself with the help of others. In this way, a better quality of life can be achieved and, when this happens, it is a liberating and empowering process in the community.

Credit unions are therefore about managing people. By changing oneself, one contributes to changing the situation. This is done simply by helping oneself first (1st Principle: Self-Reliance); by helping oneself, a person is also helping others (by not becoming a burden on them) and will be capable of helping others (2nd Principle: Solidarity). No matter how small a person's potential, when harnessed with that of others, it can gradually become a powerful force for change. When this struggling process is started, grown by, controlled through and dependent upon education (3rd Principle: Education), change is certain to happen sooner or later. In the education process, through various training sessions and discussions, the community tries to change its mindset (that the people are hopeless), false belief (that they are too poor and uneducated to take action) and mentality (of dependence) so that they can together start to take concrete action.

As a result of this struggling process, the Pancur-Kasih Movement credit union alone had nearly 100,000 members by the end of 2008, with total assets of more than US\$6m (PKCU, 2009). When it was first established in 1987, this credit union had only 61 members with assets of US\$16. The PancurKasih Movement credit union is not, however, the only credit union developed and facilitated by the PancurKasih Movement. By the end of 2008, a total of 54 credit unions had been established all over Indonesia in 13 provinces across nine islands. The total membership of these credit unions combined is close to 500,000 (496,007) with total assets of US\$313m (BKCUK, 2009).

The success of the PancurKasih Movement credit union can clearly be seen not only its membership and assets but also when compared with other credit unions in Indonesia (non-PancurKasih Movement credit unions). By the end of 2008, there were 851 credit unions all over Indonesia with a total of 1,154,208 members and assets of US\$575m (CUCO-Indonesia, 2009). Although the PancurKasih Movement's credit unions number only 54 (6.3% of all credit unions in Indonesia) almost half of all credit union members in Indonesia are within those 54 credit unions and 54.43% of all assets are within the PancurKasih Movement's credit unions.

The Credit Unions' Contribution to Poverty Reduction and the Strengthening of Indigenous Peoples' Rights

Two decades of existence of the Credit Union Movement in Kalimantan has brought very significant changes to the way in which the Dayaks perceive themselves in terms of their own potential and capacity to bring about change. It has given them renewed confidence that self-determined development is possible. Through the credit union, they have been experiencing a new process of development that can empower and liberate them from their previous desperate conditions without destroying their identity and culture as indigenous peoples. The credit unions have supported them both financially and non-financially, as described below.

Financial Benefits

Credit unions have given indigenous peoples the opportunity to secure their future through their investment as members both in shares and non-share investments with reliable productive income from dividends of up to 15% per annum. As credit union members, they now have direct access to financial resources that they can use to meet their needs for better healthcare and education, as well as productive activities to secure incomes for their family at low and reasonable rates of interest (2% sliding or 1.5% flat interest rate). Through a spirit of togetherness and group working, they now have more opportunities to manage community projects, providing better public facilities such as roads, electricity, clean water, etc. The credit unions also allow them to manage community funds for use in their cultural and religious activities.

Non-Financial Benefits

By having access to financial resources through the credit unions, the communities have found better solutions to their immediate and emergency needs. Before there were credit unions in their areas, people used to turn to the only asset they had to fulfil their need for immediate cash: land. Credit unions have significantly helped reduce the sale of communities' lands as well as the removal of natural resources such as timber to meet their cash needs. As the credit unions prioritize the ongoing education of their members in sound financial management, the communities are protected from gambling and consumerism. The universal and non-discriminatory

values attached to the credit unions have promoted peace-building and reconciliation in conflict-prone areas while multiculturalism and pluralism are implemented through concrete actions within the communities. These and the other contributions that the credit unions are able to deliver have strengthened the safety, unity and solidarity of the members of communities in which they operate and, quite possibly, have directly contributed to achieving the dignity and sovereignty of indigenous peoples.

Conclusion

Credit unions are just one example of a possible self-determined development model implemented by the indigenous peoples in Kalimantan and which, at the same time, also has an empowering and liberating impact. It shows how a “development” model that originally came from outside the indigenous peoples’ culture can be implemented and transformed in accordance with their local culture and identity. It may not be a perfect example and, in this regard, only time will tell. The development of this movement for more than two decades in Kalimantan and Indonesia in general has at least taught us a number of lessons, and these can be valuable experiences for sharing with indigenous peoples around the world.

As with other development models that are exogenous to the indigenous peoples, however, credit unions should be implemented wisely and carefully. In places where the communities have lost so much of their organisation and their collective nature due to continuous marginalization and oppression, the establishment of a credit union should perhaps be the final step. There are thus a number of challenges that have to be faced by those who decide to implement such a project in their communities. Experience has taught us that the greatest challenge relates to managing a credit union within the principles, philosophies and spiritualities of the indigenous peoples. These philosophies must first be understood and adhered to by their members before any credit can be provided. Credit union movements should therefore be backed up by strong community organizing efforts, cultural revitalization and transformation as well as a strengthening of natural resource management. Credit unions deal with capital and when principles, philosophies and spiritualities are replaced by greed and a get-rich-quick mentality, they can also become a very powerful destructive force for indigenous

peoples as they unmask and show their real “development” face, a face that many have warned is capable of creating “disorderliness”, “confusion” and even “madness”. When the community is capable of managing a credit union within its own wisdom, knowledge and philosophy, however, it can become a powerful tool for fostering change and bringing about the real empowerment and liberation of indigenous peoples. ○

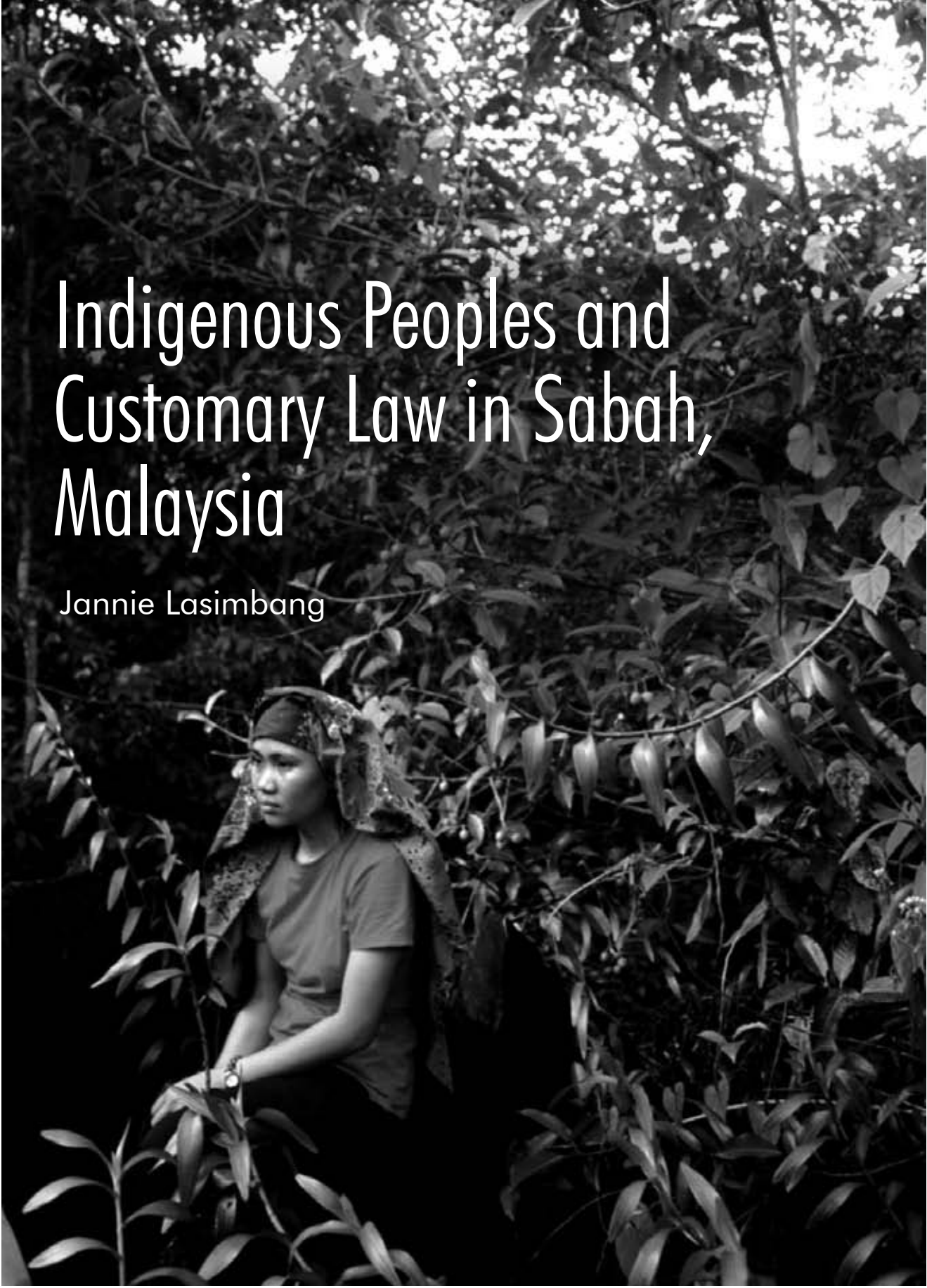
Notes

- 1 <http://www.guardian.co.uk/world/2009/nov/20/peru-gang-killing-human-fat>
- 2 <http://www.belfasttelegraph.co.uk/news/world-news/peruvian-gang-killed-farmers-to-extract-fat-for-antiwrinkle-treatment-14571889.html>
- 3 The term “Naturality” is used here instead of “Naturalism” to avoid it being associated or misunderstood with “Fatalism” which is perceived as, “...living in harmony with whatever fate it delivers.” See: Darrow.L. Miller, “The Development Ethic: Hope for A Culture of Poverty, University of the Nations.” <http://www2.gospelcom.net/uofn/kona/resources/world-view/devethic.html>
- 4 http://en.wikipedia.org/wiki/Credit_union
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Indigenous Peoples and Customary Law in Sabah, Malaysia

Jannie Lasimbang

1. Background

Developments in the indigenous legal system¹ in Sabah in 2010, in particular with regard to the native courts, have brought many interested parties to the fore.² These developments are milestones in relation to indigenous peoples' right to participate in matters that affect them and their future. A number of events have been organised, including discussions through the government's national Key Result Areas laboratory on native courts, the Native Court Judiciary Convention, the admission of lawyers as advocates to the Native Court of Appeal, and the Seminar by the Malaysian National Human Rights Commission (SUHAKAM) on the Indigenous Legal System in Sabah. News items covering various opinions have also added further attention and significance to this issue. SUHAKAM has, moreover, organised a number of visits and dialogues with native courts and studied the related complaints it has received over the years. It is planning to hold a high-level Forum with the objective of firming up opinions and soliciting relevant questions and comments that can help achieve a good understanding of such issues.

2. Key Issues

For the indigenous peoples of Sabah, the indigenous legal system revolves around the *adat*, which encompasses customary laws, concepts, principles and practices, and the customary institution that implements and regulates the *adat*. In short, it can be called an holistic indigenous system of governance. The *adat* includes both written and unwritten customs, rules and norms that govern every indigenous person and their community.

Although the *adat* of indigenous peoples is recognised in a number of provisions in different laws, such as the Federal Constitution, Native Court Ordinance and Sabah Land Ordinance, there is no single law in Sabah that safeguards Sabah's indigenous peoples' right to determine how the *adat* and customary laws should be promoted and protected. As such, the indigenous communities' pursuit of the promotion of their distinct ways of life and social traditions is not well supported by either the federal or state governments. Some of the key issues that have surfaced with regard to customary laws are discussed below.



Forum on Indigenous legal system in Sabah – Photo: Suhakam

2.1 Revitalising the Adat and the Role of the Ketua Kampung and Native Court

The native courts of Sabah and Sarawak in east Malaysia are among the few indigenous courts in the world that are recognised by the state. However, in the current discourse related to the native court, the role of the *Ketua Kampung* (village head) has not received much attention in terms of strengthening its position to act as guardian or enforcer of the *adat*. The concept of justice for indigenous peoples is premised on the need for every member of the community to know what is right and what is wrong, and therefore desist from committing wrong. As such, from a very young age, every member of an indigenous community is taught to know the *adat* and be a person who is *ki-adat* (in Kadazan, this means *knowledgeable of the adat*). It is when someone violates the *adat* that this person, together with the aggrieved person, is brought before the *Ketua Kampung* for mediation and resolution of such wrongdoing. If either party is not satisfied with the decision of the *Ketua Kampung*, the case can be brought before the native court. The traditional role of the *Ketua Kampung* is therefore to ensure that community members are taught to respect both the *adat* and other community members.

The role of the *Ketua Kampung* needs to be clarified so that all parties focus firmly on enforcing and promoting the *adat* and political appointments are stopped. Selection criteria must be based, among other things, on the understanding and experience of elders – both women and men - to enforce the *adat* in their respective communities, as they are knowledgeable, wise and respectable in the eyes of the community. They could be promoted to the position of judges in the native courts, also on the basis of merit and criteria. The native court judges will act as advisors to the *Ketua Kampung* in terms of how the *adat* can be maintained, on the basis of cases they have to deal with in the native court, but they will not interfere with each others' roles. The interaction of both the na-

tive court and *Ketua Kampung* would ensure that the *adat* remains vibrant, and that dispensation of justice is enhanced. Because of the rapid erosion of the *adat* among indigenous communities, the KK and communities need to be fully involved in revitalising the *adat*. An efficient native court therefore needs to be developed in line with the concept of an indigenous justice system that promotes community harmony and solidarity.

Native Courts of Sabah, Malaysia

Sabah is an interesting example of an autonomous state where legal, procedural and judicial autonomy is respected at the basic levels, and the judicial authority at mid-levels is shared between indigenous chiefs, and head people with state judicial officers. In addition, the superior national courts retain the highest authority for appeals and revisions. All courts apply customary law, unless codified laws supersede it. The Native Courts Enactment of 1992 provides for a detailed system of courts. At the lowest level is the Native Court, which has jurisdiction over a territory below a district. A native court consists of three members, who are resident native chiefs or head people and, exceptionally, a district chief, duly empowered by the State Secretary. The native courts act as courts of original jurisdiction and adjudicate on personal law matters between “native” and “native”, and between native and non-native (if the sanction of the District Officer is obtained). They may also adjudicate on other matters if expressly authorized by legislation. They have powers to fine and imprison (on the endorsement of a magistrate), and decisions are taken unanimously or by majority.

Above the native courts are the district native courts – one for each district within a state – which consist of the district officer as the presiding member and two other members, who are appointed from among district chiefs or native chiefs. Above the district native courts are the native courts of appeal, which are presided over by a judge (from the Ministry of Justice) and include two other members – district or native chiefs (to be appointed by the concerned minister). Litigants may not be represented by advocates in the native courts or district native courts.

– Excerpts from *Traditional Customary Laws and Indigenous Peoples of Asia* by Raja Devasish Roy, *Minority Rights Group International* –

2.2 Jurisdiction of the Native Court

Although legal pluralism does exist in Sabah, with the native court being one of three parallel juridical systems, the jurisdiction of the native courts has been gradually eroded through various reasons. Native courts are perceived as inferior, and some rulings of native or district chiefs, when administering customary laws, are not respected by the civil and syariah courts as having judicial authority. The Chief Judge for Sabah and Sarawak, Richard Malanjum, has called for genuine legal pluralism whereby the native courts are not considered inferior statutory tribunals subject to the supervisory jurisdiction of the civil court. He is also of the view that the District Native Court, being an appellate court, should be staffed by district chiefs independent of the district’s administrative officials, as is the current practice in Sabah.



While deficiencies on the part of the native courts are admittedly a subject for improvement, it is also important to stress that the dispute resolution mechanisms of native/district chiefs and customary laws may be premised on completely different worldviews. A further subject of concern that needs to be addressed is a mechanism by which the native court can provide jurisdictional clarity with respect to *adat* and religious laws in relation to the syariah court (as indicated in Section 9 of the Native Courts Enactment 1992). Apart from this, there is a debate to be had on whether the native court limits itself/is limited to handling only “soft” matters such as social, cultural, family and cultural issues, as opposed to “harder” issues such as lands, territories and resources. In Sarawak, native land disputes between natives fall

within the purview of the native court but this is currently not the case in Sabah.

2.3 Legal Review

In 1992, the Native Courts Ordinance was instituted by the state government to provide a new and amended version of the 1953 Native Courts Ordinance, resulting in the Native Courts Enactment No. 3 of 1992. It provides for the constitution, procedure, jurisdiction and powers of the native courts. Three accompanying Rules to the Enactment were introduced in 1995, namely the Native Courts (Practice and Procedure) Rules, the Native Courts (Native Customary Laws) Rules, and the Native Courts (Registration of Native Court of Appeal Advocates) Rules.

Dusun women from Sabah, Malaysia – Photo: Christian Erni



A review of the Native Courts Enactment 1992 and accompanying Rules of 1995 is currently being undertaken by a committee involving the Permanent Secretary of the Ministry of Local Government and Housing and the State Attorney-General's Chamber. One of the main issues that has been raised is the need for the broad participation of native court staff as well as other interested parties in the review of the Enactment and its Rules and not just in the final stages of the review process, even if this means it may take longer. The possibility of avoiding the codification of native customary laws has also been flagged for discussion in the ongoing legal review. Native chiefs have already identified the current Native Court (Native Customary Laws) Rules 1995 as one of the stumbling blocks as they freeze the penalties for offences at those prescribed in the Rules. By not being over-prescriptive, a better understanding of indigenous juridical concepts may be brought about.

2.4 Administrative/Infrastructural Support for Native Courts

The possibility of the government extending administrative and infrastructural support to native courts has been very encouraging, including proposals from the Native Court Judiciary Convention. The federal government has also identified the native courts as one of the Key Result Areas that it has decided to focus on as a measure of its performance and therefore commit funding to. Almost all the native courts are situated in obscure locations within the district offices, with hardly any administrative or financial support.

There is also increasing attention from indigenous advocates, through the Sabah Law Association, and calls to set up an institute that could conduct training programmes for native court personnel, along with other activities to help enhance the knowledge and skills of native court judges and other staff, as well as provide opportunities for debate on issues of current concern, in particular native customary laws. Concerns with regard to issues mentioned in 2.1 above could also be included, such as intergenerational transfer of the *adat* through more contemporary methods. Indigenous organizations in Sabah, such as PACOS Trust, have already decided to step up efforts to facilitate dialogue and training for indigenous youths on the part of elders and leaders.

2.5 Proposed Establishment of Native Judicial Department

Sabah's chief minister has also heeded the call of the Chief Judge of Sabah and Sarawak for a native court

judiciary to be formalised into a department and recognised as part of the judicial system in Sabah. Such a department would have its own administration and annual budget, similar to that of the other judiciaries in Sabah, thus making it easier for the native court to request recognition and status, as accorded to the civil and the syariah courts.

2.6 Role of Advocates in the Interface Between Traditional and Other Legal Systems

Section 27 (1) of the Native Courts Enactment 1992 clearly specifies that only registered advocates may appear on behalf of any party to proceedings before the Native Court of Appeal. The recent admission of 20 advocates is seen as an important move by many. Less discussed is the reaction of native court personnel, some of whom have expressed feelings of intimidation. There is a need to explore this further, given that the Native Court of Appeal is an interface between the native and civil courts, both in terms of proceedings and world-views. Concerns with regard to the possibility of advocates charging a commercial rate, thus making the Native Court of Appeal less accessible to some natives, may also be a subject for discussion. Also important to the debate is a similar concern about the possibility of richer natives pressuring the Native Court to allow advocates to represent them as provided for in Section 27 (2).

2.7 Political Appointments and Controlling Authorities

The political appointment of District Chiefs (DC) and Native Chiefs (NC) as native court judges is a sensitive issue and also a subject of grave concern for many, particularly ordinary natives who expect justice to be dispensed fairly. The issue of appointing the DCs and NCs has compromised the independence of the native court. One major recommendation that has been made by SUHAKAM is that a set of criteria and the selection process for DCs and NCs should be established, ensuring that it is free from political interference.

The selection and criteria for the *Ketua Kampung* also need to be addressed since this position represents the frontline in terms of ensuring that customary laws are understood and enforced at the village level. In the past, this role has become blurred when political appointments also place expectations on the *Ketua Kampung* to be attentive to other matters in addition to being the guardians of the *adat*.

The above-mentioned personnel are currently appointed by the Native Affairs Council, which falls under the Sabah Local Government and Housing Minis-

try. The Council is empowered by the Sabah Native Affairs Council Enactment 1998 which also, however, contains many other questionable Council provisions and objectives.³ Indigenous communities were sceptical of having such a Council, given the negative experiences encountered by their Orang Asli (Orang Asli Affairs Department) counterpart in Peninsular Malaysia. Many are of the view that the Council does not follow an agenda of promoting the rights of indigenous peoples, mainly because the decision-making process does not involve the relevant stakeholders, especially the native court, Ketua Kampung and knowledgeable community representatives themselves.

Some of the activities of the Council are questionable, for example, in Article 2c: “to control and co-ordinate all activities relating to research on customary laws and adat of the natives” or simply confusing, as in Article 2h: “to hear and resolve conflicts and disputes on matters relating to the customary laws and adat of the natives”, since these roles have already been entrusted to the native courts and village heads. This is especially so since the members of the Council are appointed by the government and consist mainly of bureaucrats.

2.8 Codification and Incorporation of the Adat

Since, in general, the *adat* is not well-understood or documented, there is often a fear that the government will not recognise it. Past efforts by the government to recognise customary laws have often meant codification, which goes against the diverse *adat* and customary laws of communities. Documentation of customary laws is preferable as it promotes flexibility and relevance over time. This could be a listing of indigenous principles in order to keep customary laws that would allow communities to accommodate progressive change. This way, customary laws could be written and preserved without formal codification.

The tendency to form committees to govern the community and their natural resources removes the control that was traditionally held by the indigenous community. Although such committees may in fact allow for more participation, particularly from women and youth, it means that already weakened traditional structures are further sidelined. In the long run, this will further diminish the indigenous communities’ aspirations for self-determination and a pluralistic society.

There have also been many instances whereby customary processes have been incorporated into the law. However, these attempts to incorporate customary processes as legal provisions have either demonstrated a lack of understanding on the part of government staff

or have, when enforcing these laws, highlighted the stark difference that exists between indigenous and non-indigenous insights. The attempt to incorporate indigenous customary laws on land ownership into section 15 on Native Customary Rights Land of the Sabah Land Ordinance 1930 shows a lack of understanding of indigenous peoples’ concepts of land and natural resource management, resulting in the misrepresentation of their customary law. This has, in turn, resulted in gaps in the process of land demarcation.

3. Conclusion

The *adat* and the institutions that govern it are still highly relevant to indigenous peoples in Malaysia not only because of the recognition of the native courts, which offers a much cheaper and accessible alternative to other judicial systems, but also because its legal concepts are in line with indigenous worldviews. There are very encouraging moves on the part of various state bodies and individuals to promote and protect the *adat* and to overcome various challenges. ○

Notes

- 1 The indigenous legal system includes legislative (indigenous or customary laws), judicial and procedural aspects. Indigenous juridical system is also used interchangeably.
- 2 Both Sabah and Sarawak have native courts that are recognised by the State; however, although the Orang Asli of Peninsular Malaysia also have traditional leaders who arbitrate in disputes, their legal system is not recognised by the government.
- 3 Section 4 (1). The objects of the Council shall be:
 - a) generally to advise the State Government on all matters pertaining to the native system of personal law and *adat* in Sabah;
 - b) to examine the various *adat* of the natives and make recommendations for their application and enforcement;
 - c) to review from time to time the customary laws of the natives and make recommendations for their amendments;
 - d) to work towards the abolition of non-productive *adat* which is detrimental to the progress of the State;
 - e) to explain or elucidate the different forms of *adat* of the natives; and
 - f) to serve as a centre for the collection and dissemination of information and advice on the *adat* of the natives.

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DEFINING CUSTOM

Colonial Interpretation and Manipulation of Indigenous Customs in India

Asoka Kumar Sen



British rule brought about the transformation of indigenous¹ customs into customary law as part of the colonization of Indian law. Associated with this process was an attempt to understand what custom meant to the indigenes and who were its authentic exponents. Since the precise purpose of the colonizers was to incorporate the colonized into the British administrative framework, however, rather than to reproduce the indigenous definition of custom verbatim, they redefined and invented the customs and traditions that had an impact on Western ideologies and the imperatives of British imperialism. This prompted them to invent and reinterpret the very meaning of custom and tradition. It is therefore crucial to understand indigenous and colonial definitions of custom, the motives influencing British officials and how the term was finally defined.

This essay² seeks to address this critical area of *adivasi* history in the context of the Munda, Santal, Ho and Oraon communities of Jharkhand. It first gives the lexical and jurisprudential definition of the term, in order to provide a theoretical basis, and then follows this with what indigenous society and colonial officials meant by it. This will help understand the defining criteria, the points of both emphasis and dilution, the ideologies that were latent in these approaches and, finally, the conflicting viewpoints and attempts to invent custom and tradition. Since this has emerged as a scholarly quest across the world,³ the concluding part provides information on the extra-legal-official-social connotations of custom.

Lexical / Legal Meaning

Lexically,⁴ custom denotes usual or generally accepted and long established ways of behaving or doing things. It is further defined as “what one is wont to do” or “usage”; regular trade or business; any of the distinctive practices and conventions of a people or locality, and usages of a manor or of a district. Practices and usages sanctified by society for their prolonged use came to represent a culture, a traditional pre-legal social order.⁵ The order or system-creating potential of social usages came to attract lawmakers when they addressed the task of making laws to incorporate a pre-legal society into the purview of a formal and definitive law-governed network. This presaged the legal definition of custom.

Law lexicons⁶ characterize custom as “unwritten law” or right established by long use and consent of the ancestors. Custom is divided into two kinds,

general and particular, to denote its territorial coverage. If it extends over the whole realm, it is considered universal or general custom, or common law. But when a custom extends over some villages/districts only, it is *de facto* a particular custom. Jurisprudentially⁷ speaking, a custom with the force of law can be divided into legal and conventional custom. “A legal custom is one whose legal authority is absolute, one which in itself ... possesses the force of law.” On the other hand, a “conventional custom is one whose authority is conditional on its acceptance and incorporation in agreements between the parties to be bound by it.” In English law, custom exclusively means legal custom, while a conventional custom is considered to be a usage. Legally, “to make a custom good” it must date from time immemorial, i.e. in use “so long that the memory of man runs not to the contrary”. It must also be continuous, peaceable, reasonable, certain, compulsory and consistent with other customs.⁸ Having defined custom legally, I shall next seek to portray why and how indigenous communities and the British defined the term, and the extent to which they followed or deviated from the theoretical meaning and with what purpose.

Notion of Custom: Indigenous and British

Chotanagpur and Santal Pargana regions of former Bihar, which are now part of Jharkhand state, were predominantly home to the Munda, Santal, Ho and Oraon peoples. Chotanagpur emerged as the meeting ground⁹ of common law¹⁰ and customary orders during the second half of the 18th century, particularly after the formation of the South West Frontier Agency and the framing of the civil rules in 1834 by Thomas Wilkinson, its political agent. Although England represented a *lex non-scripta*, or an unwritten or common law society, close links between custom and common law, as developing from old customs and decisions made by judges, were also retained.¹¹ Wilkinson was aware of the law-creating potential of customs. His initial contact with tribal societies began at Nagpur and developed further while leading the British army to conquer tribal areas of Chotanagpur. The British converted Chotanagpur and Santal Pargana into a non-regulation territory, in order to distinguish it from the regulation territory that the non-tribal parts of the Indian Empire comprised. Thus Chotanagpur long predated the hiatus that British administrators emphasized more prominently from the 1870s onwards, between law and custom-governed communities within the

Hindu society.¹² General law was substituted by recognized and notional customs. The *adivasis* were governed by their indigenous system of *pir/parha* and village governance known among Mundas/Hos as the Manki-Munda system (a Manki is the head of a group of villages called a *pir* and a Munda is the head of a village) under the superintendence and control of an omnipotent district head.¹³ As in Africa,¹⁴ this dual rule created the impression that colonial rulers were putting a premium on indigenous methods of governance. Thus Bentinck's¹⁵ day administrators in Chotanagpur replicated the Munro¹⁶ system of governance, the bedrock of which was recognition of the indigenous institutions¹⁷ and their governance through their customs.

It is not clear whether the *adivasis* had a specific word to denote custom. To ascertain this, we have to turn first to the extraneous agencies of colonial officials and Christian missionaries. Neeladri Bhattacharya, however, cautions us that their relationship with native tradition was "complex, ambiguous and varied" and so their reading was not necessarily "any closure to tradition", thereby leaving scope for distortion.¹⁸ Lexicons prepared by administrators and missionaries contained such terms as *dastur/dostur*, meaning customs or ways of people, habit, usage and *niyom* or rule.¹⁹ Similarly, colonial documents show that they had a vague notion of how life was normed and ordered. They more or less understood that custom should refer to a time beyond memory. But since this did not conform to the clock or a calendrical notion of time, they did not state its date or era with any precision.

During the *Sardari Larai*,²⁰ in a petition sent to the Lieutenant Governor of Bengal in 1867, the Mundas complained about the *thikadars* (farmers, leaseholders) charging excessive rent for "lands that have been held rent-free by them and their ancestors of time immemorial".²¹ When the Santal related that their rules were made by their "ancient ancestors", they were obviously referring to an unspecified past.²² Similarly, the Ho generally used a word the Hindi equivalent of which was "*prachin samay me*" (in ancient times).²³ Underlining the above temporal parameter, B. S. Solanki, a Ho *peshkar* (native officer in a judge's or collector's office) in the Kolhan administration (south-western part of former Singhbhum, termed the Kolhan Government Estate) specified that in "ancient times" their custom was to bury the bones or the burnt dead body in their original family *sasan* (burial place).²⁴ On the other hand, it was synonymous with an ancient or rather unremembered past when the Mankis, Mundas and tenants stated

that, prior to Kolhan being brought under British control, the Mankis had been the lords of their *elakas* (area); the Mundas and the tenants had absolute rights over the forest produce for their use and the right to clear the forest land for cultivation and to graze their cattle.²⁵ Although this implied such criteria as continuity and social acceptability, the indigenes did not consider custom to be changeless. In relation to a break with continuity, the Santal recalled a past when their ancestors had "upset the rules of the ancient ancestors". B. S. Solanki similarly observed that, in those days, this "procedure" did not exist as the people had made new *sasans*²⁶ in their new places of residence.²⁷

The assertion that the Mankis were the lords of their *elakas* and the Mundas and tenants had absolute right over the forest land inherited the notion of social governance through their village and *pir/parha* heads. Apart from the above, the pre-colonial period witnessed the development of institutions by which heads and elders resolved disputes at family and *killi* levels respectively. When these spilled beyond these levels to the higher courts, the trial was not only open but a socially participative one.²⁸ The Santals added to this special councils of five Manjhis under the *parganait* (chief of the *pargana*), the highest body of "people in council", held during annual *shikar* (hunting), issues of a "weighty" nature that could not be resolved at other indigenous courts were referred for resolution.²⁹ *In fine*, custom was indigenously defined not only as time immemorial, consensual and socially re-creatable but also as a set of socially governable norms.

The colonial notion of custom drew on two sources. British officials had a considerable body of literature through which to appropriate the theoretical meaning of custom. In the context of the Punjab, they drew on "the writings of English common-law theorists and nineteenth century evolutionist anthropologists".³⁰ We can presume that *The Encyclopaedia Britannica* was the most handy and useful source of knowledge about the tribal order. The volumes of the journals of the *Royal Asiatic Society of Great Britain, the Asiatic Society of Bengal* and the *Asiatic Researches* were also informative. Other relevant works were L. H. Morgan's *Ancient Society*, H. Maine's *Ancient Law* or B. Malinowski's *Family among the Australian Aborigines*. On the meaning of custom in particular, Edward Coke's *The Complete Copyholder* or S. Carter's *Lex Custumaria* or the more famous Blackstone's *Commentaries* could be perused. The British officials' debt to the theory of anthropo-jurisdictional knowledge as given in the above sources

generally remained, however, unacknowledged. L. B. Burrows was perhaps the only official who cited Maine's study while writing his note on the "Inheritance and partition of property among aboriginal".³¹

The impact of theory on administrator-ethnographers was considerably diluted by empirical evidence and colonial imperatives. In *adivasi* areas, they opened a dialogue with the village heads or villagers to obtain information on the meaning and content of custom.³² This might create the impression that the colonial transformation of indigenous custom into customary law was the product of a dialogue, or negotiation.³³ But we should not ignore the reality of the iniquitous partnership between the negotiators and the invented nature of the product. It is relevant to quote Neeladri Bhattacharya: "The native voice was inscribed within imperial discourse, but it is constrained, regulated and ultimately appropriated."³⁴

Interestingly, officials were not uniform in selecting the precise term to denote custom. In relation to the Santal, and while borrowing from Guru Kolean, Boddington used both custom and "rule of the ancient ancestors"; O'Malley more uniformly invoked the term custom.³⁵ On the other hand, local officials diverged in its use. Some used it as a synonym for rule of governance; others, however, were not jurisprudentially focused. While Tickell³⁶ preferred to use Ho ceremonies and rites of a generic nature, O'Malley³⁷ and Dalton chose such expressions as custom and rule of inheritance as well as ceremonies.³⁸ This confusion in British ethnography could be attributed to the specific task, writing ethnographic accounts or issuing rules, that these administrator-ethnographers were supposed to address.

Ethnographer-officials were uncertain as to how custom should be defined. While more generally and persistently it denoted norms for the ordering of society, custom also came to denote the method or system of governing material life, such as "tumbul" or the Ho's agricultural gleaning custom³⁹ and their typical attitude or behaviour of retreating to the hills as a mark of protest against the provision of forced labour for road-building.⁴⁰

Officials were similarly ambivalent with regard to applying defining criteria. Colonial records are replete with such expressions as "universal", "original" and "custom of the country" as evidence of the social or general nature of customs that satisfied the criteria of consensuality and peaceability. To substantiate this, W. H. Grimley, the Commissioner of Chotanagpur, noted that the prohibition on transfer of holdings beyond descendants was a "general cus-

tom" or "custom of the country" in Chotanagpur.⁴¹ In his letter to Bompas, the Deputy Commissioner of Singhbhum, Manook, his assistant, affirmed that the right of alienation, at family level, was the original custom among the Ho.⁴²

On the other hand, like their African counterparts,⁴³ colonial officials in tribal Bihar were sharply divided on the criterion of immemoriality/ancientness implying invariance. Allusion of "rules of the ancient ancestors" clearly suggested the ancient origin of Santal customs. Referring to the original settlers in Chotanagpur, such as the Munda, Oraon and Kharia, J. Davidson, personal assistant to the Governor General's Agent in 1839 mentioned their "old custom".⁴⁴ J.A. Craven observed that, "One of the conditions essential for establishing custom is that the custom has existed from time immemorial; and this must be proved by strict evidence."⁴⁵ Other officials insisted on change rather than immemoriality/continuity as a parameter of custom. They referred to Santal mythology by which, at *Tore Pokhori Baha Bandela*,⁴⁶ "our ancestors, who knows for what reason, upset the rules of our ancient ancestors", although the latter had desired that "rules and customs remain ours for ever and always".⁴⁷ In the case of the Ho, such references are more numerous: their adoption of the "ceremonies, rites, festivals and prejudices" of the Hindus;⁴⁸ the taking of the non-Ho language by the younger generation; the payment of money along with cattle as *gonong* (bride price), thus suggesting a mix of modern (i.e. money) and old (i.e. cattle);⁴⁹ the changes in funeral customs from burial to burning; an increase in the incidence of irregular marriages as well as a growing tendency towards agnosticism or Hinduism.⁵⁰

With mutability of customs in mind, administrators classified custom into "old undated" and "old dated". The former stood for those belonging to pre-colonial times, while the latter, though meaning old, often denoted a British-day custom. To exemplify, references to the past such as "from a very early date the tribesmen paid a rent of eight annas to the government"⁵¹ in fact meant the creation of a new custom or practice since 1821. Similarly, the claim that the original customary law rooted in civil justice had been kept intact⁵² did not refer to the original Ho system but to the one inherited and recreated by Wilkinson in 1837.

This official emphasis on mutability tallied with that of their African counterparts, and also those of the Punjab, underlining the evolutionary nature of indigenous customs.⁵³ Both, however, served different colonial strategies. British ethnographers insist-

ed that the steady mutation of indigenous material life injected a certain centrifugality into their culture. For some,⁵⁴ as in the case of the Santal and Ho, it signified a move towards the Hindus while for others such as Dalton, being “directly under our government for about thirty-seven years” meant that the Ho had started drifting towards a British created order.⁵⁵ What they seemed to underline was that this greater adaptability rendered *adivasi* customs discontinuous and flexible rather than rigid and invariable. This emphasis on change in the original order provided the ideological basis for another dilution, namely that it was not society but custom that could be redefined and recreated by others, in this case also the British government. This was unlike some of the British colonial administrators in Africa who used this as a reason for refusing to codify customs in order not to arrest their development.⁵⁶ In the case of the colonial administration in India, however, this was a hegemonic ploy to consolidate colonial rule in tribal Bihar, Bengal and Punjab.⁵⁷

The *adivasi* attitude towards colonial attempts to invent their customs and dilute their method of social governance was, on the whole, ambivalent. Notwithstanding tribal movements to protect their rights over *Jal*, *Jungle* and *Jameen* (water, forest and land), epitomized by the well-documented Kol Rebellion (1831-2), the Santal *Hul* (1855-6) and the Birsite *Ulgulan* (1895-1901), *adivasis* had to more or less rationalize the reality of subjection to alien rule. They preferred British courts and judges to their customary institutions and officials for the resolution of disputes. This is evidenced by the large number of cases filed in the British courts.⁵⁸ In the case of the Santal, this observation is further revealing: “The people of the country are not nice either. They do not inform the village headman, neither do they complain to the Pargana, and to the people of the country they do not appeal either. Also a quarrel between husband and wife these wretched fools at once bring in before the European magistrates, a crying shame...”⁵⁹ Despite this capitulation, we come across several instances of tribal challenge and protest against the legal basis of colonial rule and assertion of customary rights over their resources, which they claimed devolved to them as a matter of natural right.⁶⁰ These assertions somewhat unnerved the local administration. They ignored some of the acts of recalcitrance, convened a meeting of the village and *pir* (group of villages) heads to reconcile them to abiding by official decisions and withdrew the forest rules restricting the grazing rights of Singhbhum tri-

bals.⁶¹ These clarified that colonial attempts to procedurally redefine custom as primarily an official rather than social domain were circumvented by tribal contest, thereby setting up a shared realm of governance. We similarly witness collaboration on the substantive aspects of custom. Officials in Singhbhum convened a meeting with the social leaders of the Ho community to lower the rate of *gonong*, exchange of which was a traditional proof of indigenous marriage, and fix a uniform date for the *Maghe parab*.⁶² Dalton convened a similar meeting of several headmen of the Mundas to regularize the right of a son, born of a marriage by intrusion, to inherit his father’s property.⁶³ These were, however, strategic withdrawals on the part of the British. They continued, through courts and laws, to transform customs into customary law in order to entrench the Western notion of individual property, equity and justice.

Extra-Legal-Official-Social Connotation of Custom

Recent writings⁶⁴ have stressed that the above lexical and legal quest was saturated by contemporary Western ideas and the imperatives of colonial governance. So there was neither a generally accepted definition nor were the defining criteria uniform nor definite. Studying tradition and custom⁶⁵ in order to explore the colonization of customs and traditions in India and Africa, these works focused broadly on the ideology and technology of knowledge-making. We are informed that, during early decades, the Orientalists displayed a “romantic veneration” for the Hindu *sastras*⁶⁶ and Brahmans as their natural repositories. With the ascendance of utilitarian ideas as governing ideology, however, reason and utility displaced these agencies from the saddle. The quest was, nonetheless, riddled from its inception with doubts as to the uniformity of customs and the integrity of Brahmans. This prompted the British bureaucracy to think that tradition-*sastric* linkage was neither essential nor was it fully representative of Indian tradition. Secondly, tradition and custom were not “frozen in time” and continuous. Lastly, mutability to suit changing times was an intrinsic feature of tradition and custom. Deviating from the lexical and jural meanings, these writings therefore emphasized that tradition and custom were appropriable and inventable categories.

Conclusion

This relative reading of the meaning of custom reveals a contrast between theory and practice. There was agreement at lexical, legal, social and administrative levels that custom stood for practices and usages of pre-legal indigenous societies that set them apart from the *law-governed mainstream*. At the functional level, however, there was a perceptible divergence over parameters. While ancientness and social support were accepted both socially and administratively, ensuring its continuity and peaceability, emphasis over criteria differed. Changes occurring among these communities posed a debate between the ideal and practical meaning of custom. Consequently ancientness, continuity and consensuality were not considered necessary criteria of meaning.

Yet they were not fully dislodged from the ideal notion, leaving these societies in a state of dilemma. Similarly, the empirical evidence of change and also the quest for power⁶⁷ drove colonial officials to put a premium on mutability rather than continuity. Thus we can conclude that custom may be understood as a socially acceptable way of life, usage or rule of indigenous social governance of ancient origin. This could not remain immutable, however, as both internal and external forces invented and recreated it from time to time to suit the exigencies of the given community and the imperatives of the colonial state that enacted the transformation of indigenous customs into customary law. ○

Munda women, Jharkhand, India – Photo: Christian Erni



Notes

- 1 Tribe, *adivasi* and indigene have been used interchangeably for the same group, termed a tribe in colonial records but who prefer themselves to be recognized as the *adivasi* or indigene to assert their claim as the earliest settlers in India.
- 2 This essay is a modified version of a chapter from my book-length work entitled *From Village Elder to British Judge: Custom, Customary Law and Tribal Society* on the transformation of tribal customs (Munda, Santal, Ho and Oraon of Jharkhand) into customary law during colonial rule.
- 3 E. Hobsbawm and T. Ranger, *The Invention of Tradition*, Cambridge University Press, 1996; A. Mukhopadhyay, *Behind the Mask: The Cultural Definition of the Legal Subject in Colonial Bengal (1715-1911)*, Oxford University Press (OUP), New Delhi, 2006; N. Bhattacharyya-Panda, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Colonial Bengal*, OUP, New Delhi, 2008.
- 4 *Oxford Advanced Learner's Dictionary*, Indian Edition, 1989, p. 294; *Chamber's 20th Century Dictionary*, New Edition, 1983, p. 309.
- 5 Legal and pre-legal distinction rests on the determinant that law being the command of the state, legal societies are those governed both by law and state, while the others, including indigenous communities, are considered pre-state and therefore pre-legal i.e. governed not by law but by their customs. It is relevant to point out that, during the pre-colonial period, all the four tribes of this essay were custom-governed although the Munda and Oraon were under Rajputized Nagvanshi rulers while the Ho and Santal were governed by their village and supra-village social institutions.
- 6 E.R.HardyIvamy (ed.) *Mozley & Whitley's Law Dictionary*, Tenth Edition, Butterworths, London, 1988, p.123; A.S. Oppe (ed.), *Wharton's Lexicon*, Fourteenth Edition, London, 1937, p. 292.
- 7 Salmond's Jurisprudence, Chapter IX.
- 8 Hardy Ivamy, *Mozley & Whitley's Law Dictionary*, p.123.
- 9 J. C. Jha, *The Tribal Revolt of Chotanagpur (1831-32)*, K.P. Jayaswal Research Institute, Patna, 1987, pp. 233-44.
- 10 Common law as generally understood "is a system of laws that have been developed from customs and from decisions made by judges" and not legislated by Parliament.
- 11 Salmond's Jurisprudence, p. 209; *Oxford Advanced Learner's Dictionary*, p. 303.
- 12 L.I. Rudolph & S.H. Rudolph, "Barristers and Brahmans in India: Legal Cultures and Social Change", *Comparative Studies in Society and History*, Vol.8, No.1, (Oct. 1965), pp. 33-38.
- 13 Jha, *The Tribal Revolt*, pp. 241-44; A.K.Sen, *Wilkinson's Rules: Context, Content and Ramifications*, Tata College, Chaibasa, 1999, pp. 24-37.
- 14 M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press, Cambridge, 1985, p. 47.
- 15 William Cavendish Bentinck was the Governor General of India during 1828-35.
- 16 Thomas Munro was the governor of Madras Presidency.
- 17 E.T. Stokes, *The English Utilitarians and India*, London, 1959, pp. 10, 15, 142.
- 18 Neeladri Bhattacharya, "Remaking Custom: The Discourse and Practice of Colonial Codification", in R. Champaklakshmi & S. Gopal (eds), *Tradition, Dissent and Ideology: Essays in honour of Romila Thapar*, OUP, Delhi, 1996, p. 48.
- 19 J. Hoffmann, & A.V. Emelen, *Encyclopaedia Mundarica*. Vol. IV, Gyan Publishing House, New Delhi, 1998, p.1005; P.O. Bodding, *A Santal Dictionary*, Vol. II, Gyan Publishing House, New Delhi, 1999, 138; J. Denney, *Ho Grammar and Vocabulary*, Xavier Ho Publications, Chaibasa, 1975, p. 132.
- 20 During 1859-95, the *adivasis* of Chotanagpur, led by their indigenous leaders called *Sardars*, and reformers waged a fight predominantly against *zamindars* (landlords imposed by the British) to protect their land and forest rights. Known as *Sardari* or *Mulki Larai*, this culminated in the more famous *Ulgulan* or uprising (1895-1901) under the leadership of Birsa Munda.
- 21 Quoted in John MacDougall, *Land or Religion? The Sardar and Kherwar Movements in Bihar 1858-95*, Manohar, Delhi, 1985, p.63
- 22 P.O. Bodding (Translator), *Traditions and Institutions of the Santals: Horkoren Mare Hapramko Reak Katha*, Bahumukhi Prakashan, New Delhi, 1994, p.13.
- 23 Craven Settlement (CS), Village Enquiry Paper, Kaparsai, p. 31, Vasta (Bag) No (VN) 98. Another expression used was "sabek". Lomba Munda of Kamarhatu observed that, in the village Maghe festival, celebrating together together was a custom observed from olden (sabek) times. CS, Combined Title Page and Fly Leaf, Serial 22, Mis Case No.351 of 1914-15, Loba Munda of Kamarhatu's Report against raiyats of Kamarhatu for not helping *Deori* during Mage, Kamarhatu, pp. 1-5, VN 176.
- 24 Deputy Commissioner's (DC's Office), General Department(GD), Revenue Branch (RB), Tuckey Settlement (TS), Kolhan Settlement, Collection No III Settlement, File No (FN) 5 of 1915, File Serial (FS) 15, BR Sulanki's Note, para 2.
- 25 Government of Bihar and Orissa, Revenue Department, FN S/6 of 1915, Nos 1-12, Resettlement of the Kolhan Government estate in the district of Singhbhum, Serial No 6, Letter No 17-215-5, dated 14 December 1914, from the Board of Revenue, Bihar and Orissa, submitting proposals for the continuance of the resettlement operations under the provisions of the Chota Nagpur Tenancy Act, 1908, Appendix C. Copy of Memorial presented by the Hos at Chaibasa 9 July 1914, pp. 28-29, paras 4,7.
- 26 See Ref 21 above.
- 27 B.R. Sulanki's Note, para 2.
- 28 S. C. Roy, *The Mundas and their Country*, Asia Publishing House, Calcutta, 1970, pp. 66, 238-41; L.S.S.O'Malley, *Bengal District Gazetteers: Santal Parganas (BDGSP)*, Logos Press, New Delhi, 1999, pp.111-12; S. C. Roy, *The Oraons of Chotanagpur*, Man in India Office, Ranchi, 1984, pp. 231-39. D. N. Majumdar, *A Tribe in Transition: Study in Cultural Pattern*, Longmans Green & Co., Ltd., (Calcutta, 1937), pp.60-5.
- 29 O'Malley, *BDGSP*, p.112; W.G.Archer, *Tribal Law and Justice: A Report on the Santal*, Concept Publishing Company, New Delhi, 1984, pp.15-24.
- 30 Bhattacharya, "Remaking Custom", p. 38.
- 31 L.S.S.O'Malley, *Census of India, 1911*, vol. V, Bengal, Bihar and Orissa and Sikkim, part I, Report, Calcutta, 1913, Appendix, pp. I-IV.
- 32 S.T.Cuthbert wrote "On halting at a village it was my practice to send for the principal person as well as heads of each profession, that I might question them as to the peculiar customs prevalent in the villages, the rights of the peasantry..." cited in S.C.Roy, "Ethnographical Investigation in Official Records", *Journal of the Bihar and Orissa Research Society*, Vol.VII, Part IV, 1921, p.29.
- 33 Bhattacharya, "Remaking Custom", pp.47-50; Bhattacharya-Panda, *Appropriation and Invention of Tradition*, pp.3-5.
- 34 Bhattacharya, "Remaking Custom", p. 47.
- 35 Bodding, *Traditions and Institutions*, p.13; O'Malley, *BDGSP*, pp. 90-3.
- 36 Lt. S. R. Tickell, "Memoir on the Ho desum (improperly called Kolehan)", *Journal of Asiatic Society of Bengal*, vol. XI, part II, (1840), pp. 788 -808.
- 37 L.S.S. O'Malley, *Bengal District Gazetteers: Singhbhum, Saraikela and Kharsawan*, the Bengal Secretariat Depot, Calcutta, 1910, pp. 73 -7; O'Malley, *BDGSP*, pp.110-12..

- 38 E. T Dalton, *Tribal History of Eastern India (original title Descriptive Ethnology of Bengal)*, Cosmo Publication, Delhi, 1973, pp. 201 –2.
- 39 Tuckey, *Final Report*, p. 126.
- 40 This was considered “their usual custom when dissatisfied and excited”. Dalton, *Tribal History*, p. 184.
- 41 W. H.Grimley, Commissioner of the Chotanagpur Division, to the Secretary to the Board of Revenue, Lower Provinces, No. 876 L.R., 14 October 1895, para. 2, vide F. Finucane, Officiating Secretary to the Board of Revenue Lower Provinces to the Secretary to the Government of Bengal Revenue Department, No. 1194 A, 25 November 1895, Revenue Department, Nos.116-7, File 16-S/2.
- 42 S. J. Manook, Assistant Commissioner, Singhbhum, to C.H.Bompas, Deputy Commissioner, Singhbhum, 3 September 1895, see J.A.Craven, Settlement Officer, Kolhan, to the Deputy Commissioner, Singhbhum, No. 108, 21 August 1895, enclosure to W. H. Grimley to the Secretary etc.
- 43 For their African parallel see Chanock, *Law, Custom and Social Order*, pp.76-7.
- 44 Cited in S.C.Roy, “Ethnographical Investigation in Official Records”, *Journal of the Bihar and Orissa Research Society*, Vol. XXI, Part IV, 1935, p.240.
- 45 S. J. Manook, Assistant Commissioner, Singhbhum, to C.H.Bompas, Deputy Commissioner, Singhbhum, 3 September 1895, see J.A.Craven, Settlement Officer, Kolhan, to the Deputy Commissioner, Singhbhum, No. 108, 21 August 1895, enclosure to W. H. Grimley to the Secretary etc.
- 46 Santal tradition of migration identified this as a place, situated somewhere north-west of the source of Damodar river, where they resided for “a very long time”.
- 47 Bodding, *Traditions and Institutions*, p.13; W.G Archer, *Tribal Law and Justice: A Report on the Santal*, Concept Publishing Company, New Delhi, 1984, pp. 3-24. See also O’Malley, *BDGSP*, pp.90-3;
- 48 Tickell, “Memoir”, p. 803.
- 49 Dalton, *Tribal History*, pp. 184, 191-93.
- 50 Tuckey, *Final Report*, pp. 3, 5, 126,128.
- 51 Appendix to Notes, D.O. No. 194T, 17 June 1928, J. R. Dain, Deputy Commissioner, Singhbhum, to J.A. Hubback, Special Officer, Hinoo, Ranchi , para 5, Land Revenue Department, Government of Bihar and Orissa , May 1931, Prog. No. 39-40, FN IIT –26 of 1931, pp. 5-7.
- 52 Ibid., para. 3.
- 53 Chanock, *Law, Custom and Social Order*, pp.25-6; Bhattacharya, “Remaking Custom”, p.38.
- 54 Tickell, “Memoir”, p. 80; Bodding, *Traditions and Institutions*, p.13.
- 55 Dalton, *Tribal History*, p. 205.
- 56 Chanock, *Law, Custom and Social Order*, p. 136.
- 57 Mukhopadhyay, *Behind the Mask*, p. 4; Bhattacharya, “Remaking Custom”, pp. 44-5.
- 58 I refer here to my unpublished book-length study “From Village Elder to the British Judge”. One can invoke Craven and Tuckey Settlement Village Papers preserved at the District Record Room Chaibasa for information.
- 59 Bodding, *Traditions and Institutions*, pp.128-9.
- 60 Against the introduction of the land revenue settlement on the basis of *hal* (plough) measurement, Ho peasants resorted to large-scale concealing of the exact number of ploughs. During Craven settlement, although the Ho *raiyats* agreed to surrender *gora* lands within protected forests, they refused to relinquish their rice lands. The village heads permitted *dikus* to settle and own lands in tribal villages in contravention of the prohibitory provisions of Wilkinson’s civil rules and Thomson’s rules (1900) in order to assert their pre-colonial privilege, as founders or belonging to the founder’s family, of allotting village spaces, which these rules infringed upon. Similarly, in contrast to the official policy of reserving and protecting forests, Ho *adivasis* set fire to the forests, clandestinely felled trees, removed forest produce without permission and illegally grazed cattle in the prohibited forests zone. They resorted to peaceful and legal methods of petitioning against the forest rules of 1906 and 1924. A.K.Sen. “Collaboration and Conflict Environmental Legacies of the Ho of Kolhan (1700 – 1918)”, Deepak Kumar, Vinita Damodaran & Rohan D’Souza (eds), *The British Empire and the Natural World: Environmental Encounters in South Asia*, Oxford University Press, New Delhi, 2011, pp.212-17.
- 61 Ibid.
- 62 Dalton, *Tribal History*, p.192. The local administration, in consultation with the village and *pir* heads, established that *Maghe parab* must be celebrated between 15 and 20 February each year while customarily villages were free to choose their dates, generally in January and February.
- 63 H. H. Risley, *The Tribes and Castes of Bengal* , Vol. II , Calcutta, 1998, pp.102-3.
- 64 Bhattacharya, “Remaking Custom”, pp. 38-49; Bhattacharya-Panda, *Appropriation and Invention of Tradition*, pp.2-5, 36, 71 ; Mukhopadhyay, *Behind the Mask*, pp.9-10; T. Ranger, “The Invention of Tradition in Colonial Africa” in Hobsbawm and Ranger, *The Invention of Tradition*, p. 211.
- 65 Interestingly, Bhattacharya used these two words virtually as synonyms, Bhattacharya, “Remaking Custom”, pp. 36-7 while Hobsbawm forged a distinction between the two. Eric Hobsbawm, “Introduction: Inventing Traditions” in Hobsbawm and Ranger (eds), *The Invention of Tradition* , pp.2-3.
- 66 Hindu *sastra* means Dharmasatras i.e. *Manusmriti*, *Yajnavalkyasmriti*, *Naradasmriti* etc.
- 67 This interdependence of knowledge and power was emphasized in B.S.Cohn, *Colonialism and its forms of knowledge. The British in India*, Oxford University Press, Delhi, 1997, Chapter II.

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“LIVING WELL”

The Indigenous
Latin American
Perspective¹

Mirna Cunningham

Introduction

It is common to define development in terms of productivity, modernisation, technology and the accumulation of wealth. Such wealth is viewed in terms of the possession and accumulation of material goods and financial capital. This is a development concept that is alien to indigenous people, however.

This article summarises the debate and some indigenous peoples' practices in Latin America with regard to development from an endogenous perspective.

Over the last few years, a development concept has begun to emerge in Latin America that endeavours to incorporate indigenous peoples' own perspectives: it is known as *sumak kawsay* in the Quechua language, *suma qamaña* in Aymara, *sumak ñandereco* in Guaraní and *laman laka* in Miskitu, meaning "Living Well" or "Good Living". The concept was included in the recent constitutional reforms in Ecuador and Bolivia.²

Living Well

Living Well refers to the deep spirituality that we indigenous peoples continue to maintain with Mother Earth; to the economic conditions, on the basis of our own systems and institutions, that govern productive life and relations of economic exchange; to the indigenous identity that has formed the basis for stating who we are, where we come from and where we are going; to systems of social organisation based on relations established between the peoples, the traditional authorities, which fulfil their role of service to the peoples, communities, *ayllus*, *markas* and *suyus*, *capitanías*, *tentas*;³ as well as to the ways of relating to external actors, including the State.

Living Well refers to the right to the resources found on indigenous territories, exercising the right to control and manage those resources. The close relationship between indigenous peoples and Mother Earth is based on a duality and complementarity⁴ between all elements that make up the indigenous world view, including women and men. There is a dual and complementary dialectical opposition through which the parties are re-establishing the social and natural world, even the symbolic universe.

Living Well means living in balanced harmony⁵ with all these elements. In the indigenous world view, all forms of existence are given equal weight,

all have a complementary relationship, all are alive, and all are important. The fundamental basis that ensures the continuity of Living Well is, however, respect for Mother Earth, along with access to land and territory (in a context of indigenous peoples' right to self-determination), for where else do we live but on our territory?

Choque (2010) states that indigenous peoples are establishing the concept of Living Well on the basis of their own experiences and life systems, on the basis of an integral relationship with Mother Earth. It is a constant search for and re-establishment of collective, individual, political, economic, social, cultural, spiritual and physical well-being, in a context of exercising their historic rights. This concept should not be seen as frozen in time; quite the contrary: it is proposed from the point of view of peoples that have constantly faced a struggle to re-establish "Living Well".

The same author explains that the construction, or reconstruction, of Living Well refers to a close relationship between the past, what we were as peoples, the present and the future; its reference point is an historic memory of the past, known as the time of freedom, a time that has been undermined ever since the first Invasion, including by the colonial republics which referred, in their political constitutions, to the "abolition of collective lands, the abolition of traditional authorities", in short to the assimilation of indigenous peoples into the logic of a Western lifestyle. It is within this framework of hostility that the indigenous struggle to rebuild the concept of "Living Well" has been constantly forged, and it relies, in all cases, on the indigenous capacity for resistance.

Development from an Indigenous Perspective – Living Well

The principles on which the concept of Living Well is constructed and reconstructed have to be understood within the legal framework of the UN Declaration on the Rights of Indigenous Peoples, within the exercise of the right to self-determination.⁶

The first article of the Declaration on the Right to Development establishes that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.⁷

In the debate between the peoples of Latin America, some characteristic features of the concept of Living Well have been identified. These will now be described below.⁸

a. The Indigenous Vision

One of the first salient aspects is the fact that nature is a “living being”, the components of which form multiple connections, with humans also forming a part of the fabric of the cosmos. For the Indigenous Council of Central America (CICA),⁹ this world view is the philosophical core of the individual and collective thinking and action of indigenous peoples. The basis for this cosmogonic thought includes: communitarianism, time tracking, balance and harmony, consensus, dialogue, respect and a system of law.¹⁰

One consequence of this vision is that the natural resources, such as land, water, minerals and plant life, cannot be commercially traded. The aim of production is to obtain a quality of life, and produce is destined primarily for one’s own consumption. This is why many communities ritualise and redistribute their surplus, seeking balance, harmony and economic growth.¹¹

Territory plays a key role in the indigenous vision of Living Well. For the Mayangna nation of Nicaragua, territory comprises the geographical space in which the people live, along with its plant and animal resources, water, subsoil, renewable and non-renewable natural resources, organic and inorganic matter. This space forms a territorial unit that is developed according to custom and tradition, and over which they have a right of ancestral domain and/or a modern title provided by the Nicaraguan state. Here they carry out their social, economic, cultural and environmental activities, preserve their sacred sites, hunt, fish and farm sustainably.¹² When organising their territorial management and producing their territorial development plan, they incorporate rules for the environmental management of the indigenous territory.

b. The Economic Subject is Collective

Herein lies a fundamental difference between this and other development models. Although this feature does have its variants, particularly in the light of the massive flow of indigenous people to urban areas, it

Awajún people in Peru – Photo: Pablo Lasansky



holds specific cultural connotations regardless of the geographic and spatial location of the peoples.

In Central America,¹³ the indigenous world view sees natural resources as far from an economic possession; indigenous spirituality includes the belief that all forms of natural life have a soul. Everything has a spirit and it is this spirit that gives it its specific characteristics. Territoriality, “Mother Earth”, is an element that gives collective identity and belonging to an indigenous people; this is considered sacred and cannot be sold or individually allocated. The indigenous territories are collective and represent a space in the universe in which nature and humanity live in harmony. The territory comprises all of its component elements: soil, subsoil and airspace (rivers, lakes, animals, plants, metals). The territory is the basis of development for the model of Living Well, with its legal, political, economic and social system. In this context, indigenous peoples have created and possess their own knowledge with regard to living in harmony with Mother Earth, natural resources, culture, production and way of life.¹⁴

A necessary step in the process of defining each indigenous people’s own development model is

that of identifying what knowledge is specific to their culture, and the way in which the community protects, preserves and recreates this.

c. The Role Played by Endogenous Economic Institutions

On the basis of their territory and their relationship with nature, the indigenous peoples have generated knowledge, which they apply to their political, economic and social organisational relationships, and which has enabled them at particular moments to achieve a certain sustainability in terms of food security and trade in products. Maldonado (2009) mentioned some of these endogenous economic institutions, such as Minga and Ranti Ranti, among others. All these systems are based on principles of reciprocity, complementarity and community work.

d. Intercultural Relations with the Rest of Society

Another feature of the indigenous peoples’ development model is the search for ways in which to live harmoniously with other sectors of society, in-

Indigenous women in Mexico – Photo: Franziska K. Nyffenegger



cluding the State. Living Well is a question of respecting similarities and differences between the beings that co-habit this planet. This goes beyond the concept of diversity, culminating in the fact that living beings, whether the same or different, must never hurt each other. Similarly, Living Well seeks a consensus amongst everyone, so even though people may have different points of view, dialogue must lead to a neutral point on which all can agree, thus preventing conflict.

e. Equal Relations Between Women and Men and Intergenerational Relations

One aspect that has taken on some importance in the indigenous development debates is the need to address relationships between women and men, as well as intergenerational relationships. Choquehuanca (2010) notes in this respect that Living Well means respecting women because they represent the Pachamama, our Mother Earth – the owner of the gift of life and carer of all her bounty. Women are valued in the communities and are present in all activities involving life, upbringing, education and cultural revival. Indigenous community members value women as the basis of social organisation because they pass on their cultural knowledge to their children. For indigenous women, Living Well means overcoming the violent situations they experience, both inside and outside their communities.

Indigenous Peoples' Experience of Development in the Context of Nicaraguan Regional Autonomy

In the case of Nicaragua's indigenous peoples, ancestral territorial rights are guaranteed in the Statute of Autonomy for the Regions of Nicaragua's Atlantic Coast, approved in 1987,¹⁵ and the process of demarcation and titling of the indigenous peoples' ancestral territories is currently being concluded.¹⁶ In this case, good government in the Autonomous Regions is understood as coordination between the different levels of autonomous authority that already exist: indigenous communities and territories, municipal authority and multi-ethnic autonomous regions. The State is a part of this concept of good government, albeit through the Autonomous Regions and local authorities; in contrast, the traditional authorities are the organ of government at communal and territorial level.¹⁷

It should be noted that there are some basic conditions on which progress in indigenous development proposals depends. In the case of Nicaragua, the system of multi-ethnic autonomy that has been established is laying the bases for the exercise of indigenous peoples' collective rights, starting with territorial rights. The Nicaraguan Government has defined a Human Development Plan, which includes a Development Plan for the Autonomous Regions as one of its components. This Plan is based on the assumption that there is a subject with a collective identity, and that this subject participates fully in public management through the exercise of autonomous rights.

In the case of Bolivia, the process of structural transformation promoted by the current government is also laying the foundations for progress in the concept of Living Well.

Laman Laka: The Concept of Living Well Among the Miskitu People

The development of a tool for the survival and well-being of Nicaragua's indigenous peoples is based on the rational and sustained use of the natural resources available on their territories, managed according to age-old principles of human/spirit-based interaction; principles of reciprocity, community and family solidarity; and the application and transmission of ancestral knowledge. The resources to be used include the soil, the water, the plant and animal life found on the territory; within all of this, human beings interact as simply another element.

In the case of the Miskitu peoples, development is linked to what is known as *laman laka*, or "rules of co-existence" that ensure harmony within the family, regardless of age group or gender.

The concept of *laman laka* is based on the principle of the common good.¹⁸ This principle functions as the link within a community's cooperation system that ensures the inclusion of all people and families on the basis of equality and social fairness. It contributes to strengthening associational relationships, which necessarily require trust, solidarity, reciprocity and ethnic and territorial belonging. The principle of the common good is linked to the protection and appropriate use of the community's natural and cultural heritage, formed of the territory, natural resources, language, knowledge and practices of production, health, food and ways of life. The common good therefore contributes to

Alamikangban Community in Nicaragua – Photo: Mie Buus



guaranteeing the people's economic, social and cultural reproduction.

Through *laman laka*, economic rules for the use of the territory are implemented that involve a sense of: *if I have, you all have; if you all have, I have*. This involves exchange, *pana pana* or *bakahnu*, and enables interaction between people in which the value of the word predominates, along with respect for family, mutual trust, ethnic loyalty, community. Tacit agreements occur in this context with regard to the use of the ecosystem, and everyone knows where individual sowing can take place and which are the areas of collective use, where hunting and fishing is permitted and where relationships are established with the spiritual world.

All the above is linked to a system of ancestral community institutions which, in turn, are connected to the territorial, municipal and regional administration. Efforts are currently also being made to establish links and interactions in the administration of health, education, community justice and authority elections. All this can be considered a framework for internal governance.

There is another sphere of development, one that extends "exogenously" and which is focused on relations with the State and other actors. In this case, the indigenous peoples have roles focused on management and negotiation in the collective interest, for example, for the granting of concessions or the mass use of resources, either by the community or external actors.

Both these internal and external relationships have now become a part of the Nicaraguan constitutional framework, in which development is the result of balanced, multiethnic and multicultural relations, in the context of the right to self-determination, through the multiethnic statute of regional autonomy. This has opened the door to indigenous peoples' full enjoyment of their right to intercultural citizenship, access to power and participation in decision-making.

A few examples may better illustrate the development concept and its dynamics:

- It is common, for example, to share or exchange produce from hunting or fishing among community members: meat, grain, fish, tubers, wood. Hunting and fishing is carried out within the territory, but spread out over time and geographical space. Different areas are hunted and fished, and each one infrequently. Places far distant from each other are therefore chosen, and this may require several days of travelling from

the community. These practices involve collective work on the part of a number of men, and this strengthens the community unit and enables knowledge to be passed down from one generation to another with regard to resource management.

- In contrast, among the Rama people, oyster gathering in Bluefields Lake is an activity carried out primarily by teenagers, women and children, and conducted in places very close to the community. It is the same for the coastal indigenous communities that gather coconuts. In all these cases, there is a strong sense of the collective nature of the world and of the product's distribution.
- In addition to their wealth of biological diversity, the tropical rainforests, the pine forested plains, the lakes and coasts, the cays and reefs all represent the survival and development of the culture, spirituality, food supply, housing, work and household implements, health and education of the indigenous peoples. They are the providers of everything to everyone.
- This development model is being threatened "from outside": through the felling of trees in the river headwaters and basins, a result of the advancing agricultural frontier and the presence of invasive settlers; through the chemical pollution caused by the over-use of agrochemicals in the upper basins, the residues of which are swept as far down as the coastal lagoons and reefs, poisoning everything in their path. The effects of climate change are already being felt in these territories, with bigger and more frequent hurricanes and floods, endangering the biodiversity and crops, and hence the life and well-being of the indigenous peoples.

In sum, for indigenous peoples, Living Well still involves historic challenges such as territorial recognition and the self-determination of our peoples. The right to Living Well cannot be achieved while our territories are under constant threat, taken over by national and international companies, while the necessary pre-conditions for a good quality of life are ever scarcer, while our average life expectancy is less than the national average.

Faced with these enormous threats, what can we bequeath to future generations? We are at this very

moment once more putting forward our vision of life, which contains a deep sense of Living Well. ○

Notes

- 1 By Mirna Cunningham.
- 2 Art. 8, Chapter Two. Principles, values and purposes of the State. State Political Constitution. Republic of Bolivia. 2009. <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>.
Section VII. System of Living Well. Republic of Ecuador. 2008 Constitution. <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html#mozTocId153283>
- 3 The terms refer to the South American indigenous peoples' own forms of community organisation.
- 4 Just as men and women are complementary and contrasting, it is like the sun and the moon, day and night, male and female in animals, vegetables and minerals.
- 5 In harmony with the cycles of Mother Earth, with the cycles of the cosmos, with the cycles of history, the cycles of life, and in complementary balance with all forms of existence.
- 6 Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. Article 32: 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
- 7 *Declaration on the Right to Development* <http://www2.ohchr.org/english/law/rtd.htm>. Another instrument that helps in gaining an understanding of Living Well is Article 8(j) and related provisions of the Convention on Biological Diversity, which establishes that each Contracting Party shall, as far as possible and as appropriate: Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.
- 8 Luis Maldonado. Talk given at the presentation of the Indigenous Fund's Development with Identity Project. Panama. 2009.
- 9 Balu Wala: CICA-PMIIE 2008
- 10 CICA. 2008.
- 11 Maldonado, L. (2009)
- 12 Fidencio Davis. Elementos para formular el plan de desarrollo del territorio Mayangna Sauni As. URACCAN. 2009.
- 13 CICA. Metodología del Balu Wala. 2009.

- 14 Idem.
- 15 Statute of Autonomy for the indigenous peoples and ethnic communities of the Autonomous Regions of Nicaragua. Law No. 28. National Assembly of the Republic of Nicaragua. Gazette No. 238 30 of October 1987. <http://www.scribd.com/doc/15987568/Ley-28>
- 16 When this process comes to an end in 2010, 23 indigenous territories will have been titled. Law No. 445. Law on the System of Communal Property of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of Nicaragua's Atlantic Coast and of the Bocay, Coco, Indio and Maiz Rivers. Official Gazette No. 16 of 23 January 2003. National Assembly. <http://www.manfut.org/RAAN/ley445.html>
- 17 UNDP. HDR 2005. *Las Regiones Autónomas de la Costa Caribe: ¿Nicaragua asume su diversidad?* July 1, 2005. <http://www.onu.org/ni/mostrardoc/26>
- 18 http://www.idhnicaribe.org/pdf/5_capitulo_iii.pdf

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Mother Earth and “Living Well”

New Paradigms for Indigenous Struggles?



Efraín Jaramillo Jaramillo

"We are building new paradigms for the modern world with regard to how humanity must live from now on," stated Miguel Palacín Quispe, General Coordinator of CAOI (Andean Coordinating Body of Indigenous Organisations), on his recent trip to Colombia at the start of August. According to Palacín Quispe, the indigenous peoples have *"a unique proposal with which to face up to the current crisis in civilisation, the most serious manifestation of which is climate change, which is threatening to destroy all of the planet's life forms. This proposal is called Sumak Kawsay. In order to share this world view and promote our project for uniting people around Living Well, the CAOI is holding meetings in all the countries of South America"*. This action on the part of the CAOI is essential given that, *"We know that, in the majority of our countries, governments persist in imposing and implementing capitalist neoliberal economic development models that prioritise the extraction industry (mining, oil, logging), free trade agreements, laws that promote the looting and plundering of Mother Earth, militarisation and the criminalisation of our rights"*.

In Colombia, the leadership of one sector of the indigenous movement has been placing particular emphasis, above all other ideological or political considerations, on defining the earth as our Mother, as the origin of all that exists, as the only true reality to which the world can be reduced. The invocation of Mother Earth is extremely common in Amerindian world views and, indeed, those of many other indigenous peoples around the world who call for sacred respect for nature. This is not thus a new notion, and nor is it an exceptional one. What is surprising, however, is that they are seeking to establish this pantheistic view of the world within the indigenous organisations of Colombia, the birthplace of the indigenous and popular struggle for land, with the aim of mobilising the country's indigenous peoples around the struggle for the "liberation of Mother Earth". This would be a new paradigm, imbuing the indigenous struggle with new philosophical content.

This deep-rooted thinking on the part of the Andean peoples of Peru, Bolivia and Ecuador, which now seems to have taken root amongst the leaders of their indigenous brothers in Colombia, is being reinforced by the concept of *sumaq kawsay* or *suma qamaña* ("Living Well" in Quechua and Aymara), a concept that is being presented to soci-

ety as an indigenous alternative to the global crisis.¹ This "pro-Mother Earth" movement (for want of a better name; no irony intended), now reinforced by this new concept of Living Well, has become fashionable among intellectual indigenous circles in Latin America, and is now also reaching out to many friends and universities, research centres and NGOs in Colombia and abroad.

We believe the proposals of the "pro-Mother Earth" movement contain weaknesses and omissions and it is therefore these that this text will focus on. As always, and this is worth reiterating, our intention with this kind of appraisal is to flag up doubts in relation to the key ideas underpinning the social movements. Paradigms that are not challenged become unchangeable truths; they stifle the organisations and block progress in their struggles. This is the modest aim of this text, no more.

"Pro-Mother Earth" thinking is attractive for its impressive critical value, demonstrating allegorically how commercialisation is destroying nature. And yet there is a striking superficiality in the proposals it makes in terms of how to overcome social systems as complex as capitalism and socialism, which are responsible for climate change, the unbridled consumption of the produce of ecosystems, the pollution of the soil and water and the loss of biodiversity, all of which are destroying the earth and endangering the existence of all the planet's life forms. Although the indigenous marches in Colombia did begin a process of mobilisation in defence of indigenous rights, there seems to have been no progress, and nor have the marches played an important role in establishing forms of popular participation on which to build a new pluriethnic and multicultural democratic institutionality or develop an economic model that responds to the needs of this plural society.

With these conceptual paradigms, the "pro-Mother Earth" movement is seeking to rekindle the rallying cries of autonomy, territory and culture that characterised the indigenous struggles in Colombia at the end of the 20th century but which are today proving weak in the face of the new inequality-creating powers, linked to the transnational nature of the economic decisions imposed by neoliberal globalisation and the economic interests, legal and illegal, that are being violently established over vast areas of the country.

The eccentricity of this movement's proposals is exasperating, when it assumes that indigenous cultures are the natural repositories of an intelligent and shrewd substratum that is reluctant to be colonised. Something that forms the basis of the *ayllu* in the Andean world view is transformed into the main criticism of capitalism and Western civilisation. This, along with an arrogance in the way it handles its philosophical truths, distances it from other similar movements that are also excluded and thus interested in building inclusive democratic processes. By failing to take into account the fact that human knowledge can never be absolute, given the constant changes that occur in science and society, it ends up blurring and simplifying historical processes. Hardly surprising, then, that its proponents make mistakes without a second thought. Two of the worst blunders were made by President Evo Morales, who attributed baldness and homosexuality to the consumption of genetically modified chickens, and by Fernando Huancuni, an Aymara philosopher and promoter of Living Well, currently a member of Evo Morales's government, who - with an imagination that would be the envy of García Márquez - stated that the earthquake in Haiti had been a sign of the "economic-global-cosmic-telluric-educational force of Pachamama", a gaffe beaten only by the imagination of Hugo Chávez, who - in reference to the same event - stated that "a report produced by the Russian Northern Fleet seems to indicate that the earthquake that devastated Haiti was the clear result of a test carried out by the US Navy using one of its earthquake weapons".

The confusing syntax of some of the pro-Mother Earth proposals is also astounding. Labourer statements are dressed up in words from the Quechua, Aymara, Nasa or other Amerindian language, thus gaining "coherence" through the magic of the indigenous language. A social phenomenon expressed in this way requires no further clarification. Jaime Nuñez Huahuasoncco, speaking on indigenous justice, stated as follows. "Sumaq Kawsay must form a part of the analysis of how, in our Andean-Amazonian culture, the search for the balance of justice between men was resolved and how our ancestors, the Incas, used to explain the miracle of collective conscience as part of time and space. It is often said that we Quechua walk "with our eyes" fixed on the past, but this is relative; it is a question of giving a spatial image to the temporal issue because we understand that the past as a whole has "moved us forward" and never "drawn us backwards". This is why "Ñawi" in Runa Simi is the eyes with which we look but when we turn around "Ñawi", through this "metathetical" quality that some magical terms have in Runa Simi, we get "Wiña-y" which means "eternal", "always", "of all time", "unlimited time" when used as a temporal adverb but, when used as a substantive or

*neutral verb, means "growth" or "action of growing" or "act and effect of developing..."*²

In 2010, the International Year of Biodiversity, it would be irresponsible for Colombian indigenous peoples to leave the leadership of their movement and the way in which the social construction of peace with justice and democracy is developed in their regions in the hands of the "pro-Mother Earth" movement. The social construction of peace is one of the great challenges now facing us, for the popular struggle has yet to resolve the urgent issue of forming a pluriethnic social movement to face up to the serious situation in Colombia, both in terms of growing social injustice and the war on corruption, given the rise in public extractivist policies that favour a few mining companies, companies which are destroying the forests and rivers to the detriment of the heritage of all Colombians and the collective rights of indigenous and Black peoples.

The most important thing that pro-Mother Earth thinking and Sumaq Kawsay has offered the Colombian popular movement is its contribution to popularising and internalising amongst many of us a sacred respect for nature and for all forms of life, encouraging us to turn our backs on the commercialisation, unfettered growth, gluttony and consumerism that is causing the destruction of nature. It is a criticism and, even in its most basic assertions, it remains a criticism. A criticism, from the bowels of the indigenous communities, of social systems such as capitalism and socialism, which are causing irreversible damage to the planet. It introduces an ethical model into contemporary thought, by associating life with the earth, but there it ends. A deeper analysis of these systems is needed given that neither capitalism nor socialism are "paper tigers", nor evil systems that will disintegrate when the handful of evil parasites controlling them for their own benefit are thrown out. These social systems are complex networks of economic, social and political relationships, networks in which we are all involved, albeit in different, unequal and contradictory ways. If this were not the case, we would be unable to explain the eight years of President Uribe's government, unaffected as it was by the most significant demonstrations of recent years, such as the indigenous marches.

Pro-Mother Earth concepts are limited in their understanding of territorial dispossession, drugs trafficking, the internal armed conflict, the violent appropriation of environmental resources, the contradictions within the excluded social sectors. But they are, above all, inadequate when it comes to understanding the nature of our countries' dependence on the hegemonic centres of capitalism. Nor do they offer clear ideas with which to conduct a more intelligent analysis of the



Demonstration of Embera people in Bogota, Columbia – Photo: Dick Emanuelsson

ways in which subjugated peoples can respond to this kind of domination, for it is insufficient to call naïvely on their desire to rise up and overthrow the system, and even more naïve yet to fly into a rage at the phlegmatic attitude of those who do not rise up. Their philosophy does not develop any critical political thinking, and this is crucial in the building of political alternatives. Quite the contrary, their thinking is simplified into a glossary of terms, many of them in the Amerindian languages and “stated in an enigmatic tone”.³ The biggest drawback to this simplification is that it creates intransigent attitudes amongst its followers. This prevents the expression of dissenting opinions, something that is vital in pluriethnic societies such as ours.

Unlike in Peru or Bolivia, there has been no recent Indianist movement claiming the land in Colombia. The last of its kind took place with the struggles of the legendary Nasa leader, Manuel Quintín Lame in the Cauca and in Tolima, which prevented the extinction of the indigenous reserves in the Cauca. The great indigenous victories in the struggle for land have taken place hand-in-hand with the peasant movement, a movement which gave us the slogan of “the land for those who work it”, and which the newly-formed indigenous movement took up as “the recovery of reserve lands” and “the abolition of rent”. Both slogans were aimed at removing the land from the landowners and doing away with the large, idle and destructive estates that were being violently expanded. The success of this mobilisation can be seen in the fact that around 50,000 hectares of indigenous reserves were recovered in the Cauca, defeating the landowners, moreover, and opening up the first opportunities for modernising the department. This is why it is strange that a movement that is of a clearly pluriethnic political tradition, and which - undaunted by Uribe’s authoritarian power - successfully mobilised thousands of indigenous people around the struggle for their rights, should

now appropriate esoteric visions of an Indianism that exalts identitarianism (in this case a kind of anti-racist ethnocentrism), and which has a propensity to manipulate cultural symbolism, concealing enormous social contradictions but, paradoxically, seducing and attracting European “revolutionary tourists”, as Marc Saint-Upery puts it in the Bolivian case, and yet contributing little to the popular protest. They are contributing little to any real change in humankind’s relationship with nature, which will only be achieved through a change in the forms and relationships of capitalist production.

The popular struggles for land are deeply rooted in the indigenous communities. I do not therefore believe that the indigenous movement will be able to mobilise its grassroots around the concept of “Living Well”. And if the communities do mobilise around the “liberation of Mother Earth” then it will be in the sense of a struggle that was begun by our ancestors 40 years ago: for the recovery and expansion of reserve lands, lands that are still insufficient to improve living conditions. ○

Jambaló Reserve
August 2010

Notes

- 1 Evo Morales explains the meaning of Sumaq Kawsay thus: “It is Living Well, it is thinking not only in terms of per capita income but in terms of cultural identity, community, harmony with each other and with our Mother Earth,” and he thus proposes that “we build a true community of South American nations around Living Well”.
- 2 “Los Ronderos y la Justicia Comunitaria en la Nación Quechua”, Los Andes daily newspaper, Puno, Peru, 8 August 2010.
- 3 Pablo Stefanoni, in an excellent article: ¿A dónde nos lleva el Pachamamismo?”

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Happiness as a

Quality of Life Indicator

Alberto Chirif



When future generations study how we counted economic growth that consisted of heating up the atmosphere, melting the ice caps, creating a water and food shortage and dangerously raising sea levels as development and national happiness, they will class GDP as the most conspicuous indicator of our barbarity.

Since reading an article by Oswaldo Rivero,¹ former Peruvian ambassador to the UN, from which the above extract is taken, I have lost all fear of writing on an issue that has been going round in my head but which I was at a loss to give a name to, far less approach: happiness, satisfaction? In short, I am referring to the indigenous peoples' capacity to go about life's daily chores with good humour, with the capacity to laugh while they work. With a few exceptions, such as those who suffered atrocities during the subversion of the 1980s and part of the 1990s, and those who have had their territories expropriated, turning them into a people dependent upon an economic system in which there is no alternative other than to sell their produce and labour cheaply, I would venture to say they do not know the meaning of the word stress.

I say fear because I was worried that I would be unable to write on this subject without giving way to subjective evaluations for, when all's said and done, happiness is a highly personal thing, unique to each individual. In any case, how do you measure happiness? The above article helped me to overcome this obstacle in the following two ways.

Firstly, it led me to consider the indicators that national and international organisations currently use to measure poverty or development² and I came to the conclusion that, whilst the data that is drawn from the measurements is objective (percentage rates of literacy, school attendance, health services etc.), there is little basis for the ensuing conclusions, which are often used to enable politicians and propagandists of this development model to justify and impose their decisions. Let me give a few examples.

Illiteracy (literacy in the Human Development Index – HDI) suggests to the reader the idea that the literate person actually reads. This is only true in some cases, to the point that today's statisticians have created the concept of "functional illiterate" to refer to those people who, having learned to read, do not do so for whatever reason: lack of money to buy books, no interest in reading, etc. The issue can be extrapolated, however. As reading is not an end in itself but a means by which people develop intellectually, a citi-

zen will in this way develop greater civic awareness of his or her rights and duties, and achieve more prosaic aims such as passing an exam for a particular post and obtaining better pay than s/he currently has (if indeed s/he has any). Given that a proportion of the reading population reads only rubbish, such as the tabloid newspapers, however, and even then only the headlines on display at the newspaper stands (although on this point they are correct, because they will find no further information inside these daily papers), it is clear that such reading is not fulfilling the purposes intended by literacy programmes. I wonder why readers of insults and libel against those who criticise the political regime, vile in itself and debasing of individuals, should be considered more developed than those people whose communication is based on an oral tradition and who retain their capacity (albeit tarnished by "modernity") to pass on stories that relive the founding acts of their world and customs?

So that you do not think this particular indicator is the exception rather than the rule, however, I shall give another: potable water, a generous description to describe water that arrives down pipes but which does not actually correspond to its name: drinkable, healthy. There are always variations, of course, but not even in Lima do the people dare drink this water, at least not those who can afford not to, because as always the poor have to make do with what they can get. Is this qualitatively better than collecting water in earthenware jars from streams or *puquios*? To be perfectly honest, though, I have to say that even this has changed in many places, thanks to modernity, and the polluting industries and growing cities that dump untreated waste into the water sources.

An indicator such as monetary income, which does not take into account a person's living conditions, tells a lie. A family of five with a total income of 500 soles a month is poor if they live in the city because this money will not cover the things that are necessary to lead a decent life. If they live in a rural community, however, this is a significant amount of money (whilst obviously not making them rich), because some of their food will come from their work in the fields, from the bush and from the rivers, they will have built their house themselves and will repair it themselves, they will have clean water (unless contaminated, see above) and, importantly, a whole family group living nearby with whom they maintain reciprocal relationships for the exchange of goods and services.

Now, I am not saying that it is not important for indigenous peoples to go to school, to learn to read



Bellavista community, Cayarú River, Peru – Photo: Mónica Newton

and write, to have the right to better health and sanitation services and so on. They themselves both want and seek these improvements. What I am saying is that the way in which this is being implemented is not improving the quality of life of these people nor, generally, of the rest of the population that read the sensationalist headlines on the newspaper stands.

In his latest waste of money, entitled “The Amazon is Not Avatar” (see the full-colour eight-page spread in *El Comercio*’s Saturday supplement on 5/6/2010; it must have cost at least 70,000 sols), De Soto³ has come up with another way of manipulating the statistics. He suggests that there are those who state that “*the indigenous people are rich in their own way*”, something I have in fact never read, which of course does not mean that no-one has ever said such a ridiculous thing. What I have read, and personally noted, is that “*the indigenous people are not poor*”, referring to the fact that they still have food, live in a healthy environment and are able to resolve their own internal conflicts. This is, obviously, unless the “development programmes” – settlement schemes and so on - have displaced them from their lands and forests or the extraction industry has polluted their habitat and

harmed their health. The economist’s statement is as absurd as suggesting that when someone says “*not all politicians are corrupt*” what they are actually saying is “*politicians are virtuous in their own way*”.

Let us now take a look at how De Soto uses the statistics to support his proposal that the indigenous peoples’ solution is to convert their lands into a tradable commodity. He seems highly satisfied to have apparently found an overwhelming argument to justify his idea that, “*Five of the poorest districts of Peru (Balsapuerto, Cahuapanas, Alto Pastaza,⁴ and Morona, in Loreto; and Río Santiago, in Amazonas) are located in indigenous areas of the Amazon region of northern Peru*”. Firstly, it must be noted that, according to INEI,⁵ none of the districts mentioned feature among the ten poorest districts of Peru, and nor do any of the regions or provinces he mentions. Secondly, according to the same source, there are many districts with high levels of poverty and yet no indigenous population, including some in Lima. But what De Soto apparently wants to demonstrate with his reference is that the poverty in these districts (in actual fact, Balsapuerto is 12th in the national poverty table and Cahuapanas 16th, fol-



Bellavista community, Cayarú River, Peru – Photo: Mónica Newton

lowed at a distance by Morona – 242nd - and Andoas – 246th -) is caused by the presence of indigenous population living in communities. This is ridiculous, because what the indicators used for measuring poverty actually point to is a lack of State investment in schools, health, sanitation and so on. So instead of questioning the indigenous way of life, what his data is actually questioning is the State, which is far more serious given that at least two of the districts mentioned (“Alto Pastaza” and Morona) are in an area where a high proportion of the Peruvian forest’s hydrocarbons are being extracted by the oil industry.

Perhaps he thinks that, by selling their lands, indigenous peoples will have the money to send their children to Markham College, take out an insurance policy at the Anglo-American Clinic or pay Odebrecht to install sanitary facilities for them?

What right do market propagandists have to try to incorporate or, better put (because they are already incorporated), to cause the dependency of people who, with their own resources, their own intelligence and their own efforts, are constructing their own living conditions, with some independence from trade channels? They may not live an affluent life (why

should this be considered a universal value?) but neither are they condemned to suffer bankruptcy or despair, nor the frustration of having swallowed the tale that modernity (better education, health, sanitation and, above all, more money) is an object within the reach of all those who are ready to grab it (by selling their ancestral territories). Are there not perhaps overwhelming indicators to suggest that the problem lies with the lack of work for millions of Peruvians, the deplorable results of the evaluation of the school system, the critical increase in illnesses among the poorest sectors, the growing social violence that is lashing the whole country and the processes of environmental destruction in which, unfortunately, the indigenous people themselves have become actively involved?

The second reason why the De Rivero article helped me to overcome the difficulty I felt in addressing this issue is because it made me realise that happiness is now an indicator of quality of life and well-being used by statisticians in the developed world. My thoughts, however, run in an opposite direction to theirs, firstly because we start from totally different national realities: rich, highly industrialised societies

versus a society such as this, impoverished by metastatic corruption, with politicians who prefer to dish out national resources in return for under-the-table backhanders than to do an honest job of building the country for the benefit of all citizens.

One difference between these societies is that, in Peru, there are indigenous peoples who, despite being integrated within national networks that dominate the whole country (and which cause their worst problems: contamination of their habitat; unequal market exchange; loss of own knowledge appropriate to their reality, in exchange for the basics acquired at school, etc.), manage to maintain a degree of autonomy that would enable them, with substantial improvements in State services, to strengthen a development option that is based not only on increased GDP but on their peoples' capacity to manage the environment sustainably.

How do the people of developed countries explain happiness? Their response is in line with De Rivero's approach in the above article which, in turn, was based on different studies of this issue. The main factor in happiness is money, not only for the essentials but for much more: *"to buy and consume the new needs created by the market and publicity"* (ibid: 4). As such needs are limitless, the search for happiness becomes stressful and ends ultimately in unhappiness. One car is not enough, you have to have two — especially if that is what your neighbour has — and you have to trade it in regularly to keep up with the latest model; not just one house, you need another at the beach and, better still, one in the country as well as one in the town, and so on *ad infinitum*. This is the logic of the system: endless production and consumption because, the day it stops, the system will collapse. The recent economic crisis in the United States was a warning sign. Caused not by bad governance, it instead arose as a manifestation of a systemic crisis in consumerism. Other manifestations of such a crisis are climate change, biodiversity loss, growing mountains of waste (even biodegradable, not to mention the Dutch problem of its porcine population's waste, which is far greater than that of its human population) and so on. GDP is thus, clearly, a notable indicator of the barbarity of the current system, although perhaps we are currently incapable of evaluating its havoc and must hope that future generations will do this for us.

Doubts have, however, arisen recently with regard to considering GDP as an indicator of happiness, above all because it has been noted that growth in GDP does not necessarily imply growth in people's income. This is the case in Peru and 134 other coun-

tries, where incomes only grew by 2.3% over the period 1960-2008, insufficient to put an end to national poverty, far less bring monetary happiness to their inhabitants. Referring to the lack of correspondence between these factors in the United States, the winners of the Nobel Prize for Economics, Joseph Stiglitz and Paul Krugman, state that growth in GDP since 1990 has only benefited some 10% of the population (Ibid.: 5).

Faced with these considerations, indicates the author, the countries of the North have begun to seek new indicators of happiness with which to replace GDP. The Genuine Wealth Index (GWI) has thus appeared, which places greater emphasis on quality of life; and the Happy Planet Index (HPI), which prioritises a long life without harmful impact on the environment. In the United States, Great Britain and other European countries, studies have been conducted and committees formed to study the issue of happiness, creating something of a new discipline that De Rivero terms *"happylogy"*.

And yet notwithstanding these concerns, according to these studies and surveys, the population's perception of the issue has not changed substantially, and people continue to prioritise an income that enables them to consume above and beyond their basic needs. In this regard, says the author, *"Psychologists and psychiatrists have another interpretation of this culture of acquisition. They believe that earning more to buy more is creating a neurosis, which the well-known British psychologist Oliver James calls "affluenza", a syndrome in which there is a permanent anxiety to have more and better, from houses to cars and including all kinds of domestic and personal goods, including bigger breasts, less wrinkles and even larger penises"* (Ibid.: 5).

It is a syndrome in which people identify themselves by what they have and how they look, and this creates a spiritual vacuum that is increasingly common in First World countries or *"affluent societies"*, unlike the developing world where, according to the WHO, such neurosis is virtually non-existent. The compulsion to have and to consume leads eventually to Prozac, an anti-depressant medication that is highly popular in these countries.

The corollary to this is a sad one: the unbridled search for happiness through constantly having more has led the environment to a dangerous place due to global warming and other imbalances and ravages against our habitat; and it has led the people to neurosis, in other words, unhappiness, to the desire to achieve a goal that was not in their minds when they first started out, and to other evils such as obesity, coronary heart disease and various modern-day illnesses.

Things are, in contrast, very different among many indigenous peoples. I do not know what they would understand by the term happiness, and so it would be arbitrary and subjective for me to try to define it. What I do know is that situations are frequently experienced in the communities that could be likened to this. I do not know if happiness is the word to define the way in which families, alone or with others, go about their daily chores, with a joke and a laugh and the time to drink some masato when it gets too hot, or to relax and meet up with friends and family. Anyone who has visited an Amazonian indigenous community will have noted this. It is not that they do not work and earn their daily bread with sweat on their brow, but that this sweat is caused by the heat and not the heavy load imposed on them by competition and consumerism.

“Good living” is an indigenous concept, as developed in a superb book by my colleague, Luisa Elvira Belaunde⁶ and others.⁷ It is a concept which, in theory, would seem to be very similar to what researchers in the developed world are attempting to achieve by replacing GDP with quality of life (albeit inconsistently, because they always end up prioritising consumption). She refers to the fact that, during her stay in a Secoya community, she heard “men and women repeating words such as: ‘you have to live like people’ (Pai Paiyeje Paidi); ‘you have to live well’ (deoyerepa Paiye); ‘you have to think well’ (deoyerepa cuatsaye). Instead of calling on principles of political organisation and social hierarchy to maintain order and the good spirit of the community, they were calling on each other’s capacity to contribute effectively to their own personal well-being and to the development of collective life” (Belaunde, L.E. p. 28).

It was precisely in a visit that I made to a Secoya community in October of this year, albeit in the upper Putumayo basin and not that of the Napo where my colleague Luisa Elvira Belaunde conducted her work, that, when faced with the question of what they considered to be a right, two groups of teenagers (between 12 and 17 years) both said virtually the same thing, although phrased differently: “It is a right to live well, to think well”.

What right does the market economy have to destroy their lives in order to force them to become dependent on a chaotic and destructive model that is in clear crisis and incapable of giving work and wealth to those who have no alternative other than to sell their own labour? If anyone thinks that this evil will last more than 100 years and that the people will withstand it, they are not truly seeing the severity of a cri-

sis that is now unstoppable for lack of any will to change direction, and probably also any possibility of doing so.

Or is it simply a suicidal desire to drag everyone down with them? ○

Notes

- 1 Oswaldo de Rivero, *Mas de dos siglos buscando la felicidad*. In *Le Monde diplomatique*, August 2010, pp. 4-5.
- 2 The indicators used to evaluate poverty and development within a particular group are in actual fact the same but used in reverse: whilst the first measure deficiencies (illiteracy, lack of services), the latter consider progress (literacy, services provided).
- 3 Peruvian economist, founder of the *Instituto Libertad y Democracia* in 1980. Advisor to President Alberto Fujimori during the first years of his government. Co-author of the book *El Otro Sendero* and author of *El Misterio del Capital*, in which he supports his neoliberal position.
- 4 I assume this refers to Andoas district, as Alto Pastaza does not exist.
- 5 I quote: “The results show that the country’s poorest districts are located in La Libertad Department: Ongón (Pataz Province) with 99.7% total poverty and 97.2% extreme poverty and Bambamarca (Bolivar Province) with 98.7% total poverty and 92.4% extreme poverty. It should be noted that, of the ten poorest districts, six are in Huancavelica Department: three in Tayacaja Province (Tintay Puncu, Salcahuasi and Surcubamba), two in Angaraes Province (San Antonio de Antaparco and Anchongo) and one in Churcampa Province, which is Chinchihuasi district”. (Mapa de Pobreza Provincial y Distrital 2007. El enfoque de la pobreza monetaria. Technical Department for Demographics and Social Indicators. Lima, February 2009. p.35)
- 6 Luisa Elvira Belaunde, *Viviendo Bien*. CAAAP. Lima. 2001. She gained her first degree in philosophy in 1985 and a Master’s in 1986 from Louvain University, Belgium. She obtained a doctorate in Anthropology from the University of London in 1992.
- 7 Carlos Viteri, “¿Existe el concepto de desarrollo en la cosmovisión indígena?” (mimeo).

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INDIGENOUS JUSTICE IN BOLIVIA

in the Context of the Plurinational State

Elba Flores Gonzáles



The Denial and Persistence of Indigenous Justice

The colonial process was a key moment in the history of America's indigenous peoples. From 1825 on, an exclusionary and monocultural model became established in Bolivia that persisted despite the arrival of the Republic at the start of the 19th century, the founding of the Nation State in the mid-20th century and other subsequent processes.

The term "Indian", by which the people who inhabited these lands were known, was considered synonymous with savage; these people were (even) considered inferior and "soulless" beings. This social exclusion was intricately linked to the Catholic Church's process of evangelisation and, consequently, the imposition of this religion throughout the continent. The conversion of the "Indians" was sought on the basis of Judeo-Christian morals, and promoted by means of laws laid down by the "white society". This "white society" established the politico-military and religious institutions with which to progress this task, on the assumption that such work lay within the context of the divine and royal right it had been granted to apply its hegemony.

The Catholic Jesuit and Franciscan missionaries arrived in what is now Bolivia, and particularly the Bolivian lowlands, with the aim of protecting the natives from slave hunters, particularly those making incursions from Brazil. They established *reservations*,¹ urban centres of indigenous habitation in which forms of social, political and economic organisation were imposed with the ultimate purpose of converting the population to Catholicism.

The missionaries established a form of socio-political organisation known as *Cabildo* ('local government') in these reservations whereby the indigenous people themselves administered justice, albeit with the competence only to hear *minor cases*, and provided the decisions were not in contradiction with the law or Christian norms. *Major crimes* were heard by the missionaries. Indigenous justice was thus subordinate to the colonial institutional framework and law.

The advent of the Republic, with its liberal foundations, simply reproduced the institutional framework, practices and vision of the colonial world on the basis of a philosophy that continued to prioritise the assimilation and integration of anything different in order to encourage a supposed "equality" before the law. Cultural diversity as a whole was therefore excluded, socially, politically and legally, from the

formation of the Republic and its newly emerging institutional framework, and this led to constant uprisings on the part of the "Indians" against the new regime and its attempts to integrate them, in total disregard of their rights.

During this period, Bolivia tried to integrate the lowlands through economic development based on natural resource extraction, the most symbolic being the rubber tapping of the north-east Amazon. This process was made possible through the exploitation of indigenous labour under conditions of slavery. The peoples who are now claiming indigenous status in the lowlands were coerced into bonded labour during the boom in rubber and in traditional agricultural and livestock farming estates, in order to serve the masters of those establishments as slaves, depriving them of their most fundamental rights.

Other indigenous peoples such as the Sirionó, Ayoreo and Ese Ejja,² to name but a few, were brought under the tutelage of evangelical and protestant missions, established around the middle of the 20th century. The 1952 National Revolution, charged with the homogenisation of the country, declared the lowlands indigenous peoples to be *selvícolas* or forest peoples, thus placing them under the guardianship of State and Church. This approach created a lack of awareness of "difference" in the new state policies and led to an attempt to forcibly integrate these peoples into a monocultural national society.

Notwithstanding this history of cultural denial and the perpetuation of the colonial institutional framework, and hence its legal system, indigenous justice continued to be practised within the communities and peoples, although completely subordinated and subjugated. Its persistence was due largely to its great capacity to adapt, reform and thus mould its institutions to what was being provided by the State, in line with their needs and cultural practices.

Indigenous justice is the expression of these peoples' world vision; it reflects their way of seeing, being and understanding the world, both in their relationship with nature and amongst themselves. In other words, it is a system for regulating the social life of the communities and the territory. It is born from within, on the basis of cultural knowledge, wisdom and practices that are stable over time. For this reason, it is a living element within the peoples that contains two basic guiding principles of life: harmony and balance, as understood in their three-dimensional relationship: community/people, nature and cosmos. Based on cultural values, it has a system of institutions and authorities that enjoy social prestige

and have the legitimacy to apply sanctions according to their own conflict resolution procedures and who also have the power to hear and resolve all kinds of matters arising within the sphere of their jurisdiction, from minor cases to conflicts over land.

Although the main purpose of indigenous justice is to maintain the harmony and balance of nature and to regulate individual and collective human behaviour in the relationships that people establish with nature and amongst themselves, the relationship with the environment must also be included as this is considered an integral part of the cosmos. In this regard, the presence of the spirits and masters of the natural world³ takes on vital importance in the symbology of the indigenous world, as they fulfil the role of guardians of the forests⁴ and intermediaries with the magical/spiritual world, forming the indigenous world system: man-nature-cosmos present in the forest.

The purpose of indigenous justice and its application is to compensate, restore and rehabilitate the indigenous brother or sister into communal life through the power of words, dialogue and reflection, in order to restore and/or compensate for the damage caused.

Indigenous Justice and the Plurinational State

The 1994 Political Constitution of the State still continued to inherit the colonial framework imposed since the Republic. Whilst progress was made in terms of recognising the rights of indigenous peoples to administer justice by granting powers to their authorities, they were not allowed to transgress the constitutional framework or organisational structure of the judiciary; in other words, indigenous justice was seen as an alternative way of resolving conflicts but one that was subordinate to ordinary law, and at no point did a break occur with the colonial mentality of this cultural approach or with the logic of the institutional structure of power.

In the demonstrations of the 1990s and, later, with the call for a Constituent Assembly in 2002, the indigenous peoples questioned the foundations on which the Nation State had been laid. In this process, they managed to include a large part of their platform of historical demands in the social movements' proposals, which would be debated in the Constituent Assembly. In fact, the new constitution focuses fundamentally on recognising the pre-colonial and pre-republican existence of indigenous peoples, on recognising territoriality in its different dimensions, collec-

tive rights, the right to self-determination, to participation and representation in the State's institutional framework according to their own rules and procedures, and pluralism, which is expressed throughout the whole architecture of the new emerging State, termed the Plurinational State.

The new 2009 Political Constitution of the State consolidates a plural framework in areas as varied as the political, social, cultural, economic, legal and linguistic spheres. In this context, legal pluralism, as a guiding principle, recognises the co-existence and co-habitation of different legal systems within the same geopolitical space, and community justice consequently becomes a central theme within this concept of recognising diversity as the basis of the Plurinational State.

This is clearly reflected in Article 2 of the Political Constitution, which recognises the existence of indigenous peoples prior to the colonial invasion, their ancestral control of their territories and, in turn, guarantees their self-determination within the context of State unity. This self-determination consists of the right to autonomy, self-government, exercise of their culture, recognition of their institutions and consolidation of their territorial bodies.

All this is protected by international legal instruments that recognise indigenous rights, such as ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, instruments which establish the right to self-determination, autonomy and self-government but, above all, the right to preserve and strengthen one's own institutions and develop or maintain one's own legal systems.

This Political Constitution of the State also recognises fundamental individual and collective rights; in other words, it recognises the indigenous peoples as collective subjects of rights, in which their own legal systems form part of their identity and cultural integrity. In this respect, Article 30, paragraph II, indent 14, indicates: *Indigenous peoples enjoy the right to exercise their political, legal and economic systems in accordance with their world vision.*

The main features of the legal pluralism that is established in the Bolivian Constitution in the context of the Plurinational State are as follows:

Hierarchical Equality between the indigenous, native and *campesino* jurisdiction, the ordinary courts, the land and environment courts and all constitutionally recognised jurisdictions; in other words, all are of equal rank and level, none can subordinate or interfere with the others, and each

must respect the decisions adopted by the others.

Human Rights. This establishes that the indigenous jurisdiction shall respect the right to life, along with the defence and guarantees established in the Constitution (Art. 190).

Jurisdictional Guarantees. This establishes that all rights recognised in the Political Constitution of the State shall be directly applicable and shall enjoy equal guarantees for their protection (Art. 109).

Equal Opportunities. The parties to a conflict shall enjoy equality of opportunity during the case to exercise the powers and rights granted them either via the ordinary or the native indigenous path (Art. 119).

Within the vision of the Plurinational State, it is established that there shall be *just one judicial power* throughout the territory, exercised by the judicial branch through the following jurisdictions:

The **Ordinary Courts**, by the Supreme Court of Justice, Departmental Courts of Justice, Trial Courts and Judges.

The **Land and Environment Courts**, by the Land and Environment Tribunal and Land and Environment Courts.

The **Indigenous, Native and Campesino Jurisdiction** is exercised by their own authorities, according to their own rules and procedures.

Specialist Jurisdictions regulated by the law (Constitution, Act governing the Judicial Branch). With reference to the new institutional framework for the judicial branch, people – men or women – that are members of the indigenous, native and *campesino* nations and peoples have the possibility of sitting on the Plurinational Constitutional Court, if they are proposed by their social organisations. The requirements are, among other things, that they must have held a position within the native authority and have exercised their system of justice in accordance with their own rules and procedures (Art. 199. I-II.).

The Indigenous, Native and Campesino Jurisdiction

By extending the State's recognition and promotion of indigenous justice which, as previously noted, already existed given its legitimacy as an age-old practice within the communities and peoples, the Constitution now establishes that the native indigenous nations and peoples have jurisdictional powers and competence to resolve their problems within their own bodies and through their own authorities, applying their principles, values, cultural norms and own procedures in the administration of community justice.

The indigenous jurisdiction shall exercise its powers in the personal, territorial and material spheres (Art. 191).

The indigenous jurisdiction is based on the particular link people have with an indigenous nation or people and who are thus subject to that jurisdiction, whether acting as respondent or defendant, plaintiff or appellant within the community justice system. This jurisdiction applies to legal relationships and events that happen or the effects of which occur within the jurisdiction of an indigenous, native and *campesino* nation or people.

The indigenous jurisdiction may hear and rule on all issues, regardless of the severity of the events, that occur within their jurisdiction. At the discretion of the indigenous jurisdiction, particular cases may be referred to the ordinary courts, such as those affecting public assets, customs offences, drugs trafficking, corruption and crimes against humanity.

In addition, the Constitution establishes that the indigenous authorities' *decision* has the status of *res judicata* or judgement and cannot be reviewed by another jurisdiction (Art. 192). For its part, the current Criminal Code of Procedure establishes that: "*The criminal action shall be extinguished when the crime or offence is committed within an indigenous and campesino community by one of its members against another and their natural authorities have resolved the conflict in accordance with their indigenous customary law*". The indigenous authorities' decision is binding and all public authorities or people must comply with the decisions of the indigenous, native and *campesino* jurisdiction. The indigenous authorities may request the support of the competent State bodies to ensure compliance with the rulings adopted in the administration of justice (Art. 192. para II).

Finally, the Constitution recognises *Indigenous, Native and Campesino Autonomous Governments* the power

to exercise indigenous jurisdiction, granting exclusive competence to this autonomous territorial entity. Article 304, indent 8 stipulates the power of indigenous territorial governments to “...*Exercise indigenous, native and campesino jurisdiction in the application of justice and conflict resolution through own rules and procedures in accordance with the Constitution and the law.*” In this respect, the Framework Law on Autonomies and Decentralisation establishes that the minimum content of Indigenous Statutes of Autonomy must include reference to the administration of justice in the autonomous territorial entity.

Indigenous Justice and the Draft Jurisdiction Act: Views and Discussion

Article 192, para III of the Constitution indicates that a Jurisdiction Act shall establish the boundaries, the levels of coordination and the cooperation between the different jurisdictions recognised. Among other things, this law shall have the following tasks:

- To establish the boundary of the indigenous, native and *campesino* jurisdiction in relation to other constitutionally recognised jurisdictions.
- To establish the mechanisms for coordination and cooperation between the indigenous native and *campesino* jurisdiction and the ordinary courts, the land and environment courts and other constitutionally recognised jurisdictions, within a framework of legal pluralism.
- The Jurisdiction Act will also need to set the boundaries, scope, spheres and powers of the indigenous jurisdiction and other constitutionally recognised jurisdictions, in the context of respect for civic rights and guarantees.

Among the proposals that have been presented with regard to the Jurisdiction Act can be found common views, disagreements and also some issues that require further deliberation, and which we will attempt to summarise below.

It is clear that, in the context of the Political Constitution of the State, the proposed Act must be based on respect for fundamental rights such as respect for life and free exercise of the right to defence, death not being a punishment that is compatible with the application of indigenous justice. It will, however, also need to specify that the indigenous peoples are not homo-

geneous and, therefore, when sanctions are applied, some of these could create problems of constitutionality for being in violation of human rights. One such example is whippings, the function of which is more symbolic and compensatory from a cultural point of view than as a form of corporal punishment.

Despite progress in and recognition of indigenous justice, when a lynching occurs or when the community takes punishment into its own hands, this is often identified as indigenous justice, and has led to stigma and a discrediting of such “barbaric acts”. It must be made clear in this regard that a lynching is not community justice but rather a serious crime and human rights violation that occurs through a lack of law (ordinary and indigenous) and, thus, of the State. Such situations must be prevented and punished as they distort the values that underpin indigenous legal systems.

In reference to material, territorial and personal competences, the basic criterion is that the Jurisdiction Act must be as detailed and precise as possible; it must not be limited to generalities that could give rise to conflicts of power between jurisdictions. For example, when reference is made to territorial competence, it must be clear that this is expressed in the communities, indigenous territories and indigenous autonomous entities, as it is in these jurisdictions that territoriality is exercised in line with the indigenous world vision.

Segmented assessments can also be found, such as those that consider that indigenous justice relates only to community justice or that the two are synonymous, confining them only to the rural sphere, in other words, that indigenous justice is applicable only in and for the community, thus excluding the element of extraterritoriality, which is applicable given that there are peoples living in urban areas. Such is the case of the Mojeño indigenous people in the Cabildo de Trinidad or the Ayoreo indigenous people who live on the outskirts of Santa Cruz in the two districts (communities) of Bolívar and Garay, and who also administer justice outside of their ancestral territory when their rights are affected or when conflicts arise between community members. In these cases, some suggest that it would be impossible to establish indigenous jurisdiction in urban areas, while others feel that this situation would give rise to a new form of justice, which might be possible insofar as it was aimed at members of indigenous

peoples and did not affect the “non-indigenous” community.

Justice is applied between members of an indigenous, native and *campesino* people who accept their belonging and thus subject themselves to its institutional framework, its rules and own procedures. But what happens when someone outside the community commits a crime or when a member of an indigenous community commits a crime outside of its jurisdiction? The first point to be established is that there must be equal handling and equal powers between jurisdictions established in the Political Constitution of the State, unless the institutional framework of one jurisdiction decides to refer the case to another.

Another issue of debate revolves around intercultural⁵ and Afro-Bolivian communities, in terms of their power to administer justice and their competence to hear and resolve legal issues that occur on their land. This is a rather complex situation if indigenous justice is understood as being age-old, ancestral and stable over time despite the oppression that occurred during colonisation and the establishment of the Republic, and also that it is endowed with an institutional framework and its own rules and procedures. It is a different matter when referring to intercultural communities, however, who - although made up of native migrants from different highland peoples - are organised within union structures alien to their own native age-old culture. These are based on local branches and unions up to federations and the national confederation, which all clearly claim their collective rights and the administration of justice in the context of the Organic Statutes and Regulations produced in line with union rules. Faced with this position, there are those who believe that to add or include the intercultural and Afro-Bolivian communities as jurisdictions would present constitutional problems given that the Constitution itself does not expressly recognise these jurisdictions.

In summary, since the recognition of legal pluralism, there has been a break with the classic concept of legal monism and a momentous step has been taken for indigenous peoples towards legalising their pre-existing justice systems. The challenge now is not to try to separate the two kinds of justice but, on the contrary, to complement and build a new institutional architecture for the judicial branch, in a context of mutual respect, reciprocity, coordination and complementarity. For this reason, the proposed Jurisdiction Act must clearly establish all the aspects

noted above so that it can guarantee the full validity of the indigenous legal systems recognised by the Constitution. ○

Notes

- 1 The Reservations (*reducciones*) began with the arrival of the Jesuits, 130 years after the foundation of Santa Cruz de la Sierra. This process began in 1691 and lasted until 1767, a period during which 10 reservations were established; the first was San Francisco Javier in 1692, founded by Fr. José Arce.
- 2 All contacted at the start of the 20th century and now at high risk. Camacho, Carlos. Report 7 IWGIA. 2010.
- 3 Also known as the “*Jichi*” by the Chiquitano people, “*Ichinichichana*” by the Mojeño people, “*Edosiquiana*” by the Esse Eja people and “*Iyabae*” by the Guarayo people, to name but a few.
- 4 For the indigenous peoples of the jungle and river, the *forest* includes all the elements of nature and involves the supernatural, namely, water, land, air and everything living in it; it represents both the living world and the magical/spiritual world, and the guardians that establish the relationship with supernatural forces and the cosmos.
- 5 The peasant farmers affiliated to the *Confederación Sindical de Colonizadores de Bolivia* (CSCB, currently self-identify as intercultural communities. This organisation was founded under the influence of State settlement programmes aimed at the country’s lowlands.

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The Indigenous Human Right to Development

Dalee Sambo Dorough



Introduction

In 2007, the Indigenous world celebrated the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Across the globe, Indigenous peoples remain focused on its content, implementation and, ultimately, its full realization. In many ways, the keystone to achieving the standards embraced by the Declaration is essentially the human right to development. Indeed, the Declaration on the Right to Development¹ (hereinafter Development Declaration) specifically calls for “universal respect for and observance of all human rights and fundamental freedoms” and that “equal attention... should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.” To be sure, this objective was shared by Indigenous peoples throughout their twenty-five year struggle to gain the UNDRIP and, in particular, recognition of their distinct cultural context in relation to such rights.

The UNDRIP itself represents a crucial “development” for Indigenous peoples and it can and should be seen as complementary to the Declaration on the Right to Development and the subjective nature of this human right. Indeed, the subjective nature of human rights is also reflected in the preamble to the UNDRIP, by specific reference to the right to be different as well as the language concerning the “regional particularities and various historical and cultural backgrounds” of Indigenous peoples and their communities. In many ways, Indigenous peoples and states have contributed to the expansion of the human right to development through the UNDRIP.

This brief article will address the right to development in the context of the UNDRIP and the changing dynamics of this right within Indigenous communities. The nature of the right of Indigenous peoples to self-determination and the related element of the right to participate in development will also be surveyed. Here, a short commentary on the Alaska Native Claims Settlement Act will be offered. In addition, the significance of sustainable and equitable development will be addressed in relation to the practical effects of realizing the human right to development and the corresponding state obligations in the context of existing instruments, including the UNDRIP.

Interdependent Rights: Self-Determination and Development

There is no doubt that the right of self-determination was maintained by Indigenous peoples as the headline of the debate and negotiation of the UNDRIP. From the earliest drafting initiatives of Indigenous peoples, the right of self-determination was underscored. The intersection between development and the right of Indigenous peoples to self-determination is explicitly referenced in Article 3 of the UNDRIP:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Throughout the UNDRIP debates, Indigenous peoples also insisted upon recognition of the right of self-determination as a pre-requisite to the exercise and enjoyment of all other human rights. Likewise, a major feature of the Declaration on the Right to Development is the recognition of the inter-dependent, inter-related, inter-connected and indivisible nature of all human rights and the objective of eliminating obstacles resulting “from failure to observe civil and political rights, as well as economic, social, and cultural rights.”² More specifically, Article 1(2) of the Development Declaration provides that “the human right to development also implies the full realization of the right of peoples to self-determination.” This intersection of rights and standards must therefore ensure that the right of self-determination is the starting point for attaining the human right to development. Thereafter, all other standards and principles can flow from the pre-requisite right of self-determination.

The UNDRIP not only makes specific reference to the right of self-determination but it also refers explicitly to Indigenous peoples’ right “to be secure in the enjoyment of their own means of subsistence and development” in Article 20 and the “right to development” in Article 23, which provides that “Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development...to be actively involved in developing and determining...programmes affecting them... and to administer such programmes through their own institutions.” Another direct reference to development can be found in Article 32, which states that “Indigenous peoples have the right to determine and develop priorities and strategies for the devel-

opment or use of their lands or territories and other resources.”

In addition, the related preambular paragraphs 6, 9, 10, 11, 12, 16, 21 and 22 and Articles 11, 12, 13, 18, 26, 31, 34 and 36 of the UNDRIP must also be noted, as they are all forms of development. A number of other articles indirectly reference development, such as the use of “enhancement” in the preamble and the use of “improvement” in Article 21. Furthermore, the use of the term “may acquire” in Article 45 is indicative of the development of additional standards and means by which Indigenous peoples can develop.

This array of expressions of development is significant in demonstrating how far-reaching and expansive the term has become in the context of Indigenous peoples and the fact that, in relation to Indigenous human rights, the world community has established standards that have purposefully moved away from both large-scale or mega-project economic development to one that attempts to capture the comprehensive notion of the human right to development. Another important dynamic of much of the direct and indirect language of the UNDRIP is the fact that states have a duty or obligation to provide technical and financial assistance for Indigenous development, instead of shunning even the possibility of Indigenous peoples’ participating in the process of development or imposing development projects. The standard is now a duty to assist but also a duty to guarantee the direct participation of Indigenous peoples in development processes. This will be further discussed below in relation to other obligations that states have undertaken relevant to the right to development.

Participation, Consultation and Consent

One of the most crucial dimensions of the right of self-determination is the right to participate in all international, national, regional and local processes relevant to the right to development. The direct involvement of Indigenous peoples is necessary to ensure that the oppression, denial of rights, discrimination and adverse impacts caused by the prevailing model of development do not continue.

Articles 18 and 19 provide for “the right to participate in decision-making” and the obligation of states to “consult and cooperate” with Indigenous peoples “in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may af-

fect them.” Furthermore, Articles 10 and 11 make mention of free, prior and informed consent.

Each of the UNDRIP articles provides the necessary counterbalance to their “right to be actively involved” in development processes or, more significantly, the affirmative obligation of states to “consult and cooperate” with Indigenous peoples “in order to obtain their free and informed consent prior” to initiating projects “affecting their lands or territories and other resources.”

Self-Determination, Participation and Consent: The Experience of Alaska Native Peoples

The discovery of oil on Alaska’s North Slope in 1968 prompted demands by Alaska Natives for the United States to address their outstanding legal claims to the territory. Recognizing the surrounding legal issues that could be argued in favor of the Native peoples, the non-Native stakeholders determined that legislation or a unilateral Act of Congress would optimize their interests. Throughout the crafting of the legislation, there was minimal Alaska Native participation and no full and formal referendum, certainly not in the context of the current provision of consent as found in Article 19 of the UNDRIP.

The final text of the Alaska Native Claims Settlement Act of 1971 (ANCSA) provided for 44 million acres of land (roughly 10% of the original Indigenous territory) and \$962.5 million in exchange for lands lost. Rather than transferring Indigenous lands and assets to traditional institutions, they were placed in the hands of profit-making corporations: 12 regional corporations and over 200 village corporations. The regional corporations retain subsurface rights to those lands conveyed to them as well as subsurface rights to those lands conveyed to the villages. There was no recognition of self-government or self-determination as reflected in Articles 3 and 4 of the UNDRIP.

The ANCSA provided for a 20-year time period (from 1971 to 1991) to create and increase the capacity of the Alaska Native peoples responsible for the corporate operations. Those born on or before December 1971 who were one quarter Native blood or more were enrolled as shareholders in the corporations. During this period no transfer of land, no taxation and no alienation of shares was allowed. Such an extensive and specific prescription of the content of collective human rights of Alaska Native peoples resulted in the subjugation of their values, customs,



practices, and institutions. In contrast, the language of Articles 20 and 33 (respectively) of the UNDRIP recognizes the right of an Indigenous people to “maintain and develop their political, economic and social systems or institutions” and to “determine their own identity or membership in accordance with their customs and traditions”, both of which are important elements of the right of self-determination.

Moreover, despite the 1966 International Covenants, which state that “[i]n no case may a people be deprived of their own means of subsistence,” the 1971 ANCSA purportedly “extinguished” hunting and fishing rights. Further, the ANCSA purportedly “extinguished” rights to all lands lost. The 20-year time period provisions essentially allowed for the exposure of lands and assets after 1991. There have been some successes, especially at the regional corporation level. However, there have been failures as well. In some cases, villages have actually disappeared. The ANCSA has been regarded by many as an act of social engineering and assimilation and, ultimately, termination.

At present, there is an urgent need for the Alaska Native community to re-examine the impact of the ANCSA, especially in light of the significant developments concerning international human rights law, and the UNDRIP specifically. Alternatives exist and there appears to be a desire, especially amongst the younger generation ‘disenfranchised’ by the Act, to re-group or rise up in order to address the outstanding issue of self-determination and chart a course for genuine de-colonization. A recent gathering of tribal government representatives attests to the reality of tribal values, distinct political institutions, and the issues of concern to their respective communities.³ In addition to tribal self-determination and the UNDRIP, the Alaska Native tribal leaders in attendance focused upon the “restoration of rights” ranging from land rights to hunting, fishing and gathering rights to health and well-being.

There is a real need to enshrine not only the hunting and fishing rights of the Inuit and other Alaska Natives in state and federal law but also to recognize and guarantee the matter of tribal self-determination. The possibility for reparations, as noted in Article 21 of the UNDRIP, could become a factor for some Alaska Native communities. Finally, some provision for the return of lands to the traditional institutions in order to safeguard them from loss should be explored in order not to further disenfranchise Alaska’s “First Peoples”. There are immense benefits to recognizing and respecting such rights and the

movement and desire of tribal governments should not be seen as a threat to the existing structures, organizations and political forces.

In regard to the notion that the ANCSA could be utilized as a model for Indigenous peoples and their desire for affirmation of their rights, especially to lands, territories and resources, as well as to pursue development, since the emergence of other agreements and the UNDRIP, a more comprehensive approach deserves attention. In particular, and as a minimum, any arrangement should include, inter alia, the following elements:

- a comprehensive approach to self-determination and autonomy should be a major feature to ensure that the Indigenous peoples concerned have full recognition of and respect for this essential, pre-requisite right;
- any agreement must be arrived at in good faith between the parties and consistent with the right of free, prior, and informed consent and full consultation and direct participation of the peoples concerned through their genuine, representative political institutions and leaders;
- the implementation of free, prior, and informed consent must also include referenda on the basis of transparency and full disclosure;
- the relevant articles of the UNDRIP woven together to ensure the maximum total area of lands and territory possible as well as corresponding surface and subsurface resources, including the expansive nature of the term "territory", which may include watersheds, coastal and off-shore areas, etc.;
- the land tenure systems of the Indigenous peoples concerned should be the basis for the holding of title, ownership and control;
- an affirmation of the full range of "subsistence" rights necessary for the survival and well-being of the Indigenous peoples concerned; this includes hunting, fishing, harvesting, agricultural activities as well as any and all traditional and other economic forms of material and productive relationship that Indigenous peoples have with their respective lands, territories and resources;

- full recognition of and respect for the right to determine their own priorities for development, including the possibility of implementing their own distinct economic development initiatives and that such initiatives be pursued within the framework of the right of self-determination and not segregated from the essential elements of the collective human rights of the Indigenous peoples concerned in all areas of economic, social, cultural, spiritual and political development;

- that the Indigenous peoples concerned exercise their right, in the context of self-determination and autonomy, and authority to determine their own membership and the rights and responsibilities of their members;

- that the Indigenous peoples concerned also exercise authority, jurisdiction and control over the lands, territories and resources subject to the terms of the agreement; and

- that safeguards concerning Indigenous rights and potential impacts stemming from adjacent lands and territory are incorporated into an arrangement or agreement, recognizing the potential for trans-boundary issues and the need for cooperation and shared management of all relevant matters.

In this way, Indigenous peoples can be assured that the whole of their integrity as distinct peoples can be safeguarded as well as the inter-generational nature of their individual and collective human rights and fundamental freedoms. If this list is held up against the backdrop of the provisions of the ANCSA, the dramatic contrast between securing basic human rights in a comprehensive fashion and the grave omissions of the ANCSA are clearly revealed. In addition, Indigenous peoples will have a greater ability to ensure the democratic principles of good governance, and sustainable and equitable development, within an Indigenous world, will in fact be guaranteed. Such an approach could also provide the ways and means for giving full effect to the right of Alaska Native peoples to self-determination and genuinely determining "their political status and to freely pursue their economic, social and cultural development."

Sustainable and Equitable Development

The UNDRIP also makes reference to the notion of “sustainable and equitable development” in preambular paragraph 11. It is useful to underscore some of the basic premises of the concept of “sustainable and equitable development”, especially in light of implementation of the UNDRIP standards. Article 29 provides for conservation of resources, which has traditionally been thought to be the underlying objective of sustainable development. The need for this balance is also captured in the reference to “future generations” in Article 25. Indeed, the World Commission on Environment and Development report referred to sustainable development as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴

Equitable development, on the other hand, has not been fully elaborated upon in the Indigenous context. As noted above, the emphasis within the UNDRIP has been upon the provision of financial and technical assistance by states in order to ensure development within Indigenous communities and improvement in the day-to-day lives of Indigenous individuals. However, the significance of equitable development is the realization of equality of opportunity, a direct share in benefits, and fair and equitable distribution of benefits. Some of the principles that should be included in the understanding of “equitable development” are:

- developments in or affecting Indigenous lands, territories and resources must not undermine, but rather enhance the economic, social, cultural and political development of Indigenous societies;
- development must not be imposed on Indigenous peoples without their free, prior and informed consent and must fully accommodate Indigenous values and concerns;
- development initiatives by Indigenous peoples themselves should be encouraged by ensuring significant and accessible opportunities, including government support, cooperation, and assistance;
- development should only take place at a rate and pace compatible with local communities;

- Indigenous peoples must participate equitably in the benefits of development, in a manner acceptable to them;
- culturally appropriate technologies should be used.

Equitable development must mean equal opportunity, equal access and the removal of any inequalities or disparities that may exist. Furthermore, there must be an emphasis upon decentralization of decision-making.

It is well-known that the history of development and Indigenous peoples has been quite negative, yielding only adverse impacts upon Indigenous communities and their lands, territories and resources. However, in some regions of the world, we are at a new crossroads: one in which Indigenous peoples have gained control over their own destinies as well as their lands, territories and resources and they are now considering the direction of their own development strategies. In this context, it is crucial that the same human rights standards and principles are abided by. In the same way that Indigenous peoples have argued that they must be active subjects of international law and the human right to development in the UNDRIP debates, so too must Indigenous peoples be held to the same standards when engaging in economic, social, cultural and political development activities.

In some parts of the world, Indigenous peoples are witnessing a new phenomenon of heated debate and division over development activities, formerly imposed by “outsiders”. Throughout the North there are a range of examples. However, more recent debates include oil and gas development in Alaska, Greenland and Nunavut. In Alaska, the debate about off-shore drilling has centered on the potential impact on bowhead whaling and the Inupiat culture generally as well as industry’s capacity to safeguard against a disaster such as the BP Gulf of Mexico blowout. In Greenland, heated discussion has surrounded both mining and off-shore oil and gas development. In regard to the latter, the Qikiqtani Inuit Association (QIA) has actually filed an injunction against the government of Canada as well as a Nunavut Minister and Nunavut Commissioner concerning a violation of their duty to consult in order to adequately protect their harvesting rights as well as to provide adequate mitigation efforts in relation to the Eastern Canadian Arctic Seismic Experiment for oil and gas exploration.⁵ The fundamental questions related to Indigenous sustainable and equita-

ble development gained attention at the recently concluded Inuit Circumpolar Council 11th General Assembly, held from June 28 to July 2, 2010 in Nuuk, Greenland. In this regard, Inuit political leaders specified “as a matter of urgency, to plan and facilitate, an Inuit leaders’ summit on resource development with the aim to develop a common circumpolar Inuit position on environmental, economic, social, and cultural assessment processes....”⁶ The fact that they collectively determined it best to schedule and hold a lengthier debate on the matter is indicative of a broad spectrum of views on potentially life-changing matters.

Practical Effects of Attaining the Right to Development

In light of the forthcoming review of the Millennium Development Goals (MDGs) and the fact that we are far from achieving the ambitious objectives originally set by the world community, it may be useful to recall some of the basic human rights law related to the concept of development. The Universal Declaration of Human Rights⁷ is one of the first to give attention to the notion of “social security” as well as economic, social, and cultural rights and a particular “standard of living” and health and well-being. The codification of some of these standards can be found in the International Covenant on Economic, Social and Cultural Rights, which of course begins with the pre-requisite right of self-determination and to freely pursue their economic, social and cultural development.⁸ This right and the associated rights to natural wealth and resources and subsistence in the twin Covenants are also upheld. The UNDRIP and the International Bill of Rights now provide for a unique Indigenous cultural context for the matter of the human right to development that must also be taken into consideration in the review of the MDGs.

Furthermore and specific to Indigenous peoples, International Labor Organization Convention 169, though not entirely adequate, supports the right of self-determination with respect to development. Articles 6(1)(c) and 7(1) provide for the development of Indigenous institutions and initiatives and the government resources necessary for these purposes and the right of Indigenous peoples to exercise control over and decide their own priorities for development. In addition, the ILO language requires Indigenous participation in the “formulation, implantation and evaluation of plans and programs for na-

tional and regional development which may affect them directly.”

The Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰ should be understood as removing discriminatory barriers for Indigenous peoples to ensure the attainment of a standard of living and the equal access to opportunities afforded to other members of society. These instruments address matters ranging from family benefits to training and education to land reform. In this way, they are vitally important and relevant to Indigenous peoples and the question of development. Finally, the Convention on the Rights of the Child (CRC) should be reviewed in light of the specific context and needs of Indigenous children and the human right to development, as to how they intersect with the preambular and operative articles of the UNDRIP.¹¹

Again, the UNDRIP as well as all of the other instruments referenced herein underscore the necessary role of state governments in attaining, enjoying or exercising these very specific development rights, either collectively or individually. Though states did their best to avoid affirmative obligations for financial assistance within the UNDRIP, Indigenous peoples were successful at achieving both specific and general clauses to attain the measure of support and cooperation necessary to narrow the gaps that exist in levels of poverty, standard of living, health and well-being, land and resources rights, and so forth.¹² However, states have also undertaken general commitments under other instruments as well. Such commitments should be reviewed by Indigenous peoples with the aim of insisting upon equitable treatment for the realization of development.

Certainly, the Development Declaration¹³ must be revisited as well as the Rio Declaration and Agenda 21¹⁴ and its specific references to sustainable development not to mention the ongoing, pressing matter of the negotiations of “access and benefit sharing” within the framework of the Convention on Biological Diversity. Similarly, states undertook commitments at the World Conference on Human Rights [1993], the International Conference on Population and Development [1994], the Summit for Social Development [1995], the Beijing Declaration [1995] and in the Second UN Conference on Human Settlements [1996]. In each of these collective state actions, reference was made to sustainable development as well as in some cases, actual state affirmation that “the right to development is a universal and inalienable

right and an integral part of fundamental human rights law and the human person is the central subject of development.”¹⁵

Conclusion

Like the actual need for implementation of the UNDRIP, the MDGs and other international commitments, however, the real test is political will on the part of states to uphold and operationalize their international commitments as enshrined in all of the existing international instruments mentioned herein. It is crucial for our respective federal, provincial and state governments to understand not only the human right to development and those of the UNDRIP but also their obligations concerning our individual and collective human rights.

Like human rights elsewhere, we should insist upon the equal application of the rule of law. We should not tolerate the active discrimination represented by the unequal application of the rule of law in relation to development. Too often, Indigenous peoples have experienced lawlessness or worse: the active and intentional abuses of our human rights throughout our remote communities in the name of development or in the context of nation-state development agendas.

What are the incentives that will prompt states to act? Unfortunately, states have little or no incentive to build legal institutions that would potentially and ultimately support our rights. Rather they see such developments as potentially damaging to themselves and limiting their power or the power of other actors.

An implementation of the MDGs that is consistent with the minimum standards embraced by the UNDRIP will therefore take immense political will. We must find ways to embed the Declaration standards into national, regional and local law and development initiatives. Some of this can be initiated by informing local or field-based government representatives about the UNDRIP and the MDGs from an Indigenous perspective and pursuing case-driven examples of how to implement such standards and the MDG objectives. Such local work can possibly influence local officials, who can become informed, experienced allies and ultimately assets to our communities and leaders.

The benefits or incentives for nation-states are numerous. Possibilities for increased collaboration and cooperation, socio-economic progress and the increased capacity of Indigenous communities are all possible gains. Healthy, viable, Indigenous communi-

ties that are practising sustainable and equitable development would ultimately decrease the expense of good governance for nation-states. Furthermore, Indigenous peoples and their achievements become advancements for nation-states and their human rights records. ○

Notes

- 1 UN Declaration on the Right to Development, General Assembly Resolution 41/128, Annex, 41 UN GAOR Supp. (No. 53) at 186, UN Document A/41/53 (1986) adopted b7 146 votes, 8 abstentions and 1 against (United States).
- 2 Article 6(3) of the UN Declaration on the Right to Development, supra note 2.
- 3 Alaska Tribal Leaders Summit, whose conference theme was *Securing a Future for Our Children*, held on August 24-25, 2010 in Anchorage, Alaska.
- 4 OUR COMMON FUTURE, Report of the World Commission on Environment and Development, (Oxford: Oxford University Press, 1987) and acknowledged in General Assembly Resolution 42/187 of December 11, 1987. The report is often referred to as the Brundtland Report after the Chair of the sessions, Gro Harlem Brundtland.
- 5 Statement of Claim in the Nunavut Court of Justice by Qikiqtani Inuit Association against Canada (Minister of Natural Resources), Attorney General of Canada, Nunavut (Minister Responsible for the Arctic College), the Commissioner of Nunavut, Court File No. 08-10-482 CVC, August 4, 2010.
- 6 Nuuk Declaration, 11th General Assembly of the Inuit Circumpolar Council, <http://www.inuitcircumpolar.com/files/uploads/icc-files/nuukdeclaration.pdf>
- 7 Articles 22, 25, 27 and 28 of the UDHR.
- 8 Articles 1, 6, 7, 9, 11, 12, 13 and 15 of the ICESCR.
- 9 Article 5 of the CERD.
- 10 Articles 11, 13 and 14 of the CEDAW.
- 11 Articles 7, 14, 17, 21 and 22 of the UNDRIP and Articles 24, 26, 27, 28 and 32 of the CRC.
- 12 For example, Articles 24, 27, 29, 32, 39, 41 and 42 make reference to both financial and technical assistance or actions that “states shall” take to give effect to the Declaration standards.
- 13 Relevant language of state obligations within the Declaration on the Right to Development includes Articles 1, 2, 4, 6, 7 and 8.
- 14 Principle 22 of the Rio Declaration makes specific reference to Indigenous people and their communities and state recognition and support for Indigenous “identity, culture and interests” as well as “their effective participation in the achievement of sustainable development.” In addition, Principles 1, 4 and 5 address sustainable development and the corresponding obligation of “All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development...” In regard to Agenda 21, Chapter 3, paragraphs 4 and 7 highlight state obligations concerning sustainable development.
- 15 For example, the Programme of Action of the United Nations International Conference on Population & Development, September 5-13, 1994, Principle 3 and paragraph 3.16.

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THE STATUS OF INDIGENOUS PEOPLES OF THE RUSSIAN NORTH IN THE CONTEXT OF LEGAL PLURALISM¹

Natalya Novikova



The reasons for drafting new legislation targeted at the indigenous numerically-small peoples of the North² vary. One reason is, however, an appreciation of the distinct cultural features of these peoples which relates, primarily, to their traditions of resource management and different forms of self-organization. The latter are, to a considerable degree, predetermined by the fact that hunting, fishing, gathering and reindeer herding are the basis of indigenous peoples' subsistence. Obviously, their immediate dependence on renewable natural resources, and the relatively long distances that separate them from the market have resulted in distinct legal systems established among these peoples. And yet it is not actually these facts that challenge their legal protection in the contemporary world. Analyzing the situation in similar communities, K. von Benda-Beckmann notes,

It's much easier to recognise the special political status and self-determination of a group living at a distance from the market economy and the dominant culture than to come to an agreement with an indigenous people that lives in close contact with other populations and whose way of life is very similar to that of the dominant population (Benda-Beckmann 1999: 12).

The peoples of the North have lived within the borders of the Russian state for centuries. During the 20th century, most of them experienced the impact of the boarding schools' system and many of them received a university education and now live in the cities. Nevertheless, they often continue to follow the norms of their traditional society. The indigenous peoples of the North have adapted many of the cultural and legal concepts of "newcomer" populations and gave them their interpretations. In the modern world, which is aimed more at industrial development than at natural resource conservation, the rights of the indigenous peoples of the North are frequently violated. It is this factor, however, that has stimulated their increased legal awareness. The activity of public indigenous organizations in Russia and abroad also plays a role in this process. The legal protection of urban indigenous peoples claiming their rights to natural - primarily biological - resources nowadays represents a significant problem. Customary law relating to traditional means of fishing and organization of this activity may serve as additional and, sometimes, the only available proof of their special status. In order to facilitate enforcement of the principles of Russia's constitutional order in relation to indigenous peoples, the specific features of their historical and

cultural development should be considered. The policy of legal pluralism can offer a means of protecting their rights through the interaction of customary law and state regulation. According to D. Griffiths, legal pluralism is a situation in which people's behaviour complies with multiple legal orders (Griffiths 1986: 3) and this suggests not only the co-existence of these systems but also their interference. In order to facilitate their dialogue, an attempt should be made to define the specific features of the indigenous concept of law and legal consciousness as well as those legal images and figures that are followed by people in "multilegal space". The essence of "aboriginal law", called *vital action* in the language of the Khants, an indigenous group of the North, should be explored.

In the present-day conditions, indigenous peoples demonstrate different strategies for cultural and socio-economic development. In Russia, earlier attempts to establish an agency dealing with "aboriginal laws" and to codify customary law failed. Nowadays, both national and international experience can be taken into account when drawing up the general principles of customary law and other methods for integrating it into the state legal system. At the same time, it should be considered that this law can be made effective only if the diversity of its local variants existing in Russia are taken into account. In Siberia, many of the indigenous peoples' social, economic and cultural problems have become especially acute in the context of intensive industrial development, shrinking natural resources under traditional management, deteriorating environmental conditions and indigenous peoples' activities aimed at protecting their right to a traditional way of life.

Constitutional Law in Russia and International Law

By means of the 1993 Constitution, Russia guarantees the rights of indigenous numerically-small peoples, in accordance with generally recognised principles and norms of international law and the international agreements made by the Russian Federation (Article 69). "The protection of the primordial living environment and traditional way of life of numerically-small ethnic entities" (Article 72) was also recognised as the exclusive jurisdiction of the state authorities. The lack of a uniform legislative terminology complicates the situation to some extent. By default, the categories of population enumerated in the articles mentioned above belong to the indigenous numerically-small peoples of

the North, Siberia and the Far East. In academic anthropological texts, we often use the terms “indigenous peoples”, “indigenous numerically-small peoples of the North”, and “peoples of the North” interchangeably. Lawyers analysing Article 69 primarily point to a number of provisions. The generally recognized principles are interpreted, first, as recognising the fundamental human and civil rights of every individual member of these peoples, and, second, as a guarantee of their special rights as provided by international legal standards. The fundamental principles of international law are defined in ILO Convention 169 “On Indigenous and Tribal Peoples in Independent Countries” (1989) which provides that:

In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle (Article 8).

Article 9 of the Convention states that:

To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Although this Convention has not been ratified by the Russian Federation, Russian legislators followed its guiding principles and guaranteed that the customs and traditions of the indigenous numerically-small peoples of the North would be considered in court cases when relating to local issues and natural resource management. The introduction of customs and traditions into the country’s legal system granted new opportunities for protecting these peoples’ rights and developing the theory and practice of legal pluralism in Russia.

Special indigenous knowledge, as a distinctive feature of the indigenous population, has recently been discussed more widely. It concerns, primarily, traditional environmental knowledge that is considered an integral part of the sustainable development concept (Convention on Biological Diversity (1992),

the Rio Declaration on Environment and Development (1992), and other documents). The 1992 Convention was ratified by the Russian Federation in 1995 and incorporated into the national legal system.

This treaty provides that each contracting party shall:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices (Article 8).

It is primarily this kind of knowledge that underlies indigenous peoples’ legal norms. The United Nations Declaration on the Rights of Indigenous Peoples, which is advisory in nature, is another instrument that plays a significant role in defining the status of indigenous numerically-small peoples. The Russian Federation joined the states which refrained from ratifying this legal act as an instrument, which is inconsistent with the national legal system insofar as it relates to the right to self-determination. Nevertheless, in its legislation, the country tends to incorporate the main approaches to protecting the rights of indigenous numerically-small peoples that have been developed by the international community within the framework of this text, provided they do not contradict the constitutional provisions (Zor’kin, Lazarev 2009: 551). Several of the Declaration’s articles highlight the importance of indigenous peoples’ traditions and customs. Articles 26 and 27 are especially relevant to this paper as they define the rights of indigenous peoples to the lands they have traditionally been occupying and using:

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

This recognition is also achieved through negotiations between indigenous peoples and the state.

Federal Legislation

An opportunity to consider these peoples’ customs and traditions has also been introduced into Russian

federal legislation in recent years. At first sight, this rewarding phenomenon testifies to the fact that the attempts of scientists, primarily, anthropologists and indigenous peoples' activists, to draft legislation sensitive to the way of life of these peoples, have yielded results. Legislators have thus confirmed that guarantees to protect the rights of indigenous numerically-small peoples as declared in the Constitution of the Russian Federation are consistent with the principles and norms of international law.

Alongside this, however, our society as a whole, and the indigenous numerically-small peoples of the North in particular, demonstrated their relative indifference to this event. It neither stimulated academic research into customary law and its prospective incorporation into the state legal system nor intensified the work of indigenous peoples and their public organizations aimed at studying or developing possible ways of applying legal customs under the current conditions.

Legal anthropology does not consider customs and customary law as they are: it studies people's legal being or the way in which their life is regulated by laws and customs. Of course, people do not think about their effect constantly; this fact does not negate these norms, however. And yet we are especially interested in how people perceive these norms. Remarkably, it is the low level of formal legal awareness on the part of indigenous peoples' representatives, similar to that of the rest of Russia's population, that often results in a situation whereby they follow the norms of traditional law that are most applicable to everyday life, especially in the spheres of family relations and resource management. Of course, state interference has taken place throughout the whole history of the state. Contradictions over land-use issues were not so acute, however, prior to the industrial exploration of Siberia. The main conflicts in the sphere of resource management were caused by alienation of the traditional territories and economic activities of indigenous peoples. Although not so frequent, conflicts have also been arising due to limitations on the state's use of renewable biological resources. Active state interference in family life began when the boarding schools were established. The major effects of the boarding school system, which has involved three of four generations of indigenous peoples and detached them from the traditional way of life, can still be felt.

The term "customary law" is not used in federal legislation, which notes peoples' traditions and customs. This can be explained by the fact that there is no single definition of this concept that is recognised by

both ethnographers and lawyers. In this case, the definition provided in the Law "On Territories of Traditional Nature Use of Indigenous Numerically-small Peoples of the North, Siberia, and the Far East" can be employed. Customs are thus the historically developed rules of traditional resource use and traditional lifestyle generally applied by indigenous peoples. In academic literature, such customs are considered legal customs – customs used in conflict management (David 1967:469; Zibarev 1990:115-129). There is also a widespread idea that such customs are characterized by sanction. In this case, we either use the norms and rules that serve to regulate human behaviour in conflict situations or we avoid such situations. The latter circumstance is very important for studying the mechanism of "life management" through customs.

The scope of a custom is always restricted by the borders of a local community. Its scope can be defined by ethnic, territorial and geographical criteria. Nowadays, when the norms of customary law are followed only by indigenous peoples leading a traditional way of life based on reindeer herding, hunting, fishing and gathering, such a community may include a family or a group of close relatives living in the neighbourhood.

Customary law has always represented a syncretical phenomenon. At present, both its inherent legal values and its role as a regulator of social relations are among the features distinguishing it from the backdrop of the dominant worldview. Its regulatory function suggests flexibility and adherence to a model of proper behaviour to the extent legally possible, as prescribed by law. I believe that *prohibition* and *proportionality* are central to defining such extent in the case of the indigenous peoples of the North.

There are rigorous prohibitions existing in traditional indigenous societies. Remarkably, in some cases, ethnographers describing these norms point out that people, when asked "why", reply "it is prohibited", without going into detail. I think that this has more to do with the fact that they perceive such an answer as sufficient than their inability to say why (the norm cannot be partially forgotten: it either "lives" as a whole or becomes totally abandoned or inapplicable).

The concepts of proportionality and prohibition are closely interrelated in customary law. People not only observe the principle of proportionality but also obey the prohibition of its violation. The measure is defined, primarily, in relation to the environment, nature and land. It is due to this norm that traditional resource use exists.

For instance, experienced reindeer herders themselves decide how many reindeer they can keep on the pastures that are left intact after industrial exploi-

tation of the territory. The number of reindeer is strictly limited by the condition of the pastures. In any case, in the current context of oil extraction and the ensuing environmental damage, this number cannot grow. In addition to these technological restrictions, there have always been "natural" limits in the North that predetermine proportionality. Certainly, proportionality in the use of renewable natural resources was also based on the number and, primarily, on the density of population, which in the 19th century were significantly less than at present. There were, however, other circumstances. Indigenous peoples have been consciously presenting their resource use norms as resource-conserving. Present day indigenous society is diverse: it is represented by different groups with different views and aspirations. One should, however, bear in mind that current legislation grants special rights only to those who lead a traditional way of life. According to the lawmakers' logic, the scope of customs is restricted to those spheres in which their legal nature can be most easily revealed: the court, the clan-based community,³ and the territory of traditional resource management. Of course, the ideology of customary law is not always applicable in practice. The norms of customary law are more relevant to real life than a law passed by the state; however, like laws, they are violated. Indigenous peoples leading a traditional way of life observe measure in their interactions with the environment, as it serves as their subsistence basis.

In such a society, they do not discuss what is allowed. It is important to follow *prohibitions* in one's own life and to pass knowledge of them onto the children. I think one can speak of the prohibitory nature of the norms of customary law. This feature is most applicable in practice: there is no excessive regulation; there are certain prohibitions and everything else is allowed. This feature is also, however, mostly judicial and can be used to justify the introduction of legal customs (or customary law) into the state legal framework.

The normative culture of indigenous peoples is characterized by "*proportionate prohibitions*". For instance, some external circumstances may change the life of a community and not a single man, the keepers and adepts of rites and rituals, is left. In such case, the role of such man is adopted by a woman. If a family has a small herd then they do not kill doe deer for food in order to save the young animals. However, if at some moment, doe deer meat becomes the only type of food available for people, then this prohibition can be removed.

In contrast, it can be noted that the state, in turn, suggests its own model – "*disproportionate prohibi-*

tion". For instance, in Sakhalin, indigenous peoples are prohibited from fishing in Tym' River throughout the whole year because the river is a spawning stream. Fish is their primary and, in some cases, sole source of food. As a result of this prohibition, state enterprises catch fish in this river and give 100 kilos of fish (which is not enough) per person to the population; people are deprived of an opportunity to be involved in their favourite traditional activity and are left unemployed, suffering all the consequent financial and psychological problems. As a result, both state agencies and the population violate these environmental standards. A prohibition against whale hunting imposed on the Inuit of Chukotka, an ethnic group for which this activity plays a vitally important cultural role, can be considered a similar kind of prohibition.

Another important component of the traditional system of customary law is *construction and deconstruction of the norm*. It is because of its changing nature that a custom, growing into a social norm, hinders the development of and gradually deconstructs this norm.

In considering opportunities for the co-existence of customary law and state law systems, our country is on approximately the same path that has already been travelled by the global community; thus, we can learn from its experience. One of the lessons pointed out by Rouland is that:

The contents and logics of customary law are mixed. In some cases, the judgment about incompatibility of traditional law with contemporary conditions is true. However, it's absolutely wrong to assume that traditional law is unable to produce new legal norms, as flexibility and comparatively high adaptability have always been recognised as characteristics of custom. And if numerous land reforms and codifications often yielded unsatisfactory results, this was because their prescriptions were perceived by the population as some kind of externally imposed law. Instead of changing traditional law, it would be better to create the conditions for its gradual transformation rather than treat it authoritatively, ending in its abolition (Rouland 1999: 206).

Now let us consider the opportunities for using customary law that are provided by current federal legislation, as well as the challenges that may be faced in the process of considering the customs and traditions of indigenous numerically-small peoples of the North as declared in laws. Application of the new legislation by indigenous peoples themselves, including legal re-

course, may become the best evidence of its effectiveness.

A consideration of the contemporary legal protection of the rights of indigenous numerically-small peoples clearly reveals its distinct differences in relation to the methods and approaches of “traditional courts”. It was this type of court that was guided primarily by people’s customs, and this case study can be used to explore one such method of legal protection. In fact, literature and official records can only be used to judge the courts that have appeared and developed under state influence and control. One of their main features was their conciliatory nature: “Their court was, by no means, a way of punishing a person who has infringed a law, but, rather, a means of conflict management, and a major function played by the law was expiation of the wrong” (Zibarev 1990: 66-67). The defendant was given all opportunities to prove his innocence, for which an oath was

given, including the ritual of “bear’s paw oath”, widespread among many indigenous peoples of the North. The traditional court was replaced in the 20th century by other methods of conflict management that had previously co-existed in society. Conflict prevention through compliance with certain norms and the transmission of the knowledge of these norms to next generations were among such methods. These norms include, primarily, the customs that regulate family relations, visitations and hunting activities. It is the tolerance potential of the legal culture of indigenous peoples of the North that is in little demand in contemporary society. It is therefore especially useful to employ conciliatory customs and different negotiation techniques as alternative means of conflict management. If the conflict cannot be settled, the parties should refer the case to court. This can also facilitate the formation of favourable public opinion in legal proceedings.

Nivkh children learning how to butcher fish in Northern Russia – Photo: Natalya Novikova



Customary Law in Court

The current legislation first mentions the notion of “customs and traditions of indigenous numerically-small peoples” in the Federal Law “On Guarantees of the Rights of Indigenous Numerically-small Peoples of the Russian Federation” (1999), in one of its main articles speaking about legal protection “Legal Protection of the Rights of Indigenous Numerically-small Peoples” (Article 14):

Persons belonging to numerically-small peoples, as well as associations of numerically-small peoples, have a right to legal protection of the primordial environment, traditional way of life, economic activities and crafts of numerically-small peoples, which is implemented in the order prescribed by federal laws.

During legal investigation of cases wherein persons belonging to numerically-small peoples act as claimants, defendants, victims or accused, the customs and traditions of these peoples, when not in conflict with the federal laws and the laws of the subjects of the Russian Federation, can be taken into consideration.

The participation of authorized representatives of numerically-small peoples in the legal protection is allowed for the purposes of efficiency of aforementioned legal protection.

Neither courts nor indigenous peoples’ representatives themselves currently understand how or which customs they can apply. To be more precise, they may have a different opinion in this regard. Explanation of this issue is extremely important, because it is the court that can facilitate the enforcement of new laws. Which customs and traditions can be taken into consideration? Apparently, those which infringement has resulted in the violation of the rights of a claimant. A person cannot simply go to court and say that the land belongs to him by tradition, or that he fishes in these places all year round by tradition and think that, in the case of resource use conflict, the court will necessarily decide in favour of indigenous peoples. When considering opportunities for the application of this law, we face major challenges. We are, at the same time, however, granted almost limitless possibilities. If we can prove in court that the right was violated and should be restored not only by state law but also by a norm, a custom, and the traditions of the society to which a claimant or a defendant belongs, then we will be able to invigorate legal proceedings in our country.

To this end, considerable work should be conducted with regard to interpreting these customs and ascertaining their legal nature. And, first and foremost, this should be theoretical work. Indigenous peoples living by tradition often recognise only oral tradition. Adept of the culture should therefore be interviewed and consulted on how to behave in this or that situation. These data should certainly be recorded, but probably for the purpose of reading aloud and making public than for submitting them to the court in written or published form. One should not perceive this as an artificial process. If the existing laws, all state powers considered, are not applied or are not relevant to everyday life, then it is even harder to invent “artificial norms of customary law”; they will be simply neglected by the people.

An analysis of the situations in which a custom can be applied in court involves highly complex and multifaceted research that can only be conducted through the joint efforts of lawyers and ethnographers. I will only dare to express few considerations. In order for a custom to be applicable in court, it should have legal features and inherent potential for compliance with the spirit of the law. Resource management customs based on the resource-saving ideology of the traditional society are the most obvious suggestion in this regard. If the legal nature of a custom is proven in court then this custom can be used to protect rights. The principles of customary law, which can serve as guidelines for judges using traditional norms, can be formulated.⁴ Legal ethnological assessment can also considerably facilitate the enforcement of the provisions of law (Novikova 2005).

It should be assumed that the state is interested or should be interested in the conservation of Northern nature and biodiversity and should strive for sustainable development and, therefore, support those people whose way of life provides opportunities for such development. However, only people leading traditional ways of life have both a legal and a moral right to this state support. The norms of customary law regulating protection of the primordial environment and traditional way of life were incorporated into the legal framework only because they comply with it. In such cases, the appropriateness of the application of this norm, its adherence to humanistic and ecological aspects of the current legislation, primarily the Constitution of the Russian Federation, can be proven in court.

The commentaries on the Law “On Guarantees of the Rights of Indigenous Numerically-small Peoples of the Russian Federation” state that this law specifies the norms provided in Article 46 of the Constitution of the

Russian Federation, by which everybody is guaranteed a right to legal protection of his rights and freedoms (Krylov 1999:146-148). Such guarantee is especially relevant to indigenous peoples since their freedom in the contemporary context is limited due to discrepancies between their principles and methods of resource management, worldview, organization of family life, and often the very foundations of their existence and economic activity and those of mainstream society. The commentary on the law highlights that:

In judicial practice, the significance of traditions and customs as foundations for the assessment of legal facts is virtually generally recognised; however, the fact that judges are often unaware of the traditions and customs of the participants of the legal trial is challenging. Such awareness is especially important in cases mentioning the customs and traditions of numerically-small peoples, which are neither generally recognised nor recorded in documents.

This legal norm “grants an opportunity to investigate the circumstances of the case as fully and objectively as necessary. It should be stressed that, according to the Law, courts have a right to consider the traditions and customs of numerically-small peoples in criminal, civil and arbitration cases” (Krylov 1999:146-148).

I am not a lawyer and I will thus simply confine myself to a few comments on the complicated topic of considering customs in procedural legislation. I refer to the “prohibition of speaking” and silence in traditional culture. In conflict situations, the behaviour of indigenous peoples can give a false impression of their guilt. For example, in the tradition of many indigenous peoples, it is prohibited to look someone straight in the eyes, especially certain people, for example an older man. The judge unconsciously perceives such behaviour as a sign of guilt. In fact, Canadian lawyers have also talked to me about a similar problem.

The behaviour of indigenous peoples in court is related to their lack of experience in such matters. Like the majority of the people in our country, they lack the necessary legal knowledge and skills. At the same time, there are many taboos in the indigenous culture: for instance, one is prohibited from talking about small children or sacral lands. For example, during one court case, the participants did not say that an infant (a baby under one year) was present while they were infringing the law. Such an infant takes a borderline position between the spirit and human worlds, belonging neither to this world nor

to that. This information could have resulted in a different court decision; however, according to Nenets and Khanty beliefs, such an infant cannot be discussed with strangers or in the presence of strangers, so that no harm befalls it. Unfortunately, at that moment, there was no anthropologist present who could have acted as an expert mediator in court.

Customary Law and the Regulation of Traditional Resource Management in the City

The possible role of indigenous peoples’ customs and traditions in protecting their rights to natural resources is of particular interest to an analysis of the opportunities provided by the system of customary law to urban indigenous peoples. According to the Law “On the Animal World”, indigenous peoples and their associations have a right to priority use of the animal world, provided that their “unique culture and way of life include traditional methods for protecting and managing the animal world objects” (Article 49). Although this law does not mention customary law directly, one of its obvious features is the fact that legal customs regulate their vital activities. The observance of these customs in resource management can be and, in fact, is used to prove that such and such peoples and such and such communities or clan-based enterprises have the right to priority resource use. Urban indigenous peoples may consider the same features as evidence of their right to special status. It is no mere chance that legal customs are defined in the Law “On the Territories of Traditional Nature Management of Indigenous Numerically-small Peoples of the North, Siberia and the Far East of the Russian Federation”. According to this law, the use of natural resources is exercised “in compliance with the legislation and customs of indigenous peoples” (Article 13). We thus see that traditional resource management *per se* is inalienable from the observance of legal customs.

Self-government provides the maximum opportunities for regulating life activities by legal custom. For instance, the Law “On the General Principles of Organization of Communities of Indigenous Numerically-small Peoples of the North, Siberia, and the Far East of the Russian Federation” provides an opportunity to regulate issues of internal community development according to custom. Article 4 of this law states that:

Decisions on issues of the internal organization of communities can be made on the grounds of the traditions and customs of indigenous peoples, when

they are not contradictory to the federal legislation and the legislation of the subjects of the Russian Federation and do not infringe the interests of other ethnic groups and citizens.

In this case, state intervention turns out to be minimal. At the same time, it is this kind of situation that offers an opportunity to use the regulatory potential of indigenous peoples' customary law. The situation in the city of Poronaisk, Sakhalinskaia Province, is an example of public territorial self-government. Nivkh, Ul'ta and Nanai peoples living here have organized over ten clan-based communities on the shores of Terpeniya Bay. In order to manage them, a council of clan-based communities was established. The communities' activities are based on a synthesis of positive and customary law. Distribution of quotas is the main mechanism for exercising the authoritative powers of the indigenous bodies. It is this "administrative resource" that cements the whole system. And as long as the population perceives this practice as fair, it will remain effective. In conflict situations, which inevitably arise, the council of clan-based communities exercises its authority, although a system for settling life's conflicts by legal means is gradually being formed. S.S. Alekseev describes such situations quite precisely:

In contrast to the widespread concept of customary law as a primitive, archaic and historically transient phenomenon, there are solid grounds for considering customary law as a classic example of the compatibility of apparently incompatible qualities of law – its character of a rigid organism (institutionality) and the peculiarities of living law, born by life itself. The norms of customary law, indeed, are the normative basis for legal solutions to life's problems (Alekseev 2000:107).

Customary Law as a Regulator of Relations with Industrial Companies

In the past, customary law regulated relations within a territorially and ethnically marked group; nowadays it may serve as a regulator of interactions with the external world, predetermining the public (state) status of indigenous peoples. Indigenous peoples themselves may play the leading role in this process, explaining to others how they should behave according to their norms. Of course, the application of customs in the legal protection of indigenous peoples' rights will be the most effective method of incorporating these norms into the legal system and contemporary life. But this is

not the only method; it is also very important to introduce the norms of life of the indigenous population to the people living and working in the North.

I will give an example. In March 2003 a holiday, Reindeer Herders' Day, was celebrated in the city of Nadym. A conference of gas industry workers was simultaneously held in the city: its participants were also invited to the celebrations. They were offered a "Manual for Guests Attending Reindeer Herders' Camps (Ethical Behaviour for Camp Guests)" prepared by N.I. Vozhdaeva. The manual states that,

You should know that there is a code of unwritten rules of behaviour that guests visiting the reindeer herders' camp should follow. It is unacceptable to walk over the bed while in the tent. One should not touch things and clothes, and, especially, family relics – deities standing at the bedside, unless necessary. Women guests attending the camp should pay special attention to these rules. It is unacceptable to walk over household items and belongings of tundra men (a lasso, a khorei pole, etc.), to walk around the tent, or to approach sacred sledges. During meals served in a tent, women are advised not to sit with their legs on the bed. In addition, not a single Nenets woman has ever tried to demonstratively violate these or other ancient reindeer herders' customs and prohibitions and any attempt at their violation will be condemned by everyone, both in the camp and in the clan. Even urban Nenets families living by the norms and rules of another civilization always strictly observe the rites, customs and beliefs of their kinsmen during their visits to native lands. Due to a partial loss of their traditional worldview, they cannot always explain the superstitions, customs and prohibitions which they continue to follow. Tundra residents strictly follow these rules and expect their guests to do the same. Guests should therefore consider all these rules during their stay at a reindeer herders' camp, in order not to offend or "desecrate" their everyday life and culture.

A knowledge of indigenous peoples' traditions and customs can be employed in negotiations with industrial companies and in the ethnological assessment process. Certainly, one should rely on a knowledge of the laws; however, the knowledge and observance of customs gives indigenous peoples a moral right to strive for their legal rights. It is this standpoint that can be and is, in fact, shared by the people working in industry in the North. Customs are a most important component of the status of indigenous peoples in the contemporary world.



Sakhalin indigenous peoples studying a book about themselves – Photo: Natalya Novikova

The protection of sacral sites nowadays is a topical problem related to the theory of legal pluralism. In the customary law of the peoples of the North, they are sacral due to the fact that people are constantly, sometimes mentally, performing certain actions in relation to such sites in order to ensure the well-being of their families and continuity of the cultural space. Specialists are aware that sacral sites can be identified only by ethnographic means; moreover, people often do not want to attract the attention of outsiders to them, being rightfully concerned as to negative consequences. However, such sites and other elements of intangible cultural heritage today require legal protection.

In the North, experience in the study and protection of sacral sites has already been gained. The Association of Indigenous Numerically-Small Peoples of the North, Siberia and the Far East initiated and implemented the project “Importance of Protection of Sacral Sites of Indigenous Peoples of the Arctic” (on the territories of Yamalo-Nenetskii Autonomous District and Koriakskii Autonomous District) (Murashko 2007).

In the legislation of some federal entities, attempts have been made to legally resolve this problem. For instance, the Law “On the Objects of Cultural Herit-

age of Yamalo-Nenetskii District” was passed in 2006. It highlights the specific and distinct features of the traditional way of life of the indigenous numerically-small peoples of the North. The Law “On the Objects of Cultural Heritage” should play a decisive role in the preservation of Nenets culture, particularly in the process of historical and cultural assessment guaranteed by legislation. Article 8 of the Law defines the following objects of the cultural heritage of indigenous numerically-small peoples of the North:

- 1) *Family, clan, and national sacral and religious sites of indigenous numerically-small peoples of the North in the autonomous district (further: sacral sites of indigenous numerically-small peoples of the North);*
- 2) *Family and clan burial sites of indigenous numerically-small peoples of the North in the autonomous district (further: burial sites of indigenous numerically-small peoples of the North);*
- 3) *Family, clan and national memorial sites;*
- 4) *Areas of occurrence of arts and crafts;*
- 5) *Other objects representing particular value for indigenous numerically-small peoples of the North.*

The Law also determines the rights of these peoples to protection of sacral sites, also according to their *customs*.

Field studies demonstrate the need for the legal regulation of issues concerning the protection of sacral sites as an important part of the historical and cultural heritage and contemporary religious practices of indigenous numerically-small peoples in different regions of their residence. This task becomes most acute in connection with the intensive industrial development of northern territories. There are specific methods for the use and preservation of historical and cultural heritage in the cultures of different peoples. Ignorance of these methods and violation of the norms of customary law, corresponding to the traditions of these peoples, results in negative consequences and may lead to increased social tension and conflict.

* * *

The existing Russian legal system provides opportunities for the customs and traditions of the indigenous numerically-small peoples to be considered in terms of legal protection, resource management and regulation of local issues. Customary law is an important legal remedy for these peoples. In the context of increasingly hazy borders between indigenous peoples and the rest of the population in various spheres of life, traditional resource management and the traditional, particularly legal, knowledge of indigenous peoples become the most prominent features of their national legal status. ○

Notes

- 1 The paper was prepared under the project with support from RFH grant 10-01-00028.
- 2 The Federation of Russia is a multiethnic society and home to more than 100 peoples, including ethnic minorities. In 2010, 47 ethnic groups were included in the official List of Indigenous Numerically-small Peoples of the Russian Federation. This status is tied to the conditions that a people has no more than 50,000 members, maintains a traditional way of life, inhabits certain remote regions of Russia and identifies itself as a distinct ethnic group.
- 3 *Rodovaia obshchina* (literally a "clan-based community") is an economic unit of individuals representing, mostly, indigenous numerically-small peoples of the North, Siberia and Far East of Russia. Its activity is based on "traditional" industries (reindeer herding, hunting, fishing and gathering). Legislators who drafted the federal law on *obshchinas* hoped that these units would play the role of a self-governing body of indigenous clans and communities. However, in practice, since their establishment, *obshchinas* have been playing the role of economic enterprises employing not only relatives and kinsmen but also friends and acquaintances (*translator's note*).
- 4 This topic was discussed in 2005 in: Thematic Issue, "Obychnoe Pravo Segodnia [Customary Law Today]". *Etnograficheskoe Obozrenie* 5.

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The International Work Group for Indigenous Affairs - IWGIA - is a non-profit making, politically independent, international membership organization.

IWGIA co-operates with indigenous peoples all over the world and supports their struggle for human rights and self-determination, their right to control land and resources, their cultural integrity, and their right to development. The aim of IWGIA is to defend and endorse the rights of indigenous peoples in concurrence with their own efforts and desires. An important goal is to give indigenous peoples the possibility of organising themselves and to open up channels for indigenous peoples' own organizations to claim their rights.

IWGIA works at local, regional and international levels to further the understanding and knowledge of, and the involvement in, the cause of indigenous peoples.

The activities of IWGIA include: publications, international human rights work, networking, conferences, campaigns and projects.

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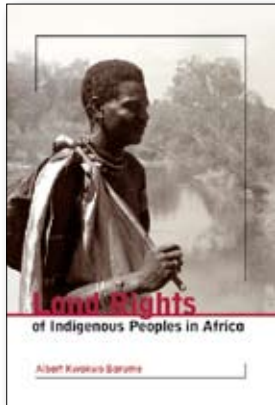
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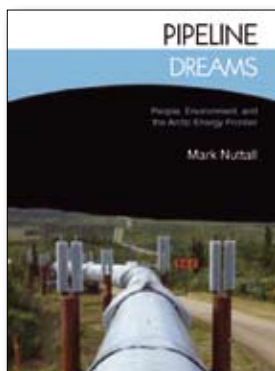


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