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**WHY CUSTOMARY LAW MATTERS:  
THE ROLE OF CUSTOMARY LAW IN THE PROTECTION OF  
INDIGENOUS PEOPLES' HUMAN RIGHTS**

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**“ALL MY RELATIONS”**

**For**

**Sean, Lois,**

**Luna and Liam**

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## Abstract

For millions of Indigenous peoples around the world their own customary laws (non-state laws they consider binding upon them) are their primary, if not their only source of law. Long marginalized and where recognized considered to lie on the lowest level of the legal hierarchy, the status of indigenous peoples' legal systems and most importantly of their customary laws changed dramatically in the twenty years between 1990 and 2010. During this period advances in national and international law and jurisprudence has clearly recognised the rights of Indigenous peoples to be governed by their own legal regimes and the obligation of states to respect and recognise their laws and institutions and the ancestral rights they uphold.

The thesis that this study proposes is that states are legally obliged to give due respect and recognition to the customary laws of Indigenous peoples in order to secure the full and effective realization of their human rights, and that these obligations and the concurrent right of Indigenous peoples to be governed by their own laws, customs and traditions are recognised principles of customary international law. In order to prove this thesis attention is given to the historic status of customary law, its role in regulating and securing the rights of Indigenous peoples to their lands, territories, resources, traditional knowledge, cultural heritage, and self-determination. Examination is made of a wide range of customary law experiences ranging from the national to the local level and addressing key issues such as: the nature, status and characteristics of customary law; proof of customary law; its role in failing states; application to conflicts with private sector actors; place in tribal adjudication systems; role in the regulation and enforcement of contractual arrangements; and its influence on dominant legal regimes. The study shows that customary law, far from being an archaic and quaint system of law existing on the margins and of little interest and less importance to the mainstream legal system, is a vibrant and dynamic body of 'living law' which is vital for the realisation of Indigenous peoples' human rights and a crucial element of any system of good global governance

The study concludes that the body of international instruments, jurisprudence of the courts and treaty bodies, state practice and *opinio juris* examined supports a finding that the thesis has been proved

## Introduction

Indigenous peoples' have long struggled for recognition of their rights to their lands, resources, culture and self-determination. Following centuries of marginalisation, discrimination and of being ignored by international law, the closing decade of the twentieth century and the opening decade have seen dramatic advances in the recognition of Indigenous peoples' human rights. New international instruments, national legislative and constitutional measures, decisions of treaty bodies and the jurisprudence of human rights and national courts revolutionised the recognition and protection of indigenous rights. An extremely significant but oft-times overlooked aspect of this renaissance has been the recognition of Indigenous peoples' rights to their own legal regimes and institutions.

Although, there is a tendency to see customary laws as something less than law it is a dynamic and vital part of the wider legal order. Customary law, to quote Bederman, 'is no mere souvenir of bygone law; it is an integral and coherent part of any healthy functioning contemporary legal system.'<sup>1</sup> This study examines the nature, scope, characteristics and current status of Indigenous peoples' customary law and its present and future role in national and international legal governance. It considers the historic and continuing role of customary law alongside natural and positive law as one of the three primary sources of law and its status in the hierarchy of laws, with a view to determining how to recognise and strengthen its role in the promotion of Indigenous peoples' human rights. The study also considers aspects of customary legal regimes that pose a threat to the realisation of individual human rights and examines innovative experiences where internal change of 'living' customary law has led to increased compliance with human rights standards.

Recognised as a source of law by legal philosophers since the time of Plato, customary law has played a significant role in the formation of a majority of the world's dominant legal traditions<sup>2</sup>. The preeminent source of law in Medieval Europe,

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<sup>1</sup> David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010), at 57

<sup>2</sup> See generally, H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000). Glen utilizes the word chthonic to describe people who live in or in close harmony with the



it provided the basis for English common law and its influence is also visible in civil law systems, Shari'a and Hindu law.<sup>3</sup> In some countries it works alongside national and religious law as a fully functioning part of national legal governance. This, for example, is the case with *adat* in Indonesia and Malaysia<sup>4</sup>, *xeer* in Somalia, and the customary regimes of scheduled tribes in the northeastern Indian states of Nagaland and Mizoram.<sup>5</sup>

Customary law is present throughout the world and in all legal systems as such it is manifest not only in national minorities and tribal law. It is to be found in municipal and national law and in court practices. It also forms the basis for a highly influential and universally binding body of international law. At the local level it provides internal regulation for communities, clubs, associations, groups of farmers, and other cooperative groups. Its influence is to be found in many areas of law including contract, tort, family law, and private and public international law.<sup>6</sup> It plays a crucial role in defining land and resource rights and has increasing relevance for areas of formal law such as the rules of evidence, equity and criminal law. It plays a highly influential role in governing international commercial relations under the *ley marchant*, which arose from the practice of merchants.<sup>7</sup> Together with other informal

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earth and says that since all people of the earth are descended from people who were chthonic 'all other traditions have arisen in contrast to chthonic tradition' at 57-58

<sup>3</sup> Ibid.

<sup>4</sup> Franz von Benda-Beckmann, and Keebet von Benda-Beckmann, 'How Communal Is Communal and Whose Communal Is It?', in Franz von Benda-Beckmann, And Keebet von Benda-Beckmann (ed.), *Changing Properties of Property* (New York: Berghahan Books, 2006).

<sup>5</sup> R. D. Roy, *Traditional Customary Laws and Indigenous peoples in Asia* (Minority Rights Group International, 2005), at 9

<sup>6</sup> See generally Bederman, *Custom as a Source of Law*.

<sup>7</sup> Presentation of Simon Morgan, at the *Customary Law and Human Rights Dialogue: Customary Law, Traditional Knowledge and Human Rights* National University of Ireland Galway, on 18-19<sup>th</sup> June 2010. (Copy on file with author). See discussion on custom in contracts in Bederman, *Custom as a Source of Law*, at 80 – 90, where he concludes that 'Custom provides a realistic, although certainly not fiat 90

and non-state law it has the power to shape and influence the vast majority of human behaviour.<sup>8</sup>

Woodman has categorised customary law under six headings,

1. Customs that people observe in particular localities
2. Some elements of the English common law, which judges have historically stated to be ‘the common custom of the realm’
3. Customary laws of indigenous minority peoples, the best publicized instances being in North and South America, Australia and New Zealand
4. Customary laws of the various ethnic groups that constitute the populations of states in sub-Saharan Africa
5. Observed religious laws, significant in many parts of the world, and
6. Customary norms of international law as well as *lex mercatoria*, the customary norms of the worldwide commercial community.<sup>9</sup>

Although this study focuses primarily on the customary laws of Indigenous peoples it will address at least in passing most of the categories of customary law set out by Woodman. Commencing with a brief examination of the historic status of customary law in Europe, particular attention will be given to the relationship between customary law and English common law. A relationship that has had an enormous impact on Indigenous peoples legal rights all around the world. As we shall see the concept of Indigenous peoples has been in flux over the last twenty to thirty years as it has shifted from a focus on descendents of pre colonial peoples living in settler state enclaves to include marginalised ethnic groups in Africa, Asia, as well as peoples such as the Saami in Scandinavia. Woodman’s sixth category, customary international law, is for many in the legal profession the only body of customary law they have ever studied or ever expect to encounter. As this study seeks to explain that situation

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<sup>8</sup> Leila Chirayath, Caroline Sage and Michal Woolcock, 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems', Background Paper for the World Development Report 2006 (World Bank 2005), at 2

<sup>9</sup> Gordon R. Woodman, 'Customary Legal Norms', in David S. Clark (ed.), *Encyclopedia of Law & Society* (2007), 379, cited in James A.R. Nafziger, Robert Kirkwood Paterson and Alison Dundes Rentlen *Cultural Law: International, Comparative and Indigenous*, (Cambridge: Cambridge University Press 2010), at 166

is rapidly changing and the legal profession would do well to take note. Before going on to examine the history, nature and current status of customary law it is pertinent to consider briefly the nature of customary international law and its role in the crystallisation and protection of Indigenous peoples human rights.

#### **a. Customary international law**

Customary international law is a constantly evolving body of largely unwritten law (custom based) that together with written law (treaties) goes to make up the corpus of international law. Unlike treaties, which are only binding upon states that have ratified them, customary international law may bind states without any formal acquiescence on their part, unless they have clearly and persistently objected to the emerging concept as it develops.<sup>10</sup> Rosenne defines customary international law as, ‘law derived from the consistent conduct of states acting out of the belief that the law required them to act that way.’<sup>11</sup> This sense of obligation referred to as *opinio juris* is reflective of the notion of *opinio necessitatis* one of the criteria which has been utilized to distinguish binding customary law from mere customary habits. While similarities may be drawn between processes for evolution and identification of customary international law and the customary legal regimes of Indigenous peoples, these are distinct, though at times interrelated, branches of law.

Influential as it emerges, customary international law only becomes binding when crystallized<sup>12</sup>, which, in Anaya’s words, occurs ‘when a preponderance of states and other authoritative actors converge on a common understanding of the norms’ contents and generally expect future behaviour in conformity with those norms’.<sup>13</sup> In order for international custom to crystallise into law it must generally demonstrate both a ‘material element’ in the form of state practice and a ‘psychological element’

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<sup>10</sup> J. D. Smelcer, 'Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in US and Australian Domestic Courts'. *Pacific Rim Law & Policy Journal* 15(1) (2006) 301 – 330, at 304

<sup>11</sup> S. Rosenne *Practice and Methods of International Law* (New York: Oceana, 1984) at 55

<sup>12</sup> Smelcer, 'Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in US and Australian Domestic Courts', at 305

<sup>13</sup> James Anaya, *Indigenous Peoples in International Law* (Second edn. New York: Oxford University Press, 2004), at 61

in the form of what is termed *opinio juris*,<sup>14</sup> that is a sense of obligation to adhere to such practices.<sup>15</sup> Evidence of the existence of customary international law may, according to Brownlie, be drawn from numerous sources including international instruments, communications by governments, national laws, court decisions, writings of eminent jurists, policies and practices of international organizations.<sup>16</sup>

Anaya describes customary international law as reflecting the ‘common ground [that states and other relevant actors have reached] about minimum standards that should govern behaviour toward indigenous peoples’ which represent a ‘controlling consensus’ flowing from ‘widely shared values of human dignity’.<sup>17</sup> Traditionally customary international law was, he says, discerned upon the basis of demonstrated uniformity of practice by states, with *opinio juris* being adduced from the ‘episodic conduct’.<sup>18</sup> *Opinio juris* was, according to Roberts, considered secondary to state practice being utilized primarily to ‘distinguish between legal and nonlegal obligations’. The situation is now however inverted and both Anaya and Roberts distinguish traditional custom from ‘modern custom’<sup>19</sup>, derived according to Roberts ‘by a deductive process that begins with a general statement of rules rather than particular instances of practice’.<sup>20</sup> The emergence of binding custom that derives not from state practice as much as from *opinio juris*, is evidenced in Anaya’s view by international instruments that, in his words, ‘have established an obligation to uphold human rights as a matter of general international law’.<sup>21</sup> He goes even further claiming that ‘explicit communications among authoritative actors ... is a form of

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<sup>14</sup> Ibid.

<sup>15</sup> Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', *95 American Journal of International Law* (2001) 757- 791, at 757

<sup>16</sup> Ian Brownlie *Principles of Public International Law*, 6<sup>th</sup> ed. (Oxford; New York: Oxford University Press, 2003)

<sup>17</sup> Ibid. at 61

<sup>18</sup> Anaya, *Indigenous Peoples in International Law*, at 62

<sup>19</sup> Ibid. see also Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', at 758

<sup>20</sup> Ibid.

<sup>21</sup> Anaya, *Indigenous Peoples in International Law*, at 69

practice that builds customary rules<sup>22</sup> whether or not such communications lead to the ratification of a treaty or other formal act of assent.<sup>23</sup> Stamatopoulou in a similar vein claims that the numerous declarations and communications of States during the almost twenty years of negotiation of the United Nations Declaration on the Rights of Indigenous Peoples<sup>24</sup>, adopted in September 2007, support the proposition that the Declaration reflects the status of customary international law relating to Indigenous peoples human rights.<sup>25</sup>

Drawing upon a comprehensive analysis of international instruments and the communications of states, made prior to the UN Declaration's adoption, Anaya identifies a number of areas in which indigenous peoples' rights have, in his opinion, been crystallised in customary international law. These include self-determination<sup>26</sup>, land rights<sup>27</sup> and cultural integrity<sup>28</sup>. Customary international law has also been claimed to exist in relation to Indigenous peoples' rights to their traditional lands and natural resources<sup>29</sup> language, sacred sites, and

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<sup>22</sup> See *Ibid.* at 62 – 68, for an overview of relevant communications associated with international negotiations and work of regional bodies and international organizations and at 82, fn. 78, where he refers to Brownlie *Principles of Public International Law*, at 6, for a list of material sources of custom including: '... diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.'

<sup>23</sup> *Ibid.* at 68

<sup>24</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007) (hereafter UN Declaration)

<sup>25</sup> Elsa Stamatopoulou, 'Taking Cultural Rights Seriously', in Steven Allen and Alexandra Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing Ltd, 2010)

<sup>26</sup> *Ibid.* at 112.

<sup>27</sup> *Ibid.* at 70

<sup>28</sup> *Ibid.* at 137,.

<sup>29</sup> See 'Final Written Arguments of the Inter-American Commission on Human Rights submitted to the Inter-American Court of Human Rights Court in the case of Awas Tingni Mayagna (Sumo) Indigenous

cultural artefacts,<sup>30</sup> as well as to their justice systems<sup>31</sup>, which includes their customary laws and traditional decision-making authorities a claim this study seeks to substantiate. Even where shown to exist there are significant difficulties associated with enforcing it against states and Smelcer argues that its principal utility for Indigenous peoples wishing to use international law to advance their rights, will, for now, be as a highly persuasive authority before national courts<sup>32</sup>.

### **b. Indigenous peoples' customary law**

For millions of indigenous and tribal peoples customary legal regimes are the predominant, if not the only, system of justice to which they have access. Traditional tenure, for example, regulates over 80% of land rights and significant marine areas in Pacific Island countries,<sup>33</sup> while 75% of land in Africa is subject to some form of customary tenure.<sup>34</sup> In countries with weak central governments and those affected by conflict customary law may be the only form of justice available. The 2006 World Development Report claims that 85% of the population in Sierra Leone, in 2003, were primarily reliant upon customary law<sup>35</sup>, while in Somalia and Sudan it is now widely

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Community Against the Republic of Nicaragua, August 10, 2001', 19 *Ariz. J. Int'l & Comp. L.* (2002), at [Para.](#) 64 where the Commission argues that 'Numerous international instruments and precedents affirm that indigenous peoples have the right to safeguard their traditional tenure over land and natural resources. These international instruments and precedents, together with a pattern of relatively consistent developments at the domestic level in American countries among others, demonstrate the existence of a norm of customary international law in this regard, or at least a very advanced process in the creation of such a norm.'

<sup>30</sup> Seigfried Weissner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', 12 *Harvard Human Rights Journal* 1999, at 109

<sup>31</sup> Ibid. see also Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty', at 24

<sup>32</sup> Smelcer, 'Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in US and Australian Domestic Courts'

<sup>33</sup> Brendan Tobin, 'The Role of Customary Law in ABS and TK Governance in Andean and Pacific Island Countries' (Geneva - Tokyo: WIPO/UNU-IAS, forthcoming).

<sup>34</sup> Chirayath, 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems', at 3

<sup>35</sup> World Bank, 'World Development Report: Equity and Development', (New York: World Bank and Oxford University Press, 2006), at 159

accepted that no Rule of Law program can function unless it takes into consideration customary law.<sup>36</sup>

Customary law regimes of Indigenous peoples and national minorities are given varying degrees of recognition throughout Africa, Asia, Latin America, Pacific Island States, and in the main common law settler states, (Australia, Canada, New Zealand, United States) as well as in many countries of the Russian Federation, South-East and Central Asia as well as in Scandinavian countries and a number of European states, including Spain and Italy. In many countries national constitutions recognise, in varying degrees, Indigenous peoples' rights to autonomy, to their customary legal regimes, traditional authorities, customary lands and resources, and cultures.<sup>37</sup> Where constitutional recognition does not exist national laws and judicial bodies may still recognise rights based upon customary law. Even where states deny the existence of Indigenous peoples on their territories they frequently recognise substantial differentiated rights for tribal groups, national minorities and other groups. In India, for example, measures to prevent interference with the land rights and customary laws of scheduled tribes are given Constitutional protection.<sup>38</sup> Similarly in Bangladesh, the Chittagong Hill Tribes are governed by a mixture of state law and customary law.<sup>39</sup> While, nomadic tribes in Eastern Tibet have found means to use the power of the Chinese state to support customary dispute settlement procedures.<sup>40</sup>

Beginning in the early 1990's, significant advances in human rights law have brought Indigenous peoples customary laws ever more to the fore. Recognition of customary law is, for example, a central element of instruments such as International Labour

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<sup>36</sup> See Maria Vargas Simojoki, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia', (Rome: International Development Law Organization, 2011) David Pimentel, 'Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan', *Hague Journal on the Rule of Law*, 2 (2010b), 1-28, Available at: <http://www.idlo.int/Publications/WP1Somalia.pdf>

<sup>37</sup> See generally Katrina Cuskelly, *Customs and Constitutions: State Recognition of Customary Law Around the World* (Gland: IUCN, 2012)

<sup>38</sup> Roy, *Traditional Customary Laws and Indigenous Peoples in Asia*.

<sup>39</sup> *Ibid.*

<sup>40</sup> Fernanda Pirie, 'Feuding, Meditation and the Negotiation of Authority among the Nomads of Eastern Tibet', *Max Plank Institute for Social Anthropology, Working Paper No. 72* (2005) at 24-25

Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries<sup>41</sup> (hereafter ‘ILO Convention 169’) and the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration also recognises Indigenous peoples’ status as ‘peoples’ under international law and their right to self-determination, from which flow a wide range of social, cultural, economic, civil and political rights. Most importantly, Article 34 of the Declaration, provides that

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and in the cases where they exist, juridical systems or customs, in accordance with international human rights

The World Bank, the Convention on Biological Diversity and World Intellectual Property Rights Organization, are just a few of the numerous international bodies that have recognised the importance of customary law for the implementation of their mandates.<sup>42</sup> The transition for recognition on paper to recognition in practice has however proven more challenging.

At the national level, a majority of countries home to indigenous or tribal peoples have, in varying degrees, recognised their rights to be governed by their own customary laws. Customary law is also playing a key role in the identification of Indigenous peoples’ rights to land and resources; re-defining their relationships with the state and third parties; scoping and informing their participation in decision-making processes; and, guiding decisions on the approval or otherwise of projects for the exploitation of resources on or under their lands and of applications to access their resources and knowledge. Although primarily relevant for the achievement, regulation and exercise of Indigenous peoples’ rights in their own jurisdictional territories and the countries in which these territories are located, respect and recognition of their customary laws has a significant international dimension, which has yet to be tested.

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<sup>41</sup> ILO Convention No. 169, adopted at the 76<sup>th</sup> Session of the International Labour Conference on 27 June 1989.

<sup>42</sup> See, for example, World Bank 'World Development Report: Equity and Development'.



### **c. Customary law's global reach**

One of the most high profile debates on customary law has taken place within the framework of international negotiations on the protection of traditional knowledge at the Convention on Biological Diversity and World Intellectual Property Organization. In both forums Indigenous peoples have consistently argued that any system for the protection of their traditional knowledge must be based upon their customary laws. In October 2010 the Conference of the Parties to the Convention on Biological Diversity (the body responsible for the implementation of the Convention) adopted the 'Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization'<sup>43</sup> (hereafter Nagoya Protocol), which requires all parties to 'take into consideration' the customary laws and protocols of indigenous and local communities in adopting measures to implement the Protocol's provisions<sup>44</sup>. In so doing, the Protocol has recognised the international dimension of Indigenous peoples' customary laws. It is now only a matter of time until courts find themselves tasked with interpreting obligations relating to traditional knowledge or genetic resources based upon the customary laws of Indigenous peoples from foreign countries. This is, however, just the beginning.

Human rights law, which has been at the forefront of the process to secure recognition of customary law, has itself been transformed in the process. Changes have already been seen in shifts from a traditionally individualistic focus to one that embraces the notion of collective rights and recognises Indigenous peoples as 'peoples' entitled to self-determination. In times gone by, issues of Indigenous peoples' human rights and responsibilities of states to respect and recognise their legal regimes would have been confined to the national jurisdiction in which Indigenous peoples reside. It would have had little relevance for foreign states and little if any impact on proceedings in a foreign jurisdiction. That is no longer the case. Indigenous peoples' rights over their land, resources, cultural patrimony, human remains and sacred objects, traditional knowledge and cultural expressions, wherever they are found, require respect and recognition of their customary laws. Obligations requiring consultation in good faith,

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<sup>43</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, (hereafter Nagoya Protocol)

<sup>44</sup> Article 12 (1) Nagoya Protocol

free prior informed consent, and/or participation by Indigenous peoples in decision-making processes, have the ability to bring customary law of Indigenous peoples into courtrooms far beyond the national jurisdiction of the countries in which they reside.

Issues of customary law may arise in relation to commercial or scientific use of genetic resources and traditional knowledge; carrying out of mining and subsurface resource extraction activities; forestry activities and the establishment of REDD+ carbon sequestration programs; establishment of protected areas and national and international conservation programs; land conversion policies; fishing in coastal waters and freshwater sites; leasing of indigenous lands: purchase by foreign investors and countries of massive swathes of agricultural lands in developing countries; and, the storage of hazardous waste. Identification of the legitimate representatives of Indigenous peoples, confirmation of their right to approve or deny permission to carry out specific activities and of the appropriate procedures to be followed to ensure compliance with traditional decision making practices, are examples of matters governed by customary law that may prove crucial to demonstrating compliance with human rights obligations.

Despite its importance the customary law of Indigenous peoples remained, until recently, largely unexplored except by social anthropologists.<sup>45</sup> Stavenhagen, writing in 1990, claimed that the issue of customary law had excited little interest among legal experts whom he saw as solely interested in written and codified ‘positive’ law.<sup>46</sup> While, Chiayath et al. in their background paper for the 2006 World Development Report, describe the lack of attention to customary law ‘as striking, even if not surprising’.<sup>47</sup> This situation appears to be slowly changing with an emerging body of research and literature on issues such as the nature of customary

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<sup>45</sup> T.W. Bennett, 'Comparative Law and African Customary Law', in Reinhard Zimmermann and Mathias Reimann (eds.), *The Oxford Handbook of Comparative Law* (2006).

<sup>46</sup> Rodolfo Stavenhagen, 'Derecho Consuetudinario Indígena En America Latina', in Rodolfo Stavenhagen and Diego Iturralde (eds.), *Entre La Ley Y La Costumbre: El Derecho Consuetudinario Indígena En America Latina* (Mexico: Instituto Indigenista Interamericano, Instituto Interamericano de Derechos Humanos, 1990), at 28.

<sup>47</sup> Chirayath, 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems, Background Paper for the World Development Report 2006', at 1

law<sup>48</sup>, its role as a source of law<sup>49</sup>, the relationship between customary law and protection of specific human rights<sup>50</sup> and its role in securing sustainable development<sup>51</sup>. Major national studies such as the 1986 study carried out by the Australian Law Reform Commission have informed national legislative development.<sup>52</sup> While numerous publications on the issue of legal pluralism and non-state law have brought discussion of the role of customary law ever more to the fore. The educational field has also seen a major shift in studies of Indigenous peoples legal regimes. For example in the United States, where no university offered studies in indigenous law in 1992, there were at least 30 university level programs for indigenous legal studies by 2011.<sup>53</sup> There is still, however, a long way to go to build awareness among decision makers, the legal profession and the populace at large regarding the nature, scope and importance of customary law and of international legal obligations to secure respect and recognition for its enforcement. Among the challenges to be faced are the task of changing perceptions that Indigenous peoples' customary law is not really law at all but merely habitual customs; building awareness of the historical and continuing place of customary law in legal governance; and promoting respect for individual human rights without undermining communal rights fundamental for the protection of Indigenous peoples' cultural and territorial integrity.

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<sup>48</sup> Amanda Perreau-Saussine and James Bernard Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*. (Cambridge University: Cambridge 2007)

<sup>49</sup> Bederman, Custom as a Source of Law

<sup>50</sup> Robin Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty', *Harvard Human Rights Journal*, 24 (2011)

<sup>51</sup> Peter Orebech, Fred Bosselman, Jes Bjarup, David Callies, Martin Chanock and Hanne Petersen. (eds.), *The Role of Customary Law in Sustainable Development* (Cambridge: Cambridge University Press, 2005)

<sup>52</sup> Australian Law Reform Commission (ALRC) 'Report No 31 The Recognition of Aboriginal Customary Laws, Vol. 2' (Australian Government Publishing Service 1986)

<sup>53</sup> Pers. comm. Melissa Tatum, Research Professor of Law, Indigenous Peoples Law and Policy Program, The University Of Arizona, in Galway 12 June 2011

#### **d. Giving custom its due**

The current study examines state practice and *opinio juris* in order to demonstrate the existence or otherwise of a right of Indigenous peoples to regulate their affairs in accordance with their own laws and practices. It likewise seeks to determine whether state practice and *opinio juris* demonstrate the existence of an obligation upon states to recognise such rights, to give and secure due respect and recognition for Indigenous peoples' customary laws and institutions. It concludes in the affirmative that customary international law has indeed emerged in both areas and argues that the recognition of customary law and Indigenous jurisdiction is vital to the achievement of a wide range of Indigenous peoples' human rights, including those related to their lands, resources, culture, traditional knowledge, and self-determination. While customary international law is clearly distinguishable from Indigenous peoples' customary laws, the latter may influence and indeed demonstrate state practice and *opinio juris*, thereby, influencing the development of customary international law.

Beginning with a look at the historic status of customary law, natural law and positive law as the three pillars of the legal order, analysis will follow the marginalization and modification of custom during the colonial period, its treatment in post-colonial times and its resurgence, to use Borrow's language, in the final decades of the twentieth century. As part of this analysis attention is given to the current status of customary legal regimes, and the interrelationship and interdependence of customary law and human rights. A secondary question which will be addressed will be the potential role of customary law in the rehabilitation and reframing of what may be seen as a fractured legal system. In the process the question will be asked as to whether the resurgence of customary law and its relationship with positive law are necessary and complementary parts of a sound legal order and if so where does the power lie to resolve any conflicts between them, a role played by natural law in earlier times.

Considering the breadth and diversity of existing customary law regimes, a comprehensive analysis of all systems is impossible. Conversely, a focus on any one country, region, or dominant legal regime (e.g. common law countries), would not provide the global perspective sought. Although, the work frequently returns to examination of the treatment of customary law in a number of key countries including Australia, Canada, Peru, South Africa and the United States, it seeks to draw upon as

wide as possible a range of national and local experiences from countries of all continents. The purpose being to show the widespread applicability and recognition of customary law at the local, national or international level in relation to a series of key topics that have dominated the international debate on Indigenous peoples' human rights. These include issues such as self-determination and autonomy; land, territorial and resource rights; rights to culture and cultural heritage; the conflicts between human rights and customary law; and, the future of customary law within national and international legal pluralism. Attention will be given to issues such as: proof of customary law; its role in failing states; its application to address conflicts with private sector actors; its role in regulation of contractual arrangements; and its influence on dominant legal regimes. The objective will be to show, that customary law, far from being an archaic and quaint system of law existing on the margins and of little interest and less importance to the mainstream legal system, is a vibrant and dynamic body of law playing an active and important role in national and international jurisprudence.

This study concludes that international law, jurisprudence of international human rights bodies, state practice and *opinio juris*, as well as national law and jurisprudence of state courts, demonstrates the vital role customary law plays and has to play in global and national legal governance, and in particular its fundamental role in securing Indigenous peoples' human rights.

## Chapter 1. Customary law in context

The roots of a majority of all legal regimes may be traced back to customary law regimes of one kind or another. Keeping this in mind may help to dispel widely held perceptions that Indigenous peoples' customary laws are some unique form of tribal governance, quaint but hardly legal. Undoubtedly, the form and nature of Indigenous peoples' customary law does not resemble that of positive statutory law, but then it does not claim to do so. Customary law is more a set of principles than of hard and fast rules, tradition-based it rests upon distinct epistemologies and responds to distinct social and cultural values, needs, and objectives, than those underlying dominant legal regimes. That does not make it any the less a system of law if, that is, law is considered as a mechanism for securing social harmony and the regulation of relationships within any given society.

This chapter seeks to place Indigenous peoples' customary law in context, providing an overview of its historic status in Europe from the classical Greek period up to, and with particular attention to, its treatment under the common law of England. It continues with consideration of common law criteria for the identification of customary law, which continue to impact on the recognition of Indigenous peoples' rights around the world to this day. It goes on to examine the nature of Indigenous peoples' legal systems and laws, and concludes with consideration of the distinguishing characteristics and sources of customary law.

### 1.1 Historic treatment of custom as a source of law

Philosophical jurisprudence, according to Murphy, has since the time of Plato, rested 'upon three fundamental concepts of order and three allied concepts of law: the order intrinsic to human nature grounds the natural law, the order found in informal social practices grounds customary law, and deliberately stipulated order grounds enacted law.'<sup>1</sup> Vestiges of these three areas of law may be seen in many legal regimes, though not necessarily referred to in these terms. This section begins with examination of the historic interplay between customary law, natural law and positive law and continues

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<sup>1</sup> James Bernard Murphy 'Habit and Convention in the Foundation of Custom' in Perreau-Saussine and Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, at 53.

with a discussion of the criteria developed to identify custom in the English common law system.

### *1.1.1 the historic status of customary law*

Aristotle believed that law (*ius*) could arise by nature (*natura*), by statute (*lege*), and by custom (*consuetudine*), as well as by other ways.<sup>2</sup> The Greek philosophers distinguished between written law *nomos egraphos* and unwritten law *nomos agraphos*, used primarily to describe ‘... innate ‘laws’, or natural law’<sup>3</sup> and, much less frequently, customary law<sup>4</sup>. For Aristotle customary law was, Murphy argues, considered superior to positive law an attitude, he suggests, stemmed from a belief that customary law was a manifestation of natural law and therefore immutable.<sup>5</sup>

The Romans, unlike the Greeks, made a clear distinction between natural law and unwritten law *ius non scriptum*.<sup>6</sup> Cicero saw customary law as falling somewhere between natural and positive law, saying that, ‘Law (*ius*) initially proceeds from nature, then certain rules of conduct become customary by reason of their advantage; later still both the principles that proceeded from nature and those that have been approved by custom received the support of religion and the fear of legislation (*lex*)’<sup>7</sup>. For Julian custom had the force of law, because ‘as all laws rested on the *tacitus consensus* of the people, this must apply to unwritten law as well’.<sup>8</sup> Justinian, grounds the legitimacy of custom in both long usage and consent, famously saying ‘[f]rom the unwritten comes the law which is sanctioned by use, because long lasting customs,

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<sup>2</sup> Aristotle *Rhetorica Ad Herennium* (II, 19) cited in James Bernard Murphy, 'Habit and Convention at the Foundation of Custom', at 57

<sup>3</sup> G C JJ van den Bergh, 'The Concept of Folk Law in Historical Context: A Brief Outline', in Alison Dundes Rentlen and Alan Dundes (ed.), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta: Volume 1*, 5-31, at 6

<sup>4</sup> A Arthur Schiller, 'Custom in Classical Roman Law', in Alison Dundes Rentlen and Alan Dundes (ed.), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta: Volume 1*, 33-47, at 36

<sup>5</sup> Murphy, 'Habit and Convention at the Foundation of Custom', at 64

<sup>6</sup> Schiller, 'Custom in Classical Roman Law', at 36

<sup>7</sup> Cicero, *De Inventione* 2.53.160, cited in Murphy, 'Habit and Convention at the Foundation of Custom', at 75

<sup>8</sup> G. C. JJ. van den Bergh, 'The Concept of Folk Law in Historical Context: A Brief Outline' 5-31, at 7

which are approved by agreement of those who are used to them, resemble laws.’<sup>9</sup>. The influence of custom in Roman law has been found in a number of key areas, including *ius gentium*, *ius honorarium*, and *ius civile*.<sup>10</sup> Smith, while equating *ius civile* with custom, argues that it was the custom of the law-finders not of the wider populace that grounded Roman civil law.<sup>11</sup> The notion that the lawmakers rather than the wider populace were the arbiters of custom is a theme that resonates in debates on the source of custom in English common law<sup>12</sup> and in current debates regarding ‘official’ versus ‘living’ customary law in former colonial states.<sup>13</sup>

During the Middle Ages customary law came to dominate the European legal landscape with local custom abrogating regional custom and both being considered superior to national law. Natural law, influential but not conclusive in Roman law, came in the Middle Ages to be seen as superior to both custom and positive law.<sup>14</sup> The compilation of Gratian’s *Decretum* in first half 12<sup>th</sup> century, which sought to bring together the various strands of canon law, presented natural law as God’s law, thereby, shifting the emphasis from the notion of natural law as universal law to a law circumscribed by theology. As natural law became equated with God’s law Cicero’s notion that custom was derived from natural law and served as the basis for positive law was replaced with a view of positive canon law as the articulation of divine law. Both custom and Canon law remained, however, subordinate to natural law. According to Smith, both Cicero and Thomas Aquinas considered laws contrary to natural law were not truly laws but rather a corruption of the law.<sup>15</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> Schiller, 'Custom in Classical Roman Law', at 38

<sup>11</sup> Munroe Smith, 'Customary Law I.: Roman and Modern Theories', *Political Science Quarterly*, 18/2 (1903), 256 – 81, at 281

<sup>12</sup> See below at footnote 69 and accompanying text

<sup>13</sup> See Tom Bennett, 'Official' vs. 'Living' Customary Law: Dilemmas of Description and Recognition', in Annika Classens and Ben Cousins (ed.), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town: Ohio University Press, 2008).

<sup>14</sup> Smith, 'Customary Law. I.: Roman and Modern Theories', at 266

<sup>15</sup> Ibid.



Porter describes the *Decretum* as part of a process of transition in Europe from ‘a legal system based largely on custom to a system of written, codified law.’<sup>16</sup> This shift responded to the growth of the modern nation state and the notion of sovereignty vested in an absolute monarch. To allow custom to override the sovereign’s actions or deny his commands would, Smith argues ‘... deny his sovereignty and make his power merely governmental.’<sup>17</sup> To the extent that the people may have retained any power to make law through custom this was, says Ibbetson, ‘dependent on the acquiescence, *patientia*, of the ruler’.<sup>18</sup> The readiness of the populace to accept the replacement of custom by a codified system of law was a mark of their antipathy towards customary laws which, Smith contends, they associated with ‘particularism and inequality’, and open to systematic abuse by local elites seeking to secure and maintain their own privileges<sup>19</sup>

While in continental Europe countries were seeking to develop codified systems of law, in England centralisation of political power had occurred much sooner and was accompanied by the development of the King’s courts which applied and developed the common law.<sup>20</sup> Matthew Hale in his *History of the Common Law of England*, 1713, separates the laws of England into *Lex Scripta*, the written Law, which referred to statute: and *Lex non Scripta*, the unwritten law which referred to general and particular customs, that ‘... obtain'd their Force by immemorial Usage or Custom’.<sup>21</sup> Sir William Blackstone, perhaps the most famous of English common law jurists, draws a distinction between three types of custom:

1. General Customs, which are the universal rule of the whole kingdom and form the common law, in its stricter and more usual signification.

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<sup>16</sup> Jean Porter, 'Custom, Ordinance and Natural Right in Gratian's *Decretum*', in Amanda Perreau-Saussine and James Bernard-Murphy (eds.), *The Nature of Customary Law* (Cambridge: Cambridge University Press, 2007), at 82

<sup>17</sup> Smith, 'Customary Law I.: Roman and Modern Theories', at 259

<sup>18</sup> David Ibbetson, 'Custom in Medieval Law', in Amanda Perreau-Saussine and James Bernard Murphy (ed.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, 151-74, at 157

<sup>19</sup> See Smith, 'Customary Law. I.: Roman and Modern Theories', at 264

<sup>20</sup> *Ibid.* at 265

<sup>21</sup> A.W.B. Simpson, 'The Common Law and Legal Theory', in Alison Dundes Rentlen and Alan Dundes (ed.), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta: Volume 1*, at 131

2. Particular customs, which for the most part affect only the inhabitants of particular districts.
3. Certain particular laws, which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.<sup>22</sup>

Brown writing in the opening decade of the 20<sup>th</sup> Century identifies four classes of popular or local custom, including ‘customary habits, unlikely ever to become law; customs which do not meet the criteria for acceptance by the courts as law, but may do so in the future; customs adopted by the courts, and considered to be part of the law of the land; and customs, which appear to satisfy judicial tests for determining the existence of custom, but have not yet been taken up by the courts.’<sup>23</sup> With regard to this latter group it is, he says, unclear whether such custom may be said to be law and therefore of itself binding upon the court or whether it only becomes law as a result of its adoption by the courts.<sup>24</sup> Blackstone refers to the common law as a ‘collection of customs and maxims’ that drew their force from ‘general reception and usage’.<sup>25</sup> Although, he viewed judicial decisions as the most authoritative source of evidence of the existence of customary law, he did not accept the notion that judges made law.<sup>26</sup> Brown takes a contrary position arguing that the idea that judges do not make law is a legal fiction demonstrable by the fact that English judges ‘often introduce new rules which have no foundation in either pre-existing Law or Custom’.<sup>27</sup> Cromartie expresses a similar view stating that

[n]o one is likely to deny that common law is the developing usage of the community of common lawyers, nor that the most appropriate word for such a thing is ‘custom’ (or, in Latin, *consuetudo*). But even in the homeland of the

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<sup>22</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Original printing Clarendon Press, Oxford, 1765- 1759) Vol. I, at 67

<sup>23</sup> W. Jethro Brown, 'Customary Law in Modern England', *Columbia Law Review*, 5/8 (1905), 561-83, at 566

<sup>24</sup> *Ibid.*

<sup>25</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Original printing Clarendon Press, Oxford, 1765- 1759) Vol. I, at 67

<sup>26</sup> *Ibid* at 68-70

<sup>27</sup> Brown, 'Customary Law in Modern England', at 563

common law tradition, a claim that on the face of it requires more argument is that this usage represents the custom of the people.<sup>28</sup>

St. German supports a more populist notion of common law as emanating from the populace at large, claiming in his treatise *Doctor and Student*, published in 1528, that ‘divers general customs of old time used through all the realm: which have been accepted and approved by our sovereign lord the king and his progenitors and all their subjects...[may]... properly be called the common law.’<sup>29</sup> The result is a tension between the notions of the King as lawmaker, albeit through the actions of the King’s courts, and proposition that the law derives from the will of the people. Overcoming such tensions required a theory of custom to bring greater clarity to the identification and enforcement of customary law.

### 1.1.2 the common law theory of custom

As custom assumed a predominant position during the Middle Ages in Europe the need for a theory of customary law and the establishment of rules for its identification became more pressing. According to Ibbetson, the Digest of Julian and the Code of Constantine, the most influential of Roman law texts, provided the key elements upon which European medieval jurisprudence crafted its theories of customary law.<sup>30</sup> These were:

1. Long-standingness of a practice
2. Flowing from the tacit agreement of the people
3. Unwritten
4. It may or may not prevail over a contrary *lex*
5. It must not be contrary to reason, *ratio*<sup>31</sup>

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<sup>28</sup> Alan Cromartie, 'The Idea of Common Law as Custom', in Perreau-Saussine and Murphy (eds.) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, 203 – 227, at 203-4

<sup>29</sup> St German’s *Doctor and Student*, ed. T.F. T. Plunkett and J.L. Barton, Selden society, vol.91 (London, 1974), p 47, cited in Cromartie, 'The Idea of Common Law as Custom' at 211

<sup>30</sup> David Ibbetson, 'Custom in Medieval Law', in Amanda Perreau-Saussine and James Bernard Murphy (eds.) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, 151-74, at 152

<sup>31</sup> Ibid.

Bartholus claims that the '*causa proxima*' of enforceable customary law was its 'foundation in the consent of the people', with long usage being the '*causa remota*'.<sup>32</sup> In Ibbetson's view, Bartholus placed greater emphasis on the consent of those subject to the law than on the period for which it had been in force following Bassianus in fixing the period for crystallising custom at 10 years.<sup>33</sup> Proof of the fact of custom was considered of much importance by Bartholus who felt two witnesses should evidence it in writing.<sup>34</sup> However, where a custom was so notorious that the judges would have been aware of it such evidence would not be required.<sup>35</sup> Bartholus, according to Ibbetson, took the view that as custom 'existed on the interface between formal law and popular practice it would be a mistake to rely on juristic writings and ignore what was actually going on.'<sup>36</sup> Bartholus would appear to support the proposition that the dynamic nature of custom requires the courts to seek out 'living custom', an issue of central to current debates regarding legitimate sources of customary law.

Blackstone in his famous *Commentaries on the Laws of England* set out a seven-stage test for determining whether a custom can override a contrary principle or tradition of common law. To succeed under this test a custom must be shown to be immemorial, continuous, peaceable, reasonable, certain, compulsory and consistent.<sup>37</sup> Over time these have been whittled down with Halsbury's Laws of England, for example, setting out just four essential attributes a custom: immemorial origin, reasonableness, certainty of locality and persons, and continuity without interruption since its immemorial origin.<sup>38</sup> These correspond largely to the most highly litigated of Blackstone's criteria the tests of immemorial origin, reasonableness and certainty.<sup>39</sup>

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<sup>32</sup> Ibid, at 156

<sup>33</sup> Ibid.

<sup>34</sup> [*Repetitio* ad D.1.3.32, Nos. 21-24] cited in Ibbetson, 'Custom in Medieval Law', at 158

<sup>35</sup> Ibid.

<sup>36</sup> Ibbetson, 'Custom in Medieval Law', at 158

<sup>37</sup> William Blackstone, *Commentaries on the Laws of England*.

<sup>38</sup> Halsbury's Laws of England 4<sup>th</sup> Edn. Reissue Butterworth's, London, 1998, vol. 12(1)

<sup>39</sup> David Callies, 'How Custom Becomes Law in England', in Orebech et.al. (eds.), *The Role of Customary Law in Sustainable Development*.

By accepted legal definition to be considered immemorial under common law a custom had to be traceable back to the coronation of Richard I in 1189. David Callies argues, however, that even in Blackstone's time the courts showed considerable discretion in their interpretation of the test of immemoriality. By the middle of the nineteenth century the test was reduced, he says, '... to a presumption that, once established, shifted the burden to the one attacking the custom to show by evidence that it was not immemorial.'<sup>40</sup>

Reasonableness had been central to securing the recognition of custom since long before Blackstone wrote his *Commentaries*.<sup>41</sup> One of the earliest recorded cases is the 1401 yearbook case of *Miles v. Benet*<sup>42</sup>, which Callies says 'helped establish the principle that a custom that subjects the multitude to the whim of an individual is bad and unreasonable'<sup>43</sup>. Based on his analysis of the case law, Callies comes to the conclusion that in determining the reasonableness of a custom the issue of reciprocity and the public good must also be taken into account.<sup>44</sup> While a custom may run contrary to common law the courts have decided that 'a custom contrary to the first principles of justice can never be good.'<sup>45</sup> In the words of Holt J., in *Lewis v Masters*, 'it is one thing if a custom be different from the law, and another thing if it be repugnant ... for customs that overthrow the principles of law, and which are unreasonable, are to be rejected.'<sup>46</sup> Callies cites at length from the judgment in the 1908 case of *Johnson v Clark*<sup>47</sup> where the court places the collective interest above that of the individual, an issue of no little importance for Indigenous peoples, holding

a custom which is for the advantage of an individual only and is prejudicial to the public, or a class of the public, is bad; for the common law, in principle

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<sup>40</sup> Callies, 'How Custom Becomes Law in England', at 168

<sup>41</sup> Ibid. at 176

<sup>42</sup> *Miles v. Benet* (1401) YB Trin 2 Hen, 4 f.24, Pl.20.

<sup>43</sup> Callies, 'How Custom Becomes Law in England', at 176

<sup>44</sup> Ibid.

<sup>45</sup> *Fisher v Lane* (1777) 3 Wils 298; 95 ER 1065

<sup>46</sup> *Lewis v Masters* (1695) 5 Mod Rep 75-76; 87 ER 528 - 529

<sup>47</sup> *Johnson v Clark* [1908] 1 Ch 303

imposes obligations on the individual for the benefit of the public, and not on the public for the benefit of the individual<sup>48</sup>

This notion of the communal good superseding individual benefits conforms more closely with Indigenous peoples' rights regimes than do exclusive individualistic property rights normally equated with western legal regimes. The repugnancy rule, however, was to become a highly controversial element of colonial governance being seen as an arrogant and unwarranted interference in the affairs of native peoples being used as it was to determine what aspects of customary law would or would not be recognised in colonial territories.

Continuity is a key requirement for enforceability of custom under English common law as any interruption may be taken as a cessation of the custom. According to Blackstone '...an interruption of the possession only, for ten or twenty years, will not destroy the custom. As if I have a right of way by custom over another's field, the custom is not destroyed, though I do not pass over it for ten years; it only becomes more difficult for me to prove: but if the right be any how discontinued for a day, the custom is quite at an end.'<sup>49</sup> However if continuity is broken by coercion or other such pressure this may not serve to void the custom as law.<sup>50</sup> Requirements for continuity have been amongst the most controversial for Indigenous peoples seeking to secure recognition of land rights following dispossession by colonial powers and settler states.

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<sup>48</sup> Ibid. at 309-318 cited in Callies, 'How Custom Becomes Law in England', at 185

<sup>49</sup> Blackstone *Commentaries* at 77, See Callies 'How Custom Becomes Law in England' for a review of cases demonstrating the distinction between interruption of use, which does not void a custom and interruption of the right, which does.

<sup>50</sup> See Callies, 'How Custom Becomes Law in England', at 172 where he discusses *Warrick v. Queen's College, Oxford* (1870) 10 LR Eq 105 a case in which the court found substantial evidence that several commoners, due to persuasion, threat and other means, had ceased to exercise their common rights, it also found that where the lord has attempted to stop the user of a common, the fact that some tenants have yielded to such attempts was not an interruption of the right within the meaning of statutes defining interruption. As a consequence, what customary rights remained were sufficiently continuous to be upheld.

Custom has been frequently raised as a defence to accusations of trespass, an issue of much importance to Indigenous peoples seeking access, for instance, to sacred sites and traditional hunting and fishing grounds. Proving custom was under English law critical to such a defence and to do so it was necessary to demonstrate certainty relating to the practice (i.e. the actual activities that may take place, and the manner in which they are to be enjoyed), locale (it must be specific to an identifiable area) and persons (it can apply to all the members of a community but cannot apply to the population of the country as a whole).<sup>51</sup>

One of Blackstone's criteria that has rarely been the subject of litigation is the notion of compulsivity, commonly referred to as *opinio necessitatis*. Callies takes as self-evident that a custom must be binding if it is to be law, saying 'a law is not a law if it is not obligatory on the parties.'<sup>52</sup> The issue at stake is whether custom is to be considered law prior to its adoption by the courts or only after such adoption, as Austin thought.<sup>53</sup> Professor Salmond would turn Austin's argument on its head proposing that '[c]ustom is law not because it *has been* recognized by the Courts, but because it *will* be so recognised, in accordance with fixed rules of law if the occasion arises.'<sup>54</sup> The question remains however as to who is empowered to fix the rules by which custom is to be identified. The Privy Council in the 1931 Nigerian case of *Eleko v The Officer Administering the Government of Nigeria & anor.*, took the position that '[i]t is the assent of the native community that gives a custom its validity and, therefore, barbarous or mild, it must be shown to be recognised by the community whose conduct it is supposed to regulate.'<sup>55</sup> This appears to demonstrate support for a test of *opinio necessitatis* there is, however, as yet no hard and fast rule in this area and the English common law rules for the identification of enforceable custom have been variously interpreted in those countries falling under the rule of the

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<sup>51</sup> Ibid. at 165-204

<sup>52</sup> Ibid. at 205

<sup>53</sup> See Alan Watson, 'An Approach to Customary Law', *University of Illinois Law Review*, (1984), 561 – 76 where he argues that *opinio necessitatis* does not provide a sound basis for a theory of customary law.

<sup>54</sup> Salmond *Jurisprudence*, p. 164 cited in Brown, 'Customary Law in Modern England', at 568

<sup>55</sup> [1931] A.C., 662, at 673, cited in A. St. J. J. Hannigan, 'Native Custom: Its Similarity to English Conventional Custom and Its Mode of Proof', *Journal of African Law*, 2/2 (1958), 101 -15, at 112

common law. Blackstone's criteria, in particular the requirement of continuity, continue to play an influential role in governing issues of recognition of custom in many parts of the world today, often serving to legitimise the historic dispossession and ongoing denial of Indigenous peoples' ancestral rights to their lands and resources.<sup>56</sup> The definition and implementation of rules for the identification and enforcement of customary law is therefore crucial for securing the recognition and respect for Indigenous peoples' legal regimes and their rights to self-determination, a theme central to this study.

## **1.2 Customary law of Indigenous peoples**

There are an estimated 350 million indigenous people worldwide, with around 5,000 distinct peoples in more than 70 countries speaking over 4,000 different languages.<sup>57</sup> The Secretariat to the United Nations Permanent Forum on Indigenous Issues (hereafter UNPFII) claims that it is 'not unreasonable to assume that there are at least as many legal systems' as there are distinct Indigenous peoples.<sup>58</sup> In most countries where indigenous peoples reside their customary laws and practices are given direct or indirect recognition, which may range from formal constitutional recognition to tolerance of customary practices that on the face of it run counter to national law. For some peoples, such as the uncontacted peoples of the Amazon<sup>59</sup> and other Indigenous peoples living in remote areas outside the reach of national law, custom is the only law they know. Likewise in post-conflict countries<sup>60</sup>, failing states<sup>61</sup>, and states with no formal functioning government or juridical system<sup>62</sup>, customary law may prove the

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<sup>56</sup> See further the discussion on extinguishment of native title in chapter 5 below

<sup>57</sup> Report of the Secretariat on Indigenous Traditional Knowledge, United Nations Permanent Forum on Indigenous Issues (UNPFII), sixth session, May 2007, E/C.19/2007/10, at 12

<sup>58</sup> See E/C.19/2007/10 at 12, see also Stavenhagen, 'Derecho Consuetudinario Indígena en América Latina', at 39

<sup>59</sup> An estimated one hundred uncontacted peoples are believed to exist in the Amazonian region, many in danger of extinction. UNEP/Convention on Biological Diversity/WG8J/3/INF/1, at 38

<sup>60</sup> See, ICHRP 'When Legal Worlds Overlap: Human Rights, State and Non-State Law', (Versoix, Switzerland, International Council on Human Rights Policy: 2009).

<sup>61</sup> Martin Chanock, 'Customary Law, Sustainable Development and the Failing State', in Orebech et al. (eds.), *The Role of Customary Law in Sustainable Development*, 338 - 83

<sup>62</sup> Michael van Notten, *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*, edited by Spencer Heath MacCullum, (Asmara, Eritrea: The Red Sea Press, 2005).



preferred, if not the only, system of law to which the populace can turn in their search for justice.<sup>63</sup> This section examines the nature of Indigenous peoples legal regimes before going on to examine the nature of customary law.

### 1.2.1 the nature of Indigenous peoples legal regimes

Customary law has been described as a body of rules, customs, or traditions, considered binding upon them by the people or community to whom they refer.<sup>64</sup> There is, however, no universally recognised definition of customary law a term viewed by many as problematic. Its link with ‘custom’ has, for example, been described as potentially confusing and suggestive of a wide range of traditional behaviours some of which ‘have nothing whatever to do with law’.<sup>65</sup> In its place Alison and Alan Dundes propose use of the term ‘folk law’ saying that ‘[a]ll folk law is customary in the sense that it is traditional, but not all custom is law!’<sup>66</sup> John Glenn considers the term folk law as being too close to folklore and suggests instead the term ‘chthonic law’<sup>67</sup>. Based on the word autochthonous the term describes, he says, the laws of peoples ‘living in or in close harmony with the earth’.<sup>68</sup> Christine Zuni Cruz finds Glenn’s approach attractive for its recognition of a distinct indigenous ‘chthonic legal tradition’, which Glenn places alongside the word’s dominant legal traditions.<sup>69</sup> Unger in his book *Law in Modern Society* utilises the term ‘interactionalist’ law interchangeably with customary law to describe systems of law he says demonstrate ‘factual regularity in behaviour’ and ‘the sentiment of obligation

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<sup>63</sup> See generally Janine Ubink and Benjamin van Rooij 'Towards Customary Legal Empowerment: an Introduction', in Janine Ubink (ed.) *Customary Justice: Perspectives on Legal Empowerment*, (Rome, International Development Law Organization (IDLO), 2011)

<sup>64</sup> Taslim Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (London: Stevens, 1962)

<sup>65</sup> Alison Dundes Rentlen and Alan Dundes (eds.), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta: Volume 1*, at 4

<sup>66</sup> Ibid.

<sup>67</sup> Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000), at 57

<sup>68</sup> Ibid, citing E. Goldsmith, *The Way: An Ecological World View* (Rider, 1992)

<sup>69</sup> Christine Zuni Cruz, 'Law of the Land - Recognition and Resurgence in Indigenous Law and Justice Systems', in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds.), *Indigenous peoples and the Law: Comparative and Critical Perspectives* (Oxford and Portland, Oregon Hart Publishing 2009), at 317

and entitlement'.<sup>70</sup> Interestingly, Unger, distinguishes customary law from positive law describing the latter's emergence as a consequence of 'the disintegration of community'.<sup>71</sup> More recently, Perry has utilised the term 'customary law systems' to distinguish Indigenous peoples' legal regimes from mere collections of habits and customs.<sup>72</sup>

Interestingly, the United Nations Declaration on the Rights of Indigenous Peoples does not use the term 'customary law' at all but refers instead to the 'laws, customs and traditions' of Indigenous peoples.<sup>73</sup> Although, the Declaration's provisions clearly encompass indigenous people's customary laws,<sup>74</sup> the term customary law itself was evidently not considered sufficiently all embracing to cover the full range of Indigenous law, custom and tradition envisaged under the Declaration. Indigenous peoples themselves have utilised a variety of alternative terms to describe their own legal regimes. Quechua activist Alejandro Argumedo argues that the term 'customary law' does not adequately reflect the nature of contemporary indigenous legal regimes, which, he says, often incorporate elements drawn from non-indigenous sources. For this reason he favours use of the favours the term 'indigenous law'.<sup>75</sup> In a similar vein, Gabriel Muyuy Jacanamejoy, Director of the Colombian Presidential Program for Development of Indigenous Peoples, has drawn attention to use by Indigenous peoples in Colombia of the all-encompassing term 'our own laws' to describe their laws and customs.<sup>76</sup> Chief Justice Yazzie of the Navajo Nation co-opts the notion of common law, utilising the term to 'Navajo common law', to describe the Navajo

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<sup>70</sup> Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: The Free Press, 1977), at 49

<sup>71</sup> *Ibid.* at 61

<sup>72</sup> Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty', at 47

<sup>73</sup> UN Declaration, Article 34

<sup>74</sup> See generally Claire Charters, and Rodolfo Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009).

<sup>75</sup> See Brendan Tobin and Emily Taylor, *Across the Great Divide: Complementarity and Conflict between Customary Law and National Sui Generis TK Law in Peru*. (Lima: SPDA IDRC 2009), at 7

<sup>76</sup> *Ibid.*

system of Peacemaking based upon what he calls the 'Life Way'<sup>77</sup>, which he argues incorporates traditional Navajo concepts into modern legal institutions.<sup>78</sup> The notion of an 'Indigenous common law' has, according to Tatum, the potential to more readily convey the credentials of Indigenous peoples' legal systems as a solid body of law rather than a mere collection of habitual practices.<sup>79</sup> Despite the foregoing, the term customary law continues to be utilised extensively by Indigenous peoples' representatives and academics to refer to Indigenous peoples' legal regimes. It is also widely used in international and national forums and it is increasingly referred to in national, regional and international reports, negotiations and legislation. Indeed, so widespread is its use that scholars and others that had previously leaned towards use of the term 'Indigenous law' have in recent years felt obliged to use the term customary law.<sup>80</sup> In view of this growing use care must be taken to clearly identify instances in which recognition of all aspects of Indigenous peoples' legal regimes is requisite and those for which recognition of customary law alone is appropriate. Although there are obvious limitations to use of the term 'customary law' it is arguably broad enough to cover a wide range of law, traditions and customs, generated by Indigenous peoples' own institutions in accordance with their own decision-making practices. This may include laws recorded in written format although, as will be seen in more detail later, codification of customary law poses many problems. While, customary law would not normally be deemed to incorporate statutory instruments adopted by a tribal government the substance, application and interpretation, of such statutory law may rest upon and require compliance with customary law principles.

While recognising the limitations associated with the utilisation of the term 'customary law' the current study seeks to examine the status of indigenous peoples'

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<sup>77</sup> The Honourable Robert Yazzie, 'The Life Way and the Law Way', in Harvard Project (ed.), *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination: The Harvard Project on American Indian Economic Development* (New York, Oxford: Oxford University Press, 2008), at 49

<sup>78</sup> The Honourable Robert Yazzie, 'Life Comes from It': Navajo Justice Concepts', *New Mexico Law Review*, 24 (1994), 175, at 187

<sup>79</sup> Pers. comm. Melissa Tatum, 13 June 2011.

<sup>80</sup> See, for example, Heather McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition* (Sydney, London, Sao Paulo, Eagan: Thomson Reuters, 2009), at 67

traditional unwritten legal regimes and their role in securing protection of human rights. The study adopts the premise that ‘customary law’, along with natural law and positive law, are fundamental aspects of the legal order and crucial for balanced legal governance. It is a premise of this study that the rise of positivism has brought disequilibrium to that legal order, undermining its capacity to respond to the needs of a multicultural, environmentally threatened, global community. The interdependence and permeability of customary, natural and positive law is such that strict boundaries cannot easily be drawn between them. Both custom and positive law are, for example, the means through which natural law may be given ‘practical meaning’<sup>81</sup>, while natural law may be identified from universal custom.<sup>82</sup> At times custom may also take the form of positive law<sup>83</sup> and may even be reduced to writing while positive law may on occasion be little more than the articulation of custom<sup>84</sup>.

As used here, the notion of indigenous peoples’ and local communities customary law, refers to that body of customs, norms and associated practices, which have been developed or adopted by indigenous people or local communities, whether maintained in an oral or written format, to regulate their activities and which they consider to be binding upon them without the need for reference to national authorities.

### 1.2.2 the nature of customary law

Indigenous peoples’ worldview or cosmovision and their distinct epistemologies underlie systems of law, custom and tradition rooted in land, spirituality and culture. A study by the Law Reform Commission of Western Australia on Recognition of Aboriginal Customary Law, cites one Aboriginal respondent as saying that Aboriginal law ‘connected people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and our responsibility to

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<sup>81</sup> Porter, 'Custom, Ordinance and Natural Right in Gratian's *Decretum*', at 91

<sup>82</sup> Murphy, 'Habit and Convention in the Foundation of Custom', at 64

<sup>83</sup> Bederman, *Custom as a Source of Law*, at 25-6

<sup>84</sup> Gordon W. Woodman, 'Customary Laws and Customary Legal Rights', in Tom G. Svensson (ed.) *On Customary Law and the Saami Rights Process in Norway: Proceedings from a Conference at the University of Tromso*, (University of Tromso, 1999), at 19

the maintenance of this order.<sup>85</sup> The infusion of law with spirituality is, according to Glenn, an inevitable consequence of indigenous cosmivision, which sees the natural world as 'sacred'; it is in essence, he says, 'a divine legal tradition.'<sup>86</sup> If the natural world is divine then, says Glenn, it is not to be 'chopped down, dug up, extracted and burned or dumped upon.'<sup>87</sup> This sense of the inviolability of nature is captured graphically in the message to the West from the Mamas, a consecrated group of the Kogi people of the Colombian Sierra Nevada, who in the late 1990's broke their self-imposed seclusion from the outside world to send a warning of the dire consequences for humankind of continuing environmental destruction. In their words, referring to the sanctity of Mother Earth they sent the message that: a son does not rape his mother.<sup>88</sup>

Referring to the divine source of custom, the Honourable Robert Yazzie, Chief Justice of the Navajo Nation describes *beehaz'aanii* the Navajo word for 'law', as 'the essence of life', something fundamental and absolute existing from the beginning of time.<sup>89</sup> In terms that resonate with Thomist notions of natural law, he says:

Our religious leaders and elders say that man-made law is not true 'law'. Law comes from the Holy People who gave the Navajo people the ceremonies, songs, prayers and teachings to know it. If we lose our prayers and ceremonies, we will lose the foundations of life. Our religious leaders also say if we lose those teachings we will have broken the law.<sup>90</sup>

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<sup>85</sup> Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report: The Interaction of Western Australian Law with Aboriginal Law and Culture*, (Law Reform Commission of Western Australia, 2006) at 64, citing LRCWA, 'Project No. 94, Thematic Summaries of Consultations – Manguri' (4 November 2002), at 3

<sup>86</sup> Glenn, *Legal Traditions of the World*, at 68

<sup>87</sup> *Ibid.* at 69

<sup>88</sup> Pers. comm. Alejandro Argumedo, August 2011. See also *Images of the Heart Ancient Telepathy of the Human Heart: Drunvalo Melchizedek interviewed by Miriam Knight* Available at: <http://communityconnexion.com/article/09-00/drunvalo2.html>

<sup>89</sup> Yazzie, 'Life Comes from It': Navajo Justice Concepts', at 175

<sup>90</sup> *Ibid.* at 176

The terms Indigenous peoples associate with their normative regimes do not easily equate with western notions of 'law'. Describing the term 'Tjukurrpa' of the Spinifex Aboriginal people of Western Australia Cane says that, the

equation of the Tjukurrpa with 'law' conveys something more than Europeans might associate with conventional legislation. The Spinifex perception of law incorporates elements of fear, power, complexity, reason and authority but also conveys something universal and metaphysical. It is, in both practice and content, more spiritual than judicial. Spiritual beings are described as belonging to 'the Law' and country is seen as part of 'the Law'. Sacred boards are said to be 'the Law' and ceremonial acts are conducted as expressions of 'the Law'. Senior holders of Tjukurrpa are 'Law men'. When travelling through country people will often point to physical features and describe it as 'Law' or they might not speak at all, whispering, 'big Law'.<sup>91</sup>

Although there are exceptions, Indigenous peoples, do not tend to have a specialised elite trained in the law.<sup>92</sup> Furthermore, as Glenn notes an interesting aspect of customary law's unwritten nature is that 'no one can enjoy the privileged role of scribe, and no one can subsequently write large, ongoing commentaries and themselves become sources.'<sup>93</sup> That is not to say custom is impervious to the influence of individuals and a 'council of elders', seen as wise in the ways of custom and interpretation of the law is a common feature of indigenous societies.<sup>94</sup> To the extent that chiefs and councillors are viewed as wise in the law this derives, according to Bennett and Vermeulen, from 'their *general* status in the community as figures of authority' and the role of chief in trial proceedings is they say largely passive.<sup>95</sup>

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<sup>91</sup> Scott Cane, 'Pila Ngru: The Spinifex People' (Freemantle: Freemantle Arts Centre Press, 2002). Cited in McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 69

<sup>92</sup> For an example of a pre colonial exception see Fergus Kelly *A Guide to Early Irish Law* (Early Irish Law Series, III (Dublin: Dublin Institute for Advanced Studies 1988), at 242 – 251, where he discusses the law schools of the ancient Irish where customary law was codified and taught.

<sup>93</sup> Glenn, *Legal Traditions of the World*, at 59

<sup>94</sup> *Ibid.* at 60

<sup>95</sup> T. W. Bennett, and T. Vermeulen, 'Codification of Customary Law', *Journal of African Law*, 24/2 (1980), 206-19.

Where chiefly rule exists, this is still, Glenn posits, a form of consultative rule.<sup>96</sup> Similarly, Tonkinson in a study of kinship among the Mardujarra claims that, '[a]boriginal society has no chiefs or law enforcement specialists.'<sup>97</sup> While there are 'status distinctions based on age' it is, he says, broadly egalitarian in nature relying for conformity on 'individual self-regulation rather than fear of external authority or the wrath of the gods.'<sup>98</sup> Leadership shifts within groups according to the issue at hand with most decisions being taken by 'family heads in consultation with other adult members of the group.'<sup>99</sup>

The focus of Indigenous peoples legal regimes tends to be towards the restoration of community well-being rather than retribution. Both sanctions and dispute resolution mechanisms<sup>100</sup> have the overall objective to resolve conflicts, when arising, as quickly as possible.<sup>101</sup> Zion describes the Cree [Native American] law as 'structural and procedural, rather than substantive and rule-oriented ... [dealing] with relationships, mutual obligations and the ways in which the particular tribe and its people survive.'<sup>102</sup> This focus on structure and process rather than fixed rules gives customary law gives its flexibility to address specific cases on their merits, it may also however leave itself open to abuse at the hands of dominant members of a community or people.

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<sup>96</sup> Glenn, *Legal Traditions of the World*. at 60

<sup>97</sup> Tonkinson Mardujarra Kinship, in White J P and D.J. Mulvaney (eds.) *Australians to 1788* (Fairfax, Syme and Weldon, Sydney, 1987) extract reprinted in McRae et al. *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, 75-81, at 79

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Submission of Dr. Diane Bell to Law Reform Commission, '*The Recognition of Aboriginal Customary Laws*, Volume 1', (Australian Government Publishing Services, 1986), at Para 37.

<sup>101</sup> McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 79

<sup>102</sup> J. W. Zion, 'Searching for Indian Common Law', in B.W. Morse, And G.R. Woodman (eds.), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988), cited in McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 96

### 1.3 Characteristics of Indigenous peoples' customary laws

Customary law, says Ian Hamnett, 'emerges from what people do, or – more accurately – from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe.'<sup>103</sup> For Bennett this characteristic of custom as a fact, i.e. what people do and how it is transformed into a norm i.e. what people 'ought' to do, is an 'enigmatic process that has never been fully understood'.<sup>104</sup> Writing in 1991, Bennett argued that the issue of definition of customary law had been largely discarded in favour of identification of the characteristics of customary law.<sup>105</sup> This section examines both the characteristics and sources of Indigenous peoples' customary law.

#### 1.3.1 characteristics of customary law

For Hamnett one of the principal characteristics of customary law is its focus not on '...what does this judge say?' but rather 'what do the *participants* in the law regard as the rights and duties that apply to them?'<sup>106</sup> The real task of the customary jurist is, he claims, 'to answer this last question, not to apply deductive or analytic reasoning to a set of professionally formulated legal concepts.'<sup>107</sup> Customary law he argues is to be found in 'concrete principles, the detailed application of which to particular cases is flexible and subject to change.'<sup>108</sup> Hamnett stresses the distinction between customary law and practices, saying, 'people recognize in normative law a moral authority, a legitimacy, that they do not accord to practice or usage as a whole.'<sup>109</sup> Hamnett warns against conflating African customary law with the English doctrine of custom burdened as it is with the requirement to meet Blackstonian style criteria as a condition for the identification of custom.<sup>110</sup> His warnings regarding Blackstone's

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<sup>103</sup> Ian Hamnett, *Chieftainship and Legitimacy* (London: Routledge & Kegan Paul, 1975).

<sup>104</sup> T. W. Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Cape Town, Wetton, Johannesburg: Juta & co, Ltd, 1991), at 6.

<sup>105</sup> *Ibid.*, at 5

<sup>106</sup> See Hamnett, *Chieftainship and Legitimacy*, at 6, cited in Bennett *A Sourcebook of African Customary Law for Southern Africa*, at 6

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.* at 6

<sup>110</sup> *Ibid.*



criteria is well made, it does not however get away from the fact that something more than mere usage is required to turn custom into law.

While denying the need for deductive reasoning, Hamnett suggests reliance on what the ‘participants’ take to be their rights and duties under the law<sup>111</sup>; in essence this belief is the stuff of *opinio necessitatis*. Bederman, based on his reading of Max Gluckman, claims that ‘[m]any African preliterate legal systems worked because they fundamentally assessed the reasonableness of conduct in the light of custom.’<sup>112</sup> He goes on to query whether this notion of reasonableness or ‘a sense of obligation (based on reciprocity)’, are the necessary ‘extra ingredient’ that changes a mere usage into binding custom.<sup>113</sup> Bederman refutes the notion that custom requires judicial recognition and adopts a dynamic view of custom arguing that desuetude under customary law reflects the capacity of Indigenous peoples and their tribal court’s to reframe customs considered ‘unreasonable in the circumstances of modern life.’<sup>114</sup> Similarly, Roy in a study of customary law in Asia presents a view of customary law as a dynamic process rather than as a strictly defined set of rules and regulations. In this vein, he adopts Bekker’s definition of customary law, seen as

an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their son’s sons (sic), until forgotten, or until they became part of the immemorial rules...<sup>115</sup>

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<sup>111</sup> Ibid.

<sup>112</sup> Bederman, *Custom as a Source of Law*, at 13, referring to Max Gluckman, *The Judicial Process among the Bartose of Northern Rhodesia* (Manchester: Manchester University Press, 1955), ‘a Bartose [judge] ... assesses evidence by the standard of how a reasonable man or woman would have behaved, meticulously according to custom...’ at 138

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Bekker, J.C 1989, *Seymour’s Customary Law in Southern Africa, 5th edn*, Cape Town, Juta & Co. Ltd, at. 11, cited in Roy, *Traditional Customary Laws and Indigenous Peoples in Asia*, at 6

This notion of customary law evolving over time, from a peoples' 'way of life', recognises the manner in which Indigenous peoples' legal regimes are encapsulated within and help to define the boundaries of their culture. An alternative way of viewing customary law is to consider its purpose, rather than its content. A description of Mayan law by Guisela Mayén, for instance, states that:

Indigenous law consists of a series of unwritten oral principles that are abided by and socially accepted by a specific community. Although these norms may vary from one community to another, they are all based on the idea of recommending appropriate behaviour rather than on prohibition... Customary indigenous law aims to restore the harmony and balance in a community; it is essentially collective in nature, whereas the Western judicial system is based on individualism. Customary law is based on the principle that the wrongdoer must compensate his or her victim for the harm that has been done so that he or she can be reinserted into the community, whereas the Western system seeks punishment.<sup>116</sup>

Tsositse suggests that, despite wide variance among customary law regimes, it is possible to identify underlying similarities such as communal and collective aspects of ownership, a mix of rights and responsibilities grounded in a spiritual value system, and a central ethic 'that resources must be used in a way that is productive and beneficial to all members, including future generations'.<sup>117</sup> In a multi-country study, coordinated by the International Institute for Environment and Development (IIED), project participants concluded that 'while specific customary laws vary considerably between communities, there are many commonalities in the underlying *values* or *principles*, of diverse ethnic groups.'<sup>118</sup> Amongst the identified common values were

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<sup>116</sup> Guisela Mayén, quoted by Louisa Reynolds, *Mayan law still lacks official recognition*, Latin America Press, October 6, 2006. Available at:

<http://www.globalissues.org/HumanRights/indigenous/#CustomaryLawbackwardorrelevantjusticesystems>

<sup>117</sup> Rebecca Tsositse, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm', *Journal of Law, Medicine & Ethics*, (2007), 396 – 411, at 398

<sup>118</sup> Krystyna Swiderska, 'Banishing the Biopirates: A New Approach to Protecting Traditional Knowledge', *IIED Gatekeeper Series 129 (IIED)*, (2006a), at 14 (emphasis in the original).

‘respect for nature or Mother Earth; free/open sharing of resources; reciprocity or equal exchange of resources; and solidarity or brotherhood, i.e. helping those in need and serving the common good.’<sup>119</sup> These principles, while not unknown to western legal regimes, stand in stark contrast to current western focus on maximum exploitation of resources and the enforcement of property rights which, in Blackstone’s words, may be exercised ‘in total exclusion of the right of any other individual in the universe.’<sup>120</sup> Indigenous peoples’ legal regimes adopt amore nuanced approach to interests in land and resources recognising both collective and communal rights, which must not be confused. As Tsosie describes it

Tribal property systems tend to be group oriented and may have aspects of both collective and communal ownership. Collective ownership systems place ownership in the community, but may allow individuals to acquire superior rights to or responsibilities for part of the collective property. Communal ownership systems, on the other hand, do not permit individuals to acquire special rights to any part of the property vis-à-vis other community members.<sup>121</sup>

The frequent failure by dominant legal regimes to recognise the reality of Indigenous peoples’ internal relationships, their ways of ordering their own affairs and of rights associated with collective versus communal property, can cause much hardship. If Indigenous peoples’ rights are to be respected it is, therefore, crucial that they be given the opportunity to participate in and to influence adoption and implementation of law and policy likely to affect them and their legal regimes.

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<sup>119</sup> Ibid. For explanation of these terms see 'Protecting Community Rights over Traditional Knowledge: Implications of Customary laws and Practices', *Research Planning Workshop, Cusco, Peru 20-25 May 2005*, (IIED London 2005)

<sup>120</sup> Rebecca Tsosie 'Indigenous, Peoples’ Claims to Cultural Property: A Legal Perspective, ' *Museum Anthropology*, 21/3 (1997), 5, citing William Blackstone *Commentaries on the Laws of England*, at 7

<sup>121</sup> Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm', at 397

### 1.3.2 sources of customary law

While the very diversity of Indigenous peoples' legal regimes vitiates against any attempt at harmonisation or strict definition, there is a growing recognition that customary legal systems are dynamic, largely oral in nature and tend to promote a return to community harmony rather than retribution. Being informal and primarily oral customary law is not, to use Glenn's words, 'overly preoccupied with voluminous detail' needing to be easily memorable.<sup>122</sup> For Borrows the primary sources of custom are the stories, songs and ceremonies of Indigenous peoples, as he puts it, custom

originates in the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. These principles are enunciated in the rich stories, ceremonies, and traditions within First Nations. Stories express the law in Aboriginal communities, since they represent the accumulated wisdom and experience of First Nations conflict resolution.<sup>123</sup>

By way of example, Borrows recounts how the Navajo courts *In Re Certified Question II: Navajo Nation v McDonald*<sup>124</sup> applied the story of the 'Twin Heroes' which, he says, embodied the 'Navajo traditional concept of fiduciary trust of a leader (*naat'aanii*)' to ascertain whether their tribal chairman had a fiduciary obligation to the nation.<sup>125</sup> He quotes from the court's judgement where it applied the story, saying

After the epic battles were fought by the Hero Twins, the Navajo people set on the path of becoming a strong nation. It became necessary to elect *naat'aanii* by consensus of the people. A *naat'aanii* was not a powerful politician nor was he a mighty chief. A *naat'aanii* was chosen based on his ability to help the people survive and whatever authority he had was based upon that ability

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<sup>122</sup> H.Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000), at 58

<sup>123</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), at 13

<sup>124</sup> 16 ILR 6086 (1989)

<sup>125</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 13

and the trust placed in him by the people. If *naat'aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words<sup>126</sup>

Based on its reading of customary law as encapsulated in the story of the Two Heroes, the Navajo court, held that '[t]he Navajo Tribal Council can place a chairman or Vice Chairman on administrative leave if they have reasonable grounds to believe that the official seriously breached his fiduciary trust to the Navajo people'<sup>127</sup>.

If law is to be found in the stories of Indigenous peoples then an ability to interpret their symbolism and imagery is crucial for the correct application of the law. The normative quality of the law rests in the principles it enshrines and not in any specific rules. This marks a contrast with positive law, which eschews the notion that law is anything other than fact based. One view, then, of customary law would be of a body of principles amenable to interpretation according to the contemporaneous moral, ethical and equity based standards of the relevant society. These principles may be applied and modified by Indigenous peoples over time. Principles taken from stories and other sources of customary law may be applied in any specific case without changing the principle, preserving flexibility while maintaining continuity over time. The notion of custom as principle based is a legal concept easily recognisable by western law. Barsh and Youngblood Henderson pick up on in their study of Canadian treatment of Indigenous peoples' sovereign rights, referring to Professor Dworkin's essay 'The Model of Rules' where he explains that,

Western legal systems are characterized by a combination of rules (black-letter law) and principles (custom or convention). Principles provide a necessary logical framework for interpolation within the spaces between rules, for resolving conflicts and inconsistencies among rules, and for clarifying the meaning of ambiguous rules ... they lend a consistency and predictability to adjudication that would otherwise not exist.<sup>128</sup>

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<sup>126</sup> In *Re Certified Question II: Navajo Nation v McDonald* 16 ILR 6086 (1989), cited in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 13-14

<sup>127</sup> *Ibid.*

<sup>128</sup> Russell Lawrence Barsh and James Youngblood Henderson, 'The Supreme Court's *Van Der Peet* Trilogy: Naive Imperialism and Ropes of Sand', *McGill Law Journal*, 42 (1997).

This suggests interesting possibilities for the application of customary legal principles to bring ‘consistency and predictability’ to implementation of tribal, national and international law, in order to secure Indigenous peoples’ ancestral and human rights. Exercise of such a role is dependent, however, on effective recognition of customary laws’ inherent status as a primary source of law, a goal impeded by the traditional tendency to place it on the lowest rung of the legal hierarchy.

It is important to note at this stage the almost universal consensus that recognition of customary law is restricted if and to the extent that it runs counter to fundamental human rights.<sup>129</sup> It is also, frequently, subordinated to national laws and regulations making the relationship between customary law and positive law a fraught one. Stavenhagen draws attention to the distinction Bohannan makes between positive law related to state power and customary law which, he says, pertains to societies that do not have a state, or operate without reference to the State.<sup>130</sup> Similarly, Bennett and Vermuelen describe the cardinal distinguishing feature of customary law, as seen by Kelsen, as being that ‘it derives from a relatively decentralised procedure’ while statutory laws derive from more centralised political authority.<sup>131</sup> This distinction does not, however, undermine the binding nature of customary law which arises from submission to a variety of obligations and or sanctions imposed by the recognised institutions and authorities of the relevant people, most often by the community itself, or experienced in the form of perceived obligations and retribution or threat of retribution imposed by supernatural forces.

The tendency to focus on the real or perceived distinctions between customary law and positive legal regimes masks the many similarities between these sources of law. Bederman, who takes the view that ‘[a]ll law begins with Custom’<sup>132</sup>, claims that custom’s status in law today lies in two positive constructs: domestic legal systems and international law, going on to say that to ‘a surprising degree, customary norms

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<sup>129</sup> See, for example, UN Declaration, Article 34

<sup>130</sup> Stavenhagen, 'Derecho Consuetudinario Indígena en América Latina', at 30 citing Paul Bohannan, 'The differing realms of the law', *American Anthropologist*, Vol. 67, 33-42

<sup>131</sup> Bennett and Vermeulen, 'Codification of Customary Law', at 215

<sup>132</sup> Bederman, *Custom as a Source of Law*, at 3

remain a potent and robust form of positive law making'<sup>133</sup>. In contrast Woodman, who argues that there is no basis *ab initio* for treating customary laws as subordinate to other laws, claims that 'all law, including state law is in the last resort customary'.<sup>134</sup> The contradictions in their approaches, with Bederman leaning towards a vision of customary law as positive law and Woodman viewing positive law as a product of custom, should not overshadow the important synergies in their positions with both claiming that all law begins in custom, which therefore is a crucial source of law.

While leaning towards a positivistic view of custom Bederman notes that the status of customary law as 'a species of natural law or positive law'<sup>135</sup> has remained a conundrum for the last two millennia.<sup>136</sup> He also notes a third position put forward by writers such as Friedrich von Savigny and Georg Friedrich Puchta, of the Historical School of Jurisprudence whom, he says, placed customary law 'between the Scylla of positivism and the Charybidis of natural law'.<sup>137</sup> Porter, following Cicero, also views custom as resting somewhere between natural law and positive law.<sup>138</sup> In her words, 'the customs of a people mediate between natural right and written law'<sup>139</sup> and while recognising that written law 'will normally supersede and override customary law'<sup>140</sup>, she argues that such written laws 'because they find their context and point within a broader framework of customary law, the customs of the people will provide the necessary context for their interpretation.'<sup>141</sup> She concludes that

written law will have no purchase on a community, unless it reflects the practices of that community in some way; even a law that sets out to correct custom will necessarily reflect other aspects of the customary practices of a

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<sup>133</sup> Ibid. at 53

<sup>134</sup> Woodman 'Customary Laws and Customary Legal Rights', at 19

<sup>135</sup> Ibid. at 16

<sup>136</sup> Ibid. at 26

<sup>137</sup> Ibid. at 25

<sup>138</sup> Porter, 'Custom, Ordinance and Natural Right in Gratian's *Decretum*', at 100

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

community, or it will lack the purchase in the community for which it is intended. Far from being a minor adjunct to the law properly so called, custom is seen from this perspective as the one essential component of any legal system, sufficient to sustain a rule of law under some circumstances, and one essential component of the rule of law under any and every circumstance.<sup>142</sup>

We end the chapter as we began it in the interrelationship between customary law, natural law and positive law. This relationship was to be completely rewritten as international law was appropriated as a tool for legitimisation of the great colonial land grab, customary law was marginalised and modified to serve the colonial purpose, and legal positivism came to rule the roost.

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<sup>142</sup> Ibid.



## Chapter 2. Custom's Colonial Legacy

Cloaked in the language of missionary and civilizing endeavour, colonialism was first and foremost a land and resource grab. The colonial enterprise was facilitated by the colonial powers' unlimited capacity for legal invention and their complete disregard for the rule of law and sanctity of treaties. Law served, in the words of Chanock, as 'the cutting edge of colonialism, an instrument of power and coercion.'<sup>1</sup> While colonial activity by non-European powers had been widespread, international laws of conquest and treatment of colonized peoples were devised largely by European powers.<sup>2</sup> This chapter focuses on the Spanish and British colonial legacy, examining the role of law as an instrument of colonial power, its utilisation to deny indigenous rights, and its role in defining customary law. It commences with the historic treatment of Indigenous peoples' rights to dominium and their progressive exclusion from the ambit of international law. It continues with consideration of doctrinal fictions used to dispossess Indigenous peoples of their lands and negate their ancestral sovereignty in common law colonies and settler states. It concludes with examination of issues of recognition and proof of customary law and the impacts of codification in the colonial and early post-colonial period.

### 2.1 Native Dominion and a Spanish take on the Law of Nations

From the outset, colonial powers sought to legitimize their activities under the quasi-legal veil of Papal Bulls. The most notorious of these was the *Inter Cartera II*, which presumed to divide the 'new world' between Spain and Portugal.<sup>3</sup> The English, similarly sought and obtained a Papal Bull, the *Laudbilter*, to give 'legitimacy' to their colonial ambitions in Ireland. This section explores the development and application of a Spanish theory of the Law of Nations during the Conquista and its application by the English in the colonization of Ireland.

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<sup>1</sup> Martin Chanock, *Law, Custom and Social Order* (Cambridge University Press, 1985), at 4

<sup>2</sup> Jeremie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Aldersey, New York: Transnational Publishers, 2006), at 4.

<sup>3</sup> *Ibid.*, at 6

### 2.1.1 Native Dominion and 'just war' in the New World

The Spanish colonization of the New World began in earnest with the overthrow of the Aztec and Inca empires by the so-called *conquistadores*. Infamous for their brutality, Bartolome de las Casas (c. 1484 -1566) estimated that the conquistadores were responsible for the deaths of upwards of 15 million natives.<sup>4</sup> In his influential *History of the Indies* de Casas criticizes the Spanish *encomienda* system, which presumed to grant lands and the labour of the native population living on them to Spanish colonists.<sup>5</sup> This expropriation of lands ran counter to the Papal Bulls which, though granting a right to colonize in the name of Christianity, did not grant any right of the conquerors to abrogate the ancestral rights of native peoples. This is clear from the recognition by Pope Innocent IV, in the mid-thirteenth, that infidels – he was referring to Muslims who were at a comparable level of civilization with Christians - could have ‘dominium, possession and jurisdiction’.<sup>6</sup> De las Casas went further arguing for recognition of Indigenous peoples as a distinct category of peoples entitled to protection under international law and to ‘dominium’ over their lands.<sup>7</sup>

Francisco De Vitoria (c. 1492-1546) of the Salamanca school shared De Casas view regarding indigenous rights to ‘dominium’ and rejected Aristotle’s view that barbarians were natural slaves and that Indigenous peoples are irrational, and could not be the subject of rights.<sup>8</sup> Perhaps the most influential jurist of the period, he took the view that no one was a slave by nature and rejected the proposition that rights of *dominium* might be lost by sinners.<sup>9</sup> This led him to conclude that Indigenous peoples

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<sup>4</sup> Robert Williams, *The American Indian in Western Legal Thought: Discourses of Conquest* (New York: Oxford University Press, 1990), at 173-4

<sup>5</sup> James Anaya, *Indigenous Peoples in International Law* (Second edn. New York: Oxford University Press, 2004), at 16

<sup>6</sup> *Commentaria Innocenti Quarti ... super libros quinque Decretalium* (reprint Frankfurt, Minerva 1968) 3.3.4.8 Cited in Brian Tierney, 'Vitoria and Suarez on Ius Gentium, Natural Law and Custom', in Amanda Perreau-Saussine and James Bernard Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, at 106

<sup>7</sup> Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, at 4

<sup>8</sup> Tierney, 'Vitoria and Suarez on Ius Gentium, Natural Law and Custom', at 107

<sup>9</sup> Ibid.

were 'rightful rulers and owners' of their own lands.<sup>10</sup> For Vitoria dominion vested in all humans on the basis of natural law, and 'the communities they had established as well as the properties they divided among themselves were rightly theirs on the basis of the *ius gentium*.'<sup>11</sup> Vitoria says of 'discovery' that '[b]y itself it gives no more support to a seizure of the aborigines any more than if it had been they who had discovered us.'<sup>12</sup> Despite recognizing Indigenous peoples' rights to their freedom and lands, Vitoria went on to interpret *ius gentium* as requiring native peoples to allow the Spaniards to trade freely with them, to cross and settle upon their lands, as well as to search for gold.<sup>13</sup> In case of refusal the Spaniards were, in his mind, entitled to wage 'just war' and to take the lands of native peoples failing to concede these rights.<sup>14</sup> Vitoria had, in effect, constructed a secular theory of the Law of Nations based on natural law sources, which provided a legal theory to support Spain's right to rule in the New World.<sup>15</sup> His theory was based on recognition of a natural law right of dominium in favour of Indigenous peoples, and a contesting natural law duty to allow the colonising power – in this case Spain – to enter onto their lands for the purposes of commerce and the spreading of Christianity.

Hugo Grotius (1583-1645) also argued in favour of recognition of Indigenous peoples' dominium, taking the view that discovery was not a legal basis for obtaining legal title of ownership.<sup>16</sup> Grotius was, claims Gilbert, espousing a naturalist framework in which 'basic rights inhere in men as men, not by reason of their race,

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<sup>10</sup> Ibid.

<sup>11</sup> See Martti Koskenniemi 'Colonization Of The 'Indies' – The Origin Of International Law?' Talk given at the University of Zaragoza, December 2009, at 10. Available at: [www.helsinki.fi/eci/Publications/Koskenniemi/Zaragoza-10final.pdf](http://www.helsinki.fi/eci/Publications/Koskenniemi/Zaragoza-10final.pdf),

<sup>12</sup> Francisco Vitoria *De Indis et de Ivre Belli Reflectiones* 73 (E.Nys ed., J. Bate trans. 1917) at 138-9 cited in Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 99

<sup>13</sup> Tierney 'Vitoria and Suarez on Ius Gentium, Natural Law and Custom ' at 109, says that Vitoria's writings in this area demonstrate his own lack of conviction as to the veracity of some of these arguments,

<sup>14</sup> Gilbert, *Indigenous peoples' Land Rights under International Law: From Victims to Actors*, at 9

<sup>15</sup> Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 103

<sup>16</sup> Hugo Grotius, *The Rights of War and Peace (De Jure Belli Ac Pacis)* (1625 translation 1925), at 550

creed or colour, but by reason of their humanity.<sup>17</sup> Despite this concern, Grotius like Vitoria before him also developed a theory, albeit less expansive, of ‘just war’, which served to legitimize the usurpation of this same ‘dominium.’<sup>18</sup> Thereby, providing, in the words of Anaya, ‘enduring support for patterns of colonization and empire that exerted control over Indigenous peoples and their lands.’<sup>19</sup>

Raquel Yrigoyen describes the history of the colonial period and its impact on Indigenous peoples in Latin America with reference to three distinct groups.<sup>20</sup> The first of these were Indigenous Nations previously integrated into the Inca, Aztec and Mayan empires who were, she claims, more susceptible to colonization.<sup>21</sup> These became the subjects of special legal regimes that protected their territories from colonists, imposed colonial taxes, forced labour, and special sanctions, while giving them a limited level of autonomy to apply their own ‘usos y costumbres’ so long as they did not contradict the church or colonial law.<sup>22</sup> Following independence a program of assimilation was adopted which saw the lifting of the colonial rules and the loss of their collective rights to their lands, authorities, customs and usages, etc.<sup>23</sup> A second group were those Indigenous peoples such as the Mapuche, Pehuenque and Ranqueles, which had not been conquered by the Incas and with whom the Crown entered into treaties, leaving them free to regulate their affairs in accordance with their own customary law.<sup>24</sup> Following independence the new Republican states of Argentina and Chile refused, Yrigoyen reports, to recognize these treaties, and waged ‘a campaign of military occupation and extermination’ as a result of which these fiercely independent Indigenous peoples lost a majority of their territories.<sup>25</sup> The third

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<sup>17</sup> Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors*, at. 9 citing Francisco de Vitoria, *De Indis et de Ivre Belli Reflectiones*, at 139

<sup>18</sup> Anaya, *Indigenous Peoples in International Law*, at 19

<sup>19</sup> Ibid.

<sup>20</sup> Raquel Yrigoyen, ‘Hitos Del Reconocimiento Del Pluralismo Jurídico y el Derecho Indígena en las Políticas Indigenistas y el Constitucionalismo Andino’, in Mikel Berraondo (ed.), *Pueblos Indígenas Y Derechos Humanos* (Bilbao: Universidad de Deusto, 2006), 537 - 67.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid. at 540.

<sup>23</sup> Ibid. at 541

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

group were the Indigenous peoples of the Amazon, Orinoco and Guajira forests who had avoided colonization due to their capacity to disappear into the forests.<sup>26</sup> Missionaries were the key to bringing these peoples under colonial rule serving, Yrigoyen claims, as the vanguard for colonial and military incursions into their lands in the Republican period, in a union of 'la cruz, el arado y el fusil' (the cross, the plow and the gun),<sup>27</sup> and paving the way for the economic plunder of Amazonia beginning in earnest with the rubber boom in the latter part of the nineteenth Century.

Although, the period of the rubber boom stands out for the horrific abuse, torture and murder of Amazonian Indigenous peoples, their humiliation, trade and murder had, says Valcárcel, begun before and were to continue after the economic basis for the extraction of rubber had disappeared.<sup>28</sup> The full horrors of the rubber trade is graphically recorded in the diaries and reports of the Irishman Roger Casement who, in 1911, travelled to the Amazonian Putumayo region to investigate, on behalf of the British Crown, the abuse of the native people by the Peruvian Amazon Rubber Company.<sup>29</sup> In his précis on the confidential report by Dr Romulo Paredes for the Peruvian government he writes, '[c]rime swelled in proportion to the rubber returned, and mounted step by step with the number of kilogrammes of rubber obtained. Thus, the larger the number of murders, the higher the production, which is to say that a large proportion of the rubber was produced out of blood and corpses.'<sup>30</sup> A hundred years on from Casement's trip most Latin American countries have adopted constitutional and or legislative recognition of Indigenous peoples' rights to their lands, territories and resources, and to apply their own customary laws to their

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<sup>26</sup> Ibid. at 542

<sup>27</sup> Ibid. at 543 referring to Pilar García, *Cruz y Arado, Fusiles Y Discursos: La Construcción De Los Orientales En El Perú Y Bolivia 1820-1940* (Lima: IEP, 2001).

<sup>28</sup> Carlos A Valcárcel, *El Proceso Del Putumayo Y Sus Secretos Inauditos* (Iquitos: Monumenta Amazónica, 2004).

<sup>29</sup> See Angus Mitchell (ed.), *The Amazon Journal of Roger Casement* (Dublin: Lilliput Press, 1997) and Angus Mitchell (ed.), *Sir Roger Casement's Heart of Darkness: The 1911 Documents* (Dublin: Irish Manuscripts Commission 2003).

<sup>30</sup> See 'Précis by Sir Roger Casement of the Confidential Report to the Prefect of Loreto by Dr, Romulo Paredes, Upon the Work of the Judicial Commission Dispatched by the Peruvian government to the Putumayo' in Angus Mitchell (ed.), *Sir Roger Casement's Heart of Darkness: The 1911 Documents* 686 – 713 at 700-701

internal affairs.<sup>31</sup> A majority of countries of the region are also Parties to International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries, which among other things obliges states to consult with Indigenous peoples prior to granting any rights to exploit resources on their lands.<sup>32</sup> Despite these advances widespread failure to establish meaningful consultation procedures has led to numerous and at times bloody confrontations across the region as Indigenous peoples struggle for recognition of their rights to their lands, resources and self-determination.

### 2.1.2 the Irish and their Brehon laws

As with the Spanish experience, the English also sought legitimacy for their colonial ambitions, behind a Papal Bull. The *Laudbilter* was granted, in 1154, to Henry II by the newly elected English Pope Adrian IV for the ostensible purpose, Williams says, of bringing the ‘renegade church’ in Ireland ‘into conformity with Gregorian reforms’<sup>33</sup> Influenced by the Spanish model of colonization in the New World and their natural law discourses the English sought to subjugate the Irish ‘whom reason and duty cannot bridle’<sup>34</sup> by ‘establishing plantation colonies by military conquest.’<sup>35</sup> Part of the rationalisation of the right to colonize Ireland was the supposed under-utilization of its lands.<sup>36</sup> Their policies included expropriation of the native peoples’ lands and territories, introduction of a system of exploitation of native labour similar to the Spanish *ecomienda* system, and their treatment as ‘inferior, dependent peoples.’<sup>37</sup> The English also applied the Spanish colonial institution, the

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<sup>31</sup> See Yrigoyen, ‘Hitos Del Reconocimiento Del Pluralismo Jurídico y el Derecho Indígena en las Políticas Indigenistas y el Constitucionalismo Andino’, at 542, where she notes that Argentina did not give constitutional recognition to Indigenous peoples’ rights until 1994

<sup>32</sup> ILO Convention 169, Article 15.2

<sup>33</sup> Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 136

<sup>34</sup> Walter Devereux, Earl of Essex, cited in Patrick Thornberry, *Indigenous peoples and Human Rights* (Manchester: Manchester University Press, 2002), at 70

<sup>35</sup> Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 139

<sup>36</sup> P. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2004), at 71

<sup>37</sup> *Ibid.* at 141

*Requiriminetto*, giving ‘All Irishmen ... which commonly be called churles’ a choice to submit to English rule or be put to the sword.<sup>38</sup>

When the English arrived in Ireland they found a comprehensive legal system developed over centuries whose ‘essentials’ may, Kelly says, be traced back to the Common Celtic Period (c.1000 B.C).<sup>39</sup> The Old Irish law, commonly referred to as the *Brehon* Laws, was extensively recorded in written form in the 7<sup>th</sup> and 8<sup>th</sup> century.<sup>40</sup> McHugh claims that Davies, who was Solicitor General and later Attorney General for Ireland (1603-1619), ‘like Sir Matthew Hale [...] regarded British colonization as founded upon the Roman model which recognized and worked through the indigenous polities and laws.’<sup>41</sup> Hale took the view that although the conqueror had the right to abolish or change the laws and customs of the conquered, ‘a change of the Laws of the conquered country was rarely universally made, especially by the Romans ... unless they were such as were foreign and barbarous, or altogether inconsistent with the Victor’s Government.’<sup>42</sup> The English would, however, have expected English Lords in Ireland to abide by the common law. Instead they demonstrated a tendency to observe the *Brehon* law, which Hale cites as one of the reasons why common law was slow to take root in Ireland.<sup>43</sup> Over time, however, English common law began to chip away at Irish custom and in the 1608 Tanistry case to attack the tenets of *Brehon* law.

The *Tanistry* case (1608), is described by Elias as the ‘*locus classicus* on the subject of customary law in English law’, saw in his words the utilisation of ‘common law tests of custom ... to break up the social organization of the Irish nobility’.<sup>44</sup> In that

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<sup>38</sup> *Ibid.* at 143

<sup>39</sup> Fergus Kelly, *A Guide to Early Irish Law* (Early Irish Law Series, III; Dublin: Dublin Institute for Advanced Studies 1988), at 231

<sup>40</sup> *Ibid.* at 225

<sup>41</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 72

<sup>42</sup> Sir Matthew Hale, *History of the Common Law*, at 49

<sup>43</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 72

<sup>44</sup> Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, at 104-5

case the court declared void the ancient Irish custom of tanistry that established a system of succession of the eldest and worthiest male relative of ‘the blood and name of the deceased’, a custom that, McHugh claims, frequently led to ‘bloody physical confrontation.’<sup>45</sup> The court found the custom of tanistry failed to meet tests of reasonableness (its promotion of physical valour and bloodletting), certainty (the heir to succeed an estate was uncertain) and submission to Crown prerogative (it was disruptive of the royal peace).<sup>46</sup> The court held, however, that ‘certain parts of *Brehon* law might still apply to Irish property’.<sup>47</sup> In time the *Brehon* law was replaced by the common law all but wiping the memory of the old laws from the consciousness of Irish people.<sup>48</sup> Its demise was inevitable in the face of extreme British repression, in which the conqueror’s laws - most infamously the Penal laws that Montesquieu described as ‘conceived by demons, written in blood and registered in Hell’<sup>49</sup> – played a dominant role. The destruction wreaked by English colonialism on the Irish by the middle of the seventeenth century was so total it led one French traveller of the time to comment, that

I have seen the Indian in his forests and the Negro in his chains, and thought, as I contemplated their pitiable condition, that I saw the very extreme of human wretchedness; but I did not then know the condition of unfortunate Ireland.<sup>50</sup>

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<sup>45</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 73

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> The Brehon law lives on in spirit if not in practice in the Irish *Dail* (Parliament) where the deputy to the *Taoiseach* (Prime Minister) is known as the *Tánaiste* (heir to chieftain)

<sup>49</sup> Seamus MacManus, *The Story of the Irish Race: A Popular History of Ireland: Revised Edition* (Old Greenwich, Connecticut: Devin-Adair Company), at 455

<sup>50</sup> *Ethnic America*, Basic Books, 1981, at 18, cited in Heinrich A. Rommen *The Natural Law, a Study in Legal and Social History and Philosophy*, translated by Thomas R. Hanley, Liberty Fund, Indianapolis, 1998, available at <http://www.friesian.com/rommen.htm>



## 2.2 Broken treaties and doctrinal fictions

England began its colonial enterprise in the Americas armed, Williams says, with Spanish-influenced colonising techniques ‘nurtured in the soil of Ireland’.<sup>51</sup> This included, McHugh notes, extensive experience in ‘negotiating and making pacts with ‘barbarous’ chieftains and of establishing procedures and justifications for acquiring or seizing their lands’.<sup>52</sup> A vision of Indigenous peoples as uncivilised and as lacking the laws and means to manage their own interests did not prevent the British Crown from concluding numerous treaties with them. This includes over one hundred treaties and formal agreements in Africa, more than forty treaties with first nations in North America<sup>53</sup>, forty more in Arabia and the Persian Gulf, two-dozen treaties in Malaysia,<sup>54</sup> and numerous treaties in India. In New Zealand the British entered into just one Treaty with Maori, while in Australia it made no treaties with Aboriginal peoples applying the concept of *terra nullius* or uninhabited territory as the basis for assuming all rights over the territory. The United States also concluded some 400 treaties with first nations.<sup>55</sup> In each case the goal was to secure sovereign rights over the colonized territory. Establishing sovereignty did not of itself, however, signify acquisition of proprietary land rights, which McNeil argues originate either from practice (customary law) or enactment (positive law).<sup>56</sup> What was to shape the colonial experience in these countries and the recognition of customary law and associated communal land rights was the manner in which the British Crown presumed to award itself sovereignty. And the extent to which pre-existing indigenous sovereign rights were recognized or denied. Asch, citing Slattery, describes the four

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<sup>51</sup> Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 147

<sup>52</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 71

<sup>53</sup> Thornberry, *Indigenous Peoples and Human Rights*, at 79

<sup>54</sup> See McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* at 111, see also at 202, fn. 362 referring to treaties in Africa he cites the SCI list for the following number of Treaties: Belgium 3, France 5, Germany 75, Britain 85, Italy 327 and the Netherlands 339

<sup>55</sup> Thornberry, *Indigenous Peoples and Human Rights*, at 79

<sup>56</sup> Kent McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World', in Richardson et. al., *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, at 258.

‘primary means’ under English law for states to justify the ‘acquisition of new territories.’<sup>57</sup> These are:

conquest, or the military subjugation of a territory over which the ruler clearly expresses a desire to assume sovereignty on a permanent basis; cession, or the formal transfer of a territory (by treaty for example) from one independent political unit to another; annexation, or the assertion of sovereignty over another political entity without military action or treaty; or the settlement or acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity.<sup>58</sup>

This final precept was to serve as the basis for both the doctrine of discovery and that of *terra nullius*, which would be widely applied in British colonial territories. This section reviews the use and abuse of treaties and the application of doctrines of discovery and *terra nullius* by colonial powers in the process of wresting control of colonised lands from Indigenous peoples.

### 2.2.1 Treaty making and breaking

In what would later become Canada, the British entered into a series of treaties with Indigenous peoples during the 17<sup>th</sup> and 18<sup>th</sup> centuries involving the exchange of gifts including wampum belts.<sup>59</sup> For the Indigenous peoples these ceremonies and agreements defined relationships in indigenous terms, which Walters suggests ‘worked Europeans into the web of kinship relations that defined [Indigenous peoples] ... own legal and political order’.<sup>60</sup> In 1763, by Royal Proclamation, the King recognized the land rights of ‘the several Nations or Tribes, with whom We are

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<sup>57</sup> Michael Asch, 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology', in Curtis Cook and Juan D. Lindau (eds.), *Aboriginal Rights and Self Government* (Montreal: McGill University Press, 2000), at 149

<sup>58</sup> Brian Slattery, 'The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of the Territory, Phd Diss', (University of Oxford, 1979) cited in Asch, 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology', at 149

<sup>59</sup> Mark D Walters, 'Promise and Paradox: The Emergence of Indigenous Rights Law in Canada', in Richardson et. al., *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, at 27

<sup>60</sup> *Ibid.* at 28

connected’<sup>61</sup> The Proclamation also referred to the Crown’s assumed ‘Sovereignty’ and ‘Dominion’, which, Walters says, conflicted with first nations vision of their relationship as ‘allies’ rather than subjects.<sup>62</sup> Sir William Johnson, the Crown’s representative, who was of Scottish descent was, McHugh claims, sensitive to the indigenous position.<sup>63</sup> In 1764 at Niagara, at the largest ever council of tribal leaders with the Crown, he presented the Indian Nations with a two wampum belts in an attempt to conclude agreement with the Indian nations in their own form.<sup>64</sup> One of these the Gus-Wen-Tah or Two-Row Wampum resembled, Williams reports, the form of the peace and friendship agreement made by the Haudenosaunee Confederacy<sup>65</sup> when they first came in contact with Europeans.<sup>66</sup> They described its significance, as follows.

There is a bed of white wampum, which symbolizes the purity of our agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall travel the river together, side-by side, but in our own boat. Neither of us will try to steer the other’s vessel.<sup>67</sup>

The belt clearly expresses the Indian Nations’ vision of harmonious coexistence and respective legal autonomy. By the 1820’s, McHugh says, the British had consolidated their military hold on the territory and securing the support of first nations was no

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<sup>61</sup> Royal Proclamation of 7 October 1763, in WPM Kennedy (ed.) *Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929* (2<sup>nd</sup> edn, Oxford University Press, 1930, 35-38)

<sup>62</sup> Walters, 'Promise and Paradox: The Emergence of Indigenous Rights Law in Canada', at 28

<sup>63</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 106

<sup>64</sup> Walters, 'Promise and Paradox: The Emergence of Indigenous Rights Law in Canada', at 28-29

<sup>65</sup> The British referred to the Haudenosaunee as the Confederated Iroquois Nations

<sup>66</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 126

<sup>67</sup> Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 327

longer a priority, their interests had now turned to the land.<sup>68</sup> For the British the Indian nations had, he claims, 'gone from 'Allies' with a measure of recognised autonomy to 'Subjects' amenable to English law.'<sup>69</sup>

The notion of Indigenous peoples holding sovereign power to enter into treaties granting or recognising the sovereign power of the Crown was crucial to the British colonial effort. Treaties with Indigenous peoples served to consolidate colonial holdings. There would have been a significant downside for the colonists, however, if these treaties were to be considered binding under international law. Conveniently, the colonial powers were the arbiters of international law, which had as its subjects 'civilised states', a club that did not in Oppenheim's words recognise 'organised wandering tribes.'<sup>70</sup> Indigenous peoples had in effect been written out of international law.<sup>71</sup> Anaya claims, that 'treaties with ... Indigenous peoples could simply be ignored for the purposes of international law.'<sup>72</sup> This was rationalised by claiming that Indigenous peoples were too 'primitive' to enter into agreements or to have 'a form of sovereignty and underlying title that required recognition by colonial authorities.'<sup>73</sup> This position suffuses the decision of the Privy Council, in *Re: Southern Rhodesia*, where the Law Lords held

Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilised society.<sup>74</sup>

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<sup>68</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 107

<sup>69</sup> Ibid.

<sup>70</sup> Lassa F.L. Oppenheim (ed.), *International Law* 3rd Ed. Edited by Ronald. F. Roxborough (London: Longmans, 1920), at 126, cited in Anaya, *Indigenous Peoples in International Law*, at 29

<sup>71</sup> Brendan Tobin, 'The Law Giveth and the Law Taketh Away': The Case for Recognition of Customary Law in International ABS and Traditional Knowledge Governance', *Policy Matters, No. 17 Exploring the Right to Diversity in Conservation Law, Policy, and Practice* (IUCN, 2010), 16 - 24.

<sup>72</sup> Anaya, *Indigenous Peoples in International Law*, at 30

<sup>73</sup> Asch, 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology', at 151

<sup>74</sup> In *Re: Southern Rhodesia* (1919) AC 210 (PC), at 233, cited in, 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology' at 151

The enduring nature of such racist beliefs was apparent in the 1973 *Calder Case*<sup>75</sup> where, in deciding on the Nisga'a peoples' claim for recognition of their pre-colonial rights, Chief Justice Davey of the British Columbia Appeals court, held '[t]he Indians on the mainland of British Columbia ... were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilised society, and none at all of our notions of private property...'<sup>76</sup> On appeal, the Supreme Court of Canada recognised that the Nisga'a lived in organised societies prior to the time of colonization.<sup>77</sup> Despite having previously recognised the existence of indigenous polities prior to colonization, the Supreme Court in the case of *R v Sparrow*<sup>78</sup> decided that Crown sovereignty and underlying title arose 'from the outset' of colonization.<sup>79</sup> This is clearly contradictory. As there had been no conquest, annexation or cession of indigenous lands, and they were obviously not uninhabited at the time of colonization, the British had not acquired sovereignty in accordance with any of the prescribed forms for doing so under English law. For Asch and Macklem, the Court was treating Canadian lands prior to colonization as *terra nullius*.<sup>80</sup> It was in effect applying the 'doctrine of discovery' to legitimize Crown assumption of sovereignty and the historic appropriation of indigenous lands.

The doctrine of discovery has been described, as 'the historical root of ongoing violations of Indigenous peoples' human rights, ... which for centuries served as 'legal' rationale for stealing land and dehumanizing aboriginal peoples, as well as justification for the establishment of boarding schools throughout North America to

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<sup>75</sup> *Calder et al. v Attorney General of British Columbia* (1970), 74 WWR 481 (B.C.C.A).

<sup>76</sup> *Ibid.* cited in Asch, 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology', at 152.

<sup>77</sup> Asch, 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology', at 154

<sup>78</sup> *R v Sparrow* (1990), 1 S.C.R. 1075, at 13

<sup>79</sup> Asch, 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology', at 155

<sup>80</sup> *Ibid.*, at 155, referring to Michael Asch and Patrick Macklem 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v. Sparrow*' *Alberta Law Review* 29 (2): 498 - 517

‘civilize’ Indian children’.<sup>81</sup> Together with the concept of *terra nullius* it became the basis of dispossession of Indigenous peoples throughout the world. In his seminal study of the doctrine’s genesis and imposition in the United States Williams argues that rejection of the doctrine of discovery is a prerequisite for the decolonization of the West’s law towards Indigenous peoples which, in his view, ‘permits the West to accomplish by law and in good conscience what it accomplished by the sword in earlier eras: the physical and spiritual destruction of Indigenous peoples.’<sup>82</sup>

### 2.2.2 doctrinal shenanigans: discovery and terra nullius

Described by Sheleff as a ‘self-serving legal construct of the European colonial powers’,<sup>83</sup> the doctrine of discovery provided that whichever colonial power first discovered new territories would be recognized as having sovereign control over them, no matter how such control was achieved. The application of the doctrine by the British denied Indigenous peoples the normal protection of the law and imposed English law without any recognition of Indigenous peoples’ own customary legal regimes. The normal rule under British colonial law would have been the application of either the ‘doctrine of continuity’ or the ‘doctrine of recognition’ to the laws in the colonized territory.<sup>84</sup> Under the ‘doctrine of continuity’ the ‘local inhabitants’ laws, customs and attendant rights’ were presumed to continue in force in the conquered territories, at least until such time as it had been overridden by legislative enactments.<sup>85</sup> Halewood cites Lord Mansfield in *Campbell v Hall*<sup>86</sup> for the proposition that it was ‘too clear to be controverted’ that, ‘[t]he laws of the conquered

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<sup>81</sup> UNPFII, 'Preliminary Study Shows 'Doctrine of Discovery' Legal Construct Historical Root for Ongoing Violations of Indigenous peoples' Rights', (Economic and Social Council Permanent Forum on Indigenous Issues HR/5019, 2010).

<sup>82</sup> Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*.

<sup>83</sup> Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London and New York: Routledge, 1999), at 100.

<sup>84</sup> Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, at 18

<sup>85</sup> Michael Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge', PhD Diss. (York University, 2005), at 141

<sup>86</sup> *Campbell v Hall* (1774) 1 Cowp. 204, EC vol 98, 848, EC vol 98, 1045.

country continue in force, until they are altered by the conqueror...'<sup>87</sup> In the case of the doctrine of recognition, annexation would result in the abolition of all pre-existing rights.<sup>88</sup> Neither doctrine was applied, Gilbert notes, in the case of Indigenous peoples.<sup>89</sup> Instead, Chief Justice Marshall found in *McIntosh* that the United States is entitled to '... maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest'.<sup>90</sup> In order to legitimise the application of the doctrine it was first necessary to deny the application of the normal laws applicable to conquered territories. Marshall, sets the scene for this in *McIntosh* claiming that 'the tribes of Indians inhabiting [the United States] were fierce savages' whom it was impossible to govern as a distinct people because they were 'ready to repel by arms any attempt on their independence'.<sup>91</sup> This leads him to conclude,

[t]hat law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things was unavoidable.<sup>92</sup>

Resistance to the colonial enterprise was, therefore, utilised to legitimise depriving Indigenous peoples of their rights under the law. This was the same policy applied by the English to the Irish and by the Spanish to Indigenous peoples throughout Latin America.

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<sup>87</sup> Ibid. at 1048, cited in Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge', at 142

<sup>88</sup> Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, at 18

<sup>89</sup> Ibid.

<sup>90</sup> *Johnson v McIntosh* 21 U.S. (8 Wheat.) (1823) at 486, cited in Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 103 See also Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 314 where he refers to Marshall's findings that Spain, France, Portugal, England and Holland all based their territorial rights in the New World on the basis of discovery

<sup>91</sup> *Johnson v McIntosh* at 590, cited in Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 102

<sup>92</sup> Ibid.

The legal basis for the doctrine of discovery has been soundly challenged by Norgen, who claims that ‘there had been no genuinely international agreement establishing it as a working principle of Native American-European relations...’<sup>93</sup> For Williams’ its application gave the sanction of the Rule of Law to a ‘medievally derived ideology – that normatively divergent ‘savage’ peoples could be denied rights and status equal to those accorded to the civilized nations of Europe.’<sup>94</sup> The continuing impact of the doctrine is apparent in contemporary US jurisprudence. Special Rapporteur Tonya Gonnella Frichner, in a preliminary study for the United Nations Permanent Forum on Indigenous Issues, draws attention to the 2005 case of *City of Sherill v Oneida Indian Nation of New York*<sup>95</sup> where, she says, ‘the Supreme Court’s reference to the doctrine of Discovery places the context for the Court’s decision ... within the Framework of Dominance, dating back to the era of the Vatican bulls.’<sup>96</sup> The Vatican has still not rescinded these Bulls, despite frequent requests from Indigenous peoples to do so. As a measure of indigenous concern for its historic and continuing impact, the Permanent Forum on Indigenous Issues set as the theme for its 11<sup>th</sup> session in 2012: the Doctrine of Discovery and its enduring impact on Indigenous peoples and the right to redress for past conquests.<sup>97</sup>

### 2.3 Recognition of customary law

Recognition of custom by colonial powers was far from uniform. A comprehensive study of state and non-state law prepared by the International Council on Human Rights Policy notes that 19<sup>th</sup> Century Russian colonisers allowed customary courts in Central Asia to decide on ‘minor issues’; the French preferred to impose codified law to one and all, a practice suspended in part in colonial territories where chiefly

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<sup>93</sup> Norgen, *The Cherokee Cases*, at 89, cited in Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 102

<sup>94</sup> Williams, *The American Indian in Western Legal Thought: Discourses of Conquest*, at 317.

<sup>95</sup> *City of Sherill, N.Y. v Oneida Indian Nation of N.Y.* 544 U.S. 197, 203 n.1 (2005)

<sup>96</sup> Tonya Gonnella Special Rapporteur Frichner, 'Impact on Indigenous peoples of the International Construct Known as the Doctrine of Discovery, Which Has Served as the Foundation of the Violation of Their Human Rights', (Permanent Forum on Indigenous Issues, E/C.19/2010/13, 2010b), at 32

<sup>97</sup> Tonya Gonnella Frichner, 'The ‘Preliminary Study’ on the Doctrine of Discovery ', *Pace Environmental Law Review*, 28/1 (2010a), at 344



collaboration was required; while, Muslim law allowed for recognition of customary practices.<sup>98</sup> The British generally varied their approach with the terrain. In India, for instance, Hindu and Muslim law were ‘acknowledged by leading British jurists to be systematic regulation by ‘great’ religions.’<sup>99</sup> These, in Chanock’s opinion, lent themselves easily to the British strategy of ‘governing the Empire through the recognition of the law of the subordinated people (subject to the principle of repugnancy)’.<sup>100</sup> In Africa, unlike India, colonial powers were less inclined to recognise the existing legal regimes. The reason for this, according to Chanock, was the apparent lack of ‘Laws’ in the sense of codified regimes such as existed in India.<sup>101</sup> African custom was, he claims, taken as something ‘lesser’ than law, it became known as ‘customary law’ the ‘law of the subjugated the colonized.’<sup>102</sup> For Chanock this ‘customary law’ is the product of a colonial mindset that separated the colonized from the colonizer resulting in ‘the construction of a new realm of law that was not common law, nor custom nor statute. It was customary law – a law of and for subordinates – racially and culturally, which was seen as suitable to their state of evolution.’<sup>103</sup> While recognising the colonial influence on customary law Spear is of the view that colonial authorities reliance on local intermediaries to ‘legitimate their rule’ limited their power leaving them ‘subject to local discourses of power that they neither fully understood nor controlled.’<sup>104</sup> British ‘indirect rule’ was, he says, a ‘contradiction in terms’.<sup>105</sup> On the one hand, in order to benefit from the ‘illusion of traditional authority’ it had to respect the limitations inherent if local chiefs were to maintain their legitimacy.<sup>106</sup> On the other hand, ‘once colonial administrators acknowledged the sovereignty of traditional discourse, they too became subject to

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<sup>98</sup> ICHRP, ‘When Legal Worlds Overlap: Human Rights, State and Non-State Law’, (Versoix, Switzerland International Council on Human Rights Policy, 2009), at 7-8

<sup>99</sup> Chanock, ‘Customary Law, Sustainable Development and the Failing State’, at 341.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid. at 342

<sup>104</sup> Thomas Spear, ‘Neo-Traditionalism and the Limits of Invention in British Colonial Africa’, *Journal of African History*, 44 (2003), 3-27, at 9

<sup>105</sup> Ibid. at 12

<sup>106</sup> Ibid.

it'.<sup>107</sup> Spear concludes that the effect of colonialism may be seen as 'leading out of earlier eras as well as leading into later ones in an endless process of becoming, deploying both old and new means to do so.'<sup>108</sup> From this perspective customary law may be seen as a system of indigenous law continuously reconstructing itself in response to internal and external forces. It is a body of law capable of adaptation to meet the needs of the times. This section will address questions of proof of custom, subordination of customary law under the 'repugnancy rule' and the role of the courts in its development. It will also consider the impact of codification on customary law.

### 2.3.1 in search of customary law

Two central questions have dominated the issue of recognition of custom. First of these is how to identify customary law from mere habitual custom and the second is the conformity of customary law with the notion of natural justice and moral values of the dominant regime, the so-called 'repugnancy rule'. Turning to the former issue, Zorn and Corrin Care outline two diametrically opposed views.<sup>109</sup> The first requires parties to prove customary law as any other matter of fact by calling evidence, which may, they say, be a costly affair, involving complicated rules of evidence and adversarial processes foreign to Indigenous peoples.<sup>110</sup> It may even require the submission of the issue to a jury.<sup>111</sup> The opposing view is 'that custom is a question of law, and therefore can be found by the court without requiring the production of evidence as to its existence.'<sup>112</sup> The Privy Council in *Angu v Attah*<sup>113</sup> set down the relationship between these two forms of proof, where the court stated,

[a]s is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular

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<sup>107</sup> Ibid. at 13

<sup>108</sup> Ibid. at 27

<sup>109</sup> Jean Zorn, and Jennifer Corrin Care 'Barava Tru - Judicial Approaches to the Pleading and Proof of Custom in the South Pacific', *International and Comparative Law Quarterly* 51/3 (2002), 611-39.

<sup>110</sup> Ibid.

<sup>111</sup> Bederman, *Custom as a Source of Law*, at 61

<sup>112</sup> Zorn, 'Barava Tru - Judicial Approaches to the Pleading and Proof of Custom in the South Pacific',

<sup>113</sup> *Angu v Attah* (1916) (Privy Council) Reports, 1874-1928, 43

customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them.<sup>114</sup>

The decision in *Angu v Attah* represented an advance from the earlier view that custom should be treated like foreign law and always be proven by evidence. Writing in 1958, Hannigan contrasts the application of rules for finding custom in Ghana and India with common law tests for enforceable custom.<sup>115</sup> He finds that immemorial antiquity was not considered essential in either Ghana or India and was just ‘one of the methods which can be used to prove a custom’.<sup>116</sup> In support he cites the West Africa Court of Appeal in *Kokolemle Consolidated Cases*<sup>117</sup> where the court, referring to the decision of Jackson J., at first instance, held ‘[s]uch native law or custom, as the learned judge held, must not be the native law or custom or usage of ancient times, but existing law and custom’.<sup>118</sup> In this case the court showed a clear preference for identification of the living law, rather than fixating on the length of a custom’s observance. Hannigan identifies a variety of ways in which the courts may take evidence of custom, including expert witnesses, which he says is the first form of evidence accepted in Ghana, the works of textbook writers and that of previous cases.<sup>119</sup> Referring to textbook evidence, he notes the long tradition of written custom in India, and notes the case of *Hirbae & ors. v Sonabae*<sup>120</sup> where the Koran ‘was considered to be *prima facie* evidence of the custom.’<sup>121</sup>

A detailed research paper on Proof of Aboriginal Customary Law prepared for the Australian Law Reform Commission identified a trend in African countries to move

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<sup>114</sup> Ibid, at 44 cited in Hannigan, 'Native Custom: Its Similarity to English Conventional Custom and Its Mode of Proof', at 102

<sup>115</sup> Ibid.

<sup>116</sup> Ibid. at 104 - 6

<sup>117</sup> *Kokolemle Consolidated Cases* W.A.C.A, No. 106/53, 4<sup>th</sup> March.1953, cited in Hannigan, 'Native Custom: Its Similarity to English Conventional Custom and Its Mode of Proof', at 106-7

<sup>118</sup> Ibid.

<sup>119</sup> Hannigan, 'Native Custom: Its Similarity to English Conventional Custom and Its Mode of Proof', at 108

<sup>120</sup> *Hirbae & ors. v Sonabae*, Perry’s Oriental Cases, at 110, cited in Hannigan, 'Native Custom: Its Similarity to English Conventional Custom and Its Mode of Proof', at 108

<sup>121</sup> Ibid.

beyond the restrictions of *Angu v Attah*.<sup>122</sup> The report points to statutory changes in Ghana, which provide that customary law is to be determined as a matter of law.<sup>123</sup> Similarly, the Botswana Law Act of 1969, which drew on the Ghanaian experience provided in Section 11 that if the court, having taken submissions from the parties, is in doubt regarding the existence or content of customary law, it may ‘consult reported cases, textbooks and other sources and may receive opinions either orally or in writing to enable it to arrive at a decision.’<sup>124</sup> In Himsworth’s view, section 11 helps to overcome the problem of having dual systems of law – a problem common to African countries – by making ascertainment of customary law a matter of law in both customary courts (where it has always been so) and the ordinary courts.<sup>125</sup>

Himsworth highlights the challenges associated with finding the applicable customary law in a specific instance, referring by way of example to the case of *Samotsoko v Palane*<sup>126</sup> where, he says, Professor Schapera’s opinion ‘as to the rule of customary law was adopted without consideration of the fact that the case involved people of the Batawana tribe whilst Professor Schapera had been concerned with the law of the Ngwato.’<sup>127</sup> Article 10 of the Botswana Act seeks to address this issue, requiring a decision be made on the applicable law and providing guidance on this matter. In issues of land, for example, the applicable law is the customary law of the place where the land is situated, while in cases of inheritance it is the customary law applying to the deceased.<sup>128</sup> Regulation of choice of laws is relevant both for conflicts between alternative customary law regimes and conflicts arising between customary law and positive legal instruments. This issue is also linked to the question of repugnancy which derives from the notion of reasonableness as outlined by Blackstone and which was to become a standard element of colonial law and its

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<sup>122</sup> ALRC, 'The Proof of Aboriginal Customary Law', *Research Paper No.14, Reference on Aboriginal Customary Law* (Australian Law Reform Commission), at 7

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> C. M. G. Himsworth, 'The Botswana Customary Law Act 1969', *Journal of African Law*, 16/1 (1972), 4-18. at 17

<sup>126</sup> *Samotsoko v Palane*, 1958 H.C.T.L.R. 75

<sup>127</sup> Himsworth, 'The Botswana Customary Law Act 1969', at 14

<sup>128</sup> Ibid.

treatment of customary law. It is worth noting that the repugnancy rule was also an integral aspect of all colonial charters.<sup>129</sup> The relevant provisions of the Massachusetts Charter of 1629, for example, as set out by McHugh, states that the powers granted to make, 'Laws and Ordinances for the Good and Welfare of the saide Company and for the Government and ordering of the saide Lands and Plantacion, and the People inhabiting and to inhabite the same'<sup>130</sup> are qualified in so far as 'such Lawes and Ordinances be not contraire or repugnant to the Laws and Status of this our Realme of Englande'<sup>131</sup>.

The scope and focus of the repugnancy rule is discernible in a number of judgments chosen by Leslie from cases in what was then Rhodesia.<sup>132</sup> These state that the repugnancy rule 'excludes laws that 'inherently impress us with some abhorrence or are obviously immoral in their incidence'<sup>133</sup>, or so outrage 'acceptable standards of ethics as to create a sense of revulsion'<sup>134</sup>. Sheleff summarises five main areas, identified by Harvey, where repugnancy provisions have been applied, these are: 'procedural matters where there has been a deficiency in the manner in which a trial had been adjudicated (for example not hearing both sides); in denying slavery or even a customary set-up reminiscent of slavery; in property claims where too long a period has elapsed to justify a claim against another's possession; in various matters relating to marriage; and in actions dealing with various aspects of witchcraft.'<sup>135</sup>

For Elias, determinations on the issue of repugnancy posed a constant dilemma for the judiciary who had to 'strike a nice balance between what is reasonably tolerable and

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<sup>129</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 90 -98

<sup>130</sup> Massachusetts Charter (1629), in *Colonial charters*, III, 1846 at 1858, cited in McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 97

<sup>131</sup> *Ibid.*

<sup>132</sup> Robert Leslie, 'The Repugnancy Rule in African Law and the Public Policy Rule in Conflict of Laws', *Acta Juridica*, (1977).

<sup>133</sup> *Tabitha Chiduku v Chidano*, 1922 SR 55, at 6

<sup>134</sup> *Mayitenga and Mamire v Chinamura & others* 1928 – 1962 SRN 829 at 832 (1958)

<sup>135</sup> Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 128 referring to William Burnett Harvey, *Introduction to the Legal System in East Africa* (Kampala: East African Literature Bureau, 1975), at 524

what is essentially below the minimum standard of civilised values in the contemporary world.’<sup>136</sup> Elias viewed the application of the repugnancy rule and the public policy rule as reflecting an inherent failure of the British legal system, ‘its incapacity to look both ways in order to provide an equitable balance between custom and colonial law.’<sup>137</sup> Sheleff finds much to favour in the work of Leslie who drew analogies between the ‘widely accepted legal principle of public policy’ and the ‘repugnancy’ rule.<sup>138</sup> Sheleff describes the functioning of the public policy rule in a conflict of laws situation where a court after recognising the applicable law to be that of another jurisdiction may then refuse to recognise a particular rule of that foreign law on the grounds it ‘violates’, in the language of Justice Cardozo, ‘some fundamental principle of justice, some prevalent concept of good morals, some deep-rooted tradition of common weal.’<sup>139</sup> He goes on to note Leslie’s suggestion that the rule of repugnancy should not be seen as invariably leading to the excise of the relevant custom but could be used more as an ‘equitable jurisdiction’. From this perspective a court could ‘depart from a rule of customary law, not because the rule itself is repugnant to natural justice or morality, but because its enforcement in the particular circumstances of the case then before it would have results considered by the court to be repugnant to natural justice or morality.’<sup>140</sup>

Following decolonization the notion of repugnancy was considered incompatible with respect for customary law. Rejection of the common law notion of ‘repugnancy’ does not, however, equate with acceptance of customary law *in toto*. In place of ‘repugnancy’ there are now a wide range of measures by which custom may be held inapplicable. At the national level its applicability has been made conditional upon

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<sup>136</sup> Taslim Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, at 104

<sup>137</sup> For discussion of the treatment of repugnancy issues by Elias across his career see Toufayan, 'When British Justice (in African Colonies) Points Two Ways: Ondualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Eelias' *Leiden Journal of International Law*, 21 (2), 377-410.

<sup>138</sup> See Leslie, 'The Repugnancy Rule in African Law and the Public Policy Rule in Conflict of Laws', at 117

<sup>139</sup> *Louks v Standard Oil Co.*, 224 NY 99 at 111, cited in Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 130

<sup>140</sup> Leslie, 'The Repugnancy Rule in African Law and the Public Policy Rule in Conflict of Laws', at 119

compatibility with constitutional law<sup>141</sup>, national law<sup>142</sup> and regulations<sup>143</sup> human rights<sup>144</sup>, public order and morals<sup>145</sup>, fundamental rights of the person<sup>146</sup> and natural justice.<sup>147</sup> At the international level ILO Convention 169 recognises Indigenous peoples rights to ‘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’.<sup>148</sup> Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples adopts a less restrictive position, stating

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.<sup>149</sup>

Article 34 of the Declaration does not seek to subordinate customary law to human rights but rather defines the right to ‘promote, develop and maintain’ customary law as being a human right in itself, which is constrained by the boundaries of human rights law. This is of much importance for the status of customary law, which can no longer be seen as coming at the bottom of a legal hierarchy. Indeed, constitutional changes and decisions of the courts are increasingly seeing customary law as on a par if not superior to common law.<sup>150</sup> The courts are also seen as having an important role

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<sup>141</sup> See constitutions of Colombia 1991 Art 246, Malawi 1994 S. 200, Uganda 1995, Art. 2(2), Ecuador 2008 Article 57(10), Liberia 1986, Art. 2, Rwanda 2003, Art. 201. See also Art. 61 the *African Charter on Human and People’s Rights*, which provides that the: Commission shall take into consideration practices consistent with international norms, customs generally accepted as law... .

<sup>142</sup> See constitutions of Namibia 1990 Art 66, Solomon Islands 1978, Sch.3 S.3 (1) and (2), Ecuador, Ethiopia 1994 Art 9, Kenya 1963, S.117 (5),

<sup>143</sup> See Constitution of Rwanda 2003, Article 201

<sup>144</sup> Ibid

<sup>145</sup> Ibid

<sup>146</sup> See Constitution of Peru 1993, Article 149

<sup>147</sup> See Constitution of Swaziland 2005, Section 252

<sup>148</sup> ILO Convention 169, Article 8(2)

<sup>149</sup> UN Declaration, Article 34

<sup>150</sup> See Constitution of Bolivia 2009, art 410. Hierarchy of laws, which places customary law on a par with national law and as superior to executive decrees, regulations and other resolutions, Art 225 II

to play in ironing out the creases between customary law and fundamental rights as specified in constitutional law, an issue which will be returned to in chapter eight.

### 2.3.2 Codification of custom

Codification of law has been practised for thousands of years. The Roman Twelve Tables date from the middle of the 5<sup>th</sup> century B.C. - the first ten Tables were prepared in 451 B.C. and reportedly carved in ivory, the remaining two were prepared in 450 B.C – the complete twelve tables are believed to have been cut on bronze tablets and placed in a public place.<sup>151</sup> They remained the only attempt at codification of Roman law until Justinian’s code almost a thousand years later.<sup>152</sup> Olivelle places the writing of the Indian *dharmasutras*, which covered all aspects ‘of individual and social behaviour and norms, as well as personal, civil and criminal law’<sup>153</sup>, around the ‘beginning of the third to the middle of the second centuries, before the common era.’<sup>154</sup> Extensive codification of Irish Brehon law, whose origins date back at least as far as the Common Celtic period around 1000 B.C., was first carried out in the 7<sup>th</sup> or 8<sup>th</sup> century A.D.<sup>155</sup> According to Kelly, the introduction of Latin letters provided the opportunity to treat legal topics in more depth.<sup>156</sup> It also provided an opportunity for the church to exercise more influence on the content of the law through its

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requires that negotiation, subscription and ratification of international relations will be guided by the principles of: (4) Respect for the rights of the indigenous originary farmer nations and people. Constitution of Papua New Guinea 1975 Section 20 and Schedule 2.1, which makes customary law part of the ‘underlying law’, in effect placing it above common law. See also decision of the Constitutional court of South Africa in *Alexkor Ltd & Another v the Richtersveld Community & Others*, BCLR (12 BCLR 1301 CC, 2003)

<sup>151</sup> The term the common era has been utilized for many years as a non-Christian representation of the calendar

<sup>152</sup> George Long, 'Lex Duodecim Tabularum', in Willam Smith (ed.), *A Dictionary of Greek and Roman Antiquities* (London: John Murray, 1875), at 68

<sup>153</sup> Patrick Olivelle, *The Dharmasutras: The Law Codes of Ancient India* (Oxford: Oxford University Press, 1999) at xxiv

<sup>154</sup> Ibid. at xxxiv

<sup>155</sup> Kelly, *A Guide to Early Irish Law*, at 225

<sup>156</sup> Ibid. at 232



involvement in the codification process<sup>157</sup> In Mesoamerica prior to colonization the Aztecs, according to Gonzalez, utilised pictograph manuscripts to record legal practices.<sup>158</sup>

During the colonial period codification was sporadic and where occurring was seen as ossifying ‘customary systems that had been more fluid’.<sup>159</sup> One of the first colonial experiments with codification was the customary code for Natal, which was first published in 1878, was revised in 1888 and made law in 1891.<sup>160</sup> Concerning mainly family law and succession it did not in Bennett’s view faithfully reflect custom being distorted, he says, by the ‘preconceptions and unscientific approach of the codification team’.<sup>161</sup> The Natal code’s intended and unintended amendments to custom were, according to Bennett, not only ‘out of touch with African practice and opinion’ it was injurious to custom as ‘the courts are bound by its provisions.’<sup>162</sup> Similarly, in the codification of custom in Fiji under the British where, Fitzpatrick claims, ‘the colonists inability to understand the complex political relations of the Fijians’ led to individual land rights being designated as communal title and accorded chiefs increased political and legal power<sup>163</sup> The result was, he says, the creation of a new aristocracy whose interests became entwined with the perception of custom as defined by the colonial system ‘as immutable and immemorial tradition.’<sup>164</sup> A perception of custom, Fitzpatrick finds, ‘functional and profitable’ for the elite while

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<sup>157</sup> See generally Kelly *A Guide to Early Irish Law* for evidence of how the church influenced the codification of law in Ireland, including for example the increased focus on the death penalty for offences in some texts. According to Kelly the Celtic tradition as reflected in the *Seanchas Mar* the most important collection of Irish ancient law texts, which, he says, ‘consistently favour reparation by payment rather than the death-penalty for murder and other serious offences (by either sex)’, at 234-5

<sup>158</sup> Jorge Alberto Gonzalez Galvan, 'El Derecho Consuetudinario Indígena En Mexico', Cuadernos Del Instituto De Investigaciones Jurídicas, Cosmovisión Y Prácticas Jurídicas De Los Pueblos Indios, IV Jornadas Lascasianas, (Mexico: Universidad Nacional Autónoma de México, 1994), at 74-5

<sup>159</sup> ICHRP, 'When Legal Worlds Overlap: Human Rights, State and Non-State Law', at 9

<sup>160</sup> T.W. Bennett, *The Application of Customary Law in Southern Africa* (Cape Town: Juta, 1985), extract reprinted in Bennett, *A Sourcebook of African Customary Law for Southern Africa*, at 113

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Peter Fitzpatrick, 'Traditionalism and Traditional Law', *Journal of African Law*, 20 (1984), 20-27, at 20 -21

<sup>164</sup> Ibid.

at the same time serving the colonial purpose, forming ‘...‘neat’, ‘simple’ and governable groups and empowered leaders’ conducive to indirect rule of native populations.<sup>165</sup>

Formal codification processes were, however, the exception rather than the rule. The British, for example, were largely concerned with the legal process rather than the content of the law applied, and did not, according to Shadle, generally favour codification.<sup>166</sup> Chanock argues that there is ‘much to suggest that it was the European rulers who wanted the customary law to be kept flexible and the African interpreters of it who wished to crystallise it.’<sup>167</sup> In the words of Sack, whom Chanock cites,

The colonial administration and the colonial courts were there to make sure that the natives did from now on what they ought to do according to their traditional laws. The white man’s machinery of law enforcement was set up to enforce the black man’s substantive law.<sup>168</sup>

What colonialism did was to change the process for application of customary law. By establishing native courts empowered to apply the law the court itself might find, significant power was, Chanock claims, transferred to those providing evidence of the customary law (in the main part male elders) to define its content.<sup>169</sup>

Shadle views what was occurring in Africa from a different angle, arguing that ‘[f]ar from creating a new customary law through codification’ administrators, at least from the 1920’s, were largely against codification.<sup>170</sup> In his view a ‘crystallized, unalterable customary law would allow them little room to adjust the law in order to control local

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<sup>165</sup> Ibid. at 21

<sup>166</sup> Brett L. Shadle, ‘Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60’, *Journal of African History*, 40/3 (1999), 411-31, at 414

<sup>167</sup> Chanock, *Law, Custom and Social Order*, at 77

<sup>168</sup> Ibid. at 28, fn 9, citing Sack

<sup>169</sup> Ibid. at 62

<sup>170</sup> Shadle, ‘Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60’, at 413

African courts and, by extension, African societies.’<sup>171</sup> He goes on to argue that by the 1930’s administrators ‘had little interest in ancient rules, but looked to ‘public opinion’ to discover the contemporary definition of the law instead.’<sup>172</sup> In Kenya, the focus of his study, the administrator’s opposition to codification may, he says, be seen in the light of their desire to keep the Native tribunals separate from the Supreme Court’s jurisdiction.<sup>173</sup> In support he refers frequently to the position of the Senior Commissioner S.H. Fazan (DC of South Nyeri) who - noting that the Supreme Courts in the Cape Colony and in Kenya had both ruled that ‘A customary law marriage was little more than illicit sex’ - was worried the Supreme Court would feel ‘little compunction in radically remaking or discarding customary law.’<sup>174</sup> With regard to codification Fazan, referring to the condemned Natal code, took the view that, ‘a code is on no account to be attempted.’<sup>175</sup> Fazan’s determined defence of customary law stands out in a Memorandum he wrote in 1929, where he says of it,

There is hope that it may reveal a capacity for evolving on its own account in a way suitable to the changing conditions of Tribal life and better adapted to them than either our own law or the Native law as it stands at present. ... While we recognize that the communal spirit of native law must in the end give way before advancing individualism, we shall not surrender the fortress to the first onslaught of detribalism, but, as the years go on and one point after another is threatened, we shall decide where to protect the tribal custom and where to let it down gently.<sup>176</sup>

Having largely escaped during the colonial period, pressure for codification of custom increased in earnest in the period leading up to and immediately following

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<sup>171</sup> Ibid.

<sup>172</sup> Ibid. at 424

<sup>173</sup> Ibid.

<sup>174</sup> Ibid. at 420

<sup>175</sup> Ibid. at 421, citing S. H. Fazan 'Memorandum Regarding the Development of Native Tribunals' (c. Aug 1929, in Rhodes House MSS Afr. S 1792, box 37 (Matson Papers), File 5/1, Rhodes house Library, Oxford University), at 11

<sup>176</sup> Fazan 'Memorandum Regarding the Development of Native Tribunals', at 415

decolonization.<sup>177</sup> The British, for example, pushed codification via the Restatement of Africa Law Project.<sup>178</sup> While the 1960 London Conference on the Future of Law in Africa promoted moves to stabilise customary law, adopting the view, in Chanock's words, 'that the time had come to freeze the development of customary law and to turn it into a body of certain and applicable rules.'<sup>179</sup> The obsession with rules reflects, he claims, the 'continuing failure' throughout the colonial period to understand customary law.<sup>180</sup> The British had, he says, '... looked for rules, and Africans, as this was realised, emphasised that the claims they were putting forward were in fact rules to be applied, not positions to be negotiated.'<sup>181</sup> Shadle rejects the notion of customary law as a purely colonial invention finding a continuing flexibility even where codification did occur with 'African court elders continu[ing] to employ law situationally.'<sup>182</sup>

Upon decolonization the newly independent states inherited a mixed body of customary law composed of 'official' codified custom, court custom, and the 'living' custom of the tribal and Indigenous peoples. On top of this they were faced with a major dilemma. On the one hand they were largely desirous of ensuring respect for customary law, on the other hand, they wanted do away with distinctions and secure one law for all. The result, according to Bennett and Vermeulen has been the adoption of solutions that almost always involved some form of codification of all or part of the legal system.<sup>183</sup> They identify two principal approaches adopted by African codification commissions to customary law. Some countries, such as Ethiopia, opted for radical reform and the 'almost total abolition of customary law.'<sup>184</sup> This approach was, they say, inspired by the view of David the drafter of the Ethiopian code, that

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<sup>177</sup> T. W. Bennett, and T. Vermeulen, 'Codification of Customary Law', *Journal of African Law*, 24/2 (1980), 206-19.

<sup>178</sup> Shadle (1999), at 416

<sup>179</sup> Chanock, *Law, Custom and Social Order*, at 56-9

<sup>180</sup> *Ibid.*, at 58

<sup>181</sup> *Ibid.*, at 59

<sup>182</sup> Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60', at 424

<sup>183</sup> Bennett, 'Codification of Customary Law', at 207

<sup>184</sup> *Ibid.*

customary law was responsible for the undeveloped nature of African society.<sup>185</sup> In his words,

Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law, which is unique in itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitates the adoption of a ready made system<sup>186</sup>

Based on the civil codes of France, Switzerland, Germany, Italy and Egypt, the Ethiopian code did not embrace customary law but sought merely to ensure that 'no provision should be so foreign as to outrage Ethiopian sensibilities'.<sup>187</sup> A contrasting approach was that adopted by countries such as Madagascar where customary law was taken as the basis for codification as the system which best reflected the needs, traditions and social values of the populace.<sup>188</sup> Even where codification is based on customary law the process is bound to do harm to the very nature and substance of custom as the basis for the ordering of communities and peoples. Bennett and Vermeulen argue that 'any form of codification of customary law, even one based on a moderate policy, such as the Malagasy code, is in danger of failing to attain the degree of acceptance which will render it effective'.<sup>189</sup> Once codified customary law is enshrined by statute it is, unless open to variance by Indigenous peoples in accordance with their own decision making processes, in effect converted into positive law. Where there are varied customary legal regimes codification will usually tend towards harmonisation, whether through the identification of common underlying traits or the recognition of one rule in preference to another. In all events modification and change of customary law will occur with codified law either undermining its traditional application, or falling into desuetude where the populace boycott and ignore the code.

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<sup>185</sup> See David 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries (1962-1963)', 37 *Tulane Law Review* 188 -189.

<sup>186</sup> *Ibid.*

<sup>187</sup> Bennett, 'Codification of Customary Law', at 208

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.* at 209

Pimentel, writing with regard to customary law regimes in present day South Sudan, argues that

If customary law is codified ... it becomes for all meaningful purposes, the property of the state. The legislature may adopt such codes, but only the legislature is then fully empowered to amend it. The tribal communities that produced that law, and the tribal elders who apply it, are then deprived of their role in shaping such law; the customary law ceases to be a living law that adapts to suit the community it serves.<sup>190</sup>

Codification is also problematic, he argues, due to the multiple versions of customary law practised in South Sudan, with ‘at least 60 customary law systems, [and] conflicting value sets’ in the region.<sup>191</sup> Analysing the approach being adopted by the Homelands in South Africa, Bennett and Vermeulen take the view that restatement of customary law rather than codification ‘is a wise policy’.<sup>192</sup> Pointing out that Africans are ‘normally fully cognisant of their law, they suggest that restatement of customary law is of greater value as a means to educate administrators of justice who may be less familiar with it.’<sup>193</sup> The perceived benefit of restatements lies in the possibility of obtaining a clear enunciation of the status of customary law without interrupting its dynamic evolution. Restatements of law addressing both custom and positive law, and taking into consideration the perspectives of dominant sectors of society, Indigenous peoples and minority groups, offer opportunities to identify points of cohesion and comparative principles of equity. This according to Thornberry is part of a process required to achieve the reciprocity he sees as requisite for democratic self-determination, something he suggests cannot be achieved absent control by

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<sup>190</sup> David Pimentel, 'Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan', at 19

<sup>191</sup> Ibid.

<sup>192</sup> Bennett, 'Codification of Customary Law',

<sup>193</sup> Ibid.

Indigenous peoples over the process for ‘articulation and interpretation of their laws, customs and traditions.’<sup>194</sup>

Once custom is officially codified it is difficult to change and may become a tool of the state utilized to restrict the application of the living law of the people. For these and other reasons Indigenous peoples are in general opposed to its codification. G. N. Sinha warns that codification ‘would amount to stopping growth of customs and customary rights of future generations. In addition ... courts may also arrive at different interpretations of the customary rights once they are codified, by following strict rules of construction or functional interpretation.’<sup>195</sup> As pressures to codify customary law increase Indigenous peoples will need to be increasingly judicious about what (if anything) to codify. Any documentation of customary law will need to be approached with care avoiding the establishment of rules that impose an inflexible structure onto the ‘living law’ of Indigenous peoples. It will also need to avoid presenting a target for governmental extinguishment, an issue that will be addressed in more detail in discussion of native title in chapter five.

While reticent about codification of the principles and substance of customary law, indigenous peoples are increasingly finding it beneficial to set down written protocols regulating research and resource collection.<sup>196</sup> These protocols may include details of the process to be followed by third parties seeking access to indigenous peoples’ cultures, lands, resources or knowledge. Customary law is also being drawn upon to govern contractual negotiation processes and the definition of contractual terms and conditions.<sup>197</sup> Examples of community protocols include the Raika Bio-cultural

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<sup>194</sup> Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism', in Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1993).

<sup>195</sup> N. Sinha, 'Is Codification of Customary Law Desirable' (manuscript on file with author)

<sup>196</sup> For discussion of community protocols see generally Kabir Bavikatte and Harry Jonas (eds.) *Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (Cape Town: Natural Justice and UNEP 2009).

<sup>197</sup> For discussion of customary law and contracts see Merle Alexander, Preston Hardison and Matthias Ahren, 'Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, across Jurisdictions, and International Law' (UNEP/CBD/WG-ABS/7/INF/5, 2009). Brendan Tobin, 'Biodiversity Prospecting Contracts: The Search for Equitable

protocol, in which the Raika pastoralists from Rajasthan, India, have set out their 'biocultural values' and customary decision making process, and delineated their rights under Indian and international law with reference to their own 'way of life',<sup>198</sup> Kuna communities in Panama were amongst the first to develop internal regulations based upon customary law as part of a process to secure recognition of their own legal regimes and regulate research activity on their culture and within their territories.<sup>199</sup> Morales, referring to this experience, describes various benefits arising from 'making the old ways more accessible' but he also notes the downside of codification in a language (Spanish) only known to part of the community; bureaucratization of the personnel responsible to manage judicial issues; and, the undermining of traditional more flexible decision-making processes.<sup>200</sup> In the Solomon Islands, according to Stillitoe, the Kwaio view codification of their *kastom* (customary law) as important for securing its legitimacy vis-à-vis state law.<sup>201</sup> He interprets this as the result of their '[c]oming from a non-literate cultural tradition', which he says, gives them a 'sense that writing imparts power, even mystery, to words and by using the same medium of communication [as the state] they hope to empower themselves.'<sup>202</sup> It is unsure indeed if their desired purpose in codification has the effect of securing the legitimacy they seek. Care needs to be taken, therefore, to ensure that the development of protocols responds to the priorities, interests and vision of indigenous peoples. To this end, it will be important to ensure that indigenous peoples are fully informed regarding the

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Agreements', in Sarah A. Laird (ed.), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (London & Sterling, VA: Earthscan Publications Ltd., 2002). Tobin and Taylor, *Across the Great Divide: Complementarity and Conflict between Customary Law and National Sui Generis TK Law in Peru*.

<sup>198</sup> For an example of a structured protocol see the Raika Bio-cultural Protocol set out in Bavikatte (ed.), *Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy*, at 76-87

<sup>199</sup> Vincente Cabedo Mallo, *Constitucionalismo y Derecho Indígena en Latina America* (Universidad Politecnica Valencia 2004). at 246)

<sup>200</sup> Ascario Morales, 'La Adminstracion de Justicia en las Comunidades Indigenas Kunas y Conflictos con el Derecho Positivo', in Cuadernos Del Instituto De Investigaciones Jurídicas, Cosmovisión Y Prácticas Jurídicas De Los Pueblos Indios, IV Jornadas Lascasianas, Derecho Indígena núm.2, (Mexico: Universidad Nacional Autónoma de México, 1994), at 109

<sup>201</sup> Paul Stillitoe, *Social Change in Melanesia: Development and History* (Cambridge: Cambridge University Press, 2000), at 249

<sup>202</sup> Ibid.



potential benefits and possible drawbacks of codifying in whole or in part their customary laws in protocols, contracts, local regulations or any other format.

Having survived centuries of marginalization and modification, customary law's resilience and the determination of indigenous peoples has secured its recognition under international law and in many national jurisdictions. If this recognition is to be meaningful the legislature, judiciary, and indigenous peoples themselves, will need to work together to find the optimum means to enable living customary law to flourish. Key to this is the maintenance and development of functional interfaces between customary, national and international law. Interfaces between indigenous peoples customary law regimes and national and international systems of governance may take a variety of forms. This includes interfaces between indigenous peoples and their institutions with national and international legislative, judicial and administrative authorities. Amongst the many areas of interface will be those relating to issues such as family, inheritance, crime, welfare, education, health, land, environment, science and traditional knowledge, transport, agriculture, fisheries and forestry development policies, as well as energy projects, dam construction, and non renewable resource exploitation including oil and mining activities. To ensure compliance with indigenous peoples' human rights, activities in these areas will need to be designed with due attention to their interests, priorities, concerns and most importantly their customary laws and practices. Anything short of this will undermine trust of indigenous peoples in the relevant legislative, policy of program measures, which will be seen as externally generated and imposed, and more than likely doomed to failure.

### Chapter 3. Customary law today

Securing international recognition of indigenous peoples rights to their customary laws has been a lengthy process. However, following a stumbling start in the 1950's, a series of actions beginning in the early 1970's has significantly raised the profile of Indigenous peoples' human rights at both the national and international levels. At the international level advances have come through a mixture of international treaty making and state practice that has crystallised in customary international law, a process which has been aided by the decisions of national courts, treaty bodies and regional human rights courts.

The first specific international instrument dedicated to indigenous peoples' rights was International Labour Organization Convention 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi Tribal Populations in Independent countries.<sup>1</sup> Adopted in 1957, Convention 107 recognised the rights of indigenous populations to ownership of the lands they traditionally occupy<sup>2</sup> and to retain their own customs and institutions<sup>3</sup>. It also required states to give 'regard' to the customary laws of indigenous populations in defining their rights and duties under the Convention.<sup>4</sup> The Convention was not, however, well received by indigenous peoples due to its focus on protection of human rights through assimilation. In 1993 Convention 107 was superseded, for all but a small number of countries, by ILO Convention 169, which focuses on securing Indigenous peoples' cultural integrity<sup>5</sup> and the protection of their rights to their lands, territories and resources.<sup>6</sup> Convention 169 requires states to ensure the participation of Indigenous peoples in decision-

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<sup>1</sup> ILO Convention No. 107, adopted at the 40<sup>th</sup> Session of the International Labour Conference, 26<sup>th</sup> of June 1957. (hereafter Convention 107)

<sup>2</sup> Ibid. Article 11

<sup>3</sup> Ibid. Article 7(2)

<sup>4</sup> Ibid. Article 7 (1)

<sup>5</sup> Convention 169, Articles 2, 3, 4 and 5

<sup>6</sup> As of January 2012 twenty-two, primarily Latin American, states had ratified Convention 169. Apart from Latin American countries ratification has also come from a number of European states (Denmark, Netherlands, Norway and Spain) and from one Pacific Island State (Fiji) one Asian country (Nepal), and in 2010 the first African state to ratify the Treaty (the Central African Republic). For a list of Treaty parties see <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>

making<sup>7</sup> and recognition of their rights to their own customs, institutions and legal regimes<sup>8</sup>, as well as to education, language and culture.<sup>9</sup> Convention 169 has been criticized, however, for its failure to give clear recognition to Indigenous peoples rights to self-determination. This task fell to the Human Rights Committee and the Committee for Economic, Social and Cultural Rights which have both recognised Indigenous peoples' rights to greater political, economic, social, and legal autonomy, within the framework of the nation state in which they reside.<sup>10</sup> In essence, the treaty bodies were recognising the existence of a customary norm of international law entitling Indigenous peoples' to what is widely termed 'internal' self-determination. This chapter examines the scope of Indigenous peoples' right to self-determination, their exercise of autonomy and their right to self-identification. It continues with a discussion of the status of customary law under international law and national constitutional law, and it concludes with consideration of the scope of customary law and its application in tribal and village courts.

### **3.1 Sovereignty and Self-Governance**

Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples recognises their right of self-determination confirming what Anaya and other commentators had already surmised, that Indigenous peoples' right of self-determination had already become a principle of customary international law.<sup>11</sup> Although not legally binding of itself the Declaration's long period of gestation, the numerous statements of states regarding their understanding of Indigenous peoples' rights and the almost global acceptance of its provisions, means that it is widely seen as reflecting the status of customary international law.<sup>12</sup> It has already been relied

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<sup>7</sup> ILO Convention 169, Article 6

<sup>8</sup> Ibid, Articles 8 and 9

<sup>9</sup> Ibid, Articles 5 and 26 - 31

<sup>10</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 304.

<sup>11</sup> Anaya, *Indigenous Peoples in International Law*, at 112

<sup>12</sup> Elsa Stamatopoulou, 'Taking Cultural Rights Seriously', in Steven Allen and Alexandra Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Studies in International Law; Oxford: Hart Publishing Ltd, 2010), 387 - 412.

upon by international treaty bodies<sup>13</sup>, as well as by national courts and regional human rights organizations. Alongside and associated with rights to self-determination Anaya identifies developing customary international norms of indigenous land rights<sup>14</sup>, and cultural integrity.<sup>15</sup> The existence of such customary international norms suggests the existence of complementary customary international law norms recognising the rights of indigenous peoples to their customary laws and institutions, and requiring states to recognise and respect indigenous peoples' customary laws in order to secure their human rights.

Now that Indigenous peoples right to self-determination has been affirmed, the question arises as to just what does this right entail. During the negotiation of the United Nations Declaration on the Rights of Indigenous Peoples many countries expressed concern at the possibility that it might be viewed as granting a right of secession. In response the Declaration includes Article 46, which seeks to limit Indigenous peoples rights to self-determination by restricting their right of secession. In the opinion of Xanthaki express rejection of the right of external self-determination was 'unnecessary' considering that '[m]ost Indigenous peoples have emphasised that independence is neither desirable nor a possible option.'<sup>16</sup> That said, recognition of Indigenous peoples as 'peoples' mean that a right to secession will, in the view of Anaya, still subsist 'where substantive self-determination for a group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned.'<sup>17</sup> The possibilities of any indigenous people being in a position to secede and of receiving recognition by the international community should they seek to do so are extremely remote. They are not, however, negligible. Sustained threats to the livelihoods, health lands, lives and cultural integrity of forest peoples; failures to give

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<sup>13</sup> E/C.12/GC/21 at 2

<sup>14</sup> Ibid. at 70

<sup>15</sup> Ibid. at 137

<sup>16</sup> Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, (Cambridge, New York: Cambridge University Press, 2007), at 168 where she also cites a Statement of the Four Directions Council, distributed during the 1995 Commission Working Group, where they say 'Indigenous peoples are not geographically or economically situated in a way that makes independence particularly attractive. Most, if not all, Indigenous peoples are consequently seeking democratic reforms and power sharing within existing states.'

<sup>17</sup> Anaya, *Indigenous Peoples in International Law*, at 109

due recognition to Indigenous peoples and their rights to autonomy and self-governance; and, programs of assimilation, ethnic cleansing and cultural genocide are amongst the threats to Indigenous peoples that may potentially be used to ground calls for the exercise of the ultimate manifestation of rights to self-determination, the right to secede.<sup>18</sup> The current analysis will focus on two aspects of self-determination central to the recognition and enforcement of customary law. These are rights to autonomy under national law and indigenous peoples' rights to self-identification.

### 3.1.1 autonomy in practice

Shin Imai identifies four broad options for implementation of rights to self-determination; these are sovereignty and self-government, self-management and self-administration, co-management and joint management, and participation in public government.<sup>19</sup> Of these he says:

The 'sovereignty and self-government' option leads to more autonomy for the Indigenous community to control its own social, economic and political development. The 'self-management and self-administration' option leads to greater control of local affairs and the delivery of services within a larger settler government legislative framework. The 'co-management and joint management' model institutionalizes Indigenous participation in the management of lands and resources. The 'participation in public government' option provides a means to influence the policies of the settler governments through Indigenous-specific institutions.<sup>20</sup>

Each of Imai's four categories signify varying levels of interaction with external authorities and differing levels of recognition, promotion and enforcement of

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<sup>18</sup> A case in point is that of Indigenous peoples in the contiguous Amazonian regions surrounding the shared borders of Peru, Brazil, and Colombia, which are threatened on all sides by creeping colonial settlement; displacement in the face of massive energy projects; incursions of oil and mining interests and the consequent loss of environmental quality; cultural erosion and commoditisation of local economies, uncontrolled deforestation, agro-industrial activities; and political violence.

<sup>19</sup> Shin Imai, 'Indigenous Self-Determination and the State', in Richardson et. al., *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, at 292 - 306

<sup>20</sup> *Ibid.*, at 292

customary law. Opportunities to secure and enforce customary law would appear to be highest in situations of self-government; this however will depend upon the manner in which such rights may be regulated by the state, its recognition of Indigenous peoples' traditional institutions and the relationship between tribal courts and law and national judicial authorities.

Imai, distinguishes independence and the notion of sovereignty, which he says does not connote the existence of a 'separate international state' but rather implies 'indigenous authority to make laws over a 'defined territory.'<sup>1</sup> This authority is not necessarily unlimited. States tend always to hold onto control over key areas such as foreign affairs and defence. They also often retain rights to regulate issues of taxation, major crimes, and resource exploitation. At the higher-level autonomy signifies significant freedom from external governmental interference, as is the case with the Government of Greenland in which a majority of parliamentarians are de facto Inuit.<sup>21</sup> First Nations in the United States are beneficiaries of what Imai claims to be the most 'explicit recognition' of indigenous sovereignty.<sup>1</sup> This sovereignty is, however, limited as set out in *US v Wheeler*<sup>22</sup>, where the court held that,

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.<sup>23</sup>

The notion that sovereignty exists at the 'sufferance' of Congress is, in itself, a denigration of indigenous sovereign rights that had been recognized in treaties entered into first with the British and later with the US government. A valid question, implicit in Borrows' analysis of the application of Crown sovereignty to indigenous lands in

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<sup>21</sup> UNHRC, 'Expert Mechanism on the Rights of Indigenous Peoples, Final Study on Indigenous peoples and the Right to Participate in Decision-Making (Advance Edited Version) Report of the Expert Mechanism on the Rights of Indigenous peoples' A/HRC/EMRIP/2011/2, (2011), at 10

<sup>22</sup> *US v Wheeler* 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)

<sup>23</sup> *Ibid.*

Canada, is why the purported negation of indigenous sovereignty by colonial powers and settler states should prove any more binding than declarations of continuing sovereignty by Indigenous peoples, which are surely more morally defensible.<sup>24</sup> As Turner puts it, ‘many Aboriginal communities maintain that they are still self-governing nations and that Aboriginal peoples have not, in fact, relinquished or ceded any powers to the state.’<sup>25</sup> Referring to the submissions of the Gitskan and Wet’suet’en people in the Landmark Canadian Supreme Court Case *Delgamuukw v British Columbia*<sup>26</sup> he notes the strength of their conceptions of sovereignty and its spiritual basis, citing their statement that, ‘[t]he land, the plants, the animals and the people all have spirit – they all must be shown respect. That is the basis of our law.’<sup>27</sup>

According to the UN Declaration, Indigenous peoples by virtue of their rights to self-determination are entitled to autonomy or self-government over their internal affairs<sup>28</sup>. This includes the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions<sup>29</sup>; and to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs<sup>30</sup>. Amongst the key indicators, then, for determining the effectiveness or otherwise of measures to promote indigenous rights to self-determination will be the extent of recognition of their own decision making authorities, the level of respect shown for their jurisdictional powers, and the support given for the enforcement of their own legal regimes in accordance with their own customs and practices.

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<sup>24</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 69-72

<sup>25</sup> Dale Turner, 'Liberalism's Last Stand: Aboriginal Sovereignty and Minority Rights', in Curtis Cook and Juan D. Lindau (eds.), *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal & Kingston, London, Ithaca: McGill-Queens University Press, 2000), 135-47, at 141

<sup>26</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010

<sup>27</sup> Gisday Wa and Delgam Uukw, *The Spirit of the Land: Statements of the Gitskan and Wet’suwet’en Hereditary chiefs in the Supreme Court of British Columbia 1987-1990* (Gabriola, BC: Reflections, 1992), 7. Cited in Turner, 'Liberalism's Last Stand: Aboriginal Sovereignty and Minority Rights', at 141.

<sup>28</sup> UN Declaration, Article 4

<sup>29</sup> UN Declaration, Article 5

<sup>30</sup> UN Declaration, Article 34

A brief overview of the constitutional law from around the globe demonstrates the growing recognition of Indigenous rights to varying levels of autonomy in many jurisdictions. In Canada, for example, Article 35 of the 1982 Constitutional Act has proved very significant for Indigenous peoples as it recognised and affirmed ‘the existing aboriginal and treaty rights of the aboriginal peoples of Canada.’<sup>31</sup> The Aboriginal Self-Government Federal Policy Guide recognises Indigenous peoples’ inherent rights to self-government, including rights to ‘administration/enforcement of Aboriginal courts and laws’.<sup>32</sup> Since the mid 1970’s over a dozen ‘significant agreements’ and scores of minor settlements on land claims and self-governance have been entered into with Indigenous peoples.<sup>33</sup> Of these, Imai identifies the Nisga’a Agreement of British Columbia as going furthest creating, as it does, constitutionally recognised rights of self-government that cannot be overridden by ordinary legislation.<sup>34</sup> Borrows notes, however, the limitations of the Nisga’a agreement that restricts their rights to free use and disposition of their lands.<sup>35</sup>

During the 1990’s all countries then part of the Andean Community<sup>36</sup> ratified ILO Convention 169 and adopted new constitutions<sup>37</sup> creating specific obligations regarding respect for Indigenous peoples’ land and resource rights, as well as rights to their customs and institutions. An important element of these new constitutions was the shift in focus from one of assimilation towards recognition of the pluricultural and multiethnic nature of the state. The Colombian Constitution of 1991, for example,

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<sup>31</sup> Constitution Act 1982. Being Sch. B to the Canada Act 1982 (UK) s. 35.

<sup>32</sup> Department of Indian Affairs and Northern Development Canada, Aboriginal Self-Government Federal Policy Guide: The government of Canada’s Approach to implementation of the Inherent right and the Negotiation of Aboriginal Self-Government (Minister of Public Works and Government Services Canada, Ottawa, 1995) available at [www.ainc-inac.gc.ca/pr/pub/sg/pley\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/sg/pley_e.html)

<sup>33</sup> Imai, 'Indigenous Self-Determination and the State ', at 295

<sup>34</sup> Ibid.

<sup>35</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 105-8

<sup>36</sup> In 2006 the Bolivarian Republic of Venezuela withdrew from the Andean Community of Nations, leaving four member countries Bolivia, Colombia, Ecuador and Peru.

<sup>37</sup> Discussion of Andean constitutional provisions is drawn primarily from Brendan Tobin, *The Role of Customary Law in ABS and TK Governance in Andean and Pacific Island Countries* (WIPO/UNU-IAS, forthcoming).



grants Indigenous peoples' wide-ranging powers to exercise autonomy in their territories, subject to the constitution and national law. This includes rights to, exercise jurisdictional functions in accordance with their own norms and procedures<sup>38</sup>; administer and govern their territories<sup>39</sup>; and to be governed by their own authorities and administer their interests, in accordance with their own customs<sup>40</sup>. Under the Peruvian Constitution of 1993<sup>41</sup> campesino and native communities are given legal recognition and are entitled, subject to law, to exercise autonomy with regard to their organization, economy, administration, communal work and in the free disposition of their territories<sup>42</sup>. They are also entitled to exercise judicial functions within their territories in accordance with their customary laws, as long as they do not violate the fundamental rights of the person<sup>43</sup>. Similarly, the Constitution of Ecuador recognises a role for customary law stating that Indigenous peoples' own authorities are entitled to exercise judicial functions, applying their own laws and procedures for the solution of internal conflicts in accordance with their customs and customary laws to the extent that this does not conflict with the constitution and national law<sup>44</sup>. The Bolivian Constitution of 2009 is of particular interest having been adopted following the coming to power of Evo Morales the first indigenous president in the country's history. Article 2 of the Constitution recognises the pre-colonial historical presence of indigenous farmer nations and people and their ancestral domain over their territories. It guarantees their self-determination within the framework of the State, and defines this to include their right to autonomy, to self-government, to their culture, to the recognition of their institutions and to the consolidation of their territorial entities. Article 2 conditions exercise of these rights on conformance with the Constitution and the law. While Article 30.II recognizes among a long list of rights their rights to exercise their political, legal and economic systems in accordance with their cosmovision; to be consulted on legislative or administrative measures that may affect them; and to prior good faith consultations regarding the exploitation of non-

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<sup>38</sup> Constitution of Colombia 1991, Article 246

<sup>39</sup> Ibid. Article 286

<sup>40</sup> Ibid. Article 287

<sup>41</sup> Constitution of Peru 1993, Article 2.19

<sup>42</sup> Ibid. Article 89

<sup>43</sup> Ibid. Article 149

<sup>44</sup> Constitution of Ecuador 2008, Article 191

renewable natural resources.<sup>45</sup> The tendency towards increased constitutional recognition of indigenous rights in Latin America, while welcome, has occurred in a period of ever-increasing pressure for the extraction of natural resources sourced in their territories. In the absence of effective enforcement of territorial, environmental, cultural and economic rights, and of rights to participation in decision-making and consultation prior to the granting of licences for resource extraction, the fine words of constitutional protection often have a hollow ring.

### 3.1.2 indigenous rights of self-identification

Historically the term ‘indigenous’ was used primarily to refer to the descendants of native non-European populations in New World Settler states colonised by European powers. The notion of indigenous peoples as a distinct category of peoples entitled to protection under international law may be traced back to the writings of Bartolome de las Casas. During the colonial period the term indigenous was, according to Kingsbury, associated with the practice of establishing special laws and policies for ‘distinct non-majority groups’<sup>46</sup>. In the era of decolonization it was applied to non-European majority populations of European colonies in Asia and Africa.<sup>47</sup> While, in the early post-colonial period it was seen as applying solely to the descendants of pre-colonial populations in settler States who were, following the blue-water doctrine<sup>48</sup>, seen as distinct from native populations in Third World countries in which settler communities are no longer the dominant political force<sup>49</sup>. The concept of ‘indigenous peoples’ has continued to evolve over time to encompass groups that would not fall within the blue water doctrine such as the Saami in Scandinavian countries and Arctic

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<sup>45</sup> See Constitution of Bolivia 2009, Article 30. II

<sup>46</sup> Benedict Kingsbury, ‘“Indigenous Peoples” in International Law: A Constructivist Approach to the Asian Controversy’, 92 *American Journal of International Law*: (1998). 414 – 457, at 427

<sup>47</sup> *Ibid.* at 426

<sup>48</sup> See E/CN.4/Sub.2/2000/10 where Asbjorn Eide states, ‘The “blue water doctrine” hold that the indigenous are those people beyond Europe who lived in the territory before European colonization and settlement, and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants.’

<sup>49</sup> C. Oguamanam, ‘Protecting indigenous knowledge in international law: solidarity beyond the nation-state.’ 8 *Law Text Culture* (2004), 191-230.

peoples of the Russian Federation, as well as minority and non-dominant tribal groups of Africa and Asia.<sup>50</sup>

After centuries of largely pejorative use the concept of 'Indigenous peoples' has, according to Kingsbury, attained great normative power making identification as indigenous increasingly attractive to minority groups.<sup>51</sup> For Kymlicka one of the major effects of the United Nations Declaration on the Rights of Indigenous Peoples has been to distinguish Indigenous peoples from other minorities, which he says has occurred in three ways.<sup>52</sup> The first of these is through recognition of rights to self-determination, legal pluralism, and autonomy; second is its form as a 'targeted' instrument applying to a defined group in contrast to 'generic' minority rights norms that apply to all groups; and, third is its drafting process, which provided, in his words, 'the objects of international law a chance to become its subjects'.<sup>53</sup> The recognition of more expansive human rights and in particular rights of self-determination has, he argues, made identification of Indigenous peoples an issue of increasing importance.<sup>54</sup> There is, however, no universally accepted definition of the term and as Kingsbury's puts it, the 'experience of international agencies and associations of indigenous peoples demonstrates that it is impossible to formulate a single globally viable definition [of indigenous peoples] that is workable and not grossly under – or over inclusive.'<sup>55</sup> This would seem problematic, however, a report prepared in 2004 for the United Nations Permanent Forum on Indigenous Issues argues that 'the prevailing view with regard to the concept of "indigenous peoples" ... is that no formal universal definition is necessary for the recognition and protection of

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<sup>50</sup> Anaya, J. (2004). *Indigenous Peoples in International Law*, at 3

<sup>51</sup> Kingsbury, "'Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy'

<sup>52</sup> Will Kymlicka, 'Beyond the Indigenous/ Minority Dichotomy', in Stephen Allen, And Alexandra Xanthaki (ed.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford and Portland Oregon: Hart Publishing, 2011), at 199

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Kingsbury, "'Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy', at 414

their rights'.<sup>56</sup> This accords with the position of Indigenous peoples themselves who have consistently argued that self-identification should be the principal criteria for identification of indigenes. Lack of a definition is not, however, without difficulties. On the one hand, it opens the doors for myriad groups to auto-define themselves indigenous, thereby threatening the cohesion of the international indigenous movement. On the other hand, it creates uncertainties regarding which peoples are indigenous a position that may be exploited by countries that deny the existence of Indigenous peoples on their territories. In the face of such uncertainties indigenous peoples representative organizations, the indigenous movement as a whole, as well as the national and international courts, treaty bodies and other international bodies, all have an important role to play in identification of indigenes.

Over the years international law has made various attempts to define indigenes. ILO Convention 107, distinguishes indigenous populations on the basis of 'descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization.'<sup>57</sup> It then goes disparagingly to distinguish them from the wider population stating that 'irrespective of their legal status, [they] live more in conformity with the social, economic and cultural institutions of that time [pre-colonial] than with the institutions of the nation to which they belong'.<sup>58</sup> An interesting aspect of the Convention's definition is its recognition that the status of tribal or semi-tribal populations (which may include Indigenous people) may be determined by taking into account their 'customs and traditions',<sup>59</sup> in essence allowing for a modicum of self-identification short of identification as indigenous. It also provides for identification of tribal and semi-tribal status based upon the existence of special national laws or regulations pertaining to

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<sup>56</sup> UNPFII (2004) PFII/2004/WS.1/3 'The Concept of Indigenous Peoples, background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues for Workshop on Data Collection and Disaggregation for Indigenous Peoples' (New York, 19-21 January 2004) see also 'UN Development Group Guidelines on Indigenous People's Issues', February 2004, at 8

<sup>57</sup> ILO Convention 107, Article 1.1.(b),

<sup>58</sup> Ibid.

<sup>59</sup> Ibid, Article 1.1.(a),

them<sup>60</sup>. Though largely superseded by ILO convention 169, the Convention is still in force in 18 states including countries such as India and Bangladesh, which together are home to a vast percentage of the global population of ‘indigenous peoples’. Although India does not formally accept the denomination of specific groups as ‘Indigenous peoples’, both constitutional law and national law recognises what are termed ‘scheduled tribes’ who may ‘benefit from a whole host of affirmative action policies’.<sup>61</sup> While, Indigenous peoples in Bangladesh, in particular the Chittagong Hill Tribes, have secured significant concessions regarding their rights to autonomy. Daes argues that the rights under the Convention arise not as a result of ‘a people’s history of being conquered, colonized or oppressed, but its history of being distinct as a society or nation.’<sup>62</sup> While all ‘indigenous’ peoples are considered ‘tribal’, under the Convention, not all ‘tribal’ peoples are, she says, considered ‘indigenous’.<sup>63</sup> The distinction is largely cosmetic as both tribal and indigenous peoples enjoy the same rights under the Convention. It has more importance when viewed in light of subsequent advances in recognition of indigenous rights.

A major advance in the recognition of Indigenous peoples’ interests came in 1972 when the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-commission) entrusted Special Rapporteur Martinez Cobo, with responsibility for the preparation of a study on the problem of discrimination against indigenous populations. The study, carried out between 1972 and 1986, contains a widely cited definition, which sets out a range of cultural, institutional, and legal, characteristics distinguishing indigenous groups from other sectors of society. The definition states,

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<sup>60</sup> Ibid. Article 1.1 This convention applies to – (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community, and whose status is regulated by their own customs or traditions or by special laws or regulations, and irrespective of their legal status, they live more in conformity with the social, economic and cultural institutions of the time of colonization or conquest than with the institutions of the nation to which they belong.

<sup>61</sup> Sheleff, L. (1999). *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*.

<sup>62</sup> E/CN.4/Sub.2/AC.4/1996/2

<sup>63</sup> E/CN.4/Sub.2/AC.4/1996/

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.<sup>64</sup>

A key element of the definition is the reference to “historical continuity” which the study explains,

“... may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence on certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.<sup>65</sup>

Though widely used the inclusion of the requirement for historical continuity with pre-invasion and pre-colonial societies creates, according to Kingsbury, ‘a potentially

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<sup>64</sup> J. R. Martínez Cobo, 'Study of the Problem of Discrimination against Indigenous Populations. Volume V. Conclusions, Proposals and Recommendations.' (New York: United Nations, 1987).

<sup>65</sup> Ibid.

limited and controversial view of “indigenous peoples”<sup>66</sup>. The definition fails, for instance, to cover Indigenous peoples who may have been displaced from their lands and/or impeded, directly or indirectly, from continuing to maintain their cultural practices, institutions, traditional dress, languages, etc. It also fails to acknowledge the existence of Indigenous peoples in areas which have not experienced colonialism or conquest, or who have migrated into a country after its borders have been established. To its merit, however, the definition includes provisions for self-identification and the right of community oversight, where it states that,

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference”.<sup>67</sup>

Increased attention to indigenous issues by the international community both influenced and was in turn influenced by an emerging international indigenous movement, which in the mid 1970’s began to develop its own definitions of indigenusness. These were based upon historical priority and lack of control over the national government in the state in which they live. A working definition prepared as a guide for the identification of potential delegates to the World Council of Indigenous Peoples (WCIP) in 1975 reads ‘[t]he term indigenous people refers to people living in countries which have a population composed of differing ethnic or racial groups who are descendents of the earliest populations living in the area and who do not as a group control the national government of the countries in which they live.’<sup>68</sup> Similarly in the 1984 a draft International Covenant on the Rights of Indigenous Peoples prepared for the WCIP describe an indigenous people as, a people

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<sup>66</sup> Kingsbury, ‘Indigenous Peoples’ in *International Law: A Constructivist Approach to the Asian Controversy* at 420

<sup>67</sup> UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4.

<sup>68</sup> See Kingsbury, ‘Indigenous Peoples’ in *International Law: A Constructivist Approach to the Asian Controversy*, at 422, See also UNPFII *State of the World's Indigenous Peoples*. ( New York: United Nations 2009).

who lived in a territory before the entry of the colonizing population, which colonizing population has created a new state or states or extended the jurisdiction of an existing state or states to include the territory, and who continue to live in the territory and who do not control the national government of the state or states within which they live.<sup>69</sup>

This definition, which closely mirrors the UN working definition set out in the Cobo Study, links indigenes with colonization and lack of control over national government.<sup>70</sup> Reliance on such criteria became more problematic as the concept of indigenous peoples evolved. Cornthassel, for example, notes that, while the definition stresses self-identification it does not address cultural, land claims and identity issues, which in his opinion makes it ‘historically, culturally and economically incomplete, reifying native peoples in a continued subordination of difference to identity’.<sup>71</sup> Although, both WCIP definitions referred to Indigenous “people” rather than “peoples”, this position was changed as the indigenous movement began to recognise the importance of being seen as “peoples” falling within the scope of Common Article 1 of both 1966 International Covenants and as such entitled to the right to self-determination.

Anaya has defined the term indigenous broadly to embrace ‘the living descendants of pre-invasion inhabitants of lands now dominated by others ... culturally distinctive groups that find themselves engulfed by settler societies born of forces of empire and conquest’<sup>72</sup>. Daes, in a *Working paper on the concept of “indigenous people”* for the Working Group on Indigenous Populations, also includes the notion of domination among four factors which, she says, “modern international organizations and legal

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<sup>69</sup> World Council of Indigenous Peoples, Draft Convention (Mimeo 1984) cited in Kingsbury , ‘Indigenous Peoples’ in *International Law: A Constructivist Approach to the Asian Controversy*, at 422

<sup>70</sup> Jeff Cornthassel, J., ‘Who Is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rearticulating Indigenous Identity’, 9 *Nationalism and Ethnic Politics*, 1 (2003), 75-100

<sup>71</sup> Ibid.

<sup>72</sup> Anaya, *Indigenous Peoples in International Law*, at 3



experts ... consider relevant to the understanding of the concept of “indigenous”.<sup>73</sup> These, she says, include: Priority in time, voluntary perpetuation of cultural distinctiveness, self-identification, and an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>74</sup> While, these factors include territorial continuity they also include cultural distinctiveness, subjugation and self-identification, all of which may be relevant not only in indigenous peoples within the territories they traditionally possess, but also among those dispossessed of their lands or forced to migrate across national borders. If the condition of historical continuity with land is removed from the equation the distinction between indigenous peoples still occupying their traditional territories and those displaced from their traditional lands may be far from obvious. To condition recognition as indigenous on continuous occupation of traditional territories would amount to further discrimination against many groups displaced during periods of colonialism or conquest, as well as those which have migrated to avoid conquest, war or environmental degradation.

According to Eide, discussions at the WGIP in 1990 ‘marked a shift in focus from the notion of indigenous peoples as being groups subjected to colonialism by European powers and identification of indigenusness based upon historical priority, towards other groups, identifiable based on criteria including cultural distinctiveness, land use, and self-identification’.<sup>75</sup> As the criterion for recognition of indigenusness became more inclusive, groups previously excluded from a narrow definition of “indigenous peoples”, such as the Masai, who cannot assert any anteriority over their territories vis-à-vis other groups in the countries in which they reside, came to fall within the definition. The adoption of ILO Convention 169 in 1992 saw the recognition of an

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<sup>73</sup> E/CN.4/Sub.2/AC.4/1996/2 Referring to these factors Erica Irene-Daes says they ‘do not and cannot, constitute an inclusive or comprehensive definition, but rather represent factors which may be present, to a greater or lesser degree, in different regions and in different national and local contexts serving therefore as general guidance to reasonable decision-making in practice’, at Para. 70

<sup>74</sup> Ibid.

<sup>75</sup> Asbjorn Eide, 'Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples', in Claire Charters and Rodolfo Stavenhagen (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen International Work Group for Indigenous Affairs, 2009), 32 - 47.

untrammelled right of self-identification for Indigenous peoples. Article 8 of the convention reads,

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognised as such.

For Kingsbury one of the difficulties with self-identification is that '[t]he imprecision of the category and expanding array of groups involved in the "Indigenous peoples movement" could eventually ... provoke sustained demands for precision.'<sup>76</sup> This, he says, was noticeable during negotiation of the Declaration, with African countries seeking assurances that the use of the term would not deny the identity of other groups to identify as indigenous to Africa or to their country.<sup>77</sup> Strong opposition to the use of the concept of 'Indigenous peoples' in the Declaration also came from China, India, Bangladesh, Myanmar and Indonesia.<sup>78</sup> In response to African concerns, which threatened at one stage to derail the process of adoption of the Declaration, attention was drawn in an *aide mémoire* to the position of the African Commission Working Group on Human Rights which distinguished between the literal meaning of the term which views 'all as indigenous to the continent' and its meaning with regard to 'sections of various African populations that remained behind after colonization and continue not to enjoy all rights on the same footing with the rest of their fellow citizens.'<sup>79</sup>

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<sup>76</sup> Benedict Kingsbury, 'Self-Determination and 'Indigenous peoples'', *86 Am. Soc. Int'l L. Rev.*, 86 (1992), 383, at 389

<sup>77</sup> Asbjorn Eide, 'Indigenous peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous peoples'

<sup>78</sup> Kingsbury, 'Indigenous peoples' in *International Law: A Constructivist Approach to the Asian Controversy*,

<sup>79</sup> See *aide memoire* responding to the position of the African Group at the Working Group referring to The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's, Working Group of Experts on Indigenous Populations/Communities*: where the Commission referred to the use of the term indigenous peoples saying '... it is a term fighting for rights and justice for those particular groups who are perceived negatively by dominating mainstream development paradigms...One of the misunderstandings is that to protect the rights of Indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state.

The Declaration as adopted has according to Cornassel provided for ‘unrestricted self-identification’ by Indigenous peoples.<sup>80</sup> Article 9 of the Declaration reads,

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

While, at first glance this Article may appear to establish an unrestricted right to self-identification, it is not without ambiguity. Firstly, Article 9 presumes the existence of an indigenous community or nation to whom ‘indigenous peoples and individuals’ have a right to belong. As neither an indigenous community nor an indigenous nation is defined in the Declaration the provision is potentially open to restrictive interpretation by national authorities in countries denying the existence of indigenous groups. This may prove particularly problematic in the case of countries in which the majority population may lay claim to be indigenous.<sup>81</sup> Secondly, the right to ‘belong’ is circumscribed by the right of a particular indigenous community or nation to exclude any individual(s) from the benefits of self-identification in accordance with their own traditions and customs, which may be sufficiently fluid to allow for exclusions on the basis of historic or evolving customs and traditions. Thirdly, the Declaration provides no guidance on how indigenous peoples are to be distinguished from other national minority groups and local communities, leaving the door open to continued dilution of the notion of indigeness.

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This is not the case. ...The issue is that certain marginalised groups are discriminated against in particular ways because of their particular culture and mode of production... The call of these marginalised groups to protection of their rights is a legitimate call to alleviate this particular form of discrimination.’ at 86-88

<sup>80</sup> Cornassel, J., 'Who Is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity', ,

<sup>81</sup> The word indigenous is defined in the Oxford English Dictionary 2nd edition Volume VII, p. 867 as '[b]orn or produced naturally in a land or region; native or belonging naturally to (the soil, region, etc.). (Used primarily of aboriginal inhabitants or natural products. It gives the root as late Latin 'indigenus', "born in a country.' In that sense all individuals may be seen as indigenous to the place of their birth, Oxford English Dictionary 2nd edition Volume VII, p. 867

Among the difficulties associated with the identification of indigenes in a period of increased recognition of indigenous human rights are the challenges associated with equitable benefit sharing and rights to self-identification versus the rights of collective determination of group membership. McHugh argues that in what he terms the age of self-determination, the state has 'restored tribal capacity authoritatively to determine its own membership'<sup>82</sup> at a time when it has to deal with new land claims and massive infusions of state financial aid. This has, he claims, led indigenous groups to define more formal rules for membership, and criteria for sharing in benefits.<sup>83</sup> In his words 'law and custom interacted' favouring those traditional territory-based aboriginal polities.<sup>84</sup> What it did not do was to clarify the position and rights of urban aboriginal groups, of members of Indigenous peoples who had married outside their groups or who had voluntarily or involuntarily left the land.

Despite widespread acceptance of Indigenous peoples' rights to define their own internal membership, this is tempered by requirements that these rights may not be used to deprive an individual of their basic human rights. In the well known case of Sandra Lovelace it was held that that denial of her right to reside on the Indian Tobique Reserve, in Canada, because of her marriage to a non-Indian violated her right 'in community with the other members of her group' to enjoy her own culture as guaranteed by article 27 of the International Covenant on Civil and Political Rights.<sup>85</sup> The *Lovelace* case was a landmark on two fronts. In the first place it recognized the rights of Indigenous peoples and their members to define themselves<sup>86</sup>. In the second

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<sup>82</sup> McHugh, *Aboriginal Societies and Common Law: A History of Sovereignty, Status and Self-Determination*, at 223

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 224

<sup>85</sup> Communication No. R.6/24, *Sandra Lovelace v. Canada*, in Official Records of the General Assembly, Thirty-sixth session, Supplement No. 40(A/36/40), annex XVIII. For a comprehensive analysis of the relevant views expressed by the Human Rights Committee see G. Alfredsson and A. de Zayas, 'Minority Rights: Protection by the United Nations', 14 *Human Rights Law Journal*, vol., No. 1-2, 26 February 1993, at 5-6.

<sup>86</sup> W. Moss, 'Indigenous Self-government in Canada and sexual equality under the Indian Act', 15 *Queen's LJ* 290, 294 (1990) cited in McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 313

place it restricted that right to the extent that it was exercised in a manner contrary to the 'key individualistic values' enshrined in the international covenants such as non-discrimination and fundamental rights recognized by constitutional law.<sup>87</sup> In effect it gave recognition to Indigenous peoples rights to be governed by their own customary laws subject to application of the same human rights standards as would be held applicable to state law. Setting aside the merits or otherwise of the *Lovelace* case, it is interesting to note the relationship evolving between international human rights law, national statutory law (positive law) and customary law. To some extent human rights law appears to be adopting the place once held by natural law as the arbiter of conflicts between customary law and positive law. Human rights law is of course itself largely positive law - it also arises however through customary international law - and the product of the combined exercise of legislative power of states. The same power that rode roughshod over customary law in the past. Securing Indigenous peoples' trust and commitment to the realisation of human rights, will, therefore require confidence building and due respect and recognition for their own legal values, customary laws and institutions. Customary law and human rights may, however, prove to be far closer in spirit than is often perceived, with both finding their source in notions of natural law, rights, and justice, although their interpretations of what such norms are may differ significantly.

Decolonization led to the official recognition of customary law in many countries and efforts to do away with it in others. In almost all cases customary law has shown stubborn resilience and countries, such as Ghana and Mozambique, which once sought to marginalise traditional authorities and customary law have subsequently seen their re-emergence. As protection of Indigenous peoples' human rights has advanced recognition of the reality of legal pluralism has seen rights to customary laws and traditional institutions enshrined in various international instruments. This section begins with a look at recognition of customary law under international law and continues with analysis of constitutional recognition of customary law around the world.

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<sup>87</sup> McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 314.

### 3.2.1 international recognition of Indigenous peoples' customary law

The rights of Indigenous peoples to their customary law have been recognized under international law as having both an internal and external aspect. On the one hand, states are obliged to recognize Indigenous peoples' rights to govern their own affairs in accordance with their own laws, while at the national level states are obliged to consult with Indigenous peoples regarding the development of laws, policies and programs which may affect them. These rights and obligations have been clearly set out in ILO Convention 169, which recognizes indigenous and tribal peoples rights to the full measure of human rights and fundamental freedoms, without hindrance or discrimination<sup>88</sup>; requires the adoption of special measures for 'safeguarding their persons, institutions, property, labour, cultures and environment in a manner which does not run counter to their expressed wishes'<sup>89</sup>; creates a duty for states to consult, in good faith, with indigenous and tribal peoples concerned 'through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly' and, to establish means for their participation in all levels of decision making, to at least the same extent as other sectors of the population<sup>90</sup>; and, recognizes their rights to 'decide their own priorities for the process of development, as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development'<sup>91</sup>. The Convention also requires that in applying national laws and regulations to indigenous and tribal peoples 'due regard' be given to their customs or customary laws and to their rights to retain their own customs and institutions.<sup>92</sup> Indigenous peoples' rights to their own customs and institutions is specifically limited under the Convention where they are 'incompatible with fundamental rights defined in national law or internationally recognized human rights.'<sup>93</sup> The binding nature of the obligations under the Convention means that countries party to it will need to ensure that national laws are developed with due

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<sup>88</sup> ILO Convention 169, Article 3.

<sup>89</sup> Ibid Article 4

<sup>90</sup> Ibid. Article 6

<sup>91</sup> Ibid. Article 7

<sup>92</sup> Ibid. Article 8

<sup>93</sup> Ibid.

regard to the customs and customary law of relevant indigenous and tribal peoples.

The United Nations Declaration on the Rights of Indigenous Peoples does not use the term ‘customary law’ but refers rather to Indigenous peoples’ ‘customs, laws, traditions and land tenure systems’.<sup>94</sup> In Article 34 the Declaration recognises Indigenous peoples’ rights ‘to promote, develop and maintain ... their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs’ in accordance with international human rights standards.<sup>95</sup> The Declaration gives specific recognition to Indigenous peoples’ rights to self-determination<sup>96</sup> including rights of autonomy or self-government in matters of economic, social and cultural development.<sup>97</sup> It requires states to give legal recognition and protection to Indigenous peoples’ rights over their traditional lands, territories and resources.<sup>98</sup> This is to be done with due respect for their customs, traditions and land tenure systems.<sup>99</sup> States are obliged to establish ‘in conjunction with Indigenous peoples’ fair, independent, impartial, open and transparent processes, giving due recognition to customary law in order to adjudicate Indigenous peoples’ land and resource rights<sup>100</sup>. They are also required to consult with Indigenous peoples through their representative organizations in order to secure their free and prior informed consent for any projects that might affect their lands territories or other resources, particularly where this involves resource development, use or exploitation<sup>101</sup>. States are, therefore, obliged to confer with Indigenous peoples’ prior to granting any lease, licence, or other rights for the exploration or exploitation of natural resources, including sub-surface, biological or genetic resources on indigenous lands or territories. Indigenous peoples are free to decide on whether to give or withhold their support in accordance with their own customary laws and practices. Where any projects cause adverse environmental, economic, social, cultural or

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<sup>94</sup> Ibid. See for example Articles 11, 26 and 27

<sup>95</sup> UN Declaration, Article 34

<sup>96</sup> Ibid. Article 3

<sup>97</sup> Ibid. Article 4

<sup>98</sup> Ibid. Article 26

<sup>99</sup> Ibid. Article 26.3

<sup>100</sup> Ibid. Article 27

<sup>101</sup> Ibid. Article 32.2

spiritual impacts The Declaration requires states to provide effective mechanisms for mitigation and for just and fair redress<sup>102</sup>. Determinations of cultural or spiritual impact are likely to be guided by attention to customary law.

The relevant provisions of ILO convention 169 and the Declaration establish a solid basis for the recognition of customary law as a source of law. They create obligations upon states to respect Indigenous peoples rights to be governed by their own laws and through their own institutions. They also require recognition be given to customary law in national courts and that Indigenous peoples rights to regulate access to and use of their lands and resources in accordance with their customary laws be secured. The comprehensive treatment given to customary law in the Declaration is a clear indication of the importance it holds for the realisation of indigenous people's human rights. If, as has been argued, the Declaration reflects customary international law then Indigenous peoples' right to their customary law and the obligation of states to give due respect and recognition to such customary laws may be seen to have crystallised into customary international law and are therefore binding upon all states.

Historically, there has been a tendency to limit the jurisdiction of customary law to the territories of relevant Indigenous peoples who consider themselves bound by it, and only rarely has it been seen as applicable to non-indigenous. This situation has however, been radically changed with the adoption in 2010 of the Convention on Biological Diversity Nagoya Protocol on Access to Genetic Resources and Benefit Sharing. The Protocol requires all countries to take measures to ensure that the access to and use of Indigenous peoples' traditional knowledge and genetic resources is subject to their prior informed consent. It also obliges all countries to 'take into consideration' the customary laws and protocols of indigenous and local communities in the implementation of their obligations. The Protocol is the first international instrument to recognize the extraterritorial effect of Indigenous peoples' customary law. It gives specific recognition to the fundamental role of Indigenous peoples' customary laws in securing their human rights. The Protocol and its significance for recognition of customary law will be addressed in more detail in chapters six and seven.

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<sup>102</sup> Ibid., Article 32.3



### 3.2.2 constitutional recognition of customary law

In a comprehensive study of national constitutions from 185 countries, carried out for IUCN, Katrina Cuskelly found at least 112 to have provisions relevant to recognition of customary law.<sup>103</sup> Forms of recognition include definition of customary law<sup>104</sup>; establishment of procedures for proof of customary law<sup>105</sup>; recognition of customary law as forming part of national law<sup>106</sup>; recognition of traditional authorities and traditional practices for their establishment and/or election<sup>107</sup>; declaration of rights to autonomy and self-governance<sup>108</sup>; guaranteeing, promoting and/or recognising rights to culture and/or cultural integrity;<sup>109</sup> establishment of requirements regarding application of customary law by the courts<sup>110</sup>; establishment or maintenance of

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<sup>103</sup> Katrina Cuskelly *Customs and Constitutions: State recognition of customary law around the world* (Gland: IUCN, forthcoming), at 4 (Page numbers as per advance publication: copy with author) The study at p. 19 categorises relevant constitutional provisions under nine headings: protection of culture; the general protection of minority rights; institutional arrangements; self-administration; family law; land and resource rights; codification of customary law; customary law in the courts; and the relationship between customary law and statutory law.

<sup>104</sup> See constitutions of Ghana 1992 Article 11 (3); Lesotho 1996, Section 154; Marshall Islands 1979, Article XIV, section1; Papua New Guinea 1975, Schedule 1(2); Zimbabwe 1979, Section 113

<sup>105</sup> See Constitution of Rwanda 2003, Art 145

<sup>106</sup> See constitutions of Gambia 1997, Section 7; Singapore 1963, Article 2; Zimbabwe 1979, Section 113.

<sup>107</sup> See constitutions of Ghana 1992, Article 270 (1); Lesotho 1996, Sections 45 & 46; South Africa 1996, Sections 211 and 212; Uganda 1995, Art 246 (1); Zimbabwe 1979, Section 111(1) Colombia 1991 Art 246, Peru 1993, Article 89.

<sup>108</sup> See constitutions of Bolivia 2009, Articles 289 – 296, 299 & 304; Ecuador 2008, Article 57(9); Nicaragua 1987 -2005, Article 180 & 181; Paraguay, Article 63; Peru 1993, Article 89; Slovenia 1991, Article 64; Ukraine 1996, Article 140.

<sup>109</sup> Rights to culture are recognised in the constitutions of more than 60 countries including Albania, Algeria, Andorra, Armenia, Azerbaijan, Bangladesh, Belarus, Benin, Bolivia, Brazil, Colombia, Congo, Cameroon, Ecuador, Egypt, Ethiopia, Finland, Gambia, Georgia, Guatemala, Honduras, Hungary, Kazakhstan, Kiribati, Kyrgyzstan, Laos, Latvia, Lithuania, Macedonia, Mongolia, Mozambique, Myanmar, Nepal, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Philippines, Peru, Poland, Qatar, Romania, Rwanda, Seychelles, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Sudan, Sweden, Syria, Thailand, Timor-Leste, Tuvalu, Uganda, Ukraine, Uzbekistan, Venezuela, Viet Nam, Zambia.

<sup>110</sup> See constitutions of Liberia 1986, Article 65; Nigeria 1999, Section 237; Rwanda 2003, Article 145; South Africa 1996, Section 39 (2)

traditional or local courts<sup>111</sup>; recognition of traditional territories and land as inalienable, imprescriptible and immune from seizure<sup>112</sup>; recognition of natural resource rights<sup>113</sup>; requirements for courts to include judges versed in customary law<sup>114</sup>; creating advisory bodies or Councils of Chiefs formed by traditional authorities to directly participate in decision making and/or advise on national law and its effect on customary law<sup>115</sup>; defining the relationship between customary law and common law, constitutional law and/or national law<sup>116</sup>; recognition of customary rules relating to marriage and family law issues; and recognition of customary law which does not conflict with human rights<sup>117</sup>.

Recognition of customary law is frequently qualified by provisions limiting its applicability where it conflicts with the constitution<sup>118</sup>, national law<sup>119</sup> and regulations<sup>120</sup>, human rights<sup>121</sup>, in particular women's rights<sup>122</sup>, public order and

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<sup>111</sup> See constitutions of Ethiopia 1994, Article 78; Ghana 1992, Article 125 (2) & (5); Malawi 1994, Section 110(3); South Africa 1996, Section 143(1) Zimbabwe 1979, Section 18(15).

<sup>112</sup> See constitutions of Gambia 1997, Section 22(4); Ghana 1992, Article 267; Kenya 2010, Article 60; South Africa 1996, Section 25(7); Uganda 1995, Article 237; Zambia 1996, Article 16(2).

<sup>113</sup> See constitutions of Bolivia 2009, Article 352-4, 381-3 & 384; Ecuador 2008, Article 57(6); Peru 1993, Article 66.

<sup>114</sup> Constitution of Nigeria 1999, Section 237 provides that at least 3 Justices of the Court of Appeal are to be learned in customary law

<sup>115</sup> See constitutions of Ghana 1992, Article 272; Botswana 1966, Article 88(2); Somalia 2004, Article 30.

<sup>116</sup> See constitutions of Papua New Guinea 1975 and Solomon Islands 1978

<sup>117</sup> See for example Constitution of Rwanda 2003, Art 201: unwritten customary law remains applicable as long as it has not been replaced by written laws, is not inconsistent with the Constitution, laws and regulations, and does not violate human rights, prejudice public order or offend morals

<sup>118</sup> See constitutions of Malawi 1994, Section 200; Uganda 1995, Art. 2(2); Bolivia 2009, Ecuador 2008, Article 57(10), Liberia 1986, Article 2; Rwanda 2003, Article 201; Ethiopia 1994, Article 9.

<sup>119</sup> See constitutions of Namibia 1990, Art 66; Solomon Islands 1978, Schedule.3 Section 3 (1) & (2); Colombia 1991, Article 246; Kenya 1963, Section 117 (5).

<sup>120</sup> Constitution of Rwanda 2003, Article 201

<sup>121</sup> Ibid

<sup>122</sup> See constitutions of Ethiopia 1994, Article 35 (4) which provides that Customs and practices that oppress or cause harm to women are prohibited and Malawi 1994, Section 24 (2) which provides that legislation shall be passed to eliminate customs and practices that discriminate against women

morals<sup>123</sup>, fundamental rights of the person<sup>124</sup> or where repugnant to natural justice<sup>125</sup>. The scope of recognition has in some cases been further limited by temporal restrictions. Namibia for instance recognises ‘all customary law in force on the date the Constitution was adopted’.<sup>126</sup> Malawi likewise gives recognition to ‘customary law in force on the applicable date’.<sup>127</sup> Restrictions of this nature would appear to freeze customary law at a specified date, potentially undermining its dynamic nature and the right of Indigenous peoples to continue to develop it.

Although many national constitutions give direct or indirect recognition of customary law as part of the national legal system, only seven make any attempt at definition. The Constitutions of Ghana and Sierra Leone in a somewhat circular manner provide that customary law is to be defined by recourse to ‘the rules of law, which by custom are applicable to particular communities’.<sup>128</sup> Zimbabwe’s constitution distinguishes ‘African customary law’ which it defines as ‘the tribal law and custom of Africans of a particular tribe.’<sup>129</sup> A number of constitutions limit recognition of customary law to those customs and/or usages, which have the ‘force of law’ in their respective territories.<sup>130</sup> The question as to whether a custom has the ‘force of law’ may be variously interpreted depending upon whether it is the community, the courts or the legislature, which has the power to identify when a custom becomes law. Requirements for legislative or judicial recognition of custom are set out in the Constitution of Samoa.<sup>131</sup> Fiji’s Constitution obligates the parliament to take action to recognise customary law<sup>132</sup> raising a question as to whether customary law maintains its validity in the face of legislative inaction. In the Marshall Islands customary law is

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<sup>123</sup> Ibid

<sup>124</sup> Constitution of Peru 1993, Article 149

<sup>125</sup> Constitution of Swaziland 2005, s. 252

<sup>126</sup> Constitution of Namibia 1990, article 66

<sup>127</sup> Constitution of Malawi 1994, Section 10(2)

<sup>128</sup> See Ghana Constitution 1992, Sierra Leone Constitution 1991 (transitional charter)

<sup>129</sup> Constitution of Zimbabwe 1979.

<sup>130</sup> See constitutions of Singapore 1963, Article 2.; Bangladesh 1972, Article 152; Samoa 1960, Article 111, Art XIV, S.1; Constitution of the Marshall Islands 1979, Article XIV, Section 1

<sup>131</sup> Constitution of Samoa 1960

<sup>132</sup> Constitution of Fiji 1997

defined as including ‘any Act declaring the customary law’.<sup>133</sup> While, the Constitution of Lesotho recognises customary law ‘subject to any modification or other provision made in respect thereof by any Act of Parliament’.<sup>134</sup> In the light of advances in international law states will need to review the status of customary law vis-à-vis national law. Safeguards will need to be adopted to ensure that national law does not undermine Indigenous peoples rights to their own customs and laws and to due recognition and respect for their customary laws in the recognition and adjudication of their land and resource rights.

Determining just when a custom acquires the ‘force of law’ is of much importance for its wider recognition and application. This in turn is linked to the question of proof of customary law. The 1975 Constitution of Papua New Guinea attempts to clarify these issues adopting the most expansive definition of any national constitution, describing customary law as ‘... the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial’<sup>135</sup> This definition breaks with the common law tradition that to be recognised as binding a custom must be immemorial. For Corrin Care the Papua New Guinea Constitution ‘...elevates the status of custom and makes it clear that it will continue to develop and form part of the legal system’<sup>136</sup>. In so doing it recognises and embraces the dynamic nature of customary law. The Constitutions of both Papua New Guinea and Vanuatu recognise the continuing applicability of British common law, and British and French law, respectively, but subordinate them to the customary law.<sup>137</sup> This reversal of fortune reinstates custom as the superior source of law, the application of custom is however limited to the extent that it conflicts with the constitution statute, or is repugnant to the general principles of humanity.<sup>138</sup> In South Africa a series of cases have made it clear that the

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<sup>133</sup> Constitution of the Marshall Islands 1979, Art XIV, S.1

<sup>134</sup> Constitution of Lesotho, 1996, S.154

<sup>135</sup> Constitution of Papua New Guinea, 1975, Sch. 1.2

<sup>136</sup> Corrin Care, J., The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997, *Journal of South Pacific Law*, Vol. 4, 2000 USP.

<sup>137</sup> Constitution of Vanuatu 1980, Article 95, Constitution of Papua New Guinea, Sch. 2.2 (c)

<sup>138</sup> Constitution of Papua New Guinea, Sch. 2.1 (2)

status off customary law is to be determined by the constitution not by the common law. The courts are, says Bennett, now conscious of the need to free themselves from 'common-law preconceptions when analysing' customary law.<sup>139</sup> He cites in support of his view the decision in the seminal case of *Alexkor Ltd & Another v Richtersveld Community & others*<sup>140</sup> where the court states,

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<sup>141</sup>

The South African courts have since the start of the century been at the forefront of recognition of indigenous peoples' customary laws and of its relationship to the common law. Their judicial pronouncements reflect the sense of legal change which underlay the development upon independence of the Constitution of Papua New Guinea, which has been described as, representing the 'transmutation of the legal system from one clearly rooted within the common law tradition to one which is rooted firmly in the customs, values and traditions of the people.'<sup>142</sup>

The challenges associated with building functional links between national law and customary law in countries with high cultural diversity are undoubtedly more pronounced. In Papua New Guinea with over 700 language groups the challenges are most acute. As Goldring explains with regard to language groups,

if each of these does not have a totally separate body of rules, there are differences between the customs of each group, some of which may be

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<sup>139</sup> Bennett, 'Official' vs. 'Living' Customary Law: Dilemmas of Description and Recognition', at 148

<sup>140</sup> *Alexkor Ltd & Another v Richtersveld Community & others* 2003 (12 BCLR 1301 (CC))

<sup>141</sup> *Alexkor & others v Richtersveld Community & others* 2003 (12 BCLR 1301 (CC)) Para [51] cited in Bennett, 'Official' vs. 'Living' Customary Law: Dilemmas of Description and Recognition', at 148, also referring to *Mabuza v Mbatha* 2003 (4) SA 218 (C) in Para [32]

<sup>142</sup> John Goldring, *The Constitution of Papua New Guinea* (Sydney: The Law Book Company, 1978), at 150 cited in Joshua Castellino and David Keane, *Minority Rights in the Pacific Region* (Oxford: Oxford University Press, 2009), at 213

significant; and if in some groups the customs are a fairly settled body of norms, in others they are flexible to the extent that the way in which disputes arising out of similar fact situations will be determined in different ways according to a variety of circumstances.<sup>143</sup>

The commitment in Papua New Guinea to application of ‘Papua New Guinea ways’ through the empowerment of village courts and subordination of common law to custom has been described, by Castellino and Keane, as a ‘fascinating’ practical experience in the operation of customary rules ‘given the sheer multiplicity of customs’.<sup>144</sup> In Papua New Guinea decentralisation has been seen as a key tool for responding to this diversity. It has not, however, always proved successful where, as Genolagani and Henao point out, there has been a failure to ‘... give sufficient recognition to the wards and clans who are the real masters of indigenous laws’.<sup>145</sup> Establishing functional interfaces between local government decision-making authorities and customary authorities in a manner, which respects the latter’s rights to self-governance has, Kwa argues, proved more effective.<sup>146</sup> Despite its positive approach to customary law, Papua New Guinea’s constitution has been criticized for sweeping aside many good customs, a result in part due, say Genolagani and Henao, to a lack of preparedness of customary authorities to champion their interests before the national authorities<sup>147</sup>.

Another form of explicit recognition of customary law is found in provisions regarding the jurisdiction of national and traditional courts. South Africa’s

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<sup>143</sup> Ibid.

<sup>144</sup> Castellino, *Minority Rights in the Pacific Region*, at 213

<sup>145</sup> John Genolagani and Douveri Henao, ' Biodiversity and sustainable use of marine biodiversity in PNG: Policy and legal implications', in Caillaud et al. ' Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', 17 *SPC Traditional Marine Resource Management and Knowledge Information Bulletin* (2004), at 28

<sup>146</sup> Eric Kwa, 'Traditional and Modern Law: A Marriage in Progress – the Draft Talasea Local Government Marine Environment Plan (Papua New Guinea)', in Caillaud et al. ' Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', at 28

<sup>147</sup> Genolagani, ' Biodiversity and sustainable use of marine biodiversity in PNG: Policy and legal implications' at 29

constitution, for example, recognises the rights of traditional authorities that observe customary law to function subject to the constitution, applicable law and customs<sup>148</sup>; states that the Bill of Rights does not deny rights or freedoms recognised or conferred by customary law to the extent they are consistent with the Bill of Rights<sup>149</sup>; and specifies that courts may apply customary law subject to the constitution and any legislation specifically dealing with customary law<sup>150</sup>. Some African and Pacific Island countries require the inclusion of Indigenous peoples in legislative review, in particular where there is likely to be any impact on customary law. Botswana's constitution, for example, prohibits the legislature from proceeding on any Bill that would affect the organisation, powers or administration of customary law, customary courts or tribal organisation until it has been referred to the House of Chiefs<sup>151</sup>. The Government of Yap includes traditional chiefs who are empowered to make decisions to ensure Yap customs are upheld.<sup>152</sup> The country's national legislation includes provisions requiring due recognition for customs and traditional systems of law.<sup>153</sup>

It is unclear to what extent customary law may be applied to third parties not members of the indigenous people to which the relevant customary law applies. Gambia's constitution specifically limits its scope of application to the internal affairs of the communities to which it applies.<sup>154</sup> Similarly, the constitution of Chad limits customary law's application to the communities in which it is recognised.<sup>155</sup> Most constitutions are, however, silent on the issue. Where this is so it is arguable that Indigenous peoples and local communities are entitled, except to the extent specifically set down in the constitution and subject to compliance with human rights standards, to apply their laws to third parties within their area of jurisdiction.

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<sup>148</sup> Constitution of South Africa 1996, Section 211 (2)

<sup>149</sup> Constitution of South Africa 1996, Section 39 (3)

<sup>150</sup> Constitution of South Africa 1996, Section 211 (3)

<sup>151</sup> Constitution of Botswana 1966, Article 88 (2)

<sup>152</sup> See, Tobin, 'The Role of Customary Law in ABS and TK Governance in Andean and Pacific Island Countries'

<sup>153</sup> Ibid.

<sup>154</sup> Constitution of Gambia 1997, S. 7 (e)

<sup>155</sup> Constitution of Chad 1996, Art 164

### 3.3 Tribal law and tribal courts

Indigenous peoples' rights to autonomy, self-determination, to their way of life and to their customs, traditions and laws, would mean little if they were unable to regulate their affairs in accordance with their own laws. Realization of such rights requires that they be entitled to create, implement and enforce their own laws through their own socio-cultural decision making mechanisms, practices and institutions. Enforcement may take place at the family or kinship level, through community assemblies, chiefly courts, clan ad-hoc tribunals, or other quasi-judicial or judicial forums. The enforcement of indigenous peoples' customary laws may in certain cases require its application in national and international courts and dispute resolution mechanisms. This section begins with consideration of the scope of Indigenous peoples customary laws and practices and its status in the hierarchy of tribal legal systems. It continues with examination of the manner in states have approached tribal jurisdiction and the application of customary law in tribal and village dispute resolution.

#### 3.3.1 the scope of customary law and its status in tribal legal regimes

There are thousands of customary legal regimes each one of which has developed according to its own specific set of cultural, political, economic, social and spiritual conditions. Within that diversity it is possible to identify general areas of application and categories of law. Customary law applies to all aspects of Indigenous peoples' personal relationships, it governs their land and resource rights and usages, describes their decision-making authorities and practices, guides conflict resolution processes, and in certain cases defines specific sanctions and remedies for breaches of their laws. Woodman describes four categories of customary laws: imperatives, such as prohibitions on murder or dietary requirements; facilitative or power-conferring norms, relating to voluntary forms of conduct, for example the 'conduct necessary to form a marriage'; norms 'specifying legal consequences of natural events, such as the rules of succession on death'; and, those defining legal concepts such as 'family' or 'father'.<sup>156</sup> It is he says important to bear in mind all such sources of customary law when carrying out research, and even more so when states are adopting laws giving

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<sup>156</sup> Woodman, 'Customary Legal Norms', at 15



‘recognition’ to customary law.<sup>157</sup> Stavenhagen provides a list of nine areas of ‘legal or juridical’ ordering by societies governed by customary law,

1. General norms of public behaviour;
2. Maintenance of internal order;
3. Definition of rights and obligations of members;
4. Regulation of access to and distribution of scarce resources (for example, water, lands, forest products);
5. Regulation of the transmission and exchange of goods and services (for instance, inheritance, work, products of hunting, marriage dowries);
6. Definition and typification of offences, generally distinguishing offences against other individuals and offences against the community or public good;
7. Sanction of individual’s criminal conduct;
8. Management, control and resolution of conflicts and disputes;
9. Definition of the duties and functions of public authorities<sup>158</sup>

Stavenhagen emphasises that this list is by no means exhaustive and suggests that the list he provides may be divided into norms and rules on the one hand and rights, transgressions and sanctions on the other.<sup>159</sup>

Ezra Rosser, utilising western legal concepts, describes a wide range of customary law based rules and rights which have been addressed in tribal court cases in the USA, these include rules relating to right to notice; due process rights; jurisdiction and standing; subject matter jurisdiction; rules of evidence; role of judge and juries; representation and practice rules for lawyers; equity and power of courts.<sup>160</sup> Under rights she lists as headings, marriage, children and divorce; restitution; employment; death and inheritance; land; government and government officials.<sup>161</sup> The breadth of issues addressed by tribal and village courts demonstrates a significant level of

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<sup>157</sup> Ibid.

<sup>158</sup> Stavenhagen, 'Derecho Consuetudinario Indígena en América Latina'. at 31 (author’s translation)

<sup>159</sup> Ibid. (author’s translation)

<sup>160</sup> Ezra Rosser, 'Customary Law: The Way Things Were Codified', 8 *Tribal Law Journal* (2008), at 28

<sup>161</sup> Ibid.

autonomy in many areas of law, and evidences state practice in the recognition of the role of customary law in areas of law relevant for the realisation of Indigenous peoples' human rights. One area in which national authorities have generally tended to assume control over the internal affairs of indigenous peoples is that of major crimes, including murder and rape.

Where Indigenous peoples have recognised rights to govern their own internal affairs, customary law has at times been supplemented and in some cases superseded by tribal statutes, indigenous by-laws and other forms of legal enactments. Tribal law as it is known in the United States has evolved to deal with the challenges of regulating an ever-increasing variety of social, economic and cultural issues. The merging of customary law and positive legal instruments is part of a process of transition from a purely oral legal system into a mixed oral and written legal system and reflects in part the historic relationship between unwritten custom and written law in ancient times. What is crucial about this relationship, however, is the status given to customary law by tribal law systems. Matthew Fletcher, an Appellate Judge of the Hoopa Valley Tribe in a study of customary law in tribal law jurisprudence found that: '[t]ribal court litigation, especially litigation involving tribal members and issues arising out of tribal law, often turns on the ancient customs and traditions of the people.'<sup>162</sup> For example the White Earth Band of Chippewa Indians Judicial Code places tribal law on a par with 'other laws'.<sup>163</sup> The Oglala Sioux Tribe Law and Order Code provides that the tribal courts are to 'give biding effect to any ... applicable custom or usage of the Oglala Sioux Tribe' to the extent it does not conflict with tribal statutes and federal law.<sup>164</sup> Under the tribal court code of the Stockbridge- Munsee Community of Mohican Indians, '[w]henver there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling.'<sup>165</sup> While the Bay Mills Indian Community Tribal Court Code places customary law, 'on a par with tribal statutes and federal statutes, so long as the

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<sup>162</sup> Matthew L.M. Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence', *Michigan Journal of Race & Law*, 13 (2007), 57-97, at 61

<sup>163</sup> Ibid. at 66

<sup>164</sup> Ibid. at 67 referring to the Oglala Sioux Tribe Law and Order Code ch.II § 20.27 (c)

<sup>165</sup> Ibid. referring to the Stockbridge-Munsee Tribal Law Court Code ch. I,§1.3(B)

custom does not conflict with federal law.’<sup>166</sup> The most detailed code is, Fletcher claims, the Hoopa Valley Tribal code, which requires that customary law be applied by tribal courts ‘where tribal statute is silent.’<sup>167</sup> The fact that customary law forms part of a hierarchy of legal sources does not, according to Rosser, diminish its important role in tribal jurisprudence, to the contrary, he says, ‘customary law’s unique ability to be both an independent authority and a tool for interpreting federal and state law gives it even greater significance.’<sup>168</sup> He goes on to say

The true meaning of customary law comes across not only from cases decided upon it alone but from cases in which custom is used by tribal courts to decide whether state and federal laws should be applied or used as reference points.<sup>169</sup>

Despite the clear importance given to customary law by tribal codes, Fletcher finds ‘precious few tribal court cases cite to custom as persuasive or controlling authority.’<sup>170</sup> He claims that most tribal courts are unable to apply customary law, as they are either ‘unaware of it or if they are aware of it, no customary law they are aware of applies to the fact pattern in issue.’<sup>171</sup> He suggests that if customary law is to play the role envisaged by tribal court codes it will be necessary to provide a roadmap for ‘finding, understanding, and applying customary law’, beginning with sources of custom.<sup>172</sup> These include, firstly, the parties to the litigation, secondly, the judges ‘inherent knowledge’, thirdly, secondary literature about customary law by anthropologists, historians and other scholarly researchers, fourthly, elders knowledgeable about their people’s customs and traditions, and fifthly, ‘written work of tribal community members.’<sup>173</sup> Discussing the various sources of customary law Fletcher argues that a ‘clear understanding of the [relevant indigenous] language, with all its nuances and complexities, is essential to finding tribal customs and

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<sup>166</sup> Ibid. referring to the Bay Mills Indian Community Tribal Code ch. IV

<sup>167</sup> Ibid. referring to Hoopa Valley Code tit.2,ch.1,§2.1.04

<sup>168</sup> Ezra Rosser, 'Customary Law: The Way Things Were Codified', at 23

<sup>169</sup> Ibid.

<sup>170</sup> Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence'. at 81

<sup>171</sup> Ibid. at 71

<sup>172</sup> Ibid. at 89

<sup>173</sup> Ibid. at 90-91

traditions'.<sup>174</sup> He notes the resistance tribal members have to the use of scholarly works of non-Indian researchers;<sup>175</sup> the difficulties associated with adjudicatory style proceedings in which opposing expert opinions on customary law may preclude the court from applying customary law at all<sup>176</sup>; and, the difficulties associated with tribal courts announcing law which is to serve as precedent. With regard to this latter point Fletcher cites Professor Watson, who poses a question relevant to the issue of desuetude versus court established precedent, where he asks '[s]uppose that once the custom is known to be law and is accepted as law, the practice changes. Does the law cease to be law, and the new practice become law.'<sup>177</sup> The answer to such questions is indeed far from clear.

As Fletcher shows there are significant difficulties associated with the application of customary law in formal judicial proceedings where the judges are not themselves versed in customary law and are not fluent in the language of the relevant indigenous people whose law is in question. If indigenous peoples own judicial authorities have trouble identifying customary law the challenges facing national courts and courts in foreign jurisdictions, when faced with the challenge of identifying and applying customary law, are likely to be even greater. Capacity building at all levels of the judiciary regarding sources of customary law and processes for the taking of evidence is therefore crucial to effective recognition and enforcement of relevant customary law. There is a clear need for participatory processes involving judicial and administrative authorities and indigenous peoples to determine the sources of customary law and design functional processes for the taking and giving of expert evidence, including evidence of community members on customary law.

Indigenous peoples' customary legal regimes are not in the main isolated from positive legal regimes. Consequentially any notion of a traditional body of 'pure' indigenous law derived from a pre-colonial past is unlikely to reflect the reality of customary law regimes diluted, and in some cases distorted by colonial and post-colonial rule. Stavenhagen claims that Indigenous peoples' customary laws of today

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<sup>174</sup> Ibid. at 89

<sup>175</sup> Ibid. at 91

<sup>176</sup> Ibid. at 71

<sup>177</sup> Ibid. at 93 citing Alan Watson, *An Approach to Customary Law*, 1984, U. Ill. L. Rev. 561 at 563

in Latin America are not something necessarily ‘ancestral’, but may contain elements derived from the colonial and contemporary periods.<sup>178</sup> Chanock discussing the situation in Africa argues that ‘there was little purity about custom, which had always been open to many influences’<sup>179</sup> and claims that customary law is in fact a construct of colonial rule.<sup>180</sup> Somewhat similarly, Maria Teresa Sierra writing on the customary law of the Nahuas in the Sierra de Puebla in northern Mexico warns against the idealization of customary law, saying:

Customary law does not exist as a separate and isolated set of norms. Rather it is embedded in mutually constitutive relations with state law. The dominant legal order plays a central role in the lives of Indian communities, sometimes even helping community members resist oppressive relations within their group. Power relations are embedded in legal processes, not only in the confrontation between local customs and national processes but also within communities, in the very practice of customs.<sup>181</sup>

The extent to which Indigenous peoples are governed wholly or in part by their legal regimes depends upon numerous factors including: the extent of national and international recognition of customary law; proximity of indigenous peoples to centres of state power or influence; the extent to which customary law is applied by traditional, tribal and national courts; and, the level of perceived legitimacy for Indigenous peoples of such courts and the customary law they apply. Despite the influence of external forces, Indigenous peoples generally tend to defend their customary law regimes and their rights to apply them. Whatever the perspective of external actors regarding the traditional nature of customary law, it is the right of Indigenous peoples to be determine what constitutes their legitimate laws, traditions and customs, a right now unequivocally enshrined in international law.

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<sup>178</sup> Stavenhagen, 'Derecho Consuetudinario Indígena En America Latina', at 34, where he notes that the customary laws of Indigenous peoples of Latin America have been profoundly modified by colonialism and the post-colonial republics of the region.

<sup>179</sup> Chanock, *Law, Custom and Social Order*, at 29

<sup>180</sup> Ibid. See also Chanock, 'Customary Law, Sustainable Development and the Failing State', at 342

<sup>181</sup> Maria Teresa Sierra, 'Indigenous Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra De Puebla', 29 *Law & Society Review*, 2 (1995), at 247

Even where custom has been officially ignored as a source of law by the State, as occurred in Ethiopia after decolonization, the result can be to delegitimize state law rather than a renunciation by Indigenous peoples of their customary regimes.<sup>182</sup> The continuing legitimacy, functionality and durability of customary law as the primary body of law for many indigenous peoples demonstrates the need for greater efforts by national authorities to support its continuing application, while promoting progressive conformance with international human rights standards.

### 3.3.2 State recognition of tribal courts and customary jurisdiction

States have adopted various approaches to recognition of indigenous legal regimes, judicial authorities and conflict resolution procedures. At the highest level explicit recognition has been given to indigenous jurisdiction over defined territorial areas, as is the case with Indigenous peoples in the United States who have developed their own system of Tribal courts.<sup>183</sup> Zuni Cruz notes the emulation by Native American Indians of the mainstream American courts, citing Chief Justice Emeritus Robert Yazzie, where he explains why what he terms the Navajo 'Life Way' of adjudicating was presented in a manner reflective of the state's judicial system<sup>184</sup>, saying

The [courts of the Navajo Nation] were created out of a fear of a State take-over of criminal and civil jurisdiction, and as a defense. They were designed to look like justice of the peace courts with the hope that, with the appearance of The Law Way, the state would leave us alone.<sup>185</sup>

Adoption of the Law Way has come, however, at a price. Preparedness to compromise on the strict adherence to customary law and to adopt the form and

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<sup>182</sup> Wilmien Wicomb, 'The Emancipatory Potential of Customary Law for the Rights of Women to Access Land', *Indigenous Affairs 1-2 - Development and Customary Law* (2010), at 23

<sup>183</sup> Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 194

<sup>184</sup> See Christine Zuni Cruz, 'Law of the Land - Recognition and Resurgence in Indigenous Law and Justice Systems', at 329

<sup>185</sup> Yazzie, 'The Life Way and the Law Way', in Harvard Project (ed.), *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination: The Harvard Project on American Indian Economic Development*, at 49

substance of adjudication necessary to maintain at least a modicum of tribal jurisdiction has been a crucial part of Indigenous peoples struggle for self-determination throughout the world. In large parts of Africa, Asia and the Pacific region national law recognises a wide range of what are variously termed local courts, village courts, chief's courts, circle' chiefs courts, community courts, and popular courts, all of which apply customary law. Largely the legacy of colonial policies of 'indirect rule' these courts are described by Kuruk as statutory customary courts, which he distinguishes from non-statutory adjudicating systems, saying

The statutory customary courts only formalized selected aspects of the traditional systems that suited the practical purposes of the colonial administration. While not recognized at an official level, the traditional adjudication systems left intact by the colonial administration continued to be used by the parties as they wished.<sup>186</sup>

In Latin America Indigenous peoples are widely recognised as having 'special jurisdiction' enabling them to apply their own customary laws to the regulation of their internal affairs.<sup>187</sup> This special jurisdiction overlaps with national law so that they form, in the words of Castillo, a 'shared legal map onto which different, overlapping normative systems are traced in an interaction which necessarily affects the very substance of the legal systems themselves.' The recognition of special jurisdiction gives recognition to customary laws that were already the *de facto* law for many communities. While, on the face of it, this amounts to a significant level of autonomy for Indigenous peoples, a lack of implementing regulation in most countries makes the boundaries of indigenous autonomy extremely porous. In Peru for example the judicial authorities have until very recently had little if any contact with indigenous peoples with a view to examining the interfaces and boundaries between customary law and jurisdiction competence and the formal national judicial system.

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<sup>186</sup> Paul Kuruk, 'African Customary Law and the Protection of Folklore', *Copyright Bulletin*, XXXVI/2 (2002), at 11

<sup>187</sup> See, for example, Constitution of Peru 1993, article 149

In some countries, such as Australia and Cambodia, Indigenous peoples' laws are acknowledged in practice but not in law. In Cambodia indigenous forms of dispute resolution play an important role in local conflict resolution, without any formal government recognition.<sup>188</sup> While the Australian courts have given recognition to native title based on subsisting customary law, there has been no statutory recognition of customary law despite the recommendations of the Australian Law Reform Commission in its voluminous 1996 study.<sup>189</sup> Despite the lack of official recognition the response of the judiciary in the Northern Territory to cases of customary punishment has, in the words of Douglas, 'been to develop a kind of soft legal pluralism. Judges both take into account the proposed punishment and yet do not formally condone it.'<sup>190</sup> This is, however, a long way from recognition and protection of Indigenous peoples rights to autonomy as set out in the Declaration.

In contrast to the situation in Australia, in Sabah all courts apply customary law.<sup>191</sup> At the lowest level Native courts, - presided over by three members, normally 'resident native chiefs or head people' - have jurisdiction over personal law cases 'between 'native' and native', and [subject to the approval of the District Officer] between 'native' and 'non-native'.<sup>192</sup> A layer above are the district native courts presided over by the district officer who presides and two other members 'appointed from among district chiefs or native chiefs.'<sup>193</sup> Above these are the native courts of appeal, again made up of a mix of a judge and two other members (district or native chiefs). Legal representation is not allowed in the native and native district courts and the majority of cases dealt with relate to personal law and property rights grounded on customary law.<sup>194</sup> There is concurrent jurisdiction between native and state courts on criminal

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<sup>188</sup> Maria Backstrom, Jeremy Ironside, Gordon Paterson, Johnathon Padwe and Ian G. Baird, *Indigenous Traditional Legal Systems and Conflict Resolution in Ratanakiri and Mondulakiri Provinces, Cambodia* (Towards Inclusive Governance: UNDP, 2007).

<sup>189</sup> Australian Law Reform Commission (ALRC), *Report No 31 the Recognition of Aboriginal Customary Laws, Vol 2* (Canberra: Australian Government Publishing Service, 1986).

<sup>190</sup> Heather Douglas, 'Customary Law, Sentencing and the Limits of the State', *Canadian Journal of Law and Society*, Volume 20, Number 1, 2005, 141-156

<sup>191</sup> Roy, *Traditional Customary Laws and Indigenous Peoples in Asia*, at 18

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.



issues and resistance, Roy says, to transfer of criminal jurisdiction to the state courts other than for grave offences such as rape and murder<sup>195</sup>

In the Chittagong Hill Tracts, in Bangladesh, customary, regional and national law is applied concurrently.<sup>196</sup> Although State courts have concurrent jurisdiction over ‘indigenous justice administration’ this is, according to Roy, rarely exercised and most cases are resolved before the village *karbari* who, he says, ‘usually sits with a council of influential social leaders and other village elders – usually men’.<sup>197</sup> Processes are, he says, more akin to mediation and arbitration and the tendency is to try to bring about ‘reconciliation’ rather than trying to get to the truth.<sup>198</sup> However, a more inquisitorial approach may be taken, where ‘there is strong community interest in getting to the heart of the matter.’<sup>199</sup> Issues that cannot be resolved by the *karbari* and his council move on to be dealt with by the headman where they are tried in a similar fashion, though somewhat more formally.<sup>200</sup> Evidence is almost always given orally and a record of the case is only made in writing if it is going to go on appeal to the circle chief.<sup>201</sup> Where the circle chiefs’ courts record cases they keep information of the parties to the proceedings the nature and basis of the claim, supporting evidence, the decision and the grounds upon which it was made.<sup>202</sup> Although an appeals process from the circle chiefs decisions has existed since 1989 Roy, writing in 2004, claims that

the Indigenous peoples of the [Chittagong Hill Tracts] prefer to confine their conflict resolution processes to indigenous institutional set-ups. This perhaps is a clear indication that despite the increasing socio-economic plurality within

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<sup>195</sup> Ibid.

<sup>196</sup> Raja Devasish Roy, 'Challenges for Juridical Pluralism and Customary Laws of Indigeous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh', 21 *Arizona Journal of International & Comparative Law*, 1 (2004) 113-81, at 127

<sup>197</sup> Ibid. at 130

<sup>198</sup> Ibid.

<sup>199</sup> Ibid. at 131

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid. at 131-2

indigenous society, traditional indigenous integrity on personal law matters is still strong.<sup>203</sup>

Roy identifies four reasons why Indigenous peoples in the Chittagong Hill Tracts have not turned to the state appeals system, including: confidence in the chief's decisions; the alien nature of the state courts; a culturally reinforced aversion to litigation, which is regarded as socially demeaning; and, the complicated and costly nature of the state litigation system.<sup>204</sup> Further advantages are, he says, the flexible nature of traditional court procedure; officials in the traditional courts are more readily conversant with customary law; and there are higher possibilities of reconciliation.<sup>205</sup> While noting the dangers of bias in traditional courts, they are, he says, to be preferred and the bias can he argues be overcome in 'judicial review by invoking the legal principal of natural justice.'<sup>206</sup>

An extensive study among Indigenous peoples of North East Cambodia, carried out by Backstrom et al. in 2007, found they 'overwhelmingly support their traditional legal system and wish to keep practicing it.'<sup>207</sup> Their study reveals highly developed conflict resolution practices which may be summarized as follows<sup>208</sup>: an aggrieved party commences the process by confronting the 'defendant', either directly or by engaging a *kanong* (investigator or mediator) to do so. The defendant may also get a *kanong* to represent their interests. The role of the *kanong(s)* is to broker a settlement and reconciliation. If this is not possible then the *kanong* informs an adjudicator in the case of the Jarai, Tampuan and Kachok peoples. While the Brao, Kreung and Kavet may allow the aggrieved party to select one or more adjudicators or alternatively allow both parties to identify one adjudicator each. The parties are kept apart 'to avoid conflict, violence or making the problem worse' while the *kanong(s)* and adjudicators travel back and forth as often as necessary between the two sides, which may include

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<sup>203</sup> Ibid. at 130

<sup>204</sup> Ibid. at 134

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Backstrom et. al. *Indigenous Traditional Legal Systems and Conflict Resolution in Ratanakiri and Monduliri Provinces, Cambodia*, at 9

<sup>208</sup> Ibid. at 24 - 25

elders and family members depending on the gravity of the situation. Once responsibility has been ascertained the issue turns to the question of restitution and compensation. For the Brao, Kreung and Kavet the amount of the fine is established by the adjudicators and the parties then negotiate to seek an agreed level of compensation a process that may be assisted by the wider community.<sup>209</sup> The Jarai, Tampuen and Kachok have a different approach, holding what Backstrom et al. refer to as an 'ad hoc tribunal' at which the adjudicators, having heard all the evidence collected by the *kanongs*, seek the consent of the two parties and of the elders before making a final decision.<sup>210</sup> This latter point is crucial, in the words of Pa Dol villagers cited in the study,

The arbitrators cannot make decisions based on what he wants or thinks; they must seek consent from the two parties to the conflict and the elders, so that the decision would be acceptable by both sides. In the judgment the adjudicators have to think carefully and ensure justice and the fine should be appropriate. They must ensure that the two parties have no revenge or anger in the future and they can be friends again.<sup>211</sup>

Tribal justice in the United States adopts similar notions of restorative justice rather than the adversarial 'all or nothing' system equated with the Anglo-American judicial system. For Chief Justice Yazzie, what he calls the vertical system is obsessed with hierarchies, power and 'the truth'. In his words 'the side that represents the truth as it is perceived by the court wins, while the other side loses. "Truth" becomes a game where people attempt to manipulate the process, or undermine it where it does not suit their advantage.'<sup>212</sup> The Chief Justice takes the view that 'any definition of "law" must contain an emotional element: one of spirit and feelings.'<sup>213</sup> In this he breaks with all notions of positive law, which is not only devoid of spirit and feelings it rejects the very notion that morals should have any bearing upon legal interpretation. His solution based upon Navajo notions of Justice is what he calls a horizontal model,

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<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Yazzie, "'Life Comes from It": Navajo Justice Concepts', at 179

<sup>213</sup> Ibid. at 180

which he says may be better portrayed as a circle ‘perfect, unbroken and a simile of unity and oneness.’<sup>214</sup> He describes what the Navajo call ‘peacemaking’ as ‘a system of relationships where there is no need for force, coercion or control.’<sup>215</sup> The process involves bringing the parties and their relatives together in a relaxed atmosphere, without formal rules of procedure or evidence in order to encourage people to ‘talk to each other to reach a consensus’.<sup>216</sup> Restorative justice has as its aim to return people to good relations, the issue of ‘intent, causation, fault or negligence’ are, Chief Justice Yazzie says, of no concern to the victim who must he says be compensated.<sup>217</sup> He also points to another concept of Navajo justice, the notion of distributive justice, which he says, ‘abandons fault and adequate compensation ... in favour of assuring well-being for everyone’ in the community.<sup>218</sup> A form of absolute liability distributive justice takes the victim’s feelings and the perpetrators capacity to pay into account in determining the level of compensation.<sup>219</sup> Marrying notions of distributive and restorative justice to a court based on the vertical model led to the establishment in 1982 of the Navajo Peacemaker Court.<sup>220</sup> The court incorporates what the Chief Justice refers to as Navajo common law into ‘modern legal institutions’ in a manner which allows Peacemakers (who guide the process)) to ‘apply the values of spiritual teachings to bond disputants together and restore them to good relations.’<sup>221</sup> In doing so the Navajo have transcended the limits of a judicial system adopted to defend their rights to self-determination by shifting its focus to reflect their “Life Way”. This is a vivid demonstration of the dynamic nature of customary legal regimes and their capacity to adopt and adapt institutional and procedural systems to accommodate their living laws and cosmovision.

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<sup>214</sup> Ibid.

<sup>215</sup> Ibid. at 181, where he says ‘forcing a person to do something against their will is a form of witchcraft, something which is ‘considered horrible in Navajo thought.’

<sup>216</sup> Ibid. at 183

<sup>217</sup> Ibid. at 185

<sup>218</sup> Ibid

<sup>219</sup> Ibid.

<sup>220</sup> Ibid. at 186

<sup>221</sup> Ibid.

Although diverse, Indigenous peoples' judicial systems demonstrate significant similarities in their practices and underlying concepts of fairness and purpose. They appear to generate a strong sense of community loyalty and to hold widespread legitimacy amongst the people who consider themselves bound by village and tribal courts. The practice of restorative justice appears to survive into more formal tribal court systems such as that of the Native American tribes, where it may be the subject of more nuanced application. The widespread recognition of Indigenous peoples' jurisdiction to apply their own laws to conflict resolution in areas such as land and resource rights, minor criminal matters and family law issues, supports the proposition that: (a) state practice demonstrates acceptance of the right of Indigenous peoples to their customary laws and (b) there is an obligation upon states to give due respect and recognition to Indigenous peoples' customary law in order to secure their human rights. This in turn supports a claim that both the aforementioned rights have crystallized into customary international law.

## Chapter 4. In Praise of Customary Law

Although it has been marginalised for centuries, customary law is clearly an important source of law. The ascendancy of positivism during the colonial period and the contiguous decline in the influence of natural law facilitated that marginalisation. In more recent times, recognition of Indigenous peoples' human rights has made it increasingly clear that legal certainty cannot stand firmly upon a system of law that ignores or rides roughshod over the rights and legal regimes of large sectors of the population. Customary law is part of the law, centuries of marginalisation has not made it go away. Failure to respect it and the ancestral rights it enshrines not only undermines recognition and enforcement of Indigenous peoples' human rights, it also brings into question the legitimacy of third party rights to lands, resources, cultural artefacts, and even biotechnological inventions, acquired or developed in breach of customary law.

The current global legal order, largely dominated by positive law, has, despite its many achievements, shown significant limitations as a tool for securing human rights and good global governance. Failure to prevent and or mitigate the impacts of climate change; unsustainable resource exploitation; undue corporate influence over political and regulatory processes; ever increasing tensions with regard to resource use, including privatization and other restraints on access to water; loss of ecological balance in the face of monoculture farming and industrial overfishing; impacts of market speculation on food security; weak regulation of the banking sector: and threats to religious freedom, cultural diversity and linguistic diversity are just a number of the areas where the current political, economic and legal orders have been found wanting. Restoring credibility to the legal order will require imagination and commitment. Most notably it will need to overcome entrenched dominant legal traditions firmly embedded in positivism, which support discredited economic theories of growth that impoverish the earth<sup>1</sup>, consolidate the divide between rich and

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<sup>1</sup> See Richard Douthwaite, *The Growth Illusion: How Economic Growth Has Enriched the Few, Impoverished the Many and Endangered the Planet* (Dublin: The Lilliput Press, 2000). Where he warned of the 'worldwide economic collapse that seems to loom nearer each day' and argued of the need to bring the capitalist system 'to heel so that its formidable powers bring life instead of

poor, and undermine the capacity of the poorest sectors of society to meet their subsistence needs.

Two important concepts providing the conceptual basis for legal ordering designed to respond to the challenges of the moment are the notions of human rights and the rule of law. Both, however, are hampered by their origins in the self-same individualistic, proprietary rights-based, positive law tradition that has continuously impeded the development of a truly equitable and functional legal order. The ever increasing recognition of customary legal regimes is forcing legislators at both the national and international levels to examine the underlying principles of law as it relates to issues such as property rights and ownership, individualistic versus collective interests, environmental protection and biodiversity conservation, as well as the promotion of human rights and of rule of law programs. For some the spectre of customary law is an unwanted impediment on absolute legislative freedom, for others it is a welcome check on a system of law considered to have lost its way, its link to the land and to spirituality. Furthermore, there is an ever-increasing body of literature demonstrating that customary law is the principal source of justice for countless millions of Indigenous and tribal peoples and local communities around the world.<sup>2</sup>

While it is important to avoid adopting of an overly romanticised notion of Indigenous peoples' legal regimes, which are subject to many of the deficiencies found in positive legal regimes, there is much to be gained from exploring the commonalities, shared epistemologies and cosmovision, convergence of moral and ethical principles, environmental sensitivity, and long term vision apparent in many customary legal systems. Steeped in tradition customary law is at one and the same

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destruction. The system is not cast in stone: it can be changed.... The planet needs a pause. Human kind must cease its damage, its increasing.', at 346

<sup>2</sup> See for example the International Development Law Organisation Working Papers Series - Enhancing Legal Empowerment: Customary Justice Programming in Post-Conflict and Fragile States, published in 2011 which includes studies on customary justice systems in Bougainville, Liberia, Rwanda, Somalia, Uganda, Namibia, as well as a study on women's' rights, all available at <http://www.idlo.int/english/WhatWeDo/Research/LegalEmpowerment/Pages/Customary1.aspx>

time a conservative system of law resistant to change and a vibrant dynamic system capable of rapid change in the face of new challenges and opportunities.

The present chapter considers three important aspects of customary law and its role in securing human rights. First, it examines the role of customary law in bringing legal certainty through the enforcement of Indigenous peoples' rights to participate in decision-making and of obligations to secure their prior informed consent. It continues with analysis of the importance of customary law for the protection of cultural and biological diversity. The chapter closes with examination of the role of customary law in fractured societies and in the design and implementation of Rule of Law programs.

#### **4.1 Obligations to recognise customary law**

International law establishes obligations upon states to recognise customary law in a variety of ways, including, but not limited to, recognition of Indigenous peoples' rights to self-determination, self-governance and autonomy; securing their effective participation in decision-making processes; requiring free prior informed consent of Indigenous peoples for specific activities; recognition and enforcement of their land and resource rights; and the protection of their cultural rights. The issue of self-determination was dealt with in the previous chapter while the issues of land, resource and cultural rights, are the subject matter of the subsequent three chapters. This section will focus on the interrelated issues of rights to participation, consultation and free prior informed consent under international law, and their relevance for the recognition and enforcement of customary law and the achievement of legal certainty.

##### **4.1.1 participation and consultation**

Rights of Indigenous peoples to participate in decision-making processes and State obligations to secure prior informed consent of Indigenous peoples are clearly recognised in the United Nations Declaration on the Rights of Indigenous Peoples. These rights and obligations may be divided into four categories. First, Indigenous peoples have rights to participate in the political, economic, social and cultural life of



the State<sup>3</sup>; in decision-making in matters which would affect their rights,<sup>4</sup>; and in processes to recognize and adjudicate their rights to their lands, territories and resources, which must be done with due recognition for their own laws, traditions, customs and land tenure systems<sup>5</sup>. Second, states have general obligations to consult Indigenous peoples regarding: issues of discrimination<sup>6</sup>; protection of indigenous children from economic exploitation<sup>7</sup>; use of their lands or territories for military activities<sup>8</sup>; rights to maintain and develop contacts, relations and cooperation with Indigenous peoples in other countries<sup>9</sup>; and, the taking of appropriate measures to achieve the ends of the Declaration<sup>10</sup>. Third, and most importantly, Indigenous peoples' prior informed consent is required for their relocation<sup>11</sup>; before adopting and implementing legislative or administrative measures that may affect them<sup>12</sup>; as a precondition for storage or disposal of hazardous waste on their territories<sup>13</sup>; and, for any project affecting their lands or territories and other resources, particularly in relation with the development, utilization or exploitation of mineral, water or other resources<sup>14</sup>. Fourthly, redress through effective measures, including restitution where possible, is required where their 'cultural, intellectual, religious and spiritual property [have been] taken without their free, prior and informed consent or in violation of their laws, traditions and customs.'<sup>15</sup> Redress and restitution is also required for the 'lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.'<sup>16</sup> Taken together these rights and

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<sup>3</sup> UN Declaration, Article 5

<sup>4</sup> Ibid. Article 18

<sup>5</sup> Ibid. Article 27

<sup>6</sup> Ibid. Article 15

<sup>7</sup> Ibid, Article 17

<sup>8</sup> Ibid, Article 30

<sup>9</sup> Ibid, Article 36

<sup>10</sup> Ibid, Article 38

<sup>11</sup> Ibid. Article 10

<sup>12</sup> Ibid. Article 19

<sup>13</sup> Ibid. Article 29

<sup>14</sup> Ibid. Article 32

<sup>15</sup> Ibid. Article 11

<sup>16</sup> Ibid. Article 28

obligations offer numerous opportunities for Indigenous peoples to promote and indeed to require recognition and compliance with their customary laws and practices.

Convention 169 sets out significant obligations for states to consult with Indigenous peoples. For Thornberry the right to self-identification as indigenous in Article 1 of the Convention ‘is a powerful contribution to the idea of participation since it plays a role in determining the whole applicability of the principles to the peoples concerned.’<sup>17</sup> The Convention requires states to consult with Indigenous peoples ‘through appropriate procedures and in particular through their representative institutions’ regarding legislative or administrative measures which may affect them and to afford them at least the same opportunities to participate in ‘all levels of decision-making’ as other sectors of the population<sup>18</sup>. Obligations in Article 6.2 that consultations are to be ‘undertaken in good faith and in the form appropriate to the circumstances with the objective of achieving agreement or consent to the proposed measures’, have, Thornberry’s argues, the effect of ‘hardening’ the duty to consult<sup>19</sup>, thus pointing towards a duty to seek prior informed consent. The Convention recognises Indigenous peoples’ rights to participate in the ‘formulation, implementation and evaluation of development plans and programs which may affect them directly.’<sup>20</sup> Relocation requires their free and informed consent, although it may still be forced upon them if their consent is not forthcoming<sup>21</sup>. Consultation is also required under Article 17 wherever Indigenous peoples’ capacity to alienate their lands outside the community is considered.<sup>22</sup> One of the most frequently cited and often disputed provisions of the Convention is Article 15 which recognises the rights of Indigenous peoples over natural resources pertaining to their lands, and their rights to participate in their use, management and conservation.<sup>23</sup> Article 15(2) of Convention 169 requires that even where the state retains rights to ‘mineral or sub-surface resources or ... other resources pertaining to lands’ they are obliged to

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<sup>17</sup> Thornberry, *Indigenous Peoples and Human Rights*, at 348

<sup>18</sup> ILO Convention 169, Article 6 (a) and (b)

<sup>19</sup> Thornberry, *Indigenous Peoples and Human Rights*, at 349

<sup>20</sup> ILO Convention 169, Article 7

<sup>21</sup> *Ibid.* Article 16

<sup>22</sup> Thornberry, *Indigenous Peoples and Human Rights*, at 349

<sup>23</sup> ILO Convention 169, Article 15 (1)

establish or maintain procedures for consultation with Indigenous peoples, 'with a view to ascertaining whether and to what degree their interests would be prejudiced' this consultation must take place '... before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.'<sup>24</sup> Despite being ratified by most states in Latin America, Convention 169 has, to date, a relatively poor record in securing consultation of Indigenous peoples over resource exploitation in the region. A report by the Inter-American Commission on Human Rights notes a tendency of states within the Inter-American system to transfer their responsibility to conduct prior consultation to private companies 'generating a de facto privatization of the State's responsibility.'<sup>25</sup>

James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, has identified a 'lack of adequate implementation of the duty of States to consult with Indigenous peoples in decisions affecting them' as a common problem affecting Indigenous peoples around the world.<sup>26</sup> He has stressed that the state's responsibility cannot be abdicated by assigning it to private sector actors,<sup>27</sup> and that 'lack of consultation leads to conflictive situations, with indigenous expressions of anger and mistrust, which in some cases, have spiralled into violence.'<sup>28</sup> A case in point is that of Peru where during the four years of the government of Alan Garcia over 190 people, including 153 civilians and 38 members of the police and military, lost their lives in social conflicts, which were primarily related to natural resource exploitation.<sup>29</sup> The most serious single incident occurred in

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<sup>24</sup> Ibid. Article 15 (2)

<sup>25</sup> IACHR, 'Inter-American Commission on Human Rights. Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System', *OEA/Ser.L/V/II. Doc. 56/09* (2010), at 109

<sup>26</sup> UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. James Anaya A/HRC/12/34', (15 July 2009), Para 37

<sup>27</sup> Ibid. Para. 72

<sup>28</sup> Ibid. Para 37

<sup>29</sup> APRODEH 'Muertes por conflictos sociales fueron consecuencia del privilegio de la repression', *Peru en Conflicto* 29 august 2011, available at <http://peruconflicto.blogspot.com/2011/08/peru-aprodeh-muertes-por-conflictos.html>

June 2009 involving clashes between police and members of the Awajun people of the northern Amazon. The Awajun, as part of a long series of demonstrations in Amazonian areas, had blocked a road in the northern town of Bagua in an effort to force the State to enter into meaningful dialogue with them. Police efforts to break the indigenous blockade by force led to violent clashes in which 24 police and 10 civilians, mainly Awajun, lost their lives. The Awajun, who remained unconquered throughout the colonial period, were demonstrating against the adoption of a range of executive orders that threatened their ancestral rights and their rights under national law over their traditional forests. In the aftermath of the Bagua incident the Peruvian government established a series of working groups with Indigenous peoples to address issues such as resource rights and consultation processes all of which, through the presence of Indigenous peoples, were informed by customary law. On August 23<sup>rd</sup>, 2011, the newly elected Peruvian Parliament unanimously adopted the ‘ley de consulta’ (consultation law), which was approved by the incoming President Humala and signed into law on the 6<sup>th</sup> of September 2011. The law states that securing consent is to be the objective of consultations.<sup>30</sup> It provides that where consent is not forthcoming it can be overridden by the State, in which case the State is obliged to give a justification for its decision, which may be subject to judicial review.<sup>31</sup> The law, which applies to all legislative and administrative actions that may affect Indigenous peoples, marks a significant step forward in securing their rights to participate in decision making. In so doing it provides an important stage upon which to promote recognition of Indigenous peoples’ customary laws.

The Peruvian ‘ley de consulta’ has significant implications for state actors and all companies, research institutions, missionary groups, non-governmental organizations

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<sup>30</sup> ‘Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio No. 169 de la Organización Internacional de Trabajo’, Ley No. 29785

<sup>31</sup> Peru’s Law on consultation (Ley de Consulta) has been held up as an example of ‘best practices’ by Special Rapporteur James Anaya in his submission to the Expert Mechanism on ‘Some examples of good practices for Indigenous peoples’ participation in decision making: political participation, consultation standards, and participation in development projects’ (11 March 2011) cited in UNHRC, ‘Expert Mechanism on the Rights of Indigenous peoples, Final Study on Indigenous Peoples and the Right to Participate in Decision-Making (Advance Edited Version) Report of the Expert Mechanism on the Rights of Indigenous Peoples A/HRC/EMRIP/2011/2’, at Para 63

planning activities that may impact on Indigenous peoples. It is of particular importance for companies intending to invest in mining and subsurface resource exploitation, hydroelectric energy projects, logging and other agroindustrial activities. As part of due diligence, studies will now be necessary to ensure that there has been adequate consultation with Indigenous peoples, with due respect for their customary laws and institutions, prior to bidding for any licences for exploration or exploitation of natural resources or involvement in development projects. In some cases consultation alone may not be sufficient. Special Rapporteur James Anaya has, for example, emphasised that the UN Declaration requires the consent of Indigenous peoples in the case of extractive industry projects that may have significant social, cultural or environmental impacts on Indigenous peoples.<sup>32</sup>

#### 4.1.2 free prior informed consent

The notion of free prior informed consent first emerged in the area of medicine where it became necessary to obtain a patient's consent prior to invasive surgery. It is now a well-established principle of international law which when applying to Indigenous peoples requires their freely given informed consent (i.e. based upon full information of the potential impacts, benefits, opportunities and dangers associated with a specific activity, project program or legislative or administrative act, provided in a format and language understandable to the relevant Indigenous people) in advance of the promulgation of any relevant law, the taking of any administrative decision, or the commencement of any project or other activity which may affect them. As noted earlier the Declaration sets out four areas in which indigenous peoples consent is mandatory (relocation, adoption of legislative and administrative measures, depositing hazardous waste on their lands, and for projects affecting their lands or resources) and two areas (cultural, intellectual property, religious or sacred property and lands, territories and resources) in which redress or restitution is required where consent has not been obtained. While the Declaration is not of itself legally binding,

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<sup>32</sup> Declaración Pública del Relator Especial James Anaya sobre los derechos humanos y libertades fundamentales de los indígenas, sobre la ley del derecho a la consulta previa a los pueblos indígenas u Originarios reconocido en el convenio No. 169 de la Organización Internacional de Trabajo' aprobado por el Congreso de la República del Perú, 7 July 2010. Available at :

<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=10194&LangID=S>

legal obligations to secure free prior informed consent of Indigenous peoples are to be found in a number of binding international instruments including ILO Convention 169 and the Nagoya Protocol. In the latter case, prior informed consent is required for access to and use of Indigenous peoples' genetic resources and traditional knowledge.<sup>33</sup> The Protocol requires countries into which such genetic resources and or traditional knowledge are imported to adopt measures to ensure that such prior informed consent exists and compliance with the relevant laws of the country from which the resources or knowledge were sourced.<sup>34</sup> In meeting their obligations under the Protocol states parties are obliged to 'take into consideration' the customary laws and protocols of Indigenous peoples.<sup>35</sup>

The Committee on Elimination of Racial Discrimination has, according to Gilbert and Doyle, been the 'most active and innovative international human rights body' in addressing obligations to consult with Indigenous peoples, frequently raising the issue in its concluding observations to states.<sup>36</sup> It has also used its Early Warning Urgent Action procedure to raise questions regarding failures to carry out consultations and seek consent in relation to, among other countries, Belize, Brazil, Chile, Panama, Botswana, Canada, Niger, the Philippines, Peru, India, and Indonesia<sup>37</sup>. In its General Recommendation No. 23 on the Rights of Indigenous Peoples, the Committee calls upon States parties to '[e]nsure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.<sup>38</sup>

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<sup>33</sup> Nagoya Protocol, Articles 6.3 and 7

<sup>34</sup> Nagoya Protocol, Article 12(1)

<sup>35</sup> Ibid.

<sup>36</sup> Amongst the states to which CERD has addressed the duty to consult in its concluding observation, are Canada, Indonesia, New Zealand, the Democratic Republic of the Congo, The United States of America, Ecuador, Sweden and Namibia,

<sup>37</sup> See UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to A/HRC/12/34'. at Para 40. See also Jeremie Gilbert and Cathal Doyle, *A New Dawn over the Land: Shedding Light on Collective Ownership and Consent*, in Stephen Allen and Alexandra Xanthaki *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, at 307

<sup>38</sup> UNCERD General Recommendation No. 23, Rights of Indigenous peoples, Para. 4(d)

In some cases the duty to consult may be linked to an obligation to secure free prior informed consent of Indigenous peoples. The Inter-American Court of Human Rights in *Saramaka v Suriname*<sup>39</sup> held, for example, that Indigenous peoples

must be consulted, in accordance with their own traditions, and traditional methods of decision-making. Where large-scale development or investment projects would have a major impact the duty to consult is complemented by a requirement to obtain free, prior, and informed consent, according to their customs and traditions.<sup>40</sup>

The Inter-American Court has also held that, in the event of relocation of Indigenous peoples, ‘pursuant to a comprehensive interpretation of ILO Convention 169 and of the American Convention, there must be consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law.’ with regards to the ‘selection and delivery of alternative lands, payment of fair compensation or both’<sup>41</sup> In a similar fashion, the African Commission on Human and Peoples Rights held in the 2009 case of *Kenya v Endorois*<sup>42</sup> held that the standard to be met for obtaining free prior informed consent was a requirement for compliance with the custom and traditions of Indigenous peoples.<sup>43</sup>

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<sup>39</sup> *Saramaka People v. Suriname* 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007);

<sup>40</sup> *Ibid.* Para 134

<sup>41</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, Para 151. I/A Court H.R., *Case of Sawahoyamaya Indigenous Community v Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 135 cited in IACHR, 'Inter-American Commission on Human Rights. Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System', at 105

<sup>42</sup> *African Commission on Human Rights Case 276/ 2003 – Centre for Minority rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009), Para 291, cited in Gilbert, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent', at 309

<sup>43</sup> *Ibid.*

At the national level Chief Justice Lamer giving the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia*<sup>44</sup> held that even in cases of minor infringements of Indigenous peoples' land rights what will be required in most cases is something 'significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation.'<sup>45</sup> The knock-on effect of the *Delgamuukw* decision was felt in 1999 when the British Columbia Ministry of Forests was forced to withdraw its Sunshine Coast forestry development plan due to lack of consultation with the Klahoose First Nation.<sup>46</sup> In the landmark case of *Maya Villages of Santa Cruz and Conejo v the Attorney General of Belize and the Department of Environment and Natural Resources*, Chief Justice Conteh, presenting the decision of the Supreme Court of Belize, ordered the defendants (agents of the government of Belize) to 'cease and abstain from any acts that might ... affect the existence, value or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent'.<sup>47</sup>

Apart from legal obligations arising under international law, countries seeking funding from the World Bank are obliged to engage in 'a process of free prior and informed consultation' with Indigenous peoples who may be affected by the relevant project.<sup>48</sup> The term Indigenous peoples is not defined by the World Bank but is applied in a broad manner to include groups referred to as 'indigenous ethnic minorities,' 'aboriginals,' 'hill tribes,' 'scheduled tribes,' or 'tribal groups'<sup>49</sup> some of whom may not be recognised as indigenous in their country of origin, as for example

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<sup>44</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, Para 168

<sup>45</sup> *Ibid.* at Para 168

<sup>46</sup> Mary C. Hurley, 'Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v British Columbia*', Background Paper: BP-459E (Ottawa: Library of Parliament, Parliamentary Research Branch, January 1998, Revised February 2000), at 27

<sup>47</sup> *Aurelio Cal and the Maya Village of Santa Cruz v Attorney General of Belize; and Manuel Coy and Maya Village of Conejo v Attorney General of Belize*, (consolidated) Claim Nos 171 & 172, 2007, Supreme Court of Belize (18 October 2007) Para 136 (d), at 1049

<sup>48</sup> World Bank Operational Policy 4.10 as Revised February 2010

<sup>49</sup> *Ibid.*



with ‘scheduled tribes’ in India and ‘national minorities’ in China.<sup>50</sup> With regard to lands it requires attention to both individual and collective customary rights, described as ‘patterns of long-standing community land and resource usage in accordance with Indigenous peoples’ customary law, values, customs, and traditions, including seasonal or cyclical use, rather than formal title to land and resources issued by the State.’<sup>51</sup>

Obtaining free prior informed consent is more than a mere box ticking exercise and Indigenous peoples are increasingly developing their own protocols and contractual agreements based upon principles of customary law, which define the manner in which consent may be sought. Companies, research institutions and their legal advisers will need to be increasingly aware of the rights of Indigenous peoples to grant or deny consent for a wide range of activities. Commercial investors, the World Bank and other lending agencies are all increasingly likely to require evidence that consent of Indigenous peoples, in accordance with their own customs laws and traditions has been obtained, as a condition for funding of projects. Attention to customary law and its role in consent procedures are a must for states and the private and research sectors. Ignorance of that law will be no defence. For Indigenous peoples’ prior informed consent procedures offers a great opportunity to require that those seeking consent agree to be bound by customary law rules. Where dealing with third parties Indigenous peoples will be advised to enshrine, to the greatest extent possible, the principles they wish to guide any agreement in writing. This is not to suggest that customary law should be codified but that any agreement will need to be clear about the conditions under which customary law will apply, the jurisdiction if any of traditional courts or decision making authorities, and the application of customary law where appropriate in alternative dispute resolution procedures. Prior informed consent is, therefore, a two way street. It provides rights but it also creates responsibilities for Indigenous peoples. This includes the responsibility to prepare

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<sup>50</sup> See World Bank 'Policy Brief – Indigenous peoples', which estimates the global population of Indigenous peoples at 300 million or 4.5 % of the world’s population, with almost 80% of Indigenous peoples located in Asia. The policy brief estimates that 72% of Indigenous peoples reside in China, India, LaoPDR, Vietnam and Central African Republic, Democratic Republic of the Congo, and Gabon, at 3

<sup>51</sup> World Bank Operational Manual 4.10 – Indigenous peoples, see footnote 17 and associated text.

themselves to make decisions, to agree upon modalities for considering matters requiring their consent and establish, where not already existing, the necessary internal procedures for dealing with complex consent related decision making in areas not historically covered by customary law.<sup>52</sup>

Where consent is required customary law is immediately involved, creating obligations for states and rights for Indigenous peoples, and linking customary law to human rights. Adoption of national law and policy establishing consultation and consent procedures is part of an evolving body of state practice providing recognition and respect for customary law and its role in securing human rights.

#### **4.2 Protection of cultural and biological diversity**

Indigenous peoples are in the sadly ironic position of living in some of the most biodiverse spots in the world, - centres of biodiversity they have played an important role in conserving through their traditional resource management and use strategies - while at the same time they are amongst the most vulnerable to the effects of global environmental degradation and climate change, for which they have had little if any responsibility. Victoria Tauli-Corpuz, writing during her time as chair of the UN Permanent Forum on Indigenous Issues, argued that erosion of biodiversity did not merely present a physical loss for Indigenous peoples, it also meant loss she says,

of indigenous knowledge systems, cultures, languages, and our identities. Our very survival as peoples and cultures rests on how well we have conserved and sustainably used the biodiversity and ecosystems in our territories.<sup>53</sup>

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<sup>52</sup> For discussion of negotiating strategies and preparatory actions see Russell Lawrence Barsh and Krisma Bastien, *Effective Negotiations by Indigenous Peoples: An Action Guide with Special Reference to North America*, (Geneva: ILO, 1977) see also Brendan Tobin, 'Biodiversity Prospecting Contracts: The Search for Equitable Agreements', in Sarah A. Laird (ed.), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (London & Sterling, VA: Earthscan Publications Ltd., 2002).

<sup>53</sup> Victoria Tauli-Corpuz, 'The Importance of Indigenous peoples in Biodiversity Conservation', in Kathleen Mckinnon (ed.), *Environment Matters at the World Bank: Banking On* (Washington: World Bank, 2009), at 6

Tauli-Corpuz draws special attention to the links between linguistic diversity and biological diversity suggesting the status and trends of linguistic diversity and number of speakers of indigenous languages may serve as a proxy indicator of biodiversity loss.<sup>54</sup> This linguistic diversity is under severe threat and of the more than 7000 languages currently spoken in the world more than half are threatened with extinction in the present century.<sup>55</sup> With the loss of each language humankind is irreparably impoverished through the cultural and linguistic diversity and of related traditional knowledge. This section begins with analysis of Indigenous peoples' rights to their cultures and 'way of life' including their customary legal regimes and institutions. It then goes on to consider the importance of traditional resource management, based on customary law, for biodiversity conservation.

#### 4.2.1 cultural diversity and rights to a 'way of life'

The UNESCO Universal Declaration on Cultural Diversity describes culture as 'the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'<sup>56</sup> Similarly, in Article 2 (a) of the Fribourg Declaration on Cultural Rights, culture is described as covering 'those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development'.<sup>57</sup> This notion of culture as a 'way of life' first emerged through in the progressive interpretation of article 15 (1) (a) of the International Covenant on Economic, Social and Cultural Rights, which recognises the rights of everyone to 'take part in cultural life'.

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<sup>54</sup> Ibid., at 7

<sup>55</sup> See National Geographic Enduring Languages Project, which is documenting the world's endangered languages. Available at: <http://travel.nationalgeographic.com/travel/enduring-voices/>

<sup>56</sup> UNESCO Universal Declaration on Cultural Diversity, (adopted at the 31<sup>st</sup> Session of the General Conference of UNESCO, Paris, 2000.) See 5<sup>th</sup> Preambular paragraph and associated footnote 2 which describes this definition as being in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982), of the World Commission on Culture and Development (Our Creative Diversity, 1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998).

<sup>57</sup> E/C.12/GC/21, at 3

At the time of drafting Article 15 was, says Weller, limited to the dominant national culture.<sup>58</sup> Its interpretation was expanded to include popular culture in the late 1960's and further expanded in the 1990's, according to Patrick O'Keefe, with the adoption of an anthropological definition which described culture as 'the internal frame of society... manifested in a peoples' 'way of life'.<sup>59</sup> The Committee on Economic, Social and Cultural Rights has described this latter notion of culture as 'a world view representing the totality of a person's encounter with the external forces affecting his life and that of his community'.<sup>60</sup> The Committee, O'Keefe's says, sees 'article 15 as guaranteeing ... indigenous groups the freedom to practise and the opportunity to promote their cultures'<sup>61</sup>. This freedom includes, he says, a 'degree of autonomy'<sup>62</sup> to be exercised 'within the framework of the overall national society'.<sup>63</sup> In essence the Committee may be seen as promoting a notion of the right to culture which accords with the concept of internal self-determination as it has been set out in the Declaration on the Rights of Indigenous Peoples.

In General Comment 21 the Committee sets out its opinion regarding the scope, nature and core elements of the right to take part in cultural life under Article 15 (1) (a).<sup>64</sup> In it the Committee stresses the individual and collective rights of Indigenous

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<sup>58</sup> Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford: Oxford University Press, 2007), at 218

<sup>59</sup> Patrick O' Keefe, 'The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR', *International and Comparative Law Quarterly*, 47 (1998), 904-919, at 905

<sup>60</sup> General discussion on the right to take part in cultural life as recognized in Article 15 of the International Covenant on Economic, Social and Cultural Rights, E/1993/22, chap. VII (General discussion) para.13, cited in O'Keefe, 'The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR', at 917

<sup>61</sup> O' Keefe, 'The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR', at 918.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid. at 918-9.

<sup>64</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 21: right of everyone to take part in cultural life (art. 15 (1), Para. (a), of the International Covenant on Economic Social and Cultural Rights) E/C.12/GC/21, 21 December 2009

peoples to full enjoyment of all human rights and fundamental freedoms, pointedly referring to the provisions on cultural institutions, ancestral lands, natural resources and traditional knowledge in the Declaration and ILO Convention 169.<sup>65</sup> The Committee makes it clear that States are obliged to both abstain from interference with the exercise of cultural practices and with access to cultural goods and services, and to take positive action to ensure the ‘preconditions for participation, facilitation and promotion of cultural life and preservation of cultural goods’.<sup>66</sup> General Comment 21 describes ‘cultural life’ as a living process, historical, dynamic and evolving<sup>67</sup> and the right to participate in cultural life as a ‘cultural choice’, which must be recognized, respected and protected on the basis of equality.<sup>68</sup> It refers to ‘culture’ as a broad inclusive concept encompassing all manifestations of human existence<sup>69</sup> including,

customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.<sup>70</sup>

This definition clearly embraces Indigenous peoples’ governance systems and legal regimes relevant to the expression, development, maintenance and control of culture, cultural identity and cultural property. The Committee, in General Comment 21, is of the opinion that the right to take part in cultural life is interdependent of other rights enshrined in the Covenant, including the right of all peoples to self-determination.<sup>71</sup> It also finds that the obligation of states to respect the right to culture requires: the

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<sup>65</sup> See UN Declaration Articles 5, 8 10, 11, 12, and 13. ILO Convention 169 Articles 2,5, 7, 8 and 13, 14 and 15.

<sup>66</sup> E/C.12/GC.21, at 2

<sup>67</sup> E/C.12/GC/21, at 3

<sup>68</sup> E/C.12/GC/21, at 2

<sup>69</sup> Ibid.

<sup>70</sup> E/C.12/GC/21, at 3-4

<sup>71</sup> E/C.12/GC/21

adoption of specific measures to empower everyone to (a) freely choose their own cultural identity, which includes the right ‘... to express their cultural identity freely and to exercise their cultural practices and way of life; ... (d) maintain and strengthen their spiritual relationship with ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.’<sup>72</sup>; and (e) the right to participate in decision-making processes which may have an impact on their lives<sup>73</sup> These rights to self-determination, participation in decision making and respect for culture as a way of life, imply the existence of a right to require respect for the underlying pillars of cultural integrity including customary law and traditional decision making institutions. The Committee takes the view that States obligations under Art 15.1 (a), create, ‘an immediate obligation to guarantee that the right to take part in cultural life, is exercised without discrimination and to recognise cultural practices and to refrain from interfering in their enjoyment.’<sup>74</sup> This, they say, is a ‘specific and continuing obligation’ requiring States to take ‘deliberate and concrete measures aimed at the full implementation of the right’.<sup>75</sup> Regressive measures are not permitted.<sup>76</sup> Despite the Committee’s view that the obligations to take measures under Article 15 (1) (a) are immediate, the Covenant is drafted in aspirational terms potentially reducing the sense of urgency to take action amongst states.

In contrast, with the position under the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights must be implemented immediately. The Covenant sets out what Sheleff has described as the ‘most definitive, statement in an international document in regard to group rights.’<sup>77</sup> Article 27, which is couched in negative terms, states that

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

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<sup>72</sup> E/C.12/GC/21, at 12

<sup>73</sup> E/C.12/GC/21, at 13

<sup>74</sup> E/C.12/GC/21, at 11

<sup>75</sup> Ibid.

<sup>76</sup> E/C.12/GC/21, at 11

<sup>77</sup> Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 137.

the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The negative formulation of Article 27 has, O’Nion tells us, led some commentators such as Nowak and Tomuschat to take the view that states have no obligations to take positive action to secure the right to enjoy culture.<sup>78</sup> The contrary position is taken by Caportorti who takes the view that a refusal to recognize special rights would render application of Article 27 ‘meaningless’.<sup>79</sup> The Human Rights Committee leans toward the latter view stating in General Comment 23 that enjoyment of cultural rights under Article 27 ‘may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.’<sup>80</sup> One area in which positive measures may be required, says Weller, is ‘to protect the cultural identity of a minority, and to secure the rights of its members to enjoy and develop their culture in community with other members of the group’.<sup>81</sup>

Obligations to protect cultural integrity are also found in The UN Declaration on the Rights of Minorities, which reframes the provisions of Article 27 of the International Covenant on Civil and Political Rights in positive terms<sup>82</sup> as well as in ILO Convention 169<sup>83</sup>, the Council of Europe Framework Convention on National Minorities<sup>84</sup>, and the African Charter on Human and Peoples Rights<sup>85</sup>. ILO

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<sup>78</sup> Helen O’Nion, *Minority Rights in International Law: The Roma of Europe* (Research in Migration and Ethnic Relations Aldershot: Ashgate, 2007).

<sup>79</sup> See Francesco Caportorti, 'Study on the Rights of Person Belonging to Ethnic, Religious and Linguistic Minorities' UN Doc. E/CN.4/Sub.2/384 (rev1. 1979), at 16 cited in Helen O’Nion, *Minority Rights in International Law: The Roma of Europe*.

<sup>80</sup> General Comment No 23, CCPR/C/21/Rev.1/Add.5

<sup>81</sup> Mark Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*

<sup>82</sup> International Covenant on Civil and Political Rights, Article 1(2)

<sup>83</sup> ILO Convention 169, Article 2 (2) (b)

<sup>84</sup> Council of Europe Framework Convention on National Minorities, Article 5, 15 and 17

<sup>85</sup> African Charter on Human and Peoples Rights, Articles 17 and 29 (7)

Convention 169 recognizes state obligations to take positive action<sup>86</sup> in the form of special measures to promote the full realization of Indigenous peoples cultural rights ‘with respect for their social and cultural identity, their customs and traditions and their institutions’<sup>87</sup>. It also includes obligations regarding consultation and participation of Indigenous peoples at all levels of decision-making, discussed earlier. Weller takes the view that states are obliged not only to tolerate cultural diversity but must also take measures to promote cultural pluralism including through the adoption of policies and legislative measures.<sup>88</sup> One possible way for states to take action would, he proposes, be to afford autonomy to ‘cultural communities in the management of their own cultural affairs.’<sup>89</sup> Such an approach would accord with and help promote Indigenous peoples’ self-determination, albeit within the framework of the state.<sup>90</sup>

Although cultural rights have in the main been articulated as individual rights, both the Human Rights Committee and the Committee on Economic Social and Cultural Rights have interpreted them as having a collective quality. Article 27 has been interpreted by the Human Rights Committee as protecting both collective and individual rights in cultural integrity<sup>91</sup> and to ‘cover all aspect’s of an indigenous group’s survival’ a position also taken by the Inter-American Commission of Human Rights.<sup>92</sup> The Human Rights Committee has, in a number of important decisions, interpreted Article 27 as protecting traditional economic activities that possess ‘non-

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<sup>86</sup> Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, at 203.

<sup>87</sup> ILO Convention, Article 2(b)

<sup>88</sup> Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, at 227

<sup>89</sup> See 'Lund Recommendations on the Effective Participation of National Minorities in Public Life', the Hague, September 1999.

<sup>90</sup> See Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, at 197, for the proposition that pursuit of cultural rights is a less conflictive means for Indigenous peoples to promote recognition of many of the rights that they seek under the banner of self-determination.

<sup>91</sup> Anaya, *Indigenous Peoples in International Law*, at 135.

<sup>92</sup> *Ibid.* at 134.



universal and collective dimensions.<sup>93</sup> The approach of the Committee has been first to seek to establish whether the relevant traditional economic activity constitutes an, ‘essential element’ of the culture in the relevant community or indigenous people.<sup>94</sup> This, according to Weller, is generally undisputed in cases involving Indigenous peoples but is less straightforward he claims with other minority groups.<sup>95</sup> Once the existence of a relationship between culture and a specific economic activity has been ascertained the Committee proceeds to examine the extent to which a minority’s rights to enjoy its culture has been interfered.<sup>96</sup> In *Lansman et al v Finland*,<sup>97</sup> the Committee took the view that measures which have ‘a limited impact on the way of life of persons belonging to a minority’ will not necessarily amount to a denial of the right to enjoy culture under Article 27,<sup>98</sup> The Committee noted, however, that if the level of impact was to increase it might amount to a violation.<sup>99</sup> Anaya notes that the Committee came to its decision without addressing the Saami’s claim to the lands, in effect accepting the State as owner of the lands.<sup>100</sup> This demonstrates the difficulties Indigenous peoples face in overcoming ingrained notions of state sovereignty over lands over which they claim ancestral territorial rights and in securing respect and enforcement of their customary laws.

The Human Rights Committee has shown a willingness to draw upon custom and tradition in determining the extent of rights to cultural integrity. In the case of *Francis Hopu & Bessert v. France*<sup>101</sup>, for example, the Committee adopted a broad

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<sup>93</sup> Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observations', 30 *Mich. J. Int'l L.*, (2008), 177 - 210, at 537

<sup>94</sup> Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, at 242.

<sup>95</sup> See *J.G.A Diergaardt et al v. Namibia* (Communication No 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000)

<sup>96</sup> Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, at 243

<sup>97</sup> *Lansman et al. v Finland*, communication No. 5211/1992, Human rights committee, U.N. Doc. CCPR/C/52/D/511/1992 (views adopted Oct. 26, 1994)

<sup>98</sup> *Ibid.* Para 9.4

<sup>99</sup> *Ibid.* Para 10.4

<sup>100</sup> Anaya, *Indigenous Peoples in International Law*, at 137.

<sup>101</sup> CCPR/C/58/D/671/1995, Case No 671/1995

interpretation to the term ‘family’ as that term was understood by ‘the society in question’.<sup>102</sup> The Committee has not to date decided on whether and to what extent a breach of or failure to recognize Indigenous peoples’ rights to apply their own customary laws would be considered a violation of Article 27. It seems likely that such a claim would prosper in the case of customary laws essential for the realisation of rights to enjoy cultural identity, apply traditional land and resource management practices, and enforce customary control of the use and sharing of both tangible and intangible aspects of culture. Such an action might be envisaged where, for example, Indigenous peoples are impeded from practising and enforcing customary laws governing land or resource use that are necessary to prevent over exploitation of resources required to secure their cultural integrity and subsistence as a people.

When taken together with their rights to self-determination Indigenous peoples’ rights to enjoy their culture and to their ‘way of life’, as outlined above, create clear obligations for states to recognise Indigenous peoples’ rights to their own, traditions, laws and customs. States must, therefore, take measures, including legislative, policy and administrative measures, to support Indigenous peoples to maintain their own customary legal regimes.<sup>103</sup> States may also be obliged to repeal, amend or otherwise modify laws, policies and administrative practices that undermine Indigenous peoples’ customary regimes.

#### 4.2.2 traditional resource management and biodiversity conservation

For Indigenous peoples, their resource management strategies based on traditional knowledge are, Posey informs us, generally seen ‘as emanating from a spiritual base.’<sup>104</sup> Indigenous peoples, he suggests, view themselves as stewards or guardians of nature and view biodiversity as their ‘extended family – ‘all our relations’.’<sup>105</sup> The notion that biodiversity forms part of their extended family is in stark contrast with

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<sup>102</sup> Stamatopoulou, ‘Taking Cultural Rights Seriously’, at 398

<sup>103</sup> See, for example, Article 12 of the Nagoya Protocol requiring Parties to ‘take into consideration’ customary law and protocols of Indigenous peoples when adopting legislative policy and/or administrative measures to implement their obligations under the Protocol.

<sup>104</sup> Darrell Posey (ed.), *Cultural and Spiritual Values of Biodiversity* (Intermediate Technology Publications, 1999), at 4

<sup>105</sup> *Ibid.* at 4-5

the notion of ‘biological and natural resources’ utilised in legal and policy making circles. Inspired by Lockean philosophy failure to ‘exploit’ natural resources has been taken as entitling the government to divest the traditional owners of their lands and resources in order to put them to ‘good economic use’. Such theories, which informed colonial policy, have continued to serve as the basis for expropriation of indigenous lands and denigration of their traditional approaches to resource management. In the words of Tauli-Corpuz

Most of our struggles are to protect and save our lands, territories, and resources and assert the right to use and control our indigenous knowledge systems and customary laws, which govern our relationship with nature and the rest of humanity. Our contributions seek to ensure the protection and conservation of biodiversity, as well as to strengthen the links between biodiversity and the development of our culture and identity.<sup>106</sup>

The distinction between dominant conceptions of resources as ‘exploitable’ and Indigenous peoples’ relationship with ‘all their relations’ is apparent from a story recounted by Carlos Chavez from Jalisco, Mexico, regarding a workshop he facilitated in the early 1990’s with members of the Huichol people on the theme of natural resources. During the workshop he enquired what term the Huichol people used for natural resources. After conferring amongst themselves for some time in their own language they proffered the word *Iurameka*. As he prepared to write the word on the board opposite the words natural resources, a member of the Huichol jumped up and cried ‘Stop! Its a trap!’ When he was asked what he meant he said that *Iurameka* was the word the Huichol used for what ‘they’ [i.e. the wider society] call natural resources viewed like things that can be bought in a shop, but it is not he said what ‘we mean’. His fellows agreed with him and they once again talked among themselves returning sometime later smiling to suggest that the word *Iurameka* could be translated as ‘essences of life’ and that everything from a human to a stone is an ‘essence of life’.<sup>107</sup> The story succinctly captures the distinct nature of Indigenous

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<sup>106</sup> Tauli-Corpuz, 'The Importance of Indigenous peoples in Biodiversity Conservation', at 6

<sup>107</sup> See Brendan Tobin, Juan Torres Guevara and Mario E. Tapia, *Ecosistemas De Montana: Un Nuevo Banco De Oro?* (Lima Friedrich Ebert Stiftung, 1998), at 31 where the authors retell the story

peoples' cosmovision and the basis it provides for notions of reciprocity that underlies their traditional land and resource management strategies.

Indigenous peoples and local communities throughout the world have developed resource management strategies governed by customary law, which regulate land use, forest management, and hunting, fishing and marine harvesting practices, among other things<sup>108</sup>. Their land and resource management strategies are closely linked to their cosmology which, Barsh says, 'portray a universe in constant flux, driven by well known forces as well as a diversity of powerful random elements ('tricksters')' requiring Indigenous peoples to be vigilant and adaptive.<sup>109</sup> Their legal regimes need to demonstrate the same adaptive nature, providing the flexibility to respond to changing social, cultural and environmental realities.<sup>110</sup>

Traditional resource management has been described as resting on three pillars: traditional tenure, traditional knowledge and customary law.<sup>111</sup> Under this view, traditional land and marine tenure defines the areas traditionally controlled or used by the relevant indigenous people or local community. Traditional knowledge encompasses their accumulated knowledge over biological resources, landscapes and ecosystems, in the areas controlled or utilised by them. While customary law, guided by traditional knowledge regulates the use and transmission of that knowledge and the use and management of biological resources, landscapes and ecosystems, within areas of traditional tenure. Seen from this perspective, customary law is woven into the relationship between traditional knowledge and Indigenous peoples' traditional lands and marine areas and the resources, landscapes and ecosystems found within them. As

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recounted by Carlos Chavez, Asociación Jalisco de Apoyo a Grupos Indígenas AC, Mexico, in a document presented at the Seminar of the Ashoka Foundation on Environmental Policies in the Americas, Washington 1998

<sup>108</sup> Posey (ed.), *Cultural and Spiritual Values of Biodiversity*

<sup>109</sup> Barsh in Posey *Cultural and Spiritual Values of Biodiversity*, at 73-4

<sup>110</sup> See Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, where the author utilises the notion of the trickster to facilitate discussion of Indigenous peoples' customary law and its relationship to Canadian law.

<sup>111</sup> Brendan Tobin, 'The Role of Customary Law and Practice in International ABS and TK Governance,' in Caillaud, et. al., 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', at 31

such it is less a body of norms and more part of a process, a dynamic system that must evolve with the environment it addresses if it is to remain relevant. Customary law is not, therefore, of itself necessarily conducive to sustainable management of resources and its capacity to serve as an instrument for sustainable development may be dependent upon factors external to the law itself, including the quality of traditional knowledge and the capacity of indigenous authorities to enforce their customary laws. As Bosselman puts it ‘some customary law systems seem to produce sustainable results and some do not.’<sup>112</sup>

Bosselman analyses customary law as a tool for sustainable development utilising the notion of resilience, which he describes as a ‘key test in determining whether any management system will be able to achieve sustainable development.’<sup>113</sup> Resilient systems are he says in modern terms characterized as ‘adaptive management systems’ which, he goes on to say, are ‘premised on the assumption that management strategies should change in response to new scientific information.’<sup>114</sup> Bosselman’s approach is attractive considering the dynamic nature of customary legal regimes and their close relationship to the environment and knowledge they address. Commencing from the position that ‘not all customary law regimes are resilient’, and not all Indigenous peoples ‘are necessarily conservationists at heart.’<sup>115</sup>, he examines the resilience of customary law systems judged against five procedural and technical factors indicative of sustainability.<sup>116</sup> First off he looks at the ability of customary law to learn from the past saying ‘a resilient system would be one that has already demonstrated a capability to respond to changing environmental conditions and has

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<sup>112</sup> Fred Bosselman, 'Adaptive Resource Management Via Customary Law', in Orebech, et. al. *The Role of Customary Law in Sustainable Development*, at 246

<sup>113</sup> Ibid. at 246

<sup>114</sup> Ibid. at 249

<sup>115</sup> Ibid. at 252

<sup>116</sup> Ibid. Bosselman’s criteria for determining sustainability of customary law systems include (1) Does the system have a good historical record, oral or written, of the way the system has worked in the past under different environmental conditions? (2) Is an effective procedural mechanism for making rule changes built into the system? (3) Does the system feed back the right information on current operations into the rule modification process? (4) Are the rules sufficiently finely detailed that they can be tweaked without wholesale revision? (5) Do the rules facilitate negotiation of modification by providing for a balance of rights and responsibilities relating to a wide range of ecosystem functions?,

recorded the history of adaptation.’<sup>117</sup> A second factor is that of capacity for change which he finds common to customary law regimes, citing Berkes for the view that ‘[t]raditional does not mean inflexible adherence to the past: it simply means time tested and wise.’<sup>118</sup> As an example of adaptability in customary rule-making he cites Hanna and Jentoft, who say of the fisheries industry in Maine, that,

Flexible local rule making allows revision of management decisions that do not lead to the desired outcome. Rules can be revised without the costly and time-consuming co-ordination process that would ensue from a more hierarchical decision process. Rapid response and continual monitoring are possible because action is local.<sup>119</sup>

His third factor relates to feedback mechanisms to enable change based on information. Here again customary resource mechanisms perform well applying a wider ecosystem management approach which is, he says, ‘necessarily flexible and adaptive, no longer following centralized protocols.’<sup>120</sup> As an example of feedback loops he refers to temporal taboos, still widely used in Oceania. Referred to variously as tabus, taboos or buls, such restrictions may cover an entire environment, portions of it, or just certain species. They may be used as a form of direct management where a ban is placed to correct observed degradation of ecosystems or resource stocks, or as indirect management where placed for more cultural or spiritual reasons<sup>121</sup>, as for

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<sup>117</sup> Ibid. at 254

<sup>118</sup> Friket Berkes, 'Role and Significance of 'Tradition' in Indigenous Knowledge', *Indigenous Knowledge and Development Monitor*, 7 (1999), at 19, cited in Bosselman, 'Adaptive Resource Management Via Customary Law', at 255

<sup>119</sup> Susan Hanna, and Svein Jentoft., 'Human Use of the Natural Environment: An Overview of Social and Economic Dimensions', in Susan S. Hanna et al. (eds.), *Rights to Nature: Ecological, Economic, Cultural and Political Principles of Institutions for the Environment* (Washington DC: Island Press, 1996), 35 at 47-8, cited in Bosselman, 'Adaptive Resource Management Via Customary Law', at 257

<sup>120</sup> Bosselman, 'Adaptive Resource Management Via Customary Law', at 258, citing Hanna Cortner and M. Moote, *The Politics of Ecosystem Management* (Island Press, Washington DC 1999), at 37

<sup>121</sup> Russel Nari, 'Merging traditional resource management approaches and practices within the formal legal system in Vanuatu', in Caillaud et.al. 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', at

example a ban on fishing on a particular reef for a period of time following the death of a chief. Originally used for community resource management they are increasingly being incorporated into marine conservation strategies.<sup>122</sup> Bosselman's fourth factor relates to what he calls fine-grained rules which, he says, have the advantage that they can be more easily 'tweaked' to respond to incremental changes in the environment.<sup>123</sup> He provides as an example a study of fishing communities in the Dominican Republic, which he says found 'that a community that had successfully conserved the resources in its area was using very detailed customary practices that could be modified with changing weather and climate conditions.'<sup>124</sup> Interestingly, he argues that as Indigenous peoples' property rights are more clearly defined 'they have felt more secure to negotiate changes in their detailed customs to meet changing conditions.'<sup>125</sup> The inference being that Indigenous peoples' customs are, in the absence of recognition of land and cultural rights, a point of stability, reference and tradition they are loathe to relinquish. His fifth factor relates to the balance between rights and responsibilities. Based on evidence drawn from 'empirical studies of customary systems of resource management', he argues, that an appropriate mixture of rights and responsibilities 'can sometimes be achieved by a mix of private and limited common property'.<sup>126</sup> Bosselman's study provides evidence of the practical role played by customary law in traditional resource management, which is crucial for Indigenous peoples' subsistence strategies and realisation of their human rights.

One of the key areas of interface between traditional resource management and programs for conservation of biological diversity is in the area of Protected Areas. In many cases Indigenous peoples have been forced off their lands to make way for Protected Areas, which were traditionally envisioned as areas free of human activity. Such policies are now widely seen as misguided and Indigenous peoples are increasingly seen as having a role to play in co-management of Protected Areas, an issue of much importance for forest dependent peoples in particular. In a sign of

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<sup>122</sup> See generally, Caillaud et al., 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia'.

<sup>123</sup> Bosselman, 'Adaptive Resource Management Via Customary Law', at 260

<sup>124</sup> Ibid.

<sup>125</sup> Ibid. at 260

<sup>126</sup> Ibid. at 263

changing policy India, in 2006, adopted the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, which provides for recognition of 'individual and common tenure over forest lands and resources.'<sup>127</sup> The Act is being used, according to Dash, to recover and consolidate their traditional territories, secure their forest resources and as a defence against mining and industrial projects.<sup>128</sup> Given his estimate of 275 million forest dependent people in India, the importance of securing forest rights for indigenous peoples subsistence and realisation of a wide range of human rights is clear. Despite the promise of the Act, Dash paints a 'discouraging picture' noting that less than 3 percent of almost 49,000 community claims had been granted by 2010.<sup>129</sup> Amongst the most serious hurdles faced by communities in securing forest rights has been the insistence by the authorities on the provision of documented evidence, which Dash says is often unavailable, especially in the case of customary rights.<sup>130</sup> This narrow view runs counter to the Act itself, which includes oral and physical evidence in the list of evidence that may be provided to demonstrate forest rights.<sup>131</sup> To date India has refused to accept that it has distinctive groups entitled to recognition as Indigenous Peoples within its borders. It remains to be seen how this position may change in the light of adoption of the United Nations Declaration on the rights of Indigenous Peoples and the entry into force of the Nagoya Protocol which, in varying degrees, require all countries to give due recognition and respect to indigenous peoples and their laws.

The role of customary law in biodiversity conservation was the theme of a workshop hosted by the Australian Institute of *Marine* Science in Townsville in 2004. The workshop examined experiences of traditional resource management in Pacific Island countries and participants came to the conclusion that

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<sup>127</sup> Tushar Dash, 'The Forest Rights Act: Redefining Biodiversity Conservation in India', in Holly Shrumm and Jessica Campese (ed.), *Policy Matters: No. 17, Exploring the Right to Diversity in Conservation Law, Policy, and Practice*, 33 - 39

<sup>128</sup> *Ibid.* at 36 where Dash discusses the experience of the *Chuktia-Bhunjias* and the *Junags* both of whom are recognised as being 'particularly vulnerable tribal groups'

<sup>129</sup> *Ibid.* at 38

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*



Marine resources can be more effectively managed if communities and governments combine their knowledge and forces to ensure sustainable conservation. Co-management can be achieved via a complex adaptive process, involving communities and government agencies, built upon strengths and overcoming weaknesses of both customary and governmental bodies.<sup>132</sup>

Examples of local community involvement in the management of marine resources in Oceania abound. In Fiji, for instance, local communities have been actively involved in the establishment of local marine management areas, which are seen as important tools for resource management and for reinvigorating traditional subsistence fisheries severely hit by large commercial scale fishing<sup>133</sup>. In New Zealand the 1996 Fisheries Act recognises *Kaitiakitanga* 'the exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate *tangat whenua* (people of the land) in accordance with *tikanga* Maori'<sup>134</sup>. Under the Act Maori experts may be appointed 'to administer and enforce rules in traditionally controlled areas, to assist fisheries officers and give access permission to indigenous areas'.<sup>135</sup> In Vanuatu the Fisheries Act requires that customary owners of marine areas be consulted prior to declaring an area protected under the act. This has led to innovative collaborations, such as occurred when government representatives shared scientific information with local chiefs and communities in Malekula on the basis of which communities placed a tabu upon marine areas and adjacent mangrove forest for a year<sup>136</sup>. This form of co

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<sup>132</sup> Caillaud et al., 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', at 34

<sup>133</sup> Alifereti Tawake, and Silika Tuivanuavou, 'Community Involvement in the Implementation of Ocean Policies: The Fiji Locally Managed Marine Areas Network', in Caillaud et al. (ed.), 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', at 26

<sup>134</sup> Paul Havemann, *Kaitiakitanga*, 'Customary fisheries management in New Zealand', in Caillaud et al. 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', at 23

<sup>135</sup> Ibid.

<sup>136</sup> Donna Llewellyn, 'Customary law on Malo, South Santo, Vanuatu, and the protection

management has been described as a step towards the incorporation of traditional management systems (i.e. customary law) '... into 'overall fisheries strategies' and, therefore, codified law'.<sup>137</sup>

One particularly interesting example of community efforts to promote respect for their customary law relating to traditional management of marine resources involved the preparation in the late 1990's of a protocol by a local community in the Solomon Islands. The written protocol defined the community's customary law regulations relating to fishing on their reef, which they presented to the local police with a request for their support in its enforcement.<sup>138</sup> This example, along with other such community initiatives served as the basis for what Alejandro Argumedo and the members of the Potato Park in Peru have termed 'biocultural protocols'.<sup>139</sup> In a similar fashion, Raika pastoralists of Western India - following a ban on traditional grazing of their livestock in the Kumbhalagh Wildlife Sanctuary in Rajasthan - have developed a detailed Protocol setting out their biocultural rights and duties under customary, national and international law. More recently, Raika the Protocol serves, says Jonas et al., as 'an interface for constructive dialogue about their values and ways of life with government officials in a manner that embodies both the resilience and vulnerabilities of their biocultural diversity.'<sup>140</sup> Indigenous peoples' biocultural protocols are an express manifestation of their rights to self-determination. Progressive development of an ever wider overlapping web of Protocols based upon

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of the marine environment', in Caillaud et al. 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia', at 22

<sup>137</sup> Ibid.

<sup>138</sup> Comments made to author by unidentified community members during informal discussions on customary law and resource management in Solomon Islands, in June 2002

<sup>139</sup> See for discussion of biocultural protocols Kabir Bavikatte, Harry Jonas and Johanna Von Braun, 'Traditional Knowledge and Economic Development: The Biocultural Dimension', in Suneetha M. Subramanian and Balakrishna Pisupati (ed.), *Traditional Knowledge in Policy and Practice: Approaches to Development and Human Well-Being* (Tokyo, New York, Paris: United Nations University Press, 2010).

<sup>140</sup> Harry Jonas, Holly Shrumm and Kabir Bavikatte, 'Biocultural Community Protocols and Conservation Pluralism', in Holly Shrumm and Jessica Campese (ed.), *Policy Matters: No. 17 Exploring the Right to Diversity in Conservation Law, Policy, and Practice*, at 111

diverse bodies of customary law may some day serve as a mutually supportive body of custom based principles, rights and duties promoting recognition and enforcement of indigenous peoples human rights.<sup>141</sup>

It is clear from the foregoing that customary law plays a central role in traditional resource management and has an important part to play in the management of protected areas. Any decline or cessation in the practice of traditional customs is, therefore, likely to undermine traditional resource management systems, which in turn threatens communities' subsistence strategies and the conservation of cultural and biological diversity. Customary law is, therefore not only instrumental in securing Indigenous peoples environmental security, it is crucial for the protection of the resources required to meet their means of subsistence. Recognition of Indigenous peoples rights to their customary laws is clearly requisite for securing indigenous peoples rights under Common Article 1 of the 1966 International Covenants which provides that no people may be deprived of their means of subsistence. Furthermore its fundamental role in securing cultural and biological diversity creates clear obligations upon states to recognise and respect customary law and its role in securing Indigenous peoples human rights.

#### **4.3 Where Custom is 'The Law'**

Customary law is in many cases the only law Indigenous peoples, in particular remote or isolated peoples, may ever know. Even within indigenous peoples whose societies are linked into the national legal system, many members of the community may have little if any dealings with the national authorities and state laws, while their leaders and educated youth interact more fully with the state and its agents, moving, so to say, between two legal worlds. Custom may play its most important role where other legal systems are inoperable as in the case of what Chanock terms the 'failing state', which he describes as 'non-democratic in character and with little effective public participation',<sup>142</sup> or where countries are exiting from periods of sustained political violence and undergoing rule of law programs. In some cases customary law may be

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<sup>141</sup> This issue is discussed in more detail in Chapter eight.

<sup>142</sup> Martin Chanock, 'Making Customary Law: Men, Women and Courts in Colonial Northern Rhodesia', in Margaret Jean Hay and Marcia Wright (eds.), *African Women and the Law* (7; Boston: Boston University Papers on Africa, 1982).

the only source of law as occurred in Somalia in the 1990's where the country effectively returned to a system of customary control over the stateless territory. This section examines these scenarios in reverse order demonstrating the important role custom has played and continues to play as a source of law and system of justice in many parts of the world today.

#### 4.3.1 Custom in stateless and failing states

Customary law has, according to Chanock, an important role to play in states with weak, corrupt or non-existent governments.<sup>143</sup> Michael van Notten recounts an interesting example, of this, in his study of the role played by customary law as the basis for governance in Somalia following the effective abolition of their government in 1991.<sup>144</sup> Van Notten describes the system he found in Somalia as kritarchy, a term which Dun says applies to legal and political systems 'most closely approximated in the institutional structures of traditional societies' based on customary rather than statutory law.<sup>145</sup> Although the picture presented to the outside world by journalists was one of lawlessness Van Notten decided to investigate for himself and found it 'far from lawless'.<sup>146</sup> Instead, he says, he found in place 'an elaborate indigenous law system that, he says, 'is basically sound, more so than even than most legal systems in the world today.'<sup>147</sup> Van Notten describes the Somali system of the time as

hundreds if not thousands of mini-governments, each wholly independent of the others. These governments operate on a basic set of principles, many of which are harmonious with the concept of natural law. Indeed, but for a few exceptions, the Somali nation is structured such that it comes very close to what in philosophy might be called 'the natural order of human beings'.<sup>148</sup>

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<sup>143</sup> See generally Chanock, 'Customary Law, Sustainable Development and the Failing State'.

<sup>144</sup> Van Notten, *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*.

<sup>145</sup> Frank van Dun, What is Kritarchy?, in Van Notten, *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*, at 187 et seq.

<sup>146</sup> Van Notten, *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*, at 137

<sup>147</sup> Ibid.

<sup>148</sup> Ibid. at 138

Their justice system is based, he reports, on the basis of property rights: police and judges are chosen on an ad hoc basis from the extended families of the parties to a conflict; crimes are compensated rather than perpetrators punished, with re-education left up to families: whole families guarantee to compensate for criminal damage to persons or their property; and they respect notions of freedom of speech, movement and contract, free trade and the property of others.<sup>149</sup>

Van Notten's work demonstrates clearly the important role customary legal regimes may play in maintaining order where the state is fragmented or otherwise absent. This has been substantiated in a more recent study carried out by Maria Vargas Simijoki and published in 2011<sup>150</sup> where she notes that Somali customary law (*xeer*)

represents an integral component of the Somali way of life and continues to be the preferred and most used legal system in all Somali regions, applied in up to 80–90 percent of disputes and criminal cases. *Xeer* is also regarded as fundamental to maintaining social relations within clans. During the conflict and its aftermath, traditional structures (*xeer* and the elders who regulate it) gained elevated importance due to their ability to provide some level of security. Today, the elders are regarded as the guarantors of peace and stability, and *xeer* “the glue that prevents a collapse into anarchy”.<sup>151</sup>

In 2002 a workshop on the judicial system in Somaliland presented a picture of a hybrid system in which, although *Sharia'a* law was recognised as the dominant law regime, it was rarely observed, with judges leaning towards the application of codified positive law drawn from the Anglo-Indian common law and Italian law.<sup>152</sup> Participants, which included members of the legal profession and judiciary as well as civil society organizations, agreed that in the absence of a strong central government authority customary law was pervasive with Judges feeling compelled to tolerate it,

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<sup>149</sup> Ibid.

<sup>150</sup> Vargas, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia'

<sup>151</sup> Ibid. at 9

<sup>152</sup> 'The Judicial System in Somaliland: Workshop Report', (Academy for Peace and Development, 2002). Available at: <http://www.apd-somaliland.org/docs/judiciaryreport.pdf>

‘since to do otherwise may lead to confrontation or conflict and undermine public safety.’<sup>153</sup> Under *xeer* responsibility is generally borne by the clan rather than the individual and the influence of clan decisions are such that courts may find themselves at times merely rubber stamping decisions made by tribal authorities.<sup>154</sup> Such is the influence of *xeer* that courts may find themselves having to relinquish jurisdiction over cases.<sup>155</sup> The courts may also be called upon to release offenders where mediation under customary law has occurred, this is particularly problematic in cases of sexual violence where women may be pressurized to forfeit their legal rights under statutory law and *Shari’a* following a settling of accounts by relatives.<sup>156</sup> Even where women do commence cases in the courts they may find that elders petition judges to return the case to the customary level.<sup>157</sup>

Amongst the weaknesses of *xeer* Van Notten lists cultural impediments to saving and investment and legally sanctioned pressures to distribute all profits; failure to protect women’s rights; ban on the sale of property to outsiders; the distribution of fines and other payments among all members of the victim’s extended family or *jilib*; possibility of pressure on victims to forego compensation for the good of inter clan relations; tendency not to condemn fraud; reluctance of courts to provide remedy unless victim seeks immediate redress; the law makes Clansmen virtual prisoners of their Clan; insults may be treated as criminal breaches; foreigners are only entitled to legal protection if taken under the protection of a particular clansman and his *jilib*; and there is no centralised system for collation of major verdicts as a source of jurisprudence.<sup>158</sup> For van Notten the significant weaknesses identified in Somali customary law, in particular ‘laws affronting the dignity of women and impeding

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<sup>153</sup> Ibid. at 4

<sup>154</sup> Ibid.

<sup>155</sup> See Van Notten, *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*, at 176-7,

<sup>156</sup> 'The Judicial System in Somaliland: Workshop Report', at 4

<sup>157</sup> Ibid.

<sup>158</sup> Van Notten, *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*, at 103-7

economic activity' explain, he claims, 'much of the nation's slow economic growth.'<sup>159</sup>

Van Notten views the weaknesses of customary law in so far as it leads to attacks on human dignity as violations natural justice.<sup>160</sup> This is problematic for his defence of Somali customary governance, which McCullum claims harmonised with Van Notten's own notion of natural law<sup>161</sup>. This he describes as being,

the voluntary, universal order of human society, that it originates in our life as reasoning human beings among our own kind, that it acknowledges the right of every person to live a life governed by his own goals, judgments, and beliefs and that it serves to prevent as well as to resolve conflicts among people. It stipulates that every person shall be free to make any disposition he likes of his own property and shall refrain from making any disposition of the property of others without their permission. It permits all activities that do not infringe upon the person or property of another. This law takes priority over all other principles and rules that shape human society, including rules legislated by parliaments or established by contract. Finally it requires that its enforcement be pursued only in ways consistent with itself.<sup>162</sup>

The notion of each individuals freedom to their own property and to be free from the infringing actions of others does not sit easily with the reality of *xeer*, which, as Vargas reports, allows for collective responsibility for serious crimes such as intentional and revenge killings; the practice of widow inheritance or *dumaal* (where a widow is forced to marry a male relative of her deceased husband), *higsiiian* (where a widower is given the right to marry his deceased wife's sister) and *godobtir* (the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement); places victims of rape under significant pressure to marry the perpetrator; sanctions revenge and honour killings; denies women rights of

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<sup>159</sup> Ibid. at 109

<sup>160</sup> Ibid. at 108

<sup>161</sup> Ibid. at 164

<sup>162</sup> Ibid. This citation is taken from McCullum who edited Van Notten's work posthumously.

inheritance; and, denies basic legal protections for children.<sup>163</sup> The existence of customary laws that, not only fail to prevent but, actively promote activities which constitute breaches of fundamental human rights to equality, non-discrimination, to life and human dignity amongst others serves to bring customary legal regimes into disrepute. Bringing about change, however, poses many challenges especially where the state is not in a position to ensure the enforcement of human rights.

Despite its failings both van Notten and Vargas, writing almost a decade apart, came to the same conclusion, that customary law prevented the country falling into complete anarchy. However, while *xeer* may have served to prevent anarchy, it does so at a heavy price for the country's forgotten minorities.<sup>164</sup> Somalia's four dominant clans the Darod, Hawiye and Dir (nomadic pastoralists) and the Rahanweyn (agro-pastoralists) regulate the application of *xeer* to the detriment of minority groups, including the Bantu (descendants of imported or runaway slaves and indigenous farmers) Midgan (occupational groups) hunters and leatherworkers, tumal (blacksmiths) yirbo (ritual specialists); Benadiri – mercantile communities of Arab origin; and religious minorities.<sup>165</sup> In a study carried out for Minority Rights Group International, Hill lists serious human rights abuses suffered by the country's minorities including exclusion from political participation and employment; limits on their access to justice where abuse has been perpetrated against them or they stand accused of a crime; denies them their rights to development, education and sustainable livelihoods; and places restrictions on inter-marriage between majorities and minorities.<sup>166</sup> Furthermore, minority women suffer, Hill says, not only from national political processes and male social attitudes, but also within their own communities.<sup>167</sup> Minority women are also reportedly subjected to systematic gender-based violence in camps for internally displaced persons. The result is a tension between customary law and its recognition as a fundamental tool for securing order

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<sup>163</sup> See generally Vargas, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia'

<sup>164</sup> Martin Hill, 'No Redress: Somalia's forgotten minorities' (London: Minority Rights Group International, 2010)

<sup>165</sup> Ibid. 7-8

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.



and preventing total anarchy and its role as a system of law utilized to subjugate both clan members, in particular women and minority groups. What seems clear from the research to date is that without customary law there would be no order in Somalia. At the same time customary law alone cannot bring order in conflict situations fuelled by political and religious ideologies inspired, promoted and financed by external forces. Furthermore customary law may serve as a tool of oppression and has proved unable alone to secure peace and human rights. It is still, however a key part of any solution.

In an interesting development in 2003, Vargas Simojoki reports that, a small group of traditional elders in Toghdeer in Somaliland proposed a project to bring their customary law more into line with *Shari'a* and international human rights standards.<sup>168</sup> This project, supported by the Danish Refugee Council, was later extended to Awdal, Maroodi Jeex, Sahel, Sool and Sanag, with each area adopting its own declaration on *xeer*, which was then used as the basis for the adoption of a national declaration for Somaliland in 2006.<sup>169</sup> The project was replicated in Puntland, where local declarations again led to the adoption of a National Declaration in 2009.<sup>170</sup> Among the issues dealt with in the declarations were,

- limit communal responsibility in cases of revenge or intentional killing
- protect the right of widows to inherit according to *shari'a* principles
- protect the right of widows to marry men of their choice (eliminating the practice of *dumaal*);
- increase protection for vulnerable groups such as orphans, street-children, persons with disabilities and internally displaced persons; and
- formation of committees to resolve conflicts that threaten peace and security.<sup>171</sup>

In some areas the impact was immediate and startling. Vargas Simojoki reports, for example, that within five months of the signing and dissemination of the Declaration of the Toghdeer House of Aquils there was a 90 percent reduction in murder cases,

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<sup>168</sup> Ibid. at 6

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid. at 13

and at least five cases of widows marrying men of their own choice had been recorded.<sup>172</sup> In cases of rape however there was still evidence of traditional elders mediating cases rather than sending them forward to the formal justice system<sup>173</sup> demonstrating in Vargas Simojoki's words that the goodwill of the elders was not enough to 'overcome broader issues of gender and social discrimination deeply entrenched in Somali norms and culture'.<sup>174</sup> The project's success, such as it was, was due primarily to the fact that it was driven from within the community itself, in Vargas Simojoki's words

These elders — who represented both the interface with the state justice system and the gatekeepers of access to justice at the customary level — were supported and empowered with the hope of improving the operations of *xeer* and offering better protection to vulnerable groups. Through this process, the elders committed themselves to referring serious criminal acts to the courts, thus breaking the cycle of impunity inherent in the functioning of *xeer* and group compensation mechanisms. Critically, the impetus for revising customary law came from within the *xeer* membership rather from external actors. Consequently, it was argued, the process of revision was more likely to be regarded as legitimate and hence sustainable.<sup>175</sup>

As of 2011 the elders were, according to Vargas Simojoki, awaiting ratification of both National Declarations by the government of Somalia and the country continues to be ruled by three disjointed systems of law, statutory, shari'a and *xeer*.

The diversity of legal regimes in Somalia, in which local variations of *xeer* abound, mirrors to some extent the multiplicity of regimes seen in Papua New Guinea. One of the key aspects of the Papua New Guinea approach to bringing such legal diversity under a national framework has been the place given to customary law, which is now constitutionally recognised as superior to the inherited common law.<sup>176</sup> It is a case of

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<sup>172</sup> Ibid. at 14

<sup>173</sup> Ibid.

<sup>174</sup> Ibid. at 20

<sup>175</sup> Ibid. at 21

<sup>176</sup> Constitution of Papua New Guinea, 1975, Sch. 2.2

placing the local and traditional over the inherited and imported law, with the constitution placed over both. For Somalia any future national legal framework will need to give due recognition and respect to customary law. Building up from customary law rather than trying to impose democracy from above may be the key to establishment of a functional national legal order.

Where custom is the only law then promotion of human rights will be dependent upon its uptake by indigenous peoples' own authorities. International organizations, states and other bodies who seek to promote human rights in countries or areas where customary law is the only or the predominant law will need to give due respect and recognition to such law and related conflict resolution and other enforcement mechanisms. At the same time commentators, indigenous peoples and all those interested in promoting customary law will need to overcome a marked tendency to gloss over the inherent failings of customary law regimes, in particular the aspects of such regimes that conflict with fundamental human rights.

#### 4.3.2 Custom, human rights and the rule of law

Customary law has been the subject of research in various countries with regard to its role in provision of access to justice in countries in which following periods extreme or concerted violence formal legal systems have broken down or have otherwise lost credibility. In Liberia in the aftermath of civil war a study by the United States Institute of Peace found 'the most relevant justice institutions for the vast majority of the country's population are customary ones.'<sup>177</sup> The study made three key findings with regard to customary institutions and practices: First, they had great durability in comparison to the formal courts in the aftermath of the civil war, functioning 'in all communities and at all levels' even in the most 'conflict devastated and socially disrupted counties'.<sup>178</sup> Second, they were 'overwhelmingly ... preferred' at first

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<sup>177</sup> Deborah H. Isser, Stephen C. Lubkemann, Saah N'Tow, with Adeo Addison, Johnny Ndebe, George Saye and Tim Luccaro, *Looking for Justice: Liberian Experiences with the Perceptions of Local Justice Options* (Peaceworks, 63; Washington: United States Institute of Peace, 2009), at 23

<sup>178</sup> *Ibid.* at 25

instance, with only eleven percent of disputes being taken to a formal authority.<sup>179</sup> One reason for this may have been the higher rate of resolution found in customary institutions.<sup>180</sup> Third, the ‘overarching principles’ of customary justice were found not to have been, ‘fundamentally altered’ by the conflict.<sup>181</sup> The United States Institute of Peace study found customary justice resembled a form of ‘non-binding arbitration, with additional elements of mediation’, with parties free to appeal decisions on up the line if they were unhappy with the outcome.<sup>182</sup> What is clear from the study is the sense that the formal court system was to be used only as a last resort. In the words of one male elder in Nimba

The best way possible to settle land or any dispute in our area is to go through the elders in the community, who will talk the case between you and the next person. But when you go to court, you are calling for war because whoever the court says is wrong will keep grudge in his, her heart for the next person. Peaceful solution can be found through the elders because they understand the problem. If you go to the elders and you are not satisfied, then you can go to court.<sup>183</sup>

David Pimentel the former head of the Rule of Law Program at the United Nations Mission in Sudan highlights the importance of local legitimacy, and the lack of any significant alternative to customary law in Southern Sudan, where, he says,

Customary law mechanisms have deep cultural and historical roots and are effective in maintaining a sense of order, stability, and continuity in tribal society. Public confidence in them is high; higher than it would be in any

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<sup>179</sup> Sandefur, Justin, Bilal Siddiqi and Andrew Zeitlin, ‘The Rule of Law and the Rule of Men: Forum-Shopping in Liberia’s Dualistic Legal System’ (presentation, Centre for the Study of African Economies Annual Conference on Economic Development in Africa, University of Oxford, March 2009) cited in Isser et al. *Looking for Justice: Liberian Experiences with the Perceptions of Local Justice Options*, at 25

<sup>180</sup> Isser et al., *Looking for Justice: Liberian Experiences with the Perceptions of Local Justice Options*, at 25

<sup>181</sup> Ibid.

<sup>182</sup> Ibid. at 26

<sup>183</sup> Ibid. at 27

newly imposed statutory court. And given the enormous population to be served and the dearth of judges qualified to adjudicate in statutory courts, Southern Sudan lacks the resources to replace customary courts with any alternative system.<sup>184</sup>

There is a widespread sense, outside of customary law traditions, that customary justice involves practices that are incompatible with human rights. This is often raised as a reason to denigrate and indeed deny any value to customary legal regimes. Such incompatibility is found in both Liberia, where trial by ordeal was a central feature of the customary legal regime and the Sudan where bride-wealth is still widely practised. The concept of bride-wealth Pimentel explains gives to unmarried girls ‘a significant economic value in certain communities.’<sup>185</sup> This value is recognised by the customary courts, which traditionally could order someone to give one of his daughters in compensation in a case, for example, of wrongful death.<sup>186</sup> Correcting ingrained cultural practices contrary to human rights is a challenge for both human rights and customary legal systems. The United States Institute of Peace study found that for local communities trial by ordeal continues to be seen as a valid and important element of their legal system, while ‘human rights’ are seen primarily as undermining reconciliation processes, family discipline and in some cases family subsistence.<sup>187</sup> Overcoming such perceptions, which should not be dismissed as misconceptions, will require trust building and a demonstration by example of walking the walk not just talking the talk.

Addressing efforts to promote human rights and the rule of law Rosa Brooks warns that ‘the project of intervening in “other” cultures in order to change and “improve” them is a fundamentally arrogant and imperialist project with many pitfalls.’<sup>188</sup>

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<sup>184</sup> Pimentel, 'Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan', at 28

<sup>185</sup> Ibid. at 18

<sup>186</sup> Ibid.

<sup>187</sup> See generally, Isser et al., *Looking for Justice: Liberian Experiences with the Perceptions of Local Justice Options*

<sup>188</sup> Rosa Ehrenreich Brooks, 'The New Imperialism: Violence, Norms and the "Rule of Law"', *Michigan Law Review*, 101 (2003), at 2339

Although she takes the view that it is not ‘a project we can abandon’ as that would amount to turning our backs on ‘immense human suffering’ and the dangers ‘of terrorism fuelled by hopelessness and rage’, she cautions that

If we are going to engage in the risky business of neoimperialist interventions to create new norms, we owe it to ourselves and to the world to do it as self-consciously and effectively as possible<sup>189</sup>

From an indigenous perspective any dialogue regarding the introduction of foreign legal concepts must begin from a basis of recognition and respect for their rights of self-determination, including their rights to their own legal regimes. An important starting point will be the recognition of the collective aspect of Indigenous peoples’ human rights and of the role customary law and indigenous peoples’ institutions have to play in ‘rule of law’ programs.

In some cases customary law may offer the only response to human rights abuses, especially where there is a breakdown in the legal order as frequently occurs in conflict zones. A case in point is that of Sudan where in 2009 the UNDP Rule of Law Program began research into the possibilities that customary law might be able to provide a solution to the lack of any functional legal remedy for systematic widespread sexual violence in Darfur.<sup>190</sup> Looking to customary law for solutions in cases of sexual violence is problematic where tendencies exist to promote mediated solutions and acceptance by relatives of compensation often with the exclusion of the victim from the proceedings.<sup>191</sup> This has been widely denounced and in assign of the changing times proposals in Fiji to reduce penalties for sexual violence and apply customary law were effectively resisted by women’s groups, demonstrating that custom can be changed from within.<sup>192</sup>

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<sup>189</sup> Ibid. at 2339-40

<sup>190</sup> Pers. comm. UNDP Rule of Law Program Sudan, October 2009

<sup>191</sup> See generally Vargas, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia'

<sup>192</sup> ICHRP., 'When Legal Worlds Overlap: Human Rights, State and Non-State Law', at 49

While cultural relativism cannot be allowed to act as a cover for sexual violence and other breaches of fundamental human rights, denouncing customary legal regimes *en toto* on the basis of specific weaknesses is unlikely to secure the change necessary to strengthen human rights protection. What is required is a more nuanced approach, highlighting questionable practices and demonstrating the benefits associated with reform rather than arguing for the wholesale replacement of the customary legal order. In the final analysis the capacity of customary legal regimes to secure the rights of indigenous peoples and their individual members is dependent upon numerous internal and external factors. For this reason any blanket support or denunciation of customary law regimes as a whole is inappropriate.<sup>193</sup>

Throughout this chapter we have seen that dialogue, involvement of Indigenous peoples in decision-making and respect for their institutions and laws, is crucial for protection of their rights and for building trust with human rights law. We have seen how conservation of biological and cultural diversity is dependent upon customary law and traditional institutions. Experiences in conflict and post-conflict zones have shown that realization of many human rights is dependent upon recognition of indigenous peoples' customary laws. At the same time entrenched discrimination and discredited traditional practices are in many cases responsible for breaches of individual human rights.

In conclusion the protection of Indigenous peoples human rights would appear to require a dual track approach to customary law. On the one hand, it is clear that respect and recognition of customary law and the institutions of Indigenous peoples is requisite for securing their rights to participation in decision making, protection of their cultural, economic and environmental integrity, and the establishment and maintenance of the Rule of Law. On the other hand, and in conjunction with the foregoing, there is a need for dialogue, capacity and awareness building among Indigenous peoples to provide support internal change of questionable practices. It is furthermore clear that efforts to promote and support internal change of questionable custom are likely to prove most effective in the long run.

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<sup>193</sup> David Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law', *Harvard International Review*, (2010a).

## Chapter 5. Ancestral rights recovered

The relationship between Indigenous peoples and their traditional lands is on one level the most tangible aspect of customary law. Whether hunting, fishing, tilling the land, harvesting its bounty, celebrating sacred rites or other cultural ceremonies, Indigenous peoples are involved in a relationship that is imbued with law and custom. Observation of practices circumscribing each relationship is in essence an observation of customary law. Occupation and possession, whether exclusive or shared, is under customary law demonstrative of rights and interests associated with a defined territorial area and its resources. Boundaries, often fluid and porous, are defined by the relationships between neighbouring families, communities, clans and peoples. During the colonial period Indigenous peoples' ancestral land rights had been largely ignored, negated or revoked by the application of a variety of legal doctrines including *terra nullius*, discovery, conquest, and adverse possession. All of which, Borrows claims, have since been discredited as legitimate bases for unilaterally dispossessing Indigenous peoples of their lands.<sup>1</sup>

Any hopes Indigenous peoples might have had of reuniting traditional territories, arbitrarily divided by colonial borders, following decolonization were shattered by the application of the doctrine *uti possidetis*, which was used to fix national boundaries on the basis of borders inherited at the time of independence.<sup>2</sup> Considering that at the time of decolonization the doctrines of discovery and *terra nullius* had been discredited a question arises as to whether the doctrine of *uti possidetis* may be applied to lands which had not been the subject of conquest and over which neither doctrine might be validly applied. The question is complicated by the lack of clarity over another legal construct the so-called 'intertemporal rule' which, according to D'Amato, sets out the general principle that 'with respect to title and treaty questions arising in the distant past, the rules of international law that are applicable are those

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<sup>1</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 117

<sup>2</sup> For discussion of *uti possidetis* and its impact of Indigenous peoples rights to reunite territories divided by colonial powers see Joshua Castellino, 'The 'Right' to Land, International Law & Indigenous Peoples', in Joshua Castellino and Niamh Walsh (eds.), *International Law and Indigenous Peoples* (The Raoul Wallenberg Institute Human Rights Library; Leiden/Boston: Martinus Nijhoff Publishers, 2005).



contemporaneous with the acts in question<sup>3</sup>. There would, he says, be no doubt regarding this issue, were it not for the decision of Max Huber in the 1928 Palmas Island Arbitration which raises the possibility that the validity of title should be adduced according to the state of law at the time of the relevant act, which in the case in question would be the date of decolonization. D'Amato, however, sees the Las Palmas decision as contradicting the concept of title arguing that Huber's application of the 'Intertemporal Law' has 'generally not been accepted'.<sup>4</sup> The outcome is that indigenous peoples, dispossessed of their lands through the application of the doctrines of discovery and *terra nullius* and precluded from reunifying their lands through the application of the doctrine of *uti possidetis* are, if we follow D'Amato's reasoning, deprived of any meaningful avenue for redress through the application of the intertemporal rule. If that wasn't enough the doctrine of discovery establishes a plenary state power to extinguish native title. Therefore, even if Indigenous peoples do secure recognition of their ancestral land rights it continues to hold them at the sufferance of the state.

Advances in human rights law over the past twenty years have begun to address the inequities in the historic treatment of Indigenous peoples' land rights, they have not as yet, however, resolved the conundrums associated with the recognition of sovereign rights and title over lands acquired in blatant contradiction to international law itself. A significant body of case law at the national and regional level, as well as before the Human Rights Council, has radically altered the recognition and protection of indigenous land and resource rights, mostly, but not always, in their favour. Central to this process has been the manner in which courts have approached the recognition of customary law. This chapter begins with discussion of the nature of indigenous peoples' individual and collective land rights. It continues with examination of the notion of native title in common law jurisdictions and its extinguishment under state plenary powers. The chapter closes with a review of the role of customary law in the protection of Indigenous peoples' land and territorial rights under international law and of its place in securing rights over their sacred sites.

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<sup>3</sup> Anthony D'Amato, 'International Law, Intertemporal Problems', *Encyclopedia of Public International Law* (1992), 1234 -36, at 1235

<sup>4</sup> Ibid.

## 5.1 Indigenous peoples' rights to land

Indigenous notions of land and resource rights are largely distinct from proprietary western notions of individual private property rights. Nor can they be lumped under the banner of communal property interests. They are more likely to contain a mixture of individual and collective rights<sup>5</sup>, which may range from exclusive rights over specific areas to shared rights of usage, and associated duties to care and respect the environment and its bounty. This section examines the nature of Indigenous peoples' land rights as described by their customary law regimes.

### 5.1.1 Indigenous peoples individual and collective land rights

Land tenure is, says Bennett, 'the most problematic topic in customary law.'<sup>6</sup> The problem lies in no small part in the distinct nature of indigenous and dominant concepts of interests in land. Although Indigenous peoples' rights over lands are consistently presented as collective rights, this obscures the complex nature of indigenous customary management of their communal lands, territories and resources. The extreme diversity of indigenous cultures and in their customary law regimes militates against any assumptions of homogeneity in their systems for defining their land and resource rights. Franz and Keebet von Benda-Beckmann in a study of Minankabau of West Sumatra, where tensions exist between *adat* (customary law), State and Islamic law, in determining issues of 'appropriation, allocation, transfers and inheritance'<sup>7</sup>, concluded that

Treating 'communal rights' as a more or less homogenous category and theorizing over how people are likely to deal with property under a 'common property' regime, without detailing the kind of communal property and the very different possible constellations of concretised rights, is bound to fail.<sup>8</sup>

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<sup>5</sup> Von Benda-Beckmann, 'How Communal Is Communal and Whose Communal Is It?' at 209

<sup>6</sup> Bennett, 'Official' vs. 'Living' Customary Law: Dilemmas of Description and Recognition', at 138

<sup>7</sup> Von Benda-Beckmann, 'How Communal Is Communal and Whose Communal Is It?' at 212

<sup>8</sup> *Ibid.* at 213

Similarly, a study of land rights in Vanuatu, by Haccius, claims that the formal legal system has distorted the practice of customary land tenure giving powers to customary chiefs to alienate lands that are at odds with customary law.<sup>9</sup> He shows how constitutionally protected customary land rights are easily, and frequently, overridden by Ministerial grants of leases to expatriate tourism and land development companies.<sup>10</sup> A significant tool in the dispossession of indigenous lands has been the fragmentation of communal property fomenting its commodification. In New Zealand such practices led to the transfer of a majority of Maori lands into the hands of colonists in the fifty or so years following the signing of the Treaty of Waitangi.<sup>11</sup> In Peru indigenous lands previously viewed as inalienable, imprescriptible and not subject to embargo, lost all but the latter protection in the Constitution of 1993. This constitutional change was all the more disturbing in the light of an earlier finding by an ILO Committee of Experts that Peruvian Act No 26845, which sought to change communal indigenous lands to individual title, violated Convention 169.<sup>12</sup> The ILO Committee warned in this case that,

when communally owned indigenous lands are divided and assigned to individuals or third parties, this often weakens the exercise of their rights by the community or the Indigenous peoples and in general they may end up losing all or most of their land, resulting in a general reduction of the resources that are available to Indigenous peoples when they own their land communally.<sup>13</sup>

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<sup>9</sup> Justin Haccius, 'The Interaction of Modern and Custom Land Tenure Systems in Vanuatu, State, Society and Governance in Melanesia' (Discussion Paper, Australian National University, School of International, Political and Strategic Studies, 2011), at 10

<sup>10</sup> See generally *ibid.*

<sup>11</sup> See generally, Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987) Jacinta Ruru, 'The Maori Encounter with Aotearoa: New Zealand's Legal System', in Richardson et. al., *Indigenous peoples and the Law: Comparative and Critical Perspectives*, at 111- 134

<sup>12</sup> David C. Baluarte, 'Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169', *Sustainable Development Law & Policy*, 4/2 (2004), at 11.

<sup>13</sup> Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and tribal convention, 1989 (No.169), made under article 24 of the ILO Constitution by the

Bennett argues that attempts to frame indigenous customary law rights within notions of 'ownership' that are incompatible with indigenous interests in land is a key failing of the existing legal system.<sup>14</sup> Viscount Haldane signalled the inappropriateness of applying English notions of property rights to native title in the 1921 Privy Council case *Amodou Tijani v The Secretary Southern Nigeria*<sup>15</sup>, where he states,

The title such as it is, may not be that of an individual as in this country it nearly always is in some form, but may be that of a community. Such a community may have a possessory title to the common enjoyment of the usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the particular community and its usages in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading<sup>16</sup>

The inherent difficulties associated with attempts to describe indigenous legal concepts utilizing the technical vocabulary of dominant legal regimes was at the forefront of the famous exchanges between Paul Bohannan and Max Gluckman.<sup>17</sup> Bohannan argued in favour of use of native terms to articulate indigenous legal principles and concepts, whereas Gluckman felt that where it was practical to use English terms it was preferable to do so.<sup>18</sup> Allott, according to Bennett, proposed a compromise 'of sorts: the use of a simple, non-technical vocabulary ... stripped of

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General Confederation of Workers of Peru (CGTP) Para 32 (b) cited in Geir Ulfstein, 'Indigenous peoples' Right to Land', *Max Planck Yearbook of United Nations Law*, 8 (2004), 1-48, at 17

<sup>14</sup> Bennett, 'Official' vs. 'Living' Customary Law: Dilemmas of Description and Recognition', at 142

<sup>15</sup> (1921) 2 AC 399

<sup>16</sup> *Ibid.* at 403-404

<sup>17</sup> Bennett, *A Sourcebook of African Customary Law for Southern Africa*, at 39

<sup>18</sup> For an introduction to the history and evolution of legal anthropology see Sally Falk Moore, *Law and Anthropology: A Reader* (Oxford: Blackwell Publishing, 2005). For discussion of the exchange between Bohannan and Gluckman see Sally Falk Moore, 'Comparative Studies: Introduction', in Laura Nader (ed.), *Law in Culture and Society* (University of California Press, 1997), at 341-2.

legalism.’<sup>19</sup> Bennett shows how using Allott’s framework ‘two or more interest-holders may, simultaneously, exercise rights and powers over the same tract of land’, in contrast with the situation under common-law notions of ‘ownership’ that ‘tend to represent the [interests in land] as if one person, or body of people, holds a plenary right out of which fractions are given to others.’<sup>20</sup>

Bennett like Allott before him is inviting us to set aside the restraints of dominant legal traditions in general in order to take a new look at customary rights to land and resources based upon the perspective of Indigenous peoples themselves. What he proposes is a restructuring of notions of property rights and ownership in order to accommodate and show respect for Indigenous peoples’ concepts of land interests. Without such understanding even well intentioned efforts to promote Indigenous peoples’ land rights runs the risk of imposing foreign principles and perceived notions of the structure of Indigenous property regimes rather than securing empowerment of customary law and the enforcement of ancestral land rights.

## **5.2 Native title and its extinguishment**

Customary law both enshrines and is reflected in traditional land rights. On the one hand customary law defines the parameters of land interests whether individual, collective or shared. On the other hand, state recognition of traditional land rights reshapes the applicability of customary law. State recognition of land rights is the coalface, so to say, at which customary rights and positive law come into contact. The definition of this relationship in common law countries has often fallen upon the courts, most notably in the area of native title rights. The notion of native title was first outlined by Chief Justice Marshall J., in the 1823 United States case of *Johnson v McIntosh*<sup>21</sup> which may be seen as a compromise between the rights of settlers and Indigenous peoples, in which Indigenous peoples were granted limited rights of sovereignty subject to the plenary right of Congress to extinguish such rights. This section will examine the application of the notion of native title in common law countries and the controversial use by the legislature and the courts of powers to

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<sup>19</sup> Bennett, *A Sourcebook of African Customary Law for Southern Africa*, at 39

<sup>20</sup> Bennett, 'Official' vs. 'Living' Customary Law: Dilemmas of Description and Recognition', at 147

<sup>21</sup> *Johnson v McIntosh* 21 U.S. (8 Wheat.) (1823)

extinguish native title, which have severely curbed the recognition of Indigenous peoples' ancestral rights.

### 5.2.1 native, aboriginal and traditional title

Variously referred to as native title, traditional title, aboriginal title, Indigenous peoples' residual rights over their traditional lands has been recognized in differing ways, in many common law countries including Australia, Canada, Malaysia, New Zealand, South Africa and the United States of America. In Canada Aboriginal title has been viewed as a sui generis right something that 'cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems.'<sup>22</sup> In Australia native title, first recognised in *Mabo v Queensland (No.2)*<sup>23</sup>, is deemed to rest on customary law of aboriginal peoples and 'though recognized by the common law, is not an institution of the common law.'<sup>24</sup> In the words of Brennan J. in *Mabo*

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by indigenous inhabitants of the territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs<sup>25</sup>

In South Africa traditional title derives 'not by virtue of the common law but by virtue of the Constitution' which places customary law alongside common law as a source of law.<sup>26</sup> While, the Sabah and Sarawak High Court has held that 'native title is not dependent upon any legislation, executive or judicial declaration' as it existed long before any legislation and 'legislation is relevant only to determine how much of those native customary rights have been extinguished.'<sup>27</sup>

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<sup>22</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, Para 112 (per Lamer CJ)

<sup>23</sup> *Mabo v Queensland (No.2)* (1992), 107 A.L.R. 1

<sup>24</sup> Brennan J. In *Mabo v Queensland (No.2)* (1992), 107 A.L.R. 1 at 42, Para 65.

<sup>25</sup> *Ibid.*

<sup>26</sup> *The Richtersveld Community & Others v Alexkor & Others* 1997 BCLR (12 BCLR 1301 CC, 2003)

<sup>27</sup> *Nor Anak Nyawai et al. v Borneo Pulp plantation Sdn Bhd*, [2001] 2 current L.J. 769 (Malaysia) – Sabah and Sarawak High Court.

The 1992 *Mabo* decision was widely seen as giving an immense boost to the indigenous rights movement.<sup>28</sup> The adoption of the 1993 Native Title Act and the decision in 1996 of *Wik Peoples v Queensland*<sup>29</sup>, which held that a grant of a pastoral lease over a given area does not necessarily extinguish native title over the same area, were also widely welcomed. Not all comments were favourable, however, Mick Dodson, for example, highlighted the limitations of the decision, saying,

Let us not pretend that the decision by the high Court [in *Mabo*] recognised our land rights as we understand them. ... We know that the high Court attempted to accommodate indigenous law and custom within the colonial common law but it was only able to understand our law and custom from within the framework of Eurocentric colonial legacy and political systems.<sup>30</sup>

For Mansell the judges in *Mabo*, ‘effectively sought to quell any Aboriginal thoughts of sovereignty’<sup>31</sup> and he warned that ‘what the gods give, they can taketh away’,<sup>32</sup> The prophetic nature of his warning was made all too apparent with the adoption in 1998 of the Native Title Amendment Act which rolled back previous advances in the law and increased possibilities for extinguishing native title. In *Yorta Yorta*<sup>33</sup>, the first case to deal with native title following adoption of the Native Title Amendment Act, the court established two key requirements for the proof of native title: society and continuity.<sup>34</sup> *Yorta Yorta* in effect decided that where Indigenous peoples have failed, for whatever reason, to maintain their community and or the practice of their traditional customs and laws their native title cannot be resuscitated. In Barcham’s words Indigenous peoples were required to match an, ‘impossible standard of

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<sup>28</sup> Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, at 244

<sup>29</sup> (1996) 187 CLR 1

<sup>30</sup> See HEROC -*Us Taken-Away Kids* (2007)

<sup>31</sup> Michael Mansell, 'The Court Gives an Inch but Takes Another Mile', *Aboriginal Law Bulletin*, (1992), 4, cited in McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 291

<sup>32</sup> *Ibid.* at 6, cited in McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 387.

<sup>33</sup> *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 455

<sup>34</sup> McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 330

authentic traditional culture'.<sup>35</sup> Although the Court in *De Rose v South Australia*<sup>36</sup> recognised the compatibility of 'evolutionary traditional law' with the requirement for continuity,<sup>37</sup> subsequent cases such as *Larrakia*<sup>38</sup> and *Bodney v Bennell*<sup>39</sup> have shown Australian Courts to have little interest in the reason for any interruption in the observance of traditional law and custom.<sup>40</sup>

In Canada, Indigenous peoples' native title rights were significantly strengthened by the adoption of section 35 of the Constitutional Act 1982, which created obligations to recognise 'existing' aboriginal and treaty rights. The extent of this obligation with regard to aboriginal rights was fleshed out in *R v Sparrow*<sup>41</sup>, which, McHugh claims, 'confirmed the existence of free-standing aboriginal rights apart from aboriginal title.'<sup>42</sup> These rights arose, explain Barsh and Youngblood Henderson, where 'a 'practice' existed prior to accession of Crown sovereignty, and had not been properly extinguished by the Crown prior to the Constitutional Act of 1982'.<sup>43</sup> This was not, however, recognition of the doctrine of continuity, which would have required the state to recognise all un-extinguished, rights as subsisting native title.<sup>44</sup> Any optimism Indigenous peoples might have had that the Supreme Court would prove sympathetic

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<sup>35</sup> M. Barcham, 'The Limits of Recognition', in B Smith and F. Morphy (eds.), *The Social Effects of Native Title* (Australian National University Press, 2007).

<sup>36</sup> *De Rose v South Australia* (2003) 133 FCR 325

<sup>37</sup> *Ibid.*

<sup>38</sup> *Risk v Northern Territory* [2006] FCA 404 Mansfield J: The Larrakia community of 2005 is a strong vibrant and dynamic society. However, the evidence demonstrates an interruption to the Larrakia people's connection to their country and in their acknowledgement and observance of their traditional laws and customs so that the laws and customs they now respect and practice are not traditional as required by s 223 (1) of the NT Act, at 839

<sup>39</sup> *Bodney v Bennell* (2008) 167 FCR 84

<sup>40</sup> McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 349

<sup>41</sup> *R v Sparrow* [1990] 1 S.C.R. 1075

<sup>42</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 471

<sup>43</sup> Barsh, 'The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand', at 998

<sup>44</sup> For a detailed study of the potential role of the doctrine of continuity in Canadian jurisprudence see Michael Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge', (York University, 2005).



to indigenous issues, were dashed, McHugh claims,<sup>45</sup> by a series of judgments including the *Van der Peet* trilogy<sup>46</sup> and *R v Pamajewon*.<sup>47</sup> The *Van der Peet* decision adopted a controversial 'integral to a distinctive culture' test for identification of indigenous rights<sup>48</sup>, which requires that not only must a practice be shown to be pre-colonial it must be shown to have been central to the first nations culture.<sup>49</sup> Halewood distinguishes the integral to a distinctive culture test, which applies to rights protected by article 35 (1) of the Constitution Act from the wider range of common law rights arising under the doctrine of continuity, only some of which, he says, will meet the *Van der Peet* test.<sup>50</sup> Halewood favours a policy providing for recognition of both the doctrine of continuity and the integral to a distinct culture test arguing that 'the overall effect of recognizing the doctrine of continuity, along with the 'integral to a distinctive culture test', would be that a wider range of aboriginal rights ... would be protected'.<sup>51</sup> The Supreme Court in the case of *Delgamuukw v British Columbia*<sup>52</sup> distinguished recognition of rights from recognition of title and established a separate test for the former stating in Lamer C.J.'s words, that '... under the test for aboriginal title, the requirement that the land be integral to the distinctive culture is subsumed by the requirement of occupancy.'<sup>53</sup> The Supreme Court did not want to be the arbiter however of what any final agreement on land rights would look like and it has consistently pushed the states to negotiate with indigenous peoples rather than to enter into litigation.

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<sup>45</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* 471

<sup>46</sup> *R v Van der Peet* [1996] 2 SCR 507; *R v Smokehouse Ltd*[1996] 2 SCR 672; *R v Gladstone* [1996] 2 SCR 723

<sup>47</sup> *R v Pamajewon* [1996] 138 D.L.R. (4<sup>th</sup>) 204 (SCC)

<sup>48</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*, at 471

<sup>49</sup> Barsh, 'The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand', at 998

<sup>50</sup> Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge', at 202-3

<sup>51</sup> *Ibid.*, at 244

<sup>52</sup> *Delgamuukw v British Columbia* [1997] 3 S.C.R. – 1010

<sup>53</sup> *Ibid.* at Para. 111

Recognition of traditional title in South Africa arose within the framework of Indigenous peoples' invocation of their rights to restitution of lands under the Constitution and the *Restitution of Land Rights Act 1994*.<sup>54</sup> The 1994 Restitution Act is significantly different from the Australian Native Title Act, in that it breaks with the notion of establishing continuity as a condition for recognition of title.<sup>55</sup> It is in the words of Choudree and McIntyre, 'dealing with rights which have been acknowledged to have been 'taken away' and are being 'given back'.'<sup>56</sup> This difference in focus was to have a significant impact in the case of the *Richtersveld Community and others v Alexkor Limited and the Government of the Republic of South Africa Case*.<sup>57</sup> In that case Viver ADP, at the Supreme Court of Appeal, found that the Richtersveld Community customary right of ownership, which had survived the annexation by the British Crown, constituted a 'customary law interest under their indigenous customary law entitling them to exclusive occupation and use of the subject land and that its interest was akin to the right of ownership held under common law,'<sup>58</sup> that is a 'right in land.'<sup>59</sup> Although, the court found it was unnecessary to decide on the issue of whether or not the doctrine of aboriginal title forms part of South African common law, its decision has been described as 'akin to', or an 'implied', application of the doctrine of aboriginal title.<sup>60</sup> That said, the *Richtersveld* decision emphatically divorces traditional title based on indigenous customary law from the common law, holding 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

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<sup>54</sup> George Mukundi Wachira, 'Applying Indigenous peoples' Customary Law in Order to Protect Their Land', *Indigenous Affairs* December (2010), at 10

<sup>55</sup> Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, at 241-2 referring to the work of Rajesh Choudree, and Gregory McIntyre, 'Restitution of Land in Two Jurisdictions', *The South African Journal Law Journal* (1997), at 114.

<sup>56</sup> Choudree, 'Restitution of Land in Two Jurisdictions', at 187

<sup>57</sup> No 488/2001 (Mar 24, 2003)

<sup>58</sup> *Ibid.* at Para. 27 cited in Gilbert *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, at 67

<sup>59</sup> *Ibid.* at Para 8.

<sup>60</sup> Marica Barry, 'Now Things Must Happen: Richtersveld and the Dilemmas of Land Reform in Post-Apartheid South Africa', *South African Journal of Human Rights*, 20 (2004), at 368

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.<sup>61</sup>

This decision takes custom out from under the heel of common law and, it is posited, distances Indigenous peoples' traditional title from the powers of extinguishment associated with the notion of 'residual right of occupancy'<sup>62</sup> delineated by Marshall in the *McIntosh* case, almost two centuries ago. The *Richtersveld* case has been relied upon in another landmark decision by the Supreme Court of Belize, in the case of *Cal v Attorney General*<sup>63</sup> where the court found that the Maya communities of Conejo and Santa Cruz had communal title to their lands based upon 'Maya customary land tenure.'<sup>64</sup> In his judgement Chief Justice Abdulai Conteh opined 'it is my considered view that both customary international law and general principles of international law would require that Belize respect the rights of indigenous peoples to their lands and resources.'<sup>65</sup>

The widespread recognition of native title demonstrates a clear state practice of recognising customary law as the basis for the identification and adjudication of Indigenous peoples rights over their lands. The recognition of ancestral land rights is at one and the same time acceptance of Indigenous peoples' rights to their customary laws and to the lands they describe, it is also recognition of the role of customary law in securing Indigenous peoples human rights.

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<sup>61</sup> *Alexkor Ltd & Another v the Richtersveld Community & Others*, BCLR (12 BCLR 1301 CC, 2003), Para 51

<sup>62</sup> Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, at 58

<sup>63</sup> *Cal v Attorney General* 46 ILM 1022 (2007)

<sup>64</sup> *Ibid.* Para 67

<sup>65</sup> *Ibid.* Para 127

### 5.2.2 extinguishing native title

Native title as a system for recognition and protection of indigenous land rights, comes with a stinger in the tail in the form of what Erica-Irene Daes describes as an ‘illegitimate assumption of State Power to extinguish such title.’<sup>66</sup> The notion of native title delineated by Justice Marshall’s in *Johnson v McIntosh*<sup>67</sup> is a double-edged sword, providing limited rights to Indigenous peoples over their own lands and territories while vesting plenary power in the State to unilaterally override and extinguish their ancestral title.<sup>68</sup> A relatively recent application of this principle occurred in the case of the *Tee-Hit-Ton Indians v. United States*<sup>69</sup> where the US Supreme court held that (subject to some limited exceptions) the United States may ‘confiscate the land or property of an Indian tribe without due process of law and without paying just compensation.’<sup>70</sup> Daes highlights the racially discriminatory treatment of Indigenous peoples’ land rights by the court which in its ‘wisdom’ excluded lands held under native title from the protection granted to all other forms of property under the constitution.<sup>71</sup>

In 1975 the International Court of Justice in its Advisory Opinion in the *Western Sahara Case* firmly debunked the theory of *terra nullius*.<sup>72</sup> In the words of Judge Ammoun, Vice-President of the Court, ‘the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned.’<sup>73</sup> The High Court in *Mabo*, while accepting this view took the position that it had no power to take any decision that would ‘fracture the skeletal principle of our legal system.’<sup>74</sup> Its clear dilemma was how to recognise indigenous

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<sup>66</sup> E/CN.4/Sub.2/2001/21, Para 38

<sup>67</sup> *Johnson v McIntosh* 21 U.S. (8 Wheat.) (1823)

<sup>68</sup> Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors*, at 58

<sup>69</sup> *Tee-Hit-Ton Indians v. United States* 348 U.S. 272 (1995).

<sup>70</sup> Erica-Irene Daes, ‘Indigenous Peoples and Their Relationship to Land: Final Working Paper’, E/CN.4/Sub.2/2001/21, (2001), Para. 45

<sup>71</sup> Ibid.

<sup>72</sup> Referring to the decision of the International Court of Justice in its Advisory Opinion on Western Sahara (62) (1975) ICJR,

<sup>73</sup> 175 C.L.R. at 29, 32-33, Para 86

<sup>74</sup> Ibid. Para 43 (per Brennan J.)

land rights without undermining property rights granted to settlers and immigrants across Australia. For Anaya the Court was ‘bowing to political considerations akin to those prevalent in *Johnson v McIntosh*’,<sup>75</sup> and the notion of native title as devised by Marshall served the purpose well. Brennan J., describes Native title as a residual right that having survived ‘the Crown’s acquisition of sovereignty, burdens the Crown’s radical title.’<sup>76</sup> Being a burden on the Crown’s title it is extinguishable by specific acts of the legislature. For Mansell *Mabo* demonstrates the racist position that ‘Indigenous peoples’ interests in land are something less than the interests of European.’<sup>77</sup> Despite its failings, *Mabo* had raised significant expectations for recognition of indigenous land rights. These were dashed with the adoption of the 1998 Native Title Amendment Act and trampled on in cases such as *Yorta Yorta*,<sup>78</sup> which set the bar for recognition of native title at an almost impossible level.<sup>79</sup> In 2005 the Committee on Elimination of Racial Discrimination recommended that Australia review the requirement of such a high standard of proof, ‘bearing in mind the nature of the relationship of Indigenous peoples to their land.’<sup>80</sup>

The cruellest irony is the manner in which Australian courts have rewarded policies of displacement of Indigenous peoples from their lands, destruction of their traditional societies and the undermining of their customary legal regimes as the reasons for denying recognition of native title. In the view of Aboriginal lawyer Noel Pearson, ‘[a]n horrendous burden of proof... [has been] placed upon native claimants purely through the misconception of title arising from misapplication of the common law.’<sup>81</sup> This misconception he argues derives from an erroneous assumption that Native title

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<sup>75</sup> Anaya, *Indigenous Peoples in International Law*, at 198

<sup>76</sup> 175 C.L.R. at 29, 32-33, Para 63

<sup>77</sup> Mansell, ‘The Court Gives an Inch but Takes Another Mile’, at 6, cited in McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*. at 291

<sup>78</sup> *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 455

<sup>79</sup> Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors*, at 72

<sup>80</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia, U.N. Doc. CERD/C/AUS/CO/14, para.17 (Apr. 15, 2005) cited in Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors*, at 72-73

<sup>81</sup> N. Pearson, ‘Land Is Susceptible of Ownership’, *High Court Centenary Conference* (Canberra 2003), 10-13. in McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 363

springs from the rights and interests established under traditional laws and customs.<sup>82</sup> The more appropriate approach in his view would be to recognise Indigenous peoples' rights 'to occupy and possess the land under the authority of, and in accordance with the[ir] traditional laws and customs.'<sup>83</sup> Pearson's point is that native title should always be found where there is occupation. This would accord with the doctrine of continuity and the presumption of ownership arising from possession under common law. For Pearson evidence of customary law is relevant only with regard to the exercise of rights or interests arising from possession.<sup>84</sup>

In language reminiscent of Brennan, J.'s dictum in *Mabo*, the Canadian Supreme Court in *Delgamuukw* described Aboriginal title as a 'burden' on the 'Crown's underlying title,' that crystallized at the time of sovereignty.<sup>85</sup> For Borrows the notion that 'Aboriginal title is a burden on the Crown's underlying title' is the magic like incantation, the mantra of sovereignty, which by its mere assertion 'is said to displace previous Indigenous titles by making them subject to and a burden on, another people's higher legal claims.'<sup>86</sup> The decision, he says, 'subordinates Aboriginal legal systems and limits the uses to which Aboriginal peoples can put their lands.'<sup>87</sup> Aboriginal peoples are he claims being asked to accept 'the notion that they are conquered'<sup>88</sup> and submit to treatment in a fashion 'analogous to serfs, dependent on their lord to hold the land in their best interests.'<sup>89</sup> Justice Douglas Lambert discussing the legacy of *Delgamuukw* notes the increased openness shown by the court to reception of evidence in the form of oral histories.<sup>90</sup> He also notes the 'extensive core of aboriginal self-government rights' that are inherent in recognition of 'aboriginal title', rights he suggests may at some point be deemed to include the right to 'an integrated aboriginal justice system' under section 35(1) of the

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> [1997] 3 S.C.R. – 1010

<sup>86</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 95

<sup>87</sup> Ibid., at 97

<sup>88</sup> Ibid., at 98

<sup>89</sup> Ibid., at 99

<sup>90</sup> Hon. Mr. Justice Douglas Lambert., '*Van Der Peet and Delgamuukw: Ten Unresolved Issues*', *University of British Columbia Law Review*, 32/2 (1998), 249-270, at 264

Constitution.<sup>91</sup> Lambert suggests that a more sympathetic reading of the whole notion of residual title would provide ample opportunities for greater equity in recognition of indigenous rights. For Borrows, however, the inherent presumption of a Crown right to subordinate Aboriginal title as part of the doctrine of residual title is of itself wrong in law, and can never be the basis for reconciliation, as he puts it, ‘If the rule of law cannot be relied upon to overcome the political and economic exploitation of Aboriginal peoples, what assurances do we have that it will not be equally vulnerable in situations involving non-aboriginal Canadians?’<sup>92</sup>

The 1982 Constitution Act in effect terminated the Crown’s unilateral right to extinguish title. In *R v Sparrow*<sup>93</sup> the Supreme Court established a ‘justification test’ requiring the government to show a ‘substantial and compelling’ legislative objective, where Indigenous peoples’ rights were ‘infringed’ contrary to the Crown’s fiduciary obligations towards First Nations under the 1982 Act.<sup>94</sup> In *Delgamuukw* the Chief Justice set out a list of ‘legislative objectives’ that might be read as ‘compelling and substantial’ saying,

The development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kind of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title<sup>95</sup>

The Chief Justice’s list includes all of the most threatening development activities from the perspective of Indigenous peoples, including dam building, mining, oil and gas exploration, the lumber and cattle ranching industries and associated colonisation as well as imposition of protected areas. Labelling such potentially devastating threats to the cultural integrity and land rights of Indigenous peoples as merely

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<sup>91</sup> Ibid. at 268

<sup>92</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 114

<sup>93</sup> 1990 ISCR 1075

<sup>94</sup> Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors*, at 74

<sup>95</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1111 (S.C.C.), per Lamer C.J.C

‘infringements’ is says Borrows ‘an understatement of immense proportions.’<sup>96</sup> Xanthaki claims the Chief Justice’s long list falls below international standards requiring that ‘limitations on human rights must be interpreted and applied restrictively.’<sup>97</sup>

In 1999 the Human Rights Committee in its Report on Canada recommended that, ‘the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant.’<sup>98</sup> According to Morse, where rights of Indigenous peoples have been recognised under section 35 of the Canadian Constitution Indigenous peoples may in appropriate circumstances be entitled to exercise a right of veto in relations to initiatives infringing their constitutionally protected rights.<sup>99</sup> A series of cases between 2004 and 2005 have, he claims, placed a ‘legally enforceable duty’ upon federal and provincial governments to consult with Indigenous peoples whenever they are contemplating ‘initiatives that could infringe upon aboriginal or treaty rights’.<sup>100</sup> This obligation exists whether or not those rights are potentially entitled to recognition under law or have in fact been confirmed by law.<sup>101</sup>

Native title for all its weaknesses has had a significant impact on land rights, in Australia for example the indigenous Estate including native title lands now accounts for almost thirty percent of the total landmass. A large percentage of the lands are, however, in more remote areas of the continent, and the majority of lands are held under titles granted by statute and not native title. With regards to Indigenous land holdings in Canada, Morse has set out in detail the comprehensive land claims of First Nations, Inuit and Métis peoples based upon their subsisting title within the

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<sup>96</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 99

<sup>97</sup> Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, at 248

<sup>98</sup> Doc.CCPR/C/79 Add.105

<sup>99</sup> Bradford W. Morse, ‘Indigenous peoples of Canada and Their Efforts to Achieve True Reparations’, in Federico Lenzerini (ed.), *Reparations for Indigenous peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008), at 291

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*



framework of the federal governments Comprehensive Land claims Policy.<sup>102</sup> Of these the Nunavut land claim is by far the largest settlement, at 1,900,000 square kilometres. The settlement establishes Nunavut as a separate State within the Canadian Federal system, with its own territorial government rather than an Inuit system of self-government. A strategy not without risks as McHugh notes<sup>103</sup> citing the 2001 *Kadlak* case for the view that

The risk is that the value of universal. Political and economic equality will replace the values of consensus decision-making, respect for the wisdom of elders, the extended family, sharing and land-based subsistence which are the hallmarks of Inuit community life.<sup>104</sup>

The same decision notes that '[n]ationally Inuit Tapirisat of Canada have indicated a willingness to consider having the charter of rights and Freedom apply to Inuit self-government.'<sup>105</sup> The challenge for the Nunavut legislature and courts will be to find a way to recognise and support collective customary law values while promoting realisation of individual human rights in accordance with the Charter. Canadian settlements have included a mixture of monetary payments and land and resource rights, including rights to share in benefits of resource exploitation. The benefits secured in each case were Morse says dependent on factors, such as '[t]he relative bargaining strength of the parties, the quality of the leadership involved, national politics that determine the party in power, its location in relation to urban centres, the evolution in negotiations and changes in legislation and case law.'<sup>106</sup>

Similar conditions are noted by McRae et al. with regard to land rights negotiations involving aboriginal peoples in Australia where they say, citing Altman, '99.7 per cent of native title areas and 99.8 per cent of non-native title areas' forming part of the

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<sup>102</sup> Ibid. 293 et seq.

<sup>103</sup> McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination*

<sup>104</sup> *Kadlak v Minister of Sustainable Development (Nunavut)* [2001] NUCJ 1.

<sup>105</sup> Ibid.

<sup>106</sup> Morse, 'Indigenous Peoples of Canada and Their Efforts to Achieve True Reparations', at 296

Indigenous estate are located in remote parts of the country.<sup>107</sup> The more isolated the area claimed the more likely Indigenous peoples are therefore to secure recognition of their ancestral rights. That said native title has undoubtedly played an important role in forcing reluctant federal and State governments to negotiate with Indigenous peoples for recognition of their ancestral rights. The process has not been pretty and has fallen far short of an equitable solution of the historic expropriation of lands. A question for the future will be whether it was the best deal Indigenous peoples could have got. Borrows finds significant inroads into Indigenous sovereignty in, for example the Nisga'a Final Agreement, where the Nisga'a were forced to relinquish all future claims over traditional territories not included within the framework of the final agreement, and had to submit their courts to the discipline of the British Columbia Supreme Court, with its very questionable history towards Indigenous peoples rights.<sup>108</sup>

Extinguishment although presumed by the State to void aboriginal title does not erase aboriginal people's views of their links to the land. In the words of Wayne Bergman, Executive Director of the Kimberly Land Council, commenting on the decision by the Australian High Court in *Ward* and his sense that 'each time we go back to court we lose a little more',<sup>109</sup>

even though this extinguishment of our rights is deemed to have taken place in Australian Law, it is not as if that part of the Miriuwung Gajerrong peoples' traditional country has gone away. Nor have the people with responsibilities to care for the country gone away. People do not give up on their law and culture just because Australian law is incapable of recognising it. In this way the decision changes nothing.<sup>110</sup>

Gilbert suggests three areas in which human rights law may intervene with regard to extinguishment. These include judicial oversight of the justifications for

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<sup>107</sup> McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*.

<sup>108</sup> Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, at 106

<sup>109</sup> Wayne Bergmann, 'Miriuwung Gajerrong: An Invitation to Understanding', *Native Title Newsletter*, AIATSIS July/August No.4 (2002), at 5

<sup>110</sup> *Ibid.*, at 5

extinguishment, examination of the relationship between indigenous title and non-indigenous title and the existence of otherwise of discrimination regarding their recognition, and progressive realization of rights to participation and consent.<sup>111</sup> Advances in human rights law may not only strengthen native title it may replace it with a more solid and less malleable right over traditional lands and territories. Such a right would be based upon occupancy and customary law, and would not be so easily overturned, diminished or ignored by the legislature, Crown or other plenary power. The extent of indigenous land rights under international law is the subject of the subsequent section

### 5.3 Rights to land and sacred sites

The special nature of Indigenous peoples' social, cultural and spiritual relationship with their traditional land, territories and freshwater and marine areas is now widely recognised.<sup>112</sup> Special Rapporteur Martinez de Cobo called for understanding of this relationship, in his seminal report saying,

for Indigenous peoples, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is ... essential to understand the special and profoundly spiritual relationship of Indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.<sup>113</sup>

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<sup>111</sup> See discussion in Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, at 80-84

<sup>112</sup> See for discussion of indigenous land rights Daes, 'Indigenous peoples and Their Relationship to Land: Final Working Paper', Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*. For discussion of land rights post adoption of the UN Declaration on Rights of Indigenous peoples see Matthais Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous peoples: An Introduction', in Claire Charters, And Rodolfo Stavenhagen (ed.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous peoples* (Copenhagen: International Work Group for Indigenous Affairs (IWGIA), 2009). Gilbert, *A New Dawn over the Land: Shedding Light on Collective Ownership and Consent*

<sup>113</sup> U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, Para 509

Recognition of this special cultural and spiritual relationship is found in Article 13 (1) of ILO Convention 169, which also recognises the collective nature of such rights.<sup>114</sup> Article 13 is, Thornberry notes, ‘couched in mandatory language’ which he says should lead to a ‘weighting in favour of the special indigenous relationship with land in any contest with State authorities on the interpretation or application of the [Convention’s] specific provisions [on land], when other considerations are evenly balanced’.<sup>115</sup> At the regional level the African Commission on Human and Peoples’ Rights has recognised the fundamental importance of Indigenous peoples’ special attachment to and use of their traditional land ‘for their collective physical and cultural survival as peoples.’<sup>116</sup> In a similar vein, the Inter-American Court of Human Rights in the case of *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*<sup>117</sup> held that

For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy ... to preserve their cultural legacy and transmit it to future generations.<sup>118</sup>

The historic, current and intergenerational aspects of Indigenous peoples’ relationships with their land, territories and resources<sup>119</sup>, is captured in Article 25 of the UN Declaration on the Rights of Indigenous Peoples, which recognises Indigenous peoples right to maintain and strengthen ‘their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their

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<sup>114</sup> ILO Convention 169, Art. 13

<sup>115</sup> Thornberry, *Indigenous Peoples and Human Rights*, at 351

<sup>116</sup> Advisory Opinion of the African Commission on Human and Peoples’ Rights on The United Nations Declaration on The Rights Of Indigenous Peoples, adopted by the African Commission on Human and Peoples’ Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana 2007, Para 12 (b)

<sup>117</sup> *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* 2001 Inter-Am. Ct. H.R. (ser. C) No. 79. Available at: [http://www.escriet.org/caselaw/caselaw\\_show.htm?doc\\_id=405047](http://www.escriet.org/caselaw/caselaw_show.htm?doc_id=405047)

<sup>118</sup> *Ibid.* Para. 149.

<sup>119</sup> Gilbert, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent', at 294

responsibilities to future generations in this regard.’ Article 25 also captures the nature of that relationship as one of not merely rights but of responsibilities. These responsibilities, framed in relation to future generations, are inherent in Indigenous peoples’ spiritual and cultural relations with the land, based as it is on notions of reciprocity encompassed by their customary law regimes. This section reviews the status of Indigenous peoples’ land rights under international law and the role of customary law in the identification and protection of their lands and traditional territories. It then goes on to look specifically at the status of Indigenous peoples’ rights over sacred sites.

### 5.3.1 international recognition of traditional title

The Cobo report recognises indigenous title to their lands based on customary law stating that, ‘land occupied and controlled by Indigenous peoples should be presumed to be indigenous land’,<sup>120</sup> and arguing for immediate transfer of ‘all indigenous reserved land to relevant Indigenous peoples to be controlled and owned by them in accordance with their laws and customs’.<sup>121</sup> It calls for proactive titling and registration of their customary land and water rights<sup>122</sup>; and, calls for international and national recognition of the rights of Indigenous peoples to own their lands communally and to manage it in accordance with their own traditions and culture<sup>123</sup>.’ Erica Irene Daes, argues that lack of effective recognition and protection of indigenous land rights, and discriminatory treatment of their ‘aboriginal title’, ‘accounts for the overwhelming majority of human rights problems affecting Indigenous peoples.’<sup>124</sup> Securing land rights is therefore central to achievement of Indigenous peoples’ rights to life, health, education, to their resources, traditional knowledge, cultural integrity, and self-determination as well as the protection of cultural diversity.

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<sup>120</sup> U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, Para. 519.

<sup>121</sup> U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, Para. 520

<sup>122</sup> U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, Para 523

<sup>123</sup> U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, Para 536

<sup>124</sup> Daes, 'Indigenous peoples and Their Relationship to Land: Final Working Paper', Para 38.

International Labour Organization Conventions 107 and Convention 169 both establish binding legal obligations upon states to recognise ‘collective’ rights of ‘indigenous populations’ and Indigenous peoples’, respectively over the lands they traditionally occupy.<sup>125</sup> Although Convention 107 applies to only a small groups of states these include countries such as Bangladesh and India who between them are home to a very significant proportion of the world’s Indigenous peoples. The ILO Committee of Experts on the Application of Conventions and Recommendations has said, with regard to ILO Convention 107, that

Traditional occupation, whether or not it has been recognised or authorised, does create rights under the convention... ‘traditional occupation’ is imprecise, but it clearly [covers] lands ... whose use has become part of their [the peoples] way of life.<sup>126</sup>

Convention 169 provides more extensive protection recognising the rights of Indigenous peoples to ownership and possession of the lands they traditionally occupy, and requiring the adoption of measures, to safeguard their rights to use lands ‘not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities’.<sup>127</sup> It requires states to take necessary steps to identify and protect lands traditionally occupied by Indigenous peoples<sup>128</sup> and to establish adequate procedures to resolve indigenous land claims<sup>129</sup>. The state must carry out these obligations with attention to the requirements of Article 5, which requires protection of the cultural religious and spiritual values and practices of Indigenous peoples and in accordance with article 8 (1), which requires ‘due regard’ be given to Indigenous peoples’ ‘customs or customary laws’. Taking Articles 5 and 8 into account leads Ulfstein to suggest that indigenous acquisition of ‘ownership’

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<sup>125</sup> For a detailed analysis of the treatment of indigenous land rights under Convention 169 see generally Ulfstein, ‘Indigenous peoples’ Right to Land’, where he also examines the treatment of Saami land rights in Norway.

<sup>126</sup> Individual Observation, India, 1990, cited in THORNBERRY, *Indigenous peoples and Human Rights*, at 334

<sup>127</sup> ILO Convention 169, Article 14

<sup>128</sup> ILO Convention 169 Article 14(2)

<sup>129</sup> ILO convention 169 Article 14 (3)

‘should not necessarily require exclusive control to the same extent as under ordinary national property law,’ in order to qualify as occupation necessary for the recognition of title.<sup>130</sup> Ahren has made similar arguments, with regard to interpretation of the provisions on land rights in the UN Declaration on the Rights of Indigenous peoples.<sup>131</sup>

The Declaration establishes distinct levels of protection for land traditionally held but no longer occupied by Indigenous peoples and lands and territories they still occupy. With regard to the former Article 26 recognises Indigenous peoples’ rights – without defining the extent of such rights- to the lands and territories which they have ‘traditionally owned or occupied or otherwise used or acquired.’<sup>132</sup> Gilbert and Doyle see this as an, ‘ambiguous compromise’ recognising indigenous rights but leaving it to national jurisdictions to interpret the scope of those rights.<sup>133</sup> Ahren argues that the generic reference to ‘rights’ in Article 26 when read in the context of article 25 of the Declaration must be presumed to refer to both ‘cultural and property rights.’<sup>134</sup> Ulfstein points out that the Human Rights Committee in its General Comment 23 and in a series of cases including *Lubicon Lake Band*, the first and second *Lansmann* cases and the *Mahuika* case, has set out the parameters of state obligations to take ‘positive legal measures’ to protect the material basis for Indigenous peoples’ culture<sup>135</sup>. The Human Rights Committee in its General Comment 23 notes that Indigenous peoples’ culture may manifest itself as

A particular way of life associated with the use of land resources ... includ[ing] such traditional activities as fishing or hunting and the right to live in reserves protected by law.<sup>136</sup>

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<sup>130</sup> Ulfstein, 'Indigenous peoples’ Right to Land', (at 19

<sup>131</sup> Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous peoples: An Introduction', at 210

<sup>132</sup> UN Declaration, Article 26

<sup>133</sup> Gilbert, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent', at 298

<sup>134</sup> Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the Un Declaration on the Rights of Indigenous peoples: An Introduction', at 209

<sup>135</sup> Ulfstein, 'Indigenous peoples’ Right to Land', at 8

<sup>136</sup> CCPR General Comment 23, The rights of minorities (article 27) (8 April 1994)

The Committee Ulfstein notes ‘emphasizes that ... Article 27 of the International Covenant on Civil and Political rights sets an absolute barrier with no margin of appreciation’ with regard to ‘measures whose impact amounts to a denial of the right.’<sup>137</sup> The Committee clearly advocates for recognition and protection of Indigenous peoples’ way of life, which includes and is defined by their customary laws and practices.

With regards to the lands and territories Indigenous peoples ‘possess’, the UN Declaration recognises Indigenous peoples’ rights of ownership and occupation as well to their use, development and control.<sup>138</sup> Ahren notes that ‘the extent of Indigenous peoples’ ownership rights under Article 26 of the Declaration will rest upon the interpretation given to the term ‘possess’ as it relates to lands and territories. He argues that,

the term has to be customized to an Indigenous peoples’ rights context. In other words, one cannot necessarily expect and demand the same level of intensity and exclusivity with regard to land utilization in indigenous cultures compared to non-indigenous cultures.<sup>139</sup>

Building on this position he remarks, citing McNeil, that ‘possession’ in the context of Indigenous peoples should be seen as ‘possession in fact’, giving rise in turn to a presumption that Indigenous peoples also have ‘possession in law’<sup>140</sup> From the perspective of those claiming continuing indigenous title based upon subsisting sovereign rights, ‘possession’ of itself raises a presumption of ‘customary tenure’ sufficient to ground recognition of rights under Article 26.

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<sup>137</sup> Ulfstein, 'Indigenous peoples' Right to Land', at 9

<sup>138</sup> UN Declaration, Article 26

<sup>139</sup> Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous peoples: An Introduction', at 210

<sup>140</sup> See Kent McNeil, 'Emerging Justice?', *Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) at 141, cited in Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous peoples: An Introduction', at 211



The central role of customary law for the recognition, protection and adjudication of Indigenous peoples' land rights is clearly set out in of the Declaration. Paragraph 3 of Article 26 obliges States to give legal recognition and protection to Indigenous peoples' lands and territories in a manner which gives 'due respect' to their 'customs, traditions and land tenure systems.'<sup>141</sup> Article 27 of the Declaration obliges states to give 'due recognition' to Indigenous peoples' customary laws in the recognition and adjudication of their rights pertaining to their lands, territories and resources, including those which they have traditionally owned or otherwise occupied or used.<sup>142</sup> To achieve this end states are obliged to establish, 'a fair, independent, impartial, open and transparent process' and to do so 'in conjunction with Indigenous peoples'. The result, while stopping short of requirement that recognition and adjudication of land rights be solely based on customary law, does in effect place custom at the heart of the process for identifying and delimiting rights over lands and for the adjudication of any disputes that may arise in relation to them. This has ramifications beyond the relationship between Indigenous peoples and the state and may in effect bring customary law into the process of adjudication of disputes between Indigenous peoples and third parties. This is significant as it recognises the role customary law has to play beyond the confines of Indigenous peoples' internal affairs if 'intercultural justice' is to be achieved.<sup>143</sup> It also marks an important step towards the reincorporation of custom within the body of legal pluralism governing land rights from which it has been illegitimately excluded through the discredited policies of colonial and post-colonial legal governance. An important question is what customs, traditions and land tenure systems are states obliged to 'respect'. Recent cases in South Africa would argue in favour of recognition of so-called 'living' custom as opposed to 'official (codified) custom.'<sup>144</sup> This runs counter to the application of

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<sup>141</sup> UN Declaration, Article 26

<sup>142</sup> UN Declaration, Article 27

<sup>143</sup> Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm', at 408

<sup>144</sup> See, for example, the discussion on living custom in Bennett, 'Official' Vs 'Living' Customary Law: Dilemmas of Description and Recognition'. See also Annika Classens, 'Customary Law and Zones of Chiefly Sovereignty: The Impact of Government Policy on Whose Voices Prevail in the Making and Changing of Customary Law', in Annika Classens and Ben Cousins (eds.), *Land, Power and Custom:*

continuity requirements as applied in Australia and may prove problematic where there are conflicting bodies of custom or distinct versions of custom within a specific Indigenous people. It is important however to be aware of and respectful of changes in customary rights within indigenous groups. This is particularly important in the light of advances made by Indigenous women to secure changes of custom responding to their demands for increased equality and reflecting changing realities in rural societies in particular.<sup>145</sup>

The Inter-American Court has established that ‘the right to property protected under Article 21 of the American Convention, interpreted in light of the rights recognized under common Article 1 and Article 27 of the ICCPR’ entitles Indigenous peoples to ‘enjoy property in accordance with their communal tradition.’<sup>146</sup> In doing so it does not impose communality on Indigenous peoples but entitles them within the framework of their communal customs laws and traditions to organise their land holdings as they see fit. Based on the foregoing the Court in the case of *Saramaka v Suriname*<sup>147</sup> held that:

the members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory.<sup>148</sup>

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*Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town: Ohio University Press, 2008).

<sup>145</sup> See, for example, Annika Classens and Sindiso Mnisi, 'Rural Women Redefining Land Rights in the Context of Living "Customary Law' *South African Journal of Human Rights*, 25/3 (2009), 491-516.

<sup>146</sup> *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), Para 175

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.* Para 176

The jurisprudence of the Inter-American system has found indigenous communal land rights to stem from ‘ancestral use or occupancy’ and not from any act of the state.<sup>149</sup> It also recognises the continuation of these rights where Indigenous peoples have been dispossessed of their lands. In the words of the Inter-American court in the case of the *Sawhoyamaxa Indigenous Community v Paraguay*<sup>150</sup>

The members of Indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith.<sup>151</sup>

A recent Report by the Inter- American Commission on Human Rights takes the view that recipients of land under large land grants or where the state has sold off indigenous lands are ‘unlikely to qualify as good faith innocent purchasers.’<sup>152</sup> Referring to the decision in *Sawhoyamaxa Community* the IACHR Report claims that ‘neither the loss of material possession, nor prohibitions on access to traditional territories by the formal owners are obstacles to the continuous territorial rights of indigenous communities.’<sup>153</sup> This is in direct contrast with the position taken by the courts in Australia where a break in continuity for whatever purpose has been taken to extinguish native title, and raises questions regarding the conformance of judicial approaches to native title with international human rights law.

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<sup>149</sup> IACHR, *Access to Justice and Social Inclusion: the Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, Para 23 cited in IACHR, 'Inter-American Commission on Human Rights. Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System', at Para 68.

<sup>150</sup> I/A Court in the case of *Sawhoyamaxa Indigenous Community v Paraguay*. Merits Reparations and Costs. Judgment of March 29, 2006. Series C No 146

<sup>151</sup> I/A Court in the case of *Sawhoyamaxa Indigenous Community v Paraguay*. *Merits Reparations and Costs*. Judgment of March 29, 2006. Series C No 146, Para 128

<sup>152</sup> IACHR, 'Inter-American Commission on Human Rights. Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System', at 53

<sup>153</sup> *Ibid.* at 54

The treatment of relocation of Indigenous peoples under Convention 169 is far from adequate, allowing as it does for forced relocation ‘as an exceptional measure’, where the state has been unable to secure their ‘prior informed consent’.<sup>154</sup> Considering the widespread failure of states parties to ILO Convention 169 to establish functional procedures for consultation with Indigenous peoples there is little to give confidence that the Convention can prevent dispossession of indigenous lands in the face of state development plans. Under Article 16, Indigenous peoples are, where possible, to be given an opportunity to return to their traditional lands<sup>155</sup>, failing which they are to be given commensurate lands except where they express a preference for monetary or in kind compensation.<sup>156</sup> The UN Declaration goes further providing for redress in cases in which Indigenous peoples’ lands and/or territories have been ‘confiscated, taken, occupied or damaged without their free prior informed consent.’<sup>157</sup> Redress is to take the form of restitution where possible and where this is not possible ‘just, fair and equitable compensation.’<sup>158</sup> The Committee on the Elimination of Racial Discrimination takes a similar position in its General Recommendation No.23 promoting a return where possible to their lands saying compensation should be a remedy of last resort.<sup>159</sup>

The extensive recognition of the role of customary law in defining and adjudicating Indigenous peoples rights to land under international law, and the application of such principles in the jurisprudence of human rights bodies supports the thesis proposal that respect and recognition for customary law is vital to the realisation of human rights and forms part of customary international law.

### 5.3.2 access to and control of sacred sites

Access to and enjoyment of sacred sites is an issue of concern for Indigenous peoples in many parts of the world. Sacred sites may include mountains, lakes, rivers and streams and other landscapes. The control and maintenance of these sites may have

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<sup>154</sup> ILO Convention 169, Article 16 (2)

<sup>155</sup> ILO Convention 169, Article 16 (3)

<sup>156</sup> ILO Convention 169, Article 16 (4)

<sup>157</sup> UN Declaration, Article 28

<sup>158</sup> Ibid.

<sup>159</sup> CERD General Recommendation No. 23: Indigenous peoples UN Doc A/52/18, annex V, Para 5.

fallen outside the control of the relevant Indigenous peoples as a result of colonization, forced displacement, war and/or resource exploitation. They may also be the subject of competing use brought on by commercial enterprise, tourism, national conservation policies and development policies. UNESCO has sponsored a number of international meetings to examine the links between sacred sites and protection of Cultural and Biological Diversity. At one of these, an international symposium in Tokyo in 2005, participants adopted a Declaration on the Role of Sacred Natural Sites and Cultural Landscapes in the Conservation of Biological and Cultural Diversity, which calls upon

governments, protected area managers, the international system, governmental authorities and non-governmental organizations and others to respect, support and promote the role of Indigenous peoples and local communities, as custodians of sacred natural sites and cultural landscapes, through the rights-based approach,<sup>160</sup>

The Declaration does not however address the issue of Indigenous peoples' rights to restitution of ancestral rights over sacred sites. The reluctance to address this thorny issue in international fora appears to be grounded upon concerns regarding conflicts over heavily disputed sacred sites, such as Jerusalem, which pose a threat to world peace.<sup>161</sup> The result, however, is a failure to address Indigenous peoples' legitimate claims for international support to secure their rights to their places of worship.

In the United States the courts have shown a marked reluctance to take action to recognize Indigenous peoples' rights over their sacred sites, or to protect those sites from harm, even in the face of activities that may destroy indigenous religion. In what

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<sup>160</sup> Declaration on the Role of Sacred Natural Sites and Cultural Landscapes in the Conservation of Biological and Cultural Diversity International Symposium 'Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes', held by UNESCO and the United Nations University, Tokyo, Japan, 30 May to 2 June 2005.

<sup>161</sup> During the meeting a proposal for inclusion in the declaration of a provision recognising Indigenous peoples rights to restitution of their sacred sites was met with strong resistance by participants claiming it would add fuel to the conflicts over Jerusalem. (based upon the author's notes as a party to the negotiations leading to adoption of the declaration)

Brown refers to as a particularly ‘mean-spirited’ decision,<sup>162</sup> the US Supreme Court in *Lyng v Northwest Indian Cemetery Protective Association*<sup>163</sup> refused an application to stop the building of a logging road and issuing of logging licences in Chimney Rock, a place which served as ‘an integral and indispensable part of Indian religious conceptualization and practice’.<sup>164</sup> Despite recognising that the ‘logging and road-building projects at issue ... could have devastating effects on traditional Indigenous religious practice’ Justice O’Connor presenting the court’s decision held that ‘[w]hatever rights the Indians may have to the use of the area ... those rights do not divest the Government of its right to use what is, after all, its land.’<sup>165</sup> Justice Brennan in a dissenting opinion, joined by Justices Marshall and Blackmun, sees the case as ‘another stress point in the longstanding conflict between two disparate cultures – the dominant Western culture, which views land in terms of ownership and use, and that of the Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred.’<sup>166</sup> In their dissenting opinion they denounce as ‘indefensible’ the abdication by the court of ‘all responsibility for balancing these competing and potentially irreconcilable interests’ and views its decision to turn the task over to the Federal Legislature as effectively bestowing ‘on one party to this conflict the unilateral authority to resolve all future disputes in its favour, subject only to the Court’s toothless exhortation to be ‘sensitive’ to affected religions.’<sup>167</sup>

In another landmark case that of *Navajo Nation v. U.S.*<sup>168</sup> several tribes took an action to prevent the use of recycled water containing human waste for snowmaking on the San Francisco Peaks. Their claim asserted that a decision by the Forest Service to approve the contested activity would lead to desecration of one of their most sacred

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<sup>162</sup> Michael Brown, *Who Owns Native Culture* (Cambridge, Massachusetts: Harvard University Press, 2003b), at 166

<sup>163</sup> *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988)

<sup>164</sup> Brown, *Who Owns Native Culture*, at 166

<sup>165</sup> *Lyng v Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) Justice O’Connor cited in Nafziger, et.al *Cultural Law: International, Comparative and Indigenous*, at 39.

<sup>166</sup> Dissenting opinion of Justice Brennan joined by Justices Marshall and Blackmun cited in Nafziger et al. *Cultural Law: International, Comparative and Indigenous*, at 42

<sup>167</sup> Ibid.

<sup>168</sup> *Navajo Nation v. US*, 535 F.3d, at 1072

sites in violation of the Religious Freedom Restoration Act<sup>169</sup>. The Ninth Circuit Court rejected the tribe's claim demonstrating, according to Carpenter et al., a 'familiar fear that if the law were to protect Indian religious and cultural interests, Indians effectively would acquire 'ownership' of the public lands.'<sup>170</sup> The case highlights the lack of sensitivity applied to indigenous rights where the courts are focused on protecting the idealized Western notion of inviolable property rights, despite the cultural harm this may occasion. It also fails to take into consideration possibilities of shared occupancy rights and Indigenous notions of custodianship and stewardship as opposed to the exclusionary notions of property, which dominate western law.

The relationship between sacred lands and commercial development has also proven controversial in Australia. In the Hindmarsh Bridge Controversy, members of the Ngarrindjeri people opposed construction of a bridge at Hindmarsh Island near the mouth of the Murray River in South Australia concerned it would damage a site central to their well-being.<sup>171</sup> The Ngarrindjeri viewed the bridge linking the Island to the Mainland, as an 'unacceptable affront to the spiritual identity which the Aboriginal community has with the land of its forebears.'<sup>172</sup> Their claims were based upon sacred 'women's business', knowledge of which was included in confidential affidavits only for viewing by women.<sup>173</sup> In 1995 a royal commission came to the conclusion that the secret women's knowledge was a fabrication<sup>174</sup> and permission for the bridge's construction was given. Subsequently, however, Justice von Doussa in *Chapman v Luminis Pty Ltd (No.5)*<sup>175</sup> took the view that it had not been proven that the knowledge was fabricated and that:

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<sup>169</sup> Carpenter et al., 'In Defense of Property', at 104.

<sup>170</sup> The Ninth Circuit cited *Lyng* for the proposition that tribal religious claims could result in 'de facto beneficial ownership of some rather spacious tracts of public property', at 1072, cited in Carpenter et al., 'In Defense of Property', at 105

<sup>171</sup> Diane Bell, 'The Word of a Woman: Ngarrindjeri Stories and a Bridge to Hindmarsh Island', in Peggy Crock (ed.), *Words and Silences: Aboriginal Women, Politics and Land* (Crow's Nest, NSW: Allen & Unwin, 2001), at 118

<sup>172</sup> McRae et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 422.

<sup>173</sup> See discussion of Hindmarsh Island affair in Brown, *Who Owns Native Culture*, at 171 et seq.

<sup>174</sup> *Ibid.* at 177.

<sup>175</sup> *Chapman v Luminis Pty Ltd (No.5)* FCA 1106 (21 Aug. 2001)

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) did not require the Minister to understand and accept the reasoning why use of an area would cause harm in terms of Aboriginal spiritual belief and tradition. Rather, it required that the beliefs were genuinely held and that in terms of those beliefs the proposed activity gave rise to a threat of injury or desecration.<sup>176</sup>

Although the *Chapman* decision vindicated the women elders who were the source of the relevant ‘sacred women’s business’, it failed to prevent the construction and opening of the bridge in 2001.<sup>177</sup>

The Hindmarsh case highlighted an issue of much concern for Indigenous peoples regarding requirements to disclose secret knowledge as part of judicial or other proceedings where they seek to secure or protect their ancestral rights. In the Hindmarsh Bridge Controversy evidence of ‘women’s business’ was originally provided on the basis that it would only be accessible to women. Following a change of government, the Ngarrindjeri request that their further evidence be taken by a female Judge and reviewed by a woman Minister was denied, at which time, Bell says, the women decided that the confidential parts of their story could not be protected and refused to give any further evidence.<sup>178</sup>

Just how widespread knowledge has to be in order to be considered sufficient to demonstrate the existence of a sacred site or other indigenous right is one of the questions posed by Brown in his analysis of the case.<sup>179</sup> Diane Bell, an anthropologist who spent five years investigating the Hindmarsh case, argues that:

In an oral culture knowledge is restricted to certain persons; for the system to work, those who are not privy to the ‘inside knowledge’ must accept the authority of those persons who are privy, and the wisdom of the restrictions.

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<sup>176</sup> Ibid.

<sup>177</sup> Brown, *Who Owns Native Culture*, at 203.

<sup>178</sup> Bell, ‘The Word of a Woman: Ngarrindjeri Stories and a Bridge to Hindmarsh Island’, at 119.

<sup>179</sup> Brown, *Who Owns Native Culture*, at 184



They must be willing to believe without ‘knowing’, but be prepared to participate in the system nonetheless.<sup>180</sup>

However, close to the truth Bell’s description of oral cultures may be, the more restricted the distribution of knowledge is regarding issues such as sacred sites, traditional land and resource use patterns, and customary law, the harder it is likely to be for Indigenous peoples to secure its recognition without corroborating evidence.

Although judicial relief has frequently been denied to secure indigenous rights over sacred sites, a variety of alternative options including the promotion of voluntary measures to restrict contested activities<sup>181</sup>, co-management programs<sup>182</sup> and the development of international guidelines on cultural impact assessments<sup>183</sup> may provide some relief. They do not, however, secure indigenous rights or give recognition to the customary rights and laws that bind Indigenous peoples to these sacred places. Lack of such recognition undermines Indigenous peoples rights to practice their religious and pass on their sacred and other traditional knowledge, in time-honoured rites linked to the land.

The widespread recognition of indigenous title based upon subsisting rights grounded in customary law is a clear recognition of the role of customary law in securing

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<sup>180</sup> Diane Bell, *Ngarrindjeri Wurruwarrin: A World That Is, Was, and Will Be* (North Melbourne: Spinifex, 1998) at 537

<sup>181</sup> See Brown *Who Owns Native Culture*, 151 – 172 for discussion of the *Devil’s Tower* case, a sacred site for the Lakota and a favoured site for rock climbers, where voluntary bans on climbing during the most important time of the year for the Lakota’s sacred rites has been he claims a marked success.

<sup>182</sup> UNESCO, 'International Workshop on the Importance of Sacred Natural Sites for Biodiversity Conservation ', *International Workshop On The Importance Of Sacred Natural Sites For Biodiversity Conservation* (Kunming And Xishuangbanna Biosphere Reserve: UNESCO, 2003).

<sup>183</sup> Secretariat to the Convention on Biological Diversity, 'Akwé: Kon: Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or Which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities', (Guidelines Series; Montreal 2004). (27. In determining the scope of a cultural impact assessment, the following should be considered: (a) Possible impacts on continued customary use of biological resources; and (f) Possible impacts on the exercise of customary laws.)

Indigenous peoples' human rights. The very notion of indigenous territorial rights is itself a declaration of customary law and the extensive recognition and titling of Indigenous peoples lands across the world is the strongest manifestation of respect and recognition for their customary legal regimes to date. There can be little, if any, doubt that Indigenous peoples rights to recognition of their traditional land rights has crystallised into a norm of customary international law. If recognition of traditional territory amounts to recognition of customary law then it is safe to claim that the obligation for states to recognise and respect customary law of Indigenous peoples and apply it for the enforcement of their human rights is by extension a norm of customary international law.

## **Chapter 6. Natural Resources or Essences of Life?**

Indigenous peoples' cultural survival is both dependent upon and threatened by natural resource use. On the one hand, their daily subsistence, development, spiritual and cultural well-being is intertwined with the natural environment and biodiversity. On the other hand, natural resource exploitation is the single biggest threat to their territorial and cultural integrity and in some cases to their very existence. This chapter examines the rights of Indigenous peoples over natural resources including subsurface resources under international law. It considers the role of customary law in the definition of resource rights and the control resource exploration and exploitation. The chapter concludes with consideration of Indigenous peoples rights to and the role of customary law in regulating access to genetic resources and the protection of agrobiodiversity.

### **6.1 Rights over natural resources under international law**

Effective and sensitive control of resource use is paramount to securing Indigenous peoples' subsistence strategies, protection of their territorial, environmental and cultural integrity and enjoyment of their way of life. Recognition of resources rights under national and international law has however been slow in coming and significant pressures continue to be placed upon indigenous communities by industrial exploitation of sub-surface, mineral, fisheries and forestry resources. At the same time, local seed production, rights over medicinal plants and genetic resources, are threatened by agroindustrial, natural product, pharmaceutical, and cosmetics companies. This section will examine the rights of Indigenous peoples to natural resources under international law and will go on to look at the issue of subsurface natural resource exploitation with specific attention to the exercise by Indigenous peoples of political and legal means, including traditional authorities to secure their rights.

#### ***6.1.1 Indigenous peoples' rights over natural resources***

One of the defining aspects of self-determination is its recognition of the principle of permanent sovereignty over natural resources and of the associated right to freely dispose of natural wealth and resources. For Special Rapporteur Erica- Irene Daes

‘the right of permanent sovereignty over natural resources was recognized because it was understood early on that without it, the right to self-determination would be meaningless.’<sup>1</sup> MacKay charts the principle’s evolution from its beginnings in a series of UN Resolutions in the early 1950’s, which articulated it as a ‘right of peoples and nations’, its expression during decolonization as a ‘right of developing countries’, and its treatment in the Convention on Biological Diversity as a ‘right of States’.<sup>2</sup> The right to permanent sovereignty is enshrined in common article 1(2) of both International Covenants of 1966, which state that

All peoples may, for their own ends, freely dispose of their natural wealth and resources ... In no case may a people be deprived of their means of subsistence.

For Indigenous peoples the link between their rights to self-determination in common Article 1 (1) of the Covenants and their rights to the resources necessary for their subsistence under common Article 1 (2) is clear. Fergus McKay cites Ted Moses, Grand Chief of the Grand Council of Crees, for his eloquent statement of this important link, where he says

When I think of self-determination, I also think of hunting, fishing and trapping. I think of the land of the water, the trees, and the animals. I think of the land we have lost. I think of all the land stolen from our people. I think of hunger and people destroying the land. ... the end result is too often identical: we Indigenous peoples are being denied our own means of subsistence. ... our right to self-determination contains the essentials of life – the resources of the earth and the freedom to continue to develop and interact as societies as peoples.<sup>3</sup>

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<sup>1</sup> Erica-Irene A. Daes, 'Final Report of the Special Rapporteur on Indigenous peoples' Permanent Sovereignty over Natural Resources,' *E/CN.4/Sub.2/2004/30, July 13, 2004*, at 6

<sup>2</sup> Fergus MacKay, 'Indigenous peoples' Rights and Resources Exploitation', *Philippine Natural Resources Journal*, 12/1 (2004), 43-74, at 53

<sup>3</sup> Ted Moses, 'The Right to Self-Determination and Its Significance to the Survival of Indigenous peoples ', in P. AikioHuamani and M. Scheinin (eds.), *Operationalizing the Right of Indigenous*

The Human Rights Committee in its 1999 report on Canada emphasized that in relation to Indigenous peoples common Article 1 (2) of the 1966 Covenants required that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their means of subsistence. In a similar vein, the 1986 United Nations Declaration on Development in Article 1(2) provides that

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.<sup>4</sup>

ILO Convention 169 requires special safeguard be given to Indigenous peoples' rights to natural resources pertaining to their lands, including rights to participate in their use management and conservation.<sup>5</sup> Although, the Convention's provisions on rights to resources do not talk of 'ownership' but rather of rights of 'use', these rights may prove extensive applying as they do to 'the total environment of the areas which the peoples concerned occupy or otherwise use.'<sup>6</sup> This may, for instance, include traditional, land or marine territories<sup>7</sup> used for hunting and fishing, as well as areas used by pastoral nomadic peoples for watering or pasturing their herds or flocks, whether or not under their ownership or possession. Article 15 (2) of the Convention addresses the controversial issue of natural resources over which the state exercises ownership, in particular mineral and sub-surface resources. In such cases the State is obliged to consult with Indigenous peoples in advance of undertaking or permitting any programmes for the exploration or exploitation of resources on their lands. Indigenous peoples are to participate in benefits of such activities and to receive compensation for any damage arising.

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*peoples* (Turku Institute for Human Rights, Abo Akademi University 2000), cited in MacKay, 'Indigenous peoples' Rights and Resources Exploitation', at 54

<sup>4</sup> Declaration on the Right to Development, GA Res 41/128 of 4 December 1986

<sup>5</sup> ILO Convention 169, Article 15 (1)

<sup>6</sup> *Ibid.* Article 13 (2)

<sup>7</sup> Thornberry, *Indigenous Peoples and Human Rights*, at 365

Under the UN Declaration Indigenous peoples' are entitled to the same level of protection of their rights over their resources as apply to their lands and traditional territories. This includes rights to the resources they have traditionally owned, occupied or otherwise used or acquired, and rights to own, use, develop and control the resources they possess by reason of traditional ownership or other traditional occupation or use.<sup>8</sup> These rights must be adjudicated with due respect for their customs, laws and land tenure systems.<sup>9</sup> States are obliged to establish and implement 'in conjunction with Indigenous peoples' fair, impartial, independent, open and transparent processes to recognise and adjudicate their rights over their resources, including those they have traditionally owned or otherwise occupied or used.<sup>10</sup> This is to be done with 'due recognition' for their 'laws, traditions, customs and land tenure systems'.<sup>11</sup> The Declaration gives specific recognition to Indigenous peoples' rights over human and genetic resources, seeds, medicines, and knowledge of the properties of fauna and flora.<sup>12</sup> It requires states to provide redress including compensation when there has been breach of Indigenous peoples' resource rights.<sup>13</sup> It also requires that they have access to prompt, just and fair procedures to resolve disputes with states or other parties, and effective remedies for breaches of their individual and collective rights.<sup>14</sup> These procedures and any decision taken under them must give due regard to the Indigenous peoples' customary laws and traditions and to international human rights.<sup>15</sup> Taken together the provisions of Convention 169 and the UN Declaration provide a solid basis for the recognition of Indigenous peoples' rights over natural resources, they stop short however of recognising their exclusive rights to the resources on or under their lands and territories.

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<sup>8</sup> UN Declaration, Article 26

<sup>9</sup> Ibid.

<sup>10</sup> Ibid. Article 27

<sup>11</sup> Ibid.

<sup>12</sup> Ibid. Article 31

<sup>13</sup> Ibid. Article 28

<sup>14</sup> Ibid. Article 40

<sup>15</sup> Ibid.

### 6.1.2 native title and the duty to consult

Finding ways to mediate between state and customary law in order to secure Indigenous peoples' ancestral rights over natural resources has frequently proven more problematic than securing native title over land. In Australia there are very few cases recognising native title over natural resources. One of the few cases of note is that of *Yanner v Eaton*.<sup>16</sup> In this case Murandoo Yanner was prosecuted for 'taking and keeping without a permit' two juvenile estuary crocodiles he had caught using a traditional form of harpoon. The High Court found that the permit system and the vesting of property in fauna in the Crown did not extinguish native title. According to McRae et al. the majority found s 211 of the Native Title Act 1993 'effectively gave Indigenous people immunity from a permit scheme when they were exercising a native title right to hunt.'<sup>17</sup> The recognition of a usufructuary right to hunt in *Yanner* was, according to the court, 'merely a surface manifestation of a broader and much deeper spiritual connection with land'.<sup>18</sup> Subsequently, in *Yarrimir v Northern Territory*<sup>19</sup> the majority of the high court upheld the decision of Olney J that 'named clans' had non-exclusive native title rights to possession, occupation, use and enjoyment of the sea and sea-bed.<sup>20</sup> Olney J rejected claims by the clans for recognition of exclusive rights over their traditional marine areas.<sup>21</sup> Native title does not, according to McRae et al., provide aboriginal peoples with a veto over mining activities it does, however, provide them with a right to negotiate benefit-sharing agreements. A right, they say, was greatly reduced by the provisions of the Native Title Amendment Act of 1998.<sup>22</sup>

In Canada a majority of the principal native title cases were linked to the rights of aboriginal peoples to fish commercially in their traditional waters. While, more proactive than Australia in recognising native title over resources, the Canadian

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<sup>16</sup> *Yanner v Eaton* [1999] HCA 53 (7 October 1999)

<sup>17</sup> McRae, et al. (ed.), *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 321

<sup>18</sup> *Yanner v Eaton* [1999] HCA 53, 373, at 383-384, cited in McRae, et al., *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 321

<sup>19</sup> *Yarrimir v Northern Territory* (2001) 208 CLR1

<sup>20</sup> McRae, *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 232

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 38

jurisprudence has often adopted contorted reasoning in seeking to ascertain the existence of customary rights based upon the practices of Indigenous peoples prior to British assumption of sovereignty. As a result, Lambert J says, Indigenous peoples are likely to defend their use of resources based upon their native title over lands rather than arguing for a resource right based upon customary use.<sup>23</sup> In 1999 states were, according to Hurley, seen by Indigenous peoples to be dragging out negotiations with Indigenous peoples over their land and resource rights.<sup>24</sup> Ian Dutton Vice-Chief of the American First Nations in British Columbia, for example, claimed, ‘that the Court’s decision in *Delgamuukw* had not changed the federal and provincial approach to treaty negotiations’.<sup>25</sup> Dutton took the view that the time had come for ‘aboriginal people to get organized around the fact of our title and then the governments will be compelled to deal with us in a meaningful way.’<sup>26</sup> In essence he appears to have been calling upon Indigenous peoples to exercise their customary land and resource rights whether or not the government had formally recognised such rights. In this vein, the Westbank First Nation carried out unlicensed logging on Crown lands over which it claimed title.<sup>27</sup> This action was, Hurley reports, supported by numerous local, national and regional Aboriginal groups, and was followed by some other First Nations.<sup>28</sup> When the province sought a court ruling to stop the logging the Court held it would have to rule first on the conflicting issues of Aboriginal and Crown title.<sup>29</sup> In this case by acting ‘as if’ their ancestral title had indeed been recognised Indigenous peoples were able to take the initiative and force a response from the state. To some extent this may be seen as direct action to complement actions such as the development of

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<sup>23</sup> See generally Hon. Mr. Justice Douglas Lambert., '*Van Der Peet* and *Delgamuukw*: Ten Unresolved Issues', *University of British Columbia Law Review*, 32/2 (1998), 249 - 70.

<sup>24</sup> Hurley, 'Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v British Columbia*', at 24

<sup>25</sup> Ian Dutton, ' B.C. Ignoring Court, Natives Say: Negotiators Don't Recognize Title Despite *Delgamuukw*, Leader Charges, ' *Victoria Times Colonist*, 19 February 1999, p.A3, cited in Hurley, 'Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v British Columbia*', at 24

<sup>26</sup> *Ibid.*

<sup>27</sup> Hurley, 'Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v British Columbia*', at 31

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*



Protocols and the commencement of administrative and legal proceedings to secure resource rights.

At the regional level the Inter-American Court of Human Rights views the cultural and economic survival of indigenous and tribal peoples as dependent upon their access to and use of the natural resources in their territory ‘that are related to their culture’.<sup>30</sup> In *Saramaka People v Suriname*<sup>31</sup> the Court concluded that the Saramaka people are entitled ‘to use and enjoy the natural resources that lie on and within their traditionally owned territory and that are necessary for their survival’, and that,

Members of tribal and indigenous communities have the right to own natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake’<sup>32</sup>

The Court went on to reason that the right to territory would be meaningless if not connected to the natural resources that lie on and within the land.<sup>33</sup> The court took the view that its jurisprudence regarding the property rights of Indigenous peoples extends to tribal peoples due to their ‘similar characteristics’ including having distinct social, economic and cultural traditions from other sectors and regulating themselves at least in part, by their own norms, customs and traditions<sup>34</sup>. Holding, that both individual and communal property rights are protected under Article 21 of the American Convention<sup>35</sup>, the court set out three safeguards the state must follow to ensure that issuance of concessions within the Saramaka peoples’ territory does not amount to a denial of their survival as a people. These are,

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<sup>30</sup> *Case of The Mayagna (Sumo) Awas Tingni Community*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, para.120 available at [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=405047](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=405047)

<sup>31</sup> *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007)

<sup>32</sup> *Ibid.* at 844

<sup>33</sup> *Ibid.* Para 122

<sup>34</sup> *Ibid.* at 843

<sup>35</sup> *Ibid.* Para 121

First, the state must ensure effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter ‘development or investment plan’)<sup>36</sup> within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.<sup>37</sup>

With regard to the third obligation, compliance with the Akwe-Kon guidelines would now also require the carrying out of cultural impact assessment, with due attention to Indigenous peoples’ customary laws and practices. For impact assessment processes to gain legitimacy they will need to ensure meaningful opportunities for Indigenous peoples’ participation in their development, during their evaluation and in monitoring the implementation of any mitigation plans. To date states and the private sector have been slow to respect such rights of participation.

Attempts to bypass consultation obligations and fast track development projects may result in action by international human rights bodies as occurred with the proposed Belo Monte Dam project in Brazil. In June 2011 the Brazilian government rushed through approval for what would be the world’s third largest dam. The dam which had originally been proposed in 2006, will if built flood an area of approximately 516km<sup>2</sup>.<sup>38</sup> A filing by non-governmental organisations of a case before the Inter-American Commission on Human Rights requesting it to take ‘precautionary measures against Brazil’, resulted in the commission requesting the Brazilian government to ‘suspend the licensing process for the Belo Monte hydroelectric

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<sup>36</sup> The court defined a ‘development or investment plan’ as any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions.

<sup>37</sup> *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), Para 129

<sup>38</sup> For discussion of the Belo Monte Project see Alexandre De Oliveira Andrade Moraes Sampaio, ‘*Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous peoples in Brazil*’, (National University of Ireland 2011). (copy on file with author)

project and prevent the implementation of any material works.<sup>39</sup> The prompt action by Indigenous peoples and non-governmental organisations demonstrates a growing capacity to utilise legal avenues together with media campaigns and direct action, which in the Belo Monte case included blockades of roads by Indigenous peoples, in the struggle to protect human and environmental rights and integrity. The growing capacity to take their struggle to the international level has reshaped the playing field between isolated Indigenous peoples and governmental and private sector actors. This in turn leads to increased opportunities to promote respect for Indigenous peoples' customary laws and cosmovision.

Failure to respect obligations to consult and where applicable obtain the consent of Indigenous peoples and to respect and recognise the role of customary law in determination of resource rights and prior informed consent procedures is a clear breach of obligations under international law. The resultant human rights jurisprudence demonstrates the existence of binding obligations upon states to respect Indigenous peoples customary laws.

## **6.2. Mining and subsurface resource rights and wrongs**

Tension between national development programs and the rights of Indigenous peoples are rarely off the news. Whether it is the planned building of dams and the flooding of indigenous lands, exclusion of Indigenous peoples from protected areas, cattle ranching and destruction of forest homelands. Nowhere has tension been higher than in relation to the activities of the mining and subsurface resource extractive industries.

This section examines Indigenous peoples' rights over subsurface resources and the measures taken by them to defend their rights and secure enforcement of their customary laws, in particular through the innovative use of their own traditional authorities to control third party activities on their lands

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<sup>39</sup> See 'Commission's request to the government' in *Indigenous Communities of the Xingu River Basin, Para v. Brazil* [2011] Inter-American Commission on Human Rights (PM-382-10) cited in Moraes Sampaio, 'Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous peoples in Brazil', at 11

### 6.2.1 rights to subsurface resources

Daes in her study of *Indigenous peoples' Permanent Sovereignty over Natural Resources* claims that Indigenous peoples have a collective right to 'use, own, manage and control the natural resources found within their lands and territories.'<sup>40</sup> These resources can, she says, include 'air, coastal seas, and sea ice as well as timber, minerals, oil and gas, genetic resources, and all other material resources pertaining to indigenous lands and territories.'<sup>41</sup> This view is not shared by all. Stefania Errico in an examination of the status of Indigenous peoples' rights over subsurface resources draws attention to the negotiating history of the UN Declaration in coming to the conclusion that states are entitled to reserve the rights over subsurface resources.<sup>42</sup> Errico stresses the point, however, that 'denial of Indigenous peoples' control over subsoil resources does not mean these people are deprived of *all* rights with regard to the subsoil resources existing in their lands and territories.'<sup>43</sup> ILO Convention 169, for example, creates an obligation for states to consult with Indigenous peoples prior to the grant of any rights to carry out exploration or exploitation of resources on their territories.<sup>44</sup> It also requires that Indigenous peoples participate in the benefits arising from such resource exploitation and receive just compensation for any damages they may sustain.<sup>45</sup>

While the debate regarding the extent of Indigenous peoples' rights to permanent sovereignty over subsurface resources under international law is likely to continue into the future, a certain level of clarity is discernable from the provisions of ILO Convention 169 and the UN Declaration. In the first place it is clear that Indigenous peoples are entitled, as a minimum to recognition of their rights over the resources they have owned used or acquired.<sup>46</sup> They are also entitled to a 'fair, independent,

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<sup>40</sup> E/CN.4/Sub.2/2004/30

<sup>41</sup> E/CN.4/Sub.2/2004/30, Para. 39

<sup>42</sup> Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous peoples' Rights', in Stephen Allen, And Alexandra Xanthaki (ed.), *Reflections on the Un Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011), at 340

<sup>43</sup> *Ibid.* at 341

<sup>44</sup> ILO Convention 169, Article 15(2)

<sup>45</sup> *Ibid.*

<sup>46</sup> UN Declaration, Article 26

impartial, open and transparent process' for the adjudication of their rights over subsurface resources.<sup>47</sup> Implementation of these provisions must be done with due respect and due recognition respectively for their customary laws traditions and land tenure systems.<sup>48</sup>

In countries such as Canada and the United States Indigenous peoples have rights over subsurface resources in their reserves and reservations. These rights extend to 'royal minerals' (gold and silver), which, McKay notes, is not the case for 'non-indigenous surface owners under common law'.<sup>49</sup> In Australia the Aboriginal Land Rights Act provides aboriginal peoples in the Northern Territory with communal fee simple title over their lands. Although this title cannot be sold it has been described by the High Court in the *Blue Mud Bay case*<sup>50</sup> as 'for almost all practical purposes, the equivalent of full ownership.'<sup>51</sup> Land trusts and land councils have the power to 'grant a lease, allow mining or permit road construction' subject to the prior informed consent of traditional owners.<sup>52</sup> In McKay's view rights to sub-surface resources in common law countries should be seen to subsist in accordance with the notion of native title and doctrine of continuity, where they have not been expressly extinguished by statute.<sup>53</sup> The tendency has, however, been to limit native title to cases where Indigenous peoples can demonstrate a historic and continuing use of the relevant resources. Where Indigenous peoples have been recognised as having rights over sub-surface resources they have quick to develop their own capacity to manage and exploit such resources and have begun to share information of successful experiences with other Indigenous peoples. The Southern Ute Indian Tribe has, for example, provided the Blackfeet Indian Nation with advice on gas exploration.<sup>54</sup>

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<sup>47</sup> Ibid. Article 27

<sup>48</sup> Ibid. Articles 26 and 27

<sup>49</sup> MacKay, 'Indigenous peoples' Rights and Resources Exploitation ', at 58

<sup>50</sup> *Northern Territory v Arnhem Land Trust* (2008) 248 ALR 195

<sup>51</sup> Ibid. at 208

<sup>52</sup> McRae et al. *Indigenous Legal Issues Commentary and Materials: Fourth Edition*, at 240

<sup>53</sup> MacKay, 'Indigenous Peoples' Rights and Resources Exploitation'

<sup>54</sup> Ibid. at 171

In determining rights of Indigenous peoples, courts may consider the historical practices of Indigenous peoples relating to control of access to their lands and over subsurface resources under customary law. Arguably, this should be done with a view to determining the 'living customary law' as opposed to some presumed immemorial fixed law. Although customary law may not always be able to show historical regulation of subsurface resources, control of 'who comes onto the land' is in itself a form of regulation of resource exploitation. Furthermore, the dynamic nature of customary law means that Indigenous peoples are in a position to modify their traditional regimes to respond to current challenges and opportunities, just as national legal systems seek to develop new legal mechanisms to respond to the issues of the moment.

The scope of communal rights over resources has been widely defined in the *Richtersveld* case where Chaskalson CJ, speaking on behalf of the South African Constitutional Court, recognized the exclusive right of the community inherent in communal ownership, to 'use its waters, to use its lands for grazing and hunting and to exploit its natural resources above and beneath the surface.'<sup>55</sup> The court referred to the historic control of mining activities by the Richtersveld community in deciding it had a right to control mining in its traditional territory. As part of the final settlement of its claim the Richtersveld Community obtained a 49% shareholding in the Alexkor Corporation, which in June 2011 reported a profit for the first time in five years.<sup>56</sup> The challenge for the community will now be to see how it can effectively manage its share of profits, promote equitable benefit sharing at the local level, and prevent internal conflicts over distribution of benefits from tearing the community apart.<sup>57</sup>

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<sup>55</sup> *Alexkor Ltd & Another v the Richtersveld Community & Others*, BCLR (12 BCLR 1301 CC, 2003).

<sup>56</sup> <http://www.miningmx.com/news/diamonds/State-seeks-to-revive-Alexkor.htm>

<sup>57</sup> In 2009 alone the Richtersveld Communal Property Association (RCPA) defended five legal claims, and was in October 2010 still awaiting a response from the Minister of Rural Development and Land Reform to its repeated call for the appointment of an independent mediator to resolve the long running disputes in the Richtersveld. Press Release Issued by HWB Communications (Pty) Ltd on behalf of the Richtersveld Communal Property Association Committee. 13 October 2010. Available at: <http://www.hwb.co.za/media-article.php?id=317>

At the regional level the African Commission on Human and Peoples' Rights has recognised Indigenous peoples' rights to resources on their ancestral lands. In the 2002 *Ogoni* case the Commission decided that the right to natural resources contained within their traditional lands vested in the indigenous people.<sup>58</sup> The Commission also found that the Government of Nigeria had violated the rights of the Ogoni under Article 21 of the African Charter on Human and Peoples' rights, by giving 'the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis.'<sup>59</sup> It held that 'with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.'<sup>60</sup> In the landmark *Endorois* case<sup>61</sup> the Commission took the view that the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State.<sup>62</sup> A key element of the case was the Commission's recognition of the Endorois' right to development under Article 22 of the African Charter. The Commission noted the need for consultation and not merely for informing Indigenous peoples of a *fait accompli*.<sup>63</sup> The Commission's decision relies heavily on the jurisprudence of the Inter-American Court and the UN Declaration. It also, according to Korir Sing'oei, borrows from the UN Declaration on the Right to Development to describe five criteria which must be complied with in order to ensure the right to development is achieved: equitability, non-discriminatory, participatory, accountability and transparency.<sup>64</sup> The *Endorois* case breaks new ground in Africa and globally by recognising Indigenous peoples' rights to development. The combination of the right to consultation and the right to development offer Indigenous peoples a good opportunity to promote respect for their own customary laws and their traditional land and resource management strategies.

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<sup>58</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 2010, Para. 267

<sup>59</sup> *Ogoni Case*, at 58, cited in MacKay 'Indigenous Peoples' Rights and Resources Exploitation', at 56

<sup>60</sup> *Ibid.*

<sup>61</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 2010

<sup>62</sup> *Ibid.* Para 268

<sup>63</sup> *Ibid.* Para 281

<sup>64</sup> Abraham Korir Sing'oei, 'Kenya: From Non-Beneficiaries to Active Stakeholders - the Endorois', *Pambazuka News, allAfrica.com*, (2010).

### 6.2.2 righting resource wrongs

States, the private sector, and the legal community in general, have yet to grasp the full import of the advances in international law regarding recognition and protection of indigenous rights over their resources. There is likely, however, to be a sharp learning curve as the corporate world and national authorities come to realise it is no longer 'business as usual'. Indigenous and non-governmental organizations have shown their preparedness, capacity and willingness, to sustain protracted legal and media campaigns against both national governments and even the largest of corporations. The struggle by the 5,000 strong U'wa indigenous people against Occidental Petroleum and the Colombian Government is a case in point. Their campaign, which began as a struggle for recognition of their collective rights to their traditional lands went on to become a multipronged national and international campaign and legal offensive which led to the abandonment by Oxy of its plans to drill for oil on their territories and secured recognition of their collective land rights.<sup>65</sup> In the United States the Achuar from Peru have been given leave to take Occidental Petroleum before the US courts in Los Angeles.<sup>66</sup> While in Ecuador after 17 years of litigation an alliance of affected communities have seen their claim upheld by the courts, which found Chevron liable to the tune of approximately US \$18.2 billion in total damages for massive contamination in the Ecuadorian Amazon.<sup>67</sup>

Indigenous peoples frustrated by the inordinate delays, costs and frequent lack of independence, of the formal court system are beginning to turn to their own legal regimes to secure redress for third party torts. A case of particular importance in this vein relates to the activities of the Canadian TVI Company and its involvement in mining on Mount Canatuan, a mountain sacred to the Subanon people of Mindanao,

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<sup>65</sup> Cesar Rodriguez-Garavito, and Luis Carlos Arenas, 'Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U'wa People in Colombia', in Boaventura De Sousa Santos, And César A. Rodríguez-Garavito (ed.), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

<sup>66</sup> See discussion of *Maynas Carijano v Occidental Petroleum* action taken on behalf of the Peruvian Achuar by Earthrights, at <http://www.earthrights.org/legal/indigenous-achuar-face-against-occidental-petroleum-amazon-pollution-case>

<sup>67</sup> See Decision number 2003-0003, Judge Nicolás Zambrano of the Provincial court of Sucumbíos in Nueva Loja, 14 of February 2011



in the Philippines. The Philippines provides, on paper, one of the strongest bodies of laws for recognition of Indigenous peoples' ancestral land rights and customary laws. The 1987 Philippine Constitution, for instance, empowers the Congress to provide for the applicability of customary laws governing property rights in determining the ownership and extent of ancestral domain.<sup>68</sup> The 1997 Indigenous Peoples' Rights Act (IPRA) provides in Section 3 for recognition of Indigenous peoples' ancestral domain over the lands that 'have been 'occupied, possessed and utilized' by them or their ancestors 'since time immemorial, continuously to the present.'<sup>69</sup> In 2003 the Subanon were among the first indigenous people in the Philippines to be awarded a Certificate of Ancestral Domain title.<sup>70</sup> Both IPRA and the 1995 Mining Act require prior informed consent of Indigenous peoples prior to mining on their ancestral lands.<sup>71</sup> In 1996 TVI was granted a permit for operations on Mount Canatuan without any prior consent by the Subanon.<sup>72</sup>

In 2002, the National Council for Indigenous Peoples orchestrated the creation of a group calling itself the 'Siocon Council of Elders', which then entered into a Memorandum of Agreement with the company, purportedly, granting it rights to carry out its mining activities.<sup>73</sup> Failing to get an adequate response from the national courts, the Subanon from the affected area brought their case to their highest 'judicial authority' the Gukom sog Pito ko Dolungan (Gukom of the Seven Rivers Region).<sup>74</sup>

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<sup>68</sup> Constitution of the Philippines 1987, Article XII Section 5

<sup>69</sup> Raymundo D. Rovillos and Daisy N. Morales, *Indigenous peoples, Ethnic Minorities and Poverty Reduction: Philippines* (Manila: Asian Development Bank 2002), at 13

<sup>70</sup> Apu Manglang Glupa' Puska, et al., 'Submission to the 71st Session of the Committee on the Elimination of All Forms of Racial Discrimination Regarding Discrimination against the Subanon of Mt Canataun, Sicon, Zambonga Del Norte, Philippines in the Context of Large Scale Gold Mining on Their Ancestral Domain.' (2007 ), at 4, (copy on file with author)

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Puska et al., 'Submission to the 71st Session of the Committee on the Elimination of All Forms of Racial Discrimination Regarding Discrimination against the Subanon of Mt Canataun, Sicon, Zambonga Del Norte, Philippines in the Context of Large Scale Gold Mining on Their Ancestral Domain.', at 5

<sup>74</sup> Doyle, 'The Effectiveness of Legal and Non-Legal Remedies for Addressing the Rights of Indigenous peoples at Mindanao Island and Elsewhere', at 91

The Gukom found the Siocon Council of elders to be ‘**illegitimate, illegal** and an **affront** to the customs, traditions and practices of the Subanons of the Pito Ka Dolungan’ and declared it ‘abolished and all the acts entered into by [it] ... NULL and VOID’.<sup>75</sup>

In 2007 the Subanon raised the stakes making a submission to the Committee on the Elimination of Racial Discrimination (CERD) regarding the failure by the Philippines to protect its rights.<sup>76</sup> At the same time, according to Doyle, Timuay (traditional leader) Jose Anoy complained to the Gukom that TVIRDI a subsidiary of TVI had failed to respect customary laws within the affected area.<sup>77</sup> The Gukom decided in his favour and fined the company, which originally refused to recognise the Gukom or its decision.<sup>78</sup> However, in 2009, they recognised Timuay Jose Anoy as the traditional leader of the Subanon in the area and entered into discussions on how to resolve their differences. On May 17, 2011, TVIRDI took part in a cleansing ceremony in which they recognised Mount Canatuan to be a sacred site and, reportedly, admitted their wrongdoing in its desecration.<sup>79</sup> Prior to the ceremony they had reportedly paid the fines that had been negotiated following the company’s admission of guilt.<sup>80</sup>

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<sup>75</sup> Assembly Resolution No. 01-2004: Resolution on the Decision Pertaining to the Composition and Legitimacy of the Siocon Council of Elders and the Official Position on the Issue of Leadership and Representation of the Canatuan Subanon Community, 3rd ASSEMBLY OF THE GUKOMS, Rio Hondo, Zamboanga City, Mindanao, Philippines, June 7-10, 2004. Para 4. (emphasis in original) (copy on file with author)

<sup>76</sup> Puska et al., 'Submission to the 71st Session of the Committee on the Elimination of All Forms of Racial Discrimination Regarding Discrimination against the Subanon of Mt Canataun, Sicon, Zambonga Del Norte, Philippines in the Context of Large Scale Gold Mining on Their Ancestral Domain.'

<sup>77</sup> Doyle, 'The Effectiveness of Legal and Non-Legal Remedies for Addressing the Rights of Indigenous peoples at Mindanao Island and Elsewhere', at 91

<sup>78</sup> Ibid. See also *Verdict of the Gukom of the Seven Rivers upon complaint by Timuay Jose Anoy against TVIRD for its failure to respect customary laws within the territory of Timuay Jose Anoy* (unofficial translation – copy on file with author)

<sup>79</sup> Canadian mining firm admits wrongdoing to Subanon People, Intercontinental Cry, May 25, 2011 Available at :

<http://intercontinentalcry.org/canadian-mining-firm-admits-wrongdoings-to-subanon-people/>

<sup>80</sup> Ibid.

The decisions of the Gukom of the Seven Rivers and the compliance by TVIRDI with that decision create an important precedent for the use of traditional authority in the resolution of conflicts involving indigenous peoples and third parties. Exercise by the Subanon Gukom of jurisdiction over third parties is a clear expression of their rights to self-determination, to their own laws and judicial authorities, and to the adjudication of their resource rights in accordance with their own customary laws. It may also be seen as an exercise of rights arising under customary international law to apply their customary laws in the defence of their human rights. It must be remembered, however, that enforcement of the Gukom judgment would likely have proved impossible not been for the external pressure brought to bear upon the company and the Philippine Government through the media and CERD.

### **6.3 Farmers rights and the conservation of agrobiodiversity**

Indigenous peoples play a crucial role in the conservation of wild biological diversity and in the domestication and development of crop varieties and animal breeds as well as the cultivation of traditional medicinal plants. Despite the importance of their role their rights over biological and genetic resources remain largely unprotected around the globe. Over the centuries Indigenous peoples' knowledge, cultural expressions and genetic resources have been collected, collated, investigated and commercialized with little if any benefit to Indigenous peoples themselves. In more recent times intellectual property rights regimes have been used to secure monopolistic control over products developed utilizing Indigenous peoples' biological and genetic resources, cultural manifestations and traditional knowledge. Copyright has, for example, been used to secure revenue streams arising from use of Indigenous peoples' songs and stories. Patents have been obtained over many traditional crop varieties including basmati rice, Hawaiian taro, Peruvian maca and camu-camu, and yellow Enola beans.<sup>81</sup> Patents have also been granted over sacred plants, such as Ayahuasca utilized by Amazonian shamans as part of their spiritual healing practices. Patents

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<sup>81</sup> Daniel F. Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (London: Earthscan, 2010).

have even been sought over the very blood of Indigenous peoples.<sup>82</sup> In the early 1990's Pat Mooney described this uncontrolled pillage as 'biopiracy' a term the ETC Group defines as,

the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions who seek exclusive monopoly control (patents or intellectual property) over these resources and knowledge<sup>83</sup>

This section examines the relationship between customary law and emerging national and international law for regulation of Indigenous peoples' rights over their genetic resources and protection of their agrobiodiversity.

### 6.3.1 access to genetic resources and benefit sharing

All countries rely on exotic imported genetic resources for national food security. Recognition of this fact coupled with historical practice led to a voluntary undertaking by countries to treat genetic resources as the common heritage of humankind. Genetic resources were in effect treated as part of a global commons. The irony was that while biodiversity rich countries were allowing free access to their resources industrial companies began to extract resources from the commons and incorporate them in new inventions subject to monopolistic intellectual property rights. Even more controversially patents were extended to life forms and plant varieties, often with little or no added value. One of the most outrageous cases related to yellow Enola beans and US patent number 5,894,079 issued to Larry Proctor the president of the US seed company POD-NERS for a 'new field bean variety'.<sup>84</sup> The patent, which was

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<sup>82</sup> Darrell Posey, and Graham Dutfield *Beyond Intellectual Property* (IDRC, 1996b). The authors report on three applications for patents arising from research carried out by the Centres for Disease Control of the United States Department of Health and Human Services and the National Institutes of Health (NIH) on rare human T-cell lymphotropic viruses (HTVL) linked to T-cell leukaemia. As a result of this research NIH filed patent applications on t-cell lines from a woman of the Guyami people of Panama, a member of the Hagami people of Papua New Guinea, and of Solomon Islanders, at 27-28

<sup>83</sup> See ETC Group (formerly RAFI) at <http://www.etcgroup.org/en/issues/biopiracy>

<sup>84</sup> For more detailed discussion and information on cases of biopiracy see Robinson, *Confronting Biopiracy*.

denounced from the outset, was finally rejected by the US patent office following challenges by the International Centre for Tropical Agriculture.<sup>85</sup> This was little compensation to Mexican farmers who for almost ten years were held to ransom by Proctor on the basis of a badly granted patent. To add insult to injury the original beans appear, according to Robinson, to have been ‘misappropriated from Mexico by the inventor.’<sup>86</sup> Cases such as this demonstrate the flawed nature of the intellectual property rights system, which Silvia Ribeiro describes as ‘broken beyond repair.’<sup>87</sup>

The entry into force of the Convention on Biological Diversity and its recognition of national sovereignty over genetic resources did away with the notion of a global genetic commons. However, the Convention’s recognition of state sovereignty over genetic resources has caused significant concern for Indigenous peoples who claim ancestral rights over biological and genetic resources on their lands and traditional territories, as well rights arising from the domestication, cultivation and nurturing of agrobiodiversity, traditional medicinal plants and animals. Although the Convention, in Article 8(j), recognised rights of indigenous and local communities over their traditional knowledge, practices and innovations<sup>88</sup>, it gave no guidance on their rights over genetic resources vis-à-vis state sovereign rights.

Progressive regulation of the Convention on Biological Diversity’s provisions on access to genetic resources and benefit sharing has led to a creeping recognition of Indigenous peoples’ rights over their genetic resources. The first significant step was the adoption, in 2002, of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefit Arising out of their Utilization*<sup>89</sup>, which set down minimum standards for the recognition of Indigenous peoples’ rights over their genetic resources. Provisions on Indigenous peoples’ resource rights under both

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<sup>85</sup> Robinson, *Confronting Biopiracy*, at 51-53.

<sup>86</sup> *Ibid.* at 53

<sup>87</sup> ETC Group Enola Patent Ruled Invalid: Haven't we Bean here before? (Yes, yes, yes, yes and yes.) News Release 14 July 2009 Available at: [www.etcgroup.org](http://www.etcgroup.org)

<sup>88</sup> The issue of Indigenous peoples rights over their traditional knowledge is dealt with in chapter seven

<sup>89</sup> COP Decision VI/24

Convention 169<sup>90</sup> and the UN Declaration<sup>91</sup> have further strengthened Indigenous peoples' claims to rights over their genetic resources. Article 31 (1) of the Declaration, for example, gives specific recognition to Indigenous peoples' rights to,

maintain, control, protect and develop their ... sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

With the adoption of the Nagoya Protocol Indigenous peoples' rights over genetic resources have been given formal recognition in a legally binding international instrument. Article 6 (2) of the Protocol provides that

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources

Bavikatte and Robinson argue that Article 6.2 creates mandatory obligations for states to 'take measures' to protect Indigenous people's rights.<sup>92</sup> Morgera and Tsioumani take the view that the requirement that Indigenous peoples have an 'established right to grant access' as a prerequisite for seeking their prior informed consent makes it clear that the Protocol itself does not intend to grant any new property right over genetic resources.<sup>93</sup> Matthias Buck, chief negotiator for the European Commission

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<sup>90</sup> ILO Convention 169, Article 15

<sup>91</sup> UN Declaration, Articles 26, 27 & 31

<sup>92</sup> Kabir Bavikatte, and Daniel F. Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing', *LEAD Journal (Law Environment and Development Journal)* (www.lead-journal.org, 2011), at 47

<sup>93</sup> Elisa Morgera, and Elsa Tsioumani, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity', *Yearbook of International Law* 21 (forthcoming 2011), at 14 (page numbers as per prepublication manuscript copy), Available at: <http://ssrn.com/abstract=1914378>

during the negotiation of the Nagoya Protocol, argues that Article 6.2 will only come into play where Indigenous peoples' rights to grant access to genetic resources are enshrined under national law.<sup>94</sup> What amounts to 'an established right to grant access' is, however, far from clear. The term may well be interpreted to cover rights derived from human rights law, native title, customary law and traditional practices, as well as directly applicable international or regional instruments, whether or not addressed specifically in national regulation. For Bavikatte and Robinson the term does not exclude the possibility that such rights may be established by international law.<sup>95</sup> While, Gurdial Singh Nijar draws attention to the position of the Expert Group on Traditional Knowledge established by the ABS Working Group, which has taken the view that the right of Indigenous peoples over genetic resources has 'been established by, or was fast becoming part of, international customary law.'<sup>96</sup> How the courts eventually interpret the provisions of Article 6.2 will, in the view of Morgera and Tsioumani, depend upon the manner in which it is read in the 'light of relevant human rights instruments, including the right to self-determination and the rights to lands' territories, and resources traditionally occupied by Indigenous peoples.<sup>97</sup> One thing is clear, those seeking access to the genetic resources of Indigenous peoples will need to pay close attention to customary law.

An interesting aspect of both Article 6.2 and Article 7, which regulates access to traditional knowledge and which will be discussed in detail in the following chapter, is that they create obligations for both provider and user countries. Both countries in which Indigenous peoples reside and countries into which their genetic resources and knowledge is, directly or indirectly, imported are obliged under the Protocol to take

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<sup>94</sup> Matthias Buck 'Intervention at the International Workshop: Access to Genetic Resources, Traditional Knowledge and Benefit Sharing: Common Pools of Genetic Resources: Improving Effectiveness, Justice and Public Research in ABS', 15-16 September 2011, University of Bremen.

<sup>95</sup> Bavikatte, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing', at 47

<sup>96</sup> Gurdial Singh Nijar, *The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: An Analysis* (Kuala Lumpur: CEBLAW, 2011), at 28

<sup>97</sup> Morgera, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity', at 13

measures ‘with the aim of ensuring’ that access to genetic resources<sup>98</sup> and traditional knowledge<sup>99</sup> is subject to the prior informed consent or approval and involvement of Indigenous peoples and local communities. Furthermore, in implementing their obligations relating to ‘traditional knowledge associated with genetic resources’ under the Protocol, Parties are obliged by Article 12(1) to ‘take into consideration indigenous and local communities customary laws, community protocols and procedures, as applicable’. In determining the scope of Article 12 (1) it is important to take into consideration the Preambular language of the Protocol which recognises ‘the interrelationship between genetic resources and traditional knowledge, [and] their inseparable nature for indigenous and local communities’.<sup>100</sup> Taken together these provisions create significant responsibilities for all countries to secure Indigenous peoples’ rights over genetic resources and traditional knowledge in accordance with their own customary laws and traditions. The type of issues likely to be regulated by customary law and community protocols may include the identification of Indigenous peoples’ own authorities, prior informed consent procedures, restrictions if any on the uses that may be made of resources and knowledge, conditions of confidentiality, and obligations and modalities for benefit sharing. These and other obligations may be outlined in written contracts or may arise due to the context in which resources are accessed, shared, or otherwise came into the possession of users.

The obligations under the Protocol to secure prior informed consent of Indigenous peoples for access to and use of their genetic resources and traditional knowledge are, in the words of Buck and Hamilton, a reflection of ‘the increasing emphasis on indigenous rights at the international level since the adoption of the CBD, most prominently in the 2007 United Nations Declaration on the Rights of Indigenous Peoples.’<sup>101</sup> Notwithstanding the foregoing the extent of user countries obligations to ensure the existence of prior informed consent for the use of Indigenous peoples genetic resources remains contested. Most importantly the question arises as to

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<sup>98</sup> Nagoya Protocol, Article 6(2)

<sup>99</sup> Ibid. Article 7

<sup>100</sup> Convention on Biological Diversity, Preamble, Para. 21

<sup>101</sup> Matthias Buck and Clare Hamilton, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity', *RECIEL* 20(1) (2011), 47- 61, at 52



whether states are obliged *ab initio* to ensure that access to Indigenous peoples genetic resources is with their consent or acceptance. Or whether this obligation only arises after national legislation regulating access has been adopted in the country in which the relevant Indigenous peoples are located.

Under Article 6.3 states requiring prior informed consent for access and use of its genetic resources are obliged to adopt legislative, administrative or policy measures as appropriate. Genetic resources of Indigenous peoples are, however, addressed in Article 6.2, which establishes obligations upon all states to adopt measures with a view to ensuring that the prior informed consent of Indigenous peoples is obtained for access to and use of their resources. Article 6.2 is not directly conditioned by Article 6.3, it is suggested therefore that states obligations to protect Indigenous peoples rights over genetic resources over which they have an ‘established right’ is immediately binding upon all those Parties ratifying the Protocol. Provisions under Article 6.3(f) requiring states, as applicable and subject to domestic legislation, to set out criteria for securing prior informed consent of Indigenous peoples may be seen as a duty to take measures to facilitate and enforce Indigenous rights to control access to and use of their resources in accordance with their own customary laws and decision making practices and institutions.

Indigenous peoples’ genetic resources may be seen as elements of their cultural patrimony. As such they are subject to their sovereign rights to self-determination and to permanent sovereignty over their resources as regulated by their own legal regimes and institutions. Any attempt to condition user countries’ obligations to implement the provisions of Article 6.2 upon action by the states in which relevant Indigenous peoples reside would be a denial of the responsibility of all countries under international law to respect and protect Indigenous peoples’ human rights. This is contrary to the specific wording of the Protocol which creates obligations *ab initio* for all countries to take measures to ensure that access to and use of Indigenous peoples’ traditional knowledge and genetic resources ‘over which they have established rights’ is subject to their prior informed consent. This may include measures to regulate access at the point of access and to condition the importation and use of Indigenous peoples’ genetic resources upon provision of evidence of prior informed consent and mutually agreed terms covering such access and use. It may also include incentive

measures to promote compliance by ex-situ collections, plant breeders, and the natural products, agro-industrial and biotechnology industry in general.

One of the most contentious issues for the European negotiators of the Nagoya Protocol was the issue of recognition and respect for Indigenous peoples' customary laws.<sup>102</sup> The notion of European courts having to recognise and make judgments based customary law of Indigenous peoples from foreign jurisdictions was, according to Buck, considered by some European lawyers to be a 'nightmare scenario'.<sup>103</sup> European countries have of course as signatories to the UN Declaration on the Rights of Indigenous Peoples already committed to giving due respect and due recognition to indigenous people's customary laws in the recognition and adjudication of their rights over their resources. Why then the resistance to inclusion of similar provisions under the Protocol? The answer may lie in the realization that the binding nature of the Protocol is likely to lead to litigation in which the existence, content, and import, of customary law of Indigenous peoples from foreign jurisdictions becomes central to proceedings. In contrast, opposition to recognition of customary law from countries home to Indigenous peoples, such as Canada, appear to rest more on a desire to avoid creating precedents that may strengthen Indigenous peoples' demands for recognition of sovereign rights and autonomy that underlie demands for self-determination. The inclusion of Article 12 in the Protocol is therefore a major coup for Indigenous peoples. Providing further evidence of the emergence of a customary international norm requiring states to recognise Indigenous Peoples' customary laws and their role in securing human rights. User countries now need to put aside their fears of customary law, recognise it has always been a part of the legal system and as Buck suggests put the time, effort and funding necessary into analysing the extent of their obligations under Article 12 (1) and the potential modalities for ensuring its effective implementation.<sup>104</sup> In this vein, attention to a series of studies carried out by the

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<sup>102</sup> Kabir Bavikatte, and Daniel F. Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing', *LEAD Journal (Law Environment and Development Journal)* (www.lead-journal.org, 2011).

<sup>103</sup> Buck 'Intervention at the International Workshop: Access to Genetic Resources, Traditional Knowledge and Benefit Sharing: Common Pools of Genetic Resources: Improving Effectiveness, Justice and Public Research in ABS'

<sup>104</sup> Ibid.

United Nations University, IMPAC, WIPO, IUCN, IIED and others provide a useful start for the commencement of more focused analysis of these issues<sup>105</sup>.

### 6.3.2 Farmers seeds and in-situ conservation of agrobiodiversity

Agrobiodiversity including farmers' varieties and landraces are the fundamental building blocks upon which local and global food security depends. In developing countries local plant genetic resource management systems accounts for 60-90% of seed planted, this rises to 100% where the formal plant-breeding sector is absent.<sup>106</sup> Conserving local crop diversity, farmers' varieties, and landraces, is, therefore, key to local subsistence and development strategies as well for global agrobiodiversity conservation. Brush puts forward three reasons in favour of in-situ conservation of landraces: first, is the continuing need for evaluation of landraces and their wild relatives in their native environment, as well as for collection of germ plasm for off-site evaluation and conservation; second, are the lower costs of in-situ conservation compared to ex-situ conservation; and, third, is the role in-situ conservation plays as a backup for ex-situ conservation.<sup>107</sup> Farmers have their own priorities for conservation that include the superior taste of landraces, their role as insurance against unforeseeable events and ecological advantages such as prevention of soil erosion.<sup>108</sup> Alteri and Merrick argue that preservation of traditional agroecosystems and crop diversity cannot be achieved in isolation 'from maintenance of the socio-cultural organization of the local people,'<sup>109</sup> which includes their cultural practices, traditional diet and 'way of life'. All of which are intertwined with their land and resource rights

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<sup>105</sup> See, for example, Swiderska, 'Banishing the Biopirates: A New Approach to Protecting Traditional Knowledge', Rodrigo de la Cruz, *Customary law in the Protection of Traditional Knowledge*, (2007) WIPO/GRTKF/LIM/07/5, Tobin, 'The Role of Customary Law in ABS and TK Governance in Andean and Pacific Island Countries', Caillaud et al. 'Tabus or Not Taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia'

<sup>106</sup> Conny Almekinders, *Management of Crop Genetic Diversity at Community Level* (Eschborn, Germany: GTZ, 2001), at 5

<sup>107</sup> Stephen B. Brush, 'A Farmer-Based Approach to Conserving Crop Germplasm', *Economic Botany*, 45/2 (1991), 153-65, at 154

<sup>108</sup> Detlef Virchow, 'Conservation of Plant Genetic Resources for Food and Agriculture: Main Actors and the Costs to Bear', *International Journal of Social Economics* 26/7/8/9 (1999a), at 1149

<sup>109</sup> Miguel A. Altieri, and Laura C. Merrick, 'In Situ Conservation of Crop Genetic Resources through Maintenance of Traditional Farming Systems', *Economic Botany*, 41/1 (1987), at 93

grounded upon their own legal regimes. For Tirso Gonzalez the very notion of in-situ conservation itself does violence to the worldview of indigenous peoples, which, he says, links people, land, culture and spirituality in a bond alien to dominant development theories.<sup>110</sup> Gonzalez emphasizes the importance of securing participation of Indigenous farmers in decision-making and planning activities if agrobiodiversity is to be successfully conserved in his view it is crucial that ‘international development and funding institutions as well as the state recognize, in theory and practice, the key connections between culture (cultural diversity), production (indigenous or capitalist agriculture), and nature (agrobiodiversity)’.<sup>111</sup> Without this he says conservation objectives cannot be achieved and Indigenous farmers will continue to be overlooked by development strategists.<sup>112</sup> Following his advice would require decision makers to take on board the rights and experience of farmers with traditional resource management guided as it is by customary law.

Despite its importance, in-situ conservation and the protection of local crop diversity receives very little in the way of financial support and does not tend to feature highly on the radar of the majority of agricultural scientists and national and institutional research budgets. Virchow notes, for example, that of the approximately US \$740 million spent on national and multilateral activities for the conservation and utilization of plant genetic resources for food and agriculture in 1995, only a fraction, if any, of which went to those small farmers cultivating landraces.<sup>113</sup> He claims that reliance on resource poor farmers to conserve plant genetic diversity without adequate support demonstrates a ‘failure to internalize the value of its conservation’ and perpetuates ‘the threat of uncontrolled extinction of agrodiversity’, which in turn places in jeopardy the future sustainability of agricultural development.<sup>114</sup>

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<sup>110</sup> Tirso Gonzalez, 'The Cultures of the Seed in the Peruvian Andes', in Stephen B. Brush (ed.), *Genes in the Field: On-Farm Conservation of Crop Diversity* Edited by Stephen B. Brush (Ottawa: IDRC / IPGRI /Lewis Publishers 2000).

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Detlef Virchow, 'Conservation of Plant Genetic Resources for Food and Agriculture: Main Actors and the Costs to Bear', at 1155

<sup>114</sup> Ibid., at 1158

Women account for half the food production in developing countries and are the main producer's of the world's staple crops, providing up to 90% of the poor's food intake.<sup>115</sup> Women farmers around the world have been at the forefront of moves to rescue traditional farming practices landraces and to exclude genetically modified organisms from the local farming environment. A particularly noteworthy example is that of the *Nayakrishi Andolon* an initiative of largely poor farmers in Bangladesh in which women are seen as the natural leaders.<sup>116</sup> Women are, according to Mazhar, the ones who conserve and germinate seeds, who transmit this knowledge from generation to generation, mother to daughter, sister to sister and mothers-in-law to daughters-in-law.<sup>117</sup> Loss of local seeds and dependence of farmers on market seed is seen by peasant women as being a loss of their own power.<sup>118</sup> In the Peruvian Andes, women have been the power behind a network of *chalaypasa* markets where exchange of crop varieties, primarily by way of barter, between low and highland areas provides access to a wider diversity of varieties part of a traditional balanced nutritious diet.<sup>119</sup> These barter markets are, claim Marti et al., governed by customary law principles such as

- (a) reciprocity based on friendship and kin relations between women from yunga, quechua and puna zones; (b) redistribution based on social participation norms and access strategies to the different altitudinal tiers by different agro-ecological zone communities; and (c) self-sufficiency based on subsistence farming by each household.<sup>120</sup>

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<sup>115</sup> Brendan Tobin, and Lorena Aguiler, *Mainstreaming Gender Equality and Equity in Abs Governance* (Costa Rica: IUCN, 2007), at 17

<sup>116</sup> F. Mazhar, 'Nayakrishi Andolon: An Initiative of the Bangladesh Peasants for Better Living', in Louise Sperling, And Michael Loevinshon (ed.), *Using Diversity: Enhancing and Maintaining Genetic Resources on-Farm* (IDRC, 1997).

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Neus Marti, Alejandro Argumedo and Michel Limber, *Barter Markets: Sustaining People and Nature in the Andes* (London IIED Sustaining Local Food Systems, Agricultural Biodiversity and Livelihoods, 2010), at 3

<sup>120</sup> Ibid. at 10

Despite their important role in resource management less than 10% of women farmers around the world own their own land.<sup>121</sup> In many countries customary laws designed to secure communal lands preclude women from owning or inheriting land. Such laws are increasingly seen as discriminatory and in breach of women's fundamental human rights, this is particularly so where the breakdown of extended families and the ravages of HIV/AIDS have left many women as the heads of their household.<sup>122</sup> Despite the failings of customary law, Indigenous women while seeking changes to customary law are often amongst the most strident defenders of Indigenous peoples' rights to be governed by their own normative structures. Research carried out by Annika Classens and Sindiso Mnisi with rural women, including indigenous women, in South Africa showed, according to Wicomb, that 'women are able to negotiate change within their communities in order to advance their own position.'<sup>123</sup> In the words of Classens and Mnisi

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.<sup>124</sup>

What Classens and Mnisi are alluding to is the dynamic nature of living customary law and the capacity of women to influence its development. The opportunity for women to bring pressure for internal change to custom would appear to be strengthened where constitutional law conditions recognition of customary law on compliance with fundamental human rights. For Wicomb the recognition by the South African Constitution of customary law facilitates engagement between custom and

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<sup>121</sup> ICHRP. 'When Legal Worlds Overlap: Human Rights, State and Non-State Law'.

<sup>122</sup> Ibid.

<sup>123</sup> Wicomb, 'The Emancipatory Potential of Customary Law for the Rights of Women to Access Land', at 26

<sup>124</sup> Annika Classens and Sindiso Mnisi, 'Rural Women Redefining Land Rights in the Context of Living 'Customary Law'', *South African Journal of Human Rights*, 25/3 (2009), 491-516, at 493

concepts of equality and democratic decision-making.<sup>125</sup> Reframing the debate will, she claims, require

legislators, lawyers and women's rights activists to redefine the discourse of 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.<sup>126</sup>

While women are struggling to secure increased recognition of their rights within their customary legal regimes Indigenous farmers, both men and women, are struggling for recognition of their collective rights at the international level. In an innovative program to support their efforts IIED has pioneered work with rural farmers to enable them to bring their voice to the national and international level, through hosting what are known as citizen juries. In December 2009 one such jury was convoked in Karnataka province in India to consider and provide a verdict on the issue of democratization of agricultural research. The jury of 30, chosen through a laborious process from an original list of 500 potential jurors, included 50% women and an equal percentage of dalits, indigenous and other marginalised groups. Held over 5 days the jury's final conclusions were set out in a 22 point list which included demands for 'research on local landraces that are adaptable to their ecosystems and drought resistant, provide quality and tasty food and fodder and produced by farmers themselves'.<sup>127</sup> Although the jury was not a traditional authority and was not governed by a uniform body of customary law the juries demand that that 'seed distribution, seed festivals, field trials and seed improvement programmes' be approved by their own authorities may be seen as a call for compliance with customary decision making and respect for their self-determination. To a certain extent the jury's final list of demands represents a multicultural Protocol expressing

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<sup>125</sup> Wicomb, 'The Emancipatory Potential of Customary Law for the Rights of Women to Access Land', at 27

<sup>126</sup> Ibid.

<sup>127</sup> Information on the citizen jury held in Karnataka was gleaned from a video of its deliberations prepared by IIED. Available at:

<http://www.iied.org/natural-resources/key-issues/food-and-agriculture/raita-teerpu-farmers%E2%80%99-jury-democratisation-agricul>

shared beliefs, values and norms. The process itself serves as a useful example of the potential for traditional customary authorities to consider and rule upon issues of genetic resource conservation and farmers rights in a manner similar to the Subanon action on mining discussed earlier.

While the Convention on Biological Diversity did away with the notion of common heritage over genetic resources the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty) sustains a small but highly significant global commons for a list of specified crops, such as tomatoes potatoes, rice, and maize (referred to as Annex 1 crops), which are considered vital to global food security. The Treaty establishes a multilateral benefit sharing system designed, in principle, to channel benefits to farmers for their role in crop conservation and development. To date no benefits have accrued to the fund from users of genetic resources and its sole funds have come from donations by a small group of northern countries. The fund began to distribute resources to farmers for in-situ conservation projects in 2009.<sup>128</sup> To date the notion of farmers' rights as it has been dealt with under the treaty has focused primarily on benefit sharing, in terms of economic disbursements for projects within communities. Argumedo et al. call for a more 'broad interpretation of farmers' rights which goes beyond the right to benefit-sharing to include the right of farmers to continue the practices which contribute to the conservation and sustainable use of [plant genetic resources for food and agriculture], and to sustain the traditional knowledge and livelihood systems needed for this.'<sup>129</sup>

Efforts to adopt a more expansive approach to farmer's rights and the protection of landraces in Peru have been pioneered by local communities often working in close collaboration with non-governmental organizations. Of particular note is the experience of the Potato Park an initiative bringing together six Quechua communities in the mountains above Pisac, in the department of Cusco.<sup>130</sup> The Potato Park is a

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<sup>128</sup> Pers. comm. Selim Louafi, Bremen, September 15, 2011

<sup>129</sup> Alejandro Argumedo, Krystyna Swiderska, Michel Pimbert, Yiching Song and Ruchi Pant, 'The Need for a Broad Approach Based on Biocultural Heritage', (Asociacion Andes, IIED, Centre for Chinese Agricultural Policy, and Ecoserve 2011), at 2

<sup>130</sup> Alejandro Argumedo, and Tammy Stanner, *Association Andes: Conserving Indigenous Biocultural Heritage in Peru* (The Gatekeeper Series; London: IIED 2008, at 21 Based on the potato park model



‘Community Conserved Area’, managed by the communities in accordance with the principles of Quechua customary laws, which are utilized as the basis for a Community Protocol to ‘control and regulate foreign access to their traditional knowledge and innovation systems and associated genetic and biological resources’.<sup>131</sup> The communities of the Park have developed a benefit sharing code based on customary law principles to regulate the internal distribution of benefits arising from their various activities. They have also negotiated an agreement based on customary law principles with the International Potato Centre in Lima, as a result of which the centre has repatriated over 400 varieties to the Park. The Park working through the Asociación ANDES has become the first farmers group to officially place its collection of Annex 1 germplasm within the framework of the International Treaty.

From the experience in the Park has emerged the concept of ‘collective biocultural heritage’ which Argumedo et al. describe as the ‘interlinked knowledge, bio-genetic resources, landscapes, cultural and spiritual values and customary laws of indigenous and local communities.’<sup>132</sup> This concept links biological and cultural diversity with traditional knowledge and spirituality and grounds Indigenous peoples’ rights to their cultural heritage and ‘way of life’ on respect for their customary law and the protection of the socio-economic practices which secure their cultural integrity. For Andean communities this must include the right to protection of their native seed varieties, a fact embraced by the relevant authorities in Peru who in collaboration with farming communities, agronomists and relevant institutions have developed a draft agrobiodiversity law. At the outset the development of the draft law was influenced by traditional conservation philosophies closely associated with protected areas legislation. This was apparent in the initial draft law that set out proposed objectives, modalities and criteria for the establishment of a system of protected zones or areas of

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Association ANDES is working with communities to develop more community conserved areas including the Lucre-Muyna Conservation Area, a Ramsar site; the Ausangate Spiritual Park; and the Andean Camelid Communal Park of Cotarusi.

<sup>131</sup> Alejandro Argumedo and Michel Pimbert, *Protecting Indigenous Knowledge against Biopiracy in the Andes* (London: IIED, 2006), at 9

<sup>132</sup> Argumedo et. al., ‘The Need for a Broad Approach Based on Biocultural Heritage’, at 3

particular importance due to their wealth in native crops and wild crop relatives.<sup>133</sup> The draft proposed that zones might be created by public or private initiatives (including that of local communities) and though they may overlap with protected areas they would not in principle be part of the system of National Protected Areas.<sup>134</sup> At the regional level the Municipality of San Marcos has already adopted Ordinance No 043-2006/MPSA, which promotes the conservation of native crop varieties, and provides for the declaration of zones of local interest and protection in areas with a high level of local diversity of native crops such as maize and potato.<sup>135</sup> Activities in agrobiodiversity zones would, according to Ruiz, be based upon the needs of the communities that inhabit them and third parties would need to secure their prior informed consent for research and other activities.<sup>136</sup>

A consultative process across the Andean region led in April 2011 to a revised draft which moved away from the notion of protected areas and the threat of what Huamani describes as the ‘soft expropriation’ of farming communities land rights and their transfer into the public domain.<sup>137</sup> The new draft law focuses more on the issue of securing land title for farmers than on the issue of resource conservation. This says Huamani responds to farmers true concerns and creates the necessary conditions upon which local farmers can build their own resource strategies and development programs. The draft law seeks to make farmers more visible placing areas of agrobiodiversity on the maps, it envisions the establishment of a fund to support in-situ conservation in such areas, and it provides that any activity likely to significantly impair the capacity of the regions farmers to continue with their conservation activities must first be approved by the Ministry for Agriculture.

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<sup>133</sup> 'Proposal for a draft law for the creation and recognition of Agrobiodiversity zones' in Manuel Ruiz Muller, *Agrobiodiversity Zones and the Registry of Native Crops: Learning from Ourselves* (Lima: SPDA, 2009), at 38 -43

<sup>134</sup> Ibid

<sup>135</sup> Muller, *Agrobiodiversity Zones and the Registry of Native Crops: Learning from Ourselves*, at 45

<sup>136</sup> Pers. Comm. Manuel Ruiz Muller, Lima September 2010, see also 'Proposal for a draft law for the creation and recognition of Agrobiodiversity zones Title VI. On the Initiative for its creation', in Muller, *Agrobiodiversity Zones and the Registry of Native Crops: Learning from Ourselves*, at 42

<sup>137</sup> Pers. Comm. Walter Huamani, Ministry for the Environment, Lima, December 2011

Through experiences in community conservation, citizen juries and the adoption of protocols farmers are taking the initiative in the design and implementation of mechanisms to secure their rights over genetic resources, regulate access and benefit sharing, and secure the protection of traditional knowledge. In the process, they are demonstrating the utility, vitality and flexibility of customary law as a tool for securing human rights. Establishment of agrobiodiversity zones will place farmers at the heart of local agriculture and human rights protection. Rights over natural resources are under international law to be governed with due respect and due recognition for Indigenous peoples' customary laws and in manner which secures their cultural integrity. More than any other area, the regulation of natural resource rights has the power to secure or undermine the realisation of indigenous peoples human rights, including rights to food, health, education, human dignity, cultural integrity and self-determination. Decisions on resource exploitation have the power to support or frustrate indigenous peoples' own short and long-term development and subsistence strategies. Incursions of mining and oil companies; promotion of agricultural and fisheries extension programs; regulation of the trade in biological and genetic resources as well as environmental services; introduction or prohibition of genetically modified organisms; climate change policies including REDD+ carbon sequestration programs; and, the conservation or contamination of vital resources such as water sources, are issues which must be regulated with due regard for Indigenous peoples customary laws if their human rights are to be secured.

Realisation by Indigenous peoples of their human rights is clearly dependent upon the effective exercise of their rights to apply their customary laws in the regulation of natural resource use within their territories and to the use of their genetic resources both within and beyond their territorial jurisdiction. Furthermore, states are obliged to give due recognition and respect to Indigenous peoples' customary laws in the preparation, adoption and implementation of natural resource law, policy, and program activities. The foregoing propositions are indicative of rights and obligations relating to natural resource management that have crystallized or are in the process of crystallization as norms of customary international law.

## Chapter 7. From Cultural Property to Cultural Heritage

As we have seen Indigenous peoples' rights to self-determination and to their lands, traditional territories and resources are fundamental for protection of their cultural integrity. It is, however their distinctive cultural identity and their commitment to its retention which most clearly distinguishes Indigenous peoples and underlies their struggle for respect and recognition of their ancestral and human rights. This notion of cultural identity and the struggle to protect cultural integrity has evolved over time as Indigenous peoples have moved from being the objects of cultural investigation to being the arbiters of culture's scope and nature. This evolution is well described by Gray who draws upon the work of Friedman to identify three aspects of culture: the 'culture of social analysis' imposed from outside, the culture of 'indigenous self-identification', and culture in which 'imagery and information become elements in an act of self-determination against colonisation' and the 'basis for demanding rights'.<sup>1</sup> While he sees all three notions of culture as part of an ongoing tension, Gray views the latter politically charged sense of culture as the only means to fully incorporate culture within the indigenous rights struggle.<sup>2</sup> As Indigenous peoples have redefined the notion of culture to embrace a diverse range of tangible and intangible manifestations of culture, a frequently polemic debate has ensued regarding the nature of their cultural rights and the most appropriate means for securing their protection.

This chapter begins with discussion of the debate on cultural property and growing support for reframing indigenous rights in terms of cultural heritage. It goes on to examine indigenous peoples' rights over funeral remains and sacred and cultural objects held in museums and the manner in which customary law is helping in their recovery. The chapter closes with an analysis of the role of customary law in national and international protection of traditional knowledge rights.

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<sup>1</sup> Andrew Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community* (Providence, Oxford: Berghahn Books, 1997), at 165

<sup>2</sup> *Ibid.*

### 7.1 Towards an Indigenous notion of cultural heritage

The term 'cultural property' was first used in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>3</sup> In 1970 the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property established requirements for State Parties to mutually respect and enforce their respective 'cultural property export controls and related legislation'.<sup>4</sup> The Convention left each State Party with the discretion to adopt its own definition of cultural property and made exportation without an obligatory certificate illegal.<sup>5</sup> Neither Convention gave any specific recognition to the rights or interests of Indigenous peoples. Since the 1980's the notion of cultural property has expanded to include not only movable works of art and architectural monuments but things 'as disparate in their scale and characteristics as human remains, art genres, and regional landscapes',<sup>6</sup> as well as traditional knowledge and traditional cultural expressions. Indigenous peoples have proposed an even wider notion of culture to include such things as human genetic material and 'all documentation of Indigenous peoples' heritage in all forms of media'<sup>7</sup> as well as 'biological species as distinct from plant or animal populations'.<sup>8</sup> This section begins with consideration of the expansion of notions of cultural property to encompass an ever-wider range of range of cultural manifestations of Indigenous peoples and the

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<sup>3</sup> John Henry Merryman, 'Cultural Property Internationalism', *International Journal of Cultural Property*, 12 (2005), 11-39.

<sup>4</sup> Ibid. at 22.

<sup>5</sup> Ibid.

<sup>6</sup> Brown, *Who Owns Native Culture*, at 40

<sup>7</sup> See Terri Janke, *Our Culture: Our Future - Report on Australian Indigenous Cultural and Intellectual Property Rights* (Sydney: Michael Frankel & Co. , 1999), at 11-12 where she lists among aspects of indigenous heritage: Literary, performing and artistic works (including music, dance, song ceremonies, symbols, designs, narratives and poetry), languages, Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna), spiritual knowledge, moveable cultural property, indigenous ancestral remains, indigenous human genetic material (including DNA tissues) , cultural environment resources (including minerals and species), immovable cultural property (including sacred sites and burials) and documentation of Indigenous peoples heritage in all forms of media (including scientific and ethnographic research reports, papers and books, films , sound recordings.)

<sup>8</sup> Brown, *Who Owns Native Culture*, at 40

challenges this brings. It goes on to discuss the shift in emphasis from cultural property to cultural heritage in the progression towards notions of custodianship and stewardship of culture.

### 7.1.1 the expanding notion of cultural property and heritage

The fusion of notions of culture and property has seen rights to land and resources grounded upon Indigenous peoples' sacred and cultural links to their traditional territories;<sup>9</sup> development projects brought to a halt to avoid desecration of sacred sites;<sup>10</sup> museums required to repatriate human remains and cultural objects to Indigenous peoples based on proven or presumed links with burial remains<sup>11</sup>; redefinition of rights to access and utilize traditional knowledge found in the public domain<sup>12</sup>; and international documentation of iconic forms of intangible cultural heritage<sup>13</sup>. Legal and administrative measures adopted to secure Indigenous cultural heritage include full property rights, sui generis regimes, co-management schemes, and establishment of obligations to consult and/or seek prior informed consent from Indigenous peoples for access to, holding of or use of elements or aspects of Indigenous peoples' cultural heritage. The evolving body of law pertaining to Indigenous peoples' cultural property interests has been described as 'unique' traversing as it does the boundaries between real, personal, and intellectual property and those between international, domestic, customary and tribal law.<sup>14</sup>

Although, framing their struggle within the language of human rights, Indigenous peoples' efforts to protect their cultural patrimony has been drawn inexorably into the realm of cultural and intellectual property rights. Applying the concept of 'cultural property' to aspects of Indigenous peoples' tangible and intangible culture is highly

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<sup>9</sup> See *Awas Tingni* and *Saramaka* cases referred to in the previous chapter.

<sup>10</sup> See discussion of Hindmarsh Island affair in Brown, *Who Owns Native Culture*, at 173 *et seq.*

<sup>11</sup> Rosemary Coombe, 'The Expanding Purview of Cultural Properties and Their Politics', *Annual Review of Law and Social Sciences*, 2 (2009), 393-412.

<sup>12</sup> See Peruvian Law 27811, 24 July 2002, introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=3420>

<sup>13</sup> UNESCO Convention on Intangible Cultural Heritage

<sup>14</sup> Carpenter et. al., 'In Defense of Property', at 103

controversial. This is the case for a number of reasons, including the inherent conflicts of legal vision between customary law and positive legal regimes.<sup>15</sup> These include conflicts of perception regarding individual versus collective rights<sup>16</sup>, property ownership versus stewardship responsibilities<sup>17</sup>, and cultural sovereignty versus ‘cultural internationalism’.<sup>18</sup>

Social scientists including Brown and others have warned that granting property rights over traditional knowledge poses a threat to free flows of knowledge<sup>19</sup>, a view which Carpenter et al. see as favouring the protection of the public domain over cultural survival.<sup>20</sup> Brown’s analysis identifies, however, a paradoxical position that, what he terms, the ‘advocates of the indigenous ‘we own our culture’ perspective’ find themselves. That is, ‘the odd position of criticising corporate capitalism while at the same time espousing capitalism’s commodifying logic and even pushing it to new extremes.’<sup>21</sup> Christine Godt identified a somewhat similar paradox when investigating exclusive licensing arrangements between Ethiopia and a Dutch commercial company to grow Teff, a highly nutritious gluten free grain native to northeastern Africa.<sup>22</sup> Noting the widely held view that the Convention on Biological Diversity was a foil against the extremes of the World Trade Organisation and intellectual property rights regimes, she argues that by entering into exclusive licensing arrangements under the framework of the Convention the commercial partner sought to exercise complete control over the growing of Teff in Europe.<sup>23</sup>

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<sup>15</sup> Brendan Tobin, 'Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru', *RECIEL*, 10/1 (2001a).

<sup>16</sup> Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm', at 397-8

<sup>17</sup> See generally Coombe, 'The Expanding Purview of Cultural Properties and Their Politics',

<sup>18</sup> Merryman, 'Cultural Property Internationalism',

<sup>19</sup> Michael Brown, *Who Owns Native Culture*, Naomi Mezey, 'The Paradoxes of Cultural Property', *Columbia Law Review*, 107, (2007), 2004 - 46

<sup>20</sup> Carpenter et. al. 'In Defense of Property',

<sup>21</sup> Brown, *Who Owns Native Culture*, at 237

<sup>22</sup> Christine Godt, 'Regulatory Paradoxes - the Case of Agricultural Innovation', in J. Drexler, C. Godt, R. Hilty, B. Rémiche, & L. Boy (ed.), *Technology and Competition - Technologie Et Concurrence* (Brussels: Larcier (De Boek) 2009), 71-90.

<sup>23</sup> *Ibid.*

Thereby, leading to greater restrictions on access to genetic resources than would have been available under the most stringent terms of the International Convention on Plant Variety Protection UPOV.<sup>24</sup>

Barsh is a strident opponent of a property rights approach arguing it will lead to ‘a distortion of the very nature of indigenous cultures, and of the relationship between Indigenous peoples and their lands.’<sup>25</sup> The danger, he says, lies in the distinction in Western thought between nature and culture ‘reflected in the assumption that nearly all cultural and intellectual property can be completely detached from the landscapes in which they arose’.<sup>26</sup> In his view this fails to recognise that land and knowledge rights are, ‘so closely intertwined that the use of property based terms ‘such as ‘land tenure’ completely distorts indigenous conceptions of law’.<sup>27</sup> Similarly, Erica Irene Daes sees the relationship between indigenous culture and the land as so strong that ‘it is inconceivable that ...any element of the people’s collective identity, could be alienated permanently or completely.’<sup>28</sup> The Kainai Blood tribe, for example, has, according to Al-Attar Ahmed et al., their own ‘fully functioning system of cultural property protection’, and any transfers occurring without adherence to that system are considered illegal.<sup>29</sup> The spiritual nature of tribe’s relationship with their cultural heritage is apparent in the words of a member of the Kainai Blood Tribe, cited by Al-Attar Ahmed et al., where he states that,

Ownership in our community, in our way, is different from a white man’s ownership and view. We believe that we don’t own thing[s] that they belong to the Creator and bundles are given to our people for specific purposes.<sup>30</sup>

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<sup>24</sup> Ibid.

<sup>25</sup> Russel Lawrence Barsh, 'How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property', *International Journal of Cultural Property*, 8/1 (1999), 14-47, at 15

<sup>26</sup> Ibid. at 16

<sup>27</sup> Ibid. at 20

<sup>28</sup> E/CN.4/Sub.2/1993/28, Para. 22

<sup>29</sup> Ibid. at 321

<sup>30</sup> Mohsen Al Attar Ahmed, Nicole Aylwin and Rosemary Coombe, 'Indigenous Cultural Heritage Rights in International Human Rights Law', in Catherine Bell and Robert Patterson (ed.), *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform* (Vancouver:: University of British Columbia Press, 2009), 311-42, at 320 fn 39



The Kainai Blood tribe has, according to the authors, their own ‘fully functioning system of cultural property protection’<sup>31</sup> Transfers occurring without adherence to the Kainai Blood Tribe’s legal systems are considered illegal.<sup>32</sup>

The ‘ideological baggage’ associated with the term ‘cultural property’<sup>33</sup> has led many authors to embrace the concept of cultural heritage<sup>34</sup>. A term which Prott and O’Keefe believe embraces areas ‘...‘property’ does not, and should not, try to cover.’<sup>35</sup> The gist of their argument is that the notion of ‘property’, viewed as a possessory right, is inappropriate to describe the full range of relationships associated with heritage objects.<sup>36</sup> Daes utilises the term ‘collective heritage’ of indigenous people to cover both their cultural and intellectual property,<sup>37</sup> defining ‘heritage’ as

everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things, which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally occurring species of plants and animals with which a people has long been connected.<sup>38</sup>

Although, international law is increasingly accommodating itself to the use of the term ‘cultural heritage’ the legal framework for protection of aspects of culture is still

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<sup>31</sup> Ibid., at 321

<sup>32</sup> Ibid.

<sup>33</sup> Lyndel Prott and Patrick O’Keefe, "Cultural Heritage' or 'Cultural Property", *International Journal of Cultural Property*, 1/2 (1992), 307 – 20, at 309.

<sup>34</sup> See generally Coombe, 'The Expanding Purview of Cultural Properties and Their Politics', Janke, *Our Culture: Our Future - Report on Australian Indigenous Cultural and Intellectual Property Rights* and, Prott, "Cultural Heritage' or 'Cultural Property",

<sup>35</sup> Prott, "Cultural Heritage' or 'Cultural Property", at 309

<sup>36</sup> Ibid.

<sup>37</sup> E/CN.4/Sub.2/1993/28, para.23

<sup>38</sup> E/CN.4/Sub.2/1993/28, Para 24

primarily property based. One response has been to propose greater application of the Indigenous notion of stewardship for protection of cultural heritage.

### 7.1.2 towards a customary concept of property stewardship

As they have been drawn ever further into a property rights dialogue the challenge for Indigenous peoples has been how to reframe the debate from within. To this end they are seeking recognition of a range of cultural heritage rights conducive to enforcement of their own customary laws and practices. Janke, in her influential 1999 study of indigenous peoples' cultural and intellectual property in Australia, sets out comprehensive list of the type of heritage rights Indigenous peoples are seeking.<sup>39</sup> These include rights to: 'own, control and define what constitutes Indigenous Cultural and Intellectual Property and/or Indigenous heritage; have protection based on self-determination; be recognized as guardians and interpreters of their culture; collective ownership of cultural and intellectual property rights; authorize or refuse rights for commercial use in accordance with their own customary law; require prior informed consent for access and use; and maintain secrecy over Indigenous knowledge and other cultural resources.'<sup>40</sup> Recognition and enforcement of these rights would empower Indigenous peoples to control access to and use of their cultural property, as they may define it, in accordance with their rights to self-determination and in conformance with their own customary laws and practices.

For Special Rapporteur Erica Irene Daes the fact that Indigenous peoples do not view their heritage 'in terms of property at all' highlights the importance of giving voice and recognition to Indigenous peoples' own legal regimes as the legitimate arbiters of their rights over cultural heritage.<sup>41</sup> While recognising the diversity and complexity of Indigenous peoples' legal regimes Daes identifies various similarities in them, including, the communal nature of rights over heritage,<sup>42</sup> - despite which individuals

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<sup>39</sup> Janke, *Our Culture: Our Future - Report on Australian Indigenous Cultural and Intellectual Property Rights*, at 47-48

<sup>40</sup> Ibid.

<sup>41</sup> E/CN.4/Sub.2/1993/28, Para 26

<sup>42</sup> E/CN.4/Sub.2/1993/28, Para 28

may be the practical caretaker or custodian of specific aspects of heritage<sup>43</sup> - and, the need for group consent for sharing of heritage (specific decision making procedures may differ depending upon the nature of the subject matter e.g. traditional medicines, songs, stories).<sup>44</sup> Based on her 1993 study Daes elaborated draft principles and guidelines for the protection of the heritage of Indigenous peoples.<sup>45</sup> The principles specified, among other things, that effective protection of Indigenous peoples' heritage should be based broadly on self-determination and Indigenous peoples' ownership and custody should be collective, permanent and inalienable or as prescribed by their own customs, rules and practices.<sup>46</sup> In 2000 the proposed principles and guidelines were reviewed and submitted to the Working Group on Indigenous Populations with the suggestion that the Group might consider at some stage seeking to transform them into a convention on Indigenous peoples' cultural heritage.<sup>47</sup> Weissner and Battiste, who chaired the review session, identified three major ideas arising from Daes' earlier study. These were, the need for a holistic and expansive view of cultural heritage, deference where possible to indigenous customs, laws and practices, and effective legal protection at the national and international level.<sup>48</sup> The adoption of the UN Declaration on the Rights of Indigenous peoples is an important step in this direction, It needs, however, to be supported by action at the national level and by Indigenous peoples themselves to strengthen and secure recognition of their customary laws.

## **7.2 Ancestral remains and cultural patrimony**

Taken together, Article 27 of the ICCPR, Article 15. (1) (a) of the ICESCR, and the relevant provisions of ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples establish a firm basis for members of Indigenous peoples to claim their right to enjoy, together with other members of their people,

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<sup>43</sup> E/CN.4/Sub.2/1993/28, Para 29

<sup>44</sup> E/CN.4/Sub.2/1993/28,

<sup>45</sup> E/CN.4/Sub.2/1995/26, annex

<sup>46</sup> Ibid.

<sup>47</sup> E/CN.4/Sub.2/2000/26

<sup>48</sup> Siegfried Wiessner and Marie Battiste 'The 2000 Revision of the United Nations Draft Principles and guidelines on the Protection of the Heritage of Indigenous People', 13 *St Thomas Law Review*, (2000) 383 – 390, at 384

those aspects of their culture which are inherently and inextricably associated with their way of life. An important aspect of this is the issue of respect for the inviolability of Indigenous peoples' rights to family, to religion and to privacy.

This section examines the highly emotive issue of the return of funeral remains and cultural and sacred objects held in museums and other non-indigenous sites.

### 7.2.1 repatriation of human remains, cultural and sacred objects

Indigenous peoples around the world have consistently fought for respect and protection of ancient burial grounds and for the repatriation of disinterred human remains and sacred and cultural objects, whether held in private or public collections. At present international law does not specifically recognise the rights of sub-national groups to restitution of cultural heritage. That said, both the International Law Association and the Working Group on Indigenous peoples have supported the preparation of a draft convention on indigenous culture that would include provisions on the repatriation of cultural heritage across national borders.<sup>49</sup> To date, however, repatriation depends upon the status of national law with measures having been adopted in, among other countries, Australia, New Zealand and the United States. Of these the US legislation has received the greatest attention to date.

The U.S. Native American Graves Protection and Repatriation Act (hereafter US Native Graves Act) has been described as the 'keystone in the legal framework for protecting and repatriating indigenous heritage.'<sup>50</sup> The Act regulates four categories

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<sup>49</sup> Ana Feipa Vrdoljak, 'History and Evolution of International Cultural Heritage Law: Through the Question of the Removal and Return of Cultural Objects', *30th Anniversary of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation: Expert Meeting and Extraordinary Session* (Seoul, 2008), at 15, referring to Erica Irene Daes UN Doc. E/CN.4/Sub.2/1994/31. See also Report of the Cultural Heritage Law Committee, International Law Association Toronto Conference (2006), Report of the Seventy-Second Conference, Toronto, 2006, (London: ILA, 2006), p. 348 (Chair: James Nafziger) where it states 'The United Nations should consider the possibility of drafting a convention to establish international jurisdiction for the recovery of Indigenous peoples' heritage across national frontiers, before the end of the International Decade of the World's Indigenous People.'

<sup>50</sup> Nafziger, *Cultural Law: International, Comparative and Indigenous*, at 427.

of Native tangible cultural heritage including, ancestral human remains, funerary objects, sacred objects, and objects of cultural patrimony.<sup>51</sup> It establishes criminal sanctions for illegal trafficking in Native American human remains and cultural objects<sup>52</sup> and sets down procedures for repatriation of human remains and cultural items by museums and federal agencies. For Nafziger et al. the US Native Graves Act is ‘essentially human rights law’<sup>53</sup> drawing upon the international ‘regime of human rights and self-determination that emerged after the Second World War.’<sup>54</sup> It is also, according to Tsosie, the first U.S. statute to recognise collective rights over cultural property, in the process providing Native American tribes with a legal avenue to pursue their cultural claims.<sup>55</sup>

The US Native Graves Act recognises the inalienable nature of Indigenous peoples’ cultural patrimony an approach that finds resonance in other countries laws for the protection of traditional knowledge.<sup>56</sup> Most importantly, it defers to tribal customary law for the purposes of determining ‘the legal question of alienability at the time the item was transferred’.<sup>57</sup> This serves as a useful example of how federal legislation can act to secure compliance with customary law of Indigenous peoples. The Act can in effect extend the influence of customary law far beyond relevant tribal jurisdiction. The Act also defers to custom and tradition on sacred objects, by considering, in the words of Tsosie, ‘the vital role of indigenous beliefs (an ‘intangible’ aspect of culture) in establishing what is ultimately considered a tangible cultural resource.’<sup>58</sup> Where conflicts arise between communities,<sup>59</sup> The Native Graves Act requires the resolution

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<sup>51</sup> Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm', at 404.

<sup>52</sup> Nafziger, *Cultural Law: International, Comparative and Indigenous*, at 427.

<sup>53</sup> *Ibid.* at 431.

<sup>54</sup> *Ibid.* at 429.

<sup>55</sup> Tsosie, 'Indigenous Peoples' Claims to Cultural Property: A Legal Perspective', at 6

<sup>56</sup> See Peru’s Law 27811

<sup>57</sup> Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm', at 404.

<sup>58</sup> Tsosie, 'Indigenous Peoples' Claims to Cultural Property: A Legal Perspective,' at 6

<sup>59</sup> See Brown *Who Owns Native Culture*, at 20 where he provides an example of a potential conflict regarding funerary objects; recounting the story of the Hopi and Navajo Indigenous peoples who both

of such disputes in a court of law as a precondition for disbursing disputed objects.<sup>60</sup> Full and active participation of traditional decision-making authorities in any dispute resolution procedures is, therefore, fundamental to ensuring an appropriate resolution of conflicts between alternative customary law regimes or interpretations of custom.

For Carpenter et al. the Native Graves Act empowers tribes as peoples to regain access to and custody of Indian remains and artefacts in a manner consistent with their own life ways and beliefs.<sup>61</sup> They see traces of indigenous notions of stewardship of property in the Act, which refers to ‘custody and possession, not title and ownership.’<sup>62</sup> They also note that while enabling repatriation of human remains by museums, the Act has not led to the ‘plundering of American museums by Indian tribes that many feared’.<sup>63</sup> On the contrary, Indigenous peoples have, they say, shown themselves to be pragmatic ‘often leaving in museums those items they have determined they cannot properly house or care for.’<sup>64</sup> In an effort to escape from the strictures of traditional exclusionary ownership rights Carpenter et al. propose a new conceptual approach for addressing indigenous interests in cultural property based upon notions of collective stewardship rights. Their conceptual approach, which is described in detail in chapter eight, brings to mind Allott’s notion of indigenous land rights that may include non-exclusionary interests over shared spaces and resources.

Although, the US Native Graves Act is primarily applicable to Native American and Hawaiian groups it has, says Nafziger et al., encouraged the return of remains to foreign claimants.<sup>65</sup> In such cases, it is to be hoped that respect will be shown for the rights of foreign Indigenous peoples’ to identify their cultural patrimony in accordance with their own customary laws and traditions. Al Attar et al. note the difficulties the Kanai Blood Tribe faced in their efforts to recover items held in

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claim links to the Anasazi culture who constructed magnificent cliff dwellings in the Cahco Canyon Mesa Verde.

<sup>60</sup> Nafziger, *Cultural Law: International, Comparative and Indigenous*.

<sup>61</sup> Carpenter et. al., 'In Defense of Property', at 171

<sup>62</sup> Ibid.

<sup>63</sup> Ibid. at 172.

<sup>64</sup> Ibid.

<sup>65</sup> Nafziger, *Cultural Law: International, Comparative and Indigenous*, at 428

museums and private collections across Europe, which they believed to have been illegally obtained, saying

to reacquire them they are forced to abide by the tenets of European legal tradition. Often this means providing written documentation to verify ownership; in instances in which oral testimony is accepted as proof, it may be held up to Western evidentiary standards to support Indigenous claims. The Kanai are obviously disadvantaged when they are asked to claim property under foreign legal standards and their own protocols are ignored<sup>66</sup>

The challenge of course is to take on board the distinct cultural perceptions that exist among Indigenous peoples. For Coombe recognition of other conceptual understandings of the relationship between people and aspects of their culture is,

a form of mutual respect and recognition that arguably continues to elude most theorists of both property and culture. Effectively, it is to acknowledge that cultural property is just one dimension of cultural rights a category of human rights that puts enhanced emphasis on moral rights, collective cultural identity, cultural integrity, cultural cooperation, cross cultural communications, and intercultural exchange.<sup>67</sup>

The recognition of a central role for customary law in defining rights to transfer human remains and cultural and sacred objects, as provided for in the US Native Graves Act, is a specific example of regime collaboration rather than competition. By establishing modalities that allow customary law to define rights over cultural heritage the Native Grave Act empowers Indigenous peoples and helps to ensure that historical acts contrary to their rights are not perpetuated. In doing so it provides a clear example of how national and international law can promote wider application of customary law.

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<sup>66</sup> Al Attar Ahmed 'Indigenous Cultural Heritage Rights in International Human Rights Law', at 322

<sup>67</sup> Coombe, 'The Expanding Purview of Cultural Properties and Their Politics', at 401

### 7.3 Traditional knowledge

Indigenous peoples' traditional knowledge is the most intimate part of their culture, it inculcates the very notion of cultural belonging and encapsulates and reflects Indigenous peoples' holistic worldview. In the words of Aroha Mead

Traditional knowledge is the knowledge that we're born with, that we've inherited, that we contribute to in our lifetime and pass on to future generations. Its whole function is survival and the development of a culture, of a people.<sup>68</sup>

This definition, based upon Maori concepts of *Mataruanga Maori*, captures the collective, personal, intergenerational, cumulative and dynamic nature and properties of traditional knowledge and its holistic and tradition based focus. It highlights its also its fundamental role as the basis of subsistence and development strategies of Indigenous peoples and local communities<sup>69</sup>. Traditional knowledge plays a role in guiding decision-making, it underlies cultural and spiritual ceremonies and practices, and acts as a bond securing community cohesion. It is now also increasingly sought as an input for scientific and commercial research, and is valued as an extensive body of informal science in areas such as agriculture, fisheries, botany, ecosystem management and in programs associated with the mitigation of climate change.<sup>70</sup> Its value lies both in its individual elements and in the sum of its parts, which make up a dynamic and consistently evolving knowledge system that nurtures ongoing innovation to meet changing needs<sup>71</sup>.

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<sup>68</sup> Aroha Mead – quote used in *The Genetic Revolution*, an Exhibition at the Museum of New Zealand Te Papa Tongarewa, 3 September 2005 - 23 January 2006. Available at: [www.tepapa.govt.nz](http://www.tepapa.govt.nz)

<sup>69</sup> Rosemary J. Coombe 'Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?', 17 *FLA. J. INT'L L.* 115, (2005)

<sup>70</sup> UNPFII, 'Report of the International Technical Workshop on Indigenous Traditional Knowledge', (New York 2006).

<sup>71</sup> Pedro Garcia, *Diversidad Biologica, Cultura Y Desarrollo (II Parte)* (Grupo de Trabajo 'Racimos de Ungurahui' y la Comision de Emergencia Ashaninka (CEA), Lima 2000).



Protection of traditional knowledge is vital for the realization of Indigenous peoples' human rights, including rights to food, education, health, culture, human dignity, development, to their lands, resources, customary laws and institutions and to self-determination.<sup>72</sup> At the same time its long-term protection is dependent upon realisation of many of the self same rights. Despite the great importance of traditional knowledge for Indigenous peoples and local communities as well as the wider society, it has until recently remained largely unprotected and continues to be subjected to numerous internal and external threats.<sup>73</sup> Internal threats include, among other things changing cultural values; loss of control over land and resources; failure to transmit knowledge between generations; and loss of language.<sup>74</sup> While, external threats include national policies promoting cultural assimilation; forced removal from lands and misappropriation of resources; restrictions on freedom to continue nomadic lifestyles; war and conflict; discriminatory or inappropriate government policies; lack of recognition of traditional customs and institutions; globalization and exposure to the market economy; inappropriate educational and health systems; as well as centralised and insensitive agriculture and fisheries extension programs; incursion of extractive industries; the influence of organised religion; and biopiracy.<sup>75</sup> The very breadth and scale of threats facing traditional knowledge demonstrates the need for a coordinated and multisectoral response at both the national and international level.

This section begins with an examination of the role ascribed to customary law in national and international measures for the protection of traditional knowledge. It goes on to discuss the relationship between compliance mechanisms, protection of traditional knowledge and the recognition of customary law.

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<sup>72</sup> Brendan Tobin, 'Setting Protection of TK to Rights – Placing Human Rights and Customary Law at the Heart of TK Governance', in E. C. Kamau and G. Winter (eds.), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* (Earthscan, 2009a).

<sup>73</sup> For discussion of the threats facing traditional knowledge see UNPFII, 'Report of the International Technical Workshop on Indigenous Traditional Knowledge', (New York 2006). Brendan Tobin, and Krystyna Swiderska, *Speaking in Tongues: Indigenous Participation in the Development of a Sui Generis Regime to Protect Traditional Knowledge in Peru* (London: IIED, 2001b). Krystyna Swiderska, 'Banishing the Biopirates: A New Approach to Protecting Traditional Knowledge', Pedro Garcia, *Diversidad Biologica, Cultura Y Desarrollo (II Parte)*

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

### 7.3.1 protection of traditional knowledge

Recognized in more than a dozen international instruments, the right of Indigenous peoples to protect and enjoy their traditional knowledge has become the standard bearer of the indigenous drive for recognition and protection of their human rights.<sup>76</sup> The Convention on Biological Diversity sees itself as the primary international instrument mandated to address issues regarding protection of traditional knowledge relevant for the conservation and sustainable use of biological diversity<sup>77</sup>. It draws this mandate from the provisions of Article 8(j), which 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

The tentative recognition of indigenous knowledge rights in the Convention on Biological Diversity stands in sharp contrast to the more explicit provisions of Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, which recognises Indigenous peoples' rights

to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora,

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<sup>76</sup> For a list of provisions on traditional knowledge in international instruments see Mick Dodson, 'UNPFII Study on Customary Laws Pertaining to Indigenous Traditional Knowledge and to What Extent Such Customary Laws Should be Reflected in International and National Standards Addressing Traditional Knowledge' (2007). E/C.19/2007/10,

<sup>77</sup> Convention on Biological Diversity, Decision IV/10

oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

The stridency of Article 31 is a manifestation of just how far traditional knowledge rights have come since the adoption of the Convention on Biological Diversity in 1992. Issues relating to traditional knowledge under the Convention fall primarily within the mandate of the Working Group on Article 8 (j) and related provisions of the Convention. The Working Group has adopted unique working practices in which representatives of Indigenous peoples and of states jointly chair proceedings. Amongst its primary achievements have been the preparation of the *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments*<sup>78</sup> and the *Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*. The Code is intended to help ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity<sup>79</sup>. It encompasses both secret knowledge and traditional knowledge that has fallen into the public domain. It also addresses issues such as the role of customary law, protection of the integrity of Indigenous peoples' collective rights and the ethical principles of Indigenous peoples<sup>80</sup>.

At the request of the Conference of the Parties to the Convention on Biological Diversity the Working Group on Article 8 (j) has prepared draft elements for *sui generis* systems for the protection of traditional knowledge. These focus on issues of prior informed consent and recognition of customary law relating to indigenous/traditional/local knowledge; biological resources; and procedures governing access to and consent to use traditional knowledge, biological and genetic

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<sup>78</sup> *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*

<sup>79</sup> UNEP/CBD/COP/8/31, Decision VIII/5 F.

<sup>80</sup> *Ibid.*

resources<sup>81</sup>. The importance of customary law as a basis for protection of traditional knowledge has been set out in a detailed paper on *sui generis* issues prepared by the Secretariat to the Convention<sup>82</sup>, which states that

[f]or *sui generis* systems to be effective there will likely be a need for measures at local, national and international levels. It is highly desirable that local measures be based closely on the relevant customary laws of the indigenous and local communities concerned and developed with their full and effective participation and their prior informed consent. In fact, traditionally, there may already be *sui generis* protection in place, through customary law and such measures require formal recognition by the State and support to ensure their effectiveness and continuity.<sup>83</sup>

In October 2010 the adoption of the Nagoya Protocol cemented international recognition of the inextricable link between customary law of Indigenous peoples and the protection of their rights over their traditional knowledge.<sup>84</sup> The Protocol obliges all Parties to take measures to secure Indigenous peoples' traditional knowledge rights.<sup>85</sup> It does not, however, recognise a property right in their favour. Rather it creates a series of obligations for Parties, which if implemented in accordance with the letter and spirit the Protocol, will provide Indigenous peoples with extensive rights to control access to and use of their traditional knowledge. This is achieved through the creation of obligations for both countries in which indigenous peoples reside and countries into which their traditional knowledge has or may be imported. The system is crafted in such a way that customary law governs both the point of access, where

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<sup>81</sup> Convention on Biological Diversity Decision VII/16, Annex: Some potential elements to be considered in the development of *sui generis* systems for the protection of traditional knowledge, innovations and practices of indigenous and local communities.

<sup>82</sup> UNEP/CBD/WG8J/5/6

<sup>83</sup> Ibid.

<sup>84</sup> The Protocol will enter into force 90 days after the deposit of the 50th instrument of ratification, acceptance, approval or accession by states or regional economic integration organizations that are parties to the Convention. As of September 2011 the Protocol had been signed by 52 countries, though none had as yet ratified the Protocol,

<sup>85</sup> Nagoya Protocol, Articles 7, 12, 16

prior informed consent of Indigenous peoples is a condition for access and use,<sup>86</sup> and the point of use, where states are obliged to ‘take measures’ to ensure that such use has been the subject of prior informed consent and of mutually agreed terms.<sup>87</sup> In implementing their obligations states are required by Article 12 (1) of the Protocol to ‘take into consideration’ Indigenous peoples’ customary law and community protocols.<sup>88</sup> The Protocol is the first binding international instrument to give extraterritorial effect to Indigenous peoples customary law. A precedent that is likely to be replicated in many other areas of law in the future.

In order for states to meet their obligations under international law to give due respect<sup>89</sup>, due recognition<sup>90</sup>, due regard<sup>91</sup> and/or to ‘take into consideration’<sup>92</sup> the customary laws of Indigenous peoples they will need to review the adequacy of existing rules for recognition and enforcement of foreign laws. With regard to contracts, for example, under the existing rules of choice of law in common law countries, at least, you cannot choose as the law of a contract a law which is not a national law. The question then arises as to whether Indigenous peoples’ customary laws form part of the national law of the countries in which they reside. In some countries that is already clearly the case as for example where customary law is recognised under national constitutional and or statutory law. It may also arise where customary law is recognised by the courts, as is the case with recognition of native title rights. Recognition may also come where national constitutional law provides for the direct applicability of international treaties ratified by the relevant state<sup>93</sup>. Where the status of customary law is unclear, then securing its recognition in a foreign jurisdiction will, according to Morgan, depend upon action to establish the legislative

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<sup>86</sup> Ibid. Article 7

<sup>87</sup> Ibid.

<sup>88</sup> Nagoya Protocol, Article 12.1

<sup>89</sup> UN Declaration, Article 26

<sup>90</sup> Ibid. Article 27

<sup>91</sup> ILO Convention, Article 8

<sup>92</sup> Nagoya Protocol, Article 12 (1)

<sup>93</sup> See, for example, Constitution of Kenya 2010

footing of customary law at the national level.<sup>94</sup> In some cases international law may provide a solution. Ahern suggests, for example, the possibility that customary law might be considered a form of non-state law entitled to the same treatment as national law under the provisions of the EC Convention on the Law Applicable to Contractual Obligations (Rome 1980), commonly referred to as Rome 1.<sup>95</sup> There is, however, as yet no jurisprudence to directly support this view.

Simon Morgan, an expert in international commercial law and *ley marchant*, has set out a number of questions which will need to be addressed in conflicts relating to contracts in which customary law features.<sup>96</sup> These include: obtaining access to the relevant authorities; establishing the Tribunal's jurisdiction; identifying the cause of action, starting and maintaining the action; establishing that the relevant customary law is applicable and enforceable; how to prove and interpret customary law, given that it is made up of oral traditions; readiness and ability of authorities in a foreign jurisdiction to apply customary law; proof and quantification of loss; enforcement of judgments made under customary law; and, issues in relation to 'equality of arms' and cost.<sup>97</sup> Morgan suggests that 'in the absence of a regime allowing for the international recognition and enforcement of customary law, arbitration could provide an answer to many of these issues.'<sup>98</sup> Alternative solutions may, he suggests include the establishment of an international ombudsman's office, development of binding international legislation to govern the treatment of customary laws in proceedings, or the promotion of alternative dispute resolution processes.<sup>99</sup> Actions which may be taken to support compliance with the provisions on customary law in the Protocol and

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<sup>94</sup> Simon Morgan, 'Customary law in National and International Arbitration and Litigation Proceedings', paper presented at the *First Customary Law and Human Rights Dialogue: Customary Law, Traditional Knowledge and Human Rights* National University of Ireland Galway, on 18-19<sup>th</sup> June 2010.

<sup>95</sup> John Ahern, 'Intervention at First Customary Law and Human Rights Dialogue: Customary Law, Traditional Knowledge and Human Rights' National University of Ireland Galway, on 18-19<sup>th</sup> June 2010.

<sup>96</sup> Simon Morgan, 'Customary law in National and International Arbitration and Litigation Proceedings', at 3

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

the UN Declaration include, for example, the preparation of guidelines on the development of functional interfaces between the national judiciary and customary legal regimes and Indigenous peoples' traditional authorities; establishment of appropriate evidentiary standards for the proof of customary law before national courts; revision of existing principles of conflict of laws and their applicability to recognition of customary laws of indigenous peoples' from foreign jurisdictions; and, identification of the criteria for determining whether the customary laws of Indigenous peoples may be considered part of national law for the purposes of their recognition in a foreign jurisdiction.<sup>100</sup>

The Nagoya Protocol requires states to take appropriate measures to ensure that 'traditional knowledge associated with genetic resources' utilized within their jurisdiction has been accessed in accordance with prior informed consent and mutually agreed terms, as required by the Party where such Indigenous peoples are located.<sup>101</sup> Article 7 of the Protocol creates unequivocal obligations for user countries to take measures 'with the aim of ensuring' that use of traditional knowledge within their territories has been the subject of prior informed consent and mutually agreed terms. Although all countries are potentially user countries the term is widely understood as applying primarily to countries with advanced research, technological and/or industrial capacity in the pharmaceutical, cosmetics, natural products, agroindustrial, and biotechnology sectors.<sup>102</sup> It is important to stress that the obligations under Article 7 apply to all countries where traditional knowledge is being accessed and or utilised, and are not conditional on any action by the countries in which Indigenous peoples reside. To decide otherwise would make the realisation of Indigenous peoples' human rights over their traditional knowledge conditional upon national capacity and political will of the states in which they reside.

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<sup>100</sup> See, for example, the European Community Convention on the Law Applicable to Contractual Obligations (Rome 1980) known as Rome I,

<sup>101</sup> Nagoya Protocol, Articles 15 and 16

<sup>102</sup> Charles V. Barber, Sam Johnston and Brendan Tobin 'User Measures: Options for Developing Measures in User Countries to Implement the Access and Benefit-Sharing Provisions of the Convention on Biological Diversity 2nd Edition', (UNU-IAS, 2003).

The Protocol was adopted without a functional compliance system. It has, however, established a system for monitoring the utilization of genetic resources which centres around an internationally recognised system for certification of compliance with relevant access and benefit sharing legislation.<sup>103</sup> The system is, for now, limited to genetic resources and does not envisage certification of the origin and existence of prior informed consent for use of traditional knowledge.<sup>104</sup> This, it is posited, significantly reduces the capacity of the Protocol to serve as the basis for monitoring and enforcement of traditional knowledge rights. Article 18 of the Protocol requires Parties to provide access to a system for resolving disputes. To meet this obligation states will need to address the challenges discussed earlier regarding recognition and enforcement of obligations arising under customary law.

The Protocol focuses on the regulation of trade in genetic resources and traditional knowledge under contractual agreements. It does not provide the necessary legal framework for protection of Indigenous peoples' rights over their traditional knowledge in cases of misappropriation or where there has been leakage of knowledge following contractual breaches. The question of misappropriation has been largely left for regulation in other forums, the Convention in essence abdicating its position as the self styled primary body responsible for the regulation of rights relating to traditional knowledge associated with biological diversity. A further issue of some concern is the lack of any clarity regarding the scope of the term 'traditional knowledge associated with genetic resources' means. In the absence of any official definition of this term it is suggested that recourse may be had to customary law and

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<sup>103</sup> Nagoya Protocol, Article 17, for discussion of certification systems see Brendan Tobin, Geoff Burton and Jose Carlos Fernandez-Ugalde, *Certificates of Clarity or Confusion: The search for a practical, feasible and cost-effective system for certifying compliance with PIC and MAT*, (Yokohama: UNU-IAS, Japan, 2008); Brendan Tobin, David Cunningham, and K. Watanabe *The Feasibility, Practicality and Cost of a Certificate of Origin Scheme for Genetic Resources*, UNEP/CBD/WG-ABS/3/INF/5, (CBD Secretariat, 2005)

<sup>104</sup> For discussion of certification and its role in protection of Indigenous rights see Tobin 'Alternativas a Las Legislaciones De Propiedad Intelectual, Reunión Regional Sobre Propiedad Intelectual y Pueblos Indígenas', Brendan Tobin 'The Search for an Interim Solution', in K. Whimp & M. Busse (eds.) *Protection of Intellectual, Biological and Cultural Property in Papua New Guinea*, (Asia Pacific Press and Conservation Melanesia, 2000)



the actual practices of indigenous peoples in order to ascertain the nexus between relevant resources and their traditional knowledge.

Working in parallel to the Convention on Biological Diversity the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (hereafter IGC), has taken significant steps towards the development of international instruments for the protection of traditional knowledge and traditional cultural expressions. Established in 2000, the IGC is also negotiating around the theme of genetic resources where the debate is focusing primarily on proposals for the adoption of requirements for the disclosure of the origin/source of genetic resources and of evidence of prior informed consent and mutually agreed terms for their access and use. In October 2011 the WIPO General Assembly called upon the IGC to ‘expedite its work’ ...with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection’ of genetic resources, traditional knowledge and traditional cultural expressions.<sup>105</sup> The Assembly has charged the IGC with presenting its concluded work to the General Assembly for its consideration in 2012 it will consider establishing a Diplomatic Conference to finalize negotiation of any International instrument(s).<sup>106</sup>

At an early stage of its work the Intergovernmental Committee began the development of separate documents as the basis for negotiations on protection of traditional knowledge relating to biological diversity and of traditional cultural expressions. The Committee was slow to begin negotiations on the issue of genetic resources, in 2012, however, the Committee dedicated its 20th meeting to this topic.<sup>107</sup> With regard to protection of traditional knowledge the proposed scope of protection includes the content or substance of knowledge resulting from intellectual activity in the traditional context, passed between generations, in any field including agricultural, environmental and medicinal knowledge associated with genetic

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<sup>105</sup> WIPO/GRTKF/IC/20

<sup>106</sup> Ibid.

<sup>107</sup> WIPO/GRTKF/IC/20/4

resources<sup>108</sup>. Legal remedies are to be provided where fair and equitable benefit sharing does not take place<sup>109</sup>; access is to depend on prior informed consent<sup>110</sup>, and an exemption is made for customary use and exchange of traditional knowledge<sup>111</sup>. The draft presents a potential traditional knowledge regime built upon concepts of misappropriation. It defines misappropriation to include

any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means; deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge<sup>112</sup>.

One of the key elements of the draft IGC proposal on traditional knowledge is that any regime be developed with appropriate recognition and respect for customary law and its role in protection of traditional knowledge.<sup>113</sup> It recognises that respect for customary law may require consideration of the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.<sup>114</sup> While Article 1(5) (f) of the draft document provides that

The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable benefit sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the

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<sup>108</sup> WIPO/GRTKF/IC/10/5, Article 3,

<sup>109</sup> Ibid. Article 6

<sup>110</sup> Ibid. Article 7

<sup>111</sup> Ibid. Article 8

<sup>112</sup> Ibid. Article 1

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge<sup>115</sup>

The text prepared by the Intergovernmental Committee acknowledges that key terms such as unfair trade may need to be defined with attention to concepts of unfair under customary law.<sup>116</sup> It envisions that legal protection for traditional knowledge may be secured by one or more of a range of measures, including a special law on traditional knowledge, intellectual property laws, law of contracts, laws concerning Indigenous peoples', national access and benefit sharing laws and sui generis traditional knowledge regimes based upon customary law.<sup>117</sup> The proposal requires prior informed consent as a condition for access to and use of traditional knowledge thereby enabling Indigenous peoples and local communities to exercise control over their knowledge in accordance with their customary law and practices. A revised draft in 2011 provided that protection should be extended at least to traditional knowledge which, is considered

integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.'<sup>118</sup>

This formulation immediately brings to mind the 'integral to a distinctive culture' test, developed in *Van der Peet*<sup>119</sup>, which has proved a significant hurdle for aboriginal peoples seeking to secure recognition of their resource rights in Canada. The key question here is who does the deciding on what is integral to cultural identity. Anthony Taubman, who as head of the secretariat for the IGC played a highly instrumental role in the development of the draft documents, suggests that traditional knowledge should be considered integral to a community based upon factors that may

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<sup>115</sup> WIPO/GRTKF/IC/10/5

<sup>116</sup> Ibid.

<sup>117</sup> Article 2, Draft provisions.

<sup>118</sup> WIPO/GRTKF/IC/18/5, Article 1(3)(iii)

<sup>119</sup> *R v Van der Peet* [1996] 2 SCR 507

be described by customary law.<sup>120</sup> These include definition of custodianship or the nature of community ownership; the rights and responsibilities associated with custody, access rights, means of dissemination and preservation of knowledge; and the customary mode of defining modalities for prior informed consent, benefit sharing mechanisms, dispute settlement, and sanctions for infringement of customary law.<sup>121</sup> He sees a role for tribal elders in identifying traditional knowledge as against some ‘objective, culturally neutral conception of traditional knowledge’, which he says is needed at the level of national or international law if the system is to be workable.<sup>122</sup>

The inclusion of the notions of ‘custodianship, guardianship, collective ownership or cultural responsibility’ is a welcome move towards indigenous concepts of stewardship. The IGC document, for example, describes the term ‘custodian’ in the context of traditional knowledge as referring to

those communities, peoples, individuals and other entities, which, according to customary laws and other practices, maintain, use and develop the traditional knowledge.’ It expresses a notion that is different from ‘ownership’ as such, since it conveys a sense of responsibility to ensure that traditional knowledge is used in a way that is consistent with community values and customary law.<sup>123</sup>

The Revised IGC draft Objectives and Principles provides that entitlements to share in benefits should be guided by the customary protocols, understandings, laws and practices of Indigenous peoples and local communities.<sup>124</sup> It also recognises that within local communities customary laws may play an important role in regulating

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<sup>120</sup> Anthony Taubman, ‘Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge’, in Keith E. Maskus and Jerome H. Reichmann (eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005).

<sup>121</sup> *Ibid.* at 538

<sup>122</sup> *Ibid.*

<sup>123</sup> WIPO/GRTKF/IC/19/INF/8

<sup>124</sup> *Ibid.* Article 5

benefit sharing.<sup>125</sup> The importance given to customary law in the IGC process has led WIPO to prepare an issues paper on customary law which describes both the challenges and opportunities for securing its recognition as the basis for protecting Indigenous peoples rights over their traditional knowledge.<sup>126</sup> The issue paper describes a variety of ways in which customary law has to date been drawn upon in intellectual property related cases as well as in national legislation.<sup>127</sup> These include: establishing the legal standing of a collective entity; settlement of disputes between or within traditional communities; to assert an equitable interest in intellectual property, or a more general fiduciary relationship between traditional owners and an individual IP right holder; to sustain a claim of breach of confidence relating to secret sacred material; to confer legal identity on a community as the basis of collective ownership of an intellectual property right; as the basis of a general right over biological resources and traditional knowledge; to enshrine a distinct right for continuing customary use; as the basis for a claim to determine entitlement for damages based on ‘personal and cultural hurt,’ including establishing the basis for and quantum of damages; and to determine the status of a claimant as a member of an Indigenous or other traditional community, to identify a community as being an eligible local or traditional community, or to establish a specific Indigenous or aboriginal right.<sup>128</sup>

Although the WIPO customary law issues paper is very much a draft document it provides an important signal of the existing role of customary law in protection of traditional knowledge rights. It also demonstrates the potential for significant expansion of this role through effective development of the capacity of national courts and administrative bodies to receive evidence of customary law based rights and duties, and provide adequate recognition and support for the enforcement of such rights. While clearly supportive of a prominent role for customary law in defining rights over traditional knowledge, Taubman suggests that ‘it would be ‘self-

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<sup>125</sup> Ibid. Article 4(2)(e)

<sup>126</sup> See WIPO *Draft Customary Law Issues Paper 1: Customary Law & the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge: Issues Paper – version 3.0* (December 2006)

<sup>127</sup> Ibid.

<sup>128</sup> Ibid. See also Taubman, ‘Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge’, at 531-532

defeatingly burdensome to require proof of customary law at the community level as a prerequisite for triggering legal protection of traditional knowledge'.<sup>129</sup>

The Revised IGC Draft Objectives and Principles are a somewhat ingenious response to many of the concerns relating to protection of traditional knowledge. They pointedly avoid proposing intellectual property style protection with all its inherent limitations such as its individualistic, time limited, industrial criteria, which are foreign to traditional knowledge systems. Though foreign, not all intellectual property models are of themselves inherently detrimental to protection of traditional knowledge rights. Geographical indicators, trademarks, and trade secrets, have, for instance, all be used as a means for protecting traditional knowledge. Coombe argues that 'creative use of geographical indications is one example through which culture and commerce are conjoined and tradition potentially preserved through its commercialization.'<sup>130</sup> As noted earlier there are many commentators who view any engagement with western property regimes as a slippery slope towards the loss of cultural integrity. The slide in towards western style property rights for the protection of traditional knowledge has led Coombe to argue for a more expansive approach to the notion of property saying, '[t]he very topic of cultural property demands greater critical reflexivity with respect to property's diverse forms as well as enhanced scrutiny of Western proprietary prejudices'.<sup>131</sup> While recognising certain advances in emergent fields of law, transnational politics and institutions, Coombe takes the view that state-based efforts 'lag far behind traditional customs, contemporary mores, and particularly, the new practices, protocols, ethics, relationships of mutual respect and recognition that have been provoked by cultural property claims'.<sup>132</sup>

One of the major difficulties facing Indigenous Peoples in their search for the optimum model for protection rights of their over their traditional knowledge is the limitations of enforceability of their own customary laws absent necessary national and international law. Conversely, the limitations of adopting a property based

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<sup>129</sup> Taubman, 'Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge', at 539

<sup>130</sup> Coombe, 'The Expanding Purview of Cultural Properties and Their Politics', at 403

<sup>131</sup> Ibid. at 407

<sup>132</sup> Ibid.

approach without recognition of a property right *per se* is that Indigenous peoples and local communities will remain dependent on the good will and commitment of their national authorities, and the authorities in the countries in which their traditional knowledge or products derived from its use are being used, for recognition, and enforcement of their rights.

### 7.3.2 alternative approaches to protection of traditional knowledge

Mick Dodson Special Rapporteur to the United Nations Forum on Indigenous Issues, has prepared a report on the current and potential role of customary law in the protection of traditional knowledge, in which he argues that,

Attempting to alter intellectual property law so that it accommodates traditional knowledge, knowledge that is completely different in essence, is reminiscent of the proverb, 'You can't fit a round peg in a square hole'. No matter how one tries, it just does not fit. It is for this reason that a completely new and customized approach is needed<sup>133</sup>

Ideas as to what form such new system should take include the notion of traditional resource rights<sup>134</sup>, community rights legislation<sup>135</sup>, proposal for a misappropriation regime linked to a certificate of origin scheme including mandatory disclosure requirements in patent application procedures<sup>136</sup>, model laws<sup>137</sup> and national *sui*

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<sup>133</sup> Mick Dodson, 'UNPFII Study on Customary Laws Pertaining to Indigenous Traditional Knowledge and to What Extent Such Customary Laws Should Be Reflected in International and National Standards Addressing Traditional Knowledge' E/C.19/2007/10, (2007).

<sup>134</sup> Darrell Posey, *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous peoples and Local Communities* (Gland: IUCN, 1996a).

<sup>135</sup> Gurdial Singh Nijar, 'Community Intellectual Rights Protect Traditional Knowledge', *Biotechnology and Development Monitor*, No. 36, p. 11-12., 36 (1998).

<sup>136</sup> Brendan Tobin, 'Certificates of Origin: A role for IPR Regimes in Securing Prior Informed Consent', in Mugabe and others (eds.) *Access to Genetic Resources: Strategies for Sharing Benefits* (Nairobi: ACTS, 1997); Brendan Tobin, 'Alternativas a Las Legislaciones De Propiedad Intelectual, Reunión Regional Sobre Propiedad Intelectual y Pueblos Indígenas', PNUD/COICA Santa Cruz: Bolivia, 28-30 September, (1994). Available at:

[http://nuigalway.academia.edu/BrendanMichaelTobin/Papers/1354490/Alternativas\\_a\\_la\\_Propiedad\\_Intelectual](http://nuigalway.academia.edu/BrendanMichaelTobin/Papers/1354490/Alternativas_a_la_Propiedad_Intelectual)

*generis* regimes.<sup>138</sup> All of these proposals have in different forms found their way into national and regional law and policy, and each views customary law as playing an important role in the regulation and protection of traditional knowledge rights.

At the regional level the Andean Community has pioneered the development of measures for protection of traditional knowledge rights. Andean Community Decision 391, adopted in 1996, requires prior informed consent of indigenous, local and Afro-American communities as a pre-condition for approval of bioprospecting agreements, where such agreements involved the collection of resources on their land or use of their traditional knowledge.<sup>139</sup> Countries of the region have included disclosure requirements in Decision 486, requiring applicants for patents utilising genetic resources or traditional knowledge from the region to disclose its origin and show that prior informed consent has been obtained for its use.<sup>140</sup> The cumulative effect of these Decisions creates a framework within which Indigenous peoples may promote compliance with their own customs, laws and traditions as a condition for access to and use of their traditional knowledge. The Decisions, specifically exclude from their remit traditional knowledge sharing according to Indigenous peoples' own customary laws and time honoured practices, which are crucial to maintaining the vitality and integrity of traditional knowledge systems. Countries of the region have consistently championed the debate on disclosure of origin at both the World Intellectual Property Organization and the World Trade Organization the Andean Community. In 2004 the Secretariat of the Andean Community together with the Comision Andino de Fomento instigated a research program on regional protection of traditional knowledge. The result of this research, led by a number of respected indigenous experts, was published in 2005 in the form of draft elements for a sui generis regime

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<sup>137</sup> Michael Blakeney, 'Protecting Traditional Knowledge and Expressions of Culture in the Pacific', *Queen Mary Journal of Intellectual Property*, 1/1 (2011).

<sup>138</sup> Peru Ley 27811

<sup>139</sup> See Andean Community of Nations Decision 391: Common Regime on Access to Genetic Resources. Available at: [www.sice.oas.org/trade/junac/decisiones/dec391e.asp](http://www.sice.oas.org/trade/junac/decisiones/dec391e.asp)

<sup>140</sup> Andean Community, Decision 486, Common Intellectual Property Regime, Article 26 (i). Available at: <http://www.sice.oas.org/trade/junac/decisiones/dec486e.asp>



on protection of traditional knowledge<sup>141</sup>. The report, which presents an indigenous perspective on traditional knowledge protection, states that, 'given the collective and integral characteristics of traditional knowledge of Indigenous peoples, it is recommended that Indigenous peoples' own ancestral systems based on customary law and their own cultural practices be applied for their protection, thus allowing communities to further consolidate their traditional structures.'<sup>142</sup>

In 2010 the African Intellectual Property Organization (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.<sup>143</sup> The Protocol reflects many provisions of the Draft IGC documents on protection of traditional knowledge and traditional cultural expressions. Its stated purpose is to protect traditional knowledge holders against infringement of their rights under the Protocol and to protect expressions of folklore against misappropriation.<sup>144</sup> Protection is to be extended to traditional knowledge that is

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a local or traditional community; and
- (iii) integral to the cultural identity of a local or traditional community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.<sup>145</sup>

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<sup>141</sup> R. De la Cruz, G. Muiyuy, A. Viteri, G. Flores, J. Gonzalez, J.G. Mirabel, R. Guimares, 'Elementos Para La Protección Sui Generis De Los Conocimientos Tradicionales Colectivos e Integrales Desde la Perspectiva Indígena', (Caracas: Comunidad Andina Y Corporación Andina De Fomento. 2005).

<sup>142</sup> Ibid.

<sup>143</sup> 'Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization (ARIPO)' Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010

<sup>144</sup> Ibid. Section 1.1

<sup>145</sup> Ibid. Section 4, Protection criteria for traditional knowledge

Traditional owners are granted the exclusive right to authorize exploitation of their traditional knowledge<sup>146</sup>. Exploitation is defined as including manufacturing, importing, exporting, offering for sale, selling or using beyond the traditional context<sup>147</sup> Protection is not to affect traditional use and accessibility of knowledge.<sup>148</sup> The duration of protection is unlimited as long as the criteria for recognition of knowledge as traditional are maintained.<sup>149</sup> Protection against misappropriation, misuse and unlawful exploitation<sup>150</sup> is given to expressions of folklore, which are

- a) the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and
- (b) characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.<sup>151</sup>

Under the Protocol customary law has a central role to play in identifying traditional knowledge and expressions of culture<sup>152</sup>, in determining rights holders<sup>153</sup> and in resolution of local and transboundary conflicts over ownership rights.<sup>154</sup> Adoption of the Swakopmund Protocol increased pressure on negotiators at the WIPO IGC to bring the negotiations on international instruments for the protection of traditional knowledge and traditional cultural expressions to a close.

Work on the development of a model law for protection of traditional knowledge in the South Pacific has been going on for a number of years, and has been the subject of numerous regional, sub-regional and national workshops. An early version of the draft model law applied a novel approach to the issue of traditional knowledge in the public

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<sup>146</sup> Ibid Section 7.1

<sup>147</sup> Ibid. Section 7.3

<sup>148</sup> Ibid. Section 11

<sup>149</sup> Ibid. Section 13

<sup>150</sup> Ibid. Section 19.1

<sup>151</sup> Ibid. Section 16, Protection criteria for expressions of folklore

<sup>152</sup> Ibid Articles 4 and 16

<sup>153</sup> Ibid, Section 18 (a)

<sup>154</sup> Ibid. Articles 22(1) and 24

domain, suggesting that rights over such knowledge should be determined not on the basis of where information was found but on how it got there.<sup>155</sup> Later versions of the model law have retreated from this innovative attempt to redefine the application of the public domain to traditional knowledge. In 2010 the Pacific Islands Forum Secretariat published an extremely comprehensive set of guidelines for the development of legislation for the protection of traditional knowledge, based upon the Traditional Biological Knowledge, Innovations and Practices Act, commonly referred to as the 'TBKIP Model Law'.<sup>156</sup> The TBKIP Model Law requires that a licence be obtained for use of traditional knowledge, thereby, providing opportunities for Indigenous peoples to require conformance with customary norms and practices. The Model law guidelines address the issue of customary law in many areas of traditional knowledge governance including identification of traditional knowledge, determining rights of ownership, resolution of disputes, and distribution of benefits.<sup>157</sup>

To date the most comprehensive national regime for protection of Indigenous peoples rights over their traditional knowledge is to be found in Peru. In August 2002 Peru adopted Law 27811 for protection of the collective rights of Indigenous peoples over traditional knowledge relating to biological diversity<sup>158</sup>. The law is declaratory in nature recognizing that rights over traditional knowledge spring not from any act of government but from the existence of the knowledge itself. The law recognises traditional knowledge to be the cultural patrimony of Indigenous peoples,<sup>159</sup> thereby recognising both intergenerational and intragenerational rights and responsibilities relating to such knowledge.<sup>160</sup> Access to and use of traditional knowledge requires prior informed consent and a licence for commercial use<sup>161</sup>. Benefits arising from use

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<sup>155</sup> 'Draft Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002', (on file with author)

<sup>156</sup> 'Guidelines for Developing Legislation for the Protection of Traditional Biological Knowledge, Innovations and Practices Based on the Traditional Biological Knowledge, Innovations and Practices Model Law', (Pacific Islands Forum Secretariat 2010)

<sup>157</sup> Ibid.

<sup>158</sup> Peru Law 27811

<sup>159</sup> Peru Ley 27811, Article 11.

<sup>160</sup> Brendan Tobin, 'Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru', *RECIEL*, 10/1 (2001).

<sup>161</sup> Peru Ley 27811, Article 6

of traditional knowledge are to be shared not only with contracting indigenous communities but also with the wider indigenous community through an Indigenous Development Fund, managed by Indigenous peoples<sup>162</sup>. Communities are required to notify other affected communities and seek their support for negotiations relating to shared traditional knowledge and are entitled to resort to their own customary law and practice as a means for resolving disputes<sup>163</sup>. The Peruvian law adopts an interesting position regarding traditional knowledge in the public domain. It recognizes that such knowledge is subject to a right of Indigenous peoples to be compensated for its use, and proposes a form of knowledge tax be imposed on all commercial sales of products, directly or indirectly utilizing traditional knowledge<sup>164</sup>. This is an important precedent, in essence supporting the proposition that the rights of Indigenous peoples over their traditional knowledge are not necessarily exhausted by the fact that such knowledge has made its way into the public domain.<sup>165</sup> The law does not, however, recognize any right for Indigenous peoples to prevent or otherwise control use of knowledge that has fallen into the public domain. The result has been to define rights over knowledge on the basis of where the knowledge is found, not on the basis of how it got there.

Another potential means for securing protection of traditional knowledge rights is through the notion of native title as a subsisting right grounded upon customary law. Halewood based upon a comprehensive study of the relevant law argues that ‘In Canada, under certain conditions, aboriginal peoples enjoy collectively held rights, recognised in common law, to preclude others from using, reproducing, an disseminating their knowledge.’<sup>166</sup> He claims that the advantages of applying both the ‘integral to a distinctive culture’ test – which, he says, enjoys the ‘full approbation’ of the Supreme Court of Canada - and the doctrine of continuity – not formally recognised *per se* by the Supreme Court – is that both rights can, in his words, ‘(1)

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<sup>162</sup> Peru Ley 27811 Article 8

<sup>163</sup> Peru Ley 27811 Article 46

<sup>164</sup> Peru Ley 27811 Article 13

<sup>165</sup> Graham Dutfield *Intellectual Property Rights, Trade and Biodiversity*, Earthscan, London, 2000

<sup>166</sup> Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge', at 358

vest collectively in aboriginal peoples or nations *per se* (2) be of indefinite duration, and (3) be subject to internal regulation of the peoples holding the right.’<sup>167</sup> He notes an added advantage of the doctrine of continuity; it would define the content of the right over traditional knowledge through deference to customary laws of the relevant peoples.<sup>168</sup> He sees the foregoing characteristics of ‘aboriginal knowledge protection rights’ as having ‘significant advantages over existing intellectual property laws.’<sup>169</sup>

Attempts to extend the concept of native title to cultural property have to date found little traction with the courts. Arguments against such recognition in Australia have centred on the existence of copyright laws, which override any common law basis for recognition of a form of native title right over cultural property.<sup>170</sup> But cultural property susceptible to copyright is only a small fraction of indigenous traditional knowledge, and in a dissenting opinion Kirby J in *Western Australia v Ward*<sup>171</sup> held that

Recognition of the native title right to protect cultural knowledge is consistent with the aims and objectives of the Native Title Act, reflects the beneficial construction to be utilised in relation to such legislation and is consistent with international norms declared in treaties to which Australia is a party. It recognises the inherent spirituality and land-relatedness of Aboriginal culture.<sup>172</sup>

Halewood, whose research supports calls for recognition of native title rights over traditional knowledge for Canadian First Nations claims that ‘to date ... no aboriginal

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<sup>167</sup> Ibid. at 361

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> *Bulun v Bulun v R & T Textiles Pty Ltd.* (1998) 41 IPR 513 @ 523 – 525 cited in McRae et al (2009) at 426

<sup>171</sup> *Western Australia v Ward*, [2002] HCA 28

<sup>172</sup> Ibid. cited in McRae et al. 2009, at 428.

knowledge protection rights appear to have been extinguished.<sup>173</sup> Similarly, Preston Hardison argues that Indigenous peoples in the United States, at least, have not relinquished sovereignty over their genetic resources or traditional knowledge. This he says is clear from the fact that at the time of entering into treaties Mendel had not yet discovered the genome.<sup>174</sup> For the Tulalip Tribes the position is clear, as they have not relinquished their rights and their rights have not been extinguished they are entitled to exercise sovereign rights over their traditional knowledge.<sup>175</sup> These sovereign rights are, however, threatened by lack of respect for their customary laws. In a statement to the fifth meeting of the WIPO Intergovernmental committee they put it thus,

Indigenous peoples' have generally called for protection of knowledge that the Western system has considered to be in the "public domain" as it is their position that this knowledge has been, is, and will be regulated by customary law. Its existence in the "public domain" has not been caused by their failing to take steps necessary to protect the knowledge in the Western [intellectual property] system, but from a failure from governments and citizens to recognize and respect the customary law regulating its use.<sup>176</sup>

In order to address conflicts between intellectual property regimes and Indigenous peoples' traditional knowledge rights states will need to adopt a human rights based approach. In so doing they have an opportunity to redress the imbalance between positive laws instruments and customary law principles.

Customary law is widely recognised as having a central role to play in the protection of indigenous peoples rights over all aspects of their cultural heritage. International

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<sup>173</sup> Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge', at 360

<sup>174</sup> Pers. comm., Preston Hardison, July 2011

<sup>175</sup> Ibid.

<sup>176</sup> 'Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain', July 9, 2003, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, fifth Session, July 5-17, 2003

and national law have given particular recognition to the importance of customary law for protection of Indigenous peoples' rights over their traditional knowledge. The adoption of the Nagoya Protocol, of regional traditional knowledge laws, and of national sui generis laws creates an extensive body of state practice recognising Indigenous peoples' rights' to apply their own customary laws to protect their interests and of a related obligation of states to recognise and respect Indigenous peoples' customary laws in order to secure their human rights. This state practice supports the contention that these rights and obligations have become or are in the process of becoming norms of international customary law.

## **Chapter 8. Intercultural legal pluralism**

Interfaces between Indigenous peoples' customary law regimes and national and international systems of governance may take a variety of forms, including interfaces between legislative, judicial and administrative authorities. Amongst the many areas of interface will be those relating to issues such as family, inheritance, crime, welfare, education, health, land, environment, science and traditional knowledge, transport, agriculture, fisheries and forestry development policies, as well as energy projects, dam construction, and non renewable resource exploitation including oil and mining activities. To ensure compliance with Indigenous peoples' human rights, activities in these areas will need to be designed with due attention to their interests, priorities, concerns and most importantly their customary laws and practices. Anything short of this will undermine trust of Indigenous peoples in the relevant legislative, policy or program measures, which will be seen as externally generated and imposed, and more than likely doomed to failure.

This chapter addresses three key aspects of the interface between Indigenous peoples, national and international decision-making and judicial processes, as well as with third parties. First it examines the challenges facing recognition of customary law in state and international judicial and alternative dispute resolution procedures. Secondly it considers the processes of change in the content, format and presentation of aspects of customary law. This includes discussion of processes of change in customary law in response to calls for recognition of individual human rights, in particular those of women. It also looks at the development of community protocols and promotion of Indigenous concepts of stewardship as means to secure biocultural heritage rights and the recognition and enforcement of customary law. Thirdly, it addresses the issue of customary law and legal pluralism and the search for intercultural equity and justice. The chapter concludes with a discussion on the future relationship between customary law and positive law, and the need or otherwise for an overarching body of common legal principles to arbitrate between them in a reconstructed global legal order.



## **8.1 Recognition and proof of customary law**

Identification of underlying principles of customary law such as those of reciprocity, duality, and equilibrium<sup>1</sup>, as well as principles of distributive and restorative justice, have an important role to play in helping to guide the construction of interfaces between customary and positive law regimes. It is not, however, possible or desirable to develop a harmonised body of customary law. For this reason, any regime recognizing customary law must provide sufficient flexibility for the recognition of a diversity of systems. The challenges associated with doing so are exacerbated by the fact that customary law is closely tied to Indigenous peoples' ethical, cultural and spiritual principles. Its application does not necessarily follow the logic of positive law. This may make it difficult to build functional interfaces between systems with very different objectives. It does not however provide a reason for shirking away from the challenge. This section begins with consideration of the challenges and opportunities for securing recognition and application of customary law in national and international courts and dispute resolution mechanisms. It goes on to examine evolving rules on proof of customary law and the taking of oral evidence, and their role in securing effective respect and recognition of customary law in the courts.

### ***8.1.1 the judicial interface and the search for the 'living' law***

Advances in human rights law with regard to the autonomy, customary laws and institutions of Indigenous peoples raise questions regarding the compliance of existing legal systems with Indigenous peoples' rights to their own living customary law and institutions. With the adoption of Convention 169 and the Declaration on the Rights of Indigenous peoples' jurisdictional relationships between state and customary law systems will need to be examined from a new perspective. In the past the recognition or otherwise of customary law and the jurisdiction of tribal authorities was a matter for the national authorities alone. This has now changed and the form and fashion by which Indigenous peoples are empowered to exercise their own jurisdiction over their internal matters and their relationships with third parties is now a matter for international oversight. Indigenous peoples have been written back into international law and their rights to self-determination, albeit within the framework of

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<sup>1</sup> Krystyna Swiderska et al., *Protecting Customary Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Interim Report (2005-2006)* (IIED 2006)

the state requires a complete re-evaluation of their rights to their own autonomous legal systems. Furthermore, all countries now need to examine their preparedness and capacity to take into consideration indigenous regimes they have not previously recognised, i.e. the legal regimes of Indigenous peoples in foreign countries as required by the Nagoya Protocol. The issue of just how customary law is to be recognised across borders adds to the pot a whole new dimension, local custom with a global remit.

This new dimension is framing an emerging debate in Peru, which has yet to develop working interfaces between customary regimes and the state judicial system. In April 2009 the Peruvian Supreme Court in *Acuerdo Plenario No. 1-2009/CJ-116*<sup>2</sup> recognised that: analysis of Indigenous peoples' constitutional rights must take into account both ILO Convention 169 and the Declaration on the Rights of Indigenous peoples.<sup>3</sup> The Constitutional Tribunal of Peru has also held that Convention 169 complements both 'normatively and interpretively' the Constitution's clauses relating to Indigenous peoples.<sup>4</sup> In May of 2011 the *Presidencia* of the Supreme Court established a working group to define a roadmap for the judiciary in its relations with indigenous justice; coordination and resolution of conflicts between these two systems; and, the formulation of legislative proposals.<sup>5</sup> Taken together with Peru's law on consultation with Indigenous peoples adopted in August 2011 this signals the start of a process for the recognition of Indigenous peoples' customary laws and institutions that will define the parameters of their autonomy far into the future.

In order to ensure compliance with international legal obligations and the national constitution the Peruvian authorities will need to consider a wide range of issues relevant to the recognition of indigenous autonomy and the development of functional interfaces between customary law and state legal regimes. These include questions regarding the scope of customary jurisdiction, and the rights (if any) to apply it to

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<sup>2</sup> Acuerdo Plenario No. 1-2009/CJ-116, Asunto: Rondas Campesinas y Derecho Penal

<sup>3</sup> Javier La Rosa Calle and Juan Carlos Ruiz Molleda (eds.), 'La Facultad Jurisdiccional De Las Rondas Campesinas: Comentarios Al Acuerdo Plenario De La Corte Suprema Que Reconoce Facultades Jurisdiccionales a Las Rondas Campesinas' (Lima: Instituto de Defensa Legal (IDL) 2010), at 109

<sup>4</sup> STC No. 3343-2007-PA/TC, 19 February 2009

<sup>5</sup> Resolución Administrativa No. 202-2011-P-PJ, 11 May 2011

third parties on indigenous lands; conflict of laws and the boundaries and interface between multiple parallel jurisdictions; existence or otherwise of any rights of appeal that individuals may have from indigenous jurisdiction to the state courts; rules on the exhaustion of local remedies; the recognition and enforcement of indigenous decisions by state courts, including minimum standards of justice and due process required for such recognition; recognition and application of customary law by the state courts, including issues of the status of custom, proof of custom and rules of evidence, admissibility of oral evidence and the role of customary law experts and assessors in state courts; prevention of forum shopping; the extent or otherwise to which state courts may limit the application of customary law based upon a conflict with fundamental human rights and with national and/or constitutional law; and the impact of state court decisions upon the applicability of custom.

Consideration will also need to be given to the constraints placed on the application of customary law by national law, constitutional law and human rights; the benefits and limitations of taking written records of cases decided by indigenous authorities, as a means to build a indigenous body of jurisprudence and for securing recognition and enforcement of indigenous decisions by state courts; and, the basic requirements of due process and equality that may affect the recognition of judgments by state and foreign courts. Many of the foregoing issues will need to be addressed by all countries as part of a scaling up in recognition of indigenous rights. To assist this process there is a need for comparative research to identify best practices regarding recognition of indigenous adjudication systems and the construction of functional interfaces between state and customary judicial systems, based upon mutual respect and informed consent.

As recognition of customary law has increased the challenge facing the courts has been to identify 'living' customary law and to determine the extent to which the courts should play a role in developing custom to ensure it complies with constitutional law and human rights. The question as to whether the courts can and should take action to develop customary law, in the event that it conflicts with constitutional law, was central to the decision of the Constitutional Court of South Africa in the joint cases of *Bhe v. Magistrate Khayelitsha*, *Shibi v. Sithole*, and *South*

*African Human Rights Commission v. President of the Republic of South Africa*<sup>6</sup>. These three cases addressed the issue of women's rights to inherit under section 23 of the Black Administration Act of 1927. Section 23 provided that intestate succession would be governed by 'black law and custom', which in effect meant application of the principle of male primogeniture. In *Bhe* Mrs. Bhe and her two daughters were faced with being left homeless when her ex-partner's father was appointed sole heir of the deceased's estate, while in the case of *Shibi* the plaintiff's brother had died intestate and a male cousin had been appointed sole heir.<sup>7</sup> In the third case the South African Human Rights Commission challenged the whole basis of Article 23 arguing, in Grant's words, that 'the very basis of determining the applicability of customary law and compelling its application to a particular racial group, was discriminatory and violated human dignity.'<sup>8</sup> The Court found both Article 23 and the customary law rule of male primogeniture to be unconstitutional. The court split, however, on the nature of the remedy to be applied. The majority of 10 judges took the view that the legislature should assume responsibility for remedying the 'incompatibility of customary law with the right to equality.'<sup>9</sup> In the meantime, the court decided to apply a modified version of the Intestate Succession Act (which covered all estates not governed by the black Administration Act).<sup>10</sup> In a separate dissenting judgment, Justice Sandile Ngcobo held that the court should exercise its powers under Section 39 (2) of the constitution to develop customary law in order to 'promote the spirit, purport and objects of the Bill of Rights.'<sup>11</sup> He argued that the Court had an obligation to 'participate in the development of customary law'<sup>12</sup>, a position supported by Section 211 of the South African Constitution which requires the courts to 'apply

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<sup>6</sup> *Bhe v. Magistrate Khayelitsha, Shibi v. Sithole, and South African Human Rights Commission v. President of the Republic of South Africa* (2005) (1) B.C.L.R. 1 (CC).

<sup>7</sup> Grant, 'Human Rights, Cultural Diversity and Customary Law in South Africa', *Journal of African Law*, 50/1 (2006), 2-23, at 10

<sup>8</sup> *Ibid.* at 11

<sup>9</sup> *Ibid.* at 12

<sup>10</sup> Tracy E. Higgins, 'Constitutional Chicken Soup', *Fordham Law Review*, 75/2 (2006a), at 713

<sup>11</sup> Constitution of South Africa 1996, Section. 39(2)

<sup>12</sup> Higgins, 'Constitutional Chicken Soup', at 713

customary law when that law is applicable.’<sup>13</sup> Higgins, who together with a team of researchers carried out a year of research into gender equality and customary law marriages in South Africa<sup>14</sup>, found the decision in *Bhe* case had little impact on the manner in which customary law was applied ‘in rural and semi-urban communities where knowledge of the *Bhe* decision is virtually nonexistent.’<sup>15</sup> Higgins takes the view that the courts decision undermined democratic reform, reducing pressure for legislative action and ‘characterizing gender equality as irreconcilable (in this context anyway) with the norms of customary law.’<sup>16</sup> By declining to follow the decision of Justice Ngcobo and actively participate in the development of customary law the Court, in Higgins view, ‘conveyed the message that custom must be sacrificed in favour of constitutional values.’<sup>17</sup>

Grant explores the decision in *Bhe* from a different angle highlighting the recognition in both the majority and minority judgments ‘that official customary law had ossified and that African society was changing and with it customary law practices.’<sup>18</sup> Official customary law refers to that body of custom which is to be found in “official” sources, such as ‘statute, case law or government documents’<sup>19</sup> It is, says Grant, ‘widely accepted to be a distortion of ... the law as lived in the community.’<sup>20</sup> Despite consensus regarding the applicability of living custom neither the majority nor the minority in *Bhe* sought to apply it. The majority, Grant says, dismissed the proposal that ‘the court should sanction the evolution of customary law in accordance with constitutional principles’, taking the view that a case-by-case development would be too slow and lead to varied outcomes due to the lack of clarity over living customary

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<sup>13</sup> Constitution of South Africa 1996, Section. 211(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

<sup>14</sup> Tracy E. Higgins, Jeanmarie Fenrich and Ziona Tanzer, 'Gender Equality and Customary Marriage: Bargaining in the Shadow of Post -Apartheid Legal Pluralism', *Fordham International Law Review*, 30/6 (2006b).

<sup>15</sup> Higgins, 'Constitutional Chicken Soup', at 715

<sup>16</sup> *Ibid.* at 717

<sup>17</sup> *Ibid.* at 718

<sup>18</sup> Grant, 'Human Rights, Cultural Diversity and Customary Law in South Africa', at 16

<sup>19</sup> *Ibid.* at 13

<sup>20</sup> *Ibid.*

law.<sup>21</sup> In contrast, he says, Justice Ngcobo J. took the position that the court was required to bring the customary law into line with the equality provisions in the constitution, rather than determine the applicability of the living customary law. Ngcobo J's solution was to propose modification of the rule of primogeniture to allow the eldest surviving child, whether male or female, to succeed 'to the position of family head'.<sup>22</sup> A solution he felt would, Higgins claims, 'preserve the valuable function of the customary successor while eliminating the gender discriminatory aspects of the rule.'<sup>23</sup>

For Grant the *Bhe* decision leaves development of customary law poised 'between the Scylla of legislative ossification and the Charybdis of case-by-case development with all its attendant difficulties.'<sup>24</sup> He identifies a number of potential ways forward, including the median route proposed by the Law Reform Commission that would allow the courts to seek proof of customary law from both written and oral sources, including 'expert opinions, witnesses and assessors.'<sup>25</sup> The increasing use by Indigenous peoples of partial codification of customary law may also have a role to play here, establishing guidelines and portals for the discovery of custom. Developing avenues of exchange, areas in which trust may be built, and spaces for the discovery of living law drawing upon customary frameworks of dialogue may prove more productive than relying upon adversarial-style procedures to ascertain custom. As Fletcher noted in his study of First Nations Tribal Court systems the adoption of an adversarial approach ended in deadlock frustrating the court's attempts to identify and apply customary law.<sup>26</sup> Based upon his experience as staff attorney and later appellate judge for the Hoopa courts he argues that adoption 'of an arbitration-style hearing involving a battle of tribal elders as expert witnesses has, ... prevented the application

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<sup>21</sup> Ibid. at 17

<sup>22</sup> Higgins, 'Constitutional Chicken Soup', at 714 referring to *Bhe* 2005 (1) BCLR at 137

<sup>23</sup> Ibid.

<sup>24</sup> Grant, 'Human Rights, Cultural Diversity and Customary Law in South Africa', at 20

<sup>25</sup> Ibid. referring to 'The South African Law Reform Commission (SALRC), Project 90, The Harmonization of the Common Law and the Indigenous Law: Report on Conflicts of Law ' (SALRC: September 1999), at 104

<sup>26</sup> Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence', at 71

of any customary law in Hoopa courts'.<sup>27</sup> At the same time overly protracted processes may equally frustrate the search for equitable solutions. Some form of compromise in the working practices of both the customary and national legal systems will likely be needed if they are to work together in a functional manner. As Grant puts it, 'in the long term, creative ways must be found of reconciling the practical needs of a modern legal system, the cultural heritage of the society it serves and the observance of internationally recognised human rights norms.'<sup>28</sup> Any attempts to force changes on Indigenous peoples' who have only recently secured recognition of their rights to their customary laws are bound to fail. Trust will need to be built first and trust will only come if there are concerted efforts to demonstrate due respect and due recognition for their legal regimes.

The expanding remit of customary law and of state obligations to secure its recognition and enforcement demonstrates the need for clear guidance to the judiciary on the status of customary law. Legal certainty and judicial commitment to the enforcement of the law are two sides of the same coin. As has been seen in the case of regional human rights institutions, decisions in one forum provide the support for those in other regions. It will, therefore, be important to ensure that cases brought before the courts to establish precedent in the area of recognition of customary law are chosen with care.

### 8.1.2 proof of custom and alternative dispute resolution

A preliminary step in the adjudication of customary law involves identification of the applicable law; this is the case in village forums and in formal courts. The procedures for identifying the applicable law may vary and the consequences of failing to secure acceptance of a specific custom as applicable may be distinct, but the underlying principles are the same. As seen earlier the formal regulations relating to proof of custom as enforced under British law were not considered applicable in many colonial countries although vestiges of Blackstone's seven criteria for identification of valid custom have lingered on in various jurisdictions. In taking measures to meet their obligations with regard to the recognition, implementation and enforcement of

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<sup>27</sup> Ibid.

<sup>28</sup> Grant, 'Human Rights, Cultural Diversity and Customary Law in South Africa', at 23

Indigenous peoples' customary law, states will need to consider existing rules of evidence (if any) regarding the proof of customary law. Where they do not exist or where they are clearly insufficient, overly restrictive, or narrowly drawn, states will need to explore means to bring them into line with emerging best practice. The experience of Papua New Guinea in this area is particularly instructive.

Papua New Guinea has over seven hundred language groups each with their own customary laws and land tenure systems, woven, Zorn says, 'from a complex web of traditional norms, kinship relations and social obligations.'<sup>29</sup> The complexity of recognising such a vast diversity of laws was largely avoided by the colonial courts up until the adoption of the Native (Recognition) Ordinance in 1963.<sup>30</sup> The Ordinance required custom to be proved as matters of fact, but allowed the courts to dispense with strict technical rules of evidence and to accept hearsay and expressions of opinion.<sup>31</sup> The situation was radically changed by the new Constitution of 1975, which elevated the status of custom, which was henceforth to be 'applied and enforced, as part of the underlying law'.<sup>32</sup> The underlying law was conceived as a new Papua New Guinea common law drawing on customary law and English common law and Equity. Where conflicts arise between customary law and common law or Equity, customary law is to prevail. The Constitution has in essence inverted the roles of custom and English common law within the national legal system. In 1977, The Papua New Guinea Law Reform Commission proposed changes to the law to enable the courts to take judicial notice of customary law. The courts proved resistant, however, preferring, to the obvious frustration of the Commission, 'to re-adopt pre-Independence legal rules or the English common law rules rather than developing new rules to suit the conditions in our country.'<sup>33</sup>

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<sup>29</sup> Jean G. Zorn, 'Graun Bilong Mipela: Local Land Courts and the Changing Customary Law of Papua New Guinea', *Pacific Studies*, 15/2 (1992)

<sup>30</sup> Jennifer Corrin Care, and Jean G. Zorn, 'Statutory 'Developments' in Melanesian Customary Law', *Journal of Legal Pluralism*, 46 (2001), at 56

<sup>31</sup> See 1963 Native Customs (Recognition) Ordinance, Section 2 entitled 'Proof of Custom' reprinted in ALRC, 'The Proof of Aboriginal Customary Law', at 8-9

<sup>32</sup> See Constitution of Papua New Guinea 1975, Section 20 and Schedule 2.1

<sup>33</sup> Papua New Guinea Law Reform Commission 1976 at 2 cited in Corrin Care, 'Statutory 'Developments' in Melanesian Customary Law', at 60



The reluctance of the courts in Papua New Guinea to give greater attention to custom may be seen as a hangover from the colonial period and its message that custom was something less than law.<sup>34</sup> This inertia began to lift, according to Corrin Care and Zorn, in the late 1990's, a shift that was consolidated by the adoption of the Underlying Law Act 2000, which makes proof of custom a matter of law<sup>35</sup> and requires 'the courts and counsel to try to find an applicable rule from custom before even considering imported common law.'<sup>36</sup> The Law Reform Commission proposed that '[i]f the post-Independence Courts are to be free to develop a truly Papua New Guinea law they must not be fettered by outside decisions which reflect the perceptions and world-views of other societies.'<sup>37</sup> The Underlying Law Act permits the courts to look at cases from any foreign jurisdiction but rules out their use as 'precedential or even as persuasive'.<sup>38</sup> The Act is, to borrow Smith's terminology, an important step in the 'decolonizing [of judicial] methodologies.'<sup>39</sup> It is not, however, without its difficulties. In implementing the Law Reform Commission's recommendations it opens the door for judicial activism by the courts, which could, it has been suggested lead to the development of 'a "customized" form of general law, different from any single system of customary law in Papua New Guinea.'<sup>40</sup> As Weisbrot sees it, 'It may be that the wide diversity of local custom will have to be sacrificed in part for the expedience of legislating on customary matters'<sup>41</sup> Amongst the dangers of such an approach is the likelihood that a homogenized form of general custom is likely to reflect primarily the values and customary norms of dominant groups, to the potential detriment of more isolated groups in particular.

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid. at 60 - 61

<sup>36</sup> Ibid. at 97

<sup>37</sup> Papua New Guinea Law Reform Commission 1977 at 26, cited in Corrin Care, 'Statutory 'Developments' in Melanesian Customary Law', at 90

<sup>38</sup> Underlying Act 2000, Section 21

<sup>39</sup> Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous peoples* (Dunedin University of Otago Press 1999).

<sup>40</sup> ALRC, 'The Proof of Aboriginal Customary Law', at 11

<sup>41</sup> D Weisbrot, 'Interpretation of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict', in D. Weisbrot, A. Paliwala, A. Sawverr (ed.), *Law and Social Change in Papua New Guinea* (Sydney: Butterworths, 1982), at 97, cited in ALRC, 'The Proof of Aboriginal Customary Law', at 11

Judicial recognition of custom may not be the panacea in all cases. A research paper prepared to inform the Australian Law Reform Commission's study on recognition of customary law argues that judicial recognition of customary law in Australia would pose a 'real risk of Aborigines losing control over their own customary law.'<sup>42</sup> It goes on to examine the challenges associated with the taking of Aboriginal evidence, including the need to comply with customary law rules regarding 'authority to speak on a particular matter'; the likely exclusion of Aboriginal opinion evidence of customary law, even when based upon specific examples of how it was applied in similar circumstances in the past; rejection by the Australian courts of the rule in *Angu v Atta* regarding proof of custom by those acquainted with it; and, the difficulties of fitting aboriginal evidence of customary law within narrow exceptions to the hearsay rule.<sup>43</sup> Based on this analysis it argues in favour of changes to Australian law to ensure the admissibility of Aboriginal evidence regarding customary law. It suggests, in particular the adoption of a provision along the lines of section 48 of the Indian Evidence Act of 1872 and section 56 of the Nigerian Evidence Act of 1945, to allow the courts to treat as admissible evidence given by 'persons having special knowledge of' customary law.<sup>44</sup> This proposal was adopted by the Australian Law Commission in its recommendations for changes to existing rules on evidence and procedure.<sup>45</sup> To this end, it recommended that evidence regarding a matter of Aboriginal customary law or traditions which might otherwise be declared inadmissible as hearsay and opinion evidence, be considered admissible where the person giving the evidence has 'special knowledge or experience of the customary laws of the community in relation to that matter; or, would be likely to have such knowledge or experience if such laws existed.'<sup>46</sup> The Commission also draws attention to the fact that under 'Aboriginal tradition' it may be necessary 'to allow two or more members of an aboriginal community to give evidence pertaining to the customary laws of that community together.'<sup>47</sup> It calls for special procedures to protect the

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<sup>42</sup> ALRC, 'The Proof of Aboriginal Customary Law', at 12

<sup>43</sup> Ibid., at 41-6

<sup>44</sup> Ibid., at 47

<sup>45</sup> ALRC, 'Report No 31 the Recongition of Aboriginal Customary Laws, Vol 2'.

<sup>46</sup> Ibid. Para 642

<sup>47</sup> Ibid. Para 648

confidential nature of secret Aboriginal knowledge, including *in camera* hearings, and exemptions from provisions of sex discrimination legislation, to allow for exclusion of members of the opposite sex to the witness from proceedings.<sup>48</sup> It also recommends that courts be given the power to adjourn ‘to enable a pre-sentence report to be obtained where consideration of Aboriginal customary laws and traditions are relevant in sentencing.’<sup>49</sup> With regard to recognition of Aboriginal customary law it considered a range of possibilities including,

- Codification or specific enforcement of customary laws;
- Specific or general forms of ‘incorporation’ by reference;
- The exclusion of the general laws in areas to be covered by customary laws; the translation of institutions or rules for the purposes of giving them equivalent effect (e.g. marriage or adoption); and
- Accommodation of traditional or customary ways through protections in the general legal system.<sup>50</sup>

The Commission considered codification or direct enforcement of customary law and exclusion of the general law, except in limited circumstances, inappropriate.<sup>51</sup> It favoured specific forms of recognition rather than general ones, and leaned towards forms of recognition that ‘avoid the need for precise definitions of Aboriginal customary laws’, a notion that, the Commission says, is to be understood ‘broadly rather than narrowly.’<sup>52</sup> In 2009 the Native Title Amendment Act adopted more flexible rules with regard to hearsay and opinion evidence. This facilitates the taking of oral evidence regarding customary laws of Aboriginal peoples. The changes make it easier for the Court to take evidence of traditional laws and customs, which is of particular importance in native title cases.

Taken together, the findings of the Australian Law Reform Commission; the experience of Papua New Guinea with the development of the Underlying law; the

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<sup>48</sup> Ibid. Para 656

<sup>49</sup> Ibid. Para 676

<sup>50</sup> Ibid. at 210

<sup>51</sup> Ibid.

<sup>52</sup> Ibid

greater flexibility in India and in some African countries with regards to admissibility of evidence on custom; and, the increased preparedness of Australian and Canadian courts to receive oral evidence of customary law, provide a firm basis upon which to commence development of international guidelines for the taking of evidence on customary law in foreign jurisdictions. Establishing an Ombudsman's office to assist Indigenous peoples in the process of taking of evidence by way of deposition or otherwise may prove an important means to making the links between customary and positive law regimes less onerous for all parties.

## **8.2 The changing face of custom**

Various examples have arisen during the course of this work demonstrating clear conflicts between customary law and individual human rights, primarily in relation to women. Some community practices are extremely disturbing. The continuing practice of female genital mutilation, application of communal justice involving violence to the person and inhuman and degrading treatment, trial by ordeal, spearing, and the dangers associated with accusations of witchcraft are widely seen as threats to the realisation of basic human rights. Reports of such activities are frequently linked to condemnation of customary law regimes *en toto*. On the other side of the debate claims are made that imposition of universal human rights may undermine the territorial or cultural integrity of Indigenous peoples and their internal justice systems. Getting the right balance between respect for collective cultural rights and individual human rights is not an exact science. On the one hand, it is necessary to resist attempts to utilise cultural relativism as a screen for abuse, on the other hand, attempts to impose what are seen as externally devised standards based upon foreign value systems are likely to hinder rather than nurture the spread of human rights recognition and adherence. This section provides an overview of some of the issues involved, it does not presume to be either comprehensive or to assume a stance on these matters. It seeks to explore the issues rather than propose any solutions.

### 8.2.1 customising human rights

Presentation of Indigenous peoples customary legal regimes as sources of restorative justice tends to obscure the reality of significant and systematic discrimination against women, and cases of extreme violence towards those accused of crimes. The

inequalities found in many customary legal regimes, abuse of power by tribal leaders, and extreme forms of bodily mutilation are frequently raised as arguments for doing away with customary regimes in favour of state law. Without in any way condoning such practices or accepting tired arguments of cultural relativism as a basis for approving all the vagaries of customary law regimes, it is submitted that such attitudes fail to recognise the social, legal and cultural basis of customary laws.

Concerns regarding questionable cultural practices, discrimination and extreme physical punishments are unquestionably valid and every effort needs to be taken to promote respect for universal human rights and to outlaw practices that threaten the lives, well being and human dignity of women, children and elders, in particular. The answer is not, however, the wholesale replacement of customary legal regimes.

International law is quite clear on two things, first that Indigenous peoples have a right to their own legal regimes, and secondly that rights to practice customary law must be carried out in a manner that conforms with and does not lead to a breach of universal human rights. Robin Perry, in an article addressing the challenges of reconciling customary law and human rights in pursuit of indigenous sovereignty, highlights the importance of Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples, which he says is noteworthy for three reasons. First, he says, it enshrines a right to use customary law while ‘simultaneously reaffirming the predominance of other “international human rights standards”’ for the recognition of Indigenous peoples’ rights to their legal systems.<sup>53</sup> Second, in recognising a right to ‘develop’ customary law Article 34 recognises its dynamic nature which makes it responsive to ‘the changing circumstances of’ indigenous peoples.<sup>54</sup> Third, by reference to ‘customs, spirituality ... and... juridical systems or customs’ Article 34 recognises that customary legal regimes ‘are ordinarily more multi-faceted, deeply rooted and all-encompassing for indigenous peoples than the formal laws by which the state regulates its citizens.’<sup>55</sup> He sees the Declaration as reflecting a ‘degree states’ *opinio juris*’ serving as a an ‘authoritative ... non-binding codification of,

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<sup>53</sup> Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty', at 94

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

internationally recognised indigenous rights'.<sup>56</sup> In a similar vein he cites Weissner's view that there exists 'widespread practice and opinio juris that indigenous peoples are entitled to maintain and, importantly, strengthen their own systems of justice.'<sup>57</sup> He also draws attention to the language of the current Draft American Declaration on the Rights of Indigenous Peoples, which in Article 21 recognises Indigenous peoples' rights to their legal regimes in terms that mirror the provisions of Article 34 of the Declaration.<sup>58</sup> This leads him to the conclusion that

on the basis of the evolving and expanding scope of the right to self-determination, the proliferation of international instruments recognizing [customary law systems], and developing state practice and opinio juris, the right of indigenous peoples to use [customary law systems] is beginning to crystallise as an emerging norm of customary international law<sup>59</sup>

At the national level as we have seen constitutional provisions recognising rights to practice customary law and to culture are frequently circumscribed by provisions requiring that such practices do not conflict with fundamental rights under the constitution. Returning to the status of customary law indigenous peoples' rights to their own legal regimes are rights recognised in international human rights law. Attempting to deny that right and arguing for the abolition of their legal regimes is an exercise in futility. After centuries of neglect they are now fully recognised under international law, they are not going to disappear. The challenge then becomes how to engage with legal regimes some of which may include elements of inequality and which may condone the practice of or be responsible for the perpetration of actions that run counter to individual's human rights. These are important issues, and although indigenous peoples are rightly concerned that they should not be used to distract from the wider process of securing full and effective recognition of their legal regimes at the national level, they cannot be simply swept aside.

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<sup>56</sup> Ibid. at 94-5

<sup>57</sup> Ibid. at 96

<sup>58</sup> Ibid. at 97

<sup>59</sup> Ibid. at 98

Having utilised the human rights system to secure recognition of their rights indigenous peoples have in essence bought into the system, the question now is how to promote human rights without undermining the very basis of their rights to self-determination. Steady progress is, reportedly, being made in many countries towards the eradication of the most controversial and inequitable practices, much more, however, needs to be done. Two areas of concern will be briefly looked at here, the issue of discrimination against women in Africa and the question of communal justice systems in Andean countries. Taking these in reverse order

In Andean countries indigenous communities in areas largely unpoliced by the state have in recent years been promoting their own brand of ‘communal justice’ with increasing vigour. Campesino (peasant) farming communities have traditionally regulated internal conflicts under systems of restorative justice, which according to Faundez prioritized “the admission of guilt, apology and atonement.”<sup>60</sup> Andean justice can be harsh justice and the national courts have shown a willingness to give significant space to indigenous peoples to apply their own customary laws and sanctions. The International Council for Human Rights Policy in its extensive study of non-state law reports on the case in Colombia where the Constitutional Court held in Decision T-523 (1997) that a punishment of sixty lashes, banishment from the community and loss of political rights, given to someone accused of murder was not excessive “as it was in keeping with traditional indigenous practice of the community in question”.<sup>61</sup> In a similar case in Ecuador, the community detained a murder suspect for a couple of weeks after which they decided to hang him. Under pressure from outside forces they changed the sentence and put him to hard labour, freezing baths at high altitude, and fifteen lashes. In this instance the President of Ecuador made a scathing attack saying, ‘In this country there is no death penalty, you cannot kidnap people, torture is not acceptable as a form of punishment ... indigenous justice cannot

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<sup>60</sup> Julio Faundez, 'Non-State Justice Systems in Latin America Case Studies: Peru and Colombia', *Paper Prepared for the DFID Workshop on Working with Non State Justice Systems* (2003), at 18

<sup>61</sup> ICHRP, *Bhe v. Magistrate Khayelitsha, Shibi v. Sithole, and South African Human Rights Commission v. President of the Republic of South Africa* When Legal Worlds Overlap: Human Rights, State and Non-State Law', at 35

go against human rights, and torture is not justice,'<sup>62</sup>. Concerned at the severe reaction of the authorities and the media in Ecuador, Professor James Anaya as Special Rapporteur highlighted the conformance of the country's constitutional provisions with human rights standards and called for dialogue to 'construct in a participative' manner the necessary mechanisms to promote coordination and cooperation between the indigenous legal regime and the state legal regime.<sup>63</sup> Anaya's concern was related to incendiary comments in the press that threatened to undermine the recognition of Indigenous peoples rights as enshrined under the constitution.

Communal justice systems are also a part of the Peruvian landscape. This is particularly true in the Andean highlands where the so-called Rondas Campesinas, serve as an armed campesino self-help enforcement body. The Rondas adopted their present format during the war with the Shining Path and have worked hard to secure recognition under the special jurisdiction applied to native and campesino communities.<sup>64</sup> It is a mark of their political influence that the work of the national courts to establish ties with indigenous peoples, discussed earlier, has focused primarily on the issue of the so-called ronderos. To date very few cases involving Amazonian communities have come before the superior courts, the situation is different with the ronderos whose actions have led to numerous claims of human rights abuse<sup>65</sup>

The willingness of Andean states to allow and indeed nurture the exercise of communal justice reflects in part the states absence in large parts of the Andes. Economically the ronderos are cheaper to maintain than a local police force, their utility does not however pardon their abuses. Speaking to the issue of whipping, for example, the International Council for Human Rights Policy is quite clear in its view that '

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<sup>62</sup> <http://www.elmercurio.com.ec/240367-la-justicia-indigena-desata-un-conflicto-con-la-ordinaria-en-ecuador.html>.

<sup>63</sup> <http://www.politicaspUBLICAS.net/panel/re/nws/528-rel-justicia-ecuador.html35>

<sup>64</sup> La Rosa Calle (ed.), 'La Facultad Jurisdiccional De Las Rondas Campesinas: Comentarios Al Acuerdo Plenario De La Corte Suprema Que Reconoce Facultades Jurisdiccionales a Las Rondas Campesinas', at 109 et seq.

<sup>65</sup> Ibid.



the implied argument that inhuman prisons justify whipping or even that whipping is somehow less inhumane when committed by some communities threatens to undermine the basis of human rights and represents, at best, a moral relativism that questions a shared sense of human dignity.<sup>66</sup>

From a traditional human rights perspective the requirement that customary law and practices must conform to human rights law seems unquestionable. From the perspective of Indigenous peoples such a position may appear to be an imposition of foreign value systems. The issue of appropriateness of customary law derogations from individual rights is even more complicated when issues do not involve physical violence. Ralph Regenvanu, for instance, has argued that inappropriate imposition of concepts of individualistic personal property rights could potentially undermine the integrity of community subsistence strategies, based as they are upon collective resource management and property systems.<sup>67</sup> Traditional laws designed to maintain communal property interests while justifiable in themselves may, however, serve as a mask for property systems that deny women rights to hold land in their own right.

Discrimination against women under customary law is widespread. Indigenous women from the Chittagong Hill Tracts region in Bangladesh, for example, face discrimination on two fronts, from the land laws and personal laws of the wider society and the customary land and personal laws of their own people.<sup>68</sup> In Africa efforts by national authorities to balance human rights and customary rights in national constitutions often appear strained. As Muna Ndulo notes

while many African constitutions contain provisions guaranteeing equality, human dignity, and prohibiting discrimination based on gender. ... the same

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<sup>66</sup> ICHRP, 'When Legal Worlds Overlap: Human Rights, State and Non-State Law', at 36

<sup>67</sup> Ralph Regenvanu, *Customary law and the Protection of Traditional Knowledge in Vanuatu*, Panel presentation, Workshop on the Role of Customary Law in Traditional Knowledge Governance, side event at IGC 10, Geneva, April 25 2006.

<sup>68</sup> Roy, Raja Devasish (2004), 'Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh', *Arizona Journal of International & Comparative Law*, 21 (1), 113-81, at 173

constitutions recognize the application of customary law ... without resolving the conflict between customary norms and human rights provisions.<sup>69</sup>

Grant, reviewing the status of customary law and its treatment of inheritance rights of women in light of the equality provisions of the Constitution of South Africa, says that the issue of universalism 'is particularly contentious in many African countries where arguments based on resistance to 'Westernization' and the need to protect cultural values are often raised.<sup>70</sup> This, he goes on to say, 'is exemplified by the exclusion of a range of cultural practices from the ambit of anti-discrimination provisions in the constitutions of a number of African states'.<sup>71</sup> The Constitution of Zimbabwe 1979, for example, provides in Section 23 (3) that

a law shall not be held to be in contravention of anti-discrimination provisions to the extent that it relates to: (b) the application of customary law in any case involving Africans and one or more persons who are not Africans where such persons have consented to the application of customary law

Blanket exclusion of Indigenous peoples or any group from the protection of human rights norms on the basis that they are bound by customary law rules is an extreme example of cultural relativism.<sup>72</sup> In opposition to what she implies is passé cultural relativism Ndulo argues that 'African theory and practice have been influenced by and have become part of the global movement for the globalization of human rights.'<sup>73</sup> She goes on to describe three distinct approaches to customary law. The first, she terms the 'historical approach' adopted during the colonial period; the second approach is that of constitutional recognition in the postindependence era; the third approach, in what she calls the postdemocratization era, should, she argues, encourage the courts 'to interpret customary law in accordance with human rights

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<sup>69</sup> Muna Ndulo, 'African Customary Law, Customs, and Women's Rights', *Indiana Journal of Global Legal Studies*, 18/1 (2011), at 89

<sup>70</sup> Grant, 'Human Rights, Cultural Diversity and Customary Law in South Africa', at 2

<sup>71</sup> Ibid.

<sup>72</sup> See also the constitutions of Botswana 1966, Art 15(4)(d); Lesotho 1993, Section 7 (6) (c), Swaziland 2005 Section 26; Zambia 1996, Article 23 (4)(d)

<sup>73</sup> Ndulo, 'African Customary Law, Customs, and Women's Rights', at 91

norms.’ This she suggests may be achieved by showing that ‘the traditional social and economic relations on which the customary norms that discriminate against women are founded, and on which traditionalists oppose reform, have in reality been radically transformed.’<sup>74</sup> Ndulo proposes reform of customary law on four fronts: first, encourage all African countries to sign up to relevant regional and international human rights instruments and their enforcement mechanisms; second all African national constitutions should outlaw discrimination and remove immunity of customary law from human rights provisions; third, both customary law and national law should be reformed to get rid of gender discrimination; and, fourth non-discriminatory aspects of customary law should be preserved and included in the legal reform.<sup>75</sup>

Classens and Mnisi take a somewhat different approach based upon extensive fieldwork with African women they come to the conclusion that customary law regimes are changing from the inside out. They point to the dangers of ‘essentialised versions of custom and rights that inform the long-running debate between universalism and cultural relativism and suggest that an understanding of rights as constantly changing and shaped through struggle is a more illuminating starting point for engaging with women’s land struggles.’<sup>76</sup> Through their research they found that changes in demographics, the large number of unmarried women with children and their need for residential sites is leading to changes in land distribution practices, though they say the land is ‘often allocated in the name of a male relative’.<sup>77</sup> Women they say are couching their claims on customary ‘values’ such as the entitlement to land to fulfil their basic needs and support their children (by birthright).<sup>78</sup> In the process women are, they claim, introducing principles such as Equity and notions of democracy and Constitutional rights into the debate.<sup>79</sup> In contrast to the living law’s evolution they note the government’s controversial efforts to push forward legislation

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<sup>74</sup> Ibid. at 92-3

<sup>75</sup> Ibid. at 114-5

<sup>76</sup> Classens and Mnisi, 'Rural Women Redefining Land Rights in the Context of Living "Customary Law', at 495

<sup>77</sup> Ibid. at 500

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

that would consolidate power in the hands of tribal leaders, bypassing local decision making structures. Despite the obvious drawbacks to determinations of the living law which may vary from place to place rendering expensive empirical research carried out for earlier cases of ‘limited value’ Classens and Mnisi are of the opinion that’

whatever the difficulties in proving the ‘positive content’ of living law, evidence of historical and ongoing contestation challenges distorted versions of ‘official’ customary law by reference to arguments and actions of ordinary people. In this sense, the living law approach contains inherently democratic possibilities.<sup>80</sup>

In a sign of inroads being made by human rights the courts in Tanzania decided to overrule a case in which the application of customary law would lead to breaches of human rights principles enshrined in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on Human and Peoples Rights, which the court said were a ‘standard below which any civilized nation will be ashamed to fall.’<sup>81</sup> The Tanzanian court relied on the Government’s ratification of CEDAW, and of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights, to find that women were constitutionally protected from discrimination, under customary law. If customary law is seen as being in conflict with the realization of the basic human rights of women and other disadvantaged groups, this is going to impede its recognition by the international community and foreign jurisdictions. In this vein, cases relating to access and benefit sharing and protection of rights over traditional knowledge, equity and human rights in general would tend to require that women be recognised as holding rights to their knowledge and resources and to share equitably in benefits arising from its use, in the same manner and extent as men,<sup>82</sup>.

The tensions between customary law and human rights instruments are not ones that will be easily overcome. Patriarchal systems, which have traditionally subjugated

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<sup>80</sup> Ibid. at 516

<sup>81</sup> WEDO 2003

<sup>82</sup> Brendan Tobin and Lorena Aguiler, *Mainstreaming Gender Equality and Equity in ABS Governance* (Costa Rica: IUCN 2007).

women, will not easily relinquish power and women long marginalised from decision making may find it difficult to prepare themselves to fully participate and defend their interests. Pressures for cultural change to comply with human rights principles may have unintended negative impacts upon community welfare and in some cases, may undermine the welfare of those sectors they seek to support. The contrasting approaches of Ndulo and Classens and Mnisi reflect a continuing tension between legal positivism and a more nuanced, evolutionary approach to generation of norms. In essence it is the struggle customary law has always faced a struggle for recognition in its own right and the right to evolve at its own pace. Any attempt to fast forward its development and merge it in some new contrived legal format is likely to fail in practice. That is not to deny the merit of Ndulo's proposals but merely to caution against any notion that they can be imposed in a top down process, at least in so far as they address customary law as a body of law in and of itself.

It is important to remember that the customary laws and practices of Indigenous peoples and local communities are as diverse as Indigenous peoples and local communities themselves. Care is needed, therefore, to avoid any generalisation classifying their legal systems as being discriminatory. While it is without question that women in many Indigenous peoples and local communities find themselves in a position in which discrimination does occur, this is not the case in all peoples or communities. It is noteworthy, for instance, that the issue of gender has appeared more frequently in discussions relating to protection of traditional knowledge within the Working Group on Article 8 (j) than in many other areas of the Convention on Biological Diversity's work. As the Working Group on 8 (j) has a very strong presence of Indigenous peoples and local communities, it seems to demonstrate their concern for respect of gender issues is, in fact, high. One result of the concern for gender related issues in the Working Group on Article 8 (j) has been the recognition in the Akwé: Kon Guidelines on environmental and social impact assessments<sup>83</sup>, of the vital role women play in conservation and their greater susceptibility to negative

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<sup>83</sup> *Akwé: Kon Guidelines: Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*

development impacts<sup>84</sup>. The guidelines highlight the need to secure the full and effective participation of women in policy making and implementation.

One of the distinguishing characteristics of Indigenous peoples and local communities, which is consistently raised as a reason for the design of *sui generis* regimes for the protection of their rights over traditional knowledge, and over biological resources, is their collectivism. The collective nature of their societies, including rights over land resources and knowledge argues against the imposition of individualistic property rights regimes which could lead to the disintegration of communities and undermine their collective welfare. Similarly, it has been pointed out that slavish adherence to and implementation of individualistic human rights may have an effect on community cohesion and undermine cultural integrity<sup>85</sup>. Developing means to ensure both individual and collective rights will require collaboration and capacity building amongst and within Indigenous peoples and local communities, and with national and international regulators. Finding the optimal balance will require women's informed and effective participation.

### 8.2.2 custom-made law

Customary law as we have seen is constantly reformulating itself in the face of new challenges and opportunities. It is influenced by and in turn influences national law and policy and is shaped by is now also reshaping international law. Its greatest influence has to date been in the development of the Declaration and of law and policy relating to protection of traditional knowledge. For much of the time Indigenous peoples have focused their attention on securing recognition of their interests in international instruments negotiated by states. Enormous amounts of time and effort have been spent trying to influence instruments such as the Nagoya Protocol and the negotiating documents at the WIPO IGC. Attention is now turning to the actions Indigenous peoples can take unilaterally to protect their interests.

This sub-section focuses on two areas in which Indigenous peoples efforts to promote change have shifted thinking and modalities associated with the role of customary law

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<sup>84</sup> Ibid

<sup>85</sup> Tobin, *Mainstreaming Gender Equality and Equity in ABS Governance*

in protection of their biocultural heritage. These are the notion of biocultural protocols and the application of indigenous notions of stewardship to debates on the use of property rights to protect cultural heritage.

#### ***A. Community Protocols***

Codification of customary law as a means for securing its recognition has raised many concerns amongst Indigenous peoples and local communities who feel this may begin the process of turning it into positive law, undermining its flexibility, continuity and legitimacy. A multi year program of research into the role of customary law in the protection of traditional knowledge in Andean and Pacific Island countries found resistance to codification was most strident in the Andean region.<sup>86</sup> There was some mild support for the idea in the Pacific region, but only for codification of underlying principles or ethics of customary law as had occurred in New Zealand.<sup>87</sup> Lack of codification of customary law was not seen as an insurmountable impediment to governments and the international community engaging with Indigenous peoples and local communities with a view to developing mechanisms to give force to customary law.<sup>88</sup>

One means to bridge the gap with positive law without recourse to codification of customary law is the development of community protocols. The notion of Indigenous peoples' protocols has been around for a long time, towards the end of the 1990's and the start of the twenty-first century it became associated with a variety of measures adopted to protect Indigenous rights over their traditional knowledge. This included contracts incorporating customary law principles and values, rules for conducting research, codes of conduct for researchers, and procedures for seeking access to and use of traditional knowledge without requiring that customary law itself be codified. Establishment of protocols. Protocols may be seen as form of partial codification of custom to the extent that they lay down procedures defining steps to be followed in accordance with custom in order to process applications to carry out research, collect

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<sup>86</sup> Tobin, 'The Role of Customary Law in ABS and TK Governance in Andean and Pacific Island Countries.'

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

and/or use traditional knowledge, biological and genetic resources. Protocols of this nature enable the custodians of biocultural heritage to define conditions for prior informed consent, benefit sharing, and place restrictions on access and use of resources and knowledge. Protocols may include information on the relevant law and the scope of the rights claimed by Indigenous peoples. It may provide details on the material covered and may establish areas of knowledge and resources and even geographical areas that are off limits, as may for example be the case in protection of sites with significant sacred and/or cultural importance. Taking the initiative to develop community protocols provides traditional knowledge custodians with an opportunity to influence the development of national, regional and international law and policy in this area. Community protocols may be seen as a bridge between customary law and positive law regimes. As such their development is an aid to effective regulation of traditional knowledge and biocultural issues at all levels.

Community protocols may prove particularly influential where developed by Indigenous peoples whose traditional territories span one or more national boundaries, or where they involve more than one indigenous people or local community within a single state. In 2002 the Awajun Indigenous people in Peru proposed the development of a protocol amongst all Jibaro peoples (Shuar, Achual Awajun, Huambisa and Candoshi) whose territories span the Peruvian Ecuadorian border. They also proposed that a series of workshops should be held with Indigenous peoples throughout Peru to promote the development of a canopy of overlapping protocols to regulate access to resources and knowledge across indigenous peoples' traditional territories. Similarly proposals were made for development of an Inuit wide BioCultural Protocol on traditional knowledge governance during the fourth General Assembly Inuit circumpolar Conference in Barrow, Alaska in 2006.<sup>89</sup> Lack of funding in both cases impeded implementation of a proposed activities, the Inuit Canadian office did however produce a project proposal with local, national and international components. Development of such people wide protocols has much merit. In the first place it provides a uniform framework for regulating the rights of the specific Indigenous peoples in relation to resources and knowledge that may be shared, while allowing for locally specific arrangements for endemic resources. Adoption of such

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<sup>89</sup> Pers. comm. Violet Ford July 2007



protocols would have the potential to significantly influence the design of national, regional and international law and policy. They would send a strong message to international bodies, negotiating forums and to national governments and other actors regarding Indigenous peoples' view of how prior informed consent procedures should work.

Empowering Indigenous peoples and local communities to develop community biocultural protocols on issues such as traditional resource management, access to their lands and territories, resource extraction, REDD+ climate change projects, as well as access to and use of traditional knowledge and genetic resources, will in the long run assist national and regional authorities and the international community to develop appropriate mechanisms for protection of Indigenous peoples' rights while giving due regard for customary law. Considering the status of current negotiations at the Convention on Biological Diversity, IGC and the WTO, as well as ongoing regional and national efforts to develop traditional knowledge law and policy, provision of such support to Indigenous peoples and local communities should be prioritised. The Global Environment Facility, international aid agencies, governments and international institutions as well as the research and private sector should all be called upon to make funding available to support the development by Indigenous peoples and local communities of such protocols. In the long run this may prove one of the most effective tools for securing effective protection of Indigenous peoples' cultural, resource and knowledge rights and appropriate respect and recognition for customary law.

To assist this process the UN Permanent Forum on Indigenous Issues and the Working Group on Article 8 (j) could usefully work in collaboration with relevant international organisations, governments, and Indigenous peoples to prepare a report on community protocols already in existence. Indigenous peoples of Australia, Canada, New Zealand, Panama and the US have been amongst the leaders in the development of community protocols. Their experience and similar experiences from around the world might, usefully, be examined with a view to the development of model protocols. Indigenous peoples and local communities around the world could use these in the development of locally appropriate protocols to govern traditional knowledge and ABS issues. Provision of support to Indigenous peoples and local

communities to develop such protocols will assist not only traditional knowledge custodians but also international, regional and national efforts to regulate traditional knowledge. In the long run empowering the custodians of traditional knowledge may in the long run prove the most effective means for securing development of a functional international system to respect and protect traditional knowledge.

Indigenous peoples participating in a series of regional and sub-regional workshops on the role of customary law in the protection of traditional knowledge in Andean and Pacific Island countries, took the view that any research into the nature and body of customary law should be designed from the ground up in collaboration with Indigenous peoples and should to the greatest extent feasible be carried out by Indigenous peoples themselves.<sup>90</sup>

#### **B. Stewardship**

In a truly intercultural pluralistic legal environment customary law and positive law will need to interact and draw upon their respective strengths, principles and equitable instruments. Carpenter et al. have argued cogently for the adoption of a stewardship model of property based in part on Indigenous peoples' own customary laws and traditions. Their proposal is for a 'customised' view of cultural property adopting what they term a 'more relational vision of property law' where the ordering of interests is based upon 'various human and social values, including nonmarket values.'<sup>91</sup> They propose the application to indigenous cultural property of a concept of what they call 'Peoplehood', a concept, which they say, '... dictates that certain lands, resources, and expressions are entitled to protection as cultural property because they are integral to the group identity and cultural survival of Indigenous peoples.'<sup>92</sup> They construct their notion of peoplehood upon the concept of personhood developed by Mary Jane Radin, whom they say, would view it as legitimate 'to make exceptions to the prevailing 'universal commodification' standard for property that is nonfungible, incommensurable and inalienable, as some indigenous cultural

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<sup>90</sup> Tobin, 'The Role of Customary Law in ABS and TK Governance in Andean and Pacific Island Countries'.

<sup>91</sup> Carpenter et. al., 'In Defense of Property', at 105

<sup>92</sup> Ibid.

properties surely are.’<sup>93</sup> Based upon what they call the ‘pervasive view that property is a bundle of relative, rather than absolute, entitlements, including limited rights to use, alienate and exclude’<sup>94</sup> they embrace the language of ‘custody, care and trusteeship’ to articulate the ‘relationship and obligations’<sup>95</sup> which they say ‘independent of title – lies at the heart of cultural stewardship.’<sup>96</sup> This notion of cultural stewardship is formulated with a close eye to the experience of the corporate, indigenous and environmental spheres, incorporating notions of: fiduciary obligation of care or loyalty;<sup>97</sup> prioritization of service to the group over individual self-interest; involvement of the steward as part of a collective enterprise<sup>98</sup>; and recognition of a duty of care for the Earth of itself and for future generations.<sup>99</sup> The model they propose is seen as a complement to existing property, liability, and inalienability, rules for describing indigenous non-owners rights alongside those of owners.<sup>100</sup>

The notion of peoplehood and the rights associated with it breaks out of the indigenous versus other cultures debate and places indigenous rights alongside the rights of other peoples. In doing so it may serve as a means for enabling the extension of customary or tribal law to the regulation of cultural property beyond the immediate jurisdiction of the relevant indigenous people. It could for example be applied to sites of significant importance for Indigenous peoples, which they do not own due to

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> See Rebecca Tsosie, 'Land, Culture, and Community: Reflections on Native Sovereignty and Property in America', 34 *IND. L. REV.* 1291, (2001) at 1306, where she says that ‘Although Native peoples, like all people, share the need to use the land for their physical sustenance, they hold different notions about the appropriate relationship and obligations people hold with respect to the land. The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor . . . that they no longer maintain the rights to these lands.) cited in Carpenter, et. al. 'In Defense of Property'

<sup>96</sup> Carpenter et. al., 'In Defense of Property',

<sup>97</sup> Ibid. at 147, Carpenter et. al. also argue, at 152, that ‘While, asserting the fiduciary ethic in regard to their cultural property model they distinguish it on the basis of the ‘multiple levels of interactivity in the cultural property regime, as well as overlapping and sometimes opposing obligations, rights and duties regarding fiduciaries and beneficiaries at different points along the cultural property spectrum’,

<sup>98</sup> Ibid. at 150

<sup>99</sup> Ibid at 155

<sup>100</sup> Ibid at 161

dispossession, removal or illegal transfer.<sup>101</sup> It might likewise be applied to other tangible and intangible property held in museums, databases, and ex-situ collections of biological and genetic resources; building a fiduciary relationship between Indigenous peoples and institutions holding aspects of their cultural heritage.<sup>102</sup> Carpenter et al. distinguish between notions of static and dynamic stewardship, the former applying to sacred and other intangible property, while the latter is applied to rights of commodification, control and use of downstream goods and rights of Indigenous peoples to make and market cultural artefacts.<sup>103</sup> In this way they attempt to develop a notion of heritage rights protection which caters both to indigenous concerns to prevent commoditization of sacred and significant elements of culture, while recognizing the growing involvement and desire by Indigenous peoples to control the market in their cultural goods. Commenting on Mezy's arguments that cultural property will impede cultural hybridization of culture, they argue the contrary saying that cultural property will facilitate 'the dynamic process of cultural evolution, change and survival, by allowing Native peoples to share in decisions regarding the way their indigenous cultures are displayed in the world.'<sup>104</sup>

Developing frameworks for the application of customary law principles in the interfaces between customary and positive law and the cross fertilisation of legal regimes may be seen as the implementation in practice of Indigenous peoples human rights grounded on customary law. By taking the initiative and defining the criteria for the recognition of their cultural and intellectual property rights Indigenous peoples are bringing pressure upon states to respect and recognise the role of customary law in securing their human rights. In essence they are helping to define the parameters of customary international law by the very fact of forcing a reaction by states to their

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<sup>101</sup> Ibid. at 161 where the authors refer to the Devils Tower case – *Bear Lodge Multiple Use Association v Babbitt*, 175 F.3d 814 (10th Cir. 1999) in which the National Park Service with the approval of Secretary of the Interior placed a voluntary ban on climbing at Devils Tower, the result of which was a fall of over 70% in the numbers climbing Devils Tower during the month of June.

<sup>102</sup> Alexander, Merle, K. Chamundeeswari, Alphonse Kambu, Manuel Ruiz and Brendan Tobin 'The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis', (Tokyo: UNU-IAS, 2003).

<sup>103</sup> Carpenter et. al., 'In Defense of Property', at 162 -3

<sup>104</sup> Ibid. at 189

initiatives. Although customary international law arises from state practice it is not hard to see Indigenous peoples vying for a role in its definition. Having been written out of international law for so long, now that they have regained their sovereign status as peoples entitled to self-determination they are not prepared to sit on the sidelines of the international law making process. Having secured their seat in international negotiation forums for the drafting of the Declaration, the Nagoya Protocol and the work of the Intergovernmental Committee, Indigenous peoples have every reason to ask in what manner their own customary laws may influence the crystallisation of customary international law.

### **8.3 Intercultural legal pluralism**

Early on we considered the significance of the Haudenosaunee Confederacy's two-row wampum belt, which presented an idealistic view of two distinct worlds moving in harmony without interrupting one another. This eutopic vision of parallel sovereignty turned out to be just that. For Indigenous peoples' legal pluralism has traditionally meant a system where their customary law (if recognised at all) is almost always at the bottom of the pecking order. As such it is easily overridden by the constitution, human rights law, national law, and in some case even local by-laws. This is definitely not self-determination, it is discrimination and in the light of developments in human rights law it is no longer acceptable. The notion of legal pluralism as a separation of legal worlds, in which Indigenous peoples' rights to their legal regimes is limited to their own internal affairs and has no bearing on third parties, is not in tune with the needs and reality of today's multicultural legal melange. The interrelationship of legal regimes and the contested nature of rights, duties and principles, of law and morals demand a more nuanced approach. This need has been expressed in terms such as intercultural equity<sup>105</sup> and intercultural justice<sup>106</sup>, and to a somewhat lesser extent in the notion of biocultural justice<sup>107</sup>. It is a world of legal interfaces that cannot be imposed but must be negotiated, tested and modulated

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<sup>105</sup> Brendan Tobin, 'Setting Protection of TK to Rights – Placing Human Rights and Customary Law at the Heart of TK Governance',

<sup>106</sup> Rebecca Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm',

<sup>107</sup> Bavikatte, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing'.

to respond to the realities of differing worldviews, value systems and legal vision. This section examines the notions of intercultural justice and equity and goes on to consider how the relationship between customary law and positive law might work towards the reconstruction of our fragmented legal order.

### 8.3.1 in search of intercultural equity

Native culture is closely related both to Native religion and to the natural environment, which, in Tsosie words, is itself the ‘source of the Creator’s law (natural law) that is intended to govern the people in their appropriate interactions with the rest of the natural order.’<sup>108</sup> Tsosie finds the interrelationship of culture, land and spirit best articulated in the notion of traditional ecological knowledge which has been described from the perspective of the Dene people of Canada by Winona La Duke as a ‘spiritually based moral code that governs the interaction between the human, natural and spiritual worlds.’<sup>109</sup> The grounding of culture in the spiritual and legal order of Indigenous peoples, seen as emanating from the earth itself, explains the concern of Indigenous peoples that deconstruction or harm to any aspect of their cultural systems may have ‘profound consequences for the cultural survival of Native people.’<sup>110</sup> Tsosie claims that the frequent disregard of these interrelationships by dominant society’s courts demonstrates the need for an intercultural legal framework exercising ‘intercultural justice’ in order to ‘alleviate the historical and contemporary grievances and harms that continue to affect’ Indigenous peoples.<sup>111</sup> This notion of intercultural justice goes beyond a call for recognition of Indigenous peoples’ own legal regimes and their role in internal regulation of their affairs, to call for collaboration with Tribal court systems, attention to the moral and ethical framework of tribal justice, including such notions as restorative justice, ‘equal respect, group solidarity, good relations, and compatibility with ‘natural’ (i.e..’ universal) principles, [which] may be used to understand and provide redress for cultural harm.’<sup>112</sup> Not only, she claims is this necessary from a moral and ethical standpoint it is in the

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<sup>108</sup> Tsosie, ‘Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm’, at 403-4

<sup>109</sup> Ibid. at 404

<sup>110</sup> Ibid.

<sup>111</sup> Ibid. at 408

<sup>112</sup> Ibid. at 409

context of her analysis of the United States law obligatory considering that ‘[t]he rights of Native nations are not purely the rights of cultural or ethnic groups. Rather they are separate sovereigns with the right to self-determination as peoples within the domestic federal system.’<sup>113</sup>

At the international level the concept of state sovereignty has traditionally served to exclude the individual and non-state communities from acting as lawmakers, sources of law, or as actors entitled to initiate actions for defence of their rights. International human rights law legislation has begun to make inroads into this exclusive domain of the sovereign state and increasingly legal pluralists are arguing for recognition of a wide range of sources which together go to make up a hybrid body of law with often contested jurisdiction over the same subject matter. This has been well articulated in a study of legal pluralism by Schiff Berman, which states that

the past fifteen years have seen increasing attention to the important—though sometimes inchoate—processes of international norm development. Such processes inevitably lead scholars to consider overlapping transnational jurisdictional assertions by nation-states, as well as norms articulated by international bodies, nongovernmental organizations (‘NGOs’), multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on.<sup>114</sup>

Legal pluralism tends towards the identification and recognition of parallel and/or contesting jurisdictional claims, rather than a blending of legal regimes. In support of a more intercultural approach to development of law and policy in multiethnic societies, it has been proposed that principles of customary law should be enshrined alongside positive legal principles in relevant national and international law<sup>115</sup>. One obvious area of law for inclusion of customary law principles is the development of a

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<sup>113</sup> Ibid.

<sup>114</sup> Schiff Berman, P. ‘Global Legal Pluralism’, *Southern California Law Review*, Vol. 80, p.1155, (2007)

<sup>115</sup> Walsh, C. ‘Interculturalidad, reformas constitucionales y pluralismo jurídico’, *Publicación mensual del Instituto Científico de Culturas Indígenas*. Año 4, No. 36, Marzo (2002)

global body of rules of equity to guide interpretation and implementation of any regime on access and benefit sharing and traditional knowledge, as well as to oversee issues relating to Indigenous peoples' cultural, land and resource rights. In advancing such a task it will be important to find a starting point where all can commence sharing of ideas, stories, notions and understandings of equity. Taking oral evidence of customary practices into account requires, according to Borrows, an attempt to view stories from the perspective of the teller. Discussing how oral evidence might better taken on board by the courts, he suggests that

If judges examine oral history with their own complex experiences of written history in mind, they may be better able to appreciate the variegated nature of fact found in Aboriginal oral traditions.<sup>116</sup>

He argues that if judges consider their reading of historical texts such as the Iliad, Bible, Ramayana, Norse Sagas and Mayan Codex, - he describes these texts as 'polyfunctional: containing a plurality of factual insights and conveying a multiplicity of truths from different methodological perspectives.' – it may give them 'greater patience and insight when taking aboriginal evidence and bring them closer to 'the nature of fact in legal inquires related to Aboriginal oral traditions'.<sup>117</sup>

If customary law is to retake its rightful place in the legal structure it must first be understood. Any such process will need to rely heavily on translators, translators not just of language but also of ideas of concepts. The role of the Treaty of Waitangi in collating evidence and preparing submissions to the courts is a case in point. Without the ability to make legally binding judgments it is empowered to hear and analyse Maori claims acting as a conduit to the courts. Just such understanding across cultural boundaries will be necessary to develop a body of intercultural equity and justice.

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<sup>116</sup> John Borrows, 'Listening for a Change: The Courts and Oral Tradition', *Osgoode Hall Law Journal*, 39/1 (2001), at 35

<sup>117</sup> *Ibid.* at 36



### 8.3.2 restoring the fragmented legal order

Customary law, as we have seen, has always formed part of the legal landscape. Obscured by the glare of positive law for centuries, it is only now coming to the attention of the greater part of the legal fraternity. Despite its historic marginalisation it is the primary and sometimes the only source of law and dispute resolution for countless millions across the planet. The final decades of the twentieth century has seen a global revival in the fortunes of customary legal regimes. Direct or indirect recognition of Indigenous peoples rights to their own legal regimes is now to be found in a majority of national constitutions. As recognition of the importance of customary law grows questions regarding the scope, nature and characteristics of custom and its relationship with positive law have become more important.

Customary law is law. Not only is it law, it is binding law and it has significant ramifications for states, for private sector actors, the research sector, non-governmental organisations and organised religion. Following centuries of marginalisation, disdain and suppression of Indigenous peoples' legal regimes and their demands for self-determination, the genie is, so to say, out of the bottle. Customary law is here to stay and its status and role in local, national and international legal governance is only going to get stronger. As its role and influence grows the boundaries and areas of interface between customary law and other legal regimes will become more visible creating new opportunities and challenges for the regulation and enforcement of Indigenous peoples rights including their rights to regulate their own affairs in accordance with their own cosmovion.

In order to identify and apply best practices for the nurturing of the relationship between customary law and positive law it has proven valuable to examine the historic ties between these bodies of law, and the varying means by which this relationship has expressed itself over time in a variety of scenarios around the globe. As seen earlier the position of positive law and customary law vis-à-vis one another never been static. Although, positive law tended to supersede custom, customary law could and frequently did overrule positive law, while both custom and positive law were considered subordinate to natural law. The tensions, synergies and inescapable interdependence of these three sources of law have long served as the basic building

blocks of legal governance, even where not immediately apparent. Across the globe a daily interplay between multiple variations of custom, natural and positive law demonstrates this interdependence. This is so even where the terminology of customary law and natural law have long been out of favour.

In the search for a means to envision the interrelationship and interdependence of customary law, positive law and natural law a fluvial metaphor springs to mind which helps envision the interplay between these three streams of law. Under this vision custom deriving from the will of the people may be viewed as the deep flowing waters of a river. Slow moving and subject to gradual, progressive modifications, reflecting cautious but continuous changes in society, capable at times of significant and abrupt change in the face of major obstacles, but conservative at heart, seeking to return to a position of relative calm as soon as possible. Stipulated or positive law may be seen as the fast running waters on top of the river, moving fast and sometimes furiously, undergoing constant and frequent shifts in direction in response to changes in governments, demands of powerful interest groups, and the dictates of political and economic expediency. Prone to idealistic and populist displays it is a process of trial and error, as ideology imposes sometimes innovative and at times ill-conceived responses to new social, cultural, economic and technological challenges. While, natural law may be seen as the common pool or lake into which both custom and stipulated law flow. Calm, clear, cool and constant, patient and reasoning, mature and eternal, providing the reflective process necessary to bring about solutions to conflicts between customary and positive law. Solutions found not through power or might, or even persuasion, but by reference back to a common system of universal moral principles. A filter, if you like, laying aside purely individualistic interests, corporate greed, cultural relativism, and righteous indignation, in the search for the 'self-evident common good' as opposed to the 'self-serving individualistic' demand. But here in lies the rub, the unavoidable dilemma. The capacity of our common pool or lake to provide self-evident solutions presupposes the existence of some collective north, some common goal or vision, some shared truth(s) to serve as the filter for individual myopia. For Aristotle this would have been the universal truth of natural law, which . As Sir Henry Maine describes as the 'distinct object to aim at in the pursuit of

improvement'<sup>118</sup> a true north to be sought progressively, but which will always likely remain somewhat of reach.

The notion that law is pointing at some abstract moral good, as opposed to slavishly enforcing rigid stipulated rules, brings natural law closer to the notion of customary law than to positivist law. Indeed at the outset custom was as Cicero viewed it the instrument through which Natural law might be enforced. Natural law as a concept has, however, been variously hijacked over the centuries by powerful self-interest groups leaving its reputation tarnished its impact faint and its following reduced to a core of devotees with no significant congregation. That said the principles that natural law enshrined if true must still be true. If common truths exist they must be identifiable, the question becomes then where are they to be found and what advantage would accrue from doing so.

The relationship and indeed the line between custom and natural law have often been blurred. Aristotle, Murphy tells us, saw custom as more authoritative and as concerning 'more important matters than do written laws' which he surmises may be because custom rested on ancient and widely shared norms, and dealt with issues of 'family life and divine worship'.<sup>119</sup> Although Murphy does not make the point it seems plausible to argue that Aristotle envisioned a natural law genus for custom. Murphy again cites Aristotle for the proposition that 'written laws depend on force while unwritten laws do not'.<sup>120</sup> What Aristotle is alluding to, says Murphy, is 'the habitual dimension of custom: because habits create a second nature, we do what custom demands spontaneously.'<sup>121</sup> The notion of a self-enforcing system of custom approximates the concept of conscience that informs natural law. It is however somewhat idealistic and Aristotle himself did not, according to Pollock, presume that

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<sup>118</sup> Sir Henry Maine, *Ancient Law: Its Connection with Early History of Society and Its Relation to Modern Ideas*. (World Classics Oxford: Oxford University Press, 1861), at 64

<sup>119</sup> James Bernard Murphy, 'Habit and Convention at the Foundation of Custom', at 64

<sup>120</sup> *Rhetoric* (1375 a 16) cited in James Bernard Murphy, 'Habit and Convention at the Foundation of Custom', at 64

<sup>121</sup> *Ibid.*

the rules of natural justice as found in society are in fact ‘perfectly constant’.<sup>122</sup> What ‘Nature’ implies for him, Pollock says, is ‘the conception of a rational design in the universe, which is manifested, though never perfectly realized, in the material world.’<sup>123</sup> The notion of rational design and the existence of universal truths that may be identified through the application of reason lie behind the concept of natural law. Natural law was, according to Maine, guided by stoicism which in turn guided Roman law towards ‘simplicity, symmetry and intelligibility’ seen as the ‘the characteristics of a good legal system’.<sup>124</sup> These characteristics were responsible, Maine claims, for ‘Roman law’s prodigious influence on mankind.’<sup>125</sup> It is arguable that simplicity and symmetry are likewise to be found in customary legal regimes, where oral traditions favour the transmission of concise principles of law between generations. While, the spiritual ties of Indigenous peoples to their lands, environment and nature ensure that natural law is part and parcel of their legal regimes.

Despite historical marginalisation in an international legal order dominated by positivism, natural law is an inescapable part of our collective legal heritage, and traces of natural law are to be found in diverse aspects of the global legal infrastructure. Its greatest and most ‘beneficent achievement’ says Pollock was its role as the foundation of the Law of Nations as devised by Grotius<sup>126</sup>. It is also reflected in notions of Equity and from it are drawn universal principles of law which have coalesced under the framework of human rights law. It is still to be found as an influential force in courts of some countries, and the notion of natural law is at heart of indigenous concepts of their own customary regimes.

Viewing natural law as procedural law rather than substantive law provides a means for devising mechanisms through which natural law might be found to address the conflicts between positive law and custom. One potentially interesting mechanism is

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<sup>122</sup> Frederick Pollock, ‘The History of the Law of Nature: A Preliminary Study’, *Columbia Law Review*, 1, 11- 32, at 12

<sup>123</sup> Ibid.

<sup>124</sup> Maine, *Ancient Law: Its Connection with Early History of Society and Its Relation to Modern Ideas*, at 47

<sup>125</sup> Ibid. 64

<sup>126</sup> Pollock, ‘The History of the Law of Nature: A Preliminary Study’, at 11

that of alternative dispute resolution based upon a body of legal pluralism, which draws on both positive and customary sources of law. Under such a view natural law appears through informed reason as opposed to adversarial trial. In the same vein equity, conceived as a manifestation of natural law, and as a procedural remedy to the slavish application of the law, suggests how reasoned justice may defend against the insensitivity of the stipulated law.

Custom, with its feet in nature and its head in spirit can bring to the law what it always brought, the wisdom of the people, the knowledge of the elders, the calm of longevity, the strength of numbers. It can help once more to ground legal governance in the land, in culture, in people and community. Without a sense of community, lost in the glorification of individualism, humankind is in danger of losing emotional and spiritual safety net that goes with belonging and can never come from owning. Custom, with its inherent qualities of reciprocity, hospitality and responsibility can help to bring that back. It is not a replacement for legislative decision making it is the complement without which equity, justice, and collective well-being may forever remain beyond our collective reach.

## Conclusions

Despite centuries of marginalization, distortion and modification customary law has survived as an important and dynamic source of law in many parts of the world. Although there may be cases where customary law regimes remain in a pristine format these are the exception rather than the rule. In most cases customary legal regimes have evolved in response to changing social and political realities and needs, or as the result of modification by or in response to external forces including colonization, organized religion, national and international law and commercial markets. The extent of modification may be directly related to factors such as the level of influence exercised by national authorities; the relative power, autonomy and distance of indigenous people from external power structures, and markets; the extent to which the people as a whole exercise control over their legal regimes; and the relative power of their own elites, as well the propensity for such elites to consolidate their own power through association with external forces.

Colonization has undoubtedly had a significant and in many cases destructive influence on the content and nature of customary legal regimes as well as on the decision making authorities of Indigenous peoples. While, this brings into question the traditional and customary basis of such laws and authority structures, it should not be used as a basis for denying recognition of Indigenous peoples' rights to govern their own affairs in accordance with their own laws and practices. To do so would be to deny the dynamic nature of indigenous societies and their capacity to find mechanisms to secure their continued survival as culturally distinct peoples, in the face of enormous external pressures. The corruption of customary law to meet the exigencies of external influences, and the consolidation of power in local elites on the basis of their capacity to interface with external forces does not of itself delegitimize the rights of such peoples to self-determination. Denial of rights to self-determination may itself be a primary cause of corruption and distortion of power structures within Indigenous peoples. Even where official law and imposed forms of governance exist these may have less internal influence than is often perceived by their outward form. Recognition of rights to self-determination and a focus on the interrelationship between Indigenous peoples' decision making authorities and their counterparts in the national legal and political system, would do much to ensure the empowerment of

Indigenous peoples. Effective realisation of the right to self-determination would help secure their rights to maintain, modify or resuscitate, traditional decision making authorities and decision-making practices. This in turn will serve as the basis for revitalisation and vindication of customary law as a dynamic body of law that has evolved and continues to evolve through internal decision-making processes, defined and maintained by those who feel bound by its provisions.

Recognition of customary law as a process rather than a focus on its post colonial content is a necessary step towards its resuscitation, a process which may be enriched through Indigenous peoples' reflection upon and recuperation, as appropriate, of original sources of customary law and the modalities of law making. These may be found in the stories, songs and traditions of the relevant people. It should not be presumed however, that Indigenous peoples' desire or indeed would benefit from a return to some perceived pristine form of pre-colonial custom. There are many aspects of customary law which Indigenous peoples themselves may well feel inappropriate to meet their present social, political and cultural, spiritual and environmental needs. Any decision on the recovery, restitution or reformulation of customary law should therefore be left to Indigenous peoples themselves to decide upon.

Recognition of customary law at the national and international level may be direct or implied and countries have approached the issue in a wide diversity of ways. These include its incorporation as part of national law; recognition as a source of law; empowerment of traditional authorities; recognition or establishment of traditional courts; creation of councils of chiefs to advise on customary law; restrictions on the adoption of laws conflicting with custom; recognition of rights to culture and of specific rights to land, resources, or knowledge; as well as, adoption of customary law to guide management of protected areas; and to regulate the election of monarchs, regents, and traditional chiefs. In some countries customary law has been co-opted as part of the national legal system and a mandate has been given to the judiciary to adjudicate over its application and development. In others its recognition as a source of law has been coupled with recognition of the rights of traditional authorities and or traditional courts to adjudicate over matters of customary law. Whether recognised or not, customary law continues to play a major role in the internal management of Indigenous peoples' affairs, around the world. Even where applied without direct state

interference Indigenous peoples have found it useful at times to co-opt elements drawn from national legislation into their local legal regimes.

In order to secure a balanced approach to enforcement of human rights and protection of cultural integrity it will be necessary to find a balance between the rights of the individual and the collective rights of communities and Indigenous peoples. One constraint frequently placed upon the exercise of customary law has been the need to secure fundamental human rights. Even here, however, the issue is not cut and dried. Insisting on the full recognition of individual human rights could undermine Indigenous peoples' underlying collective rights such as those pertaining to their lands, territories, resources, culture, or knowledge. Addressing conflicts between customary law and human rights requires engagement rather than imposition. If customary law is to change it can only feasibly and legitimately be changed by those who consider themselves bound by it. As Higgins showed in the wake of the *Bhe* decisions, the living law continues to evolve even after the court's pronouncements. Thereby, signifying the importance of addressing living customary law as a reflection of Indigenous peoples' 'way of life' rather than of an imposed set of rules. As Saskia Vermeulen puts it 'For law to work it has to be living law, and in order for it to find the space to live, it will have to find more flexibility in its practice'.<sup>1</sup> In this way customary law may be seen as part of what Colombia's Indigenous peoples would call a 'plan de vida' a life plan followed by choice and design.

The effectiveness of customary as a tool for securing human rights will depend upon the extent to which it is recognised and supported by national, regional and/or international law and is enforced by relevant authorities. To this end, it will be important that any obligations developed at the international level are complemented by the financial and in kind support necessary to ensure implementation and enforcement in developing countries. Where customary laws and practices are unwritten the capacity and willingness of external authorities to enforce such laws and practices may be diminished. There are significant practical and legal hurdles to be overcome if largely unwritten legal concepts and rules are to be given force in the

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<sup>1</sup> Saskia Vermeulen, 'Law as a Narrative: Legal Pluralism and Resisting Euro-American (Intellectual) Property Law Through Stories', 61 *Journal of Legal Pluralism* 55-80 (2010)



administration of justice and protection of Indigenous peoples resource and knowledge right in national and foreign courts. It is worth always remembering that international law itself includes many unwritten elements. The unwritten nature of customary law is not in itself, therefore, a good reason for refusing its recognition

Customary law is a fact, and it is a fact that requires addressing with due respect and recognition. It can no longer be seen as lying at the bottom of the legal hierarchy. Rather it must be raised in the hierarchy of laws to a point commensurate with the rights it enshrines, rights of sovereign Indigenous peoples with full rights of self-determination. Securing effective respect and recognition of customary law will require inventiveness and willingness to bridge the divide between positive and customary legal regimes and their respective decision-making and enforcement authorities. Building functional interfaces between these regimes and authorities will require respect for their respective jurisdictional authority, while building acceptance of their interdependence with a view to maximising areas of synergy and minimising possible conflicts.

International law has clearly recognised that realisation of Indigenous peoples human rights can only be achieved with due respect and recognition for their customary laws. National law and policy; constitutional practice; the recognition of customary title to land and resources; decisions of international treaty bodies; regional human rights instruments and jurisprudence and the communications of states throughout the process of negotiations of the UN Declaration; international treaties such as ILO Convention 169, the Convention on Biological Diversity, and Nagoya Protocol; practices of international bodies; state practice and *opinio juris*; collectively support the contention of this thesis that Indigenous peoples rights to their customary laws and states obligations to give due recognition and due respect for customary law in order to ensure the realisation of Indigenous peoples' human rights have crystallised or are in the process of crystallising as norms of customary international law.

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