STUDIA IURIDICA

96

MISCELLANEA

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SIGILLUM UNIVERSITATIS VARSOVIENSIS

Studia Iuridica tom 96

MISCELLANEA

WYDAWNICTWA UNIWERSYTETU WARSZAWSKIEGO
WUW
Warszawa 2023

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„Studia Iuridica" znajdują się w wykazie czasopism punktowanych przez Ministerstwo Nauki i Szkolnictwa Wyższego na potrzeby oceny parametrycznej jednostek naukowych.

ISSN 0137-4346 (druk)
ISSN 2544-3135 (pdf online)

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Druk i oprawa: POZKAL

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ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.1

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THE INDIGENOUS SUBJECT IN LAW: AT THE INTERSECTION OF THE CARTESIAN SUBJECTIVITY AND THE RULE

Abstract

This paper addresses a key question raised by the tension between the subject of normative law and indigenous, collective systems. Within the framework of the Lacanian psychoanalysis, the author explores Cartesian specificity of a legal subject. He argues that structural nature of that legal construct not only affects an individual ontologically but also reorients the dialectics inherent in legal dogmatism. Following Baudrillardian thought, it is assumed in the paper that the total opposition to normative law is not the absence of law but rather the Rule. The Rule is a concept engaging the individual into dialectics of a game and at the same time ruling out any sense of inherently legal transgression. However, the context of indigenous systems based on the Rule, besides amplifying an alienating effect of the individualization of responsibility, also explains the incongruity of normative law in some cultural contexts. The failure to integrate indigenous, traditional and local legal systems into the post-colonial normative discourse is just one of many illustrations of this. As an exemplary case, the author evokes injustice (in the Lyotardian sense) resulting from litigation simultaneously based both on Brahmanical marriage rules and the Hindu Code Bill. In its final part, the text summarises the impasses of the legal dialogue with indigenous rules and the ways of emancipation for an individual imbedded in the Cartesian subjectivity, which are inspired by transcultural encounters.

KEYWORDS

indigenous law, the Rule, différend, Lacanian psychoanalysis, discourse, body

SŁOWA KLUCZOWE

prawo tubylcze, Reguła, différend, psychoanaliza lacanowska, dyskurs, ciało

With nothing more than the word elephant and the way in which men use it, propitious or unpropitious things, auspicious or inauspicious things, in any event catastrophic things have happened to elephants long before anyone raised a bow or a gun to them.[1]

1. INTRODUCTION

This paper is meant to address two basic matters. First of all, it focuses on the phantasmatic background of the most prevalent conceptions about indigenous systems. This issue is primarily presented in the context of its provenance, namely the place of Cartesian subject in the discourse of legal normativity. Then, an effort is made to accentuate features of indigenous systems which may be regarded as a source of real difference in legal discourse. Employing theoretical tools of psychoanalysis, the Lyotardian idea of injustice and the Baudrillardian Rule, the argumentation tries to stress the discursive place of the body and different modes of totalization. Finally, the above-mentioned points are exemplified by a legal case from India, representing an encounter between an indigenous system and the universal normativity.

The idea lying behind this inquiry is the hypothesis that there is 'the possibility of difference, of a mutation, of a revolution in the propriety of symbolic systems'.[2] The same difference normative law as a system, and above all as a discourse, tries to cover with the appearance of the sameness and completeness. However, it is beyond the scope of this paper to embark upon an analysis of any law from 'other reality'. Indigenous systems are not addressed as a source of external inspiration or distant roots of a familiar order. The underlying assumption is to let the indigenous systems speak in the legal domain with the most distinct voice possible, what is insurmountable in the discourse itself. Maybe it will 'isolate somewhere in the world (faraway) a certain number of features (…), and out of these fea-

[1] J. Lacan, *Les écrits techniques de Freud: La leçon de 12 mai 1954*, Paris 1975.

[2] R. Barthes, *Empire of Signs*, New York 1989, pp. 3–4.

tures deliberately form a system',[3] which system, to paraphrase Roland Barthes, I shall call indigenous. I hope that mediating such a speculative inquiry through jurisprudential materials may not only allow local systems of indigenous peoples become localizable within the discourse but also make law more tangible and closer to the living practice.

2. TRAVERSING THE PHANTASM OF INDIGENOUS SYSTEMS

Then the king went to the blind people and on arrival asked them, 'Blind people, have you seen the elephant?'
'Yes, your majesty. We have seen the elephant.'[4]

We eagerly enlist specific indigenous local systems under the common heading of the so-called Indigenous Justice Paradigm.[5] It designates social collectivism accompanied by holistic philosophy and the central role of vaguely defined 'ways of life'[6] as its main attributes. It somehow comes down to a picture of a tight-knit group proclaiming, in Chief Justice Tom Tso's words, 'We are so related to the earth and the sky that we cannot be separated without harm.'[7] That image does not appear to be foreign but rather missing from and inaccessible to any legal discourse. At the same time, it provides us with a simplicity possible only in the phantasmatic domain. One of the most significant documents in this respect is the Annex to the United Nations Declaration on the Rights of Indigenous Peoples, which recognizes them as contributing 'to sustainable and equitable development and proper management of the environment'.[8] The drafters are also 'convinced' that the cooperation with indigenous peoples will bring harmony to the international arena. Accordingly, nothing connected with the Indigenous Justice Paradigm seems to be competitive with the legal universalism. The remoteness of the idea that the empowerment of customary law can pose any threat to the western standards of human rights clearly illustrates this. The domestication of this law

[3] *Ibid*. p. 3.

[4] T. Bhikkhu, *Udana: Exclamations, Tittha Sutta: Sectarians*, Barre 2012, pp. 39–40.

[5] A. P. Melton, *Indigenous Justice Systems and Tribal Society*, 'Judicature' 1995, Vol. 79(3), p. 126.

[6] A. P. Melton, *Traditional and Contemporary Tribal Law Enforcement: A Comparative Analysis*, Western Social Science Association, 31st Annual Conference, Albuquerque, New Mexico 1989.

[7] T. Tso, *The Process of Decision-Making in Tribal Courts*, 'Arizona Law Review' 1989, Vol. 31, p. 234.

[8] United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, adopted on 13 September 2007, p. 4.

is prevalent to such an extent that the statements by the Australian Privy Council about 'social repugnance' of Aboriginal customs appear today a naïve overestimation rather than a gross discrimination. Every aspect of it seems to be both distant and legally familiar, but under no circumstances should we conflate this familiarity with the similarly paradoxical Freudian uncanny (*unheimlich*). It can be imaginarily far away or even exotic, but as in most cases of any exoticism, there is no trace of real otherness qua affecting internal alienation of our own discourse. The UN Declaration effectively coalesces with such an approach. While delimiting the indigenous peoples' rights, it does not refrain from specifying that they are entitled to have, create, protect and develop only their own 'sciences' and 'literatures',[9] as if singular forms of literature and science were already occupied. In fact, all of the above-listed descriptors represent nothing else than a projective plane for phantasies sustaining our own legalistic dogmatism.

3. CAN TRIBAL HOLISM PATCH CARTESIAN SUBJECT UP?

And forthwith calling Nicanor, who had been master of the elephants, and making him governor over Judea, he sent him forth (...)
2 Maccabees 14:12, KJV

And when he had cut out the tongue of that ungodly Nicanor, he commanded that they should give it by pieces unto the fowls, and hang up the reward of his madness before the temple.
2 Maccabees 15:33, KJV

The great Freudian contribution to legal studies is not only unmasking of subject's structural constitution as legal in nature but also the portrayal of law as entirely subjective. The only subject psychoanalysis can relate to is the Cartesian subject which, besides being shared with legal sciences, encapsulates all of the Western culture's discontents. Therefore, law compulsively covers the fundamental splitting (*Spaltung*) of discursive subjectivity by a mirage of obtainable wholeness of universality, while psychoanalysis is a practice which is orientated to persistently uncover the irreducible gap. One of the names of this irreducible gap in a divided subject is the Freudian castration. The subjectivity is simultaneously embedded in the discourse and mediated through it.

The unavoidable consequences of this inherent gap is a compulsion of discourse to camouflage it. The legal subject qua the Cartesian subject is a discursive fiction of unity and must be actively sustained to the same degree as any other

[9] *Ibid*., Article 31(1), p. 22.

fiction. This goal can be achieved by relegating a phantasy of obtainable fullness elsewhere, for example, to an exotic holism of indigenous peoples. The supposition of such an order outside our 'cultural universe' only sustains a naïve totalization of the world, harmoniously balanced when taken as a whole. We cannot use legal language without instantly falling into that dialectical trap. The symptomatic nature of that phenomenon can be easily illustrated with India, where after the era of colonialism, Gandhian and socialist factions within the ruling Congress Party supported a revival of traditional *Panchayat* (village assembly) justice and proposed it as a means of obtaining original 'harmony and conciliation' in place of legal 'faction and conflict'.[10] However, there is no way back; the fulfilment of fundamental phantasy each time turns out to be a bitter failure, and the search for the 'lost harmony' of a legal system is an endeavour without any clear conclusion.

To avoid recourse to any sort of legalistic normativism with idealistic undertones, we should evoke another psychoanalytical reference. It cannot be stressed enough that psychoanalysis always stays in touch with impasses of its own discourse. The above-mentioned impasses contain also the one identified by Claude Lévy-Strauss as seemingly 'insurmountable'. No matter how coherent and well-articulate a social system is, it is also a collectivity of living beings,[11] or psychoanalytically speaking 'living bodies'. Moreover, this is also an irreducible obstacle for any normative law and a reminiscence of the fundamental impossibility present in each discourse. However, for psychoanalysis it is above all a guarantee of the real. The indigenous systems testify to the same necessity by requiring of each new-born to be admitted to its structure[12] or, as in the case of the Yurok tribe, by categorising parents as dead in contrast with the life they have created.[13] The tribal system is always haunted by a living being, just as psychoanalytical subjectivity is haunted by the body and its enjoyment.

Enforcement of a universal regulation is always an instance of violence. Singular justice is not only excluded from generalization of normative law, but exclusion of singular justice is the very condition and foundation for establishing the universalizing legal discourse. Every sentence or, more generally, every application of norms involves a violent alienation of the judged subject. Nonetheless, we should not rush to conclusions and remember Pascale's dictum *La justice sans la force est impuissante*.[14] Justice emerges simultaneously with the legal discourse only to appear later as moments of auto-transgression, which in fact preserves the current order.

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[10] M. Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, 'Comparative Studies in Society and History' 1972, Vol. 14(1), p. 56.

[11] C. Lévi-Strauss, *The Savage Mind*, London 1966, pp. 154–155.

[12] *Ibid*. p. 197.

[13] *Ibid*. p. 198.

[14] In English: 'Justice without force is impotent', cf. B. Pascal, *Œuvres complètes*, Paris 1963, p. 103.

Justice and law are like two sides of a Möbius strip. At the end of the day, after each full circuit, they always pass into each other. The tribal holism of justice and law lets both categories coexist but merely as separate, mute signifiers.

4. DIFFÉREND, THE RULE AND TOTALIZATION

In order to elucidate the perspective of possible difference, I would like to present a set of theoretical tools. As the first point of reference for portraying the precariousness caused by the discursive nature of injustice, I would like to refer to its Lyotardian understanding which combines crime with the perpetuation of silence that erases it. The following definition not only situates the very discourse as a precondition for any injustice to appear. The consequence of adopting this approach is the possibility to recognize what Jean-François Lyotard called *différend*.[15] It is a situation when a plaintiff is deprived of discursive means to convey or prove a wrong which, paradoxically, is possible to be identified as such by the very same discourse.

Another concept which will allow us to push the inquiry even further is Jean Baudrillard's concept of the Rule. As he says '[i]t is not the absence of the law that is opposed to the law but the Rule. The Rule plays on an immanent sequence of arbitrary signs, while the Law is based on a transcendent sequence of necessary signs.'[16] The Rule is based on the immanence of conventional procedures and body cycles, while the law is an instance of an unstoppable Kantian continuity. Models portraying the mode of the Rule's operation are both sets of Wittgensteinian language-game (*Sprachspiel*) and the course of a poker game. The Rule eradicates the possibility of transgression known from the law. It offers a different kind of totality than the ultimate incompleteness of discourse covered with a mirage of universality. It substitutes infinite but internally limited universalization with a finite set without a single exception. In the place of universality, it places what Lacan called *pas-toute* (not-all).

Now, let me move to a plane of what could be called Lévi-Straussian thirteen,[17] a model of double human totality. That number in the mythology of structuralist anthropology signifies a collective of two asymmetrical moieties, the failed union of six and seven or, in other words, phantasy of even wholeness and forever incomplete evenness. Not without reason, could it be argued that limiting indigeneity to the enclosed parameters of 'not-all' is a rash simplification. Nonetheless, in opposition to the herein outlined conception of 'limits of a tribal group as the

[15] J.-F. Lyotard, *Le Différend*, Paris 1983.

[16] J. Baudrillard, *Seduction*, Montreal 1990, pp. 131–132.

[17] C. Lévi-Strauss, 1966, *op. cit*., p. 145.

frontiers of humanity', I would advance the contrary proposition of the 'humanity without borders', simultaneously present even in the most 'savage minds'. In this pair, the latter counterpart cannot be anything other than a sole universalization in the guise of its totemistic agent.[18]

5. HOW DOES THE RULE GAME THE LAW?

The crown is not my right. It pleases me not. Mary is the rightful heir.[19]

The dialectics emerging from the confrontation of the Rule and normative law may be vividly exemplified by the situation in India. The country is a cradle for legal frictions as it serves as a home to both post-colonial British law and traditional, personal laws. At the same time, it is ethnically secularised to such a degree that the government refuses to acknowledge the legal existence of the Adivasi, indigenous peoples per se. Instead, a certain half-measure was introduced. Namely, a list of 705 ethnic groups, called Scheduled Tribes (STs), spread across 31 states, was created. Among them, 75 tribal communities were distinguished under the sub-category of Particularly Vulnerable Tribal Groups (PVTGs).[20] Generally, the strongest emphasis was put on providing a clear classification of all tribal societies according to strict and selective criteria of recognition. It is not without significance that it took place alongside the development of the list of Scheduled Castes (SCs) which paradoxically was intended to mark a radical departure from the prior caste system by permanently sanctioning a list of the most socially disadvantaged groups.

The same tribes seeking escape from foreign aggression 'concealed themselves in hills and jungles' and 'wherever the army marched, every inhabited spot was desolated'.[21] Exactly in consequence of that act of 'wanting to know nothing about' the dominant discourse, a regular Hindu 'peasant became a tribal'.[22] In the deserts, where there are no forests and no possibility to flee and hide, such escape was not possible.[23] Now, the dominant discourse reaches for the same population, this time by means of law, in the hope of deceitfully uncovering their vital concealment and maintaining their isolation by binding them to their lands. This time, again the only hope is to take refuge in the clump of legal regulations.

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[18] *Ibid*., p. 166.

[19] The ignored protest of the Nine-Day Queen, Lady Jane Grey, before her coronation.

[20] R. Sahani, Sh. K. Nandy, *Particularly Vulnerable Tribal Groups in India: An Overview*, 'Journal of the Anthropological Survey of India' 2013, 62(2), pp. 851–865.

[21] K. S. Lal, *The Legacy of Muslim Rule in India,* New Delhi 1993, Ch. 7.

[22] *Ibid.*

[23] *Ibid.*

I would risk a statement that the Lyotardian debate around différend is groundless in the context of indigenous laws since their dialectics stands in a direct opposition to the transgressional normativity. They are beyond it, situated at the intersection of the Rule and logic of not-all. However, even if the Rule is beyond the scope of différend, the heterogeneity of its encounters with litigation gives rise to its most radical cases.

Let me evoke a case of an Indian woman Rupa,[24] which will familiarise us with a morbid image of a woman not only maltreated but also abandoned by her husband. According to classical Hindu laws, their marriage was a unilaterally indissoluble sacrament, *samskara* (संस्कार). That norm that a woman cannot change her husband remains inviolable even if faced with the most extreme pathologies of conjugal life. On the other hand, a husband is entitled to any number of marriages. Such an unbridled polygamy had been permitted under Hindu law before enactment of the Hindu Marriage Act in 1955.[25] The tragedy of this particular situation was only aggravated by the society's blunt apathy in the face of a deserted wife's sorrow. After all, the same local and closely interconnected group which introduced her into her mature 'way of life',[26] averted their eyes from her in the hour of trial. Ironically, they directed their highly demanded attention towards nothing other than the second wedding of the culprit. Subsequently, Rupa arrived at the crossroad which should be a rite of passage for each enthusiast of phantasmatic integrity between society and law in indigenous groups. She was supposed to live on, follow the collective 'way of life'. However, to her detriment, Rupa supposedly 'knew something' about the artefact of European culture called tragedy. She also knew that, besides her integral place in the community, she is a Cartesian subject with the capability to suffer tragically. Knowing so much, she shifted from the role of an unfortunate group member straight into the role of Lady Jane Grey from Paul Delaroche's painting. Hence, she began to look for a discourse which could provide her with justice, but in search of a protective instance, she stumbled upon an ultimate fault of its structure.

The legal context in India imposes on its every subject a web of complex relations, as general statutory regulations overlap with traditional law.[27] One of the components in this vast category is Hindu Law, *Dharmasastra* (धर्मशास्त्र). It is certainly true that the Hindu Code Bill validated customary rituals and ceremonies, such as the Brahmanical procedure of the Hindu marriage, but without specifying any form of obligatory registration. Therefore, on the grounds of civil litigation the only way to prove the marriage was to convince the adverse commu-

[24] J. Krishnadas, *From East to West: Can Feminist Legal Strategies be Transformative? Post-disaster to Everyday Times of Crisis*, 'Jindal Global Law Review' 2019, Vol. 10(2), pp. 247–268.

[25] P. Lakshmi, *Personal Laws and the Rights of Women*, 'Christ University Law Journal' 2012, Vol. 1(1), p. 94.

[26] Resolution 12.5 Protection of Traditional Ways of Life, IUCN, GA 1975 RES 005.

[27] P. Lakshmi, 2012, *op. cit*.

nity to bear testimony in favour of Rupa. Needless to say, the husband's narrative denying any contract of marriage won in the court. The outcome for the abandoned wife is rather dire. She not only failed in her attempts to win the litigation, but she also had to face ostracism within her own social environment.

Besides being an evident example of unequal treatment of women resulting from the Indian personal laws, this case shows the impossibility of disturbing the status quo of the indigenous Rule by recourse to any set of legal norms. The dialectics of the game introduced by the Rule immediately ousts anyone who sets a goal different from the game itself. One can operate with an element of the game but only providing one is still in it. In this instance, we have to deal with a regime resembling a football game as practiced by the Gahuku-Gama of Papua New Guinea. Once this tribe learned how to play, its members started playing it continually for several days, just as many matches as necessary to achieve the same score by each team.[28] Thus, after entering into litigation with a goal of seeking justice, Rupa is immediately removed from the game as a 'cheater' and her marriage turns out to be legally invisible. Hence, as long as the husband is obedient to the Rule and stays indifferent to the stakes of the dispute, there is only one possible judgment. Similar persistence is totally incomprehensible in the statutory dimension. Even though the husband made false statements multiple times, every juridical attempt to formulate a just resolution inevitably failed. It is now sufficient to state the obvious; namely, the problem of incompatibility of both orders goes beyond a simple problem of translation into specific norms.

6. BETWEEN THE EFFECTIVENESS OF LEGAL SYSTEM AND THE CUSTOMARY RESIDUE

Which done, he crept under the elephant, and thrust him under, and slew him: whereupon the elephant fell down upon him, and there he died.
1 Maccabees 6:46, KJV

Judicial proceedings are absolutely helpless in the confrontation with the dialectics of indigenous rules. Moreover, every time law tries to overcome it by exerting alienating violence on human beings, it simultaneously exposes points of its very own discursive impotence. The fragile appearance of local systems can only be perceived as such due to a truly unfortunate mistaking of the acting-out of impotent discourse for the phantasies of universal omnipotence, which it is merely subordinated to.

[28] C. Lévi-Strauss, 1966, *op. cit*., pp. 30–31.

It is sufficient to identify this dialectical specificity to immediately realize that the historical fact of 'recognition of Indian and Inuit customary marriage law by Canadian courts is relatively little known by the Indian peoples and has had little effect upon their lives'[29] and the fact that 'rejection of the traditional law of Aboriginals by Australian courts has not caused its disappearance as many Aborigines and Torres Strait Islanders continue to adhere to its tenets, even if this causes conflict with state law'[30] are completely coherent and foreseeable. Another vivid demonstration is laid bare in the cases such as *Regina v Jack Congo Murrell* (1836)[31] and *William Cooper v The Honourable Alexander Stuart* (1889),[32] which illustrate that the previously legally unrecognized Aboriginal customary law came to the fore only after the Northern Territory Supreme Court refused to acknowledge tribal rights to their own land.[33] When Gopal Das Khosla makes the following remark about the Indian legal system 'I have no doubt that the judicial machinery imported from England and set up here with slight modifications can work efficiently if some of the dirt and grit can be eliminated' and it is followed by the transfer of responsibility to 'departures from the British way and the local modifications',[34] we should very carefully consider the form of the accusation.

Undoubtedly, the legal structure of British 'machinery' is always the most efficient and it is hard to argue otherwise, especially if we acknowledge that it sets its own rules and conditions, and therefore can compete almost only with itself. The comparison of the local context as 'dirt and grit' should not pass without recognizing the significance of its peculiarity. The comment is of astounding profundity as it bears witness to specificity of not-all represented by indigenous systems. It even makes the author hard to be blamed for any intentional pejorative connotations, because from the perspective of universalization, operating alongside totalization of not-all, the said dirt and grit, just as the six in the number thirteen, always stands in the way of a harmonious communion.

[29] B. W. Morse, G. R. Woodman, *Indigenous Law and State Legal Systems: Conflict and Compatibility*, (in:) B. W. Morse, G. R. Woodman (eds), *Indigenous Law and the State*, Dordrecht 1987, p. 107.

[30] *Ibid*.

[31] *R v Murrell* [1836] NSWSupC 35.

[32] *Cooper v Stuart* [1889] 14 App Cas 286.

[33] B. W. Morse, G. R. Woodman, 1987, *op. cit*., p. 108.

[34] G. D. Khosla, *Our Judicial System*, Allahabad 1949, pp. 70–71, 87.

7. LEGAL KNOWLEDGE AND WAY OF LIFE

What we need today in India as far as the judges are concerned is a scholastic living.[35]

There is a supposition that indigenous peoples have the clearest understanding of their own systems. However, Article 17(3) of the Indigenous and Tribal Peoples Convention stipulates clearly that 'Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members (…)'.[36] What at first glance seems contradictory in these two assertions is coherent at a certain level. Initially, it may seem patronizing to assume that indigenous peoples may be less versed with their own law than outsiders. Nonetheless, apart from the sole legislative intent, establishing such a protective umbrella against *Ignorantia iuris nocet* can be acceptable when set in the context of a different relation to knowledge. Tribes obviously are closer to their own tradition, but they are submerged in it, they play by the Rule and they succeed only by letting themselves be duped by it.[37] One should forget any knowledge of the previous compositions and instead, just like a first-time domino player, consider only the value of the adjacent halves in joining the pieces just for the sake of prolonging the game.[38]

Therefore, if there is any meaning behind esoterically transmitted 'way of life', it is just that it is a game. When we stumble upon a phenomenon that many inhabitants of rural areas have learned to 'astutely' use western courts for their own ends,[39] it is rather certain we are faced with a very particular kind of astuteness. We can only agree to the use of that term insofar as we extract from it the mode in which it has etymologically changed throughout the years. Starting from the Greek *asty* meaning 'town', in Latin it implied city sophistication. By merging together *astutus* ('crafty, wary, shrewd, sagacious, expert') and *astus* ('cunning, cleverness, adroitness'), the word departed from its origin and acquired its own distinct significance. The model of that etymological transformation itself can be instructive for understanding the indigenous handling of the normative law. In parallel, the use of that word underlines the quality of skilfulness at finding one's bearings in a legal situation. Indeed, indigenous peoples successfully identify their position in the legal context, however, in a rather unusual sense. They know

[35] S. H. Kapadia, *Human Rights and Social Justice*, speech given at Lucknow on 13 December 2008.

[36] Indigenous and Tribal Peoples Convention (No. 169), adopted by the International Labour Organization on 27 June 1989.

[37] J.-A. Miller, *The Unconscious and the Speaking Body*, Presentation of the theme for the X Congress of the WAP, Rio de Janeiro 2016.

[38] C. Lévi-Strauss, 1966, *op. cit*., p. 219.

[39] M. Galanter, 1972, *op. cit*., p. 64.

how to operate with their totality of not-all. Therefore, through demonstrating 'precise' indifference or inability,[40] they manage to let their logic flourish in that discursively hostile environment.

In opposition to that, knowledge as accumulation of fixed regulations, even if they are based on local customs, is aggressive in the same fashion as generality of law is. Hence, tribe members can actually be derailed by manoeuvring them into the discourse of litigation substantively disguised in normative translations of the Rule.

However, we should not take it as a proof for a dialectical impasse of indigenous laws. Rather, it should be discussed whether one can engage in such an integrationist 'dialogue' without undergoing a prior structural change of the mode of one's subjectivity. It is closely related to Marc Galanter's comparison of the dual modernization of medicine, where the western-style approach competes with the indigenous traditionalism. Even if he is right when stating that the revival of indigenous law is not actually its revival but 'its containment and absorption',[41] he misses the point that what he tries to tackle is actually a movement of 'dual universalization' or maybe it might be even called 'universalization's double'. It underlines the entirely imaginary nature of the distinction, where one option is the 'clean' original of an idealist and the other a phantasy of a sentimental universalist. As I explicitly stated, Rupa 'knew something about tragedy', she is an example of a new breed of 'bi-legal' beings, which at the end of the day boil down to perfect examples of 'uni-legal' or even simpler 'legal' beings.[42] Maybe 'they utilize both "indigenous" and official law in accordance with their own calculations of propriety and advantage', but precisely by introducing a policy of advantage they prove they are already alienated. This is the crux of the difference between the integrationist, Cartesian subject and 'astuteness' of indigenous peoples.

8. CONCLUSIONS

হাতি খাদে পড়লে ব্যাঙেও লাথি মারে[43]

In conclusion, the incompatibility of civil law with indigenous systems should effectively problematize any hybrid solutions. Working in the name of unifying the law or even empowering certain individuals in traditional communities, we risk much more than credibility and effectiveness of the judicial system. The pre-

[40] C. Lévi-Strauss, 1966, *op. cit.*, p. 219.
[41] M. Galanter, 1972, *op. cit*., p. 60.
[42] *Ibid*., p. 64.
[43] A Bengali proverb meaning: 'When an elephant is in a hole, even a frog will kick it.'

sented litigation of an Indian woman portrays how a civil litigation applied to indigenous peoples' disputes may lead not only to plaintiffs' exclusion from their group, but much worse, to creating *ex-nihilo* a situation of injustice. It shows us that no matter how strict asceticism and reluctance are exercised in formulating general legal self-criticism the discourse infallibly betrays its own premises. Therefore, we should consider the burden of our own phantasies in how we perceive indigenous peoples. Finally, before pursuing our dreams of comprehensive help, we should question in advance the degree to which its very form is based on the phantasms sustaining the fiction of the Cartesian subject in the law.

We must agree with James S. Fingleton's report that 'the exercise is one of recognition: the group has a natural membership, and the goal is to identify that, not create a new artificial body.'[44] The general law should neither create nor incorporate the indigenous 'state of fact'. One should strictly avoid constructing any 'new' or 'artificial' body. If Bradford W. Morse can say with confidence that given a chance, indigenous law has proved the adaptability and flexibility necessary to prevail in the face of future pressures, it is because of its totality of not-all. However, we should keep in mind that this unique quality cannot be viewed without the context of legal discourse as it bears a specific relation to the universal discourse's ultimate impasse. Indigeneity provides us with the real difference as it offers an alternative way of operating with what is inherent in but, all the same, absolutely inconceivable for any universal law, that is the body.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.2

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THE EVOLUTION OF PAPAL SOCIAL THOUGHT ON INDIGENOUS PEOPLES

Abstract

The aim of the paper is to present the evolution of papal social teaching on indigenous peoples' rights from a historical perspective. It seems possible to distinguish various phases of the Catholic standpoint based on the factual, historical background: medieval challenges of infidel peoples, the Indian question during the colonization period, the impact of modernity: class struggle and the Catholic social teaching, and finally, the contemporary globalization era during the present pontificate of Pope Francis. The common threads of papal teaching concern, firstly, the evangelizing mission of the Church to bring faith to overseas peoples and, secondly, human rights of indigenous peoples. The human rights perspective is inextricably linked with the principle of self-determination, understood as the foundation of good governance.

KEYWORDS

indigenous peoples, Catholic social thought, canon law, self-determination, Innocent IV, Paulus Vladimiri

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ludy tubylcze, katolicka myśl społeczna, prawo kanoniczne, samostanowienie, Innocenty IV, Paweł Włodkowic

1. INTRODUCTION

The aim of the paper is to present the evolution of papal social thought on indigenous peoples and their rights. In order to accomplish the task, it seems necessary to elaborate on particular historical periods in canon law and the development of the Catholic doctrine. Hence, the analysis is comprised of four major parts dealing with: medieval heritage, colonial conquest, the modern period and contemporary challenges.

The topic of indigenous peoples' rights in the Catholic social teaching is an important, complex, interdisciplinary and often debated issue. Nevertheless, it seems impossible to provide a complete, exhausting and overall picture of the evolution of relevant papal teaching in a single paper, hence it would be beneficial to encourage the prospective readers to get acquainted with elaborate writings devoted to the subject matter.[1] The foregoing paper may thus serve as an introduction to the topic of indigenous peoples' rights, with a secondary aim of connecting the statements in the debate on papal social thought with the issues raised in the contemporary political discourse.

2. MEDIEVAL HERITAGE

Debate on indigenous peoples in medieval Europe arouse around the distinct categories of non-Christians (the class of peoples defined as staying outside the Church, *extra Ecclesiam*). Those groups were of a twofold nature: internal and external. From the internal perspective one may pinpoint schismatics and heretics, Jews and Muslims (Saracens). From the external perspective, the relevant groups were Tartars of Mongolia as a threat coming from Asia, Muslims of the

[1] One can recommend the following publications on the topic of indigenous peoples: J. Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250–1550*, University of Pennsylvania Press 1979; M. Stogre, *That the World May Believe: The Development of Papal Social Thought on Aboriginal Rights*, Sherbrooke 1992; and S. F. Belch, *Paulus Vladimiri and His Doctrine Concerning International Law and Politics*, London 1965. The historical analysis presented in this paper is mostly based on the findings from the above books.

Middle East during the crusades, the native pagan populations of the Eastern boundaries of Europe, and indigenous peoples of newly discovered islands in the Atlantic Ocean and in North Africa during the preliminary conquests.

The medieval debate on indigenous (and non-Christian, *ergo* infidel) peoples concentrated on the just war theory[2] and the issue of *dominium*, understood as the political and property rights. The relevant question was whether infidels (and also indigenous populations) could legitimately possess things in private ownership and whether they were justified in holding independent public power in given territories. If the answer to those questions were to be negative, then another topic emerged, connected to a possible war (military conflict) and further consequences of the seizure of land and looting. If however, the answer was positive, in affirmation of infidels' rights, the topic left for deliberation concerned mutual relations between Christian and non-Christian societies, with the need to determine the scope of autonomy for evangelizing missions in infidels' lands.

A significant figure engaged in the pursuit of elaboration of infidels' rights was Pope Innocent IV, born as Sinibaldo Fieschi in 1195 to a noble Italian family in Genoa, a distinguished canonist who headed the Catholic Church from 1243 until his death in 1254. In his official documents he declared the following:

> [L]ordship, possession, and jurisdiction can belong to infidels licitly and without sin, for these things were made not only for the faithful but for every rational creature as has been said: For He makes his sun to rise on the just and the wicked and He feeds the birds of the air (Matthew 5:26). Accordingly we say that it is not licit for the pope or the faithful to take away from infidels their belongings or their lordship or jurisdictions because they possess them without sin. (…) all men, faithful and infidels, are Christ's sheep by creation, even though they are not of the fold of the Church and thus from the foregoing it is clear that the pope has power and jurisdiction over all *de iure* even though not *de facto*.[3]

The pope was very careful in defining reasons for intervention in infidel societies. Firstly, it was possible for the pope to intervene in the pagan societies if they violated natural law (e.g. by practicing various perversions, committing the sin of idolatry or refusing missionaries entry into the land). Secondly, the pope could initiate hostile proceedings towards indigenous peoples in case of perturbations in evangelization, for instance, in the event the missionaries were refused entry, or to protect them against armed attacks.[4] Thirdly, a special competence of the pope was to overthrow the local infidel rulers if they persecuted their Christian subjects.

The above-presented doctrine of Pope Innocent IV should be evaluated positively; this vision was based on a mature, human-oriented pattern of mutual rela-

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[2] For a profound historical analysis of the idea of just war, see B. Heuser, *War: A Genealogy of Western Ideas and Practices*, Oxford 2022.

[3] Cited after: M. Stogre, 1992, *op. cit*., p. 51.

[4] *Ibid*., pp. 57–58.

tions of Christians and non-Christians, with clearly defined limits of benevolent action. Moreover, it should be stressed that one of the Pope's reasons to adopt this infidel-friendly attitude was Innocent IV's willingness to enter diplomatic negotiations with the Mongols, however eventually the mission was a failure.

The infidel-friendly theory of Pope Innocent IV was subsequently modified by his successors and interpreted differently, with weaker protection of indigenous rights. It was not until Paweł Włodkowic (Paulus Vladimiri) that the ideas of Pope Innocent IV returned to the floor. Vladimiri – a Polish writer, lawyer, diplomat and scholar of the Kraków University – was born in Mazovia in 1370, pursued a religious scholar career and died in Kraków in 1435. His doctrine on infidels' rights was enriched with a new point brought into the discourse, namely the idea of religious tolerance.[5] Vladimiri argued for the right of every nation to existence, freedom, independence, its own culture and equitable progress, and wanted that right to be guaranteed.[6] Hence, he recognized the rights of non-Christians to their own state, property and family. Vladimiri argued for religious tolerance in the context of Poland's dispute with the Teutonic Order and his own mission to the Council of Constance. The disputes during the Council were described as follows:

> [T]he striking clash of contrasting ideas on both sides. These three ecclesiastics and canon-lawyers, on one side Paulus Vladimiri, a Pole, and on the other side Ioannes Vrebach de Bamberga, a German, and Ardicinus de Novara, an Italian, were contemporaries; they were dealing with the same problem, and utilizing the same sources in order to defend the position each regarded as the just cause. And yet, each represented not only different but contrary currents of medieval thought concerning the great principles of international law, particularly regarding the relationship of Christian to non-Christian nations. Vrebach and Ardicinus represented and defended theories prevalent in their days as the *de facto* law of conduct of European nations. Vladimiri strove for common acceptance, in theory and in practice, of principles alive in the

[5] There are many fine writings discussing Paulus Vladimiri's theory of religious tolerance; see e.g.: S. F. Belch, 1965, *op. cit*.; S. Bełch, J. Domański, T. Graff et al., *Paweł Włodkowic i polska szkoła prawa międzynarodowego*, Warszawa 2018; B. Díaz, *Just War against Infidels? Similar Answers from Central and Western Europe*, 'Studia Philosophiae Christianae' UKSW 2017, Vol. 53(3); L. Ehrlich, *Paweł Włodkowic i Stanisław ze Skarbimierza*, Warszawa 2017; T. Giaro, *Medieval Canon Lawyers and European Legal Tradition. A Brief Overview*, 'Review of European and Comparative Law' 2021, Vol. 47(4); P. W. Knoll, *'A Pearl of Powerful Learning': The University of Cracow in the Fifteenth Century*, Leiden 2016; M. Kopeć, *Paweł Włodkowic's Contribution to Development of the Polish Legal Profession*, 'Przegląd Prawno-Ekonomiczny' 2014, No. 26; K. Lankosz, *Paweł Włodkowic (ok. 1370–1436)*, Kraków 2000; J. Łucyszyn, *Axiological Sources of Social Order According to Paweł Włodkowic*, 'Politeja' 2016, Vol. 13, No. 5(44); D. Pietrzyk-Reeves, *Polish Republican Discourse in the Sixteenth Century*, Cambridge 2020; M. Płotka, *Permissive Natural Law and Its Scope in Paul Vladimiri's Philosophy*, 'Studia Philosophiae Christianae' UKSW 2020, Vol. 56(S1); W. Zyzak, *Der katholische Glaubensbegriff und Toleranz. Inspirationen von Paweł Włodkowic*, 'The Person and the Challenges' 2016, Vol. 6(1).

[6] D. Pietrzyk-Reeves, 2020, *op. cit*., pp. 26–27.

> heart of the Church and expounded by her best representatives, and for the banning of contrary beliefs and practices which he classified as un-Christian and un-human. The former defended the dying order of thing without regard to the rising reality; the latter subjected what he regarded as erroneous custom to critical examination and tended towards reform before it was too late, before the Christian nations could become too much infected with what he defined as *toxicum pestiferum* of the *haeresis Prussiana*.[7]

According to Vladimiri, infidels and the faithful are equal to each other in their humanity. As for the seizure of land, neither imperial or papal grants to occupy lands of the infidels are valid, for this is contrary to natural and divine law. Natural law was emphasized by Vladimiri as law derived from God and an autonomous, specific human and natural order. Thus, it was independent of revealed law and was applicable to every society and state, without regard to whether the inhabitants thereof were Christian believers or pagans. Since all men have the same nature, they all enjoy the right to be treated in accord with that universal humanity.[8]

Nevertheless, the impact of Vladimiri's doctrine of tolerance alongside the need to undertake peaceful evangelizing missions part of ordinary diplomatic relations was relatively limited, due to its selected geographical application to pagan societies living at the outskirts of Central Europe. In particular, it was not adopted and applied when the colonial question arose in the following century.

3. COLONIAL CONQUEST

An adequate summary of the papal documents on indigenous peoples during the colonization era should be associated with the decisions issued by the following popes: Alexander VI, Eugene IV, Nicolas V, Paul III, Pius V, Gregory XIV, Urban VIII, Clement VIII, Benedict XIV, Gregory XVI.[9] The documents adopted by them focused on several topics, starting from jurisdiction over the territories newly discovered by the European nation states, Spain and Portugal.[10]

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[7] S. F. Belch, 1965, *op. cit*., pp. 773–774.

[8] P. W. Knoll, 2016, *op. cit*., pp. 429–446.

[9] The details of the papal activity are presented in: M. Stogre, 1992, *op. cit*., pp. 64–124. The author refers to the notion of *terra nullius* that provided the justification for European sovereignty over the newly discovered lands: 'since the aboriginal peoples didn't cultivate the land like the Europeans did, or live in fixed settlements, the lands, especially in North America, were considered *terra nullius*'; see *ibid*., p. 107.

[10] James Muldoon presented the figure of Juan de Solórzano Pereira (1575–1654) who was one of the finest lawyers in Peru and Spain. His work, *De Indiarum Jure*, was the most sophisticated defence of the Spanish conquest of the Americas ever written, and he was widely cited in Europe

First of all, the papal documents recognized those states' mandate to govern the American territories in return of the ecclesiastical mission to spread Christian faith to indigenous populations. Secondly, the documents focused on the ability of the Indian-American populations to receive baptism and specified the required procedures for them.

Thirdly, the documents dealt with the practices of slavery, maltreatment, tortures and murder of indigenous populations. This critical and negative standpoint of the papacy regarding the atrocities committed by the colonial powers was adopted after the protests of several missionaries, most notably bishop Bartolomé de Las Casas, OP.[11] The papal documents contained canon law penalties for maltreatment of the indigenous population, namely *latae sententiae* excommunication incurred by virtue of committing the act. However, their practical application was ineffective, and hence in general the penalties were inoperative.

Fourthly, the papal documents insisted upon respecting the *dominium* of indigenous peoples, albeit limited to their private sphere of possession and personal property. Indigenous rights to property and freedom were to be exercised within Spanish or Portuguese jurisdictions.

It can be concluded that the papal teaching on indigenous rights during the colonial conquest era was focused on missionary goals, with little attention paid to purely human rights of the native populations. In particular, the recognized entitlements involved private rights of freedom and property, with no public rights of self-determination (self-governance). One may critically evaluate the dependence of the papacy on the Iberian nation states exercising colonial power, considering numerous instances of atrocity crimes committed by them.

4. THE BEGINNINGS OF CATHOLIC SOCIAL TEACHING

The Catholic social teaching, started in the pontificate of Leo XIII, provided for human rights as a primary and direct concern of the papacy. Slavery remained an unresolved issue for a relatively long time. Eventually, Pope Leo's line of argument against slavery focused on natural law and human dignity requirements alongside theological reasons: all people are created by the same Creator, all people are redeemed by the same Saviour, and all people are destined for eternal life and salvation.

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and the Americas; cf. J. Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century*, University of Pennsylvania Press 2015.

[11] See A. F. Dziuba, *Pytania wokół władzy papieskiej w Nowym Świecie według Bartłomieja de Las Casas OP (+1566)*, 'Saeculum Christianum: Pismo historyczno-społeczne' 2000, Vol. 7(2).

The notion of *dominium* was broadened to include not solely private entitlements but also rights to hold political power. The papal documents contained more demands for actions of charity and justice.

In the decolonization era, the focus on indigenous peoples was shifted onto ethnic and national minorities in newly independent post-colonial states. Papal documents stressed the importance of the right of minorities to exist, live and flourish within a multicultural and multiethnic society and state. The task of governments is to safeguard minorities' rights, which are aimed at their peaceful coexistence and cooperation in the state.

The Second Vatican Council associated the notion of human rights and human dignity with theological reasoning. What it means to be a human can be fully understood solely through the person of Christ. Hence missionary activities, evangelization and human rights are interconnected and all aim at human flourishing. The mission methodology should, therefore, be based on inculturation initiatives.

More recent papal documents, especially those of St Paul VI and St John Paul II, focus on the role of justice, culture and the need of human 'integral liberation'. Missionary work and human rights actions have to be integrated in order to allow a person to flourish.[12]

The Catholic social teaching, especially during the pontificate of St John Paul II, stresses the rights of peoples and nations which are nothing but '"human rights" fostered at the specific level of community life (…). The international order requires a balance between particularity and universality, which all nations are called to bring about, for their primary duty is to live in a posture of peace, respect and solidarity with other nations.'[13] St John Paul II underlined the necessity for the appropriate protection of indigenous peoples' rights. In particular, one should stress the vital relationship between those peoples and their territory and resources, which is 'a fundamental expression of their identity. (…) These peoples offer an example of a life lived in harmony with the environment that they have come to known well and to preserve. Their extraordinary experience, which is of an irreplaceable resource for all humanity, runs the risk of being lost together with the environment from which they originate.'[14]

[12] See M. Stogre, 1992, *op. cit*., pp. 186–192.

[13] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, Vatican 2004, p. 88.

[14] *Ibid*., p. 267.

5. THE IMPACT OF THE PONTIFICATE OF POPE FRANCIS

The original feature of the pontificate of Pope Francis is a deepened understanding of various de facto reasons of indigenous peoples' contemporary misery, in particular in Latin America, due to his personal pastoral experience as Archbishop of Buenos Aires. Pope Francis also continues the line initiated by his predecessors, most notably St John Paul II, pursuant to which indigenous peoples' rights are identified within the fundamental right to existence, right to one's own language and culture, right to shape the collective life according to own traditions, excluding the abuse of basic human rights, and in particular the oppression of minorities.

The characteristic feature of the present pontificate may be associated with the inner and intrinsic inclusion of lines of reasoning which aim is to protect the environment, culture and vibrant social relations. A theological analysis is performed as a final stage of the papal argumentation, which seems to be focused primarily on the important characteristic features of the contemporary world. Pope Francis' original method of argumentation may be illustrated with the example of the document dealing with indigenous rights, i.e. the Post-Synodal Exhortation: *Querida Amazonia*, where he underlines social, cultural, ecological and ecclesial perspectives ('dreams').[15]

The social perspective on indigenous peoples is focused on past atrocities and their present consequences, such as: injustice, crime, broken institutions, and poverty. The document mentions in particular the negative impact of multinational global corporations, driven mainly by the urge to earn profit. The feeling of outrage should nevertheless be imbedded in the transformative culture of forgiveness, with the crucial role of dialogue. Efforts made to enter into and hold social dialogue could eventually lead to a restored sense of community for the people.

The cultural perspective pinpoints the need to preserve the Amazonian polyhedron, the obligation to protect endangered cultures and peoples at risk. The proposed method is similar to dialogue, as mentioned above, with the proposal of an 'intercultural encounter', embedded not solely in the present time but also considering the roots of a particular culture.

The ecological perspective focuses primarily on the necessity to protect the river, water and the whole of the Amazon region. This ecological drive is rooted not solely in the technical requirements of a clean environment and health-neutral factors but is also relevant in the spiritual sphere, to such ideas as purity, contemplation, and harmony. Ecology, apart from specific goals, should play a role in education and influence citizens' everyday habits.

[15] The order of the four perspectives is original; cf. Pope Francis, *Querida Amazonia*, Post-Synodal Apostolic Exhortation, Vatican 2020.

The ecclesial perspective is based on the notion of inculturation facing the dilemma between ethnicity and theology (religion). Is the aspect of ethnic and national origin of importance in the Christian tradition? Is the content of faith well adapted to the specific features of particular cultures? What is the proper scope of inculturation: should it be based on theology, liturgy and other forms of ministry? How should social and spiritual inculturation be carried out? According to Pope Francis, there is a need to recognize ecumenical and interreligious characteristics of the population in Amazonia and a requirement of peaceful coexistence, acknowledging women's role in conflict avoidance.

Evaluating the above-presented perspectives in Pope Francis' *Querida Amazonia* Exhortation, one may emphasize the novelty in his line of reasoning. It seems that in various Vatican documents Pope Francis addresses 'integral human liberation', which extends beyond just human milieu of indigenous peoples to include broader, collective and general requirements of a clean environment and climate change.

6. CONCLUSION

The aim of this paper was to present the evolution of papal social teaching on indigenous peoples' rights from a historical perspective. It seems possible to distinguish various phases of the Catholic standpoint based on the factual, historical background: medieval challenges of infidel peoples, the Indian question during the colonization period, the impact of modernity: class struggle and the Catholic social teaching, and finally, the contemporary globalization era during the pontificate of Pope Francis. The common threads of papal teaching concern, firstly, evangelizing mission of the Church to bring faith to overseas peoples and, secondly, human rights of indigenous peoples.

The human rights issue can be encapsulated in the self-determination principle, which is related not only to the collective decision-making process (external and internal aspects of self-determination)[16] but also to the protection of human rights of the individual, in particular freedom of belief, social rights and protection of private property. Self-determination can thus be linked to freedom from external, both economic and political, interference and coercion.[17] Hence, the well-being of indigenous peoples depends not only on the awareness and involvement of the 'people of God' but also on the engagement of 'all persons of good will'.

[16] The principle of self-determination and the requirements of good governance can be regarded as interconnected; cf. D. Bach-Golecka, *The Emerging Right to Good Governance*, 'American Journal of International Law. Unbound' 2018, Vol. 112.

[17] See S. Puig, *At the Margins of Globalization. Indigenous Peoples and International Economic Law*, Cambridge 2021.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.3

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DRUG POSSESSION, CHILEAN INDIGENOUS PEOPLES, AND CULTURAL DEFENSES

Abstract

This paper examines two decisions in which the legal dispute was focused on whether it was lawful to possess coca leaves by indigenous peoples to practice rituals according to their traditional customs. Both ILO Convention 169 (ILO C169) and the International Covenant on Civil and Political Rights (ICCPR) were paramount in justifying a cultural defence.

KEYWORDS

indigenous peoples, indigenous rights, religious freedom, traditional religions, criminal law, cultural defences, possession of drugs, cultural diversity, international human rights law

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ludy tubylcze, prawa tubylcze, wolność religijna, religie tradycyjne, prawo karne, obrona przez kulturę, posiadanie narkotyków, różnorodność kulturowa, międzynarodowe prawo praw człowieka

1. INTRODUCTION: INTERNATIONAL LAW IN THE CURRENT CHILEAN CONSTITUTION

One of the most relevant issues in current legal scholarship is the relationship between international law and national constitutions. In Chile, Article 5.2 of the present Constitution expressed its relation to international human rights agreements in this way: 'The exercise of sovereignty recognizes as a limitation the respect for the essential rights which emanate from human nature. It is the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.' This text was a product of the 1989 constitutional reform, which triggered a legal revolution. Chilean courts began to consider human rights conventions as a primary source and developed relevant case law on several topics, from human rights abuses to environmental cases.[1] Domestic judges became the primary enforcers of international human rights law.[2] The current constitutional text does not grant a specific rank to international human rights treaties. Still, its mention is relevant because Article 5.2 of the present Constitution gives international human rights law some priority among legal sources. Some scholars considered that treaties had a constitutional rank and were part of the block of constitutionality; others thought them to have an infra-constitutional nature. However, Chilean courts must interpret domestic law, including the Constitution, in conformity with international human rights agreements.

Possibly, a new constitution may replace the existing one. In 2019, massive protests triggered a broad political agreement to start a process to write a new constitution. A referendum was approved to hold a special election to select the members of a Constitutional Assembly. For the first time, Chileans voted for a body only created to write a new constitution. Of 155 members, 17 seats were reserved for indigenous peoples, which were allocated proportionally, depending on the number of indigenous groups: seven seats for the Mapuche; two for the Aymara; and one each for the Diaguita, Quechua, Atacameño, Colla, Chango, Rapa Nui, Kawésqar, and Yagán peoples. The population massively supported the political groups that wanted radical changes in the Chilean constitutional model. It is impossible to foresee the outcome of this process. Still, it is highly likely that the influence of the international human rights treaties on the Chilean legal system will be greater. One of the international agreements that will be most relevant is the Indigenous and Tribal Peoples Convention of 1989, No. 169 (ILO C169). It is easy to anticipate that indigenous rights will be an essential issue when the new

[1] R. Cespedes, *The Influence of International Law on the Chilean Legal System: More than just Pinochet*, QMLJ 2013, No. 3, p. 37.

[2] M. Á. Fernández González, *La aplicación por los tribunales chilenos del derecho internacional de los derechos humanos*, 'Estudios Constitucionales' 2010, Año 8, No. 1, p. 425.

constitution is discussed. This treaty was ratified by Chile in 2008 and has been paramount in protecting indigenous peoples' rights. A significant majority of the recently elected Constitutional Assembly have expressed the wish for having a plurinational state acknowledging, inside Chile, several 'peoples' with different ethnicities, languages, and political identities.

Chilean courts have already decided cases related to indigenous rights and natural resources, environment, and cultural defences. Those judicial trends will be paramount in crystallizing fundamental indigenous rights in the future constitution. Part of this trend is the respect of indigenous traditional religions. The two judicial judgments I intend to comment on are part of this tendency.

2. CULTURAL DEFENCES AND INDIGENOUS PEOPLES

The cultural defence is a type of criminal defence that involves situations justifying or excusing criminal behaviour. In all the cases, the defendant displays behaviour described and labelled as criminal by law. However, some circumstances justify or excuse such behaviour, ergo, criminal punishment may not be applied. Those conditions are the values or customs of indigenous or minoritarian cultures that may at times conflict with the dominant standards. Majoritarian values are often embodied in the domestic criminal law. The conduct is justified when the behaviour displayed is legitimate, even though it contradicts general legal norms. One example of that is the possession of substances categorized as drugs by law. The international law sources of cultural defences are mainly the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the ILO C169.

The ICCPR is one of the most relevant United Nations agreements and an essential text in international human rights law. It is part of the International Bill of Human Rights, along with the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR). This pact protects individual rights. The only treaty provision which seems to go beyond this traditional approach is Article 27, which protects minorities. Article 27 provides the framework to guarantee minorities' and indigenous peoples' identities. Article 27 recognizes the rights of ethnic (among them indigenous peoples), religious and linguistic minorities to enjoy their culture, follow their religious beliefs and practices, and speak their language. This provision is intended to protect distinctive cultural traditions as part of the collective identity of minorities and indigenous peoples. In General Comment 23 (1994), the UN Human Rights Committee interpreted this provision of the ICCPR. It declared that:

> Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.

> Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.

The ILO C169 is the primary binding international treaty concerning indigenous people. Indigenous people are a minority of some kind.[3] The general tone of the Convention promotes equality and non-discrimination but not standardization: the ILO C169 values cultural diversity, which has consequences, for instance, for education and teaching of indigenous languages (Articles 26–31).[4] In this manner, the ways of life of indigenous and tribal peoples are legally protected. Some provisions establish measures of positive discrimination. The Convention considers indigenous custom a source of law (Articles 8–9), primarily to mitigate criminal liability (Article 10).[5] The provisions in question have been applied in recent case law by the Chilean courts, where the accused claimed cultural defences.[6] Those claims involved sexual crimes, drug possession, and more.

3. CHILEAN DECISIONS

The decisions discussed below are related to the possession of coca leaves (*Erythroxylum coca*). Those leaves come from a bush used for millennia by the Aymara,[7] Quechua,[8] and Atacameños,[9] indigenous peoples' groups living in the highlands of Chile, Bolivia, and Peru. Their possession and consumption are customary in the Andean area, and it is easy to find them in the markets of Peru and

[3] See G. Pentassuglia, *Minorities in International Law: An Introductory Study*, Strasbourg: Council of Europe Publishing 2002.

[4] L. M. Graham, *Reconciling Collective and Individual Rights: Indigenous Education and International Human Rights Law*, 'UCLA Journal of International Law and Foreign Affairs' 2010, Vol. 15(1), p. 83.

[5] A case concerning indigenous custom and protected animal species is *A v Public Prosecuting Authority*, Final appeal judgment, Case no HR-20008-02183-A, ILDC 1328 (NO 2008), Norwegian Supreme Court Gazette (Norsk Rettstidende) 2008, 1789, 19 December 2008, *Oxford Reports on International Law in Domestic Courts*.

[6] J. van Broeck, *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, 'European Journal of Crime, Criminal Law and Criminal Justice' 2001, Vol. 9(1), p. 1.

[7] The Aymara people are natives the Andes. They live in Bolivia, Peru and Chile. Their ancestors lived in the area controlled by the Inca empire.

[8] Groups of indigenous people who speak the Quechua languages and live in Ecuador, Bolivia, Chile, Colombia, and Argentina.

[9] The Atacama people are indigenous people from the Atacama Desert and the highlands in the north of Chile, Argentina and southern Bolivia. It is relevant to point out that part of the Atacama people's tradition is smoking hallucinogenic substances.

Bolivia, close to the Chilean border. The most common practice among these peoples is chewing coca leaves for healing purposes, but they are also used in rituals, usually syncretic traditions in the celebration of Mother Earth (*La Pachamama*). Since the Inca empire, coca leaves have been a cultural symbol of those indigenous peoples' identity. During the twentieth century, the coca plantations brought the authorities into conflict with the indigenous communities to prevent the fabrication of cocaine. The two analysed cases reflect that conflict.

3.1. *IWHC AND LAHC V PROSECUTOR'S OFFICE OF CALAMA*[10]

The first case was decided according to Article 26 of the ICCPR (ILO C169 was only ratified in 2008), which is the legal basis of the cultural defence acknowledged by the court. Two indigenous Aymara women of Bolivian nationality were arrested for possession of coca leaves (considered illegal since it is the essential raw material to manufacture cocaine). One of the women did not exercise her right to remain silent and told the police that she had bought the coca leaves in Bolivia to give to a woman in Chile for a religious ritual. The prosecutor argued that the substance was a drug, and therefore the women had committed a crime according to the Chilean Drug Trafficking Act (2005). Article 54.1 of the Chilean Indigenous Act (1993) gave general legal value to indigenous custom, but it only benefited the indigenous people of Chilean nationality. The women agreed that they had technically violated the letter of the law but argued that they were exempt from blame because indigenous people had some religious traditions that made them believe their behaviour was not a crime. In their indigenous culture, the use of coca leaves was commonplace, and they had misunderstood the legal prohibition. The first instance criminal court acquitted the women. It held that they had carried out the act criminalized under Chilean law but could not be convicted because they had followed their customs and religious practices. Even though they had coca leaves with the aim of giving them to a third party, there was no criminal intent. The third party declared that she had intended to use the coca leaves in a religious ceremony. Such practices are customary and usual in that region of the country where the Aymara indigenous peoples live. The prosecutor challenged the first instance decision, arguing that the women confessed to having coca leaves, which is a crime under the law.

The writ of annulment was denied, and the first instance ruling was upheld. Article 27 of the ICCPR, a treaty ratified by Chile, acknowledged the minorities' collective right to enjoy their culture, practice their religion, and use their own language. Article 27 of the ICCPR is self-executing and very clear. Therefore, it was mandatory and had to be applied. Article 27 of the ICCPR acknowledges freedoms whose right-holders are national citizens and foreigners. Since Chile

[10] Writ of annulment, Rol No. 250-2007 (30.11.2007), Court of Appeal of Antofagasta (Chile).

had ratified the ICCPR, it was constitutionally incorporated into the domestic legal system, and thus minorities gained the right to equality. Consequently, they cannot be discriminated against on the grounds of their religious beliefs. Accordingly, those minorities can practice their religion and culture and speak their languages irrespective of their nationality. The indigenous community living in the Chilean and Bolivian Altiplano (the Andean Plateau) use coca leaves in their daily life as part of their ancestral religious rituals. The ruling of the first instance criminal court followed and applied an international norm that forms part of the Chilean legal system. Still, coca leaves are a 'drug' according to the Chilean Drug Trafficking Act. Acts of Parliaments are the only primary source of criminal law, as the Constitution (1980) and the Chilean Criminal Code prescribe. The legal value of other incidental sources, such as customs or administrative regulations, are limited. However, there is no criminal liability and its consequential punishment without guilt. It was clear that the women did not have guilty minds, ergo, there was no crime. Courts had to achieve justice, and in this case, the coca leaves were not a 'drug' *per se* but a typical medicinal plant from the Andean Plateau, which was also used as part of an ancient religious ritual by the indigenous people.

This decision is an excellent example of how important international law is for the domestic system. Article 27 of the ICCPR was interpreted in the UN Human Rights Committee General Comment 23.[11] The court followed this comment without quoting it. The Committee stated that Article 27 of the ICCPR created a right and a correlated state obligation (General Comment 23, para 6.1). States are obligated to ensure the survival of minorities' cultural and religious manifestations. Even though the ICCPR acknowledges individual rights, Article 27 of the ICCPR has a collective meaning; the court also recognized this feature. The court also stressed that Chile was obligated to respect the international treaty. Although the court did not quote Article 18 of the ICCPR, its understanding of the term 'religious belief' was in line with the interpretation in the UN Human Rights Committee General Comment 22.[12] The Committee stressed that Article 18 of the ICCPR protects theistic, non-theistic, and atheistic beliefs. Article 18 of the ICCPR is not limited in its application to traditional religions or beliefs with institutional characteristics. Ancient indigenous religions are thus protected by the ICCPR and cannot be discriminated against, as emphasized by the court. Consequently, the Aymara women exercised the right to possess and carry coca leaves to perform a religious ritual. The court considered that Article 27 of the ICCPR was the most appropriate international provision to resolve this controversy. According to the court, the Aymara were a non-dominant and less numer-

[11] CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, adopted at the fiftieth session of the Human Rights Committee.

[12] CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, adopted at the forty-eighth session of the Human Rights Committee, paras 1 and 2.

ous group compared to the rest of the population, with different ethnic, religious, and linguistic features. They are also descendants of the peoples who inhabited the territory before the Spanish colonization; they possess a distinct identity and exhibit a strong attachment to their ancestral lands.

At present, the Chilean courts apply the ILO C169 to such cases since it was ratified in 2008, as I will point out in the next examined case. It is clear that the women's intention was not to use coca leaves as a drug or raw material to manufacture cocaine. They intended to use them part of a religious ritual practised for centuries by the indigenous people. The defendants knew that coca leaves were not used by the vast majority of the Chilean population. However, their regular consumption of coca leaves as medicine or as an essential part of an offering to Mother Earth enabled the court to recognize the cultural defence granted by the first instance court. Even though the possession of coca is formally considered a crime in the Chilean legal system, it was condoned when committed by a member of a minority group in which that behaviour was normal and part of their culture and religious tradition. The Chilean courts applying the ICCPR allow different laws to govern other groups within the same country, considering their cultural background. This case is an example of legal pluralism – the existence of multiple legal systems within one geographical area – which respects the spirit of international human rights law.[13]

3.2. *VELÁZQUEZ ZAMBRANA V PROSECUTOR OFFICE OF ARICA*[14]

In this case, the court applied the ILO C169 as the basis of cultural defences. On 11 June 2014, during a routine police check in Chile, a Bolivian Aymara truck driver was found in possession of various commodities that were not declared to the customs office. The items included five kilos of coca leaves, the essential raw material to fabricate cocaine. He was arrested on suspicion of committing smuggling-related crimes. The defendant claimed that he had bought and smuggled the coca leaves from Bolivia for an Aymaran woman in Chile, who wanted to sell them during the religious festivities. Velázquez Zambrana acknowledged that he had technically violated the letter of the law but argued that he should be exempted from culpability because the Aymara people had certain cultural traditions, including the use of coca leaves as medicine and on celebratory occasions. The prosecutor argued that the coca leaves were a drug, and therefore Velázquez Zambrana had committed a crime according to the Chilean Drug Trafficking Act (2005).

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[13] B. Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney L Rev 2008, Vol. 30(3), p. 375.

[14] RUC No. 1410018700-1, RIT No. 27-2015 (02.03.2015), Arica y Parinacota Criminal Trial Court (Tribunal Penal Oral) (Chile).

Velázquez Zambrana was acquitted of the charges on the smuggling of coca leaves. He was found guilty of smuggling other legal commodities. Velázquez Zambrana had not acted with the criminal 'intent' of trafficking coca leaves. He had not understood the illegality of the possession of coca leaves. Articles 2, 5, and 8 of the ILO C169 acknowledge that indigenous people have the right to retain their culture and practice their religion. Article 8(1) of the ILO C169 provides that '[i]n applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.' Consequently, Chile is obliged to guarantee respect for the cultural identity of indigenous peoples, which means that when the criminal responsibility of their members has to be determined, it has to be balanced against their social and cultural particularities. Coca is widely used in Bolivia, where it is not illegal, and coca leaves are vital to the Aymara culture. In this instance, coca leaves were used with no intention of trafficking drugs. Coca leaves have to be imported from Bolivia because they cannot be produced in Chile due to its climate. They are so fundamental to the Aymara people that the use of the leaves was protected by the ILO C169. Additionally, the quantity and quality of coca leaves smuggled by Velázquez Zambrana could not be used to make cocaine. Thus, public health was not at risk. In general, it is forbidden to import coca leaves into Chile, but in this case the use of coca leaves was 'culturally motivated', which had to be tolerated.

In Chile, the ILO C169 is mainly applied to environmental conflicts,[15] but it has relevant application in criminal law. Collective rights are exercised by a group of people, not individually. In this case, the freedom to possess a plant (used in a Western cultural context to fabricate drugs) to perform religious rituals was considered a collective right. The court made references to how essential coca leaves were to the identity of the Aymara people. The ILO C169 recognized the indigenous peoples' collective right to preserve their ethnic religion. It was clear that Velázquez Zambrana's intention was not to use coca leaves as a drug or as raw material to manufacture cocaine. He intended it to be used as part of a ritual practised for centuries by the Aymara people. Even though the defendant knew that coca leaves were not used by the vast majority of the Chilean population, the indigenous peoples' regular consumption of the leaves as medicine or an essential part of an offering to Mother Earth resulted in the court recognizing the cultural defence. Even though Velázquez Zambrana's behaviour fitted the description of drug trafficking under the law, the acts were excused when committed by a member of the indigenous group for which that behaviour was normal. The court emphasized how 'normal' coca leaves were in the life of the Aymara people and how the use of the leaves was connected to their identity.

[15] See *Parque Eólico Chiloé, Comunidad Indígena Antú Lafquén de Huentetique v Corema de la Región de los Lagos*, Writ of protection, ILDC 2800 (CL 2012), Rol No. 10.090-2011 (22.03.2012), Supreme Court (Chile).

In their application of the ILO C169, the Chilean courts have applied diverse legal rules to govern different groups of people within the same country, considering their cultural backgrounds. The discussed case is also an example of legal pluralism: the legal system allowed some valid exceptions for indigenous people, coexisting with the general law applicable to non-indigenous peoples. The court did not face the controversy related to freedom of religion but mainly a cultural right issue. As a group, indigenous people have the right to preserve their ways of life in ethnomedicine, particular foods, and traditional rituals. Coca leaves have been used by the Aymara people for centuries, and denying them the collective right to use the plant could put the survival of their culture at risk.

4. CONCLUSION

According to the current Chilean Constitution, indigenous peoples are holders of international rights. Some of those freedoms are acknowledged by the ICCPR and the ILO C169. International human rights treaties prevail over domestic legislation, and the Chilean courts apply them as a higher law in the hierarchy. The ICCPR and the ILO C169 have been helpful tools facilitating fair adjudication of criminal law cases in which indigenous peoples are involved, being the ultimate source of cultural defences. In the two analysed cases, the Chilean courts fully justified the indigenous peoples' behaviour (the possession of drugs) on the grounds of their cultural and religious freedoms. According to the UN Human Rights Committee, indigenous peoples' traditional religions are protected by international law since the definition of the term 'religion' is broad. Those decisions open the door for legal pluralism, and they are an acknowledgment of cultural diversity in Chile. It is highly possible that if the new constitution is adopted, the recognition of indigenous customs will be greater.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.4

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NO PLACE TO CALL HOME. INDIGENOUS PEOPLES AND THE PROBLEM OF HOMELESSNESS

Abstract

What is the meaning of the word 'indigenous'? According to the *Oxford English Dictionary*, it means: 'originating or occurring naturally in a particular place.' Paradoxically, what was first taken away from the people we define by this umbrella term is a place of their own. It is important to realize that not only their birthright to housing and organizing their living space has been violated. The lack of place is also a contradiction of the word 'indigenous', and thereby a direct cause of most problems connected with the contemporary situation of indigenous peoples around the globe. That is why, this paper presents research on the topic of homelessness among indigenous peoples. For the purpose of discussing the problem in more detail, the focus is on two particular native groups: Indigenous peoples of America (First Nations, the Inuit, the Métis) and Aboriginal Australians. For the sake of clarity, First Nations, the Inuit, the Métis are referred to as 'Indigenous', and native Australians as 'Aboriginal', although these two words are in fact synonymous. The aim of this bipartite study is also to compare the situation of native groups and laws that govern public space from two entirely different parts of the world, and to check whether there are more similarities or differences regarding the issue of homelessness.

KEYWORDS

homelessness, indigenous, First Nations, the Inuit, the Métis, aboriginal, Aboriginal Australians

SŁOWA KLUCZOWE

bezdomność, tubylczy, Pierwsze Narody, Inuici, Metysi, rodowity, Aborygeni australijscy

Foxes have holes and birds of the air have nests,
but the Son of Man has no place to lay His head.
Luke 9:58, MEV

At the beginning, we will take a look at the definition of homelessness.[1] It is worth noticing that homelessness from an indigenous perspective does not fit neatly into the classical First World's typologies, such as Canadian ones: 'unsheltered', 'emergency sheltered', 'provisionally sheltered', and 'at risk of homelessness'. The Canadian Observatory on Homelessness, an organization whose research has heavily influenced my study, has worked to define the Indigenous homelessness from an Indigenous perspective. Based on this, it is clear that being without a home, according to an Indigenous worldview, is not simply having no accommodation or structural habitation but rather the lack of a web of relationships that involves: connections to human kinship networks; relations to animals, plants, spirits, and elements; relationship to the Earth, lands, waters, and territories; and connection to traditional stories, songs, teachings, names, and ancestors. All these aspects of the interconnectedness are known as 'home' in Indigenous societies and worldviews.[2]

The concepts of home and homelessness may also differ across different communities in Australia. Homelessness in Aboriginal and Torres Strait Islander communities cannot be understood without a reference to the legacy of colonization and dispossession. The concepts of a country are fundamental to the culture and identity as being homeless they have a spiritual connection to the land they live on irrespective of the type of shelter they live in. Some Aboriginal Australians may experience separation from their tradition, land, family or kinship groups

[1] The date of the text validity is 1 November 2020.

[2] Homeless Hub: Canadian Observatory on Homelessness, www.homelesshub.ca (https://www.homelessnessnsw.org.au/resources/indigenous-people-and-homelessness?fbclid=IwAR30UjGpgd10b0E2qga3X6s4r_qr8eLcETLKDoGe5VYuO8NSQrypfRXEvrE) (accessed 01.11.2020).

as spiritual homelessness,[3] just like the aforementioned Indigenous peoples of America.

The Indigenous peoples of America is a collective term to encompass the diversity of cultures within First Nations, the Inuit and the Métis. Urban Indigenous peoples experience homelessness at a disproportionate rate and make up a significant percentage of population experiencing homelessness in cities. Research shows that Indigenous homelessness in major urban areas ranges between 20% and 50% of the total homeless population, while other studies have reported that the range may be much wider, at 11–96%. To put it another way, in some Canadian cities, such as Yellowknife or Whitehorse, Indigenous peoples make up 90% of the homeless population. Places like Thunder Bay and Winnipeg fair somewhat better; an average of 50% of those experiencing homelessness are Indigenous. In Toronto, Canada's largest urban centre, Indigenous peoples constitute around 15% of those experiencing homelessness in the city, even though they account for only around a half of the total population. In fact, one study found that 1 in 15 Indigenous peoples in urban centres experience homelessness compared to 1 in 128 for the general population. This means that urban Indigenous peoples are eight times more likely to experience homelessness.[4]

Homelessness amongst Indigenous peoples should be considered a consequence of Canada's history of colonization and exploitation of Indigenous land and populations. The Indian Act (1876) and related policies served to dispossess Indigenous peoples of land, disrupt the practice and transmission of traditional knowledge, undermine the matriarchal role of women, and remove generations of children from their communities into settings where abuse was widespread. The Indian Act, on and off reserve housing, programmes aimed at curbing urban Indigenous homelessness, and the 'system' in general have, it would seem, failed Indigenous peoples nationwide and made their housing insecure from Vancouver to Halifax. Many of the personal issues (including familial dysfunction, substance use, addictions, health issues, community violence) faced by Indigenous peoples can be directly linked to various types of historical trauma. In 2016 in the Metro Vancouver homeless count, homeless youth had increased to the highest level recorded in the region with 397, or 24% of the overall homeless population, under the age of 25. Youth reported that they had been affected by the lack of youth services or cuts to youth programmes from one or more levels of government. Street-involved youth often fall between services tailored to children or adults,

[3] Homelessness NSW, www.homelessnessnsw.org.au (https://www.homelessnessnsw.org.au/resources/indigenous-people-and-homelessness?fbclid=IwAR30UjGpgd10b0E2qga3X6s4r_qr8eLcETLKDoGe5VYuO8NSQrypfRXEvrE) (accessed 01.11.2020).

[4] Homeless Hub: Canadian Observatory on Homelessness, www.homelesshub.ca (https://www.homelessnessnsw.org.au/resources/indigenous-people-and-homelessness?fbclid=IwAR30UjGpgd10b0E2qga3X6s4r_qr8eLcETLKDoGe5VYuO8NSQrypfRXEvrE) (accessed 01.11.2020).

and this issue is further complicated for Indigenous youth in the child welfare system who age out of many system supports on adulthood. Developmental resources grounded in Indigenous cultural practices are required to prevent homelessness among youth who transition from foster care settings, and also to support youth who have experienced trauma in foster care settings. Indigenous youth compared with non-Indigenous youth have a higher likelihood of experimenting with substances at a younger age and using substances persistently into adulthood. Early initiation into drug use poses a significant risk for adverse outcomes, such as infectious disease and other morbidity or mortality. Youth who have initiated injection drug use at an earlier age have been found to be more likely to become infected with HIV and hepatitis C, demonstrating the need for targeted and early intervention for youth at risk of drug use. Few studies have investigated the protective factors related to substance use trajectories for Indigenous youth. Mainstream substance use treatment models have demonstrated limited success for Indigenous people. This may be because the factors responsible for substance use (as well as homelessness and trauma) are unique to the experience of Indigenous people, and require 'treatments' that restore and rebuild Indigenous culture and rights. Approaches that create reconnection to community, culture and traditions have been shown to have a positive impact on substance use. Increased access to psychosocial support, youth recreation and peer support models, and trauma-informed services are also required.[5]

Structural issues of homelessness among Indigenous peoples can include transitions from reserves to urban living, racism, landlord discrimination, low levels of education and unemployment. There are also serious social issues stemming from the historical trauma, including high incarceration rates and high suicide rates amongst the youth.[6] In a study conducted by the 'British Medical Journal' within a sample of Indigenous people, almost half of the participants met criteria for post-traumatic stress disorder, i.e. PTSD (49% compared with 26% among the non-Indigenous), which is consistent with a significant body of literature documenting the historical and continuing trauma experienced by the Indigenous people in Canada. Trauma can be transmitted across generations, based on findings that children of trauma survivors were more likely to have negative responses to stressors and more likely to develop PTSD or depression as a result. Intergener-

[5] B. Bingham, A. Moniruzzaman, M. Patterson, J. Distasio, J. Sareen, J. O'Neil, J. M. Somers, *Indigenous and Non-Indigenous People Experiencing Homelessness and Mental Illness in two Canadian Cities: A Retrospective Analysis and Implications for Culturally Informed Action*, 'BMJ Open' 2019, Vol. 9(4), p. 3.

[6] Homeless Hub: Canadian Observatory on Homelessness, www.homelesshub.ca (https://www.homelessnessnsw.org.au/resources/indigenous-people-and-homelessness?fbclid=IwAR30UjGpgd10b0E2qga3X6s4r_qr8eLcETLKDoGe5VYuO8NSQrypfRXEvrE) (accessed 01.11.2020).

ational trauma represents a complex subtype of PTSD that must be addressed in housing interventions for Indigenous people.[7]

Housing conditions on reserves and in the Métis and Inuit communities are often sub-standard, leading some researchers and Indigenous activists to state that on-reserve housing should also be considered part of homelessness. According the Tamarack Institute's research, Indigenous peoples in Canada are more than eleven times more likely to use a homeless shelter than non-Indigenous people. The analysis also finds that, while Indigenous men are more than ten times more likely to use a homeless shelter over the course of a year than non-Indigenous men, Indigenous women are more than fifteen times more likely to use a homeless shelter than non-Indigenous women over the course of a year. Meanwhile, Indigenous seniors are more than sixteen times more likely to use a homeless shelter over the course of a year than non-Indigenous seniors.[8]

Around three-quarters of participants in the study conducted by a 'Spare Change News' journalist say that they have been subject to discrimination by citizens, police officers and even non-Indigenous homeless people. A comparable proportion have been victims of violence in towns, whether verbal or physical. This violence is often inflicted by friends, ex-partners, other homeless people or police officers. Among the Inuit, the victims of violence are mainly women, but the opposite is true for First Nations. However, most Indigenous people feel safe if they have friends and family with them. Unlike non-native Québécois homeless people, who are often seen alone or in twos or threes on the street, Indigenous homeless people tend to stay in groups. Those who beg share the money collected, and they are supportive and protective of one another. It is not uncommon to see several people or even a dozen from the same family in the group. There are almost as many female Indigenous homeless people as men, which is not the case among non-native homeless people. Another difference is that the majority of Indigenous people continue to get on very well with their families, while non-native people are often in conflict with or completely cut off from their families.[9]

Aboriginal Australians comprise 9% of the homeless population compared with 3.3% of the general population. Similarly, in New Zealand, Maori homelessness has been reported to be five times that of non-Maori.[10] The rate of Aboriginal homelessness varies considerably across jurisdictions. The highest rate was observed in the Northern Territory, with 1 in 4 Aboriginal people in that jurisdiction considered to be homeless (2,462 per 10,000 population). Across

[7] B. Bingham, A. Moniruzzaman, M. Patterson at al., 2019, *op. cit*., p. 6.

[8] N. Falvo, *The Use of Homelessness Shelters by Indigenous Peoples in Canada*, https://www.homelesshub.ca/blog/use-homeless-shelters-indigenous-peoples-canada (accessed 01.11.2020).

[9] I. Raymond, *Indigenous People and Homelessness: A Distinct and Growing Reality*, 'Spare Change News', 5 December 2017, http://sparechangenews.net/2017/12/indigenous-people-homelessness-distinct-growing-reality (accessed 01.11.2020).

[10] B. Bingham, A. Moniruzzaman, M. Patterson et al., 2019, *op. cit*., p. 1.

the other jurisdictions, the rate of homelessness for Aboriginal people ranged from 87 homeless people per 10,000 people in Tasmania to 502 homeless per 10,000 people in the Australian Capital Territory. It is worth noticing that between 2006 and 2011, the rate of homelessness among Aboriginal people decreased in most jurisdictions. In contrast, for non-Aboriginal people the rate of homelessness increased in all but two jurisdictions (Queensland and the Northern Territory). In 2011, the types of homelessness experienced by Aboriginal homeless people varied across the states and territories. As noted earlier, most (92%) of the homeless in the Northern Territory lived in severely crowded dwellings. Severe crowding among Aboriginal homeless people in the other jurisdictions ranged from 6% in Victoria to 79% in Western Australia.

There are substantial differences in the distribution of Aboriginal and non-Aboriginal people experiencing homelessness across remoteness areas. For Aboriginal people, the highest proportion of homeless people was in 'Very remote areas', followed by 'Major cities'. In 2011, 7 in 10 Aboriginal people experiencing homelessness were in remote areas: 60% in 'Very remote areas' and 10% in 'Remote areas'. By comparison, 21% of all Aboriginal Australians lived in 'Remote' and 'Very remote areas' of Australia, indicating homeless Aboriginal people were over-represented in these areas. As detailed below, nearly all (97%) of the Aboriginal homeless people in 'Very remote areas' and most (71%) of those in 'Remote areas' lived in severely crowded dwellings. About 12% of Aboriginal homeless people were enumerated in 'Major cities', and the remaining 17% in regional areas (6% in 'Inner regional' and 11% in 'Outer regional'). For non-Aboriginal people, the number experiencing homelessness decreased with increasing remoteness, broadly reflecting the distribution of the total non-Aboriginal population. Nearly three-quarters (74%) were in 'Major cities', 15% in 'Inner regional areas', 8% in 'Outer regional areas', with 3% in 'Remote' and 'Very remote areas'.

There is considerable variation in the types of homelessness experienced by Aboriginal homeless people across remoteness areas. The proportion of Aboriginal homeless people who lived in severely crowded dwellings increased with remoteness, from 19% of those in 'Major cities' to 97% of those in 'Very remote areas'. Aboriginal people in 'Very remote areas' who lived in severely crowded dwellings made up 59% of the total Aboriginal homeless population in 2011. 'Major cities' and 'Inner regional areas' had the highest proportions of Aboriginal people who were homeless and lived in supported accommodation (44% and 42% of homeless Aboriginal people, respectively). In comparison, among non-Aboriginal homeless people, those in severely crowded dwellings made up 13% of the homeless in 'Very remote areas', and a relatively larger proportion (35%) of those in 'Major cities'. The proportion of non-Aboriginal homeless people in supported accommodation was highest in 'Inner regional areas' (27%), followed by 'Major cities' (20%).

The Specialist Homelessness Services Collection (SHSC) distinguishes between shelter clients who, at the beginning of their support period, were home-

less and those who were at risk of homelessness. In 2012–2013, a slightly larger proportion of Aboriginal clients (52%) were homeless at the beginning of their first support period when compared with non-Aboriginal clients (49%). The remaining clients were considered to be at risk of homelessness at the time they began receiving support from an agency (48% of Aboriginal clients and 51% of non-Aboriginal clients). Of Aboriginal clients who experienced homelessness at some time during 2012–2013, 4.9% experienced more than one period of homelessness (that is, moved out of homelessness and back into homelessness during the year). This compares with 5.2% in 2011–2012. Among non-Aboriginal clients, 3.7% had more than one period of homelessness during 2012–2013, compared with 4.6% during 2011–2012.

The majority of Aboriginal clients are female: 62% in 2012–2013. Considered in relation to the total Aboriginal population, about 1 in 10 Aboriginal females (970 per 10,000 population) accessed specialist homelessness services in 2012–2013, compared with about 1 in 17 Aboriginal males (595 per 10,000 population). Aboriginal shelter clients are younger than non-Aboriginal clients. For example, clients aged under 10 comprised nearly one-quarter (24%) of Aboriginal clients compared with 14% of non-Aboriginal clients. Meanwhile, 12% of Aboriginal clients were aged 45 and over, compared with 20% of non-Aboriginal clients. These differences by age of clients at least partly reflect the younger age structure of the total Aboriginal population.[11]

Many Aboriginal people live in housing that does not meet their needs. Aboriginal Australians are six times more likely to live in overcrowded conditions that non-Aboriginal Australians. Overcrowding due to a shortage of housing is more severe in rural and remote areas; living in overcrowded conditions may contribute to health issues and family violence, and can disrupt education and work. Overcrowding is one of the biggest causes of 'hidden homelessness' amongst Aboriginal Australian communities. Many Aboriginal people live in remote areas and have to travel to regional centres to access basic services. People who live in town may temporarily stay with their family in overcrowded houses or in public places. Some Aboriginal Australians live in public places in urban areas. They may choose to live in these places on a temporary or permanent basis. Some may wish to return to the country, however, they require services that are only available in urban locations, which highlights the lack of appropriate housing options for Aboriginal Australians and availability of services in regional and rural areas. For others still, it is a lack of means to travel home to the country. The connection to the country may mean some Aboriginal people experience lack of access to or a loss of control of their use of public places as homeless. Aboriginal Australians are also disproportionately affected by laws that govern public space.

[11] Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians*, Canberra 2014, pp. 13–16, 19–21.

Family violence is the primary cause of homelessness for Aboriginal Australians. Aboriginal communities are over-represented as both victims and perpetrators of violent crime. It is worth noticing that 40% of the Aboriginal people in homeless assistance services are women escaping domestic violence and 21% (almost a quarter) of women seeking help from a homeless service as a result of domestic violence are Aboriginal women.[12]

In summary, Indigenous peoples of both ethnicities (technically, in a land of their own) experience homelessness at much higher rates than non-Indigenous people, not to mention some devastating indirect effects of the homelessness phenomenon, such as health problems, family violence, disruption of education and work, lack of spiritual connection to the land and separation from traditions. Solutions to Indigenous homelessness – both prevention and treatment – must involve practices that restore social and cultural power to Indigenous communities. Further research is needed to replicate these findings in other regions and where the historical experiences of Indigenous peoples differ based on varying degrees of political and social autonomy and the preservation of cultural practices.

Addressing Indigenous homelessness requires Indigenous leadership in Canada, Australia and New Zealand. As regards measures that have already been taken, beginning in the late 1990s, the Canadian federal government tried to address homelessness with three new programmes: National Homelessness Initiative, Homelessness Partnering Strategy and Affordable Housing Initiative. The Affordable Housing Management Association (AHMA) is in the best position to provide leadership in Canada as a province-wide, independent Indigenous organization. The AHMA has a proven track record of developing proposals with other organizations that meet government requirements for funding, while addressing Indigenous needs and goals. The AHMA has examined existing research on homelessness in Canada, which reveals that: (i) homelessness programmes designed, delivered and governed by Indigenous people have better outcomes; (ii) better data are needed on the extent, causes, and demographics of Indigenous homelessness; (iii) the findings should be used to develop an effective national Indigenous homelessness strategy. Addressing Aboriginal homelessness is a daunting task, will take time, and needs to involve all levels of government. In is also necessary to engage stakeholders in developing programmes: people living on the streets, chiefs and councils, elders, service providers and non-profit organizations; to support evidence-based solutions and research to develop evidence, gather information by building relationships in communities and participating in 'talking circles'; and to develop a database identifying numbers and gaps in the services. Solutions that are culturally appropriate to Indigenous homelessness should support Indigenous values and traditional practices, with a continuum of services

[12] Homelessness NSW, www.homelessnessnsw.org.au (https://www.homelessnessnsw.org.au/resources/indigenous-people-and-homelessness?fbclid=IwAR30UjGpgd10b0E2qga3X6s4r_qr8eLcETLKDoGe5VYuO8NSQrypfRXEvrE) (accessed 01.11.2020).

that includes emergency shelter services, structured intake, client participation in service delivery, mental health, physical health, detox and dental services, affordable, supportive transitional and permanent housing, culturally appropriate staffing and training, peer, community and family supports, discharge planning at correctional institutions, education, skills development, employment and income support services, transportation for accessing employment and services.[13] The 'Canadian Medical Association Journal' also emphasizes that, to align with domestic and international law, ethics guidelines, and the Calls to Action of the Truth and Reconciliation Commission of Canada, the development of clinical practice guidelines must be led by First Nations, the Métis and the Inuit, and informed by their diverse and unique worldviews, practices and experiences.[14]

The already mentioned SHSC began helping Aboriginal Australian communities on 1 July 2011. Specialist homelessness agencies that are funded under the National Affordable Housing Agreement and the National Partnership Agreement on Homelessness are in scope for the collection. The agencies that are expected to participate in the SHSC are identified by the state and territory departments responsible for the delivery of services. Approximately 1,500 specialist homelessness agencies across Australia participate in the SHSC. All agencies participating in the collection report a standard set of data about the clients they support each month to the Australian Institute of Health and Welfare (AIHW). The data collected concern the characteristics and circumstances of a client, what assistance is received, and outcomes. The data are based on support periods or episodes of assistance provided to individual clients. Information on the Indigenous status is only provided by agencies if clients have given explicit consent for this information to be reported. In 2012–2013, the Indigenous status was not reported for 15% of clients (or about 36,800 people).[15]

Arguably, we can assume that currently prospects regarding the problem of homelessness are quite optimistic and social awareness is increasing, whether owing to general efforts or Indigenous peoples themselves. There is still room for improvement though, yet the descendants of former colonizers have to remember that their debt to these native people practically cannot be repaid. Perhaps the best way in which the people who are a direct cause of Indigenous homelessness can help the Indigenous peoples is not to interrupt?

[13] A. Leach, *The Roots of Aboriginal Homelessness in Canada*, 'Parity' 2010, Vol. 23(9), pp. 6–7.

[14] J. Thistle, J. Smylie, *Pekiwewin (Coming Home): Advancing Good Relations with Indigenous People Experiencing Homelessness*, 'Canadian Medical Association Journal' 2020, Vol. 192(10), p. 2.

[15] Australian Institute of Health and Welfare, 2014, *op. cit.*, pp. 39–40.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.5

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INDIGENOUS CLASS PROCEEDINGS IN CANADA. AN EXAMINATION OF THE CONVERGENCE OF INDIGENOUS RIGHTS AND CLASS ACTIONS IN THE CANADIAN COMMON LAW SYSTEM

Abstract

The foundations of contemporary Indigenous relations in Canada have been laid by class action lawyers who foresaw the potential for correcting, acknowledging and addressing historical wrongs. Decades of persistence by Indigenous leaders and collateral work by lawyers compelled the Canadian government, the Canadian public and its major religious and charitable institutions to face their pasts. Class and mass action lawsuits are indispensable to lawyers seeking to advance claims that recognize the systemic oppression of Indigenous people beyond individual harms. Respected class action lawyer Steven L. Cooper, KC, outlines more than 250 years of this legal history that has defined the unique status of Indigenous Canadians, from recognizing royal proclamations as they relate to land claims to settlements that have seen hundreds of thousands of Indigenous people compensated for harms inflicted in residential schools and hospitals.

KEYWORDS

Indigenous rights, class actions, Canada, Truth and Reconciliation Commission, residential schools, discrimination, compensation

SŁOWA KLUCZOWE

prawa tubylcze, pozwy grupowe, Kanada, Komisja Prawdy i Pojednania, szkoły z internatem, dyskryminacja, odszkodowanie

1. INTRODUCTION[1]

Canada[2] has long been recognized as a stable bastion of liberal democracy with a far less turbulent past than that of many other former colonial outposts of European power. As a country, both domestically and internationally, it is perceived as a kinder, gentler version of other American postcolonial states.

There is more than a grain of truth to that image of Canada; it has been taught in schools and fostered by succeeding generations of leaders and politicians. However, as is the case for myth – particularly that of national origin – the reality is somewhat harsher. It took decades of persistence by Indigenous leaders and collateral work by lawyers to cut through the mythology and compel the Canadian government, the Canadian public and its major religious and charitable institutions to face their pasts.

The leap into the current era was founded by a series of class actions and class action lawyers who foresaw the potential for correcting, or at least acknowledging and addressing, historical wrongs. These problems were of a more systemic nature than could be addressed by individual plaintiffs, Indigenous bands or organizations.

Class actions were initially commenced under an obscure rule found in the Rules of Court in each common law jurisdiction in Canada (the Province of Quebec, being of French origin, has retained the civil law system, although there are modifications reflecting the fact that it is surrounded by common-law jurisdictions in the rest of the country). Each jurisdiction allowed for a representative action where – to paraphrase – there was a common issue amongst multiple potential plaintiffs. The representative action needed to be recognized by a court of competent jurisdiction in order to proceed. Such actions can bind a group of individuals who are not retained by the lawyer advancing the case and as such care is exercised to ensure the action is well considered.

[1] This paper derives from a remote presentation given by the writer in Warsaw in September 2020. It is not a paper of academic value but rather represents a very general introduction and overview.

[2] The name originates from one of the very first misunderstandings between the Indigenous population of North America and European colonialists. It is surmised that the name derives from the local Indigenous word for ‘village’ given when asked ‘what do you call this place?’ by newly arrived sailors.

This paper intends to address the intersection between Indigenous law and class actions. The origin of the former, of course, predates the explorations of Columbus in 1492 while the latter is a much more recent legislative and judicial creation. The contents are intended to be more descriptive than academic and a mere introduction to the topic.

2. ORIGINS

Over the last thirty years all the provinces of Canada (but none of the three territories) have adopted legislation under the heading Class Proceedings Act, more commonly referred to as class actions. The legislation in each common law jurisdiction is similar, although there are important differences that go beyond the purview of this paper.

When most people think of class actions, images of nattily dressed lawyers on both sides of the aisle arguing technical, financial or product information are conjured up. Often the class actions are of little interest to even those in the putative class. The principal goal of many of the class actions is to punish companies and high-level executives who, it is alleged, are engaged in nefarious or negligent activities. The public reads about price fixing schemes, faulty products or overcharging.[3] Such claims usually result in little in the way of damages or compensation to those directly affected. In many ways, the public image of a class action is a matter which benefits few other than the lawyers involved. Lost on the public and even many in the profession is the social benefit that results from the mere prospect of being a defendant in a class action. This form of sociolegal behaviour modification is one of the oft stated goals of such litigation.

Class actions involving the Indigenous population in Canada usually involve, or at least initially involved, smaller law firms who were doing other work for the Indigenous client base. Many of us, the writer included, teamed up with a developing group of purely class action lawyers in order to combine front-line Indigenous sensitive expertise with the boutique specialized field of class actions. The latter were often primarily involved in financial or product liability cases.

Unlike financial or product liability class actions, which usually engage well-understood, carefully judicially considered concepts of liability, damages and process, Indigenous rights cases developed out of a judicial void. Before 1980, most cases decided by our highest court tended to reflect colonial thinking: 'Is an Eskimo an Indian?' Yes, said the court.[4] By the mid-1980s, a series of cases

[3] One such recent example of the latter is a case involving a mobile phone company in the Northwest Territories that was charging its customers $1 per month for 911 emergency service calls. The problem is no such service existed in that jurisdiction.

[4] *Reference Re Eskimos*, 1939 CanLII 22.

made their way to the Supreme Court of Canada that fundamentally changed the relationship between the First Peoples and colonial powers. Coincidentally, class actions were coming into their own as a legal hammer. It was a courtship (if you excuse the pun) of two judicial revolutions that opened the door to widespread judicial consideration of a litany of unresolved Indigenous issues. Only twenty years before, a potential plaintiff had been prohibited from leaving the reserve or hiring a lawyer. Oh, how times had changed.

3. THE ROYAL PROCLAMATION OF 1763

Before the historic decisions by the Supreme Court of Canada in *R. v Guerin*[5] and *R. v Sparrow*[6], the idea that Indigenous people had a separate constitutional existence with attendant rights was inconceivable to the judiciary, let alone mainstream Canada. Long forgotten was the Royal Proclamation of 1763 issued by then sovereign King George III recognizing the special relationship between His Majesty and the First Peoples of North America. At the time, pre-revolutionary British North America included the eastern side of what is now the United States. While the revolution which commenced in 1776 disconnected that relationship, it remained and indeed remains intact in what is left of British North America.

For roughly the last 150 years, co-existing with the Royal Proclamation were a series of treaties initially covering relatively small areas of eastern Canada that ultimately resulted in what are now referred to as the Numbered Treaties (1 through 11). These treaties[7] purported to resolve issues between the colonial power and the Indigenous peoples across western and northern Canada. When congregated, these treaties represent most of what the world now knows as Canada.

When the sale of land intended to be developed into a golf course was arranged through the federal government from an Indigenous band to a private investor, the local First Nations band started its own revolution. The band was fed false information and given promises that no one ever intended to keep as the basis for surrendering their land to the federal government to be then turned over or sold to an elite private golf course then in development. The band challenged the transfer all the way to the Supreme Court of Canada.[8] The Royal Proclamation was trot-

[5] *R. v Guerin*, 1982 CanLII 2971 (FCA).

[6] *R. v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075.

[7] Numbered Treaties 1 to 11 are a series of historic post-Confederation Treaties that were made in rapid succession over a short period of time from 1871 to 1921 between First Nations and the Crown (Canada). The treaties were used as political tools to secure alliances and to ensure that both parties could achieve the goals they had set out for their peoples, both at the time of treaty-making and into the future.

[8] *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335.

ted out for the first time in over 200 years with both sides arguing its impact on the transfer. Lawyers for Canada insisted that the transfer was done according to the proper surrender process which had been developed subsequent to the Royal Proclamation while lawyers for the band retorted that the surrender had been founded on fraud.

To the surprise of almost everyone, and with only passing reference to the Royal Proclamation, the Court found that the rights to the land were not premised on any treaty[9] or proclamation but rather on a unique interest in land as long-time first occupiers. A *sui generis* right and interest predated the journeys of Columbus and his confrères and that of the numerous colonially authorized traders and farmers. The band was awarded $10 million in damages. More important than the money was the recognition for the first time in colonial law that the Indigenous population of North America need not find the rights in its own land in any colonial pronouncement or statute.

4. DEVELOPMENT AND EXPANSION

A number of results from this and subsequent related decisions of the Supreme Court of Canada and the lower courts have helped fill in the constitutional map. For the first time, Indigenous peoples were recognized as distinct in their connections to the land. People once considered lesser citizens, who only several decades before had not been permitted to leave land reserved for them by the colonial government nor even to hire a lawyer without the approval of the Indian agent, could now pursue long-delayed interests.[10]

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[9] '"[T]reaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;' Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties.

[10] The Rules of Supreme Court of the Northwest Territories, NWT Reg (Nu) 010-96, Judicature Act, Official Consolidation of the Rules of the Supreme Court of the Northwest Territories, C.R.Nu., R-010-96, Part 24: Consolidation of Actions, Order respecting actions, examinations for discovery:

318. (1) Where there are two or more actions or proceedings that have a common question of law or fact or arise out of the same transaction or series of transactions or where, for any other reason, it is desirable to make an order under this rule, the Court may order

(a) the actions or proceedings be consolidated or be tried at the same time or one immediately after another;

or

(b) any of the actions or proceedings to be stayed until after the determination of any other of them.

At the time that the early Indigenous constitutional cases were considered by the courts, class actions were still in their infancy and each case stood on its own representing a limited number of plaintiffs. There was no easy method by which lawyers could purport to represent a large group of individuals who were impacted by decisions of a government that acted well beyond its lawful authority. Lawyers and potential plaintiffs had not yet found each other. Many potential plaintiffs were still in or had barely survived the residential school system which (as described below) was designed to ensure social compliance with colonial imperatives.

The marriage of Indigenous rights and class actions developed slowly into a torrent beginning in the late 1980s. As lawyers became more confident in their ability to make their cases against the federal government and large, often powerful, institutions such as the Catholic Church, more rights were pursued, more damages were negotiated and more historical wrongs were written into the history books.

Beginning in the early 1990s isolated groups of lawyers were being contacted by individuals and, occasionally, organizations representing Indigenous people about a system that had been in place for over 100 years. Individual cases were making their way through the judicial system, finally reaching the Supreme Court of Canada in 2005.[11] This system, known as the residential school system, had been a Canadian adaptation of a similar program already operating in the United States, called the industrial school system. While the methodologies and management were somewhat different, the goal for each system was the same: the utter destruction of the Indigenous people as a cohesive non-European collective. While often called assimilation, it was, by any description, a form of social genocide. The intent, despite many critics' suggestions otherwise, was not to kill the Indian *per se* but rather to 'kill the Indian in the child', as one of the early promoters once described the program. By killing the Indian in the child, many in government felt that the Indigenous population could be and should be assimilated into, not made part of, the European majority. The intent was to Europeanize and Christianize entire Indigenous populations wherever they may be found. Their partners in all of this were the churches, the largest being the Roman Catholic Church in Canada at the time.

5. RESIDENTIAL SCHOOL CASES

The Roman Catholic Church, and to a lesser extent the Anglican Church, had made great strides in evangelizing the Indigenous population. Smaller churches,

[11] *Blackwater v Plint*, 2005 SCC 58 (CanLII), [2005] 3 SCR 3.

such as the Presbyterian Church, the United Church and even several small outposts of the Moravian Church, under the guise of 'civilizing the savages' lauded their European bases. Using the medium of education without the intent of truly educating the children of the First Nations, Inuit and Métis of Canada, the churches were responsible for indoctrinating the children, and through them their families, into their particular brand of Christianity. Had that been the only impact, it would have been bad enough. Had the other impacts been unintended consequences, it would have been worse. The reality was that the entire system resulted in the most horrific of abuses. The result was not integration but near social disintegration.

Most of these children were forcibly removed from their homes and communities. In some cases where the schools and residences were located in Indigenous communities that meant children were kept away from their families, their culture and their societies notwithstanding that they were in the midst thereof. Not every child was moved away physically, but all were completely disconnected from their families.

Through a combination of religious and overt expressions of power and dominance, and by the abject failure to ensure proper supervision or even the basic qualification of the people who maintained absolute control over the children, easily 20% of the attendees at the residential schools were sexually abused. Virtually all were abused in some other fashion, whether it was physical, psychological or otherwise. Some children were subjected to medical experiments reminiscent of World War II. Others were disciplined in ways that parents, even of the day, would not have recognized as anything other than abuse. Many of the children were malnourished. Through it all, the children were admonished to speak nothing of the abuse and deprivation.

Volumes have been written on the history and impact of the residential school system and it is beyond the purview of this paper to go into more detail other than to note that it was not only the generation of attendees affected, the impact was intergenerational.

Since then, over 100,000 former residential school students have applied for and received compensation ranging from $10,000 to $500,000, depending on their individual circumstances. More important than the money, most would say, was the establishment of the Truth and Reconciliation Commission, which after years of deliberations and testimony prepared a report that contains society modifying recommendations. Amongst the most prominent and important of those recommendations was that the federal government resolve ongoing and pending litigation involving Indigenous matters.[12] This report did make a difference and although the federal government continues to resist many of the class actions, most – if not all – are settled eventually.

[12] Truth and Reconciliation Commission of Canada: Calls to Action, 2015, Nos 26 and 29.

Those of us class action lawyers who had been pursuing class claims since the 1990s and who had coalesced into what was called the Baxter National Consortium, recognized the power of the class action. At the time when the residential school settlement was signed off by more than 40 lawyers in 2005, there were more than 15,000 claims against the government. In the end, more than 100,000 under the settlement were processed. But for the class actions resulting in this settlement, most claims would have died with the former students.

Subsequent actions all took the form of class actions, including my own in the Province of Newfoundland and Labrador Residential School claim. That claim was eventually settled in favour of over 1,000 survivors of that residential school system. A separate 'Day School' claim resolved most recently involved a further estimated 80,000 survivors.[13]

The class action process continues to be used in related claims, including two claims against the national police force, the Royal Canadian Mounted Police, a nationwide claim against the federal government involving the Indian hospitals system, and class actions in various provinces dealing with forced sterilization of Indigenous women.

6. MASS ACTIONS

An adjunct to the class action is the mass action approach. A mass action is a modification of conventional litigation in that it involves multiple plaintiffs (in my cases as many as 300 plaintiffs involving one or two defendants). We have commenced such actions involving medical experimentation, in which skin grafts were forcibly and without consent removed and grafted to involuntary Inuit subjects. The manifestation of this abuse involved the extraction of small pieces of skin from one person and the grafting of the sample onto another individual and vice versa.

Other examples of mass actions in which I have been involved include relocation cases. The first such claim and settlement was with a group called the High Arctic Exiles. These were Inuit families from northern Quebec who were moved to very remote northern Islands for no other purpose than to establish Canadian sovereignty in an ongoing dispute with Norway and Denmark over ownership of the High Arctic.[14]

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[13] 'Day School' survivors were distinguished from 'Residential School' survivors by the fact that they went home after school as opposed to living in a school residence.

[14] It is not without significance that several northern, now Canadian, islands have very Norwegian names, two of them memorializing the support of two prominent Scandinavian brewers: Amund and Ellef Ringnes. Hans Island, between Greenland and Canada is 'invaded'

Grise Fiord and Resolute Bay, Nunavut, are the two most northerly communities in North America and were peopled by the federal government by forcing two groups of Inuit to move thousands of miles beyond their traditional territory. They were lured with hunting opportunities and a promise to return home at their request. Both statements were lies and the mass action resulted in the first relocation resolution in 1996. I became involved in subsequent relocation claims about ten years later. My clients, the Ahiarmiut,[15] were identified by 'Life' magazine in 1956 as one of the two most primitive tribes left on the planet. This was a ridiculous claim at the time, with contrived photographs provided by a 'Life' photographer who dropped in for a few days. The group was also documented by a well-known Canadian author, Farley Mowat, in his works *People of the Deer*[16] and *The Desperate People*[17].

Their trials and tribulations were well documented and analysed for decades. The Government was slow to acknowledge and even slower to settle their claim. The claim itself revolved around five forced relocations of the group numbering roughly 100 any particular time. The first relocation resulted in the starvation and death of some Ahiarmiut as part of a plan that was later identified to be an attempt to turn them into commercial fishermen. As part of this relocation, the group was placed on an island in the middle of a lake several hundred miles south of their traditional territory. They were left without support, supervision or supplies. After waiting months for the lake to freeze over, they managed to make their way back to their traditional territory only to be moved multiple times thereafter.

I commenced the action as a form of mass action whereby the group was represented as the Ahiarmiut Relocation Society. After ten years of mixed litigation and negotiation, the federal government agreed to pay a $5 million settlement to be distributed between the relocatees and their offspring.

Currently, I have four more relocation cases in the litigation pipeline. The Government of Canada paid no heed to the rights and interests of the various Indigenous groups in the northern half of Canada, moving them around like pawns in a chess game. Sometimes the Indigenous population was moved for the administrative convenience of the federal government, but more often than not for matters of national interest, particularly sovereignty and defence. Several relocation groups were moved to locations that were considered critical for the defence of Northern Canada from the enemy of the day.[18] They would provide knowledgeable 'feet on the ground' to identify enemy incursions. All well and

periodically by the Danish or Canadian Military to establish national ownership. A bottle of alcohol and a flag is left by each invader.

[15] 'The Far Away Dwellers', referring to their unique position inland along the tree line and away from salt water. They were referred to at the time as 'Human Flagpoles'.

[16] F. Mowat, *People of the Deer*, February 1952.

[17] F. Mowat, *The Desperate People*, June 1957.

[18] The Russians, Germans, Chinese, Norwegians, Americans or Danes.

good until one considers that nobody told them, and nobody thought their consent to perform was relevant. It was conscription to serve the national interest under the illusion of serving their interests.

The impact of the relocations remains to this day with many of the relocatees considered lesser citizens of the small communities into which they were injected. A yet unresolved issue is the fact that the Indigenous population was transient until the 1950s and 1960s when they were corralled into communities where there was no work and where it was much more difficult to supply the family with food and other needs. The most important survival technique of the Inuit over the years in the harsh environment was to be in transient small groups and not in permanent structures congregated in what were sometimes very poor hunting and fishing areas. Concentrating them in urbanized environments reduced accessible hunting areas. More people and less land meant that hunting became harder and even competitive. Slowly, the Inuit were forced to give up hunting and fishing as the primary means of survival in favour the colonial preference for the wage economy. The wage economy ensured that the relocated population had no choice but to stay where they were.

7. MASS ACTIONS VERSUS CLASS ACTIONS

The question of class actions versus mass actions and conventional litigation is one that is often present in the minds of litigators, whatever the nature of the claim. It is important to understand the differences and respective advantages and disadvantages of each form.

The presumption in our Rules of Court is that every claim will proceed as conventional litigation with one or a few plaintiffs and one or a few defendants. The Rules of Court are designed to reflect that presumption. Mass actions proceed as conventional litigation but with the added complexity of having to seek instructions from multiple plaintiffs which can sometimes be inconsistent and can even give rise to conflicts of interest. In mass actions, as in conventional litigation, each client has a right to be represented without conflict. In conventional litigation it is not usually a difficult matter to obtain clear instructions, give clear advice and avoid conflicts. The more plaintiffs that are added, the more complex communications, advice and instructions become. It is rare to have two plaintiffs, let alone 50 plaintiffs, with identical interests and issues. In some ways, despite the complexity of class actions, mass actions can be more difficult to manage because there is no modification of responsibilities or plaintiff relations as opposed to conventional litigation.

8. CLASS ACTIONS

Class actions are inherently far more complex and expensive than most other litigation matters and are only appropriate in certain circumstances and by the relevant class proceedings legislation. Upon commencement and filing, a class action is not active litigation in the ordinary sense. It is *proposed* and ultimately approved by a court through a process called 'certification'. Until certification, in most cases, a defendant is not even required to file a defence. The defendant has multiple kicks at the litigation cat in that it can attempt to foreclose upon certification by establishing that the claim does not meet the threshold to proceed.

In contrast to class actions, mass actions and conventional litigation need no certification or approval of a court to proceed. There are mechanisms by which a defendant can short-circuit the litigation including summary applications to limit the claim or eliminate it entirely at an early stage. In most instances, the judge recognizes the general right for one's day in court and will rarely make pre-trial decisions which adversely affect the plaintiff's right to proceed.

In a class action, the court is asked to determine whether there is *inter alia* sufficient commonality between the proposed class or classes of claimants and the issues attached thereto. Generally speaking, there are five requirements for an action to be certified as a class action:

- pleadings must disclose a reasonable cause of action. There is an ever-expanding compendium of possible actions, including those that the court considers novel. In fact, many class actions involving Indigenous class members include pleadings with untested, unclear or truly novel legal issues;
- there must be a class capable of clear definition. It is never the case that differences between class members are determinative. The class boundaries can be fuzzy but must exist;
- there must be issues of law or fact sufficiently common to all class members;
- the class action must be the preferable procedure to advance the litigation. The court will want to know that individual or mass litigation cannot or should not be the preferred method in any particular claim. This includes the nature of the claims (for example, aggregated minimal dollar value claims) as well as litigative and judicial economy; and
- the representative plaintiff must adequately represent the interests of the class. In many claims there is more than one representative plaintiff and/or more than one class or subclass of putative class members.

If the proposed action is certified, then litigation proceeds in the ordinary course, but in a somewhat modified form. The class members are not clients. Only the class itself is the client. The 'class' is a legal fiction in litigation much as

a ‘company’ is a legal fiction in corporate law – a mechanism, not an organism but treated in the same fashion. The class as a client is a chimera, part human, part fiction, but one entity. This is a difficult distinction for most clients and even many lawyers to understand. The client class is represented by the representative plaintiffs and even their involvement is somewhat cursory for a majority of the action.

The representative plaintiff agrees to follow the advice and direction of the class action lawyers and can be replaced in a variety of circumstances. This is a substantially different process than other forms of litigation in which there is a readily identifiable and unchanging client; this format actually works well as a representative plaintiff becomes the sounding board for many ideas and opinions and, particularly, potential settlement proposals. It ensures that the autonomy of the class action lawyers is restricted by the involvement of often very sophisticated representative plaintiffs. It also gives the court some comfort that there is input by others, rather than just the class action lawyers.

9. NON-COMPENSATORY BENEFITS OF CLASS AND MASS ACTIONS

9.1. APOLOGIES

The advantage of class actions includes the ability, particularly within the settlement process, to ensure that the claim is about more than money. In the Indian Residential Schools Settlement Agreement of 2005,[19] the Truth and Reconciliation Commission was the most important non-compensatory component of the settlement. The Truth and Reconciliation Commission, after years of deliberation, made 94 recommendations called Calls to Action. The impact still resonate today. Amongst the calls to action were 26 and 29, calling on provincial, territorial and federal governments to amend legislation to allow claims that were previously barred by limitations, and to work collaboratively and expeditiously with Indigenous people to resolve outstanding litigation.

Apologies are often from senior members of government and/or institutions. In several instances, this included the Prime Minister of Canada. Apologies are an essential component in many Indigenous-based claims because of the historical nature of the injustices. Money alone does not represent reconciliation. Reconciliation is made up of both an acknowledgement of errors and compensation in both monetary and non-monetary forms. There can be no reconciliation in any

[19] The agreement in principle concluded in November 2005, the formal agreement signed on 8 May 2006.

instance in which an apology has not been rendered. Ordering an apology is not within the court's jurisdiction. Apologies arise only in settlement agreements.

9.2. PUBLIC ACKNOWLEDGMENT

The reason many of the abuses and institutional injustices in Canada have gone unknown and unreported is that on an individual litigation basis there is invariably a non-disclosure and confidentiality agreement, which is a usual part of the settlement agreement. There were certainly settlements in the most extreme cases involving residential school abuses before 2005. In each case the clients signed documents that obliged them to remain silent about the accusations made and the settlement achieved under the spectre of having to repay the settlement funds to the institution or government with whom they settled. This was an effective method to buy the client's silence and I have always described it as such to each client.

This leads to another important benefit of a class action in that there is no individual plaintiff to sign a non-disclosure agreement. The very nature of class actions is that they are conceived as a public process. Class action certification leads to a massive public notice process. It is such a sufficiently detailed and comprehensive step that companies specialize in doing nothing other than providing notice of class actions.

The notice feature of class actions has obvious benefits. First, those who felt that they were alone, were intimidated into not speaking about their individual circumstances or who are unaware of how to pursue their claims are far more likely to become aware of the process which can resolve their complaints. Secondly, the defendant can no longer hide the circumstances which resulted in the claim. This can be a time for an institutional reckoning which is, after all, one reason for the existence of class actions.

9.3. SOCIETAL CHANGE

School curriculums are being rewritten as a result of settlements which made public dark chapters of Canadian history. This is not the intent, but it is certainly the common effect of class actions involving historical injustices, particularly those affecting the Indigenous population. Students in grade schools and post-secondary institutions now take obligatory courses outlining a more realistic view of Canadian history. No longer are students in Canadian institutions taught only about the colonial history of Canada as was the situation prior to the Indian Residential Schools Settlement Agreement. Rather curriculums now teach about the civilizations that existed before 1492 and the conflict between the First Peoples of North America and the invaders who attended North America only in the

last 500 years or so. This correction is still nascent but as little as ten years ago it was virtually non-existent. Up to this point, history taught in North American schools started in 1492 with a sentence or two suggesting that there may have been people that existed on the continent before the brave explorers came across the Atlantic Ocean.

9.4. ACCESS TO JUSTICE

One of the unheralded benefits of the class action process over other forms of litigation is access to justice, particularly for people who have been socially ostracized, marginalized or who, for any number of reasons, do not see the justice system as their system.

Class actions give social, even cultural permission for people to come forward with claims that have often remained buried for decades.[20] Residential school and relocation class and mass actions granted social permission for Inuit to break the cultural taboo against speaking of hard times. Had the class action not been pursued, most of the abuse and resulting claims would never have been disclosed. When a claimant under the settlement compensation process came forward, it was not uncommon for them to go to extraordinary efforts to hide the facts from their family. On more than one file, my staff had to project themselves as health practitioners when contacting the client to ensure that even the fact the lawyers were involved was not known to the family or the community. Many claimants had their belongings moved to locations far from home to limit the chances of a privacy breach.

10. LITIGATION PROCESS

Procedurally, class actions have a predictable path. A proposed class action is filed in the appropriate court depending on a variety of factors. The only national court that exists in Canada is the Federal Court and it is restricted to actions involving only the federal government and its agencies, such as the Royal Canadian Mounted Police. National class actions can be commenced in any provincial jurisdiction because of the existence of individual provincial class proceedings

[20] In one personal recollection, a 95-year-old Inuk lady explained to me that the Inuit traditionally had a very hard life. One cultural adaptation to reflect that fact was not discussing past hardships. It is culturally ingrained in most Inuit – particularly those of the first generation to transition to current society – to bury and never disclose dark chapters in their lives.

acts.[21] The same cannot be said about class actions/class representative actions in the territories because they have not progressed past the representative action stage. Often, competing claims will be filed in multiple jurisdictions across the country, each purporting to represent a national class and therein lie many conflicts of law applications between various courts. There is an increasing tendency towards applications to preclude second-in-time applications for certification on the same or similar actions referred to as *Heyder*[22] applications. Ultimately, class action lawyers anticipate the legislation will be updated and changed across the southern jurisdictions in Canada to decrease firms' competing cross-jurisdictional claims.

When multiple overlapping claims are commenced, there will be carriage motions. Often derisively referred to as a 'beauty contest', judges are given the unenviable task (by their own description) of choosing between very similar law firms and claims. Again, there is a movement afoot to find a better way to resolve competing claims between law firms.

Upon certification and the resulting notice program to potential class members, the matter moves along the litigation path with initial examinations of key representatives and experts and, if necessary, a trial. Most such claims resolve early after certification as settlement is discussed. Any resulting settlement is made the subject of an approval hearing before the supervising judge. The judge can accept, reject or modify the settlement proposal, always with the interests of the class at heart. Once approved, the settlement proposal is the subject of a further notice program, often even more extensive than the first notice after certification. The importance of the notice at this stage cannot be overstated because class members are considered bound by the result if they fail to opt out.[23] This applies even to those class members who are not made aware of the settlement despite the notice program. The notice program itself is part of the approval that is sought from the supervising judge.

11. LOOKING FORWARD

Class actions are one of the options in the litigator's toolbox, particularly in the case of Indigenous rights issues which often involve large groups of individ-

[21] Class Proceedings Act, SA 2003, c C-16.5; Class Proceedings Act, 1992, SO 1992, c. 6; Class Proceedings Act, RSBC c. 50; Class Actions Act, 2001, SS 2002, 2001, c. 21, 2015, c. 4; Class Proceedings Act, CCSM, c C130; Class Proceedings Act, SNB 2006, c C-5.15; Class Actions Act, SNL 2001, c C-18.1; Class Proceedings Act, SNS 2007, c. 28.

[22] *Heyder v Canada (Attorney General)*, 2018 FC 432 (CanLII).

[23] A few Provinces have 'opt-in' provisions for extra-provincial class members, but most have adopted 'opt-out' as the standard.

uals many of whom may not even be aware of the potential for a claim. Class actions have resolved literally hundreds of thousands of cases in Canada that otherwise would never have been pursued or would have been pursued individually with limited and/or unknown results. Class actions are giving the Indigenous population the power of the collective without substantially giving up individual rights. It is often the case that non-viable claims once congregated are aggregated within the class action. Limitations arguments do not change in class actions but often the dominant role over parts of a constitutional claim, or sexual abuse claim for example, allow for the claims to proceed. Eighty percent of the claims in the residential schools settlement may be lost solely on the basis of the passage of time or considered not economically viable.

Finally, one can never underestimate the power of the public in ensuring that historical injustices are resolved. Politicians are keenly aware of the effect of appearing to aggressively defend against claims by historically subjugated populations. Politicians are often justifiably concerned about the impact of a decision from the court, particularly at the Supreme Court of Canada level, which can result in advances in the law creating claims that previously were not known to law. *Regina v Guerin* taught governments and large institutions to be wary for what they wish for. A fairly minor claim resulted in decades of claims involving tens of billions of settlement dollars. Had they simply paid out the damages early on to the band, maybe (just maybe) the subsequent claims would not have been commenced. An adverse finding can have an impact well beyond the individual case however large it may be, and it is often better economically, politically and otherwise to settle a claim that has some merit than to take a chance on a judicial finding. Settlements are not binding, but decisions of the court in the common law system are and become precedents.

Class actions are indispensable to lawyers representing Indigenous claimants. Without them, our national history would remain in the service of the colonizer. King George III would, no doubt, be surprised at how his proclamation was interpreted in the twentieth and twenty-first centuries. I am not sure he would be pleased.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.6

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A SHIELD OR A SWORD? MIGRATION LAW AND POLICY AND MODERN SLAVERY IN AUSTRALIA

Abstract

How might migration legislation and policies contribute to modern enslavement of migrants in Australia? Migration law and policy are a shield in the sense that they have been used and have the potential to be used to shield or protect trafficked individuals and those subject to modern slavery. Nevertheless, the state could be complicit in modern slavery through its migration law and policies exemplified by English language requirements for visas and for entering into certain professions. By placing the English language barrier between migrants and their economic and professional aspirations in obvious cases when a demand for proof of English language proficiency must not be made in the first place, the Australian Government and institutions create the environment conducive for excluding migrants from the professions and exposing them to economic abuse and exploitation. The stated basis of the English language requirements for Australian visas is that English language 'is critical to getting a job' and safely practising a profession and participating in Australian society. Yet migrants from non-exempt countries are required to sit for an English test when they apply for permanent resident visas (such as Subclass 186) and temporary visas (such as Subclass 485), even when they are present and already employed in Australia. Educational qualifications in English awarded by Australian and non-Australian tertiary educational institutions that satisfy the Australian study and qualification requirements are not the acceptable proof of competency in the English language. The effect of non-recognition of educational qualifications in English as proof of the English language ability is that visa applicants from non-exempt countries, even

those present and working in Australia and/or who have completed a course of study in Australia, have to sit for an English language test. The content of this test bears no connection whatsoever with the English language used in practice. The test has an expiry date thereby tying migrants' English language ability to the test expiry date, suggesting that once the test expires, so does their competency in English. Failing one component of the test requires resitting all the four components. Whereas an Australian educational qualification in English is required for admission to the legal, medical and nursing professions, the English language competence of migrants from non-exempt countries who hold the qualification is extracted from this qualification. Therefore, migrants cannot rely on the qualification as prove of their competency in English, even though the practice boards accept this same qualification as meeting the standards for admission to practise. The evidence disallowed or required to prove the English language capability both for Australian visas and to enter into the professions thus belies the stated purposes of the English language requirements. English is a global language that is spoken by different nationalities in different parts of the world. Therefore, taking a blanket approach that proficient speakers of English originate in the nations that are exempt from the English language requirements ignores the reality of English language usage. In these circumstances, the English language would seem a disguised legal and policy tool for gatekeeping, exclusion and nationality-based discrimination. The deliberate denial of the English language abilities of certain migrants and the stipulation of absurd and inexplicable evidentiary requirements as proof of the English language competency deprive such migrants of opportunity to enter into professions of their choice, ridicule and expose them to exploitation and modern slavery contrary to Australian values and legislation on equality and fair play.

KEYWORDS

Australia, English, English language requirements, migration, modern slavery, slavery

SŁOWA KLUCZOWE

Australia, język angielski, wymogi języka angielskiego, migracja, współczesne niewolnictwo, niewolnictwo

1. INTRODUCTION[†]

In their seminal paper, *The Weaponisation of Language: English Proficiency, Citizenship and the Politics of Belonging in Australia*, Rachel Burke, Nisha Thapliyal and Sally Baker argue powerfully that:[1]

> Language has long been used as a gate-keeping device in Australia's colonial and postcolonial history. The use of language to select 'worthy' immigrants was evident in the so-called 'White Australia Policy', which was a suite of legislation adopted in 1901 to ensure migrant intake contributed to the imagined British 'national identity'. Under this policy, any potential entrant to Australia could be required to undertake a dictation test, administered at the discretion of immigration officers, in any European language. While the policy governing the implementation of the dictation test made no reference to 'race', it functioned as a means of exclusion for those deemed 'unsuitable' for migration, including for reasons of ethnicity. Proponents, including trade unionists and ministers from across the political spectrum, defended the dictation test and broader immigration platform as a means of maintaining 'national identity', economic growth, and social harmony.

The authors also state that English language proficiency 'is being used to "weaponise" Australian citizenship discourse against more pluralistic and participatory conceptions of belonging and citizenship.'[2] In this paper, I argue that the English language requirements for visas and for entering into certain professions in Australia applicable solely to non-citizens of certain nationalities not only play the role of gate-keeping (excluding or including, depending on the nationality of the applicant involved), but these requirements also mask inequality of treatment, exploitation, nationality-based discrimination and modern slavery. I argue also that these English language requirements contravene or are inconsistent with the Racial Discrimination Act 1975 (No. 52, Cth) and Australian values of equality of treatment and fair play.

The Commonwealth of Australia's commitment to address inequality and modern slavery is without doubt, at least in terms of legislation and policy. An example is the National Action Plan to Combat Human Trafficking and Slavery 2015–19 (NAPCHTS).[3] The NAPCHTS 'recognises the dignity and worth of each person, and the obligation' Australia has 'to work against those who seek to ben-

[†] I would like to express my sincere gratitude to Dr Rachel Burke of the University of Newcastle who generously reviewed and gave me an opinion on an earlier draft of this paper. I very much appreciate her generosity and expert opinion.

[1] R. Burke, N. Thapliyal, S. Baker, *The Weaponisation of Language: English Proficiency, Citizenship and the Politics of Belonging in Australia*, 'Journal of Critical Thought and Praxis' 2018, Vol. 7(1), p. 87.

[2] *Ibid*., p. 85.

[3] National Action Plan to Combat Human Trafficking and Slavery 2015–19, Commonwealth of Australia 2014.

efit by restricting another's freedom."[4] It was a 'strategic framework for Australia's response to human trafficking and slavery.'[5] The NAPCHTS was a successor plan to numerous previous action plans to eradicate trafficking in persons.[6] This commitment is also reflected in the enactment of the Modern Slavery Act 2018 (No. 153, Cth). According to its long title, the Act requires defined entities 'to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes'.

Australia's commitment to non-discrimination and equality of treatment regardless of nationality and race is also reflected in the Racial Discrimination Act 1975, Australian Human Rights Commission Act 1986 and international human rights conventions to which Australia is a party.[7] The Racial Discrimination Act makes racial discrimination unlawful stating in section 9(1) and (1A) respectively that:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
> Where:
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
> (b) the other person does not or cannot comply with the term, condition or requirement; and

[4] *Ibid*., p. 1, para. 1.2.

[5] *Ibid*.

[6] Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2015–30 June 2016*, Commonwealth of Australia 2016; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2014–30 June 2015*, Commonwealth of Australia 2015; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2013–30 June 2014,* Commonwealth of Australia 2014; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2012–30 June 2013,* Commonwealth of Australia 2014; Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response, 1 July 2010–30 June 2011*, Commonwealth of Australia 2011; Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response, 1 May 2009–30 June 2010,* Commonwealth of Australia 2010; and Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response, January 2004–April 2009*, Commonwealth of Australia 2009.

[7] For example, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

> (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;
> the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

By section 9(2) of the Racial Discrimination Act, the rights against which people should not be discriminated based on race, colour, descent or national or ethnic origin include those contained in International Convention on the Elimination of All Forms of Racial Discrimination, such as: (i) political rights, in particular the right 'to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service'[8]; and (ii) economic, social and cultural rights, in particular, the 'rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment'[9] and the 'right to public health, medical care, social security and social services'[10]. This essentially means that the Commonwealth of Australia has obligations under domestic law and international law to promote equal access to public service and non-discrimination.

The Racial Discrimination Act also strongly stands for equality of treatment before the law in Australia. It is stipulated in section 10(1):

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

Thus, in the event of conflict between a provision of the Racial Discrimination Act and another enactment, whether primary or delegated legislation, the provisions of the Act on equality of treatment and non-discrimination shall prevail. By section 9(1) of the Act, a distinction, exclusion, restriction or preference based on race or nationality is prohibited if the purpose or effect of the distinction, exclusion, restriction or preference is the nullification or impairment of the recognition, enjoyment or exercise of a human right or fundamental freedom. Thus national, racial or ethnic background alone and presumed language capacity or

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[8] International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly Resolution 2106 (XX), adopted on 21 December 1965, Article 5(c).

[9] *Ibid*., Article 5(e)(i).

[10] *Ibid*., Article 5(e)(iv).

incapacity based on that national, racial or ethnic background are not sufficient in and of themselves to justify the distinction, exclusion, restriction or preference, when doing so would result in a denial of fundamental human rights and freedoms, including the right to work and the right to public service. By section 9(1A) of the Racial Discrimination Act, conditions and requirements imposed on persons of one race but not on another: must be reasonable having regard to 'the circumstances of the case', which would include the purpose of the condition or requirement; must be possible for such persons to comply with; and must not be designed to or have the effect of nullifying or impairing the recognition, enjoyment or exercise of a fundamental human right.

The preceding analysis of policy instruments and legislation supports the proposition stated earlier that there is a commitment to equality of treatment and combating modern slavery and human trafficking in Australia. In this paper, I explore the extent to which Australian migration law and employment requirements promote racism, inequality and modern slavery. Migration law and visas can be used to prevent and address the problems of inequality and modern slavery. However, it is possible that visa requirements can create conditions that put migrants at the risk of exploitation, abuse and unequal treatment by both the Commonwealth and non-Commonwealth entities. I address this issue with specific reference to temporary and permanent resident visas and corresponding English language requirements for the grant of visas and English language requirements for entry into certain professions in Australia.

Migration law can be a shield in the sense that it can be used to protect migrants who might be subject to unequal treatment and modern slavery in Australia or their home countries. At the same time, migration law could justify the maintenance of migrants on temporary visas through which they work at the risk of exploitation, unequal treatment, and exclusion from the protection of both the state and private businesses. Thus, migration law and policy are both a shield and a sword in the sense that they can protect and promote modern slavery in Australia. The commitment of the Commonwealth of Australia is to prevent and remove modern slavery. This objective cannot be effectively achieved if aspects of the law and policy on migration allow modern slavery to flourish behind formal requirements. Given the commitment of the Commonwealth of Australia to fight modern slavery, its migration law and policy must be a shield, not a sword.

Primarily, this task is accomplished by the review, interpretation and analysis of applicable legislation, regulations, and policy documents.

2. MIGRATION LAW, VISAS AND ENTRY INTO AUSTRALIA

2.1. THE POWER TO SET VISA CRITERIA AND GRANT VISAS

Every sovereign state has the inherent right to regulate the entry of foreign citizens into its territory. This is achieved usually through migration legislation that prescribes the criteria that must be met for a person to be granted the permit to enter into the country. Unless a country enters into an international migration treaty or agreement that limits its authority on the admission of aliens or non-citizens into the country, that authority would be limited only as provided for by domestic law and/or customary international law. Thus, each country has the freedom to determine the criteria for the grant of a permit to enter the country and the conditions for the continuous holding of that visa or permit.

In Australia, the primary legislation regulating the entry of non-citizens into the country is the Migration Act 1958 (Cth). The Act is supplemented by subsidiary legislation made under it, such as the Migration Regulations 1994 (Cth). Section 4(1) provides that the 'object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.' This object is achieved by the provision in the Act 'for visas permitting non-citizens to enter or remain in Australia.'[11] Non-citizens may travel to Australia only when they hold a valid visa.[12] According to sections 31, 40 and 41 of the Migration Act, the classes of, criteria and conditions for visas may be prescribed by regulations. Pursuant to these provisions, Division 2.1 of the Migration Regulations has provisions for the classes, criteria and conditions for visas. After considering a valid application for a visa, the Minister may grant the visa if the application meets the criteria or refuse to grant the visa if the application does not satisfy the criteria.[13]

These provisions of the Migration Act and Migration Regulations are central to the power to create classes of visas and to specify the criteria for the grant of or refusal to grant a visa as well as the conditions for the holding of the visa. The prescribed criteria for the grant of a visa of a particular class are grouped into primary criteria and secondary criteria.[14] The English language requirements as a criterion for a visa, which is the subject of this paper, may source its legal legitimacy in these provisions.

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[11] Migration Act 1958 (No. 62, Cth), s. 4(2).
[12] *Ibid.*, s. 42(2).
[13] *Ibid.*, s. 65.
[14] Migration Regulations 1994 (Cth), Reg 2.03(1).

2.2. ENGLISH LANGUAGE AND VISAS IN AUSTRALIA

2.2.1. THE PURPOSE OF ENGLISH LANGUAGE REQUIREMENTS

The Honourable Alan Tudge MP, then Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs explained the purposes of the English language requirements thus in a press release in October 2020:[15]

> English is our [Australians'] national language and is critical to getting a job, fully participating in our democracy and for social cohesion. (…)
> While the ability to speak multiple languages is a great asset for an individual and for Australia, a person will struggle to fully participate in our society and democracy without basic English.

In fact, the title of the press release speaks for itself: 'New requirement to learn English *to maximise job prospects*' (emphasis added). Similarly, according to the then Department of Immigration and Border Protection:[16]

> The Department uses English language requirements to protect the integrity of Australia's visa programmes, and to ensure visa holders are able to safely participate in Australian society.
> English language requirements generally apply across the Student and Skilled visa programmes and are prescribed in the *Migration Regulations 1994*. Required evidence of English language proficiency differs across visa subclasses to reflect the different objectives of respective visa programmes. For example, a Student visa applicant's English language ability should allow them to successfully complete a course of study in Australia; whereas a Skilled visa applicant must demonstrate that their general English ability will allow them to successfully participate in the labour market.

Thus, being able to get a job and participate in the Australian labour market and society are generally the central objectives of the Australian English language requirements. However, some employed migrants and students who successfully complete a course of study in Australia are still required to sit for an English test to prove their proficiency in English just because of their nationality. The disconnect between these stated purposes of English language requirements and evidence required to prove English language proficiency, and the implication for discrimination, inequality and modern slavery are discussed in the subsequent sections.

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[15] Australian Government Department of Home Affairs, *New Requirement to Learn English to Maximise Job Prospects*, 8 October 2020, https://minister.homeaffairs.gov.au/alantudge/Pages/New-requirement-to-learn-English-to-maximise-job-prospects.aspx (accessed 07.01.2021).

[16] Australian Government Department of Immigration and Border Protection, *Review of the Implementation of Alternative English Language Proficiency Tests in the Student Visa Programme*, 2013, p. 4, https://www.homeaffairs.gov.au/reports-and-pubs/files/report-english-test.pdf (accessed 13.02.2021).

2.2.2. THE ENGLISH LANGUAGE REQUIREMENTS FOR VISAS IN AUSTRALIA

The Migration Act 1958 itself has only one provision addressing the subject of *functional* English language proficiency for visa applicants in section 5(2):

> For the purposes of this Act, a person has functional English at a particular time if: (a) the person passes a test that: (i) is approved in writing by the Minister for the purposes of this subsection; and (ii) is conducted by a person, or organisation, approved for the purposes of this subsection by the Minister by notice in the *Gazette*; or (b) the person provides the Minister with prescribed evidence of the person's English language proficiency.

Regulation 5.17 of the Migration Regulations 1994 made pursuant to and to give effect to section 5(2) of the Migration Act stipulates the following:

> For the purposes of paragraph 5(2)(b) of the Act (dealing with whether a person has functional English), the evidence referred to in each of the following paragraphs is prescribed evidence of the English language proficiency of a person: (a) evidence specified by the Minister in an instrument in writing for this paragraph; (b) evidence that: (i) the person holds an award (being a degree, a higher degree, a diploma or a trade certificate) that required at least 2 years of full-time study or training; and (ii) all instruction (including instruction received in other courses for which the person was allowed credit) for that award was conducted in English.

The scope and operative effect of these provisions of the Migration Act and the Migration Regulations, and their limits to the power of the Governor-General or the Minister responsible for immigration to make regulations on English language proficiency as a criterion for a visa have been considered elsewhere.[17] The combined effect of section 5(2) of the Migration Act and Regulation 5.17 of the Migration Regulations is that a person must have functional English and that they satisfy the functional English requirements for purposes of the Migration Act, i.e. they produce an English test[18] result with the requisite score (the test having been conducted in three years before the day the application is made) or evidence of the specified educational qualification in English, or they are citizens of and hold the passport of Canada, the Republic of Ireland, New Zealand, the United King-

[17] D. Dagbanja, *The Invisible Border Wall in Australia*, 'UCLA Journal of International Law and Foreign Affairs' 2019, Vol. 23(2), p. 221; and D. Dagbanja, *A Gamble to Take? Visas and Delegated Legislative Power on English Language in Australia*, 'Statute Law Review' 2021, Vol. 42(2), p. 156.

[18] International English Language Testing System (IELTS) for which the average band score of at least 4.5 based on the four test components is required; Test of English as a Foreign Language internet-based Test (TOEFL iBT), for which a total band score of at least 32 based on the four test components of speaking, reading, writing and listening is required; Pearson Test of English Academic (PTE Academic), for which a total band score of at least 30 based on the four test components is required; Cambridge English: Advanced (CAE), for which a total band score of at least 147 based on the four test components is required.

dom or the United States of America.[19] Both the Migration Act and the Migration Regulations do not stipulate that these requirements apply to any specific visas, suggesting they were designed to apply to all visa classes and subclasses. The Migration Regulations specify functional English in relation to visas such as Subclass 407 (Training)[20] and Subclass 462 (Work and Holiday)[21].

This is a reasonable, flexible and comprehensive regime of English language requirements because it accommodates the different situations of different visa applicants such that they may be required to produce an English test result (if they do not hold any educational qualifications in English and lack other evidence of functional English), be a citizen and hold a passport from any of the specified countries (based on the questionable assumption that everyone who holds a passport from any one of these countries has functional English), or provide evidence of educational qualifications in English. The purposes of requiring a person to prove their English language competence, namely, to be able to get a job and participate in Australian society, can effectively be served by using any of these mechanisms to prove functional English. Yet different classes and subclasses of visas come with different English language requirements without showing that the main and primary purposes of the Act are not served by the functional English language requirements.

Another type of English language requirement is *vocational* English, which is applicable to visas such as: Subclass 160 (Business Owner);[22] Subclass 161 (Senior Executive);[23] and Subclass 162 (Investor).[24] A person has *vocational* English if he/she holds a passport of a country specified above or if the person has undertaken a language test and obtained the required score within three years before the application for the visa.[25]

The third type of English language required of visa applicants depending on the visa involved is *competent* English. A person has competent English if he/she

[19] Migration Regulations 1994 – Evidence of Functional English Language Proficiency 2015 – IMMI 15/004, dated 3 December 2014, commenced 1 January 2015. Australian Government Department of Home Affairs, *English Language: Functional English*, https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/english-language/functional-english (accessed 07.01.2020).

[20] Migration Regulations 1994 (Cth), clause 407.215 of Schedule 2.

[21] *Ibid*., clause 462.215 of Schedule 2.

[22] *Ibid*., clause 160.216 of Schedule 2.

[23] *Ibid*., clause 161.215 of Schedule 2.

[24] *Ibid*., clause 162.215 of Schedule 2.

[25] *Ibid*., Reg 1.15B. The tests required are: IELTS, requiring at least 5 for each of the four test components; TOEFL iBT, requiring at least 4 for listening, 4 for reading, 14 for writing and 14 for speaking; PTE Academic, requiring at least 36 for each of the four test components; OET, requiring at least B for each of the four test components; Cambridge C1 Advanced test with at least 154 in each of the four test components. Australian Government Department of Home Affairs, *English Language: Vocational English*, https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/english-language/vocational-english (accessed 07.01.2021).

has undertaken a language test and obtained the required score or hold a passport of a specified country.[26] Competent English is required in the case of visas such as: Subclass 489 (Skilled-Regional-Provisional);[27] Subclass 491 (Skilled Work Regional-Provisional);[28] Subclass 494 (Skilled Employer Sponsored Regional);[29] Subclass 186 (Temporary Residence Transition stream);[30] Subclass 186 (Direct Entry stream);[31] and Subclass 187 (Temporary Residence Transition stream)[32].

The Migration Regulations also provide for *proficient* English and *superior* English. Both require an applicant to undertake a test.[33] There is no requirement to hold a passport from the specified countries. The difference between them is in the test score required.[34]

Three things are common to all English language requirements. Firstly, all non-citizens from countries other than Canada, Ireland, New Zealand, the United States of America and the United Kingdom must sit for an English test and produce the required score specific to the visa type and level of English language proficiency for that visa, unless an exemption applies. Secondly, citizens of these specified countries are not required to produce evidence of English language proficiency; it is sufficient that they are citizens and hold passports of these countries. Thirdly, it is a common requirement for each of the different levels of English language standard that an English test must be conducted during three years immediately before the application for the visa is made. This literally suggests that as the test expires, so does a person's English language proficiency.

This paper focuses on the Subclass 186 (Direct Entry stream) visa and Subclass 186 (Temporary Residence Transition stream) and Subclass 485 (Temporary Graduate) visas because of the unnecessarily duplicitous nature of the English

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[26] Migration Regulations 1994 (Cth), Reg 1.15C; and Migration Regulations 1994 – Specification of Language Tests, Score and Passports 2015 – IMMI 15/005, dated 3 December 2014. The test scores required are: an IELTS test score of at least 6 in each of the four test components of speaking, reading, writing and listening; or an OET test score of at least B in each of the four test components of speaking, reading, writing and listening; or a TOEFL iBT test score with at least the following scores in the four test components: 18 for speaking, 13 for reading, 21 for writing and 12 for listening; a PTE Academic test score of at least 50 in each of the four test components of speaking, reading, writing and listening.

[27] Migration Regulations 1994 (Cth), clause 489.223 of Schedule 2.

[28] *Ibid*., clause 491.215 of Schedule 2.

[29] *Ibid.,* clause 494.226 of Schedule 2.

[30] *Ibid*., clause 186.222 of Schedule 2.

[31] *Ibid*., clause 186.232 of Schedule 2.

[32] *Ibid*., clause 187.222 of Schedule 2.

[33] *Ibid*., Regs 1.15D and 1.15EA.

[34] For proficient English, an IELTS test score of at least 7 in each of the four test components of speaking, reading, writing and listening or a score of at least B in each of the four components of an OET is required. In the case of superior English, an IELTS score of at least 8 in each of the four test components of speaking, reading, writing and listening or a score of at least A in each of the four components of an OET is required. See note 26 above, Migration Regulations 1994 – IMMI 15/005, *op. cit*., paras D, E, G and H.

language requirements. As shown in the following paragraphs, English language ability is an inherent or integral part of the qualification or eligibility to be nominated to apply for the 186 or to make a direct application for the 485 visa. Nevertheless, educational qualifications or evidence of employment in Australia does not exempt applicants for these visas from the English language requirements of either sitting for an English test or producing a passport from one of the specified countries.

The 186 visa is an employer-nominated visa. An applicant for the Subclass 186 (Direct Entry stream) visa must be nominated by a person or employer who will employ the applicant and the nomination must be approved by the Minister responsible for immigration and border protection.[35] The person nominated may be a prospective employee[36] or may already be employed in Australia.[37] An assessing authority specified by the Minister in an instrument in writing may assess the applicant's 'skills as suitable for the occupation' and whether the applicant has been 'employed in the occupation for at least 3 years on a full-time basis and at the level of skill required for the occupation.'[38] It follows that the processes for assessment of an applicant for Subclass 186 (Direct Entry stream) require satisfaction of the employer, the assessing authority (if required) and the Minister that the person nominated for the visa possesses skills required for the nominated position, and these skills must necessarily include the English language ability if the nomination job is to be performed in English. In other words, by the time the person is nominated for this category of visa, the employer would have already been satisfied of the nominated person's skills and English language ability to perform the job using English. The Minister's approval of the nomination affirms that the person possesses the skills, including the English language ability appropriate for the job.

While the Subclass 186 (Direct Entry stream) visa covers persons who are either already employed or are yet to be employed, Subclass 186 (Temporary Residence Transition stream) visa is available only to persons who are already employed in Australia and are nominated by their employer for this visa. To be nominated for Subclass 186 (Temporary Residence Transition stream), the person must have been employed in Australia under a temporary skill visa, which had been the Subclass 457 (Temporary Work (Skilled)) visa until it was replaced by the Subclass 482 (Temporary Skill Shortage) visa in 2018.[39]

Although English language is an integral part of an applicant's eligibility to be employed in the first place and then subsequently nominated for either of the 186 visas, it is still a criterion common to the primary criteria for these visas that

[35] Migration Regulations 1994 (Cth), clause 186.233(1)–(3) of Schedule 2.
[36] *Ibid.*, clause 186.233(2) of Schedule 2.
[37] *Ibid.*, clause 186.234(2) of Schedule 2.
[38] *Ibid.*, clause 186.234(2)(a) and (b) of Schedule 2.
[39] *Ibid.*, clause 186.223 of Schedule 2, and Reg 5.19(5).

an applicant must be *competent in English* or be a person in the class of persons specified by the Minister in an instrument.[40] Applicants for these subclasses of visas who are not citizens and do not hold the passport of the United Kingdom, the United States, Canada, the Republic of Ireland or New Zealand can only meet the competent English language requirement by producing evidence of a test score, even when they are already employed in Australia. Their prior work experience in Australia and evidence of educational qualifications obtained in or outside Australia for which instruction was conducted in English do not meet the competent English requirements.[41] There is no exemption from the English language requirements for 186 visa applicants who are not citizens of and do not hold passports of the specified countries.[42]

In accordance with the criteria for the Subclass 485 (Temporary Graduate) visa, the applicant must hold a qualification or qualifications conferred or awarded by an educational institution specified by the Minister and satisfy the Australian study requirement.[43] Each degree, diploma or trade qualification used to satisfy the Australian study requirement must be closely related to the applicant's nominated skilled occupation.[44] According to Regulation 1.15F of the Migration Regulations, the Australian study requirement is satisfied if a person has completed a degree or more degrees, diplomas or trade qualifications awarded by an Australian educational institution for which all instruction was conducted in English. The qualification must be obtained while the applicant for the 485 visa held a student visa. A degree, according to Regulation 2.26AC(6) of the Migration Regulations, means 'a formal educational qualification, under the Australian Qualifications Framework, awarded by an Australian educational institution', including a bachelor's degree, a master's degree, a doctoral degree and a postgraduate diploma.[45] Holders of a student visa are required to provide evidence of an English test score with their student visa application, unless they are citizens and holders of a passport from the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland.[46]

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[40] *Ibid*., clauses 186.222 and 186.231 of Schedule 2.

[41] Migration Regulations 1994 – Specification of Language Tests, Score and Passports 2015 – IMMI 15/005, para. 2, 3(C)–(E), 4(D)–(F), 5(D)–and (F).

[42] Migration (LIN 19/216: Exemptions from Skill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Instrument 2019, para. 7(2), which addresses exemption from English language requirements, covers only Subclass 187 (Regional Sponsored Migration Scheme).

[43] Migration Regulations 1994 (Cth), clause 485.231(1)–(3) of Schedule 2.

[44] *Ibid*., clause 485.222 of Schedule 2.

[45] *Ibid*., clause 500.111 of Schedule 1.

[46] Migration (IMMI 18/015: English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Instrument 2018, para. 6(1) and (2) and Schedule 1; Australian Government Department of Home Affairs, *Subclass 500: Student Visa*, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500#Eligibility (accessed 16.01.2021).

Thus the English language ability of an applicant for the Subclass 485 (Temporary Graduate) visa can be established by the facts that they sat for an English test prior to gaining admission to their course of study in Australia and their completion of a course of study in Australia. In the case of those who pursue a postgraduate programme in Australia, they would usually hold an undergraduate degree for which instruction was conducted in English. In spite of these facts, clause 485.212 of Schedule 2 to the Migration Regulations requires that an application for the Subclass 485 (Temporary Graduate) visa be accompanied by evidence that the applicant has undertaken a language test and achieved the specified score.

3. ENGLISH LANGUAGE REQUIREMENTS FOR ENTERING INTO PROFESSIONS IN AUSTRALIA

This section focuses on English language requirements for entering into professions in Australia, with specific reference to the legal, medical and nursing professions. These professions are notorious for requiring local certification of eligibility to practice in Australia, including the requirement to undertake a local study in the relevant field. For example, the *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession*[47] require an assessment of legal qualifications of foreign qualified lawyers. Upon assessment, they may be required to study all or some of the core units for an Australian law degree. There is also a requirement for completion of practical legal training before admission can be granted to practice in Australia.[48] Assessments in these programmes come in the form of written assignment and oral presentations. However, the legal qualification obtained in Australia and relied on for admission to practice which the legal practice board accepts does not automatically meet the English language requirements for admission. The Law Admissions Consultative Committee has set very stringent English language requirements that must be satisfied to be admitted to the profession, with very limited and skewed exceptions. The English Language Guidelines require applicants, except those from recognised countries, to sit for an English test with very

[47] Law Admissions Consultative Committee, *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession*, August 2015, revised 2017, https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/202136163_30_Uniform%20Principles%20for%20assessing%20Overseas%20Qualifications.pdf (accessed 16.01.2021).

[48] See, for example, section 21(2)(c) of the Legal Profession Act 2008.

limited scope for gaining an exemption after sitting for the test and obtaining the required score.[49]

To be registered as a medical doctor[50] the applicant must have 'a combination of *secondary* education *and tertiary* qualifications,' where the applicant has 'undertaken and satisfactorily completed at least two years of (…) secondary education which was taught and assessed solely in English in a recognised country.'[51] (emphasis added). The applicant must also have tertiary qualifications in the relevant professional discipline, which the applicant is relying on to support their eligibility for registration under the applicable state legislation 'which were taught and assessed solely in English in a recognised country.'[52] These must be satisfied in order to meet the English language requirements. In the absence of a *combination* of these qualifications from *a recognised country* the applicant must sit for an English test.

In the case of the nursing profession, applicants for initial registration must demonstrate their English language competence in one of the following ways. They may demonstrate that English is their primary language and they have attended and completed at least six years of primary and secondary education taught and assessed solely in English *in a recognised country.* Two years of this education must have been between years 7 and 12. The tertiary qualification relied on to support the applicants' eligibility for registration must have been taught and assessed solely in English in a recognised country. A registered nurse or midwife must have successfully completed at least two years of a full-time pre-registration programme of study approved in a recognised country. An enrolled nurse must have successfully completed at least one-year full-time pre-registration programme of study approved in a recognised country. This standard focuses primarily on having English as the primary language and obtaining relevant educational qualifications relied on to register from a recognised country.[53]

Applicants who do not meet these requirements but seek to register as a registered nurse or midwife or both must have successfully completed at least five years full-time equivalent continuous education[54] which was taught and assessed in English in a recognised country, including the tertiary qualifications relied

[49] Law Admissions Consultative Committee, *English Language Proficiency Guidelines*, October 2018.

[50] Medical Board of Australia, *Registration Standard: English Language Skills*, 1 July 2015, para. 1.

[51] *Ibid.*, p. 2, para. 2(a).

[52] *Ibid.*, p. 2, para. 2(b).

[53] Nursing and Midwifery Board of Australia, *Registration Standard: English Language Skills*, 1 March 2019, p. 2, para. 1.

[54] *Ibid.*, p. 5, where five years (full-time equivalent) continuous education is defined as 'education over a period of five consecutive calendar years without a break from study apart from the education institution (e.g. school, university or vocation education provider) scheduled holidays.'

on to support the applicant's eligibility for registration. The education must be a combination of tertiary and secondary education; tertiary and vocational education; tertiary, secondary and vocational education; or tertiary education, all taught and assessed in English. The last period of education must be within five years prior to applying for registration.[55]

Those who apply for registration as an enrolled nurse but do not meet primary language and local education requirements must have successfully completed at least five years full-time equivalent continuous education which was taught and assessed in English in a recognised country. The five years include the period spent completing vocational qualifications relied on to support the applicant's eligibility for registration. The education must be continuous and a combination of vocational and secondary education; tertiary and vocational education; tertiary, secondary and vocational education; or tertiary education, all taught and assessed in English. The last period of education must be within five years prior to applying for registration.[56]

Applicants who do not meet these combinations of education from a recognised country are then left with no option but to sit for an English test.[57] As most migrants would have obtained their primary, secondary, vocational and tertiary educational qualifications outside of the recognised countries, they effectively do not qualify for the primary language and educational qualifications exemptions that could free them from the English language test. In effect, the rules on English language requirements are designed in a manner that effectively achieve the object of making sure nearly all migrants do not meet the recognised country requirements sit for an English test, even though they arrived in Australia with relevant combinations of educational qualifications in English from their home countries. The functional English language requirements under the Migration Act 1958 and the Migration Regulations 1994 allow these migrants to enter Australia without further prove of their English language ability once they hold relevant educational qualifications in English from their home countries. Yet these same qualifications neither satisfy the English language requirements for visa Subclasses 186 (both Direct Entry and Temporary Transition streams) and Subclass 485 (Temporary Graduate) nor do they meet the English language requirements for entering into the legal, medical and nursing professions. It is legitimate then to question exactly what the English language requirements for Australian visa and entering into the professions seek to achieve.

The effect of English language requirements is that years of legal, medical or nursing education in a recognised country, including Australia alone may not meet the English language requirements for registration as a legal practitioner, medical practitioner, an enrolled or registered nurse. In other words, for someone

[55] *Ibid*., p. 2, para. 2.
[56] *Ibid*., p. 3, para. 3.
[57] *Ibid*., p. 3, para. 4.

who does not have a combination of relevant primary, secondary and tertiary qualifications for a continuous period of five years from *a recognised country*, they must necessarily sit for an English test even if they obtained a nursing degree from Australia or any other recognised country, such as Canada, New Zealand, the Republic of Ireland, South Africa, the United Kingdom and the United States of America.[58]

The English language requirements for admission to the legal and medical professions and for registration as an enrolled or registered nurse evidence the fact that while the qualifications relied on for admission to the respective professions obtained even from Australia and other recognised countries are acceptable for admission, the qualifications per se do not evidence the applicant's English language competence. In effect, it means a person's English language ability is severed or extracted from the very qualifications which the respective professional bodies find acceptable for admission. No explanation has been provided as to why that level of educational qualification can be obtained in Australia without acquiring the requisite level of English language competency required for practice in the respective professions. It is less clear why educational qualifications are acceptable for registration to practice the profession yet the person who has obtained or attained that qualification must sit for a separate English test to prove their English language ability. It is less clear why completion of units required for admission to a profession in Australia, instruction for which is conducted in English, would not evidence a person's English language competency. In the case of a non-citizen seeking to register as a registered nurse, they would have been registered as an enrolled nurse in Australia after satisfying the educational and English language requirements. However, such prior evidence does not always satisfy the English language requirements for the next level of a registered nurse. Separating or severing a person's English language competency from the qualifications they hold, instruction for which was conducted in English, without showing that the level of English language competency used for the instruction falls short of that required for practice is anomalous and incongruous. This artificial separation of the English language ability from the qualification obtained by the same person supports the argument that these English language requirements may well be aimed primarily at precluding some opportunities for certain migrants rather than at determining their English language proficiency.

[58] Nursing and Midwifery Board of Australia, *Registration Standard: English Language Skills*, 1 March 2019; Law Admissions Consultative Committee, *English Language Proficiency Guidelines*, October 2018; and Medical Board of Australia, *Registration Standard: English Language Skills*, 1 July 2015.

4. THE ENGLISH LANGUAGE REQUIREMENTS AND MODERN SLAVERY

4.1. MODERN SLAVERY IN THE AUSTRALIAN CONTEXT

The very migrants who are required to sit for an English test when they seek to apply for visa Subclasses 186 (Direct Entry stream) and 186 (Temporary Transition stream) and other permanent visas requiring only an English test as proof of competency in English would have been assessed for functional English based on their educational qualifications in English or based on a previous English test when they were granted temporary visas. These migrants could literally remain in Australia for the rest of their working lives if they choose to remain in Australia on temporary visas without being questioned on their English language ability. If ever they are granted permanent visas, they may remain on the same job and operate at the same level or standard of English language usage they did when they were on temporary visas. Indeed, permanent visa holders and those granted citizenship are never required to operate in practice, carry out their duties or participate in Australian society at a different level of English language ability than they did when they held temporary visas. This means that a visa category or subclass alone cannot reasonably and objectively justify the rejection of educational qualifications in English as proof of competence in English. It equally cannot justify setting different levels of English language proficiency for different visa subclasses. Again, a visa category or subclass cannot justify subsequent English language tests required of someone who has already sat for the test and obtained the required score.

The question is then: what does the English language requirement other than proof of functional English seek to achieve and to what extent does it put migrants at risk of modern slavery? Migration is about the national interest of the host country too, not just about the interest of a migrant alone. The Migration Act provides in section 4(1) that the object of this Act 'is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. Could the pursuit of the national interest through migration law and policy lead to exploitation and abuse of migrants by the state?

Addressing these issues requires an answer to the question of what modern slavery is. When moving the motion for the second reading of the Modern Slavery Bill 2018, now the Modern Slavery Act 2018 (No. 153, Cth), Alex Hawke, Assistant Minister for Home Affairs, noted that nearly two centuries since William Wilberforce promoted legislation for the abolition of the slave trade in the United Kingdom, there were an estimated 25 million modern slavery victims who 'are exploited in global supply chains'[59] in 2018. This number includes 'over 4,000

[59] House of Representatives, *Parliamentary Debates: Official Hansard*, No. 9, Commonwealth of Australia, 28 June 2018, p. 6754.

people in Australia estimated to be enduring slavery or slave-like conditions'.[60] For Senator Linda Reynolds of Western Australia, modern slavery is not about unfair labour practices and lack of fair pay for fair work. It is about 'the most serious deprivation of individual liberty and individual freedoms – servitude. Modern slavery today encompasses human trafficking, slavery and slavery-like practices, servitude, forced marriage and forced labour' each of which 'on its own is a serious exploitative practice and a grave violation of human rights'.[61] Those who 'exploit others (…) typically use more subtle forms of coercion, such as threats and deception, to maintain power over their victims, who are some of the most vulnerable and powerless in the world today.'[62] To Senator Reynolds, Australians contribute to slavery unknowingly when they buy from those who exploit others, but she also noted that slavery 'exists here in Australia'.[63] Senator Nicholas McKim of Tasmania says modern slavery 'includes slavery, servitude, forced labour, deceptive recruiting, trafficking in persons, debt bondage and organ trafficking.'[64] Modern slavery can also 'include being forced to work for low wages in sectors like construction, in sweatshops or in food supply chains, including in the agriculture sector.'[65] Thus core to the definition of modern slavery in Australia is the idea that it covers 'a range of exploitative practices'.[66]

The theme of exploitation is also reflected in academic definitions of modern slavery. Justine Nolan and Martijn Boersma stated in *Addressing Modern Slavery* (emphasis added):[67]

> Several exploitative practices are associated with modern slavery: forced labour, which refers to work that people must perform against their will under the threat of punishment; bonded or indebted labour, when individuals work to pay off a debt while losing control over working conditions and repayments; human trafficking, which concerns the recruitment and movement of people (usually for forced labour or sexual exploitation); and child slavery, which is distinct from child labour as it involves not only children working but also their exploitation for someone else's gain. *Other exploitative practices include deceptive recruitment for labour*; domestic ser-

[60] *Ibid.*, p. 6755.

[61] The Senate, *Parliamentary Debates: Modern Slavery Bill 2018*, Commonwealth of Australia, Second Reading, 28 November 2018, p. 8813.

[62] *Ibid.*, p. 8814.

[63] *Ibid.*

[64] *Ibid.*, p. 8799.

[65] *Ibid.*

[66] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight*: *An Inquiry into Establishing a Modern Slavery Act in Australia*, Commonwealth of Australia, December 2017, p. 29. For a classic definition of slavery, see United Nations Convention to Suppress the Slave Trade and Slavery, Geneva 1926, Article 1; Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva 1956, Article 1.

[67] J. Nolan, M. Boersma, *Addressing Modern Slavery,* New South Publishing 2019, pp. 7–8 and 8–9.

> vitude; and forced marriage. Unlike the general term 'modern slavery', each of these the practices are crimes that do have individual definitions in national and international laws [emphasis added]. (…)
> Two fundamental changes are the move away from the straightforward purchase of slave labour, and the existence of slaves as an employment category. While the statistics suggest that the 'market' for exploitative labour is booming, the notion that humans are purposefully sold and bought from an existing pool is outdated. *While such basic transactions do still occur, in contemporary cases people become trapped in slavery-like conditions in various ways.* Understanding how this happens is of crucial importance if we are to bring modern slavery further into our realm of understanding [emphasis added].

It follows that the forms and contexts in which modern slavery takes place differ. The themes of exploitation, human trafficking and deceptive recruitment for labour are crucial to the understanding of modern slavery for the purposes of this paper. Under section 271.2(1) and (1B) of the Criminal Code Act 1995 (No. 135, Cth), the use of deception by a person to organise or facilitate the entry or proposed entry of another person into Australia with intent or being reckless as to whether the person would be exploited constitutes the offence of trafficking in persons.

4.2. THE INTERSECTION OF ENGLISH LANGUAGE REQUIREMENTS AND MODERN SLAVERY IN AUSTRALIA

The above definitions of modern slavery tend to focus on the actions or inactions of individuals and organisations. They hardly focus on states and state actors and their actions and inactions which directly or indirectly enslave people by the states or create the conditions for their enslavement by others. In this paper, I argue that the state could directly and indirectly be complicit in the modern slavery project through its migration law and policy. For example, temporary visas in every country, including in Australia, expose migrants to exploitation by the state and private employers. Arguably, there is no distinction between citizens and resident non-citizens when it comes to tax. Yet the same state does not extend public services available to citizens and permanent visa holders to temporary visa holders, for example, in relation to a basic human right such as the right to national health insurance. The Australia Medicare is available only to its citizens and permanent visa holders.[68] Temporary visa holders are generally required to maintain their own health insurance. For example, it is a requirement for Subclass 482 (Temporary Skill Shortage) that an applicant 'has adequate arrangements for

[68] Health Insurance Act 1973 (No. 42, 1974, Cth), s. 3(1) defines 'eligible person' as 'an Australian resident or an eligible overseas representative'.

health insurance during the period of the applicant's intended stay in Australia.'[69] A temporary visa holder or a class of temporary visa holders may only enjoy the health insurance if the Minister for Health so prescribes by regulations.[70]

Labour exploitation in Australia has been linked to the Australian visa system. For example, the Joint Standing Committee on Foreign Affairs, Defence and Trade found labour exploitation of migrants in terms of low pay and the trafficking of individuals into Australia and concluded the Committee was 'particularly concerned to hear the experience of victims of exploitation and modern slavery in the horticultural industry.'[71] The Australian Government has acknowledged that:[72]

> Migrant workers can be particularly vulnerable to exploitation, either by those who facilitate their journey to Australia or by employers once they arrive. This may be because of cultural and language barriers, a lack of knowledge of local workplace laws and standards, and in some cases, their reliance on their employer for their immigration status.

The Parliamentary Joint Committee on Law Enforcement also found that:[73]

> [W]ithout adequate visa support and protection, some victims of human trafficking, slavery and slavery-like practices may 'experience great hardship and uncertainty about their future.' (…) [S]upport and protection offered through the visa program is contingent upon victims contributing to police investigations.
> 3.23 Submitters and witnesses identified this as a particular problem faced by migrant workers, who may have been coerced into working illegally by their employer and therefore need such protection, but may be unwilling to engage with authorities for fear of visa cancellation.
> 3.25 Some submitters raised the issue of the power of the Minister for Immigration and Border Protection to cancel visas, and the adverse impact that this may have on victims of trafficking, slavery and slavery-like offences.
> 3.31 (…) [T]here are significant concerns that victims of human trafficking, slavery and slavery-like offences may be subject to visa cancellation, potentially preventing these victims from assisting police with their investigations, but also placing these victims in an increased position of vulnerability, including in respect of recovering entitlements.

The artificial and baseless nature of the English language requirements for permanent visas to Australia raises the question whether these requirements could be used as tools to deceptively recruit migrants for cheap labour and other exploit-

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[69] Migration Regulations 1994 (Cth), clause 482.214 of Schedule 2.

[70] Health Insurance Act 1973 (Cth), s. 6A.

[71] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight*, *op. cit.*, p. 272.

[72] *Ibid.*, p. 276.

[73] Parliamentary Joint Committee on Law Enforcement, *An Inquiry into Human Trafficking, Slavery and Slavery-like Practices*, Commonwealth of Australia, July 2017, pp. 47 and 50.

ative practices. The same person who can live and work in Australia on temporary visas without their English language ability being an issue because they satisfy the functional English language for which educational qualifications are acceptable as proof, will be required to sit for an English test, should the same person apply for permanent visas such as Subclasses 186 (Direct Entry stream) and 186 (Temporary Treason stream). Holders of temporary visas such as Subclass 462 (Work and Holiday) and Subclass 482 (Temporary Skill Shortage)[74] are required to have functional English, which could be satisfied by evidence of educational qualification in English.[75] The Subclass 482 visa allows individuals to whom they are granted to work from two years to about five years in Australia[76] and serves as a transitional visa to permanent residency in Australia for some applicants. The holders of this temporary visa are required to sit for an English test if they apply for Subclass 186 (Direct Entry stream) and Subclass 186 (Temporary Transition stream) and are not citizens and do not hold a passport of the specified countries, even though they were exempted from the test required based on their educational qualifications in English when they applied for the Subclass 482 visa.

By the stated purposes of the English language requirements, a student who successfully completes a course of study in Australia would have demonstrated that he/she has English language ability to participate in Australian society. Similarly, a person who is employed in Australia would also have demonstrated that he/she has the level of English language ability allowing him/her to participate in the Australian labour market. However, completing a course of study or evidence of employment in Australia does not necessarily satisfy the English language requirements for a post-study visa, such as Subclass 482 (Temporary Graduate) and 186 (Direct Entry stream) and Subclass 186 (Temporary Transition stream).

The problem then is that there is a dissonance, disconnect, absurdity, abnormality, anomaly or incongruity between the stated purposes of the English language requirements and resulting evidentiary requirements to prove the English language ability. The Australian English language requirements for these visas do not respect or recognise the facts that a person may have already been assessed for

[74] 'This visa enables employers to address labour shortages by bringing in skilled workers where employers can't source an appropriately skilled Australian worker,' Australian Government Department of Home Affairs, *Subclass 482: Temporary Skill Shortage Visa*, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482 (accessed 18.01.2021).

[75] Migration Regulations 1994 (Cth), clause 462.215 of Schedule 2; and Australian Government Department of Homes Affairs, *English Proficiency (Subclass 482)*, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482/sufficient-english (accessed 08.03.2023).

[76] Australian Government Department of Home Affairs, *Temporary Skill Shortage Visa (Subclass 482): Short-term Stream*, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482/short-term-stream (accessed 18.01.2021).

English language competence, that the visa applicant is already present in Australia and that they hold relevant educational qualifications in English whether from Australia or another English-speaking country or that they are already employed in Australia. The English test requirements specify expiry dates for test results even for individuals who are already present in Australia and may actually be employed. The English assessment process also requires a person to resit all components of the English language test if they fail one of the four components of speaking, reading, writing and listening even if they have excelled in the other three components.

In the Australian professions, such as the legal, medical and nursing professions, migrants have to meet local education requirements and sit for an English test or produce other evidence of English language proficiency before they can be registered in Australia. To begin the local education programme in Australia, migrants may be required to sit for an English test. Then, upon completing their studies and seeking to enter the profession of their choice, they must meet the English language requirements again if the test result obtained previously has expired. The educational qualification from Australia does not automatically meet the English language requirements to enter into professions such as legal practice, medical practice and nursing, even though the same substantive professional qualification is acceptable for admission to the profession.

Given that the purposes of the English language requirements are to ensure that a person can get a job, practise their chosen profession and participate in Australian society, these stated purposes cannot reasonably be in consonance with the claim that educational qualifications in English, even if obtained from Australia or the recognised countries, cannot prove competency in the English language for visas or for entering into the legal, medical, nursing and other professions in Australia. It is also absurd that an English test result is subject to an expiry date, even for someone living in Australia or in another English-speaking country, or that a person should have to resit all four components of such test, including those they have passed, instead of the one or ones for which they have not achieved the required score.

A system of this kind characteristic of the English language requirements not only creates an English language industry or business where institutions responsible are justified and sustained by English tests they organize and the fees charged, but it also enables the Australian Government and professional and employment bodies to keep certain unwanted migrants out of the permanent resident status or out of certain professions and institutions. Even if it is conceded that the English language requirements are a temporary bar, it cannot be denied that the fees charged for tests sustain the industry that runs the tests. In these circumstances, the English language requirements could lead to exploitation and abuse of migrants because they have to remain on temporary visas, sit for tests, and pay taxes perhaps at the same rate as citizens and permanent visa holders but

without the corresponding right of access to public services such as Medicare and subsidised public education.

Migration and policy may thus promote modern slavery in at least three ways. Firstly, migration law and policy, exemplified by the English language requirements, lead to extortion of money from applicants who have to pay fees to sit for an English test that they should not sit for in the first place. For a migrant already present and working in Australia, this not only contradicts the purposes of the English language requirements, it also exposes the person to exploitation and abuse in the workplace due to the necessity of taking such test. Secondly, while they give the semblance or appearance of formality, legality and the rule of law, temporary visas could be described as tools for exploitation and modern slavery. Through these visas, migrants can be used to satisfy the labour needs of the host country and secure the payment of taxes without or with limited corresponding state obligations towards those migrants because of their temporary visa status, that is, because they are not citizens or permanent residents. Migrants on temporary visas are more likely to be exploited by their private employers as some of the analysis above demonstrates. Thirdly, artificial visa criteria, such as the English language requirements, involve a financial and psychological burden on migrants, which could have further implications for family relations.

The Department of Home Affairs visa pricing estimator shows the Subclass 186 visa cost a family of five USD 11,390.00 in 2021.[77] This cost excludes medical examination fees and migration agent fees if the applicant chooses to use one. An application for such a visa can be rejected on the simple ground that the primary applicant has not produced an English test to prove their competency in English, even though the applicant may already be present and/or employed in Australia. This happened to the author in May 2018 when my application for Subclass 186 (Direct Entry stream) made in November 2017 was rejected on the ground that I did not sit for an English test to prove my English proficiency, although I was employed as a University Lecturer and the Subclass 186 (Direct Entry stream) visa that I applied for was needed to continue on the same job. I was employed from outside Australia and nominated by the university for the Subclass 457 (Temporary Work (Skilled)), a temporary visa for which my educational qualifications were acceptable as proof of English competence. That temporary visa was granted to me prior to my arrival in Australia. The same employer later nominated me for Subclass 186 (Direct Entry stream) and I was to continue, and have since continued, in the same employment as was the case for Subclass 457 (Temporary Work (Skilled)). Yet the same educational qualifications that formed the basis of my employment in Australia and met the English language requirements for the temporary visa did not meet the competent English requirements

[77] Australian Government Department of Home Affairs, *Visa Pricing Estimator: Estimate the Cost of your Visa*, https://immi.homeaffairs.gov.au/visas/visa-pricing-estimator (accessed 19.01.2021).

for the permanent visa, though in material terms the Subclass 186 (Direct Entry stream) permanent visa was to be held by the same person who was already present and working in Australia and in respect of the same employment with the same employer. I paid a visa charge of AUD 8,346.00 for the Subclass 186 (Direct Entry stream) visa application, which was rejected for no reason other than for failure to produce an English language test. I also paid a medical examination charge of AUD 1,638.90, bringing the total fees incurred for the 186 (Direct Entry stream) visa at the time to AUD 9,984.9. There were related expenses I did not record. In a subsequent application I made for Subclass 186 (Temporary Transition stream) in 2019, I paid an amount of AUD 13,351.92 which comprised a visa charge of AUD 9,220.12, a medical examination fee of AUD 1,720.27 and a migration agent fee of AUD 2,420.00, bringing the total amount charged from me for applying for the permanent residency to AUD 23,336.82.

The Australian Government was satisfied with my educational qualifications as meeting English language requirements both to participate in the Australian society and for the same employment while I was on the temporary visa but would not accept the same qualifications as proof of competent English for the permanent visa. It could be argued that one is a temporary visa and the other is a permanent visa, and that these are different categories of visas with different criteria. However, this does not address the subject of why the English language criterion and the evidence to prove the respective competence cannot be common to different visas, since different visas do not come with an obligation or condition that the visa applicant shall operate and carry on their lives in Australia at the level or standard of English language competence set as the criterion for the particular visa type upon the grant of the visa. For example, a temporary visa holder and a permanent visa holder, a citizen working for the same employer and holding equivalent positions (e.g. university lecturers) are not required to operate at different levels of English language merely because of the visa type or citizenship status.

Again, it is problematic that professional bodies would separate an applicant for professional registration's competency in English from the very qualifications relied on in support of the application to join a particular profession in Australia. Everywhere in the world successful completion of a programme or course of study in a given field is evidence of competency in the field of study and competency using the language in which instruction for the study has been conducted. If a migrant can complete the recommended professional course of study and training in English in Australia, it is less clear why successful completion of that programme or course of study should not be conclusive of the person's ability to perform their duties in the same field using English upon entering into the profession. Severing a person's competence in English from their qualifications relied on to enter into a certain profession creates an artificial barrier to entering into that profession. Such requirements expose migrants to exploitation: they incur

the costs of sitting for English tests they should not sit for in the first place; and they may never enter into the profession if they do not obtain the required score, which often has nothing to do with English language competence in practice in the particular professional field.

For example, the Nursing and Midwifery Board of Australia (NMBA) requires applicants for registration as an enrolled nurse, registered nurse or midwife to achieve the required minimum scores in one of a number of English language tests and meet the requirements for test results specified for each test. One of such tests is the International English Language Testing System (IELTS). The applicant must sit for IELTS (academic module) and obtain a minimum overall score of 7 and a minimum score of 7 in each of the four components of listening, reading, writing and speaking. The score of 7 may be difficult to achieve for many applicants, even though in practice they may be able to do their job in English. Apart from the difficulty of scoring 7, the NMBA further limits the chances of passing the test by stating that it 'will only accept test results (i) from one test sitting, or (ii) a maximum of two test sittings in a six month period only if' the applicant achieves 'a minimum overall score of 7 in each sitting, and (…) a minimum score of 7 in each component across the two sittings, and no score in any component of the test is below 6.5.'[78] The requirements can impede passing and entering into the nursing profession in two ways. Firstly, if an applicant does not obtain the required test scores in one or in two test sittings, they cannot seek to register over the six-month period from the date they first sat for the test; even if they sat for the test for the third time within the six-month period and achieved the required score this time round. At the end of the six months, they have to sit for a test afresh if they did not obtain the required scores in the previous six months. The rule also means in two test sittings an applicant must obtain an overall score of 7 in *each sitting* and a minimum of 7 in *each component* in *each sitting*, and that score in each of the components must not be lower than 6.5. Secondly, the standard requires that an applicant resit all the four components instead of the one or ones failed.

The English language requirements that artificially, without relying on the substance of an applicant's language ability, limit entry into a profession based on nationality would be incompliant with section 9(1) of the Racial Discrimination Act 1975. Again, where rules are designed in such a way that they cannot be complied with by persons of one nationality, while being lenient towards persons of another nationality and thereby deny persons of the first nationality from enjoying a right that but for the rule they would enjoy, then the rules are inconsistent with section 9(1A) of the Racial Discrimination Act.

[78] Nursing and Midwifery Board of Australia, *Registration Standard: English Language Skills*, *op. cit*., p. 3.

The English language requirements for both visas and entering into the studied professions unreasonably disadvantage persons of nationalities deemed not primary speakers of the English language or not from the recognised countries, while favouring those considered primary speakers of English or who are from the recognised countries. Most migrants from countries which are not recognised would have obtained their primary, secondary, vocational and/or tertiary education in their home countries. Therefore, requiring them to have *a combination* of primary, secondary and tertiary education from *a recognised country* in order to qualify for the exemption from an English test effectively excludes them from ever being able to use their educational qualifications in English to meet the English language requirements. The same conclusion can be reached in relation to the requirements that applicants must have *five years full-time equivalent continuous* education taught and assessed solely in English, *in a recognised country*, consisting of *a combination* of tertiary and secondary education or tertiary and vocational education or tertiary, secondary and vocational education or tertiary education. Most migrants who have already obtained initial education in their home countries are less likely to spend another five years in their host country continuously, let alone having a combination of secondary education with whatever education level they go for in the host country.

Migrants who sit for English language tests come from countries not recognised for purposes of English as the primary language. Requiring these migrants to pass an English test in one sitting or in two sittings with overall score of 7 in each sitting and a score of 7 in each component in the second sitting and not lower than 6.5 in any component, is arguably intended to ensure that they cannot pass the test.

5. CONCLUSION

Section 5(2) of the Migration Act 1958 and Regulation 5.17 of the Migration Regulations 1994 adequately, comprehensively and effectively satisfy any legitimate purpose for which visa applicants and persons seeking employment in Australia are required to prove their level of English language ability. It is stipulated that applicants for visas should prove their proficiency in English by a test result or evidence of educational qualifications in English or be a citizen of and hold a passport of a recognised country. The object of the English language requirements that migrants should be able to get a job and participate in Australian society generally can be established by any of these means. Consequently, all other English language requirements are duplicitous and place unjustifiable financial and psychological burden on migrants with social implications and make them prey to exploitation and modern slavery.

The stated purpose of the English language requirements is to ensure that migrants are able to get a job and participate in Australian society. Migrants already employed in Australia and those who have already completed university education in Australia would have undoubtedly proven that they can obtain a job and participate in Australian society. Yet these same persons are required to sit for an English test if they were to apply for visas of Subclass 186 (Direct Entry stream), Subclass 186 (Temporary Transition stream) or a post-graduate visa, such as Subclass 485 (Temporary Graduate). It cannot be in consonance with the purposes of the English language requirements, Australian laws on equality and fair and equitable treatment to require migrants of certain nationalities to sit for an English test and setting an expiry date to the test, while giving others free entry simply because they hold a passport from a certain country. Severing the English language proficiency of migrants from their educational qualifications in English when they apply for visas or seek to enter into certain professions belies the purpose of asking the person to prove their English language competence, especially when that level of educational qualification is otherwise acceptable for employment or for entering into the profession in Australia. Australian values of fair play, fair go, the rule of law and equality of treatment must manifest in the Australian migration law and policy. Migrants who enter into Australia to work, make a living and contribute to the Australian society deserve better treatment and Australia can certainly do better in accordance with its espoused values. Many migrants might not go for the citizenship or permanent residency of their host countries if they were assured of equality of treatment and non-discrimination in accordance with Australian values. However, if visa status or citizenship status becomes a basis for exclusion, exploitation and discrimination, in a country that preaches equality and non-discrimination regardless of nationality and race, then migrants would want to acquire the status that guarantees them some measure of equality of treatment and respect. Therein lies the challenge to the developed world, not just Australia, that will promote liberalization of trade and investment regimes for their businesses in the developing world, which include rules on national treatment, most-favoured-treatment and rules against what is called protectionism.

The English language requirements would seem to be aimed at excluding certain undesirable persons from the profession rather than at satisfying the regulatory bodies of the persons' English language competence. Indeed, Burke, Thapliyal and Baker have argued that the 'response of the colonial and postcolonial state to culturally diverse and economically disadvantaged migrant groups has been dominated by discrimination, exclusion and segregation.'[79] The preference for English language from certain countries and exemption of citizens of those countries from the English language requirements evidence a desire for

[79] R. Burke, N. Thapliyal, S. Baker, 2018, *op. cit*., p. 85.

preferential or selective inclusion of citizens from these countries.[80] The issue here is not about inclusion or exclusion per se, but the camouflage with which the inclusion or exclusion is done contrary to what has been officially described as 'Australian values',[81] including equality and fair play. Migrants too deserve rules on national treatment, most-favoured-national treatment and rules against protectionist immigration laws and policies, because they also make a contribution to the development of their host countries.

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[80] *Ibid*., p. 93.

[81] See Australian Government Department of Home Affairs, *Life in Australia: Australian Values and Principles*, Commonwealth of Australia 2020.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.7

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THE CONCEPT OF DELINQUENCY IN MESOAMERICA: FOCUS ON THE AZTECS AND THE MAYA

Abstract

This paper focuses on the concept of delinquency in addition to prevention and suppression methods and the idea of guilt in pre-Columbian Mesoamerica, while treating its inhabitants as highly-developed indigenous peoples. The first section of the study examines the ideas of law and justice in terms of the particular policies that shape people's way of life in every society. The premise for addressing law in this manner is that one can only comprehend it via ongoing experience. The main focus of this paper is placed on the earlier timeline, when two crucial civilisations existed in Mesoamerica. Both the Maya and the Aztecs built vast, densely inhabited, and extremely efficient empires. However, even a large human society cannot function without order and there is no order without law. Committing a crime or a tort is incompatible with the desirable values and norms that govern the society and causes harm and hazard. Taking into consideration also the detrimental consequences of a forbidden act, the psychological determination of the delinquent and his or her personal attitude towards the act, the concepts of guilt and shame cultures should be brought to attention. From a historical point of view, a delinquent's feeling of guilt was given consideration during criminal trials in Europe as early as in the Middle Ages, while in Mesoamerica this concept had already existed. Furthermore, some of pre-Columbian Mesoamericans distinguished between intentional and accidental acts, which had an impact of final judgments.

KEYWORDS

the Aztecs, criminal law, delinquency, the Maya, Mesoamerica

SŁOWA KLUCZOWE

Aztekowie, prawo karne, przestępczość, Majowie, Mezoameryka

1. INTRODUCTION

The phrase 'créese que deben tener alguna manera de justicia para castigar los malos'[1] could be translated as 'I believe that there exists a judicial system to punish the wicked'. This sentence found its place in the second decade of the sixteenth century among the voluminous correspondence between Hernán Cortés and the monarchs: King of Spain Charles V Habsburg and his wife Queen Isabella of Portugal. Conquistadors commanded by Hernán Cortés became a part of the indigenous culture as soon as they arrived in Mexico in 1519. The conquistadors were eventually assimilated into the native culture despite efforts to introduce European traditions and ideals from the Old Continent. They were granted the chance to take part in a variety of regional activities, fests, etc. while being regarded with both interest and fear by the local communities. Later, as eyewitnesses, they noticed a number of events that demonstrated the Aztecs had a legal order. It was a specific kind of justice that regulated the system in an area belonging to a larger geographical organization with a cultural wealth, known as Mesoamerica.[2] Such context might be noticed in the memoirs of Bernal Díaz del Castillo,

[1] S. Toscano, *Derecho y organizacion social de los Aztecas*, México 1937, p. 24.

[2] It should be noted that the very term Mesoamerica is at the same time a twentieth-century neologism, with a meaning of historical region and cultural area in North America. The territory is believed to extend from approximately central Mexico through Belize, Guatemala, El Salvador, Honduras, Nicaragua, and northern Costa Rica. It was Paul Kirchhoff who suggested such a substantive and incorporating solution to define the newly discovered part of the fifteenth-century world. Although his theses assumed a broad temporal and spatial context and focused on the separation of certain local characteristics, such as the cultivation of similar, if not identical, plants, specific calendar and numerical systems, an akin vision of the world (e.g. man as an object of gods and mythological beings) and ritualistic aspects and sports (e.g. ritual ball game), it was still a purely a linguistic creation with a metaphysical meaning (R. Bartlett, *The Making of Europe: Conquest, Colonization, and Cultural Change, 950–1350*, Princeton: Princeton University Press 1993, p. 269). Nevertheless, despite its critique, the term 'Mesoamerica' remains a productive benchmark and source aiding the understanding of the world. Using the concept of Mesoamerica as a framework, I gathered scattered references with interpretations of the physical remains of the

one of Cortés's companions.[3] He claimed that the Spanish newcomers had the chance to take part in an appeal hearing soon after arriving in the New World[4] that was held in the capital of the Aztec state, Tenochtitlan.[5] Frey de Sahagún implied in his writings that 'The central state's management and supervision of every Aztec's life, from birth to death, culminated in the social order that existed in Tenochtitlan and the general manner of life of its residents.'[6]

As for the Maya, inhabitants of areas to the south of the Aztec civilization, they organized their own state covering the Yucatán peninsula, the territory of modern Belize, part of Guatemala, Honduras and El Salvador. It is crucial to note that the Aztecs had been developing their empire for nearly 200 years until the Spanish invasion, while the beginnings of the Maya civilization date back to circa 2,500 years earlier, during the middle Pre-Classic Period. Despite the many similarities in political, social, economic and cultural terms, the legal order of the various *altepeme* and Maya states was different.[7] In the area of criminal law, where particular parallels outweighed variances, this issue did not seem to be apparent. Because of this, it is possible to treat Mesoamerican city-states' criminal law as a unified legal area.[8] It should be stressed that this area of Mesoamerica could boast a unique heritage in terms of legal solutions, especially as regards criminal law. Compared to other parts of the world, a concept of guilt was developed there quite early, with a division into wilful and unintentional guilt present in the consciousness of the inhabitants of pre-Columbian America. This distinction was based on the recognition of intentional and accidental acts, which was the basis for imposing appropriate penalty, varying in severity and depending on the committed act. On the European continent, such distinction was indeed introduced as

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past from a number of sources over a broad time span and integrated these to propose a general long-term structure for indigenous Mesoamerican archaeology.

[3] B. Díaz del Castillo, *Pamiętnik żołnierza Korteza, czyli prawdziwa historia podboju Nowej Hiszpanii*, selected and translated by A. L. Czerny (*Historia verdadera de la conquista de la Nueva España*, 1632), Warszawa 1962, p. 3.

[4] S. Toscano, 1937, *op. cit.*, p. 31.

[5] It should be noted that on the grounds of external relations, besides functioning as an independent entity, Tenochtitlan cooperated with the two neighbouring city-states called *altepeme* (Texcoco and Tlacopan) and they formed the Triple Alliance (Ēxcān Tlahtōlōyān). However, the inhabitants of these three areas, named Tenochca, Acolhua and Tepaneca, were defined using one common name: the Aztecs. Their most important and prevailing feature was that they belonged to a larger cultural group, known as the Nahua. Moreover, it brought together a much larger number of smaller ethnic entities, combining the language, beliefs, and material achievements of nearly twenty different societies. See M. E. Smith, *The Aztecs*, 3rd edn, New York 2012, p. 4.

[6] B. Hamann, *The Social Life of Pre-Sunrise Things. Indigenous Mesoamerican Archaeology*, 'Current Anthropology' 2002, Vol. 43(3), the Wenner-Gren Foundation for Anthropological Research, pp. 356–357.

[7] *Ibid*., pp. 357–358.

[8] P. Vyšný, *Grundprobleme der Erforschung des aztekischen Rechts*, 'Societas et Iurisprudentia' 2015, Year III, No. 3, p. 76.

early as during the Roman Empire, with the terms of *dolus malus*, which means intentional guilt, and unintentional guilt, depending on the degree of negligence, or *culpa*.[9] However, after the fall of the Western Roman Empire, the achievements of Roman legal culture were vulgarised and it was only in the late Middle Ages that this social character of crime was rediscovered. However, the phenomenon of acceptance of the degree of guilt was preceded by a few hundred years of tribal time, when the concept of both crime and guilt was understood in a simple, uncomplicated manner.

2. SOURCES AND FORM OF LAW IN MESOAMERICA

Before moving on to the delinquency aspect, it should be noted that a majority of the knowledge about the Aztec legal order derives from the primary historical (written) sources of the times of the post-Hispanic conquest. It is commonly believed that previous achievements had not survived the passage of time, being forgotten or destroyed during the Spanish invasion. In fact, shortly before the conquest of Mesoamerica, the Aztecs were in the middle of codifying their laws in a written form.[10] It should be emphasised that the indigenous writings served as a basis for the exposition, justification, and extension of topics that were both obvious on the page and well-known in the culture, rather than as the assertion or source of a set and established text.

However, the Spanish missionaries deliberately destroyed the few written judicial and legal documents that existed because those were considered incompatible with European religion and belief. Other manuscripts were burned by the Spanish army or destroyed by moisture and negligence. As a result, the limited information available on the Aztec legal order comes from Spanish chroniclers and soldiers. During the direct conquest of Mexico, and for a long time afterwards, Europeans documented their observations, scrupulously recording all thoughts. Although the fate of indigenous law under the new Spanish rule is an interesting issue in and of itself, Spanish and later documents still give an outlook on the idea of law and rule. In addition, one may learn a bit about how the legal system treated plaintiffs and defendants as well as how the system worked in practice.

[9] See Bartolus de Saxoferrato, *In secundam partem digesti veteris. Commentaria*, Venetiis 1575, ad 16, 3, 32; A. B. Schwarz, *Figura hominis diligentis in re culpae juridicae*, Romae 1952, p. 20.

[10] As it is often emphasised, especially in the book *Texcoco: Prehispanic and Colonial Perspectives* by Jongsoo Lee and Galen Brokaw, Texcoco is the place where documentation on the pre-Columbian law was rather plentiful.

These sources documented both societal coherence and social disintegration but also how indigenous notions of morality and law intertwined.

The basis for research and discussion are in fact three codes[11] written in the second half of the sixteenth century. This group includes the *Florentine Codex*[12] written by the Franciscan friar Bernardino de Sahagún, the *Codex Mendoza*[13] and the *Libro de oro y tesoro índico* (The Golden Book), also known as the *Codex Ixtlilxochitl*[14]. The latter work in particular deserves attention because it is a collection of sixty-five criminal laws compiled by the Iberian scholar Fray Fernando de Alva Cortés Ixtlilxóchitl, who claimed that these laws came directly from the original Aztec code from the early sixteenth century.[15] The legal references in the other two codes include the relationships and descriptions provided by the native Aztecs, and are taken from their songs and anthems. This was due to the fact that a huge number of Aztec laws were never written down using pictograms and existed only in oral tradition, passed down this way from generation to generation.

The Aztecs had some knowledge of law, even if they did not provide a general description of their system of law and order or methodically research, define and analyse its forms, contents or social functions. The Aztec legal system was considered very complex and directly reflected the values, culture and history typical of these people. Peter Vyšný suggested a few areas which had great significance for shaping this viewpoint. According to him, in particular, the Aztecs could see the law as an essential component and tool for upholding the supernatural world order. Secondly, enforceable rules of conduct matched widely held values, patterns (ideals) of 'good' behaviour of the populace both in public and in private. Furthermore, the law was associated with duties that all people (men, women, and children) had towards the state, family members and in other relationships. Law and order was believed to be an ever-present, relentless, and dangerous force which would destroy anyone who would not respect it. The Aztec understanding of law and rule may be therefore associated with the well-recognized, archaic

[11] A code in the historical sense of the word is meant, which is simply a book.

[12] B. de Sahagún, *Florentine Codex: General History of the Things of New Spain*, 12 vols, edited and translated by A. J. D. Anderson and Ch. E. Dibble, Salt Lake City: University of Utah Press/Santa Fe: School of American Research, 1950–1982 (original title: *Historia general de las cosas de Nueva España (1547–1577)*).

[13] *Códice mendocino, o, Colección de Mendoza: Manuscrito mexicano del siglo XVI que se conserva en la Biblioteca Bodleiana de Oxford*, 1979.

[14] J. García Icazbalceta (ed.), *Nueva colección de documentos para la historia de México*, 5 vols, 1886–1892, México: Editorial Salvador Chávez Hayhoe 1941.

[15] *Aztec and Maya Law: Aztec Legal System and Sources of Law*, Tarlton Law Library, 8 November 2018, https://tarlton.law.utexas.edu/aztec-and-maya-law/aztec-legal-system (accessed 10.02.2023).

concept of law.[16] The maintenance of social order, as well as general respect for the institutions of power, the judiciary and education system was the basis of the legal order, which is a kind of example of customary law with elements typical of the common law system.[17] These norms were interpreted and applied by Aztec judges at different levels of the judiciary.[18] The Aztec judges were not necessarily bound by old customs and, moreover, had freedom to act, which was right and reasonable under the circumstances. There was a kind of precedent in judicial practice, as in some situations judges imposed penalties used previously in similar situations.

As the Maya civilization reached its peak bloom before the Spanish invasion, the amount of primary material associated with the legal system is now very limited. Most of the Maya manuscripts and codes were destroyed by Spanish priests, and the surviving codes focus mainly on astronomy, mathematics, history, calendars and religious rituals. After the conquest, the Maya wrote various books, including *Popol Vuh* and *Books of the Jaguar Shaman*. Both of these sources contain information about the Maya history, myths and religious traditions. Conquistadors and Spanish missionaries additionally documented their observations. Bishop Diego de Landa wrote a detailed Maya chronicle entitled *Relación de las cosas de Yucatán*. The manuscript contained information about history, culture and hieroglyphics. In the end, scientists have relied on the ceramic, painting, hieroglyphic texts and anthropological research of the contemporary Maya in order to learn more about their ancestors.

The laws from the late period that governed the various Maya states were issued by the *halach uinic*, who was the supreme ruler, and his council, or by the council alone if the state had no *halach uinic*. City and village supervisors, i.e. *batabs*, were responsible for implementing these laws and they served as administrators of smaller towns. A *batab* also ruled in civil and criminal cases. Court cases were generally dealt with quickly in public meeting houses known as *popilna*. The court proceedings were conducted orally, without keeping written records.

[16] P. Vyšný, *The Aztec Concept of Law*, 6th SWS International Scientific Conference on Social Sciences ISCSS, 2019, pp. 51–58.

[17] F. Flores García, *La administración de justicia en los pueblos aborígenes de Anáhuac*, UNAM: 'Revista de la Facultad de Derecho de México' 1965, Vol. 15(57), p. 86.

[18] It is worth mentioning that the structure of the judicial system was a three-stage one. As in modern times, the Aztecs had courts of first instance (called *Teccalli*), the appellate courts (called *Tlacxitlan*) and the Supreme Court. However, they also established specialised courts such as the *calpulli* courts, which functioned as neighbourhood courts. Moreover, there were courts which dealt with economic, fiscal, craft and general internal affairs of a given *altepeme*. In the context of criminal law, individual instances dealt with cases involving the offender. There were trials with ordinary people before *teccalli*. There was a possibility to appeal against an unsatisfactory verdict and the subsequent court hearing was held in front of *Tlacxitlan*, which was also the court of first instance for aristocracy and warriors. F. Avalos, *An Overview of the Legal System of the Aztec Empire*, 'Law Library Journal' 1994, Vol. 86(2), pp. 259–276.

Witnesses were required to testify under oath. There is evidence to suggest that parties were represented by people who acted as their representatives. The *batab* verified the evidence, assessed the merits of the case, determined whether the crime was accidental or intentional and, on the basis of all the collected information, he determined the appropriate penalty. It is important to point out that there was no form of appeal against the *batab*'s decision, as was the case in the Aztec system. The only possibility to change the legal effect was for the victim or his family to pardon the accused, thus reducing their punishment.[19]

3. DELINQUENCY IN MESOAMERICA

The idea of crime has taken root in the everyday life of the community and has become an inseparable part thereof.[20] This reasoning stems from the belief that the usual routine, which is synonymous with following the applicable norms and rules, is sometimes violated. People often engage in activities that, depending on their current needs, goals, attitudes or life experiences, modify, disrupt, bypass or manipulate the existing social relationships and structures for private gain. It is undisputed that the most complete depiction of such actions is the very concept of a desire to commit a forbidden act.[21] Therefore, it can be concluded that for the Maya, Aztecs, and other peoples living in Mesoamerica, the understanding of delinquency was very similar to that of today. As a prohibited act, it was and still is contrary to the values and norms of the society concerned, causing every member of the population harm but being punishable.

In the context of the Aztec legal order, their more advanced teaching of criminal law classified crimes according to their seriousness, severity and impact on socio-political issues. Serious crimes (*tetzauhtlahtlacolli*) included various attacks on the state, i.e. *tlatoani*, elite and social order, as well as murder, robbery, theft, adultery and public excessive alcohol consumption.[22]

Another category of crimes were those against the state or the ruler, in Nahuatl known as *tlatoani* (literally 'he who speaks'). The most serious act in this case

[19] Ch. O'Connell, *The Legal System of the Ancient Maya*, (in:) D. Friedman, *Legal Systems Very Different from Ours*, 2013, http://daviddfriedman.com/Academic/Course_Pages/Legal_Systems_Very_Different_13/LegalSysPapers2Discuss13/O'Connell_Maya.htm (accessed 10.02.2023).

[20] A. Lüdke, *Chapter 1: Introduction: What Is the History of Everyday Life and Who Are Its Practitioners*? (in:) A. Lüdtke (ed.), *The History of Everyday Life: Reconstructing Historical Experiences and Ways of Life*, Princeton, New Jersey: Princeton University Press, 1995, pp. 5–7, 16.

[21] P. Vyšný, *Crime and Punishment in pre-Hispanic Nahua City-States Tenochtitlan and Texcoco*, 'Ethnologia Actualis' 2017, Vol. 17(1), p. 41.

[22] P. Vyšný, *Štát a právo Aztékov*, Trnava: Typi Universitatis Tyrnaviensis, 2012, p. 177.

was treason. Being such a serious crime, the traitor's death was not sufficient to compensate for the acts he had committed. In this case, the descendants of the traitor and his distant relatives were also punished by bearing the stigma of the crime of their ancestor for the next four generations. Moreover, it was believed that such a man's house should be destroyed in a literal and symbolic sense. In order to achieve this, the building was publicly demolished and in the place where the foundations were laid, the process of land selection was started until it reached the groundwater. It was then buried. This action was linked to the symbolic 'drying out' of a treacherous family from the community of a given city-state. Here, however, the activities were not yet finished, as the final stage was the sprinkling of salt on the ground of the traitor's property. This prevented people from settling there in the future.[23]

Crimes committed by government officials were most often associated with corruption. Most examples of Aztec bribery involved a judge. In the local culture, the very act of unethical acceptance of a small number of bribes resulted in the judge losing his right to practise, being permanently dismissed from office. In addition, he was wrapped in a shroud, which emphasized the shameful nature of the punishment. If, on the other hand, the value of the bribe was high, the criminal had to die. A similar fate was shared by those who served as soldiers in *altepeme*, as no violation of discipline was tolerated among the caste of warriors.[24]

The next category of crimes involved violation of the values and morals of Mesoamerican peoples and included, inter alia, sexual crimes such as incest, homosexuality, rape, adultery or prostitution. The perpetrators of these crimes were usually punished by death. The exception was prostitution of women who belonged to the elite.[25] In the Maya consciousness, adultery was also a serious crime for the guilty couple and for those who, being aware of it, did not report the forbidden act. Men were only punished when a married woman was involved in their intimate relationship. Married women were always considered guilty, regardless of the circumstances of the marital status of their lovers, which clearly shows the diminished and unequal role of women in the society.[26] It might be illustrated with an example of inequality and disproportionality in administering the punishment. *Historia de los Mexicanos por sus pinturas*[27] describes such

[23] P. Vyšný, 2017, *op. cit*., p. 45.

[24] *Ibid.*

[25] *Ibid*., p. 179.

[26] Ch. O'Connell, 2013, *op. cit.*

[27] See *Historia de los Mexicanos por sus pinturas*, edited by J. García Icazbalceta, México 1891, in particular pp. 258–262. The history of the Mexicans through their paintings is one of the most important Spanish works by the Franciscan friar Fray Andrés de Olmos, written in Spanish and based on documents prepared in the Nahua graphic communication system. It was an achievement of ethnographic interface and consisted of the reports from various books and images presented and explained to him by *viejos* (old people) who had held indigenous religious and political positions and who had therefore been present when texts and images had been used.

incident during the reign of Huitzilihuitl (ca. 1397–ca. 1417). It concerned a man from Texcoco who found his wife with a priest in the temple only three days after she had given birth. The three rulers condemned the woman to death, but no punishment for the priest was mentioned. Generally, the punishment for adultery was to have the woman publicly embarrassed and her companion executed. However, before it happened, the lover had been tied to a piece of wood and then being thus immobilized and helpless he was brought before the betrayed husband. At the time, the fate of the caught lovers depended on him. One of the possibilities was to forgive his wife and her lover, so that the latter could be released and save his life. The second option was meant for the betrayed man who could leave the marriage and even get involved with another woman. The third solution was that none of the perpetrators would be forgiven. Then, as pictured multiple times in *Historia de los Mexicanos por sus pinturas*, guilty couples were executed by dropping stones on their heads.[28]

Aztec family matters were regulated by custom and tradition. Families were very close and children were considered gifts of the gods. The most important duty of the offspring was to obey their parents and the elders. To maintain the proper order within each family, parents could use corporal punishment, hit their children with agave leaves or force them to inhale chili smoke. However, even with such a strict discipline, crimes against the family occurred frequently. Exemplary acts included cases when a son verbally or physically attacked his parents, seriously disobeyed them or his behaviour would have been described as unworthy. Children could even be executed or disinherited for such misdemeanours.[29]

Crimes against human life and health included murder, for which the offenders stood the prospect of execution, and abortion, for which a woman who terminated her pregnancy or requested its performance faced execution.[30] However, in this category of criminal offences the Maya law developed another approach that, from a contemporary point of the view and taking into consideration the aspect of chronology, seems to present itself in a quite modern way. The Yucatán natives saw the distinction between accidental and deliberate, conscious murder. In the case of unintentional murder, the offender was punished by death at the hands of the victim's relatives, but he had the opportunity to pay restitution in order to receive a pardon. In addition, it was possible for the perpetrator to offer one of his slaves to the victim's family to avoid the death penalty.[31] In the case of a deceitful or wilful murder, or in the case of more serious crimes which constituted an insult to the gods, such as rape, incest, treason and arson, immediate death was the pen-

[28] Ch. O'Connell, 2013, *op. cit*.

[29] P. Vyšný, 2012, *op. cit*., p. 179.

[30] *Ibid.*

[31] Friar D. de Landa, *Yucatan before and after the Conquest*, translated by W. Gates (*Relación de las cosas de Yukatán*, 1566), Baltimore 1937, Sec. XXX, https://www.sacred-texts.com (accessed 06.06.2022).

alty.[32] In the case of unintentional offences, the custom required traditional restitution, and if the accused was insolvent or a minor, they instantly became slaves.

Another type of crime included those against private property, such as theft. Depending on the value of a thing stolen, thieves had to pay a fine of twice the value of the thing (a certain amount of the fine was paid to the robbed as compensation and the remainder to the state), or they became slaves who served the robbed person. Even if in a profane context thieves were uncompromisingly prosecuted and punished, in a ritualistic context they were in some cases tolerated, i.e. they participated in certain religious rituals. For example, an important part of the religious ceremony of *panquetzaliztli* was a fight between students attending a school for ordinary people (*telpochcalli*) and those from a school for young people from the social elite (*calmecac*). When the match was won by the *calmecac* students, they were allowed to haunt the *telpochcal* students and trap them in the palace buildings in order to take certain things from it (e.g. mats, seats, drums). However, if the *telpochal* students won, the *calmecac* students were trapped in their school building and the winners were able to take anything they wanted out of it.[33] *Historia de los Mexicanos por sus pinturas* mentions crime involving maize, which was an important and sacred food crop for the Nahua.[34] In this particular case, two boys stole already planted maize seeds. As a result, they were sold as slaves. Another example is set in a more convoluted circumstances. A man caught a lady stealing maize from a granary and demanded an intercourse in return for him remaining silent. She complied with his request, yet he still exposed her larceny. The man was subsequently taken as slave by the owner of the stolen corn after she reported the entire incident, and she was set free. A final illustration of the punishment for theft crimes would be a case when a man put another to sleep with a spell and stole all the grain in his granary, being helped by the perpetrator's wife. Consequently, the couple was executed for their act.

On the other hand, the Maya treated theft in a more serious way. Regardless of its severity, it was a sufficient reason for punishing the offender with an order to pay restitution to the aggrieved, in addition to being subjected to temporary slavery. Moreover, those punishments were also passed on to family members. Breaking into private property was also treated with full rigour. Since they usually had no doors, the Maya homes were well protected and thieves who entered a building to injure its occupant or damage the property lost their lives. Noblemen or officials were punished in a particularly severe manner. If an aristocrat was found guilty of theft, his face was tattooed or parts of his face were cut off on both sides in a public square as a permanent sign of his crime and a symbol of great shame.

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[32] *Ibid.*

[33] P. Vyšný, 2012, *op. cit*., p. 179.

[34] H. B. Nicholson, *Religion in Pre-Hispanic Central Mexico*, (in:) G. F. Ekholm, I. Bernal (eds), *Handbook of Middle American Indians*, Vol. 10, Austin: University of Texas Press 1971, pp. 401, 416–19.

In Mesoamerica, criminal law was undoubtedly characterised by the severity typical of archaic legal systems. While the death penalty was universal, other punishments included restitution, loss of office, demolition of the offender's home, prison sentences, slavery and shaving of the offender's head. The death penalty could be carried out by hanging, drowning, stoning, strangulation, beheading, beating, disembowelling, burning, quartering and opening of the chest to remove the perpetrator's heart. However, if victims or their families chose to intervene in the process, that could change the final decision dramatically. If they decided to forgive the perpetrator, his death sentence was revoked and he became a slave of the victim's family.[35] Furthermore, the Aztecs had a prison system that included: *cuauhcalli* ('death row'), *teilpiloyan* ('prison for debtors'), *petlacalli* ('prison for those found guilty of petty crime') and a fourth type of prison where a judge drew lines or put wooden sticks on the ground and the prisoner was ordered to stay within the lines.[36] Although it could hardly be described as an example wholly fulfilling the idea of the Foucauldian Carceral Archipelago (very primary one if any resemblance was to be proved), one may argue that theoretical functions of this particular punishment somehow overlap with the later constructed utilitarian concept of the legitimacy of punishment. Especially, the example of the 'stick prison' seems to be the most fascinating here. It required enormous loyalty for the authority that made an individual follow the rules of this punishment, despite its simple and hardly noticeable form. It might be treated as an ironic opposition to Jeremy Bentham's panopticon – in fact both of them seem to achieve the same purpose – seizing the prisoner's soul, as Michel Foucault believes, in order to give him a chance for rehabilitation.[37] It might lead to the thesis that custom laws highly influence and successfully execute the Foucauldian discipline without using too many instruments, whose aim is to influence the body and deliberately manipulate its parts, actions, and other basic spheres of daily life. Hence, the character of this particular type of prison was strictly symbolic. It did not require building a heavily guarded area or providing prisoners with an instruction to act in a certain manner. These sticks or lines were meant not to literally imprison an offender, but on the contrary, to give him a sign of hope. The time spent there forced an individual to try to understand the wrongfulness of his actions and feel deeply affected by them in order to experience an inner metamorphosis. It resembled a self-directed ritual. According to Émile Durkheim's conception of punishment, the offender had to experience it in order to once again become part of a society. This way he was reborn overwhelmed with shame for his actions,

[35] https://tarlton.law.utexas.edu/aztec-and-maya-law (accessed 06.06.2022).

[36] M. Widener, E. Glass, *Law in Mexico before the Conquest*, University of Texas: Tartlon Law Library, https://tarlton.law.utexas.edu/aztec-and-maya-law/aztec-criminal-law (accessed 02.04.2021).

[37] M. Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd edn, New York: Vintage Books 1995, pp. 104–134.

this time without an intent to act as he did before.[38] Furthermore, because of an enormous role of an isolation, the philosophy of prison management, which could be nowadays described as the 'silent system' or the 'Auburn system',[39] may be as well traced back to the Aztecs. The impact of carceral environment on prisoners supports the Foucauldian theory of a prison as 'an exhaustive disciplinary apparatus', which at the same time upholds utilitarian values. The purpose of criminal penalty was not to stigmatize and indefinitely isolate an offender but to cure and rehabilitate him.

Similar features were characteristic of the Maya legal culture, where penalties for various crimes were very strict. The Maya distinguished between intentional and accidental acts. For instance, individuals found guilty of murder were sentenced to death. However, if it was considered an accidental act, the perpetrator was ordered to pay restitution or give one of his domestic slaves to the victim's family. If perpetrators were minors, they would become slaves. Restitution or temporary enslavement awaited thieves. Moreover, those sentences were not imposed on perpetrators alone but were also extended to their family members.[40]

4. THE PROBLEM OF GUILT IN THE MESOAMERICAN SOCIETY

The inhabitants of Mesoamerica, apart from the concept of crime, developed their own idea of an individual who commits an unlawful act. He or she can simply be defined as a subject without a human face, which makes the figure look incomplete and at the same time despicable, incapable of any improvement, and thus should be ostracised by others and cannot avoid the punishment he/she fully deserves.[41] In the worldview of the inhabitants of Mesoamerica, the human body was not only material, but also deserved recognition for its symbolic meaning.[42] The Nahua peoples had a special figurative term for a person suspected of committing a crime; they called their face 'dirty with ashes'. This was especially true for those who were aware of the crime and believed that they would be able to conceal it.[43] The symbolism of a dirty face seems to be similar to that present in

[38] J. Warylewski, *Teoria kary Fiodora Dostojewskiego. Próba określenia*, Sopot 1987.

[39] A. Coyle, *Understanding Prisons: Key Issues in Policy and Practice*, Open University Press 2005, p. 29.

[40] M. Widener, E. Glass, *Law in Mexico before the Conquest*, *op. cit*.

[41] M. León-Potrilla, L. Silva Galeana, *Huehuehtlahtolli. Testimonios de la antigua palabra*, México: Fondo de Cultura Económica 1991, pp. 55–59, 83–86.

[42] S. Houston, D. Stuart, K. Taube, *The Memory of Bones: Body, Being, and Experience among the Classic Maya* (Joe R. and Teresa Lozano Long Series in Latin American and Latino Art and Culture), Austin: University of Texas Press 2006, pp. 2–17.

[43] B. de Sahagún, *Historia general de las cosas de la Nueva España*, Madrid 2001, p. 588.

the European culture, although in Europe there is a mention of a blood rather than ash stain. In Shakespeare's works,[44] like in Mesoamerica, dirt is a metaphor for the crime. The fact that the outer world seriously suspected some people of having committed a crime and was convinced that they could not escape punishment opened up the possibility of starting a criminal trial based only on rumours that were made public.[45] The attention paid to the psychological profiles of offenders, their motives and beliefs, and how a certain social attitude towards a committed act was formed has led to the division of different cultures in terms of their belonging to a guilt culture or a shame culture.

Guilt is considered a kind of internal mental state and involves a criminal's conscience. For this reason, it is 'visible' or 'perceptible' only to the perpetrator. In the guilt culture, the consequence of a crime is individual responsibility, i.e. personal fault of the perpetrator. Shame, on the other hand, may be noticed by other members of the community, who are outwardly aware of the fact that they are subjecting the perpetrator of a forbidden act to a kind of ostracism. In the shame culture, the criminal is seen as an integral part of a community whose members show certain solidarity, and therefore the wicked person experiences the consequences of his act, that is, the shame he shares with other members of his tribe or group. The next issue that differentiates the two concepts is the possibility of blurring an unpleasant memory. Using the colloquial phrase, 'guilt can be repaired' but not shame. Shame, which accompanies people almost throughout their entire life, can only be fully 'washed away' after the death of a person who, through his behaviour, feels it.[46] In principle, it can also be said that, while in the shame culture a criminal violates the custom and moral values and norms of a given community, in the guilt culture a criminal violates rules of conduct (mainly legal norms) which are the same for the whole society.[47]

The peoples of Mesoamerica are traditionally associated with groups cultivating the tradition of the shame culture. The reason is primarily the general understanding of crime by the Maya or the Aztecs. These societies did not perceive a tort as a sin in the Western or Christian sense, although it was precisely this sense that was given to it by the Spanish authors of written records. In the case of the Nahua, crime was not a violation of moral norms; it was not understood as the opposite of good, but it was not evil, either, because a well-established dichotomy of good and evil did not exist for that population. The offender behaved contrary to social norms, which was an undesirable and 'tangible' violation of the social order and disturbed normal functioning. It manifested itself in a noticeable consequence: harm or injury. However, since for the Nahua the social order was part of

[44] For instance, *Macbeth*, 1623.

[45] P. Vyšný, 2012, *op. cit*., p. 122.

[46] P. Vyšný, 2017, *op. cit*., p. 42.

[47] W. Fikentscher, *Law and Anthropology. Outlines, Issues, and Suggestions*, München: Verlag der Bayerischen Akademie der Wissenschaften 2009, p. 425.

the order of the supernatural world, created and ruled by the gods, they attributed not only natural but also supernatural effects to the wrongs caused by such violation. Therefore, restoring the normal world order often required a remedy consisting in not only real penalties (e.g. compensation) but also supernatural ones in the form of religious and symbolic rituals.[48]

5. CONCLUSION

Throughout their history, the Aztecs and the Maya managed to develop very well-functioning and interesting civilizations. Despite fundamental and deep differences in terms of achievements and discoveries, known in Europe or Asia, they came up with innovative solutions. Certainly, the European perspective can be deceptive, therefore, priority should be given to discovering the relationships inherent in the Aztec or Maya data, rather than interpreting them according to external evolutionary theories. Nonetheless, no social organization is able to function properly without some order, which in turn cannot exist without law clearly defining social realities in each society. The basis of such approach is the assumption that one can only learn about and understand the society's organization through regular experience. Furthermore, although the analysis of legal rules, cases or legal decisions and jurisprudential principles is a useful first step along the way to comprehend Aztec legal systems, they should be interpreted in their cultural and societal context. For the societies of Mesoamerica, the maintenance of social order was tantamount to observing divine principles, and therefore potential commission of a crime had to be made good not only on the earth but also symbolically, as manifested in ritual and religious rites.

In addition to its religious affiliation, criminal law was one of the more effective tools to control society. It was based on sound ideological foundations, which placed greater importance on prosecuting and punishing criminals. Strict repression of the perpetrators was a means to maintain the right 'course' of the world, both temporal and supernatural. This was understood in Mesoamerica as the most important responsibility of the state, so the prosecution and punishment of criminals was considered a special privilege of the authorities, and often ordinary people could also contribute to the restoration of the desired order, thus benefiting personally.

Taking into account also harmful effects of a criminal act, attention should be paid to the psychological condition of offenders and their personal attitude towards it, which is related to the parallel development of the notions of guilt

[48] P. K. Johansson, *Miquiztlatzontequiliztli. La muerte como punición o redención de una falta*, 'Estudios de Cultura Náhuatl' 2010, Vol. 41, pp. 91–95.

and shame cultures. An important aspect of the Mesoamerican legal order was the distinction between randomness and intentionality of forbidden acts, which affected final judgments in particular cases. The data we have, especially that relating to the Aztec law, shows that the concept of guilt was well developed in that system. However, determining whether the concept was framed much earlier than on the European continent is problematic. This is due to the fact that such knowledge comes from the later Spanish period in the Mesoamerican history, which affects the European thought on this issue.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.8

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MANTALIL, *MAURI* AND *DJANG*: LAW AND JUSTICE IN THE INDIGENOUS WORLDS

Abstract

Indigenous and positive law systems are often based on different ontological assumptions. This is one of the aspects that can give rise to collision in a *field of legal conflict*. The text presents examples of the ontological differences between legal systems and social and cultural phenomena related to them, while pointing out that, despite their great importance, they do not prove to be the major obstacle to enduring understanding between cultures and their law systems.

KEYWORDS

customary indigenous law, positive law, ontology, field of legal conflict

SŁOWA KLUCZOWE

tubylcze prawo zwyczajowe, prawo stanowione, ontologia, pole konfliktu prawnego

1. INTRODUCTION

Recognition of multiculturalism and the accompanying legal pluralism – as a part of decolonization processes – appears in some countries inhabited by indigenous peoples. Colonial states, each to a different degree imposing their own legal rules on the conquered peoples,[1] introduced their own institutions and practices. Today, indigenous peoples demand recognition of their own subjectivity and autonomy, claiming the right to apply their own law (see, e.g. the Declaration on the Rights of Indigenous Peoples[2]).

The coexistence of different legal systems in the same countries often leads to conflicts. Conflicts at the intersection of positive and indigenous law arise at different levels, or around several central elements of dispute, resulting from sociopolitical and cultural conditions. Some of these have their source in the unfinished decolonization process and in discrimination. This results from the lack of genuine recognition by the national society of indigenous identities and practices, including legal practices. This state of affairs is often associated with the denial of basic rights to indigenous communities, for example, the right to land or the right to autonomy. On the other hand, instances of dispute are found in different opinions of representatives of indigenous communities on the validity of the applicable rules and legal norms, whether referring to indigenous law or to positive law. Another area where problems are manifested, which also combines the previous two, is the lack of mutual adjustment between norms of indigenous customary law and norms of positive law. This means there are no mechanisms and solutions facilitating the coexistence and conflict-free functioning of both legal systems within one legal order (e.g. a state). Even if such solutions exist, they are often neglected. Another important area where conflicts may arise are assumptions about the reality of facts, events, and relations, i.e. the issue of different ontologies from which different legal systems derive.

The problems highlighted above belong to a set of relations and processes that manifest themselves as a phenomenon I label a *field of legal conflict*. This is an area where conflict and tensions between the legal systems referenced by the participating actors (in this case, the indigenous customary law and the positive law) take place. Tensions and conflicts arise between: different legal norms, values, worldviews and paradigms explaining their functioning, attitudes to understanding what a human being, a person, or consciousness are, whether it is possible

[1] For more on this topic, see among others in: P. Fitzpatrick (1990, 1992), M. Chanock (1985), S. F. Moore (1986), J. F. Collier (1973), L. Nader (1989), J. Drzewieniecki (1995).

[2] United Nations GA Resolution A/RES/61/295 adopted on 13 September 2007, https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 10.02.2021).

to have rights without fulfilling obligations, and whether everyone deserves the same rights.[3]

Among the very important elements that are present in the field of legal conflict, there is the issue of understanding and perceiving 'law' per se. It results largely from the abovementioned ontological difference between indigenous cultures and the Western positivist concept of the world. This difference and its consequences is the subject of this paper. My intention is to argue, using a few selected examples of indigenous cultures from different parts of the world (Mexico, Australia and New Zealand), how the understanding of what we might call 'law' differs across these cultures from the 'Western' concept.[4] In these societies visions of the world, the role of man in it, and the role of an individual in society have been shaped by myths different from those that have formed European societies. The realization of this difference leads to, among others, the questions about what ontological concepts – including those concerning the human being, the reality of the invisible world, and the relationship between rights and obligations – should be used in multinational states, and whether it should be one concept or rather a few of them. The fundamental problem is therefore whether, despite ontological differences, the systems can coexist and adopt common standpoints.

2. *MANTALIL*

In some indigenous cultures, not all members of a community are regarded as equal. This is the case, for example, of the Tzeltal culture. As Pedro Pitarch, an anthropologist and expert on the Tzeltal culture and language, writes: 'This asymmetry also explains why not all human beings possess the same respect or, in this context, the same rights.'[5] In 1996, Miguel Gómez Gómez and Juan Santiz Cruz[6] translated the Universal Declaration of Human Rights (UDHR) into the Tzeltal language. The translators took into account the cultural context, rhetoric and content of Tzeltal discourse so that some concepts alien to members of the community could be understood. The translation, in consultation with translators,

[3] For more on the topic of legal conflict, see in M. Krysińska-Kałużna, *Prawo jako mit. Relacja pomiędzy tubylczym prawem zwyczajowym a prawem stanowionym*, Kraków: Nomos 2017.

[4] Some of the examples of ontological diversity of legal systems mentioned in this paper are presented in my book, see M. Krysińska-Kałużna, 2017, *op. cit*.

[5] P. Pitarch, *The Labirynth of Translation: A Tzeltal Version of the Universal Declaration of Human Rights*, (in:) P. Pitarch, Sh. Speed, X. Leyva-Solano (eds), *Human Rights in the Maya Region. Global Politics, Cultural Contentions, and Moral Engagements*, Durham and London: Duke University Press 2008, pp. 91–121, at p. 97.

[6] Both are indigenous persons from the municipality of Cancun in Mexico.

was analysed by Pedro Pitarch. In his text *The Labyrinth of Translation: A Tzeltal Version of the Universal Declaration of Human Rights*, the Spanish anthropologist cites, among others, translations of individual articles of the UDHR and explains the terms used for 'law' and 'rights'.

The term 'law' was translated into Tzeltal as *mantalil*. *Mantal* without the generalizing suffix *-il* means what one person tells the other to do, and so means 'advice', but also 'order', 'rule' or 'dictate'. 'Although the themes that the term *mantalil* covers are very broad, it deals in particular with questions of posture, gesture, and social etiquette, especially with regard to showing respect to relatives and neighbors.'[7] According to Gómez, *mantal* is given to children partially in the form of sacred words. Then the children can follow the 'sacred path of advice', *ch'ul be mantal*.[8] The entire concept of *mantalil*, i.e. the laws that determine proper, ethical behaviour and life, is rooted in religious and mythical thinking. *Mantalil* defines not only the relationship between people but also the relationship between human beings and the rest of the world. To explain this concept, Pitarch recounts a story told by his friend: One time when on their way home, elderly people stopped and sat down by the road because they heard a bird sing. Its singing was so beautiful that listening to it made those people reflect on the world. The bird gave them a *mantal*, moral guidelines, ethical advice.[9]

Mantalil is accumulated throughout the whole life in the human body, which possesses two sources of consciousness: the head and the heart. As Pitarch explains:

> The process of creating the body is effectively continuous and only at an advanced age – older than forty perhaps, when a man or woman is a grandparent – is a person considered to have acquired sufficient maturity to be considered a 'correct' body. Nonetheless, this development is as much physical as it is moral: each aspect is a necessary condition for the other. From a Tzeltal perspective this ethic (*mantalil*) intervenes decisively in the formation of a person, though not spiritually (as we imagine in the West) but corporally. *Mantal* is thus not only used and understood as an ethical discourse; over a lifetime one actually acquires *mantal* as if it were something substantive, so that a person can accumulate a lot or little *mantal*.[10]

Head awareness develops throughout life and 'the body is the necessary condition for the moral development of a person.'[11] Therefore, as we can see, in the Tzeltal culture *mantal* 'law' is not a set of abstract rules, it is a substance that can and should be accumulated in a human body.[12]

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[7] P. Pitarch, 2008, *op. cit.*, p. 95.

[8] *Ibid*., pp. 95–96.

[9] *Ibid*., pp. 96–97.

[10] *Ibid*., p. 95.

[11] *Ibid*., p. 96.

[12] M. Krysińska-Kałużna, 2017, *op. cit*.; M. Krysińska-Kałużna, *Los orígenes míticos de la ley*, 'Pensamiento filosófico del CESLA' 2015, No. 3, pp. 13–35.

The concept of 'right' (meaning 'to have rights' or that 'something is right to do') was translated using the expression of *ich'el ta muk*, which means 'respect'. 'The expression is made up of the transitive verb *ich'*, meaning to receive, obtain, or take something; *ich'el ta muk* can be literally translated as "receiving something greatly, with force."'[13] Therefore, the Tzeltal notion of 'right' is interpreted within a logic of reciprocity and complementarity. The Tzeltal do not think that all humans are equal – which was the assumption of the UDHR authors – but rather distinct and 'powerfully unequal' beings, an aspect that makes reciprocity and complementarity necessary.[14]

The word 'fraternal' used in relation to the assumption expressed in the UDHR that all persons are equal, in the Tzeltal culture does not have the same meaning, because siblings are never equal. For example, brothers and sisters differ by age, hence they are not equals. 'In the same way, husband and wife are unequal, and this is what makes them need each other. This asymmetry also explains why not all human beings possess the same respect or, in this context, the same rights. Respect is not something given but something acquired as one goes about fulfilling one's obligations.'[15] Fulfilling one's commitments is the basic condition for getting respect; one can only deserve it and not obtain it just because one is human. For this reason, it is difficult to state that children in the Tzeltal culture have rights. Children do not gain respect but owe debt to those who care for them. Only the possibility of entering into a relationship of mutual obligations will allow them to gain the respect of other members of society. The 'creature in the mother's womb' does not have rights, because according to the Tzeltal it is not yet a person, 'it has never heard that there exist laws'.[16]

In the translation of the UDHR into Tzeltal the word *kirsano* (plural: *kiranuetik*) was used. It is a borrowing from Spanish and comes from the word *cristiano*, meaning a Christian person. The authors of the translation tried to avoid the term *winik*, because in Tzeltal it means a human as a man and excludes women from this category, or at least – as Pitarch writes – their inclusion is questionable and not self-explanatory. Interestingly, the use of the word *kirsano* excludes beings that only look like people but are not human. Pitarch writes:

> Among the Tzeltals of Cancuc, *kirsano* is usually used to distinguish human bodies of skin and bone from other types of beings such as spirits, the dead, souls, lords of the mountain, and monsters. If someone comes cross a being of some sort during the night, they wonder whether it is a *kirsano* or not, if it is a human body or not. These other beings have some human qualities, but their bodies are not really their own. Conversely, the category of *kirsano* includes human beings that are not indigenous,

[13] P. Pitarch, 2008, *op. cit*., p. 97.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*., p. 98.

such as Europeans, or the 'cannibals' in the Lacandón Forest, despite their great cultural distance.[17]

Kirsano is thus the category that extends equality beyond the group of men of one people and also includes, inter alia, women and non-indigenous persons.

The terms 'freedom', 'justice', and 'peace' are translated in the UDHR into Tzeltal as *lekil utsilal* and *sbuts k'inal*. The first of them literally means 'a lot of goodness', that is 'being a contented person, protected, out of danger, without enemies, who lives well and can go where he or she pleases in harmony with the rest of the world, the human as well as the natural and non-human ones.'[18] *Sbuts k'inal* means that one is physically healthy and is 'not scared, worried, ashamed, or depressed'.[19] According to Pitarch, the language describing illness and health is for the Tzeltal the primary way of talking about social and political relations. 'It is not an exaggeration to say that the Universal Declaration of Human Rights is proposed, in its Tzeltal version, as a means of improving the health of human beings.'[20]

3. *MAURI*

The essence of the indigenous law and justice system is to restore balance in the community. Less important is the argumentative inquiry of who was right, as we know it from the Western courtrooms. Consequently, justice is seen and labelled as healing by many indigenous communities. This is how the Navajo, the Ojibwa, the Haudenosaunee or the Maori perceive it.[21] 'Justice produces equilibrium. In order for equilibrium to exist, there is a pathway – Ko Te Ara Tika (the right road) that Maori seeking justice for themselves and others must follow. It is paved with traditional principles – indicators and measures of true and proper behavior – crafted by our ancestors as they journeyed through the cosmos and into Te Ao Marama (the physical world).'[22]

Justice and law, as portrayed by Nin Tomas, exist only when they penetrate and connect the material (visible) world and the spiritual world in which the ancestors function. As in the Tzeltal culture, for the Maori, the principles to be followed

[17] *Ibid*., p. 102.

[18] *Ibid*., p. 103.

[19] *Ibid*.

[20] *Ibid*.

[21] W. D. McCaslin (ed.), *Justice as Healing: Indigenous Ways*, Saint Paul, MN: Living Justice Press 2005.

[22] N. Tomas, *Maori Justice – The Marae as a Forum for Justice*, (in:) W. D. McCaslin (ed.), *Justice as Healing: Indigenous Ways*, Saint Paul, MN: Living Justice Press 2005, pp. 134–140, at p. 135.

in life are closely related to obligations to other people 'and serve to position each individual within the wider universe that we carry within us'.[23]

The principles that Tomas presents and that determine the Maori relationship with the rest of the world are deeply embedded in the mythology and cosmogony of this people. These include: *Pono* (truth, i.e. actions must be true to the Maori view of the world), *Tika* (rightness, i.e. actions must accord with this view), *Whakapapa* (genealogy, i.e. actions must recognize spiritual and physical kinship with the rest of the world), and *Whanaungatanga* (interrelatedness, i.e. actions must maintain and affirm relationships with other people and the rest of the world). To achieve this, one must recognize at least three of the most important spiritual concepts which are *Wairua* (spirituality), part of a non-physical existence: *Tapu* (the authority found in all things, placed there by the gods); *Mana* (the way in which spiritual authority manifests itself and is perceived by others); and *Mauri* (the life energy that connects all things spiritually and is the source of human life essence).[24]

Tomas describes how her people deal with the problem of sexual abuse of children by elders. Foreign (Western) law is not a method that can help victims. 'The Marae [formal Maori meeting place – MKK] provides a forum in which healing can occur for all the people who are affected by sexual abuse and where it can be acknowledged that everyone is a victim in some way. I say this not to minimize the hara[25] or to protect the perpetrators but to acknowledge that the Maori community as a whole is affected by the sexual abuse of its children, and, this being so, must be able to participate in the healing process.'[26] The healing process takes place in the *Marae*, a place filled with references to the Maori mythology, e.g. by referring to the above-mentioned spiritual principles and concepts. Formal speeches that take place during meetings in the *Marae* before the gathered people deal with the matter at hand, refer to the spirituality of the Maori people by reciting mythical events from the lives of their ancestors.[27]

4. *DJANG*

The law is healing also for Australian Aboriginal peoples. If the law cannot provide health to people through understanding of its jurisprudence, 'it is merely

[23] *Ibid*., p. 135.

[24] *Ibid*., pp. 135–136.

[25] Evil, or the violation of *tapu*, the moral code. For more about *hara* and other Maori notions, see *Māori Dictionary*: https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=hara.

[26] N. Tomas, 2005, *op. cit*., p. 138.

[27] M. Krysińska-Kałużna, 2017, *op. cit*.

a set of rules to regulate their movements and their goods', writes a researcher on indigenous jurisprudence Christine F. Black coming from the Yugambeh[28].[29] Law stories weave people together,[30] and people's health depends on the stories that come to them.[31]

The basic principle of the Aboriginal concept of law is: the Law comes from the Land. The second important principle derived from the first one is: the Law is exercised through the Law of Relationship.[32] To describe the Aboriginal jurisprudence, the Australian author uses two important terms: *talngai* and *gawarima*. '*Talngai* means light, which is used to enlighten in a metaphysical sense – what goes around the camp as knowledge. *Gawarima* describes a circular movement in which the information/story goes around the camp. In turn, it becomes a knowledge that is of ritual nature and is therefore meant to heal through feeling the knowledge.'[33] The Australian native story about law is built of circles. The outermost, with the remaining circles within, is cosmology. The second is relationships.[34] Right in the middle of the circles is the individual whose legal behaviour is shaped by primordial energy, called *Djang*,[35] and whose rights and obligations are determined by the Law of Relationship.[36] It is 'the most appropriate term to emphasize the centrality of the legal relationship in the edifice of the legal ethos – that is, the Land is the Law. (…) The shape and pattern of this Law of Relationship creates a body of law which, in Australia's case, "vibrates in song" and is "woven across" *Corpus Australis*. This is expressed in the concept of song-lines, or Dreaming Tracks, which criss-cross the body of the continent.'[37] As the continent of Australia is a body in Aboriginal jurisprudential concept,[38] 'walking the land' means also 'actualizing' the law and knowledge associated with the law[39]. The song lines that cross the country are the rhythm of the law.[40] If we fail to comply with the law, the Land may change overnight.[41] *Djang* – the ancient power, the primordial energy, must be in balance if humanity is to survive on the planet.[42]

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[28] Christine F. Black is a descendant of both the Kombumerri and Munaljahlai peoples. The Yugambeh are a group of Aboriginal Australian clans.

[29] Ch. F. Black, *The Land is the Source of the Law. A Dialogic Encounter with Indigenous Jurisprudence*, London and New York: Routledge 2011, p. 64.

[30] *Ibid*., p. 5.

[31] *Ibid*., p. 63.

[32] *Ibid*., p. 45.

[33] *Ibid*., p. 4.

[34] *Ibid*., p. 15.

[35] *Ibid*., p. 41.

[36] Law is related to human rights and obligations, see *ibid.* at p. 58.

[37] Ch. F. Black, 2011, *op. cit*., p. 15.

[38] *Ibid*., p. 18.

[39] *Ibid*., p. 51.

[40] *Ibid*., p. 53.

[41] *Ibid*., p. 6.

[42] *Ibid*., p. 17.

'The balance of the *Djang*, therefore, is the basis for the Law of Relationship: the metaphysical and physical relationship between people and the cosmos.'[43] One of the reasons that *Djang* is out of balance is the violation of holy places.[44]

Indigenous law, as Black argues, is not a collective version of Western law. The real source of law for Aboriginal Australians is Land[45] or *Djang*, not people.[46] Law is not made by humans but ordained and deposited into the Land by the primordial energies. The source of law is beyond humankind and their individual concerns; 'rather, it sits in the realm of eons of time'.[47] Senior Law People are carriers of knowledge about the Land and the Law. From childhood, they learn about 'epistemology, ecology, languages, oral literature and esoteric knowledge of their nation's classical thought'.[48] Law is inextricably linked with myths and cosmology. 'To explore the establishment of law in any Indigenous culture, one must first enter the cosmology via the cosmological narrative. Central to that narrative are the constitution of authority and the jurisprudence that legitimates such authority.'[49] In Black's narrative, cosmologies are 'the circle that encompasses all one perceives to be reality'.[50] Cosmologies are 'safe places' for understanding.

Indigenous law and indigenous peoples' legal theory can be explored through feeling.[51] Feeling is the proper form of communication, and spirit or soul is the fundamental form of being.[52] For the 'feeling' of the law, the Law of Relationship with the spiritual/unseen world is important.[53] 'To feel the Law, which is posited in the Land, requires a communications with the unseen. This *feeling* of the spirit world and the reliance on that feeling as the basis for knowledge keeps the individual mindful of his own actions and so leads him to *internalize* the law, rendering it intimate, in contrast to the West's reliance on external prompts and norms.'[54] Feeling shapes experience gained from the landscape and the universe itself.[55] This familiarity with other states of consciousness is – from Black's point of view – a hallmark for Aboriginal peoples.

Djang is also a source of wisdom.[56] Thanks to this energy, knowledge can be obtained in Dreaming sites. These places are guarded by the dead. Thus, the dead

[43] *Ibid*., p. 32.
[44] *Ibid*., p. 33.
[45] *Ibid*., p. 9.
[46] *Ibid*., pp. 32, 45.
[47] *Ibid*., p. 50.
[48] *Ibid*., p. 45.
[49] *Ibid*., p. 24.
[50] *Ibid*., p. 27.
[51] *Ibid*., p. 12.
[52] *Ibid*., p. 34.
[53] *Ibid*., p. 27.
[54] *Ibid*., p. 25.
[55] *Ibid*., p. 24.
[56] *Ibid*.

are still involved in the affairs of the living and the relationship between the living and the dead also results from the relationship between people and the Land.[57] One of these relationships is the teaching of Senior Law Men by deceased ancestors.[58] At the Centre of the universe is the Land, not the people, and 'dreaming' is associated with feelings for the Land.[59] 'There is no escape into solitude, for, at every corner, a rock, a tree, a spirit is watching the action of the Aborigine. Hence life becomes "full-law" participation – fully engaged with all that surrounds us, both seen and unseen. Therefore, when there is little resistance between seen and unseen, it is much easier for inanimate objects to pass through the liminal space and manifest, as the Senior Law Men explain.'[60] Therefore, Aboriginal peoples see no reasons to attach more importance to the material world than to the spiritual world.

5. CONCLUSION

For the abovementioned indigenous communities, law is not an abstract system of man-made rules. First of all, it is a phenomenon closely related to the spiritual aspect of life. 'The natural laws of Aboriginal Peoples and the state laws of non-Aboriginal people are inherently different, based on fundamentally different beliefs and values. As a result, they are in ongoing conflict',[61] claims Gloria Lee, Prince Albert Grand Council Justice Director and the former research developer for the Saskatchewan Indian Institute of Technologies. The law can be a substance accumulated in the body and creating a real person, it can be the energy necessary for the existence of the world, embodied or read in the landscape, associated with the spirits of ancestors. It can be a force that heals the community, creates a relationship between people and nature. The law does not have to be a clearly defined rule, it can be known by feeling, not only among Aboriginal Australians. As Chief Justice Robert Yazzie explains: 'When the Navajo courts define law, we must consider *norms*. Norms are values and shared feelings about the way to do things. Sometimes Navajo say, "Do things in a good way." As Indi-

[57] *Ibid*., pp. 36–37.

[58] This is the case, for example, of Mawalan II, taught by his late father Wandjuk Marika (see Ch. F. Black, 2011, *op. cit*., pp. 36, 72). Wandjuk Djuwakan Marika, who died in 1987, was Senior Law Man and also an artist, painter, actor, composer and political Indigenous land rights activist, see e.g. W. Marika, *Wandjuk Marika: Life Story*, Brisbane: University of Queensland Press 1995.

[59] Ch. F. Black, 2011, *op. cit*., p. 40.

[60] *Ibid*., p. 35.

[61] G. Lee, *Defining Traditional Healing*, (in:) W. D. McCaslin (ed.), *Justice as Healing: Indigenous Ways*, Saint Paul, MN: Living Justice Press 2005, pp. 98–107, at p. 102.

ans, we know what it means to do things in a good way. Therefore, the people's shared feelings fill in that broad term of *law* to give it meaning.'[62] Ada Pecos Melton, president of the American Indian Development Associates and a member of the National Tribal Advisory Committee of the National Tribal Justice Resource Center, writes: 'The concept of law as a way of life makes law a living concept that one comes to know and understand through experience.'[63]

However distant the ontological foundations of the system of positive law may seem from the indigenous law systems' ontological basis, it does not entail that the two 'structures' cannot meet or be open to each other. The necessity for this openness on the part of dominant cultures and societies is demonstrated, for example, in legal acts such as the UN Declaration on the Rights of Indigenous Peoples, ILO C169,[64] the UNESCO Universal Declaration on Cultural Diversity. But it also should be seen in the pragmatic conclusions resulting from the observed effects of the application of the Law of Relationship between human beings and the rest of the world in indigenous societies. The relationship with non-human beings proposed by the indigenous communities gives a much greater chance for our survival on the planet.

The limits to openness on the part of positive law constitute the assumptions on which human rights are based. It is difficult to imagine that the state courts could, for example, as a rule, assume that not every person is equally human being or that not all people are equal (thus recognizing certain rules stemming, e.g. from the Tzeltal culture, but also many others). On the other hand, 'as a rule' indigenous peoples in Mexico are treated worse than the non-indigenous, and this also applies to legal proceedings. Therefore, what sense would it make for the Tzeltal community, affected by the violence of the *Ladinos* for hundreds of years, to adapt the concept of customary law in order for it to align with positive law, if the latter serves the interests of the dominant society? The possibility of 'peaceful meeting' of the two kinds of legal systems raises a question about the indigenous communities' willingness for this breakthrough to happen.

The meeting of the systems on the ground of ontology, however, has come to fruition. Legal personality granted to the Whanganui River by New Zealand in the national law system was one such event.[65] In the Maori culture, protecting

[62] R. Yazzie, *Healing as Justice: The Navajo Response to Crime*, (in:) W. D. McCaslin (ed.), *Justice as Healing: Indigenous Ways*, Saint Paul, MN: Living Justice Press 2005, pp. 121–133, at p. 122.

[63] A. Pecos Melton, *Indigenous Justice System and Tribal Society*, (in:) W. D. McCaslin (ed.), *Justice as Healing: Indigenous Ways*, Saint Paul, MN: Living Justice Press 2005, pp. 108–120, at p. 109.

[64] Indigenous and Tribal Peoples Convention (No. 169), adopted by the International Labour Organization on 27 June 1989.

[65] The Whanganui River became the first river in the world to be recognised as a legal person in 2017. 'The Whanganui River is not the only instance of a natural resource being granted legal personhood in New Zealand. In 2014, the Te Urewera park, the ancestral home of the Tuhoe

landscape and the natural environment means protecting the *tupuna*, or 'ancestors', who live there and it is the community's duty. Moreover, humans and water are believed to be particularly intertwined. Now, following 140 years of negotiation, the river has been granted the same legal rights as a human being would, and if ever abused (e.g. polluted), it can sue. At the same time, other concurrent events have reasserted the sustained functioning of the old colonial schemes. In 2020, the Australian mining company Rio Tinto blew up the 46,000-year-old Juukan Gorge cave with prehistoric paintings, a priceless place for Aboriginal peoples, archaeologists, and all mankind. The company obtained permission from local authorities to extend the area of the nearby mine. In the field of legal conflict, capital and profit have a decisive role. One can overcome ontological differences and admit that the river is a legal subject, but apparently, actors making decisions in the field of legal conflict are unable to give up profit. And ontology has nothing to do with it.

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people, became the first natural feature in the country to be recognised as a legal person. In 2018, Mount Taranaki – a 120,000-year-old stratovolcano sacred to the Maori – was awarded the same status.'; see K. Evans, *The New Zealand River that Became a Legal Person*, BBC, 20 March 2020, http://www.bbc.com/travel/story/20200319-the-new-zealand-river-that-became-a-legal-person (accessed 10.02.2021).

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.9

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LEGACY OF THE CONFLICT BETWEEN EUROPEAN AND INDIGENOUS AFRICAN LEGAL CONSTRUCTS OF LAND TENURE IN CONTEMPORARY ZIMBABWE

Abstract

The study focuses on the undeniable significance of the European legal traditions, brought to former Southern Rhodesia/Rhodesia by European settlers, for the legal status of land tenure in the country, the legacy of which traditions still deeply impacts the situation in present-day Zimbabwe. There are two main aspects of this influence: the aftermath of imposed land division and the prevalence of Western legal traditions in contemporary law. Numerous laws enacted unilaterally by white Rhodesians, most notably the 1930 Land Apportionment Act and the 1951 Native Land Husbandry Act, impacted the land tenure in the region. The indigenous African population was undoubtedly discriminated against by these legal actions: numerous acres of the land were taken by European conquerors and those left were of much lesser value in terms of farming and pasture. After the end of minority rule in Rhodesia in 1980, when Robert Mugabe rose to power, new land policies were imposed and numerous land allocations were awarded to the supporters of his regime in the name of removing racial injustices. The consequence was disastrous: the policy led to the demise of once world-famous agriculture and Zimbabwe became ceaselessly endangered by famine. Furthermore, laws concerning the land tenure and husbandry were (and still are) based on European legal constructs, alien to the native population of Zimbabwe. Indigenous traditions were subsequently ousted by the European law and are significantly absent in Zimbabwe today. Nowadays, after the fall of

Mugabe in 2017, the country finds itself in the defining point of its history. The question persists: Can Zimbabweans derive useful values from their past in order to shape a new land policy in their homeland that would be just for all its citizenry?

KEYWORDS

Zimbabwe, Rhodesia, land tenure, legacy of colonialism, African legal traditions, land reform

SŁOWA KLUCZOWE

Zimbabwe, Rodezja, własność ziemi, dziedzictwo kolonializmu, tradycje prawne Afryki, reforma ziemska

1. INTRODUCTION

This study aims to present the extent of European legal influences in present-day Zimbabwe, focusing on the land tenure aspects of this phenomenon. Moreover, the paper will reflect on the legacy of colonialism and European minority dominance for over a century in contemporary Zimbabwe in relation to land distribution. The historical context will be discussed concisely due to the fact that the subject itself is remarkably broad. Thus, the goal of the study is not to fully exhaust the topic of the history of land tenure in Southern Rhodesia, Rhodesia and independent Zimbabwe, but to show its impact on present-day situation in the state. The paper will additionally focus on how the present is deeply influenced by country's past, regarding the land tenure. Finally, the study aims to portray the conflict between the native populace and the colonisers from a different culture, and to present its effects visible nowadays.

The impact of European law and legal values on the land policy and land tenure in contemporary Zimbabwe can be defined by considering its two main aspects. Firstly, there is the land distribution during the minority rule in Rhodesia and its aftermath. Secondly, one should take into account the prevalence of European legal constructs in historical and contemporary legal regulations. The resulting analysis starts with a description of the historical division of land in Southern Rhodesia, Rhodesia and Zimbabwe. The impact of the prevailing European legal tradition over the indigenous African legal system is discussed in the following part of the study.

2. LAND DISTRIBUTION

2.1. SOUTHERN RHODESIA AND RHODESIA

This historical description should be started with the statement that European expansion can be traced back to the end of nineteenth century and the Pioneer Column, which arrived in the Mashonaland (nowadays southern part of Zimbabwe) in 1890. Its success can be mainly attributed to influential Cecil John Rhodes,[1] who was a main proponent of this expedition. This date marked the start of the rule of the British South Africa Company in Rhodesia, the name of which of course came from the impactful politician.

When describing the native populace of the Zimbabwe plateau, it has to be highlighted that it was relatively undiversified, what can be regarded as a rarity in African circumstances, since there were two main ethnic groups that accounted for almost all of the population. These groups were (and still are to this day) the minority Ndebele and the majority Shona. Despite the smaller number, it was the Ndebele group that was dominant in the region and held control of majority of the natural resources, such as fertile land, cattle, etc. It most likely coincided with the fact that this nation was created in the nineteenth century by a split from the rest of the Ndebele ethnic group from the south of the Limpopo river[2] and conquered large parts of present-day Zimbabwe. There was even a saying, reportedly popular throughout of the arrival of the first European settlers, that compared the Shona people to sheep and the Ndebele to wolves.[3]

Undoubtedly, the ideas of *civilizing* of the so-called barbaric and primitive indigenous populace of the African interior were deeply rooted in the mindset of the first settlers. This can be clearly seen in the words of a Rhodesian prime minister, Sir Godfrey Huggins: '(…) at the same time, under his [a European's – JK] influence, knowledge and care, he may raise the African to become morally and physically (i.e., in vigour) like a European.'[4] Yet, the main goal of the European colonists was unquestionably finding precious ores and conquering land. They were quick to discover that vast native-controlled areas were of highest suitability for agricultural purposes. This collision of interest undeniably had to spark a significant conflict. Needless to say, even though the native Africans put some resistance,[5] it was the European minority who was victorious. The European colonial dominance over the area would finally last for nearly a century.

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[1] He most notably promised the natives 'equal rights for [all – JK] civilised men'.

[2] It nowadays forms the border between Zimbabwe and the Republic of South Africa.

[3] H. Zins, *Historia Zimbabwe*, Warszawa 2003, p. 77.

[4] B. N. Floyd, *Land Apportionment in Southern Rhodesia*, 'Geographical Review' 1962, Vol. 52(4), p. 579.

[5] Namely, Shona and Ndebele rebellions in 1896–1897, called the First *Chimurenga*.

From the beginning, the newly arrived Europeans asserted their dominance as regards land tenure, even though Clause 14 of the charter of the British South African Company obliged it to safeguard the possession and disposition of natives' land.[6] Africans were mostly located into reserves, namely, established in 1894 infamous Gwaai and Shangani, which totalled only about 2,490,000 acres[7] and were thought of as waterless and unhealthy by the natives.[8] Moreover, the Europeans began to alienate large tracts of land under the title of freehold,[9] which land was used by the indigenous African populace for centuries. However, even if de facto discriminating, the legal system was not formally disadvantageous towards the natives, since an African could 'acquire, hold, encumber and dispose of land' on the same conditions as a European.[10] Yet, the Africans evidently did not use this right, since only about 100,000 acres were bought by them in this manner until 1923[11] or even as little as 45,000 acres by 1925,[12] which can be at least partially attributed to the Europeans' unwillingness to sell any land to Africans.[13] The presented legal conditions changed when the Land Apportionment Act was passed in 1930, a law that would later become a cornerstone of land allotment (cf. Figure 1) in the Southern Rhodesia and Rhodesia. It established a rigid territorial segregation,[14] which settlers often justified as a necessity in order to preserve the indigenous African culture,[15] without a doubt in a deceptive manner. Moreover, the natives' right to own land anywhere in Southern Rhodesia was revoked and the African populace had to move into the reserves.[16] The Land Apportionment Act of 1930 granted nearly half of the colony's total land area to European settlers. The land allocated to Africans constituted only around 29% of the total area, nearly half of what was granted to white settlers. This disproportionate allotment becomes even more indisputable and somehow striking if one considers the proportion of European and African populations at the time (cf. Figure 2). As we can presume, Europeans amounted to even less than 5% of the colony's entire population. This means that effectively around 95% of the country's populace was granted less than 30% of the total arable area, while less

[6] W. Roder, *The Division of Land Resources in Southern Rhodesia*, 'Annals of the Association of American Geographers' 1964, Vol. 54(1), p. 48.

[7] B. N. Floyd, 1962, *op. cit.*, p. 572.

[8] D. Goodwin, *Whatever it Takes: Tenure Security Strategies of Communal Land Right Holders in Zimbabwe*, 'Africa: Journal of the International African Institute' 2013, Vol. 83(1), p. 164.

[9] A. C. Jennings, G. M. Huggins, *Land Apportionment in Southern Rhodesia*, 'Journal of the Royal African Society' 1935, Vol. 34(136), p. 305.

[10] B. N. Floyd, 1962, *op. cit.*, p. 574.

[11] A. C. Jennings, G. M. Huggins, 1935, *op. cit.*, p. 297.

[12] W. Roder, 1964, *op. cit.*, p. 43.

[13] D. Goodwin, 2013, *op. cit.*, p. 164.

[14] B. N. Floyd, 1962, *op. cit.*, p. 566.

[15] A. C. Jennings, G. M. Huggins, 1935, *op. cit.*, p. 298.

[16] B. N. Floyd, 1962, *op. cit.*, p. 577.

than 5% had around 50% at their disposal. Needless to say, such land division was overwhelmingly disproportionate and discriminative towards the indigenous populace and resulted in overcrowding of the reserves and miserable living conditions of Africans. Furthermore, not all land granted to the Europeans was actually used for agricultural purposes. In fact, in 1958[17] approximately less than 30% of total European population gained their livelihood from the land,[18] which meant that vast acreages of highly fertile land lay fallow and numerous African people were denied access to them solely because of economic and political privilege of the white minority. It is incontestable that such a model of land division was extremely unfavourable for the majority of the populace. This state is even more visible if one takes into account yet another issue: the quality of the allocated land. Factors worth mentioning were namely: most crucial rainfall,[19] access to water,[20] and the absence of mosquitos and tsetse flies[21]. Europeans were granted a significant majority of better-quality lands, which were suitable for farming specialized and diversified crops, such as: fruits, tea, tobacco, etc.[22] Lands of lesser quality were usually designated for ranching purposes only, which was not that unreasonable considering the fact that the natives heavily relied on their livestock for their sustenance. However, the latter cannot be regarded as any excuse for the allotment of land, which resulted in the situation where the African majority was granted less land, of much lower quality, largely situated in areas with lower precipitation and poor soil. Yet another factor one has to take into account was the communication; areas controlled by the white minority were progressively connected to towns and cities by railway and roads. The same cannot be said about the African-controlled land. For example, in 1913 about 80% of European farms were within 25 miles of the railway, while only about 33% of African farms were in the same situation.[23] Moreover, realistically only white settlers could expect some form of aid or support from the government of the colony, e.g.: loans, subsidies, favourable taxation policy, etc.[24]

European settlers would often justify this division by claiming that the natives did not have the necessary skills to successfully use particular types of soil, most notably the fertile red soil.[25] As a matter of fact, regarding the natives' knowledge of agricultural usage of different soil types, it is commonly thought that the natives not only knew how to work the light sandy soils, but also the aforemen-

[17] This number did not differ drastically between the 1930s and the 1950s.

[18] W. Roder, 1964, *op. cit.*, p. 48.

[19] *Ibid.*, p. 46.

[20] A. C. Jennings, G. M. Huggins, 1935, *op. cit.*, p. 304.

[21] B. N. Floyd, 1962, *op. cit.*, p. 578.

[22] *Ibid.*, p. 568.

[23] W. Roder, 1964, *op. cit.*, p. 50.

[24] D. G. Clarke, *Land Inequality and Income Distribution in Rhodesia*, 'African Studies Review' 1975, Vol. 18(1), p. 4.

[25] W. Roder, 1964, *op. cit.*, p. 41.

tioned red clay soil of higher value for agriculture.[26] Nevertheless, a shifting cultivation system was widespread amid the Africans, and the periodical transfer of villages to more fertile areas, of course in the limits of a particular tribal ward,[27] was a common practice. Undoubtedly, the natives mostly relied on subsistence agriculture that would only meet their own basic needs, however, it is worth noting that they were also pastoralists, hunters and gatherers.[28]

Furthermore, the newly implemented system barred Africans from buying land plots in other areas except for the Native Purchase Areas (cf. Figure 1). These areas had similar characteristics as the rest of African lands and were thought of as a space for *expansion* of indigenous populace, who would eventually contribute to the capitalistic market economy. However, these plans were defective regarding their main assumptions: since access to the market was severely limited for Africans, most of them could not amass enough funds to purchase additional lands. Thus, few residents of the reserves could afford to move there;[29] the total number of those who eventually settled in the Native Purchase Areas was close to 9,000.[30] This simple impossibility was understood by the white minority as a sign of incapacity, ineptitude and inability to adopt capitalistic Western values and law. In such a legal environment, the Africans in general could not have progressed economically, which resulted in stagnancy of their agriculture.

The Native Land Husbandry Act of 1951, another immensely important law regarding land tenure in Southern Rhodesia, was enacted in order to remediate the errors of the existing land division. The white minority government realized that the reserves were in fact overcrowded[31] and the quality of soil there deteriorated rapidly[32] due to the intensive usage of scarce acreage suitable for farming. The goal of the act was to constrain this phenomenon[33] by the allotment of small plots of land that would be sufficient for a family to live off it. The main measure to achieve it was to be introduction of individual tenure under government control in the reserves,[34] since the authorities thought that it was impossible to successfully enforce proper farming methods under a communal system.[35] However, the lawmakers did not acknowledge the importance of communal tenure of land for

[26] *Ibid*., pp. 44–45.

[27] This issue will be further analysed in the following part of the paper.

[28] W. Roder, 1964, *op. cit*., p. 45.

[29] W. R. Duggan, *The Native Land Husbandry Act of 1951 and the Rural African Middle Class of Southern Rhodesia*, 'African Affairs' 1980, Vol. 79(315), p. 227.

[30] *Ibid*., p. 235.

[31] I. Phimister, *Rethinking the Reserves: Southern Rhodesia's Land Husbandry Act Reviewed*, 'Journal of Southern African Studies' 1993, Vol. 19(2), p. 225.

[32] B. Mbiba, *Communal Land Rights in Zimbabwe as State Sanction and Social Control: A Narrative*, 'Africa: Journal of the International African Institute' 2001, Vol. 71(3), p. 428.

[33] B. N. Floyd, 1962, *op. cit*., p. 579.

[34] W. R. Duggan, 1980, *op. cit*., p. 227.

[35] I. Phimister, 1993, *op. cit*., p. 227.

Africans. They also overestimated the capacity of the authorities concerning the implementation of the policies, as well as overlooked the lack of funding and necessary land.[36] Due to a bureaucratic model, the natives' hostile response to the policies and lack of resources essential in order to fully execute the new law, during almost a decade only 60% of the reserves were covered by certain of its numerous provisions[37] and it was formally implemented in 42% of the reserves, with an actual implementation being significantly lower[38]. One could only presume that a successful implementation of the Native Land Husbandry Act of 1951 would have effectively improved the living conditions of Africans. Nonetheless, even such reforms would have been *too little, too late*; Africans deserved equal treatment under the law and equal share of arable areas, which was not granted to an extent that would have possibly been sufficient for them. Moreover, the attempted enforcement of the act fuelled the expansion of African nationalism and opposition to the European minority in the 1950s,[39] with even richer peasants turning away from cooperation with the colonial government[40]. Nonetheless, the individualized rights of land tenure granted under the act were recognized until the end of Rhodesia[41] and would later become a substantial part of the private-held land acreages in independent Zimbabwe.

The white minority did not plan on reducing their privileges and superior position in the country's legal system, especially regarding the matter of land tenure. Ultimately, even though a minority of Europeans were working in the agricultural sector, the crops and other farming products, most importantly tobacco, maize and tea, accounted for a significant part of Rhodesian total exports. The country was even called *the breadbasket of Africa* and was proud of its status as an agrarian power in the region. Of course, at the same time millions of Africans frequently struggled to survive in the atrocious conditions that came into existence in the aftermath of the implemented land policies. For many an armed struggle seemed the only way to liberate their homeland, preserve their culture, gain equal rights and introduce social justice. Thus, a civil war called the Bush War broke out, lasting from 1964 to 1979. In the year following the beginning of the conflict, the white minority government declared independence from the British empire by the Unilateral Declaration of Independence (UDI), however the country was not recognised by the international community. The most important legal enactments during the period of Rhodesian independence were the Land

[36] W. R. Duggan, 1980, *op. cit.*, p. 233.

[37] V. E. M. Machingaidze, *Agrarian Change from Above: The Southern Rhodesia Native Land Husbandry Act and African Response*, 'The International Journal of African Historical Studies' 1991, Vol. 24(3), p. 557.

[38] I. Phimister, 1993, *op. cit*., p. 236.

[39] V. E. M. Machingaidze, 1991, *op. cit*., p. 558.

[40] I. Phimister, 1993, *op. cit*., p. 239.

[41] A. Cheater, *The Ideology of 'Communal' Land Tenure in Zimbabwe: Mythogenesis Enacted?* 'Africa: Journal of the International African Institute' 1990, Vol. 60(2), p. 194.

Tenure Act of 1969 and the Tribal Trust Land Act of 1979, both concerning mostly the local African and European authorities, and as such are not further discussed in this study. The land apportionment finally amended by the Native Land Husbandry Act of 1951 would remain nearly unchanged until 1980, the year when independent Zimbabwe was born.

2.2. INDEPENDENT ZIMBABWE

The Bush War came to an end when the United Kingdom, which had never recognised the independence of Rhodesia and therefore laid claims to the area as its colony, decided to conduct and moderate peace accords in late 1979. The talks resulted in the signing of the Lancaster House Agreement, which not only declared a ceasefire in the war but also laid foundations of the newly established independent state of Zimbabwe.

In the terms of land tenure, a 'willing seller, willing buyer' system was implemented, which was based on voluntary selling of the land by its current owners to the state, thus ushering in a policy of *accommodation*.[42] Undoubtedly, this solution was not in the interest of the Patriotic Front[43] politicians, who desired a rapid land redistribution. The United Kingdom and the United States would additionally support the newly formed state financially as regards the land reform and buyouts of the land from the existing owners. The main goal of this system was to deescalate the rising tensions and save the country from continuous armed struggle. The history would, however, prove the 'willing seller, willing buyer' system woefully ineffective. Numerous current landowners were not eager to dispose of their land. Moreover, large amounts of financial subsidies from the UK and the USA were defrauded and spent on other sectors of the new state's budget. Finally, the aforementioned Western powers started to withdraw from their financial obligations. These mediocre results and sluggishness of the land redistribution resulted in a revision of the country's policy in this matter. The change was undoubtedly linked with significant consolidation of the power in the hands of Robert Mugabe, Zimbabwe's first prime minister and second president.

It is worth noting that land tenure relations in the newly-born independent Zimbabwe could (and nowadays still can) be classified into three main types corresponding to respective areas: state, private and communal.[44] State Lands consist mostly of forests, national parks, etc., whereas Communal Lands are formally

[42] M. O'Flaherty, *Communal Tenure in Zimbabwe: Divergent Models of Collective Land Holding in the Communal Areas*, 'Africa: Journal of the International African Institute' 1998, Vol. 68(4), p. 537.

[43] The Patriotic Front brought together more radical African nationalists and consisted of two main militant organizations: Zimbabwe African People's Union (ZAPU) led by Joshua Nkomo and Zimbabwe African National Union (ZANU) led by, nowadays infamous, Robert Mugabe.

[44] M. O'Flaherty, 1998, *op. cit*., p. 539.

governed by the customary law. Other areas are for the most part dominated by freehold ownership of the land,[45] the legacy of the European and Native Purchase Areas of the colonial period. It is worth noting that the majority of African population of Zimbabwe inhabits the Communal Lands nowadays.[46] Moreover, in the 1980s the Communal Lands accounted for 42% of the total country area, yet this figure rose to about 66% in 2010.[47] This increase was mostly due to the grand intensity of land pressure in former reserves in the 1980s[48] and was achieved using methods discussed below.

The Land Acquisition Act of 1992 enabled the public authorities to acquire all land they saw fit, although after paying compensation. Yet, compensating the previous landowners in a fair amount would turn out to be too costly for the public authorities. Nonetheless, as Mugabe's position and prominence strengthened, the new government would commence practising *praeter* or even *contra legem* measures in order to claim all the land needed for its purposes. A new system called the Fast Track Land Reform Program (FTLRP) was launched in July 2000, a goal of which was to redistribute more than around 12,355,000 acres.[49] It marked the beginning of what is referred to as *jambanja*, i.e. a lawless and chaotic process of state-sponsored land reform,[50] which soon turned out to be not only against the law and arrangements of the Lancaster House Agreement but also bloody and deeply violent. Farm owners and farm workers alike would be beaten, tortured or even killed by the soldiers and militias. This aggressive approach was meant to scare the remaining white Zimbabweans and ensure the takeover of all the designated land in the country. Indeed, the *white flight*[51] process dynamically intensified and numerous farmlands from the freehold sector were seized by the government.[52] Moreover, the previous owners could not have usually challenged the decisions that expropriated them, not to mention even putting up any form of successful resistance against the officials accompanied by militias.

This unjust takeover of the land by the majority government was formally thought of as a fulfilment of the promises made by the ZANU during the Bush War and subsequent struggle against the white minority. The redistribution would, however, turn out to benefit only a small number of the Zimbabwean populace: the newly formed oligarchic group, centred on Robert Mugabe. The majority of African populace was still left without the land they deserved and fought for. Additionally, many new landowners were not interested in cultivating

[45] A. Cheater, 1990, *op. cit*., p. 188.

[46] *Ibid*., p. 188.

[47] D. Goodwin, 2013, *op. cit*., p. 165.

[48] B. Mbiba, 2001, *op. cit*., p. 431.

[49] P. Zikhali, *Fast Track Land Reform, Tenure Security, and Investments in Zimbabwe*, Environment for Development Initiative 2008, pp. 1, 4.

[50] D. Goodwin, 2013, *op. cit*., p. 166.

[51] A rapid decrease in the number of white inhabitants of the country.

[52] A. Cheater, 1990, *op. cit*., p. 197.

their land allotments, nor had they knowledge and skills needed in order to keep the agriculture functioning on the same level as it used to during the Rhodesian period. In effect, significant acreages of land would be laid to waste over time, a dreadful phenomenon for the Zimbabwean populace, economy and international position.

The decline in agriculture would result in the transformation of the former *breadbasket of Africa* to a state in constant fear of food shortages and famine, internal instability and hyperinflation. Most importantly, the promised land redistribution would never be achieved on at least adequate level, meaning that the struggle of the majority of Africans for the equal share of their homeland continues to this day. All the aforementioned tensions erupted when Robert Mugabe was overthrown in 2017, which was a crucial moment for the present-day situation in the country. Whether any vital changes will be implemented and the country will be turned into a democracy remains uncertain; time will show how the new political conditions will affect the land tenure and land distribution in Zimbabwe.

3. AFRICAN AND EUROPEAN LEGAL CONSTRUCTS

3.1. SOUTHERN RHODESIA AND RHODESIA

The analysis of legal traditions of the native people has to be commenced with emphasizing the fact that due to a rather distinct ethnic division in the country, as has already been mentioned, the indigenous law will be presented in a homogenous manner, not accounting for small regional differences. Furthermore, the topic has not been properly researched at the time of the first contacts between the Europeans and Africans in the region, thus there is a shortage of data on this subject.[53] The following discussion is mostly based on Wolf Roder's[54] and Angela Cheater's[55] portrayal of the topic in their papers. In order to properly describe indigenous legal traditions regarding land tenure, it has to be highlighted that Africans evidently relied on a different system of legal values from that of the European settlers. Primarily, communal land distribution and collective cultivation of land was widespread, a custom which was absolutely confined to a tribal ward (*dunhu*). As such, the land within the ward was virtually open to use for every follower of a chief of the tribe, with the sole requirement of showing will to cultivate the occupied acreage. Moreover, land rights were inalienable; they

[53] M. O'Flaherty, 1998, *op. cit*., p. 541.
[54] W. Roder, 1964, *op. cit*., p. 46.
[55] A. Cheater, 1990, *op. cit*., pp. 189–191.

could not have been sold or bought. Resources such as game, water or timber were open to use for every member of the tribal chiefdom. This model of African indigenous ownership was by no means unlimited. The tribal ward had its borders (*miganho*) that were well-defined, since they were usually marked by natural features, such as rivers, hills or lakes. One tribal ward was comprised of numerous villages and the ward unity was mostly based on territorial grounds, rather than a simple kinship of its members. As such, followers of the chief held a communal right over all the territory in a *dunhu*. Thus, even though the land was free to use for the tribe members, the idea of some limitation of this law was widespread. Additionally, it is generally thought that individual cultivators had rights to the crops they grew. Therefore, it is widely regarded that the natives of Zimbabwe understood at least some basic concepts of the individual land tenure model.[56]

The land also held an immensely important place in spiritual beliefs of the native populace of the Zimbabwe plateau. It was most notably linked with the spirits of the ancestors and held in high regard. This religious connotation of land undoubtedly influenced the aforementioned ideas of communal land ownership. Since the land did not have a marketable value and was not thought of as property (*cinhu*), wealth was usually measured by the size of one's herd of cattle, especially since pasturing was a common usage of the land. This phenomenon was clearly visible, especially in the drier parts of the country, with difficult conditions for farming.[57] For example, takeover of the majority of the cattle herd which belonged to Lobengula, the overthrown king of the Ndebele people, had significant impact on the rest of the tribe and resulted in an unrest.[58]

Western law brought by the settlers was in contrast mostly focused on individual ownership of land. It is of utmost importance to note that that law was not at all homogenous but consisted of two important legal subtraditions: British *common law* and Roman-Dutch *civil law*. The first certainly came with the British colonisers and colonial bureaucracy; the latter was mostly brought by the Boer settlers who arrived from south of the Limpopo river. Even though common and civil law were and still are contradictory in terms of numerous legal issues, the basic concept of land tenure was quite similar in both of them. A person was entitled to possess a certain plot of land, delimited by boundaries, most commonly under a freehold title. The aspect of will to use the area to cultivate was non-existent and the owner could dispose his property freely, of course within the limits set out in certain legal regulations. For example, a part of his farmland could be completely left unused and redundant, a condition almost unimaginable in the native Africans' traditional system of land tenure, thus being indefensi-

[56] A. C. Jennings, G. M. Huggins, 1935, *op. cit*., p. 309.
[57] B. N. Floyd, 1962, *op. cit*., p. 574.
[58] H. Zins, 2003, *op. cit*., p. 94.

ble from their point of view.[59] As it has been already mentioned, such situations were not infrequent in the land apportionment system of Southern Rhodesia and Rhodesia. Due to that, the conflict between native and settler populaces of the country increasingly intensified and continued to shape the political landscape of the state for decades. This strife grew particularly intense during the implementation of the Native Land Husbandry Act of 1951, when European legislators tended to completely replace the traditional African agricultural model with the Western one. The stance emphasizing that the *primitive* traditions must sooner or later yield to the values brought by the settlers was widespread in the European Rhodesian society,[60] which of course provoked the African opposition, as has been mentioned.

3.2. INDEPENDENT ZIMBABWE

Since contemporary Communal Lands can be treated as a land category successive to African-held areas during the colonial period, their legal situation will be analysed first. Even though the customary law is of considerable importance in these areas, at least from a formal viewpoint, it is the Western law that is still decisive in shaping legal constructs applied there.[61] Moreover, the customary law which remains in effect in the Communal Lands cannot be treated as identical with pre-colonial indigenous legal traditions of land tenure.[62] The Communal Land Act [Chapter 20:04], a successor to the Tribal Trust Land Act of 1979, is the main legal enactment concerning these areas, therefore further commentary will be based on its provisions.

> Communal Land shall be vested in the President, who shall permit it to be occupied and used in accordance with this Act [Part II, Section 4].

The foregoing section introduces the key competencies of the President in the matter of disposition of the land, what clearly contravenes the traditional rule of communal ownership of the land, since the role the President plays in the contemporary regulation is of a different kind to that which a tribal chief traditionally had. Thus, the right to administer Communal Lands is entirely rooted in legal regulations of positive law, which can be undoubtedly linked to the European legal tradition. Additionally, it can be observed that the state has ultimate power in the Communal Areas,[63] what can be additionally illustrated with further passages from the analysed act.

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[59] W. Roder, 1964, *op. cit*., p. 46.
[60] B. N. Floyd, 1962, *op. cit*., p. 575.
[61] M. O'Flaherty, 1998, *op. cit*., p. 540.
[62] *Ibid*., p. 545.
[63] *Ibid*., p. 540.

> [A] person may occupy and use Communal Land for agricultural or residential purposes with the consent of the rural district council established for the area concerned [Part III, Section 8(1)].

Again, even though a prerequisite of the chief's consent was of vital importance in traditional law, the consent of the rural district council cannot be equated with it, due to its character based on positive legal regulations and limited by other legal principles. Moreover, it is important to notice that the former prerogative of the chief was passed to the district council, thus lessening the role of traditional authorities,[64] what highlights the subordination of African customs to state control.

> [W]hen granting consent in terms of subsection (1), a rural district council shall –
> (a) where appropriate, have regard to customary law relating to the allocation, occupation and use of land in the area concerned; and
> (a1) consult and co-operate with the chief appointed to preside over the community concerned (…); and (…)
> (b) grant consent only to persons who, according to the customary law of the community that has traditionally and continuously occupied and used land in the area concerned, are regarded as forming part of such community or who, according to such customary law, may be permitted to occupy and use such land (…)
> [Part III, Section 8(2)].

This section is probably the most similar to African traditions of land tenure, mainly due to the fact that it includes a reference to so-called customary law. Moreover, the role of chiefs and traditions of certain regions is emphasized. Nevertheless, one has to indicate again the positive character of the legal principles presented above, which have unquestionable origins in Western law. It would not be an overstatement to point out that in present-day Zimbabwe the customary law concerning land tenure can be applied, as long as it is coherent with and based on European law. One could even say that the African custom is legitimized under a strict control of the state.[65]

Western law was mostly triumphant in this clash of legal traditions and played a decisive role in shaping the contemporary Zimbabwean law regarding land tenure and ownership of land. Thus, even though indigenous traditions are nowadays found in certain areas of the legal system, as presented in the previous paragraph of the study, the topic of land is dominated by the concepts known to Western law. In what follows, this phenomenon is presented based on examples from the Rural Land Act [Chapter 20:18], a law which is determinative of land tenure in the majority of areas other than the Communal Lands.

[64] A. Cheater, 1990, *op. cit*., p. 189.
[65] *Ibid*., p. 202.

> In this Part 'property' means any land which is described as a single piece of land in any deed of grant, transfer or other certificate of title registered in the Deeds Registry [Part III, Section 7].

As it can be seen in the foregoing section, the definition of land implies it has to be a confined area within some boundaries. Furthermore, one's right to the land is limited by a legal title to it, which is based on a registry administered by the state. These solutions are visibly in conflict with indigenous traditional legal constructs concerning the land tenure, mostly the communal ownership of the land. The role of the state in designating the land is clearly against the African traditions as well. However, the definition of 'property' presented above can undoubtedly be associated with European legal traditions.

> No owner or occupier of any property shall permit any person, other than an employee of such owner or occupier in the normal course of his employment, to cultivate any portion of such property unless such portion has been clearly demarcated on the ground (…) [Part III, Section 9(1)].

In this paragraph it is distinctively implied that the communal ownership is against the provisions of the act. The prerequisite of the clear demarcation of any part of one's land in order for a third person to cultivate it directly conflicts with the rule of communal usage of the land. Also in this case, the current law is in accord with European legal traditions where a plot of land was clearly limited by some boundaries.

4. CONCLUSION

To conclude, it is undeniable that the period of the European minority's rule in the Zimbabwean history significantly affects the country's present situation as regards land tenure. The legal constructs based on Western law, which were adopted by the settlers, were doubtless immensely disadvantageous to the native populace of the country. It was not only the colonial land division that was discriminatory for the African majority in terms of the area, quality and fertility of granted land, but access to the market and economic opportunities were also limited for them. Land apportionment in Southern Rhodesia deeply impacted and continues to affect independent Zimbabwe. Its consequence was the misdistribution of land, which has led to the current dreadful situation of the country's agriculture and economy, the political unrest and disappointing living conditions for the majority of population. Moreover, the prevalence of the European legal traditions and dying out of the indigenous ones, observed both historically and in contemporary law regulating the land tenure with only a few exceptions, resulted in the decline of traditional cultures. The Africans' difficulty in adapting to the

new situation and legal values, and the demise of native legal constructs can be directly attributed to the country's colonial past. To sum up, the past of Zimbabwe unquestionably affects the country's present, which is not an extraordinary case in the African continent. The condition that makes Zimbabwe stand out is, however, the recent political turmoil that the state has been through. The important question to pose is: Can Zimbabweans derive useful values from their past in order to shape a new land policy in their homeland that would be just for all its citizenry?

5. FIGURES

Figure 1. Approximate land apportionment in Southern Rhodesia in millions of acres, rounded to tens of thousands

Year	African areas in total	Native Purchase Areas (part of African areas)	European areas	Undetermined and unassigned areas	National parks and forests
1913[a]	21.39	-	21.95	44.00	-
1925	21.60	-	31.59	42.15	0.89
1930	29.07	7.46	49.15	17.89	0.59
1946	29.10	7.50	49.20	17.80	0.60
1950	30.40	5.70	48.00	17.50	0.80
1958	41.95	8.05	48.99	0.06	7.20
1962	44.40	4.20	36.90	5.40	9.90

a – The Crown Lands not included

Based on: W. Roder, 1964, *op. cit*., p. 42; B. N. Floyd, 1962, *op. cit*., pp. 567, 577, 580; A. C. Jennings and G. M. Huggins, 1935, *op. cit*., pp. 299, 309; D. G. Clarke, 1975, *op. cit*., p. 7

Figure 2. Approximate populations of Africans and Europeans in Southern Rhodesia in thousands, rounded to tens of thousands

Year	Africans	Europeans
1911	700	*No reliable data*
1921	850	*No reliable data*
1930	970	*No reliable data*
1940	1,390	70
1945	1,640	80
1950	1,930	130
1955	2,220	170
1960	2,890	230

Based on: W. Roder, 1964, *op. cit*., p. 51; B. N. Floyd, 1962, *op. cit*., p. 567

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.10

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DILEMMAS OF RE-NATIVIZATION OF INDIGENOUS LAW

Abstract

The author in this study tests the applicability of basic categories of Leon Petrażycki's (1865–1931) socio-psychological theory of law, pointing at ambiguity of the concept of 'indigenous law', 'natives' law' and 'customary law'. First, however, the right to one's own law is followed through the history of colonization. It is essential for the plight of the indigenous people that already in 1537 Popes recognized that 'original inhabitants' had 'rights' and thus 'legitimate claims'. If, on the one hand, there are 'rights' and 'rightful claims' then, on the other, there are duties that include not only the negative refraining from appropriation but also the positive duty to protect in exchange for the impairing the indigenous sovereignty. But whenever the *nexus iuris* is recognized, i.e. the link of correlative rights and duties, there is a law (Petrażycki) and 'inherent – even if impaired, or as some say, abused – sovereignty of the indigenous people' (Justice Marshall). The pluralist notion of 'law', the distinction between the 'normative positive' reference and the 'normative intuition' and the distinction between the 'normative' and the 'factual' should allow one to organize systematically the multiple issues that one encounters when approaching the area of 'indigenous law'. From discussion of the official non-indigenous indigenous law exemplified by the federal Native American law of the United States the paper moves on to discuss the Navajo case of the official tribal law. It comes out that the native procedures and law are full of religious meaning so the 'cultural' sovereignty is much more fundamental and value-loaded than the secular philosophy of human rights incommensurable with the right to one's own law. This is not considered

when borrowing from native law into secular Western law (Greenland's Criminal Code; mediation procedures in North America). The meaning of cultural sovereignty is the right to develop one's law so that it fits one's needs and aims. But the full success story is when the antithesis of the 'indigenous' and 'dominant' law is settled through the feedback from the former to the latter, like when the law – not only of a country but also on the global level – becomes syncretic and embraces deeper universalization of the human rights.

KEYWORDS

indigenous law, cultural sovereignty, human rights

SŁOWA KLUCZOWE

prawo tubylcze, suwerenność kulturowa, prawa człowieka

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.
(2007 United Nations Declaration on the Rights of the Indigenous Peoples, Article 34)

1. INTRODUCTION

The picture of the 'last wild Andamanese' shooting arrows towards an airplane (or hopefully a drone) trying to localize the remnants of an uncompromising young American missionary who, breaking the Indian government protective prohibition, bribed a fisherman and landed on the small island where a dozen or so people live their own culture disconnected from the global humankind might serve also as a motto for this paper.[1] The official law of the dominant people, the successor to the colonizing power, was broken, and the law of the indigenous people was applied. But another motto might be the recent shocking discovery of the remains of more than 200 indigenous children buried nameless in the grounds of a former forced 'integrated school' in Canada.[2]

[1] *American 'Killed in India by Endangered Andamans Tribe'*, BBC, 21 November 2018, https://www.bbc.com/news/world-asia-india-46286215.

[2] *Canada Mourns as Remains of 215 Children Found at Indigenous School*, BBC, 29 May 2021, https://www.bbc.com/news/world-us-canada-57291530.

The strong urge for independence, the sense of sovereignty and the claim to remain under one's own law are practically universal over time and space. The paper deals mostly with the American aborigines, especially Northern Americans called 'Indians' and 'Eskimo' by the colonizers, who prefer to be called by the name of their own choice, a practice that involves sovereignty, though in its cultural aspect. The American examples are used most frequently as the geopolitical influence of the US doctrines, policies and practices is overwhelming. But one should bear it in mind that in reality, first, there are plenty of indigenous peoples scattered all over the globe; secondly, their political, legal and social positions differ; and thirdly, some general issues are common in the relationship between the indigenous periphery and the dominant centre. The major aim of the paper is to distil such generalities from the empirical heterogeneity.

Therefore, settling with European colonizers on the Atlantic coast of the Americas from the very beginning, we may observe 'law' as an asset of cultural sovereignty cherished for more than its purely political aspect. As described by Captain John Smith:

> The Chicahamanias desire friendship. (…) [In 1613] we became in league with our next neighbours, the Chicahamanias, a lustie and a daring people, free of themselves. These people, so soon as they heard of our peace with Powhatan, sent two messengers with presents to Sir Thomas Dale, and offered him their service, excusing all former injuries, hereafter they would ever be King James his subjects, and relinquish the name of Chickahamania, to be called Tassauntessus, as they call us [the English], and Sir Thomas Dale there Governour, as the Kings Deputie; *onely they desired to be governed by their owne Lawes, which is eight of their Elders as his substitutes* [emphasis added, comments: JMK]. This offer he kindly accepted, and appointed the day he would come to visit them.[3]

Treaties, wars, land evictions, open fraud and administrative deceit followed as was the routine fate of the indigenous people in North America. 'Why Queen recognises a US tribe but US government does not?', asked BBC on 10 July 2013: 'Six Native American tribes in the US state of Virginia are campaigning to win formal recognition from the federal government. The tribes claim they have been denied their proper rights – enjoyed by 565 other tribes in the US which do have official status – since a 1920s state law on "racial integrity" decreed that people in Virginia were either "white or coloured". Yet the tribes are recognised in the UK thanks to a peace treaty signed in 1677 with the King of England.'[4] The Chickahominy were eventually recognized on 11 January 2018 when the Thomasina

[3] J. Smith, *The Generall Historie of Virginia, New England and the Summer Isles, Together with The True Travels, Adventures and Observations, and A Sea Grammar*, 1584–1624, The Fourth Booke, original spelling.

[4] *Why Queen Recognizes a US Tribe but US Government does not*, BBC, 10 July 2013, https://www.bbc.com/news/av/magazine-23233104.

E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017 was passed bringing to 573 the number of federally-recognized tribes in the US.

2. HOW THE 'INDIGENOUS' WERE BORN

The concept of 'indigenous law' is dynamic. In fact, its meaning has never been coherent as it has always crossed over concepts like 'customary law', 'traditional law', 'tribal law', and so on. But the mainstream current was linked for centuries with the Western colonialist rivalry of the modernizing nations wishing to find the new land open to their own population. In this sense, it was the modern version of the old wandering of the peoples. Our ancestors, starting from what is considered now as the cradle of the humanity in Africa dispersed over almost all the continents mixing with or eliminating the competing kin, such as the Neanderthals or even less well-known others. This process still continued on the frontiers like the Pacific seas or in the Arctic when the new demographic intra-human processes of a similar kind started with accompanying bloody or peaceful contacts between people on the move and those who had already dug in. The geographical ignorance of Europeans in the fifteenth and sixteenth centuries resulted, among other things, in the misnaming of Native Americans, with whom I mostly deal in this paper, as 'Indians'. Only now do I realize how harmful this wrong name is in that linguistically it deprives the natives of their indigeneity and puts them on a par with Europeans in relation to their land.

It is often forgotten, though, that before the Americas were 'discovered' there had been 'heathen' natives of North-Eastern Europe subject to a similar conquest under the surmise of conversion to Christianity. This led to the legal and armed confrontation between the Kingdom of Poland and the Grand Duchy of Lithuania with the Teutonic Order; the latter had resettled from Palestine via Transylvania into Poland and started its recovery in the neighbouring pagan Prussia, invited in 1230 by a local Polish duke to fight *Prutenos et alios Sarracenos*, a formula that for some time created 'Saracens' at the Baltic Sea[5] in a similar way to what happened later to the Natives of America being misnamed as 'Indians'. At the Council of Constance in 1416, Paweł Włodkowic (also known as Paulus Vladimiri) on behalf of the Polish-Lithuanian delegation stated that:

[5] L. Chollet, *Croisade ou évangélisation? La polémique contre les Chevaliers Teutoniques à l'aune de témoignages des voyageurs français de la fin du Moyen-Âge*, 'Ordines militaries. Colloquia Torunensia Historica. Yearbook for the Study of the Military Orders' 2015, Vol. XX, p. 180: 'Pétris de l'esprit des croisades d'Orient, de nombreux auteurs français qui relatent ces expéditions contre les païens du Nord se mettent à appeler ceux-ci "Sarrasins", par analogie avec les Musulmans méditerranéens.'

> The Teutonic Knights [*Cruciferi* in Latin: JMK] fighting against the peaceful infidels or rather attacking them never engaged in the just war against them. The Reason: as against the assaulting the ones who are willing to live in peace is all law, that is, natural, the Lord's, canon and civil. (…) Moreover, such attacks of the faithful on the infidel, are against the love of one's neighbour, for two contradictions cannot coexist, and *our neighbours, according to the Truth, include both the faithful and the infidel* [emphasis added: JMK].[6]

Here, the early history of human rights considered to be universal started, albeit some observe that the principle amounting to recognition of religious freedom itself was already well built into the official doctrine of the Church:

> No one is to be brought to the Christian faith by force, proclaimed an ancient text incorporated into Gratian's *Decretum*, the first of the basic lawbooks of the medieval church. No unwilling person is to be compelled to come to baptism, proclaimed a famous letter of Pope Clement III incorporated into the *Decretals* of Gregory IX, the second of those same lawbooks. Persuasion, not force, was to be the medium by which the faith of Christ was to be spread throughout the world.[7]

This debate emerged as only the prologue to the larger-scale developments one hundred years later.

The policy of colonization in history was not as systematic as it looks today. There were various policies, various accidents and varying attempts. There were adventurous adventurers, state rulers, companies and religious orders involved. But the competing claims had to be regulated within what was considered Christendom and the Popes were asked to arbitrate in the Polish-Lithuanian versus the Teutonic Order dispute as in the perennial competition between the Catholic monarchies of Portugal and Spain. For centuries, Europe meant the Catholic Europe with the Bishop of Rome assuming supreme power over the emperor(s) and other monarchs. The various so-called Bulls of Donation included therefore the formula of a grant, such as: 'we gave, conveyed, and assigned forever to you and your heirs and successors (…) all islands and mainlands whatsoever, discovered and

[6] 'Że krzyżacy z Prus walcząc ze spokojnymi niewiernymi, albo raczej napadając ich jako takich nigdy nie mieli sprawiedliwej wojny z nimi. Uzasadnienie: ponieważ przeciw napadającym tamtych, którzy chcą trwać w pokoju, jest każde prawo, mianowicie naturalne, Boskie, kanoniczne i cywilne. Naturalne, mianowicie: "co nie chcesz aby tobie się stało" itd. Boskie, mianowicie: "Nie będziesz zabijał", "Nie będziesz kradzieży czynił" (Wj 20), w których to słowach zakazany jest wszelki rabunek i wszelki gwałt. (…) Takie napadanie niewiernych przez wiernych nie tylko wyklucza miłość bliźniego, ale także przez tego rodzaju niedozwolone przywłaszczenie sobie rzeczy cudzej mieści w sobie kradzież i rabunek. Uzasadnienie: Bliźnimi bowiem naszymi są tak wierni, jak i niewierni, bez różnicy.'; see L. Ehrlich, *Pisma wybrane Pawła Włodkowica*, Vol. 1., Warszawa 1968, pp. 9, 57–60.

[7] R. H. Helmholz, *Fundamental Human Rights in Medieval Law*, 'Fulton Lectures' 2001, p. 10.

to be discovered, (…) that were not under the actual temporal dominion of any Christian lords.'[8]

These words, however, should be read in their historical context. The expedition of Columbus was undertaken between two major events during the permanent war between Christendom and Islam. On 29 May 1453 the Ottoman Turks took over Constantinople before conquering Buda(pest) in 1541; on 2 January 1492 the kingdom of Granada capitulated to the Spanish after seven centuries of the Islamic domination on the Iberian Peninsula. Geopolitical reasons necessitated the Papal search for co-religionist allies in the East and South – not without foundations as the history of Nestorian rulers in Turkestan and the legend of King John document – so the race for taking over the non-Christian 'neutral' areas was strategically needed, being as well a pious attempt at conversion of the indigenous 'heathens' all over the world (on this both contenders, Christians and Muslims, were in agreement). The Second Front materialized though in an unexpected and often ignored way, at the same time in the new incarnation of Constantinople, the Third Rome, i.e. the Orthodox Christian Muscovy, that successfully fought with Islamic powers in the South until the annexation of the Crimean Khanate in 1783, and in the East until the decisive victory by Cossacks under Yermak over the Siberian Kuchum Khan in 1582, which opened the way for the often bloody (considering, e.g. the armed resistance of the Daurs, the Itelmens and the Chukchees) and exploitive conquest of the indigenous population of Siberia and colonization of its land eastward up to the Alaska, accompanied by partially successful and, as it seems, mostly peaceful and sometimes forced[9] Christianization of the natives by the Russian Orthodox Church.

As for the Western Roman Catholics, however, the profane zeal for colonization and exploitation from the beginning prevailed leading to the necessity to defend the evangelical spirit of the endeavour. As the *defensor de los Indios*, Fray Bartolomé de Las Casas wrote in 1552:

> I will only make this small addition to what I have said that the Spaniards, from the beginning of their first entrance upon America to this present day, were no more sollicitous of promoting the Preaching of the Gospel of Christ to these Nations, than if they had been Dogs or Beasts, but which is worst of all, they expressly prohibited their addresses to the Religious, laying many heavy Impositions upon them, daily afflicting and persecuting them, that they might not have so much time and leisure at their own disposal, as to attend their Preaching and Divine Service; for they looked upon that to be an impediment to their getting Gold, and raking up riches which their Avarice stimulated them so boundlessly to prosecute. Nor do they understand any more of a God, whether he be made of Wood, Brass or Clay, then they did above an hundred years ago, New Spain only exempted, which is a small part of America, and

[8] *Dudum Siquidem*, Bull of Pope Alexander VI, 1493.

[9] L. Nestor, *Pravoslavie v Sibirii*, St Petersburg 1910, Otechestvennaya tipografiya, https://dl.wdl.org/21435/service/21435.pdf (accessed 15.05.2023), p. 42.

> was visited and instructed by the Religious. Thus they did formerly and still do perish without true Faith, or the knowledge and benefit of our Religious Sacraments.[10]

Upon the news from Hispaniola, already in 1501, Isabella I, Queen of Castile, declared Native Americans to be both people and subjects of the Castilian Crown, and so subject to the same rights and obligations as any other subjects of the queen. She ordered her commissioner Nicolás de Ovando to convert the 'Indians' 'as quickly as possible' but 'without using any force against them', 'to ensure that all live always in peace and concord and justice, treating all equally without exception', paying for any forced work done but keeping the new territories free from foreigners and 'persons of suspect faith' as 'Moors, Jews, reconciled, heretics or persons newly converted'.[11] The later metropolitan legislation in vain attempted to suppress the continuing genocide of Native Americans first through *Leyes de Burgos* issued by King Ferdinand II of Aragon on 27 December 1512, until Pope Paul III in 1537 in his *Sublimis Deus* Bull stated that:

> We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men [able to communicate with the Christianity: JMK] (…) the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in anyway enslaved; should the contrary happen, it shall be null and of no effect.[12]

That led to the New Laws, *Leyes Nuevas* (*Leyes y ordenanzas nuevamente hechas por su Mayestad para la gobernación de las Indias y buen tratamiento y conservación de los Indios*), of King Charles I of Spain (Charles V, Holy Roman Emperor), promulgated on 20 November 1542 in Barcelona, that slowly and only partially were applied in the colonies meeting with armed resistance and rebellion on the part of the colonizers, and after the 1550/1551 juridical debate in Valladolid the amended less protective law was issued in 1552.

These legal documents and then the chain of interpretation had to be recalled as they continue their legal relevance until today, as is well exemplified by the co-called Discovery Doctrine formulated by Justice John Marshall

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[10] B. de Las Casas, *A Brief Account of the Destruction of the Indies by Bartolomé de Las Casas* (original title: *Brevísima relación de la destruccíon de las Indias*), London 1689/2007, republished by Project Gutenberg, http://www-personal.umich.edu/~twod/latam-s2010/read/las_casasb2032120321-8.pdf, p. 37.

[11] Queen Isabella I and King Ferdinand of Spain, *Instructions for the New World*, (1501) New York 2018.

[12] Pope Paul III, *Sublimis Deus. On the Enslavement and Evangelization of Indians*, 29 May 1537, www.papalencyclicals.net.

in *Johnson v McIntosh*,[13] which is commonly considered a cornerstone of the US landownership law. Justice Marshall had no doubts as to the motives of the European colonizers, as seen at the beginning of his report:

> [T]he character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. (…)
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[14]

It also involved the recognition of the *terra nulla* as something uninhabited only when not belonging to anyone recognized as the legitimate owner. The official international law thus divided the globe into *terrae nullae*, either among two Catholic superpowers of the time under the jurisdiction of the Popes or as open to the competition between Western actors according to the principle of *potior est qui prior est*, with due deference to the other actors recognized on the *terra firma*. The recognition of the indigenous rights is based upon the same principle of justice but with different definitions of the legitimate subjects of the right to land (and some waters). The problem continues as seen in the today's global politics in the form of conflicts on rights to suboceanic earth, sovereignty over the seas and the incoming dispute on the exploitation of the outer space. So far it has been assumed that extraterrestials do not exist but the lawyers must be ready to react if this were to suddenly become untrue, so the errors committed against terrestrial natives would not be repeated. But the reality is still that the indigenous population, when political and economic interests prevail, is often treated as non-existent: '[E]ver since the final decades of the last century, the Amazon region has been presented as an enormous empty space to be filled, a source of raw resources to be developed, a wild expanse to be domesticated. None of this recognizes the rights of the original peoples; it simply ignores them as if they did not exist, or acts as if the lands on which they live do not belong to them.'[15] All this has been accompanied 'by grave violations of human rights and new forms of slavery affecting women in particular, the scourge of drug trafficking used as

[13] 21 U.S. (8 Wheat.) 543 (1823).

[14] *Johnson v McIntosh* (1823), p. 573.

[15] Pope Francis, *Querida Amazonia*, Post-Synodal Apostolic Exhortation, Vatican 2020, Ch. 1, para. 12.

a way of subjecting the indigenous peoples, or human trafficking that exploits those expelled from their cultural context.'[16]

On the positive side, the words of the *Sublimis Deus* Bull solidified – made it a positive normative fact – the official recognition that 'original inhabitants' had 'rights' and thus 'legitimate claims'. If, on the one hand, there are 'rights' and 'rightful claims', then on the other, there are duties that included not only the negative refraining from appropriation but also the positive duty to protect in exchange for the impairing the indigenous sovereignty. Therefore, whenever the *nexus iuris* is recognized, i.e. the link of correlative rights and duties, there is a law. However, although Justice Marshall acknowledged also the 'inherent – even if impaired, or as some say, abused – sovereignty' of the indigenous people, the question remains unresolved to this day of whose law this is.

3. WHAT LAW? THEORETICAL PERSPECTIVES

What law are we speaking about? Not long ago, Barbara Oomen was studying the contemporary use of what is called customary law in the areas of the officially recognized 'traditional chiefs' – 'indigenous' if we forget for a moment about the Khoikhoi and San people – where jurisdiction in the Republic of South Africa arrived at a conceptual puzzle, best illustrated by a remark of her field research assistant versed in the tribal customs as taught in the Law School, who on watching the proceedings of a Village Court was astonished that this was distinct from his lectures. In light of such an experience, she observed:

> It is useful (…) to distinguish four registers of law, each embedded in separate discourses and discernible through a distinct research methodology. First, there is South Africa's common law, the composite of laws, legal precedents and doctrine, with the Constitution as its umbrella text. [Secondly] the 'official' customary law is a species of the generic common law, its recognition couched in a specific discourse but its substance essentially also discernible from the text. A third distinction is that of the 'stated customary law', the idealized rules often retrieved through interviews with traditional readers or village elders (…) more efficient than the participatory research of the longue durée associated with the fourth register, living law. This term, first coined by Ehrlich and with synonyms such as 'local law', 'folk law' and 'law in action', serves to indicate the law as lived in day-to-day life and the norms and values it draws on.[17]

Oomen's four registers deserve a closer look. At least in Poland the tradition of sociology of law has been preserved, the forerunner of which was Leon Petraży-

[16] *Ibid*., Ch. 1, para. 14.

[17] B. Oomen, *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era*, New York 2005, p. 201.

cki (1865–1931), a Russo-Polish scholar who taught the original socio-legal theory at St Petersburg University School of Law and, after the Bolshevik revolution, left Russia to join the re-established Polish University of Warsaw in the newly independent Poland. Some of his students, for instance Pitirim A. Sorokin, Nicolas S. Timasheff and Georges Gurvitch, after the escape from communist Russia developed each their own version of the socio-legal theory, while in the Soviet Union the theory was soon banned as decadent idealism. Petrażycki in 1905[18] defined law in terms of the normative emotions of duties to satisfy someone's rights and of correlative rights to such a duty to be performed by another (*nexus iuris*), what Leopold Pospíšil calls 'obligatio'[19] in distinction from 'obligation'. The same idea was later formulated as a more sociological paradigm by the Polish-British anthropologist Bronisław Malinowski as 'anthropological definition of law'.[20] In sum, the *nexus iuris* was accepted as a *sine qua non* criterion of 'law' by Bronisław Malinowski, Paul Bohannan,[21] Max Gluckman and Leopold Pospíšil, while Americans like E. Adamson Hoebel[22] preferred to refer to Hohfeld's classification of jural relations. Petrażycki's theory openly liberates the concept of 'law' from that of the 'state' and offers the wider, pluralistic perspective.[23] Moreover, this is not only 'pluralistic' but also multi-level (to use Pospíšil's phrasing) in its perspective. As it can be seen in the North American native justice context, Michael Barkun's theoretical concept of 'horizontal law without sanctions' has been often invoked as the conceptual instrument to legitimize the recognition of the conciliatory type of justice.

Barkun does not know Petrażycki – like the majority of Anglo-American writers – but curiously enough, he is silent on Malinowski, too. In his critique of command theory of law, he raises the same arguments about international law as Petrażycki but he stops at rejecting sanctions:

> The command theory distinguishes law from other modes of social control solely by its ability to use or threaten to use centralized and legitimate physical coercion to

[18] To date the only edition of his works in English has been the collection by H. W. Babb (L. Petrażycki, *Law and Morality*, Cambridge, MA 1955); see also R. Cotterell, *Leon Petrażycki and Contemporary Socio-Legal Studies*, 'International Journal of Law in Context' 2015, Vol. 11(1). See also E. Fittipaldi, A. J. Trevino (eds), *Leon Petrażycki: Law, Emotions, Society*, London 2023.

[19] L. J. Pospíšil, *Anthropology of Law: A Comparative Theory*, New York 1971.

[20] J. Kurczewski, *Bronisław Malinowski Misunderstood or How Leon Petrażycki's Concept of Law is Unwittingly Applied in Anthropology of Law*, 'Societas/Communitas' 2009, Vol. 7, pp. 47–62; *idem*, *Petrażycki in Melanesia: Where Pospíšil and Malinowski Meet*, (in:) T. Ledvinka et al. (eds), *Towards an Anthropology of the Legal Field: Critiques and Case Studies*, Prague 2012.

[21] P. Bohannan, *The Differing Realms of the Law*, Supplement to 'American Anthropologist' 1965, Vol. 67(6).

[22] E. A. Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics*, Cambridge: Harvard University Press 1954.

[23] J. Kurczewski, *Petrażycki's Two Dimensions of Law*, (in:) E. Fittipaldi, A. J. Trevino (eds), *Leon Petrażycki: Law, Emotions, Society*, London 2023.

> secure obedience. We have already touched upon its widespread acceptance, but, this acceptance notwithstanding, severe logical and empirical difficulties militate against it and seem seriously to outweigh its cardinal virtue, simplicity. Physical coercion, of course, can be a powerful force for controlling human behaviour, and in specific situations it seems – and indeed is – paramount. But a careful examination of its very real limitations demonstrates that it is of much greater significance as a short-term expedient rather than as the foundation of a legal system. This question must necessarily be dealt with in the context of stateless societies, if for no other reason than their manifest inability to organize sanctions in the conventional sense. The demotion of physical coercion to subordinate status, however, must have profound effects on our understanding of law in the larger perspectives of both developed and primitive societies.[24]

Barkun also advocates the wider meaning of law through invoking the notion of 'jural community' defined as 'an area in which all the actors recognize that a common method exists for resolving disputes between them [peaceably or not...]. Jural community, then, need not entail acceptance of a particular concept of law. Within the conventional usage of the terms, it allows for no distinction between "law," "custom," "etiquette," and "morals."'[25] It is fascinating to read how Barkun interacts with advocates of the *nexus iuris* theory of law without knowing of their existence. So, in contrast to Petrażycki and Malinowski, he writes: 'Our definition also omits considerations of obligation, not because it is unimportant but because it is so difficult to get at. ("Obligation" has been a potent concept in legal and in political philosophy, but, on the whole, it is easier to treat as part of our discussion of norms, in a later chapter.).'[26] He observes, nevertheless, 'a subtle distinction between Easton and the ethnographers of jural community: between the subjective feeling of obligation and the identification of the procedures that are the object of obligation. In a sense, legal analysis seems in the end to turn inward, seeking the roots of law first in the community but ultimately in the individual.'[27] But as Pospíšil[28] will later critically note, the 'obligatoriness' is confused by Barkun with the 'obligatio', as he detours in reasoning by arguing that: 'Ultimately, the law-abidingness of a group is explicable only in terms of the specific decisions of individual persons on the desirability and/or possibility of disobeying. Obligation, again, flows from subjective feelings of the "oughtness"', to arrive at a misleading, ambiguous and on the surface trivial formula that 'Law states the patterns of obligatory behaviour'.[29]

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[24] M. Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community*, New Haven: Yale University Press 1968, p. 61.

[25] *Ibid*., p.71.

[26] *Ibid.*

[27] *Ibid*., p. 87.

[28] L. J. Pospíšil, 1971, *op. cit*.

[29] M. Barkun, 1968, *op. cit*., p. 89.

When taking into account the mechanism leading to the performing of a duty or claiming a right by someone, Petrażycki distinguished between the mechanism of feelings and actions (called by him the *legal emotion*), springing out as if intuitively, and the positive legal emotions contingent upon some externalized legitimizing reference, such as an officially promulgated law or a pattern of conduct by ancestors ('old custom') or by contemporaries (the new custom). However, the 'official' here was opposed by Petrażycki to the 'unofficial' statutes, e.g. of the mafia, while even the judge is often officially left with his conscience to decide intuitively the case. The 'official customary law' fits perfectly this cross-distinction and might be opposed to the 'unofficial' one. As for Eugen Ehrlich's concept of 'living law', developed in a totally different theoretical environment, the question remains open of how to describe it in reference to the 'anthropological definition of law'. Its usefulness is beyond doubt but its meaning remains ambiguous.

In the post-World War II generation, the Polish-Canadian sociologist of law Adam Podgórecki attempted to settle the issue by equating Petrażycki's 'intuitive law' with Ehrlich's 'living law' and opposing it as the real law to the 'positive' normative law.[30] This makes sense on condition that Petrażycki's concept of the 'normative fact' is understood widely as any external normative reference and not only the 'written law' or the 'written official law'. The customary 'living law' is thus any normative practice – here Pierre Bourdieu's analysis[31] of Kabylian law fits – but it might be as well 'official' in that it might be authorized by the given power state, church or company as 'unofficial' if unauthorized. Practices not enacted but observed may become the recognized normative reference, and then they are the 'positive customary law' that might be even written down, at least by a legal ethnographer. Therefore, the living law is the normative practice that is of intuitive versus positive nature, and may be officially recognized or not. We need to not subsume the 'intuitive' and the 'living' under the same generic category but we should use the opportunity that Ehrlich's simple conceptualization of the difference between practice and the normative provides. Contemporary official state law is mainly positive and written but its practice might include intuitively filled gaps and solved antinomies. There is not only 'people's living law' but the state's institutions and officials' living law that from time to time is drastically exposed to the public on occasion of sudden exploding affairs. The other way to explicate the opposition between law *not only* in the books but also in the observed practice of others and even in one's own conscience is to call it the law as the norm and to oppose it to law as performed. This distinction permeates all types of law as discerned by Petrażycki: official and unofficial, positive and intuitive, though in the latter it is the most hidden as in some border cases the very performance becomes automatically the normative. For instance, I punched the unruly drunk

[30] A. Podgórecki, *A Sociological Theory of Law*, Milan 1991.

[31] P. Bourdieu, *Outline of a Theory of Practice*, Cambridge 1977.

on my route, I did it – now I think that, despite all consideration to the contrary, I was right as I was in the right. The action was intuitive as it was unreflected. Upon reflection, it is intuitive as it was just in my conscience. If we keep up the distinction, however, the 'intuitive law' concept is reserved for this aspect of the 'living law' meant as 'law in practice' that refers to what was often called 'legal consciousness' but embraces the 'legal subconsciousness' as well.

Even if this short conceptual excursus helped to complicate rather than simplify the matters at hand, nevertheless one feels more secure in employing the concepts like 'custom' or 'living law' not in isolation but taken as a group of sensitizing instruments of inquiry. The pluralist notion of 'law', the distinction between the 'normative positive' reference and the 'normative intuition', and the distinction between the 'normative' and the 'factual' should allow one to organize systematically the multiple issues that one encounters when approaching the area of 'indigenous law'.

4. THE OFFICIAL NON-INDIGENOUS INDIGENOUS LAW

The least known is exactly the 'living' or pragmatic aspect of the law. However, as we can see, even the normative aspect is hard to study. As official state law is the easiest to approach, we should begin with it to search for possibly the official state indigenous law, that is – to quote Oomen – 'a species of the generic common law, its recognition couched in a specific discourse but its substance essentially also discernible from the text.'[32] This is best illustrated with the federal Native American law of the United States.

As four main 'hypotheses' or 'leading principles' to summarize the relevant vast heterogeneous body of official federal law Nathan R. Margold listed: (1) the principle of the political equality of races; (2) the principle of tribal self-government; (3) the principle of federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians.[33]

The Federal Indian law is considered 'a distinct body of law that relates to the legal relationships between the federal government and Indian tribes. It is dynamic, evolving and encompasses several hundred years of federal policies and interaction with tribes. The sources of Federal Indian law include principles of international law, the United States Constitution, treaties with Indian tribes, federal statutes and

[32] B. Oomen, 2005, *op. cit*., p. 201.

[33] F. S. Cohen, *Handbook of Federal Indian Law with Reference Tables and Index*, Washington 1942, p. IX.

regulations, executive orders, and judicial opinions.'[34] It is 'complex' as it comprises 'thousands and thousands of statutes, regulations, treaties, and court decisions' that are often contradictory to themselves and that relate to the variety of tribal sovereign powers some of which have a specific status (e.g. Alaskan tribes, not to speak of Hawaiians whose sovereignty has been illegally neglected). Still, there are some general principles of this law that are commonly applicable, such as the following:[35]

(1) Tribes have 'inherent sovereignty', which is 'based on the fact that tribes were already governing themselves before settlers came to America, and the United States recognizes those retained self-governing powers.' Felix S. Cohen, in his *Handbook of Federal Indian Law*, summarizes inherent sovereignty in this quote: 'Perhaps the most basic principle of all Indian law supported by a host of decisions (…) is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. (…) What is not expressly limited [by Congress] remains within the domain of tribal sovereignty.'[36]

(2) Tribes are 'domestic dependent nations': 'Tribes are "domestic" because they are within the boundaries of the United States. They are "dependent" because they are subject to the power and responsibility of the federal government. They are "nations" because they exercise sovereign powers over their people, property, and activities that affect them.'

(3) The Indian Commerce Clause of the US Constitution (Article 1, Section 8, Clause 3: 'The Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian Tribes') gives the US Congress plenary power over Indian nations limited only by the US Supreme Court's review.

(4) The government-to-government relationship of federally recognized tribes with the federal government, which explains the continuing battle for federal recognition (as epitomized recently by the more than three decades-long process that led to federal re-acknowledgment of the Cape Cod's Mashpee Wampanoag tribe in 2007, legally 'non-existing' for a long time).

(5) 'Trust responsibility' of the federal government, i.e. 'an obligation to protect tribes, their way of life, and to provide services such as education, housing and health care to ensure their survival and welfare. (…) Through treaties and other settlements, tribes received only small parcels of their original land base. In exchange, the federal government promised to protect tribes and provide services. This federal obligation is known as the "doctrine of trust responsibility," and applies to all tribes, not just treaty tribes.'

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[34] See General Principles of Federal Indian Law, https://uaf.edu/tribal/academics/112/unit-4/generalprinciplesoffederalindianlaw.php (accessed 15.05.2023).

[35] *Ibid.*

[36] F. S. Cohen, 1942, *op. cit.*, Chapter 7: The scope of tribal self-government, p. 122.

(6) Inapplicability of the United States Constitution and its Bill of Rights to the activities of the tribal governments. 'This is because the sovereign powers of tribes predate the Constitution. However, Congress passed the Indian Civil Rights Act in 1968 which applies to all tribes in the United States. The Indian Civil Rights Act is very similar to the US Bill of Rights. The Act requires tribes to provide due process for anyone who falls under their jurisdiction and tribes may not impose cruel or unusual punishment. One difference from the Bill of Rights is that the Indian Civil Rights Act does not require tribes to separate church and state. Another difference is that the Indian Civil Rights Act limits sentencing options for all tribes.' (imprisonment for a term not more than of three years or a fine of up to $15,000 or both).

(7) Recognition of 'Indian country' as the territorial area over which tribes have jurisdiction. It was defined by congressional statute in 1948 to include not only reservations, but also dependent Indian communities, and allotments. 'In general, tribes have more jurisdiction within Indian country than outside it.'

(8) Cannons of construction: 'Over time, through many conflicts between tribes and the US government, guidelines for interpreting Indian law cases were developed. These types of guidelines are called "cannons of construction." The three basic guidelines for interpreting Indian law cases are that ambiguities in treaties must be resolved in favor of the Indians; Indian treaties must be interpreted as the Indians would have understood them; and Indian treaties, agreements, and laws must be construed liberally in favor of the Indians.'

(9) Double jeopardy: 'When both tribes and the state or federal government have jurisdiction over a matter, a person may be tried for the same offense in both tribal and state court or federal court, and the double jeopardy clause of the US Constitution does not apply. This is because tribes are "separate sovereigns".'

(10) Absence of criminal and penal jurisdiction over non-Natives (based on the US Supreme Court decision in a case *Oliphant v Suquamish Indian Tribe* in 1978). However, tribes may regulate non-Natives, who affect the health, safety, and welfare of the tribe and tribal members, through civil actions.[37]

5. NATIVIZATION OF THE NON-NATIVE LAW: THE INUIT CASE

The spread of the 'global ethics',[38] including the rights of animals and the rights of nature, especially since the cultural revolution of the 1960s, intensified

[37] https://uaf.edu/tribal/academics/112/unit-4/generalprinciplesoffederalindianlaw.php (accessed 15.05.2023).

[38] A. Podgórecki, *Global Ethics – A Need for a New Synthesis*, (in:) *idem*, *Mega-Sociology*, Prace Katedry Socjologii Norm, Dewiacji i Kontroli Społecznej IPSiR UW, Warszawa 2016.

by the increasing real dangers of climate change, paradoxically helped to develop support for the 'ecological' native people who survived into the twenty-first century but also to popularize the philosophy that is derived from their way of life by the new generations of ethnographers and social activists.

Let us recall that political domination does not exclude acceptance of the law of those subdued: the indigenous Roman and Han legal institutions with time were taken over by the successive waves of 'barbarian' conquerors coming from North and West. The Inuit people by choosing in the old days the Arctic niche for their habitat helped themselves to survive relatively well until our days in contrast to the potential Euro-colonisers. The Danish in Greenland and Euro-Canadians in the Far North had to, pragmatically, recognize the living native law. But this led to a significant feedback when the official law of the exogenous origin accepted the indigenous legal implants. The apparently simple recognition of customary Inuit adoption practices may serve as a relatively recent example:

> Inuit Customary Adoption Incorporated into Quebec's Civil Code – 'Historic' say Makivik and Nunavik Regional Board of Health and Social Services (…). On Friday June 16, 2017 at the Quebec National Assembly, Bill 113 called 'An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information' was adopted with the unanimous consent of all parliamentarians. The Bill notably includes important new provisions related to Inuit customary adoption, which were developed in close collaboration with Makivik and the NRBHSS along with other Aboriginal partners (…) Jobie Tukkiapik, President of Makivik Corporation, stated: 'Nunavik Inuit have consistently called for Quebec's laws to legally reflect the effects of our customary adoption regime. Although recognition is offered by the Constitution Act and at the James Bay and Northern Quebec Agreement, a practical inclusion of the effects of our adoptions on the kinship of our Inuit children and their parents was considered crucial. We therefore wish to thank the Government of Québec and Minister of Justice Stéphanie Vallée for having recognized in respect and integrity this important customary regime.'[39]

But decades ago an adoption of the Inuit law was made on a much fuller and larger scale by the Polish-Canadian criminologist and penologist Tadeusz Grygier in his draft of the Social Protection Code.[40] Maria Łoś, Emeritus Professor of the University of Ottawa, notes that:

> Grygier's model code was consistent with his philosophy. All his life, he strived to minimize suffering rather than maximize happiness, to negotiate rather than impose, to promote sanctions that helped to heal and repair instead of avenging and punishing. His Model Code, like his life philosophy, combined the utilitarian imperative of pragmatic altruism with the Epicurean moral philosophy of common sense, friendship and internal harmony. The ideas behind the code were also influenced by his

[39] https://www.makivik.org/inuit-customary-adoption-incorporated-quebecs-civil-code-historic-say-makivik-nunavik-regional-board-health-social-services (accessed 15.05.2023).

[40] *Social Protection Code: A New Model of Criminal Justice*, New York 1977.

> pioneering investigations of concepts of justice and law among the Inuit of northern Manitoba [!] (…). It is not often remembered that the now celebrated idea of 'restorative justice' was introduced and elaborated in 1962 by W. T. McGrath and Tadeusz Grygier at a national conference of criminal justice organizations.[41]

So, the Inuit, who were unique in surviving the European conquest (*pace* the extinct Viking colonists in Greenland!) and who taught the Europeans how to survive in the Arctic kayaking in an anorak with harpoon in hand, provided also the lesson of the civilized way of dealing with trespassers of the fragile order of mutual tolerance and cooperation in small groups.

Grygier's 'Code as a whole is influenced by Indian ideology and Eskimo (Inuit) practice that the author and his team studied in Far North in 1970. The aim of the study requested by the Canadian Ministry of Far North was to answer the question why there was so much criminality in this area. It came out later that the Indian criminality is strictly linked to the abuse of alcohol. In contrast to other societies, Indians did not keep their crime secret and its purpose was not for gain. Their offences had been open, manifest, rebellious, violent and destructive. They had been the reaction to the humiliation, lack of freedom, imposed economy and law, above all to depriving the men of their traditional social status. Hence, often their wives and kids had been the victims. Amongst the Eskimo there had been almost no crime. Such absence was indeed the most interesting, and thus the influence of the Eskimo customs and unwritten law on the Code was the greatest."[42] The Eskimo law did not recognize 'guilt' (a recurrent theme throughout this paper) but 'shame' and sanctions of ridiculing and contempt (this field observation prompted Pospíšil[43] to turn from Hoebel's[44] 'teeth of the law' to a wider definition of sanctions that would include the 'psychological' measures as well). The purpose was in both, Eskimo and Indian, cultures the personal, familial and social survival to which Grygier added peace, consensus and solidarity as the aim for Indians and practice amongst Eskimo. Grygier pointed also to John Braithwaite, who advocated shaming as the basis for restitutive justice under the influence of Australian Aboriginal peoples, and to Verner Goldschmidt's draft of the Greenlandic Criminal Code that in contrast to Grygier's influential but never fully promulgated Code had been partially accepted and adopted as the official law for Greenland.

At last we arrive at Verner Goldschmidt, a Danish sociologist of law and culture who as early as in 1950 was requested by the Danish government to draft the Criminal Code for Greenland following his participation in 1948 in field research

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[41] https://sites.google.com/site/tadeuszgrygier/home-biography/criminology (accessed 20.11.2022).

[42] T. Grygier, *Sprawiedliwość czyli istota moralności, zdrowia i prawa*, Toronto 2006, p. 14, translation by JMK.

[43] L. J. Pospíšil, 1971, *op. cit*.

[44] E. A. Hoebel, 1954, *op. cit.*

into the practices (Ehrlich's living law!) of Greenland under the Danish administration. In the past the Greenland population, typically for the colonial era, had been divided into two classes: natives under the Danish administration, which would issue particular ordinances later codified into the official 'Greenlandic law' and similar to the Federal Indian law of the US, and the Danes subject to the metropolitan Danish law. After World War II, the time came for the attempted unification of the law. 'Two methods were here imaginable – Goldschmidt wrote afterwards – A codification of Greenlandic legal practice might be undertaken, in such a way, however, as to create a code which was applicable not only to that part of the Greenlandic population who had hitherto been subjected to the criminal law described above, but also to such persons as had hitherto been under the Danish Penal Code. Another possibility was to introduce the Danish Penal Code into Greenland, applicable to that part of the population who had up till then been under Greenlandic jurisdiction, it being of course necessary to be prepared to introduce certain important qualifications in view of the special geographical and cultural conditions. I chose, not to attempt to introduce the Danish Penal Code into Greenland, but instead, at least in principle, to attempt a codification of Greenlandic practice.'[45] The very name of the code had been the outcome of the ethno-socio-juridical research study that disclosed the dysfunctionality of 'penal' law when applied to the native Greenlanders. 'The Greenlandic legal practice reflected the fact that the Greenlandic legal authorities distinguished the determination of guilt from the determination of sanctions in a manner quite foreign to Danish criminal law. It looked as if the finding of guilt took place essentially on the same basis as in Danish criminal law, whereas the fixing of sanctions was to a far greater extent determined by a global assessment of the offender's individual and social situation at the moment of conviction.'[46] One should not assume that this involved the possibility of restitution of the original Eskimo native justice,[47] including tolerance towards sexual acts with children, polygamy, leaving the old disabled people to their death or procedural drum-and-song contests resolving any possible dispute as an alternative to bloody revenge.

Goldschmidt[48] himself stressed that: 'The Criminal Code makes no attempt at giving formalized expression to the Greenland population's conception of justice. The foundation on which the Code has been built does not comprise examinations of the behaviour and attitudes of the members of society. It has solely been based on systematic observation of concrete legal reactions and on information as to the geographical and social background of the decisions made. Thus the Code is an attempt at expressing the pattern of behaviour of the legal authorities

[45] V. Goldschmidt, *The Greenland Criminal Code and its Sociological Background*, 'Acta Sociologica' 1956, Vol. 1(1), p. 232.

[46] *Ibid*., p. 232.

[47] See, e.g. E. A. Hoebel, 1954, *op. cit.*

[48] V. Goldschmidt, 1956, *op. cit*., p. 250.

in legal terms.' From our viewpoint, it means that Goldschmidt's draft expressed the 'official living law', both 'positive' and 'intuitive', as observed in the practices of the Danish colonial administration. However, this practice included a compromise with the unofficial indigenous Greenlandic intuitive and customary justice that interacted with the administrative actions. 'Throughout the eighteenth and nineteenth centuries the development was, in broad outline, that more and more actions were made criminal offences in accordance with Danish views, whereas it proved possible to a limited extent only to introduce Danish punitive measures.'[49] Though the expression 'restitutive law' does not appear, Goldschmidt described his intended reading of the past experience of colonial authorities through attempting to adapt as much as possible the official law to the native ideas that the damages are the most important issue. Nevertheless, the resistance from the conservative official metropolitan Danish legislators led to a compromise that: 'to make the system of punitive measures complete it was contemplated in preparing the first draft to include provisions concerning the impositions of damages – on an analogy with the Italian 1921 draft of a penal code. Such provisions were, however, not inserted in the draft, above all because there were on the whole some doubts concerning the Greenlandic law of damages, and also because on traditional legal dogmatic grounds it was thought inadvisable to include provisions relating to civil law in the Criminal Code. In view of the fact that many Greenlandic cases, particularly concerning personality [!] offences, have been settled solely by means of damages, it would presumably have been most expedient if damages had been mentioned as a punitive measure in the Code. Here, as in so many other parts of the Code, it has, however, become necessary to compromise with Danish legal tradition. In section 86 it is laid down that the court, when establishing that the accused has committed a crime, must decide on one or several of the punitive measures of the Criminal Code to be used. When circumstances permit, the court may refrain from deciding on the use of any punitive measure. This provision emphasizes the separation of the establishment of guilt and the establishment of sanctions. The provision involves that in the sentence the court may, e.g. establish that a serious crime has been committed, and that it may at the same time in connection with the question of punitive measures state the reasons why a quite lenient measure has been chosen, or why none has been used at all. Here it is possible to establish that from a social point of view a certain action may be undesirable, while at the same time the authorities may refrain from using any measures against the offender out of consideration for his individual circumstances.'[50] The provision was absent from the Danish Penal Code in force at the time.

[49] *Ibid.*, p. 220.
[50] *Ibid.*, p. 241.

In fact, Goldschmidt was not accidently referring to the Enrico Ferri's idea of criminal justice as 'social defence'. It was elaborated on in the second half of the twentieth century as the 'therapeutic model'.[51]

The model generalized as 'restitutive', based upon damages derived from the traditional concept of many native peoples, thus came back to them from the reformist faction of the Western lawyers' culture. The idea that finally caught the global audience[52] meant, as Jessica Metoui rightly titled her paper,[53] 'returning to the circle'. The Canadian Manitoba Province report of the Aboriginal Justice Implementation Commission advocated the steps already taken in drafting the Greenland Criminal Code of 1954:

> The strategy proposed by the AJIC is based on the principles of community justice. This is a community-based, restorative justice model. It views crime as an attack on the victim and as a disruption of community balance. It seeks to mend the harm done to the victim and the community. There is no single community justice program or set of policies that can be simply introduced into a community – by definition, different communities fashion their own approaches. It involves new approaches to how one defines a crime, the role of a police force and its relationship to a community, the role of the courts, the types of sanctions that are employed, the justice system's recruiting policies, and the system's obligations to the victims of crime. Most importantly, it envisions a much bolder and comprehensive role for the community in the ongoing operation of the justice system. One measure of progress towards a community justice system is the degree to which the measures taken reduce the involvement of the criminal justice system in the lives of individuals and communities, and increase community involvement in finding solutions for crime.
>
> Where the current system is centralized, isolated, and focused on criminals, a community justice approach is rooted in neighbourhoods, requires collaboration among citizens, and is attuned to the situation of the victims and the community at large. The issues that the criminal justice system addresses are serious, complex, and persistent. The AJIC recognizes that community justice approaches will not cause these problems to disappear. While community and restorative justice approaches take a less punitive approach to the administration of justice, they must retain a strong appreciation of how crime affects victims and communities. A process that seeks to restore community balance cannot place victims at greater risk.[54]

Significantly, recommendations like the above were i.a. based upon consultations with representatives of all (except one) the First Nations and the Manitoba Métis People Federation (altogether 27 interviews). Regarding 'restorative/com-

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[51] D. B. Wexler, *Therapeutic Justice*, 'Minnesota Law Review' 1972, Vol. 57, p. 290.

[52] H. Zehr, *Changing Lenses: A New Focus for Crime and Justice*, Scottdale 2005, pp. 268–269.

[53] See J. Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 'Journal of Dispute Resolution' 2007, Vol. 2007(2).

[54] Aboriginal Justice Implementation Commission, *Final Report*, 29 June 2001, http://www.ajic.mb.ca/reports/final_toc.html (accessed 15.05.2023).

munity justice', respondents were asked: 'There has been, in the last ten years or so, a movement toward "restorative justice" where more attention is paid to including victims and community members in meeting directly or indirectly with offenders. Is this an approach that makes sense to you?'. The findings were as follows: 'A strong consensus exists as to the suitability of restorative justice. Twenty-three answered in the affirmative while only one said "no" and another said "don't know". It was not clear why the one respondent said "no". Those who said yes specified it would depend on the severity of the offence. A surprising finding related to this question is that no one objected to victims and offenders meeting directly, despite the literature that indicates that indigenous people tend to prefer non-confrontational models such as shuttle mediation, where a mediator meets with parties separately and does not bring them together in the same room.'[55]

What is important, in this case Native people were not asked about the traditional native justice but about 'a movement toward "restorative justice"' over the last ten years. Hanne Petersen, a sociologist with considerable research experience of the 'living' Greenlandic law, observed that 'the local Greenlandic legal culture has been neither rights-oriented nor rule-oriented; it has rather been consensus-oriented and situationally-oriented'[56] and agreed with the findings of the Manitoba inquiry: 'According to Sinclair, the Aboriginal world view holds that truth is relative and always incomplete, whereas the Western justice system frowns upon an individual who appears uncertain about his or her evidence. Because determining the truth in Aboriginal traditions is not usually a prelude to punishment, those accused of wrongdoing are more likely to admit having done something wrong. This is also the case in Greenland, where cases are seldom appealed because of questions concerning guilt, but where the sanctions may be questioned.'[57] And the original work of Goldschmidt needs citing again, also because it refers to comments made by one of the founders of the modern sociology of law, Vilhelm Aubert (1922–1988):

> Aubert sees the Greenlandic Criminal Code as an 'attempt at introducing control on the part of criminal law into the continuous social control of the small groups'.[58] *There is reason to assume that the frequency and strength of the reactions in primary group societies are often influenced by the fact that the reaction may contribute, to a larger extent than the offence committed, towards weakening the solidarity between the members of society and intensifying the feeling of uncertainty and discord caused by the offence* [emphasis added: JMK].[59]

[55] T. Lajeunesse, *Final Report: Consultation with Aboriginal Peoples*, Report prepared for the AJIC, 8 May 2001, section 3: Findings, e) Community Justice.

[56] H. Petersen, *Legal Cultures in the Danish Realm: Greenland in Focus*, (in:) K. Hastrup (ed.), *Legal Cultures and Human Rights: The Challenge of Diversity*, 2001, p. 70.

[57] *Ibid*., p. 80.

[58] V. Aubert, *Om straffens sosiale funksjon* [On the Social Function of Punishment], Oslo 1954, p. 161 et seq., esp. p. 162.

[59] V. Goldschmidt, 1956, *op. cit*., p. 249.

6. THE DIFFERENT WORLDS

The above-discussed 'return to the circle' meant, however, not only the procedure but also the basic substantive concepts behind the law. As Judge Murray Sinclair argues: 'The starting point is a difficult one for people raised with the liberal ideals of "civil rights" and "equality"; it requires one to accept the possibility that being Aboriginal and being not-Aboriginal involve being different. It requires one to come to terms with the concept that the Aboriginal Peoples of North America, for the most part, hold world views and life philosophies different from those of the dominant (…) society, and that these belief systems and approaches to life are so fundamentally different as to be inherently in conflict.'[60] These words resonate today with some of Central and Eastern European leaders like Viktor Orbán or Jarosław Kaczyński in their plea for illiberal democracy. We urgently need to dissect the neo-authoritarian trend and the 'old tradition' collectivism.

Some of the Westernization pressures involved from the beginning not only the practices considered repugnant (*sutee* or anthropophagy being the evident examples) but also the 'ideological' assumptions behind them. Danish merchants were empowered to punish the Inuit for contacts with *angakoks*, Pueblo Indians were forbidden to dance by Spanish missionaries and the Navajo by the US Army, the Kwakiutl were forbidden to practice the *potlatch*, and nobody was allowed to punish witchcraft as if the world with witches unrepressed were safer. The positive side meant conversion to Christianity (or to Islam where there were opportunities for the Islamic colonization in Africa, Europe or Asia). The pragmatic missionaries with time discovered that the new faith was more palatable if mixed with the native beliefs and more or less open syncretism prevailed everywhere. It was easier once the complexities of the new religion had been made known. A native would find in the alien religion the basic elements, which Lucien Lévy-Bruhl called *le mystique*: the plurality of spirits, the omnipresence of God, the trans-substantiation, the symbolic efficacy, etc.

Among the former Plains tribes this semi-revival took the form of the Native American Church (NAC) that fought for its legal recognition, despite its activities being curbed through the Code of Indian Offenses of 1883. The Church's legal incorporation took place in Oklahoma in 1913 but the ritual consumption of the hallucinogenic peyote led to a prolonged conflict between Native and non-Native authorities, continued also in the Navajo land. It was only in 1967 when the Native American Church of the Navajo land (since 2003: Azee Bee Nahagha of Diné Nation) successfully presented the 1st Amendment to the new Navajo Nation Bill of Rights titled 'Declaring the Freedom of Religion as a Basic Human Right,

[60] M. Sinclair, *Aboriginal Peoples, Justice and the Law*, (in:) J. Y. Henderson, R. Gosse, R. Carter (eds), *Continuing Poundmaker and Riel's Quest*, presentations made at the Conference on Aboriginal Peoples and Justice, Saskatoon 1994, p. 175.

Repealing Certain Tribal Council Resolutions and Legalizing Peyote as a Sacrament within Native American Church Services' that was passed on 11 October 1967 by a vote of 29–26 overturning the 1940 Navajo Anti-Peyote Law. At the national level the issue ended when the Federal Indian Religious Freedom Act of 1978, also called the American Indian Religious Freedom Act, was passed to provide legal protection for the Church's use of the plant.[61]

The above may serve as an example of influence of Native Americans on the US Federal law. More significantly, the incorporation helped to institutionalize within the new white-dominated world the non-white cosmogony of floral character as '[a] prominent belief amongst church members is that all plants are purposefully created by the Great Spirit most often equalled with Jesus Christ', including peyote which was created for medicinal, spiritual, and healing purposes. 'Disease and death are believed to be a result of an imbalance in the individual. Besides peyote, other sacred plants, prayer, and fasting are used to cure this imbalance. Use of peyote is never for recreational purposes and the hallucinogenic effects of the plant are considered spiritual visions. To most Native Americans, visions are a communion with the metaphysical. Members also believe in the importance of helping the world in order to create peace, health, and freedom. They seek guidance from the Great Spirit in protecting the earth, continuing the ways of their ancestors, and caring for future generations.'[62]

The membership in the NAC is estimated at a quarter of million people only, and this includes non-Natives but apart from them the traditionalists, like 'Ceremonials', among the Navajo are numerous in many Native tribes. They would agree with opposition to Genesis 1:28–30 as expressed in the Navajo or Ojibwa myth of Creation: 'Creation came about from the union of the Maker and the Physical World. Out of this union came the natural children, the Plants, nurtured from the Physical World, Earth, their Mother. To follow were Animalkind, the two-legged, the four-legged, the winged, those who swim and those who crawl, all dependent on the Plant Earth and Mother Earth for succour. Finally, last in the order came Humankind, the most dependent and least necessary of all the orders.'[63] According to the Navajo myth of origin, recreated each time in the ceremony known as 'blessing way', a baby found and raised by the first couple became the Changing Woman, who is the main deity (though not the only one) of the Navajo, epitomizing their matrilineal clan system and prevailing female ownership of land and livestock. 'The Navajo teaching that came to us through their spiritual beliefs says that there is need to stay with Mother Earth in harmony. The same relationship shall be with Sky and other elements of Nature includ-

[61] http://www.abndn.org/history-of-abndn.html (accessed 20.11.2022).

[62] https://en.wikipedia.org/wiki/Native_American_Church (accessed 25.05.2023).

[63] F. Ahenakew, C. King, C. I. Littlejohn, *Indigenous Languages in the Delivery of Justice in Manitoba*, research paper prepared for the Aboriginal Justice Inquiry, Winnipeg 1990, p. 23.

ing human beings, birds, and animals among others.'[64] Similarly *Pacha Mama* (Mother Earth) continuing cult is undergoing official recognition in the Andean countries (Bolivia, Peru, Ecuador) and was recognized as reality of beliefs to be accommodated by the Catholic Church.[65]

Of the indigenous population of Amazonia Pope Francis writes that their beliefs embody Pope Benedict XVI's 'human' and 'social' ecology:

> The wisdom of the original peoples of the Amazon region 'inspires care and respect for creation, with a clear consciousness of its limits, and prohibits its abuse. To abuse nature is to abuse our ancestors, our brothers and sisters, creation and the Creator, and to mortgage the future'. When the indigenous peoples 'remain on their land, they themselves care for it best', provided that they do not let themselves be taken in by the siren songs and the self-serving proposals of power groups. The harm done to nature affects those peoples in a very direct and verifiable way, since, in their words, 'we are water, air, earth and life of the environment created by God. For this reason, we demand an end to the mistreatment and destruction of mother Earth. The land has blood, and it is bleeding; the multinationals have cut the veins of our mother Earth'.[66]

And he adds that:

> In this regard, the indigenous peoples of the Amazon Region express the authentic quality of life as 'good living'. This involves *personal, familial, communal and cosmic harmony and finds expression in a communitarian approach to existence* [emphasis added: JMK], the ability to find joy and fulfillment in an austere and simple life, and a responsible care of nature that preserves resources for future generations.[67]

Let us return to the aspect of guilt determination in the Western legal culture. 'In Aboriginal cultures, the guilt of the accused would be secondary to the main issue', Judge Sinclair claims, and continues:

> The issue that arises immediately upon an allegation of wrongdoing is that 'something is wrong and it has to be fixed.' If the accused, when confronted, admits the allegation, (…) there is still a problem and the relationship between the parties must still be repaired. Because punishment is not the ultimate focus of the process, those accused of wrongdoing are more likely to admit having done something wrong. That is why, perhaps, we see so many Aboriginal people pleading guilty. At the same time, to deny an allegation which is 'known' by all to be true, and then to go through the 'white man's court' is often seen as creating more damage. The concepts of adversarialism, accusation, confrontation, guilt, argument, criticism and retribution are not in keeping with Aboriginal value systems. Adversarialism and confrontation are

[64] S. Trimble, *The People: Indians of the American Southwest*, New Mexico 1993, after Navajo Cultural Anthropology Research Paper exclusively available on IvyPanda: https://ivypanda.com/essays/navajo-cultural-anthropology/ (accessed 25.05.2023).

[65] Pope John Paul II, Homily in Cuzco, Peru, 3 February 1985, https://www.vatican.va/content/john-paul-ii/es/homilies/1985/documents/hf_jp-ii_hom_19850203_cuzco.html.

[66] Pope Francis, *Querida Amazonia*, 2020, Ch. 3, para. 42.

[67] *Ibid*., Ch. 4, paras 70, 71.

antagonistic to the high value placed on harmony and the peaceful co-existence of all living beings, both human and non-human, with one another and with nature.[68]

Judge Sinclair lists other conflicts ending with the basic statement: 'In acknowledging their powerlessness before the Creator, Aboriginal children would be taught to affirm their dependence upon the Creator and upon all of creation; to wait patiently and quietly, in a respectful manner, to receive the mercy of the Creator.'[69] Sinclair is both a Canadian judge and Ojibwa priest. Unsurprisingly, Sinclair ends demanding Aboriginal self-government in justice.

7. THE OFFICIAL TRIBAL LAW: THE NAVAJO CASE

Nobody seems better suited to the description of the varieties of 'tribal law' of the US Native Americans than the Navajo (or the Diné, 'The People' as they used to call themselves). Firstly, their legal system was called the 'flagship' of American Indian tribal courts.[70]

Secondly, 'Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge', as announced by 'The New York Times' on 21 May 2021. This is the largest Native American tribe living on the largest tract of 'Indian land' in the US. Recent research shows that 'Navajos all come from various peoples (some of whom no longer exist): some small groups of individuals joined existing clans and do not know their own history beyond what they learned from the clan they joined, and other groups were localized ethnic or clan groups who joined the coalition of what became identified as the Navajo (…). Each group that became Navajo brought its own knowledge of the land, ceremonialism, and social and economic life. This became part of the Navajo way of life, which is personified in the Blessingway ceremony and is referred to by terms such as *beauty*, *harmony*, or *balance*.'[71]

The modern legal history of Navajo is complex and might be divided into five stages discussed below.

(1) Until 1864 Navajo had followed their own 'customary' unwritten law of which nothing is known except that there were elders but no authoritative person to settle the disputes arising between members of different 'bands'. 'Way back there, the Navajo people didn't have any kind of law. They used to just talk it together, and the things straightened up by talking together – maybe three or four

[68] M. Sinclair, 1994, *op. cit*., pp. 182–183.

[69] *Ibid*., pp. 183–184.

[70] 'Navajo Times', 29 October 2010, ww.navajotimes.com/news/2010/1010/102910judges.php.

[71] M. Warburton, R. M. Begay, *An Exploration of Navajo-Anasazi Relationships*, 'Ethnohistory' 2005, Vol. 52(3), p. 544.

people talking together.'[72] As a label of 'lawlessness' usually covers the different concept of order, we may need a more tangible image of what that means. Assuming the similarity of the social organization with the Comanche in the open Great Plains period, since their way of life and changes in mode of subsistence were alike, it might be as Hoebel described the latter: 'The simple needs of Comanche society did not impose any great social pressure for governmental controls, and the high value placed upon individual freedom of action also worked to hold the government at a minimum.'[73] There were, like among the Navajo, the 'peace chiefs' and the 'war-chiefs', but the term 'chief' is misleading as they were leaders.[74] One of the most acute of Hoebel's informants when asked about the peace chiefs had nothing more to say than 'I hardly know how to tell about them; they never had much to do except to hold the band together'.[75] Certainly, 'holding the band together' has especially much to do with people who in time of war felt free to leave the party, pick up their arrows and go their own way. 'In view of their basic values of individual supremacy and the related ambiguity of powers of the chieftains, it is not surprising that in this tribe there were no public officials endowed with law-speaking or law-enforcing authority. The law of the Comanche was neither legislative nor judge-made. It was (…) "hammered out on the hard anvil of individual cases by claimant and defendant pressing the issues in terms of Comanche notions of individual rights and tribal standards of right conduct." Thus it was almost exclusively a system of private law: a system of individual responsibility and individual action; a law that was case made.'[76] And such, it seems, was the old law of the Navajo.

(2) Like the Comanche, the Navajos would raid their traditional enemies settled in the pueblos, i.e. they raided the Spaniards, fought with the Apache, the Mexicans and the Anglo-Americans who came after them until, in the 1860s, the US Army decided on a 'final solution' to the 'Navajo question': in 1864 about 8,000 of the surrendered and dismounted Navajo were forced to arrive through the Long Walk to Fort Sumner where the survivors were placed in a sort of a concentration camp. The adults were made to attempt farming they had never done on the soil that was never fertile enough, while the children were placed in the boarding school. About 200 people died on the way, and the interned Navajo entered disputes with the Apache interned there before. The overpopulated, with almost 10,000 Indians, Bosque Redondo 'internment camp' was poorly subsi-

[72] J. Ladd, *The Structure of a Moral Code*, Cambridge: Harvard University Press 1957, p. 204.

[73] E. A. Hoebel, 1954, *op. cit*., p. 131.

[74] 'Navajo peacemakers are *naat'aanii* in Navajo tradition, a term sometimes inaccurately translated as "peace chief". Instead, a naat'aanii is a community leader whose leadership depends on respect and persuasion and not a position of power and authority'; see J. Zion, *The Dynamics of Navajo Peacemaking*, 'Journal of Contemporary Criminal Justice' 1998, Vol. 14(1) .

[75] E. A. Hoebel, 1954, *op. cit*., p. 132.

[76] *Ibid*., p. 133.

dized and poorly managed until 1868 when the new treaty was signed with the Navajo granting them back the freedom to resettle in a part of their native land consisting of 3.5 million acres (14,000 km²) of the 'reservation' demarcated by the Four Sacred Mountains. In the camp, the US Army handled severe crimes, while petty crimes and disputes remained in the purview of the 'chiefs' of the twelve 'villages' that were set up by the US Army officers. It is often said that the trauma of the Long Walk and the final victory resulted in the forging of the Navajo Nation, as they call themselves.

(3) After the Navajo return from the Bosque Redondo in 1868, a completely new 'system' of authoritative centralized justice applied, which was handled by the Indian Agent (obviously, Euro-American) of the Federal Bureau of Indian Affairs (BIA) with the support of the US Army, while smaller disputes remained under the Navajo control. That certainly was not the previous 'traditional' Navajo system of justice, nor was it the constitutional US official system. The Native people were under the military rule of the US Army that not only engaged some other tribes into struggle with the Apache, the Comanche and the Navajo, but once the latter surrendered, forced them to collaborate in the disciplinary order, first in the camp and then in the reservation. In 1883, the US Supreme Court 'concluded that the federal government is without criminal jurisdiction to prosecute Indian-on-Indian crimes unless or until Congress authorizes such jurisdiction'. In response to the *Crow Dog* case (109 U.S. 556 (1883)), Congress enacted the Major Crimes Act in 1885, providing Federal courts with jurisdiction over the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person.[77] In 1889 that was supplemented all over the United States with the new system of 'Indian Courts' envisaged and supervised by the US administration and enforced on the Native Americans. For the Navajo, BIA Agent David L. Shipley established the Navajo Court of Indian Offenses and appointed judges. Previously, judicial authority was exercised by himself.

Eugene R. Fidell[78] calls such courts the 'fourth system of American law' that 'collectively (…) serve more people than several states' and that may encompass the private law as well: 'Roughly 300 of the 566 federally acknowledged Indian tribes have courts or dispute resolution systems. They dispose of thousands of cases every year. These courts are as varied as the tribes they serve: some tribes have traditional courts, some have courts pursuant to constitutions approved under the Indian Reorganization Act of 1934 (IRA), some rely on pre-IRA Courts of Indian Offenses, some share trial courts with other tribes, some participate

[77] See 18 U.S.C. §§ 1152-53 (No. 17-646 (2018):11).

[78] The case reported after E. R. Fidell, *Competing Visions of Appellate Justice for Indian Country: A United States Courts of Indian Appeals or an American Indian Supreme Court*, 'American Indian Law Review' 2016, Vol. 40(2), pp. 233–248.

in inter-tribal courts, and many have appellate courts (either their own or inter-tribal ones) (…). It is astounding that, as Professor Fletcher notes, "no one really knows how many tribal courts there are (…)". These are colloquially known as "CFR courts".' The courts were introduced not by the US Congress but based on the administrative decision of Hon. Hiram Price, the Commissioner of Indian Affairs, under the Rules of March 1883 and established with the 'approval' of the Secretary of the Interior on 10 April 1883.

The third stage continued, albeit with unknown 'underground' reality of the 'living law', after 1934 when the Indian Reorganization Act (IRA) gave the tribes all over the United States an opportunity to introduce their own constitutions.[79] In the summer of 1935, the Navajo people voted against the adoption of the IRA provisions that were part of Franklin D. Roosevelt's New Deal. The vote was suspiciously interpreted locally as a referendum on the livestock reduction program presented by the Bureau of Indian Affairs in 1934 in order to improve grazing conditions.[80] In the US, 172 tribes accepted the act, and 73 rejected it. However, the IRA did not legitimize the Courts of Indian Offenses, nor did it list the establishment of Indian tribal courts among the powers of an 'Indian tribe or tribal council'. The 1883 Code of Indian Offenses was finally amended when John Collier assumed the role of Commissioner of Indian Affairs in the administration of President Roosevelt in 1933. 'He eliminated all references to the bans on dances, such as the sacred Lakota Sun Dance, and other customary Indian practices.' The modern incarnation of the Code of Indian Offenses is found in the Code of Federal Regulations at Title 25 CFR Part 11 and it, unlike the original version,

[79] Indian Reorganization Act of 18 June 1934 (48 Stat. 984, 25 U.S.C. 461 et seq.), Sec. 16: Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

[80] https://navajopeople.org/navajo-history.htm (accessed 15.05.2023).

provides for a basic criminal code for lesser crimes committed by Indians on reservations covered by these provisions.[81]

The list of criminal offences, purged of the anti-cultural components, has been in the meantime extended to include, e.g. the modern concerns with credit cards and violence against women. The 25 CFR § 11.500 Law applicable to civil actions provides that: (a) In all civil cases, the Magistrate of a Court of Indian Offenses shall have discretion to apply: (1) Any laws of the United States that may be applicable; (2) Any authorized regulations contained in the Code of Federal Regulations; and (3) Any laws or customs of the tribe occupying the area of Indian country over which the court has jurisdiction that are not prohibited by Federal law.[82]

(4) The present judicial system for the Navajo Nation was created by the Navajo Tribal Council on 16 October 1958. It established a separate branch of government, the 'Judicial Branch of the Navajo Nation Government', which became effective on 1 April 1959. The Navajo Court of Indian Offenses was dissolved, and the sitting judges became judges in the new system. The resolution established 'Trial Courts of the Navajo Tribe' and the 'Navajo Tribal Court of Appeals', which was the highest court and the only appellate court.

In 1978–1985, the Supreme Judicial Council established the Navajo Tribal Council, a political body rather than a court. On a discretionary basis, it could hear appeals as the Navajo Tribal Court of Appeals. Subsequently, the Supreme Judicial Council was criticized for bringing politics directly into the judicial system and undermining impartiality, fairness and equal protection.

(5) In December 1985, the Navajo Tribal Council passed the Judicial Reform Act of 1985, which eliminated the Supreme Judicial Council and renamed the other courts that are now governed by Title 7, Courts and Procedures, of the Navajo Tribal Code.

The Navajo Nation Peacemaking Program was introduced in 1988. This model is the original invention of the Navajo politicians. It is based upon the elements of the traditional (first-stage) practices that have preserved within the 'underground' living law of the generations after 1864 and became modernized under the influence of both the nativist and ADR movements gaining influence in the 1970s.

The Navajo (Diné) law includes, as a result of this historical development, several distinct components that are listed officially as coming from different normative sources: (1) the US Federal 'Indian' law; (2) the Diné 'common law', including the (a) official law of the Navajo Nation, and (b) the 'customs' to which the officers of law may refer; (3) the 'peacemaking' mechanism that is autonomous and works case by case; (4) the sacred Diné law that remains the esoteric

[81] *Code of Indian Offenses*, http://robert-clinton.com/?page_id=289.

[82] CFR 25 Part 11, Courts of Indian Offenses and Law and Order Code, https://www.law.cornell.edu/cfr/text/25/part-11.

knowledge of the community sacral officers. Raymond D. Austin[83] proudly states that:

> The Navajo Nation judges enjoy a solid reputation for utilizing extant Navajo customs and traditions as law (Navajo common law) and blending the old with the new, a process that meshes Navajo customs and traditions with relevant and beneficial parts of not only Anglo-American legal traditions, but also legal traditions from different parts of the world. The process of blending the old with the new uses a framework that gives primacy to Navajo philosophy and Navajo ways of doing things. The use of Navajo common law by the Navajo judges and Navajo Nation government, which has been described as a Navajo legal revolution, is really the Navajo people defining Navajo Nation sovereignty the Navajo way – by relying on their own customs, traditions, language, spirituality, and sense of place.
>
> The skill of the Navajo Nation judges at using Navajo common law and at blending the old with the new has generated intense study and scholarship by those interested in American Indian methods of dispute resolution and the related topic of use of customs and traditions as law by the World's indigenous peoples. (…)
>
> This statement does not mean, nor does it imply, that the Navajo Nation courts always blend Navajo common law with Anglo-American or other law. In some cases, the Navajo Nation courts have applied only Navajo custom to decide issues; in others, the Navajo Nation judges have applied only Anglo-American law. Moreover, the Navajo Nation courts have leeway to utilize the law or reasoning of other 'nations,' including Indian nations, to decide cases.

8. HARMONY OR PRUDENCE?

Short descriptions of the peacemaking process leave an impression that it is but another example of what is well known as the romanticization of the past and oversimplification that serves, i.a. political purposes. I have no doubts as to the technical aspects of the procedure but as to its ethical meaning, as it can be seen in the more detailed reports and studies. The process is democratic and collective but not necessarily communal in the ethical sense. Let us look into the authoritative analysis of the Navajo ethics as made by John Ladd.[84] On the one hand, one finds there statements that seem to support the model presented above; on the other hand, Ladd describes the Navajo (at least their ethical representative Bidaga) as 'egoistic' in a specific meaning of the term. 'The commission of a wrong act is attributed to a person not knowing what he is doing. (…) The con-

[83] R. D. Austin, *Navajo Courts and Navajo Common Law*, PhD dissertation, Graduate College, University of Arizona, 2007, https://turtletalk.files.wordpress.com/2010/05/ray-austin-dissertation.pdf, p. 37, including note 76.

[84] J. Ladd, 1957, *op. cit*.

sequence is (…) that there is no place for anything resembling our Western notion of "sin". It is therefore no mere coincidence that the Navajo interpreter speaks of wrong actions as mistakes, rather than as "sin", "crime", "guilt". (…) If we conjoin the doctrine of almost the universal ethical competence with the belief that ethical knowledge is sufficient to effect right action, it follows that in principle coercion is never necessary. Every dispute can be settled by "talking it over". The exception to this principle occurs only when a person is incompetent',[85] that is when drunk or a child. This is accompanied by a theory of 'wind soul' that enters the body at birth and leaves at death. Following Father Berard Haile, Ladd argues that this esoteric doctrine absolves an individual from responsibility so 'events, not the actors or qualities, are primary'[86] and '[t]he main interest is in "straightening things up" by rectifying the trouble, and not by trying to change the criminal's responsibility or to save his soul. (…) The ethics is individualistic and egalitarian: in the sense that it can be understood and learned by everyone; (…) a person's character is determined by a supernatural dispatcher of "winds" [good, happy, bad, i.e. making mistakes, mean]; persuasion is the accepted means of influencing others, and coercion is neither necessary (…) nor sufficient.'[87]

Ladd calls the Navajo ethics 'prudential' (Native authors often use term 'empirical'):

> In general terms I shall contend that the Navajo moral code can be called 'rationalistic' [i.e. providing reasons for every prescription: JMK], 'prudentialistic', 'egoistic' and 'utilitarian by derivation'. (…) By 'prudentialism,' I mean not only that their system is rationalistic but that it is oriented to the welfare of the individual agent. In other words, it is egoistic, although it differs from Western egoism in that the welfare of the agent is not subjectively defined in such terms as pleasure, self-assertion, self-realization, or sanctification. From the basic prudentialist prescription and by means of certain factual assumptions, the Navajo moralist derives particular moral prescriptions and rules which are, in effect, utilitarian, that is, they tend to promote the greatest good (happiness) of everyone.[88]

And the same 'prudence' is present already in the Goldschmidt's comments to the Greenland Criminal Code of 1954:

> As a curious example of the open-mindedness and imagination occasionally displayed in taking measures against psychically abnormal criminals I may mention a case tried in the court of Upernavik in 1935. The accused had raped an 8-year-old girl and had been previously warned by the local municipal council because he had sexual intercourse with dogs. He was sentenced to 12 months' forced labour on probation, so that the sentence was to be enforced only in the case of renewed offences.

[85] *Ibid*., pp. 272–273.

[86] B. Haile, *Legend of the Ghostway Ritual in the Male Branch of Shootingway*, Arizona 1950, after J. Ladd, 1957, *op. cit*., p. 274.

[87] J. Ladd, 1957, *op. cit*., p. 274.

[88] *Ibid*., pp. 212–213.

> It appears, partly from the case itself, partly from information given to the juridical expedition that the motivation of the binding over was that the local municipal council had induced the convicted person to marry a local feebleminded erotomaniac woman who was sterile, on the ground that in this way it would be possible to lead the convict's abnormal sexual instinct along normal channels without any danger of issue afflicted with a hereditary taint. As far is known, this measure has had the intended effect, since after his marriage the convict has not been charged with any crime. The number of unsettled cases is comparatively large. This is partly due to the vacillation with which the enforcement of the law took place under the previous Greenlandic legal system, partly to the fact that cases were often settled without legal proceedings when the offender pleaded guilty and showed repentance. In many cases it would also seem as if the legal authorities were not particularly interested in taking further steps when a committed crime had been cleared up.[89]

The lack of interest in punishing is linked with getting rid of trouble. In fact, the Upernavik case fits literally Charles Fourier's utopian community he called 'Harmony' in which also every sexual orientation will be satisfied by linking one willing participant with another. The 'harmony' means here 'lack of trouble' through maximum toleration and not unison cooperation for their common good. Similarly, Franz Boas described the 'law' among the Canadian Inuit in the following way: 'There was a good hunter who used to threaten physically the other until those under permanent threat decided he needs to be shot by one of them who then took the widow and her orphaned children "so that they shall be no burden on the company",[90] while later on he helped the community with a trouble caused this time by a very old woman who was provided for by her relatives so "although she resisted him, he took her out of her hut one day to a hill and buried her alive under stones".'[91] The simplicity of these actions considered self-evident and left without any further reaction of others is part of the wide 'prudentialism' of the Inuit ethos exemplified also by a wife lending to accompany a 'friend' in his hunting expedition, lack of any formal recognition of the union between family partners, 'altruistic suicide' by the elderly, adoption of surplus offspring in times of plenty or freezing newborns in times of scarcity. This is not only the law of the small face-to-face group, as Aubert pointed out, but more than that, it is the law of the small group of people under permanent risk of death.

Austin, himself a Navajo, asks the question:

> How do Navajos conceptualize *hozho*? At a higher level, or more appropriately the universal level, *hozho* describes a state (in the sense of condition) where every tangible and intangible thing is in its proper place and functioning well with everything else, such that the condition produced can be described as peace, harmony, and bal-

[89] V. Goldschmidt, 1956, *op. cit.*, pp. 231–232.

[90] F. Boas, *The Central Eskimo*, Washington 1888, https://www.scribd.com/doc/103891166/Boas-Franz-The-Central-Eskimo-1888, note 4, p. 582.

[91] *Ibid.*, note 7, p. 615.

> ance (for lack of better English terms). Moreover, at the highest level of Diné philosophical abstraction, *hozho* describes the abstract 'perfect state,' although this ideal condition is, quite frankly, imponderable, or, according to Navajo philosophy, a reality that is beyond human experience. The phrase 'everything in the universe' refers to the interconnected, interrelated, and interdependent elements (i.e., air, water, animals, birds, heavenly bodies, etc.) that form a unified whole, such that the resulting structure might resemble a web.[92]

In fact, this doctrine of 'harmony' perpetuated until today, found historically the most elaborate expression in the Confucian doctrine of the basic relations and of the form – *li* – that needs to be reproduced both at the micro- and macroscopic level under the 'face' covering all anti-social individual emotions and sentiments.

When applied to the disputed problem, it means that the settlement means re-establishing the proper state of affairs in the universe and not the harmony between the individuals. The interpersonal relation is just one of the relations that matter. In other words, the 'harmony' is the metaphysical state and, despite the misleading descriptions, peacemaking is the modern edition of the old sacred ritual aiming at achieving such state, not the secular mediation between individuals or a group therapy for individuals. The conciliation achieved is within the Living Whole, not (only) between the particular human individuals, though it is egoistic as it relates to the good of an individual. Simply, to follow the order of beings is good to us. But if all follow that for their own good, then the good of everyone as well as the common good are sustained in a collective contingency relationship.

A cautious review of the existing sources has recently led to the following conclusion:

> The findings in this literature suggest that a diverse range of Indigenous nations in North America value non-interference in interpersonal interactions. However, prior to contact with Europeans, nations on the Northwest Coast, such as the Haida, Nuu'chah'nulth, Kwakwaka'wakw, and Tsimshian, had clearly defined class divisions and a hierarchy based on wealth and heredity. (…) As harmonious relationships seem to be essential to the survival of egalitarian societies, this begs the question of the merit that hierarchically organized Indigenous societies would place on non-interference in interpersonal relationships. (…) An understanding of the Indigenous concept of non-interference appears to be an integral part of competent cross-cultural practice with Indigenous peoples of North America. However, the key literature on the topic appears to be incongruent with the body of research on Indigenous peoples, customs and practices. In contrast to dominant discourse of non-interference as a rigid, overriding Indigenous value, a review of the literature reveals a cultural concept that is complex, fluid and influenced by context.[93]

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[92] R. D. Austin, 2007, *op. cit*., p. 83.

[93] J. Wark, R. Neckoway, K. Brownlee, *Interpreting a Cultural Value: An Examination of the Indigenous Concept of Non-interference in North America*, 'International Social Work' 2019, Vol. 62(1), p. 428.

And the self-description of the peacemaking model makes it clear that the 'harmony' is to be attained through the collective work with the individual that was sincerely described by James Zion:[94]

> Modern sentencing trends, which tend to be increasingly punitive, drive criminal defense attorneys to offer new excuses for criminal behavior: involuntariness, reasonable deficiency, and non-responsibility in defenses such as brainwashing, 'rotten social background,' the battered spouse defense, the Vietnam veterans defense (i.e., post-traumatic stress disorder [PTSD]), and the cultural defense. The cultural or culture defense 'exempts an accused person from criminal liability when it is shown that the reason for the criminal act was that it was required to be done by the norms of a culture to which the accused belonged, that is, by a folk law to which the accused was subject.'[95] *Such defenses make us uncomfortable* [emphasis: JMK] because they seem to run against common sense and our feelings of outrage when there is a victim – particularly of acts of violence. Defendants offer excuses for their conduct – more often alcoholism or drug dependency – and we cannot adequately deal with them in adjudication. The self-incrimination privilege (although it is vital to civil liberties in an authority-based system), high caseloads, and formalized court procedures make it difficult to confront offenders, elicit their explanations for behavior, and deal with the underlying causes of their conduct. Whether such defenses are asserted by criminal defense counsel, the Navajo Nation judges recognize them (…). The growing concept of restorative justice gives an opportunity to deal with the dynamics that underlie those kinds of offenders, hear their excuses, and deal with them in context. That is why Navajo peacemaking works.

As for the functioning of the system in its beginnings, Zion[96] reports that most often Navajo courts deal with such misdemeanours as: (a) driving while intoxicated, (b) assaults and batteries, and (c) offenses against the public order (most often disorderly conduct). 'There are large numbers of domestic violence cases in the criminal justice system and in civil restraining order proceedings. Most crimes are associated with alcohol use, and most violent offenses involve people who are related by a family or Navajo clan relationship.'

The peacemaking process is a religious ritual:

> *Hozhooji naat'aanii* is itself a ceremony. Navajo prayers are based on the concept that the processes of prayer and ceremony create *hozho* or harmony. (…) At the conclusion of the prayer, which ends a ceremony, individuals are again in their proper place, functioning harmoniously and in beauty with everything else. (…)
>
> At the end of the process, *hozho* should be achieved, and people will describe it with the phrase *hozho nahasdli*. The translation is to the effect that now that the process has been completed, the individuals involved in it are in good relations and, indeed,

[94] J. Zion, 1998, *op. cit*., pp. 58–74.

[95] G. Woodman, *Culture and Culpability: The Potential of the Cultural Defence*, 'Commission on Folk Law and Legal Pluralism Newsletter' 1993, No. 23, p. 46, after J. Zion, 1998, *op. cit*.

[96] J. Zion, 1998, *op. cit*.

> all reality is in good relationship, with everything in its proper place and relating well with each other in *hozho*. This shows that Navajo dispute resolution is process-oriented and that the process is important of itself. (…) The process is closely related to Navajo concepts of illness and healing. When people are ill, they are out of harmony and must be restored to harmony to be well. (…) Navajo healing ceremonies are effective and use two major processes: suggestive words and symbols to purify the patient, and a reaffirmation of solidarity with the community and deities by making the patient the center of goodwill and reintegration with the group (…) the process of helping the patient return to harmony involves invoking supernatural powers for assistance, driving out evil forces, and utilizing the force of solidarity (*k'e*) to help the patient achieve a return to continuing relationships with the group. The peacemaker's role in the justice ceremony [JMK] is to guide the parties to *hozho* (…). A *naat'aanii* uses authoritative (not authoritarian) persuasion to lead and to guide others.[97]

These two extensive quotations should help illustrate the crucial point: peacemaking is not mediation nor psychotherapy, but this is the religious reconciliation of an individual with the group and with the metaphysical order through which the group re-enters the sacred harmony with the Living Whole, deities included.

Moreover, 'Navajo peacemaking is unique *and it is not mediation as practiced in the United States. That is, the person who presides is not neutral in the sense of a "mediator neutral"* [emphasis: JMK]. Navajo peacemakers are *naat'aanii* in Navajo tradition, a term sometimes *inaccurately translated as "peace chief"* [emphasis: JMK]. Instead, a *naat'aanii* is a community leader whose leadership depends on respect and persuasion and not a position of power and authority. As was pointed out above, words are powerful in the Navajo language, and the dispute resolution procedure is "talking things out." The word *naat'aanii* has a word root that relates to speaking. A *naat'aanii* is someone who speaks wisely and well, with the content of the speech being based in Navajo tradition, often the creation of scripture and associated songs and stories. A *naat'aanii* has an opinion about the dispute, but it is not expressed as a command. A *naat'aanii* peacemaker is a teacher whom participants in peacemaking respect, because the person is chosen by the community based on his or her reputation. The Navajo process is also unique because of the participants: They are not only the immediate disputants but their relatives as well. The relatives include persons who are related by clan affiliation as well as by blood. They participate in the process of "talking things out" and have significant input in the form of expressing an opinion about both the facts and the effects of the dispute, the parties' conformity to Navajo values, and the proper outcome of the dispute.'[98]

In contrast to the official ADR method, which I could observe in the late 1970s in the practice of the Community Mediation Board introduced by Raymond

[97] P. Bluehouse, J. W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 'Mediation Quarterly' 1993, Vol. 10(4), p. 332.

[98] J. Zion, 1998, *op. cit.*

Shonholtz and which stressed non-judgmentality of the mediator communicating with parties to a dispute, here the judgmental statements and actions (or so significant silence in the native culture) are freely expressed by all the present. Taking also into account the finality of the consensus, it means that (to paraphrase Hoebel) the final agreement is hammered out by the majority on the anvil of a 'culprit'. 'It allows an offender to present his or her excuses for examination by other participants and by the peacemeaker',[99] which makes it possible for him or her to escape the 'guilt' or any other 'responsibility', except for what is considered necessary for avoiding further 'troubles', be it just a solemn promise to change the behaviour with 'damages' incurred or not. The process ends when a 'troublemaker' joins back what is the communal definition of the proper order.

The egalitarian bands are not the only form of native social organization in Americas. The Comanche or Navajo were nomads confronting the settled agricultures of the classical model that gave rise to systematic sociology in the works of its founder Ibn Khaldoun. Those were pueblos – rural communities engaged in corn cultivation – the equivalent of the European village communities so familiar that an American source described them as '[p]eaceable, industrious, intelligent, honest, and virtuous (…) Indian only in feature, complexion, and in a few of their habits'. Furthermore, '[t]he degree of civilization which they had attained, their willing submission to all the laws of the Mexican government (…) and their absorption into the general mass of the population (…) forbid the idea that they should be classed with the Indian tribes.'[100] These communities continuing until today, through the armed insurrection, forced the Franciscan order to start after the 1680s the policy of syncretism amounting to toleration of the indigenous religion, which is strong today and institutionalized as the complex system of esoteric organizations and rituals. The pueblos emerged under the Spanish rule as also well-structured secular systems with centralized power of the *gobernador* and the council that evolved with time.[101] In 1936 Constitution and Bylaws of the Santa Clara Pueblo, the judicial power is like the legislative power vested in the

[99] *Ibid.*

[100] *United States v Joseph*, 94 U.S. 614, 616-617 (1876) cited after K. Gutierrez-Conroy (2011:10 note 36) though, as she wryly notes, after almost forty years under the tutelage of the Bureau of Indian Affairs, in *United States v Sandoval*, 231 U.S. 28, 39-41 (1913), the same tribe was described as: 'sedentary rather than nomadic in their inclinations (…) dispossessed to peace and industry (…). Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstitions and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.' Compared to other tribes the Court concludes that 'although industrially superior, they are intellectually, and morally inferior to many [other tribes]; and they are easy victims to the evils and debasing influences of intoxicants.'

[101] C. Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 'Tribal Law Journal' 2001, Vol. 1, pp. 9–10.

Council.[102] As for Taos (Zuni) Pueblo, its contemporary judicial system is comprised of the 'modern' tribal court, the Governor's Office traditional court and the War Chief's Office traditional court that exercise collective jurisdiction over the Pueblo's affairs.[103]

The war society acted mostly in witchcraft cases, hanging the suspects just to get the confession and eventually hanging for death the convicted witches. 'Apparently by 1911 torture and the death penalty had been abandoned, and only "nagging" was applied to extort a confession.'[104] In Case 18 (ca. 1925) the chief Bow priest is cited as forbidding the lynching of a boy who confessed of the witchcraft resulting in cholera epidemic and saying 'it is the white man's fault (…). In the old days we could have hung these witches and stopped this disease. Now we can do nothing'.[105] As to the murder as such '[i]n the Zuni tradition, however, as in the older medieval laws of Europe and in rules of many other cultures, the essence of the offense was private'[106] in contrast to public homicide through witchcraft. Regarding the trial, the description by ethnographers (though not the direct observation) is strikingly similar to what one learns from the history of the Navajo law: '[O]ne of the functions of the Council and of its members individually is to seek private adjustment or compromise of disputes and thus to maintain general harmony in the society by preventing, insofar as possible, the overt eruptions of controversies at public hearings. In the majority of cases this method is probably successful. But even during the conduct of a trial the effort at conciliation is sustained. The judge will seek to persuade the parties to agree between themselves; and even after the case has gone to a decision, it is not final until both parties have accepted it by refraining from further appeal

[102] BIA, Constitution and Bylaws of the Santa Clara Pueblo, New Mexico, https://www.loc.gov/law/help/american-indian-consts/PDF/36026302.pdf, Article IV, Sec. 2. *Judicial power.* – The pueblo council shall also adjudicate all matters coming before it over which it has jurisdiction. In all controversies coming before the pueblo council, the council shall have the right to examine all witnesses and ascertain full details of the controversy, and after the matter shall have been sufficiently commented upon by the interested parties, the council shall retire to a private place to make a decision. All of the members of the council except the Governor and the Lieutenant Governor shall have the right to vote upon a decision, and a majority shall rule. In the event of a tie, the Governor shall have the right to cast a vote, thereby breaking the tie. It shall be the duty of the Governor and the Lieutenant Governor to express to the members of the pueblo council their views regarding the case before a vote is taken.

Sec. 3. *Common law of pueblo.* – With respect to all matters not covered by the written constitution, bylaws, and ordinances of the pueblo of Santa Clara, nor by those laws of the United States of America which are applicable to the pueblo of Santa Clara, the customs and usages of the pueblo, civil, and criminal, as interpreted by the council, shall have the force of law.

[103] https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1027&context=tlj.

[104] W. Smith, J. M. Roberts, *Zuni Law. A Field of Values*, 'Peabody Museum Papers' 1954, Vol. 43(1), p. 48.

[105] *Ibid.*, p. 49.

[106] *Ibid.*, p. 50.

to higher authority or until the highest possible level of authority (the governor) has been reached.'[107] Observing the frequency of physical aggression, researchers concluded, however, that 'the Council rarely [in one recorded case] resorted to corporeal punishment in the enforcement of its judgments. This is consistent with the theory that most injuries, either to individuals or to society, are to be rectified by material payments for the compensation of the injured party, rather than by disciplinary or vindictive action against the offender',[108] while in the few recorded cases of 'public offense', like drinking misbehaviour in public, the fines on behalf of the pueblo were imposed. Exceptions were two and both involved betraying the Zuni religion: the already-mentioned witchcraft using the religiously illegal powers, and revealing secrets of the *kachina* cult that in modern days was punished with flogging by masked members of the cult.

The insight into the 'living indigenous law' of Bolivia may add arguments to this caveat. In Andean countries the 'natives' for centuries has been underprivileged but they are in some areas a numerical majority and the democratization in politics at the end of the twentieth century introduced this minority to international geopolitics. The electoral victory of Evo Morales – himself a Native American – in Bolivia, the poorest country of Latin America with also the highest (61%) share of the indigenous population, ultimately gave Indians voice in national politics. This involved the recognition of the 'traditional' indigenous justice on a par with the Euro-justice that came here with the conquest. However, this included a specific version of the indigenous justice that was closer to the aforementioned Pueblo rather than Navajo (*pace* Comanches!) model: 'There are elements of community justice that clearly violate human rights: the use of physical punishments, the subordination of women, and, potentially, invidious discrimination based on ethnicity, to name the most egregious.'[109] John L. Hammond then invokes the recognition of the international instruments of human rights as limiting the possible abuse to add that '[s]till, the recognition of indigenous justice is necessary to repair a history of oppression. Where conflicts arise, they must be resolved in a way that respects both the rights of the individual and those of the group.'

The already mentioned 'harmony' (*sumac kawsay* in Quechua, *suma qamaña* in Aymara translated as *buen vivir* into Spanish) is achieved through the concerted work of the community members who express all their feelings on a matter under the guidance of the leader or chief to effect the cooperation on the part of the 'troublemaker', expressed in the consensus that, once achieved, ends the matter. Here the Zuni add the principle of 'fourfold affirmation' that in theory secures the finality of the decision. Firstly, the living law as practiced in the rural areas of Bolivia (and some other Latin American states, like Peru or Ecuador) is

[107] *Ibid.*, p. 108.

[108] *Ibid.*, p. 122.

[109] J. L. Hammond, *Indigenous Community Justice in the Bolivian Constitution of 2009*, 'Human Rights Quarterly' 2011, Vol. 33(3), p. 679.

of religious nature. Secondly, this law is communitarian and is aimed at 're-establishing' the local social order, i.e. maintaining the proper relations not only among people but also with other metaphysical and natural non-human beings. Thirdly, the order means lack of 'troubles' between people, and between people and the other beings, so the pressure is exerted on individuals to accept this order and assist in preserving it by restitution, damages and reconciliation. Fourthly, persuasion and other means of communal pressure make the 'troublemaker' think that to uphold the common definition is in his/her best interest.

Types of intervention in a dispute as to the decision-sharing between parties

Types of intervention:		Third-party entrance into a dispute:	
		Consent by the original parties: necessary	Consent by the original parties: unnecessary
Binding nature of the third-party judgment	Consent by the original parties: necessary	I. Mediation	II. Reconciliatory justice
	Consent by the original parties: unnecessary	III. Arbitration	IV. Authoritative justice

Source: J. Kurczewski, *Spór i sądy*, Kraków 2020, p. 45

The table as above – even if based upon the ideal types of the dispute management – might be helpful in clarifying the difference between the empirical models. As an alternative to the Western European paradigm of the adversarial justice, one may approach a dispute as a problem that is based upon the full consensus of all participants concerning both the beginning and the final resolution ('mediation'), where controversies in the social milieu are actively searched and then a solution is suggested by a third party (arbitration), and where the third party is invited to make the final settlement ('arbitration'). The *hozho* model seems to be closer to the latter 'reconciliation' model than to 'mediation' in its stricter sense. Still, this requires loyalty towards the ideal of the non-conflictual cohabitation (i.e. cooperation) on the part of the people, which is unnecessary in the purely 'mediation' model where individual autonomy is at its greatest. In fact, Native Northern Americans have offered empirical examples that might fit in all the boxes in the above table, with authoritative solutions at the group level, at least in the face of the ultimate threat to survival.

9. REPUGNANCY OR HUMAN RIGHTS AS BASED UPON A HIGHER STANDARD?

What laws are the standard? Even Francisco de Vitoria listed among the legitimate reasons for subjecting the indigenes to the Spanish *los sacrificios humanos y la antropofagia*.[110] The '*peaceful* heathens' were defended by Włodkowic and de Las Casas. Tolerance has never been absolute. The notorious American Indian Code of Offenses of 1883 aimed at eliminating the practices (and beliefs behind them) that had been considered detrimental to pacification and assimilation of Indigenous Americans into the 'melting pot' of Euro-American dominant culture. This is aptly summarised by Robert N. Clinton:

> By the time of the Code of Indian Offenses was promulgated most of the nomadic plains tribes had been corralled onto reservations, early examples of internment or concentration camps. Their traditional hunting lifestyles had been effectively destroyed by such confinement, as well as the deliberate federally sponsored eradication of the buffalo (bison) on which they depended. This forced change in tribal economies resulted in the nation's first welfare state, in which the tribal members became completely dependent on federal rations (the development of Indian frybread being the most obvious and long lasting by-product of this change in subsistence habits). In this context, the penalty prescribed by the Code of Indian Offenses for practicing traditional and customary ways often involved the denial of rations. Thus, the federal government's message to tribal Indians in the late nineteenth century was crystal clear – abandon your traditional culture and comply with the Code of Indian Offenses *or starve*. The Code of Indian Offenses therefore was not an early criminal code for Indian Reservations, as it is sometimes portrayed, but, rather, the clearest evidence of a deliberate federal policy of ethnocide – the deliberate extermination of another culture.[111]

As an example of the indigenous practices deemed to be eliminated suffice to cite Rule 4th of the Code:[112] 'The "sun-dance," the "scalp-dance," the "war-dance," and all other so-called feasts assimilating thereto, shall be considered "Indian offenses," and any Indian found guilty of being a participant in any one or more of these "offenses" shall, for the first offense committed, be punished by withholding from the person or persons so found guilty by the court his or their rations for a period not exceeding ten days; and if found guilty of any subsequent offense under this rule, shall by punished by withholding his or their rations for a period not less than fifteen days, nor more than thirty days, or by incarceration

[110] B. Maldonado Simán, *La Guerra justa de Francisco de Vitoria*, 'Anuario Mexicano de Derecho Internacional' 2006, Vol. 6, https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/166/269, p. 695.

[111] *Code of Indian Offenses*, http://robert-clinton.com/?page_id=289.

[112] *Ibid*., *Rules Governing the Court of Indian Offenses*, http://robert-clinton.com/wp-content/uploads/2018/09/code-of-indian-offenses.pdf.

in the agency prison for a period not exceeding thirty days.' The Code forbade also practices of 'medicine-men' (Rule 6th), plural marriages (Rule 5th, though for this not only Native Americans but Mormons were also censured), and the 'bride price' (Rule 8th).

To what degree the Navajo Tribal Court and police implemented these laws is not known but certainly the religious aspect survived, as well as the dances which the Navajo rightly take pride in also today. This cultural terror and repression was not peculiar to the US administration. At the insistence of the Prime Minister John A. MacDonald, the third section of the amended Canadian Indian Act of 1880, signed on 19 April 1884, proclaimed that: 'Every Indian or other person who engages in or assists in celebrating the Indian festival known as the "Potlatch" or in the Indian dance known as the "Tamanawas" is guilty of a misdemeanor, and liable to imprisonment for a term of not more than six nor less than two months in any gaol or other place of confinement; and every Indian or persons who encourages (…) an Indian to get up such a festival (…) shall be liable to the same punishment.'

The ban on practicing traditions, criticized from the beginning by some Euro-Canadians – including the anthropologist Franz Boas – was finally lifted in 1951.

As for a similar purge of the indigenous normativity in other areas under the British colonial rule, Melissa Demian[113] has found that the earliest expression of the moral and aesthetic 'repugnancy clause' in this form, used in a comparable context, appeared in an 1849 ordinance of the Colony of Natal, where: 'It was provided that customary law was to be preserved except where it was "repugnant to the general principles of humanity recognized throughout the whole civilized world".' [reference omitted: JMK]. Demian explains that:

> Repugnancy clauses like that in the Natal ordinance appeared in numerous forms in the laws of most if not all British colonies in sub-Saharan Africa [references omitted: JMK], with the explicit purpose of placing limits on the applicability of practices categorized as customary law (or in an earlier formulation, 'native law and custom') where these were seen to conflict with the common law in particular and European values in general, coded variously as 'natural justice,' 'morality,' 'equity,' 'accepted standards of ethics,' and so on [reference omitted: JMK]. Allott,[114] in particular, demonstrates how the ordinary instrument of repugnancy may actually have acquired its moral value through colonial ordinances and their application in the case law of the then-British colonies.[115]

[113] M. Demian, *On the Repugnance of Customary Law*, 'Comparative Studies in Society and History' 2014, Vol. 56(2), p. 510.

[114] A. Allott, *New Essays in African Law*, London 1970.

[115] M. Demian, 2014, *op. cit*., p. 510.

According to Demian,[116] 'the moral usage of repugnance was no sooner introduced to the statutory landscape than it began to lose traction with the courts, which seemed peculiarly reluctant to apply the respective repugnancy provisions of their jurisdictions. Read[117] offers an array of reasons for this phenomenon, ranging from increasing liberalization of the colonial judiciary to a lack of interaction between the "traditional and the imported legal systems," such that the latter had few opportunities to apply the repugnancy provision to the former. He prefers, however, the explanation that *customary law itself was changing so much under the conditions of the colonial era that the need for a repugnancy clause was obviated*' [emphasis added: JMK].

Nevertheless, the issue reoccurs whenever the revitalization of the native culture is undertaken. Therefore, while stressing the respect for the indigenous cultures, Pope John Paul II on the 500th anniversary of the conquest reiterated a warning:

> La tutela y respeto de las culturas, valorando todo lo que de positivo hay en ellas, *no significa, sin embargo, que la Iglesia renuncia a su misión de elevar las costumbres, rechazando todo aquello que se opone o contradice la moral evangélica* [emphasis added: JMK]. 'La Iglesia – affirma el Documento de Puebla – tiene la misión de dar testimonio del "verdadero Dios y único Señor". Por lo cual, no puede verse como un atropello la evangelización que invita a abandonar las falsas concepciones de Dios, conductas antinaturales y aberrantes manipulaciones del hombre por el hombre (*Puebla*, 405–406).[118]

It is significant that such a statement came from the Pope who not once emphasized the validity of the human rights.

> It is manifest that John Paul II's understanding of human rights incorporated his appreciation for the Declaration as well as the Church's teachings on human rights. In 1979, he gave his first address to the United Nations General Assembly, and he focused his remarks on the Universal Declaration, which he called 'a true milestone on the path of the moral progress of humanity' and the protection of fundamental human rights. During his second visit to the United Nations Headquarters in 1995, the Pope reiterated his 1979 remarks by stating that the Declaration is 'one of the highest expressions of the human conscience of our time.' (…) John Paul II advocat-

[116] *Ibid*., p. 511.

[117] J. S. Read, *Customary Law under Colonial Rule*, (in:) H. F. Morris, J. S. Read (eds), *Indirect Rule and the Search for Justice: Essays in East African Legal History*, Oxford: Clarendon Press 1972, p. 180.

[118] Pope John Paul II, *Message to the Indigenous Peoples of the American Continent [Mensaje del Santo Padre Juan Pablo II a los Indígenas del Continente Americano]*, Santo Domingo, 12 October 1992, https://www.vatican.va/content/john-paul-ii/es/messages/pont_messages/1992/documents/hf_jp-ii_mes_19921012_indigeni-america.html, para. 4.

ed the view that human rights preexist the instruments and legislation of both state and society.[119]

Not surprisingly, 'a compelling case can be made that the medieval *ius commune* recognized a number of fundamental rights that protected the interests of individual men and women. It is also clear that those who held these rights were given the power to exercise them in courts of law. (…) [However] [t]he canonists did not think about them in the same way we do. In the medieval canon law, human rights were based upon a purportedly objective assessment of the teachings of natural law and the Christian religion.'[120] Richard H. Helmholz lists three rights, acknowledging that they are not absolute as in the contemporary reality the enjoyment of our rights has exceptions and limitations: religious freedom (or rather freedom from forced conversion), the right to social welfare and the right to due process of law. It has already been remarked that the right to one's own law understood as the right of legal citizenship – of which law one is? – was regarded as obvious in the medieval official and living law. One may argue that this is not the individual right as individuals relate to their jural community, but this is the individual's right as long as one refuses to be tried according to the alien law.

The modern human rights movement – more specifically the women's rights movement, though in its beginnings stressing the Native American gender relations as the model for the white population (cf. Alice Fletcher talk on her studies of 1888) – entered later in conflict with the 'native justice movement' exactly on this point. Briefly, the human rights perspective assumes universality – as the very title of the UN Declaration indicates – but the Native Movement claims the universal right to collective particularity! This is well illustrated with the paradigmatic case *Santa Clara Pueblo v Martinez*[121] where the Supreme Court sustained a law passed by the governing body of the Santa Clara Pueblo that explicitly discriminated on the basis of sex, acknowledging the sovereignty of the pueblo. Feminist lawyer Catharine A. MacKinnon[122] asked then: Whose tradition is that? She said she understood that the tribe might want to defend their land by not allowing descendants of mixed (in this case a Santa Clara wife and a Navajo husband) marriage to be members of the pueblo but why this should be limited to the Santa Clara women and not to the Santa Clara men. MacKinnon then recognized the right to sovereignty and the need to defend it, requesting Native women to decide the native meaning of equality. But the respective legislative amendment was made in 1968 in a democratic way and MacKinnon was met with defence

[119] R. R. Martino, *John Paul II and the International Order: Human Rights and the Nature of the Human Person*, 'Notre Dame Journal of Law, Ethics & Public Policy' 2007, Vol. 21, pp. 61–62.

[120] R. H. Helmholz, 2001, *op. cit*., pp. 15–16.

[121] 436 U.S. 49 (1978).

[122] C. A. MacKinnon, *Whose Culture? A Case Note on Martinez v Santa Clara Pueblo*, (in:) *eadem*, *Feminism Unmodified: Discourses on Life and Law*, Cambridge: Harvard University Press 1983, p. 63.

of the ruling on the part of a Santa Clara woman who, though her daughters are deprived of the pueblo's membership (and she also is in a relationship with a Navajo!), 'was relieved to hear the decision' that Santa Clara was to retain the ongoing conversation about who is a recognized member of the community. What is more, the Western world acknowledged a way of life which traditionally honoured nurturing and feminine qualities.[123] The conversation continued until on 1 May 2012 the 'Santa Fe New Mexican' journal brought the information that the Navajo in a referendum rejected the discriminatory amendment.[124]

What prevailed, in fact, was the sovereignty. The debate on the case brought important results, such as discovering the value of 'cultural sovereignty'. As Francine R. Skenandore[125] observed: '*Santa Clara* is a very difficult case to reconcile from both a sovereignty perspective and an equal rights perspective. Ultimately, the two positions cannot be reconciled', and then she advocated 'the cultural sovereignty paradigm' recently proposed by Indian law Professor Rebecca Tsosie and tribal advocate Wallace Coffey. According to Professor Tsosie and Coffey, '[it] is time to reconceptualize Native sovereignty from a model that treats sovereignty as a strategy to maintain culture to a model that analyzes culture as a living context and foundation for the exercise of group autonomy and the survival of Indian nations.'[126] According to Skenandore, based on this new cultural paradigm, sovereignty is not undermined or compromised, while a tribe may be responsive to its members and preserve cultural norms and values. She argued that:

> Cultural sovereignty is maintaining the customs, traditions and values that define one tribe from another while simultaneously creating change from within to ensure an existence that the tribe defines itself. It necessarily implicates autonomy because the tribe's envisioned existence may not be consistent with the values of the larger society, and autonomy requires independence from the larger society. From autonomy emanates the freedom to define and maintain tribal identity, including the use of membership rules the larger society may disagree with but the tribe considers necessary when it envisions its continued existence in an ever-changing world.[127]

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[123] R. Swentzell, *Testimony of a Santa Clara Woman*, 'Kansas Journal of Law and Public Policy' 2004/2005, Vol. 14, p. 99.

[124] https://www.santafenewmexican.com/news/local_news/santa-clara-pueblo-vote-on-member-rules-leaves-loose-ends/article_3ea83343-5059-5f87-aa25-a473d336aac1.html (accessed 20.11.2022).

[125] F. R. Skenandore, *Comment: Revisiting Santa Clara Pueblo v Martinez: Feminist Perspectives on Tribal Sovereignty*, 'Wisconsin Women's Law Journal' 2002, Vol. 17, p. 368.

[126] See after F. R. Skenandore, 2002: W. Coffey, R. Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 'Stanford Law & Policy Review' 2001, Vol. 12, p. 209.

[127] F. R. Skenandore, 2002, *op. cit*., p. 370.

Cultural sovereignty can then be defined as 'the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures.'[128]

The Catholic Church of today proposes an inter-cultural dialogue with the indigenes. Firstly, it recognized their culture.[129] Secondly, there is an appeal to interact:

> Starting from our roots, let us sit around the common table, a place of conversation and of shared hopes. In this way our differences, which could seem like a banner or a wall, can become a bridge. Identity and dialogue are not enemies. Our own cultural identity is strengthened and enriched as a result of dialogue with those unlike ourselves. Nor is our authentic identity preserved by an impoverished isolation. Far be it from me to propose a completely enclosed, a-historic, static 'indigenism' that would reject any kind of blending (*mestizaje*). A culture can grow barren when it 'becomes inward-looking, and tries to perpetuate obsolete ways of living by rejecting any exchange or debate with regard to the truth about man'. That would be unrealistic, since it is not easy to protect oneself from cultural invasion. For this reason, interest and concern for the cultural values of the indigenous groups should be shared by everyone, for their richness is also our own.[130]

This debate leads to the basic issue of the sovereignty of the rights-based polity versus the cultural sovereignty of its components. In political theory the concept of 'nomos-group' is sometimes used.[131] The N-group is one that is assumed to hold a jointly respected rules. Friedrich A. Hayek was more specific as for him *nomoi* are the universal rules of just conduct as opposed to *themis*, which are rules applicable to particular people, or serving the ends of the rulers.[132] A *nomos* has the advantage of not obliging individuals to perform particular actions; they can use for their own purposes knowledge which the rulers do not have. This sounds almost as the generalization of the Navajo and other natives' experience under the dominant heterogeneous regime, while the distinction between *nomos* and *themis* roughly corresponds to that between public and private law. I believe that Hayek combines here the 'intuitive law' (of Petrażycki) or 'living law' (of Ehrlich) with universal law of nature. This is possible if one agreed with something apparently absurd: the universal law with changing contents. Yet this is not absurd but only

[128] *Ibid*., p. 369.

[129] '[L]a Iglesia alienta a los indígenas a que conserven y promuevan con legítimo orgullo la cultura de sus pueblos: las sanas tradiciones y costumbres, el idioma y los valores propios. Al defender vuestra identidad, no sólo ejercéis un derecho, sino que cumplís también el deber de transmitir vuestra cultura a las generaciones venideras, enriqueciendo de este modo a toda la sociedad'; Pope John Paul II, *Message to the Indigenous People*, 1992, para. 4.

[130] Pope Francis, *Querida Amazonia*, 2020, Ch. 2, para. 37.

[131] See J. Cohen, *Pluralism, Group Rights and Corporate Religion: Reply to Critics*, 'Netherlands Journal of Legal Philosophy' 2015, Vol. 44(3).

[132] F. A. Hayek, *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, Vol. 1, London 1998.

the levels of analysis are mixed: the universality of rules as such and the variability of their contents. Almost all humans experience the obligation but the intuitions differ. The cultural conscience is what a social scientist must take into account when explaining a human activity. What is philosophically important is that even if external limiting conditions (cosmos) are universal in contrast to the politically binding rules (law of the lawyers), the individual sense of the obligation ought to be differentiated both from the former and from the latter. The human practice is then the outcome of all three: the assumed 'objective' order, human conscience and the external social pressure.

The issue of 'indigenous law' has entered the battleground on which the recent fundamental political controversy continues. The *Cruciferi* conquered the 'heathen' Prussians as well as the neighbouring Poles converted long before, but it was self-evident for them to allow both to live under their own law. In fact, the oldest written Polish law is the Polish customary law recorded before 1320 as translated into the Old German for the use of colonial administration of the Teutonic Order,[133] but also the *Iura Prutenorum* would be applied for the first centuries until 'most likely' at least the sixteenth century, when the conquered indigenous population was totally assimilated into the German-speaking society ruled by the Order.[134] The personal principle was universal throughout the Middle Ages until the modern states started to take shape. Brian Z. Tamanaha has observed that:

> In the 17th and 18th centuries, a sharper distinction emerged between the public and private realms. State law became the pre-eminent form of law; international law and natural law were also recognised, but mainly in virtue of and on the terms set by state law. Customary norms and religious law were, in effect, banished to the private realm. They did not disappear, but a transformation in their status came about. Some of these norms and institutions continued to obtain recognition and sanction from state legal systems; other norms continued to be observed and enforced in strictly social or religious contexts. The key characteristic they lost over time was their former, equal standing and autonomous *legal* status. Once considered independently applicable bodies of *law*, owing to the takeover of state law they rather became *norms*, still socially influential, but now carrying a different status from that of official state law. Customary and religious norms, it must be emphasized, often were more efficacious than state law in governing every day social affairs, but the loss of legal status had significant implications that would bear fruit over time.[135]

Jean Cohen points to the political question: are N-groups to be recognized as sovereign, in fact, as N-sovereign within a wider sovereign polity to which they belong? The question might be as well framed as if other members of a sovereign

[133] J. Matuszewski, *Najstarszy zwód prawa polskiego*, Warszawa 1959.

[134] D. Makiłła, *Prawa pogańskich Prusów. Stan i metodyka badań*, 'Czasopismo Prawno-Historyczne' 2020, Vol. 72(1), p. 20.

[135] B. Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 'Sydney Law Review' 2008, Vol. 30(3), pp. 380–381.

polity are obliged to respect the N-sovereignty of a subgroup within their political life sphere. This question then is usually broken into two: Does N-sovereignty of some hurt the overall sovereign polity and the other members, and what is the meta-rule of sovereignty when a conflict between two (or more) appears? She is willing to acknowledge the 'cultural' sovereignty but not the 'religious' sovereignty as inherently illiberal (!). Yet this is a speculative abstraction. As it has already been shown with the Navajo example, there is no separation between culture and religion. One cannot divert the indigenous Navajo (the Pueblo, the Ojibwa, the Aymara, the Inuit, etc.) legal culture from the religion of the Navajo and other peoples. The meeting of cultures was also the peaceful or bellicose meeting of religions, indigenous and heterogeneous, Christian, Islamic, Judaic, and thousands of others. But the sovereignty issue is in real conflict not with religion but with human rights, unless the rights are conceived also as collective rights and not only as individual ones. Here lies the crucial difference in the original Julia Martinez and Santa Clara Pueblo positions. Her rights were incommensurable with the pueblo's right of sovereignty.

It is not the task for this study to deal with the *arcana* of the permanent debate on the meaning of sovereignty in general and on the US Native American tribal sovereignty in particular, but a comment by Eric Cheyfitz deserves attention:

> Simply put (…) what we might term Native, indigenous, or traditional sovereignty, which is neither tribally nor nationally located but rather kin-based, is subsumed in this case (as it is in the post-contact era), by that *sovereignty* generated within the legal vocabularies of Western nation-states. It is this subversion of traditional sovereignty by a tribal sovereignty generated within the colonial context that leads grassroots groups such as the HPL Navajos in the *Manybeads* case to invoke a language of individual rights (in this case the right to freedom of religion) in order to assert their traditional sovereignty. Thus, from the perspective of tribal councils opposing traditional grassroots movements, the language of sovereignty and the language of rights may be opposed (…). Yet from the perspective of grassroots resistors these two languages are one.[136]

The *Manybeads* case,[137] in fact, points to the inter-tribal relations that today, as in the pre-conquest times, oscillate between conflict and alliance. The case concerned the rights of some Navajo people who after relocations on both sides were living on the land allotted to the Hopi. Claimants – the Navajo residents of the Hopi Partitioned Land, or HPL – argued that the 1974 Federal law which required them to abandon the land violated their constitutionally protected right to freedom of religion. 'If they are required to move, they say they won't have access to ancestral land they consider sacred.' The metaphysics is revived again: the seemingly economic issue has actually the sacred, religious character, as very

[136] E. Cheyfitz, *The Colonial Double Bind: Sovereignty and Civil Rights in Indian Country*, 'Journal of Constitutional Law' 2003, Vol. 5, pp. 239–240.

[137] 760 F. Supp. 515 (D. Ariz. 1989).

often all over the globe the indigenous people claim back their access to the sacred sites though rarely located on the present land of another indigenous group (and here the legal concept of 'indigeneity' needs to be considered).

The real solution of the problems with 'sovereignty' is not so much in contrasting 'culture' with 'politics' and 'polity' but in considering the 'dynamics' as opposed to the 'statics'. The scholarly attempts to freeze the 'indigenous' law as 'customary' law, as distinct from the 'official' federal or 'official' tribal law, act against the real live development that is possible only if all normative elements are recognized as active in the ongoing development of the living law. Legal pluralism is the value that may be termed 'poli-nomality'. Normative diversity is part of the bio-diversity. Let us realize that the moral 'evolution' might be observed without asserting its positive evaluation. While the change in morals makes us satisfied with the development that, for instance, led from mutilation, decapitation, etc. to suppression of death penalty, the change is objective but its consequences need to be studied *sine ira* (I must confess though to the sense of relief as I have not been convinced by anyone of the possible damage done to the humanity due to humanization of the penal law, despite attempts by many who in vain argue that this has led to the rise in crime, the argument unfounded and not necessarily decisive even were it true). The 'pluri-normativity' or 'poli-nomality' needs not entail tolerating the practices that have been found repugnant. In fact, the custom does evolve and the rules are re-created not as the exact replica. The custom of today is different from the custom of yesterday and it shall change in future as well. And this includes also 'the written custom' or 'legislated custom'. In the area of gender discrimination, the exhaustive comparative research by Ann E. Tweedy[138] provided empirical ground for her general conclusion that:

> There are numerous tribal protections against sex discrimination in force, ranging from equal protection guarantees, to explicit broad-based constitutional or statutory protections, to context-specific proscriptions against discrimination that apply in anywhere from fairly broad to quite narrow contexts. Although it is difficult to generalize, the wording of several statutory laws and some case law suggests a greater concern for disparate impact than inheres in federal anti-discrimination law. Moreover, all of these protections evidence tribal policies against sex discrimination. However, it is important to be realistic about the fact that all tribes do not have such protections in place, and, similarly to the United States, some tribes continue to make sex-based distinctions (including a few of the tribes that prohibit sex discrimination in some contexts). Nonetheless, the diversity of tribal approaches to the issue of sex discrimination and the breadth of existing legal protections are impressive.
>
> More research is needed to better understand the scope, application, and frequency of these laws. As more tribes begin to make their laws available outside of their judicial systems, this research will become more feasible. (…) One thing that should

[138] A. E. Tweedy, *Sex Discrimination under Tribal Law*, 'William Mitchell Law Review' 2010, Vol. 36(2).

> be clear from existing information is that tribes collectively do not take a monolithic approach to sex discrimination and that many tribes have made a significant commitment to eradicating it.[139]

This illustrates well the blending process which the indigenous and non-indigenous 'indigenous' law is undergoing.

Santa Clara Pueblo v Martinez is not the only case, and gender equality is not the only area when the values conflict. Not so popular as the Pueblo and Navajo, other tribes sometimes provide for the 'black stories' in which the 'tribal justice' as such – or rather its performance – meets the challenge from the human rights defenders. One of such stories concerns the group of the Ojibwa peoples, *Ahnishinahbœó'jibway* in Red Lake reservation in Northern Minnesota, inhabited by 5,162 residents in 2000, who strongly defended their identity and sovereignty, cutting themselves off the alliance with other Ojibwa tribes, refraining from using the 1934 IRA and retaining their clan structure with hereditary leaders until 1950. As they claim: 'We are among the very few Aboriginal Indigenous people who still live on our own Sovereign land, which has been our land for many millennia. The *Ahnishinahbœó'jibway* have always been Sovereign. The United States is aware that they have no legal jurisdiction at Red Lake; and that they had no right to come onto our land and destroy our forests and our food supply, and try to steal our land.'[140] This still isolated area is much poorer than that of the Navajo with $8,372 annual income in 1999, ca. 40% of residents living below the poverty line and the unemployment rate near 60% accompanied by a high level of crime (in 2004, the tribal police filed 3,500 court cases).[141]

In the late twentieth century the Red Lake Indian court became a focus of public controversy, which illustrates some problems related to the issue of sovereignty versus human rights, and simultaneously the murky history and performance of the 'official indigenous law' already described above by means of the Navajo legal history. 'In 1918, the Red Lake Band of Chippewa Indians was formally organized under a written constitution: that of the General Council, generally known as "Peter Graves' council." The governmental powers delineated by the 1918 constitution did not include the establishment of a court. In fact, the 1918 constitution grants only extremely limited governmental power to the General Council: conferring authority on the "several Chiefs" to "call a meeting," deciding in "disputes as to Chiefs," respecting and giving "proper consideration" to petitions "placed before them by any member of the Red Lake Band," expend-

[139] *Ibid*., pp. 445–446.

[140] Wub-e-ke-niew, *We Have the Right to Exist*, Black Thistle Press, https://www.maquah.net/We_Have_The_Right_To_Exist/WeHaveTheRight_20-Chapter11.html.

[141] https://en.wikipedia.org/wiki/Red_Lake_Indian_Reservation.

ing and accounting for funds – and very little else.'[142] Nevertheless, the official 'Indian court' continued to operate until new IRA regulations were adopted in 1935. But the story is complicated as there was strong resistance to what was considered machinations of the Federal Indian administration:

> There are at least two stories about how the Indian Reorganization Act was put onto Red Lake *Ahnishinahbæó'jibway* land. One story, which circulated at Red Lake, is that 'a "yes" vote meant a "no" vote.' According to this story, the B.I.A. said, 'we will do it in a democratic way, and let the people [*sic*] decide.' The people voted 'no,' rejecting the Indian Reorganization Act. The bill went back to the United States Congress, which attached a rider saying that 'a "no" vote meant a vote for the I.R.A.' Then, the I.R.A. went back to the Reservation, and it 'passed' unanimously, that is, everybody voted 'no.' This story is a metaphor for the B.I.A.'s use of proxy votes under trusteeship.
>
> Another story comes from the B.I.A.'s files in the National Archives. (…) The Bureau of Indian Affairs used Indian Trusteeship and the M.C.T. they had invented, to falsely imply that the Indian Reorganization Act had been accepted by their Chippewa, as well as the *Ahnishinahbæó'jibway* at Red Lake.[143]

In the summer of 1972, the 'North Dakota Law Review' published a paper by William J. Lawrence, *Tribal Injustice: The Red Lake Court of Indian Offenses*, detailing some of the legal, jurisdictional and procedural problems relating to the Red Lake Court. Lawrence described a 'jurisdictional morass' at Red Lake pointing out that in practice it was 'ineffective in enforcing its judgments and (…) most band members receive little or no satisfaction in bringing civil cases before the court.'[144] He also touched on the issue of 'tribal politics' affecting the outcome of cases before the Red Lake Court of Indian Offenses. Lawrence discussed problems with that court, including that, '[t]he greatest shortcoming and most basic criticism of the court is its nearly total disregard for due process for law. The court is notorious for giving improper notice. There have been numerous cases in which judges have failed to allow parties to present testimony and evidence in their behalf. (…) It is this type of proceeding which (…) has prompted many to refer to it as a "Kangaroo Court".'[145]

Lawrence concluded that although there is a way out of the present state of decadence defended in the name of sovereignty that would involve the setting up the Red Lake Court totally anew, 'it is an ironic fist of fate that *a court which was originally designed to eradicate the historical way of life of the Indian people is*

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[142] C. NiiSka, *Red Lake Tribal Council Plans Governmental Reorganization*, 'Native American Press/Ojibwe News', 7 February 2003, https://www.maquah.net/clara/Press-ON/03-02-07a.html.

[143] Wub-e-ke-niew, *op. cit*.

[144] W. J. Lawrence, *Tribal Injustice: The Red Lake Court of Indian Offenses*, 'North Dakota Law Review' 1972, Vol. 48(4), p. 645.

[145] *Ibid*., p. 648.

now defended by many as a preserver of the tradition. The only explanation of this dichotomy is that many Indian cultures are so diluted with non-Indian ways that what remains is a bastardized culture [emphasis: JMK].'[146]

The conflict exploded in the following years, and the suits followed, but in 2001 Clara NiiSka still was able to write that:

> Despite its shaky legal foundations and its extremely problematic record of civil and human rights violations, the United States continues to maintain a court of Indian offenses at Red Lake. In 2001, the Red Lake B.I.A. Agency was allocated a quarter of a million dollars to operate the B.I.A.'s court of Indian offenses at Red Lake. The key problems described by William J. Lawrence in the North Dakota Law Review nearly thirty years ago persist at the Red Lake Court of Indian offenses, including lack of impartiality. As Lawrence wrote in 1979, 'A favorite tactic employed by the court to assure the outcome it desires is to notify only the party whom it feels should prevail, of the date and time of adjudication. Obviously, the lack of presence of the adversary allows the court to "resolve the dispute" in an amiable atmosphere.' In addition to defects in notification, the Red Lake Indian Court has recently ensured one-sided 'hearings' using intimidation, by jailing attorneys for opposing parties, and through exile. Furthermore, fuelled by gambling interests and Congressional policies of 'strong tribal government'– and the legal expertise that both Indian casino revenues and federal appropriations can buy – and federal legal actions to expand federal etc. jurisdiction on behalf of Indians under US 'trusteeship,' Indian court decisions are being filed with Minnesota courts – with the expectation that they will be accorded 'full faith and credit – with increasing frequency'.[147]

In the Andean region of South America where Native Americans are majority the institutionalized infraction of human rights in the indigenous justice concerns the use of physical penalties. The traditional law had 'the teeth' and continues so as the reports sympathetic to the indigenous sovereignty signalize. Though it is claimed by a field researcher that '[t]he sanctions have undergone substantial change in the last decades. From days when severity was a norm, today it has been substituted mostly by the economic fines and communal work. The former are allocated to the community welfare, such as buying something or paying the school. *El chicote (flogging) practically is not used as a sanction, only on decision of the authorities in an exceptional case, always signifying respect for the authority*' ['sin embargo su presencia sigue significando el respeto a la autoridad' – translation and emphasis: JMK].[148] Still, as one of the several functions of the indigenous peasant justice ('la justicia indígena originaria') René Escobar lists 'securing that offenders receive punishment consisting in financial fines, com-

[146] *Ibid*., p. 658.

[147] C. NiiSka, 'Native American Press/Ojibwe News', 22 June 2001, https://www.maquah.net/clara/Press-ON/01-06-22a.html.

[148] R. G. Chuquimia Escobar, *Justicia originaria en tierras altas: comunidades de Patacamaya, Sullcata Colchani y Umala*, (in:) B. de Sousa Santos, J. L. E. Rodríguez (eds), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Abya-Yala 2012, p. 583.

munity work, *chicotazos*, supernatural sanctions'.[149] The field research conducted in 2010 in the North of the Department of Oruro concluded that there is the precise procedure of whipping depending on seriousness of the misdeed and sometimes the parents administer this punishment.[150] In the first draft of Indigenous Autonomy Area in one of the almost 100% Aymara's *ayullu* the special Article 21 described the said *chicotazo.* In general, Hammond[151] observed that:

> The physical punishments of community justice may violate restrictions imposed by human rights norms. For example, violators are sometimes publicly whipped. In a case that became notorious, Marcial Fabricano, a former leader of the Trinitario Mojeño people of the department of Beni, was whipped in May 2009, in punishment for a number of alleged abuses of his office. Like lynching, whipping is especially controversial because physical abuse violates the integrity of the body. But lynching, as I have shown, is a perversion of community justice. Whipping, on the other hand, is indeed an accepted form of punishment within community justice. Defenders of the punishment argue that whipping is a symbolic act of authority, and the Constituent Assembly's Community Justice Sub-commission classified it not as a physical punishment but as a moral punishment. (…) But many outsiders find whipping inhumane and degrading, possibly qualifying as torture, violating the prohibitions of the ICCPR and the Convention against Torture.

Boaventura de Sousa Santos supporting the indigenous justice sees the solution through putting into practice the human rights and traditions in question:[152]

> The values embodied in the [human] rights should be respected but the actual practices that are respecting or violating those not being ethically neutral should be subject to interpretations as to whether they conform to the cultural norms on which they are based. So for example, are *el hortigazo* (flogging with nettles), *el baño* (a forced bath), *los chicotazos*, the physical punishment in general, a torture? In what context and under what conditions? Are there other sanctions applied by the ordinary justice which from the perspective of the indigenous justice are more violent? For instance, the perpetual life imprisonment or long-term incarceration?
>
> Another much controversial issue is the equality of men and women protected by the Constitution and the International Human Rights Law (DIDD). Do the indigenous concepts of complementarity of men and women, el *chacha-warmi*, contradict the equality principle in this meaning or, on the contrary, do they implement it in a different manner but are equally valid? In this area two questions should be emphasized. One is the equivalence or lack of it as to the two principles that originate

[149] *Ibid.,* p. 585, translation JMK.

[150] M. A. Mendoza Crespo, *Experiencias de justicia indígena en el departamento de Oruro – Bolivia*, (in:) E. Cóndor Chuquiruna, M. A. Mendoza Crespo, E. Rivera Alarcón (eds), *Normas, procedimientos y sanciones de la justicia indígena en Bolivia y Perú*, Lima 2010, p. 57.

[151] J. L. Hammond, 2011, *op. cit*., pp. 678–679.

[152] B. de Sousa Santos, *Cuando los excluidos tiene Derecho: justicia indígena, plurinacionalidad e interculturalidad*, (in:) B. de Sousa Santos, J. L. Exeni Rodríguez (eds), *Justicia indígena, pluranacionalidad e interculturalidad en Bolivia*, Abya-Yala 2012 , p. 41.

> from different cultures. Are they incommensurable or it is possible to make intercultural translation and acknowledge both as in principle the two equally valid paths to safeguard the parity of men and women in all areas of public and private life? And the other question concerns the discrepancy between what the principles proclaim in abstract and the actual practices performed in their name. And this problem is not particular of the indigenous cultures and communities but, on the contrary, this is the universal problem.[153]

Yes, the problem is universal but it does not mean that one should escape from confronting the truth that the comeback of the indigenous justice in full would mean the resurgences of ethical issues that plagued the victorious 'Western' justice until the modern human rights movement got momentum at the level of the global international society to which the indigenous nations are entering and which recognizes their existence and their rights. Although these questions are undoubtedly hard to answer, the public debate and the practical struggle continue as to the possibility of compromising between the two values: the human right(s) and the (cultural) sovereignty, and the indigenous peoples as well as people of indigenous experience must have the equal rights in the debate and in this struggle.

10. FINAL COMMENTS

Using the wide concept of law that makes room for plurality and diversity of types, we have made a quick and a perhaps erratic tour through the problems that indigenous peoples have with the law, their own law and the problems alien people have with the law of the indigenous. The tragedy resulting from the conquest and the heroic resilience of those conquered are impressive. The survival and the renaissance of the indigenous law are one of the most edifying moments in the history of law. The history of indigenous law throughout the world should teach us a lesson.

The indigenous people in their permanent struggle for survival are facing three basic options. Firstly, assimilation into the dominant legal system and culture. The constitutions, codes and structure of justice administration established by some of the indigenous people may surprise us in their consistency and other parameters by which the official legal cultures judge themselves. Then the names of the people – often proudly re-nativized – remain the only signs of the diverse identity which no longer exists: the political sovereignty (though 'impaired') may even be strengthened or regained in full but the cultural sovereignty is lost. On the opposite pole of a strategic choice is *indigenismo*, understood as the attempt

[153] *Ibid.*, p. 41, translation JMK.

at revival of the past. But even such technical elements of contemporaneity as the possibility of online proceedings or credit card shopping make the change necessary. The meaning of cultural sovereignty as borrowed from others for this paper is the right to develop one's law so that it fits one's needs and aims; it is law understood as a creative process. This involves both legal innovation and legal syncretism in which the indigenous tradition is blended with the borrowings from the dominant law. De Sousa Santos offered a bit different list of options: 'negation, co-existence at a distance, reconciliation and conviviality' ('la negación, la coexistencia a distancia, la reconciliación y la convivialidad'), a series ending in the *convivialidad* understood as the 'aspiration that the ordinary justice and indigenous justice recognize themselves mutually and enrich each other in the proper process of relationship respecting autonomy of each other and respective realms reserved for their jurisdiction.'[154] But the full success story is if the antithesis of the 'indigenous' and 'dominant' law is settled through the feedback from the former to the latter as when the law – not only of a country but at the global level – becomes syncretic. The winds of the ecological approach with which we are trying to cleanse our planet brought also indigenous seeds of the ecological law. What perfectly epitomizes that is the BBC news of 15 March 2017: 'A river in New Zealand has become the first in the world to be granted the same legal rights as a person. The New Zealand parliament passed the bill recognizing the Whanganui River, in North Island, as a living entity. Long revered by New Zealand's Maori people, the river's interests will now be represented by two people. The Maori had been fighting for over 160 years to get this recognition for their river, a minister said.'[155]

At the end, the words of the already cited here half-Ojibwa former Canadian senator, graduate in law from the University of Manitoba, holder of honorary degrees of many universities, a Fourth Degree Midewiwin member of the Native Three Fires Society, chairman of the Truth and Reconciliation Commission, Judge Murray Sinclair (alias Mizanay (Mizhana) Gheezhik, meaning 'The One Who Speaks of Pictures in the Sky') from the Truth and Reconciliation Commission on the history of the notorious 'residential schools' (something that recently the PRC has developed for Uyghurs and which had been widespread assimilationist practice from Soviet Siberia through Lapland up to Australia and South America) seem most appropriate:

> Reconciliation is about atonement. It's about making amends. It's about apology. It's about recognizing responsibility. It's about accounting for what has gone on. But ultimately, it's about commitment to maintaining that mutually respectful relationship throughout, recognizing that, even when you establish it, there will be challenges to it. (…) For public servants, what's important is to understand, when the government

[154] *Ibid*., pp. 34–35, translation JMK.

[155] *New Zealand River First in the World to be Given Legal Human Status*, https://www.bbc.com/news/world-asia-39282918.

> makes a commitment like they have done to the United Nations Declaration on the Rights of Indigenous Peoples or to establishing a Nation-to-Nation relationship (…). Understanding what that means and what that means to government policy, government actions and government programs is very key. (…) In particular, the young Indigenous population today will still trot out the history of residential schools as a basis for claiming that more needs to be done. But more does need to be done. We mustn't forget that. Language programs need to be established to allow Indigenous people to recover their language. Culture revival programs are very important to Indigenous youth, survivors of residential schools and survivors of those survivors. They want to look at ways that they can bring their culture back so they can live in accordance with the teachings of their ancestors. Cultural revival is not something that's funded by existing program dollars in a significant way. It needs to be acknowledged as valid. It's in the United Nations Declaration on the Rights of Indigenous Peoples (…). Figuring out a way to make all of that happen in a cohesive, coherent manner is very important. (…) The Government (…) needs to have a vision about reconciliation. (…) Recognize that it's going to take a long time. We need to be patient with ourselves. We need to recognize that we're going to stumble, we're going to make mistakes and we're going to get things wrong initially because we're going down a whole new road here. We need to stay committed. As long as our hearts are aimed in the right direction and we're moving in the right way, we'll get there.[156]

But on this way to put the indigenous on a par with others of the humankind the special treatment not abusing the other human rights seems necessary. 'Today, measures seeking to restore indigenous peoples to meaningful self-governance and economic health are challenged as violating prohibitions on equal protection. (…) Policies that seek to fulfill promises made to tribal governments, rebuild tribal lands, or restore tribes as political agents with the ability to provide for their people mitigate the effects of this state-sanctioned racial discrimination. These measures do not violate equal protection; they further it.'[157] Agreed. And one cannot but agree with Christine Zuni Cruz[158] when she claims that: '[A]n indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms' as the opposite means assimilation. And more so if we would finally agree that the human rights are neither tribal nor federal but universal and inborn even if our initial readings might differ in place and time. The problem is not the tribal police enjoying the sovereign right to arrest the non-Native for battery of a Native consort on tribal land, the problem is with cultural sovereignty as a defence for the right of *chicotazco*. 'Western law is based on the values and norms of Western societies', says Zuni Cruz[159] and then she asks: '[W]hy not to choose the law that reinforces our own values and norms?'

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[156] https://www.csps-efpc.gc.ca/video/ssontr-eng.aspx (accessed 15.05.2023).

[157] B. R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 'California Law Review' 2010, Vol. 98, pp. 1165–1198, at p. 1197.

[158] C. Zuni Cruz, 2001, *op. cit*., p. 4.

[159] *Ibid*., p. 21.

The honest answer is: Yes, one may, but then one risks being isolated as the last free Andamanese. The thing is how to remain loyal to one's own heritage, while acknowledging others as neighbours in the same position. This means to be reconciled within as well as between. So the recognition of the other's law should offer one an option of mutual accommodation. The changing content of the tradition makes accommodation processes inevitable; they should, nevertheless, be put to free debate of sovereign participants that would lead to the fuller universalization of the human rights.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.11

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THE RIGHT TO MOTHER TONGUE EDUCATION FOR INDIGENOUS PEOPLES: AN OVERVIEW OF INTERNATIONAL AND REGIONAL STANDARDS

Abstract

Language is an essential element of indigenous culture and identity. Meanwhile, indigenous languages are endangered or nearly extinct. It is argued that ensuring that native communities receive education in their mother tongue is key to conserve and revitalize indigenous cultures and linguistic heritage. This paper reviews the normative guidelines regarding the right to be taught in one's own language set out in international and regional human rights law. It is argued that although there is currently no binding, universally accepted obligation to provide education for indigenous peoples in their native languages, a binding measure might soon emerge. Additionally, it is argued that the protection of indigenous heritage and cultural diversity requires re-evaluation of the current standards and that the right of native peoples to mother tongue-based education should be strongly endorsed by the international community.

KEYWORDS

indigenous education, indigenous language, mother tongue education, right to education, rights of indigenous peoples

SŁOWA KLUCZOWE

edukacja ludności tubylczej, język tubylczy, nauka w języku ojczystym, prawo do nauki, prawa ludności tubylczej

1. INTRODUCTION

Language is a primary tool of everyday communication and a significant factor in shaping one's identity. It is an essential instrument not only for individuals' personal development, integrity and growth, but it is also crucial for communities as a vehicle for fostering cultures. The preservation of language is especially paramount to indigenous peoples and their children worldwide.

Members of indigenous and tribal communities have historically experienced severe oppression in education; they have been subjected to assimilationist education which brought insurmountable suffering upon generations of native people. As a result, oftentimes indigenous languages are not being transmitted at all, due to the unwanted forced integration. To this day, indigenous peoples encounter severe disadvantages due to (but by no means not only) lack of access to the appropriate language of instruction.[1]

It is argued that ensuring that education is provided to native communities in their mother tongue is key to conserve and revitalize their cultures and language, therefore, it should be strongly endorsed by international human rights law and adequately implemented in each state.

This paper aims to contribute to the current research by evaluating and assessing the international and European human rights instruments, and by reviewing the normative standards of education provided to indigenous peoples in their native languages.[2] The study's objective is to reconstruct the guidelines for mother tongue-based education based on the available rules of binding and non-binding nature, thus filling the gap in the scholarship.[3]

Although there is currently no binding obligation for states to provide access to schools with indigenous minorities' language of instruction, a new standard is slowly emerging and the necessity to provide education in the mother tongue

[1] See e.g. A. Olsen Harper, Sh. Thompson, *Structural Oppressions Facing Indigenous Students in Canadian Education*, 'Fourth World Journal' 2017, Vol. 15(2), pp. 41–66.

[2] It is recognized that procedural and institutional measures are equally important as the substantive law, however, for reasons of limited space, this matter is left to be resolved by future research.

[3] For reasons of limited space, the discussion of the European Union law falls outside the scope of this paper.

is becoming widely recognized as indispensable for individual development, but also as a much needed factor to enjoy indigenous cultures.

2. RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW

Each vulnerable group has different areas of concerns and for indigenous peoples[4] it is primary the preservation of their unique culture, identity, and language.[5] It is difficult to provide an exact number of indigenous people (worldwide and in each country), but it is claimed that they make up less than 6% of the world's population but speak around 4,000 languages, which is an overwhelming majority of the world's languages.[6] Despite that, many indigenous languages are in threat of dying, as the number of native speakers is shrinking rapidly.[7] Therefore, although it is appreciated that indigenous peoples have a distinct and special status and are vastly different from other minorities, this paper refers to natives as minorities, because indigenous communities are predominantly numerically smaller and in a non-dominant position in comparison with the rest of the population.[8]

The roots of indigenous education are prehistoric; native communities have managed to develop their own methods of disseminating knowledge and cultural values. However, their educational heritage has been largely superseded due to serious attempts to assimilate the indigenous into the mainstream culture. That is why, it is vital to ensure and support native communities' control in public and free education in accordance with the self-determination principle.[9]

To this day, native people experience stigma and language barriers in the school environment. Policies that have been adopted by nation-states often dis-

[4] Indigenous is understood as local, original or native to a geographic region, however, the precise definition has been interpreted from various viewpoints; W. J. Jacob, Sh. Y. Cheng, M. K. Porter, *Global Review of Indigenous Education: Issues of Identity, Culture, and Language*, (in:) *idem* (eds), *Indigenous Education: Language, Culture and Identity*, Dordrecht 2015, pp. 1–35.

[5] S. J. Anaya, *Indigenous Peoples in International Law*, Oxford: Oxford University Press 2004; P. Thornberry, *International Law and the Rights of Minorities*, Oxford: Clarendon Press 1991.

[6] The United Nations Permanent Forum on Indigenous Issues, *Together We Achieve*, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Languages.pdf (accessed 04.12.2022).

[7] It is estimated that every two weeks, one indigenous language becomes extinct; see The United Nations, *Indigenous Peoples' Right to Education*, https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Backgrounder_Indigenous_Day_2016.pdf (accessed 04.12.2022).

[8] The United Nations, *Indigenous Peoples and Ethnic Minorities: Marginalization is the Norm*, (in:) *Promoting Inclusion through Social Protection*, Report on the World Social Situation, September 2018.

[9] S.-H. Lee et al., *Self-Determination and Access to the General Education Curriculum*, 'The Journal of Special Education' 2008, Vol. 42(2), pp. 91–107.

regard the indigenous perspective. Although there are some successful attempts at adopting an intercultural and bilingual educational model, the implementation of an appropriate language of instruction in Europe is still unsatisfactory.[10] This study generally considers an indigenous language as a 'mother tongue'; however, it is recognized that due to language annihilation, many indigenous peoples have been primarily exposed to the official state language and cannot speak their native tongue or their ability to use their language is limited.[11]

Reiterating the UNESCO World Conference conclusion, the international community as well as individual states should be constantly reminded that '[a]ll cultures form part of the common heritage of mankind. The cultural identity of a people is renewed and enriched through contact with the traditions and values of others.'[12] In line with that proclamation, efforts to raise the threshold of human rights of vulnerable groups and their linguistic rights in education are indeed being made by the international community. Recently, indigenous peoples have been considered invaluable in contributing to the United Nations 2030 Agenda for Sustainable Development. Notably, the Agenda promises in Goal 4 (target 4.5) that indigenous peoples and children in vulnerable situations should be provided with equal access to all levels of education.[13] This is certainly promising, as undoubtedly the role of international law is of utmost importance for indigenous peoples, who have successfully turned to supranational organizations whenever states have neglected their claims, as observed by Will Kymlicka.[14]

The pivotal provision that grants protection to indigenous peoples in terms of culture is Article 27 of the International Covenant on Civil and Political Rights (ICCPR).[15] The UN Human Rights Committee in its General Comment No. 23 addresses Article 27 by confirming that it imposes specific obligation on States parties which should ensure the survival and development of cultural and social identity of linguistic minorities 'thus enriching the fabric of society as a whole'[16]. As argued by Joshua Castellino, the provision grants four aspects: the right to

[10] W. J. Jacob, Sh. Y. Cheng, M. K. Porter, 2015, *op. cit*.

[11] W. J. Jacob, *Strategies for Overcoming Linguistic Genocide: How to Avoid Macroaggressions and Microaggressions that Lead toward Indigenous Language Annihilation*, (in:) W. J. Jacob, Sh. Y. Cheng, M. K. Porter (eds), *Indigenous Education: Language, Culture and Identity*, Dordrecht 2015, pp. 127–138.

[12] Mexico City Declaration on Cultural Policies, adopted by the UNESCO at the World Conference on Cultural Policies, Mexico City, 26 July–6 August 1982, para. 4.

[13] Transforming our World: The 2030 Agenda for Sustainable Development, United Nations GA Resolution A/RES/70/1, adopted on 21 October 2015.

[14] W. Kymlicka, *Theorizing Indigenous Rights*, 'The University of Toronto Law Journal' 1999, Vol. 49(2), pp. 281–293.

[15] United Nations GA Resolution 2200A (XXI), 16 December 1966, UN Treaty Series, Vol. 999, p. 171.

[16] UN Human Rights Committee, CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 9.

identity, physical existence, existence of an identity and separate existence.[17] As for the linguistic aspect of Article 27, the General Comment No. 23 highlights the fact that linguistic minorities have the right 'to use their language among themselves, in private or in public'.[18] The protection stipulated in Article 27 should not be confused with the collective rights of self-determination granted under Article 1 of the ICCPR, which establishes the right to pursue economic, social, and cultural development, which is also directly linked to the discussed topic.[19]

The right of cultural freedom – imperative to indigenous peoples' existence – is also provided for in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[20] The Committee on Economic, Social and Cultural Rights (CESCR) emphasized in its General Comment No. 21 that the right of everyone to take part in cultural life is intrinsically linked to the right to education (Articles 13 and 14) 'through which individuals and communities pass on their values, religion, customs, language and other cultural references'.[21] According to the General Comment No. 21, indigenous peoples require special protection, acknowledging that language and education are important for minorities and indispensable for their existence and survival.[22] Regarding children, states should take all the necessary steps to allow them to achieve the aims of education:

> States should recall that the fundamental aim of educational development is the transmission and enrichment of common cultural and moral values in which the individual and society find their identity and worth. Thus, education must be culturally appropriate, include human rights education, enable children to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies.[23]

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[17] J. Castellino, *Order and Justice: National Minorities and the Right to Secession*, 'International Journal on Minority and Group Rights' 1999, Vol. 6(4), p. 405.

[18] UN Human Rights Committee*,* CCPR General Comment No. 23: Article 27 (Rights of Minorities), para. 5.3.

[19] S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Political Rights*, Oxford: Oxford University Press 2013, p. 832.

[20] United Nations GA Resolution 2200A (XXI), 16 December 1966, UN Treaty Series, Vol. 993, p. 3; R. O'Keefe, *The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR*, 'The International and Comparative Law Quarterly' 1998, Vol. 47(4), pp. 904–923.

[21] The CESCR points out that the right to take part in cultural life consists in five elements according to a 5-A model: availability, accessibility, acceptability, adaptability, and appropriateness. The model should serve as a framework setting out necessary conditions for the full realization of the right for everyone to take part in cultural life; see UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, Right of everyone to take part in cultural life (Art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, E/C.12/GC/21, para. 2.

[22] The CESCR General Comment No. 21 lists also: women, older persons, persons with disabilities, minorities, migrants, and indigenous peoples and persons living in poverty.

[23] *Ibid*., para. 26.

The Committee further remarks that 'educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities', and even stipulates that those programmes should be 'conducted on or in their own language'.[24] Naturally, this is only a non-binding interpretation of the provision, however, it recognizes that education in children's own language is of crucial importance and requires attention in international human rights law as it not only helps to safeguard the right to education in general, but also fosters children's cultural development.[25]

3. MOTHER TONGUE-BASED EDUCATION: THE INTERNATIONAL STANDARD

State education is a relatively new concept in the human history. It used to be a matter left for families, and religious congregations usually conducted classes. The need for public education was recognized relatively recently, but the idea of compulsory education in government schools became widely adopted and considered beneficial to children's development.[26] However, state schools also have a dark side: they became a critical tool in the forced assimilation agenda in a number of countries. The boarding school experience caused trauma and led to endangering many indigenous languages.[27]

Today, the discrimination in the school system is far from being settled. Many native students are still overlooked and derided throughout their entire course of education. What is more, it is believed that even the best-intended policies can work to the detriment of indigenous children.[28]

Studies confirm the native children's performance is lower and dropout rates are higher. Some indigenous peoples who know very little or not at all the language of instruction are not able to make a successful start in school, because they do not have necessary skills to understand the assigned tasks.[29] As pointed out in an expert study by Tove Skutnabb-Kangas and Robert Dunbar, minority children who do not have access to mother tongue-based education are amongst

[24] *Ibid*., para. 27.

[25] R. O'Keefe, 1998, *op. cit*.

[26] F. de Varennes, *Language, Minorities and Human Rights*, Brill 2021.

[27] L. Daniels, *Expressions of Policy Effects: Hearing Memories of Indian Residential Schools*, (in:) T. Strong-Wilson et al. (eds), *Productive Remembering and Social Agency*, Brill 2013, pp. 29–47.

[28] W. J. Jacob, Sh. Y. Cheng, M. K. Porter, 2015, *op. cit*.

[29] V. Çoşkun, M. Şerif Derince, N. Uçarlar, *Scar of Tongue: Consequences of the Ban on the Use of Mother Tongue in Education and Experiences of Kurdish Students in Turkey*, Yenişehir/ Diyarbakir: Disa Publications 2011, p. 81.

the least successful at school and later in life, as they experience mental problems and suffer economic, social, and political marginalization.[30] Therefore, discussing this issue is critical.

Under international human rights law, there is currently a broad consensus that the right to education has the status of a fundamental right due to the development of the second-generation human rights.[31] It is recognized in most of the core international human rights documents, including the UDHR (Article 26)[32] and the ICCPR (Articles 13, 14 and 26). Additionally, it is protected in other international instruments, for example, in the Convention on the Elimination of All Forms of Discrimination against Women (Article 10, CEDAW),[33] the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)(v), ICERD)[34] and the Convention on the Rights of Persons with Disabilities (Article 24, CRPD)[35]. Moreover, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a Convention against Discrimination in Education. Also at the European level, the right to education has been added to Protocol No. 1 to the European Convention on Human Rights (Article 2, ECHR).[36] However, to highlight a linguistic aspect of the right to education, some provisions need to be addressed in detail.

3.1. LEGALLY BINDING INTERNATIONAL INSTRUMENTS

The concept of 'mother tongue education' can be defined in various ways,[37] but for the purpose of this research the notion is based on Sjaak Kroon's study and is understood as the child's mother tongue being the language of instruction in

[30] T. Skutnabb-Kangas, R. Dunbar, *Indigenous Children's Education as Linguistic Genocide and a Crime against Humanity? A Global View*, 'Gáldu Čála. Journal of Indigenous Peoples Rights' 2010, No. 1, pp. 10–103.

[31] V. Wisthaler*, The Right to Education for Minorities: An Overview on Existing Recommendations from The Hague to Geneva*, 'European Yearbook of Minority Issues Online' 2011, Vol. 8(1), p. 123.

[32] Universal Declaration of Human Rights, the United Nations GA Resolution 217 adopted on 10 December 1948, is the first international document to declare education to be a human right.

[33] United Nations GA Resolution 34/180, 18 December 1979, UN Treaty Series, Vol. 1249, p. 13.

[34] United Nations GA Resolution 2106 (XX), 21 December 1965, UN Treaty Series, Vol. 660, p. 195.

[35] United Nations GA Resolution A/RES/61/106, 13 December 2006.

[36] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols 1, 4, 6, 7, 12, 13, and 16, Council of Europe, Rome, 4 November 1950.

[37] See: T. Skutnabb-Kangas, *The Role of Mother Tongues in the Education of Indigenous, Tribal, Minority and Minoritized Children: What Can be Done to Avoid Crimes against Humanity?* (in:) P. W. Orelus (ed.), *Affirming Language Diversity in Schools and Society. Beyond Linguistic Apartheid*, New York: Routledge 2014, pp. 215–249; Ch. Stoop, *Children's Rights to Mother-*

schools.[38] There is a vast amount of literature on the right to education, especially in respect of minorities and indigenous rights.[39] Additionally, a growing body of literature has examined the importance of education in mother tongue from sociological, linguistic, and psychological viewpoints.[40] However, very few studies have been published on the scope of the right to education in mother tongue for native communities.[41]

The mother tongue-based education became an international concern some years before World War II. The matter was addressed directly for the first time in the international arena by the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice, in the Advisory Opinion No. 26 regarding minority schools in Albania.[42]

At present, this matter is largely neglected in the binding international law documents. The ICESCR does not require states to grant the right to mother tongue education to linguistic minorities. There is no linguistic aspect in Article 13, and the education in mother tongue is not even mentioned by the CESCR in its General Comment No. 13 on education. Nonetheless, according to general rules of interpretation, this provision undoubtedly also applies to indigenous peoples, who can set up their own schools outside the state system. Additionally, parents belonging to minorities can decide to send their children to a school of their choice.[43]

Tongue Education in a Multilingual World: A Comparative Analysis between South Africa and Germany, PER/PELJ 2017, Vol. 20, pp. 1–35.

[38] S. Kroon, *Mother Tongue and Mother Tongue Education*, (in:) J. Bourne, E. Reid (eds), *Language Education*, London: Kogan Page 2003, p. 4. See also T. Skutnabb-Kangas, 2014, *op. cit*.

[39] See e.g.: S. S. Åkermark, *Minority Education – Torn in Contradictions?* 'European Yearbook of Minority Issues' 2012, Vol. 9(1), pp. 223–247; T. Skutnabb-Kangas, *Multilingualism and the Education of Minority Children*, 'Estudios Fronterizos' 1989, Vol. 8(18–19), pp. 36–67.

[40] See e.g.: S. Kiefer, K. Sallamaa (eds), *European Identities in Mother Tongue Education*, Linz: Pädagogische Akademie des Bundes in OÖ 2005; A. Chen, *The Philosophy of Language Rights*, 'Language Sciences' 1998, Vol. 20(1), pp. 45–54; Ch. Horst, *The Right to Mother Tongue Education*, (in:) S. Kiefer, K. Sallamaa (eds), *European Identities in Mother Tongue Education*, Linz: Pädagogische Akademie des Bundes in OÖ 2005, p. 12.

[41] See e.g.: W. J. Jacob, 2015, *op. cit*.; V. Wisthaler, 2011, *op. cit*.

[42] The PCIJ confirmed that minorities have the right to set up their own schools but also to use their own language of instruction. This case demonstrates that there is a long-standing belief in the international community that receiving education in mother tongue is not only reasonable and justifiable but also paramount to national and linguistic minorities, especially in private institutions; PCIJ, Thirty Fourth Session, Minority Schools in Albania, Advisory Opinion No. 26, 6 April 1935, Series A/B, No. 64.

[43] However, some researchers further argue that the interpretation of Article 13(1) in conjunction with Article 13(2) allows one to conclude that members of linguistic minorities have the right to receive education aimed at the full development of their personality and sense of dignity, which implies the right of everyone to receive education in their mother tongue; see Ł. Szoszkiewicz, *Linguistic Human Rights in Education*, 'Adam Mickiewicz University Law Review' 2017, Vol. 7.

Similarly, the UN Committee on the Rights of the Child (CRC) does not directly address this issue; it is missing even in the General Comment No. 1 on the aims of education.[44] However, in the General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, and the arts (Article 31), the Committee addresses Article 30 and notes that children from linguistic minorities 'should be encouraged to enjoy and participate in their own cultures. States should respect the cultural specificities of children from minority communities as well as children of indigenous origin, and ensure that they are afforded equal rights with children from majority communities to participate in cultural and artistic activities reflecting their own language, religion, and culture.'[45]

Still, it is the UNESCO Convention against Discrimination in Education that for the first time mentions *expressis verbis* the right to education for minorities. The most relevant provision for linguistic minorities regarding the mother tongue education is laid down in Article 5, which directly stipulates that the use of a minority language in education is essential. The UNESCO Convention can generally be considered a success, since it attaches great importance to providing full and equal opportunities in education for all, while acknowledging the responsibilities of the state.[46] However, studies point out that it has not brought significant changes regarding the standard of mother tongue education for minorities.[47] For this reason, despite the fact that the document explicitly addresses the aspect of language in education in Article 5, the full potential of this international convention does not seem to have been realized.

The International Labour Organization (ILO) has also greatly contributed to the indigenous peoples' rights. The ILO Indigenous and Tribal Peoples Convention No. 169 of 1989 (ILO C169) replaced the earlier, much more paternalistic convention of 1957.[48] The latest instrument confirms that indigenous peoples should receive education on an equal footing with the rest of the population (Article 26). States should also develop and implement education programmes in cooperation with native communities and ensure their involvement, as well as support their own educational institutions (Article 27).

Most importantly, the ILO C169 stipulates, under Article 28, that native children should be taught to read and write in their own indigenous language or the language most commonly used by the group to which they belong. If it is not prac-

[44] UN Committee on the Rights of the Child (CRC), General Comment No. 1 (2001), Article 29(1): The aims of education, 17 April 2001, CRC/GC/2001/1, para. 11.

[45] UN Committee on the Rights of the Child (CRC), General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Art. 31), 17 April 2013, CRC/C/GC/17, para. 28.

[46] K. Singh, *UNESCO's Convention against Discrimination in Education (1960): Key Pillar of the Education for All*, 'International Journal for Education Law and Policy' 2008, Vol. 4.

[47] V. Wisthaler, 2011, *op. cit*., p. 126.

[48] See more in S. May, Sh. Aikman, *Indigenous Education: Addressing Current Issues and Developments*, 'Comparative Education' 2003, Vol. 39(2), pp. 139–145.

ticable, authorities should undertake consultation with those peoples regarding the adoption of measures to achieve this goal. Since the Convention is binding, the potential of this document is compelling. Regrettably, to this day only a few countries have ratified it, therefore, the impact of this document is limited.[49]

3.2. INTERNATIONAL REGULATORY FRAMEWORKS

At the same time, the topic of mother tongue-based education has been a subject of number of the UN soft-law documents. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration) is aimed at promoting the realization of the rights of minorities, in particular their identity, and encourages states to strengthen the legislative measures protecting them. The central element of the Declaration is Article 4(3), which provides that 'states should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.' This provision is unique and far-reaching. It provides for an alternative for states to ensure education in minorities' language of instruction or at least safeguards the possibility to learn the language. Therefore, states should at least provide education *of* the language, if not *in* the language.[50]

Addressing that provision, the Commentary on the Minorities Declaration in the Secretary-General's Note acknowledges the fact that language is an important carrier of identity, and states should promote it. Importantly, it is highlighted that states should provide education in the mother tongue, especially at the pre-school and primary school level, when 'the language of the minority is a territorial language traditionally spoken and used by many in a region of the country'.[51] Further recommendations stipulate that the official language of the state should be introduced gradually in later stages of education. In the Commentary it is recognized that when a minority is not concentrated in a particular territory, the solution to mother tongue education is more difficult, nonetheless minorities should always learn their language.[52] What is noteworthy, it is indicated that, depending on the

[49] Indigenous and Tribal Peoples Convention (No. 169), adopted by the International Labour Organization on 27 June 1989.

[50] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations GA Resolution A/RES/47/135, 18 December 1992.

[51] UN Subcommission on the Promotion and Protection of Human Rights, Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 4 April 2005, E/CN.4/Sub.2/AC.5/2005/2, para. 61.

[52] *Ibid*., para. 63.

resources of the state, even when the minority is dispersed, the state should be obliged to fund the teaching of the language.[53]

Arguably, the biggest achievement for native communities was the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, proclaimed by the General Assembly in 2007 by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions.[54] Article 14 of that resolution explicitly provides that indigenous peoples 'have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.' The linguistic aspect of education, especially for children, is recognized as central to indigenous peoples' rights, including the principle of non-discrimination. Although undoubtedly impactful and encouraging, the influence of the UN Declaration on the Rights of Indigenous Peoples is moderated by the fact that it is of a non-binding nature and thus cannot adequately fulfil the needs of native communities in regard to mother tongue education.

Lastly, the organization that plays a major role in promoting indigenous educational rights is the UNESCO. Its Universal Declaration on Cultural Diversity supports education in mother tongue and argues in favour of bilingual education. The document emphasizes the importance of '[s]afeguarding the linguistic heritage of humanity and giving support to expression, creation and dissemination in the greatest possible number of languages.' (Annex, para. 5).[55] Additionally, linguistic diversity is encouraged 'while respecting the mother tongue – at all levels of education, wherever possible, and fostering the learning of several languages from the earliest age.' (Annex, para. 6). The commentary issued by the UNESCO addressing the Declaration mentions multiple challenges of providing mother tongue education.[56] Accordingly, in line with the principles of linguistic pluralism and cultural diversity, it states that 'curricula must – from the earliest years of schooling, in order to capitalize on a child's extraordinary capacity for language learning – cater for the array of mother tongues spoken within national boundaries, and introduce the other languages needed to improve standards of communication at the national and then international levels.'[57] It is suggested that states should not only aim at mother tongue education but also endeavour to pro-

[53] *Ibid*., para. 64.

[54] United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, adopted on 13 September 2007.

[55] The declaration was adopted in Paris on 2 November 2001; cf. UNESCO Universal Declaration on Cultural Diversity: A vision, a conceptual platform, a pool of ideas for implementation, a new paradigm. A document for the World Summit on sustainable Development, Johannesburg 26 August–4 September 2002, Cultural Diversity Series No. 1, http://unesdoc.unesco.org/images/0012/001271/127162e.pdf (accessed 04.12.2022).

[56] *Ibid*.

[57] *Ibid*., p. 28.

vide bilingual education. This far-reaching and promising goal is in line with the UNESCO Declaration's overall multicultural approach.[58] Moreover, the UNESCO Declaration lays down the standard that minorities should be free to establish their own schools where the language of instruction would be their mother tongue.

This position is further emphasized in the 2008 UNESCO Outcomes and Trends in Inclusive Education at Regional and Interregional Levels. The document advocates government-supported education policies that are aimed at providing equal learning opportunities for all, which includes bilingual education.

Nevertheless, despite the state obligation to provide free primary education aimed at the full development of a person, there is no requirement stemming from international treaties to set up schools with minorities' mother tongue as the language of instruction, even though minority children would benefit greatly from such measure. In sum up, according to the binding international norms, states are not obliged to provide mother tongue-based education, despite the fact that undoubtedly it would aid children's development and strengthen their potential. The standard set in soft law is more encouraging. Each declaration argues for mother tongue education for minorities, yet the overall evaluation of the documents, including the lack of implementation mechanisms, may point to their ineffectiveness.[59] On the other hand, the impact of the standards stemming from non-binding measures cannot be diminished.[60]

However, as it can be seen from the Special Rapporteurs' reports, currently states do not widely adhere to the suggested soft-law postulates, and they usually do not provide minorities in public schools with education in their mother tongue. As a result, it can be concluded that at the international level the universal standard regarding minorities and indigenous peoples' right to education in their mother tongue is not satisfactory, despite some measures discussed above.[61]

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[58] A. Fuentes, *Cultural Diversity and Indigenous Peoples' Land Claims: Argumentative Dynamics and Jurisprudential Approach in the Americas*, PhD thesis, University of Trento 2012, p. 128.

[59] P. Hilpold, *UN Standard-Setting in the Field of Minority Rights*, 'International Journal on Minority and Group Rights' 2007, Vol. 14(2–3), p. 188.

[60] A. Fuentes, *Expanding the Boundaries of International Human Rights Law. The Systemic Approach of the Inter-American Court of Human Rights*, 'European Society of International Law Conference Paper Series' September 2017, Vol. 10(3), Paper No. 13/2017, p. 9.

[61] Report of the Special Rapporteur on the Right to Education: The promotion of equality of opportunity in education, UN GA, A/HRC/17/29, 18 April 2011, para. 63.

4. EUROPEAN STANDARD ON MOTHER TONGUE-BASED EDUCATION

Indigenous peoples in Europe share similar struggles to the rest of native communities, however, because the colonization process took place a long time ago, the inhabitants of European countries are often absent from the mainstream, regional discourse. As argued by Rainer Grote, global organizations play a bigger role in the protection of indigenous groups and the regional level is largely inadequate.[62] Meanwhile, indigenous peoples 'stand at the very crux of what it means to belong in "Europe".'[63]

Currently, reference to European indigenous peoples is usually limited to the Saami people of Finland, Norway, Sweden and Russia, the Inuit, who live in Greenland and many groups that live in Russia. Importantly, neither Finland, Sweden nor Russia have ratified the ILO C169 discussed above. On the other hand, Norway and Denmark have ratified the Convention, however, as discussed by Grote, they have seemingly interpreted its provisions in a narrow way, stripping the native communities from all of its benefits.[64]

The policies that have been adopted by the nation-states are already discussed in depth in the literature.[65] Therefore, the following section focuses on the issue of mother-tongue education for indigenous peoples from the macro-perspective.

4.1. EUROPEAN COURT OF HUMAN RIGHTS

On the regional, European level, the organization that plays the greatest role in human rights protection is undoubtedly the Council of Europe, and consequently, the European Convention on Human Rights is of utmost importance. Despite the

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[62] R. Grote, *On the Fringes of Europe: Europe's Largely Forgotten Indigenous Peoples*, 'American Indian Law Review' 2006, Vol. 31(2), pp. 425–443.

[63] W. J. Jacob, Sh. Y. Cheng, M. K. Porter, 2015, *op. cit*., p. 12.

[64] *Ibid*.

[65] See: M. O'Dowd, *The Sámi People in Scandinavia: Government Policies for Indigenous Language Recognition and Support in the Formal Education System*, (in:) W. J. Jacob, Sh. Y. Cheng, M. K. Porter (eds), *Indigenous Education: Language, Culture and Education*, Dordrecht 2015, pp. 187–205; P. Keskitalo, T. Olsen, *Historical and Political Perspectives on Sámi and Inclusive School Systems in Norway*, (in:) M. C. Beaton et al. (eds), *Including the North: A Comparative Study of the Policies on Inclusion and Equity in the Circumpolar North*, Rovaniemi 2019; U. Aikio-Puoskari, *The Ethnic Revival, Language and Education of the Sámi, an Indigenous People, in Three Nordic Countries (Finland, Norway and Sweden)*, (in:) T. Skutnabb-Kangas et al. (eds), *Social Justice through Multilingual Education*, Bristol 2009, pp. 238–262; D. Khanolainen, Y. Nesterova, E. Semenova, *Indigenous Education in Russia: Opportunities for Healing and Revival of the Mari and Karelian Indigenous Groups?* 'Compare: A Journal of Comparative and International Education' 2022, Vol. 52(5), pp. 768–785.

great role that the Convention plays in the protection and promotion of human rights in Europe, it is not sufficiently designed to protect indigenous peoples' cultural and linguistic rights, except for the general prohibition of discrimination in Article 14 of the ECHR.[66]

The right to education is secured in Article 2 of Protocol No. 1 of the ECHR, which scope has been shaped by the European Court of Human Rights (ECtHR).[67] Importantly, there has not been a single case that would specifically address the indigenous educational rights, yet. Nonetheless, the Court has reaffirmed that the provision on the right to education must be interpreted in the context of other rules of international law, such as the ICESCR and the UNESCO Convention against Discrimination in Education.[68]

The general scope of the right to education in one's mother tongue was specified in the famous *Belgian Linguistic Case.* The judgment confirmed that there is no positive obligation for states to provide education in one's own language at any level, even if there is more than one official language.[69] According to this judgment, there is no right to education in the mother tongue not only for minorities but also for people living in different language speaking regions.[70]

However, in another case concerning Greek Cypriots living in the northern part of the island, the Court found a violation of Article 2 of Protocol No. 1 of the ECHR, since there were no secondary schools available for them providing education in their mother tongue (Greek), after completing a primary school with the Greek language of instruction. The *Cyprus v Turkey* judgment explicitly indicated that in 'certain circumstances, failure to provide education in the mother tongue may, in fact, violate the right to education'.[71] Nonetheless, as pointed out by Kristin Henrard, although the Court does not recognize the general right to education for minorities in their mother tongue, 'it does acknowledge that the

[66] However, the discrimination is only prohibited in relation to another right guaranteed by the Convention. Therefore, it is not a 'free-standing' provision, which is undeniably a great disadvantage; see E. Fribergh, M. Kjaerum, *Handbook on European Non-Discrimination Law*, European Court of Human Rights, Strasbourg: Council of Europe 2011, p. 17.

[67] ECtHR judgment of 25 February 1982 in *Campbell and Consans v the United Kingdom*, Application no. 7511/76, para. 33; see also: European Court of Human Rights, Research Division, *Cultural Rights in the Case-Law of the European Court of Human Rights*, https://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf (accessed 04.12.2022).

[68] European Court of Human Rights, *Cultural Rights in the Case-Law of the European Court of Human Rights*, *op. cit*.

[69] ECtHR judgment of 23 July 1968 in *Belgian Linguistic Case*, Applications nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para. 3.

[70] E. Fibergh, M. Kjaerum, 2011, *op. cit*. p. 115.

[71] ECtHR judgment of 10 May 2001, Application no. 25781/94; K. D. Beiter, *The Protection of the Right to Education by International Law*, Leiden, Boston: Martinus Nijhoff Publishers 2006, p. 427.

medium of instruction matters in terms of effective access to education',[72] as it is explicitly indicated that in 'certain circumstances, failure to provide education in the mother tongue may, in fact, violate the right to education'[73].

Another language-related case concerns the suspension of Kurdish students from their university, which was a disciplinary measure administered to them for requesting that their university introduce optional classes in their mother tongue, Kurdish. The Court in case *Irfan Temel and Others v Turkey* also found a violation of Article 2 of Protocol No. 1 of the ECHR.[74] Moreover, the Court confirmed that states could not interfere with any institutions established by private entities at their own discretion,[75] thereby confirming international standards stemming from the UN treaties.

The *Catan and Others v Moldova and Russia* judgment stands in clear contrast to the *Belgian Linguistic Case*. It concerned Moldovan applicants living in Transdniestria, who – on the basis of Article 2 of Protocol No. 1 and Article 8 (right to respect for private and family life) alone and in conjunction with Article 14 of the ECHR – complained about the closure of schools with the Moldovan language of instruction and using the Latin alphabet (as opposed to Cyrillic) by separatist authorities. In short, the families had to choose whether to place children in schools available in Transdniestria, where they faced disadvantage of pursuing the education in an artificial language, which was not recognized anywhere else in the world, or to make children travel to schools where they were harassed.[76]

The Court held that these measures were intended to enforce the Russification of the language and culture of the Moldovan community living in Transdniestria and '[g]iven the fundamental importance of primary and secondary education for each child's personal development and future success, it was impermissible to interrupt these children's schooling and force them and their parents to make such difficult choices with the sole purpose of entrenching the separatist ideology.'[77] In sum, the Court reiterated that there is a right to receive education in one's own language, which demonstrates a change in the Court's jurisprudence.

The ECtHR case law points to the fact that the Strasburg Court is increasingly aware of the importance of mother tongue language of instruction, not only in the

[72] K. Henrard, *International Perspectives on Minorities' Rights and Mother Tongue Education. Equality, Identity, and Integration*, (in:) T. Skutnabb-Kangas, R. Phillipson (eds), *Language Rights*, London: Routledge 2016, p. 205.

[73] K. D. Beiter, 2006, *op. cit*., p. 427.

[74] ECtHR judgment of 3 March 2009 in *Irfan Temel and Others v Turkey*, Application no. 36458/02.

[75] See European Court of Human Rights, Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, https://www.echr.coe.int/Documents/Guide_Art_2_Protocol_1_ENG.pdf (accessed 02.12.22).

[76] ECtHR judgment of 19 October 2012 in *Catan and Others v the Republic of Moldova and Russia*, Applications nos 43370/04, 8252/05 and 18454/06.

[77] *Ibid*., para. 144.

primary, but also at the secondary and even at the university levels. Nonetheless, there has been no convincing evidence so far that the Court has recognized that the right to education includes the right of minorities, especially indigenous peoples, to receive mother tongue instruction, despite some conclusions stemming from the above-mentioned judgments.

Nonetheless, because the European Convention on Human Rights is a 'living instrument', subject to interpretation, in my opinion, it is likely that the ECtHR will eventually rule in favour of the right to mother tongue education, through e.g. the systemic approach to international human rights law.[78]

4.2. COUNCIL OF EUROPE

The Council of Europe, acknowledging the necessity to strengthen the political pluralism and cultural diversity in Europe, prepared two treaties aimed at enhancing human rights: the Framework Convention for the Protection of National Minorities[79] and the European Charter for Regional or Minority Languages[80].

The Framework Convention is a first legally binding document of that nature. Article 14 addresses not only the right to learn a minority language but also the state obligation to endeavour to ensure adequate opportunities to minority groups for being taught their language or in their language. Nonetheless, this provision is subject to multiple restrictions, such as that there needs to be sufficient demand of the substantial number of persons belonging to minorities. In addition, the provision does not require any positive action, especially financial obligations.[81] In sum, although the importance of mother tongue education is noted in the Framework Convention, due to the very wide margin of discretion granted to states, its impact on the right to mother tongue education for minorities is limited.

The first document devoted specifically to minority languages was the Council of Europe's European Charter for Regional or Minority Languages (ECRML). Its main goal was to strengthen the cultural pluralism in Europe, and although it focuses on the minority language, not on minorities or indigenous peoples them-

[78] A. Fuentes, 2017, *op. cit.*

[79] Framework Convention for the Protection of National Minorities, Council of Europe, 1 February 1995 (ETS 157).

[80] European Charter for Regional or Minority Languages, Council of Europe, 5 November 1992 (ETS 148).

[81] As indicated by the Advisory Committee in the *travaux préparatoires*, Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Compilation of Opinions of the Advisory Committee relating to Article 14 of the Framework Convention for the Protection of National Minorities 4th Cycle, 2017, https://rm.coe.int/1680648f95 (accessed 04.12.2022).

selves, it is of great relevance to the protection of distinctive European cultures.[82] The ECRML is 'the only internationally binding instrument focused on minority language protection'.[83] It has been drawn up despite a popular presumption that if there is no ban on speaking a certain language, there is no need for additional protection.[84] The Charter aims to protect regional and minority languages, recognizing them as cultural heritage, which is essential for the development of democracy and cultural diversity in Europe.[85] The Charter was designed to protect the traditionally used languages and preserve them in line with the value of multilingualism and interculturalism.[86] Through ratification, States parties officially declare they shall actively endorse financially or through other means regional and minority languages, among others in the field of education.[87]

Therefore, the Charter has undoubtedly set new international standards pertaining to cultural diversity and language.[88] Additionally, it supports one of the pillars of the Council of Europe, i.e. multilingualism, by providing broader protection for regional and minority languages and shaping language policies in the States parties to the Charter.[89] Nonetheless, the ECRML does not establish any rights for minorities, including the right to mother tongue education, even though those minorities are, in fact, the primary beneficiaries of those language policies.

4.3. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE

The standards regarding linguistic rights in Europe have been significantly influenced by numerous initiatives of the Organization for Security and Co-operation in Europe.[90] The document of particular importance is the Hague Rec-

[82] J.-M. Woehrling, (in:) A. N. López, E. J. R. Vieytez, I. U. Libarona (eds), *Shaping Language Rights. Commentary on the European Charter for Regional or Minority Languages in Light of the Committee of Experts' Evaluation*, Strasbourg: Council of Europe Publishing 2012, p. 9.

[83] T. Soldat-Jaffe, *The European Charter for Regional or Minority Languages: A Magnum Opus or an Incomplete Modus Vivendi?* 'Journal of Multilingual and Multicultural Development' 2015, Vol. 36(4), p. 372.

[84] J.-M. Woehrling, 2012, *op. cit.*, p. 13.

[85] See Preamble to the European Charter for Regional and Minority Languages.

[86] *Ibid*.

[87] P. McDermott, *Language Rights and the Council of Europe: A Failed Response to a Multilingual Continent?* 'Ethnicities' 2017, Vol. 17(5), p. 610.

[88] S. McMonagle, *The European Charter for Regional or Minority Languages: Still Relevant in the Information Age?* 'Journal on Ethnopolitics and Minority Issues in Europe' 2012, Vol. 11(2), p. 6.

[89] Excluding immigrants, cf. A. Kozhemyakov, *The European Charter for Regional Minority Languages: Ten Years of Protecting and Promoting Linguistic and Cultural Diversity*, 'Museum International' 2008, Vol. 60(3), p. 34.

[90] Previously the Conference on Security and Co-operation in Europe (CSCE), renamed the OSCE in 1995.

ommendations Regarding the Education Rights of National Minorities, which contributed immensely to the standard of mother tongue education for minorities, despite the claim that it simply provides a reference for states and compilation of the already existing rights and state obligations.[91] It is particularly highlighted that education in one's native language is important during the early years: in kindergarten and primary school. The Explanatory Note to the Hague Recommendations provides a wider context for and interpretation of the provisions on education in the languages of minorities. Importantly, it is thoroughly explained why multilingualism is the 'most effective way of meeting the objectives of international instruments relating to the protection of national minorities'. The Hague Recommendations also highlight the significant role of teachers, who should not only be bilingual but also have 'a good understanding of the children's cultural and linguistic background'.[92] Therefore, to achieve the goal, the training of teachers should be adequately facilitated by states.

Although this claim is generally supported by the academia as strengthening 'cognitive and emotional capabilities of the child while simultaneously allowing different languages to reinforce each other',[93] some researchers argue otherwise. Bilingual education, in view of some pedagogues, psychologists, sociologists and linguists, inevitably aims at assimilation but also 'causes serious linguistic, mental, psychological, cognitive, educational, social and economic damage'.[94] Moreover, it may bring numerous learning and literacy problems, and eventually children are 'not being able to develop any language in which to fully express themselves or to follow the curriculum'.[95] At the same time, it is noted that if the second language is introduced after the persons' mother tongue is fully developed, the risk of possible damage is significantly lower. Therefore, it can be concluded that the OSCE policies regarding bi- or multilingual education can be beneficial to individuals if implemented with due caution.

In sum up, the influence of the Organization for Security and Co-operation in Europe and the OSCE High Commissioner on the standard of mother tongue education for minorities is undisputed. The OSCE recommendations reduce barriers for individuals belonging to minority communities, while emphasizing state obligations.

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[91] The Hague Recommendations Regarding the Education Rights of National Minorities, OSCE High Commissioner on National Minorities, October 1996. The Oslo Recommendations Regarding the Linguistic Rights of National Minorities were released in 1998. It is confirmed there that the use of minority languages by minorities 'in public or in private' cannot be fulfilled without making a reference to education; see The Oslo Recommendations Regarding the Linguistic Rights of National Minorities and Explanatory Note, OSCE High Commissioner on National Minorities, February 1998.

[92] The Hague Recommendations, paras 12, 13, 14.

[93] S. S. Åkermark, 2012, *op. cit*., p. 226.

[94] V. Çoşkun, M. Şerif Derince, N. Uçarlar, 2011, *op. cit*., p. 90.

[95] *Ibid*., p. 91.

5. CONCLUSION

The purpose of this study has been to compare and evaluate the existing normative standards set by both in regional and international organizations in human rights treaties regarding the mother tongue education for indigenous peoples. It is concluded that there exists such human right. The discussion above suggests that although it still cannot be said that there is a legally binding right to the mother tongue education, and that states have the obligation to provide schooling with mother tongue as the language of instruction for minorities and indigenous peoples, there are several indications that imply such human right might soon be established.

It is already recognized that education needs to be free for all, especially at the primary level, which in addition must be compulsory. Moreover, it is repeatedly stressed that education should be aimed at the full development of the person. This paper has aimed to show that such development is only possible when minority children can participate in classes in their own language, especially at the initial stages of their education. Later, as suggested by the Hague Recommendations as well as in the UNESCO Universal Declaration on Cultural Diversity, to facilitate (an acceptable) integration with the society, bilingual education might be encouraged. Despite the fact that bilingual and multilingual education is presumably an excellent idea for indigenous children, the relevant state policy should be pursued with extreme caution to prevent discrimination and assimilation.

What is more, indigenous peoples have the right to establish their own educational institutions. It is, however, repeatedly highlighted in the documents, and confirmed by human rights bodies, that this provision does not impose any financial obligations on states. I strongly believe that a shift in interpretation is needed, and it is high time the scope of this provision was extended to oblige states to provide necessary facilities for minorities' schools. The findings of this study point to the likelihood that such right will be acknowledged in international and regional human rights law.[96]

The findings of this paper underpin the idea that indigenous peoples should have a right to mother tongue education, especially because native languages urgently need revitalization to prevent them from becoming extinct. An effective action is required to protect the linguistic heritage and cultural distinctiveness.

Education is a powerful instrument. As stated by the CESCR, 'the importance of education is not just practical: a well-educated, enlightened and active

[96] The binding standard can be defined through different means, for instance, by re-evaluation of the current standard in international courts and tribunals, in line with the systemic interpretation. See the discussion in A. Fuentes, 2017, *op. cit*. Nonetheless, the question on how to deal with the gap in this respect, including potential restrictions on the right to education, is a matter to be resolved by future research.

mind, able to wander freely and widely, is one of the joys and rewards of human existence.'[97] I strongly believe that states should be obligated to support every individual, especially native people, in their journey towards personal wisdom and awareness, as well as the indigenous communities in their quest for fostering their heritage and cultural identity. Such pursuit cannot be realized fully if the fundamental education is not conducted in indigenous minorities' language of instruction. Therefore, it is necessary to advocate for the mother tongue education which is available and free.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.12

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THE ISSUE OF INDIGENOUS PEOPLES AT THE UNITED NATIONS: SELECTED PROBLEMS

Abstract

The paper is a critical analysis of the index of norms and mechanisms protecting the collective rights of indigenous peoples established at the United Nations. The norms and mechanisms for the rights of indigenous peoples have been studied from two viewpoints: firstly, through the prism of how the norm of 'the right to self-determination' is created and implemented within the framework of international cooperation; and secondly, as collective rights, which are both a form of implementation of the individual human right and its complement. The United Nations Declaration on the Rights of Indigenous Peoples has been analysed with the use of the legal and dogmatic method. The conclusion provides an assessment complemented by *de lege ferenda* postulates.

KEYWORDS

indigenous peoples, United Nations (UN), collective rights, right to self-determination, United Nations Declaration on the Rights of Indigenous Peoples

SŁOWA KLUCZOWE

ludy tubylcze, ONZ, prawa kolektywne, prawo do samostanowienia, Deklaracja praw ludów tubylczych

1. INTRODUCTION

The study is a critical analysis of the index of norms and mechanisms protecting the collective rights of indigenous peoples established at the United Nations. The norms and mechanisms protecting the rights of indigenous peoples are examined, on the one hand, through the prism of the way in which the norm of 'the right to self-determination' is created and implemented within the framework of international cooperation; on the other hand, as collective rights being a complement and a form of implementation of the individual human right. The fundamental normative accomplishment of the UN, i.e. the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is analysed with the use of the legal and dogmatic method. The conclusion provides an assessment complemented by *de lege ferenda* postulates.

It is a truism to state that human rights nowadays count as individual rights,[1] the axiological basis of which is the obligation to respect human dignity, originate from collective[2] and political rights[3]. Bearing in mind the historical roots of human rights in the indigenous peoples' rights, the past intertwines with the present.[4] The rights of indigenous peoples are, first of all, collective rights.[5] The indigenous peoples' rights co-create preliminary norms, which, through collective rights, comply

[1] It is not, however, an exclusive state. Both universal norms of international law (e.g.: Articles 1(2) and 55 of the Charter of the United Nations as well as Article 1(1) and (2) of the International Covenant on Civil and Political Rights) and many national systems (such regulations are included, for example, in the constitutions of Angola and South Africa) protect collective rights. See: https://www.un.org/en/about-us/un-charter/full-text; https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights; https://www.constituteproject.org/constitution/Angola_2010.pdf?lang=en; https://www.gov.za/sites/default/files/images/a108-96.pdf (accessed 20.07.2020).

[2] For instance, the Peace of Augsburg (1555) established the principle of *cuius regio eius religio*.

[3] For instance, the 1689 Bill of Rights and the 1689 Claim of Right in the United Kingdom.

[4] See: C. Bisaz, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*, Leiden 2012, pp. 43–126.

[5] It means that: (i) the right-holder is collective; (ii) the exercise of the right pertains to a legally protected collective good; (iii) the interest behind the right is of collective nature. See: *Group Rights*, Stanford Encyclopaedia of Philosophy, https://plato.stanford.edu/entries/rights-group (accessed 20.07.2020).

with the obligation to respect human dignity. The implementation of collective rights pertaining to indigenous peoples is positively correlated with the individual rights of these group members that are both related to belonging to the group (to indigenous peoples) and independent of it.[6] The recognition of the collective rights and obligation to respect them neither constrains the individual human rights nor weakens them. The recognition of the collective rights is a derivative of the interpretation of human rights in line with the *pro homine* principle.

2. ANTECEDENTS

The second half of the twentieth century is a turning point in the process of building national awareness and aspirations, derived from this awareness, to have a national state. These aspirations were gradually satisfied, which does not mean that all nations have implemented the right to self-determination. However, even incomplete (in the subjective aspect) implementation of the nations' rights particularly reveals the discrimination of indigenous peoples as a social group. Individuals belonging to indigenous peoples have suffered due to the infringement of fundamental human rights and freedoms for decades; they have been deprived of the opportunity to take advantage of the rights that similar groups have enjoyed. The first step towards discovering the indigenous peoples' rights, compiling the list of those rights and their implementation was the noticing and recognition of the indigenous peoples' subjectivity. Although the issue of indigenous peoples was raised by the international community in the second half of the twentieth century, the limited effects of action taken are a failure of the international community and international institutions established to ensure equal treatment of individuals and social groups. At the same time, addressing this issue is an element of the third wave in the articulation of the right to self-determination and its implementation.

The right to self-determination was formulated for the first time in the Fourteen Points speech of President Woodrow Wilson given on 8 January 1918.[7] The document recognized the rights of:

- the populations of colonial territories to equal consideration of their interests while determining the questions of sovereignty (point 5);
- free nations to enjoy the full sovereignty (point 7);
- the peoples of Austria-Hungary to autonomous development (point 10);

[6] See A. H. Nuila, *Collective Rights in the United Nations Declaration on the Rights of Peasants and other People Working in Rural Areas*, FIAN International Briefing Note, March 2018, https://www.fian.org/fileadmin/media/publications_2018/Reports_and_guidelines/droits_collectifs_UK_web.pdf (accessed 20.07.2020).

[7] https://avalon.law.yale.edu/20th_century/wilson14.asp (accessed 20.07.2020).

– nations of the Balkan states – Rumania, Serbia and Montenegro to statehood within historically and nationally established lines (point 11);
– the Turkish portion of the Ottoman Empire to statehood (point 12);
– nationalities under Turkish rule to autonomous development (point 12);
– Polish national groups to their state (point 13).

Nevertheless, it is difficult not to perceive the different treatment of social groups:

– the first one, nations (including 'Polish national groups'), were granted the right to statehood;
– the rights of the second, national minorities, were limited to the right to autonomous development;
– however, with respect to the colonial populations, the decision was postponed.

It would be difficult to determine objective criteria for different treatment of the status of the indicated groups, which are also internally diverse. The depth and inhomogeneity of the stratification is visible on the example of the simultaneous recognition of 'national groups' and, consequently, their rights, but the rights are not identical when it comes to the content and scope. With reference to the Italian national group, the recognition of its existence implied the right to inhabit interdependently with the course of the border (point 9), while with reference to national groups inhabiting the territory of future Turkey, it resulted only in granting the right to autonomy (point 12). Nevertheless, this differentiation approved by the international community became a foundation of further legal and institutional solutions and gave rise to the League of Nations. However, the recognition of the status of national groups as temporary by the Covenant of the League of Nations constituted a significant difference. The Covenant acknowledged, as a principle, the right to statehood of peoples and nations, i.e. to independent governance, yet postponing its realization with regard to 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world'.[8] Not disputing the right to and basis of the assessment of the peoples' 'ability', one should point to the assumption that they were not 'yet' able and imposing the obligation to provide care on the nations that had such an ability.

The guardian mandatory was to guarantee the well-being and development of the peoples, and this responsibility was recognized as 'a sacred trust of civilization', which should be a result of the capacity to govern independently. The Covenant clearly distinguished the group of peoples associated with the indigenous population of Africa and South Pacific Islands.

[8] Article 22 of the Covenant of the League of Nations, February 1920, https://libraryresources.unog.ch/ld.php?content_id=32971179 (accessed 20.07.2020).

This first stage of exercising the right to self-determination resulted in numerous social groups asserting the right and establishing, mainly in Europe, new states. However, not all groups took advantage of the right to self-determination in the interwar period.

Consequently, the same objective was set by the United Nations. States recognized the right to self-determination as one of the fundamental principles of the United Nations. This norm was stipulated under Article 1(2) of the UN Charter with regard to Article 55. As a consequence of recognizing this principle, the populations of the dependent territories were granted the institutional and legal instruments as well as guarantees to develop their national sovereignty or independence: the right to choose.[9] The second stage of implementing this right took place in the decade of independence, in the 1960s, by the beneficiaries of the collapse of the colonial system; although it took the form disregarding the national structures, and often infringing the rights of some nations. In this period, the states in civilisation terms belonging to the group of transatlantic colonizers witnessed the eruption of moral shame and disgust with colonialism and related practices. The consequence was refusal to approve of colonialism in any form as these were social demands. Such demands were relatively quickly and easily satisfied by the colonial powers due to the combination of the following factors: (i) economic unprofitability of colonialism (it is not a coincidence that Portugal, where the 'market' did not have impact on the policy, defended colonies the longest); (ii) the necessity to take up the gauntlet in the Cold War with the Eastern bloc; (iii) political, economic and social modernization of the West, which was accompanied by the change of power elites where groups/persons identifying themselves with colonialism were removed from their positions of power.

Decolonization proceeded as part of '[r]ecognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence'.[10] The UN General Assembly in the Declaration of the Granting of Independence to Colonial Countries and Peoples of 1960 recognized an inalienable right of all nations to complete freedom and 'the increasingly powerful trends towards freedom in such territories which have not yet attained independence'. At the same time, the document did not ensure or even rejected the possibility of any attempt at determining the peoples entitled to the right to independence in any other way than by solidifying the *uti possidetis* principle and creating a norm, according to which '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'

[9] See the UN Charter, Articles 73 and 76.

[10] Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations GA Resolution 1514 (XV), 14 December 1960.

As a consequence of the denied choice, the process and value of decolonization were soon confronted with the conflict of values noticeable in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[11]

On the one hand, the Declaration of 1970 regarded the equal right of the peoples to self-determination as absolute, rejecting the 'subjection of peoples to alien subjugation, domination and exploitation', and on the other hand, for the *uti possidetis* principle the 'disruption of the national unity and territorial integrity of a State or a country' was found to be in contradiction to the Charter of the United Nations (Preamble of the Declaration). Interpreting 'the principle of equal rights and self-determination of peoples', it was recognized *expressis verbis* that the only form of its realization was 'a speedy end to colonialism' and the right of peoples to the freely expressed will with regard to deciding about their own future was the way to realize the right to self-determination.

Obviously, while working on the Resolution, the community of states approved of 'stability' achieved by protecting the territorial integrity or political unity of sovereign states. Thus, gaining sovereignty of a certain territory meant formal exercise of the right to self-determination by 'the whole people'; at the same time, it was disinheritance, *de iure*, i.e., depriving other/some of peoples inhabiting this territory of the right to self-determination. There was a shady deal made between the old world (partially colonial powers) recognizing stability and balance of power as the desired state and the new world – states established on the ruins of colonial systems. Independent states (emerging nation states among them) formed in the postcolonial territories and recognizing themselves as exclusively entitled to the right to self-determination did not agree to share the entitlement to self-determination with co-residents. In many cases, decolonization was for other peoples (among others indigenous peoples) another conquest and colonization, which took place with the approval of part of the world and silence of the other.

Thus, indigenous peoples did not exercise of the right to self-determination in its full subjective scope (they did not even exercise the right to autonomy), despite the fact that they were indicated as the subject of these rights. This was influenced by factors of various, but always non-legal, nature:

– the mandate system – one of whose objectives was to prepare indigenous peoples (who were not nations and did not form states) to govern independently – was abolished before it could fulfil the aim for which it was established;
– the mandate system, in fact, lacked political ability and determination to accomplish this task.

[11] United Nations GA Resolution A/RES/2625 (XXV), 24 October 1970.

3. INDIGENOUS PEOPLES AT THE UNITED NATIONS

However, in the 1980s, during the 'long journey' towards human rights, indigenous peoples were noticed again. In 1977, during a debate on the minority rights at the UN, the existence of indigenous peoples was acknowledged, and the issue of their rights was raised. The international community maintained this interest and the problem of indigenous peoples became a regular point in the international agenda on human rights.

The success of the proponents to regulate the status of indigenous peoples was the establishment of the Working Group on Indigenous Populations in 1982 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, currently the UN Sub-Commission on the Promotion and Protection of Human Rights. The works of the Group resulted in a draft, dated 20 April 1994, of the Declaration on the Rights of Indigenous Peoples, preceded by twelve-year works, which involved, among others, seeking opinions and suggestions of hundreds of indigenous groups, NGOs, IGOs and governments.

In 1995, the Commission on Human Rights established the open-ended inter-sessional Working Group on the draft Declaration. The balance of actions taken at the institutions and organs of the UN System comprises international instruments and mechanisms protecting the rights of indigenous peoples, such as: the UNDRIP, the establishment of the United Nations Permanent Forum on Indigenous Issues (UNPFII), the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and the UN Special Rapporteur on the Rights of Indigenous Peoples (UNSR). Mixed feelings are expressed about the stage of ratification of the ILO Indigenous and Tribal Peoples Convention No. 169 amounting to 23 ratifications after thirty years of its adoption.[12] The American Declaration on the Rights of Indigenous Peoples of 2016 is also of particular significance.

The organizational separation of the Working Group on Indigenous Peoples from the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities cannot be underestimated. Its importance is due to:

- formal recognition of the subjectively different category of those subject to the regulation: those covered by the regulation;
- the issue of indigenous peoples raised at the UN as a result of the institutional separation;
- using the expression 'peoples' instead of 'minorities', which has consequences for the axiology of the regulation.

Special importance should be attached to the last factor; the change of the nomenclature referring to the category of *peoples* and not minorities. Consequently, *indigenous peoples* gain the status equivalent to 'peoples' being the sub-

[12] Ch. Swartz, *After 30 Years, only 23 Countries Have Ratified Indigenous and Tribal Peoples Convention ILO 169*, 'Cultural Survival', 5 June 2019.

ject of Article 1(2) of the Charter of the United Nations, para. 1 of the Declaration on Granting of Independence to Colonial Countries and Peoples of 1960, paras 1 and 3 of the Declaration on Principles of International Law of 1970, Article 1(1), (2) and (3) of the International Covenant on Civil and Political Rights, Article 1(1), (2) and (3) of the International Covenant on Economic, Social and Cultural Rights of 1966.

It is visible that indigenous peoples are treated as a specific community having rights originating from both the list of rights of an individual (individual rights) as well as rights of minority groups and their members (collective rights).[13]

The international community realized that, within it, there were social groups regularly marginalized, groups that did not exercise the rights which had been granted to other social groups because they were not eligible for them. The international community acknowledged that the contemporary norms allowed tolerating discrimination of indigenous peoples, not recognizing them as holders of rights regarded as 'inherent natural rights' of other social groups.

Nevertheless, the fact that the United Nations addressed this issue three decades ago is good news, since it means that it will not be endlessly ignored, and shame will no longer be brushed aside.

It should also be emphasized that the United Nations was not the only forum that raised the issue of indigenous peoples. An example can be the Inter-American Commission on Human Rights which considered the rights of indigenous peoples. The Commission elaborated on and presented to the General Assembly of the Organization of American States (OAS) a draft widely regulating the rights of indigenous peoples. It is a particularly interesting case due to the fact that potential holders of these rights inhabit the region of competence conferred on the Commission.

4. RECOGNITION OF THE RIGHTS OF INDIGENOUS PEOPLES IN THE UNDRIP

The rights of indigenous peoples have eventually been enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.[14] After a period of intense and simultaneously polarizing discussions and debates regarding the content of the draft declaration developed in 1985 and subsequent years, its final

[13] R. Falk, *The Rights of Peoples (in Particular Indigenous Peoples)*, (in:) J. Crawford (ed.), *The Rights of Peoples*, Oxford 1988, pp. 17–18.

[14] See A. Badger, *Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples*, 'American University International Law Review' 2011, Vol. 26(2), pp. 485–514, http://www.corteidh.or.cr/tablas/r29305.pdf (accessed 21.07.2020).

text was agreed on and the UNDRIP was eventually adopted in 2007 by the UN General Assembly by a vote of 143 in favour to only 4 against (like the Universal Declaration of Human Rights, it was adopted by majority vote rather than a consensus). However, all the four countries (Australia,[15] Canada, New Zealand and the USA) that voted against have, later, expressed their support for the Declaration.

The Declaration demonstrates the ability of the United Nations to accommodate the distinct status of indigenous peoples, providing a significant framework for the implementation of indigenous peoples' human rights and simultaneously a reference point for the states' accountability with regard to their specific obligations. The Declaration transparently and explicitly lays down the individual and collective rights of indigenous peoples[16] all over the world as distinct peoples, striking an important balance between compliance with these rights and valid interests/concerns of state governments.

Although the significance of the entire Declaration for the indigenous peoples cannot be overestimated, there are a number of notable articles that deserve a special mention. Article 3 embraces the right to self-determination, and when read in the context of other relevant paragraphs, it maintains the necessary balance between exercising of this right by indigenous peoples and the international obligations of national governments. A significant aspect of the right to self-determination is definitely the issue of free, prior and informed consent included most specifically in Article 19, which secures the 'participatory' role of indigenous peoples in matters affecting them.[17] The distinct rights of the indigenous peoples to their environment are affirmed in the articles addressing lands, territories and resources.[18] The provisions of these articles refer to states' obligations to recognize and safeguard the indigenous land rights. The linkage between lands, territories and resources and human rights compliance, particularly the human right to development is embodied in the Article 23 of the Declaration.

[15] In 2009, the Australian government officially endorsed the Declaration changing the official stance of the previous government and fulfilling a key election promise. The Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, expressed her support for the Declaration at Parliament House claiming that this move was a step forward to revise the relationship between Indigenous and non-Indigenous Australians. See J. Macklin, MP, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf (accessed 17.06.2020).

[16] Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, 13 September 2007.

[17] *State of the World's Indigenous Peoples*, Department of Economic and Social Affairs, United Nations, New York 2009, https://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf (accessed 17.06.2020), p. 198.

[18] For example, Articles 10 and 25–29 of the UNDRIP.

The Declaration is, beside the OAS's *acquis* and the ILO Conventions, a relevant human rights instrument concerning specifically indigenous peoples, but it is also the first instrument formally recognizing the existence of indigenous peoples, their rights to their own identity, the right to self-determination, their cultures and heritage, and their rights as peoples, communities and collectives. Moreover, the Declaration provides the framework for newly modified relations between states (and other actors) and indigenous peoples and sets out guidelines (which were previously absent) on how to effectively respond to the needs and demands of indigenous peoples.

Overall, the Declaration, owing to the fact that its provisions are consistent with international law and, even more importantly, with the principles of the UN Charter, may play a significant and lasting role in the future relations between indigenous peoples and states as well as generally in international law.

5. NORMATIVE CONTENT OF THE UNDRIP – THE LEGAL STATUS OF INDIGENOUS PEOPLES

The rights recognized as the fundamental rights of indigenous peoples are:
- the right to their own different cultural identity;
- the right of access to international institutions;
- and, among others, the right to be the subject of the right to autonomy or self-determination.

As a consequence, the listing of specific rights has been formulated:
- Indigenous peoples have the right to self-determination, to freely determine their legal status and pursue their economic, social and cultural development.
- Indigenous peoples have the right to maintain and strengthen their political, social and cultural distinctiveness and own legal system, while retaining their right to participate fully, if they so choose, in the political, social, economic and cultural life of the state.
- States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination, promote tolerance, understanding and good relations among indigenous peoples and all groups of the society.
- Indigenous peoples, based on a free choice, have the right to fully participate in decision-making in all matters that could affect their rights, lives and future, through representatives chosen in accordance with their own procedures, as well as to maintain and develop their own local decision-making institutions.

- Indigenous peoples have the right to fully participate, on the basis of a free choice and in accordance with procedures established by them, in developing legislative or administrative measures that may affect them. Before adopting and implementing such measures, states shall obtain free, prior and informed consent of the peoples concerned.
- Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with the lands, territories, waters and coastal seas and other resources they traditionally owned, occupied or used, and to uphold their responsibilities for their maintenance for future generations.
- Indigenous peoples have the right to own, use, develop and control the lands and territories together with the whole fauna and flora of the land, air and waters as well as other resources, which they traditionally used. This also comprises the full recognition of their rights, customs and traditions, the right to land tenure, and development of institutions and resource management, as well as the right to effective protection by the state and defence against interference, transfer of ownership or infringement of these rights.
- Indigenous peoples have the right to restitution of the lands, territories or resources they traditionally owned, occupied or used, which have been confiscated, occupied or used without their free, prior and informed consent. If the restitution is not possible, they have the right to fair and equitable compensation. Unless otherwise freely agreed upon, compensation shall take the form of lands, territories or resources equal in size and legal status.
- Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, together with the right to claim that the state obtains their free and informed consent prior to the approval of any projects affecting their lands, territories or resources, particularly mineral, water or other resources, in connection with their development, utilization or exploitation. On the basis of agreements with the peoples concerned, for any such activities, fair compensation shall be provided, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
- Indigenous peoples, when exercising their right to determine their identity, have the right to autonomy and self-determination in matters concerning internal and local affairs, including culture, religion, education, information, health, accommodation, employment, social welfare, economic activity, management of land and resources, environment, entrance of other peoples across borders, as well as means and measures of financing these autonomous functions.
- Indigenous peoples have the collective right to determine their own citizenship in accordance with their own traditions and customs. The indigenous

citizenship does not exclude the right of particular persons to acquire citizenship of the state where they live. Indigenous peoples have the right to determine the composition and choice of members of their own institutions in accordance with their own procedures.
– Indigenous peoples have the collective right to determine the responsibilities of members of their own community.
– Indigenous peoples have the collective right to the recognition, observance and enforcement of treaties, agreements and other constructive agreements concluded by the state. Conflicts and disputes, which cannot be resolved otherwise, will be directed to the appropriate international bodies approved by all parties concerned.

6. IMPLEMENTATION OF THE UNDRIP AT THE NATIONAL LEVEL

The United Nations is mainstreaming the application of the Declaration on the Rights of Indigenous Peoples; in particular Article 41 stipulates that '[t]he organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance.' Moreover, Article 42 reads that '[t]he United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies (…) shall promote respect for and full application of the provisions of the Declaration and follow up the effectiveness of this Declaration.' In order to mainstream and integrate the issues of indigenous peoples into processes and programmes, in February 2008 the United Nations Development Group adopted the Guidelines on Indigenous Peoples' Issues.[19] Moreover, numerous specialized agencies and other organizations of the United Nations have developed policies, programmes and/or guidelines on engagement with the issue of indigenous peoples within the UN system, such as:
– Food and Agriculture Organization of the United Nations (FAO) – Policy on Indigenous and Tribal Peoples (2010);
– International Fund for Agricultural Development (IFAD) – Policy on Engagement with Indigenous Peoples (2009, 2022);[20]

[19] *State of the World's Indigenous Peoples*, Department of Economic and Social Affairs, United Nations, 2009, *op. cit*., p. 222.

[20] International Fund for Agricultural Development, IFAD Policy on Engagement with Indigenous Peoples, 2022, https://www.ifad.org/en/-/document/ifad-policy-on-engagement-with-indigenous-peoples (accessed 05.04.2023).

- UN-REDD Programme – Operational Guidance: Engagement of Indigenous Peoples and other Forest-Dependent Communities (2009) followed by Harmonized Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and other Forest-Dependent Communities (2012) and Guidelines on Free, Prior and Informed Consent (2013);
- UNEP and Indigenous Peoples: A Partnership in Caring for the Environment Policy Guidance (2012);
- UNDP – Guidance Note: UNDP Social and Environmental Standards – Standard 6: Indigenous Peoples (updated 2017);
- World Bank Operational Policy 4.10 – Indigenous Peoples (2005; revised 2013);
- World Bank Environmental and Social Framework including a specific environmental and social safeguard, ESS7, on Indigenous Peoples/ Sub-Saharan African Historically Underserved Traditional Local Communities (2017);[21]
- United Nations Educational, Scientific and Cultural Organization (UNESCO) – Policy on Engaging with Indigenous Peoples (2018).[22]

Furthermore, the World Intellectual Property Organization (WIPO) is engaged in cultural protection of the ingenious peoples; negotiations have been conducted to secure an agreement on international legal instruments designed to protect traditional knowledge, traditional cultural expression, and genetic resources.[23] Last but not least, in 2014 the *Handbook for Parliamentarians* was published as the outcome of the collaboration between the United Nations Department for Economic and Social Affairs, the Office of the High Commissioner for Human Rights (OHCHR), IFAD, UNDP, and the Inter-Parliamentary Union (IPU). It is a practical document that facilitates the national governments' understanding of the issues related to the rights of indigenous peoples and provides guidelines on the implementation of the Declaration, defining the minimum standards for ensuring the survival of indigenous peoples and well-being around the world.

In the implementation of the rights of indigenous peoples, three indigenous mechanisms of the United Nations play a significant role: the Permanent Forum on Indigenous Issues, the Special Rapporteur on the Rights of Indigenous Peoples as well as the Expert Mechanism on the Rights of Indigenous Peoples. The aim of the Permanent Forum on Indigenous Issues, established in 2000, is to promote

[21] https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf (accessed 05.04.2023).

[22] https://unesdoc.unesco.org/ark:/48223/pf0000262748 (accessed 05.04.2023).

[23] For more information on the work of the WIPO Intergovernmental Committee on Intellectual Property and Generic Resources, Traditional Knowledge and Folklore, see https://www.wipo.int/tk/en/igc (accessed 17.06.2020).

the implementation of the Declaration.[24] Whereas the task of the Special Rapporteur is to promote best practices, report on compliance with the human rights of indigenous people addressing possible areas of violations, and to conduct 'thematic studies on topics of special importance'.[25] Finally, the Expert Mechanism, established in 2007, consisting of seven independent experts 'disseminates and promotes good practices and lessons learned regarding the efforts to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples'.[26]

The UNDRIP has obliged the UN treaty bodies to specifically consider, in their monitoring of human rights treaties, the current situation of indigenous peoples. For example, the Human Rights Committee has given careful consideration to 'access to social services, representation in public offices, negative stereotypes, hate speech, domestic violence, police violence, disappearance, overrepresentation in prison and many other such issues as they relate to indigenous peoples' and has also embraced the rights of indigenous peoples put in a wider context of human rights violations relating to human trafficking, birth registration, personal security, protection of activists.[27]

Whereas the treaty bodies deal with civil, political, economic and cultural rights regarding indigenous peoples, in recent years, a special priority has been to persuade national governments to ensure: that companies respect the rights of indigenous peoples, even when acting outside the state;[28] the self-determination of indigenous peoples;[29] and the 'review of indigenous institutions for compatibility with human rights norms'.[30]

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[24] Article 42 of the UNDRIP refers directly to this mechanism: 'The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.'

[25] For more on the mandate of the Special Rapporteur, see https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Mandate.aspx (accessed 17.06.2020).

[26] For more on the mandate of the Expert Mechanism, see https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Reviewofthemandate.aspx (accessed 17.06.2020).

[27] *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned, 2007–2017*, Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/36/56, United Nations HRC 2017, para. 14.

[28] See: International Convention on the Elimination of All Forms of Racial Discrimination, Concluding observations on the combined twenty-first and twenty-second periodic reports of Norway, CERD/C/NOR/CO/21-22, United Nations 2015, para. 24; and *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie*, A/HRC/17/31, United Nations HRC 2011.

[29] See International Covenant on Civil and Political Rights, Concluding observations on the seventh periodic report of Sweden, CCPR/C/SWE/CO/7, United Nations HRC 2016, para. 38.

[30] See International Covenant on Civil and Political Rights, Concluding observations on the sixth periodic report of Ecuador, CCPR/C/ECU/CO/6, United Nations HRC 2016, paras 37–38; *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned, 2007–2017*, UN HRC 2017, *op. cit*., para. 17.

7. RECENT ACTION TO ENSURE THE RIGHTS OF INDIGENOUS PEOPLES AT THE UN

Although many indigenous peoples still remain unprotected and unrecognized, face forced assimilation, exclusion and systemic discrimination, and their culture and knowledge are in danger of becoming extinct, their long-lasting, tireless and courageous struggle for their rights has led to certain visible signs of progress.

In 2014, the UN General Assembly held a high-level plenary meeting, known as the World Conference on Indigenous Peoples, to draw attention and mobilize action towards the implementation of the rights of indigenous peoples. The outcome document of the Conference called for a UN system-wide action plan (SWAP)[31] to 'ensure a coherent approach to achieving the ends of the Declaration (…) raising awareness of the rights of indigenous peoples at the highest possible level and increasing the coherence of the activities of the system in this regard.'[32]

The SWAP covers six action areas:[33]

- raising awareness of the UNDRIP and indigenous issues;
- promoting the implementation of the UNDRIP, particularly at the country level;
- supporting the realization of the rights of indigenous peoples in the implementation and review of the 2030 Agenda for Sustainable Development;
- mapping of existing policies, standards, guidelines, activities, resources and capacities within the UN and multilateral system to identify opportunities and gaps;
- developing capacities of states, indigenous peoples, civil society and UN personnel at all levels;
- supporting the participation of indigenous peoples in processes that affect them.

The action plan builds upon the UN system's work on the issues of indigenous peoples guided by five UN Common Programming Principles,[34] namely: the human rights-based approach; gender equality; environmental sustaina-

[31] The action plan was developed by the Inter-Agency Support Group on Indigenous Issues (IASG) and finalized at the annual meeting of the IASG in 2015.

[32] *Outcome Document of the High-Level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples*, United Nations GA Resolution A/RES/69/2, 2014, para. 31.

[33] *System-Wide Action Plan on the Rights of Indigenous Peoples*, United Nations, 26–27 October 2015, p. 5, https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/SWAP_Indigenous_Peoples_WEB.pdf (accessed 27.06.2020).

[34] UNDAF Companion Guidance: Programming Principles, United Nations Development Group, June 2017, https://unsdg.un.org/sites/default/files/UNDG-UNDAF-Companion-Pieces-1-Programming-Principles.pdf (accessed 17.06.2020).

bility; results-based management; and capacity development. Under a human rights-based approach to programming, plans of action, policies and processes of development are embedded in the system of rights and corresponding obligations established by international law, ensuring that human rights standards and principles, including equality and non-discrimination, participation and accountability,[35] guide all phases of the programming process.

Referring to the action plan, the above-mentioned principle of gender equality ensures that the diverse impact of policies and programmes on women and men is taken into account and that multiple forms of gender discrimination among indigenous peoples are properly addressed. The principle of environmental sustainability ensures that the activities set out by the action plan recognize the close link of environmental factors to the implementation of the rights of indigenous peoples, including the contribution of indigenous peoples' traditional knowledge to sustainable development.[36]

Another substantial achievement in safeguarding the rights of indigenous peoples at the United Nations is the 2030 Agenda for Sustainable Development,[37] adopted by the UN Member States in 2015, which advances the empowerment of indigenous peoples, and calls for their full inclusion in the realization of the Sustainable Development Goals. The 2030 Agenda refers to indigenous peoples six times: three times in the political declaration, twice in the targets under Goal 2 on end to hunger (target 2.3) and Goal 4 on education (target 4.5), and one in the section on follow-up and review that calls for indigenous peoples' participation. Apart from the above-quoted direct references, numerous Sustainable Development Goals and associated targets are also relevant for indigenous peoples. Furthermore, the overall framework of the 2030 Agenda includes a number of items that advance the development concerns of indigenous peoples. It should be emphasized that human rights standards and principles are strongly reflected there.[38] Additionally, its focus on reducing inequalities is particularly relevant to the issue of indigenous peoples, who have inherently been in an unprivileged position in comparison to other population groups.

Whereas the primary responsibility of the 2030 Agenda lies at the national level, the High Level Political Forum (HLPF) – the main UN platform for supervising its follow-up and review[39] – has been established at the global level. It meets once a year under the auspices of the Economic and Social Council and

[35] *Ibid*., p. 4.

[36] *System-Wide Action Plan on the Rights of Indigenous Peoples*, United Nations, 2015, *op. cit*., p. 13.

[37] Transforming our World: The 2030 Agenda for Sustainable Development, United Nations GA Resolution A/RES/70/1, 25 September 2015.

[38] *Ibid*., para. 10.

[39] Detailed decisions on the follow-up and review to the 2030 Agenda are reflected in the resolution on follow-up and review (*Follow-up and Review of the 2030 Agenda for Sustainable Development at the Global Level*, United Nations GA Resolution A/RES/70/299, 2016).

every fourth year under the auspices of the General Assembly with the participation of indigenous peoples to ensure that indigenous voices, priorities and concerns are taken into consideration.

8. BARRIERS TO IMPLEMENTATION

The axiological basis of the discussion is the recognition that the current legal status of indigenous peoples is highly unjust and inferior, and this opinion is, as it seems, commonly shared. Thus, a fundamental question should be raised: If the current state is considered bad, why are not efficient actions taken in order to change it? The answer to this question, essential for the considerations, is relatively simple. Indigenous peoples fall victim to the inability to reconcile responsibilities resulting from two opposite (?) values approved by the international community and adopted legal norms and instruments. There is a conflict between values and norms. Thus, we have to deal with a clash between:

– stability, as realized by the *uti possidetis* principle, and
– equality, i.e. the value derived from identifying justice with distributive justice and rejecting all actions whose consequence is, *a priori* unjust, inequality of rights.

Therefore, in this dispute, the prevailing value is not a 'commonly' promoted (and in fact voiced) superior value: equality and justice, but stability shamefully treated as 'the lesser evil'. We face an unnamed axiological dispute over values; and even if the international community's right to choose among the indicated values were recognized (though it is not obvious), this choice should be made clearly indicating which value is chosen to be realized and what price for this choice will be paid by those who, as a result of the choice of the value, will be prevented from exercising the rights that others have.

Therefore, one should explicitly articulate what is the repeated first world mantra: stability, the equivalent of which in the third world is the mantra of unchangeability of borders,[40] and how this corresponds to the values declared by the international community.

It is also impossible to accept stability (in the *uti possidetis* principle) recognized as the *sine qua non* condition for the lasting international peace and justice, considering the explicit, affirmed in treaties, will of states to establish this desired state based on various normative and axiological grounds.

The argument against the so understood stability with reference to indigenous peoples is the radical departure from principles and norms of equality with respect to this social group, which practically means rejection of equality as a value and

[40] It is, among others, the principle of the Charter of the Organization of African Unity.

treating it, at most, instrumentally. This is clearly a breach of the rules of equality, the observance of which is indispensable for the international order provided for in the principles of the Charter of the United Nations.

9. CONCLUSION

The first steps that aimed at developing regulations protecting the rights of indigenous peoples were taken at the UN in the second half of the twentieth century. These were followed by the adoption of the ILO Convention No. 107 (1957),[41] initiated work on the United Nations GA Resolution on the UNDRIP and established (or broadened the competences of) the existing UN bodies and organs, which should have resulted in developing a complex set of instruments protecting the rights of indigenous peoples.[42]

On the one hand, one can observe the effects of recognizing the challenge which was the systematic and systemic violation of the rights of indigenous peoples and persons belonging to them. In many states, norms and institutions protecting the rights of indigenous peoples have been established and attempts of coming to terms with the past have been made. The results of international cooperation are tangible.[43] On the other hand, the process has proceeded slowly, both considering justified expectations and similar action taken in order to protect collective rights. There are various reasons for such slowness and discovering them is beyond legal consideration; however, dramatic differences in the attitudes of particular states to the rights of indigenous peoples are easily noticeable. Nevertheless, a snowball effect can hopefully be expected for the process of developing and implementing norms protecting the rights of indigenous peoples, and it will not only accelerate but even start an avalanche.

[41] It did not stop the works of the ILO on conventions protecting the rights of indigenous peoples, the next one being the Convention No. 169 of 1989. However, the ILO has taken an active interest in indigenous peoples since the beginning of the Organization's operations, and it undertook the work on protecting the rights of indigenous peoples as early as in the Convention No. 29 (1930). In doing so, the ILO dramatically departed from bad practices of the League of Nations manifested in refusal to provide a voice to the leaders of indigenous peoples (in 1923 and 1925), https://www.un.org/development/desa/indigenouspeoples/about-us.html (accessed 21.07.2020).

[42] Different institutions and bodies of the UN system participate in the work, see e.g. *Indigenous Peoples*, World Bank, https://www.worldbank.org/en/topic/indigenouspeoples#2 (accessed 21.07.2020) or *Indigenous Peoples*, UNESCO, https://en.unesco.org/indigenous-peoples (accessed 21.07.2020).

[43] Besides IGOs, NGOs participate in it, see e.g. *Indigenous Peoples*, Amnesty International, https://www.amnesty.org/en/what-we-do/indigenous-peoples (accessed 21.07.2020).

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.13

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NEW INDIGENOUS ELITE AND THE FORMATION OF ETHNONATIONALISM: THE CASE OF THE ANDEAN COUNTRIES

Abstract

One of the core elements of the contemporary Latin American indigenous activism is postcolonial ethnonationalism, oriented towards ethnic, cultural, social, and civic emancipation. It has been developed to facilitate the struggle for the native rights, the defence of the ethnic territory, to maintain identity and protect own heritage. The inventors and disseminators of the concept are representatives of the emerging indigenous elite, usually controlling many ethnic organizations. That new social group, referred to sometimes as neo-Indians, is very heterogeneous and composed of the grass-roots leaders, experienced activists, educated professionals, rebellious youth, and intellectuals. There are among them ethnic leaders, politicians, journalists, artists, writers, scientists, teachers, students, lawyers, small entrepreneurs, and many other influential people. All of them have contributed to the formation of emancipative ideas, shaping the syncretic world outlook of the contemporary native peoples, which is an important factor underpinning their modern ethnic identity. The ideology of ethnonationalism, based on the concept of 'indianismo' (indigenous interests expressed and safeguarded by the native people themselves) is a creative combination of traits of different origins. Among them, four components are of special significance: (i) transmuted ethnic ideas but rooted in the native culture; (ii) original features invented in the course of the ethnic mobilization; (iii) concepts borrowed from the international and global discourse, and adapted to the local needs; and (iv) ideas taken directly from

the contemporary political, social, and judicial thought. Different combinations of these traits are present both in indigenous ethnonationalism and in the ethnic activism associated therewith. They serve as a building material for the native political projects and their symbolism, help to reinterpret the vision of the native past, facilitate the development of intercultural education, inspire the aboriginal concepts of ecology, enable the revival of ancient religion, lead to the restitution of social justice, and strengthen the formation of modern ethnicity. Reflections on the development of that process, where all these different elements have been put together, and on the role of the native elite in the formation of ethnonationalism, are at the centre of this study. It is based on ethnographic fieldwork and anthropological research carried out in four Andean countries (Ecuador, Peru, Bolivia and Chile), where indigenous mobilization has been a significant factor in the social and political life since the second half of the twentieth century.

KEYWORDS

indigenous peoples, Latin America, Andean countries, new native elite, indigenous leaders, ethnonationalism, ethnic movements, ethnicity

SŁOWA KLUCZOWE

ludy tubylcze, Ameryka Łacińska, kraje andyjskie, nowa elita tubylcza, liderzy tubylczy, etnonacjonalizm, etniczne ruchy, etniczność

1. INTRODUCTION

Studies on indigenous movements in Latin America, particularly in countries with the significant percentage of native population, have been carried out since at least the 1990s, and resulted from the necessity to understand the process of growing activism of the *pueblos indígenas* (indigenous peoples) or *pueblos originarios* (first peoples). The majority of these studies are interdisciplinary and have been conducted mostly by social anthropologists and political scientists, who share similar interests and adopt similar approaches rooted in two closely interrelated subdisciplines: anthropology of politics and political anthropology. The main topics usually examined in this field are relationships between the nation/state and native peoples, current social and ethnic activism of the new indigenous organizations, the formation of a new generation of aboriginal leaders (native elites), and their strategies of ethnic emancipation.[1]

[1] J. Jackson, K. Warren, *Indigenous Movements in Latin America: 1994–2004: Controversies, Ironies, New Directions*, 'Annual Review of Anthropology' 2005, Vol. 34(1), pp. 549–573.

This essay centres mostly on the two latter topics, which have been chosen to stress the importance of a new indigenous elite in the formation of the native nationalism in the western part of South America.[2] On the basis of my ethnographical fieldwork carried out for many years in four Andean countries, and then followed by comparative studies on many forms of Latin American indigenous activism, I am going to discuss three important questions related directly to the aboriginal leadership. The first task is to describe the role of new ethnic leaders, as representatives of the present indigenous elite, in the transformation of asymmetric power relationships established still in colonial times, and separating the marginalized native people from the mainstream society, composed of *creole* and *mestizo* people. Without the impact of the indigenous leaders on their own society as well as their pressure on the state administration, the return of the *indios* on the main (or sometimes only regional) political scene would be impossible. Therefore, in fact the indigenous activism, as a very important new social movement, can be considered a product of the intellectual, political and organizational endeavour of the emerging group of new ethnic leaders.

The second aim of the paper, which to some degree has a general scope and mostly points out some most important tendencies, is to present the new ethnic elite as a diversified social group. I would like also to stress the presence of the influential leaders at many different levels of the native society, from the local up to the top scene of pan-indigenous organizations and state legislation. There is no doubt that their activities have been changing in the course of time, and their ethnic consciousness has been adapted to the evolving interethnic situation. It is obvious that all of them have not only activated the ethnic feeling of their compatriots, but they also have had some impact on the changing attitude of the mainstream society toward the aboriginal citizens. As a result of all activities undertaken by the leaders, the native people started to reformulate their past, looking for elements of ethnic pride, rejected the postcolonial, unequal relations responsible for marginalization of minority groups, and have realized that now is time to gain empowerment and secure their own position as a separate political, social and ethnic subject. I attempt to argue that the local leaders as well as other influential personalities have made a significant contribution to the process of emancipation of indigenous people, and initiated changes in the interethnic relations in Latin American countries.

Finally, the third purpose of my paper is to show the impact of the new native leadership on the formation of complex ideas which can be closely associated with postcolonial ethnonationalism. Instead of the integration of all the social strata, ethnic groups and racial segments of the national society, usually promoted by the postcolonial and post-totalitarian states, in some countries tendencies toward

[2] The preliminary draft of the paper was presented at the World Congress of the International Union of Anthropological and Ethnological Sciences held in Florianopolis, Brazil, in July 2018.

strengthening of indigenous ethnicity are quite strong. The leaders of minority groups try to introduce concepts of multinationality, interculturalism and ethnic pluralism to the political agenda, referring directly to the international conventions and human rights. In majority of cases, the Andean ethnonationalism is not combined with separatist ideas, but rather it is rooted in the nativist ideas of the indigenous 'nations' having a millennial tradition and the right to develop according to own rules, without losing close ties with values inherited from ancestors. In light of these assumptions, I am going to highlight the importance of the native elite considering three interrelated phenomena: indigenous activism, pursuit of emancipation, and ethnonationalist ideas.

The conclusions regarding the general characteristics of the new native elite have been based mostly on my ethnographic fieldwork, personal experiences, and many research visits to Ecuador, Peru, Bolivia and Chile undertaken over the last two decades.[3] Thanks to such considerable opportunity, I was able to establish close contacts with different groups of indigenous population, and had a chance not only to interview the ethnic leaders but also to observe their regular activities and their tactics during the time of protests. The spectrum of my informants was quite broad and reflected the majority of positions occupied usually by the native leaders. They included activists (of both sexes) of indigenous organizations, native officials representing local governments and state administration, ethnic politicians, party members and parliament members, teachers and university professors, students, intellectuals, writers, journalists, artists, union leaders, professionals (like lawyers, engineers, small entrepreneurs), and many other very influential people. All of them devoted their time and attention to share with me their opinions, ideas and reflections, for which I am very grateful. All those fruitful encounters helped me to understand the aims and strategies of indigenous activism and the importance of leading ethnic personalities in the empowerment of the native people. All the data gathered during the fieldwork have been confronted with many supplementary sources, like published documents and interviews, pamphlets, websites, ethnic journals, as well as memoires written by some indigenous leaders. Thanks to such diversified collections of data relating to the four Andean countries, my task of categorizing indigenous leaders (elite members) and describing their involvement in the formation of ethnonationalism turned out to be possible.

The case area under the analysis is the Andean region covering the Cordillera range of four South American countries (Ecuador, Peru, Bolivia, Chile) where I have carried out ethnographical fieldwork and anthropological studies since

[3] All my subsequent research projects and fieldwork trips to South America were possible thanks to the funding provided by the Polish Ministry of Science and Higher Education, the Polish National Science Centre (NCN), the Polish Academy of Sciences, and Adam Mickiewicz University in Poznań.

the turn of the century.[4] The Amazonian territories of the four above-mentioned states were not of special interest in my research and, therefore, the commentary presented in the paper is based mostly on data reflecting the situation of the Andean people. However, many identified tendencies and features observed among *serranos* (highlanders) could be also applied to native activism of the small Indian groups living in the jungle (*selva*). The whole Andean region, examined mostly through the ecogeographical prism as a zone with high mountains (popularly called *sierra*), forms in fact a single very homogenous cultural area, shaped by ancient indigenous civilisations, then Spanish colonial times, and is distinguished by the strong presence of native population sharing many common characteristics. Its division into a few countries, each one with their own political and social history, cannot certainly be ignored, but the obvious differences, especially in relation to the current situation of the native people, largely have still a secondary meaning. One more element is also important for the treatment of the Andean area as one topic, namely the strong ties and intensive exchange of ideas across the state borders between particular native movements and their activists. The concepts developed in one country are usually accepted relatively fast and in a slightly modified way in the neighbouring states. Therefore, the general view of the Andean ethnic activism presented here seems fully justified as a common approach in Latin American studies. In such a way it is quite easy to find out some general features and similarities as well as identify important differences in each country. Some comments related directly to the latter question are included in the final part of this paper.

In all the above-mentioned countries, despite of differences in the size of native population, politics of identity, ethnic background, and social context, indigenous activism has been very strong for decades, changing the official status of *indígenas* and transforming the state regulations concerning native people. There is no doubt that the Andean indigenous activism can serve as a very useful case facilitating the understanding of similar ethnic processes taking place in many other New World regions (like Amazonia, Middle and North America), as well as worldwide in all areas populated by native groups. It must be added that the Andean aboriginal revival, quite noticeable also on the international arena, is in fact an important part of the 'Fourth World Movement' – a typical postmodern global network, sharing ideas and coordinating activities of all indigenous organizations, regardless of their geographical setting.

According to the current interpretation of indigenous activism, this type of ethnic revival should be categorized as a form of reaction against endocolonial

[4] A. Posern-Zieliński, *Indigenous Organizations as 'New Tribes' and their Ethnopolitical Strategies. The South American Context*, (in:) L. Mróz, A. Posern-Zieliński (eds), *Exploring Home, Neighbouring and Distant Cultures*, Warsaw: DiG 2008, pp.189–208; A. Posern-Zieliński, *The State and the Indigenous Peoples in Latin America*, (in:) R. Stemplowski (ed.), *On the State of Latin American States*, Kraków 2009, pp. 301–384.

situation of the native peoples and the domination of nation/state (run by the Mestizo-Creole mainstream) over aboriginal groups.[5] The current clash between organized native minorities and mainstream powers controlling politics and economy of the country is directly related to the early process of indigenous emancipation taking place in the 1980s and the 1990s. The idea behind it was to change the subaltern status of *indígenas*, inherited from the colonial past and consequently maintained by all republican governments, in order to abolish marginal position of the native peoples and achieve for them the status of active subject in the civic space.

There is no doubt that contemporary ethnic activism of the indigenous people has many features characteristic of ethnonationalism (ethnic nationalism). This ethnopolitical ideology is, in fact, a variant of regular nationalism, wherein the ethnic group, nationality or the whole nation is defined in terms of ethnicity, with strong emphasis placed on an ethnocentric approach to various social and political issues. Such broad definition of ethnonationalism is usually counterpointed by civic nationalism, which should be applied to a political community composed of civic members, regardless of their ethnicity and cultural background. Ethnic nationalism is present in many geopolitical settings and appears in different contextual settings. We can observe it within the nation/state, in the federal plural states, and also in states formed by immigration, or sometimes as a main feature of the unitary and ethnically homogenous states. In many plural states, composed of different racial, cultural, religious and ethnic groups, 'minority ethnonationalism' appears as a response to the unequal power relationship in the sphere of economy, politics, social justice and culture. In the postcolonial context, especially in countries with significant groups of native people, we should speak of 'indigenous ethnonationalism'. Indigenous Latin America, and particularly its two areas: Mesoamerica and the Andes, is a good example of the manifestation of these political ideas, which can be observed and analysed in their different phases of formation. The emerging new type of the native leaders and the influential personalities (mostly intellectuals) have played an important role in the development of ethnic politics of identity as an effective tool diminishing the pressure of assimilation, strengthening ethnicity, and reducing marginalization of the aboriginal peoples. The elite members are, in fact, inventors of the new emancipatory ideology, which is responsible for the radical changes in the consciousness of their plain compatriots. They try to construct a new sense of identity and build a solid feeling of ethnic solidarity; however, the basic material used by them is a creative combination of native cultural features and political patterns borrowed from the global discourse.[6] Incidentally, this combination of two different sources

[5] W. Assies, H. Gudermann (eds), *Movimientos indígenas y gobiernos locales en América Latina*, Universidad Católica del Norte, San Pedro de Atacama 2007.

[6] D. Conversi (ed.), *Ethnonationalism in the Contemporary World: Walker Connor and the Study of Nationalism*, London: Routledge 2002; Sh. Hennayake, *Interactive Ethnonationalism:*

of ethnicity should serve as a good example, which could diminish some tensions existing between partisans of two contradictory approaches regarding the formation of nationalism: the followers of constructivism versus advocates of primordial ideas. In many cases, and not only in Latin America, both categories of these ethnic ideas (invented and reactivated) frequently appear together as a core material of the ethnic nationalism. Some additional questions associated with ethnonationalism, along with the discussion of the role played by the native elite in its formation, will be dealt with in more detail in the following parts of the essay.

In the course of many interethnic clashes (sometimes violent but largely manifested in peaceful forms), two kinds of ethnic ideologies have been constantly confronted. On the one hand, there is the assimilationist policy of the nation/state, which wants to implement an integrational project of the incorporation of the *indígenas* into the neutral and social category of peasantry (*campesinos*), and thanks to this strategy to deprive them of their indigenous identity. On the other hand, we observe the indigenous revival, which has appeared as a natural effect of ethnic activities undertaken by the growing number of native organizations and their influential leaders.[7]

Two global events have had a very strong impact on the development of indigenous activism. The first one was a climate created in 1992, when the whole world celebrated the 500th anniversary of the 'discovery' of America, which provoked a lot of protests among the Indians against apotheosis of the colonization of the New World. Another factor was related to the important document known as the Declaration on the Rights of Indigenous Peoples adopted by the United Nations Organization in 2007, after many years of difficult negotiations. This unprecedented legal act of worldwide significance has given to all native peoples a set of standardized regulations, norms and recommendations, which should be recognized by any state administration and all institutions (including businesses) of the dominant society.

Many ideas included in the Declaration had been previously elaborated on by the native leaders and included as basic proposals of the indigenous associations. One of the core elements of all these movements was an ideology of emancipation, developed as a kind of weapon necessary in the constant struggle for political rights, defence of native territories, protection of endangered heritage and recognition of a fair status for native people. The inventors of the new ethnopolitical ideas were mostly members of the emerging indigenous elite who were responsible not only for social and political changes but also for the transformation of the world outlook of their native followers, including their perception of social and ethnic justice.

An Alternative Explanation of Minority Ethnonationalism, 'Political Geography' 1992, Vol. 11(6), pp. 526–549.

[7] P. Faudree, *Singing for the Dead: The Politics of Indigenous Revival in Mexico*, Durham: Duke University Press 2013.

The indigenous elite present in the Andean countries is not, in fact, a completely new phenomenon. It is worth mentioning that already in the time of the preconquest Inca empire powerful aristocracy, nobility, clergy, administration clerks, and influential regional chiefs (*caciques*) led the local groups as parts of the indigenous multiethnic state. During the colonial time, some of that indigenous elite continued to be active in the new political order and were recognized by Spanish authorities as a privileged social group within the 'indirect rule'. In the course of time, they were gradually assimilated into the Mestizo society. The end of this social group was the second half of the eighteenth century, directly after the failure of the famous Túpac Amaru rebellion against colonial exploitation.[8] From that period on, they were almost totally eliminated from the public scene, and regarded as potential enemies of Spaniards and strong defenders of the royal indigenous tradition.[9] Consequently, at the moment of the formation of Andean independent states, the native people were completely deprived of their own elite and became a kind of 'ethnoclass' limited to peasantry only. That marginal social status has been strengthened by all republican (Creole and Mestizo) governments. The native population reduced to the marginal social and economic positions was not capable of manifesting their own ideas and demands, except in the form of spontaneous riots and rebellions, which quite frequently took place during the nineteenth and twentieth centuries. Without smart leadership, they were not able to change their situation and act effectively as the aware civic subjects. The emergence of the new elite by the end of the twentieth century improved significantly the interethnic situation of native peoples. They have now their own representations that are able to organize people and negotiate all important issues with dominant ruling authorities.[10]

Undoubtedly, the basis for those changes was the democratization process taking place in the majority of Latin American countries since the turn of the century.[11] Those transformations have allowed Indians to become a potential social, political and ethnic actor on the state arena. Referring only to the Andean context, two important political events should be mentioned, which effectively triggered the process of native emancipation. Firstly, it was the Indian uprising of 1990, which for many days paralysed whole Ecuador. That great protest changed completely the position of the native people in the country and additionally had a strong impact on the whole indigenous section of the Andean region.[12] Secondly,

[8] S. J. Stern, (ed.), *Resistance, Rebellion, and Consciousness in the Andean Peasant World: 18th to 20th Centuries*, Madison: University of Wisconsin Press 1987.

[9] G. Ramos, Y. Yannakakis, *Indigenous Intellectuals: Knowledge, Power, and Colonial Culture in Mexico and the Andes*, Durham: Duke University Press 2014.

[10] J. Bengoa, *La emergencia indígena en América Latina*, Fondo de la Cultura Económica, México 2000.

[11] R. Montoya Rojas, *Cuando la cultura se convierte en política*, 'Revista Andaluza de Antropología' 2011, No. 1, pp. 41–62.

[12] K. Lucas, *La rebelión de los indios*, Quito: Abya-Yala 2000.

one should remember about the mass protest movement initiated by indigenous peasants, miners, and *cocaleros* (coca leaf growers), which brought about a radical change in the Bolivian political system, and after years of social and political turbulences, helping Evo Morales, a prominent union leader of Aymara ancestry, raise to power (in 2006) and become the first aboriginal president in any South American country.[13] Both of these important events, as well as many others, prove a new political potential of the indigenous people and mark the important position of the native population in the present-day Andean countries.

2. INDIGENOUS ELITE AND ITS DIVERSITY

The indigenous elite of today is very heterogeneous and its current presence on the political scene is associated mostly with two basic factors: (i) formation of the grass-roots leaders in the course of numerous protests, organized for the cause of *indígenas*, and (ii) expansion of education among aboriginal youth, leading to the emergence of native professionals and intellectuals. As the result of all those transformation processes, a new type of indigenous elite has been formed, replacing or marginalizing the already existing traditional authorities. There are among them political leaders, ethnic and social activists, journalists, artists, writers, scientists, teachers, lawyers, etc. Many of them play a very important role in the social, ethnic and political life, both at local and state level, acting as official representatives of indigenous people in negotiations with the state administration and other agencies, and disseminating new ideas among the plains natives. It should be mentioned that from the beginning of the organized ethnic movement, important positions among the group of new leaders and social activists have been occupied also by indigenous women.

From the anthropological point of view, members of the indigenous elite should be regarded as a kind of 'cultural brokers', because they act efficiently in the typical 'middle ground' between two different societies, cultures, and policies. Such a position allows understanding of the non-Indian (Creole/Mestizo) ideas but also helps those leaders to communicate many different phenomena to their compatriots.[14] As a matter of fact, the native (political and intellectual) elite contributes substantially to the formation of the modern indigenous society, aware of its rights, proud of its heritage and ready to compete with the dominant (Mestizo) mainstream environment.

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[13] X. Albó, *Pueblos indios en la política*, La Paz: Plural 2002; X. Albó, *Movimientos y poder indígena en Bolivia, Ecuador y Perú*, La Paz: CIPCA 2008.

[14] C. Zapata Silva, *Intelectuales indígenas en Ecuador, Bolivia y Chile*, Quito: Abya-Yala 2013.

The elite members act as official representatives of the native groups in the negotiations with state agencies, local administration, industrial corporations and NGO officers, they lead and manage their native groups and associations, they develop also new ethnic ideas combining the indigenous traditional worldview with some Western concepts like democracy, autonomy, human and minority rights, and multiculturalism.[15] They also frequently represent their people on the international scene, speaking on behalf of native peoples at various summits and world meetings, seeking financial aid and moral support, building the transnational network of indigenous movements, and participating in the development of the international law protecting indigenous peoples. They rearrange the existing structure of native authorities (*caciques, presidentes de las comunidades*) by building a parallel modern ladder of ethnic leadership, based mostly on personal achievements, effectiveness, and popularity. Some of them have gained very influential positions by acquiring professional experience in negotiations, mastering good knowledge of law and demonstrating the ability to obtain financial aid.

The new elite is also a trigger facilitating the empowerment of indigenous peoples, changing the nature of existing interethnic relations.[16] The leaders of native associations are definitely against the paternalistic ideology of *indigenismo* (state/mainstream ideas and ethnic policy toward Indians) and they propose instead their own ideology labelled *indianismo* (Indianism), which should be regarded as an important instrument in the ethnic struggles and the formation of 'new natives'. However, the indigenous elite in Latin America does not belong to the governing elite. It is composed of leaders and intellectuals who, in fact, occupy the position of only 'subaltern elite'. Looking for some similar examples, one might notice that the situation of the native elite could be somewhat compared to the role played by the Polish elite (the intelligentsia) in the nineteenth century (and at the time of the partition of the state by the neighbouring powers), when there were made enormous efforts to maintain identity and assert ethnic rights on the civic arena.[17] Members of the indigenous elite belong to the group of 'new Indians' who are the leaders of the 'new tribes' (indigenous associations) and act as intellectual guides influencing the native mind.[18] Many of them, having roots in rural communities, are present mostly in urban centres, where the access to the state administration offices and important agencies dealing with indigenous issues is much easier. They constantly travel between countryside and capitals of the state or provinces, participate in meetings with other leaders, consult a number of aid programmes with NGO officers and negotiate important problems with

[15] R. Stavenhagen, *Los pueblos indígenas y sus derechos*, UNESCO, México 2008.

[16] A. Posern-Zieliński, *Los líderes indígenas en los países andinos y su rol en la consolidación del movimiento nativo*, 'Estudios Latinoamericanos' 2002, Vol. 22, pp. 69–86.

[17] W. Molik, *Inteligencja polska w Poznańskiem w XIX w. i początkach XX wieku*, Poznań 2009.

[18] A. Posern-Zieliński, 2008, *op. cit*.

the government representatives. Considering that some of them travel frequently abroad to take part in a variety of international meetings, organized by such institutions as the UNO, the UNESCO, the OAS, the ILO and many other top agencies and foundations, it can be concluded that indigenous elites include leaders relatively distanced from their ethnic background, usually in the country's interior. Those activists could be labelled ironically 'professional Indians', but in fact their impact on decision-making and fundraising is really important. As a consequence of all those actions taken, new regulations, institutions, and projects have been introduced step by step to eliminate the marginal position of the native people.[19]

When analysing the indigenous elite, it is necessary to recognize this social group as a diversified collectivity. The gender aspect is in that case also quite important and is manifested mostly by two parallel branches of native associations. The main organizations, representing regional and professional groups of *indígenas*, are usually run by men, but simultaneously there are plenty of women associations specialized in family and household matters.[20] Another distinctive feature of the native leadership consists in the juxtaposition of rural and urban activists. The former are rooted in their peasant communities (*comunidades*) and remain in constant contact with them. The majority of them are leaders of those local units (*presidentes de las comunidades*) and act as elected heads of village self-governments; they are also recognized by the state as its official representatives at the lowest level of administration. Usually, the pace of changes taking place in the life of native villagers depends on their leaders' abilities to secure external aid and on their entrepreneurial spirit to activate local societies.[21]

On the other hand, there are indigenous leaders, usually educated and well-acquainted with matters of law, economy and politics, whose typical area of activity is the urban environment. They act at the top level of indigenous organizations, and spend most of their time on conferences, workshops, and negotiations with state officials. The next category of native leaders is made up by unionists, representing the interest of farmers, pastoralists, miners, and artisans. In the Andean countries, many unions have a clearly native profile, and their leaders operate both as social activists fighting for better working and living conditions, and as ethnic authorities defending the indigenous rights. Peasant union activists have been quite significant on the civic scene. In those regions where the majority of natives live in *comunidades campesinas* or are owners of small family farms (*minifundios*), the peasants' union organizations have usually an ethnic character, and their activities include social and economic issues combined with the ideas related to maintaining their identity and protection of tradition. Such leaders are

[19] M. Paredes, *Representación política indígena: Un análisis comparativo subnacional*, Lima: Jurado Nacional de Elecciones 2015.

[20] M. Śniadecka-Kotarska, *Antropología de la mujer andina*, Quito: Abya-Yala 2005; M. Śniadecka-Kotarska, *Ser mujer en el Perú: 1980–2005*, CESLA, Varsovia 2008.

[21] R. Choque Canqui, C. Quisbert Quispe, *Líderes Indígenas Aymaras*, La Paz: Ibis 2010.

active primarily in Bolivia and Peru. They fight there environmental pollution, caused mostly by the mining companies, they defend small coca plantations as the basic resource of *cocaleros* families, and organize local self-defence forces (*rondas campesinas*) protecting villages against rubbery of stocks. During the civil war in Peru (in the 1980s) they served very well as squads fighting against communist guerrillas (*Sendero Luminoso*).[22]

One of the most important categories of leaders, and very well assessed by the public, is a group of natives who have strong political ambitions. They participate in the forming of indigenous parties, act as members of mainstream parties, and sometimes represent native interests as elected members of parliament. There are among them many former activists of the grass-roots background with a lot of experience in organization of indigenous protests, who finally have decided to enter the world of the state politics. Still, besides them there are also university graduates, usually familiar with matters of law and ethnic issues, and quickly mastering the rules behind the political machine. The emergence of a new generation of indigenous politicians should be, without doubt, evaluated quite positively, however, their low efficiency and poor contact with the plain native people is a common problem. The rural natives, due to their lower level of education, are more likely to adopt populist and leftist slogans disseminated by Mestizo politicians, rather than to follow the emancipatory, reformative and sometimes even utopian ideas proposed by the top indigenous leaders. The exaggerated ambitions of many native leaders are another obstacle to achieve success in politics and take effective actions, which would be acceptable by different indigenous factions that usually have contradictory interests.[23]

Still another elite group consists of natives occupying important positions in local administration, state departments, and NGO agencies. The majority of them represent a new generation of native professionals with an established economic status. Their prestige and competency recognized both by the natives and mainstream society help them to perform responsible duties and act for the benefit of all citizens, regardless of their ethnicity. Some of them occupy the posts of *alcalde* (city mayor), work as chiefs of the local police units, chair professional associations, or act as counsellors to the *ayuntamiento* (town hall).[24]

The native successful people include also ‘self-proclaimed’ leaders; they belong to the category identified by anthropologists as ‘big men’, which means individuals who have achieved their high status thanks to their clever actions, contacts with influential authorities, and persuasion skills. The majority of them

[22] S. J. Stern (ed.), *Shining and Other Paths: War and Society in Peru, 1980–1995*, Durham – London: Duke University Press 1998.

[23] D. J. Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge*, Cambridge University Press 2005.

[24] A. Posern-Zieliński, *Między indygenizmem a indianizmem. Andyjscy Indianie na drodze etnorozwoju*, Poznań: Wydawnictwo Naukowe UAM 2005, pp. 151–168.

have advanced to the upper social class through their close cooperation with the internationally based NGO agencies, operating aid funds and implementing the modernization projects in the countryside. The indigenous collaborators and advisers of foreign agencies act as intermediaries between local people, the state administration and NGO officers, and thanks to this they usually are able to monopolize contacts with the developmental agencies, and control the flow of commodities, money and information. They easily gain prestige and become influential having the opportunity to participate directly in all decision-making regarding the distribution of financial aid. Additionally, they can also improve their own economic situation, owing to the material and financial benefits related to their unique status.[25]

Moreover, the indigenous elite brings together people performing important roles in religious life. If one looks at the Catholic clergy, there are not many priests of Indian origin just yet, but this situation is gradually changing. The present intention is to promote the formation of native priests and the trend is related partially to the idea of inculturation (adaptation of Christianity to the indigenous culture) and the Church strategy to replace foreign missionaries with priests of indigenous background. However, due to the great expansion of Protestant religions in all Latin American countries, and above all, the growing popularity of the most successful denominations such as Adventism, Pentecostalism, Jehovah's Witnesses, and Mormonism, numerous new religious communities have been established among the indigenous people. Their influence on the native mind is often quite significant and not limited to the religious matters only, changing also the patterns of everyday life and promoting the developmental projects.[26] The local leaders are quite active in those new religious groups, usually recruited from among those indigenous converts who have better knowledge of the principles of the new faith. There is also one more category of religious authorities, namely the 'neo-shamans' and medicine men (*curanderos*), who are today more and more active in the urban environment, playing an important role of spiritual advisers, psychological counsellors and popular healers. They combine traditional native beliefs, magic techniques and therapeutic knowledge with sacral ideas and practices taken from the Western world. Their growing popularity and professionalization make them widely known and appreciated also by the non-indigenous society.

Finally, an influential group that should be mentioned are native intellectuals, active in the fields of culture (writers, poets, painters, sculptors, musicians), media (journalists, bloggers), education (teachers, university professors, scientists), and

[25] A. Posern-Zieliński, *Europeans and the Indigenous Peoples of Latin America*, (in:) R. Stemplowski (ed.), *Europe and Latin America – Looking at Each Other*? Warsaw: PISM 2010, pp. 79–114.

[26] M. Marzal, *Rostros indios de Dios. Los amerindios cristianos*, Quito: Abya-Yala 1991; H.-J. Prien, *Christianity in Latin America*, Leiden: Brill 2013.

a few other prestigious professions (physicians, lawyers). There is no doubt that they can be counted as the 'symbolic elite' who have no real power but still have a significant influence on people's mindset and opinions. The majority of them represent the first generation of educated *indígenas* who, despite their elevated social position as the middle-class members and incorporation into the national society, still maintain their ethnic identity and openly express their attachment to the native heritage. They support the indigenous struggle for justice and cultural autonomy, they spread among aboriginal people new emancipatory ideas, and contribute to challenging the pejorative Indian stereotypes still present among the mainstream society.[27] The influence of the intellectuals has been growing especially among the educated indigenous youth, and their impact on the development of the modern native identity free from the subaltern complex is quite essential and strengthens the feeling of ethnic pride.[28]

3. INDIGENOUS LEADERSHIP AND THE EMANCIPATION PROCESS

The influential role of the new native elite is closely linked to the exceptional abundance and significance of indigenous associations. As a matter of fact, the number of indigenous organizations is really impressive. They operate today as a kind of 'new tribes' and have ambitions to supervise all aspects of indigenous life. On the one hand, these organizations promote new leaders and underpin their authority, but on the other, some recognized figures are able to transform native organizations into powerful social and ethnic machines. The wide spectrum of native organizations is a reflection of a large range of their activities, goals, ethnic and regional backgrounds, gender profiles and political affiliations. It is also the result of diversified leadership due to the ideological divisions, personal ambitions and ethnic interests. However, in spite of all those differences, they all have one common goal, which is the struggle for indigenous rights and maintenance of identity, combined with social and economic development. The new native associations, liberated from the endocolonial subordination and pursuing a modern strategy of social action, have initiated significant changes in the lives of aboriginal people.

Referring to some of my previous research on the indigenous activism, it is possible to identify three main types of ideological profiles present among the

[27] A. Waskar, *Earth Politics: Religion, Decolonization, and Bolivia's Indigenous Intellectuals*, Durham: Duke University Press 2014.

[28] J. Rappaport, *Intelectuales públicos indígenas en América Latina: Una aproximación comparativa*, 'Revista Iberoamericana' 2007, Vol. 73(220), pp. 615–630.

native elite of today.[29] The first category, definitely oriented toward the idealized past and attached to some elements of nativist thinking, could be named the 'neo-traditional' elite. Their representatives operate still within the 'cargo' system (i.e. rotary obligations to perform necessary duties for the benefit of a community) and try to strengthen their threatened authority by combining the traditional style of governance with modernizing changes. Sometimes, they are even able to form regional and even pan-regional associations to increase their prestige and influence. A good example of that trend is the case of the CONAMAQ organization (National Council of Ayllus and Markas of Qullasuyu) in Bolivia. It is an important umbrella association creating a new hierarchy of leaders capable of participating in key negotiations with the local administration and central government.[30]

For the representatives of the second type the most important are such ideas as native autonomy, restitution of lost land properties and community well-being. Members of that group act mostly on the local and regional scale and try to establish good and effective relationships with provincial state authorities. Another tendency is present among the third category of leaders who are mostly oriented toward the future. They promote modernization projects but without compromising ethnic roots, and develop ideas of indigenous participation in all fields of the national civic life. It is obvious that the classification proposed above has only a limited value like any simplified typology, because in the real life all different tendencies are frequently combined together in various ways, and sometimes are composed of evidently contradictory concepts.

As this brief overview of the native leaders already shows, they have acquired their privileged position in a great variety of ways. In the majority of cases, they represent the first generation of educated people and, indeed, the number of young leaders among them is relatively high, what stands in sharp contrast to the indigenous traditional pattern of recognizing older people as those by nature endowed with power. The modern leaders situate their ambitions both at the local level – where they still have to compete with the traditional authorities – and at the regional and state levels, where they could gain significant positions thanks to their contacts with the central administration, government, and international agencies. The abundance of various indigenous associations, organizations, unions, and umbrella federations means that the number of leaders is increasingly high. They are the real core of the native elite and the main promoters of the emancipation movement, struggle for indigenous rights, social and economic ethnodevelopment, and rejection of the subaltern status.

However, that leadership elite has also some weaknesses, which sometimes contributes to the inefficiency of many actions. Internal disputes, tensions, exaggerated ambitions, and competition for access to prestigious titles and attractive

[29] A. Posern-Zieliński, 2002, *op. cit*., pp. 69–86.

[30] E. Ticona, *Organización y liderazgo aymara: La experiencia indígena en la política boliviana*, La Paz: Universidad de la Cordillera 2000.

cargos (posts) are all common features, which frequently lead to the lack of unanimity, wrong decisions and even to the disband of organizations. It may be also noted that in some cases leaders of higher level follow a policy not always understandable and adequate to the current needs of the indigenous people. Against this background, the phenomenon known as *caudillismo* (charismatic and autocratic chieftainship), quite typical for the Latin American political tradition, can be distinguished. This mainstream pattern adopted by some indigenous activists, evidently contrary to the native idea of the democratic rotation of posts, consequently leads to the emergence of leaders having unquestionable authority and unchallengeable power. Nevertheless, such autocratic tendencies are strongly obstructed by the popular pattern of conducting comprehensive discussions and multilateral consultations, leading finally, according to the tradition, to the preferable unanimity of decisions. An important feature of the customary politics is to consult first all important issues with the leaders of a lower level, then with elected members of the regional indigenous council and, finally, to reach the consensus among representatives of the umbrella organizational unit. Another weak point is the tendency to promote those public actions which have a spectacular character and can serve to strengthen the position of the leaders only.

A factor that additionally inhibits the mutual cooperation between leaders is related to their different political approaches. Some of them are more conciliatory towards the state authorities, while others choose to be totally oppositional or even endeavour to start a rebellion in a situation of political crisis. There are leaders influenced by a leftist ideology, and others who seek inspiration in ecology, nativism, sustainable development, communitarianism, and traditional religion; some emphasize political neutrality, while others support mainstream political parties, conclude alliances with them or build own party-type organizations. One can encounter leaders who are rather class-oriented, stressing solidarity with other exploited groups of the national society (peasants, miners, urban workers), while others are very attached to the ideas of ethnic identity and native heritage. The prevailing tendency of common ethnic interests, expressed by solidarity and pan-indigenous spirit, not always leads to actual cooperation between different indigenous groups. Instead, some tension builds up from time to time, especially between different ethnic groups in one country (e.g. the Quechua versus the Aymara in Bolivia and Peru) or regional native units (e.g. the Saraguro people versus the Otavalo natives in Ecuador, or indigenous peasants from the Andean mountains versus native 'tribes' from Amazonia). However, all these controversies are not significant and when the situation is critical they can usually be overcome.

When assessing some positive and negative features of the indigenous leadership, one should note that the new elite plays an important role in the empowerment of the native peoples. It goes without saying that the development of new ethnic organizations and their emancipatory initiatives are directly associated

with the gradual formation of a new type of indigenous elite. Members of that group, free both from the pressures of endocolonial subordination and the control of traditional native authorities, make conscious use of their newly acquired competencies as regards ethnic issues, civic ideals, rule of law, and politics. As a result, they contribute significantly to the qualitative changes, affecting the situation of not only the Indian people but also of the mainstream society in each of the Andean nations.

The evolution of the native leaders' profile (from traditional to modern one) should be considered in the context of three basic transformation stages of indigenous activism. The first stage of the emancipation process is characterized by decolonization of the existing ethnic and social structures, leading to the formation of a new native organizational network, which in the course of time marginalizes and replaces the traditional institutions. The main goal of this process is to transform the indigenous society and adapt it to modern conditions. At this stage, the native society is consequently influenced and managed by new associations and leaders who act mostly within their own ethnic environment but gradually gain prestige as the only recognized representation of indigenous people.

The second stage is associated with the decolonization of ethnic activities, which is supposed to lead to the return of native people to the political scene as a real civic subject, to the transformation of interethnic relations with the dominant society, to the organization of effective forms of protest, and generally to the empowerment of the indigenous minorities. The main task expressed at this phase is to transform the nation/state both top-down (through constitutional reforms securing indigenous rights) and also bottom-up (through guaranteed traditional forms of property relations based on community lands and territories, protection of cultural autonomy and heritage, the right of decision-making at the local level regarding all issues relating to economic development, infrastructure, ecology, etc.).

The third stage of emancipation is connected with the decolonization of the native mind. The main goal should be achieved by erasing the still present traces of colonial mentality, the eradication of epistemological violence resulting from the Western values affecting the indigenous perception, the revival of endangered native ideas, restoring ethnic pride and establishing a new aboriginal identity. A new world outlook, based on the combination of native values and modern ideas, is shaped and widely disseminated by indigenous leaders and intellectuals on the sound foundation of native associations. The leaders try to create a kind of 'subaltern culture of resistance', which should be an effective ideological instrument to overcome epistemological domination of the Western thought.[31] The final goal, in that case, would be the replacement of the 'culture of resistance' with the

[31] G. Ch. Spivak, *The Postcolonial Critic: Interviews, Strategies, Dialogues*, London: Routledge 1990, pp. 50–59.

'culture of agency', followed by transformation of the subaltern consciousness of *indígenas* into a revitalized native world outlook based mostly on aboriginal values but adapted to the contemporary situation. Part of this modernized *cosmovisión* is a set of ideas characteristic of indigenous nationalism.

At all three stages of emancipation, which should be regarded as a kind of theoretical concept only, the native elite plays an essential role but in each phase in a slightly different way. At the first one, the leaders act mostly as grass-roots reformers, ethnic activists, and social innovators. In turn, at the second stage, they appear primarily as organizers of protests, negotiators, and politicians. In the last phase, representatives of the indigenous elite are basically ideologists, thinkers, and intellectuals.

4. ANDEAN ETHNONATIONALISM AND INDIGENOUS ACTIVISM

As I mentioned before, many ideas formed, developed and promoted by the indigenous elite fall into the category of ethnonationalism.[32] This political concept, known also as ethnic nationalism is, in fact, a special kind of exclusive ideology based on common culture, tradition, heritage, kinship, and descent. Ethnic groups expressing their identity in such a way prefer being treated as autonomous entities with the right to self-determination.[33] The concept of ethnonationalism was framed mostly as an instrument to facilitate the interpretation of nation-building processes taking place in the nineteenth and twentieth centuries in Europe, but in the course of time it has been applied also to the studies of postcolonial societies.[34] In this new context, ethnonationalism is identified with the resurgence of ethnicity observed among indigenous and minority groups (nationalities) that are subordinated to the dominant society having control over the ethnically plural state. The revival of ethnic awareness, related to ethnonationalism, takes usually many forms and can evolve under some circumstances from a soft model, based on the culture maintenance and social advance, to a more radical trend, combining ethnic rights with political issues. When the native activism is connected with ethnic demands, such tendency can be described properly as 'indigenous ethnonationalism'. Its formation is based at least on two social factors: (i) increased communication between different local communities but belonging to one ethnic

[32] W. Connor, *Ethnonationalism: The Quest for Understanding*, Princeton University Press 1994.

[33] J. Nash, *Mayan Visions. The Quest for Autonomy in an Age of Globalization*, New York: Routledge 2001.

[34] A. Lecours, *Ethnonationalism in the West: A Theoretical Exploration*, 'Nationalism and Ethnic Politics' 2000, Vol. 6(1), pp. 103–124.

group, and (ii) a strong impact of emerging leaders on the ethnic society. Their direct activities and ideological influence facilitate the development of the sense of subjective self-awareness and ethnopolitical identity of the plain members of the ethnic unit. One of the central themes of indigenous ethnonationalism is the idea of self-determination, which can be conceptualized in mild forms as the right to ethnodevelopment at the local level, and recognition of ethnic differences, ethnic territories and native representatives by the nation/state.[35]

That idea can be manifested also more distinctly as a demand to create an autonomous unit in the areas populated entirely by a particular ethnic group, which is a case of some native groups from the Amazon jungle, where they live in the *reservas indígenas*, recognized and officially protected by the state. However, self-determination sometimes has a more radical form leading to the formation of almost independent ethnic regions (like in the case of the revolutionary clusters of the Maya communities in Chiapas, Mexico) or even to separatist tendencies (present among some rebellious groups of the Mapuche in Chile). It should be noted that such phenomena can be quite rarely noted in Latin America, where the ideas of social advance, ethnic recognition and civic representation of indigenous groups within a democratic multicultural state are prevailing.

In general, indigenous ethnonationalism is manifested in such features as ethnic activism, the idea of autonomy, struggle against domination of the majority, revival of native culture, development of ethnic pride based on the mythicized past, and the feeling of solidarity tying together different native groups for the sake of common interest. In spite of regional differences, all forms of native ethnonationalism have many similar characteristics present in native activities, demands, and ideology. Its general goal is at least fourfold: rejection of (endo)colonial oppression, restitution and recognition of indigenous rights, revival of native culture, and maintenance of ethnic identity. The combination of all these factors depends on the historical background and ethnic relationships in a given area. However, the general trend is quite obvious: at the initial stage, social and economic demands predominate, subsequently ethnic and cultural postulates become more important, and finally, civic and political ideas are strongly emphasized.

The Andean ethnonationalism, despite its own specificity, is governed by similar rules. Ideas of native ethnonationalism are developed as a result of the activities of indigenous organizations, their leaders, and intellectuals. They are manifested primarily in different mobilizations (negotiations, conferences, meetings, parades, marches of protest, strikes, roadblocks, occupation of buildings, demonstrations, celebrations of feasts, public rituals, etc.) and additionally take the form of more sophisticated concepts contained in official documents, ethnic

[35] M. E. Andersen, *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in 'Latin' America*, Plymouth: Lexington Books 2010, pp. 165–193.

press, interviews, books, and online publications. The last aspect of the indigenous nationalism can be identified as a creative intellectual product of the native elite, who are capable of formulating ethnic ideas composed of features of usually different origin. There are among them elements rooted in the native culture, tradition, heritage, and history but cleverly adapted to the current needs. Another group of ideas includes features that have actually been invented by the native leaders but with time considered mostly inherited directly from the ancestors.[36] The third category consists of attractive and fashionable ideas borrowed from the Western thought and adapted to the Andean reality, like an ecological approach to the environment, principles of intercultural education, the value of intellectual property and significance of sustainable economy. Finally, there is a set of concepts that embraces many ideas taken directly from the global discourse, like references made to the rights of indigenous people and universal human rights or the principles of democracy and social justice, incorporated without any essential changes into to native ethnonationalism.

The combination of all those characteristics (inherited, invented, borrowed, adapted) is used to build an ethnic ideology, which in each Andean country has a slightly different profile, depending on the local interethnic situation, previous experience of native movements, and the power of indigenous activism. One feature, however, is common to the different mutations of indigenous nationalism, namely a very strong emphasis placed on the meaning of a symbolic ethnic border (metaphorically understood, in line with the concept introduced by Fredrik Barth),[37] existing between the indigenous peoples and the world of the Others (Creoles, Mestizos and Whites). This sharp dual division is outlined in every aspect of the native existence, from everyday life, social patterns and economic activities, to the perception of the past, rituals, beliefs (*cosmovisión*) and world outlook.

In connection with these comments, let me draw attention to selected aspects of the indigenous activities and ethnic ideas which are characterised by the above-mentioned features, although obviously this topic is too broad and should be discussed separately in detail and with great accuracy. It is worth stressing only that the analysed phenomena are closely related to the revival of ethnicity and the desire of leaders to raise new indigenous consciousness, based on ethnic pride and the conviction that the process of destruction of indigenous culture and identity erosion must be stopped. The natives should be aware that they have valuable culture of their own, that they can be proud of their heroic history, that they have their religion which should not be treated as heathen, and that they have the right to build their own modern life, adapted to current civilizational conditions but based on local values and heritage.

[36] B. Anderson, *Imagined Communities*, London: Verso 1991.

[37] F. Barth, *Ethnic Groups and Boundaries*, Long Grove: Waveland Press 1998.

The ideas related to ethnic nationalism can be found in many areas of indigenous activities and thought. One of them is the political arena in the strict sense of the word. An important concept there is autonomy, realized at least in three versions: (i) as real cultural autonomy understood as the right to maintain own identity and tradition, despite the dispersion of native people throughout the country, (ii) as micro-territorial autonomy, applying to the areas that under law belong to the indigenous people only (*comunidades campesinas*), and finally (iii) as regional autonomy, a concept of exclusive indigenous zones in areas almost entirely populated by the Indians.[38] The idea of autonomy is closely related to the recognition of indigenous rights. It means also the approval of 'special' laws and rules applying only to the native people, including the acceptance of legal pluralism, based on acknowledgment of the traditional principles of native justice. Another significant indigenous claim is the aspiration to have their own recognized representatives in the public space: from the local administration offices to the upper level of state authorities. Political symbolism of ethnicity is also quite important. This category covers, among others, such phenomena as frequent public display of the indigenous flag (known in Bolivia as *whipala)*, which highlights the presence and power of native people in the civic arena, or the use of some ethnic ornaments and designs attached to the official attire of many indigenous politicians (the former president of Bolivia, Evo Morales, regularly followed that trend, even when travelling abroad).

Contemporary indigenous collective identity can be seen as the expression of ethnonationalism. Native activism brings about change and strengthens ethnic consciousness of the Indians, who face gradual assimilation, acculturation, and miscegenation. Hence, the conscious efforts of activists to influence, especially young people, also those living in the cities, and to encourage them to maintain their tradition and develop ethnic pride. In the Andean countries, a four-level identity scale is becoming increasingly popular. It starts from the affiliation to the local group (the cases of the Otavalo and Saraguro Indians of the Kichwa stock in Ecuador, and Q'ero communities of the Quechua people in Peru). Then, there is the ethnolinguistic and cultural identity of the natives living in one or several countries (the Quechua from Peru, Bolivia and Argentina, the Aymara from Peru, Bolivia and Chile, the Mapuche from Chile and Argentina), and next one could distinguish the state-indigenous identity, which includes all natives, regardless of their ethnic affiliation but living in one country (Ecuador, Bolivia or Peru). The latter level corresponds to the pan-Indian ethnicity (when the native population perceive themselves as indigenous peoples of all the Andean countries, of the whole Latin American area, or even as the original people of Abya Yala (it means both Americas, according to the current Indian terminology). From the period when the

[38] H. Díaz-Polanco, *Autonomía regional. La autodeterminación de los pueblos indios*, México: Siglo XXI 1999; S. Velazco Cruz, *El movimiento indígena y la autonomía en México,* México: UNAM 2003.

natives appeared on the public scene, their dual civic identity has also been clearly emphasized: firstly, as *indígenas* having special constitutional rights, and secondly as Ecuadorians, Peruvians, and Bolivians, or in the opposite order depending of the context. The situation is slightly different only in the case of Chile, because not all the Mapuche regard themselves as Chileans, seeing the state as oppressive and still treating native people as a kind of colonized second-class citizens.

The native history, its reinterpretation and application in indigenous politics and education, is also an important factor shaping the ethnic identity. Indian leaders have made considerable efforts to decolonize the vision of the past, and ultimately to present it from the indigenous perspective. Hence, there are many initiatives to remove the monuments of Spanish conquistadors and discoverers from the prestigious public settings, and to replace them with monuments commemorating famous Indian chiefs who struggled against alien invaders; as well as plenty of pageants and semi-traditional events in the form of 'artificial reconstructions' of the ancient celebrations and holidays (such as the popular Inca festival, *Inti Raymi*, taking place annually in Cuzco, Peru) that are organized throughout the year. The progressive glorification of the Inca past as the time of native imperial power is also noticeable, as are many popular references to the precolonial Andean civilizations, which are to prove exceptional achievements of the ancestors of today's Indians.[39] A tendency has also been observed in the last decades, quite similar to that already present in North America, to take control over the ancient sites and monuments, museums dedicated to precolonial civilizations, sacral objects displayed on exhibitions, and archaeological excavations.

Ecological themes form an important part of the indigenous ideology and are used to present the Indians as the people living always in harmony with nature, defending it against the ruthless exploitation by the expanding industrial civilization. A special version of this romantic ecological concept, which additionally relates to ethnic nativism, is observed in Bolivia, where it is known as *pachamamismo* (a word derived from *Pacha Mama*, indigenous Mother Earth).[40] It is believed that the natives should control their natural resources (water in the rivers and lakes, mineral deposits, plants, and animals) because it is only them who will be able to apply the principles of *sumak kawsay* (*buen vivir* in Spanish). This concept is a kind of native idea of 'well-being', which is considered an alternative to the Western developmental projects of continuous progress. It promotes such a way of life which secures the equilibrium between necessary human needs and the surrounding nature, treated always with respect as a vital source of all

[39] K. Pacheco Medrano, *Incas, indios y fiestas*, Cusco: INC 2007; J. Galinier, A. Molinié, *The Neo-Indians: A Religion for the Third Millennium*, Boulder: University Press of Colorado 2013.

[40] G. Omar, *El discurso moderno frente al 'pachamamismo': La metáfora de la naturaleza como recurso y de la Tierra como madre*, 'Polis. Revista Latinoamericana' 2012, No. 33, pp. 219–233.

human and non-human beings. The idea is composed of many features rooted in the social, economic, and religious tradition of the Andean people but cleverly adapted to the Western concepts of sustainable development and the philosophy of deep ecology.[41] Basing on such ideological assumptions, the experimental proposals of the obvious nativist character have been frequently implemented to return to the old agricultural techniques and traditional crops as a proven way of land cultivation in the Andes.

Issues of native education belong also to the important factors shaping a modern mind but without compromising the ethnic identity. In accordance with the principles of intercultural education, promoted by national and international regulations, ethnic leaders advocate the establishment of bilingual schools, where native students, besides mastering Spanish, could be also taught in their ethnic languages (Quechua, Aymara, and Mapudungun – the language of the Mapuche). Unfortunately, such schools do not enjoy much popularity among Indians, and their role is rather symbolic, serving more as a political proof that the idea of bilingual education is successfully implemented and that the state fulfils its obligation.[42] Much greater prestige is accorded to intercultural universities, which educate new native leaders, professionals, and future intellectuals.[43] The curricula developed at those universities combine basic Western knowledge with subjects based on cultural experiences of the Andean people and issues related to the important indigenous needs. Numerous topics of instruction programmes include: traditional medicine, native techniques of soil cultivation and pastoralism, customary law, ancient civilizations of the Andes, history of Indian resistance, indigenous philosophy, native languages, and also questions of native rights and law regulating the situation of the Indians. There are also many courses and workshops organized by different institutions (indigenous and NGOs), especially for the rural population. They are of great importance in the dissemination of modern knowledge and revival of values handed down by the ancestors. On the other hand, native young people actively use the ethnic press and websites, run by many indigenous organizations, and articles published there cover a range of issues that also contribute to awakening ethnonationalism. The main purpose of them is to revive the endangered identity and initiate the debate on the proper strategy for indigenous emancipation.

The trend toward the revitalization of native culture emphasizes also the values of the Andean religion and sacral tradition, treated as an important element

[41] Ph. Altmann, *'Good life' as a Social Movement Proposal for Natural Resource Use: The Indigenous Movement in Ecuador*, 'Consilience. The Journal of Sustainable Development' 2013, Vol. 10(1), pp. 59–71.

[42] R. Cortina, *The Education of Indigenous Citizens in Latin America*, Bristol: Multilingual Matters 2013.

[43] J. Rappaport, *Intercultural Utopias: Public Intellectuals, Cultural Experimentation, and Ethnic Pluralism in Colombia*, Durham: Duke University Press 2005.

of the indigenous identity. There are many attempts at reactivating ancient rituals and ceremonies; sometimes, they are even granted the official status of state celebrations, for instance, at the initiation of presidency or at the opening of important national meetings (e.g. in Bolivia or Peru). The Andean traditional world outlook (*cosmovisión*) is considered a native philosophy based on the millennial intellectual achievement, with its own original system of cognitive values and ethical principles, which should be appreciated and are worth continuing. The Catholic Church is also trying to indigenize its rites and learning, mostly according to the principles of the new evangelization movement and its core 'inculturation' strategy, which postulates the translation of Christianity to the native cognitive system and respective ritual patterns.[44] An interesting product of that adaptation is *teología india* (Indian theology), a current development by the Latin American clergy attempting to combine harmoniously the Andean religious concepts with Christian basic ideals, and searching for the common ground of both religious systems.[45] The great revival affects also all kinds of shamanic and healer (*curanderos*) activities, linking the traditional way of treatment with practices borrowed from different trends of the 'new age' ideology.[46] Neo-shamans, very popular today also outside of their native society, provide healing and magical services frequently in a professional modern way, seeing their clients in special consulting offices (*consultorios*). Some of them are even recognized officially by the local and state administration as useful medical specialists (*médicos tradicionales*), who can support the existing healthcare system (e.g. in Chile, Ecuador). This very positive attitude toward indigenous religion, medicine, and knowledge of herbs is mainly the effect of the *interculturalidad* doctrine enshrined in the constitutions of the Andean states and then disseminated among the national societies.

5. ETHNIC REVIVAL IN FOUR ANDEAN COUNTRIES

Despite many common elements of the indigenous activism in the whole Andean region, the native movement in each country has its own specifics. The differences are quite clear, especially when we compare ethnopolitical strategies and ethnonationalist profiles. The distinctive features observed in the four Andean countries have been influenced by many objective factors, both rooted in the past and caused by the recent social and ethnic situation. However, three of

[44] J. Espeja (ed.)*, Inculturación y teología indígena*, Salamanca: San Estaban 1993.

[45] N. Sarmiento Tupayupanqui, *Caminos de la teología india*, Cochabamba: Verbo Divino 2000.

[46] J. Scuro, *De religión y salud a espiritualidad y cura. El neochamanismo como vehílulo del cambio*, 'Ciencias Sociales y Religión' 2015, Vol. 17(22), pp. 167–187.

them seem to me of special significance: primarily, demographic strength of the aboriginal people in the total country population; secondly, the type of current interethnic relations, once provoking tensions, then again leading to a compromise; the last factor being the historical background of relations between natives and the dominating society since the colonial times until recent decades.

Therefore, let us start with Chile, where the percentage of indigenous people is not so high as in the other Andean countries. The native population accounts for between 8% and 11% of all citizens, which is equivalent to 1.2 million to 1.7 million people. They are dispersed throughout the whole country, but the biggest ethnic group, the Mapuche, lives in the southern provinces, historically known as Araucania. However, as a consequence of migration, they live also in great numbers in the capital: Santiago de Chile. The whole history of the Mapuche has been marked by constant struggle against conquest and colonization of their native territories. Under the leadership of their brave warlords, the Mapuche were able to maintain successfully control over their homeland until the second half of the nineteenth century. The heroic ethnic history marked by bloody battles, clever treaties signed with the enemies, and new institutions invented to strengthen the Mapuche federation of tribes are today a core element of the native consciousness, education and pride, inspiring also patriotic imagination of the young generation. The current interethnic situation of the Mapuche people is characterized by frequently violent confrontations with state forces, in the form of strikes, road blockades, occupations of industrial installations or even property damage. The main reason of their protests is all the time the same: defence of native lands, threatened by the neoliberal policy of development, leading to gradual degradation caused by pollution and an ever greater scarcity of water. Such circumstances can explain why the Mapuche ethnonationalism has a frequently rebellious character and, in some extreme groups, evinces even separatist tendencies. The idea of autonomy is also present, especially among those leaders who are under the ideological influence of Basque and Catalan nationalists, or follow the concepts disseminated by the Mapuche political emigrants in North America and Western Europe. The Mapuche elite members belong to many political factions and such situation goes back to the beginning of the twentieth century. Today, there are rebellious young leaders organizing radical forms of protest, but at the same time many Mapuche authorities are quite active in the state administration and local government, choosing a more conciliatory way to improve native life. A very influential role in Mapuche ethnonationalism is played by indigenous artists, especially poets and sculptors, as well as many intellectuals (university professors, teachers, and journalists).[47]

[47] J. A. Marimán, *Autodeterminación. Ideas políticas mapuche en el arbol del siglo XXI*, Santiago de Chile: LOM 2012; J. Bengoa et al., *Mapuche. Procesos, políticas y culturas en el Chile del Bicentenario*, Santiago de Chile: Catalonia 2012; I. Hernández, *Autonomía o ciudadanía incompleta. El pueblo Mapuche en Chile y Argentina*, Santiago de Chile: Pehuén 2003.

The pattern of interethnic relations in Bolivia is definitely different. The country has the largest percentage of the aboriginal population in the entire South America. According to various data, based mostly on estimates, the native group ranges between 40.5% and 56% of the total population. The discrepancies arise from the difficulties in ethnic identification. The dilemma of who should be counted to the category of the native people usually depends on the applied criteria (according to language use, place of living, or attachment to tradition), the current political situation, and changing ethnic self-awareness. Nevertheless, it means that the size of the Indian population ranges from 2.8 million up to 4.5 million people. The majority of them belong to two important nationalities: the Quechua and the Aymara, whose ancestors were among the founders of ancient Andean civilizations and used to live in the preconquest time in the Inca empire. Both groups of these Indians also take pride in a very long tradition of anticolonial uprisings, followed by a series of riots against economic exploitation in the modern times. In the middle of the twentieth century, they already started to organize themselves in a typical modern way, building ethnopolitical associations and forming nativist ideas characteristic of ethnonationalism (expressed especially in the ideology of *catarismo*) and mixed with indigenous socialism, based on the principles of peasant economy and community cooperation. The constant growth of the sociopolitical movements, present in different factions of the native people, changed dramatically the traditional scene of the Bolivian power relationship, which finally allowed Evo Morales – the leader of the *cocaleros* union – to rise to power and take office as president in 2006. As the first indigenous president in the country's history, he headed the government supported by his team of devoted followers (a cluster of grass-roots native leaders, neo-Marxist intellectuals, and urban socialists) until 2019. His government, officially representing the interests of native people, was in fact rather populist and innovative, searching for an anti-capitalist 'third way' of the country's development. However, ethnonationalist symbolism and nativist references to the Indian past were also frequently used for the political mobilization of native supporters of the regime. As a result of radical political changes, contemporary Bolivia is considered officially a multiethnic country, with the indigenous peoples (as the majority) playing an important role. Indian cultural heritage is protected and treated as a valuable part of the whole national tradition.

The native elite has a quite important position on the diversified indigenous scene. At least three categories of native authorities deserve to be mentioned. The most influential leaders include usually activists of different unions, representing interests of indigenous miners, peasants, coca growers, and small urban merchants. From the ideological point of view, the majority of them follow a trend which combines the ideas of social justice with selected traditional ethnic characteristics. The leaders more attached to the traditional values control the associations of *comunidades campesinas*, known also as *marcas* and *ayllus* (peasant

communities). Their indigenous members (*comuneros*) still follow many ancient ways, considered by them essential to keep the community alive, and try only to adapt traditional features to the modern conditions. The native intellectuals (scientists, philosophers, writers), as the third group of authorities, have only a limited impact on the current political matters, but their influence on the native way of thinking is significant. They contribute to the debate on ethnicity, reinterpret the indigenous history, and lead the discussion on the vision of Bolivia's future as the country governed by the native people. In their concept of ethnonationalism, such themes like nativist ideas, glorification of the indigenous past, appreciation of traditional patterns, and critique of the Western values are present and very strongly emphasized. All these attractive ethnic ideas are combined creatively, to some extent, with the leftist socio-economic proposals as well as with ecological slogans that today are popular worldwide.[48]

When moving further north, to Peru, one encounters an entirely different situation. The indigenous activism is relatively weak, despite the real size of the aboriginal population. According to some exaggerated estimations, the native group accounts for close to 44% or 45.5% of all citizens, which gives about 14 million to 15 million people. But according to the census of 2017, the percentage of the indigenous people was only about 26%, giving only 8.3 million people. According to the same source, the majority of the Peruvian population (60%) is made up of Mestizos. As we can see, the discrepancy between estimates and the 'objective' census is really great. The explanation can be found not in statistics but rather has to do mostly with cultural miscegenation (*mestizaje*) and constant acculturation of the natives, who aspire to be considered Mestizos. In this context, the crucial question is the ambiguous issue of self-identification and unclear criteria applied to assessment of the ethnic origin by census officials. Many decades of strong assimilation and the state integration policy towards the *indígenas* of the *sierra* (mountainous region) have transformed ethnic Indians, mostly the Quechua and to a lesser extent the Aymara nationalities, into the plain *campesinos* (peasants) and *comuneros* (members of a traditional rural community). Hence, the local countrymen of native background, still attached to traditional customs and their ethnic language, prefer to be identified according to their social position, instead of being seen (based on a common stereotype) as primitive 'Indios', that is people associated usually with the lowest prestige. The interethnic situation in Peru is gradually changing, mostly as a result of increased migration from the rural areas to the outskirts of big cities. The former *indígenas* gradually turning into peasants, when they settle down in shanty

[48] B. Gustafson, *New Languages of the State. Indigenous Resurgence and the Politics of Knowledge in Bolivia*, Durham: Duke University Press 2009; R. Gutiérrez Aguilar, *Los ritmos del Pachacuti. Movilización y levantamiento indígena – popular en Bolivia*, Buenos Aires: Tinta Limon 2008, L. E. Lopéz, P. Regalsky, *Movimientos indígenas y Estado en Bolivia*, La Paz: Plural 2005.

towns, become the first generation urban Mestizos maintaining only some symbolic attachment to their traditional ways.

Despite this, in the course of the last two decades, a gradual revival of the indigenous identity has been also observed in Peru. This process is partly stimulated and facilitated by the international law providing indigenous peoples with special protection. Achievements of the native activism in the neighbouring countries (Ecuador and Bolivia) and their potential influence on the situation in Peru cannot be ignored, either. And finally, there is one more factor: the urgent need to form efficient organizations, which could oppose the activities of industrial (mainly mining) companies responsible for serious damages to the environment and water pollution. Such associations of peasants have pretty soon discovered that it is much easier for them to attain their goal if they act as *indígenas*, whose territories should be protected in accordance with their special status of native people, guaranteed by the state and the international recommendations. Therefore, a new type of leaders has appeared who are involved in actions combining the ecological, social and ethnic issues in the interest of *campesinos-indígenas* (indigenous peasantry). In the southern part of Peru (Cusco and Titicaca areas), the ethnonationalist ideas are more significant than in the other regions of the country. They are manifested primarily in the symbolic sphere through references to the Inca heritage and traditional indigenous customs. It is worth mentioning that some forms of ethnonationalism, having its roots in native culture, can also be observed from time to time in the mainstream political life. This tendency has been mostly expressed by mestizo populist movements or parties, which incorporate selected indigenous features into their own manifests and symbolism. The purpose of this is to emphasize, by means of culture appropriation, their attractive political position, firstly, as a unique representation of all groups of the society, including people of indigenous ancestry, and secondly, as a manifestation of the ethnohistorical roots of the Peruvian nation, going back to the imperial time of the Incas.[49]

In sharp contrast to the situation in Peru, the indigenous people in Ecuador, mostly the Kichwa (the branch of the Quechua family) have a long-lasting tradition of organized social and ethnic movements, and the majority of them have maintained their native identity, despite the progress in education, modernization of their everyday life, and formation of the aboriginal middle class. Like in the other Andean countries, the size of the indigenous population is a question of debate, because the statistical discrepancies of published data are really significant, due to ambiguous criteria of ethnic identification and estimates based on various methods. According to the data provided by the state authorities,

[49] C. I. Degregori, P. Sandoval (eds), *Saberes periféricos. Ensayos sobre la antropología en América Latina,* Lima: IEP 2008; L. Abad Gonzáles, *Resistencia india organizada: el caso de Perú*, Quito: Abya-Yala 2006; R. Thorp, M. Paredes (eds), *La etnicidad y la persistencia de la desigualdad. El caso peruano*, Lima: IEP 2011.

the Indians constitute around 8% of the total population, which equals around 1.4 million people. Meanwhile, indigenous sources estimate the size of the native group as close to 39% of all citizens, which increases the number of natives to 6 million. Even if their number is assumed at somewhere between 3 million and 4.6 million (18% or 25%, according to more realistic data), it shows clearly how important position this group must have not only in terms of demographics but also in social and ethnic relations.

As a matter of fact, the Ecuadorian indigenous organizations and their very smart leaders started to conquest the country's political scene in the last decade of the twentieth century. Their successful ethnic activism was gradually transformed into the political machine facilitating control over many local administration offices, and simultaneously promoting some of the indigenous leaders to the top positions of the state government. They were able to unite almost all native forces of the country and build one strong federative organization (CONAIE), which could negotiate with the government on equal terms. The unique success of the Ecuadorian natives became a good example to follow for many other aboriginal movements across the whole Latin America, and even outside the continent. The leaders from Ecuador participated in many conferences, encounters and meetings abroad and contributed a lot to the official debate on the shape of the UN Declaration on the Rights of Indigenous Peoples. Another important feature which characterizes the situation of the native people in Ecuador is very well-established indigenous identity, observed both among rural population and in the emerging native, urban middle class, and even among emigrants to the US and Spain. Many years of interethnic conflicts, followed by cooperation with the state authorities led to the situation, in which ethnic ideas developed by the indigenous leaders did not function in opposition to the central government. The most important of them are such concepts as *pluriculturalidad* (cultural pluralism) and *multietnicidad* (multiethnicity), considered two important pillars of interethnic relations. The idea of *plurinacionalidad* (national pluralism), proposed by the Ecuadorian native elite as the third basic element of the ethnic equality, was not accepted by the state authorities, due to the risk of potential decomposition of the country.[50]

Comparing the four above-discussed examples of indigenous activity, it is quite easy to identify some main differences between these ethnic movements. The position of Chilean natives is definitely rebellious, anti-state, and even has some features of ethnic separatism. The indigenous people of Bolivia represent a strong socio-political trend, mixed with nativist ideas, and participate directly in the state politics. In Peru, the priorities are cultural and ecological issues dealt with by people of indigenous origin without questioning the integrational drive of

[50] J. Sánchez-Parga, *El movimiento indígena ecuatoriano. La larga ruta de la comunidad al partido*, Quito: Abya-Yala 2010; M. Becker, *Indians and Leftists in the Making of Ecuador's Modern Indigenous Movements*, Durham: Duke University Press 2008; M. Viatori, *One State, Many Nations: Indigenous Rights Struggles in Ecuador*, Santa Fe: SAR Press 2009.

the nation/state. And last but not least, Ecuadorian Indians form a well-integrated native group, who is very active politically, strongly attached to their heritage and ethnicity, and has developed a successful model of cooperation with the mainstream society and the central government.

6. CONCLUSION

The general overview of indigenous activism allows one to identify many common and similar features for native movements in the Andean countries, but also to define particular distinguishing features of the individual cases. However, regardless of the obvious differences, there is no doubt that in all of the analysed examples, new indigenous leaders and intellectuals play an important role in the organized ethnic mobilization, just as proponents of the 'indianismo' ideology (the model of an Indian society designed by the indigenous themselves). A set of native emancipatory ideas, formed in opposition to the concept of 'indigenismo' (paternalistic and integration policy of the nation/state towards indigenous people), facilitates the development of ethnonationalism.[51]

The modern indigenous elite has contributed to the improvement of living conditions of the native people, promoted the education of aboriginal youth (*educación intercultural*), and participated in forming of the incipient native middle class. The leaders have spread many emancipatory ideas, contributed to the recognition of indigenous cultural heritage and encouraged the natives to participate in the democratic changes taking place in the whole Andean region. This way, the principles of interculturalism, multiethnicity, linguistic plurality and recognition of indigenous rights have gradually begun to shape social and political reality of the Andean part of Latin America. Despite all these reforms, for now carried out primarily in the legal sphere, the real emancipation process is still far from completion; however, the general trend of changes, once started, seems to be potentially favourable to the indigenous peoples.

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[51] A. Posern-Zieliński, 2005, *op. cit*., pp. 197–200; R. Andolina, N. Laurie, S. A. Radcliffe, *Indigenous Developments in the Andes: Culture, Power, and Transnationalism*, Durham: Duke University Press, 2009, pp. 53–79.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.14

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CLIMATE CHANGE MITIGATION AND ADAPTATION: WITH OR AGAINST INDIGENOUS PEOPLES?

Abstract

Climate change and its negative consequences represent a common problem for all the people on Earth and are likely to become one of the most serious challenges that humankind faces. As such, mitigation measures and adaptation actions are of particular importance. Although often thought as the two sides of the same coin, the climate change mitigation and adaptation differ from each other, especially in the context of indigenous peoples. Therefore, the first part of the paper centres on the relation between climate change mitigation and adaptation and their consequences for indigenous communities. The newest international treaty on climate change, the Paris Agreement, establishes the global goal on adaptation, which should take into consideration vulnerable groups, communities and ecosystems, and more importantly, should be based on and guided by the best available science and knowledge of indigenous peoples, often referred to as 'traditional knowledge'. As such, the second part of the paper focuses on the adaptation methods guided by the traditional knowledge. Although examples include indigenous peoples' traditional knowledge from all over the globe, much attention is given to the Arctic Indigenous Peoples as, due to current speed of climate change, the Arctic is recognized as a global climate change hotspot. Although indigenous peoples have been living in their territories since the time immemorial, adapting their ways of life to the difficult weather and environmental conditions, with the current climate change happening so rapidly, their possibilities of adaptation are weakening and climate change renders them more vulnerable, altering their economic and cultural activities and threatening their very

existence. However, the current rate of climate change is not the only factor impairing the indigenous peoples' adaptive capacities. Therefore, the final part of the paper is aimed at presenting what the obstacles to the successful adaptation to climate change are and whether migration should be considered an adaptive action.

KEYWORDS

indigenous peoples, mitigation and adaptation to climate change, cultural aspect of climate change, the Arctic, traditional knowledge

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1. INTRODUCTION[1]

Climate change is probably the most unprecedented global environmental challenge of our time. Its impact is felt across all sectors and sections of society. The expected and already observed effects of climate change include an increase in global average air and ocean temperatures, widespread melting of snow and ice, and the rising global average sea level, as well as varying changes in precipitation, storm frequency, and landscape coverage. There is no doubt that climate change is a global problem. As such, there is a strong need for international consensus and more importantly – cooperation. The international climate change law cornerstone, the United Nations Framework Convention on Climate Change (UNFCCC), was signed by 154 states at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. Since then, the international climate change regime has been gradually expanding to include several international agreements, including the most recent one – the Paris Agreement. Although, at first glance, international climate change law may seem very distant from the issue of indigenous peoples' rights, making this law effective requires various approaches and participation of different stakeholders. This insight has been noted by the drafters of the latest instrument from the international climate change regime, the Paris Agreement, which makes reference both to the concept of human rights and to indigenous peoples.

[1] The author wishes to acknowledge the fact that the research done for this paper received funding from the National Science Centre (NCN) under the agreement 2020/37/N/HS5/00595.

Indigenous peoples have been identified as particularly sensitive to climatic changes, due to a high dependence on the environment for their livelihoods. The United Nations body for assessing the science related to climate change, the Intergovernmental Panel on Climate Change (IPCC), has stressed that people who are socially, economically, culturally, politically, institutionally, or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses.[2] As indigenous peoples continue to be marginalized, climate change will exacerbate many of existing barriers and in many cases will make their adaptive responses more difficult. Therefore, the first part of the paper centres on the relation between climate change mitigation and adaptation and their consequences for indigenous communities.

The latest international treaty on climate change, the Paris Agreement, establishes the global goal on adaptation, which should take into consideration vulnerable groups, communities and ecosystems, and more importantly, should be based on and guided by the best available science and knowledge of indigenous peoples, often referred to as 'traditional knowledge'. As such, the second part of the paper focuses on the adaptation methods guided by the traditional knowledge.

Although indigenous peoples have been living in their territories since the time immemorial, adapting their ways of life to the difficult weather and environmental conditions, with the current climate change happening so rapidly, their possibilities of adaptation are weakening and climate change renders them more vulnerable, altering their economic and cultural activities and threatening their very existence. However, the current rate of climate change is not the only factor impairing the indigenous peoples' adaptive capacities. Therefore, the final part of the paper is aimed at presenting what the obstacles to the successful adaptation to climate change are and whether migration should be considered an adaptive action.

2. ADAPTATION AND MITIGATION IN THE INTERNATIONAL CLIMATE CHANGE LAW

Climate change mitigation and adaptation are two core features of the system created by the UNFCCC and related instruments. Although very different, these two types of action are mutually indispensable for fighting climate change, yet they have distinct dimensions for indigenous peoples.

[2] Ch. B. Field, V. R. Barros, D. J. Dokken et al. (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge – New York 2014, p. 6.

Climate change mitigation involves human interventions that reduce greenhouse gas emissions from sources or enhance their removal from the atmosphere by carbon sinks (understood as elements that absorb CO_2, such as for example forests, vegetation, or soils).[3] The examples of mitigation actions include: replacing greenhouse gas-emitting fossil fuels like coal, oil, and natural gas with clean, renewable energies like solar, wind, and geothermal; retrofitting old buildings to make them more energy efficient; planting trees and preserving forests so they can absorb and store more carbon dioxide from the atmosphere.[4] To be successful, mitigation requires long-term planning, economic resources, and should be generally managed in a top-down manner.

Adaptation, on the other hand, is '[t]he process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects.'[5] Adaptation helps manage climate risk reducing it to an acceptable level, taking advantage of any positive opportunities that may arise. Adaptive actions are usually undertaken at a private, local and regional level, and require central managing to a lesser extent.

Adaptation could be understood as addressing the consequences of climate change, while the goal of mitigation is to address the cause of the problem. Adaptation options can be categorized into grey, green and soft measures. Grey measures refer to technological and engineering solutions to improve adaptation of territory, infrastructures and people. Green measures are based on the ecosystem-based (or nature-based) approach and make use of the multiple services provided by natural ecosystems to improve resilience and adaptation capacity. Soft options include policy, legal, social, management and financial measures that can alter human behaviour and styles of governance, contributing to improved adaptation capacity and to increased awareness on climate change issues.[6]

The UNFCCC refers to mitigation under Article 4(2)(a), stating that the developed country Parties and other Parties included in Annex I 'shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and

[3] K. J. Mach, S. Planton, Ch. von Stechow (eds), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R. K. Pachauri and L. A. Meyer (eds)], IPCC, Geneva 2014, p. 125.

[4] D. Rojas, *Climate Adaptation vs. Mitigation: What's the Difference, and Why does it Matter?* The Climate Reality Project, 7 November 2019, https://www.climaterealityproject.org/blog/climate-adaptation-vs-mitigation-why-does-it-matter (accessed 15.11.2022).

[5] K. J. Mach, S. Planton, Ch. von Stechow, 2014, *op. cit.*, p. 117.

[6] The European Climate Adaptation Platform Climate-ADAPT, *Adaptation Options*, https://climate-adapt.eea.europa.eu/knowledge/adaptation-information/adaptation-measures (accessed 15.11.2022).

enhancing its greenhouse gas sinks and reservoirs', and to adaptation in Article 4(4). While Article 4(2)(a) is quite detailed, Article 4(4) of the UNFCCC is limited only to financial assistance provided by the developed country Parties and other developed Parties included in Annex II to the 'developing country Parties that are particularly vulnerable to the adverse effects of climate change'.[7] Therefore, it is quite clear that in 1992 far greater emphasis was placed on mitigation than on adaptation to climate change.

As it has been mentioned, the mitigation actions include replacing greenhouse gas-emitting fossil fuels like coal, oil, and natural gas with clean, renewable energies like solar. Although indigenous peoples contribute little to greenhouse gas emissions and their ways of life are considered sustainable, very often they bear the burden of mitigation undertakings. For instance, biofuel initiatives are a means of reducing greenhouse gas emissions but may lead to an increase in monoculture crops and plantations and an associated decline in biodiversity and food security.[8]

In September 2019, the UN Special Rapporteur on human rights and the environment, David Boyd, conducted an official visit to Norway and identified several pressing challenges with regard to Norway's obligation to respect, protect and fulfil the human rights of the Sámi people. In Finnmark County, he found that the development of, inter alia, wind farms and hydroelectric power plants resulted in the disappearance and fragmentation of pasture lands and posed a serious threat to the sustainability of the reindeer husbandry, which is the primary subsistence activity for the Sámi.[9] The situation in Finnmark County is by no means an exception, as similar mitigation projects are being developed on indigenous lands all over the world. This, in turn, calls for environmental justice and creates a serious ethical dilemma, which requires careful analysis on the part of the authorities before any such project is developed. In any case, the minimum requirement should be prior consultation with an indigenous community concerned, which is compliant with Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'[10]

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[7] United Nations Framework Convention on Climate Change, 9 May 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

[8] United Nations, Department of Economic and Social Affairs, *Climate Change*, https://www.un.org/development/desa/indigenouspeoples/climate-change.html (accessed 15.11.2022).

[9] The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2020*, Copenhagen 2020, p. 529.

[10] United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, adopted on 13 September 2007.

The Paris Agreement, on the other hand, gives a lot of attention to both of the concepts, and especially to the adaptation. The discourse of adaptation gradually appeared in the literature on climate change in the 1990s, and in 2001, the Intergovernmental Panel on Climate Change for the first time claimed that adaptation strategy was necessary 'to complement climate mitigation efforts at all scales'.[11] A strong emphasis on adaptation in the Paris Agreement, an instrument adopted in 2015, may indicate a consensus that climate changes are inevitable, and only their extent and severity are at stake.

Article 7 of the Paris Agreement stipulates 'the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal'.[12] In Article 7(5): 'Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach'.[13] This approach should take into consideration vulnerable groups, communities and ecosystems, and more importantly, it should be based on and guided by the best available science and traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate. However, as the latest studies indicate, indigenous peoples are rarely consulted and their views are not incorporated into the national policies,[14] including the Nationally Determined Contributions, i.e. a governments obligation under the Paris Agreement.[15] Therefore, the following section details what the traditional knowledge, or indigenous knowledge, is and how it could be beneficial for both indigenous and non-indigenous communities.

[11] See M. Fayazi, I.-A. Bisson, E. Nicholas, *Barriers to Climate Change Adaptation in Indigenous Communities: A Case Study on the Mohawk Community of Kanesatake, Canada*, 'International Journal of Disaster Risk Reduction' 2020, Vol. 49, p. 1.

[12] Paris Agreement adopted at the UN Climate Change Conference of the Parties to the United Nations Framework Convention on Climate Change, 12 December 2015, UN Treaty Series, Vol. 3156, Article 7(1).

[13] *Ibid*., Article 7(5).

[14] See C. R. Bijoy et al., *Nationally Determined Contributions in Asia: Are Governments Recognizing the Rights, Roles and Contributions of Indigenous Peoples?* Asia Indigenous Peoples Pact (AIPP) Foundation, Chiang Mai 2022.

[15] See M. Mills-Novoa, D. M. Liverman, *Nationally Determined Contributions: Material Climate Commitments and Discursive Positioning in the NDCs*, 'WIREs Climate Change' 2019, Vol. 10(5).

3. TRADITIONAL KNOWLEDGE AND INDIGENOUS VALUES

Although there is no uniform legal definition of indigenous peoples, and neither there should be one, the characteristic feature of the communities that define themselves as 'indigenous' is the central role of their culture and traditions, distinct from those of the mainstream or dominant society, and their relationship to the surrounding environment. According to W. Neil Adger, culture, defined as the symbols that express meaning, including beliefs, rituals, art and stories, creates collective outlooks and behaviours, and is a source from which strategies to respond to problems are devised and implemented.[16] One of the elements of indigenous culture is called traditional knowledge, which makes reference to knowledge and know-how accumulated across generations that guide human societies in their innumerable interactions with their surrounding environment,[17] and can be defined as 'a cumulative body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission.'[18] As culture and traditional knowledge are central to indigenous peoples, they are also central to their adaptive capacities and will guide their adaptation methods.

There are myriad ways in which indigenous peoples express their adaptive capacity, using traditional knowledge. In Africa, a water harvesting technique originating from the Sahel and known as *zai* pits or *tassa* helps restore degraded drylands through climate-smart agriculture, while in Vanuatu, traditional architecture proved to be a key factor in disaster risk reduction, as the communal buildings used as evacuation centres during Cyclone Pam in 2015 were found much safer and stronger when built using local materials and building skills.[19]

An example of how integrating traditional knowledge can benefit the process of adaptation are the Low Impact Shipping Corridors, i.e. the adaptation strategy developed by the Canadian Government that supports safety and sustainability under rapidly changing environmental conditions.[20] The Low Impact Shipping Corridors in Canadian Arctic are voluntary maritime routes where services and

[16] W. N. Adger et al., *Cultural Dimensions of Climate Change Impacts and Adaptation*, 'Nature Climate Change' 2013, Vol. 3(2), p. 112.

[17] D. J. Nakashima et al., *Weathering Uncertainty: Traditional Knowledge for Climate Change Assessment and Adaptation*, UNESCO, Paris 2012, p. 29.

[18] D. Riedlinger, F. Berkes, *Contributions of Traditional Knowledge to Understanding Climate Change in the Canadian Arctic*, 'Polar Record' 2001, Vol. 37(203), p. 315.

[19] United Nations High Commissioner for Refugees, *Indigenous Peoples' Knowledge and Climate Adaptation*, Fact Sheet, 9 August 2020, https://www.unhcr.org/5f3104104.pdf (accessed 15.11.2022).

[20] J. Dawson et al., *Infusing Inuit and Local Knowledge into the Low Impact Shipping Corridors: An Adaptation to Increased Shipping Activity and Climate Change in Arctic Canada*, 'Environmental Science & Policy' 2020, Vol. 105.

infrastructure investments are prioritized. When corridors were first established, indigenous knowledge was not included in their development and 'the corridors lacked local perspective from the people who know the area best and (…) the cultural significance of marine areas.'[21] The input from the indigenous communities proved valuable and allowed a wider perspective. For example, community members from the Inuvialuit settlement region recommended that ships avoid Baillie Island area as a rare plant species grows on this Island, and thus they recommended that ships be limited to coming within 16 km offshore in order to limit coastal erosion in that area,[22] while community members from Ulukhaktok recommended the creation of no ice-breaking zones as ice-breaking could negatively impact caribou migration routes.[23] This exemplifies that inclusion of indigenous knowledge into adaptive strategies can ensure protection of flora and fauna. However, integrating indigenous knowledge is beneficial not only for the ecosystems and communities concerned but also for the safety of other people. In this regard, in the context of Low Impact Shipping Corridors, Sachs Harbour community members recommended that Prince of Wales Strait 'be avoided by all ships at all times' as, in their view, 'this Strait can be very dangerous as there is an island in the middle that is partially submerged by water thus there is a high risk of groundings or other accidents and incidents.'[24] In the global context, e.g. in Latin America and Australia, indigenous fire-management practices has been identified as 'reducing the occurrence of dangerous fires, increasing biodiversity, and enhancing carbon sinks', which is beneficial for the whole planet.[25]

One of the adaptive methods of indigenous peoples is the exchange of traditional knowledge between different, and sometimes culturally distant, communities. As the current climate change distorts the migration patterns of various animals in Nunatsiavut, an autonomous area claimed by the Inuit in Newfoundland and Labrador in Canada, the Nunatsiavut Government is leading an indigenous knowledge exchange project with First Nations hunters from the Northwest Territories: 'First Nations hunters will come to Nunatsiavut to build capacity and provide the necessary skills to Labrador Inuit related to moose harvesting and processing. In exchange, Labrador Inuit will share their expertise on the harvesting, processing and use of ringed seals.'[26]

Some communities are working to address the changing climate by combining their indigenous knowledge with other information sources to try and predict weather events, for example, by collaborating with the NASA and using satellite

[21] *Ibid*., p. 20.

[22] *Ibid*., p. 27.

[23] *Ibid*., p. 30.

[24] *Ibid*., p. 27.

[25] J. D. Ford et al., *The Resilience of Indigenous Peoples to Environmental Change*, 'One Earth' 2020, Vol. 2(6), p. 535.

[26] Inuit Tapiriit Kanatami, *National Inuit Climate Change Strategy*, Ottawa 2019, p. 9.

research systems to complement their own observations, as in the case of reindeer herding in Siberia.[27] According to Cuthbert C. Makondo and David S. G. Thomas, whose research in Zambia focused on food security, the combination of traditional or indigenous and scientific knowledge is potentially one of the best ways to successful adaptation, as 'modern problems cannot be solved with singular, mechanistic, science-centred solutions alone.'[28]

Non-recognition and non-inclusion of indigenous perspectives and lack of culturally-specific approaches to adaptation to climate change can seriously hamper indigenous peoples' possibilities of adaptation. James D. Ford, Graham McDowell and Tristan Pearce claim that adaptive capacity may not necessarily translate into actual adaptation[29] and, as W. Neil Adger et al. point out, cultural dimensions of climate change 'are rarely and only partially included in conventional assessments of climate change impacts and adaptation.'[30] Therefore, the disregard for indigenous peoples culture should be identified as one of the obstacles to the successful adaptation.

4. VULNERABILITY DOES NOT FALL FROM THE SKY: OBSTACLES TO SUCCESSFUL ADAPTATION OF INDIGENOUS PEOPLES

Although indigenous peoples have been adapting to environmental conditions since the time immemorial, the current climate change is progressing faster than traditional knowledge can adapt and is strongly affecting people in many communities. Due to the worst snow condition, for example, the Inuit from Pangnirtung, Nunavut, Canada, are forced to use tents during their hunting trips:

> The snow is not the same anymore. The bottom of the snow is a lot softer than it used to be. It's no good for igloos anymore. [Twenty years ago] we used to be able to stop anywhere we needed a place to sleep just to build an igloo and sleep in that igloo. And nowadays you can't just find good snow anywhere. In [those] days we used to find them anywhere. The condition of the snow is not very good, the bottom of it is

[27] K. Galloway McLean, *Land Use, Climate Change Adaptation and Indigenous Peoples*, Our World. United Nations University, 8 October 2012, https://ourworld.unu.edu/en/land-use-climate-change-adaptation-and-indigenous-peoples (accessed 15.11.2022).

[28] C. C. Makondo, D. S. G. Thomas, *Climate Change Adaptation: Linking Indigenous Knowledge with Western Science for Effective Adaptation*, 'Environmental Science & Policy' 2018, Vol. 88, p. 89.

[29] J. D. Ford, G. McDowell, T. Pearce, *The Adaptation Challenge in the Arctic*, 'Nature Climate Change' 2015, Vol. 5(12), p. 1050.

[30] W. N. Adger et al., 2013, *op. cit.*, p. 116.

> very soft. So that's what I've notice in the snow as well – not only on the bottom but on the top as well.[31]

Tents, however, do not provide such good insulation as igloos and, what follows, the lack of good igloo snow poses a greater danger in emergency situations because igloos are vital emergency shelters during hunting trips.

Yet it is not only the rapidity of the climate change that can impede the successful adaptation of indigenous peoples. On the one hand, indigenous peoples have been identified as 'highly vulnerable' in the global climate change discourse, especially in studies focused on techno-engineering adaptations.[32] On the other hand, a 'growing body of research illustrates that indigenous peoples have significant resilience and are actively observing and adapting to change in a diversity of ways.'[33] As noted above, historically indigenous peoples have demonstrated high adaptability, however, new vulnerabilities are emerging that relate to ongoing societal and environmental changes. As Jesse Ribot warns 'vulnerability does not just fall from the sky',[34] but it is rather socially constructed.

The colonization that indigenous peoples were subjugated to has still impact on their lives, making adaptation to climate change much more difficult. According to Mark Nuttall, Pierre-André Forest and Svein D. Mathiesen:

> Today, Arctic peoples cannot adapt, relocate, or change resource use activities as easily as they may have been able to do in the past, because most now live in permanent communities and have to negotiate greatly circumscribed social and economic situations. The majority of indigenous peoples live in planned settlements with elaborate infrastructures and their resource activities are determined to a large extent by strict resource management regimes, regulatory and legal regimes, land use and land ownership regulations, quotas and local and global markets.[35]

As such, the colonization during which indigenous peoples were forced to settle in a certain area, usually not of their choice, is now limiting their adaptive capabilities. This can be exemplified by the history of the Yup'ik village of Newtok. The Yup'ik used to be a seasonally nomadic indigenous group of what is now Alaska, who moved between camps as they hunted seals, moose, and musk oxen

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[31] Sh. Watt-Cloutier, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 7 December 2005, http://www. ciel.org/ Publications/ICC_Petition_7Dec05.pdf (accessed 15.11.2022), p. 42.

[32] J. D. Ford, G. McDowell, T. Pearce, 2015, *op. cit.*, p. 1046.

[33] J. D. Ford et al., 2020, *op. cit.*, p. 532.

[34] See J. Ribot, *Vulnerability does not Just Fall from the Sky: Toward Multiscale Pro-poor Climate Policy*, (in:) M. R. Redclift, M. Grasso (eds), *Handbook on Climate Change and Human Security*, Edward Elgar Publishing 2013, pp. 164–172.

[35] M. Nuttall, P.-A. Forest, S. D. Mathiesen, *Adaptation to Climate Change in the Arctic*, A background paper prepared for the joint UArctic Rectors' Forum and Standing Committee of Parliamentarians of the Arctic seminar, Rovaniemi, 28 February 2008, pp. 4–5.

and gathered berries and wild greens, and for whom Newtok was just a winter settling place. Every spring before the river ice broke, the Yup'ik would travel across the river to Nelson Island where they set up summer tents. In the 1950s, however, the Bureau of Indian Affairs began building schools for the tribes in rural Alaska and a site was selected for them to settle without first seeking residents' input.[36] Not long after the village was established, the people of Newtok realized that the distant riverbank was eroding very quickly.[37] The rapid warming and rising of the sea level resulted in the village being almost inhabitable. Although in 2003 the Congress agreed to create the new village of Mertarvik on higher, volcanic ground and the plot of land was secured through a land exchange with the National Department of Fish and Wildlife, the relocation started only in October 2019.[38] It remains to be guessed whether the Yup'ik, had they been consulted in the 1950s, would need to be relocated due to coastal erosion induced by climate change.

The story of the Yup'ik raises a question whether migration should be considered an adaptation action. Although primarily migration was labelled as a consequence of climate change, currently it is being described as a form of human adaptation.[39] It is argued that, '[w]hile for some groups, under certain circumstances, migration can be an effective form of adaptation, for others it leads to increased vulnerabilities and a poverty spiral, reducing their adaptive capacities.'[40] Changing livelihood activities and relocation may be viewed as adaptation strategies by outsiders, but for communities this may represent the loss of important values.[41] Under Article 10 of the UNDRIP: 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.' However, in many instances the exposure to the climate change and the inaction of states forces indigenous peoples to migrate, which in consequence renders them more vulnerable to discrimination and exploitation in destination areas. Moreover, a vast majority of indigenous communities does not want to leave their home areas.[42] There is strong evidence that when people are displaced from places that they value, their cultures are diminished, and in

[36] C. Welch, *Climate Change has Finally Caught up to this Alaska Village*, 'National Geographic' 22 October 2019, https://www.nationalgeographic.com/science/article/climate-change-finally-caught-up-to-this-alaska-village (accessed 15.11.2022).

[37] *The Village – Newtok*, Relocate Network, https://relocatenewtok.org/about (accessed 15.11.2022).

[38] *Mertarvik*, Relocate Network, https://relocatenewtok.org/mertarvik (accessed 15.11.2022).

[39] K. Vinke et al., *Migration as Adaptation?* 'Migration Studies' 2020, Vol. 8(4), p. 626.

[40] *Ibid*.

[41] J. D. Ford, G. McDowell, T. Pearce, 2015, *op. cit.*, p. 1050.

[42] See I. Wiśniewska, *Migot. Z krańca Grenlandii*, Wydawnictwo Czarne 2022.

many cases endangered.[43] As such, migration should be considered a last-resort adaptation measure.

Another obstacle to successful adaptation of indigenous peoples is the lack of official title to their lands. In the Pacific Islands, for instance, the disposition of land has made indigenous peoples more vulnerable to drought impact since they do not have the ability to relocate or diversify their agriculture.[44] Also the resource-based activities of indigenous peoples are determined to a large extent by strict resource management regimes, which furthermore limits their adaptive possibilities. In their work in interior Alaska, F. Stuart Chapin et al. document how formal state and federal institutions that manage ecosystem services remain focused on controlling a single resource as opposed to managing whole ecosystems.[45] Current laws regulating the protection of the environment have restrictive effect on the lives of indigenous peoples, like for example in Greenland, where during most of the year the Inuit can only hunt seals, which do not provide enough meat to feed the families and whose meat is usually only sufficient to feed the dogs, used later in travel.[46] Moreover, the market value of seals is low and does not allow providing for a family. Without income or possibility of proper alimentation, the quality of life and possibility of adaptation to current climate changes are deteriorating.

5. CONCLUSION

Although climate change mitigation and adaptation are two core features of the system created by the UNFCCC and related instruments, they have different roles in fighting climate change. While the former addresses the cause of the problem and is generally managed in a top-down manner, the latter aims at managing climate risk at an acceptable level and involves a bottom-up approach.

As the research indicates, indigenous peoples very often bear the burden of mitigation undertakings. Although indigenous peoples have been identified as particularly vulnerable to climate change, the research shows that they demonstrate a high level of resilience and adaptive capacity. Yet, in order to be successful, the adaptation process must include indigenous worldviews, culture and traditional knowledge, and it must be conducted by indigenous peoples according

[43] W. N. Adger et al., 2013, *op. cit*., p. 113.

[44] J. D. Ford et al., 2020, *op. cit*., p. 535.

[45] See F. S. Chapin, et al, *Policy Strategies to Address Sustainability of Alaskan Boreal Forests in Response to a Directionally Changing Climate*, 'Proceedings of the National Academy of Sciences of the United States of America' 2006, Vol. 103(45).

[46] I. Wiśniewska, 2022, *op. cit*., pp. 47–72.

to their customs.[47] As pointed out by W. Neil Adger et al., in climate change adaptation, 'culture and politics interact to determine who has voice, whose values count and what information is legitimate.'[48] The roots of indigenous peoples' sensitivity to climate change are closely linked to the experience of colonization and continued marginalization by the settler states. The obstacles to the successful adaptation to climate change include the rapidity of the current climate change, but also the disinterest in a culture-specific approach, represented by traditional knowledge, the lack of formally recognized ownership to indigenous lands and control over the resources. Therefore, in order to develop effective long-term adaptation strategies, it is necessary to remove or reduce the underlying structural determinants of vulnerability. Where indigenous rights are recognized and significant decision-making power is locally held, the resources are used in a sustainable manner, which contributes to the conservation of biodiversity and reduces deforestation and land degradation.[49] Since adaptation to climate change is something that primarily takes place at the local level, it is important that indigenous peoples themselves define the risks related to this rapid change.

As it has been shown, the integration of indigenous knowledge into adaptation actions can be beneficial both for the indigenous communities and for the non-indigenous parties involved. Therefore, the approach of the Paris Agreement, which underlines the value of indigenous knowledge, should be seen as an example of good practice and included into national legal systems. However, the efforts should not end there, as states should take into account not only the provisions of the Paris Agreement but also the UNDRIP recommendations. Although efforts are increased globally to protect indigenous rights, decisions on land use, development, and resource management continue to receive a limited input from indigenous peoples, and without addressing the underlying causes of vulnerability that are rooted in marginalization, disempowerment and colonization, there is hardly a chance for successful adaptation of indigenous peoples to climate change.

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[47] See E. K. Galappaththi, J. D. Ford, E. M. Bennett, F. Berkes, *Climate Change and Community Fisheries in the Arctic: A Case Study from Pangnirtung, Canada*, 'Journal of Environmental Management' 2019, Vol. 250.

[48] W. N. Adger et al., 2013, *op. cit.*, p. 114.

[49] J. D. Ford et al., 2020, *op. cit.*, p. 535.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.15

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THE RIGHTS OF INDIGENOUS PEOPLES IN INDONESIA IN THE CONTEXT OF 'RESPONSIBILITY TO PROTECT'

Abstract

The concept of 'responsibility to protect' (RtoP) was adopted at the United Nations World Summit by the Member States in 2005. The first pillar of this principle laid down in paragraph 138 of the World Summit Outcome Document of the UN General Assembly obliges states to protect their population from genocide, war crimes, crimes against humanity, and ethnic cleansing. This paper aims to prove that Indonesia not only endorsed this idea at the diplomatic level but also implemented a mechanism which protects the indigenous community in the event of serious human rights violations. The Indonesian system is based on the state's obligations arising from ratified international human rights treaties and the national institutions, such as the Indonesian National Commission on Human Rights (Komnas HAM) and Human Rights Courts that respond to the first pillar of the responsibility to protect. This paper presents the international and national legislation as well as the mechanism set up by the Indonesian authorities to protect indigenous people in cases of serious human rights violations. It focuses on examples of the actions undertaken by Komnas HAM and the ad hoc tribunal established at the permanent Human Rights Court in connection with situations where the rights of the Papuan people were violated. Despite the imperfection of the system, the conclusion is that the Indonesian state has the instruments necessary to protect the rights of the indigenous communities according to the RtoP principle embodied in paragraph 138 of the UN World Summit Outcome Document.

KEYWORDS

responsibility to protect, Indonesia, Komnas HAM, human rights courts

SŁOWA KLUCZOWE

‘odpowiedzialność za ochronę’, Indonezja, Komnas HAM, sądy praw człowieka

1. INTRODUCTION

At the United Nations World Summit in 2005, Member States adopted the Responsibility to Protect principle (RtoP), which was recognized as an outstanding achievement in the field of human rights and international security. In line with this principle, governments made a commitment to protect their citizens against genocide, war crimes, ethnic cleansing and crimes against humanity.[1] This commitment is included in the first of the three pillars on which the RtoP is based, according to paragraph 138 of the UN World Summit Outcome Document that was adopted by the General Assembly in 2005. The other two pillars relate to assisting other countries to fulfil this obligation, and to declaring that the international community will take action if a country manifestly fails to protect its citizens in the event of atrocity crimes.[2]

In 2001, the above rules were initially embodied in the report ‘Responsibility to protect’ by the International Commission on Intervention and State Sovereignty (ICISS) established by the Government of Canada and the UN General Assembly (UN GA). The commission specified the responsibilities of states: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild, which should be competences of governments and national institutions. Moreover, the experts noticed that in order to prevent possible conflicts, state authorities should

[1] Ł. Kaługa, *Odpowiedzialność za ochronę jako odpowiedź społeczności międzynarodowej na zbrodnię ludobójstwa*, ‘Międzynarodowe Prawo Humanitarne’ Vol. 5, 2014, pp. 102–123, at pp. 103–106, https://www.researchgate.net/publication/330555710_ODPOWIEDZIALNOSC_ZA_OCHRONE_JAKO_ODPOWIEDZ_SPOLECZNOSCI_MIEDZYNARODOWEJ_NA_ZBRODNIE_LUDOBOJSTWA_RESPONSIBILITY_TO_PROTECT_AS_A_RESPONSE_OF_INTERNATIONAL_COMMUNITY_TO_THE_CRIME_OF_GENOCIDE (accessed 24.06.2020).

[2] United Nations, World Summit Outcome, Resolution adopted by the General Assembly on 16 September 2005, A/RES/60/1, 24 October 2005, paras 138–139, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (accessed 28.10.2020).

provide fair treatment to all citizens through good governance based, inter alia, on accountability, transparency and the rule of law.[3]

This paper aims to prove that in order to fulfil its protection responsibility under paragraph 138 of the UN World Summit Outcome Document of the UN GA from 2005, the Indonesian government responded by adopting international human rights treaties, and establishing national laws and institutions that protect the indigenous communities from serious human rights violation.

During President Suharto's rule (1966–1998), the indigenous peoples were deprived of most of their rights, such as the right to land and natural resources. The government policy has led not only to the expropriation of these communities, but also to the degradation of their natural environment. Injustice and poverty caused rebellions in the population, which were brutally pacified by the security forces.[4] The scale of violence, the disproportionate use of security forces against the population and, above all, the impunity of the perpetrators caused the society, after the fall of the authoritarian power, to expect the new democratic government would design a system that would strengthen the rule of law and restore the sense of justice among the citizens.[5]

Consequently, the Indonesian government established the Human Rights Courts in 2000, which are competent to handle serious human rights violations. The Indonesian National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, henceforth Komnas HAM) has a mandate to conduct preparatory proceedings in such cases. According to the Indonesian law, Komnas HAM was the only institution to receive such authorization.[6] One of the aims of the commission's activity is to protect the rights of vulnerable groups, such as indigenous communities,[7] which is important in the context of protecting their rights as in Indonesia this problem affects 50 million to 70 million people.[8]

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[3] G. Evans, M. Sahnoun (co-chairs), *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*, Ottawa 2001, p. XI, 19, http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 28.10.2020). The definition of 'good governance', according to the United Nations Economic and Social Commission for Asia and the Pacific, contains these principles; see https://www.unescap.org/sites/default/files/good-governance.pdf (accessed 30.10.2020).

[4] Ł. Bonczol, *Zrozumieć Indonezję. Nowy Ład generała Suharto*, Warszawa 2012, pp. 133, 224–229.

[5] K. Setiawan, *The Human Rights Courts: Embedding Impunity*, (in:) M. Crouch (ed.), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, Cambridge: Cambridge University Press 2019, pp. 287–310, at p. 287.

[6] *Ibid*., pp. 287, 294.

[7] *Visi & Misi*, Komnas HAM, https://www.komnasham.go.id/index.php/about/2/visi-amp-misi.html (accessed 24.06.2020).

[8] As estimated by the Indonesian Peoples' Alliance of the Archipelago (AMAN), which comprised 2,359 ethnic groups claiming to be Indonesian indigenous peoples, in Indonesia the protection of the rights of indigenous peoples concerned 50 million to 70 million people. See *Statement of AMAN/The Indigenous Peoples Alliance of the Archipelago Related to the Siege and*

The actions of the Indonesian government were reflected in its official position expressed at the United Nations in New York on 8 September 2014 in relation to the report of the UN Secretary-General: *Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect*. A representative of the Indonesian authorities noted that: 'Indonesia has always supported the three pillars of the responsibility to protect, and committed itself to active participation and deliberation on implementing them. It is our unwavering position that the Responsibility to Protect is, and must be, a universal principle.'[9]

This paper presents how the Indonesian state fulfilled its obligation under the first pillar of RtoP in relation to the indigenous communities. Accordingly, the first part of the paper discusses the legal protection system in place in Indonesia, by means of which the Indonesian authorities implement the arrangements made at the UN 2005 World Summit regarding the 'responsibility to protect'. The second part of the paper describes actions the state took in cases of serious violations of the indigenous peoples' rights in the province of Papua, where the Komnas HAM was involved in the protection of the rights of the Papuan people, and a specially ad hoc tribunal was appointed to resolve one of the cases.

2. THE MECHANISM OF PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES AND ITS RELATION TO RTOP

The protection of the rights of indigenous peoples in Indonesia is based on the state's obligations resulting from the international human rights treaties and on national legislation.[10] In this context, an important development was also a national mechanism consisting in strong institutions operating according to the rules of good governance, which were to monitor the human rights situation and to deal with cases of serious human rights violations. Therefore, the Indonesian government established two institutions: the Human Rights Courts and the National Commission on Human Rights, Komnas HAM, to fulfil the human rights mandate.

Recent Attacks against Papua Students in Surabaya, http://www.aman.or.id/2019/08/statement-of-aliansi-masyarakat-adat-nusantara-the-indigenous-peoples-of-the-archipelago-related-to-the-siege-and-recent-attacks-against-papua-students-in-surabaya (accessed 24.06.2020).

[9] *Statement by Deputy Permanent Representative of the Republic of Indonesia to the United Nations at the Informal Interactive Dialogue on the Report of the Secretary-General on 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect'*, New York, 8 September 2014, http://s156658.gridserver.com/media/files/indonesia-2.pdf (accessed 15.10.2020).

[10] It should be noted that Article 7(2) of the Law No. 39 of 1999 on Human Rights recognizes that all international treaties Indonesia ratifies become domestic law.

Indonesia is a state party to eight out of nine international treaties and some optional protocols on the protection of human rights that are described as the core international treaties by the United Nations Human Rights Office of the High Commissioner.[11] The wide range of provisions they contain covers many problems that refer also to indigenous communities. Some of them directly relate to the protection of the rights of indigenous communities. An example of this is the joint Article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights adopted by the UN GA on 16 December 1966, which refers to the right to self-determination and the free pursuit of economic, social and cultural development. Moreover, the International Covenant on Civil and Political Rights grants members of ethnic minorities the right to practice their own culture, religion and language (Article 27). In the context of protecting the rights of indigenous peoples, the Human Rights Committee stated that these rights were particularly important to indigenous peoples as they covered the entire spectrum of their customary activities.[12]

Two articles of the Convention on the Rights of the Child, adopted by the UN GA on 20 November 1989, also deserve attention as they emphasize that children belonging to indigenous communities have the right to practice their own culture, religion and language (Article 30) and stress the importance of educating children in tolerance and friendship (Article 29(d)). Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted by the UN GA on 21 December 1965), which prohibits all forms of discrimination based on race, colour, national or ethnic origin, is also important for the protection of the rights of indigenous peoples, especially as many of the human rights violations against the indigenous community are ethnically motivated. Due to their particular traditions, culture and way of living, the indige-

[11] Indonesia is a state party to: the Convention on the Elimination of All Forms of Discrimination against Women (adopted by the UN GA on 18 December 1979), the Convention on the Rights of the Child (adopted by the UN GA on 20 November 1989), the International Convention on the Elimination of All Forms of Racial Discrimination (adopted by the UN GA on 21 December 1965), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the UN GA on 10 December 1984), the International Covenant on Economic, Social and Cultural Rights (adopted by the UN GA on 16 December 1966), the International Covenant on Civil and Political Rights (adopted by the UN GA on 16 December 1966), the Convention on the Rights of Persons with Disabilities (adopted by the UN GA on 13 December 2006), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted by the UN GA on 18 December 1990). Indonesia is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance (adopted by the UN GA on 23 December 2010). See https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx (accessed 28.10.2020).

[12] United Nations Human Rights Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System*, Fact Sheet No. 9/Rev.2, pp. 19–20, https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf (accessed 24.06.2020).

nous communities are exposed to acts of discrimination and marginalization in societies they live in.[13]

Regarding the rights of indigenous peoples, it should be noted that the Indonesian government has not adopted the Optional Protocol to the International Covenant on Civil and Political Rights (adopted by the UN GA on 16 December 1966), which is relevant from the victims' point of view. The provisions of the protocol allow individuals to submit a complaint against the state to the UN Human Rights Committee when their government violates the provisions of the above-mentioned pact. In the event of violating these rights by Indonesian state officials, victims or their families cannot appeal to this UN body that is particularly dedicated to monitoring the implementation of the International Covenant on Civil and Political Rights in national legislations.[14]

The Republic of Indonesia is not a state party to the Indigenous and Tribal Peoples Convention No. 169 of the International Labour Organization (adopted in Geneva on 27 June 1989),[15] an international legally binding instrument guaranteeing the rights of indigenous and tribal peoples in independent countries and essential for the protection of the indigenous peoples' rights. However, Indonesia's authorities adopted the most comprehensive international document on this subject: the Declaration on the Rights of Indigenous Peoples.[16] It is worth emphasizing that although the declaration is not legally binding, it still constitutes a moral promise and political statement of the state regarding the protection of rights of indigenous communities.[17]

The issue of protection of the rights of indigenous peoples was also regularly discussed by the Indonesian authorities as part of the Universal Periodic Review (UPR) sessions in which Indonesia has regularly participated since its launch by the Human Rights Council in 2006.[18] In connection with the ratification of international treaties on the protection of human rights, Indonesia has been regularly cooperating with independent experts in the field of human rights within

[13] Special Rapporteur on the Rights of Indigenous Peoples, https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx (accessed 29.10.2020)

[14] UN Human Rights Office of the High Commissioner, *Ratification of 18 International Human Rights Treaties*, https://indicators.ohchr.org (accessed 24.06.2020).

[15] International Labour Organization, *Ratifications for Indonesia*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102938 (accessed 24.06.2020).

[16] United Nations Declaration on the Rights of Indigenous Peoples (Resolution A/RES/61/295 adopted by the UN GA on 13 September 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 24.06.2020).

[17] H. Schreiber, *Globalizacja i azjatyckie ludy tubylcze*, (in:) J. Nakonieczna, J. Zajączkowski (eds), *Azja Wschodnia i Azja Południowa w stosunkach międzynarodowych*, Warszawa 2011, p. 151.

[18] United Nations Human Rights Council, *Universal Periodic Review – Indonesia*, https://www.ohchr.org/EN/HRBodies/UPR/Pages/IDindex.aspx (accessed 03.06.2020).

the framework of special procedures and treaty bodies, i.e. committees to monitor the implementation of international treaties on the protection of human rights.[19]

The protection of the rights of indigenous peoples became the subject of discussions between representatives of the Indonesian authorities and the UN Special Rapporteurs during their visits to Indonesia in 1998–2018, such as the missions of the Special Rapporteur on the situation of human rights defenders (5–12 June 2007), on torture and other cruel, inhuman or degrading treatment or punishment (10–23 November 2007), on the right to using the highest attainable standard of physical and mental health (22 March–3 April 2017) and on the right of access to food (9–18 April 2018).[20] Despite the fact the Special Rapporteur on the Rights of Indigenous Peoples has not visited Indonesia yet, the expert holds dialogue with the Indonesian authorities on cases concerning violations of the rights of these communities.[21] However, in 2018–2020, the Indonesian government did not renew the standing invitations for the Special Rapporteurs of the Human Rights Council,[22] which was a precedent in many years of cooperation within the UN mechanisms.

Indonesian legislation stipulates that the responsibility for the implementation of human rights rests with the state. The relevant provisions are contained in the 1945 Constitution (Article 28I(4)), the People's Consultative Assembly Resolution (TAP MPR) No. XVII/MPR/1998 (Article 43) and the Law No. 39 of 1999 on Human Rights (Articles 8, 71), which oblige the government and the president to protect human rights in accordance with international treaties and national reg-

[19] See: UN Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/2, 31 March 2008, https://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ID/A_HRC_WG6_1_IDN_2_E.pdf (accessed 28.10.2020); UN Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, A/HRC/WG.6/13/IDN/2, 12 March 2012, https://www.refworld.org/docid/50040d1f2.html (accessed 28.10.2020); UN Human Rights Council, *Compilation on Indonesia. Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/27/IDN/2, 17 February 2017, https://www.refworld.org/pdfid/5914663c4.pdf (accessed 28.10.2020).

[20] United Nations Human Rights Office of the High Commissioner, *Indonesia*, https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/IDIndex.aspx (accessed 03.06.2020).

[21] UN Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. Addendum: Communications sent, replies received and observations, 2012–2013*, A/HRC/24/41/Add.4, 2 September 2013, https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A_HRC_24_41_Add.4_ENG.doc (accessed 03.06.2020).

[22] UN Human Rights Office of the High Commissioner, *Standing Invitations*, https://spinternet.ohchr.org/StandingInvitations.aspx?lang=en (accessed 03.06.2020). The standing invitations are open invitations extended by states in order to allow UN experts working in protection of human rights to conduct their country visits. See UN Human Rights Office of the High Commissioner, *Standing Invitations for Country Visits to the Special Procedures of the Human Rights Council*, last updated 15 May 2020, https://www.ohchr.org/Documents/Issues/HRIndicators/MetadataStandingInvitations.pdf (accessed 28.10.2020).

ulations.[23] In addition, as part of the promotion and protection of human rights, the Indonesian authorities introduced the National Human Rights Action Plans aimed at, inter alia, strengthening the rule of law through strong state institutions, the harmonization of applicable regulations, the implementation of international standards, education in the field of human rights, and constant monitoring of government activities in this area.[24] The above actions obliging the Indonesian authorities to protect citizens' rights were in line with the first of the three pillars on which the principle of responsibility to protect is based.[25]

They also laid a foundation for the establishment of the National Commission on Human Rights, Komnas HAM, by the Presidential Decree No. 50 in 1993, which also dealt with cases of serious violations of the rights of indigenous communities. The 1945 Constitution of the Republic of Indonesia (Article 18B) recognizes the rights of traditional communities, and the Law No. 39 of 1999 on Human Rights (Article 6) also applies to them. However, the problem were the regulations that contradicted the above-mentioned provisions, which in practice resulted in the violation of the rights of indigenous communities in matters such as land ownership, the right to freedom of speech and assembly, or the right to their own culture and religion.[26]

Komnas HAM was established as an independent institution operating in accordance with the Paris Principles of 1991.[27] Since 1999, its mandate has been strengthened under the Law No. 39 of 1999 on Human Rights (Chapter VII), which detailed the powers of the National Commission on Human Rights and the powers of its members. In 2001, the institution received a high rating (status A) confirming the efficient implementation of international standards in the field

[23] L. Alexandra, *Indonesia and the Responsibility to Protect*, 'The Pacific Review' 2012, Vol. 25(1), pp. 51–74, at p. 61.

[24] UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21. Indonesia*, A/HRC/WG.6/13/IDN/1, 7 March 2012, pp. 3–4, paras 6–7, https://www.refworld.org/pdfid/50040bab2.pdf (accessed 15.10.2020); UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21. Indonesia*, A/HRC/WG.6/27/IDN/1, 20 February 2017, pp. 4–5, paras 16–17, https://www.refworld.org/pdfid/591464344.pdf (accessed 15.10.2020).

[25] The other two pillars are: the state's obligation towards other states in fulfilling this obligation, and the readiness to act collectively when another state is unable to meet its obligation; see http://s156658.gridserver.com (accessed 15.10.2020).

[26] UN Human Rights Council, *Summary Prepared by The Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/3, 6 March 2008, para. 36, https://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ID/A_HRC_WG6_1_IDN_3_Indonesia_summary.pdf (accessed 24.06.2020).

[27] UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/1, 11 March 2008, https://www.refworld.org/pdfid/4857754fd.pdf (accessed 03.06.2020).

of human rights, awarded by the International Committee at the United Nations Office of the High Commissioner for Human Rights.[28] The Commission managed to get high evaluations for the next several years.[29] After 2008, Komnas HAM established its regional offices among others in Papua, West Sumatra, West Kalimantan and Aceh Darussalam.[30]

In cases of serious violations of human rights, only Komnas HAM has the right to conduct preliminary investigation. If, in the opinion of its representatives, there is significant evidence that a crime had been committed, the Commission refers the case to the Attorney General. The prosecutor can initiate investigation or dismiss the case. In the event it is recognized that the documentation is insufficient, the prosecutor has the right to refer the case for reconsideration by the Human Rights Commission. Pursuant to Article 22(1) of the Law No. 26 of 2000 on Human Rights Courts, the investigation should be completed within ninety days.[31]

If the prosecutor finds substantial evidence of serious human rights violations, the case must be brought to one of the four permanent human rights courts with its jurisdiction in certain provinces of Indonesia: Central Jakarta, Surabaya, Medan and Makassar (Article 45(1) of the Law No. 26 of 2000) that are competent to adjudicate on cases of gross violation of human rights. The Law No. 26 of 2000 on Human Rights Courts also made it possible to form ad hoc tribunals for cases prior to 2000, before this Law was adopted. Their formation should be approved by the president and members of parliament (Article 43(2) of the Law No. 26 of 2000).[32]

It is important to note that the competence of the Indonesian Human Rights Courts has been limited only to cases of genocide[33] and crimes against humanity (Article 7 of Law No. 26 of 2000) with the omission of war crimes and ethnic cleansing that are included in paragraph 138 of the UN World Summit Outcome Document of 2005. The omission of war crimes in the Law No. 26 of 2000 on

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[28] UN Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1. Indonesia,* A/HRC/WG.6/1/IDN/2, 31 March 2008, *op. cit*.

[29] *OHCHR and NHRIs*, https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx (accessed 24.06.2020).

[30] UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/1, 2008, *op. cit*.

[31] Law No. 26 of 2000 on Human Rights Courts, https://policehumanrightsresources.org/content/uploads/2019/07/Law-26-2000-Act-on-the-Human-Rights-Courts-2000-Eng.pdf?x96812 (accessed 15.10.2020).

[32] K. Setiawan, 2019, *op. cit*., p. 292.

[33] Indonesia is not a party to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN GA on 9 December 1948 in Paris; see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (accessed 24.06.2020).

Human Rights Courts was a controversial decision in the context of the armed conflict that has been going on for many years in the provinces of Papua and West Papua. Some researchers believed that such a state of affairs was not accidental, implying that it was dictated by political reasons. However, from the point of view of the victims of serious human rights violation, an important provision of the Law No. 26 of 2000 on Human Rights Courts was its Article 42, which provides for the principle of responsibility of military commanders or other superiors, including civil leaders. The decision to establish the Human Rights Courts in 2000 reflected the government's need to strengthen the justice system in case of gross violations of human rights.[34] The establishment of the above-mentioned institutions operating in line with international human rights standards formed a sound basis for protection of citizens according to the RtoP principle.

3. STATE ACTIONS IN CASES OF SERIOUS VIOLATION OF THE RIGHTS OF INDIGENOUS PEOPLES

Regarding serious violations of the rights of indigenous peoples, Komnas HAM conducted several high-profile investigations, mainly concerning cases in the Papua province. Moreover, in connection with one of the cases, an ad hoc tribunal in the permanent Human Rights Court was formed. Both institutions have taken actions in line with the human rights mandate and the first pillar of the responsibility to protect.

After the political change that took place in 1998,[35] the Republic of Indonesia managed to achieve political stability in all provinces of the country, except Papua and West Papua.[36] The ongoing military conflict between the Indonesian authorities and the Papuan people[37] had a historical background and concerned the postulates of indigenous peoples as regards such rights as ownership of land and natural resources, or the right to their own culture and religion. In addition, some Papuan activists demanded the right to self-determination leading to the

[34] K. Setiawan, 2019, *op. cit*., p. 292.

[35] Suharto resigned as President on 21 May 1998; see S. Eklöf, *Indonesian Politics in Crisis: The Long Fall of Suharto 1996–98*, Copenhagen 1999, p. 232.

[36] J. Braitwaite, V. Braitwaite, M. Cookson, L. Dunn, *Anomie and Violence. Non-truth and Reconciliation in Indonesian Peacebuilding*, Canberra 2010, p. 1. Both provinces are located in the eastern part of New Guinea island; see A. Ananta, D. R. Utami, N. B. Handayani, *Statistics on Ethnic Diversity in the Land of Papua, Indonesia*, 'Asia & the Pacific Policy Studies' 2016, Vol. 3(3), https://onlinelibrary.wiley.com/doi/full/10.1002/app5.143 (accessed 30.04.2019).

[37] Most Papuans opposed the government; see J. Braitwaite et al., 2010, *op. cit*., p. 66.

establishment of their own state.[38] In 2001 the Indonesian authorities granted special autonomy to Papua (Law No. 21 of 2001 on Special Autonomy for the Papua Province), however, Papuan nationalists claimed that their rights were not respected by successive Indonesian governments.[39] Due to this situation, clashes between Papuan activists and the security forces took place in both provinces. Between 2010 and 2018, Amnesty International documented 69 cases of extrajudicial executions that were carried out by the police and military officials. Among the victims, 85 people belonged to the Papuan community.[40]

To deal with one such case, a permanent court was established in Makassar, where an ad hoc tribunal was set up for the *Abepura* case, named after a town in Papua where serious human rights violations had occurred. The case concerned the events of 7 December 2000, when 300 traditionally armed Papuans stormed a police station. One policeman and two members of the paramilitary police force (the Police Mobile Brigade, Brimob) were killed in the attack. In retaliation, police forces attacked sleeping Papuan students. As a result of these incidences, three people died. The police also arrested 90 people; many of the detainees were tortured by security forces.[41]

In this case, despite of the difficulties on the part of the police due to its lack of cooperation, Komnas HAM conducted a preparatory investigation in which it collected documentation confirming the possibility of serious human rights violations, such as extrajudicial killings, arbitrary detentions, torture and persecution based on sex, race and religion. In 2004 the case was referred to the Attorney General's Office and then to the Makassar Human Rights Court. The prosecutor accused only two of the 24 people indicated by Komnas HAM as possible perpetrators of committing crimes against humanity (including murder, persecution and torture), despite the fact that, as some critics noted, the prosecutor had not proven sufficiently that the acts committed could be considered systematic. This

[38] *History of West Papua*, https://www.freewestpapua.org/info/history-of-west-papua (accessed 07.03.2019). Papuans have been demanding independence since 1962–1963 when Indonesia took over New Guinea from the Kingdom of the Netherlands; see C. Webb-Gannon, *Merdeka in West Papua: Peace, Justice and Political Independence*, 'Anthropologica' 2014, Vol. 56(2), pp. 353–367, at p. 353.

[39] E.-L. Hedman (ed.), *Dynamics of Conflict and Displacement in Papua, Indonesia*, a collection of papers developed in conjunction with a one-day workshop held on 26 October 2006 at St Antony's College, Oxford, 'Working Paper Series' 2007, RSC Working Paper No. 42, Department of International Development University of Oxford, p. 6. Papua got its name in 1999. Previously, the province was called Irian Jaya. In 2003, Papua was divided into two provinces Papua and West Papua. See B. P. Resosudarmo, J. A. Mollet, U. R. Raya, H. Kaiwai, *Development in Papua after Special Autonomy*, p. 434, https://openresearch-repository.anu.edu.au/bitstream/1885/59427/2/01_Resosudarmo_Development_in_Papua_after_2014.pdf (accessed 15.10.2020).

[40] Amnesty International, '*Don't Bother, Just Let him Die': Killing with Impunity in Papua*, 2 July 2018, p. 6, https://www.amnesty.org/download/Documents/ASA2181982018ENGLISH.PDF (accessed 24.06.2020).

[41] K. Setiawan, 2019, *op. cit*., pp. 305–308.

feature is included in the definition of crimes against humanity under Article 9 of the Law No. 26 of 2000 on Human Rights Courts. The police officers were also accused of acts committed by their subordinates under the principle of responsibility of commanders. It is worth noting that both defendants argued that they had acted in the interest of the state, considering the attacked Papuans as separatists presenting a threat to the interests of the state.[42] Among the threats to the state security, the Indonesian national security strategy lists separatist acts and fights resulting from separatist aspirations as actions that may violate the sovereignty of the state.[43] The *Abepura* case ended with an acquittal for both the accused. Legal experts pointed to the weakness of the indictment as the main reason for the unsatisfactory outcome of the trial for the victims. According to the court, the prosecutor did not prove the chain of command that would allow the court to convict other commanders and did not present evidence that those were systematic attacks.[44]

Regarding serious violations of the rights of indigenous peoples, an incident (known as the *Paniai* case) in Enarotali, Papua province, which was also handled by Komnas HAM, remained unsettled until September 2020. In 2014, during a demonstration by Papuan protesters against the beating of eleven Papuan children by police officers, the police opened fire on the demonstrators. As a result of this military action, 11 people were seriously injured. The newly elected president, Joko Widodo, referred to the case and made a public commitment to investigate and punish those responsible. The *Paniai* case was described in detail by the Indonesian media. Amnesty International also included it in a report on serious human rights violations in Papua and West Papua.[45]

In the *Paniai* case, Komnas HAM conducted preparatory proceedings, as a result of which its representatives decided that the investigated case met the criteria of an act of crime against humanity. At the beginning of 2020, the case was referred to the Attorney General, who sent the documents back to the Human Rights Commission for reconsideration.[46] Critics believed that the actions of the

[42] *Ibid.*

[43] See L. A. Alexandra, *Perception on Human Security: Indonesian View*, 'Human Security in Practice: East Asian Experiences' March 2015, No. 99, p. 7, https://www.jica.go.jp/jica-ri/publication/workingpaper/jrft3q00000026ji-att/JICA-RI_WP_No_99.pdf (accessed 26.09.2019), and the statement of one of the defendants: 'I should not be brought to this hearing and prosecuted for gross human rights violations, but I should receive an award from the state and be named a national hero. Because I have sacrificed [myself] to protect many people who are threatened and treated by the Papua Merdeka separatists.'; see K. Setiawan, 2019, *op. cit*., pp. 305–308.

[44] K. Setiawan, 2019, *op. cit*., p. 308.

[45] Amnesty International, '*Don't Bother, Just Let him Die'*, 2018, *op. cit*., p. 6.

[46] For the statement of Komnas HAM on the events of December 2014, see *Komnas HAM Categorises Paniai Incident as Serious Human Rights Violation – Case Submitted to Attorney General*, https://humanrightspapua.org/news/32-2020/542-komnas-ham-categorizes-paniai-incident-as-serious-human-rights-violation-case-submitted-to-attorney-general (accessed 24.06.2020).

prosecutor who sent the examined documents back to the Commission members twice over the two months did not bode well for the future of the proceedings. One of the Commissioners, Ahmad Taufan Damanik, even claimed that the actions of the Attorney General's Office did not indicate any willingness to investigate the case, and that further actions depended solely on the political will of the rulers, including President Joko Widodo.[47]

It is also worth noting that over the past twenty years, many of the cases of gross human rights violation have not reached their final stage in courtrooms. It is believed that such a situation was fostered by the atmosphere of rivalry between the institutions of the Attorney General's Office and the Commission on Human Rights, which contributed to the fact that many of the Commission's initial proceedings were rejected by the Attorney General.[48]

4. THE SYSTEM IS THERE BUT POLITICAL WILL IS NEEDED…

Taking into account the fact that Indonesia ratified international human rights treaties, and developed an appropriate mechanism at the national level in the event of serious human rights violations, it should be concluded that the Indonesian authorities have made efforts to protect the interests of indigenous peoples. The competence and many years' prestige of the National Commission on Human Rights, Komnas HAM, which conducted a number of preparatory proceedings, and finally the role of the Human Rights Courts created an appropriate system for prosecuting perpetrators of gross human rights violations, also those related to indigenous communities. The mechanism proves Indonesia's commitment to fulfil the state's obligation to protect its citizens, including the indigenous peoples, against gross human rights violations as it is embodied in the first RtoP pillar. It can also be assumed that acting in accordance with the introduced legislation, international legal standards, and cooperating within the framework of the UN Human Rights Council measures, the Indonesian government has demonstrated engagement in preventive activities against potential crises. These actions correspond to the idea of responsibility to protect as a universal principle that has been accepted by Indonesia.

[47] Quote from the statement of Komnas HAM Commissioner, Mr Damanik: 'This represents an opportunity for the president to live up to his promise for justice, there are five things which done by the president'; see: *Bloody Paniai Case Likely to Stall as AGO Returns Case Dossier, yet Again*, CNN Indonesia, 5 June 2020, https://www.indoleft.org/news/2020-06-05/bloody-paniai-case-likely-to-stall-as-ago-returns-case-dossier-yet-again.html (accessed 24.06.2020).

[48] K. Setiawan, 2019, *op. cit*., p. 308.

The problem remains in the political arena, where the interests of a specific group belonging to the indigenous peoples, as is the case of Papuan activists, do not coincide with the interests of the state. However, when human rights violations occur, institutions should be independent of the political will of those in power. In both proceedings mentioned in this paper, the rivalry between the representatives of Komnas HAM and the Attorney's General Office played a significant role. In cases of serious human rights violations, such activities have a destructive effect on the perception of the judiciary by indigenous communities, which were deprived of most of their rights during President Suharto's regime. In the situation of the ongoing armed conflict in Papua, the sense of justice felt by the inhabitants of the provinces is of particular importance, especially if the sovereignty of the state is at stake. In both of the presented cases, the evidence collected by the experts of the Commission on Human Rights was assessed as not meeting the criteria of acts falling within the jurisdiction of Human Rights Courts. The problem was due to the lack of cooperation of the security forces with the system of justice. However, it should be hoped that the international prestige of the Commission and President Widodo's commitments to Indonesian citizens will improve the effectiveness of Komnas HAM's work in protecting human rights, including the rights of indigenous peoples.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.16

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FREEDOM OF RELIGION IN THE EUROPEAN PUBLIC SPACE. REMARKS BASED ON THE LATEST CASE LAW OF SELECTED INTERNATIONAL AND NATIONAL COURTS CONCERNING RELIGIOUS SYMBOLS

Abstract

The author attempts to analyse selected rulings of the European courts concerning religious symbols in order to answer the question whether freedom of religion is still respected in Europe. The analysis is based on the reflection on the context of contemporary European cultural landscape: diversity of constitutional models of particular states, the concept of neutrality in the matter of religion, and the ability of contemporary political elites and judges to understand the sphere of the sacred (*sacrum*). The selection criteria for the rulings have been cases concerning objects related to practising religion: (i) the hijab – an Islamic headscarf, (ii) the burqa – a garment covering practically the entire body, and (iii) the crucifix hung on a classroom wall. The review brings up important questions about lack of tolerance, pluralism and acceptance of religious diversity in contemporary Europe, and 'reasonable accommodation' as a possible solution.

KEYWORDS

freedom of religion, tolerance, CJEU, ECtHR, crucifix, hijab, burqa

SŁOWA KLUCZOWE

wolność religii, tolerancja, TSUE, ETPCz, krzyż, hidżab, burka

1. INTRODUCTION

Much is being said about tolerance and inclusivity in contemporary Europe. The very motto of the European Union is 'United in diversity'.[1] Combating discrimination is one of the priorities of the European Union and also of the Council of Europe. The European Parliament often adopts resolutions aimed at combating inequalities and promoting freedom.[2] So why are European Catholics feeling increasingly discriminated against? Why in the European Union can an employer restrict an observant Jew or Muslim from freely expressing his or her faith in the workplace? We are witnessing a kind of paradox in which the promotion of tolerance and respect for diversity displaces religion not only from the public space, but also, which is even more disturbing, from the private sphere.

Reflection on the actions of the particular Member States and the case law of European courts justifies an observation that the prohibition of discrimination based on sex, race or sexual orientation is treated in a different way (broadly) from the prohibition of discrimination based on religion (restrictively). It is almost impossible to think today that a private company operating in the EU could prohibit an employee from contacting customers on the basis of his race, gender or sexual orientation, and at the same time the Court of Justice of the European Union confirmed the possibility of prohibiting a Muslim worker appearing at work wearing a hijab, an Islamic headscarf.

In the last decades it has been the courts, not the legislature, that are the most important, if not the only, entities regulating freedom of religion. The legislature has found itself at an impasse. The history of the preamble to the Treaty establishing a Constitution for Europe (not ratified) can serve to best illustrate this. After the Convention on the Future of the European Union proposed a solemn reference to the 'culture of the ancient Greeks and Romans' and to the French Revolution, there were a few noteworthy demands to add a reference to its Christian heritage, which was omitted in the draft. However, this turned out to be impossible. The only thing agreed was a reference to Europe's cultural, religious and humanistic

[1] https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en (accessed 02.11.2022).

[2] Instead of many: European Parliament resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone (2021/2557(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html (accessed 02.11.2022).

heritage.[3] On the other hand, although legislature often affects the freedom of religion, it does so somewhat incidentally, e.g. in the case of a ban on slaughtering animals without stunning,[4] or a ban on covering one's face in public space.[5]

The courts, in accordance with the procedure, are obliged to consider cases that are brought before them. They have to settle issues that politicians prefer to avoid. This is a great challenge and responsibility. At the same time, in the reality of contemporary democracy shaped by the media and polls, it is a chance to reach decisions not motivated by particular or temporary political interests.

In this paper an attempt is made to analyse selected rulings of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and the Italian Supreme Court concerning religious symbols, and to answer the question whether freedom of religion is still respected in Europe.

2. CONTEMPORARY POLITICAL AND LEGAL BACKGROUND

The analysis of case law should be preceded by a reflection on the context of case resolution in contemporary Europe. To illustrate this context, I have chosen

[3] See more broadly in J. H. H. Weiler, *Chrześcijańska Europa. Konstytucyjny imperializm czy wielokulturowość?* Poznań: W drodze 2003, p. 47 et seq.

[4] See Belgian decree of 7 July 2017 amending the Law of 14 August 1986 on the protection and welfare of animals, regarding permitted methods of slaughtering animals, Belgisch Staatsblad, 18 July 2017, p. 73318. The CJEU (Grand Chamber) in its judgment of 17 December 2020 in the case C-336/19, which should be discussed in a separate paper, ruled that EU law does not preclude legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death. In the reasons for the judgment it was pointed out that scientific arguments make it possible to refute doubts of a religious matter, which seems to be a far-reaching statement: 'As regards, lastly, whether the interference with the freedom to manifest religion resulting from the decree at issue in the main proceedings is proportionate, first, as is apparent from the preparatory documents for that decree, as cited in paragraph 13 above, the Flemish legislature relied on scientific research which demonstrated that the fear that stunning would adversely affect bleeding out is unfounded. In addition, those same preparatory documents show that electronarcosis is a non-lethal, reversible method of stunning, with the result that if the animal's throat is cut immediately after stunning, its death will be solely due to bleeding.' (para. 75 of the judgment). The ruling was strongly criticized by J. Faull and J. H. H. Weiler for violation of the autonomy of religious law: 'Not only did they compromise, without the courage to say so, substantive freedom of religion, they also compromised a no less important institutional religious dimension, by encroaching on the exclusive autonomy of religious authorities to decide on their own religious matters.' (*EU Judges Have 'Koshered a Pig' in Order to Allow Shechitah Ban*, 'The Jewish Chronicle', 16 June 2022, https://www.thejc.com/lets-talk/all/eu-judges-have-'koshered-a-pig'-in-order-to-allow-shechitah-ban-1WagcJQzfcXZjJMCiIN3jc, accessed 02.11.2022).

[5] French law, Loi n° 2010-1192, of 11 October 2010 prohibiting concealment of one's face in public space, https://www.legifrance.gouv.fr/download/pdf?id=EEpKbOqpVKS_j-RgGEAkJZz-KY6oT0Ac8uyatwTORrks= (accessed 02.11.2022).

three issues: the diversity of constitutional models of particular states, the concept of neutrality in the matter of religion, and the ability of contemporary political elites and judges to understand the sphere of the sacred (*sacrum*).

It is obvious that Europe consists of many states with different constitutional models, shaped by long-term state-forming processes, based on and reflecting different national identities. However, this constitutional diversity is important both for the identity of Europe itself and for the shape of the European Union. It is these differences, perpetuated over the centuries, that make the project of federalisation of the EU meet so much resistance; suffice it to mention the results of the referendum on the ratification of the Treaty establishing a Constitution for Europe in France (29 May 2005) and the Netherlands (1 June 2005), as well as Brexit.

The differences among various constitutional models are very important. They reflect the attitude of particular states to religion. Briefly, it can be pointed out that the French model assumes the secularity of the state, in which religion is an exclusively private matter; the state and the church are completely separated. Denmark and England, on the other hand, have a state religion, with the monarch being supreme head of the church. The Italian and Polish models provide for the impartiality of public authorities, which is related to the obligation of the authorities to ensure the freedom of expression of religious beliefs in public life – with the Italian constitution emphasizing the secular character of the state, and the Polish one taking into account (at least in the preamble) the sensitivity of both believers and non-believers.[6]

Such different approaches to the question of religion pose an extraordinary challenge to international courts. Settling the disputes concerning freedom of religion necessitates the search for universal solutions – the famous 'Unity in diversity' – because these solutions must be applied in all states, both in those that do not provide a place for a religion in the public space, as well as in those where religion is connected with statehood.

The second issue is the concept of 'neutrality' in the matters of religion. As mentioned above, France states already in the first article of its Constitution of 1958 that the French Republic is a secular state. Religion belongs exclusively to the private sphere, and the state and the church are completely separated. It is worth noting that the constitutional model, or more precisely its contemporary understanding,[7] has dominated the present-day political debate and is usually (by default) indicated as a model solution – neutral in terms of worldview. However, it should be very strongly emphasized that the French model – contrary to the

[6] A detailed comparative analysis of this issue was carried out by J. H. H. Weiler, 2003, *op. cit*., p. 28 et seq.

[7] The contemporary understanding of republican secularism and its historical evolution is discussed by E. Szczepankiewicz-Rudzka, *Zasada laickości V Republiki Francuskiej i jej implikacje prawno-polityczne*, 'Politeja' 2020, Vol. 17(1/64), pp. 73–88, https://doi.org/10.12797/Politeja.17.2020.64.05 (accessed 02.11.2022).

mainstream opinion – is not neutral. Although it does not prefer any traditional religion, it addresses the worldview of non-believers and agnostics, significantly interfering with the sense of identity of believers. Christians, Muslims, Jews and others must, therefore, practice and express their religion within the private sphere, because in the public space religion should not be exposed. Thus, just as the French Republic shows generous tolerance towards non-religious people, so it is grossly intolerant of believers who wish to express their faith publicly.[8]

Therefore, the French model cannot be objectively called neutral. Identifying a secular state with a truly neutral state is therefore a mistake, which is commonly repeated. The secular state resembles a religious state, in which religion has been replaced by secularism, associated with the concept of 'civil religion' of Jean-Jacques Rousseau. The lack of tolerance towards people who do not profess the right faith, characteristic of the confessional state, has turned into the lack of tolerance towards people practicing or manifesting a traditional religion. This way, neutrality truly became a 'civil religion', which cannot be described as tolerant.

According to the principle of evaluation of deeds, not declarations, the myth of neutrality of the secular state can be refuted even using the example of how education is financed. France, in the name of neutrality, finances only secular schools. England, in the name of neutrality, finances both secular schools and Christian, Jewish and Muslim ones. Which state is more neutral? Certainly not the one that leaves parents wanting to provide their children with education in a religious school without due subsidies.

The third, perhaps the most important and the least obvious issue is the ability to understand the notion of the *sacrum*. European societies are becoming increasingly secular; believers and practitioners are a minority. Religion and religious education are being pushed out of the mainstream of modern culture. The phenomenon of secularization applies to judges. More and more of them do not practice any religion. More and more do not even have any in-depth knowledge of any religion, do not have any experience of faith, prayer and liturgy. Thus, they associate the concept of *the sacred* with the rule of law rather than with the spiritual sphere. Here the crucial question arises: Do the contemporary judges, without diminishing their knowledge and wisdom, have the necessary sensitivity which commands respect for the religious duties of believers, even if this faith is not shared? Or do they treat religion as if it were one of the lifestyles that is not very welcome in the modern, neutral environment? An Islamic headscarf may then seem a caprice or superstition, and a crucifix pendant may be seen as... exhibitionism. If religion is just a fantasy, a fairy tale for the naïve, or eccentricity, it cannot be taken seriously. It can be tolerated but only as long as it does not come into conflict with fundamental rights (and even other values). Then it must give

[8] Similarly, L. Morawski, *'Zjednoczeni w różnorodności' – dwie wizje integracji europejskiej*, (in:) C. Mik (ed.), *Konferencja – Unia Europejska: zjednoczeni w różnorodności, Warszawa, 14–15 grudnia 2010 r.*, Warszawa: Wydawnictwo Sejmowe 2012, p. 43.

way to 'true' values, especially such important as economic freedom. Maybe this is the reason why the CJEU so easily recognizes the primacy of economic freedom over freedom of religion.[9]

A question must, therefore, be asked: Do contemporary European politicians and judges understand the meaning of freedom of religion? Do they have the sensitivity to give proper weight to religious demands? After all, they are in large part people who have already been brought up in a secularized culture, who do not have a deep experience of faith, and thus may not have any understanding of concepts such as holiness or sin.

It is worth remembering the above-mentioned circumstances and bear in mind the questions posed when reading the latest decisions of European courts on the freedom of religion.

3. OVERVIEW OF SELECTED EUROPEAN CASE LAW

Let us move on to the review of the rulings. I have chosen three objects related to practising religion that the rulings concern: (i) the hijab – an Islamic headscarf, (ii) the burqa – a garment covering practically the entire body, and (iii) the crucifix hung on a classroom wall. Although the first two are related to Islam, the rulings on the hijab can be directly translated into the Jewish headscarf or skullcap (kippah). Thus, the following review touches upon the three largest monotheistic religions.

3.1. ISLAMIC HEADSCARF IN THE WORKPLACE

The Grand Chamber of the CJEU in its judgment of 15 July 2021 in *WABE*[10] held that an undertaking may prohibit employees from wearing any visible symbol of political, philosophical or religious beliefs in the workplace, provided that that prohibition is applied generally and an undifferentiated way.

However, a difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer's desire to pursue a policy of political, philosophical and

[9] On the lack of religious sensitivity and understanding of the judges, see J. H. H. Weiler, *Je Suis Achbita!*, 'European Journal of International Law' 2017, Vol. 28(4), p. 989.

[10] Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH v HJ*, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0804&from=pl (accessed 02.11.2022).

religious neutrality with regard to its customers or users. In this case, the court set out three conditions:

– the policy meets a genuine need on the part of the employer, which may be inter alia the legitimate wishes of the customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out;
– the difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner;
– the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.[11]

The above quoted conditions seem to be very specific, yet seemingly rigorous, considering the key general clause: 'legitimate wishes of the customers or users'. And there is the rub. What exactly are the legitimate wishes of the customers or users? The answer, when it comes to religion, is difficult. It is much easier to state what illegitimate wishes of customers or users are as regards skin colour or nationality. We would all agree that it would be an illegitimate wish not to be served by a black person, by a Pole or by an Arab. But – and here is a tricky feature of religion as seen by the CJEU – it may be a legitimate wish not to be served by an Arab when she appears to be a Muslim wearing a hijab! The same applies to an observant Jew wearing a kippah or a Catholic wearing a cross pendant as outward signs of religious beliefs. This was confirmed in the famous G4S Secure Solutions judgment in *Achbita*.[12]

In 2017, in *Achbita*, the CJEU ruled that the employer's wish to adopt a policy of political, philosophical or religious neutrality in relations with its customers deserves protection as an expression of the freedom to conduct a business stipulated in Article 16 of the Charter of Fundamental Rights of the European Union, and thus prevails over the freedom of religion (right to manifest religion). However, to avoid indirect discrimination, the employer must demonstrate that its internal regulations are objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary. In this case, if the employer cannot offer the employee to perform his/her duties in a place where he/she will not have contact with customers, the employer may lawfully dismiss him/her.

[11] *Ibid*.

[12] C-157/15, *Samira Achbita v G4S Secure Solutions NV*, CJEU judgment of 14 March 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0157&from=PL (accessed 02.11.2022).

In the reasons in *WABE* the conditions that must be met by the employer's internal regulations justifying political, philosophical or religious neutrality were extended and specified. It is clear that the employer needs to demonstrate that its internal policy corresponds to the real need to present a neutral image towards customers, and the prohibition must be limited to what is strictly necessary. At the same time, the facts of the case, as well as its historical context, seem to indicate the widening of the possibility of interference with the religious freedom of employees. Although the CJEU, in accordance with the nature of the preliminary ruling procedure, did not resolve the dispute between the employee and WABE, it nevertheless drew a wide margin in which an employer may interfere with the religious freedom of employees. In particular, strikingly, the Court did not describe and stress the importance of the principles of pluralism, tolerance and diversity as fundamental values of a democratic society but emphasized the importance of such issues as the 'legitimate wishes' of customers or users and the policy of neutrality derived from the freedom to conduct a business.

It worth noticing that the facts of the case referred to the 'legitimate wishes' of customers of the entrepreneur running a large number of child day-care centres in Germany. Parents, being the customers, wished that their children were educated by persons who do not express their religion or beliefs in order, in particular, to 'ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions'.[13] Therefore, according to the employer, it was necessary to prohibit employees from wearing any outward religious symbols in the workplace. It is worth emphasizing that the case was not about imposing one's beliefs on children and parents by coercing them to participate in any religious practices. Unlawful was the very act to express one's religion, solely through elements of clothing or religious symbols.

It is also worth noting that the entrepreneur's internal rules indicated that it is 'non-denominational and expressly welcomes religious and cultural diversity.' Apparently, this 'welcoming' approach does not apply to employees. It needs to be stressed that, paradoxically, the acceptance of religious and cultural diversity among customers serves to justify the need for complete uniformity and neutrality of worldview (understood as irreligiosity) of the staff. While there is no doubt that the 'legitimate wish' of the parents may be a prohibition of imposing any religious practices or views on their children, in the light of the European Union values, in particular in the scope of 'Unity in diversity', the admissibility of a ban on wearing religious clothes or symbols should be questioned. This is especially evident in the facts of the case considered: if the day-care centre welcomes diversity among customers, it should be deemed legitimate to expect the staff not to impose any beliefs on children, in particular by coercing them to participate in

[13] Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH v HJ*, CJEU judgment of 15 July 2021, para. 82.

any religious practices, but it is illegitimate to expect the staff to be irreligious. Again, it can be pointed out that a wish of being served by a person of a given skin colour or nationality would not be deemed lawful.

The above takes us back to the issue of the false conception of neutrality. Prohibition of any religious symbol is not neutral. It sends a message that religion is toxic and, if necessary, may be expressed only in one's private space, not in the workplace. In fact, it means that religion is out of the scope of 'Unity in diversity'.

Moreover, it is clear in the ruling that the Court was aware that there are certain rules regarding clothing based on religious precepts. This is the case of the kippah, required by Judaism, and – as was the subject of this case – the headscarf (hijab) prescribed by Islam. However, the CJEU only stated that the prohibition in question may cause 'particular inconvenience for such workers' but does not in principle introduce a difference in treatment.[14] In order to emphasize the uniform application of the prohibition, the Court pointed out that the same employer required a Christian employee to remove the cross she wore, and she complied with this requirement.

However, the above analogy is not justified. Christianity, unlike Judaism or Islam, does not require lay believers to wear specific items of clothing. In other words, wearing a crucifix or a pendant can be an expression of one's religious views, but it is not the fulfilment of the precepts of religion. It is completely different in the case of the Jewish skullcap or the Islamic headscarf. Wearing them is indicative of practicing religion, and taking them off would be a violation of norms that religious people consider sacred. This important distinction means that an observant Muslim woman must break the rules of her religion if she wants to keep her job. As Professor Joseph Weiler put it: 'It is one thing to tell a vegetarian or vegan that they may not show up at work wearing a lapel button proclaiming their belief in animal rights but quite another to coerce them to eat meat.'[15]

Thus, we can note here a significant discrimination against people whose religion requires wearing specific, visible garments. In this regard, there is no requirement for Christians, non-believers or agnostics to betray the professed principles. However, the Court seemed not to understand the importance of freedom of religion, and moreover the specific role of clothing in Islam.

In 2013 the ECtHR ruled differently on the issue of the manifestation of religion in *Eweida*.[16] In her dispute with the British Airways, Ms Eweida alleged violation of her freedom of religion by prohibiting her from wearing at work a cross in a way visible to customers. She claimed that it was her desire to bear witness to her faith by manifesting the cross. The airline, on the other hand, expected the

[14] *Ibid*., para. 32.

[15] J. H. H. Weiler, 2017, *op. cit*., p. 991.

[16] *Eweida and Others v The United Kingdom*, Applications nos 48420/10, 59842/10, 51671/10 and 36516/10, ECtHR judgment of 15 January 2013, https://hudoc.echr.coe.int/eng#{%22appno%22:[%2248420/10%22],%22itemid%22:[%22001-115881%22]} (accessed 02.11.2022), cf. para. 94.

cross to be removed or hidden under the uniform. The Court acknowledged the primacy of the right to manifest one's beliefs. It pointed out that 'this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.' The Court considered it legitimate for the airline to seek building an appropriate image towards their customers, but national courts have given too much weight to this aspiration, and a discreet religious symbol could not harm such image.

It is worth emphasizing that it is difficult to imagine promoting tolerance and pluralism in matters of religion by removing religion from the public space and workplaces. It is rather the dialogue and implementing the *vivre ensamble*, 'living together', principle that allows accepting different views and respecting foreign customs. Noteworthy, a completely different approach to promoting tolerance and pluralism can be observed in the sphere of sexuality.

To sum up, it should be pointed out that the ECtHR judgment presents a significantly broader understanding of freedom of religion and gives it much greater weight than the discussed CJEU rulings. Unfortunately, the *Eweida* verdict was given eight years before the latter CJEU judgment, which is an expression of the unfortunate evolution of thought about freedom of religion – an evolution unfavourable for believers.

3.2. FACE COVERING – BURQA

The burqa is an opaque outer garment worn by a small number of Muslim women. It covers the head and face, and the full burqa covers the whole body. There is only a mesh panel in the eye area through which the wearer can see. Another garment that covers the face is the niqab, a veil wrapped around the head, leaving the forehead and eyes uncovered. The above should be distinguished from the hijab – a scarf that covers only the hair, ears and neck. In 2009, French President Nicholas Sarkozy said that burqas were not welcome in France. It was an announcement that introduced a ban on covering one's face in public space.

Europeans generally associate this piece of Muslim clothing with the enslavement of women: an unacceptable restriction of their basic rights, which cannot be allowed in modern society. It was precisely 'the respect for the minimum values of an open and democratic society' that constituted one of the reasons for enactment, in 2010, of the French law imposing a prohibition on covering the face and, as a result, on wearing burqas and niqabs in public, with the exception of places of worship.[17]

[17] French law, Loi n° 2010-1192, of 11 October 2010 prohibiting concealment of one's face in public space.

However, formally there was no prohibition of wearing the burqa but a 'completely secular' ban on covering of one's face in public space, this in the name of public safety and respect for the minimum values of an open and democratic society. It was only allowed to cover one's face in a place of worship. In 2014, the ECtHR in *S.A.S.*[18] declared this prohibition to be compliant with the European Convention on Human Rights. However, not for the reasons of public safety but for the requirement of *vivre ensamble*, 'living together', as formulated by the Court. This requirement was recognized as the only legitimate for the restriction on the freedom of religion.

At the same time, the Court clearly stated that, although the prohibition affects mainly Muslim women, it is of 'some significance' that the ban does not directly apply to any clothing of a religious nature but to the very fact of covering or concealing one's face, i.e. it was based on neutral, irreligious criteria. Three years later, in 2017, the Court confirmed this decision in a similar case concerning Belgian law.[19] A statutory prohibition of covering one's face has also been introduced in Austria, Bulgaria, Denmark and Latvia. In March 2021, a similar prohibition was also accepted in a referendum in Switzerland. According to the official data, no more than 30 women in Switzerland regularly wore the niqab, and a case of wearing the burqa was not recorded. Paradoxically, at the time of voting, there was an order to cover one's face for reasons of security in line with measures taken due to the COVID-19 pandemic.

Undoubtedly, from March 2020, due to the COVID-19, the understanding of 'living together' in terms of showing faces in the public space has changed. Covering one's face has already become an ordinary, even desirable habit or hygiene behaviour, and often the lack of a face mask could result in a penalty. One should pose a disturbing question: If the only reason for the ban on burqas in public spaces is the requirement to show one's face resulting from *vivre ensamble*, is this prohibition still in force?

Certainly, women's rights must be taken into account. The photos of Kabul before and after the Taliban takeover show that covering one's face is often not a free choice of Muslim women. However, the reality of the Afghan regime does not have a straightforward impact on the Muslim community in Europe, where different cultural rules apply. Moreover, various Muslim communities have individual approaches to wearing burqas or hijabs, and only a few consider covering one's face to be a religious requirement.

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[18] *S.A.S. v France*, Application no. 43835/11, ECtHR judgment of 1 July 2014, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22complaint%2043835/11%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-145466%22]} (accessed 02.11.2022).

[19] *Belcacemi and Oussar v Belgium*, Application no. 37798/13, ECtHR judgment of 11 July 2017, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-175141%22]} (accessed 02.11.2022).

An important question, which requires a sincere answer is what it is that decides about the limits to the freedom of religion: Are they set due to 'completely secular' and 'neutral' requirements based on the 'living together' principle, or are they a result of the European understanding of women's rights, according to which covering one's face with a face mask is accepted but covering it with a burqa or niqab is not? Solving this issue by invoking the idea of *vivre ensamble* was merely a trick which did not produce lasting results. The above case shows that by escaping from the essence of matters we do not actually solve real problems. Honest discussion on such a fundamental issue as the freedom of religion, however difficult and painful it may be, seems necessary. There is little doubt that the dialogue with Islam is a necessity in Europe and must consider difficult issues. However, this dialogue must be held in good faith, having awareness of the value of one's position.

3.3. CRUCIFIX IN THE CLASSROOM

The third subject of the analysed rulings is the question of a crucifix hung on the classroom wall. In many European countries, the crucifix is an element of national identity and culture, and its presence in the public space or even in the state symbols (England, Denmark, Poland) has a centuries-old tradition. But is this presence compatible with respect for diversity and freedom of religion in its negative sense (the individual's right not to profess religion)?

In Europe, for many years now, there has been a fierce dispute about religious symbols in the public space, in which Christian symbols occupy an important place, above all the crucifix. People who are not believers or are reluctant to Christianity claim that the presence of the crucifix in public space, offices or schools, is incompatible with the neutral character of these places and can affect people holding a public office and individual citizens. Thus, it violates the right to religious freedom understood as 'freedom from religion'. In turn, the other party argues that the crucifix is an integral part of national identity, representing essential values important for individuals, as well as for the society, so its removal from the public space is unacceptable.

The dispute seemed to have been settled in 2011 in the landmark ECtHR ruling in *Lautsi v Italy*.[20] A student's mother, Ms Lautsi, objected to the presence of the crucifix in the classroom, believing that this symbol indoctrinates her child, violating his freedom of religion (understood in a negative sense). According to Ms Lautsi, the crucifix in the classroom violated her child's right to education in

[20] *Lautsi and Others v Italy*, Application no. 30814/06, ECtHR judgment of 18 March 2011, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22latusi%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22[%22001-104040%22]} (accessed 22.11.2022), cf. para. 72.

a neutral environment. Her action against Italy was brought before the European Court of Human Rights and, at the first instance, was upheld. However, as a result of an appeal, the complaint was finally dismissed: the ECtHR Grand Chamber overturned the judgment of the first instance Court by a majority of 15 votes to 2, recognizing that the crucifix is a passive symbol, and as such does not have the effect of active religious indoctrination that would allow finding the violation of the European Convention on Human Rights.[21]

This judgment is a milestone in the modern understanding of the role of religious symbols, their place and function in public space. According to the Court, learning in a room with a crucifix or a mezuzah affixed to the wall does not amount to religious indoctrination. On the other hand, the associated discomfort of a non-believer, in particular a person who has unfriendly feelings towards a given religion, does not justify interference with the cultural identity expressed by displaying that symbol in a classroom.

However, there is no general consensus on the last statement. It should come as no surprise, then, that only a few years later, again in Italy, an atheist teacher protested against the presence of the crucifix in his classroom. It is worth noting that Italian law does not require hanging crucifixes in classrooms but only allows it. In this case, the headmaster decided to hang the crucifix after the students voted on the issue. However, the teacher in question would remove the symbol from the wall before each lesson, thus expressing his opposition to the headmaster's decision, and put it back after his lessons were over, for which he was suspended for 30 days. The penalty gave rise to a complaint based on the non-discrimination provisions of the Italian labour law. The Italian Supreme Court considered the complaint as 'a case of utmost importance'. On 9 September 2021, a judgment was passed, according to which it is not discriminatory to place a crucifix on the wall of a classroom in a public school if the school community has expressed such wish.[22] The school autonomy also makes it possible to display the symbols of other religions if students or their parents so choose. The Court pointed out that communities, diverse in their worldview, should strive for an *accomodamento ragionevole*, 'reasonable accommodation', by looking for a common, generous, mediated solution that would help reconcile different positions.[23]

It should be noted that the approach of the Italian Supreme Court is quite different from that discussed earlier above. The ruling points out that only a spirit

[21] *Ibid.*

[22] Corte Suprema di Cassazione, sentenza n. 24414: affissione del crocifisso nelle scuole pubbliche, 9 September 2021, http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20210909/snciv@sU0@a2021@n24414@tS.clean.pdf (accessed 02.11.2022).

[23] The Italian Supreme Court referred to the reasoning contained in the Federal Constitutional Court decision of 16 May 1995, 1 BvR 1087/91. The German Court stipulated the obligation to seek a 'reasonable accommodation' (*zumutbaren Kompromiß*). The Court also stated: 'The freedom of religion is not the right to prevent religion.'

of true dialogue and mutual tolerance can overcome fundamental disputes in a diverse society. However, all parties need to show good will, which is a considerable difficulty in today's polarized world.[24] Therefore, mindfulness and consideration for the positions of all parties is required, as well as readiness to accept some discomfort. After all, a compromise may mean that if a school community does not decide to hang the crucifix in the classroom, religion classes will be taught in classrooms where this symbol is absent. There is no solution where everyone can be completely satisfied. Still, some portion of discomfort may be acceptable to all. The coming years will show whether this jurisprudence of compromise will be adopted in Europe or whether the dominant trend, where neutrality is secularism, and thus freedom of religion cannot be too important, will prevail.

4. CONCLUSION

To sum up, a neutral state is only such that ensures the impartiality of public authorities in religious matters. This claim cannot be merely a beautiful declaration but must be continuously reflected in the actions of public authorities. It must be expressed by the dialogue and repeated efforts to ensure tolerance and pluralism, the conditions under which the majority respect the rights of the minority. Non-believers, agnostics, and those who are indifferent to matters of faith should look kindly upon the needs of believers and vice versa. Christians should look at the needs of Muslims or Jews with understanding, and kindness should be reciprocated.

It seems that the neutrality of the state has some similarity to the 'work-life balance' – it is a dynamic situation, involving constant search for solutions by correcting and adapting to changing circumstances. The way to achieve neutrality is the possibility to negotiate a 'reasonable accommodation' openly, without the need to hide the identity and religious beliefs of community members, and without relegating religion to a purely private sphere. This aspiration requires that each party in good faith, as far as possible, meet the expectations and needs of the other party, being aware of the value of its position.

The selected rulings of the ECtHR and national courts show an interesting trend: rejection of the Franco-American 'secular is neutral' paradigm and the development of a more nuanced jurisprudence of accommodation, i.e. seeking a balance between freedom and religion. At the same time, the idea of neutrality

[24] Doubts about it were expressed by F. Alicino, *Il crocifisso nelle aule scolastiche alla luce di Sezioni Unite 24414/2021. I risvolti pratici della libertà*, Diritti Comparati, 11 November 2021, https://www.dirittocomparati.it/il-crocifisso-nelle-aule-scolastiche-alla-luce-di-sezioni-unite-24414-2021-i-risvolti-pratici-della-liberta/ (accessed 02.11.2022).

identified with secularism is definitely predominant in the CJEU rulings, which does not give due weight to the rights of believers. The CJEU rulings seem to reveal lack of sensitivity that would allow acknowledging the legitimate right of people who want to live their lives observing religious norms. The lack of such understanding may be seen not only among judges but also in the political circles. This was manifested in particular in the dispute concerning the wording of the preamble to the unratified Treaty establishing a Constitution for Europe and in the omission of the Judeo-Christian heritage of Europe in the final text.

The above analysis shows that the 'United in diversity' motto remains an empty slogan in the European Union when it comes to issues of freedom of religion. Will the EU seek a true neutrality for those who, looking for solutions by means of dialogue, not only tolerate but above all accept different religions? Will it (re)enter the path of tolerance, pluralism and acceptance of religious diversity in the search for the true neutrality? The jurisprudence of 'reasonable accommodation' raises some hope.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.17

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CORSICAN SEPARATISM IN THE FACE OF SOCIO-LEGAL CHALLENGES. ANALYSIS OF THE PROBLEM ON THE BASIS OF FRENCH, INTERNATIONAL AND EUROPEAN LAW

Abstract

The paper relates to the separatist tendencies in Corsica. Following the victory of separatists in the local elections in 2017 and 2021, this issue remains one of the most current problems regarding the territorial situation in France. Firstly, the historical background showing the distinctiveness of the indigenous inhabitants of the island is analysed. Subsequently, the main problem is presented in the legal context. The basis for the analysis is the national (French), international and regional (EU) law. The attention is also focused on how the regulations are implemented in practice, particularly regarding their recognition. Although the right to self-determination does not seem to involve the right to secession due to the lack of outright effect of international law, the greater autonomy is not only possible but also desirable. The aim of the paper is to present different aspects of Corsican separateness, to examine the legal framework, and to assess the chances of Corsicans for changing their future.

KEYWORDS

Corsica, separatism, self-determination, secession, territorial integrity, France

SŁOWA KLUCZOWE

Korsyka, separatyzm, samostanowienie, secesja, integralność terytorialna, Francja

1. INTRODUCTION

One of the most prevalent issues concerning the political situation of France is the problem of growing separatist moods in Corsica. 'In 1982, the creation of a region with a special status initiated a process of legal and political differentiation on the island. This process has accelerated since 2015, with the accession to regional power of the nationalists, i.e. a political movement that fundamentally questions the place of Corsica within the French Republic, and part of which has long used or supported clandestine violence.'[1] The nationalist coalition took the vast majority of seats in the local parliament after the local elections in December 2017. Four years later 'Corsican nationalism reached a level of support unique in Europe for such a movement' by gathering almost 68% of the votes.[2] Thus, the situation in the region provokes many questions, including the legal status of the island or its chances for independence. To properly assess it, one should consider this problem in the legal context, as well as in terms of socio-political challenges. This will help to estimate the chances for increasing autonomy or the possibility of separation of the island. The paper is divided into four major parts. The first concerns the historical basis of the Corsican separatism, the second presents the situation of Corsica under French law, including its administrative status and constitutional principles. The third part focuses on the legal and international, and European context, whereas the fourth one presents social and political reasons for Corsicans' aspirations for independence.

2. THE HISTORICAL BACKGROUND TO SEPARATIST ASPIRATIONS

Corsica is the fourth largest island in the Mediterranean Sea (after Sicily, Sardinia and Cyprus). It lies north of the Italian island of Sardinia and south of

[1] A. Fazi, *Territorial Elections in Corsica, 20–27 June 2021*, BLUE January 2022, Vol. 2(1), https://geopolitique.eu/en/articles/territorial-elections-in-corsica-20-27-june-2021/ (accessed 17.04.2023).

[2] *Ibid*.

the Ligurian Sea. Its area is 8,778 km² and it is inhabited by more than 351,000 people.[3] The name 'Corsica' probably comes from the Phoenicians who called it *chorsi-lesista* referring to the coniferous forest of the island. The timber from there was needed to build ships. Then, the Romans borrowed the name from the Phoenicians, propagated it and gave it a new form – Corsica.[4]

The beginnings of Corsicans' separatist struggles should be sought in ancient times. The indigenous people are called the Corsicans (*corsi*), whereas their ethnic ancestors were the Iberian and Ligurian tribes.[5] Later on, the island was under Greek and Carthaginian rule. In the third century BC the island was taken over by the Romans, which resulted in a progressive Romanization which contributed to the spread of Catholicism and had a significant influence on shaping the identity of the local population.[6] After the fall of the Roman Empire, the island was conquered by Germanic, Byzantine and Frankish peoples. That period was crucial for the formation of the early Corsican identity.[7]

In the middle of the ninth century Corsica was occupied by the Arabs until the eleventh century when they were displaced by the Pope who handed over the island to archbishops of Pisa.[8] From that day on, Italian influences started to contribute to the formation of the local identity. It is noteworthy that many Romanesque temples, which are now important tourist attractions, were built at that time. The Pope's decision led to an intensified conflict between Genoa, which claimed the right to the island, and Pisans supported by the head of the Church. The situation resulted in the Battle of Meloria (1284) won by the fleet of the Republic of Genoa.[9] Consequently, Genoa governed the island for almost 500 years. It is worth mentioning that in 1450 Genoa ceded the administration of the island to its main bank, the Bank of Saint George.[10] Nevertheless, it was during their reign (1377) that the first uprising was organized.[11] This shows that combative traditions among the indigenous people of Corsica have a long history. There was one longer break during that period when France took control over Corsica (1553–1559). However, Genoa regained the rule after the Peace of Cateau-Cambrésis (1559).[12]

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[3] P. Arrighi, *Histoire de la Corse*, Paris 1969, p. 7; *Estimation de la population au 1er janvier 2023. Séries par région, département, sexe et âge de 1975 à 2023*, Insee, https://www.insee.fr/fr/statistiques/1893198 (accessed 17.04.2023).

[4] G. Krzyżanowski, *Korsyka – geneza i anatomia dążeń separatystycznych*, http://www.psz.pl/127-unia-europejska/grzegorz-krzyzanowski-korsyka-geneza-i-anatomia-dazen-separatystycznych (accessed 31.10.2020).

[5] *Ibid*.

[6] *Nowa encyklopedia powszechna PWN*, Vol. 3, Warszawa 2003, p. 502.

[7] G. Krzyżanowski, *Korsyka*, *op. cit*.

[8] *Nowa encyklopedia powszechna PWN*, 2003, *op. cit*.

[9] P. Antonetti, *Histoire de la Corse*, Paris 1973, p. 143.

[10] L.V. Bertarelli, *Sardegna e Corsica*, Milano 1929, p. 45.

[11] *Nowa encyklopedia powszechna PWN*, 2003, *op. cit*.

[12] P. Antonetti, 1973, *op. cit*., pp. 216–228.

After 170 years the riots started, which led to Corsica's independence. Their causes were multiple and diverse, but the main reason was the imposition of new taxes.[13] The key moment in the Corsican history was the appearance of Pascal Paoli – the second most famous Corsican besides Napoleon. Once he took over the leadership (1755), the inhabitants of the island considered him the right man in the right place,[14] and the same year the title of the 'General of the Nation' was conferred on him. He was not even 30 years old at the time but already imbued with the egalitarian political philosophy of Charles Montesquieu and Jean-Jacques Rousseau. His target was to expel the Genoese and the French. He also wanted to establish permanent, autonomous and democratic rule on the island.[15] The uprising came to an end in the same year and the Corsican Republic was created. Paoli became the head of the state, which was the world's first modern democratic republic existing from 1755 to 1769. For some, it was 'the best model that hath ever existed in the democratical form'.[16] Paoli managed to create a unique state in the contemporary political reality. It had an army consisting of two regiments and a navy with about twenty pirates, called the navy of Paoli.[17] Under his leadership, the National Assembly, which was convened in 1755, developed and passed a constitution, which was more democratic than any other in Europe.[18] Nevertheless, there are the opinions (Fernand Ettori) that this system was not so democratic as it seemed to be.[19]

First of all, the aim of the newly created legal system was the liquidation of the vendetta law that had been in force for centuries and allowed the aggrieved to exact bloody revenge on the perpetrator.[20] The constitution also guaranteed numerous civil liberties or self-governance. The ideas contained therein belonged to the most humanitarian in the contemporary world. In general, it regulated many areas: from traditional competences of the given powers, through the national defence to the cultural or religious issues.[21] In addition, a liberal legal code was introduced and the process of establishing schools and a university began.[22] The

[13] F. Pomponi, *Émeutes populaires en Corse: aux origins de l'insurrection contre la domination génoise (décembre 1729–juillet 1731)*, 'Annales du Midi: revue archéologique, historique et philologique de la France méridionale' 1972, Vol. 84(107), pp. 151–181.

[14] P. Antonetti, 1973, *op. cit*., p. 347.

[15] D. Abram, *Korsyka. GR20 i inne trasy piesze na wybrzeżu i w głębi wyspy: Ajaccio, Bastia, Calvi, Corte i Porto-Vecchio*, Warszawa 2010, p. 57.

[16] J. Boswell, *An Account of Corsica. The Journal of a Tour to that Island, and Memoirs of Pascal Paoli*, London 1768, p. 161.

[17] M. Vergé-Franceschi, *Pascal Paoli, un Corse des Lumières*, 'Cahiers de la Méditerranée' 2006, Vol. 72.

[18] *Pasquale Paoli*, Britannica, https://www.britannica.com/biography/Pasquale-Paoli (accessed 31.10.2020).

[19] P. Antonetti, 1973, *op. cit*., p. 351.

[20] *Pasquale Paoli*, Britannica, *op. cit*.

[21] P. Antonetti, 1973, *op. cit*., pp. 349–364.

[22] B. Rudnicki, *Podróże marzeń. Korsyka*, Warszawa 2007, pp. 47–48.

structural solutions of the Corsican Republic were so disruptive that in 2015 Gilles Simeoni's government, after winning the elections, swore an oath on a book dating from that period.[23]

Nonetheless, years of independence quickly passed because in 1768 Genoa, by virtue of the Treaty of Versailles, sold the rights to the island to the King of France, Louis XV. 'French troops subsequently invaded the island in overwhelming numbers'.[24] The guerrilla war led by the Corsicans ended with their defeat at the Battle of Ponte Novu in 1769. This ended the Corsican Republic and sealed the French rule on the island. Since then, Corsica has been one of the French regions. There were only two exceptions. The first was the period between 1794 and 1796 when the island was under the rule of the British fleet. It was an independent kingdom then. After the Corsicans joined the French for a short time, Great Britain withdrew its troops and the French regained their sovereignty over the island. The other case was when the Italians and Germans occupied Corsica between 1942 and 1943.

During the French reign most of the talented Corsicans succumbed to French influences and many of them joined the French army. One such person was the most famous Corsican, Napoleon Bonaparte. It is mainly to him and his generals that the suppression of rebellions and the introduction of military dictatorship in Corsica at the beginning of the nineteenth century are attributed. Nevertheless, it was also Napoleon who in 1811 introduced tax reliefs for selling different products which exist to the present day.[25] His rebellious youth was primarily due to the fact that his father took part in the uprisings at Paoli's side. The successes he achieved in domestic and foreign politics made the Corsicans understand better the imperial administration, which tended to the centralization of the country.[26]

The following years saw the abandonment of the idea of independence in favour of the development as part of France.[27] Many Corsica's residents worked then in the French administration. The change in attitude towards metropolitan France caused demographic problems. Mass emigration contributed to the decline of the island's population by almost half over half a century.[28] The main reasons why the Corsicans left were the possibility of a better life, new jobs and a greater chance for personal and professional promotion.

Decades later when a large number of people came to terms with the lack of autonomy, the French decided to take advantage of the Corsican bellicose character in World War I. More than one of every six Corsican citizens was then under

[23] P. Jendroszczyk, *Korsyka: Autonomia i ksenofobia,* 'Rzeczpospolita' 2015, Vol. 301, p. A10.

[24] *Corsica*, Britannica, https://www.britannica.com/place/Corsica (accessed 05.10.2020).

[25] J. Bielecki, *Korsyka idzie w ślad Katalonii,* 'Rzeczpospolita' 2017, Vol. 282, p. A10.

[26] K. Tyszka-Drozdowski, *Wyspa rokoszu*, 'Rzeczpospolita' 2018, Vol. 119, p. 34.

[27] D. Abram, 2010, *op. cit*., p. 59.

[28] *Ibid*.

arms.[29] Their willingness to fight without using modern weapons was not sufficient to fight enemies, which caused numerous losses among Corsicans. After the end of World War I, the emigration continued to grow and those young people who stayed on the island often joined the demiworld (French: *milieu*).[30] In 1940 all the problems the inhabitants faced were without significance due to the ongoing World War II. Corsica, as a strategic area for the troops of every state, had to defend itself against both Italy and Germany.[31] That time resulted in cooperation between the French government and Corsicans, who, being disciplined and respectful of the authorities, waited for orders.[32] After the withdrawal of the Third Reich troops, in 1943 the island became the first liberated department of France.[33]

Another issue, which is key to understanding the present day moods, is decolonization. Due to the loss of the Algerian colony by France in 1962, more than a million *pieds noirs*[34] were forced to leave Algeria. The French government sent some of them to work on the eastern Corsican plain, providing them with 75% of land originally intended for the Corsicans who, after the valorization of agricultural land, allegedly were to have the pre-emption right to land. In addition, the authorities decided to evict many Corsican families living there for several generations.[35] The decision caused great tensions on the island. For the Corsicans, the presence of the newcomers was an example of colonial injustice. It also contributed to the decrease in the percentage of residents who spoke Corsican (see more in section 3.2.1.). The end of the war in Algeria also meant that France could no longer conduct nuclear research there. In that situation the president decided to move the nuclear weapons test sites near Calvi, on the west coast of Corsica.[36]

All those decisions of the French authorities contributed to the radicalization of the Corsicans' views. At the beginning of the 1970s, two underground organizations of a nationalist character were formed: the Corsican Peasant Liberation Front (FPLC – *Fronte Paisanu Corsu di Liberazione*) and the Paolin's Justice

[29] L. Meriwether, *The War Diary of a Diplomat*, New York 1919, p. 56.

[30] D. Abram, 2010, *op. cit*., pp. 60–61.

[31] *Ibid*., p. 61.

[32] M. Choury, *Tous bandits d'honneur! Résistance et libération de la Corse (juin 1940–octobre 1943),* Paris 1956, p. 17.

[33] *The Liberation of Corsica 1943*, https://dlockyer.wordpress.com/2015/05/08/liberation-of-corsica-1943/ (accessed 31.10.2020).

[34] The term refers primarily to people from Europe who were born in Algeria during the French rule in the years 1830–1966. More broadly, it may refer to other people from abroad, both Christian and Jewish, from all parts of the Mediterranean whose families also emigrated in the nineteenth and twentieth centuries to French Algeria, the French protectorate in Morocco or the French protectorate in Tunisia, where many of them lived for several generations but escaped or were expelled after the end of the French rule in North Africa in 1956–1962.

[35] *From Independence in Algeria to the Corsican Nationalist Movement*, https://dlockyer.wordpress.com/2016/05/24/from-independence-in-algeria-to-the-corsican-nationalist-movement/ (accessed 31.10.2020).

[36] *Ibid*.

(GP – *Ghjustizia Paolina*). However, they played a minor role in the Corsican separatist movement because it was the Corsican Regionalist Action (ARC – *Action Régionaliste Corse*) that led the way.[37] The event which directly contributed to the further radicalization was the attack and occupation of a vineyard in Aléria. The newcomers engaged in blatant large-scale fraud by adding sugar to wine, which, consequently, resulted in an increase in alcohol concentration.[38] It was unacceptable for Corsicans because wine production was an important element of their tradition and culture. After that incident, the ARC was dissolved and replaced by two new organizations: the Association of Corsican Patriots (APC – *Associo di Patrioti Corsi*) and the Union of the Corsican People (UPC – *Unione diu Populu Corsu*).[39] Eventually, the most popular organisation – the Corsican National Liberation Front (FLNC – *Fronte di Liberazione Naziunale di a Corsica*) – was founded on 5 May 1976. Its first declarations concerned the increase of the island's autonomy. Later, the FLNC members began to make terrorist attacks. 'Over the next 40 years, the rebels blew up banks, cars, military vehicles, railway tracks, government buildings, made shotguns with grenade launchers and attacked police stations and military facilities, banks and charged "revolutionary tax from entrepreneurs".'[40] Despite the large number of annual attacks, these actions were not aimed at killing opponents.[41] Furthermore, all demands were formulated in the Corsican language in order to emphasize separateness.

Summing up, one must state that for many centuries, from antiquity to modern times, the Corsicans were constantly threatened by more developed peoples, tribes, or states. It is due to the fact that the island was an attractive place for many invaders because of the sea routes crossing.[42] 'Since the late 18th century, nationalists have seen the feeling of belonging to a Corsican nation in a legal and historical context as a pervasive sense of identity.'[43] History shows that it is difficult to suppress their desire for independence and a sense of individuality, though the island has been in the hands of various communities, rulers or even commercial organizations, such as the Bank of Saint George.

The geographical location is of significance since Corsica is situated several kilometres from Italian Sardinia and much farther from France. The closer proximity of the island to Italy and historical links with the Republic of Genoa indicate rather stronger cultural links with Italy. One of the examples confirming this

[37] P. Poggioli, *Corse, l'adieu aux armes*, 'Le Monde diplomatique' October 2014, Vol. 10, p. 12.

[38] B. Rudnicki, 2007, *op. cit.*, p. 54.

[39] *Ibid*.

[40] T. Skowronek, *Separatyści z wyspy Napoleona*, 'Przegląd' 2018, Vol. 3, p. 28.

[41] L. De Winter, H. Tursan, *Regionalist Parties in Western Europe,* New York 2003, p. 186.

[42] D. Abram, 2010, *op. cit*., p. 49.

[43] T. Dominici, *Corsica*, (in:) M. Sanjaume-Calvet, D. Turp (eds), *The Emergence of a Democratic Right to Self-Determination in Europe*, 2016, https://ideasforeurope.eu/wp-content/uploads/2018/03/Coppieters_5282_selfdetermination-_final.pdf (accessed 31.10.2020), p. 102.

view is the origin of the Corsu language, which is considered a dialect of one of the languages that was in use in the territory of present-day Italy (see more in section 3.2.1.). Indeed, the Constitution of the Corsican Republic was written in that language and the Corsican law for many years was drawn up in Italian, even after the takeover of the island by France. Also cultural contacts with Italy are still maintained, a number of Corsicans still study there, and even many Italian revolutionaries have found shelter on the island after failures.[44] Despite these relationships and Italy's attempts to win sympathy, e.g. by funding scholarships for talented Corsicans, which endured long after the Genoese domination had come to an end,[45] for many years Corsica has been a part of France.

The whole turbulent history confirms that many differences, notably cultural ones, have developed, a number of which are now the cause of considerable distance from France and demands of greater autonomy. In order to appease current and potential conflicts, one should introduce fair legal solutions which would be a compromise but within the legal framework. Nevertheless, the Corsican issue has already been the subject of legal changes that led to, e.g. the evolution of its status or passing provisions which granted new rights to the Corsicans.

3. CORSICA IN THE LIGHT OF FRENCH LAW

3.1. ADMINISTRATIVE STATUS OF CORSICA

The French Republic is a unitary state and there is some plausibility that such structure is more conducive to separatist tendencies than it would be possible in a federal state with usually greater autonomy. The affiliation of Corsica to France means that one must consider the legal status of the island with regard to French regulations. Analysing administrative issues during Corsica's subservience to the French Republic, it is worth distinguishing three periods. In 1793 the island consisted of two departments.[46] Then, in 1811, there was one and since 1975 it has again been divided into two, becoming this way the twenty-second region of France. In 2016 the number of regions decreased from 22 to 13, but Corsica has remained one of them. However, it is the range of rights and liberties which arouses controversy. The status and degree of the island's autonomy is affected by numerous laws.

[44] N. Mari, *Langue corse: 90% des Corses sont pour le bilinguisme*, Corse Net Infos, 2013, https://www.corsenetinfos.corsica/Langue-corse-90-des-Corses-sont-pour-le-bilinguisme_a2678.html (accessed 31.10.2020).

[45] D. Carrington, *Granite Island: A Portrait of Corsica*, London 2008.

[46] F. Pomponi, *En Corse sous la Révolution: le temps du Governo Separato (juin 1793–juin 1794)*, 'Cahiers de la Méditerranée' 1994, Vol. 48, pp. 149–165.

The most important normative act is the Constitution of the French Republic.[47] Nevertheless, the increasing radicalization of the Corsicans caused, i.a. by the establishment of the FLNC, prevailed on France to regulate the Corsican issue at the statutory level. Some of the first manifestations were two acts adopted in 1982[48] which defined the special status of the Corsican region and determined its competences. The Corsican Assembly was then established. Later on, the Act establishing the territorial community of Corsica (1991)[49] and the Act concerning Corsica (2002)[50] were passed. Although the latter did not change the status of Corsica, it extended its competencies.[51] All these laws were subject to a comprehensive assessment by the Constitutional Council in terms of compliance with the Constitution of the French Republic. Michel Bernard, President of the honorary section of the Council of State, pointed out that two basic conclusions are drawn from the Council decisions.[52] The first is that Corsica has a specific status. The other is that Corsica is an integral part of the French Republic. Both closely follow the French Constitution and have been included in the Council's decisions.

A special status at that time meant the status of a territorial community defined as 'specific' (*spécifique*). Nevertheless, since the beginning of 2018, by virtue of the Act of 2015,[53] the 'Corsican Territorial Community' was converted into the 'Community of Corsica', becoming a unique territorial community in place of the existing administrative unit and departments of South Corsica and Upper Corsica. An overview of the history of legal regulations regarding Corsica will allow showing the evolution of the related line of case law and the status of the island.

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[47] Constitution of 4 October 1958, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais.pdf (accessed 31.10.2020).

[48] Act of 2 March 1982 on the special status of the region of Corsica and its administrative organization: Loi n° 82-214 du 2 mars 1982 portant statut particulier de la région de Corse: organisation administrative, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000704430/ (accessed 31.10.2020); Act of 30 July 1982 on the special status of the region of Corsica and its competences: Loi n° 82-659 du 30 juillet 1982 portant statut particulier de la région de Corse: compétences, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000880223/ (accessed 31.10.2020).

[49] Act of 13 May 1991 on the status of the territorial community of Corsica: Loi n° 91-428 du 13 mai 1991 portant statut de la collectivité territoriale de Corse, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000536085/ (accessed 31.10.2020).

[50] Act of 22 January 2002: Loi n° 2002-92 du 22 janvier 2002 relative à la Corse, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000409466/ (accessed 31.10.2020).

[51] *Quel est le statut de la Corse?* https://www.vie-publique.fr/fiches/20150-le-statut-de-la-corse (accessed 31.10.2020).

[52] M. Bernard, *Les statuts de la Corse*, 'Cahiers du Conseil constitutionnel' May 2002, No. 12, https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/les-statuts-de-la-corse (accessed 31.10.2020).

[53] Act of 7 August 2015 on the new territorial organization of the Republic: Loi n° 2015-991 du 7 août 2015 portant nouvelle organisation territoriale de la République, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000030985460/ (accessed 31.10.2020).

At first, one should draw attention to Article 72 of the French Constitution which regulates the issue of territorial communities. The Constitutional Council in its decision 82-138 DC[54] stated that this provision allowed the creation of not only overseas territorial communities but also such which cover only one unit. Such cases were not new to French law because separate laws for Paris and Mayotte had been passed.[55] Therefore, it confirmed the special legal status of Corsica. In a subsequent decision 91-290 DC,[56] the Council added that the fact of mentioning only overseas territories in Articles 74 and 76 of the Constitution did not prevent the legislator from establishing a new category of territorial community and from giving it a special status and administrative structure, what happened by virtue of the 1991 Act. Nevertheless, there is a significant difference between Corsica's status and the status of overseas territories. As the Council recognized, the legislator may, in the case of the overseas territories, refrain (albeit to a limited extent) from division of powers between the law and the regulation, whereas in the case of Corsica that is not possible.[57]

The status of a special territorial community carries many implications. In every such unit one must guarantee the principle of free administration (decision 91-290 DC). It means that the Corsican Assembly, elected in direct elections, should have and has the right to regulate the matters of its territorial community by virtue of the above-mentioned act. This is an example of some kind of autonomy in the operation of local administrative bodies. It also shows the change in the attitude of the authorities in Paris to the decentralization of power. However, as the Constitutional Council emphasized, this principle cannot cause the collision between the territorial community status and the prerogatives of the state, mainly of the government. This distinction is a contentious issue, but it is crucial because it would allow defining a limit to the autonomy of such a territory.

In order to properly assess it, one must determine the relation between Articles 72 and 21 of the Constitution. The former stipulates that territorial communities have power to make regulations in matters coming within their jurisdiction. The latter underlines the fact that generally the Prime Minister shall have power to make regulations. Firstly, as the Constitutional Council pointed out, it is pos-

[54] Decision of 25 February 1982 concerning the Act on the special status of the region of Corsica: Décision 82-138 DC – 25 février 1982 – Loi portant statut particulier de la région de Corse, https://www.legifrance.gouv.fr/affichJuriConst.do;jsessionid=BA554DBEF31C5C267415014857D09AAF.tpdjo06v_2?idTexte=CONSTEXT000017667346 (accessed 31.10.2020).

[55] M. Bernard, 2002, *op. cit.*

[56] Decision of 9 May 1991 concerning the Act on the status of the territorial community of Corsica: Décision 91-290 DC – 09 mai 1991 – Loi portant statut de la collectivité territoriale de Corse, https://www.legifrance.gouv.fr/affichJuriConst.do?idTexte =CONSTEXT000017667837 (accessed 31.10.2020).

[57] M. Bernard, 2002, *op. cit.*

sible for the local authorities to implement the law (decision 88-248 DC),[58] but there are restrictions. The implementation of public freedoms is forbidden due to the fact that it could cause simultaneous application of different rules throughout the Republic, but also regulations must be made within the framework of competences devolved on a community by law and cannot infringe Prime Minister's powers under Article 21 of the Constitution (decision 2001-454 DC)[59].[60] The latter issue was considered earlier by the Council when it acknowledged that the exercise of rights by the communities cannot lead to the infringement of the prerogatives of the state (decision 91-290 DC). Secondly, the lawmaker was allowed to provide territorial communities with certain methods of applying the law (decision 2001-454 DC). Thirdly, the Council emphasized the fact that the law has to specify precisely the scope, methods of implementation and bodies responsible for making regulations in the community (decision 2001-454 DC).[61]

Until the establishment of the Lyon Metropolitan Area in 2014,[62] Corsica was the only territorial community with a special status within the meaning of Article 72(1) of the Constitution in metropolitan France.[63] However, the status of the island changed with the beginning of 2018, by virtue of the Act on the new territorial organization of the Republic, which was mentioned above. The 'Community of Corsica' is no longer a territorial community with a special status like the Lyon Metropolitan Area, but it has become a unique territorial community, which exercises the powers devolved both on the region and the department. The same status was granted to Mayotte in 2011,[64] as well as to French Guiana and Martinique in 2015[65]. It is noteworthy that from the beginning of 2021 another unique territorial community was created: the European Collectivity of Alsace.

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[58] Decision of 17 January 1989 concerning the Amendment to the Act no. 86-1067 of 30 September 1986 on freedom of communication: Décision 88-248 DC – 17 janvier 1989 – Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication, https://www.conseil-constitutionnel.fr/decision/1989/88248DC.htm (accessed 31.10.2020).

[59] Decision of 17 January 2002 regarding the Act concerning Corsica: Décision n° 2001-454 DC – 17 janvier 2002 – Loi relative à la Corse, https://www.conseil-constitutionnel.fr/decision/2002/2001454DC.htm (accessed 31.10.2020).

[60] M. Bernard, 2002, *op. cit.*

[61] *Ibid*.

[62] Under the Act of 27 January 2014 on the modernization of territorial public action and the affirmation of metropolises: Loi n° 2014-58 du 27 janvier 2014 de modernisation de l'action publique territoriale et d'affirmation des métropoles, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028526298/ (accessed 31.10.2020).

[63] *Quel est le statut de la Corse? op. cit.*

[64] Under the Act of 7 December 2010 concerning the Department of Mayotte: Loi n° 2010-1487 du 7 décembre 2010 relative au Département de Mayotte, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000023174577 (accessed 31.10.2020).

[65] Under the Act of 27 July 2011 concerning the territorial communities of French Guiana and Martinique: Loi n° 2011-884 du 27 juillet 2011 relative aux collectivités territoriales de Guyane et de Martinique, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000024403725 (accessed 31.10.2020).

One should also mention that a similar change could have been made for Corsica in 2003 when the referendum took place. Nonetheless, 51% voted against with the difference of 2,238 votes between for and against.[66] It was possible then to replace two administrative departments and one regional council and 'elect a new, unified assembly with some limited powers to raise and spend taxes'.[67] It was an example of readiness of the government to give more autonomy to Corsicans, but many inhabitants feared that 'a Yes vote would be seen as a victory for violent nationalists who have waged a bombing and shooting campaign for independence from France since the 1970s'.[68] This shows that decisions not always depend on central powers; sometimes, citizens can take matters into their own hands.

The current status involves many new regulations, e.g. new procedures for supervising the legality of acts passed by the Corsican authorities, competencies of the Corsican authorities, rights and obligations of the three former communities, extension of the powers of the chairman of the 11-member Corsican Executive Council. Besides, in connection with the newly created administrative unit, the Act authorized the government, pursuant to Article 38 of the Constitution, to issue three ordinances in November 2016. The first was to supplement and specify budgetary, financial and tax regulations for Corsica,[69] the second laid down various institutional measures regarding the Corsican community,[70] while the third one was aimed at regulating electoral law on the island.[71] These regulations and the 2015 Act are, for sure, a big step towards greater autonomy and satisfying the Corsicans' demands. Moreover, on 4 April 2018, the Prime Minister of the French Republic presented a draft which provided for an additional provision or paragraph to the Constitution that would allow the specificity of the island to be adapted to the law of the French Republic.[72]

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[66] *Consultation des électeurs de Corse 2003*, https://www.interieur.gouv.fr/Elections/Les-resultats/Locales/Consultation-des-electeurs-de-Corse-2003 (accessed 31.10.2020).

[67] C. Wyatt, *Corsica Seeks Stake in Future*, BBC, 5 July 2003, http://news.bbc.co.uk/2/hi/europe/3046162.stm (accessed 05.10.2020).

[68] *Ibid*.

[69] Ordonnance n° 2016-1561 du 21 novembre 2016 complétant et précisant les règles budgétaires, financières, fiscales et comptables applicables à la collectivité de Corse, https://www.legifrance.gouv.fr/eli/ordonnance/2016/11/21/2016-1561/jo/texte (accessed 31.10.2020).

[70] Ordonnance n° 2016-1562 du 21 novembre 2016 portant diverses mesures institutionnelles relatives à la collectivité de Corse, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033440998&categorieLien=id (accessed 31.10.2020)

[71] Ordonnance n° 2016-1563 du 21 novembre 2016 portant diverses mesures électorales applicables en Corse, https://www.legifrance.gouv.fr/eli/ordonnance/2016/11/21/INTA1623375R/jo/texte (accessed 31.10.2020).

[72] *Discours de M. Eduard Philippe*, *Premier Ministre: Réforme des institutions*, 4 April 2018, Hôtel de Matignon, https://www.gouvernement.fr/sites/default/files/document/document/2018/04/discours_de_m._edouard_philippe_premier_ministre_-_reforme_des_institutions_-_mercredi_4_avril_2018.pdf (accessed 31.10.2020).

All of this demonstrates that there is good will on the part of the government to acknowledge some of the Corsicans' demands, provided those are compatible with the French law and its principles. These changes prove the opinion of Michel Verpeaux that the recognition of the constitutional dimension of territorial communities has profoundly modified their perception in France. They ceased to be regarded as secondary administrative communities, situated below the state.[73]

3.2. THE STATUS OF CORSICA IN LIGHT OF CONSTITUTIONAL PRINCIPLES

Two significant principles, which are complementary, are: the principle of the indivisibility of the Republic and the principle of equality of citizens.[74] Both of them are regulated in Article 1 of the French Constitution. One of the obvious conclusions that can be drawn from the literal wording of the first principle, is that any attempt at separating any part of the territory of France would be recognized as an infringement of the Constitution, both by the French legal authorities and the majority of the French people. The other principle is not so evident. The bone of contention in the Corsican issue was Article 1 of the 1991 Act, which stipulates that the French Republic guarantees the Corsican nation – as part of the French nation – the right to preserve its cultural identity and defend its specific economic and social interests. It is noteworthy that the law was adopted by the Parliament, despite the negative opinion of the Council of State.[75] The doubts were dispelled by the Constitutional Council which recognized that the mention of the Corsican nation as a part of the French nation is contrary to both of these principles because the Constitution considers only the French nation, regardless of origin, race or religion (decision 91-290 DC). Considering such provisions like Article 1 of the 1991 Act, one must admit that their passing is very risky as it touches on the most sensitive topic connected with the identity of the indigenous people, what can lead to long-lasting political consequences. In a subsequent decision, the Council added that the term 'French nation' had a constitutional value and excluded the possibility of recognising collective rights of any community, regardless of origin, culture or worldview (decision 99-412 DC).[76] Afterwards, the

[73] M. Verpeaux, *Le droit constitutionnel des collectivités territoriales, avant-propos*, 'Cahiers du Conseil constitutionnel' 2002, No. 12, https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-droit-constitutionnel-des-collectivites-territoriales-avant-propos (accessed 31.10.2020).

[74] M. Bernard, 2002, *op. cit.*

[75] Conseil d'État, 7ème–2ème chambres réunies, 25/10/2017, no. 403335, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000035911903/ (accessed 31.10.2020).

[76] Décision 99-412 DC – 15 juin 1999 – Charte européenne des langues régionales ou minoritaires, https://www.legifrance.gouv.fr/affichJuriConst.do?oldAction=rechJuriConst&idTexte=-CONSTEXT000017667958&fastReqId=1605355888&fastPos=1 (accessed 31.10.2020).

Council directly excluded the possibility of national sovereignty of any section of the nation (decision 2001-454 DC).

It is worth drawing attention to the way in which such decisions are justified by the Constitutional Council. To underpin its judgment, it referred to the preamble of the Constitution of 1958, the Declaration of Human and Citizens' Rights of 1789, and constitutional texts which over the years used only the term 'the French people' (decision 91-290 DC).[77] It was also noticed by legal scholars and commentators. Verpeaux emphasises that the Constitutional Council indirectly referred to the constitutional continuity through constitutional customs and historical background.[78]

The way of justifying the decision is strictly connected with interpretation which plays a key role during the analysis of legal norms. Constitutional provisions relating to territorial communities are extremely brief, but at the same time they can have a lot of meaning, and consequently, they are open to interpretation.[79] That is why, by dint of the judges' efforts who interpret and develop legal norms, the constitutional foundations evolve without changing.[80] The same is true for, e.g. Article 1 of the French Constitution. Therefore, the principles of the indivisibility of the Republic and equality of citizens *prima facie* seem to be unequivocal. However, the above analysis shows that interpretation made by the Council has led to many crucial findings which in certain aspects delimit autonomy. The line of case law in relation to the way these principles are construed is rather well-established because the essence – univocal rejection of any sovereignty or distinguishing any community – remains the same. However, something new is always added and norms are developed. One of the examples was the statement of reasons in the above-mentioned decision, where the Council cited historical regulations, which significantly contributed to the uniform understanding of the given norm; after all, it seems unlikely that any court could judge differently, breaking the historical continuity.

3.2.1. SEPARATE LANGUAGE

Another issue concerning constitutional principles is recognition of a language which is spoken by the minority in France. It is one of the crucial features of a given group of people which emphasises its alterity. Almost 80% of inhabitants of Corsica speak their own, Corsican language.[81] Nevertheless, bilingualism

[77] M. Bernard, 2002, *op. cit.*

[78] M. Verpeaux, *L'unité et la diversité dans la République*, 'Les Nouveaux Cahiers du Conseil constitutionnel' 2014, Vol. 42(1), pp. 7–16.

[79] M. Verpeaux, 2002, *op. cit.*

[80] *Ibid*.

[81] M. Strzałkowski, *Korsyka: Protesty nacjonalistów przed wizytą Emmanuela Macrona*, EURACTIV.pl, 5 February 2018, https://www.euractiv.pl/section/polityka-regionalna/news/korsyka-protesty-nacjonalistow-wizyta-emmanuela-macrona/ (accessed 31.10.2020).

is often emphasized since 90% of the population want to speak French and Corsican in the future, while only 7% choose only French and 3% point to Corsican. The vast majority (86%) show a strong interest in their language.[82]

Until the mid-nineteenth century *lingua corsa* was an official language of Corsica.[83] It is closely related with Tuscan as these two languages are even considered to be the two variants of the same language.[84] It obviously stems from close historical links with the Apennine Peninsula, especially with Pisa and Genoa. After the takeover of the island by France, the influence of Italian was diminishing, but it still existed in spite of attempts to limit it (e.g. by quashing judgments written in Italian or by replacing Italian newspapers with the French ones), which is proven by the fact that sermons in Italian were preached on the island until 1938.[85] By dint of the historical background of Corsican, one can observe a certain process. At first, its origin is rather similar to the continental Italian dialects: a slow evolution from popular Latin which led in the ninth century to the development of a new language. During the medieval period the languages of Tuscany, North Sardinia, and Corsica were seen as a linguistic whole. However, in the nineteenth century the Corsican language began to carry weight with more and more texts written in Corsican (articles in newspapers, lyrics).[86] In the meantime, French replaced Italian, also as the language of administration and justice, and it was spoken by urban elites and middle classes.[87] It also resulted from the fact that since 1820, 'Italian was banned from public administration and, progressively, from education'.[88] This proves that the significance of the native language increases in the time of danger or uncertainty. During 500 years of Genoese rule over Corsica, there was a relative stability in terms of affiliation, whereas the eighteenth and nineteenth centuries were quite turbulent, forcing the Corsicans to fight for independence or autonomy. This contributed to the development of identity of the indigenous people who could express their distinctiveness by means of their language. These roots justify the opinions that linguistic aspirations are

[82] N. Mari, *Langue corse*, *op. cit*.

[83] E. Biernacka, *11 Native Languages that are Disappearing in France*, 31 October 2016, https://theculturetrip.com/europe/france/articles/11-dying-languages-in-france/ (accessed 05.10.2020).

[84] J.-M. Arrighi, *Langue corse: situation et débats*, 'Ethnologie française' 2008, Vol. 38(3), pp. 507–516.

[85] *Ibid*.

[86] *Ibid*.

[87] B. Spolsky, *Language Policy in French Colonies and after Independence*, 'Current Issues in Language Planning' 2018, Vol. 19(3), pp. 231–315, at p. 237.

[88] M. A. Farinelli, *Managing the Island Territory: A Historical Perspective on Sub-state Nationalism in Corsica and Sardinia*, 'Small States & Territories' 2020, Vol. 3(1), pp. 137–152, at p. 141.

unlikely to die on this island, as their own language is one of the strongest 'weapons' in fighting for more rights.[89]

In 1992 the French language was introduced into the Constitution as the only official language.[90] Nonetheless, it did not prevent Corsican from further development, which has been fostered since the end of World War II, e.g. by establishing the Academy 'for the defence of the Corsican dialect and traditions' in 1953.[91] This provision concerns not only Corsican, but also other local languages since France is the most linguistically varied country in Western Europe, with 51% of the population speaking another language in addition to French.[92] Passing such provisions is always risky because it fuels potential conflicts and may lead to further radicalization and rise of separatist demands. That is why, an outrage was inevitable as identity issues seem to be flashpoints. The situation may have changed several years later when the European Charter for Regional or Minority Languages was adopted. It has granted, e.g. the right to use a regional language both in private and public life. However, in the aforementioned decision, the Constitutional Council stated that it infringed Article 2 of the Constitution which provides that the language of the Republic is French (decision 99-412 DC).

Apart from parents, the biggest role in language learning is played by school. One of the most efficient ways to teach the society a given language is to introduce it to the school curriculum. In the nineteenth century it was French which was taught in Corsican schools. In 1829 the schools were divided roughly in half between French and Italian facilities, whereas in 1881 a decree stated that French would be the only language in use in school. After World War II, it was the Corsicans who wanted for their language to be taught in secondary education as a second language, which would be compulsory on the island and optional outside the island. What is more, in 1964 the National Union of Corsican Students in Paris called for teaching the Corsican language and history since the primary school. Subsequently, pursuant to the 1982 Act which granted the right of initiative to the Corsican Assembly, in 1983 this body adopted a law about bilingualism and compulsory teaching of Corsican. Although it was rejected by the Prime Minister, it made the goals of Corsicans clear.[93]

The turning point was the 1991 Act which enabled the Corsican Assembly to adopt the plan for teaching the Corsican language and culture, simultaneously

[89] *In Corsica, a Language Breeds Controversy*, https://www.dw.com/en/in-corsica-a-language-breeds-controversy/a-19524436 (accessed 31.10.2020).

[90] See the constitutional law of 25 June 1992: Loi constitutionnelle n° 92-554 du 25 juin 1992 ajoutant à la Constitution un titre: 'Des Communautés européennes et de l'Union européenne', https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000723466/ (accessed 31.10.2010).

[91] J.-M. Arrighi, 2008, *op. cit*.

[92] G. Radford, *French Language Law: The Attempted Ruination of France's Linguistic Diversity*, Trinity College Law Review Online, https://trinitycollegelawreview.org/french-language-law-the-attempted-ruination-of-frances-linguistic-diversity/ (accessed 31.10.2020).

[93] J.-M. Arrighi, 2008, *op. cit*.

including this teaching in the school curriculum. The Constitutional Council ruled that such a solution was not contrary to the principle of equality because teaching of the subject is not mandatory and is not intended to deprive any pupils of the rights and obligations applicable to all entities providing public education or associated with it (decision 91-290 DC). What is more, ten years later the 2001 Act provided that the Corsican language would be taught in Corsican pre-primary and primary classes during normal school hours. The Council upheld this provision consistent with the Constitution with the proviso that the teaching should be optional and (once again) not deprive any pupils of their rights and obligations (decision 2004-454 DC). A need to clarify this matter might stem from, i.a. the fact that in 1988 the proposal of teaching Corsican appeared as an obligation for school and since 1999 all fifth and sixth grade classes, as well as primary education, had to include Corsican in their curricula.[94] The Constitutional Council's position may be supported by the wording of Article 2 of the French Constitution, which suggests that using a language other than French cannot be imposed on students of public schools.

Consequently, since 1991 the Corsican Assembly had been voting on devising a plan for teaching Corsican, which would later be a subject of agreement with the state. In 1999 it provided for teaching Corsican at all levels of education, however, in 2006 it led to balance bilingualism, what would be a first step towards multilingualism.[95] Data from 2018 show that although 98% of pupils learn Corsican in primary schools, only 59% continue this optional subject in middle schools, and only 22% do so in secondary schools.[96] The percentage of bilingual nurseries and primary schools is much lower and totals approximately 31%.[97] As for the time which is devoted to teaching Corsican, all pupils until the sixth class learn it three hours per week during which the language and regional culture is taught.[98]

The constitutional principles play an enormous role in determining the current and future status of Corsica. The hierarchy of legal acts results in the necessary consistency of every lower-level legal act with the Constitution. Due to the fact that constitutional norms are often general and vague, it is the Constitutional Council which shapes them, delimiting the rights and obligations. In the case of

[94] *Ibid*.

[95] *Ibid*.

[96] *Quels sont les résultats de l'enseignement du Corse?* France 3 Corse ViaStella, https://france3-regions.francetvinfo.fr/corse/quels-sont-resultats-enseignement-du-corse-1399519.html (accessed 31.10.2020).

[97] *Langue corse: trois écoles maternelles en mode immersif à la rentrée 2018*, France 3 Corse ViaStella, https://france3-regions.francetvinfo.fr/corse/langue-corse-trois-ecoles-maternelles-mode-immersif-rentree-2018-1446553.html (accessed 31.10.2020).

[98] N. Azlag, *Quelle place pour les langues régionales à l'école*, VNI, 5 February 2020, https://www.vousnousils.fr/2020/02/05/quelle-place-pour-les-langues-regionales-a-lecole-628758 (accessed 31.10.2020).

Corsica, the case law became, with each subsequent decision, more and more precise, but *de facto* it has not changed and remained coherent.[99] Maintaining a similar line of case law underpins the principle of legal security. Thus, citizens know the lines of interpretation and may expect a particular approach. Furthermore, separatists and groups of people aiming at greater autonomy may be aware of a certain reaction from the state. There is no doubt that in relation to Corsica new local acts may still be expected. The latest change of the status of the island gives it greater autonomy and, in fact, may lead to further amendments. However, none of the provisions can be in breach of the law, notably the Constitution as its principles are understood in a definite way.

4. THE CORSICAN CASE AND INTERNATIONAL AND EUROPEAN LAW

Considering the problem of Corsica, one can notice many phenomena typical for other separatist movements in the international context. That is why, it is necessary to analyse this issue, taking into account international and European law. This will help draw general conclusions on legitimacy of the Corsican claims and provide a broader perspective on the problem under study.

4.1. SELF-DETERMINATION

'Self-determination has been one of the most important driving forces in the new international community. It has set in motion a restructuring and redefinition of the world community's basic "rules of the game".'[100] The right to self-determination arouses controversies because it is understood differently depending on the entity which relies on this principle. The states prefer a narrow understanding whereas minorities contend that it allows them to separate from a given state.[101] However, it cannot be applicable to every community which aims at independence or self-government.[102] This is because of the uncertainty of the legal status of this principle and difficulties in determining authorized entities.[103] Self-determination

[99] M. Bernard, 2002, *op. cit.*

[100] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge 1995, p. 1.

[101] K. Czubocha, *Separatyzm etniczny w dobie praw człowieka – nowe wyzwanie dla państwa narodowego i społeczności międzynarodowej*, Toruń 2012a, p. 154.

[102] J. Crawford, *The Criteria for Statehood in International Law*, 'British Yearbook of International Law' 1976, Vol. 48(1), pp. 93–182.

[103] M. Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations*, The Hague/Boston/London 1982, p. 110.

is sometimes perceived as a concept which is 'both boldly radical and deeply subversive'.[104] Robert Lansing even claims that it is 'loaded with dynamite'.[105]

The principle of self-determination appeared in the international law as a legally binding principle after World War II when it was decided to replace the protection of the rights of national minorities with a universal system of human rights as there was a reluctance to treat minorities as an ethnic group.[106] The right to self-determination has been laid down in many international acts. First of all, Article 1 of the Charter of the United Nations stipulates that one of the purposes of the UN is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.[107] One can already see that placing of such provision at the beginning of the Charter testifies to the importance of the principle of self-determination in the international legal order. Also Article 55 provides that relations among nations are to be 'based on respect for the principle of equal rights and self-determination of peoples'.[108] However, the term 'self-determination' has not been clearly defined in the UN Charter. Perhaps this is deliberate because this way there is certain freedom of interpretation. Additionally, self-determination is repeated, i.a. in Article 1 of the International Covenant on Economic, Social and Cultural Rights, which stipulates that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development',[109] or in the Vienna Convention on the Law of Treaties[110].

There are also examples of soft law which point out self-determination. For instance, the Declaration on the Granting of Independence to Colonial Countries and Peoples contains the same paragraph as the International Covenant mentioned above.[111] It concerns the issue of colonialism and recognizes the right to independence of colonial peoples, which has significantly contributed (mainly in Africa) to the process of decolonization. The principle is also repeated in other resolutions of the UN General Assembly of 1960 and 1970 (No. 1541 and

[104] A. Cassese, 1995, *op. cit.*

[105] R. Lansing, *The Peace Negotiations: A Personal Narrative*, Boston/New York 1921, p. 97.

[106] K. Czubocha, *Pojęcie państwa i procesy państwowotwórcze we współczesnym prawie międzynarodowym*, Toruń 2012b, p. 109.

[107] Charter of the United Nations, signed in San Francisco on 26 June 1945, as amended, https://www.un.org/en/charter-united-nations/ (accessed 31.10.2020).

[108] *Ibid*.

[109] International Covenant on Economic, Social and Cultural Rights, United Nations GA Resolution 2200A (XXI) adopted on 16 December 1966, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed 31.10.2020).

[110] Vienna Convention on the Law of Treaties, done on 23 May 1969, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 31.10.2020).

[111] Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations GA Resolution 1514 (XV) adopted on 14 December 1960, https://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx (accessed 31.10.2020).

No. 2625, respectively). The first specifies the concept of the right to self-determination of nations, stressing the possibility of free choice of political status through the creation of a state, joining another country or others, whereas the other one forbids any forced activity against other states that would infringe the right to self-determination.

The right to self-determination has two aspects: external and internal.[112] The first one relates to the decolonization period[113] to which the above resolutions refer and means 'the right of a group which considered itself a nation to form a State of its own'. The latter is perceived as 'the right to choose the form of government and to determine the policy it meant to pursue'[114] or 'a right to democratic governance applicable to peoples within states'[115]. The Declaration on the Rights of Indigenous Peoples of 2007 provides in Article 31 that '[i]ndigenous peoples have the right 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, 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.'[116] That provision was adopted by 143 states within the UN. This shows what is the way of understanding of self-determination among majority of states in the world. There is no mention of independence so the internal aspect prevails.

An interesting model was adopted by the Gibraltar authorities.[117] The preamble of the Gibraltar Constitution Order (2006) provides that the constitution 'gives the people of Gibraltar that degree of self-government which is compatible with British sovereignty of Gibraltar and with the fact that the United Kingdom remains fully responsible for Gibraltar's external relations'.[118] That means that

[112] R. Andrzejczak, *Uzasadnienie prawa narodów do samostanowienia. Prawa człowieka podstawą prawa narodów do samostanowienia*, Lublin 2002, p. 144.

[113] J. F. Engers, *From Sacred Trust to Self-Determination*, 'Netherlands International Law Review' 1977, Vol. 24(1–2), pp. 85–91.

[114] J. Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Leiden/Boston 2007, p. 188.

[115] K. Senaratne, *Internal Self-Determination in International Law: A Critical Third-World Perspective*, 'Asian Journal of International Law' 2013, Vol. 3(2), pp. 305–339.

[116] United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, adopted on 13 September 2007, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf (accessed 31.10.2020).

[117] S. J. Lincoln, *The Legal Status of Gibraltar: Whose Rock is it Anyway?* 'Fordham International Law Journal' 1994, Vol. 18(1), pp. 285–330.

[118] Gibraltar Constitution Order 2006, HM Government of Gibraltar, https://www.gibraltarlaws.gov.gi/papers/gibraltar-constitution-order-2006-6 (accessed 31.10.2020).

self-determination can be as far-reaching as it does not violate the sovereignty of a state which rules.

4.2. SECESSION

The problem of secession is not clearly regulated in international law. Multilateral international agreements ignore this issue as the international community has the negative attitude towards it. This seems to be obvious because if it was regulated, certain rights could be granted to secessionists and that would potentially facilitate secession, what might be in contrast with the interests of states.[119] Elimination of the right to secession means that the territorial integrity is more important than the claims of peoples.[120] Secession is most often demanded by ethnic groups that do not agree with a form of self-determination that only implies equality or autonomy. That is why, it is crucial to consider the legality of secession in terms of international law.

Secession may be an internal problem of a given state as well as an international one. All rests on the entities concerned. If another state is involved in any way in activities which aim at secession of an ethnic group from a given state, the territorial integrity of the latter may be threatened. If so, international law would be applicable. One of the examples might be the speech of President Charles de Gaulle given in Canada in 1967 which the Prime Minister of Canada considered an interference in the internal affairs of the state.[121] It is because he ended his speech with the slogan, 'Vive le Québec libre!' (Long live free Quebec!).[122] On the other hand, if the only entities involved in secessionist activity are the groups acting against the home state, then it is an internal issue (national jurisdiction) of a particular state.[123] In such a situation secession is an irrelevant act in light of international law.[124] It may also be recognised consistent with the international law but such a view is not largely shared. According to that opinion, secession can be considered an internal conflict, rebellion or revolution, and, consequently,

[119] K. Czubocha, 2012a, *op. cit*., pp. 148–150.

[120] R. Emerson, *Self-Determination*, 'American Journal of International Law' 1971, Vol. 65(3), p. 465.

[121] J. Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*, Warszawa/Poznań 1990, p. 227.

[122] A. Bellemare, *Charles de Gaulle's Infamous* '*Vive le Québec libre*' *Speech Feted, 50 Years on*, CBC News, 24 July 2017, https://www.cbc.ca/news/canada/montreal/charles-de-gaulle-speech-50th-annivesary-1.4218130 (accessed 31.10.2020).

[123] J. Tyranowski, 1990, *op. cit*., p. 243; *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, League of Nations Official Journal, October 2020, https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland1.pdf (accessed 31.10.2020).

[124] J. Crawford, *The Creation of States in International Law*, Oxford 1979, p. 268.

a civil war which is not prohibited in international law.[125] Anyway, there is no doubt that in the vast majority of cases an internal issue is present.

Therefore, secessionists in Corsica cannot seek the grounds for their demands in international law as it does not adjudicate this issue in an unequivocal way and rather treats it as falling outside the scope of the international legal order. Moreover, the lack of involvement of third states means that one should return to the French law and seek solutions there. The legal commentary adds that the right to self-determination within the meaning of its external aspect may be exercised only by the whole population living in the territory of a state or colony as ethnic minority groups are not empowered as groups in international law, i.a. because there is no definition of an ethnic minority in international law.[126] This would mean that independent Corsica might exist only if the population of France would vote 'for' it. Secession is also rejected due to the claim that the rights of indigenous peoples are guaranteed by the prohibition of racial discrimination.[127]

The possible effects of the separation of Corsica could be significant. The island is the third poorest region in France, not taking into account the overseas territories, and the eighth including them. The poverty rate affects about 20% of the population, which is the highest result out of thirteen regions of France and the unemployment rate is around 10%. Hypothetically, if Corsica became a member of the European Union, its GDP would be between Slovenia and the Czech Republic.[128] However, this calculation is illusory because the benefits that it would obtain from other countries would be much smaller than it gets at present, being a part of France. Another issue are the subsidies that France allocates to Corsica. Annually, it is approximately 5 billion dollars.[129] Owing to financial aid the economic growth is not that bad. In the case of secession, it would be difficult for Corsica to maintain such financial results. Choosing the secession, all the consequences should be taken into account.

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[125] K. Czubocha, 2012a, *op. cit*., pp. 151–152.

[126] K. Czubocha, 2012b, *op. cit*., p. 119.

[127] M. Perkowski, *Samostanowienie narodów w prawie międzynarodowym*, Warszawa 2001, p. 63.

[128] M. Damgé, *La Corse a-t-elle les moyens économiques d'accéder un jour à l'indépendance?* 'Le Monde', 15 March 2018, https://www.lemonde.fr/les-decodeurs/article/2018/03/15/la-corse-a-t-elle-les-moyens-economiques-d-acceder-un-jour-a-l-independance_5271331_4355770.html (accessed 31.10.2020).

[129] *Francja: Macron na Korsyce odrzuca żądania nacjonalistów*, 'Dziennik Gazeta Prawna', 7 February 2018, https://www.gazetaprawna.pl/artykuly/1102958,macron-na-korsyce-odrzuca-zadania-nacjonalistow.html (accessed 31.10.2020).

4.3. INTERNATIONAL ORGANISATIONS AND INSTITUTIONS ON THE PROBLEM OF SELF-DETERMINATION

4.3.1. THE INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION OF 22 JULY 2010 ON KOSOVO'S DECLARATION OF INDEPENDENCE

At the beginning it is necessary to describe the status of Kosovo prior to the declaration of independence as these circumstances are important for assessing the legality of both the secession and the declaration.[130] The Resolution No. 1244, issued by the UN Security Council, established a temporary international territorial administration in Kosovo (UNMIK – United Nations Interim Administration Mission in Kosovo) on 10 June 1999. Its aim was to rebuild effective power capable of fulfilling basic functions towards society.[131] One may enumerate, e.g. the maintenance of law and order, conducting of elections, performing administrative functions, and, most importantly, gradually delegation of these competences to the institutions of the self-government of Kosovo. The resolution stated that the final status of Kosovo was to be worked out in the future by an agreement, nevertheless after the unsuccessful negotiations, the Parliament in Pristina announced on 17 February 2008 the declaration of independence of Kosovo.[132] However, it was only a political statement, lacking any legal force. The declaration of independence as a certain actual state remains legally neutral, but it changes as a result of recognition or non-recognition by other states (see comments in section 4.5.).[133]

Subsequently, the UN General Assembly requested the International Court of Justice (ICJ) to issue an advisory opinion on the legality of this declaration in terms of its consistency with the Resolution No. 1244 and international law. After examining the practice of states over the years, the ICJ stated that the resolution did not prohibit unilateral declarations of independence in international law, which does not mean that there is such a right.[134] Thus, it ruled, by a decision of ten to four, that the mere declaration of independence could not be contrary to international law. Nevertheless, it can be so because of 'use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.[135] Illegal declarations were issued by, e.g.

[130] A. Szpak, *Secesja państwa w świetle prawa międzynarodowego (na przykładzie Kosowa i Krymu)*, 'Państwo i Prawo' 2014, Vol. (69)12, p. 38.

[131] I. Topa, *Międzynarodowa administracja terytorialna. Prawo – praktyka – dylematy*, Poznań 2012, pp. 49–50.

[132] A. Szpak, 2014, *op. cit*., p. 38.

[133] R. Kwiecień, *Glosa do opinii doradczej Międzynarodowego Trybunału Sprawiedliwości z 22.07.2010 r. w sprawie zgodności z prawem międzynarodowym jednostronnej deklaracji niepodległości Kosowa*, 'Kwartalnik Prawa Publicznego' 2010, No. 3, p. 220.

[134] A. Szpak, 2014, *op. cit*., pp. 44–45.

[135] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. Advisory Opinion of 22 July 2010*, International Court of Justice, https://icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf (accessed 31.10.2020).

Southern Rhodesia, the South African Homelands, or Northern Cyprus as they were backed by 'foreign military forces, or issued in pursuance of racial discrimination'.[136] Moreover, the Court pointed out that it was not the Kosovo Assembly that announced the declaration, but the representatives of the Kosovo people outside the legal regime. As it was argued, the authors had not issued this act within the confines of the international territorial administration, but outside it, pleading failure of negotiations.

Although the Kosovo case is unique due to the international territorial administration established there, the key fact is that the Court did not explicitly assess the legality of the right to secession but only the declaration. Thus, it did not take the opportunity and did not comment on the right to secession or its absence. It did not address the arguments of both supporters and opponents of Kosovo's independence. The former pointed to the uniqueness of this country resulting from historical conditions and established self-governance, while the latter denied this view, underlining the ethnic unification of the conflicted nations. Although advisory opinions are not binding, their meaning and content are universal. That one leaves wide scope for interpretation for any entities in terms of international law, due to the lack of an explicit position of the Court.

4.3.2. RESOLUTIONS OF THE UN GENERAL ASSEMBLY AND THE ADVISORY OPINION ON WESTERN SAHARA

Western Sahara is a territory in North-West Africa which was colonized by Spain in the late nineteenth century, thus becoming one of the Spanish colonies. During the decolonization period, in 1963, it was entered by the UN on the list of areas not governed independently within the meaning of Article 73 of the Charter of the United Nations, where it is currently included.[137] Although its legal status is specific, some general conclusions may be drawn from the resolutions of the UN General Assembly and the ICJ advisory opinion. The UN Resolution 2711 (XXV) of 1970 granted Western Sahara the right to self-determination which was later confirmed by the ICJ in its advisory opinion on Western Sahara in 1975.[138] The Court then quoted another Resolution 1514 (XV) of 1960 which provides, in particular, that all nations have the right to self-determination which gives them the possibility of choosing a political status according to their own will. In the advisory opinion, it was emphasised that the right requires a free and

[136] J. Vidmar, *Secession and the Limits of Democratic Decision-Making*, (in:) J. Jordana, M. Keating, A. Marx, J. Wouters (eds), *Changing Borders in Europe: Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union*, Padstow 2019, p. 208.

[137] H. Corell, *Western Sahara – Status and Resources*, http://www.derechos.org/peace/ws/doc/corell4.html (accessed 31.10.2020).

[138] *Advisory Opinion of 16 October 1975 on Western Sahara*, International Court of Justice, https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf (accessed 31.10.2020).

genuine expression of the will of the peoples concerned. In addition, it was indicated that in the entrusted and dependent territories, and in all other territories that had not yet gained independence, urgent steps should be taken to transfer all rights to peoples without any conditions or reservations. The UN General Assembly also quoted one of the fundamental principles of the United Nations which stipulates that all states should strictly follow the letter and spirit of the provisions of the UN Charter and rely on the principles of respect for the sovereign rights of all nations and their territorial integrity. Moreover, in another Resolution 34/37 of 1979 the UN General Assembly emphasized the inalienable right of the people of Western Sahara to self-determination and independence.

The mere reference to self-determination does not set the framework of that term, but the multiple mentions confirm that it is or then was an important principle of international law. The resolutions and the advisory opinion set out some guidelines how it can be understood. Therefore, self-determination may be perceived as the possibility of choosing a political status, which is a consequence of the right of peoples to free and genuine expression of their will. Nevertheless, one should remember that those documents were issued during the decolonization period or shortly after it and may not address the latest separatist movements of the ethnic minorities which were not under colonial rule. It is because of the fact that the general understanding of that right 'had been formulated as an entitlement to statehood for the benefit of populations whose territories had been colonized without any consideration of non-colonial cases.'[139] Anyway, such an interpretation of that right will be satisfactory neither for states nor for secessionists because it does not even differentiate between external and internal aspect of self-determination.

4.4. EUROPEAN PERSPECTIVE

4.4.1. CJEU JUDGMENT OF 10 DECEMBER 2015 (T-512/12)[140]

Although the case that was brought before the Court of Justice of the European Union (General Court) concerns the problem of applying a contract concluded by the European Union with the Kingdom of Morocco to the territory of Western Sahara, there are some views which indicate the importance of the right to self-determination for the European case law. The European Union was involved in this case making a Treaty in 1996 between the European Communi-

[139] J. Almqvist, *EU and the Recognition of States*, (in:) J. Jordana, M. Keating, A. Marx, J. Wouters (eds), *Changing Borders in Europe: Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union*, Padstow 2019, p. 130.

[140] Judgment of the Court of Justice of the European Union (CJEU), General Court, in *Front Polisario v Council of the European Union*, Case T-512/12, https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2016.068.01.0026.01.ENG (accessed 31.10.2020).

ties and their Member States, on one hand, and the Kingdom of Morocco on the other. In 2012, the Council on behalf of the European Union approved, in the form of an Exchange of Letters, an agreement on reciprocal liberalization measures in certain economic aspects, on amendments to the Association Agreement with Morocco, and on the replacement of Protocols 1, 2 and 3 and their annexes.[141] In 2012 the Polisario Front, i.e. the national liberation movement from Western Sahara, brought action for annulment the Council's decision. Despite many allegations from the Polisario Front, the Court agreed only with one which concerned the lack of protection of fundamental rights of the population of Western Sahara. '[T]he right to self-determination is a human right and not taking this aspect of the situation of Western Sahara into account by the Council of the EU resulted in the annulment of the Council decision approving the international agreement between the European Union and the Kingdom of Morocco.'[142] The Court recognized in paragraph 227 that the protection of fundamental rights of the population of Western Sahara, especially the protection of the right to self-determination, is of particular significance and it is a matter for the Council to examine before approving the agreement. Such a decision proves that the right to self-determination is not only important politically, but it may have legal implications.

The Court did not define the right to self-determination, especially it did not state anything about the right to secession. Moreover, one should remember that the case of Western Sahara cannot be applied directly to European separatisms because Morocco is not a member of the European Union. Consequently, the meaning of this right is still uncertain in relation to European ethnic minorities. However, it can be noticed that the principle of self-determination alone is important for the Court.

4.4.2. SECESSION WITHIN THE EU

The potential effect of a unilateral secession from a state that is a member of the European Union would be the automatic exit of a newly created state from that organisation. It stems from the fact that 'the rump state continues its international personality, while the seceded entity becomes a new person in interna-

[141] Council Decision of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, 2012/497/EU (OJ L 241 07.09.2012, p. 2), https://op.europa.eu/en/publication-detail/-/publication/d441055e-f8dc-11e1-8e28-01aa75ed71a1/language-en (accessed 31.10.2020).

[142] K. Kowalik-Bańczyk, *Terytorialny zakres unieważnienia decyzji zatwierdzającej umowę międzynarodową zawartą przez Unię Europejską – glosa do wyroku Sądu (UE) z 10.12.2015 r. w sprawie T-512/12 Front Polisario przeciwko Radzie Unii Europejskiej*, 'Europejski Przegląd Sądowy' 2016, No. 6, p. 30.

tional law'.[143] Hypothetically, if the Scottish independence referendum in 2014 had resulted in independence, the UK would have been considered the continuator of the UK for all international purposes, including the EU membership whereas independent Scotland would have become a new state.[144] Such a state does not automatically become an EU member state and, consequently, there is no automatic accession to the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the entire European Union legal system.[145] Pursuant to the current law (Article 49 of the TEU), the accession of a new state to the EU requires unanimity so each member state can veto any such application. Hence, a political agreement seems to be indispensable. Another solution is to adopt amendments to the Treaty pursuant to Article 48 of the TEU, which would result in the division of one member state into two member states, and therefore the new state would stay in the EU rather than join it, but this also requires unanimity as it must be ratified by all member states.[146]

4.5. INTERNATIONAL RECOGNITION

Irrespective of the activity of the international institutions or courts, the subjectivity of the state and its ability to participate in international relations are mainly determined by means of international recognition. Although it does not create a new legal situation and is not a condition of statehood, it plays a key role from a practical point of view. It is not a constitutive act, either.[147] Nonetheless, it is the recognition by the international community that determines the ultimate success of the unilateral secession. Such a conclusion can be drawn from paragraph 155 of a judgment of the Supreme Court of Canada regarding the legality of a unilateral secession of Quebec from Canada under Canadian and international law.[148] Recognition is much more instrumental, while a claim for independence is unilateral than where it follows from a domestic settlement, e.g. the Scottish referendum for independence in 2014.[149]

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[143] J. Vidmar, 2019, *op. cit.*, p. 210.

[144] A. Boyle, J. Crawford, *Opinion: Referendum on the Independence of Scotland – International Law Aspects*, 10 December 2012, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf (accessed 31.10.2020).

[145] J. Vidmar, 2019, *op. cit.*, p. 210.

[146] *Ibid*, p. 211.

[147] M. Dixon, R. McCorquodale, S. Williams, *Cases and Materials in International Law*, Oxford 2011, p. 158.

[148] *Reference Re Secession of Quebec*, 25506, [1998] 2 SCR 217, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do (accessed 31.10.2020).

[149] J. Vidmar, 2019, *op. cit.*, p. 212.

Despite the separatists' activity, support for separatist aspirations in Western Europe is rather limited.[150] However, this does not concern only Western states. The attitude of the international community towards secession can be illustrated by the fact that since 1945 there has never been a situation in which a secessionist state has been admitted to the United Nations without prior recognition by its former home state.[151] In relation to Corsica, one should remember that France is one of the five permanent members of the UN Security Council, which affects its strong position in the world, and therefore it would be difficult for this island to find allies. It often happens that in order to protect the *status quo*, the international community agrees to marginalize the voices of separatists on political grounds. In the post-World War II era, only Bangladesh and Kosovo have received a significant number of recognitions on the basis of a unilateral claim.[152]

Due to the fact that Corsica is a part of the EU, the European context must be considered when it comes to recognition. 'European policymaking in this area came to be governed by pragmatic considerations with a focus on a peace and security concerns.'[153] Nevertheless, it seems that such a conciliatory position may involve separatist movements outside the EU because of lack of willingness of revolution inside the organisation. The President of the European Council, Donald Tusk, said in relation to the Catalan declaration of independence on 27 October 2017 that for the EU the Spanish government would remain its only interlocutor.[154] This shows that any separatist group which would act against the national law of a member state would be condemned at the European level. The analysis of the French law, under which secession is impossible, shows that also the Corsican secession, if not based on any political agreement between the rump state and the new one, could be disapproved of. Any other solution would pose a threat to the peace and stability within the EU and would lead to further fragmentation of the organisation after Brexit.[155]

There is an opinion that 'acting in a specific international space, striving to play a leading role on the continent, the European Union is unable to work out a formula that would allow reconciliation of independence aspirations with the need to guarantee the sovereign rights of states.'[156] In the case of the recognition of Kosovo, the EU member states split and the lack of a common decision meant that it was not the EU institutions but the national parliaments that were to regulate their relations with Kosovo. The lack of agreement on this issue might be con-

[150] K. Czubocha, 2012b, *op. cit*., p. 170.

[151] J. Crawford, *The Creation*, 1979, *op. cit*., p. 390.

[152] J. Crawford, *The Creation of States in International Law*, Oxford 2006, p. 393.

[153] J. Almqvist, 2019, *op. cit*., p. 130.

[154] *Ibid*, p. 137.

[155] *Ibid*, p. 138.

[156] A. Potyrała, *Unia Europejska wobec nowych tworów państwowych (Casus Kosowa, Abchazji i Osetii Południowej)*, 'Środkowoeuropejskie Studia Polityczne' 2010, No. 1, p. 15.

nected with the threat for some states where there are separatist tendencies, e.g. Spain, the United Kingdom or France. Such actions undermine the prestige and international position of the European Union and cause doubts related to its effectiveness in regulating such important matters as the right of nations to self-determination. Hence, there is still much to discuss regarding ethnic minorities and their rights at the European level. If the EU wants to have primacy, it should take a risk and try to regulate difficult issues which have not been addressed within other legal systems.

4.6. FINAL REMARKS ON THE INTERNATIONAL CONTEXT

The above analysis shows that for key international organizations the right to self-determination does matter. However, international law is generally reluctant to explicitly determine the scope of that right, especially the right to secession or its lack. This right played the greatest role during the decolonization period when it remained one of the fundamental rights that should be guaranteed to the most possible degree to a nation under colonial rule. The development and progress on many grounds have proved, however, that there is a strong need to redefine or specify those popular terms. Frequent reference to those principles by courts and institutions or placing them in significant documents of a universal character are no more sufficient. Otherwise, uncertainty predominates.

Due to the fact that the ICJ did not seize the occasion and decide the legality of the unilateral secession of Kosovo, seeking unequivocal legal grounds for the declaration of independence in international law is in vain. Hence, the secession-seeking party should focus on national law, international recognition and political consensus with the state which rules. The Supreme Court of Canada noted that a mere wish of independence cannot be ignored in a democratic state. It creates a duty on both sides to negotiate future relations, what does not have to lead to independence but may result in a new domestic status and greater autonomy and self-government.[157]

5. PRESENT SOCIO-POLITICAL REALITY IN CORSICA

The social and political tendencies of Corsicans indicate that they are not entirely satisfied with their current status. The result of the recent local elections speak in favour of independence. In 2017, when ‘Corsican voters were to elect

[157] J. Vidmar, 2019, *op. cit.*, pp. 203–213.

for the first time an assembly with considerably enlarged powers',[158] the nationalist coalition For Corsica (We make Corsica and Free Corsica) achieved a decisive victory (56.5%). In the local parliament it gained 41 out of 63 seats.[159] Such a strong mandate certainly creates a good position to start negotiations between the island and the continent, but Jean-Guy Talamoni – the first national leader of Corsica since the eighteenth century[160] – was already seeking support in the European Union by visiting European capitals.[161] What is more, his pro-independence tone and nationalist narrative are well illustrated by the fact that he called France 'a friendly state'.[162] It seems, however, that such statements are only a propagandist communication because in the matter of independence, as Talamoni pointed out, the residents themselves would decide about their political affiliation.[163] It seems that they, on the whole, do not support complete severance because financial aid from France has influenced the quality of life on the island, e.g. through better infrastructure. In 2021, after the coalition broke up, Gilles Simeoni's party We make Corsica won, by a very small margin, the absolute majority in seats in the Corsican Assembly.[164] However, one has to agree with André Fazi who claims that in order to respond favourably to nationalist demands a broad regional consensus is needed.[165]

An important event which additionally changed the mood among both the French authorities and, above all, the residents of the island was the laying down of weapons in 2014 by the terrorist organization, FLNC, which had been ruining the Corsican estates of the French from other parts of the country for forty years.[166] It was neither the result of any spectacular success of that organization nor was it caused by the separatists' demands. The FLNC leaders claimed that their goals were already being discussed at the parliamentary level and among

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[158] A. Fazi, 2022, *op. cit*.

[159] *Second tour de l'élection des conseillers à l'Assemblée de Corse – Résultats*, https://www.interieur.gouv.fr/fr/Archives/Archives-elections/Election-de-l-Assemblee-de-Corse-des-3-et-10-decembre-2017/Second-tour-de-l-election-des-conseillers-a-l-Assemblee-de-Corse-Resultats (accessed 31.10.2020).

[160] P. Jendroszczyk, 2015, *op. cit*., p. A10.

[161] K. Stańko, *Macron pod presją nacjonalistów*, 'Dziennik Gazeta Prawna', 12 February 2018, Vol. 30, p. A15.

[162] M. de Boni, *Selon Jean-Guy Talamoni, la France est 'un pays ami' de la Corse*, 'Le Figaro', 18 January 2018, https://www.lefigaro.fr/politique/le-scan/citations/2016/01/18/25002-20160118ARTFIG00082-selon-jean-guy-talamoni-la-france-est-un-pays-ami-de-la-corse.php (accessed 31.10.2020).

[163] E. Galiero, *Corse: Talamoni livre la recette du succès nationaliste*, 'Le Figaro', 5 February 2018, https://www.lefigaro.fr/politique/le-scan/2018/02/05/25001-20180205ARTFIG00197-corse-talamoni-livre-la-recette-du-succes-nationaliste.php (accessed 31.10.2020).

[164] A. Fazi, 2022, *op. cit*.

[165] *Ibid*.

[166] Ch. Lambroschini, *Corsica's Separatist Retreat*, 'The New York Times', 4 August 2014, https://www.nytimes.com/2014/08/05/opinion/corsicas-separatist-retreat.html (accessed 31.10.2020).

all the parties. This reduced interest in the organization activities.[167] Nevertheless, the dissolution of the FLNC did not control emotions because nationality has become an important problem. The growing number of Arabs in Corsica is causing growing reluctance and fear of attacks by newcomers.[168] At the end of 2015, several hundred demonstrating Corsicans attacked a mosque, shouting xenophobic and racist slogans. Many religious items, such as the Koran, were then destroyed.[169] Moreover, the unemployment rate, which reached 9.9% at the end of 2012 and grew up to 10.6% by 2017,[170] also affects public sentiment.

Analysing the attitude of France, one can see a certain liberalization of the position on integrity. Firstly, it has already allowed the independence referendum to be held in a dependent territory of New Caledonia. By virtue of the Nouméa Accord of 1998, the inhabitants were allowed to hold up to three referenda. The first in 2018 and, if it would not result in independence, then two more were to be organized in 2020 and 2022.[171] All of them maintained the *status quo*, but the mere decision to conduct the vote demonstrates the openness of the government.[172] Of course, it must be remembered that New Caledonia is a dependent territory and Corsica is a region. At the beginning of 2018, after the visit of the French President to Corsica, hopes for greater autonomy were shattered. President Emmanuel Macron was open to just one postulate regarding the inclusion of Corsica in the French Constitution, which was done on 28 February 2018. The remainder, such as greater economic support or a change in the tax system will be subject of negotiations. Other demands regarding: amnesty for prisoners from the National Liberation Front of Corsica, introduction of a resident status for people living on the island for at least five years, privileges for Corsicans in acquisition

[167] P. Poggioli, 2014, *op. cit*., p. 12.

[168] L. Nordstrom, *A Look at the Roots of Recent Unrest in Corsica*, France24, 2015, https://www.france24.com/en/20151229-france-corsica-tensions-protests-far-right-anti-arab-protests-sectarian (accessed 31.10.2020).

[169] *Ajaccio: des manifestants saccagent une salle de prière musulmane*, Europe1, 2015, https://www.europe1.fr/faits-divers/ajaccio-des-manifestants-saccagent-une-salle-de-priere-musulmane-2641267 (accessed 31.10.2020).

[170] O. Alek, *Corsican Nationalist Movements Autonomy of the French Island in Question*, 'International Journal of Latest Research in Humanities and Social Science' 2018, Vol. 1(8), pp. 36–40, at p. 36.

[171] A. Bariéty, *Nouvelle-Calédonie: 5 questions sur le référendum*, 'Le Figaro', 4 October 2018, https://www.lefigaro.fr/politique/2018/10/04/01002-20181004ARTFIG00028-nouvelle-caledonie-5-questions-sur-le-referendum-du-4-novembre.php (accessed 31.10.2020); *New Caledonia Referendum: Call to Reject 'Colonising Power' France*, 'The Guardian', 17 July 2018, https://www.theguardian.com/world/2018/jul/17/new-caledonia-referendum-call-to-reject-colonising-power-france (accessed 31.10.2020).

[172] *Nouvelle-Calédonie: les résultats du référendum du 4 octobre 2020*, https://www.vie-publique.fr/en-bref/274808-nouvelle-caledonie-resultats-du-referendum-du-4-octobre-2020 (accessed 31.10.2020); *Référendum en Nouvelle-Calédonie: le vote du 4 novembre 2018*, https://www.vie-publique.fr/en-bref/20032-referendum-en-nouvelle-caledonie-vote-du-4-novembre-2018 (accessed 31.10.2020).

of land, independent management by Corsicans of prisons located on the island, or their own language and flag were decisively rejected.[173] The issue of Corsica is still the acid test. Interestingly, Corsica was the only location where the extreme right candidate triumphed over the current president in the second round of the presidential elections in 2017.

The issue which has recently affected separatist moods is the COVID-19 pandemic. 'The coronavirus has restored a sense of identity and separation that independence fighters have long sought.'[174] The local authorities would like to have the autonomy in managing the health crisis. It could allow them to develop their own treatment programme or decide on school openings. The head of the local government called for an independent scientific council and for making the island a 'pilot territory' in using a controversial malaria drug to treat the infection.[175] Crises generally might be used to articulate demands in an outright manner and put blame on the entities against which one fights. They are also an opportunity to present own solutions. On the other hand, the society is likely to remain united in the face of danger, which empowers the central authorities. The actual effects will be seen some time in the future.

6. CONCLUSIONS

First of all, it must be said that undoubtedly Corsica differs from the other parts of France. The analysis of the historical background proves that the past of the island was tumultuous and non-homogeneous. Due to multiple entities which ruled over Corsica, the sense of separateness, which is noticeable nowadays, has developed among the residents of the island. The historical and cultural disparities are a good basis for pressing demands, but it is not sufficient. Every postulate must be compliant with the law, both French, international and European. The legislation and case law set a certain legal framework within which one must operate in order to successfully achieve the goals. The principles are not always

[173] G. Vaillant, *Pourquoi la visite d'Emmanuel Macron en Corse s'annonce compliquée*, 'Le Hournal du Dimanche', 3 April 2019, https://www.lejdd.fr/Politique/pourquoi-la-visite-demmanuel-macron-en-corse-sannonce-compliquee-3885794 (accessed 31.10.2020); *Francja: Macron na Korsyce odrzuca żądania nacjonalistów*, *op. cit*.; M. Strzałkowski, *Emmanuel Macron odrzucił główne żądania nacjonalistów z Korsyki*, Wyborcza.pl, 8 February 2018, https://wyborcza.pl/7,75399,22999750,emmanuel-macron-odrzucil-glowne-zadania-nacjonalistow-z-korsyki.html (accessed 31.10.2020).

[174] L. Bryant, *In Corsica, COVID-19 Fuels Nationalist Demands for Greater Autonomy*, VOA, 7 May 2020, https://www.voanews.com/covid-19-pandemic/corsica-covid-19-fuels-nationalist-demands-greater-autonomy (accessed 31.10.2020).

[175] *Ibid*.

precise, but, more importantly, they are a significant reference point for societies aspiring to greater autonomy or separation.

Due to the ambiguity of supranational concepts in relation to self-determination, the biggest attention is paid to the national provisions, in the discussed case particularly to the French Constitution. Its current wording does not permit independence, but there are the acts in the French legal system which regulate the legal situation of Corsica and grant some rights to the residents of the island. The constitutional foundations provide the opportunity to increase the autonomy, but much depends on a political will of present and future authorities of both sides. What is important, the central government does not deny it that Corsica is a distinct territory, what is a positive sign. Nowadays, there are many both social and political challenges, however, the only way for Corsicans to have their, even those controversial, demands satisfied is to negotiate and cooperate. Such talks are not easy, which may be summarized in the statement that in such relations '[t]he conciliatory tone easily gives way to bitterness, the outstretched hand quickly folds into a clenched fist'.[176] The present local authorities must make a profit and loss account because it seems that both in economic and political terms secession from France would cause many problems that neither France nor Europe would like to face. Practice teaches that much depends on international recognition, but the basic principles of law must be respected in every case. Otherwise, the recognition seems to be improbable. It should be remembered that the most important is equal treatment and mutual respect, but equality must not cross the limits set by national, international and, in the case of Corsica, European law.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.18

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INDIGENOUS RIGHTS AS A FIELD OF SOCIOLOGICAL RESEARCH

Abstract

This paper sets out a new reconstruction of indigenous rights as a field of sociological research. Questioning the dominant pluralist paradigm in such inquiry, it claims that indigenous rights are primarily the results, not of socially embedded customs, but of interactions between international law and national law. It then proceeds to explain that, to capture such rights, a focus on social integration and national citizenship is required. It uses this framework to explain indigenous rights as elements of a global legal order that facilitates the construction of citizenship, especially in societies in which citizenship has been subject to deep strain.

KEYWORDS

indigenous rights, international law, integration and national citizenship, ethnicity, global legal system

SŁOWA KLUCZOWE

prawa tubylcze, prawo międzynarodowe, integracja i obywatelstwo krajowe, etniczność, globalny system prawny

1. INTRODUCTION: THE THREE-LEVEL CONSOLIDATION OF INDIGENOUS RIGHTS

The construction of rights for designated indigenous groups is a relatively new legal process. The protection of indigenous rights first became a question of broad concern in the decades following 1945, and it gained increased momentum in the 1970s. This was triggered, in part, by long-term processes of decolonization in Africa, Latin America, and later – to a lesser degree – in the regions formerly belonging to the Soviet Union. Rights for indigenous peoples are now strongly consolidated at three separate levels of legal formation.

Firstly, at the global level, indigenous rights are protected in several legal agreements and conventions, especially in documents promulgated by the International Labour Organization (ILO) and the United Nations (UN).[1] In 1957, initially, the ILO adopted Convention No. 107, whose purpose was to protect indigenous and other tribal or semi-tribal populations. Later, in 1989, the ILO adopted Convention No. 169 (ILO C169). This Convention promotes the principle of solidarity as a guiding norm for interaction between government bodies and indigenous communities, and it was conceived as a set of norms to be applied to a large range of communities claiming *pre-colonial* or *pre-national status*.[2] The rights accorded to such communities by ILO C169 include rights to cultural integrity and to some participation in decision-making processes affecting their well-being, to land occupancy, to territory and resources, and to non-discrimination in social and economic matters.[3] The rights of indigenous peoples have been addressed by different organs of the UN since the 1970s. Initially, the UN considered indigenous rights through its human rights treaty bodies. More recently, three organs with specific responsibility for indigenous matters have been created: the Permanent Forum on Indigenous Issues (2000), the Expert Mechanism on the Rights of Indigenous Peoples (2007), and the Special Rapporteur on the

[1] Some sections on pages 375–383 of this paper reproduce in a condensed form some parts of the analysis already set out in Ch. Thornhill, C. Calabria, R. Cespedes, D. Dagbanja, E. O'Loughlin, *Legal Pluralism? Indigenous Rights as Legal Constructs*, 'University of Toronto Law Journal' 2018, Vol. 68(3). I am very grateful to Carina Calabria for the research that is included here on the UN and the Inter-American Human Rights System.

[2] See Indigenous and Tribal Peoples Convention (No. 169), International Labour Organization, 27 June 1989, 28 ILM 1382 (1989) (ILO C169). For the coverage of ILO C169, see note 49 below.

[3] On the significance of such categories of collective rights, see A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, 'Transnational Law and Contemporary Problems' 1993, Vol. 3, p. 91.

Rights of Indigenous Peoples (2001). In addition, in 2007, the UN issued the Declaration on the Rights of Indigenous Peoples.[4]

Secondly, indigenous rights are protected under human rights conventions and by courts and commissions enforcing human rights law at the regional international level, especially in South America and Africa. Illustratively, in 1997, the Inter-American Commission on Human Rights (IACHR) approved a draft version of the American Declaration on the Rights of Indigenous Peoples. In 2016, the final version of this Declaration was adopted by the General Assembly of the Organization of American States.[5] In this same period, the Inter-American Court of Human Rights (IACtHR) began to issue rulings in cases concerning indigenous rights, being the first international tribunal to do this.[6] In developing its case law, the IACtHR has produced a unique line of jurisprudence regarding rights for indigenous communities, especially, although not solely, concerning questions related to land ownership. In *Awas Tingni* (2001),[7] the Court became the first international tribunal to recognize the right of an indigenous community to communal property. In *Saramaka People v Suriname* (2007) and *Kaliña and Lokono Peoples v Suriname* (2015), the Court ruled that States have an obligation to show recognition of the legal personality of indigenous peoples. Concretely, such recognition entails recognition of their collective right to property and their right to an effective remedy in cases where this right is violated.[8] In such rulings, the Court has declared that its policy is to pursue an 'evolutionary interpretation of international instruments for the protection of human rights', by which means it aims to establish normative principles that revise and widen more classical property rights.[9] To this end, in particular, the IACtHR has established protections for indigenous land rights by arguing that such rights are linked to, and flow from, the right to life, and especially the right to *vida digna*: *life with dignity*.[10] The concept of the right to *vida digna* plays a central role in underscoring the

[4] The General Assembly Resolution 61/295, concerning the Declaration, was adopted a year after its draft submission by the United Nations Human Rights Council. See United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, 61st session, 13 September 2007.

[5] See information on the adoption of the American Declaration on the Rights of Indigenous Peoples at: http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16 (accessed 25.04.2023).

[6] See Inter-American Court of Human Rights (IACtHR), *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Series C No. 79. See comment in L. Burgorgue-Larsen, A. Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford 2013, p. 501.

[7] See IACtHR, *Awas Tingni*, (2001) Series C No. 79.

[8] See IACtHR, *Saramaka People v Suriname* (2017) Series C No. 172.

[9] See IACtHR, *Awas Tingni*, (2001) Series C No. 79, para. 148.

[10] See J. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 'Hastings International and Comparative Law Review' 2008, Vol. 31(1); S. R. Keener,

system of indigenous rights in Latin America. In essence, this concept indicates that the general right to life, universally protected in international law, contains, by inference, the secondary right for people to live in material conditions that support, not only bare life itself, but life conducted as *dignified existence*.[11] This concept is now commonly interpreted to indicate that indigenous persons have a right to own, or at least not to be coercively removed from, their ancestral lands. The ground for this principle is that such lands create vital preconditions for the essential well-being of their inhabitants, enabling them to live their lives in dignified fashion.[12]

Alongside this, the African regional human rights instrument, the African Charter on Human and Peoples' Rights, expressly provides recognition for collective rights, and it gives clear protection to cultural rights, which can be interpreted as incorporating indigenous rights.[13] The African Charter has not been systematically employed as a basis for establishing specific indigenous rights, and regional recognition of rights attached to indigeneity is not as widespread in Africa as in Latin America.[14] Indeed, the question of indigeneity has sensitive connotations in many African states, especially those without large European communities, as it is susceptible to being interpreted in terms that imply that one ethnic group may have stronger property rights than potentially rival groups. In recent years, nonetheless, the balance of opinion in Africa has moved towards a position that accepts some rights based in indigeneity. The African Commission on Human and Peoples' Rights has promoted a particular line of reasoning regarding indigenous rights. Amongst other sources, this is reflected in a Report produced by a Working Group of Experts on Indigenous Populations/Communities in Africa, established by the African Commission. This Report stated that the rights arising from indigeneity can be assumed by groups claiming 'a special attachment to and use of their traditional land'.[15] In parallel, the concept of indigeneity has been cautiously recognized in judicial pronouncements of the African Commission.[16] The

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J. Vasquez, *A Life Worth Living: Enforcement of the Right to Health through the Right to Life in the Inter-American Court of Human Rights*, 'Columbia Human Rights Law Review' 2008, Vol. 40.

[11] J. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 'Human Rights Law Review' 2006, Vol. 6(2), p. 299.

[12] For application of the concept of *vida digna* in indigenous property cases, see for example IACtHR, *Yakye Axa Indigenous Community v Paraguay* (2005) **S**eries C No. 125, para. 161. For comment, see T. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 'University of Pennsylvania Journal of International Law' 2013, Vol. 35(1).

[13] See B. Saul, *Indigenous Peoples and Human Rights. International and Regional Jurisprudence*, Oxford 2016, p. 204.

[14] See F. Viljoen, *International Human Rights Law in Africa*, 2nd edn, Oxford 2012, p. 230.

[15] *African Commission's Working Group of Experts on Indigenous Populations/Communities*, *Report* (2005) 93, http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf (accessed 25.04.2023).

[16] See e.g. African Commission on Human and Peoples' Rights, *Katangese Peoples' Congress v Zaire*, Communication No. 75/92 (1995).

first such case was *Katangese Peoples' Congress v Zaire* (1995), although in this case the Commission did not decide in favour of the community in question.[17] Specific group rights for indigenous communities have been established in later cases brought to the Commission, notably *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) and *Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya* (2009). More recently, the African Court of Human and Peoples' Rights recognized that a minority population group in Kenya, the Ogiek, had legitimate claim to be classified as indigenous, and that certain rights flow from this classification. The Court established the indigeneity of the Ogiek on grounds of their strong attachment to traditional land, and of their cultural distinctiveness.[18]

Thirdly, many national institutions have constructed a specific set of constitutional norms, either through statutory legislation or through judicial rulings, which incorporate and expand international provisions for indigenous rights. This is seen most extensively in Latin America, but it can also be observed as a constitutional feature in some African states. In Colombia and Bolivia, a body of jurisprudence has been established that grants protection for the cultural autonomy of groups identified as indigenous.[19] The Constitutional Court of Colombia has adopted a policy of *maximization* in addressing indigenous judicial rights, stating that the 'maximization of the autonomy of indigenous communities' is a judicial goal.[20] In Bolivia, this recognition has been expanded to grant autonomous status to some communities, allowing them partial rights of administrative autonomy. As discussed below, some national courts in Africa have also created protective legal orders for indigenous communities.[21]

2. A NEW OBJECT FOR SOCIOLOGICAL INQUIRY

In parallel to the emergence of this three-level legal corpus, a body of legal-sociological research has developed regarding indigenous rights, which addresses such rights within the framework of legal pluralism. In fact, indigenous rights have become a favoured object of legal-sociological inquiry, as such rights rein-

[17] See discussion in S. A. Dersso, *The Jurisprudence of the African Commission on Human and Peoples' Rights with Respect to Peoples' Rights*, 'African Human Rights Law Journal' 2006, Vol. 6(2), p. 366.

[18] African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v the Republic of Kenya*, Application No. 006/2012 (2013), Judgment of 26 May 2017, para. 107.

[19] See below p. 381–382.

[20] See Constitutional Court of Colombia, T-349/96.

[21] See below p. 397–400.

vigorate the concern with pluralistic legal orders lying at the origins of legal sociology.[22] From the pluralistic perspective, the protection of indigenous rights is viewed as entailing the protection of rights that are informally embedded in the shared life practices of collective subjects, existing outside the limits of formal law, which is frequently associated with *the laws of colonizers*. The assumption that indigenous rights reflect the existing pluralistic structure of societies inhabited by indigenous populations has become the dominant view in legal-sociological research concerning questions of indigeneity.[23]

Despite its broad acceptance, the pluralistic approach to indigenous rights is in some respects sociologically questionable, and it adopts a rather narrow focus on the social forces that underlie legal protections for indigenous communities. It is possible to observe three broad tendencies in the construction of indigenous rights that have little to do with pluralistic legal structures or subjects in national societies, and which require alternative sociological interpretation. Three points are commonly salient in legal orders protecting indigenous groups, forming a convergent matrix in most contexts where such rights are acknowledged, and these points cannot easily be explained by pluralistic analysis.

Firstly, owing to its three-level structure, the body of law covering indigenous rights is largely formed *transnationally*, typically through cross-jurisdictional interactions between national legislators and courts and/or norm setters located outside national societies. Much protection for indigenous rights originates in UN directives and ILO conventions, and, on this basis, it takes effect through national laws through which international principles are incorporated domestically. Notably, indigenous rights typically became subject to entrenchment at the same time that human rights law, in general terms, acquired increased global prominence and transnational efficacy.[24] The promulgation of protections for indigenous rights cannot easily be separated from the wider transformation of international law in

[22] See the original version of this argument in E. Ehrlich, *Grundlegung der Soziologie des Rechts*, 4th edn, Berlin: Duncker und Humblot 1989 (1913).

[23] See for some well-known examples in: R. P. Alcoreza, *Estado plurinacional comunitario autonómico y pluralismo jurídico*, (in:) B. de Sousa Santos, J. L. Exeni Rodríguez (eds), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Quito 2012, p. 410; B. de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 'Law and Society Review' 1977, Vol. 12(1); S. Yampara Huarachi, *Cosmo-convivencia, Derecho y Justicia de los Pueblos Qullana* (2005), Address at the Seminar on Law and Communitary Justice organized by the APPNOI-TARI-Community Pacha[kuti], available at: http://www.katari.org/pdf/justicia%20Qullana.pdf (accessed 25.04.2023); E. Sánchez Botero, *Aproximación desde la antropología jurídica a la justicia de los pueblos indígenas*, (in:) B. de Sousa Santos, M. García Vilegas (eds), *El caleidoscopo de las justicias en Colombia*, Vol. II, Bogotá 2001, p. 186.

[24] The mid-1970s and earlier 1980s can be seen as the period in which human rights law, already existent in its basic structure from the years after 1945, acquired new force. This was reflected inter alia in the Helsinki Accords (1975), the entry into force of the international covenants, the founding of the IACtHR, the growing international criticism of human rights abuses through the UN, and the adoption of the African Charter on Human and Peoples' Rights.

the 1980s and 1990s, in which the emphasis on individual human rights acquired increased general force. The construction of pluralistic rights-holding subjects in national societies is not easily separable from such wider tendencies in inter- or transnational law, and it reflects a broader focus on the protection of distinctive subjective rights, within national societies, in the international arena. As a result, the primary motive for such construction cannot simply be identified in pluralistic patterns of agency within national societies, and it does not directly reflect the actions of groups or collective subjects demanding recognition for simply given legal norms. In most cases, definitions of indigenous rights resulted from legal opportunities created in the global arena, which made it possible for actors in domestic environments to consolidate new legal rights and legal subjects. At the centre of the body of indigenous rights is thus a very generalized propensity in global law, and indigenous groups usually acquired enhanced legal subjectivity at the same time that other groups were able to mobilize around global legal norms in order to solidify their position in society.[25] Overall, the construction of indigenous rights is relatively independent of national governments and of particular groups within national societies, and it reflects the penetration of globally expressed norms into national societies.

Secondly, the relative indifference of the guarantees provided for indigenous rights to existing social subjects is reflected, quite clearly, in the fact that, in laws protecting indigenous rights, the actual personality of indigenous groups claiming rights is frequently defined in very generic terms. Indeed, provisions for indigenous rights usually avoid offering a specific definition of the groups entitled to such rights, often qualifying the basic categorization of 'indigeneity', in order to avoid inducing conflict between groups claiming authority to assume indigeneity. As a result of this, groups that are accorded protections flowing from indigenous rights are often groups whose claim to indigeneity, if strictly defined as a quality of original or pre-national identity, is not strong. Indigenous rights, in other words, do not necessarily presuppose indigeneity among the subjects that claim them.

This non-specific construction of indigenous groups is reflected in primary international instruments regarding indigenous rights. Indicatively, ILO C169 attempts to circumvent precise definitions of the subjects entitled to claim indigenous rights. It states in Article 1(2) that: 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.' In the UN's draft criteria for defining indigenous people, the 'desirability of developing a definition of indigenous peoples' is admitted, but the possibility of establishing such a definition is questioned. Importantly, it is recognized in the UN that indigenous rights have been successfully defined and protected despite the fact that the UN has not 'adopted any formal defi-

[25] See below p. 396.

nition of indigenous peoples'.[26] In Africa, as mentioned, most social groups have some claim to indigeneity, and the title of indigeneity is typically avoided because of the risk that claims to this title may trigger violent conflict over land. In this context, the African Commission has observed that 'a strict definition of indigenous peoples is neither necessary nor desirable'.[27] In ruling on cases regarding indigenous rights, the African Court has noted 'that the concept of indigenous population is not defined in the Charter', and that 'there is no universally accepted definition of "indigenous population" in other international human rights instruments'.[28] In Latin America, the IACtHR has issued a number of rulings in which the status of indigenous people, with all attendant protections, has been broadened to provide coverage for groups without manifest claim, in strict definition, to indigeneity. In fact, the IACtHR has established that other marginal communities, with no strict claim to indigeneity, are entitled to rights akin to those ascribed to more clearly indigenous communities. Some such rulings even refer to population groups of African descent, whose position is not uncontroversially classifiable as *pre-colonial*. One example of a community construed as a holder of rights parallel to those granted on grounds of indigeneity is the Maroons. The Maroons are a tribal group comprising descendants of Africans, who were taken to the region of Suriname in the seventeenth century to work as slaves on plantations.[29] In a case concerning the Moiwana community in Suriname, the Court decided that, although 'the Moiwana community members are not indigenous to the region', communal rights to property accorded to indigenous groups should be extended to include the Moiwana community members. This was justified on grounds that the Moiwana possess a 'profound and all-encompassing relationship to their ancestral lands'.[30]

To avoid strict definition of indigeneity, national courts in many countries have replicated international guidelines in emphasizing the significance of *self-identification* as the basic determinant of indigeneity. In Colombia, the Constitutional Court followed ILO C169 in declaring 'self-identification' the main standard for determining indigeneity.[31] In one Bolivian case, it was decided that the self-identification of legal claimants as indigenous is the 'essential element and the point

[26] *Note by the Chairperson-Rapporteur of Working Troup on Indigenous Populations on criteria which might be applied when considering the concept of indigenous peoples*, U.N. Doc E/CN.4/Sub.2/AC.4/1995/3 (21 June 1995), paras 3, 6, 9, 65.

[27] International Labour Organization and African Commission on Human and People's Rights, *Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries*, Geneva 2009, p. 15.

[28] African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v the Republic of Kenya*, Application No. 006/2012 (2013), Judgment of 26 May 2017, para. 105.

[29] See IACtHR, *Aloeboetoe et al. v Suriname* (1991) Series C No. 11.

[30] See IACtHR, *Moiwana Community v Suriname* (2005) Series C No. 124, paras 131–133.

[31] Constitutional Court of Colombia, T-792/12.

of departure for such peoples', and the right of self-identification has allowed a range of groups to claim indigenous status.[32] Importantly, in many national contexts, rights ascribed to self-identified indigenous groups do not differ manifestly from rights with more general application that are allocated to other vulnerable or imperilled groups. For instance, the Constitutional Court of Colombia has frequently emphasized that indigenous groups should be treated as 'subjects of especial constitutional protection',[33] and it has set out heightened guarantees for their rights on that basis. However, in doing this, the Court has established the rights of indigenous peoples in terms not clearly distinguishable from rights granted to similar vulnerable subjects and groups. Notably, it has described mechanisms for ensuring indigenous rights as 'analogous to those conferred by the legal order' on persons pertaining to other disadvantaged social milieux.[34] As stated above, therefore, the rise in the importance of legal protections for indigenous people is part of a broader process of legal consolidation, in which protection for single subjects is generally intensified. The emergence of indigenous legal subjects is one aspect of a global pattern of subject construction, and it does not specifically result from the mobilization of indigenous subjects.

Thirdly, one globally unifying principle in the construction of indigenous rights is that such rights are typically established and recognized on a legal foundation defined through reference to principles of *proportionate autonomy*. That is to say, in most cases, indigenous groups are able to claim distinctive rights regarding – for instance – land use, education and cultural practices if, and to the extent that, the exercise of such rights does not disproportionately contravene broader legal norms, set out in human rights law and in criminal law, determining the limits of legitimate social action. In most cases, judges evaluating whether, in certain circumstances, indigenous rights should be acknowledged and protected have assessed whether such rights conflict with or unsettle the status of other high-ranking rights. Accordingly, in such assessments, judges have used standards of proportionality – of 'rational evaluation' – to determine which of the (potentially) conflicting rights should 'enjoy greater weight'.[35] Indigenous rights have thus been acknowledged where they do not disproportionately conflict with other rights, with potentially higher status. The application of proportionality reasoning underlies the terms in which indigenous law is constructed, reflecting a broad tendency towards the use of proportionality in international and national jurisprudence in recent decades.[36] This

[32] Constitutional Court of Bolivia, 0645/2012.

[33] Constitutional Court of Colombia, T-766/15.

[34] Constitutional Court of Colombia, C-175/09.

[35] Constitutional Court of Colombia, T-254/94.

[36] M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, Cambridge 2013; A. Stone Sweet, J. Mathews, *Proportionality Balancing and Global Constitutionalism*, 'Columbia Journal of Transnational Law' 2008, Vol. 47.

implies, again, that indigenous rights are not brought into being by distinct subjects in society. The recognition of indigenous rights does not involve the pluralistic walling off of indigenous subjects as social actors and it does not imply the recognition of indigenous practices as located in a unique and inviolable legal space. To the contrary, these rights presuppose an internationally implied meta-constitution, and they are usually determined by their proportional relation to a higher system of norms. The consequence of this, in many cases, is that the rights that can be claimed by indigenous groups do not differ very substantially from the rights that are allotted to other groups of citizens with specific interests, and they are typically not substantially distinct from primary norms of rights-based citizenship. Arguably, the establishment of strong protections for indigenous groups has become possible precisely because of the rising global force of human rights law, which means that a strict and robust order of higher norms has been established, within which proportionate deviations may, exceptionally, be permitted.

All of this suggests that, if we wish to explain the formation of indigenous rights, sociological analyses based simply in legal pluralism, focused on the concrete expectations of social groups existing at the margins of formal (colonial) law, do not always provide the most adequate pathway. The pluralistic approach to indigenous rights is called into question by the fact, as outlined, that the growing force of indigenous rights has been underpinned by the emergence of a solidified corpus of global human norms. In many cases, indigenous rights are pre-defined by global legal norms, and they do not have a direct foundation in the actions of existing subjects. It is difficult to examine either the definition or the exercise of indigenous rights without observing them in conjunction with the formation of a broader, and increasingly formalized system of global legal rights, entailing distinct patterns of construction for a wide range of new legal subjects.

3. CONSTRUCTING INDIGENOUS RIGHTS AS A SOCIOLOGICAL QUESTION

On this basis, it is contended in this paper that the construction of indigenous rights as a field of sociological research has become excessively focused on the pluralist paradigm. This focus may be attributed to the fact that the recognition of indigenous rights, especially at the international level, is relatively new, and analysis of such rights concentrates on societies with a clearly identifiable colonial history, often reflected in manifest ethnic heterogeneity. For this reason, sociological inquiry discovered indigenous rights relatively late, and it tended to take at face value the assumption that, in claiming rights, indigenous groups (and

their advocates) were seeking protection for socially embedded subjectivities. This paper challenges common pluralistic approaches to the social construction of indigenous rights in two ways. Based on the above analysis, firstly, it is argued that rights require sociological explanation, primarily, as elements of an emerging global legal system – it is impossible to explain such rights without explanatory consideration of this system. In addition, secondly, it is argued that the formation of such rights is also part of a much wider process, not solely focused on selected societies with acknowledged indigenous communities: it is necessary to observe how the growth of such rights is connected to more universal social dynamics, and to perceive how the rights now granted to indigenous groups describe lines of social formation not exclusive to societies in which such rights have recently been claimed. It is argued here, thus, that the key to a sociological examination of indigenous rights is to adopt an emphasis, not on *social or ethnic pluralism*, but on *patterns of integration*. Patterns of integration are linked to the establishment of national citizenship regimes, which underpin the construction of national societies at a more universal level. If examined in a lens focused on integration and citizenship formation, the expansion of indigenous rights in recent years can be assessed in a perspective that accounts for the broad social premises of such rights, and the forces shaping indigenous rights can be more reliably identified, isolated, and explained. Moreover, the focus on integration allows us to comprehend the role played by globally defined norms in the formation of indigenous rights. Through this altered focus, sociological reconstruction of the ways in which contemporary states define and protect indigenous rights can throw light on some of the deepest sociological problems and the most vital formative trajectories at the core of modern states and modern societies. Analysis of the processes through which rights of pre-national populations are protected in contemporary society enables us to interpret, in broad terms: (i) changes in primary patterns of social integration underlying national societies; (ii) changes in the basic structure of national citizenship; (iii) changes in the formation of normative systems implemented to integrate national communities.

To understand indigenous rights as a general sociological phenomenon, however, current sociological perspectives on such rights require a twofold revision.

Firstly, it is necessary to revise slightly the way in which we understand indigenous communities, and to relativize the distinction typically posited between such groups and other ethnic minorities. As discussed, the increasing emphasis placed on the protection of indigenous rights is a product, at least implicitly, of a wider transformation in the understanding of legal subjectivity and the foundations of legal subjectivity. This process is strongly connected to a trajectory in which the legal personality of agents in national societies is construed around global norms. For this reason, it is important to observe that the expansion of legal protections for population groups identified as indigenous is not strictly detached from broader alterations to concepts of national citizenship, which are

also increasingly configured around global norms. Analysis of indigenous rights needs to form part of a broader analysis of global tendencies in the construction of citizenship.

On this basis, secondly, it is necessary to adopt a revised approach to the social and political occurrences typically associated with the concept of colonization, in relation to which the discussion of indigenous rights is normally framed. The concept of colonization is usually applied to explain the overseas expansion of European polities at different historical junctures, and it is commonly seen as a process that gave rise to subsequent long-term experiences of decolonization, especially in Latin America and Africa. In such contexts, colonization appears as a process involving the large-scale displacement of population groups from economically stronger to economically weaker global regions, enabling stronger groups to reinforce their already solid hegemonic position. More specifically, it is seen as involving the transplantation of large numbers of European persons to other parts of the world, who then typically acquired dominant societal or official positions in the geographical areas that they came to inhabit. It is also seen as involving, in colonized regions, the enforced internal migration of pre-colonial population groups, through which the (usually informal) partitions between colonized communities were altered. In most cases, colonization is associated with coercive and frequently violent assertions of superiority by the invasive group over one other group or a range of other groups, with longer histories of territorial occupancy. Such assertions of superiority are normally observed in the formation of tiered citizenship regimes.[37] Such regimes may entail, for example, patterns of citizenship founded in indirect rule, in which colonial domination is consolidated through collaboration between the colonizing power and existing societal elites. Such regimes may include the stationing of military units by external occupying forces to ensure that colonized peoples are subject to unequal authority. But such regimes also include – in the most extreme cases – the imposition of slavery or de facto legal dominion by one person over others. It is against the background of such contexts that indigenous rights are usually examined. In contemporary discussions, as mentioned, such rights are habitually seen as expressions of normative habits and customs that have not been eradicated by the coercive legal regimes imposed through colonialism.

Arguably, this concept of colonization is too narrow, and it needs to be widened if we are to understand both the deep roots and the contemporary importance of indigenous rights. This concept needs to incorporate a broader comprehension

[37] See M. Mamdani, *Historicizing Power and Responses to Power: Indirect Rule and its Reform*, 'Social Research' 1999, Vol. 66(3). For more specific discussion, see D. W. Throup, *Economic and Social Origins of Mau Mau 1945–1953*, London 1988, p. 144; H. Bienen, *Tanzania: Party Transformation and Economic Development*, expanded edition, Princeton 1970, p. 38. See the analysis of indirect rule in Central Asia in G. Mirsky, *On Ruins of Empire: Ethnicity and Nationalism in the Former Soviet Union*, Westport, CT 1997, p. 3.

of colonization and its impact on social and legal formation, acknowledging the almost universal nature of colonization as the substructure of national society. Indicatively, contemporary international law recognizes the existence of only one indigenous group in Europe with potential claims to rights under ILO C169: that is, the Sámi people, residing in northern Scandinavia and northern parts of the Russian Federation.[38] However, questions relating to the integration of prior or pre-national population groups had assumed marked importance in Europe, through the long period of nation-state formation, long before formal definitions of indigenous rights appeared. Many legal questions of central importance in the formation of national democracies in Europe posed dilemmas not strictly distinct from those addressed through the recent promotion of indigenous rights. Indeed, many legal questions that preoccupied lawyers and politicians through the course of modern European history resulted from the fact that European nation states were created, effectively, through processes of de facto colonization, which entailed the gradual or violent subsumption of existing population groups beneath the structure of national states. Moreover, many such questions resulted from the fact that, in different contexts, national legal and governmental systems were constructed through formally ordered processes of population displacement.

To illustrate this observation, in Great Britain, national governmental structures were created through the longer-term solidification of central institutions across the territorial order of society. The same of course applies to France, in which cultural groups with some claim to the title of a prior population still exist at the frontiers of the nation state. Particular problems in this regard arise in the cases of Germany and Austria, whose institutional foundations were expressly constructed through formal processes of colonization. After 1918, the territorial boundaries of Austria were redrawn in such a manner that the Austrian polity acquired a reasonably homogenous ethnic and territorial form, thus side-stepping immediate legal exposure to the legacy of tensions existing within its pre-1918 multi-centric population. However, the development of the legal political system in Germany has been abidingly determined by exposure to the legal claims of minority groups able to project themselves, with some justification, as ethnically distinctive and – in principle – as indigenous. The initial emergence of the political entity that became modern Germany began through a process of Prussian territorial annexation. This was initially concentrated, in the 1740s, on regions (then largely German-speaking) in Silesia, currently belonging to Poland, and it later extended into Poznań and much of Pomerania in the last decades of the eighteenth century and after 1815. In these earlier stages in the formation of modern Germany, government officials acted as sponsored colonizers, complying with

[38] T. Joona, *ILO Convention No. 169 and the Governance of Indigenous Identity in Finland: Recent Developments*, 'The International Journal of Human Rights' 2020, Vol. 24.

royal edicts dictating colonization as a sanctioned state policy.[39] This process of expansion quite manifestly involved the attempted suppression of the autonomous practices, usually of a cultural, religious and educational nature, that were central to the lives of social groups resident in these areas, which would, using contemporary legal criteria, be expressly defined as *pre-colonial populations*. In this process, German colonizers often found themselves confronted with ethnic groups primarily working in agriculture. Amongst these groups, colonizers allowed the residues of servitude that were prevalent in social relations within existing communities to persist after the completion of colonization.[40] However, they ensured that formal interactions between pre-colonial groups and persons linked to German institutions were conducted in prescribed cultural and linguistic procedures. In this respect, German policies of colonization to the East of the Prussian borders after 1740 were close to forming a template for later patterns of European expansion in Africa, in which pre-existing kinship structures were solidified to cement indirect rule by a colonizing power. Russian westward and eastward colonization in the eighteenth and nineteenth centuries showed certain parallels to the Prussian colonization model. Eventually, of course, the Soviet Union adopted provisions for giving legal recognition to pre-colonial ethnic groups, which in some ways anticipated more contemporary approaches to societies with multi-centric population groups.[41] In the eighteenth and nineteenth centuries, however, the Tsarist regime created a governmental system in which colonization was designed to suppress the traditional expressions of autonomy, eradicating practices that could today easily be covered by concepts of indigenous rights. In such processes, the line between nation building and colonization was always uncertain, and many modern nations have their origins in colonial acts.

Notable in such nation-building patterns in Europe is that, in different ways, the legal status of groups absorbed through colonization was eventually translated into a question addressed through definitions of citizenship. Through the later nineteenth and earlier twentieth centuries, different European polities began to transform the patterns of obligation that attached government institutions to individual persons inside their territorial frontiers. Through this process, governments slowly redefined the legal categories, in which they addressed persons in society, and they began to stabilize their social foundations by attaching uniform legal titles to the persons, at different points in society, with whom they interacted. The relation between government and society was structured around basic

[39] See K. P. Woźniak, *Niemieckie osadnictwo wiejskie między Prosną a Pilicą i Wisłą od lat 70. XVIII wieku do 1866 roku. Proces i jego interpretacja*, Łódź 2013, pp. 78, 83.

[40] On the continuation of serfdom in Poznań during the process of German colonization, see J. Kozłowski, *Wielkopolska pod zaborem pruskim w latach 1815–1918*, Poznań 2004, pp. 23, 27.

[41] Y. Slezkine, *The USSR as a Communal Apartment, or How a Socialist State Promoted Ethnic Particularism*, 'Slavic Review' 1994, Vol. 53(2); T. Martin, *The Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923–1939*, Ithaca, NY 2001.

legal and political rights, embodying both enshrined liberties and objective obligations, associated with citizenship. One outstanding analysis of early citizenship regimes claims, simply, that modern political systems obtained their basic societal substructure in this process.[42] A different account has explained how the construction of citizenship underpinned the essential legal form of the nation state, acting as the cornerstone for the entire 'development of modern statehood'.[43] Accordingly, the emergence of modern national polities in Europe presupposed that the institutional actors within such polities addressed persons in society as citizens, and that national governments framed their responsibilities, their legitimacy and their integrational force in relation to expectations (both rights and duties) embedded in citizenship.

In many European contexts, the process of citizenship construction was not categorically separate from colonization, and it involved the imposition of strong ethnic distinctions on society. In many settings, the early construction of national citizenship entailed both, at the legal-legitimational level, the integration of individual actors within the governmental order, and, at the everyday social level, the differentiation of groups with access to full legal/political rights from groups not allowed complete access to such rights. Importantly, the first stage in the development of modern citizenship regimes in Europe frequently led to the creation of systems of *partial citizenship*, in which some ethnic groups were not admitted to the full exercise of citizenship rights. This can again be observed in continental empires in Europe. In the major empires in northern Europe, the expansion of citizenship rights in the later nineteenth century was often calibrated on ethnic grounds, leading to acute experiences of minority exclusion.[44] Especially noteworthy in the later decades of intra-European imperialism is that military service played a central role in defining the reciprocities between government and society expressed in citizenship, and increased access to legal and political rights amongst minority groups often depended on their willingness to serve as soldiers. In some cases, in fact, the basic legal form of the citizen was made contingent on the discharge of military service.[45] By consequence, military organizations acquired responsibility for the integration of minority groups in emerging modern states, at times conferring citizenship upon soldiers attached to minority groups in return for their willingness to provide lethal force to state organizations. In such pro-

[42] J. N. Shklar, *American Citizenship: The Quest for Inclusion*, Cambridge, MA 1991, p. 1.

[43] D. Gosewinkel, *Schutz und Freiheit? Staatsbürgerschaft in Europa im 20. und 21. Jahrhundert*, Frankfurt 2016, p. 39.

[44] On Germany, see J. Kozłowski, 2004, *op. cit.*, p. 200; L. Trzeciakowski, *Pod pruskim zaborem 1850–1918*, Rzeszów 1973, pp. 196–197; H.-E. Volkmann, *Die Polenpolitik des Kaiserreichs. Prolog zum Zeitalter der Weltkriege*, Paderborn 2016, p. 153.

[45] Access to citizenship rights depended directly on military service in legislation passed in Austria in 1867, in Russia in 1874, and in Germany in 1913.

cesses, the formation of national citizenship regimes did not obviously separate nation states from an imperial government.

Equally noteworthy in these processes is that the eventual collapse of continental empires in Europe at the end of World War I did not give rise to citizenship regimes that completely transformed the position of minority population groups. On the contrary, the period of European decolonization beginning in 1918 tended to reinforce aspects of the convergence between nation building and imperialism that characterized pre-existing processes of state formation. Of the new states that emerged on the ruins of empires around 1918, some possessed extraordinarily complex ethnic structures, rivalling in such complexity the most multi-centric polities in contemporary global society. One example of this was Czechoslovakia, marked by a deep primary inter-group split. One alternative example was Poland, which during the Second Republic can, with qualifications, be observed as a primary precursor of contemporary societies marked by obdurate ethnic fissures.

Striking in this context is that, after acquiring independence in 1918, the process of nation building in Poland was marked by the tendency to reproduce patterns of social integration and citizenship formation that had typified the imperialist policies imposed by the partitioning powers. At one level, this policy reproduction was linked to the fact that the territorial frontiers of Poland were consolidated step-by-step. The marking out of Polish national territory after 1918 was conducted, simultaneously, through intra-societal and international conflicts. Indeed, as in many post-imperial contexts, the territorial borders of Poland required confirmation by international treaty agreements, so that international law played a key role in defining the legal order and territorial structure of post-1918 Poland. Owing to such circumstances, military factors became pivotal to the definition of Polish citizenship, and military service laws served as key parameters for administering access to citizenship.[46] As the territorial boundaries of the state were fixed, all population groups in Poland were subject to military service laws, such that, as before 1918, recruitment in the army became a vital precondition and expression of citizenship. This was formalized in Article 91 of the 1921 Constitution. This link between citizenship and military service had the outcome that the army acted as the primary organ of national integration and citizenship building.[47] Indeed, the army acquired functions extending well beyond military expectations, and military units often assumed

[46] On the role of military bodies in defining Polish citizenship, see L. Kania, *Wyroki bez apelacji. Sądy polowe w Wojsku Polskim w czasie wojny z Rosją Sowiecką 1919–1921*, Zielona Góra 2019, pp. 292–294.

[47] See M. Wrzosek, *Wojny o granice Polski Odrodzonej 1918–1921*, Warszawa 1992, p. 37.

educational and cultural roles as institutions that facilitated the penetration of national consciousness in society.[48]

In this rapid nation-building process, the map of Poland was progressively redrawn in a form that absorbed many regions containing substantial minority population groups. For example, after 1918, Poland incorporated large numbers of Ukrainians and Belarusians along its Eastern frontiers, and these communities, defined by clear linguistic, religious and cultural particularities, were not entitled to citizenship in an existing external state.[49] In some cases, the eastern borderlands and their populations were drawn into the realm of national citizenship by means of state-sponsored settlement programmes, which obviously challenged ownership patterns in these areas. These programmes were not very obviously dissimilar to analogous programmes used earlier by external colonizing forces; they involved strategic population transfers into regions with large minority groups, and they were designed to link marginal regions more fully to national government and to the majority culture.[50] In this process, military considerations and organizations also played a vital role. Regional settlement policies were designed, in part, to recompense ex-soldiers for their service and to ensure the presence of patriots in national borderlands.[51]

On these separate counts, the first formation of Poland as a modern nation state reflected a complex interplay between decolonization and colonization. This

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[48] J. Kęsik, *Naród pod bronią. Społeczeństwo w programie polskiej polityki wojskowej 1918–1939*, Wrocław 1998, p. 185; Z. Waszkiewicz, *Duszpasterstwo w siłach zbrojnych Drugiej Rzeczypospolitej (1918–1939)*, Toruń 2002, p. 79.

[49] To clarify this claim, the coverage of ILO C169 is defined in Article 1(a) and (b) in very general terms. It is conceived as an instrument that applies to 'tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'. It also applies to 'peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.' In the circumstances of the 1920s, these provisions would clearly not have extended to many minority populations in Europe, most particularly because some (although not all) groups had clear secessionist ambitions. However, given the flexibility of the construction of indigeneity in contemporary international and domestic law, it is perfectly conceivable that many European minorities existing in the 1920s would now, on the proviso that they renounce separatist strategies, be incorporated in such definitions. As mentioned, with the exception of the Stalinist period, the Soviet Union created a system of minority population management that was very close to contemporary international provisions.

[50] See Z. Landau, J. Tomaszewski, *Gospodarka Polski Międzywojennej (1918–1939)*, Vol. I: W *dobie inflacji 1918–1923*, Warszawa 1967, p. 164.

[51] M. Kacprzak, *Ziemia dla żołnierzy. Problem pozyskania i rozdysponowania gruntów na cele osadnictwa wojskowego na kresach wschodnich 1920–1939*, Łódź 2009, pp. 45, 53; J. Stobniak-Smogorzewska, *Kresowe osadnictwo wojskowe 1920–1945*, Warszawa 2003, p. 58.

was reflected, not lastly, in the fact that Polish national society contained large minorities which possessed *pre-national*, if not strictly *indigenous* status, and whose cultural dispositions and claims to occupancy of land manifestly predated the construction of the nation state. This was also reflected in the fact that the military organizations played a key role in weakening horizontal affiliations in society and in tying different ethnic groups more immediately to the state as citizens.

These nation-building processes varied over time, from 1918 onwards. It is undoubtedly the case that interwar Poland saw progressive endeavours to establish inter-group balance within society, making provisions for the use of minority languages and sanctioning distinct religious, linguistic, and educational rights for pre-national communities.[52] This was formalized at the level of constitutional law, in Articles 109, 110 and 115 of the 1921 Constitution. As in contemporary societies with substantial minority groupings, these provisions were largely dictated by international law: that is, by the Small Versailles Treaty of June 1919, the Treaty of Riga of March 1921, and the Geneva Convention of May 1922.[53] However, the overlying pattern of integration in Poland at this time was designed, in part, to separate pre-national minority groups from customary practices, and to instil uniform citizenship norms into all population groups in society. In some cases, minority groups were subject to repression by military actors, so that, by the latter years of the Republic, the wider militarization of society impacted visibly on attitudes to minority groups.[54] More generally, the propensities for centrifugalism created by the persistence of pre-national groups with distinct interests and identities remained highly destabilizing for the polity and for society as a whole, and a fully national model of citizenship did not prevail.

The implications of this analysis are multiple and complex.

This analysis indicates, firstly, that many seemingly national societies have been structured through processes of colonization. This analysis suggests, secondly, that there is nothing categorically specific or distinctive about the endeavour, visible in contemporary global society, to construct legal orders to establish specific rights or specific cultural freedoms for minority, pre-national population groups. Many European societies have been structurally defined by their expo-

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[52] A. Chojnowski, *Koncepcje polityki narodowościowej rządów polskich w latach 1921–1939*, Wrocław 1979, p. 41

[53] See S. Mauersberg, *Szkolnictwo powszechne dla mniejszości narodowych w Polsce w latach 1918–1939*, Wrocław 1968, p. 16. See critical discussion in P. K. Marszałek, *Problem suwerenności II Rzeczypospolitej w świetle postanowień mniejszościowego traktatu wersalskiego z 1919 roku*, 'Historia i Polityka' 2020, No. 31(38).

[54] See A. Chojnowski, 1979, *op. cit.*, p. 234; Z. Zaporowski, *Sejm Rzeczypospolitej Polskiej 1919–1939. Działalność posłów, parlamentarne koncepcje Józefa Piłsudskiego, mniejszości narodowe*, Lublin 1992, pp. 42–44, 140; M. Nowak, *Narodowcy i Ukraińcy. Narodowa Demokracja wobec mniejszości ukraińskiej w Polsce 1922–1939*, Gdańsk 2007, pp. 139, 230; A. Kotowski, *Polska polityka narodowościowa wobec mniejszości niemieckiej w latach 1919–1939*, Toruń 2004, p. 114.

sure to problems of integration linked to this process, and these problems are reflected in the formation of many national citizenship regimes. However, this analysis suggests, thirdly, that, in the creation of most European states, national citizenship regimes were promoted in a form that, in many respects, merely re-imposed patterns of colonization on national territories, often in acutely intensified fashion. One common pattern that underpins many lines of European nation formation is a two-stage process of colonization – entailing, initially, colonization through external expansion, and, subsequently, at least partial replication of such colonization patterns by a national government, via the imposition of national citizenship laws.

Fourthly, the most vital implication of this discussion is that, in most societies, original constructions of national citizenship failed to establish a solid basis for national integration, and nation-building processes conducted through the imposition of citizenship laws were enduringly afflicted by acute instabilities. We can in fact identify – in quite general terms – a crisis of classical citizenship at the core of most national societies in Europe. Almost universally, national citizenship was only effectively consolidated in societies that were already marked by a high degree of homogeneity before the establishment of modern citizenship regimes, which began in the later nineteenth century (examples are France, the Netherlands, Sweden, Denmark, perhaps the UK). Where this was the case, such homogeneity was usually the result of the fact that territorial integrity had been established and solidified before the modern principle of citizenship existed: that is, societies in this category had already been consolidated through forcible integration. In most settings, the principles of citizenship that developed as the premise for nation building were unable to sustain their basic function: that is, to provide an integrational basis and a uniform set of obligations to support a national government. Most classical constructions of citizenship specifically did not succeed in connecting agents in different parts of national society to the state, and they established very uneven, irregular principles of inclusion in society. In many societies, pre-national groups abidingly challenged the form of national citizenship, typically with catastrophic results. In a mild form, this was evident in interwar Poland. However, the failure of national citizenship, linked to the deep and integral relation between imperialism and nation building, acquired most catastrophic expression in Germany after 1933, where fragmented, tiered citizenship regimes were promoted, first, within and – later – outside German society.

On this basis, this analysis contains the claim, fifthly, that we need to observe contemporary processes of legal engagement with pre-national groups in a long historical perspective. We need to analyse such processes both as an extension of, and as a reaction against, earlier models of citizenship formation and earlier processes of nation building. Until recently, most national integration systems established a system of citizenship rights by attempting to cement authority in monopolistic national institutions. The normative attachments linking single per-

sons to government bodies were designed to intensify the nexus between citizen and nation state, and this single and immediate nexus was the primary focus of the norms that sustain citizenship. The long-term result of this was, frequently, that national societies were not able to integrate their populations, and national governments often experienced the presence of minority populations as a source of extreme destabilization. By consequence, what we observe in the establishment of protections for indigenous rights in contemporary society is a new pattern of citizenship formation, based in distinct processes of nation building and national integration, in which the basic state-citizenship nexus is reconfigured. As in earlier patterns of citizenship construction, however, the promotion of indigenous rights remains oriented not towards pluralism but towards effective national integration.

4. INDIGENOUS RIGHTS AND THE REDIRECTION OF INTEGRATION PROCESSES

The value of approaching indigenous rights from a perspective based on analysis of social integration and citizenship formation can be exemplified through description of contemporary societies in which indigenous rights have acquired an important role. In many societies in which the expansion of indigenous rights has become prominent, the promotion of such rights expresses a response to weaknesses in national integration processes that have been caused, in part, by the legacies of imperialism, by the duplication of colonial patterns of integration, and by the inability of classical citizenship models to perform required integration functions. For this reason, in many cases, the formation of indigenous rights allows us to observe a model of citizenship formation in contexts where classical patterns of citizenship historically had a weak purchase. Such rights bring to visibility new figures of citizenship, radically separate in normative design from models of citizenship that originally underpinned processes of nation building. However, such rights still serve the same integrational function as earlier models of citizenship.

Two national examples can be singled out to explain this.

4.1. COLOMBIA

Colombia can be identified as a society in which the legal reaction to indigenous groups located inside the boundaries of the nation state has a paradigmatic quality. Paradigmatic in Colombia is the fact that indigenous rights have been constructed to promote new processes of social integration, and to address problems inherent in the historical formation of national citizenship.

In key respects Colombia forms a classical example of a society whose structure is marked by the ingrained residues of imperialism. For example, Colombia was originally transformed into a national society through patterns of elite consolidation, in which groups privileged by colonial attachment acquired dominant social roles and determined the course of institution building.[55] Further, in its initial formation, Colombia was defined by very weak institutional articulations between centre and periphery. Throughout its emergence, it was a state that displayed a partial and informal citizenship regime, in which citizenship rights were often preferentially allocated and privileged rights holders assumed high levels of political authority, especially in remote regions and localities.[56] As a result, Colombia developed a very fragile state structure, in which local patronage was a core source of authority and inter-regional coordination, and formal citizenship roles did not strongly connect actors across society to central government.[57] The primary characteristic of state institutions in twentieth-century Colombia was that their reach into society was very limited, and actors with formally defined political roles did not successfully exercise control of society. In this context, rural areas were often situated outside the reach of state institutions, and populations in such regions occupied lawless spaces, often experiencing very high levels of violence. Intermittently, notably in the early 1950s and again in the 1980s and 1990s, such violence reached the intensity of civil war, as insurgent groups imposed their own institutions in remote regions.[58] This naturally meant that many minority (indigenous) groups, surviving from the pre-national era and typically working in peripheral agricultural economies, were exposed to deprivation and violence. Such groups clearly operated at the most outward margins of a generally very patchy citizenship regime.

The legal status granted to indigenous groups in Colombia is very closely connected to such problems in the forming of national citizenship and in consolidating national integration more broadly. Indeed, the position of indigenous peoples is not easily understandable without reference to broader questions about the social penetration of national institutions. Recent attempts to enhance protection for indigenous rights have been strongly linked to endeavours to strengthen the structures of citizenship. Indicatively, the status of indigenous populations first became legally prominent in the period beginning in the mid-1980s, in

[55] J. C. Calderón, *Buscando la Nación. Ciudadanía, clase y tensión racial en el Caribe colombiano, 1821–1855*, Medellín 2009, p. 271; J. W. Márquez Estrada, *La Infancia de la nación. Estrategias políticas y culturales en el proceso de formación de la ciudadanía en Colombia: 1810–1860*, 'Clío América' 2011, Vol. 5(9).

[56] M. T. Uribe de Hincapié, *Proceso histórico de la configuración de la ciudadanía en Colombia*, 'Estudios Políticos' 1996, Vol. 9, p. 75.

[57] M. T. Uribe de Hincapié, *Órdenes complejos y ciudadanías mestizas: una mirada al caso colombiano*, 'Estudios Políticos' 1998, Vol. 12.

[58] M. Aguilera Peña, *Guerrilla y población civil. Trayectoria de las FARC 1949–2013*, 3rd edn, Bogotá 2014, p. 377.

which escalating civil violence in Colombia was observed as the outcome of fragile institutional integration, and new steps were taken to rectify this condition. The mid-1980s witnessed the beginning of an attempt at legal-political reorientation in Colombia, centred, firstly, on the drafting of the new Constitution that entered force in 1991 and, secondly, on the processes of demilitarization, beginning around 2000. Generally, both the new Constitution as a whole and the institutions that it created were conceived, instrumentally, as mechanisms serving the reinforcement of the state structure and national citizenship. Indicatively, the constitution-making process was initiated on the basis of the Presidential Decree (1926/1990), which declared that far-reaching constitutional reforms were required to reinforce state institutions. More systematically, the decision-making strategies of the Constitutional Court that was created under the Constitution in 1991 were driven by deliberately 'Weberian' considerations, and its jurisprudence was immediately conceived as part of a plan to elevate the state's monopoly of force vis-à-vis other actors and organizations.[59]

In this institutional context, indigenous groups acquired notable visibility, and the broader reconstruction of the legal-political order of society assumed distinct relevance for these groups. Indigenous groups were represented in the writing of the 1991 Constitution. Then, the period after 1991 saw the incorporation of ILO C169 and the widespread application of other international norms regarding indigenous groups in domestic constitutional law. Over a longer period, further, the Constitutional Court created in 1991 handed down a series of rulings regarding the position of indigenous groups, establishing, as mentioned, clear sets of cultural rights for these groups. Importantly, one impetus of these rulings was to ensure that, with some other designated groups, indigenous communities obtained enhanced legal protection – that is, differential legal status – in settings that were created or enduringly marked by civil violence.[60] In many rulings, heightened legal obligations were imposed on state actors and public agents operating in contexts shaped by violence, and these obligations entailed duties to protect the rights of indigenous groups in such settings. The Constitutional Court often invoked international humanitarian law to generate legal norms with this purpose.[61] In this respect, the promulgation of indigenous rights in Colombia can clearly be associated with the overarching historical experience of depleted national statehood and weak citizenship. The establishment of indigenous rights formed one part of a broader attempt to expand the force of the state in society, beyond its historical limits. Questions regarding indigenous rights were addressed in a functionalist-instrumental approach, and the conferring of such rights on groups at the margins of the state was seen as a vital precondition for hardening the obligations of state officials and for extending the force of state institutions. The rights of

[59] Constitutional Court of Colombia, SU-1150/00.

[60] Constitutional Court of Colombia, T-235/11.

[61] See, for example, Constitutional Court of Colombia, A-004/09.

such groups were consolidated with a specific view to rebuilding state capacity and solidifying a new system of citizenship, imposing a legal order on precarious and previously unregulated social domains.

Notable in this respect is that the elaboration of indigenous rights was intended to create a protective order for indigenous citizens at the same time that enhanced rights were created for other collective actors and for persons in other functional domains in Colombian society. Indicatively, the promotion of indigenous rights coincided with the establishment of new healthcare rights, new educational rights, new environmental rights, new sexual rights, all of which were conceived as means to protect vulnerable or marginal subjects in society.[62] Provisions handed down by the court to realize such rights were conceived as instruments for expanding institutional capacity in spheres of life covered by the rights in question. In most such cases, these new rights were consolidated through reference to international norms.[63] As a result, the construction of the indigenous person as a citizen with newly protected rights can be seen as a process of legal formation running parallel to, and not clearly separable from, the construction of persons in all social spheres as citizens with newly protected rights. Through this process, legal persons began to appear as citizens of healthcare, as citizens of the environment, as citizens of education, etc. In many cases, indigenous rights have been established as secondary outcomes of protection given to other rights, so that indigenous groups have obtained special protection under rulings primarily focused on health, education or environmental rights.[64] For example, indigenous population groups have acquired a distinct personality in education law, and they are recognized as possessing a right to a 'special system' of education, tailored to their cultural needs, flowing from the right to identity.[65] In this respect, in general, indigenous rights have been clearly designed as part of a strategy to intensify links between state institutions and individual actors in society as a whole, positioning all actors more fully in the realm of formally defined obligations.

In the case of Colombia, overall, we can observe a national environment, in which the formation of indigenous rights was closely focused on wider questions of citizenship, addressing the status of groups with marginal positions vis-à-vis formal state institutions. In this context, the formation of such rights was designed to craft new citizenship roles, in which subjects exercising new rights were more closely linked to the state. In particular, the consolidation of new rights was con-

[62] See Ch. Thornhill, C. Calabria, *Global Constitutionalism and Democracy: The Case of Colombia*, 'Jus Cogens' 2020, Vol. 2.

[63] For use of international law in determining environmental rights, see Constitutional Court of Colombia, T-608/11; and in establishing health rights, see Constitutional Court of Colombia, T-062/06.

[64] See the famous decision of the Constitutional Court of Colombia, T-622/16, in which judges used environmental law to grant protective rights to a river, in doing which they also bolstered the rights of indigenous communities dependent on the river.

[65] Constitutional Court of Colombia, T-907/11.

ceived as a way of producing a multi-centric constitution, designed to cement inclusionary connections between social actors and the state in all parts of society. Indigenous rights were produced as attributes of citizens within a multi-focal constitution, whose essential function was to offer an alternative to existing models of citizenship, and, through this, to remedy traditional weaknesses in the institutional structure. The sociological paradigm for observing this process is provided by analysis not of legal pluralism but of the transformation of citizenship.

4.2. KENYA

Kenya can be observed in a parallel fashion, as a society in which indigenous rights have been constructed to address traditional problems of patchy institutional integration.

Like Colombia, Kenya pertains to the category of the paradigmatic post-imperial society, with many consonant political-institutional features. Although viewed as a relatively strong state in the African context, Kenyan institutions were defined from the period of decolonization onwards by their relatively limited, or at least selective, penetration into society.[66] In particular, the reduced purchase of state institutions in Kenya was reflected in the fact that legislative and judicial bodies struggled to apply legal norms equally for all groups in society. With variations over time, different ethnic groups were able to gain an internal hold on state institutions, guaranteeing heightened legal protection for their own memberships.[67] This meant, on the one hand, that the efficacy of public institutions was often weakened by attachment to a defined set of group interests, reflected in corruption and insider brokering of offices. This meant, on the other hand, that different ethnic groups in society could isolate themselves from the full force of the law, and certain ethnicities created entitlements either to partial legal immunity or to para-legal authority and influence.[68] Whereas ethnic pluralism was reflected at the limits of the state in Colombia, in Kenya ethnic pluralism weakened the state at its core, and the ability of state bodies to extend uniform protections to all ethnic groups was restricted.

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[66] M. S. Grindle, *Challenging the State: Crisis and Innovation in Latin America and Africa*, Cambridge 1993, p. 79; D. Himbara, *Kenyan Capitalists, the State and Development*, Nairobi 1994, p. 120; A. Bannon, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 'The Yale Law Journal' 2007, Vol. 116(8), p. 1831.

[67] L. Juma, *Ethnic Politics and the Constitutional Review Process in Kenya*, 'Tulsa Journal of Comparative and International Law' 2001, Vol. 9(2), p. 491. S. Ndegwa, *Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics*, 'The American Political Science Review' 1997, Vol. 91(3).

[68] S. D. Ross, *The Rule of Law and Lawyers in Kenya* 'The Journal of Modern African Studies' 1992, Vol. 30(3).

This prominence of ethnic bias in the state impacted deleteriously on the formation of national citizenship in Kenya. Obviously, ethnic bias in the governmental order meant that a tiered citizenship regime persisted through society, so that, depending on the ethnic attachments of the ruling group, selective inclusion levels were applied to different communities. Moreover, such bias meant that collective identities linked to particular groups could prevail over national constructions of citizenship, and group interests protected at the systemic level were mirrored in the consolidation of group interests at the societal level.[69] Most crucially, the fact that public bodies could be monopolized by distinct ethnic groups created harsh rivalries between groups within society, such that processes of political engagement and transformation were often overshadowed by the threat of extreme violence. This was reflected in the period after the 2007 elections, in which Kenya moved close to ethnically motivated civil war. As in Colombia, the low inclusionary force of public institutions was directly implicated in the intensification of violence in society at that time, and the fragmentation of citizenship around ethnic identities meant that access to privileged citizenship positions was violently contested. At different junctures, procedures for enacting citizenship, such as governmental elections, were prohibited by sittings of governments, in order, by way of pretext, to avert ethnic violence.

In Kenyan law, separate legal protections have been created for non-dominant social groups. Kenyan courts have recognized that indigenous groups have distinctive claims to rights, especially to land rights, which are justified by their 'historical ties to a particular territory'.[70] On this basis, the courts have ruled that persons belonging to an 'indigenous and distinct community' can claim a collective personality, giving rise to 'attendant rights and protections'.[71] Although such rights do not have the same prominence as in Colombia, protections for indigenous rights in Kenya have been constructed, as in Colombia, as instruments that serve both to generate protection for collective subjects and to rectify structural-integrational weaknesses in the political system. This functional purpose is evident, most obviously, in the fact that, in the above cases, indigenous rights have been extended without regard for the specific ethnicity of the group in question. Such allocation of rights attached to indigeneity creates enhanced rights for smaller groups in society, traditionally marginalized from central patterns of inter-ethnic competition, and, to some degree, it counterbalances tendencies to ethnic privileging. This purpose is also perceptible in the fact that indigenous rights have been crafted as one part of a wider endeavour to extend the system of citizenship rights across society. In ways outlined above, indigenous rights granted in Kenya are not easily separable from rights allocated to other marginal communities. The

[69] S. Ndegwa, 1997, *op. cit*., p. 612.

[70] See *Joseph Letuya and 21 Others v Attorney General and 5 Others*, 2014 (H.C.K.) (Kenya).

[71] See *Rangal Lemeiguran and Others v Attorney General and Others*, 2006 (H.C.K.) (Kenya).

creation of rights for indigenous communities has been flanked by the establishment of similar rights for non-indigenous groups, subject to analogous challenges, such as damage caused by land deprivation, commonly affecting indigenous peoples.[72] Indigenous rights are thus extended as part of a broad policy to thicken social integration.

Perhaps most importantly, indigenous rights in Kenya have been constructed through the use of international and comparative law. In fact, the protection of indigenous rights emerged as part of a wider decisive strategy amongst leading jurists in Kenya, in which they aimed to convert the national legal system into a fully monist legal order. The establishment of rights through international law has been promoted as a means to introduce a new stratum of law into Kenyan society, able to consolidate legal principles with shared valence amongst all social groups, regardless of ethnicity and social position.[73] In effect, through this process, international norms have been used to consolidate a general legal order, robust and encompassing enough to incorporate and establish objective rights for all people, as an alternative to the selective or privileged legal order originally created in Kenya itself. In other words, international law has been integrated in the Kenyan legal system as a corrective system of citizenship, designed to supplant and override the factual models of citizenship, which tended to sanction group rights and to prioritize certain collectives over others. In each case, the construction of indigenous rights is not easily separable from a broad pattern of citizenship formation, designed to cement a uniform legal order in society.

In both these settings, the practice of defining and protecting indigenous rights is a practice that extends beyond the substance of these rights themselves, and it cannot be reduced to the recognition of plural subjects in society. In both cases, this practice is focused on the endeavour to remedy historical weaknesses in the institutional order of society. Equally, it is intended to generate an integrational structure for national society, able to extend citizenship rights across different social groups and to link historically diffuse subjects into one normative environment. The purpose of this process, strictly observed, is not to consolidate a pluralistic system of rights, but to embed a flexibly unified legal structure in society. Notably, in both cases, the use of international law is deliberately promoted as the foundation for a normative order strong enough to underwrite, and to maintain cohesion within, a shared system of citizenship. In both cases, vitally, the definition of indigenous rights is linked to the promotion of citizenship norms, in which

[72] See *Satrose Ayuma and 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others*, 2010 (H.C.K.) (Kenya).

[73] Senior figures in the Kenyan judiciary became increasingly resolute in arguing that the legal system needed to be construed in monist categories, and that international law should be used as an immediate source of authority for legal rulings. See the analysis set out by the Former Chief Justice in W. Mutunga, *The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions*, 'Speculum Juris' 2015, Vol. 1, p. 8.

assertions of citizenship do not result in violence, and in which state institutions can construct connections with citizens without provoking simple and aggravated contexts over the terms of national inclusion and exclusion. Such rights are clearly attached to a wider longer-term process of social pacification. Above all, such rights reflect an attempt to re-define and rectify classical models of citizenship.

5. CONCLUSION: THE TRANSFORMATION OF CITIZENSHIP

The overall claim in this paper is that indigenous rights now have great importance for legal and sociological research. Indeed, the intuition in some legal-sociological inquiry that the rise of indigenous rights marks a new period in the history of global legal formation is accurate. However, this paper also indicates that the sociological importance of this process has been misidentified, and in fact slightly understated, in established lines of analysis. Rather than observing indigenous rights as articulations of normative practices of a pluralist nature, reflecting emphases of existing collective subjects, we need to see such rights as manifestations of changing patterns of citizenship construction, which are not specific or limited to indigenous groups. Viewed in this way, it becomes apparent that indigenous rights have frequently taken shape in societies in which, historically, more classical patterns of integration were unsuccessful, and pre-national groups obdurately withstood typical integration processes linked to national citizenship. As such, the construction of indigenous rights appears as part of a new, adaptive form of citizenship, in the promotion of which state institutions have been able to develop distinct channels of inclusion and integration, constructing a basic structure of shared norms in national society. In this regard, the rise of indigenous rights has helped to countervail problems inherent in the structure of most national societies, caused by the deep parallels between nation building, citizenship formation and colonization.

The sociologically salient point in the protection of indigenous rights is not the pluralistic character of the agents able to acquire and exercise rights but the fact that the premises of national integration are now created, in part, through the penetration of international law into domestic patterns of legal subject formation. As mentioned, the coalescence of indigenous rights and international human rights law can be interpreted to reveal that such rights create solutions to traditional problems of nation building, in which pure national definitions of citizenship were ineffective in promoting social integration. Indigenous rights allow us to see that states now conduct their integration process within a global normative landscape with a complex multi-level structure, in which they construct national citizenship by assimilating norms that are strongly promoted at the international level within national society. In many cases, it is this coalescence of national

and international norms that makes national citizenship possible, allowing states to integrate citizens through multiple channels and multiple norms and multiple processes of legitimation. However, the key to interpreting this phenomenon is to examine the links between indigenous rights and global law as a new way of galvanizing national citizenship. Indeed, seen in the longer historical-sociological perspective outlined above, the construction of indigenous rights allows us to speculate that national citizenship and national integration necessarily possess a global foundation.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.19

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HOW TO CONCEPTUALIZE 'CRIMES BEYOND WORDS'? SIMONE WEIL'S PERSPECTIVE

Abstract

It seems undeniable that there are certain kinds of wrongdoing which can hardly be described in terms of rights' violations. Their wrongful character is so extreme that a different kind of moral language is indispensable to adequately capture their moral gravity. In this paper it is argued that such a language is provided by Simone Weil's moral theory. The first part of the paper is an attempt at reconstructing this theory, highlighting Weil's critique of the language of rights and analysing the 'moral extremes' that this theory embraces, viz. absolute goodness and absolute evil (which Weil calls 'injustice'). In this part an attempt is also made at clarifying the normative relations between both 'extremes', which Weil did not discuss at greater length. The second part is a case study of a type of injustice, namely crimes committed against the indigenous peoples. In the last part a comparison is made between Weil's and Hannah Arendt's views on the legitimacy of using 'absolutist' moral language in the public discourse.

KEYWORDS

absolute goodness, injustice, rights, indigenous peoples, common humanity, *metaxu,* Simone Weil, Hannah Arendt

SŁOWA KLUCZOWE

absolutne dobro, niesprawiedliwość, prawa (uprawnienia), ludy tubylcze, wspólne człowieczeństwo, *metaxu*, Simone Weil, Hannah Arendt

1. CRIMES BEYOND WORDS

Even a cursory look at the history of humankind makes us realize that in its course certain types of wrongs were done – let me call them 'crimes beyond words' – that cannot be adequately described by means of categories we normally employ in our everyday moral discourse. One would arguably have a strong feeling of incongruence if, for instance, one encountered a description of the extermination of whole peoples or a description of some – extreme – forms of racial discrimination in terms of 'moral wrongfulness' or 'moral badness'. These words do not seem to possess sufficient strength to capture what elicits such powerful moral indignation among those who hear about these kinds of atrocious acts. In order to properly name such acts, one is compelled to invoke the old-time word 'evil', which we typically wish to avoid, either because of its theological connotations, or – more commendably – because we cherish a well-grounded belief that its usage should be restricted only to those acts whose wrongfulness exceeds the measure of comprehensibility, i.e. to those acts whose wrongfulness is, in a sense, ineffable. But if we admit that certain, atrocious acts – like the Holocaust, or the extermination of indigenous people – ought to be called 'evil', and that by calling them 'evil', we move very close to the limits of moral discourse, we are still – as philosophers – obliged to try to clarify the content of this term; we cannot treat it only as an expression of our deepest moral indignation. Therefore, the question with which I would like to deal with in this paper is how this term is to be understood (even if approximately), and what are the misleading ways of filling in its content. In my view, many invaluable insights regarding these questions can be found in Simone Weil's moral philosophy. The layout of this essay is the following. In section 2, I shall reconstruct Weil's arguments for the claim that evil (understood as qualitatively different from mere wrongfulness) cannot be adequately defined in terms of rights' violations, and that its most convincing definition is that in terms of 'injustice'. In section 3, I shall present the ways in which insights from the previous section can be used with regard to a specific type of evil, viz. crimes committed against the indigenous peoples. In the final section, I shall reflect on the legitimacy of using the absolutist moral vocabulary in the public discourse; in this context, I shall compare Weil's and Arendt's views, arguing that the account of Weil is more compelling.

2. SIMONE WEIL ON THE INSUFFICIENCY OF THE LANGAGE OF RIGHTS

In her magnificent and profound (but, unfortunately, relatively little known) essay *La Personne et le Sacré* Simone Weil made a powerful case for the claim that extremely atrocious – evil – acts cannot be adequately expressed in the language of rights.[1] She asserted that the notion of right does not possess sufficient strength to perform this task. Instead of saying that extremely atrocious acts constitute a violation of rights, we should say, as Weil argued, that they are *unjust*, in the sense: *constituting an attack on the very humanity of the victim*, on what is *sacred* in him or her, and from which arises the fundamental expectation of each human being that evil will not be done to him or her.

But why is the language of rights inadequate in such cases (and, as we will see, inadequate even more generally)? One can distinguish in Weil's analysis several different, though interrelated, arguments for this claim. Firstly, *this language cannot mirror the moral gravity inherent in this kind of acts*. Accordingly, if we speak, e.g. about the suffering of a brutally raped woman, it would be a terrible understatement to say that her right to bodily integrity was violated, because something incomparably more hideous was done to her: she fell victim to *injustice*, what was done to her was *unjust*. It is a crucial thing to emphasize that injustice is taken here not in the sense of the kind of injustice dealing with distribution of goods or equalizing the claims in dyadic relationships (i.e. not in the sense of distributive or commutative justice), but in the sense closer to the Biblical meaning: as synonymous with goodness. Injustice, then, is an opposite of goodness: it is an attack on the very humanity of the victim, on what is sacred in her. Secondly, *the language of rights is, in a sense, immoral*. It is immoral because it is confrontational and self-centred. It is expressed in such statements as, e.g. 'you have no right to this', 'I have the right to that': these are statements which, as Weil claimed, imply the state of mind that excludes the virtue of charity. That is why, according to Weil, the language of rights is deeply un-Christian:[2] it can be instrumentally abused with a view to promoting one's own, egoistic interests. Thirdly, *the language of rights is also likely to be ineffective in the fight against*

[1] See S. Weil, *La Personne et le Sacré*, Paris 2017 (1942).

[2] She wrote suggestively and pointedly that one can hardly imagine St Francis speaking the language of rights (cf. S. Weil, 2017 (1942), *op. cit*., p. 53). The question which may be posed in this context is to what extent Weil can be regarded as a Christian thinker; my view on this issue is the following: she had great admiration for many aspects of Christianity, particularly for its emphasis on the virtue of *caritas*, but she unequivocally denied that Christianity is in possession of the ultimate religious truth; as she put it, 'Catholic religion contains explicitly the truths that other religions contain implicitly and *vice versa*; different religious traditions are a reflection of the same truth, and probably they are equally precious' (S. Weil, *Lettre à un religieux*, Paris 1951, p. 44). So there can be no doubt that she was not a Christian believer.

most atrocious acts. It seems too weak – too little expressive – to be really helpful in the fight for improving the lot of 'the afflicted' (*les malheureux*), those whose suffering is most acute (amounting to the denial of their very humanity), and as such ineffable.[3] It can also be easily abused (I shall return to this last point presently). It is worth adding, by way of a slight digression, that Weil also contended that an indirect argument against the language of rights is that it was invented within the Roman civilization, which she strongly detested as being, in her view, deeply inhumane, idolatrous of brutal force. She wrote that it is symptomatic that the ancient Greeks (whom she truly admired) did not know this notion; it was introduced only by the Romans, and that the rights of Roman citizens included also the 'right' to kill one's slave.[4] Weil's extremely negative evaluation of the Roman civilization is arguably one-sided and not unprejudiced, though, it must be admitted that it is very originally argued, and even its extreme character may be counted as an advantage: as providing a counterbalance to exceedingly positive views of the Roman civilization, which can often be encountered both in the literature and in public discourse.[5]

For all these reasons, Weil insisted that the notion of right should not occupy the central position in our moral and public discourse which it currently does. It should not be removed but it should cede priority to the notion of obligation (as far as the formal side of moral discourse is concerned) and to the notions of goodness and justice (as far as the material side of moral discourse is concerned). Weil preferred the notion of obligation for two interrelated reasons.[6] The first one is that it exhibits some connection with the material notions of goodness and justice, whereas the notion of right (due to its confrontational character) is in tension with these notions. The other reason is that, as Weil asserted, the notion of obligation is less susceptible to abuse: one can make good or bad use of one's own right,

[3] In Weil's terminology there is an important difference between *malheur* (affliction) and *souffrance* (suffering); the former is an extreme form of the latter; it is suffering in which 'the danger of the death of human soul', of the soul's 'reduction to nothingness' arises; cf. S. Weil, 2017 (1942), *op. cit*., p. 67.

[4] See S. Weil, 2017 (1942), *op. cit*., p. 51.

[5] For her critique of the Roman civilization, see especially S. Weil, *Quelques réflexions sur les origines de l' hitlérisme*, (in:) *eadem, Écrits historiques et politiques*, Paris 1939, pp. 11–47. This short, little known paper is a masterpiece of historical and philosophical analysis, whose depth can hardly be surpassed.

[6] The arguments to be presented are supposed to speak for, as one can call it, the 'moral priority' of the notion of obligation over that of right. However, one should add that she also presented two arguments for, so to say, 'logical priority' of the notion of obligation: one of them says that one can imagine an obligation uncorrelated with a right, but each right is correlated with an obligation; the other says that if there were just one human being on earth, he or she would have no rights but would still have some obligations; cf. S. Weil, *L'Enracinement*, Paris 1949 (1943), p. 5. These two arguments are of course controversial but their closer analysis would take me too far beyond the scope of this paper, so I just confine the discussion to presenting them.

whereas the fulfilment of an obligation is unconditionally good, in all regards.[7] This thesis may seem controversial at first sight, but if we reflect more closely on it, it seems to be really apt. Indeed, if an obligation is a genuinely moral obligation, it cannot be abused; it leaves no sphere of discretion in which the agent's will could put it to its own – egoistic – use. However, one could agree with this but point out that there are no moral obligations whose fulfilment may not have some more or less distant negative consequences. To this objection one could answer in two ways, defending Weil's claim: firstly, that this kind of imperfection of an obligation cannot count as its susceptibility to abuse; and secondly, that even this kind of imperfection vanishes if an obligation in question is a prescription of absolute goodness or a prohibition of absolute evil (injustice) as only good may follow from discharging these kinds of obligations. This is an important claim of Weil: that while inferior goodness may produce bad consequences, the highest – absolute/pure – goodness infallibly brings about goodness; the same regularity applies to evil: absolute evil always produces evil but evil as the opposite to goodness may produce good effects.[8] In this place some explanation is needed regarding this opposition: absolute goodness vs inferior goodness.

Simone Weil understood (absolute) goodness as the supernatural love, as pure compassion, which can appear only if one turns away from the pursuit of earthly goods, if one reaches the state of genuine humility, of detachment from one's *ego* (the seat of self-centred desires, separating us from other people and from God), and, consequently, if one creates 'the void' in oneself (by understanding that the earthly things do not have absolute value). Goodness thus understood should not be opposed to evil conceived as 'merely bad'. If some variety of goodness can be opposed to evil thus conceived (as 'merely bad'), it means that it is, in a sense, at the same level as evil; it may be something which barely exceeds evil. She invoked a suggestive example to illustrate this claim: if we compare such pairs of oppositions (one being good, the other evil, both in the non-extreme meaning of these terms) as 'respect for private ownership vs theft', or 'putting away money in savings bank vs prodigality', or 'a decent woman (*l'honnête femme*) vs a prostitute', we shall notice the closeness of the components of each pair. Those 'good' dispositions are not that much better than their 'evil' opposites, they constitute a low form of goodness, the goodness 'from the criminal code', as Weil called it.[9] Furthermore, in doing evil and goodness from this level, we may feel the same pressure of duty (e.g. the duty to sell at a possibly high price and the duty not to steal), which shows that both are, in a sense, on a par, that this kind of goodness is 'deprived of light' (genuine goodness, as Weil seems to suggest, does not create the pressure of duty but, rather, attracts by its beauty). In short, according to Weil this inferior goodness or virtue is a *degraded image* of

[7] S. Weil, 1949 (1943), *op. cit*., pp. 180–181.

[8] See S. Weil, *La Pesanteur et la Grâce*, Paris 1998 (1947), p. 226.

[9] *Ibid*., p. 126.

absolute good, of which it is, additionally, more difficult to be repentant than of their negative counterparts.[10]

Considering all that has been said above, it is not surprising that Weil believed that the absolutist moral notions (goodness, injustice), as well as other related notions (truth, beauty, including moral beauty) ought to be present in public discourse (from which, as Weil claimed, they have been removed). They add depth to it and, what is important from the standpoint of the goals of this paper, they are necessary to describe the most atrocious kinds of wrongfulness. But is the absolutist moral language really legitimate in public discourse? I shall leave aside this problem for a moment; I will return to it in the final section. In this section, I would like to make three additional remarks.

Firstly, as we have seen, Weil provided an insightful and deep analysis of the notions of absolute goodness and of absolute evil (injustice). She advanced compelling arguments for the claim that evil (as opposed to absolute goodness, and not just to inferior form of goodness) cannot be adequately described in the language of rights but can only be described in terms of *injustice* (in the sense opposed to absolute goodness), i.e. of the violation of what is sacred in human beings. Nonetheless, one cannot deny that the analysis was mainly conducted at the philosophical, abstract level.[11] This is why, it may be worthwhile trying to supplement it with a psychological perspective. For instance, one can invoke in this context the consideration pursued by Kristen R. Monroe in her book *The Heart of Altruism. Perceptions of a Common Humanity*, in which she argued that the source of altruism lies in our capacity to discern common or shared humanity in other people; that an altruist has the special capacity to look at other people: to see in them not strangers but fellow human beings. Now, it can be claimed that failure to recognize or to discern common humanity in other people is one of the fundamental manifestations of injustice in Weil's sense; in other words, unjust people simply cannot adopt the altruistic perspective (in Monroe's sense).

Secondly, Weil's fundamental thesis is that while absolute goodness is the apex of morality, injustice is its nadir, and neither of them can be adequately described in terms of rights' fulfilment or violation. However, the point which Weil did not

[10] *Ibid*.

[11] Although one can find in her writings also some valuable psychological insights. For instance, she formulated interesting – quasi-psychological – criteria of distinguishing good from evil (in their absolute forms). The first criterion is that if one contemplates a possible good act for a sufficiently long time, one cannot but perform it, whereas if one contemplates an evil act for a sufficiently long time, the temptation to perform it vanishes. Thus, in the state of perfect attention, in which *ego* disappears and which for Weil is identical with prayer, one cannot commit an evil act: when, in this state, one contemplates good and evil, good prevails immediately (cf. S. Weil, 1998 (1947), *op. cit*., p. 212). Another criterion is that of reality: goodness gives more reality to people and things and evil diminishes their reality (cf. *ibid*., p. 136). This seems to mean that, in doing goodness, we *recognize and respect* the reality of other people, and thus abandon an egocentric or even ethically solipsistic attitude.

make entirely clear concerns the relation between these 'moral extremes' (as one may call them). How, then, can one properly describe this relation? Arguably, it cannot be done in terms of their contradiction: an act which *is not* absolutely good is not *ipso facto* unjust (i.e. evil in the extreme sense of going beyond the violation of rights); similarly, an act which is just is not *ipso facto* absolutely good (it may be an inferior type of goodness, or evil in some non-extreme form). Thus, they are not opposed in the sense of contradiction but, rather, in a sense of contrariety (an act cannot be at the same time absolutely good and unjust but it can be neither of them). This seems rather obvious. More importantly, while acts of absolute goodness seem to belong (to use the traditional distinction from the Christian moral philosophy) to a class of counsels (supererogatory acts: not obligatory but praiseworthy), prohibitions of unjust acts are assuredly precepts (their fulfilment is not praiseworthy, and their violations are blameworthy). The peculiarity of prohibitions of unjust acts lies in that their obligatory character is *especially strong*: committing such acts ought to elicit an *especially strong moral condemnation*. At this point I depart, e.g. from above-mentioned Monroe's view, according to which the capacity to perceive a shared humanity in others is an exceptional feature, typical for a narrow group of human beings: true altruists. It may be the case that it is rare, but it does not change the fact that it should be required (as it involves a shift in perspective – from the egocentric to the universal – which, as it seems, is within reach of almost everyone) and the lack thereof is a grave moral failure. In short, acts of pure goodness have a different character than acts of justice: the former stand higher in the moral hierarchy than the former; what is common for both of them is that they can be adequately (from the formal side) described only in the language of obligations (or supererogation) but not in the language of rights. This point will prove important in my considerations pursued in section 3.

Thirdly, one should also mention Weil's metaphysical claim that the sacredness of human beings, which makes the language of rights insufficient to express the most atrocious wrongs done to human beings, stems from the fact that our soul has the 'the impersonal' part, the part we can awaken thanks to our capacity for focused attention, solitude, silence, and which, as she contended, is a shield both against egoism and collectivism. It is to be stressed that the fact that Weil put so much stress on *l'impersonnelle* in human beings attests to her scepticism towards the concept of person as purportedly inextricably connected with the notion of rights and, consequently, as insufficient to express the gravity of wrongs that may be done to human beings. However, her criticism of this concept is not entirely clear, and also not entirely convincing. On the one hand, it seems that she finds it *too abstract* and thus not capable of capturing the individual character of human beings (as she wrote, if the bodily integrity of a human being is gravely violated, no harm is done to his or her 'person'). On the other hand, she criticized it as *too little abstract*, as too closely connected with the egoistic interests, and thus, arguably, as too closely connected with this individual character of human

beings. This looks like an inconsistent line of criticism. This objection could perhaps be refuted if we assumed that *l'impersonnelle* – the most precious part, in Weil's view, in human beings – is *simultaneously* abstract (precisely by virtue of its being impersonal) and concrete (because inextricably connected with the concrete human being *as a whole*). At any rate, I believe that the same goals – first, of avoiding a too abstract account of human beings, and second, of avoiding too strict a connection with egoistic drives, and thus giving due justice to what is 'the better part' of human beings – is achieved by the classical Christian concept of person as an individual substance of rational nature (proposed by Boethius and developed within Christian personalism). In other words, Weil's rejection of the concept of person may have been unnecessary given the goal she wanted to achieve, viz. providing metaphysical basis for her claim that there is something infinitely precious – sacred – in human beings, and also providing a shield between egoism and collectivism (if we live up to the dignified status implied by the concept of person, we are unlikely to fall into a trap of egoism or collectivism).

3. EXAMPLE OF INJUSTICE: CRIMES AGAINST INDIGENOUS PEOPLES

In his book *Common Humanity: Thinking about Love and Truth and Justice*, Raimond Gaita made an attempt to apply Weil's considerations on goodness and evil to various concrete ethical problems. He interpreted highest goodness in the spirit of Weil's analyses as 'impartial, unlimited love',[12] inspired by the conviction that all human beings are *equally* precious, and precious *in the infinite degree*, that, as he put it, 'what is best in our morality is the faith that human beings are precious beyond reason, beyond merit and beyond what most moralisers will tolerate'.[13] He invoked, as an example of this kind of goodness, the case of a nun, full of genuine, pure love and compassion towards the patients of a psychiatric ward, whom she is capable of treating respectfully and non-condescendingly; she sees in each of them an unconditionally precious – 'precious beyond reason' – human beings. Love with which she is filled opens her eyes to the dignity of all human beings, to see the 'invisible' – their infinite dignity. He also proposed an interesting application of Weil's concept of injustice, on which I would like to focus in this section.

In Weil's spirit, Gaita opposed justice to fairness; he claimed that while fairness is aimed at regulating relations between humans whose status of humanity

[12] R. Gaita, *Common Humanity: Thinking about Love and Truth and Justice*, London 2002, p. 23.

[13] *Ibid*., p. 27.

is not disputed, 'acknowledgement of someone as human' is 'an act of justice'. I shall quote the relevant passage *in extenso*:

> Acknowledgement of someone as fully human is an act of justice of a different kind from those acts of justice which are rightly described as forms of fairness. Fairness is at issue only when the full human status of those who are protesting their unfair treatment is not disputed. When they centre on the distribution of goods or access to opportunities and such things, concerns about equity presuppose a more fundamental level of equality of respect. If you are taken fully as 'one of us', then your protestation that equity demands that you receive higher wages or be granted better promotion prospects, for example, is probably an appeal to justice as fairness. If, however, you are regarded as subhuman, then it would be ludicrous for you even to consider pressing such claims, unless as a device to dramatise the radically different kind of equality that is really at issue.[14]

In this case he invoked the case of Australian Aboriginal peoples. In 1992, in the *Mabo* Case, the High Court of Australia granted Aboriginal Australians natural title to some lands taken from their ancestors at the time when Australia was settled by the colonialists. The core claim of this decision was the statement, contrary to the long-standing judicial line of argumentation deeply prejudicial towards Aboriginal people, that the lands at that time were not *terra nullius*, and that thereby Aboriginal Australians were unlawfully dispossessed. What matters for my considerations is a philosophical interpretation of this decision provided by Gaita. He argues that this decision was an act of justice in Weil's sense, as it amounted in fact to recognizing Aboriginal people's full humanity (and, by contrast, refusing in the past to grant them this status was an act of injustice); the earlier law, as he puts it: 'effectively denied them full human status, because it denied the depth of moral and spiritual being which alone makes dispossession such a terrible affliction and, thereby, a terrible injustice.'[15] This denial, as Gaita (in Weil's spirit) insightfully argues, cannot be exhaustively explained in terms of harm – psychological or material – inflicted on the victims. Thus, injustice is an evil *sui generis*, which may involve harm of this kind but is not reducible to it. It is an attack, to use Weil's terms, on what is sacred in human beings, on their very humanity. If one insisted on using the notion of harm in this context, I think it could only be called 'metaphysical harm'.

I fully share Gaita's thesis that the court decision was an act of justice (in the sense of the rectification of the act of injustice in Weil's sense) towards Aboriginal Australians and therefore cannot be fully described in the language of rights. There is, of course, an important component of the rights discourse in this act, for, as its result, Aboriginal people received *the property right* to their native lands. However, there is much more to it, and this 'more' – the recognition of their full

[14] *Ibid.*, p. 81.
[15] *Ibid.*, p. 78.

humanity inherent in this act – can only be captured if we go 'beyond' the language of rights and move on to the sphere of, as one could call it, 'moral extremes' or 'moral absolutes' (my, not Gaita's, term). More generally, I fully agree with Gaita (who strictly follows Weil on this point) that the language of rights is inadequate when dealing with the most atrocious forms of evil: when cruelty is done to someone, then to say that the victim's rights are violated, is a form of too feeble protest; the proper one would be to say: 'injustice is done to him or her.' However, Gaita, similarly to Weil, does not make it sufficiently clear how one should qualify ethically *an act of justice* (i.e. *an act of removing or rectifying* injustice). Obviously, the qualification is ethically positive: but how positive, comparatively? When Gaita writes that the act of recognition of full humanity is 'justice beyond fairness', he seems to imply that this may be an act of higher goodness, similar to that done by the nun filled with unlimited love for other people.[16] However, I doubt whether there is a similarity here: while we, indeed, should regard the refusal to recognize common humanity of other people as a form of injustice, as an atrocious deed that escapes our means of description, it would be implausible, in my view, to regard this type of recognition as some higher type of goodness. There must be some heroic element in an act of justice, something supernatural in this act (as in the case of the nun filled with unlimited love). There is no such thing in the case of recognizing humanity in the Aboriginal peoples: there is a simple, unheroic – and *particularly strong* – obligation to do that. And those who are required to discharge of it are required to do what should be absolutely simple to them (unless, perhaps, they have to oppose the pressure of the public opinion, though even in this case the non-compliance would have no justification). The nun's deed is really a manifestation of pure, unlimited love. But, let me repeat, there is nothing praiseworthy in the act of recognizing common humanity of indigenous people: this is a matter of the most obvious duty. In this way, I return to the point already made in section 2: that there is an important difference between goodness and justice. The former cannot be a duty: it is in a way heroic, and therefore supererogatory, while the latter is a strong obligation, even if both belong to the sphere of morality which goes beyond the language of rights.

4. THE PROBLEM OF LEGITIMACY OF THE ABSOLUTIST MORAL LANGUAGE IN PUBLIC DISCOURSE

Weil did not go so far as to assert that the language of rights should be removed from the public (political) discourse (sphere). In her view, rights have their own

[16] However, I must add that he does not make this point clear, so it is only my interpretation of his account.

place in this discourse, but the place is legitimate only if they are illumined by the words (or, rather, the referents of these words) from the higher sphere of morality (the sphere of goodness, justice, beauty, truth). It should be stressed how paradoxical this claim is. Typically, we regard the absolutist moral vocabulary as problematic, and thereby needful of justification, especially in public discourse. Weil turned this issue on its head: it is the language of rights which needs to be justified; the absolutist language is treated as obviously necessary. Without the detriment to the crux of the matter, let me pose the question of the admissible moral 'languages' in public sphere in a traditional manner: Does the absolutist moral language have *ratio essendi* in public sphere? I will compare Weil's answer to this question with Hannah Arendt's, and will argue that the former is more compelling.[17]

An important concept used by Weil in her considerations on this question is that of *metaxu*. This Greek word (usually translated as 'the middle region') refers, in Weil's conceptual scheme, to the sphere of middle values (*la région moyenne*): of non-absolute goodness and of non-absolute evil. It embraces 'earthly things': power, money, home, family, fatherland, work, 'protected' by means of such ethical notions as rights or democracy. In her view, these 'things' do not have absolute, intrinsic value, they are only means of reaching absolute values: of pure goodness, justice, truth, or beauty. Accordingly, the proper attitude towards them consists in recognizing their importance as means, *but only as means*; they should not be pursued for their own sake. Nonetheless, these 'relative and mixed goods', *have value*: they 'nourish and warm our soul', and without them 'human life, except for sainthood, would not be possible';[18] so no one should be deprived of them and they should be respected. In fact, Weil wrote that we have to accept the apparently paradoxical situation that we have absolute obligations towards things of relative value, because two alternative options are clearly unacceptable: the first one consists in the total denial of their value and ascribing value only to the absolute (supernatural) values; and the second one consists in ascribing absolute value to things of relative value (which would amount to idolatry of family, one's country, the state, etc.).[19] As we can see, Weil's radicalism is only apparent: she did not postulate to abolish the notion of rights or democracy – the notions from the sphere of *metaxu* – but she believed that *they are not sufficient even for political life*; they bring about desirable effects only if they are manifestations of

[17] I should add that both philosophers were not engaged in an open debate on this issue; I also think they did not influence each other's views, or more precisely: Arendt was not influenced by Weil, and Weil could not be influenced by Arendt because she died before Arendt wrote her crucial works.

[18] S. Weil, 1988 (1947), *op. cit*., p. 120.

[19] In this context Weil made an insightful observation that one cannot respect *metaxu* of other people if one does not treat them precisely as *metaxu* (not absolute goods); thus, for instance, if I treat my own country as an absolute good, as an idol, I will be inimical towards other countries; cf. S. Weil, 1949 (1943), *op. cit*., p. 101.

attachment to such values as goodness, justice, truth, beauty, all of which, as she asserted, are the image in our world of the impersonal and divine order of the universe.[20] She plausibly argued that, firstly, the fight against oppression is more likely to succeed if it makes reference to this higher realm of values,[21] and secondly, that even initially legitimate claims of the oppressed may degenerate into crystallizations of vengeance or envy if they are not durably inspired by the values from the higher moral sphere. These values, as she claimed, should provide an inspiration for the institutions in which values from *metaxu* are embodied. What is more, she even suggested that we should think about 'inventing' other institutions in addition to those protecting rights, viz. such institutions which would protect us from the opposites of the highest goodness: from injustice, falsehood, ugliness. These institutions should discourage us from doing all those things which are contrary to pure goodness, truth, justice or love (e.g. she proposed establishing a special tribunal, composed of educated and morally impeccable persons, which would see to it that truth be respected in public discourse).

Weil's views on the legitimacy of the absolutist moral language in public discourse are essentially different from Hannah Arendt's, even though both philosophers shared the conviction that there is a qualitative difference between different grades of goodness and wrongfulness. Thus, Arendt claimed, similarly to Weil, that there are absolute varieties of goodness and evil which are essentially different from their inferior counterparts: while analysing Herman Melville's novel *Billy Budd*, Arendt famously argued that there exists – and is indeed the subject of the novel – 'goodness beyond virtue and evil beyond vice'.[22] She defined goodness beyond virtue as 'natural goodness', and wickedness beyond vice as 'a depravity' which 'partakes nothing of the sordid or sensual'.[23] She saw the embodiment of the former in Billy Budd, and the embodiment of the latter in Claggart. After Billy Budd killed Claggart, who bore false witness against him, he is judged (and sentenced to death) by Captain Vere – an embodiment of virtue. But, somewhat paradoxically, and contrarily to Weil, on Arendt's understanding 'natural goodness' can act violently, it does not exclude committing a murderous act; as she wrote, 'absolute, natural innocence, because it can only act violently, is at war with the peace of the world and the true welfare of mankind.'[24] Consequently, Arendt asserted that only virtue, not goodness, is capable 'of embodiment in lasting institutions'; its function is not only to 'prevent the crime of evil',

[20] See S. Weil, 2017 (1942), *op. cit*., p. 86.

[21] Let me quote the original version of this beautiful sentence relevant here: 'Seul ce qui vient du ciel est susceptible d'imprimer réelement une marque sur la terre' (S. Weil, 2017 (1942), *op. cit*., p. 60).

[22] H. Arendt, *On Revolution*, London 1990 (1963), p. 83.

[23] *Ibid*.

[24] *Ibid*., p. 84.

but also to 'punish the violence of absolute innocence'.[25] As Captain Vere says in the novel: 'Claggart was struck by an angel of God! Yet the angel must hang!'; Arendt commented:

> The tragedy is that the law is made for men, and neither for angels nor for devils. Laws and all 'lasting institutions' break down not only under the onslaught of elemental evil but under the impact of absolute innocence as well. The law, moving between crime and virtue, cannot recognize what is beyond it, and while it has no punishment to mete out to elemental evil, it cannot but punish elemental goodness even if the virtuous man, Captain Vere, recognizes that only the violence of this goodness is adequate to the depraved power of evil.[26]

Thus, Arendt argued that since absolute innocence – natural goodness – can be socially dangerous, there is no place for it in social and political life; it cannot – and should not – be 'embodied in lasting institutions'.

In summary, both Arendt and Weil agreed that 'there is goodness beyond virtue and evil beyond vice', but while Weil believed that the moral terms used to describe those 'moral extremes' are not only admissible but also necessary in public discourse, Arendt strongly rejected this kind of claim. Clearly, the difference in their views on this issue assuredly flows to some degree from the difference in their understanding of absolute goodness: Weil's understanding of it makes it incompatible with violence, while Arendt's 'natural goodness' admits of violence. But one may conjecture, given Arendt's attachment to the idea of public sphere as a sphere *sui generis*, that she would uphold her thesis that there is no place for 'moral absolutes' in public sphere even if she conceived the 'moral extremes' in the sense given to them by Weil.

All in all, I believe that Weil's view is more convincing. There are too many examples of extreme forms of wrongfulness which cannot be adequately described in the language from the sphere of *metaxu* (including the language of rights) so that we could agree to eliminate the language of 'moral absolutes' from public discourse; this would make us helpless in the face of extreme evil. Furthermore, the sphere of 'middle values' acquires additional dignity if it is – in a more or less direct way – connected with the realm of 'higher values'; as Gaita aptly wrote, 'Our sense of the authority and dignity of law, by virtue of which we consent without servility to its jurisdiction over us, depends on our seeing it as answerable to a conception of justice that transforms and guides its practices and proscriptions.'[27] The question which remains to be answered, if we adopt Weil's view, is whether the connection should be provided through the medium of special institutions (as she postulated) or more indirectly: by opening public space more widely than it is practiced in contemporary liberal democracies. But this is

[25] *Ibid.*

[26] *Ibid.*, p. 83.

[27] R. Gaita, 2002, *op. cit.*, p. 76.

a practical or technical question. The essential one is whether this kind of connection ought to be made at all. I believe that Weil provided powerful arguments for a positive answer to it.

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Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.20

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PRESENT-DAY POLICIES CONCERNING INDIGENOUS LANGUAGES IN THE AMERICAS: A GEOGRAPHICAL APPROACH

Abstract

Global changes in policies regarding Indigenous people, observed in the last decades, have had a strong impact on language policies in the Americas. They are aimed at increasing protection of Indigenous languages, especially in countries with a higher number and percentage of Native people and Indigenous language speakers (ILS). However, it is argued in the paper that the scope of these policies is often not adapted to changes in spatial distribution of Autochthonous populations, while their effective implementation in many cases seems outright impossible. The first part of the paper sums up an analysis concerning the number and spatial distribution of Indigenous people and ILS in countries and dependent territories of the Americas. The second part shows the evolution of policies towards Indigenous languages in the Americas from the colonial era to our times. The last part studies spatial aspects of the situation of Indigenous languages in Mexico City, based primarily on qualitative data obtained from interviews and observations carried out during field research. The paper concludes: that a clear progress has been made in language policies in the last decades in the analysed region, especially in Latin America; that there is no obvious difference in the implementation of these policies between unitary and federal states; and that, based on the case of Mexico City, the implementation of a relevant language policy may be seriously hindered by such factors as insufficient financing, political disputes, and a deeply embedded discrimination against Indigenous languages.

KEYWORDS

Indigenous people, language policy, North and South America, Mexico City

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1. INTRODUCTION

Currently, more than 20 million people speak Indigenous languages in North and South America. Thanks to Indigenous social movements and a growing number of researchers, the need to protect those languages is more and more often discussed both at the national and international level. Nevertheless, research concerning the current status of Indigenous languages and the situation of their speakers is still scarce. The paper seeks to fill one of the gaps in existing literature on this topic by summing up the results of a research project that identified and assessed spatial aspects of present-day policies towards Indigenous languages in North and South American countries and dependent territories, in the context of increasing urbanization of Autochthonous populations.[1]

Global changes in policies regarding Indigenous people have had a strong impact on language policies in the Americas. They are aimed at increasing protection of Indigenous languages, especially in countries with a higher number and percentage of Native people and Indigenous language speakers (ILS). However, it is argued in the paper that the scope of these policies is often not adapted to changes in the spatial distribution of Autochthonous populations, especially in the form of rural-urban migrations, while their effective implementation in many cases seems outright impossible.

1.1. COMMENTS ON TERMINOLOGY AND METHODOLOGY

Before proceeding to the main topic of the paper, it is worthwhile to briefly discuss the terminology and methodology used in the research. In the text, the notions of 'Indigenous', 'Aboriginal', 'Autochthonous', and 'Native' are considered

[1] K. Ząbecki, *Przestrzenny wymiar współczesnej polityki państw obu Ameryk wobec języków rdzennych* (Doctoral dissertation), Warszawa 2019, available at: https://depotuw.ceon.pl/bitstream/handle/item/3482/1900-DR-GF-158652.pdf (accessed 07.01.2021).

synonymous, both in the context of people and languages. In different countries and international organizations, some terms are usually preferred over others. For example, when referring in general to members of different ethnic groups that lived in the Americas before their colonization by the Europeans, in Canada the preferred terms are 'Aboriginal' or 'Indigenous' rather than 'Native' or 'Indian' (outside of a legal context), in the United States 'American Indian' and 'Native Indian' are commonly used,[2] while in Latin America the term *indio* is usually considered offensive,[3] as can be, in some cases, calling someone *indígena*.[4] In the paper, the aforementioned English terms are written in uppercase, as they refer to a specific – albeit very large and diverse – group of ethnicities whose origins date back to the pre-Columbian era.[5] In addition, a differentiation is made between 'Indigenous (or Native, etc.) people', used as a general term to describe members of all Aboriginal groups, and 'Indigenous peoples', which serves to indicate the different groups themselves.

Given that the study is partially based upon census data regarding Indigenous people and their languages, it is important to take into account methodological issues related to its use. First of all, although there are different official ways to define who is 'Indigenous', and thus different possible criteria are applied to collect corresponding data, since the turn of the twenty-first century almost all countries in the Americas have decided to choose self-identification as the main – and usually only – criterion to define their Indigenous population.[6] It is considered less stigmatizing than more 'objective' criteria, such as language or physical traits. At the same time, it means that people can change their ethnic identification over time, in a process referred to – mostly by Canadian researchers – as 'ethnic mobility',[7] which in some cases does have a significant impact on differences in results between censuses. This process has been observed not only in Canada,[8] but also for example in Bolivia, where according to the census from 2001 (the first one with self-identification as the main criterion), 62% of the population considered itself Indigenous,

[2] *Terminology*, Indigenous Foundations, https://Indigenousfoundations.arts.ubc.ca/terminology/ (accessed 07.01.2021).

[3] S. Serrano, *Indio e indígena*, 'El País' online, 22 January 2006, https://elpais.com/diario/2006/01/22/opinion/1137884409_850215.html (accessed 07.01.2021).

[4] A. Arista Zerga, *La importancia de llamarse indígena: manejo y uso político del término indígena en Lircay – Perú*, 'e-cadernos CES' 2010, No. 7.

[5] Ch. Weeber, *Why Capitalize 'Indigenous'?* SAPIENS, 19 May 2020, https://www.sapiens.org/language/capitalize-indigenous/ (accessed 07.01.2021).

[6] S. Schkolnik, F. Del Popolo, *Los censos y los pueblos indígenas en América Latina: Una metodología regional*, 'Notas de Población' 2005, Vol. 31(79).

[7] A. J. Siggner, *Impact of 'Ethnic Mobility' on Socio-Economic Conditions of Aboriginal Peoples*, 'Canadian Studies in Population' 2003, No. 30(1).

[8] M. J. Norris, S. Clatworthy, *Urbanization and Migration Patterns of Aboriginal Populations in Canada: A Half Century in Review (1951–2006)*, 'Aboriginal Policy Studies' 2011, No. 1(1).

while in 2012 it was only 41%.[9] There is no clear explanation of this change, but differences in census methodology, such as a slight change in the question about ethnicity between both questionnaires, have been since discarded as a decisive factor.[10]

Gathering and analysing data regarding ILS can also cause methodological problems, partly because it is difficult to determine what it actually means to 'speak' a language – for example, what level of proficiency is sufficient to consider someone a speaker of a given language. Since the basis for determining if someone is an ILS is that person's subjective assessment, just like in the case of ethnic identification, there can be – and often are – important changes in results between censuses that cannot be explained by natural causes. These seem to be due, among other factors, to a tendency to hide one's knowledge of an Indigenous language because of discrimination, still widespread in the Americas.[11] As a result, official data may be significantly underestimated. Additionally, there is no universal way of clearly differentiating languages from dialects,[12] and thus there may be disparities regarding, for example, the number of Indigenous languages spoken in each region.

In conclusion, census data regarding Indigenous people and ILS cannot be considered entirely reliable. Nevertheless, it is by far the largest and most complete source of information about both groups; therefore, despite its limitations, it provides in most cases a reasonable approximation of the current sociolinguistic reality of Indigenous people in the Americas. In addition, in this paper possible statistical inaccuracies do not hinder in a significant way the analysis of its main object of study, that is, language policies.

2. INDIGENOUS POPULATION IN THE AMERICAS: AN OVERVIEW

The purpose of this part of the paper is to present a brief overview of spatial distribution of Indigenous people and ILS in the Americas. This should serve as a sociolinguistic and geographical context of recent changes in policies towards

[9] CEDIB, *Indígenas: Quién gana, quién pierde. Datos comparativos de la población indígena. Censos de población, 2001 y 2012*, https://www.cedib.org/wp-content/uploads/2013/08/Tabla-Poblacion-Indigena1.pdf (accessed 07.01.2021).

[10] L. Tamburini, *Bolivia Censo 2012: Algunas claves para entender la variable indígena*, SERVINDI, 15 October 2013, https://www.servindi.org/actualidad/94399 (accessed 07.01.2021).

[11] R. Martínez Casas, *De la resistencia al desplazamiento de las lenguas indígenas en situaciones de migración*, (in:) R. Barriga Villanueva, P. Martín Butragueño (eds), *Historia sociolingüística de México: Volumen 3. Espacio, contacto y discurso político*, la Ciudad de México 2014.

[12] M. Cysouw, J. Good, *Languoid, Doculect and Glossonym: Formalizing the Notion 'Language'*, 'Language, Documentation & Conservation' 2013, Vol. 7, https://scholarspace.manoa.hawaii.edu/bitstream/10125/4606/cysouw_good.pdf (accessed 07.01.2021).

Native languages, described further on in this paper, and thus help understand processes observed in this field in the last decades.

According to census data, the total Indigenous population of the Americas exceeds currently 55 million, while over 20 million people can speak an Indigenous language. The spatial distribution of both groups is very uneven both on a regional and national scale. First of all, officially no Indigenous languages are spoken in the Caribbean countries and territories[13] or in Uruguay, and therefore they are not taken into consideration in this study. Regarding the rest of the region, as can be observed in the table below (Table 1), nearly half of the officially registered Indigenous population of the Americas lives in Mexico, and other countries with the highest number of Native people are Guatemala, Peru, and Bolivia. On the other hand, in French Guiana, El Salvador, Suriname, and Belize, the Aboriginal population is under 50,000 people. By far the highest percentage of Indigenous people in the total population was observed in Greenland, followed by Bolivia and Guatemala, while the lowest figures, below 1%, were recorded in El Salvador, Brazil, and the United States.

Table 1. Census data regarding the number and percentage of Indigenous people and Indigenous language speakers in countries and dependent territories of the Americas

Country/ territory	Indigenous population (millions)	% of Indigenous pop. in total pop.	Indigenous language speakers (ILS) (millions)	% of ILS among Indigenous people	Number of Indigenous languages
Argentina	0.96	2.4%	0.11	20.3%	15
Belize	0.04	11.3%	0.03	77.5%	3
Bolivia	4.18	41.5%	2.25	53.9%	34
Brazil	0.90	0.5%	0.29	37.4%	274
Canada	1.67	4.9%	0.23	13.7%	52
Chile	1.84	11.1%	0.16	9.2%	8
Colombia	1.91	4.4%	0.82	50.8%[14]	64
Costa Rica	0.10	2.4%	0.03	30.4%	6
Ecuador	1.02	7.0%	0.69	67.9%	13
El Salvador	0.01	0.2%	0.001	10.0%	1
French Guiana	0.01	4.2%	0.003	30.0%	6

[13] With the possible exception of Saint Vincent and the Grenadines, although available data is scarce and possibly outdated; cf. H. Devonish, *Protecting, Propagating and Reviving Caribbean Indigenous Languages*, 31 January 2004, https://www.mona.uwi.edu/dllp/jlu/ciel/pages/protecting.htm (accessed 07.01.2021).

[14] The percentage of ILS among Indigenous people indicated in the source and cited here is actually higher than the result of dividing the number of ILS by the total Indigenous population. This may be due to the methodology used; possibly only respondents above a certain age were asked about languages that they speak, although such information could not be found in the cited report.

Greenland	0.05	89.5%	0.05	95.6%	1
Guatemala	6.05	38.8%	4.35	71.9%	24
Guyana	0.08	10.5%	0.02	24.4%	12
Honduras	0.66	7.9%	0.03	4.7%	6
Mexico	25.69	21.5%	7.38	28.7%	64
Nicaragua	0.31	6.0%	0.12	39.9%	4
Panama	0.42	12.3%	0.28	66.1%	8
Paraguay	0.12	1.8%	0.06	49.3%	20
Peru	5.77	24.9%	3.29	57.0%	47
Suriname	0.02	3.8%	0.005	24.8%	9
United States	2.90	0.9%	0.38	13.0%	126
Venezuela	0.72	2.8%	0.47	64.3%	37

Source: Colombia: DANE, *Población indígena de Colombia: Resultados del Censo Nacional de Población y Vivienda 2018*, 16 September 2019, https://www.dane.gov.co/files/investigaciones/boletines/grupos-etnicos/presentacion-grupos-etnicos-2019.pdf (accessed 07.01.2021); Peru: Instituto Nacional de Estadística e Informática, *Capítulo 3.1: Población Indígena u Originaria de los Andes*, (in:) *La Autoidentificación Étnica: Población Indígena y Afroperuana*, Lima 2018, https://www.inei.gob.pe/media/MenuRecursivo/publicaciones_digitales/Est/Lib1642/cap03_01.pdf (accessed 07.01.2021); for other countries and territories, see K. Ząbecki, *Przestrzenny wymiar współczesnej polityki państw obu Ameryk wobec języków rdzennych* (Doctoral dissertation), Warszawa 2019, available at: https://depotuw.ceon.pl/bitstream/handle/item/3482/1900-DR--GF-158652.pdf (accessed 07.01.2021)

Similar disparities can be noted in the case of data regarding ILS: while there are countries with several million people who speak a Native language, like Mexico, Guatemala, and Peru, in others their number does not exceed a few thousand. Similarly, significant differences can be observed in the percentage of Indigenous people who speak the language of their ethnic group, which varies from over 90% in Greenland and over 70% in Belize and Guatemala, to below 15% in Honduras, Chile, El Salvador, the United States, and Canada. In addition, the number of officially recognized Indigenous languages varies greatly between the analysed countries and territories: by far the largest number was registered in Brazil, followed by the United States, whereas in both El Salvador and Greenland there was only one such language.

In general, there are certain regional patterns of spatial distribution of both Indigenous people and ILS. There are two main regions where these groups are relatively concentrated: the southern part of North America, including Mexico and most of Central America, as well as the Andean states in the northwestern part of South America. On the other hand, regions with a relatively low number and percentage of Native population and ILS are the eastern coast of South America and the part of North America situated north of Mexico. Still, it is worth keeping in mind that, as already mentioned, there are also significant differences in spatial distribution of both groups on a national and local scale, e.g. in Mexico

they live mostly in the south of the country, whereas in the United States they are concentrated primarily in the south and southwest.[15]

As a part of the research project, a quantitative analysis of census data for first-order administrative divisions was carried out. Data regarding the number and percentage of Indigenous people was available for 21 countries listed in Table 1,[16] whereas information about the number and percentage of ILS was obtained for 10 countries.[17] Using basic correlation coefficients – Pearson's *r* and the Spearman's rank correlation coefficient – several hypotheses were tested. First of all, it was found out that there is no statistically significant linear correlation between the number of Indigenous languages spoken in a country and both the number of Indigenous people and number of speakers of Indigenous languages. Secondly, a statistically significant negative correlation ($\rho = -0.4$) between population density and the percentage of people who speak an Indigenous language was found. However, in this case the obtained correlation varied greatly between countries, e.g. in Mexico the result was only $\rho = -0.1$, since most Indigenous people live in more densely populated southern states than in the scarcely populated north.[18] In addition, in the few cases where data was available, it has been observed that urbanization rate among speakers of Indigenous languages is significantly lower than among Indigenous population and the total population, as can be seen in the table below (Table 2).[19]

Table 2. Urbanization rate of the total population, Indigenous people and Indigenous language speakers (ILS) in Bolivia, Costa Rica, Ecuador, and Mexico

Country	Urbanization rate of the total population	Urbanization rate of Indigenous people	Urbanization rate of ILS
Bolivia	68%	43%	37%
Costa Rica	73%	41%	30%
Ecuador	63%	22%	17%
Mexico	77%	54%	38%

Source: K. Ząbecki, *Przestrzenny wymiar współczesnej polityki państw obu Ameryk wobec języków rdzennych* (Doctoral dissertation), Warszawa 2019, available at: https://depotuw.ceon.pl/bitstream/handle/item/3482/1900-DR-GF-158652.pdf (accessed 07.01.2021)

[15] For more detailed information on spatial distribution of Indigenous people and ILS in the Americas, see K. Ząbecki, 2019, *op. cit*.

[16] Similar data was unavailable for the two analysed dependent territories, i.e. French Guiana and Greenland.

[17] These countries are Belize, Bolivia, Brazil, Canada, Costa Rica, Ecuador, Mexico, Nicaragua, Peru, and the United States. In the rest of the cases data regarding ILS was available only for the entire country.

[18] However, even in these more densely populated states the ILS live mostly in rural areas; this shows serious limitations to analysing data from first-order administrative divisions, which is not precise enough, but at the same time remains for most countries the most detailed source of information.

[19] K. Ząbecki, 2019, *op. cit*.

This basic statistical analysis implies two important characteristics of the studied groups. Firstly, it indirectly suggests the rather obvious conclusion that there are important disparities between the numbers of speakers of different Indigenous languages. Actually, most of over 600 Native languages officially recognized in the Americas are seriously endangered due to a very low number of speakers,[20] which is crucial in the context of analysing present-day language policies. Secondly, the analysed data hints that there may be significant differences in the situation of Indigenous languages between rural and urban areas, and that Native people not only tend to live more often outside of the cities than the rest of respective societies, but also that they speak their languages less willingly in urban areas.

3. THE EVOLUTION OF POLICIES TOWARDS INDIGENOUS LANGUAGES IN THE AMERICAS

In this part of the paper, changes over time in language policies towards Indigenous people are described, from the colonial era to the present day. Covering such a broad timeframe is intended to help better understand the current situation of Native languages and their speakers by presenting the historical context of how their legal status has evolved.

3.1. COLONIAL ERA

During the colonial era, Spain was the first empire to try to implement a comprehensive policy towards Indigenous languages in its American colonies. The importance of language as a significant tool of strengthening the authority had already been proven in the Spanish Empire during the Reconquest of the Iberian Peninsula that had directly preceded the colonial era. Nevertheless, due to the large number of different Native languages spoken by Autochthons, regional *linguae francae* such as Nahuatl or Mayan were widely used by colonizers in the first decades of conquest of the Americas.[21] It was only in 1550 Spanish that was declared the only language of Christianization and was to be learnt by all Indigenous subjects, a decision opposed by missionaries who already had some

[20] *Languages of the World*, Ethnologue, https://www.ethnologue.com/ (accessed 07.01.2021).

[21] B. Garza Cuarón, *Políticas lingüísticas hacia la Nueva España en el siglo XVIII*, 'Nueva Revista de Filología Hispánica' 1991, Vol. 39(2).

success in spreading Christianity through local languages.[22] As a result, King Philip II imposed the knowledge of an Indigenous language on all missionaries. However, by the end of the sixteenth century the official language policy in the Spanish colonial empire reverted to Hispanicization, despite obstacles such as few educational institutions, relatively ineffective methods[23] and opposition by the Native population. This policy was not yet based on forced assimilation, which changed only in the second half of the eighteenth century when in 1770 Spanish was declared the only official language in the colonial empire and the use of Indigenous languages was to be forbidden.[24] However, the implementation of this new, more restrictive policy was only at an initial stage before most of the Spanish colonial empire in the Americas was engulfed in wars of independence at the beginning of the nineteenth century.[25]

In Portuguese colonies in the Americas, formed principally of the territory of present-day Brazil, larger European settlements started to appear only in the mid-sixteenth century, and the very limited number of Portuguese colonizers made it virtually impossible for their language to become widely used among the Indigenous population.[26] Instead, along the Atlantic coast a local *lingua franca*, called *língua geral* ('general language'), created by Jesuit missionaries and based on the Indigenous Tupi language, was widely used.[27] Already in the eighteenth century the metropole started imposing a more restrictive policy, especially after 1757, when a new law introduced the obligation to use Portuguese, while prohibiting the use of Native languages in the colony.[28] As a result of this new law and of demographic changes in the colony, the European language started to be used not only by the local elite but also by an increasing part of the rest of the society, while the *língua geral* was gradually disappearing – a process accelerated by the exile of the Portuguese king and his court to Brazil in 1808, which resulted in an unprecedented cultural growth until the country's independence in the 1820s.[29]

The process of introducing language policies was also similar in British and French colonies, established mostly in North America. In the first phase of col-

[22] J. A. Rodríguez Maldonado, *La crónica de Motolinía y la enseñanza de la lengua en la evangelización*, (in:) R. Domínguez Angel, L. Pérez Sánchez (eds), *Memorias del XI Encuentro Nacional de Estudios en Lenguas*, Tlaxcala 2010.

[23] F. de Solano, *Documentos sobre política lingüística en Hispanoamérica (1492–1800)*, Madrid 1991.

[24] C. A. Klee, A. Lynch, *El español en contacto con otras lenguas*, Washington 2009.

[25] B. Garza Cuarón, 1991, *op. cit*.

[26] A. P. Santana, L. C. Paredes Müller, *A Língua Portuguesa no Brasil: percurso histórico-linguístico*, 'SOCIODIALETO' 2015, Vol. 5(15).

[27] L. Lopes Fávero, *A política lingüística na América Latina Colonial e as Línguas Gerais*, 2008, http://elvira.lllf.uam.es/clg8/actas/pdf/paperCLG64.pdf (accessed 07.01.2021).

[28] E. Frühauf Garcia, *O projeto pombalino de imposição da língua portuguesa aos índios e a sua aplicação na América meridional*, 'Tempo' 2007*,* Vol. 12(23).

[29] B. S. Mariani, *Língua portuguesa e realidade brasileira: o Diretório de Pombal segundo Celso Cunha*, 'Capa' 1995*,* Vol. 9(23).

onization, settlers were practically independent from their metropoles.[30] Due to their small number, the spread of both English and French outside of colonial settlements was very limited. In consequence, despite some intents especially on the part of the French colonial authorities,[31] there was still no clearly defined language policy in either colonial empire in the Americas, especially since in 1763 Great Britain took control over almost all of the former New France. Only in 1775, a decision was taken to finance education of Indigenous people in the Thirteen Colonies to 'civilize' them, but the American Revolutionary War interfered with those plans.[32] Due to a longer British rule over Canada, a colonial language policy had more time to evolve there. An important part of it was the intent to assimilate the Indigenous population, among other means through language. A crucial element of that policy was the creation of residential schools, where Native children were forced to adapt to the culture of the colonizers. Still, the system was yet at an early stage when Canada gained partial independence in 1867, and developed only later on.[33]

The evolution of language policies was even slower in other colonies in the Americas. In present-day Belize, for example, neither the Spanish nor the British authorities introduced any kind of regulations regarding languages until the country's independence in 1982.[34] French Guiana, for its part, was very scarcely populated until the mid-twentieth century and served mostly as a penal colony until 1946, when it became a French overseas department. Thus, as an integral part of France, it adapted the laws of its metropole,[35] which promoted French as the only official language.[36] On the other hand, in Dutch Guiana, which in 1975 became Suriname, until the mid-nineteenth century Indigenous people were forbidden to use Dutch, and even though from 1876 for almost a century education was conducted in this language, the colonizers did not actively fight against the use of Native languages.[37]

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[30] A. Taylor, *Colonial America: A Very Short Introduction*, Oxford 2013.

[31] J. Leclerc, *Histoire du français au Québéc, Section 1: La Nouvelle-France (1534–1760)*, (in:) J. Leclerc (ed.), *L'aménagement linguistique dans le monde*, 2017, http://www.axl.cefan.ulaval.ca/francophonie/HISTfrQC_s1_Nlle-France.htm (accessed 07.01.2021).

[32] T. L. McCarty, *Policy and Politics of Language Revitalization in the USA and Canada*, (in:) S. M. Coronel-Molina, T. L. McCarty (eds), *Indigenous Language Revitalization in the Americas*, New York 2016.

[33] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1, Origins to 1939*, Montreal 2015.

[34] J. Leclerc, *Belize*, (in:) J. Leclerc (ed.), *L'aménagement linguistique dans le monde*, 2015, http://www.axl.cefan.ulaval.ca/amsudant/Belize.htm (accessed 07.01.2021).

[35] F. Piantoni, *La question migratoire en Guyane française: Histoire, société et territoires*, 'Hommes & Migrations' 2009, No. 1278.

[36] J.-M. Chevalier, *La France, pays monolingue ou multilingue?* 'Synergies Italie' 2009, No. 5.

[37] J. Diepeveen, M. Hüning, *The Status of Dutch in Post-Colonial Suriname*, (in:) D. Schmidt-Brücken, S. Schuster, M. Wienberg (eds), *Aspects of (Post)Colonial Linguistics: Current Perspectives and New Approaches*, Berlin 2016.

3.2. AFTER DECOLONIZATION

The process of decolonization and formation of independent states in the Americas spanned from the end of the eighteenth century to the second half of the twentieth century. Despite such an extensive period, numerous elements of this process were present in most or even all analysed countries. In almost every newly created state – with the partial exception of Paraguay[38] – shortly after gaining independence, authorities intended to unite the new society around a common religion and language. Despite the reluctance of Creole and Mestizo elites towards European colonizers, they adapted their languages for this purpose; although in a few cases there were also ideas of substituting them with Indigenous languages, they were never implemented.[39]

Policies intended to linguistically unify these countries were, in most cases, ineffective in the nineteenth century, due to significant geographical isolation of the hinterland, where Indigenous enclaves were still numerous.[40] One notable exception were the United States, where the process started sooner and received from early on considerable funding from authorities. The system was based on boarding schools where, similarly to Canadian residential schools, Aboriginal children were isolated from their communities and forced to speak English, with physical and psychological punishment used as a widespread method to exact obedience.[41]

In most countries, more effective policies aimed at eradicating Indigenous languages started to be implemented in the twentieth century. It was made possible with, on the one hand, the development of infrastructure that facilitated access to the hinterland, and on the other, basic education made more accessible for all, including Native people. It is arguably this universal access to education, where the use of the official (European) language was mandatory and Indigenous languages were banned, that was the most important factor leading to a gradual

[38] The case of Paraguay is different in that during the colonial era one of the Indigenous languages of the region, Guarani, was extensively used in the area by all social groups, including most of the elite. After Paraguay gained independence, it was the most widespread language in the country and it was only in the mid-nineteenth century that Spanish was declared official and Guarani was banned from public space, especially schools. However, it remained in use by most of the society and even became a co-official language in 1954, while during this whole period other Native languages were largely marginalized. See G. Makaran, *El mito del bilingüismo y la colonización lingüística en Paraguay*, 'De Raíz Diversa' 2014, No. 2.

[39] E. Bravo García, *La construcción lingüística de la identidad americana*, 'Boletín de Filología' 2010, Vol. 45(1).

[40] See, for example: R. Pineda Camacho, *Trayectoria y desafío de la política de las lenguas indígenas en Colombia*, (in:) A. Kowii (ed.), *Identidad lingüística de los pueblos indígenas de la región andina*, Quito 2005; N. Bondarenko Pisemskaya, *Situación ecolingüística venezolana contemporánea*, 'Papeles de Trabajo' 2010, No. 20.

[41] T. L. McCarty, 2016, *op. cit*.

disappearance of Native languages in favour of Spanish (known as 'language shift') among most Autochthonous communities in both Americas.[42]

It is worth noting that despite similarities in the process of assimilation of Indigenous people after the colonial era, the dynamics and effectiveness of the process depended upon several factors, such as the social status of Native languages in a given country or region (e.g. the status of Quechua and Aymara was relatively high in Peru, at least compared to Indigenous languages in other countries[43]), the number of Indigenous people and their spatial isolation (especially high in the Andean region and in Central America), as well as migrations, both of speakers of European languages to Indigenous regions and of Native people themselves to urban areas.

3.3. GLOBAL CHANGES IN LANGUAGE POLICIES FROM THE MID-TWENTIETH CENTURY

After a long period of policies intended to marginalize or even eradicate Indigenous languages and to assimilate their users into new societies, important changes in this regard started to be observed after the end of World War II, at first mainly at the international level. Two documents can be considered fundamental for these changes: the Charter of the United Nations of 1945,[44] and the Universal Declaration of Human Rights of 1948.[45] Although neither of them directly addressed the question of Indigenous languages, they mention that people have human rights regardless of the language they speak.

Even though none of the documents is legally binding, they set the stage for the subsequent evolution of language policies, expressed by the adoption, in 1957, of the International Labour Organization Convention No. 107, called the Indigenous and Tribal Populations Convention.[46] As the name indicates, it explicitly concentrated on questions relating to Indigenous people, including the right to start education in one's mother tongue, to then gradually replace it with a national or official language, while also stating the necessity to preserve Indigenous languages as far as possible. In hindsight, the document may seem paternalistic towards Native populations, and it clearly emphasized the importance of assim-

[42] K. Ząbecki, 2019, *op. cit*.

[43] C. Villari, L. A. Menacho López, *La situación lingüística actual en Ancash como reflejo de la historia de la política lingüística del Perú*, 'Indiana' 2017, No. 34(1).

[44] The Charter was signed on 26 June 1945 in San Francisco, 1 UNTS XVI, https://www.un.org/en/charter-united-nations/ (accessed 07.01.2021).

[45] United Nations GA Resolution 217 A (III) adopted on 10 December 1948, https://www.un.org/en/universal-declaration-human-rights/ (accessed 07.01.2021).

[46] It was adopted by the International Labour Organization on 26 June 1957 (ILO C107), https://www.ilo.org/dyn/normlex/de/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312252,en:NO (accessed 07.01.2021).

ilation. However, it also clearly mentioned Indigenous language rights, and as a convention was binding for ratifying countries, over half of which (14 out of 27) were American states.[47]

In the next decades, changes in national policies targeted at protecting and promoting Indigenous languages were gradually implemented worldwide, especially from the 1980s onwards. The ILO C107 became outdated, and in 1989 a new document was presented by the ILO: the Indigenous and Tribal Peoples Convention No. 169.[48] An important change regarding Indigenous languages was the removal of the provision regarding the progressive transition from a Native language to one of the national or official ones. In addition, instead of just being 'preserved', Indigenous languages should also be 'promoted', which implies a more active role of the authorities. As of the end of 2020, the Convention was ratified by 23 countries, of which 15 from the Americas.[49] It is worth noting that except for Denmark (and thus Greenland) all of them are part of Latin America, however, the ILO C169 is not in force in Canada, the United States, Belize, Guyana, Suriname, or France (French Guiana).

The ILO C169 was followed by several other international legal acts that directly mention linguistic rights of Indigenous people. For example, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UN General Assembly in 1992,[50] states i.a. that linguistic identity of minority groups should be protected by the state, that members of these groups have the right to freely use their language, both in private and in public, and that authorities should, 'wherever possible', provide access to education in one's mother tongue. The Universal Declaration on Cultural Diversity, passed by the UNESCO General Conference in 2001,[51] mentions each person's right to use the language of one's choice, and to education that respects one's cultural identity. Meanwhile, the Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007,[52] mentions directly Indigenous languages by stating that Native people have the right to 'revitalize, use, develop

[47] Data available at: https://www.ilo.org/dyn/normlex/de/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252 (accessed 07.01.2021).

[48] It was adopted by the International Labour Organization on 27 June 1989 (ILO C169), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312314,en:NO (accessed 07.01.2021).

[49] Data available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO (accessed 07.01.2021).

[50] United Nations GA Resolution A/RES/47/135 adopted on 18 December 1992, https://www.ohchr.org/en/professionalinterest/pages/minorities.aspx (accessed 07.01.2021).

[51] UNESCO Universal Declaration on Cultural Diversity adopted in Paris on 2 November 2001, http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 07.01.2021).

[52] United Nations GA Resolution A/RES/61/295 adopted on 13 September 2007, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 07.01.2021).

and transmit to future generations their (…) languages' (Article 13), as well as to create and control their own systems of education, according to their culture.

It is also worth mentioning efforts to establish a legal framework regarding Indigenous rights at a regional level, most notably in the form of the American Declaration on the Rights of Indigenous Peoples.[53] The document, adopted in 2016 after nearly three decades of work[54] by the Organization of American States, provides for i.a. the right of Indigenous peoples to 'preserve, use, develop, revitalize, and transmit to future generations their own (…) languages' (Article XIV, para. 1), especially through the education compatible with their culture. It also stipulates that the states should actively participate in the promotion of Indigenous languages and culture via the media and facilitate communication to Indigenous people in their languages in official proceedings. Still, it is worth reiterating that unlike the ILO Conventions, these declarations are not legally binding, which weakens their potential impact on national legislations.

3.4. PRESENT-DAY LANGUAGE POLICIES

The aforementioned documents show the general direction in which language policies have evolved in the last decades. However, the pace of these changes differs from country to country, and the current state of national policies towards Indigenous languages varies significantly. In Table 3, main provisions of these policies are summarized. As can be observed, there are six cases where at least one Indigenous language is official in the entire country or territory, although in Ecuador most Native languages are only in official use for Autochthonous populations, while only Quechua and Shuar are considered official in intercultural relations, which means that their status is still lower than this of Spanish. In Paraguay, on the other hand, Guarani is official alongside Spanish, but it is a language used principally by the non-Native population of the country,[55] whereas other Indigenous languages have a very limited legal protection. In addition, in some cases Native languages have an official status only in a certain area, both in federal and unitary states. The first group covers Argentina, Brazil, Canada and the United States, where this status has been given to selected languages in specific

[53] It was adopted by the General Assembly of the Organization of American States on 15 June 2016, https://www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf (accessed 07.01.2021).

[54] A. Portalewska, *Indigenous Caucus Withdraws from Negotiations on the Draft American Declaration on the Rights of Indigenous Peoples*, Cultural Survival, 18 May 2015, https://www.culturalsurvival.org/news/indigenous-caucus-withdraws-negotiations-draft-american-declaration-rights-indigenous-peoples (accessed 07.01.2021).

[55] DGEEC, *Paraguay. Principales indicadores de viviendas*, 2012, https://www.dgeec.gov.py/Publicaciones/Biblioteca/indicadores/Principales%20indicadores%20vivienda.pdf (accessed 07.01.2021).

administrative units, similarly to Nicaragua, which is a unitary state, but has two autonomous regions of the Caribbean Coast with a relatively high level of sovereignty. In two other unitary countries, Colombia and Peru, this spatially limited official status applies to areas where Indigenous population predominates, i.e. at least theoretically its range could be considered more 'flexible'.

Table 3. Summary of present-day policies towards Indigenous languages in analysed countries and dependent territories with years of introduction (constitutional provisions in bold, further explanations below the dates if necessary)

Country/ territory	Indigenous languages official in the whole country/ territory	Indigenous languages official in a part of the country/ territory	Right to bilingual education	Right to contacts with the authorities in one's language	Right to a court translator/ interpreter	Recognition, protection and/or promotion of Indigenous languages	Indigenous languages as an element of the country's heritage
Argentina		2004/2011 Corrientes Province/Chaco Province	**1994**			2006 respect towards Indigenous languages as a goal of education policy	
Belize							
Bolivia	**2000/2009**		**2009**/2010	**2009**/2012 in areas where a language is in common use	**2009**/2012 in areas where a language is in common use	**2009**	
Brazil		2002/2010/2012/ 2016/2019 in 5 municipalities	1988 in primary education			**1988**	
Canada		1988/1999 Northwest Territories/ Nunavut					1988
Chile			1993/1996 in areas with a high percentage of Indigenous people		1993	1993	

Colombia		**1991 in Indigenous territories**	**1991 in communities with their own linguistic tradition**	2010	2010		
Costa Rica			1993 in Indigenous reserves			**1999**	
Ecuador	**1998/2008 in official use for Indigenous people/two languages official in inter-cultural relations**	**1998 in areas where Indigenous people live**	**1998**			**1998**	**2008**
El Salvador			2016			**1983**/2016	**1983**
French Guiana							
Green-land	1978/2009 Greenlandic official alongside Danish/the only official language						
Guyana						**2003**	
Guate-mala			**1985 in regions with a predominance of Indigenous people**	2003	2003	**1985**	**1985**/2003
Honduras			1994/2012			1994	
Mexico	2015 68 Indigenous languages considered national languages alongside Spanish		**2001**/2003 **support from authorities/** access in primary education	2015	2015	**2001**	

Nicaragua		**1987 in autonomous regions of the Caribbean Coast**	**1987**/2006 in autonomous regions of the Caribbean Coast			**1987/2014 in autonomous regions of the Caribbean Coast**	
Panama			**1972**/2010 **bilingual alphabetization in Indigenous communities/** intercultural bilingual education in these communities			**1972**	
Paraguay	1967/1992 Guarani as national/ as official alongside Spanish		2007 recognition of Indigenous education in primary and secondary schools by authorities			2007	**1992**
Peru		**1979/1993 Quechua, Aymara/and other Indigenous languages in areas where they predominate**	**1993**/2011 **support for bilingual education by authorities**	**1993**	**1993**	2011	**1979**
United States		1978/2014 Hawaii/Alaska				1990	
Suriname							
Venezuela	**1999/2008 Indigenous languages in official use for Native people/ official alongside Spanish**		2002 in areas inhabited by Indigenous people		2005	**1999**	**1999**

Source: K. Ząbecki, *Przestrzenny wymiar współczesnej polityki państw obu Ameryk wobec języków rdzennych* (Doctoral dissertation), Warszawa 2019, available at: https://depotuw.ceon.pl/bitstream/handle/item/3482/1900-DR-GF-158652.pdf (accessed 07.01.2021)

Other provisions also differ between countries and territories in their spatial scope. Among federal countries, a significant diversity in language policies between administrative units has been observed especially in Canada, Mexico and the United States, whereas in Venezuela the language policy is adopted at a federal level and specific provisions can apply only to Indigenous areas. Similarly, in Argentina and Brazil the policy regarding Native languages is decided by the federal government, although – as has already been mentioned – in both countries administrative units can grant a special status to an Indigenous language. On the other hand, in unitary states some provisions may have a local or regional spatial scope, e.g. in Panama the right to bilingual education for Native people is limited to officially recognized Indigenous areas, while in Bolivia access to public services provided in one's language is limited to areas where this language is in common use.

Regarding national constitutions, in eight cases there is no mention of Indigenous languages at all, whereas in the other fifteen constitutional provisions vary from mostly symbolical ones, like the recognition of these languages as part of the national heritage, to those that may have a more direct impact on language survival. In this context, the most important provisions are those regarding bilingual education for Indigenous people, since they potentially facilitate the acquisition of Indigenous languages at an early age and slow down their replacement by the dominant, European languages. As can be seen in Table 3, such provisions are present in most analysed countries and territories, except for Greenland (where Greenlandic is the only official language), Canada, the United States,[56] Belize, French Guiana, and Suriname. The last three cases are also the only ones that have virtually no explicitly defined policy regarding Indigenous languages.

A temporal analysis of the evolution of language policies shows that although some changes have started already in the 1960s, the large-scale process of official recognition and protection of Indigenous languages commenced in the 1980s and continues to this day. These changes coincide with the wave of democratization observed in Latin America since the end of the 1970s to the beginning of the 1990s, which saw the end of authoritarian regimes in 16 countries of the region.[57] This process may at least partly explain why Latin American countries generally confer more extensive rights to ILS and a greater protection to their languages than in the rest of the Americas. Language policies are especially developed in Bolivia, Venezuela, Ecuador, Guatemala, Mexico, Colombia and Peru, whereas they are much more limited or even non-existent in Guyana, Suriname, Belize, Canada and the United States. Still, this should not be considered a universal

[56] However, both in Canada and the United States there are provisions at a local or regional level that provide for bilingual education, especially in reserves and reservations; K. Ząbecki, 2019, *op. cit*.

[57] S. Mainwaring, A. Pérez-Liñán, *La democracia a la deriva en América Latina*, 'POSTData', 2015, Vol. 20(2).

rule, since there are Latin American countries with relatively limited language policies, such as El Salvador and Paraguay (except for Guarani) as well as areas outside of Latin America with well-developed policies towards Indigenous languages, like Nunavut and Northwest Territories in Canada, Alaska in the United States, or Greenland.

4. A CASE STUDY: POLICY TOWARDS INDIGENOUS LANGUAGES IN MEXICO CITY

The presentation of the specific case of Mexico City in this part of the paper serves the purpose of contrasting the official language policy with mostly qualitative data regarding its implementation, collected during a research project carried out between October 2017 and February 2018. Although the observations from this case study cannot be automatically extended to other parts of the Americas, they may help understand problems that can be experienced on a local, regional, and national scale while introducing new policies regarding Indigenous languages.

4.1. INDIGENOUS PEOPLE AND ILS IN MEXICO CITY

According to census data from 2015, Mexico City has an ILS population of 130,000, which constitutes around 17% of 780,000 Indigenous people living in the city,[58] and at least an additional 200,000 ILS live in the metropolitan area that surrounds the Mexican capital.[59] Given that official data regarding Indigenous people in Mexico is usually underestimated,[60] the actual number of ILS who live in the agglomeration can be estimated at well over 350,000. In addition, data from the 2010 census shows that 82% of ILS aged five years and above that live in Mexico City were born outside of the city, and 12% arrived there during the five years preceding the census;[61] in other words, only a small percentage of ILS was born in Mexico City and acquired the language of their people there, while the vast

[58] INEGI, *Tabulados de la Encuesta Intercensal 2015: Etnicidad. Ciudad de México*, 2016, https://www.inegi.org.mx/contenidos/programas/intercensal/2015/tabulados/05_etnicidad_cdmx.xls (accessed 07.01.2021).

[59] INEGI, *Tabulados de la Encuesta Intercensal 2015: Etnicidad. Estado de México*, 2016, https://www.inegi.org.mx/contenidos/programas/intercensal/2015/tabulados/05_etnicidad_mex.xls (accessed 07.01.2021).

[60] R. Martínez Casas, 2014, *op. cit.*

[61] INEGI, *Censo de Población y Vivienda 2010. Conjunto de datos: Población de 3 años y más,* http://www.inegi.org.mx/sistemas/olap/Proyectos/bd/censos/cpv2010/P3Mas.asp?s=est&c=27781&proy=cpv10_p3mas# (accessed 07.01.2021).

majority were immigrants from other regions of the country. In total, speakers of 55 of the 68 Indigenous languages officially recognized in Mexico were identified in the 2010 census,[62] resulting in a very diverse linguistic landscape.

As has already been mentioned, official statistics regarding Indigenous people and ILS should be treated with caution, not only because available information is not entirely reliable, but also because important data, often crucial to understand these groups, is not available in this form. For instance, it is worth noting that Indigenous people in Mexico City consist of two clearly distinct groups. The first one are Indigenous – or 'original' – communities (*pueblos y barrios originarios*) that since the pre-Columbian era live roughly in the same area, mostly in the south of present-day Mexico City. Nowadays, only around 3% of them speak the Native language of their people (mostly Nahuatl or Otomi), and language rights are generally not considered a priority among these communities, especially compared to the issue of right to land.[63] In contrast, migrants from other regions of the country and their descendants (*comunidades indígenas residentes*, which can be roughly translated as 'Indigenous resident communities') have a much higher percentage of ILS, although it differs significantly between the immigrant generations: while in the first generation, among people raised mostly in Indigenous communities in rural areas, the percentage is by far the highest, it decreases considerably in the second and third generations.[64] Still, it is important to keep in mind that the dynamics of this process of language shift differs among and within Indigenous ethnic groups.

4.2. OFFICIAL POLICY TOWARDS INDIGENOUS LANGUAGES IN MEXICO CITY

Provisions of international and national law that apply in Mexico do naturally apply in Mexico City, as well. These include the ILO C169, the national constitution, and the General Law of Indigenous Peoples' Linguistic Rights (Ley General de Derechos Lingüísticos de los Pueblos Indígenas), among others. In addition, there are several acts that apply locally, the most important being the new Law of Indigenous People's Rights (Ley de Derechos de los Pueblos y Barrios Originarios y Comunidades Indígenas Residentes en la Ciudad de México, enacted at the end of 2019), the Constitution of Mexico City (Constitución Política de la Ciudad

[62] SEDEREC, *Lenguas Indígenas en la CDMX*, http://www.sederec.cdmx.gob.mx/lenguas-indigenas (accessed 07.01.2021).

[63] I. Gomezcésar Hernández, *La palabra de los antiguos. Territorio y memoria histórica en Milpa Alta*, (in:) P. Yanes, V. Molina, Ó. González (eds), *Ciudad, Pueblos Indígenas y Etnicidad*, la Ciudad de México 2004.

[64] M. Romer, *Persistencia y pérdida de la identidad étnica en la generación de los hijos de inmigrantes indígenas en el Área Metropolitana de la Ciudad de México*, (in:) P. Yanes, V. Molina, Ó. González (eds), *Urbi indiano. La larga marcha a la ciudad diversa*, la Ciudad de México 2005.

de México, 2017), the Law of Education (Ley de Educación del Distrito Federal, 2000), and the Law of Interculturality, Attention to Migrants and Human Mobility (Ley de Interculturalidad, Atención a Migrantes y Movilidad Humana en el Distrito Federal, 2011). These documents provide, among others, numerous linguistic rights to Indigenous people in Mexico City, such as the right: to use, preserve, and revitalize their languages; to be informed – where applicable – about administrative changes that may affect them in their language; to be protected from discrimination because of its use; to teach those languages and promote them through mass media; to access and contact public utilities and the justice system using their language; and to coordinate with the authorities intercultural and bilingual education, according to their own methods of teaching and learning.

In addition, an important factor in the implementation of a language policy in Mexico City is the presence of head offices of all the main federal institutions responsible for Indigenous rights. These include the National Indigenous Languages Institute (Instituto Nacional de Lenguas Indígenas, INALI), the General Coordinating Office for Intercultural Bilingual Education (Coordinación General de Educación Intercultural y Bilingüe, CGEIB), and the National Commission for the Development of Indigenous People (Comisión Nacional para el Desarrollo de los Pueblos Indígenas, CDI), all of which have carried out programmes related to the protection of Indigenous languages in Mexico City itself.

4.3. LANGUAGE POLICY IN MEXICO CITY: THEORY VERSUS REALITY

Despite an extensive range of legal instruments to protect Indigenous languages, the language policy in Mexico City is widely considered ineffective and mainly declarative, while most of its provisions are not adequately implemented and applied. This is due to several reasons. First of all, while in the last decades Mexican authorities have been pressured by international and national organizations to implement an official policy to protect Native languages, they were often unprepared and/or unwilling to do so accordingly, both at the national and local level. Secondly, there is a clear tendency in official institutions to abandon ongoing projects and replace a large part of staff after each political shift, thus significantly reducing their effectiveness. Thirdly, institutions tasked with implementing and applying the language policy tend to be underfinanced and understaffed. In addition, cooperation between local and federal authorities and Indigenous organizations, which could be an important asset in applying the new language policy, tends to be insufficient, partly due to poor coordination and a certain deficit of trust on both sides.

However, as has already been mentioned, the single most important factor that can either slow down or accelerate the process of language shift is the edu-

cation system. Despite provisions meant to facilitate the introduction of bilingual education in Mexico City, its implementation is in many cases virtually impossible. First and foremost, there are not enough qualified teachers to teach even the most popular Indigenous languages spoken in the city, such as Nahuatl, not to mention least used ones. Furthermore, there is a long tradition of discrimination of ILS in education institutions, both by other students and by teachers. Thus, despite some intents, there are still hardly any effective official programmes of bilingual education for Indigenous people in Mexico City.[65]

5. CONCLUSIONS

The analysis presented in the paper makes it possible to draw several conclusions regarding present-day policies towards Indigenous languages in the Americas. Firstly, undoubtedly a clear progress has been made in terms of legislation to protect Native languages in the last decades, and especially since the 1980s, at the international, national and local level. These changes took place after several centuries of increasingly hostile attitude towards Indigenous languages, first from colonial and then from national authorities of the newly created states. From the perspective of the Americas, the recent evolution in language policies is mostly visible in Latin America, whereas the rest of the region clearly lags behind. At the same time, there is no obvious difference in the implementation of these policies between unitary and federal states; even though in the latter it should be arguably easier to introduce laws adapted to the local situation, in practice this process is often relatively slow and does not necessarily concern regions with the major Indigenous populations (e.g. in Argentina and Brazil), while some federal states show a clearly centralized approach to implementing language policies (e.g. Venezuela). On the other hand, in some of the unitary countries (e.g. Ecuador, Colombia, Peru) such policies can be addressed to Indigenous people in regions where they are most numerous.

Another important point is the contrast between the regulatory framework and its implementation. Especially keeping in mind migrations of Native people from rural to urban areas observed in the last decades in the region, an increasingly important concern is the adoption of appropriate language policies in cities that attract Indigenous population. The case of Mexico City clearly shows that even if there is a relevant language policy, its adoption may be seriously hindered by numerous factors, such as insufficient financing, political disputes, and

[65] K. Ząbecki, 2019, *op. cit*.; *idem*, *Hablantes de lengua indígena en la Ciudad de México: entre desplazamiento y mantenimiento lingüístico*, 'Revista de Antropología y Sociología: Virajes' 2020, Vol. 22(1).

a deeply embedded discrimination against Indigenous languages, still present in many societies in the Americas.

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