RECOGNITIONS OF LAND RIGHTS OF INDIGENOUS COMMUNITIES

A STRUGGLE AGAINST STATE LEGAL SYSTEMS AND ENFORCEMENT BARRIERS

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LEGISLATIONS AND LEGAL SYSTEMS HAVE POSED COUNTLESS struggles to indigenous people, such as failures to effectively recognise and protect their identity, culture and language(s), and difficulties to enforce and uphold the existing laws. It is in relation to indigenous peoples' land rights that the failures of legal systems are the most evident, although the reasons are greatly dependent on contextual factors such as the individual community, the nature of the rights sought and the pressure of the State for the available natural resources. Additionally, the countries inhabited by the majority of the indigenous population are historically states having a weak rule of law in the social or political arenas, and where the legislative and judiciary systems, even today, are fraught with loopholes and barriers to an effective justice. Despite all the challenges, several indigenous communities have successfully gained legal recognition of their land rights, and some states have even integrated indigenous people's rights into their legal system. Most indigenous communities, however, must still fight against the time in order to gain a basic legal recognition, before their culture and society – which is highly dependent on land – are irreversibly eroded.

→| DISCUSSION

"There is an ABC ignorance which precedes knowledge and a doctorial ignorance that comes after it."

MONTAIGNE

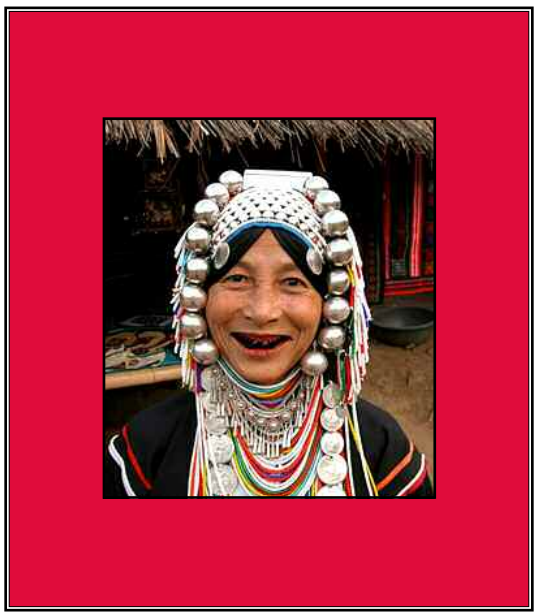
The effects of the colonisation by European settlers are the source of the initial hurdle faced in establishing land rights. In the states colonised or administered by the British Empire, for example, traditions and customary laws of indigenous communities were somehow recognised. In Manipur, a state in Northeast India, homeland of the large community of *Naga*, the British colonialists "did not disturb the hill villages. Instead they recognised their Headmen (chieftans) and entrusted them with the village administration"[1]. In Mizoram and Meghalaya, similar provisions where implemented[2]. Antony Allott distinguishes between this British system of 'Indirect Rule' and the French colonialists' system of progressive assimilation, the latter recognising that "the native populations were best administered through and under their own institutions", with some exceptions pertaining to penal laws[3]. In most colonised indigenous communities, however, the governing institutions were exact copies of those of the colonising State. As a result, the nature of the relationship between the indigenous communities and their land was not properly recognised, and the enacted laws had often the consequence of deteriorating the quality of life of the affected communities. The effects of the past colonial administration are still felt by many indigenous communities worldwide.

A major issue of the latter stages of colonisation is indeed represented by land reform laws, against whose effect most indigenous communities are attempting to find legal recognition of land rights. The British in Kenya instituted a "land register" similar to the British one, where the customary ownership of land was transformed into recordable titles. This procedure spread gradually throughout Kenya, and was then applied in other African states. Although considered as a legal equivalent to customary rights, the land registration system had the effect of alienating indigenous communities from the traditional relationship they had with their land, characterized by a unique and relevant nature of their customary rights system[4].

Other land reforms were more blatant in their object to dispossess and steal the land from indigenous communities. The 'San' or 'Khoi' hunter-gatherer indigenous communities of southern Africa have been subject to large abuses of their human rights, instituted through forced eviction from their traditional territories and forced settlement in camps[5]. The settlers established farms in the territories inhabited by the San, fencing off this land and denying any access to the migratory indigenous communities[6]. Natural resources essential for the San population, such as water and certain plants, were then used to support the farming industry. Additionally, reserves were also introduced, leading to further land dispossession[7]. These reforms remain today the main barriers to land right recognition amongst the San community in South Africa, Botswana and Namibia and represent the primary source of the social problems – relating to health, education and welfare – which currently plague the San.

For the majority of indigenous communities, the end of colonisation did not resulted in an improvement of their legal status. The issues of displacement and land alienation have in fact worsened in the past fifty years, as population increase and environmental degradation put pressure on land and natural resources, problems which developing states are often poorly equipped to deal with. As a result, indigenous people striving to have their land rights acknowledged and enforced are placed in conflict with the interests of the State and global industries such as those of mining, logging and agriculture[8].

In the North-eastern region of India, homeland of a large diversity of indigenous populations covering seven states, there are two main causes of land alienation. Firstly, there is an increasing demand of land for economic development, either from the State or private entities. Secondly, there is the issue of encroachment by immigrant populations, whose number the local and national authorities have effectively failed to curb. These issues are exacerbated by a legal system that fails to take into account the principle of customary land ownership, and by the lack of real access and integration into the legal system[9]. Similar causes of land alienation are also present in South America, where the massive flux of workers attracted by the large industries has increased the pressure on shared natural resources, and Amazonian indigenous people now "constitute a minority population in relation to other Amazonian inhabitants" [10]. In Cambodia, Jeremy Ironside notes nine causes of land alienation amongst indigenous communities, including lack of awareness of legal rights and representation, absence of a clear legislative framework, registration and enforcement mechanisms, intimidation and land grabbing by powerful people, officials and military, forest clearing, in-migration into indigenous areas and forced land selling[11].



Tackling the causes of land alienation has proved to be beyond the capacity of many developing states, whose resources are often limited by other obligations or otherwise woefully mismanaged. In Kenya, it has been the Maasai indigenous population itself who struggled to keep the issue of land alienation as a priority in the political agenda. They have met resistance from almost all sectors of the political administration and judiciary, both pre- and post-independence. In 1912 they pursued a civil case suing the British colonial administration for damages resulting from the 1904/1911 Anglo-Maasai Treaties, which resulted in most of the traditional Maasai land being fraudulently transferred to the British[12]. Although the case was dismissed by the Court of Appeal on points of technicality, the Maasai were not deterred and brought the issue up at the 1923 and 1933 East Africa Royal Commission[13]. Post-independence, the Maasai have used civil society organisations in order to continue raising awareness of their plight. In spite of the positive reaction of the media and a large sector of Kenya's population, the government remains unwilling to assist the Maasai and has on occasion used brutality to suppress their movement[14].

Not all the struggles for land rights of indigenous communities stem from land alienation. In the northern hemisphere, in particular the indigenous communities of the Circumpolar North, Canada and Scandinavia land alienation in only a relatively recent phenomena, coinciding with the discovery of oil and mineral deposits in parts of this region. Previous exploitation of local resources by non-indigenous people was limited to fishing, whaling and hunting of wildlife, since the harsh climate made any settlement by non-indigenous communities nearly impossible[15]. The indigenous communities in these regions have generally been quite successful in establishing land claims. The Inuit and First Nation indigenous groups in Canada managed to settle claims in the past decade which have granted them extensive land rights. Both the Saami of Scandinavia and Russia's indigenous communities have seen the approval of legislation in which certain land rights are acknowledged. Their main challenge has been the enforcement and the recognition of these legal rights, facing an increasing interest in the exploitation of the Circumpolar North[16].

As mentioned before, the legislation enacted in order to protect the land rights of indigenous communities is often rigged with caveats and fails to capture the real nature of the relationship between indigenous communities and their land. In most indigenous societies, land is not considered as an absolute property of one individual, like in the contemporary or colonially-introduced notions of property, but a communal resource, held jointly by all the people and governed by the principle of intergenerational equity[17]. This principle decrees that the present generations should use resources to meet their needs without limiting the same possibility for future generations[18]. This model of land ownership runs counter to contemporary or colonially-introduced notions of proprety, whereby land is titled to an individual (traditionally male) who olds it absolutely[19]. Even if such communal land ownership is not practiced by all indigenous societies[20], the majority of legislation regarding indigenous land is conflicting with the interests of the community, is ineffective and prone to abuse or misapplication[21]. In a number of countries, this issue has been addressed with different degrees of success.

The indigenous communities of Northeast India have a huge variety of customary land tenure systems, which

reflect the lifestyle and means of sustenance of each community[22]. These unique land tenure systems often derive from indigenous knowledge about the land and its resources, resulting in an harmonious relationship between the indigenous community and their environment[23]. This area of India is governed by a number of laws, with the Fifth Schedule of the Constitution preventing the sale of tribal land to non-tribals and the Sixth Schedule covering several states, in addition to specific laws and regulations of other states in the region[24]. The Sixth Schedule recognises customary laws, and by virtue of this, communal land ownership systems valid in indigenous communities[25]. However, this recognition does not apply to the entire North east region, and other laws offer only minimal protection of customary rights[26].

Indigenous people's land rights are often established via a claim procedure or registration. These processes are the most problematic for indigenous communities who cannot navigate the complex arena of the regional or national administrative and judicial systems. Furthermore, the criteria for a successful land claim are often beyond the means and capacity of many indigenous communities; in some cases, the claims mechanism is entirely counterproductive, as it requires information not traditionally documented by the indigenous tribes. However, with the help of third parties in the form of NGO's and other regional and international bodies, many indigenous groups have found support in making claims either through the established procedures or via the judiciary route.

The Philippines enacted the Peoples' Rights Act (IPRA) (Aka Republic Acts 8371) in 1997. Its objective is to ensure the "recognition of land a resources, rights and titling of indigenous lands and territories"[27]. This legislation established a titling procedure for either ancestral lands (Certificate for Ancestral Land Title or CALT) or ancestral domains (Certificate for Ancestral Domain Title or CADT) claims involving, *inter alia,* petition for delineation and delineation proper, submission of supporting documents, notice and publication, issuance of a CALT or CADT[28]. However, this mechanism has proved difficult to apply in practice, and the rate at which applications have been made since the introduction of the legislature far outweigh the pace at which titles are awarded[29]. Lourdes Amos notes that this backlog indicates the "government's reluctance to fully recognize the indigenous people' land and resource rights" resulting from conflict of interest over resources and overlapping policies in addition to lack of political will and insincerity towards full recognition of rights[30].

In South America, indigenous Amazonian communities have faced similar challenges in terms of establishing land rights through the existing state mechanisms. In their case, the main issue pertains to the recognition of territorial rights as opposed to just land rights. There has been a reluctance expressed by most Amazonian states[31] to recognising broad territorial claims, with Bolivia being the only state applying the "territorial method" of titling[32]. The result is that most of the land claims held by Amazonian indigenous communities cover sporadic patches of forest which increases the risk of exploitation and displacement[33]. Additionally, Pedro García Hierro notes that "the procedures for legalising lands are generally unnecessarily complex, long and costly, and highly vulnerable to administrative and legal chicanery"[34] and this problem is exacerbated by a land registry system which is badly managed[35].

The Canadian land claim boards are perhaps the best example of successful procedural mechanism for establishing land rights. The claim boards were established in response to the need to address 'comprehensive land claims' in territories where indigenous peoples had not previously signed treaties with the Canadian government[36]. The system by which these boards function is essential to their success, in that they are independent public bodies composed of candidates appointed by the federal government from a pool nominated by one of the parties to the claim[37]. This allows for indigenous people to represent the majority of the board members, and not to feel accountable either towards their nominators nor the federal government; such independence ensures that the validity of the claims board is not undermined.

The problems pertaining to the land rights of migratory indigenous communities are particularly critical. Their means of sustenance often require access to a land that cannot be legally claimed, due to their temporary settlement. As a result, most of the San community of southern Africa have been dispossessed of their land, and only recently begin to see some remedial action from the State. Government initiatives include parallel efforts to integrate the San community into the countries larger social and economic network via education and employment programmes[38]. In Botswana, the First People of the Kalahari

San organisation have been instrumental in the effort of the San to have their rights to access to the Central Kalahari Game Reserve recognised, and in 2003 they brought a legal action against the government of Botswana, claiming that they had been illegally removed from their land[39]. Three years later the High Court of Botswana ruled in their favour by a majority of two-to-one, and this landmark decision heralds a new chapter in the development of land rights for indigenous peoples[40].

Enforcement of land rights remains a critical issue for both indigenous communities and the states in which they reside. As aforementioned, the quality of the legislation enacted to protect indigenous peoples' rights is often dire, with contradictory, unclear and incomplete stipulations. This makes it easier for third parties to break laws without fear of being caught or punished, demonstrated by the sheer volume of illegal logging that takes part in lands rightfully occupied by indigenous peoples. In addition to this, the institutions whose responsibility is to manage indigenous community issues are often poorly equipped to deal with the myriad of challenges they face, and often have to compete with larger state institutions (for instance economic or agricultural) which creates additional barriers to enforcing indigenous community rights. The situation with judicial enforcement is equally problematic, not only due to the legislation, but also to additional factors, such as a weak or non-existent rule of law culture, a scarce funding and inadequately trained legal professionals.

The situation with indigenous communities in South America shows enforcement problems across several areas. Firstly, despite the existing regulations for legalising lands of Amazonian indigenous communities, the procedural structure is unnecessarily burdensome, costly and lengthy[41]. Furthermore, as Pedro García Heirro notes, "the procedures for revision and recovery of lands are not duly considered in any of the legal regulations"[42]. The existence of land rights does not necessarily correspond to their respect by state institutions, so that logging concessions are periodically granted in respect of land that has already indigenous people' rights attached[43]. In terms of judicial enforcement, the courts are often unsympathetic to the plight of the indigenous people, and lack of court access continues to form a barrier to legal remedies[44].

In Asia, indigenous people face continuous hurdles in their efforts to have their land rights respected. Despite the Indigenous Peoples' Land Rights Act, the Philippines have failed to prevent the grant of land which is part of the ancestral domains or has no concurrent conflicting rights attached thereto[45]. The National Commission of Indigenous Peoples – the government agency responsible for implementing indigenous policies and legislation – is often embroiled in internal political conflicts, with corrupt officials and a lack of political will or commitment towards enforcing legislation[46]. In Cambodia, land rights are undermined by both the local authorities and the manipulative actions of third parties seeking land. The latter can conclude illegal land transactions with indigenous people, whose basic understanding of legal terminology or notions makes almost impossible any legal review or challenge. Local authorities and powerful officials are also known to illegally appropriate land rightfully occupied land from indigenous communities, offering them neither compensation nor justification[47].

In those countries where the rule of law is a fundamental institution in the legal system, enforcement is mostly unproblematic. Indigenous communities in the circumpolar north, including those of Canada and Scandinavia, are strongly represented within civil society, and are consulted by public and private institutions in relation to proposed measures[48]. However, recent mining and oil gas exploration have led to an increased disregard of the enforcement and respect of the rights of indigenous communities including circumvention of legal stipulations[49]. Indigenous communities in these areas can no longer take it for granted that the regulations and institutions in place to protect them from land displacement will be continue to be effective[50].

For the vast majority of the world's indigenous communities, the legal system within which they belong has both helped and hindered their pursuit of the right to live in a traditional way. A number of binding international legal instruments such as the International Convention for the Regulation of Whaling (1946)[51] and the Convention on Biological Diversity (1992)[52] recognise certain rights of indigenous communities and have highlighted the need to integrate them within the international legal forum. Furthermore, the recently adopted United Nations Declaration on the Rights of Indigenous Peoples (2007), although not binding on states, has focussed on the core issues facing indigenous communities and recognising their role in the global community[53]. Articles 25 to 30, in particular

consider the breadth of land rights held by indigenous people and establish the notion that "land rights" is not simply synonymous of titling; but rather covers a broad spectrum of rights, relationships, entitlements and similar issues.

Land rights continue to be one the most contentious issue facing indigenous people despite the progress made at domestic, regional and international levels, because unlike social or cultural rights, there are often resource matters, and thus economic opportunities, to take account of. When these conflicts of interest arise in developing states, indigenous communities are often the first to lose out, and despite the efforts of NGO's and other bodies, ranging from village to global level, legal recognition and enforcement of indigenous land rights are still far from being achieved. This problem is exacerbated by the meantime exploitation of resources in indigenous lands, without consideration to sustainability or compensation. The ability of indigenous people to continue existing according to their chosen lifestyle closely depends on whether the global community can effectively consolidate their rights within the legal environment, and within a timeframe that will not render those rights obsolete.

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[2] *Ibid.* p. 11.

[3] ALLOTT, A.,"The Limits of Law" (London Butterworths, 1980) p. 182.

[3] [4] *Ibid.* p. 183-184.

[5] VANDERPOST, C., JORAM/USEB, and CRAWHALL, N., "Traditional Knowledge and Emancipation of Hunter-Gatherers in Southern Africa" in *Indigenous Affairs: Land Rights, A Key Issue* (2004)36-41 (36) available on http://www.iwgia.org/graphics/Synkron-Library/Documents/publications/Downloadpublications/IndigenousAffairs/IA42004.pdf.

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[7] *Ibid.* pp. 38-40.

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[9] *Supra note 1,* p. 9.

[10] GARCIA HIERRO, P., "Governance, the Territorial Approach and Indigenous Peoples" in *Indigenous Affairs: Land Rights, A Key Issue* (2004)8-13 (10-11).

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[15] AHLENIUS H., JOHNSEN, K., NELLEMAN, C., Vital Arctic Graphics "*People and Global Heritage in our Last Wild Shores"* (2005) UNEP GRID-Arendal, p. 21, 27-34, available on http://www.grida.no/publications/vg/arctic/ .

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[17] *Supra note* 1, p. 8. *Supra note* 10, p. 14.

[18] Principle 3, Rio Declaration, 1992 United Nations Conference on Environment and Development (UNCED).

[19] *Supra note* 1, pp. 25, 27.

[20] *Supra note* 1, pp. 18, 22-24.

[21] *Supra note* 1, pp. 14, 22, 24-25.

[22] *Supra note* 1, pp. 9, 18-19.

[23] *Supra note* 1, p. 8.

[24] *Supra note* 1, p. 10-12.

[25] *Supra note* 1, p. 15.

Supra note 15, p. 6.

[26] *Supra note* 1, p. 20.

[27] AMOS, L., "Titling Ancestral Domains: The Philippine Experience" *Indigenous Affairs: Land Rights, A Key Issue* (2004)20-25 (21).

[28] *Ibid.* pp. 21-22.

[29] *Ibid.* p. 22.

[30] *Ibid.* pp. 22-24.

[31] Amongst others Brazil, Ecuador, Bolivia, Colombia, Peru, Venezuela etc.

[32] *Supra note* 9, pp. 8-9.

[33] *Supra note* 9, p. 9.

[34] *Ibid.*

[35] *Supra note* 9, p. 10.

[36] WHITE, G., "Strengthening Indigenous Peoples' Influence: 'Claim Boards' in Northern Canada" *Indigenous Affairs: Land Rights, A Key Issue* (2004)26-30 (26).

[37] *Ibid.* p. 29.

[38] *Supra note* 5, pp. 40-41.

[39] http://www.iwgia.org/sw9940.asp.

[40] http://www.bbc.co.uk/1/hi/world/africa/6174709.stm.

[41] *Supra note* 9, p. 9.

[42] *Supra note* 9, p. 10.

[43] *Supra note* 9, p. 11.

[44] *Supra note* 9, p. 9.

[45] *Supra note* 26, pp. 22-23.

[46] *Supra note* 26, p. 24.

[47] *Supra note* 10, pp. 15-16.

[48] *Supra note* 35, pp. 2 6-30.

Of particular note are the Saami Council and the Inuit Circumpular Council.

[49] http://www.artictpeople.org/2008/02/25/undermining-saami-rights-in-sweeden/ .

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[50] *Supra note* 15, p. 4.

[51] Aboriginal Subsistence Whaling, http://www.iwcoffice.org/conservation/aboriginal.htm.

[52] Preamble and Article 15, 16 and 19.

[53] http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf . ▣

A silly remark can be made in Latin, as well as in Spanish.

CERVANTES, *The Dialogue of the Dogs.*