INCLUSION, COEXISTENCE AND RESILIENCE:

KEY LESSONS LEARNED FROM INDIGENOUS LAW AND METHODOLOGY

Giulia Parola
Margherita Paola Poto

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Foreword by
Paulo de Bessa Antunes

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To Mother Earth,
To Amazon Rainforest
To all Indigenous Peoples who defend the Nature
To my friends Emi and Cami!
Giulia Parola

This work is inspired by and dedicated to all the women who dare to dream. To Camilla, Giulia, Rebecca and Val
Margherita Paola Poto

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The editors wish to inspire and challenge readers to think differently, to create room for new ideas, and ultimately to contribute in enhancing the perception of the interconnectedness of all things.

ABOUT THE EDITORS

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Margherita is an ally to Indigenous Peoples and to all the Earth defenders.

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Telson; REIS, Vanessa. (Org.). Leituras de Direito Público. 1ed. Rio de Janeiro: Multifoco, 2019, v. 1, p. 311-324; BRITTO, T. M. C. O Direito Internacional e sua trajetória nos trinta anos de Constituição. In: SANTORO, Antonio; RIBEIRO, Glaucia; PIRES, Telson; REIS, Vanessa. (Org.). Leituras de Direito Público. 1ed. Rio de Janeiro: Multifoco, 2019, v. 1, p. 571-584; BRITTO, T. M. C. Uma investigação crítica sobre as vedações às operações financeiras e a execução orçamentária em plano geral. In: VAL, Eduardo; SILVA, Carolina Cyrillo da; BENTES, Fernando; QUIRINO, Carina; MOURA, Emerson. (Org.). Atualidade do Direito Público. 1ed. Rio de Janeiro: Multifoco, 2017, v. 1, p. 417-434; BRITTO, T. M. C. Regime de bens do casamento: Um ensaio sob as lentes da constitucionalização do Direito Civil. In: JUNIOR, Arthur Bezerra de Souza; MENEZES, Priscilla. (Org.). Atualidade do Direito Privado. 1ed.Rio de Janeiro: Multifoco, 2017, v. 1, p. 275-292.

Valentina De Gregorio is Migrant Network Communications Manager at Slow Food International, Bra (Italy). Valentina has dedicated the last years of her academic and personal career to study and engage with delicate issues such food security and safety, cooperation and development, environmental protection and conscious choices of citizens in a global economy. After a French and Italian Law Bachelor's Degree, Valentina joined the Master of Research in Food, Law and Finance of the International University College (Turin), while contributing to the researching activities of the Milan Center for Food Law and Policy (Milan) on exploitation of migrant labor in Italian and European agriculture. The connection between food and human rights led her to cooperate with the Civil Society Mechanism for relations with the UN Committee on World Food Security within the Food and Agriculture Organization (FAO, Rome), exploring the root causes and consequences of rural-urban displacement worldwide, including the Arctic region. In 2018, Slow Food International

welcomed her. Since then, she has been taking care of projects and initiatives aimed at promoting interaction between human diversities through good, fair and clean food. Relevant publication: Ferrando, Tomaso and De Gregorio, Valentina and Lorenzini, Sara and Mahillon, Lidia, The Right to Food in Italy Between Present and Future (August 9, 2018).

FOREWORD

> *"Many people have said that Indigenous Peoples are myths of the past, ruins that have died. But the indigenous community is not a vestige of the past, nor is it a myth. It is full of vitality and has a course and a future. It has much wisdom and richness to contribute. They have not killed us and they will not kill us now. We are stepping forth to say, "No, we are here. We live."*[1] *(Menchú, 1994, ix).*

Inclusion, Coexistence and Resilience: Key Lessons Learned from Indigenous Law and Methodology covers a broad spectrum of the main issues linked to current legal status of the Indigenous Peoples in a large variety of countries. The book is written from a critical standpoint and highlights the daily challenges that those peoples face to affirm their rights within modern legal systems, most of them forged upon Western roots that were imposed by the colonial ruling over such peoples. The book stresses in a very clear wording all the contradictions between traditional Indigenous Peoples customary Law and the Western Law that became a standard all over the world. During the last five centuries, Indigenous Peoples have learnt how to cope with Western Law and how to identify loopholes to survive and to keep their traditions

1. Joshua Cooper, 'UN permanent forum on indigenous issues' (*UNPO*, <https://unpo.org/content/view/89/236/> accessed 24 June 2019.

and ways of life alive. Finally, the international community has come to understand that indigenous and traditional societies are "submerged treasures". The book shades light on the very need to give Indigenous Peoples a say by which they may solve their problems.

The coming of the Indigenous Peoples to the Western scene was something that caused wonder and mixed feelings among the Europeans. In the first encounter with "the Indians", Christopher Columbus made a mistake and the relations between the native peoples of the part of the world that became known as Americas have been mistaken since then. In this sense, Columbus opened the door for what would be known as colonization. Since 1492 the original inhabitants of the "New World" have been facing hard times, their population decreased as a result of diseases, wars, massacres, exploitations, enslavement, mistreatment and the like. Surprisingly, the Indigenous Peoples survived and are still alive and fighting for survival, respect and recognition. However, they are deemed to be among the poorest in the world and to bear the heaviest share of the negative impacts caused by the extractive industries such as mining, timber and hydroelectric power development. Accordingly, to the UN Department of Economic and Social Affairs, "[I]ndigenous Peoples continue to be over-represented among the poor, the illiterate, and the unemployed. Indigenous Peoples number about 370 million. While they constitute approximately 5 per cent of the world's population, Indigenous Peoples make up 15 per cent of the world's poor. They also make up about one-third of the world's 900 million extremely poor rural people."[2]

2. 'Economic and Social Development' (*UN Department of Economic and Social Development*) <www.un.org/development/desa/indigenouspeoples/mandated-areas1/economic-and-social-development.html> accessed 24 June 2019.

The Indigenous World 2019[3] reports that: "By the end of the year, 230 of the 447 approved large-scale mining permits in the Philippines were in ancestral territories. These projects cover 542,245 hectares of ancestral lands and comprise 72% of the total land area covered by all of the approved mining applications in the country. Alongside these extractive projects, the construction of mega-dam projects in indigenous territories continues to threaten indigenous lands and resources. Coal extraction is particularly worrisome, as coal operating contracts in the Andap Valley Complex and several provinces throughout Mindanao - which are issued by the Department of Energy - encroach upon hundreds of thousands of hectares of ancestral lands." This kind of situation can be found in other continents and countries.

The concept of Indigenous Peoples is no longer equivalent to the peoples that lived in the "New World" but encompasses all the traditional and tribal peoples that live surrounded by the modern, industrial and postindustrial society, struggling to maintain their traditions, culture, institutions and self-determination.[4] We came to know that

3. David Nathaniel Berger, *The Indigenous World 2019* (IWGIA 2019) <www.iwgia.org/en/documents-and-publications/documents/4-the-indigenous-world-2019/file> accessed 24 June 2019.

4. Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 Jun 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO No. 169) art 1; This Convention applies to: (a) 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;(b) 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 colonization 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

despite the generic approach provided by the modern Western Law, there are populations, cultures and ways of living that are not included in the standard view kept by the majority population in a given country. Thus, *minority* is a political idea that is more likely to define people that are underrepresented in the legal political system and are at the "margin" of the main society and therefore not entitled to enjoy the whole set of rights and guarantees provided by the dominant legal system. All these peoples have legal institutions under which they live by. Surely, they do have organized ways of living, customary rules to settle disputes, traditions, culture and value-sets within their various societies. At this point it is relevant to highlight that *self-determination* is not to be confused with independence from the established national State. Among the indigenous and tribal peoples, all over the world, there are plenty of small populations that are not likely to even dream of forming a national State by themselves. Consider the situation of Brazil, where there are some traditional, tribal and Indigenous Peoples that don't reach a thousand

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political institutions. 2. 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. 3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

human beings.[5],[6]

The denomination "Indigenous Peoples" covers about 370 million peoples who live in about 90 different countries[7], although there are some discrepancies on the number[8] it is acknowledged that they are trustees of "about 80% of the world's cultural diversity and their environments comprise approximately 80% of the globe's biological diversity." Most of the Indigenous Peoples live in past colonies as minority groups that failed to establish their own country. The decolonization process that took place in the second half of the 20th century transferred the power from the colonial State to its allies in most of the countries, with the consequence

5. There are 896,917 Indigenous Peoples in Brazil, distributed among 305 ethnic groups. The principal indigenous ethnic group is the Tikúna, who comprise 6.8% of the total indigenous population. There are around 274 languages. Among indigenous persons over the age of five, only 37.4% speak an indigenous language, while 76.9% speak Portuguese. 502,783 individuals out of the indigenous population in Brazil live in rural zones and 315,180 in urban zones. Currently, there are some 713 indigenous areas, with a total area of 117,387,341 ha. This means that 13.8% of the lands in the country have been reserved for indigenous peoples. The majority of these territories are concentrated in the Amazon. Brazil is the country in South America with the largest known concentration of Indigenous Peoples in isolation in the states of Amap, Acre, Amazonas, Amapá, Acre, Amazonas, Goiás, Maranhão, Mato Grosso, Pará, Rondônia, Roraima, and Tocantins. Currently, there are 107 records of the presence of Indigenous Peoples in isolation in the Amazon region; see 'Indigenous Peoples in Brazil' (*IWGIA*) <www.iwgia.org/en/brazil> accessed 24 June 2019.

6. 'Povos indígenas do Brasil' (*Survival International*) <www.survivalinternational.org/povos/indios-brasileiros> accessed 24 June 2019.

7. Joji Carino and Loreto Tamayo, *Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples (*Indigenous Peoples Major Group for Sustainable Development 2019) <www.iwgia.org/images/documents/briefings/IPMG%20Global%20Report%20FINAL.pdf> accessed 24 June 2019.

8. Sebastian J Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publisher 2014).

that plenty of peoples were left apart from political power in the recently freed States.[9] Currently Indigenous Peoples play a pivotal role in global issues as protecting biodiversity, languages, water resources, traditional knowledge and so on. They became relevant in the International Law context.

The core concern of *Inclusion, Coexistence and Resilience: Key Lessons Learned from Indigenous Law and Methodology* is linked to the recognition of the indigenous societies as such and, because of that, the acceptance by the surrounding society of the coexistence of different legal systems. It raises the difficult question of legal pluralism, which can be understood as the coexistence of multiple legal systems in a given territory during the same period of time.

This book demonstrates, and explains, how all social rules created in a daily basis by the indigenous people's societies is truly customary Law ruling the lives of millions of peoples in the world. Unfortunately, all these creative and multiple legal systems still face difficulties to be recognized as a legitimate means to regulate Indigenous Peoples lives. This is a phenomenon known as legal pluralism, in other words the existence of different legal orders for different people that occupy the same space. It is worth noting that since globalization took over in the late 90, legal pluralism is getting traction. The economic liberalization process granted power to companies, NGOs and different social bodies to solve their own problems and to decrease State`s role in the economic and social life. The voluntaries codes of conduct are spreading out all over the world. In such a *Zeitgeist* it's fair to admit that Indigenous Peoples law as a powerful tool to the self-determination.

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9. Minority here is used as a political concept rather a numerical one. Minority in such a context means marginalization, lack of economic, political and social power.

In the Western legal tradition, the Roman Law implicitly recognized the multiplicity of legal systems. As we know, the Roman Law fostered different rules for Romans[10] and non-Romans, as Gaius pointed out "[e]very people that is governed by statutes and custom observes partially its own peculiar law and the common law of all mankind".[11] As the Roman Law spread out through Europe it encountered different social controls among the conquered peoples. The Romans didn't change the existent legal order but rather admitted such reality. The outcome was the co-habitation of two legal system.

In the medieval times there were specific laws for merchants, nobles, priests and ordinary people. The separation of the church from the State was another way to affirm two severed legal worlds. The very idea of natural law is a recognition of two spheres of legal orders, with the preemption of the first over the second. It was only with the creation of the modern State that the myth of a single legal order became prominent. The legal fiction that all human beings are equal and subject to a unique rule of law acted to dismantle the legal validity of the plural legal order, enforcing the state law as the sole to be applicable in a given territory.

As Professor S. James Anaya[12] highlights since the coming of the European to the American Continent the Indigenous Peoples became a major problem to International Law.

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10. William W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Wm Gaunt & Sons 1990) 52-55.

11. Hans J Wolff, *Roman Law: An Historical Introduction* (University of Oklahoma Press 1951) 82.

12. James S Anaya, *Indigenous Peoples in International law* (Oxford University Press 2004).

Lots of ink has been spent trying to understand how to behave *vis-à-vis* such new and astonishing reality. As a matter of fact, "the colonial encounter with Indigenous Peoples was central to the formation of international law".[13] Indeed, in the early days of the colonization, the encounter was with different nations and the multiple indigenous nations were recognized as such. The British, for instance, used to settle treaties with the Indigenous Peoples. Although these treaties were mostly unbalanced – due to the real power of each side – they granted Indigenous Peoples some legal rights that should have been– theoretically – enforced before the Courts.

In the 20th century the Indigenous Peoples claimed to have a say amongst the nations of the world. It was soon after First World War when the Indigenous Peoples first appeared as an autonomous voice in the international arena. The story of the relations between native peoples and UN is over 40 years long.[14] Even before the foundation of UN, a delegation led by Cayuga Chief Deskaheh traveled to Geneva (Switzerland) on behalf of the Iroquois Six Nations.[15] They were seeking the right to be heard and participate before the former League of Nations. Unfortunately, they

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13. Cathal M Doyle, *Indigenous Peoples, Title to territory, Rights and Resources: transformative role of the free, prior and informed consent* (Routledge 2015) 14.

14. The Secretariat of the United Nations Permanent Forum on Indigenous Peoples, 'Indigenous Peoples and the United Nations' (*UN Department of Economic and Social Affairs*) <www.europarl.europa.eu/document/activities/cont/200804/20080402ATT25555/20080402ATT25555EN.pdf> accessed 22 June 2019.

15. Daniel Thürer and Thomas Burri, 'Self-Determination', *Oxford Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873 05/14/2019> accessed 24 June 2019.

didn't get the right to speak, but it was, no doubt, the first time that a group of Indigenous Peoples, as such, appeared before the so-called community of Nations. The same steps were taken by the religious leader T.W. Ratana after a denial of a requested hearing with King George of the United Kingdom. The Maori complaints at that time was due to the breaking of the Treaty of Watangi[16] (1840) and the ownership of Maori Lands.

The first international organization to demonstrate concerns with "native workers" was the International Labor Organization [ILO][17] which was founded in 1919, as result of the Versailles Treaty. Since 1921 ILO has been showing worries about the precarious conditions of the workers in the colonies. In 1930, ILO approved 29 Convention concerning Forced or Compulsory Labor (Entry into force: 01 May 1932).[18] The 29 Convention provided protection for individuals as such and was not related to the protection of the native people itself. This situation begum to change after World War II, when ILO started to look at the indigenous and colonial peoples. In 1952, ILO nested a pilot program in the Andes, which targets indigenous populations. Following such pilot program, the United Nations requested ILO to

16. The Treaty of Waitangi is New Zealand's founding document. It takes its name from the place in the Bay of Islands where it was first signed, on 6 February 1840. This day is now a public holiday in New Zealand. The Treaty is an agreement, in Mãori and English, that was made between the British Crown and about 540 Mãori rangatira (chiefs); see 'The Treaty in brief' (*Ministry for Culture and Heritage*, 2017) <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief> accessed 22 June 2019.

17. 'History of ILO' (*International Labour Organization*) <www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> accessed 11 May 2019.

18. Convention (No. 29) concerning Forced or Compulsory Labour (adopted 28 Jun 1930, entered into force 1 May 1932) 14th ILC session (ILO No. 29).

discuss a Convention on the Indigenous Peoples. As a result, in 1957, ILO adopted the 107 Convention (C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107).[19] The Convention was ratified by 27 countries of which 10 denounced it. The ILO 107 Convention was based on the concept of integration and assimilation of Indigenous Peoples by the surrounding society or national societies,[20] besides that the Indigenous Peoples as a community were not within the core of the concerns fostered by the Convention.

The Preamble stressed that some measures "to the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries" led to the adoption of the Convention. Based on the Declaration of Philadelphia's proclamation that "all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity "and in the consideration that " there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population".

Article 1 (a) reveals a bias towards Indigenous Peoples "whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of

19. Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries - Indigenous and Tribal Populations Convention (adopted 26 June 1957, entered into force 2 June 1959) 40th ILC session (ILO No. 107).

20. ibid.

the national community". Despite this misconception, the Convention dealt with the major issues affecting Indigenous Peoples such as (i) land,[21] (ii) recruitment and conditions of employment, (iii) vocational training, handcraft and rural industries, (iv) social security and health, (v) education and means of communication.

In 1986, the ILO 107 Convention, under severe criticism of the Indigenous Peoples attention of the peoples, began in its revision process for the first time, with a double participation on the rights reserved for indigenous rights.[22] In the revision process, the most controversial and contentious issue was the replacement of the term populations by peoples, although all questions concerning indigenous lands have also been the subject of heated controversy. As highlighted by the doctrine[23], land discussions included issues such as ownership and possession, protection of property rights, control over natural resources, consent of Indigenous Peoples to be granted prior to the start of prospecting or mineral production, prohibition of transfer of indigenous lands, occupation or unauthorized use of indigenous lands, rules for the claim of territories. Few delegations were composed of individuals who had proven expertise in indigenous issues, however, Portugal, Colombia and Ecuador were represented by people "*with particular expertise in the area of indigenous human rights and who were very knowledgeable and supportive of indigenous*

21. Article 12 includes the idea of free consent for the removal of the Indigenous Peoples form their traditional territories.

22. Dalee S Dorough, 'The Revision of the International Labour Organization Convention n. 107' in Roxanne Dunbar-Ortiz and others (eds), *Indigenous Peoples` Rights in International Law: emergence and application* (Gáldu & IWGIA 2015) 250.

23. ibid 253.

concerns"[24]. Notwithstanding, the terms of the Convention were strongly rejected by the natives. Shortly after its entering into force, the revision movement started among the Indigenous Peoples themselves.

The ILO 169 Convention[25] is deemed to be "[t]o this day, the most comprehensive international law instrument binding on indigenous and tribal peoples in the world, and must necessarily be interpreted in the context of the other human rights instruments of the international system, specifically the United Nations Declaration on Rights of the Indigenous Peoples, approved in September 2007".[26] The ILO 169 Convention is grounded in a completely different basis when compared to ILO 107 Convention. Who is entitled to protection under the rules of ILO 169 Convention? Article 1 (1) (a) (b) establishes that "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" and "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 colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some

24. ibid 255.

25. Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 Jun 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO No. 169).

26. 'Consulta Livre, Prévia e Informada na Convenção 169 da OIT' (*Especiais Socioambiental*) <https://especiais.socioambiental.org/inst/esp/consulta_previa/?q=o-que-e#consulta> accessed 16 May 2019.

or all of their own social, economic, cultural and political institutions." The "definition" of Indigenous Peoples relies upon two pillars being one (i) objective: the descent from the populations which inhabited the country at the time of the conquest and (ii) a subjective: the self-identification as such. Self-identification, as established by Article 1 (2) Self-identification is a fundamental criterion for determining the groups to which the provisions of the Convention apply.

The ILO Convention is based on the recognition of self-determination of the Indigenous Peoples as within a given national state. "Recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live" (Preamble). Self-determination is ensured by the means of the proceedings established in Article 6, which deals with consultations and free, prior and informed consent [FPIC], it's the way by which the Indigenous Peoples assert their will over their territories.

One of the main points of the ILO Convention is its commitment to consultation of Indigenous Peoples when it comes to interventions on their lands, especially when related to the use of natural resources. Article 6(1) (a) establishes that the governments shall consult the concerned peoples through "appropriate procedures", specially through their representative institutions "whenever" they may be affected directly by legislative or administrative measures. Article 6 (2) sets forth that the consultations "shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

Article 6 is of a procedural nature and aims to establish instruments for indigenous and tribal peoples to exercise the rights established, among others, by Articles 4[27] and 7[28] that are substantial in nature. Accordingly, Article 4, when establishing that "special measures necessary to safeguard the peoples, institutions, property, cultures and the environment of the peoples concerned" should be adopted, makes it clear in Paragraph 2 that such measures " shall not be contrary to the freely expressed wishes of the peoples concerned ", i.e. it is for the indigenous and tribal peoples to express their agreement with the proposed measures. In addition, Article 7 recognizes that the addressees of the Convention have

27. ILO No. 169 (n 4) art 4: '1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labor, cultures and environment of the peoples concerned. 2. Such special measures shall not be contrary to the freely expressed wishes of the peoples concerned. 3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures'.

28. ibid art 7: 'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. 2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement. 3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. 4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit'.

the right "to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."

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In September 13, 2007 the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 144 States voted in favor and 4 votes were casted against (Australia, Canada, New Zealand and the United States), since then these countries have changed their former votes to support the document; 11 countries abstained. Currently the UNDRIP is deemed to be "the most comprehensive international instrument on the rights of Indigenous Peoples."[29]

In 1982, the Economic and Social Council (ECOSOC) established a Working Group on Indigenous Populations with the purpose to suggest a set of standards for the protection of the indigenous populations all over the world. This initiative was taken accordingly to a survey made by José R. Martinez Cobo[30] which showed in a very comprehensive way all the difficulties faced by Indigenous Peoples worldwide.

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29. Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007), UNGA Res 61/295 (UNDRIP).

30. José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* (UN Department of Economic and Social Affairs 1987) <www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html> accessed 15 May 2019.

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The Charter of the United Nations[31], proclaimed short after the end of WWII, brought hope to peoples who still lived under colonial rule due to its strong commitment to the self determination of peoples and nations[32]. Self-determination is a concept deeply rooted in the Declaration of Independence of the United States of America which stated that governments should rely 'their just powers from the consent of the governed' and that 'whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it'. The French Revolution developed the concept of popular Sovereignty. The formation of European States such as Germany and Italy were grounded on the idea that every nation (the unity of a people with the same language and culture, occupying the same piece of land) was entitled to be part of the same national state, in the XIX century was an offspring of the afore mentioned concept.

One of the main outcomes of the end of World War II was the proclamation of The Universal Declaration of Human Rights [UDHR] by the United Nations General Assembly, dated December, the 10th, 1948 in Paris. "It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages."[33]

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31. Charter of the United Nations (adopted 24 October 1945, entered into force on 31 August 1965 for all Members) 1 UNTS XVI.

32. ibid art 1 para 2.

33. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

UDHR[34] triggered strong liberation movements amongst colonial peoples that fought in the World War II. For the first time in modern history a solemn proclamation stressed that all human beings were equal in dignity and rights. In its preamble, the Declaration sets forth the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Preamble also added that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people." As a consequence, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, whereas it is essential to promote the development of friendly relations between nations". Nevertheless, the Declaration couldn't hide the contradiction in the recognition of the very existence of peoples without self-determination and living under colonial rule, "the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

Clearly, Article 2 of the UDHR shed light in the hearts and minds of peoples that, by the time of the Declaration, were submitted to foreigners' colonial powers. Indeed, Article 2 meant a hope of equality and fairness which hardly should be set aside by the member States of UN, "[e]veryone is entitled to all the rights and freedoms set forth

34. The UDHR is available at <www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> accessed 14 May 2019.

in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

Since the 1980s several countries have recognized, at the constitutional level, the rights of Indigenous Peoples. Such a movement is contemporaneous with the re-birth of democracy movement experienced by several nations, especially in Latin America. It is not necessary to make a complete inventory of such Constitutions, although eloquent examples can be: (1) the Brazilian Constitution of 1988, articles 231 and 232[35], which set forth a broad list of Indigenous Peoples

35. Brazilian Constitution, art 231: 'Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property. Paragraph 1. Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions. Paragraph 2. The lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein. Paragraph 3. Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law. Paragraph 4. The lands referred to in this article are inalienable and indisposable and the rights thereto are not subject to limitation. Paragraph 5. The removal of Indian groups from their lands is forbidden, except ad referendum of the National Congress, in case of a catastrophe or an epidemic which rep- resents a risk to their population,

rights; (2) The Constitution of Peru[36]; (3) The Constitution of Bolivia[37] and (4) the Equator Constitution[38] that besides recognizing the rights of nature[39], recognizes the Indigenous

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or in the interest of the sovereignty of the country, after decision by the National Congress, it being guaranteed that, under any circumstances, the return shall be immediate as soon as the risk ceases. Paragraph 6. Acts with a view to occupation, domain and possession of the lands referred to in this article or to the exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal effects, except in case of relevant public interest of the Union, as provided by a supplementary law and such nullity and voidness shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law. Paragraph 7. The provisions of article 174, paragraphs 3 and 4, shall not apply to Indian lands. Article 232. The Indians, their communities and organizations have standing under the law to sue to defend their rights and interests, the Public Prosecution intervening in all the procedural acts'.

36. The Constitution of Peru, art 88: 'The State preferentially supports agricultural development and guarantees the right to ownership of the land, whether private, communal, or in any other form of partnership. The law may define boundaries and land area based on the features of each zone. According to legal provision, abandoned land reverts to State ownership, to be placed on the market'; art 89: 'The rural and native communities have legal existence and are corporate entities. They are autonomous in their organization, community work, and the use and free disposal of their lands, as well as in the economic and administrative aspects within the framework provided by law. The ownership of their lands may not prescribe, except in the case of abandonment described in the preceding article. The State respects the cultural identity of the rural and native communities'.

37. The Constitution of the Plurinational State of Bolivia, in its Preamble refers to Mother Nature [Pacha Mama]: We found Bolivia anew, fulfilling the mandate of our people, with the strength of our Pachamama and with gratefulness to God.

38. The Equator Constitution in its preamble refers to Mother Nature [Pacha Mama](We found Bolivia anew, fulfilling the mandate of our people, with the strength of our Pachamama and with gratefulness to God.)

39. Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the

Peoples judicial system[40].

The existence of constitutionally recognized rights has served as a strong incentive for indigenous and tribal peoples to seek its compliance before the different courts of justice, whether national or international. The collective rights of

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rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem. Article 72. Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences. Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles. The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden. Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living. Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State. <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 16 March 2019.

40. Article 171. The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee for the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments The State shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to monitoring of their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction.

Indigenous Peoples in South America[41] are gradually gaining recognition, especially with regard to territorial rights. The constitutional recognition of indigenous rights in Brazil, for example, dates to the 1930s, it was already present in the Constitutions of 1934[42] and 1937[43]. The 1946[44] Constitution, marking the democratic resurgence, essentially kept the provisions contained in the previous Letters. For its part, the 1967[45] Constitution amplified indigenous rights, with a clear mention of their lands[46]. In spite of the Constitutional rights written in the Brazilian Constitution, the Indigenous Peoples still fight to the plain enforcement of their legal rights.

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41. Paulo de B Antunes, *A Convenção 169 da Organização Internacional do Trabalho na América do Sul* (Lúmen Juris 2019).

42. Article 129. The possession and occupation and rights to the land of the indigenous communities where they are permanently located will be respected, and it is prohibited to sell or encumber their rights to the land in any way, shape or form. <https://pib.socioambiental.org/en/Constitution> accessed 23 June 2019.

43. Article 154. The possession and occupation and rights to the land of the indigenous communities where they are permanently located will be respected, and it is prohibited to sell or encumber their rights to the land in any way, shape or form." <https://pib.socioambiental.org/en/Constitution> accessed 23 June 2019.

44. Article 216. The possession and occupation and rights to the land of the indigenous communities where they are permanently located will be respected, on the condition that they do not transfer their rights to the land." ibid..

45. In 1964 there was the overthrow of the constitutional regime and the beginning of an authoritarian regime that lasted until 1985.

46. Article 186. The possession and occupation and rights to the land of the indigenous communities where they are permanently located is recognized, as well as their exclusive y rights to use the land and the natural resources and all the utilities existing therein." Constitutional Amendment 1/ 1969: "Art. 198 – The lands inhabited by the indigenous communities cannot be encumbered or transferred in the terms that the federal law specifies, The possession and occupation and rights to the land of the indigenous communities where they are permanently located is recognized, as well as their exclusive rights to the utilization of the natural resources and all the utilities existing therein."

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Inclusion, Coexistence and Resilience: Key Lessons Learned from Indigenous Law and Methodology deals with all the issues mentioned in this preface in depth and demonstrates the current situation of the enforcement of the broad legal framework that protects the indigenous people's territories, traditions and way of life. The book is a huge achievement of collaborative action and research and a step forward in the field.

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PART I
INTRODUCTION

What Can We Learn from Indigenous Law And Methodology?

Giulia Parola
Margherita Paola Poto

"*Another world is not only possible, she is on her way.*
On a quiet day, I can hear her breathing" (Arundhati Roy)

1. Indigenous Law and Methodology: Bringing out Submerged Treasures and Worlds

This book contains refereed contributions presented during the workshop on Indigenous Law and Methodology that took place in Oslo in July 2-7 2018 and was funded by the Young CAS Program 2018 (Center for Advanced Study at the Norwegian Academy of Science and Letters, Oslo). Other contributions, connected to the theme, enrich the spectrum of viewpoints on the indigenous discourse.

At seed level, the idea that inspired both workshop and book project is that indigenous knowledge deeply contributes to enrich laws and research, gently nudging them to change, and training the Western legal systems to listen to other voices that were silenced for long.

Indigenous knowledge, observations, cosmologies and traditions (that, in one expression, we define as "*indigenous law*") have drawn criticism for adopting 'non-scientific' and 'non-objective' methods. The way to respond

to this challenge is by rejecting accounts of objectivity that rely on the universalization of models (that can derive from State-oriented perspectives, colonialist approaches and in general from asymmetric relations of powers) and by endorsing alternative proposals that leave room for indigenous worldviews (by means of the "*indigenous methodology*"). The indigenous methodology, therefore, takes due account of indigenous and local perspectives and integrates them with further relevant existing data on key issues such as human rights protection, procedural and substantive environmental rights, food safety and security, right to free movement of peoples, immigration and gender. At the heart of the indigenous methodological approach is a deep and abiding commitment to identifying, articulating, and applying the intellectual resources from indigenous legal orders to the work of rebuilding indigenous citizenries and governance.

In other words, the indigenous methodology brings us back the indigenous law treasure, together with its teachings. In this vein, we have identified three key lessons learned by adopting an indigenous methodology that takes into account indigenous perspectives, traditions and worldviews and these key lessons are connected to the values of coexistence, inclusion and resilience. This collection of works gathers reflections around these three main themes, culminating in a body of knowledge that investigates, scrutinizes and shows the epistemic reliability, objectivity and inner values of indigenous perspectives.

2. Key Lessons Drawn from the Training on Indigenous Law and Methodology

As said, the workshop and the reflections around indigenous law and methodology helped us open up new perspectives on possible blended methodologies that combine legal analysis, anthropology, sociology, social and gender studies.

Along this road, talks, discussions and exchanges of ideas have accompanied us in the process of involving and gathering a diverse pool of scholars with different backgrounds but with a shared passion on the indigenous world. Such passion led the group of scholars to look in the same direction, delving into: the analysis of *inclusion* and openness between humans and non-humans, individuals, collectivities and natural world; the value of a peaceful *coexistence* of legal orders and perspectives; the scrutiny of the indigenous world's ability to be *resilient* towards change.

These interconnected key lessons that emerge from the words of our contributors are also shared values in the indigenous world.

First, it is from the indigenous views that we learn the importance of *inclusion*. It is indeed a shared indigenous value the idea that the human beings are active caretakers of each other and of the Planet, cooperating in the construction, maintenance and protection of the web of life, with a sense of oneness between individuals, communities and natural world.[47] Indigenous cosmologies teach us the importance to embrace our deep connection with nature, with our ancestors and with all the living beings. Such profound

47. Gregory Cajete, *Native science: Natural laws of interdependence* (Clear Light Publishers 2019).

interconnection between human beings and nature has reverberations on the legal domain as well, suggesting the idea that official legal orders have to include and to be interconnected with norms that defend and protect peoples, communities and the natural world against fundamental rights' violations.

Second, the indigenous world teaches us the value of *coexistence*[48]. Indigenous ontologies place coexistence as a paramount value and as indigenous societies are inclusive of human and non-human beings (animals, trees, water, fire, wind, earth and all kinds of spirits), they also accommodate and make sure that indigenous and non-indigenous worlds, ontologies and actors encounter and coexist in a peaceful and lasting relationship. The effects on the legal world enable the coexistence of diverse legal systems in an interactive way and with a relative degree of autonomy. In the same vein, indigenous legal systems and international and national laws on Indigenous Peoples should aim to coexist in a harmonious way.

Therefore, *inclusion* and *coexistence* are the golden rules governing the interconnection of different legal orders, whereby these orders learn from each other the value of acceptance, comprehension and exchange, and-not least-reconciliation.

The third lesson is taught by the value of *resilience* in the face of adversity, trauma, tragedy, threats or changes. Resilience can be learned from indigenous legal orders that have withstood the wave of marginalization and developed

48. See among others Soren C Larsen and Jay T Johnson, *Being Together in Place: Indigenous Coexistence in a More Than Human World* (University of Minnesota Press 2017).

around systems of governance that are now exemplary models of mitigation and adaption in challenging times where both societal and climate changes are threatening humans and non-humans.

The key three lessons operate at a level of law and legal systems (indigenous and non-indigenous), bringing out at the same time new insights in the way of approaching the law, in the consolidation of methodologies and research perspectives that innovatively enhance the interactions between indigenous and non-indigenous views.

Thus, the three key lessons are not only illustrative of new interactions between legal orders and cultures, they also show the way of a new participatory and inclusive research approach as the way forward to the solitary confinement of the screen-based research that too often becomes self-referential and is an end in itself. Participants' observations and interactions between researchers and participants show the way towards novel approaches in legal research: research team members and communities co-create the research results, become part of the same observation process; are immersed in the same setting, hearing, seeing and reality experiencing.

This way, the observer alters the observed phenomena to the very degree that s/he actively participates to it (the phenomenon is known as "Heisenberg observer effect"[49]). And ultimately, researchers are free from the yoke of being self-referential and rediscover their purpose.

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49. Alexander Wendt, Quantum Mind and Social Science. Unifying Physical and Social Ontology (Cambridge University Press 2015); Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (SAGE Publications 2006).

3. Inclusion, Coexistence and Resilience in the Filigree of the Contributions

In line with described system of values, the chapters in this book implicitly or explicitly refer and relate to the need of: *inclusion* and interaction between different legal orders (and namely in the chapters written by Porrone, Turner, Forsgren); *coexistence* of diverse legal orders (and namely in the chapters written by Tsiouvalas, Sergon-Kirwa, Nogueira-Britto-Parola); *resilience* as the answer to climate change and societal challenges (in the chapters of De Gregorio and Wallace).

3.1 Inclusion

The collection opens with a thorough analysis on cases of Indigenous Peoples' inclusion in the process of consultation and of legal recognition of fundamental participatory rights to Indigenous Peoples. Logan Turner's chapter, *Consultation of Indigenous Peoples in Mining Projects in Canada: A Scoping Review,* opens Part II, delving into procedural and substantive rights granted to the Indigenous Peoples. His work is originally developed as a scoping review, analyzing the Indigenous Peoples' consultation process in mining projects in Canada. Logan enriches his research with an in-depth scrutiny of the connection between the legitimacy of the consultation process and the perceptions that the parties have of the process.

By observing how external legitimacy is connected to subjective perceptions, Logan gives new impetus to the idea that legal systems are anchored on the integer and reliable

power relations.

Arianna Porrone's work, *Adequate Compensation in Case of Expropriation of Tribal People's Land: the Case of Belo Monte, Brazil,* raises the same pressing question on equality, in its meaning of handling identical situation in the same way, but also of handling different situations in different ways. Equality requires to act with a sense of coexistence and inclusion: the State law has to acknowledge, regulate and implement fundamental rights that apply to all the actors of the society, be them non indigenous, indigenous or traditional peoples. Arianna's research on tribal peoples of Brazil combines grounded theory and fieldwork and offers concrete suggestions on how to treat equally tribal communities and indigenous groups, showing thus a possible way towards a more inclusive society.

The discourse on indigenous participatory rights continues in Adrian Forsgren's chapter, *Indigenous Participation Rights in the Arctic Council,* that argues in favor of the effective equal participation of indigenous groups and States in the environmental decision-making in the Arctic Region. Adrian makes the reader reflect on the importance of recognizing traditional knowledge and thus integrating it with science-based research. Finally, he is of the idea that the reflections on indigenous lifestyles and cosmologies can guide towards sustainable life choices that can be shared by both indigenous and non-Indigenous Peoples.

3.2 Coexistence

Part III opens with Apostolos Tsiouvalas' reflections on the co-existence of different legal orders. In his Chapter titled *From Theory to Practice: Tracing Law Through the Study of Coastal Sámi Marine Tenure,* Apostolos develops his theme

on the indigenous legal traditions of the Northern Coastal peoples in the county of Troms (Sea Sámi and traditional fishers), still kept alive and somehow co-existing with the Norwegian system of coastal governance. In conducting his research project, Apostolos has been fully involved in coastal activities, made deep connections with the sea peoples, heard their stories and conveyed them to us. He engaged himself in indigenous lives and narrated a story of his experience, observing the local and indigenous fishers struggling with the demands of the market economy, the national regulation and the consequent restrictions of local and traditional systems of governance. In his contribution, Apostolos makes us reflect on past wounds and injustices, but also on possible ways to revitalize ancient traditions and knowledge around the indigenous marine tenure system.

The chapter that follows, *Effect of Legal Transplant on Customary Law in Kenya,* is co-authored by Joseph Kiplagat Sergon and James Ombaki Kirwa, our two Kenyan legal experts that reflect on the richness of a pluralistic country as Kenya, where customary law plays a central role in forming the societal fabric. Their contribution somehow carries on Apostolos' idea of a multi-layered system of governance, by highlighting the complexity of pluralistic orders where State-law coexists with other legal traditions, customs, and indigenous knowledge. Their ultimate aspiration is to harmonize the different systems, maintaining their characteristics and unicity.

Zooming in on pluralistic orders with a clearly defined indigenous component, Thaiana Conrado Nogueira, Thomaz Muylaert de Carvalho Britto and Giulia Parola explore in the article *Indigenous Law in Latin America Constitutionalism: the case of Indigenous Jury in Brazil,* the complexity

of legal pluralism enshrined in the Brazilian Constitution of 1988 and in the recent Ecuadorian and Bolivian Constitutions, that embrace indigenous worldviews and give full recognition to indigenous rights, laws and cosmologies.

3.3 Resilience

Part IV is dedicated to the challenges posed by climate change to indigenous and non-indigenous communities in the Circumpolar Region, known for being one of the most vulnerable and yet resilient areas in our Planet.

Looking at the indigenous resilience from an intersectional perspective, Elizabeth Wallace in the chapter on *Climate Change Implications for Mental Health in Inuit Communities: An Intersectional Perspective,* explores the interconnections between climate change, indigenous mental health and gender, and provides key insights on the need to develop a holistic governance system that takes into full consideration all the elements of the intricate fabric of indigenous laws, indigenous and State legal orders and worldviews.

Through the analysis of indigenous choices as sustainable counter-actions to climate change, Valentina De Gregorio scrutinizes in her chapter on *Arctic Indigenous Peoples: From Climate Change Challenges to Food System Resilience,* the indigenous food systems in the Arctic, expanding her reflections to the role that food plays in shaping societies and traditions. Food traditions, according to Valentina, preserve biodiversity, provide nourishment for the community members without depleting the natural world and therefore ensure continuity of a sustainable community development, in harmony with the surrounding environment.

4. The New World on Her Way

Exposing ourselves to the indigenous world and reflecting upon the wounds of our beautiful Planet and her human and non-human inhabitants equipped us with a long-term vision that starts from the horizon drawn around inclusion, coexistence and resilience and goes beyond it.

Human influence on nature degradation requires a shift in the understanding of our Planet treasures as exploitable resources to one that recognizes the coexistence of self-regulated, comprehensive systems of physical and human components. In response to this timely need, our vision looks at a new world informed by nature's principles and indigenous worldviews. The model is grounded on the premise that ontological perspectives and processes posited in legal inquiries are subject to *physics* constraints, therefore they must be consistent with the laws of physics (the principle is known as "causal closure of physics"). In pursuing the vision of a fully interdependent, inclusive and resilient world, we look at the laws of nature as our ruling model. Similarly, indigenous communities focus on the essential and integrated components of nature to design legal orders in harmony with it.

Our vision builds on the achievements of quantum physics and its grounding principles (entanglement, holism, and superposition of states) to design a new ontology of human and non-human relations.

Quantum physics principles can help in the design and formation of the new world, with the principles of entanglement and holism helping to set up the ontology of the model in its interconnected and referential elements (nature and humans, as individuals and communities). Good governance laws endorsed by the novel model regard the

actors as holographic (hologram=to write the whole): the actors are conceived as holographic and holistic in the sense that they are regarded as knowledge-keepers of the information that sustains the natural world and its ecosystems. Such information is recorded in each individual and community that deeply depend on nature for their survival; it rules the communities, it is embedded in stories, legends and traditions that guide the habits and customs of the communities towards the natural world. This novel legal status has also effects on the definition of a participatory rather than a compositional relationship between parts and whole: the whole is present *in* the parts, not made up *of* them.

In addition to a holistic and inclusive vision, supported by quantum principles, good governance in the model can benefit from the principle of the superposition of states, that allows the coexistence of different approaches that otherwise would be clashing and incompatible with each other. Applied to the new ontological model, the principle has the potential, among others, to validate the co-existence of State and community levels in sustaining humans and nature, by contemplating the contemporaneousness of top-down decision-making (State and intra-state decisions) and collective and community-based actions (local and indigenous decisions). One of the consequences in this application of the superposition of states to the different levels of governance, is the possibility of an interaction and a trade-off between two otherwise conflicting states, with entangled and collective impacts in the protection of nature. Consequently, indigenous and local knowledge becomes an integral part of the regulatory framework, with the inclusion of nature's rights as a central part of the protection.

The compatibility between indigenous worldviews and quantum-like principles also has advantages in the authentication of methodologies (such as indigenous methodologies) that provide significant and successful responses to environmental crises. The observer-created reality, for example, states that reality is deeply affected by the way it is observed; it introduces the importance of the personal experience in physical science, and of consciousness and attentiveness in identifying the correct ways to sustain the Planet. The legal method alone has not been able to provide this. Observer-created reality is also a common feature of indigenous cosmologies and consequently, methodologies: all the elements of nature, both humans and non-humans, are acknowledged as possessing agency. Such interpretation of agency places humans and non- humans in a symbiotic relationship where human consciousness and nature communicate, create and co-create their relationships. This new ontological perspective needs a nature-centred paradigm, rather than a State or human-centred one. Indigenous worldviews, as deeply interconnected as they are to the natural world and natural world's observations, are essential to restructuring the new world that we all -as sentient beings- can hear breathing on a quiet day.

Rio de Janeiro – Tromsø, 9 August 2019

"A dream you dream alone, is only a dream
A dream you dream together is reality"
(Yoko Ono)

PART II
INCLUSION

Consultation of Indigenous Peoples in Mining Projects in Canada: A Scoping Review

Logan S. Turner

Abstract

The relationship between the Canadian State and Indigenous Peoples is fraught with challenges. While the relationship concerns many portfolios, one of the most controversial topics is the governance of natural resources. The duty to consult is a legal doctrine that has developed and evolved through Supreme Court rulings and other Canadian case law with the goal of facilitating the relationship between the State and Indigenous peoples. However, the duty to consult is plagued by problems in terms of its theorization and its implementation. Given these persistent complications, this Chapter will address the question: what is known from existing academic literature about the concept of consultation of Indigenous Peoples regarding mining projects in Canada? Using a scoping review, the analysis reveals four main characteristics associated with consultation of Indigenous Peoples in mining projects: legitimacy; power; responsibility; and perception. An important finding of this study is that most of the academic commentary directed towards the manifestation of the duty to consult has been negative. This Chapter will end with a discussion about what is missing from the academic discourse – notably the limited acknowledgment of resolved or disputed Indigenous legal jurisdictions over land and resources.

Keywords: *Consultation; Mining; Indigenous Peoples; Canada; Duty to Consult*

1. Introduction

The historical and contemporary relationship between the Canadian State and Indigenous Peoples is one fraught with challenges.[50] The development of Canadian case law has birthed a legal doctrine called the "duty to consult" as a mechanism to facilitate the relationship between Canadian governments and Indigenous Peoples, with the ultimate goal of reconciliation. However, the duty to consult is plagued by problems in terms of its theorization and its implementation in the Canadian context. Given these persistent complications, this study will ask the research question: what is known from existing academic literature about the concept of consultation of Indigenous Peoples regarding mining projects in Canada? To answer the question, this Chapter will employ a scoping review methodology. The rest of this

50. As a quick note on terminology, I will strive to be consistent in my use of terms. The term Indigenous Peoples refers to the collective original inhabitants on the land now commonly called Canada. Aboriginal is a legal term specific to Canada that refers to Indigenous Peoples and is only used when referencing historic legal documents or case law. First Nations, Metis and Inuit are distinct legal categories of Aboriginal people, as defined by Section 35(2) of the *Constitution Act, 1982*. Further, specific nations and communities are referenced whenever possible. While this Chapter often uses the umbrella term Indigenous Peoples, it needs to be noted that there is tremendous diversity amongst Indigenous Peoples in Canada in terms of demographics, culture, religion, political beliefs, worldviews, etc. When Indigenous Peoples is used, it should not be interpreted that every Indigenous person and nation share the same experiences or convictions.

Chapter will unfold in six sections before concluding. First, the emergence and clarification of the duty to consult will be discussed. Then, the relationship between Indigenous Peoples and the Canadian mining sector will be explored. Third, the methodology will be introduced. After, the results of the study will be shared. Next, the results will be discussed with a focus on the inter–dependence of the emergent themes. Last, limitations of the study will be mentioned. It is hoped that this study will map out important characteristics associated with consultation in Canada as currently being discussed in the academic literature.

2. Consulting Indigenous Peoples in the Canadian Context

Outside of the legal context, the idea of consultation is typically quite straightforward. Friends consult one another about weekend plans, spouses consult one another before making major career decisions. Democratic governments typically do the same thing; they consult relevant stakeholders before making any decisions that could affect the lives of their citizens. The Organization for Economic Cooperation and Development (OECD) defines consultation as "actively seeking the opinions of interested and affected groups [...that] is increasingly concerned with the objective of gathering information to facilitate the drafting of higher quality regulation".[51] It appears that the Canadian federal government

51. Delia Rodrigo and Pedro A Amo, *Background Document on Public Consultation* (Background Document on Public Consultation 2006) <www.oecd.org/mena/governance/36785341.pdf> accessed 16 August 2019.

recognizes the importance of public consultations as, at the time of writing, they were holding 81 temporary or ongoing public consultations.[52] However, the consultation of Indigenous Peoples in the Canadian context is much more complex because of the emergence of what is known as the "duty to consult" doctrine, arising from the development of Canadian case law around Aboriginal and treaty rights.

2.1 Development of the Duty to Consult Doctrine in Canadian Case Law

It is difficult to decide where to begin in Canadian history when trying to understand the Euro–Canadian legal relationship with Indigenous peoples, given the long history of interaction. However, with its direct relevance to the development of the duty to consult doctrine, this Chapter will start with the 1973 *Calder* case. In a case named after Nisga'a chief Frank Calder, the plaintiffs argued that aboriginal title to their ancestral lands has never been extinguished in the history of European colonialism.[53] While the plaintiffs were ultimately unsuccessful in their case, the rule established "aboriginal title [to land] as a legal right derived from the Indians' historic occupation and possession of their tribal lands."[54]

Later, section 35 of the 1982 *Constitution Act* of Canada enshrined aboriginal and treaty rights in statutory law, stating that "the existing aboriginal and treaty rights of aboriginal peoples are hereby recognized and affirmed," where Aboriginal peoples include the Indian (First Nations), Metis

52. 'Current consultations by title' (*Government of Canada*, 2018) <www.canada.ca/> accessed May 2019.

53. *Calder et al v. Attorney–General of British Columbia* (1973) S.C.R. 313.

54. As cited in *Guerin v. The Queen* (1984) 2 S.C.R. 335.

and Inuit peoples of Canada.[55] The *Act* goes on to clarify that "'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."[56] Defined by the Canadian government as "practices, traditions and customs that distinguish the unique culture of each First Nation and were practiced prior to European contact,"[57] the *Constitution Act* also guaranteed the existence and protection of aboriginal rights.

The first mention of a duty of consultation occurs in the oft–cited *Delgamuukw* case, in which it was argued that "the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation", as per Lamer C.J. and Cory, McLachlin and Major JJ.[58] The Supreme Court ruling added that while Aboriginal title is not absolute, if the Canadian government approves a justifiable infringement of Aboriginal title, the infringement should be minimal, affected Indigenous Peoples should be consulted about the infringement, and they may be entitled to fair compensation.[59] This ruling first established the need to consult Indigenous Peoples when their Aboriginal title was being infringed.

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55. Department of Justice Canada, *A Consolidation of The Constitution Acts 1867 to 1982* (2013) 63 <http://laws–lois.justice.gc.ca> accessed May 2019.

56. ibid.

57. 'Aboriginal Rights' (*Government of Canada*, 2010) <www.aadnc–aandc.gc.ca> accessed May 2019.

58. *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010.

59. Gurston Dacks, 'British Columbia after the Delgamuukw Decisions: Land Claims and Other Processes' (2002) 28(2) Canadian Public Policy 239.

The duty to consult doctrine is commonly recognized to have emerged and be refined by the jointly–released 2004 Supreme Court decisions in the *Haida Nation* and *Taku River Tlingit* cases. In the *Haida Nation* case, the Supreme Court insisted that "the duty [to consult] arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[60] Adding to this, the Supreme Court ruled that "the effect of good faith consultation may be to reveal a duty to accommodate."[61] The *Haida Nation* ruling further clarified that the duty to consult and accommodate is rooted in the Crown's honour and with the goal of advancing reconciliation; that the extent of consultation is dependent on the strength of aboriginal rights or title and the potential harms caused to it; that the process does not provide a veto to Indigenous Peoples over government policies and actions; and that while procedures of consultation may be delegated to third parties, the duty to consult is ultimately the Crown's duty because the honour of the Crown cannot be delegated.[62]

The *Taku River Tlingit* case clarified that there does not need to be a separate consultation process just for Indigenous Peoples and that the duty to consult and accommodate does not guarantee a specific outcome, again limiting the idea of a so–called "Aboriginal veto."[63] This is made clear when the Supreme Court declares that "the Province was not under a

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60. *Haida Nation v. British Columbia (Minister of Forests)* (2004) 3 S.C.R. 511.

61. ibid.

62. ibid.

63. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004) 3 S.C.R. 550.

duty to reach agreement with the Taku River Tlingit First Nation."[64] In the 2005 *Mikisew Cree* case, the Supreme Court further clarified that the duty to consult applies in the context of treaty rights, in addition to Aboriginal rights, and in the context of asserted rights, in addition to established rights.[65]

Since these rulings in 2004 and 2005, there has been an explosion of litigation and court decisions revolving around the duty to consult. One recent Supreme Court decision that is relevant to this Chapter is the 2014 *Tsilqot'in Nation* case, in which the Court ruled that in cases where Aboriginal title is established, infringements are only permitted "with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty."[66] This is relevant because it means that when Aboriginal title is recognized, the duty to consult is at the highest end of the spectrum, and land development can only take place in the two situations mentioned above.[67] This is true for both proposed and existing projects.[68]

2.2 Clarifying the Duty to Consult

While the duty to consult is firmly rooted in Canadian case law, many uncertainties about the nature and the extent of the statutory obligation persist. This section will briefly

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64. ibid.

65. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005) 3 S.C.R. 388.

66. *Tsilqot'in Nation v. British Columbia* (2014) 2 S.C.R. 257.

67. Raving Bains and Kayla Ishkanian, *Duty to Consult with Aboriginal Peoples – A Patchwork of Canadian Policies* (Fraser Institute 2016) <www.fraserinstitute.org> accessed 16 August 2019.

68. ibid.

review legal analyses to clarify relevant questions about the duty to consult.

Originating in section 35 of the 1982 *Constitution Act*, the duty to consult has constitutional status, meaning that governments must respect the legal doctrine and that it takes priority over government legislation and other conduct.[69] Further, it is argued that since the duty to consult is "grounded in the principle of the honour of the Crown,"[70] consultation between the government and Indigenous Peoples must be meaningful and should represent a good faith effort to account for and mitigate any infringements on Aboriginal right or title.[71] What meaningful and good faith consultation and accommodation means or looks like however, is highly contested.

Interestingly and possibly controversially, this "meaningful and good faith" requirement of consultation also applies to the Indigenous Peoples being consulted. In a 1999 ruling by the British Columbia Court of Appeal in the *Halfway River First Nation* case, it was ruled that Indigenous Peoples cannot obstruct the consultation process through refusal of participation or by making unreasonable demands.[72]

Concerning the question of who is involved in consultation, there are three main parties identified in the literature that play a role in the process: the federal and provincial governments; Indigenous communities, organizations and

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69. Dwight Newman, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Resource Sector* (Macdonald-Laurier Institute 2014) <www.macdonaldlaurier.ca> accessed 16 August 2019.

70. Haida Nation v. British Columbia (n 60).

71. Newman (n 69).

72. Thomas Isaac and Anthony Knox, 'The Crown's Duty to Consult Aboriginal People' (2003) 41(1) Alberta Law Review 49.

peoples; and private mining corporations.[73] Specifically, it is both the federal and the provincial governments who are the parties that are legally obligated to exercise the duty to consult.[74] While the *Constitution Act, 1867* identifies Indians and lands reserved for Indians as the exclusive responsibility of the federal government, the honour of the Crown to consult Indigenous Peoples must also be upheld by provincial governments when they contemplate conduct within their own legislative authority.[75] This can be problematic however, because there has historically been a lack of regulatory harmonization and cooperation between the two levels of government.[76]

An example of this potential confusion about who is required to consult is in the case of natural resource management. The provincial government has jurisdiction over natural resources, so it should be solely the responsibility of the provinces to consult and accommodate Indigenous peoples.[77] However, there are also certain contexts, such as uranium mining and interprovincial pipelines, where the federal government has primary jurisdiction and must exercise the duty to consult, sometimes in collaboration with the province.[78] The jurisdictional question is further complicated in

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73. William Hipwell and others, *Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change* (The North-South Institute 2002) <http://caid.ca/MiningCons2002.pdf> accessed 16 August 2019.

74. Isaac and Knox (n 72).

75. ibid.

76. ibid.

77. Newman (n 69).

78. ibid.

the Territories,[79] where varying levels of devolution of power has given each territorial government different responsibilities and authority over natural resources.[80]

Moreover, the issue of how the duty to consult is administered by the various levels of government is important, because it is "triggered" very frequently. The federal department of Indigenous and Northern Affairs Canada estimated in 2011 that the duty to consult is "triggered for some provinces over 100,000 times per year and for the federal government over 5,000 times per year."[81] A recent study from the Fraser Institute outlines the "patchwork of Canadian policies" around duty to consult provisions, with some provinces relying on draft policies rather than finalized ones; others not legislating a responsibility for Indigenous Peoples to participate in consultation; and most governments clearly offloading procedures of consultation to project proponents.[82] This lack of clear, consistent regulations is important to remember as the Chapter progresses.

Overall, while Canadian jurisprudence and legislation have aimed to develop and clarify the duty to consult, there remain many questions, challenges, and confusion about the parameters and requirements around the duty to consult Indigenous Peoples in Canada.

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79. The Territories refers to the three northern administrative regions in Canada – Yukon Territory, the Northwest Territories and Nunavut. They have less governmental power than the ten Canadian provinces, which all have considerable autonomy accorded to them in the Canadian Constitution on matters of local provincial jurisdiction, including health, education and natural resources.

80. ibid.

81. Bains and Ishkanian (n 67) 1.

82. ibid.

3. Mining and Indigenous Peoples in Canada

The opening line in a 2016 mineral investor's guide, prepared by the federal department Natural Resources Canada, claims that "Canada is widely regarded as one of the best destinations in the world for mineral investment."[83] The guide goes on to argue the importance of minerals and mining to the Canadian economy. In 2015, Canada's domestic mineral commodity exports were valued at $91.7 billion (CAD) and accounted for 19% of its total merchandise exports; and in 2014, mining–related support activities and the mineral processing sector accounted for 3.6% of Canada's gross domestic product and directly employed about 370,000 workers across the country.[84] The Mining Association of Canada adds that the mining industry indirectly employed a further 190,000 workers, and in 2015 the average salary for a mining worker was greater than $115,000 (CAD).[85] Further, it is claimed that the mining industry is the largest private sector employer of Indigenous Peoples in all of Canada.[86] Needless to say, the mining industry represents an important sector and contributor to the Canadian economy and appears at face value to be an important employer of Indigenous peoples.

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83. Government of Canada, *Exploration and Mining in Canada: An Investor's Brief* (Minister of Natural Resources 2016) 2 <www.nrcan.gc.ca> accessed 16 August 2019.

84. ibid.

85. Brendan Marshall, *Facts and Figures of the Canadian Mining Industry F&F 2016* (Mining Industry of Canada 2016) <http://mining.ca> accessed 23 March 2019.

86. ibid.

Indeed, there are writers who argue that the mining industry, alongside other extractive sectors, provide great opportunities for socio–economic development in many Indigenous communities. Some point to the voluntary initiatives proposed by mining corporations as a sign that these corporations are moving towards a new standard of accountability, respect and transparency in their relationships with Indigenous peoples.[87,88] Others point to examples of Indigenous communities harnessing the economic benefits of mining opportunities to improve health and social outcomes by clearly dictating the terms on which they will work and negotiate with third–party corporations. One such example comes from the Tahltan Nation in Northern British Columbia, which saw a complete reversal in several socio–economic indicators after the drafting of their own Resource Development Policy and the creation of the community–owned Tahltan Nation Development Corporation to regulate resource development and mining activities on traditional Tahltan lands.[89] Statistics collected about the Tahltan Nation in 1985 saw 65% and 98% rates of unemployment in the

87. One proposed example is the "Tool for Assessing Aboriginal and Community Outreach Performance", developed by the Mining Association of Canada (MAC) as part of its Towards Sustainable Mining program. As part of this tool, all MAC members must allow for self– and third party–assessment of their performance in consulting and accommodating the interests of concerned Indigenous communities.

88. Jim Cooney, *Mining, economic development and indigenous peoples: getting the governance equation right* (McGill University 2013) <www.mcgill.ca/isid/files/isid/mcgill_2013_summer_forum_-_final_report.pdf> accessed 16 August 2019.

89. Sonia Molodecky, *Indigenous Participation in Resource Development: A Paradigm Shift* (Rimisp 2016) <http://www.rimisp.org/wp-content/files_mf/1467380547196_Sonia_Molodecky.pdf> accessed 16 August 2019.

summer and winter, 80% of community members living on welfare, high suicide rates and low educational standards.[90] Newer numbers from 2006 however, point to 95% and 100% summer and winter employment rates, a non–existent suicide rate and dramatic increases in high school graduation rates.[91] These examples do seem to suggest that there may be benefits for Indigenous nations when they engage in mining projects in Canada.

However, there are others who argue that extractive industries lack regard for environmental, social or cultural considerations, that they further empower the neo–imperialist State, and that such projects have greater costs on local communities than the supposed benefits.[92] Further, several studies looking at the impact of mining on Indigenous communities found that mining activities lead to: increased mental and physical stress; increased use of addictive substances and high–risk behaviours; changes in traditional diets, leading to higher rates of obesity, diabetes, heart disease and other chronic diseases; a general loss of traditional and cultural knowledge; and a decreasing reliance on traditional economies.[93] Another paper linked the development

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90. ibid

91. ibid.

92. Shauna Morgan, 'The true price of a resource economy in Canada's North' (*Pembina Institute*, 2015) <www.pembina.org/op-ed/the-true-price-of-a-resource-economy-in-canadas-north> accessed 16 August 2019; Anna J Willow, 'Indigenous ExtrACTIVISM in Boreal Canada: Colonial Legacies, Contemporary Struggles and Sovereign Futures' (2016) 5(3) Humanities 55.

93. NAHO, *Resource Extraction and Aboriginal Communities in Northern Canada: Cultural Considerations* (National Aboriginal Health Organization 2008) <www.saintelizabeth.com> accessed 16 August 2019; Ginger

of the BHP Ekati Diamond Mine in the Northwest Territories to decreased overall health outcomes in the Lutsel K'e Dene First Nation community, including: youth becoming involved with drugs and alcohol at an earlier age; increased gambling; elder abuse; lower high school graduation rates; increased pressures on already–strained community support services; and an increase in youth suicides.[94] These adverse effects are magnified among Indigenous female populations, as studies demonstrate an increase in gender–based violence in communities near resource extraction projects.[95] Social cohesion literature set within the context of resource extraction in northern Canada further suggests that the characteristics of extractive industries, namely the influx of a transient population, erode social cohesion within small, rural and remote communities by increasing anonymity and extreme individualism among residents.[96]

While the overall benefits and disadvantages of Indigenous engagement with third–party mining activities varies widely

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Gibson and Jason Klinck, 'Canada's Resilient North: The Impact of Mining on Aboriginal Communities' (2005) 3 Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health 115.

94. Viviane Weitzner, *"Dealing Full Force": Letsel K'e Dene First Nation's Experience Negotiating with Mining Companies* (North-South Institute 2006) <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2006-Dealing-full-force-Lutsel-ke-Dene-first-nations-experience-negotiating-with-mining-companies.pdf> accessed 16 August 2019.

95. 'Mining Fact Sheet: Impacts of Resource Extraction on Inuit Women' (*Pauktuutit Inuit Women of Canada*) <www.pauktuutit.ca/wp-content/uploads/08-Mining-Fact-Sheet_EN.pdf> accessed 16 August 2019; Gibson and Klinck (n 93).

96. Prescott C and others, 'Natural resource exploration and extraction in Northern Canada: Intersections with community cohesion and social welfare' (2014) 9(1) Journal of Rural and Community Development 112.

with each community and project, the reality is that mining projects are frequently happening on and impacting the lands of Indigenous Peoples in Canada. Natural Resources Canada estimated in 2001 that close to 1200 Indigenous communities are located within 200 kilometres of mining activities, and the Assembly of First Nations estimated that over 36% of all First Nations communities in Canada are located within 50 kilometres of a primary mine.[97] Until the 1970s, Indigenous Peoples had limited legal opportunities to govern over if and how mining activities could occur on their ancestral lands.[98] Collectively, Indigenous Peoples were not provided the opportunity to voice their concerns about the impacts of mining activities on hunting, fishing and historical sites of importance, nor were they entitled to secure any economic benefits from the mining, like jobs, training or royalties.[99] Since then, alongside the developments of Canadian case law, there has been a proliferation of tools and mechanisms to increase Indigenous consultation and participation in decision–making around mining projects.[100] Such mechanisms include, but are not limited to: Indigenous community–developed protocols or guidelines for engagement in resource development; Indigenous resource development committees or corporations; Indigenous–led dialogue with industry proponents; signing of co–management agreements; negotiation of proponent–community benefit agreements (CBAs), most commonly referred to as impact–benefit agreements (IBAs); resistance techniques, either legal, discursive or direct action; or engagement with

97. Hipwell and others (n 73).

98. Cooney (n 88).

99. ibid.

100. Hipwell and others (n 73).

government–led project assessment (often called environmental assessment (EA) or impact assessment).[101]

Most relevant to this Chapter are IBAs and EAs. IBAs are, broadly defined, private contractual agreements between a local community and a project proponent in which the community receives various benefits in exchange for their support and cooperation with project development.[102] IBAs emerged in the late 1980s and early 1990s in response to increasing pressure on mining companies from social, environmental and Indigenous activists, and are now considered a standard component of any mineral development project in Canada.[103] EAs on the other hand were introduced in the 1970s and are generally government–led (provincial, territorial, or federal, depending on jurisdiction) processes rooted in legislation to study, predict and mitigate negative impacts associated with resource development projects.[104] While it is outside the scope of this study to describe and analyse IBAs and EAs in detail, the academic literature regarding these processes is very developed.[105]

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101. For a complete discussion on these mechanisms, Hipwell and others (n 73).

102. Lindsay Galbraith and others, 'Towards a new supraregulatory approach to environmental assessment in Northern Canada' (2007) 25(1) Impact Assessment and Project Appraisal 27.

103. Emilie Cameron and Tyler Levitan, 'Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous–State Relations in Northern Canada' (2014) 93 Studies in Political Economy 25.

104. Hipwell and others (n 73).

105. For IBAs, see Cameron and Levitan (n 103); and for EAs, see Galbraith and others (n 102).

4. Research Question

With growing protections being accorded to Aboriginal rights and title through rapidly expanding Canadian case law, and the emergence and evolution of various mechanisms of consultation, now is an interesting time to explore the academic debate around consultation. Thus, the question that this Chapter will aim to answer is: what is known from the existing academic literature about the concept of consultation of Indigenous Peoples regarding mining projects in Canada that affect their contemporary and historical lands?

5. Methodology

To respond to the research question, this study applied the scoping review method, as described by Arksey and O'Malley, to map the current state of the literature.[106]

As per the framework, the research question was identified in March 2018, and then a search strategy was developed through trial and error to maximize the effectiveness of the search. The final search strategy combined variants of the terms: *consult*; *mining*; *Indigenous*; and *Canada*. The strategy was then entered into seven databases identified as relevant to this topic, and articles were kept if they were published between November 2004 and March 2018 in either English or French. A total of 764 records were found through this search. Once duplicates were removed, 727 records remained to be screened.

106. Hilary Arksey and Lisa O'Malley, 'Scoping Studies: Towards a Methodological Framework' (2005) 8 International Journal of Social Research Methodology 19.

The 727 records were first screened during a title review. Any article that was published in a peer–reviewed scholarly journal and had some mention of Indigenous peoples, mining, or consultation, was kept. If the article did not include any of these concepts, or focused on a geographical location outside of Canada, they were discarded. Through the title review, 698 records were excluded. The remaining 29 records were then subjected to an abstract review, and after applying the same criteria, ten more articles were excluded. That left 19 articles to be assessed for eligibility during a full–text review, after which two further records were rejected.

To maximize the rigor and breadth of the search for relevant articles, the reference lists of all remaining records were examined, and every edition published from November 2004 to March 2018 of two particularly relevant journals were reviewed. Through this process, four articles were added to the review, for a total of 21 records.

This study then adopted a constant comparative coding method to identify common characteristics, properties and ideas related to consultation of Indigenous Peoples in Canada about mining projects. The open coding of the final 21 peer–reviewed scholarly articles resulted in the deduction of several characteristics and sub–characteristics of the consultation process, as identified by the authors. Once deduced, an arbitrary threshold of seven unique appearances was established so that only the most pertinent and relevant sub–characteristics were summarized and presented. The result was 14 sub–characteristics organized under four main overarching characteristics discussed in the reviewed literature. Those characteristics are presented in the next section.

6. Results

After the completion of the coding and collating processes, a total of 14 sub–characteristics were generated from the data provided by the scholarly articles, which were then organized under four broader characteristics associated to consultation of Indigenous Peoples in Canada concerning mining projects. These four characteristics are: legitimacy (n=73); power (n=34); responsibility (n=32); and perception (n=23). Each are introduced and explained below.

6.1 Legitimacy

The issue of legitimacy was most frequently discussed in relation to consultation, appearing a total of 73 times throughout the academic papers. The term legitimacy, as in what makes an action or process legitimate, is the topic of significant scholarly debate, dating back to philosophical arguments made by Plato and Aristotle.[107] This Chapter will use an adapted definition from political theorist Peter G. Stillman, who defined legitimacy as "the compatibility of the results of governmental output with the value patterns of relevant systems."[108] For this study, the governmental output is the consultation of Indigenous peoples, and the value patterns refer to how well the actual consultation process aligns with the understanding by peer–reviewed published academics of best practices for meaningful and good–faith consultation. Included under the characteristic of legitimacy are six sub–characteristics: meaningful community deliberation (n=15); accessibility (n=14); scope (n=13); timing (n=11); resources (n=10); and inclusion of Indigenous knowledge, principles, methods (n=10).

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107. Peter G Stillman, 'The Concept of Legitimacy' (1974) 7(1) Polity 32.

108. ibid.

6.1.1 Meaningful Community Deliberations

For a consultation to be legitimate, it is frequently argued within the data that the process must have specific institutions or mechanisms to ensure that the dialogue is inclusive, transparent, and reflects the diverse perspectives of all Indigenous Peoples and stakeholders.[109] For example, in their analysis of whether free, prior and informed consent can be implemented through proponent–Indigenous agreements, Papillon and Rodon indicate that the exercise of true, free, prior and informed consent necessitate "a collective decision–making process rooted in transparent community–based deliberations."[110] This contrasts with a major concern highlighted in the data, which is the fact that often consultations and negotiations with Indigenous Peoples are being completed by elites, such as legal experts, business leaders,

109. Neil Craik and others, 'Indigenous – corporate private governance and legitimacy: Lessons learned from impact and benefit agreements' (2017) 52 Resources Policy 379; Courtney Fidler and Michael Hitch 'Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice' (2007) 35(2) Environments Journal 50; Ginette Lajoie and Michael A Bouchard, 'Native involvement in strategic assessment of natural resource development: the example of the Crees living in the Canadian taiga' (2006) 24(3) Impact Assessment and Project Appraisal 211; Ciaran O'Faircheallaigh, 'Environmental agreements, EIA follow–up and aboriginal participation in environmental management: The Canadian experience' (2007) 27(4) Environmental Impact Assessment Review 319; Martin Papillon and Thierry Rodon, 'Proponent–Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada' (2017) 62 Environmental Impact Assessment Review 216; Guillaume P St–Laurent and Philippe Le Billon, 'Staking claims and shaking hands: Impact and benefit agreements as a technology of government in the mining sector' (2015) 2(3) *The Extractive* Industries and Society.

110. Papillon and Rodon (n 109) 217.

and politicians, rather than having a focus on full participation of affected community members.[111] St–Laurent and Le Billon note that consultation processes "are often negotiated by only a small number of members from a community [… and are] characterized by unrepresentative decision–making preventing wider communities to be involved and address their concerns."[112] It is acknowledged that the nature of certain consultation mechanisms, such as IBAs, require elites or experts because the mechanisms themselves are very technical.[113] Nonetheless, the data indicates that problems and internal community divisions may arise if the broader community does not understand or participate in consultation or in ultimately giving consent for a mining project.[114] The final major concern noted in the data in relation to meaningful community deliberation is the fact that signing certain agreements, such as IBAs, reduces the possibility for meaningful deliberation because there is a forced reduction of political space to manifest disagreement or voice alternative perspectives about a prospective or existing mining project.[115] Campbell and Prémont write that such agreements

111. Craik and others (n 109); Fidler and Hitch (n 109); O'Faircheallaigh (n 109); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109).

112. St-Laurent and Le Billon (n 109)..

113. Craik and others (n 109); Robert B Gibson, 'Sustainability assessment and conflict resolution: Reaching agreement to proceed with the Voisey's Bay nickel mine' (2006) 14(3-4) Journal of Cleaner Production 334; O'Faircheallaigh (n 109).

114. Craik and others (n 109); O'Faircheallaigh (n 109); St-Laurent and Le Billon (n 109).

115. Cameron and Levitan (n 103); Bonnie Campbell and Marie-Claude Prémont, 'What is behind the search for social acceptability of mining projects? Political economy and legal perspectives on Canadian mineral extraction' (2017) 30(3) Mineral Economics 171; Papillon and Rodon (n 109).

"carry the serious risk of reducing political space, as communities that sign private bilateral agreements […] may become barred from using certain avenues or instruments to manifest disagreement."[116]

6.1.2 Accessibility

The issue of accessibility to consultation is fundamental to the question of its legitimacy, because if Indigenous Peoples, industry proponents and/or government representatives cannot access the consultation process, it cannot be deemed meaningful or legitimate because many perspectives and people will be unable to participate. However, the concept of accessibility is quite broad, with several components to it.

There is an oft–cited issue of language in the process of consultation, as meetings and documents related to the process of consultation are not always translated into accessible languages for many Indigenous peoples.[117] For example, for the Victor Diamond Mine environmental assessment process, Whitelaw et al. found that many of their respondents "indicated that translation of documents into Cree was a problem, with only summaries being prepared in Cree."[118]

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116. Campbell and Prémont (n 115).

117. Warren Bernauer, 'Mining, Harvesting and Decision Making in Nunavut: A Case Study of Uranium Mining in Baker Lake' (2010) 7(1) The Journal of Aboriginal Economic Development 1; Lajoie and Bouchard (n 109); Sophie Thériault, 'Repenser les fondements du régime minier québécois au regard de l'obligation de la Couronne de consulter et d'accommodation les peuples autochtones' (2012) 6(2) International Journal of Sustainable Development Law and Policy; Graham S Whitelaw and others, 'The Victor Diamond Mine environmental assessment process: a critical First Nation perspective' (2009) 27(3) Impact Assessment and Project Appraisal 205.

118. Whitelaw and others (n 117).

They add that this is problematic because many Cree elders in Quebec may not be fluent in French, but at the time of writing their article, there was no legal requirement to translate documents into Cree.[119]

Similarly, it was repeatedly mentioned that consultation processes often are conducted using highly technical terminology related to the respective mining process, be it uranium mining or potential impacts of exploratory drilling.[120] For most Canadians, including Indigenous peoples, this use of technical knowledge is inaccessible, again rendering consultation processes out of reach if relevant information is not translated into laymen's terms. Studying the decision–making process around a uranium mining project in Baker Lake, Bernauer writes that "many Inuit are finding it difficult to engage mining company representatives in a meaningful discussion because they lack an understanding of the scientific concepts used to explain issues related to the nuclear industry."[121]

The third issue related to accessibility is information sharing. This characteristic of accessibility is quite broad and applies to the three main parties in consultation, as it was found that at times both the government and the mining proponents failed to share relevant information with Indigenous Peoples about consultation meetings or about the mining projects and potential impacts; but also that the government failed to make up–to–date and relevant information available about right holders and Aboriginal title claims to proponents; and that traditional or Indigenous knowledge was

119. ibid.

120. Bernauer (n 117); Craik and others (n 109); Galbraith and others (n 102).

121. Bernauer (n 117) 15.

not always rendered available and accessible.[122] Udofia et al., who explore challenges to Indigenous participation in environmental assessment processes for uranium mining in Saskatchewan through participant interviews, note that "more than half of our interviewees, including all industry and EA practitioners, and some government participants identified challenges to meaningful engagement and process efficiency as stemming from the province's data–base being either incomplete or not up–to–date." [123] At the same time, they add that while every respondent indicated that the incorporation of "traditional knowledge" is important, "almost half of participants […] indicated that the limited availability of documented traditional knowledge to proponents and government directly affects both the meaningfulness and efficiency of participation."[124] Interestingly, Udofia et al. write that this final accessibility concern was not raised by any Indigenous community respondents.[125]

Lastly, the issue of physical accessibility of consultation was introduced, as the locations of the mines and communities themselves are often in northern, remote areas, which are not easily accessible for government officials or project

122. Galbraith and others (n 102); James W Haggart and others, 'Public geoscience to reduce exploration risk: new methods to characterize the basement beneath geological cover and to address community engagement in the Cariboo–Chilcotin region of British Columbia' (2011) 48(6) Canadian Journal of Earth Sciences 869; Lajoie and Bouchard (n 109); Aniekan Udofia and others, 'Meaningful and efficient? Enduring challenges to Aboriginal participation in environmental assessment' (2017) 65 Environmental Impact Assessment Review 164.

123. Udofia and others (n 122).

124. ibid 169.

125. ibid.

proponents.[126] Udofia et al. noted that "industry indicated that remoteness [of northern communities] works against access, ongoing communication, and maintaining reasonable timeliness for participation."[127] However, the opposite is also true, in which consultation meetings and discussions may not always be in the Indigenous communities, making it very expensive and often inaccessible for Indigenous Peoples to attend and participate in consultation.[128] Overall, accessibility is an important consideration that affects the legitimacy of consultation.

6.1.3 Scope

Another characteristic that affects the legitimacy of consultation is the scope of the process. Specifically, which projects are subjected to certain mechanisms of consultation, the issues addressed during consultation, and who is consulted were the main factors described in the data.

Concerning the first, it is mentioned that the size of the mining project determines whether it will be subjected to an EA.[129] One example illustrated by Thériault is the high threshold set out under Quebec mining laws, in which a mining project is subjected to an EA only if production capacity exceeds 7000 metric tonnes per day, which few projects achieve.[130] This is problematic because these mines still may impact the contemporary and historical lands of Indigenous

126. ibid.

127. ibid.

128. ibid.

129. Lajoie and Bouchard (n 109); Thériault (n 117); Udofia and others (n 122).

130. Thériault (n 117).

Peoples in Canada, but the lack of EA reduces a viable opportunity for consultation.[131]

Further, there is a concern that mechanisms of consultation do not account for a large enough range of issues. One of the many issues raised about IBAs is that they typically, although not always, are focused on economic issues, excluding other important environmental, social, recreational and cultural considerations.[132] Papillon and Rodon write that "while IBAs can contribute to the mobilization of Indigenous consent through negotiations, they can also narrow its expression to economic considerations."[133] Overall, it is repeated throughout the data that consultation should address a wide scope of issues.

Lastly, for consultation to be legitimate, all relevant Indigenous Peoples and stakeholders must be meaningfully involved, and certain communities, people, or organizations cannot be scoped out of the process.[134]

6.1.4 Timing

The issue of time, when it comes to consultation, is an important contributor to legitimacy. Consultation should take place as early as possible in the process of developing a mining project, preferably before the proponent even stakes a mineral claim.[135] If consultation takes place while project

131. ibid.

132. Bernauer (n 117); Galbraith and others (n 102); Gibson (n 113); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109).

133. Papillon and Rodon (n 109) 230.

134. Bernauer (n 117); Thériault (n 117); Whitelaw and others (n 117).

135. Bernauer (n 117); Haggart and others (n 122); Thériault (n 117); Udofia and others (n 122).

development is already underway or has already been approved, the consultation will not be meaningful.[136] Also, the desire for a streamlined approval process can be difficult to implement, as shorter periods of consultation reduce time for necessary community participation and deliberation.[137] Further, short timelines for permit approvals are problematic for meaningful Indigenous participation, as Townshend and McClurg comment, "the reality for many First Nations, particularly those located in resource–rich regions, is that they are flooded with requests and project proposals from the government and resource development companies [and] many First Nations' lands and resources offices operate on shoe–string budgets and are understaffed."[138] Despite best efforts, it takes a considerable amount of time for an Indigenous community to "adequately give consideration to a project and to assess the effects on the community's rights and interests."[139] These issues of timing affect the legitimacy of consultation, because they do not allow for meaningful discussion.

6.1.5 Resources

Related to the topic of timing, the provision of resources to Indigenous Peoples to facilitate their meaningful participation in consultation is crucial. However, there are two

136. Thériault (n 117); Udofia and others (n 122).

137. Galbraith and others (n 102); Papillon and Rodon (n 109); Roger HW Townshend and Michael McClung, 'The Duty to Consult and Accommodate Aboriginal Peoples: A Primer for Ontario Surveyors Working in Resources Development' (2014) 68(1) Geomatica 15; Udofia and others (n 122).

138. Townshend and McClung (n 137) 22.

139. ibid.

aspects to resource provision noted in the literature: first, resources should be provided to ensure physical access; and second, resources should be provided to Indigenous groups to prepare for and partake in long-term consultation and monitoring processes.[140]

The first aspect is that resources should be provided to ensure that Indigenous Peoples can physically attend consultations and negotiations. Resources should also be provided for Indigenous communities to hire their own experts and lawyers to support meaningful engagement and participation with the technical intricacies of mining projects.[141] For example, Townshend and McClurg express concern that the 2009 Ontario "*Mining Act* amendments do not provide for any funding for professional or other advice or studies that an Aboriginal community may need to properly respond to proposals."[142] This funding could otherwise allow the communities to better understand the technical aspects of the proposals and articulate their own information and knowledge to be included in decisions and policy–making.

The second aspect concerns long-term participation. It was noted that even if resources for participation are provided, they are usually only for one–time participation in consultation, and not always for the purposes of preparing to participate in consultation nor for long–term participation

140. Galbraith and others (n 102); Gibson (n 113); O'Faircheallaigh (n 109); Thériault (n 117).

141. Craik and others (n 109); Galbraith and others (n 102); Haggart and others (n 122); Townshend and McClung (n 137); Udofia and others (n 122).

142. Townshend and McClung (n 137) 22.

in mining governance,[143] or as O'Faircheallaigh notes, in longer–term "environmental planning or management."[144]

6.1.6 Inclusion of Indigenous Knowledge, Principles, Methods

A key consideration when discussing the legitimacy of consultation is the recognition and inclusion of Indigenous knowledge, principles and methods. There is a prominent discussion in the literature about Indigenous or traditional knowledge, also sometimes referred to as traditional ecological knowledge, and how it can be included and understood in consultation, and then applied to decision–making or governance processes.[145] There are some examples of moderately effective inclusion of Indigenous knowledge, such as the Nunavut Impact Review Board–mandated inclusion of Inuit Qaujimajatuquangit (Inuit traditional knowledge) studies in environmental impact statements filed by mining companies,[146] although there is a general acknowledgment that there remain significant barriers to its meaningful integration into consultation.[147]

Additionally, O'Faircheallaigh and Papillon and Rodon write that the adversarial nature of many consultation processes is poorly adapted to Indigenous participation, as they

143. Udofia and others (n 122).

144. O'Faircheallaigh (n 109).

145. Bernauer (n 117); Craik and others (n 109); Galbraith and others (n 102); Gibson (n 113); Haggart and others (n 122); Lajoie and Bouchard (n 109); O'Faircheallaigh (n 109); Papillon and Rodon (n 109); Udofia and others (n 122); Whitelaw and others (n 117).

146. Bernauer (n 117).

147. ibid; Craik and others (n 109); Galbraith and others (n 102); Gibson (n 113); Haggart and others (n 122); Lajoie and Bouchard (n 109); O'Faircheallaigh (n 109); Papillon and Rodon (n 109); Udofia and others (n 122); Whitelaw and others (n 117).

are, at times, incompatible with Indigenous principles.[148] Both articles suggest that advance meetings with Indigenous representatives about how to design an inclusive and meaningful consultation process could improve relevant mechanisms processes.[149]

6.2 Power

The second–most frequently discussed characteristic of consultation that emerged during the coding and collating process was power (n=34). Power can be defined as "the ability or capacity to do something or act in a particular way."[150] Within the characteristic of power, three distinct concepts emerged: negotiating power (n=14); structural power of colonial instruments (n=13); and the ultimate State authority (n=7). Each will be discussed below.

6.2.1 Negotiating Power

A common consideration when discussing consultation was the fact that these processes often led to contractual agreements between mining proponents and affected Indigenous communities, most frequently in the form of an IBA. During these negotiations, it was clear from the data that the balance of power was heavily skewed in favour of the mining proponent.[151] There were several reasons for this, including that proponents usually have the capacity to choose which Indigenous communities to enter negotiations

148. Lajoie and Bouchard (n 109); O'Faircheallaigh (n 109).

149. ibid.

150. 'Power' (*Oxford Dictionaries*) <www.lexico.com/en/definition/power>.

151. Cameron and Levitan (n 103); Craik and others (n 109); Fidler and Hitch (n 109); St-Laurent and Le Billon (n 109); Thériault (n 117); Townshend and McClung (n 137).

with,[152] to decide when negotiations start,[153] and to threaten to walk away from the negotiation table.[154] Illustrating this point with the example of the Victor Diamond Mine consultation processes in northern Ontario, Craik et al. observe that the project proponent, DeBeers Canada, signed an IBA with Attawapiskat First Nation in 2005, but did not sign an agreement with nearby Fort Albany of Kaschechewan First Nations until 2009.[155] Also, given the fact that Indigenous Peoples do not have the final say over the approval of a mining proposal, they often are forced to engage in negotiations to try to secure some/any benefits for their communities.[156] It is suggested that this power dynamic puts the proponent in the driver's seat during most negotiations. Moreover, mining proponents typically have greater knowledge about the mining proposal and its technicalities, and often have more resources and capacity at their disposal during negotiations.[157]

Nonetheless, it was mentioned that the negotiating power of Indigenous communities can vary across communities and projects.[158] In an analysis of investor reactions in

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152. Cameron and Levitan (n 103); Craik and others (n 109); St-Laurent and Le Billon (n 109).

153. Craik and others (n 109); St-Laurent and Le Billon (n 109).

154. Cameron and Levitan (n 103); St-Laurent and Le Billon (n 109); Townshend and McClung (n 137).

155. Craik and others (n 109).

156. ibid.

157. St-Laurent and Le Billon (n 109); Thériault (n 117); Townshend and McClung (n 137).

158. Craik and others (n 109); Sinziana Dorobantu and Kate Odziemkowska, 'Valuing Stakeholder Governance: Property Rights, Community Mobilization, and Firm Value' (2017) 38 Strategic Management Journal 1; Gibson (n 113).

148 community–benefit agreements signed between mining companies and Indigenous communities by Dorobantu and Odziembowska, the main factors that were quantitatively demonstrated to influence the perceived negotiating power of Indigenous communities are: the strength of the community's claims to Aboriginal rights and/or title and the community's capacity to block the project through institutional (legal/regulatory actions) or extra–institutional (direct action, protests, social media campaigns, etc.) activities.[159] Another example can be found in Gibson's study of the Voisey's Bay nickel mine, in which he argued that the Innu and Inuit communities of northern Labrador had a stronger negotiating position because of their solidarity, use of various strategies to assert their demands, and their strong claims to Aboriginal title.[160] Thus, the data appears to suggest that if a community holds strong land claims and a considerable capacity to delay, block or terminate the mining project, then that community can establish itself as a powerful negotiator during consultation processes.

6.2.2 Structural Power of Colonial Instruments

When it comes to the relationships between the State, Indigenous peoples, and mining proponents, a common argument that appeared was the role that various colonial instruments play in constructing relations of power between the three parties.[161] The most powerful instrument referenced in

159. Dorobantu and Odziemkowska (n 158).

160. Gibson (n 113).

161. Rachel Ariss and John Cutfeet, 'Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law' (2011) 10(1) Indigenous Law Journal 1; Campbell and Prémont (n 115); Fidler

the data is the free–entry mining regime governing activities in most of Canada.[162] The free–entry system inherently implies that the Canadian Crown has title to and decision–making authority over all land, which is commonly understood to be a colonial policy of expropriating Indigenous Peoples from their historical lands.[163] Further, the free–entry system designates mining as the best use of land and prioritizes mining activities over the rights of Indigenous communities and landowners.[164] Thanks to free–entry, mining proponents can advance their mining activities without really needing to consult Indigenous Peoples or other landowners whose land and rights may be affected.[165] Thus, free–entry grants considerable power to mining proponents at the expense of everyone else.

Other colonial instruments include the historical treaties and legislation which accords considerable power over the lives and welfare of Indigenous peoples.[166] These constructions permit the Canadian State or judiciary to, for example,

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and Hitch (n 109); Dawn Hoogeveen, 'Sub–surface Property, Free–entry Mineral Staking and Settler Colonialism in Canada' (2015) 47 Antipode 121; Papillon and Rodon (n 109); Bruce Pardy and Annette Stoehr, 'The Failed Reform of Ontario's Mining Laws' (2012) 23(1) Journal of Environmental Law and Practice; St-Laurent and Le Billon (n 109); Thériault (n 117); Townshend and McClung (n 137).

162. Ariss and Cutfeet (n 161); Campbell and Prémont (n 115); Hoogeveen (n 161); Pardy and Stoehr (n 161); St-Laurent and Le Billon (n 109); Townshend and McClung (n 137).

163. Townshend and McClung (n 137).

164. Hoogeveen (n 161).

165. ibid.

166. Ariss and Cutfeet (n 161); Fidler and Hitch (n 109); Hoogeveen (n 161); Papillon and Rodon (n 109).

impose consultation protocols on Indigenous communities, forcing them to take part in consultations regardless of their own wishes. This was the case, as analyzed by Ariss and Cutfeet, in the legal dispute between Platinex Inc. and the Kitchenuhmaykoosib Inninuwug First Nation in northern Ontario, when Justice Smith imposed a protocol on both parties to continue consultations with the goal of permitting Platinex to commence their mining operations.[167] As such, colonial instruments continue to grant mining proponents and the State more power at the expense of Indigenous peoples.

6.2.3 Ultimate State Authority

A common theme identified in the data was the fact that the State holds considerable discretionary power over the approval of mining projects in Canada. While there is a legal duty to consult imposed on the Canadian governments, the State ultimately can decide whether to use the results of consultation procedures when deciding on the future of mining projects, without any significant ability of the mining proponent or Indigenous communities to make the final decision.[168] While there are some examples in which Indigenous communities or organizations maintain limited decision–making influence, such as the previously mentioned strong negotiation positions of Innu and Inuit communities in northern Labrador,[169] it is still the relevant provincial or federal Minister that has ultimate discretionary authority over

167. Ariss and Cutfeet (n 161).

168. O'Faircheallaigh (n 109); Papillon and Rodon (n 109); Pardy and Stoehr (n 161); St-Laurent and Le Billon (n 109); Townshend and McClung (n 137).

169. Gibson (n 113).

project approvals. This is explicitly stated by Galbraith et al. when they write that "the actual decision about whether to approve a project is usually made by a Government minister or department and can override EA findings of significant impacts."[170]

6.3 Responsibility

The issue of responsibility, as it relates to consultation, was discussed the third–most frequently within the data (n=32). Responsibility is defined by the Oxford Dictionary as "a thing which one is required to do as part of a job, role, or legal obligation."[171] Three sub–characteristics developed under the broad notion of responsibility: privatization of consultation (n=15); absence/failure of the State (n=9); and confusion about responsibilities (n=8).

6.3.1 Privatization of Consultation

It is regularly mentioned throughout the academic articles that while the legal doctrine of the duty to consult is ultimately the responsibility of the federal and provincial governments, there appears to be a trend towards the privatization of the consultation processes, in which private mining proponents are increasingly acquiring the responsibility to consult with Indigenous peoples.[172] There are a few arguments as to why this general trend of privatization

170. Galbraith and others (n 102) 32.

171. 'Responsibility' (*Oxford Dictionaries*) <https://en.oxforddictionaries.com/definition/responsibility> accessed 17 August 2019.

172. Cameron and Levitan (n 103); Craik and others (n 109); Papillon and Rodon (n 109); Pardy and Stoehr (n 161); St-Laurent and Le Billon (n 109); Thériault (n 117); Townshend and McClung (n 137); Udofia and others (n 122).

has occurred. The main argument is that the privatization is caused by the general acceptance of neoliberal policies,[173] although it is also noted that the State may be responding to financial incentives, in which governments understand how expensive consultation processes are, and actively work to offload these costs to the private sector.[174] This movement towards privatization happens along several mechanisms, as provincial legislation make proponent–led consultations the default method with proponents being required to lead EAs and being actively encouraged to engage in IBA negotiations with Indigenous peoples.[175] One such example comes again in the 2009 Ontario mining law reform, as "Section 176(1) of the *Mining Act* authorizes new regulations that may require mining companies to consult with Aboriginal communities […which] place[s] the burden of consultation on exploration and mining companies and remove[s] it from government."[176]

6.3.2 Absence/Failure of the State

Inevitably linked to the privatization of the consultation process, as described above, is the noted and growing absence and/or failure of the State in respect to its fiduciary

173. Cameron and Levitan (n 103); Craik and others (n 109); St-Laurent and Le Billon (n 109).

174. Cameron and Levitan (n 103); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109).

175. Cameron and Levitan (n 103); Craik and others (n 109); Papillon and Rodon (n 109); Pardy and Stoehr (n 161); Thériault (n 117); Townshend and McClung (n 137); Udofia and others (n 122).

176. Pardy and Stoehr (n 161), 8.

relationship with Indigenous peoples.[177] Notably, Cameron and Levitan suggest that at the time of their study, Canada was experiencing "a time of reduced federal spending on social transfer programs, as well as a lack of spending on infrastructure needed in northern, predominately Indigenous communities."[178] The authors argue that this has led to "many Indigenous signatories aim[ing] to extract benefits through IBAs that they have repeatedly failed to secure from federal and territorial governments."[179] Campbell and Premont add that "direct negotiation between communities and industry all take for granted or support the withdrawal or selective absence of the public authorities and consequently overlook [the government's] potential roles and responsibilities."[180] These arguments seem to point to the mutually reinforcing nature of the privatization of consultation and the growing absence of government bodies in such processes.

6.3.3 Confusion about Responsibilities

The third sub–characteristic that was deduced during the coding process is the reality that there is often confusion about who is responsible for what when it comes to consulting Indigenous Peoples.[181] While it varies considerably according to who has regulatory responsibility over the mining project – the multitude of jurisdictions being a

177. Cameron and Levitan (n 103); Campbell and Prémont (n 115); Craik and others (n 109); Fidler and Hitch (n 109); Galbraith and others (n 102); St-Laurent and Le Billon (n 109).

178. Cameron and Levitan (n 103) 41.

179. ibid.

180. Campbell and Prémont (n 115) 178.

181. Cameron and Levitan (n 103); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109); Thériault (n 117); Udofia and others (n 122).

key contributor to the confusion[182] – often the roles for governments, mining proponents and Indigenous Peoples are not clearly defined regarding consultation.[183] Udofia et al. learned from their interview participants that there is "limited understanding, and sometimes confusion, about who is responsible for initiating early Aboriginal participation and consultation processes, and what is to be achieved through participation versus through legal obligations to consult."[184] Udofia et al., in addition to other authors, add that there is a "lack of clarity between the legal consultation obligations of governments and the EA participation initiatives of project proponents."[185] It is widely agreed that this confusion over responsibilities reduces the meaningfulness and effectiveness of the consultation process.

6.4 Perception

Perception of different aspects of consultation also emerged as an important characteristic of the consultation process (n=23). The Oxford dictionary defines perception as "the way something is regarded, understood, or interpreted."[186] The relevant issues related to perception that will be discussed are: the reason for consultation (n=14); and what consists of adequate consultation (n=9). Underlying these sub–characteristics is the competition or clashing of perceptions between how some Indigenous communities theorize

182. Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109).

183. Cameron and Levitan (n 103).

184. Udofia and others (n 122) 172.

185. ibid 165.

186. 'Perception' (*Oxford Dictionaries*) <https://en.oxforddictionaries.com/definition/perception> accessed 17 August 2019.

consultation versus how the government and proponents think about consultation.

6.4.1 Reason for Consultation

In reviewing the data, it became clear that there is a significant divide, particularly between Indigenous Peoples and mining project proponents, around the perceived reasons for consultation to take place.[187] Specifically, Indigenous Peoples tend to engage in consultation and in IBA negotiations for the purpose of having their voices and perspectives heard and considered in the management of mining projects.[188] Moreover, according to several authors, many Indigenous Peoples perceive that the reason for consultation and IBAs is because they have a significant ownership stake in the resources being extracted, and therefore they should participate in benefit–sharing.[189] In a remarkably stark contrast, mining proponents appear to hold the perception that the reason for consultation is to simply gain the "social license to operate" and to mitigate any risk to the delay or refusal of the project proposal.[190] For example, Cameron and Levitan write that

187. Ariss and Cutfeet (n 161); Cameron and Levitan (n 103); Campbell and Prémont (n 115); Craik and others (n 109); Fidler and Hitch (n 109); Haggart and others (n 122); St-Laurent and Le Billon (n 109); Udofia and others (n 122).

188. Cameron and Levitan (n 103); Fidler and Hitch (n 109); Galbraith and others (n 102).

189. Craik and others (n 109); Fidler and Hitch (n 109); Galbraith and others (n 102).

190. Ariss and Cutfeet (n 161); Cameron and Levitan (n 103); Campbell and Prémont (n 115); Fidler and Hitch (n 109); Galbraith and others (n 102); Haggart and others (n 122); St-Laurent and Le Billon (n 109); Udofia and others (n 122).

"part of the purpose of IBAs is to ensure that there will be no interruptions to the project, and that there is certainty that the community has consented to the development and will allow it to proceed without any hindrances."[191] Overall, it appears from this study that the perception of many mining project proponents about the purpose of consultation is simply to reduce costs to the proponent, and to determine how the project should proceed, rather than if the project will be approved.

6.4.2 Adequate Consultation

Another major question that was raised by several authors was, when is consultation adequate or sufficient?[192] Most cases cited in the reviewed articles indicate that current processes are widely deemed adequate by government and industry proponents, but Indigenous Peoples perceived the consultation to have been insufficient and acted as a result. In the case of the Victor Diamond Mine, "a blockage by people from Attawapiskat FN of the ice road to the mine site in February 2009 was indicative that concerns remained over a lack of community benefits from the mine."[193] This specific instance is also interesting because it points to the fact that Attawapiskat First Nation members perceived consultation to be an ongoing relationship at least during the life of the mine, as they took direct action despite signing an IBA in

191. Cameron and Levitan (n 103) 34.

192. Ariss and Cutfeet (n 161); Campbell and Prémont (n 115); Fidler and Hitch (n 109); Lajoie and Bouchard (n 109); Papillon and Rodon (n 109); Townshend and McClung (n 137); Udofia and others (n 122); Whitelaw and others (n 117).

193. Whitelaw and others (n 117) 208.

2005.[194] However, the most common response to the perceived inadequacy of consultation is a turn to the court system, where Indigenous communities pursue various avenues of litigation to have a mining permit delayed or overturned. For example, this was seen when Kitchenuhmaykoosib Inninuwug "was granted an interim injunction against Platinex Inc, to stop exploratory drilling on their traditional lands" in July 2006.[195] More generally, Udofia et al. write that "Aboriginal communities have legally challenged EA processes and decisions due to the lack of meaningful participation."[196] Indeed, the number of legal actions initiated by Indigenous communities and project proponents in recent years is a strong indicator of the competing perceptions over what constitutes adequate consultation.

7. Discussion

Beginning with the initial research question about how the academic community is discussing the phenomenon of consultation regarding Indigenous Peoples and mining projects in Canada, this scoping review found four relevant characteristics related to consultation, and 14 sub–characteristics organized under the respective properties. Thus, the main themes appearing in the academic articles included in this review are: legitimacy; power; responsibility; and perception. The following sections will expand on and discuss the results of the study, focusing particularly on the inter–connection of

194. ibid.

195. Ariss and Cutfeet (n 161) 20.

196. Udofia and others (n 122) 165.

the themes; the underlying importance of trust in consultation; the dominance of negative findings; and the limited recognition of Indigenous laws and jurisdiction over land and resources.

7.1 The Inter-Connected Relationship between Themes

While it would be unfeasible to discuss individually each sub–characteristic and their relevance, this Chapter will discuss the inter-connected and inter-dependent nature of the four characteristics. For example, challenges to the *legitimacy* of the consultation process is inherently linked to the *perceptions* of relevant parties, including the academic community, of what consists of a legitimate consultation. The definition of legitimacy employed by this Chapter references this implicit connection when it links government output to relevant value systems. As a result of the fundamental tension between value systems and perceptions of what is legitimate, there are few known examples of consultation processes in which all involved parties walk away completely satisfied with the process. Similarly, the question of *responsibility* is shaped by the *power relations* existing between the State, Indigenous peoples, and mining project proponents. There is an increasing privatization of consultation, largely because the State has the power and authority to determine who is responsible for what during consultation.

To further demonstrate the intricate relationship running throughout these characteristics, it is useful to examine the topic of self-determination as recurrent throughout. Self–determination is a term that arguably has its origins in the American revolution and was popularized after World

War One.[197] Self-determination is an idea rooted in notions of universal human rights and "grounded in the idea that all are equally entitled to control their own destinies."[198] There is a growing movement both in Canada and around the world in which Indigenous Peoples have demanded respect for self-determination and an end to colonial relations of discrimination and oppression.[199] The idea of self–determination was very connected to the notion of legitimacy throughout the scoping review. For a consultation to be considered *legitimate*, many authors acknowledged that Indigenous communities must be involved in all aspects of planning and implementing the consultation process itself, as well as the actual governance of the mining project.[200] For a process to have *legitimate substantive participation*, Indigenous communities and societies needed to be treated as nations unto themselves and have greater voice in the management of mining projects.[201] Similarly, there is an apparent *perception* by Indigenous Peoples that *adequate consultation* only takes place when they are recognized as equal partners with a decision-making role.[202] However, this is not possible when *colonial instruments*, especially the free-entry mining regime,

197. James Anaya, *Indigenous peoples in international law* (Oxford University Press 2004).

198. ibid 98.

199. ibid.

200. Haggart and others (n 122); O'Faircheallaigh (n 109); Udofia and others (n 122); Whitelaw and others (n 117).

201. Ariss and Cutfeet (n 161); O'Faircheallaigh (n 109); St-Laurent and Le Billon (n 109).

202. Ariss and Cutfeet (n 161); Campbell and Prémont (n 115); Fidler and Hitch (n 109); Papillon and Rodon (n 109); Townshend and McClung (n 137); Udofia and others (n 122).

continue to undermine Indigenous communities' claims to self-determination and impede their ability to assert jurisdiction and sovereignty over their historical lands.[203] Yet at the same time, the shifting *responsibilities* are also argued to be changing the *power dynamic*, as Indigenous communities see an increasing role in negotiating with the mining industry about how projects will proceed.[204] This gradual change is argued in some of the reviewed articles to be a positive development that enables Indigenous Peoples to reduce their dependency on State governments and increase their own capacity for self-determination.[205] Through this example of the notion of self-determination, the complexity and inter–connections between the various themes and the idea of consultation are made apparent. Indeed, a single passage in a reviewed article often had several codes attached to it, as multiple ideas were simultaneously explored.

7.2 The Importance of Trust in Consultation

Another topic worth discussing is the underlying importance of trust in processes of consultation. While the characteristic of trust did not emerge frequently enough to appear in the results section, trust is fundamental to building relationships and making decisions, and thus to consultation. Trust is a

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203. Ariss and Cutfeet (n 161); Campbell and Prémont (n 115); Fidler and Hitch (n 109); Hoogeveen (n 161); Papillon and Rodon (n 109); Pardy and Stoehr (n 161); St-Laurent and Le Billon (n 109); Thériault (n 117); Townshend and McClung (n 137).

204. Cameron and Levitan (n 103); Craik and others (n 109); Papillon and Rodon (n 109); Pardy and Stoehr (n 161); St-Laurent and Le Billon (n 109); Thériault (n 117); Townshend and McClung (n 137); Udofia and others (n 122).

205. Campbell and Prémont (n 115); Fidler and Hitch (n 109); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109).

highly theorized and intricate concept. Relevant to this issue of historical and contemporary mistrust between Indigenous Peoples and the Canadian state is the conceptualization of trust as an institutional phenomenon.[206] Worchel describes this category of trust theory, explaining that trust is something that can be experienced between and across institutions and individuals in institutions.[207] While a person or community can come to trust an individual working in an institution through repeated positive interactions, they may not come to trust larger institutions if there is an inability to generalize personal trust across an organization consisting of many individuals with whom they have limited interactions.[208] This is important when examining the relationship between Indigenous Peoples and communities with the Canadian State.

There is a resounding consensus in literature across Canada and across disciplines that there are serious challenges of trust that complicate the relationship between Indigenous Peoples and Canadian governments.[209] The Truth and Reconciliation Commission report states it very clearly when it explains:

> The destructive impacts of residential schools, the *Indian Act*, and the Crown's failure to keep its Treaty promises have damaged the relationship between

206. Roy J Lewicki and Barbara B Bunker, 'Trust in relationships' (1995) 5 Administrative Science Quarterly 1.

207. As cited in Lewicki and Bunker (n 206).

208. ibid.

209. Cindy J Jardine and others, 'Risk communication and trust in decision–maker action: a case–study of the Giant Mine Remediation Plan' (2013) 72 International Journal of Circumpolar Health 456, 456-462.

> Aboriginal and non-Aboriginal peoples. The most significant damage is to the trust that has been broken between the Crown and Aboriginal peoples. That broken trust must be repaired. The vision that led to that breach in trust must be replaced with a new vision for Canada.[210]

Moreover, it is recognized that structural racism continues to persist in modern-day institutions, including in important sectors like the justice and health care systems. As summarized in a report to the National Collaborating Centre for Aboriginal Health, Indigenous Peoples in Canada and around the world face over-criminalization, and they experience racism during interactions with the health system.[211] This results in poorer well–being outcomes and in reduced levels of trust in the State and in the institutions that are supposed to be working to improve the lives of all.[212] Recalling Worchel's institutional theory of trust, while Indigenous Peoples and communities may be able to build personal trust with an individual working for the Canadian State, historical and contemporary discrimination understandably presents a formidable barrier to building trust with the institutions of the Canadian governments.

The Supreme Court of Canada declared that "the foundation of the duty to consult is in the Crown's honour and

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210. Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada* (Library and Archives Canada Cataloguing in Publication 2015) 238.

211. Charlotte Reading and others, 'Aboriginal Experiences with Racism and its Impacts (2014) National Collaborating Centre for Aboriginal Health <www.ccnsa–nccah.ca> accessed 17 August 2019.

212. ibid.

the goal of reconciliation".[213] Yet, as the Royal Commission on Aboriginal Peoples (RCAP) mentions, "the restoration of civic trust is essential to reconciliation".[214] Not only is trust inherently connected to the other characteristics detailed in the results of this study, but consultation will never achieve its goal of reconciliation if the relationship between the Canadian State and Indigenous Peoples continues to be marked by a profound lack of trust.

7.3 Prevalence of Negative Findings

As likely became evident during the presentation of the study results, most sub–characteristics that emerged from articles and scholars were largely presented as critiques of current processes of consultation. For example, all six sub-characteristics organized under the general property of legitimacy emerged as a result of the respective authors and scholars critiquing current consultation practices in Canada. A frequent critique was the inaccessibility of consultation, as documents and meetings are often not translated into relevant Indigenous languages.[215] Similarly, there have historically been inadequate methods of sharing information, and most of the discussions during consultations were argued by academics to be too technical to allow for meaningful engagement with the public.[216] The sub-characteristic of meaningful community deliberation

213. Haida Nation v. British Columbia (n 60).

214. As cited in Truth and Reconciliation Commission of Canada (n 210).

215. Bernauer (n 117); Lajoie and Bouchard (n 109); Thériault (n 117); Whitelaw and others (n 117).

216. Craik and others (n 109); Galbraith and others (n 102); Lajoie and Bouchard (n 109); O'Faircheallaigh (n 109); Udofia and others (n 122).

was most frequently discussed during criticisms that consultation is too often dominated by elites or experts, which has the effect of reducing the opportunities and space for meaningful, broad–based and inclusive discussions about the benefits, issues and concerns that all community members have about mining projects.[217] Similarly, current processes of consultation were regularly denounced for being too narrow in scope;[218] not beginning early enough in the project proposal;[219] having timelines for participation that were too short; [220] not providing adequate resources for participation of all relevant Indigenous stakeholders;[221] and poor effort to include and account for Indigenous knowledge, principles and methodologies when creating and implementing the consultation process.[222] This trend of critical findings is also apparent within the other characteristics, with criticisms being levelled at the uneven balance of power;[223] confusion

217. Craik and others (n 109); Fidler and Hitch (n 109); O'Faircheallaigh (n 109); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109).

218. Bernauer (n 117); Galbraith and others (n 102); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109); Whitelaw and others (n 117).

219. Haggart and others (n 122); Thériault (n 117).

220. Galbraith and others (n 102); Thériault (n 117); Townshend and McClung (n 137); Udofia and others (n 122).

221. Craik and others (n 109); Galbraith and others (n 102); Haggart and others (n 122); O'Faircheallaigh (n 109); Thériault (n 117); Townshend and McClung (n 137); Udofia and others (n 122); Whitelaw and others (n 117).

222. Galbraith and others (n 102); Lajoie and Bouchard (n 109); O'Faircheallaigh (n 109); Papillon and Rodon (n 109); Whitelaw and others (n 117).

223. Ariss and Cutfeet (n 161); Cameron and Levitan (n 103); Campbell and Prémont (n 115); Craik and others (n 109); Fidler and Hitch (n 109); O'Faircheallaigh (n 109); Papillon and Rodon (n 109); Pardy and Stoehr (n 161); St-Laurent and Le Billon (n 109); Thériault (n 117); Townshend and McClung (n 137).

over responsibilities about consultation;[224] and the issue of competing perceptions about consultation.[225]

It is worthwhile however to recognize that there are some case studies mentioned within the reviewed articles that highlight positive outcomes. One such instance was the EA process for the Voisey's Bay nickel mine in northern Labrador, where the author writes that all five key parties – Inco Ltd. (proponent), the Canadian federal government, the provincial government, the Innu Nation and the Labrador Inuit Association – successfully negotiated an amicable agreement on how to evaluate the mining proposal, notably by including a "contribution to sustainability" test of acceptability.[226] Although Gibson accurately indicated that it was too early at the time of writing to call the Voisey's Bay consultation process a success, he had very few concerns or negative comments to relay to readers throughout the article.[227] However, while Gibson's article is largely positive, it is among a small minority of articles included in the scoping review that express satisfaction with current processes. As Friedland et al. summarize, many scholars and practitioners "have criticized how the duty to consult is implemented in practice."[228]

One could hypothesize that the overwhelming negativity directed towards consultation of Indigenous Peoples

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224. Cameron and Levitan (n 103); Papillon and Rodon (n 109); St-Laurent and Le Billon (n 109); Thériault (n 117); Udofia and others (n 122).

225. Craik and others (n 109); Jardine and others (n 209); Lajoie and Bouchard (n 109); St-Laurent and Le Billon (n 109); Townshend and McClung (n 137); Udofia and others (n 122); Whitelaw and others (n 117).

226. Gibson (n 113).

227. ibid.

228. Hadley Friedland and others, 'Porcupine and Other Stories: Legal Relations in Secwépemcúlecw' (2018) 48(1) Revue Générale de droit 153, 186.

in Canada around resource extraction is reflective of wide public discontent with the current processes of consultation. Indeed, many current events reflect the challenges of implementing meaningful and good–faith consultation of Indigenous peoples. In 2017, the Supreme Court of Canada ruled that the consultation process in the Inuit hamlet of Clyde River, Nunavut, surrounding oil exploration activities was insufficient, quashing the previously awarded approval.[229] Yet, at the same time the Supreme Court ruled in favour of the proponent in another consultation case in Ontario, saying that the consultation held with the Chippewas of the Thames was sufficient before approval was granted to the Enbridge Line 9 project.[230] These are just two of several recent court cases in Canada dealing with the duty to consult. At the same time, there is significant political debate around federal environmental assessment, with the current Liberal–majority government introducing Bill C–69 in 2018 to reform and "modernize" EAs, a process that was last updated only six years earlier by the previous Conservative–majority government.[231] After Bill C–69 was introduced, Conservative politicians from across the country, including Albertan United Conservative Party leader Jason Kenney, criticized the new proposed Impact Assessment Agency as creating unnecessary regulatory burdens for resource development

229. Paul J Tasker '*Supreme Court quashes seismic testing in Nunavut, but gives green light to Enbridge pipeline'* (*CBC News*, July 26) <www.cbc.ca/news/politics/supreme-court-ruling-indigenous-rights-1.4221698> accessed 17 August 2019

230. ibid.

231. Paul J Tasker, 'UCP leader calls new pipeline approval process 'worst possible news' for industry (*CBC News*, February 2018) <www.cbc.ca/news/canada/edmonton/> accessed 17 August 2019.

corporations.[232] On the other side, Kluane Adamek, the interim Yukon regional chief of the Assembly of First Nations in Canada, argued at the time of writing that Bill C–69 needed to be "stronger" and needed to provide greater guarantee to recognize Indigenous rights.[233] This constant public, political and legal debate and uncertainty about processes of consulting with Indigenous Peoples about resource development projects is thus likely reflected within the largely negative and critical findings of this scoping review.

7.4 Missing: Recognition of Indigenous Laws and Jurisdiction

While the characteristics in this study largely developed from academics critical of the current processes of consulting Indigenous Peoples about mining projects in Canada, almost all the literature included in this scoping review failed to acknowledge any existence of Indigenous laws and jurisdiction over land or resources. Perhaps the most foundational critique against the duty to consult doctrine itself comes from a recent article, in which it is argued that while "many have criticized how the duty to consult is implemented in practice, [...] it is Canadian law, as opposed to the many Indigenous legal traditions across the country, that defines what consultation looks like and, most problematically, when and how it is necessary or fulfilled."[234] The authors clearly articulate the fact that the duty to consult as a doctrine is premised

232. ibid.

233. Tony Seskus, 'As Trans Mountain debate rolls on, Ottawa pushes to change rules for big projects' (*CBC News*, May 2018 <www.cbc.ca/news/business/> accessed 17 August 2019.

234. Friedland and others (n 228) 187.

on the idea that the State has exclusive authority to preside over issues concerning Indigenous territory, as opposed to relations between the State and Indigenous nations being governed by a relationship that recognizes the legally pluralistic nature of Canadian society.[235]

Indeed, there is a sub–characteristic that emerged from the data concerned entirely with the inclusion of Indigenous knowledge, principles and methods into consultation processes. Craik, Gardner and McCarthy indicate in their article that an IBA negotiated for the Victor Diamond Mine in Ontario frequently referenced the principle of Shabotowan, which is "the 'traditional lifestyle practiced by the Mushkegowuk Cree, including living in harmony with all life on the land, water and air.'"[236] Further, several articles included in this review acknowledged the importance of consulting with Indigenous stakeholders about how the official consultation process should look, and the necessity to include Indigenous or traditional knowledge in the consultation and ultimately in the governance mechanisms for mining projects.[237] Yet, this argument does not recognize the existence of Indigenous legal orders nor does it recognize Indigenous jurisdiction over historical and contemporary Indigenous territory. The one exception is the article by Ariss and Cutfeet, who explain the convergence and competition of Canadian, Ontario and Kitchenuhmaykoosib Inninuwug jurisdiction over the land on which Platinex Inc., a junior mining company, set up a drilling camp.[238]

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235. ibid.

236. Craik and others (n 109) 381.

237. For examples, see Craik and others (n 109); Galbraith and others (n 102); Gibson (n 113); Haggart and others (n 122).

238. Ariss and Cutfeet (n 161).

This lack of acknowledgement of Indigenous legal jurisdiction comes despite legal uncertainty about ownership of sub–surface materials on Indigenous territory in Canada. The *Delgamuukw* decision declared that "aboriginal title also encompass[es] mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way."[239] This seems to suggest that Indigenous communities hold the rights to sub–surface minerals. Indeed, as Junger explains, a 2012 ruling by the Yukon Court of Appeal in the *Ross River Dena Council* case cited the above passage from the *Delgamuukw* decision to argue that the government did have a duty to consult Indigenous Peoples before they transferred mineral rights to mining proponents through recording a claim.[240] However, the 2014 Supreme Court decision in the *Tsilqot'in* case ruled "that 'Aboriginal title confers ownership rights similar to those associated with fee simple,'" a legal construct that does not actually include rights to sub–surface material.[241] Confusing the question even more, in the same 2014 case, the Supreme Court declared that Indigenous Peoples have the right to economically benefit from the land and they have the right to decide how their land will be used through Aboriginal title rights.[242] This reaffirms that Indigenous communities have the legal right to obtain financial gain from the land but leaves open and unresolved the question of sub–surface material ownership.

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239. As cited in Robin M Junger Junger, 'Aboriginal Title and Mining in Canada – More Questions than Answers' (2015) Rocky Mountain Mineral Law Foundation <https://mcmillan.ca> accessed 17 August 2019.

240. ibid.

241. ibid 6.

242. ibid.

Nonetheless, the critique levelled by Friedland et al. towards the duty to consult doctrine is largely ignored by the academic articles included in the scoping review, possibly because of the novelty and emerging nature of this argument.[243] Friedland et al. go further in their article, claiming that the visualization and recognition of Indigenous legal orders provide hope for a renewed relationship and reconciliation.[244]

8. Limitations

As with all studies and methodologies, there are limitations to this study. In accordance with the scoping review methodology as explained by Arksey and O'Malley,[245] this study did not evaluate the quality of the articles included in the review, but simply offered a descriptive account of the main themes raised in the reviewed literature.

Moreover, this study employed a constant comparative coding method, which emphasizes the reality that the author's analysis and coding are not necessarily replicable by other scholars. [246] The analytical method during the data charting process is at least somewhat influenced by the biases of the author, despite genuine efforts at objectively reviewing the data.[247] Given that the author of this Chapter comes from a white middle–class settler family of mixed western European

243. Friedland and others (n 228).

244. ibid.

245. Arksey and O'Malley (n 106).

246. Barney G Glaser, 'The Constant Comparative Method of Qualitative Analysis' (1965) 12(4) Social Problems 436.

247. ibid.

descent, the results from this study may not be replicated by, for example, an individual of Indigenous heritage. This is due to potentially different histories, experiences, analytical frameworks, and biases.

One final limitation of this study is that only articles that were written between November 2004 and March 2018 could be included in the review. Some characteristics that emerged during the analysis were not reported for feasibility purposes. Interestingly though, some of these characteristics, such as the idea that IBAs actually enhance the negotiating power of Indigenous communities, were not included because they did not meet the threshold established for a characteristic to be included in the study results. Another characteristic that was similarly excluded was the discussion about power struggles within Indigenous communities, nations, and organizations. The growing nature of the field of Indigenous studies may see some of these themes become more prevalent in future avenues of research.

9. Conclusion

Canadian case law introduced and continues to develop the duty to consult legal doctrine, whereby Canadian governments are required to consult Indigenous Peoples about any conduct that will or may affect the Aboriginal rights and title of Indigenous peoples. This is particularly important in regard to the mining sector in Canada, because of the proximity of many mining projects to Indigenous land in Canada, and the negative effects that mining activities have on the lands and well–being of Indigenous communities. This study was proposed to respond to the research question: what is known from the academic literature about the

phenomenon of consultation of Indigenous Peoples regarding mining projects in Canada? After completing a scoping review of the literature, four main themes or properties of consultation emerged: legitimacy; power; responsibility; and perception. One of the most notable findings of this study is the level of negativity and criticism levelled at current and historic processes of consulting with Indigenous peoples. The current Liberal-majority federal government has regularly insisted on its commitment to "have a renewed, nation-to-nation relationship with Indigenous Peoples, based of recognition, rights, respect, co-operation, and partnership."[248] With the duty to consult being rooted in the principle of reconciliation, it is hoped that future avenues of research and policies will propose and evaluate new methods of consultation that are developed in close partnership with Indigenous community members across Canada and that are globally accepted as legitimate and meaningful.

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248. 'A new nation–to–nation process' (Liberal Party of Canada, 2018) <www.liberal.ca/realchange> accessed 17 August 2019.

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Adequate Compensation in Case of Expropriation of Tribal People's Land: The Case of Belo Monte, Brazil

Arianna Porrone

Abstract

Developing projects in traditionally occupied territories affects indigenous and tribal groups with particularly serious consequences for their livelihood and agro-ecological spaces. The ILO Convention n. 169 on Indigenous and Tribal Peoples provides the same safeguards for both indigenous and tribal communities, including as to the use and enjoyment of traditionally occupied territories. In the Brazilian legal framework, distinctions between the two groups which might lead to discrimination claims among them and their entitlements to land are instead present. More radically, civil law notions such as "property" or "possession" are inadequate to depict the special relations between indigenous and tribal peoples and the land they occupy. Indeed, this relation goes beyond merely patrimonial aspects and has a deep spiritual meaning. The construction of the Belo Monte Hydroelectric Power Plant in the Xingu Basin, Brazil, which is causing the displacement of 60.000 people, will be used as a case study. The remedial actions taken by the Norte Energia consortium have not been able to adequately compensate the material and moral damages suffered by tribal peoples. This paper aims to: (a) identify the legal issues hindering the granting of prior and fair compensation for the losses suffered by tribal peoples, and (b) suggest best practices for effective compensation.

Keywords: *Tribal Peoples; Land Rights; Participation; Inter-American Court of Human Rights; Compensation Procedure; Belo Monte Hydroelectric Power Plant*

1. Introduction

The relationship between peoples and land is at the core of indigenous and tribal societies.[249] Land bridges material and symbolic concerns, as a factor of production and as "a site of belonging and identity".[250] Loss of land, consequently, reverses such mechanism implying a loss of identity.

Land dispossession weakens the bond between Indigenous and Tribal Peoples (hereinafter, respectively: IP and TP), and their land, and might undermine the groups' stability, as well as the community's degree of integration.

Yet the right to development, endorsed by the United Nations Declaration of the Right to Development of 1986[251], entitles States to create the national and international conditions, favourable to the realisation of investments' plans.[252]

249. Russel L Barsh, 'Indigenous Peoples' in Daniel Bodansky and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012).

250. Parker Shipton, 'Land and Culture in Tropical Africa: Soils, Symbols and the Metaphysics of the Mundane' (1994) 23 Annual Review of Anthropology 347, 347-377; Derrick Fay and Deborah James, 'The anthropology of Land restitution: an introduction' in Derrick Fay and Deborah James (eds), *The rights and wrongs of land restitution: 'restoring what was ours'* (Routledge 2008) 1.

251. Declaration on the Right to Development (adopted 4 December 1986), UNGA Res 41/1986 (UNDRTD).

252. ibid art 3.

This is one of the fundamental principles guiding the implementation of the objectives of the World Trade Organization[253] and is intended as a comprehensive process, involving economic, social, cultural and political changes, which should aim at the constant improvement of the well-being of the entire population and of all individuals.[254] The United Nations Declaration of the Right to Development states that: 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development'[255]. Nonetheless, infrastructure or large-scale projects, such as roads, canals, dams, ports, as well as concessions for the exploration or exploitation of natural resources in ancestral or traditionally occupied territories[256] affect IP and TP with particularly serious consequences for their livelihood and agro-ecological spaces. States are required to "implement adequate safeguards and mechanisms

253. Marrakesh Agreement Establishing the World Trade Organization (adopted 15 Apr. 15 1994) 1867 UNTS 154, 33 I.L.M. 1144.

254. ibid preamble; the Preamble of the WTO Agreement cit. states that: "The Parties to this Agreement: Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".

255. UNDRTD (n 251) art 2 para 1.

256. Inter-American Commission of Human Rights, 'Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter American Human Rights System' (2010) OAS official records, OEA/Ser.L/V/II. Doc. 56/09, 82.

in order to minimize the damaging effects of such projects".[257] In Brazil, for instance, the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA), 'acts as the Ministry of Environment's administrative arm to monitor and control the use of natural resources and of environmental licensing in cases of large-scale projects'.[258] The IBAMA and the Brazilian National Indian Foundation (FUNAI)[259] are jointly responsible for ensuring the protection of IP and TP.

Despite the existence such mechanisms, adverse impacts on the rights of local communities are constantly recorded. Guardianship policies[260] indeed, often involve plans for land restitution and fair compensation which do not fully align with the victims' interests after actions such as land expropriation, forced eviction, displacement and resettlement.

This Paper will take into consideration the ongoing debate on compensation procedures to the detriment of immaterial

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257. As commented in OEA/Ser.L/V/II. Doc. 56/09, and stated by I/A Court H.R., Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185 [3].

258. Satvinder Juss and others, 'The environmental and social impact of dams: mapping the issues' (2014) Law Schools Global League, Human Rights and Infrastructures Projects Group Common Paper, Instanbul, 10.

259. BRASIL, Lei 5.371. Autoriza a instituição da "Fundação Nacional do Índio" e dá outras providências, 5 de dezembro 1967, disponível em <www.planalto.gov.br/ccivil_03/leis/1950-1969/L5371.htm> accessed March 2019; see also <http://www.funai.gov.br> accessed March 2019.

260. In Part I "States Obligations and Rights Protected", Article 10 of the American Convention of Human Rights is listed, among others, the right to compensation. Organization of American States (OAS), American Convention of Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969 <www.refworld.org/docid/3ae6b36510.html> accessed March 2019. A deeper understanding of "fair compensation" practices will be offered in par. 2.4.

values of collective use of IP and TP. It will show the necessity for the property torts in civil law jurisdictions to make a substantial evolution towards the comprehension of fundamental rights of immaterial value, precondition for high standards of living. The work is structured in two parts: Part I aims at providing an overview of the concepts and definitions on Tribal and Indigenous Peoples as set forth by international legal tools. It will be dedicated to the investigation on the status of both IP and TP as provided by the ILO Convention n.169 and on the definition of their land rights. It will be demonstrated how these forms of appropriation deviate from the traditional debate in anthropology on entitlements to land and from the controversy of agricultural land distribution. Eventually the limits of Western legal concepts will be taken into consideration: notions such as 'property' or 'possession' are ill-suited to depict the special relations between indigenous and tribal peoples and the land they occupy. The investigation will continue by focusing on the elements for adequate and fair compensation in case of expropriation of indigenous and tribal peoples from traditionally occupied territories. The standards set forth by the Inter-American Court of Human Rights will be used as a way of addressing the identified key problems.

Part II will take into consideration the controversial case of the Ribeirinhos of Belo Monte, Pará, Brazil, a group of tribal peoples living along the Xingu River, currently affected by the construction of a hydropower plant. Since the Brazilian legal system does not recognise to IP and TP equal land titles over the territories that they traditionally occupy and use, this Part will suggest a way forward for compensation in case of expropriation of tribal peoples from their traditionally occupied territories.

2. Indigenous and Tribal Peoples' Rights

2.1 Status and Definitions of Indigenous and Tribal Peoples

The International Labour Organization's Convention concerning Indigenous and Tribal Peoples in independent countries (ILO No. 169)[261] is the most commonly referred source for the identification of IP and TP at international level. With its adoption in 1989, the ILO No. 169 launched a still thriving period of efforts, dialogue and achievements in grounding and developing IP and TP's rights,[262] and in recasting the role of governments to ensure their progressive implementation.

The Convention's primary aim is (1) to overcome discriminatory practices affecting indigenous and tribal peoples, and (2) to enable them to participate in the national decision-making processes concerning aspects that might affect their livelihoods.[263]

The Convention acts in two different directions. First of all, with due regard to these peoples' distinctive traits, it makes use of an inclusive approach and equally applies to both

261. Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 Jun 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO No. 169);

262. Such as the United Nations Declaration on the Rights of Indigenous Peoples in 2007 or the Convention on Biological Diversity; see Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007), UNGA Res 61/295 (UNDRIP); Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).

263. Birgitte Feiring, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents* (International Labour standards Department 2013) <www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf> accessed March 2019.

indigenous and tribal peoples. The ILO statement of coverage employs the term "peoples", instead of that of "populations"[264], for it embraces a variety of evolving customs and identities. The use of such a flexible nomenclature is further supported by the fact that the term "indigenous peoples" has never been authoritatively defined.[265] It is worth mentioning that some countries, when referring to IP or TP, still use other local or national expressions[266] broadening the variety of identities that could be classified under the Convention. IP and TP together encompass at least 5000 distinct peoples, for a total of more than 370 million individuals living in 70 different countries.[267] Thus, we may wonder whether the new term would be a useful tool to easily embrace such a variety, or it would rather jeopardize the peculiarities of each tribe and specific socio-cultural systems.

Secondly, the ILO No. 169 recognizes procedural rights, rather than substantive ones[268]. It sets forth principles concerning States' duty to act for the respect of IP and TP

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264. See ILO No. 169 (n 261) art. 1 para 3: "The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law".

265. Barsh (n 249).

266. In some countries in Asia, for example, the language holds expressions like "hill people" or "shifting cultivators", while some Indigenous Peoples in Africa are known as "pastoralists" and "hunter-gatherers". In Latin America has often been used the term "'peasants".

267. Birgitte Feiring and Programme to Promote ILO Convention No. 169, *Indigenous & Tribal People's Rights in Practice - A Guide to ILO Convention No. 169* (International Labour Standards Department 2009).

268. Fergus MacKey, *A Guide to Indigenous Peoples' Rights in the International Labour Organization* (Forest Peoples Programme 2002) <http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/iloguideiprightsjul02eng.pdf> accessed March 2019.

fundamental rights, vital for the maintenance of their identity and autonomy,[269] and provides guidelines for their implementation including participation, consultation and consent, management of land, water and natural resources.

Article 1 (1(a) and 1(b)) on the Convention's coverage does not strictly define who the people belonging to IP or TP are, but rather describes the peoples the Convention aims to protect:[270]

> (a) 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;
>
> (b) 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 colonization 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[271].

The correct interpretation of the Convention's coverage depends on the use of elements of heterogeneous nature. Art. 1(1) sets the objective criterion for interpretation: it can be objectively determined whether a member of a group falls

269. Feiring and Programme to Promote ILO Convention No. 169 (n 267).

270. ibid.

271. Barsh (n 249)

within the Convention's scope through an analysis of the above-mentioned requirements. The ILO guide to the ILO Convention No. 169[272], defines the key elements of IP: (i) historical continuity; (ii) territorial connection; (iii) distinct social, economic, cultural and political institutions. Typical elements portraying TP include (i) culture, social organization, economic conditions and way of life different from other segments of the national population; (ii) own traditions and customs and/or special recognition.

Article 1(2) of the ILO Convention no. 169 complements art. 1(1) with the subjective criterion, self-identification which: '[…] shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'. Whether a given people considers itself to be indigenous or tribal under the Convention auspices, and whether this identification is equally accepted by the group, is amongst the pillars of self-determination. There are disparate ways and approaches to the issue of self-determination.[273] In this Chapter self-determination will serve at the sole scope of conferring a more exhaustive picture of self-identification and of IP and TP's entitlements to land.

Self-determination is, indeed, the only remaining element differentiating peoples from being "indigenous" or "tribal". While a people may be tribal by its own choice or without its consent, as a result of special legal status imposed by the state, Indigenous Peoples can only legally exist if they choose to do so, by perpetuating their own

272. Feiring and Programme to Promote ILO Convention No. 169 (n 267).

273. Erica-Irene A Daes, 'Some Considerations on the Right of Indigenous Peoples to Self Determination' (1993) 3 Transnat'l L. & Contemp. Prosp. 1.

distinctive traits and identity.[274] The ILO no. 169, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not place any limitations on the right to self-determination and acknowledge it to be a right "of all people". It is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which clearly states in art. 3[275] that: 'Indigenous Peoples have the right to self-determination' which it to say the freedom to determine their political status and pursue their economic, social and cultural development.

By virtue of this right, which is 'a fundamental human right and a prerequisite to the full enjoyment of all fundamental human rights'[276], IP and TP have the right to autonomy or self-government (UNDRIP art. 4) within their own traditional territories.

2.2 Indigenous and Tribal Peoples' Land and Territory

Most of IP and TP's economies, livelihood strategies and traditional institutions lean on territorial sovereignty. The spiritual well-being and distinct cultural identity of indigenous and tribal groups is also inextricably connected to a geographical space.[277]

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274. Erica-Irene A Daes, 'United Nations Working Group on Indigenous Populations (1984-2001)' (2008) 21(1) Cambridge Review of International Affairs.

275. UNDRIP (n 262).

276. United Nations General Assembly (1950); United Nations General Assembly (1952) cit. Daes (n 274).

277. Feiring and Programme to Promote ILO Convention No. 169 (n 267).

Territorial sovereignty is thus indispensable for the respect of IP and TP's fundamental human rights and for granting them the enjoyment of their distinctive traits and ways of life.[278]

The ILO Convention no. 169 defines the concept of land and territories in the terms of indigenous and tribal peoples, in a way that ensures the harmonic recurrence of their customs and traditions. Article 13(1) recognises the distinctive nature of IP and TP's relationship to lands in specific reference to 'the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories'.[279] This principle is also found in art. 25 of the UNDRIP:

> Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used […].

Article 13(2) further reasons that: 'the use of the term lands […] [shall] include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'. As a matter of fact, the occupation of a territory by an indigenous or tribal community is not restricted to the nucleus of houses where its members live, rather 'the territory includes a physical area constituted by a core area of dwellings, natural resources, crops, plantations and their milieu, linked insofar as possible to

278. Barsh (n 249).

279. ILO No. 169 (n 261).

their cultural tradition'.[280] In this same sense, territorial use and occupation by indigenous and tribal peoples 'extend beyond the settlement of specific villages to include lands that are used for agriculture, hunting, fishing, gathering, transportation, cultural and other purposes'.[281] This relationship is to be regarded as of collective nature.[282] Acquisition comes from the community as a whole, it finds its formal aspects in the common use of spaces and it is manifested through a

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280. As commented in Inter-American Commission of Human Rights (n 256) and as stated by: IACHR, Arguments before the Inter-American Court of Human Rights in the case of the Yakye Axa community v. Paraguay. Cited in: I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125 [120(h)].

281. The Brazilian Courts have already mentioned the concept of *habitat,* to that respect. As defined by the jurisprudence of the Court TRF-1 - Embargos Infringentes Na Apelação Civel: EIAC 29974 MT 1999.01.00.029974-7 <https://trf-1.jusbrasil.com.br/jurisprudencia/2010325/embargos-infringentes-na-apelacao-civel-eiac-29974-mt-19990100029974-7/inteiro-teor-100704287> 'O objetivo da Constituição Federal é que ali permaneçam os traços culturais dos antigos habitantes, não só para sobrevivência dessa tribo, como para estudo dos etnólogos e para outros efeitos de natureza cultural e intelectual. Não está em jogo, propriamente, um conceito de posse, nem de domínio, no sentido civilista dos silvícolas, trata-se de habitat de um povo'; and as commented by L. de Freitas J., 2010, A posse das terras tradicionalmente ocupadas pelos Índios como um instituto diverso da posse civil e sua qualificação como um direito constitucional fundamental, Universidade de Fortaleza, Fortaleza CE, 94. Translation of the author: 'The objective of the Federal Constitution is that of safeguarding the cultural traits of the original inhabitants, for their survival, as well for the researches of ethnologists and any other consequence of cultural or intellectual nature. There is not at stake a concept of peasants' possession or domain, in civil terms. Rather it is about the *habitat* of a population'.

282. ILO No. 169 (n 261) art 13 para 1.

common use of the lands. According to José Heder Benatti, in areas of common use:

> "Combinam-se as noções de propriedade privada e de apossamento de uso comum, onde encontram-se um grau de solidariedade e coesão social, formadas a partir de normas de caráter consensual que garantem a manutenção destes espaços".[283]

These areas are identifiable in rivers, lakes, paths, beaches, canyons, forests, all collectively used and administrated by the natural inhabitants of the area.

States have the duty to guarantee IP and TP to govern themselves within their recognized collective territories and to monitor the impact of public interventions on these areas. Art. 14 (1) of the ILO no. 169 imposes to all signatory parties the recognition of the: '[…] rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy'. The establishment of IP or TP's land rights is based upon the traditional occupation and use, and not on the eventual official legal recognition or registration of that ownerships by the states.[284] In addition:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other

283. Jose H Benatti (2013), Posse Agroecológica e Manejo Florestal – Á luz da lei 9985/00, Juruá Editora, Curitiba, 112. Translation of the author: 'combine the notions of private property and appropriation by common use, in which there is a degree of solidarity and cohesion that rises from norms of consensual nature, which ensures the maintenance of these same spaces'.

284. Feiring and Programme to Promote ILO Convention No. 169 (n 267).

> resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples […] before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.[285]

Article 16 of the ILO no. 169 specifically addresses the event of displacement. Since displacement affects the endurance of ties between IP and TP and their land, the non-recognition of this profound relationship[286] might cause the disappearance of such societies. The ILO Convention no. 169 provides for measures of compensations in case in which removal and relocation of indigenous and tribal peoples 'would be considered necessary'.[287]

Firstly, 'Indigenous Peoples should have the right to return as soon as the reason for which they had to leave is no longer valid'.[288] Secondly, where such unavoidable relocation becomes a permanent situation, IP and TP 'have the right to lands of an equal quality and legal status to the lands they previously occupied'.[289] Eventually, indigenous and tribal peoples 'have the right to receive full compensation for any loss or

285. ILO No. 169 (n 261) art 15 para 2.

286. UNCHR 'Report of the Special Rapporteur on the rights of indigenous peoples' (2011) UN Doc E/CN.4/Sub.2/2001/21.

287. ILO No. 169 (n 261) art 16 para 1.

288. Feiring and Programme to Promote ILO Convention No. 169 (n 267).

289. ibid.

injury the relocation may have caused'.[290] But in what terms should the loss or environmental moral damage be measured?

Land restitution and just remedy always promise a full, more equitable future[291] for the affected populations. However, in most cases, the dispossessed lands are not of great value, in and of themselves. It is mostly the symbolic value attached to their return that make them imperative for the groups' survival.

According to Derrick Fay and Deborah James 'the materiality of land encompasses immaterial significance'.[292] IP or TP's property rights can be understood as social processes[293] which involve objects that are hardly substitutable with a concrete alternative in civil law or capitalistic terms or a cash compensation.

Land dispossession and restoration are acts of authorised violence.[294] They are transformative phenomena whose occurrence is the cause of a distortion of the existing relationship between the individual and its habitat and of exclusionary processes. Only few, among the labelled as vulnerable

290. ibid.

291. Fay and James (2008), The Anthropology of Land Restitution: an introduction, 1, in Derrick Fay and Deborah James (2008), The rights and wrongs of land restitution: "restoring what was ours", Routledge, London, UK, 6.

292. ibid 8.

293. ibid 9.

294. In the *gewalt* meaning, it is to say, an accorded kind of violence. W. Benjamin in D. J. Siqueira, Davi A S Lelis, 'Indenização por Valor Afetivo e o Valor Justo no Procedimento Desapropriatório' in Reis Melo and others (eds), (Org.). Direito e administração pública II. 1ed. Florianópolis: *CONPEDI 2014*, 339-357, 3.

– the ones categorised[295] as potential claimants[296] – are in fact eligible for the highest level of protection at the time of displacement. Therefore, it is fundamental to have common, clear rules for the definitions of such categories.

The act of restitution/re-settlement requires the establishment of forms of 'imagined community',[297] based upon geographical, genealogical, ethnical, cultural, racial grounds, or on language differences or livelihoods, which put the group[298] into negotiation and litigation with the state, through the brokerage of non-governmental organizations, activist or state agencies.

The matter is, as Fred Myers[299] says, that land claims are not indigenous or tribal peoples' processes. However, it is exactly claimants' capacity of accepting that "land" has definable boundaries and, as such, can be "owned" with a certain degree of exclusion of others which allows them to invoke the story of a past linkage with that territory, as the main requirement for restitution or just compensation.

In this perspective, IP and TP must enter into negotiations with notions of capitalistic nature and narrow down

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295. Fay and James (n 291) 8.

296. Reduced to essential biases on the basis of a common history, ethnicity, indigeneity, treaty status or other legal markers; see Fay and James (n 291).

297. ibid 12.

298. See, for instance, Alfredo W Berno de Almeida quotes in Fay and James (n 291) 57-62: the *Coordenação Nacional de Articulação das Comunidades Negras Rurais Quilombolas* (CONAQ); the *Conselho Nacional de Seringueiros* (CNS); the *Movimento Interestadual das Quebradeiras de Coco Babaçu* (MIQCB); *Movimento dos Ribeirinhos do Amazonas* (MORA) and the *Movimento de Preservação de Lagos*; *Movimento Atingidos por Barragens* (MAB).

299. Fay and James (n 291) 23.

their ethics into civil and administrative law terms, in order to see their rights recognized and gain visibility before the public authorities. States must also adapt to new concepts of justice, which might not bring IP and TP's possession back to the *status quo ante*, but that could at least fulfil a collective, abstract sense of grief and damage.

2.3 Environmental Moral Damage: The Human Costs

Moral damage is what causes suffering, psychological perturbation to the plaintiff and that affects individuals or communities' sense of dignity.[300] The kind of impairment which contributes to the detriment of a physical person in its interaction with the environment is referred to as environmental moral damage. This kind of harm to the environment is inextricably linked to the right to personal identity and covers individual and collective rights at once.

The pain in its collective sense, takes the image of an immaterial devaluation of the environment and, consequently, of other incorporeal life-related values.[301] Byron Joseph Good affirms that, even though information on this kind of affliction is more ethnographic and clinical than epidemiological, certain forms of psychological distress accompanying dislocation have been identified.[302] He asserts that

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300. D J Siqueira, Davi A S Lelis, (2014), Indenização por Valor Afetivo e o Valor Justo no Procedimento Desapropriatório, 8; cit. in F Reis Melo and others (2014), (Org.). Direito e administração pública II. 1ed. Florianópolis: CONPEDI, 2014, v., 339-357.

301. Such as health, customs and traditions.

302. Byron J Good, 'Mental Health Consequences of Displacement and Resettlement (1996) 31(24) Economic and Political Weekly 1504, 1504-1508<www.jstor.org/stable/4404273> accessed March 2019.

> Grieving is a process of working through, of giving up attachments and making new attachments, of accepting a new reality and coming to find pleasures in new relationships. Given the extraordinary importance of place, of attachment to the most minute details of a community's environment, grief should be an expected part of adaptation.[303]

He adds that as a consequence of land degradation and eviction:

> Clinicians have described 'pathological' forms of grieving [on the affected communities] that includes unusual levels of sorrow and the inability to function, grief that does not resolve, or unexperienced grief that is triggered at a later time and appears strongly and out of place.[304]

The ILO Convention n. 169[305] ensures indigenous and tribal peoples the protection of the "totality" of their territories from environmental degradation, involuntary removal and unwanted intrusions by non-members.[306] This legal tool allows an extension of Indigenous Peoples and Tribal communities rights to their living resources, such as wildlife, fish, water, whether located on the lands that they permanently occupy or that they traverse seasonally to use with traditional means, and to their relevant customs and traditions.

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303. Good (n 302) 1506.

304. ibid.

305. See ILO No. 169 (n 261) art 7 para 4, art 13 para 2, art 14 para 1; art 16 para 1, art 18.

306. Barsh (n 249).

When dealing with the loss of lands, there is the urge for the responsibility systems in civil law terms to make a substantial evolution towards the comprehension of fundamental rights of immaterial and general value within the concept of environmental protection, precondition for IP and TP's high standards of living. This is also the positioning of the United Nations Environment Programme for Latin America and the Caribbean (UNEP).[307] The costs in human suffering, in collective grief, in neuropsychiatric illness and in social pathologies connected to the land degradation and a consequent loss of land, indeed 'are as tangible as the loss of land itself or an epidemic of infectious diseases. These should be viewed as real, compensable costs and should be the focus of serious planning'.[308] It is a State duty, then, to ensure rightful forms of compensation to the concerned peoples, by means of judiciary power.

2.4 Compensation Forms: The International Standards

The principles of fairness and justice suggest that a person should not be forcibly removed from her/his land for a

307. 'É necessário um novo regime de responsabilidade civil que estabeleça tanto os danos previsíveis quanto os imprevisíveis, assim como os danos presentes e futuros. Deveriam ser indenizados igualmente o dano emergente e o lucro cessante, bem como o dano moral', programa das Nações Unidas para o Meio Ambiente-PNUMA: *la responsabilidad por el daño ambiental*. Mexico: Oficina Regional para a America Latina e Caribe do PNUMA, 1996, 664, in José Rubens Morato Leite, *Dano Ambiental: do Individual ao Coletivo Extrapatrimonial*, (Editora Revuista dos Tribunais 2000) 272. Translation of the author: 'it is necessary a new regime of civil responsibility that could establish both the predictable damages and the unexpected ones, as well as the present and future damages. It should be equally compensated the emerging damage and the dismissed profit, as well as the moral damage'.

308. Good (n 302) 1508.

public purpose, without payment or other compensation's means that are not commensurate to her/his losses. However, the indemnity provided by the States following domestic rules on the subject, are often insufficient[309] or disproportioned to cover landholders' losses.

Generally, State authorities follow a compensation scheme which is economic related. The main guidance for the assessment is the fair-market-value[310] (FMV) of land, which is commonly defined as the amount a willing seller would pay, and a willing buyer would accept in an open market. The FMV is ineffective where land markets are weak or non-existent. To the extent that Merill[311] asserts that the concept of fair-market-value is a "fiction" in the context of takings of property, due to the lack of information available to accurately measure land values, or of at least a shared understanding on the notion by the international community.

Nonetheless, it is the State duty and responsibility to agree on common standards for the calculation of the "replacement cost" of groups of poor or marginalised origin, not to leave their right to property unsolved. In many cases Indigenous Peoples or Tribal communities, as well as women landholders around the world are discriminated because

309. The World Bank Land Governance Assessment on Brazil of 2014 found that although compensation is generally paid for ownership and other rights, in the majority of cases the level is insufficient for the displaced households to either afford a comparable asset or maintain their prior and economic status.

310. Nicholas K Tagliarino, 'The Status of National Legal Frameworks for Valuing Compensation for Expropriated Land: An Analysis of Whether National Laws in 50 Countries/Regions across Asia, Africa, and Latin America Comply with International Standards on Compensation Valuation' (2017) 6(2) Land 37, 37.

311. ibid, 116.

of a limit in the compensation procedures:[312] whether unable to measure customary tenure monetary worth, or unable to be gender-neutral, therefore foreclosing by definition.

To address this concern, the VGGT's[313] and other international standards[314] were formulated to protect affected landholders from impoverishment and other risks, including landlessness, joblessness, food insecurity, increased mortality, and marginalization.[315] Although these legal instruments are not legally binding for State and non-State actors (e.g. private companies), they report widely accepted human rights norms and concepts, such as right to possession, right to property, right to housing, right to an adequate living standards, right to an effective remedy before the Court, all provided by the Universal Declaration of Human Rights,[316]

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312. Tagliarino (n 310) 116.

313. The Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the responsible Governance of tenure of land, fisheries and forests in the Context of national food security* (FAO Office of Knowledge Exchange, Research and Extension 2012).

314. Simon Keith and others, *Compulsory Acquisition of Land and Compensation* (FAO Office of Knowledge Exchange, Research and Extension 2008); World Bank, *Environmental and Social Framework*, (The World Bank 2017) 77; see Social Standard 5 Land Acquisition; International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (International Finance Corporation: Environmental, Social and Governance Department 2012); see Performance Standard 7: Indigenous Peoples; Asian Development Bank, *Compensation and Valuation in Resettlement: Cambodia, People's Republic of China, and India* (Rural Development Institute 2007); UNCHR 'Report of the Special Rapporteur on the rights of indigenous peoples' (2011) UN Doc A/HRC/4/18.

315. Tagliarino (n 310).

316. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)..

International Covenant on Economic Social and Political Rights,[317] ILO Convention no. 169,[318] and the UNDRIP[319].

Some suggestions on compensation of unregistered customary tenure holders are contained in Section 3.1[320] of the VGGT's, which provides that "States should respect legitimate tenure rights holders and their rights, whether formally recorded or not». In addition, the World Bank Environmental and Social Standards (ESS5)[321] and the International Financial Corporation (IFC) Performance Standards 5 and 7[322] require for the borrowers to pay the affected populations regardless of their legal status, without making reference to differences between customary and statutory rights. This new orientation suggests that even in lack of a *contrato de concessão de direito real de uso*[323], an individual or collective legal entity will still be entitled to have recognized her/his rights to property.

Section 2 of the VGGT's calls for a fair valuation of compensation, but do not give a definition of the term "fair".

When calculating the compensation for the land loss, assessors need to rely also on the occurrence of loss of business

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317. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

318. ILO No. 169 (n 261).

319. UNDRIP (n 262) art 27.

320.The Food and Agriculture Organization of the United Nations (n 313).

321.Keith and others (n 314); World Bank (n 314).

322. International Finance Corporation (n 314).

323.*Decreto-Lei* 271/1967 que dispõe sôbre loteamento urbano, responsabilidade do loteador, concessão de uso e espaço aéreo e dá outras providências; Benatti (n 283) 144.

or other economic activities. For instance, the expropriation's declaration might preclude farmers, grazers, hunters, and other landholders of their primary source of income. If, in fact, compensation procedure would not take into account land's buildings, crops, and other tenures improvements, the affected population who built, used, and maintained these improvements would not see recognized a fair compensation to their rights.[324]

Section 18.2 of the VGGT's calls for policies which take into account non-market values such as social, cultural, religious and spiritual standards. This same principle is confirmed by Article 5[325] of the ILO Convention n. 169. Moreover, the UNDRIP[326] and the IFC Performance Standard 7[327] make a direct reference to the ancestral relation that Indigenous Peoples and traditional communities have with the territories that they occupy and use.

Among scholars, the prominent position regarding cultural heritage sites' price-tag, is to allow the affected populations to take a "self-evaluation", to subjectively ascertain intangible land value.[328] Only the aggrieved property owners, in fact, know the true value of their land. On the other side, others[329] argue that a calculation based on the experienced loss, would prioritize some groups more than others.[330]

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324. Tagliarino (n 310).

325. ILO No. 169 (n 261).

326. UNDRIP (n 262)

327. International Finance Corporation (n 314).

328. Tagliarino (n 310).

329. ibid.

330. However, I rather argue that personal assessment of losses disadvantage groups of people that are not included in the social fabric, therefore, uninformed of their fundamental rights.

Perhaps, only a Council of representatives of the group, in continuous interaction with State authorities, would be able to ascertain the affected populations' general needs. Section 16.2 of the VGGT's[331] states that 'States should be sensitive where proposed expropriations involve areas of particular cultural, religious or environmental significance, or where the land, fisheries and forests in question are particularly important to the livelihoods of the poor or vulnerable'. Consultations are deemed fundamental to provide for alternative approaches to achieve the public purpose, with regard to strategies to minimise disruption of livelihoods.

Furthermore, most of the times, the land's monetary value is of little concern and a cash reparation would not be equitable for the loss suffered (which includes the moral damages).

Another way to compensate intangible land value might include alternative forms to a money payment. Section 16.3[332] of the VGGT's provides that compensation might occur in cash or as a combination of cash, rights to alternative areas, or a combination of both.

It is true that groups that have established a symbiotic relationship with the environment they live in and are not accustomed to managing large sums of money, would not easily adapt to a different habitat. Furthermore, by accessing our capitalistic society, they could experience the impoverishment of their social bonds, widespread economical losses and marginalisation.

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331. The Food and Agriculture Organization of the United Nations (n 313).

332. ibid.

2.4.1. The Standards of the I/A Court of Human Rights

The Inter-American Court of Human Rights has defined more stringent requirements for compensation of damages, relating expropriation of ancestral lands for reasons of State's eminent domain.

The Court has developed an extensive jurisprudence on the need for States to adopt measures aimed at restoring the rights of indigenous and tribal peoples over the territories[333] that they traditionally occupy and use, and has pointed out that restitution of land alone is unlikely to be an efficient measure for the survival of each group and community's integrity[334].

The Indigenous Peoples' right to restitution of their traditional lands, has also been confirmed by the Committee for the Elimination of Racial Discrimination. According to its General Recommendation No. XXIII on indigenous peoples: 'where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent [States should] take steps to return those lands and territories'.[335]

Only:

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333. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004; see Inter-American Commission of Human Rights (n 256).

334. IACHR, Second Report on the Situation of Human Rights in Peru. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X; see ibid.

335. CERD, General Recommendation 23, Indigenous Peoples, U.N. Doc. A/52/18, Annex V (1997); see ibid.

> When a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures[336]'.

This is a last resort alternative, that only constitutes a legally acceptable hypothesis, when all possible means to obtain the restitution of each people's specific ancestral territory have been exhausted.

However, it is not sufficient to simply license damaged communities to new properties[337]; in order to grant alternative lands, indigenous and tribal peoples must have access, at least, to certain minimum agro-ecological capacities, and be subject to an assessment which determines their remaining capacity to prosper and develop. Also Article 28 §2[338] of the UNDRIP states that: 'unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'.

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336. I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146 [135]; see ibid.

337. 'The new territory needs to be of sufficient extent and quality to conserve and develop indigenous and tribal peoples' ways of life, meaning that they must include the geographic space necessary for the cultural and social reproduction of the groups'. IACHR, Third Report on the Situation of Human Rights in Paraguay. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, [50], Recommendation 1; see ibid.

338. UNDRIP (n 262)

The State has the burden of proof, with sufficient arguments, that there exist objective and prevalent grounds that justify the failure to afford such restitution of indigenous and tribal peoples' property and territory[339]. Eventually, land's loss will find just compensation only with the concession of another land.

For the implementation of development or investment plans or project that trigger ancestral territories' rights of indigenous and tribal peoples, the I/A Court of Human Rights has identified the conditions for approval only after good faith consultations – and, where applicable, consent – a prior environmental and social impact assessment conducted with indigenous participation, and reasonable benefit sharing[340]. In the case of the Saramaka People v. Suriname[341], the I/A Court of Human Rights identified participation in the benefits, as a specific form of fair compensation stemming from the limitation or deprivation of the right to indigenous community property right:

> the Court considers that the right to obtain compensation under Article 21(2) of the Convention extends not only to the total deprivation of property title by way of expropriation by the State, for example, but also to the deprivation of the regular use and enjoyment of such property. [For which reason] in the

339. I/A Court H.R (n 336).

340. I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006.

341. Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgement of November 28, 2007, Preliminary Objections, Merits, Reparations, and Costs, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf, accessed March 2019 (n 257).

present context, the right to obtain "just compensation" pursuant to Article 21(2) of the Convention, translates into a right of the members of the Saramaka people to reasonably share in the benefits made, as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

3. The Case of the Belo Monte Hydroelectric Power Plant

3.1 The Controversial Project

The Xingu Basin of the Brazilian Amazon has been site of an ongoing development dispute for the past fifty years. Situated in the Pará Region, the Xingu Basin lies between the Tapajós and Xingu Rivers within the Amazon Basin of central-eastern Brazil. Besides being one of the most ecologically diverse sites of the planet, it hosts over 25,000 Indigenous Peoples from 18 ethnic groups, including the Juruna, Xikrín, Arara, Xipaia, Kuruaya, Parakanã, Araweté, and Kayapó, for a number of 10 recognized indigenous lands, and around 40.000 *Ribeirinhos* and other tribal communities.

The first controversial proposal for the construction of a hydroelectric power plant dates back to 1970, when the "Altamira Complex" was designed in all its majesty as part of the Programa de Aceleração do Crescimento do Governo Federal (PAC):[342] it should have consisted of six separate

342. 'Programa de Aceleração do Crescimento do Governo Federal' (*Ministério do Planejamento*) <http://www.pac.gov.br.> accessed August 2019.

dams and five generating plans, requiring the flooding of 20,000 square kilometres of land.[343]

The first inspections were conducted by the Centrais Elétricas do Norte do Brasil (ELETRONORTE S/A), subsequently taken by Centrais Elétricas Brasileiras S/A (ELETROBRAS) in conjunction with the Camargo Corrêa S/A, Andrade Gutierrez and Norberto Odebrecht enterprises (Norte Energia).[344]

In 1998, the renamed "Belo Monte" complex went through a drastic makeover, because of severe criticism from the international community and violent dissent from IP and TP living in the area: the new plan involved the construction of a single dam, capable of producing eleven gigawatts of electricity (40% of the energy's national consumption), implying the inundation of 500 square kilometres of land.[345] The project is owned by the Norte Energia consortium, which is led with a 49.98% interest, by the Brazilian federal power utility Eletrobras and which includes also other enterprises: Queiroz Galvão (10.02%), Vale (4.59%), Cemig GT (4.41%), Galvão Engenharia (3.75%), Mendes Júnior (3.75%), Serveng (3.75%), JMalucelli Construtora (9.98%),

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343. Upasana Khatri, 'Indigenous Peoples' Right to Free, Prior, and Informed Consent in the Context of State- Sponsored Development: The New Standard Set by Sarayaku V; Ecuador and its Potential to Delegitimize the Belo Monte Dam' (2013) 29(1) American University International Law Review 165, 168.

344. Gabriela Pinheiro de Sousa, (2014), 'A usina hidrelétrica de Belo Monte à luz das normas constitucionais', Jus.com.br, 3 <http://ambito-juridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=14422> accessed March 2019.

345. A third of the area to be flooded in relations to the previous scheme.

Contern Construções (3.755%), Cetenco Engenharia (5%) and Gaia Energia e Participações (1%).[346]

By the end of 2019, the Belo Monte Hydroelectric Power Plant is expected to be the world's third largest dam,[347] diverting more than 80% of the Xingu River's flow,[348] and causing the forced displacement of around 68,665 peoples[349] from the Xingu Basin. The overall cost amounts to R$20 billion, and over R$800 million are going to be addressed for the recovery of the damages on the environment and human rights of the peoples living in the area.

The construction of the dam is even more disputed in consideration of the Brazilian legal framework on indigenous and tribal peoples. Both these groups benefit of the protection accorded to them by the ILO Convention no. 169. However, Brazil has adopted two different legal tools to ensure their recognition in the national society, a system which raises issues of discrimination in regard to compensation practices. Even the Inter-American Court of Human Rights has questioned[350] whether a legislation providing for "special treatment" for Indigenous Peoples on tribal groups would raise any doubt concerning State sovereignty and discrimination.

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346. 'Belo Monte Hydroelectric Power Plant, Xingu River' (*Power-Technology*) <www.power-technology.com/projects/belomontehydroelectr/> accessed March 2019.

347. After the Three Gorges in China and Itaipu, which is jointly run by Brazil and Paraguay.

348. Khatri (343) 173.

349. Piheiro de Sousa (n 344)

350. Saramaka People v. Suriname (n 257).

On the one side, the Brazilian Legislative Decree n. 143 of the 20 June 2002[351] ratifies the ILO Convention n. 169 in its wholeness. On the other side, the Decree n. 6.040 of the 7 February 2007[352] specifically addresses the rights of the "povos e comunidades tradicionais" (tribal peoples):

> grupos culturalmente diferenciados e que se reconhecem como tais, que possuem formas próprias de organização social, que ocupam e usam territórios e recursos naturais como condição para sua reprodução cultural, social, religiosa, ancestral e económica, utilizando conhecimentos, inovações e práticas gerados e transmitidos pela tradição.[353]

In this perspective TP do not enjoy IP's same land rights, due to the lack of "indigeneity".[354] Indigeneity is the original

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351. Decreto Legislativo n. 143. Aprova o texto da Convenção nº 169 da Organização Internacional do Trabalho sobre os povos indígenas e tribais em países independentes; de 2002 <www2.camara.leg.br/legin/fed/decleg/2002/decretolegislativo-143-20-junho-2002-458771-convencao-1-pl.html> accessed March 2019.

352. Decreto n° 6.040. Institui a Política Nacional de Desenvolvimento Sustentável dos Povos e Comu nidades Tradicionais; 7 de fevereirio de 2007 <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/decreto/d6040.htm> accessed March 2019.

353. Translation of the author: 'Traditional populations and communities: culturally differentiated groups, which determine themselves as such, which have their own forms of social organisation, which occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral and economic survival, using knowledge, innovations and practices that have been created and transmitted by tradition'.

354. As defined by the jurisprudence of the Court TRF 3° Região, AC 91.03.15750-4-SP – Rela. Des. Federal Salette Nascimento - Publicação no DJU de 13.12.94, 1ª Seção, pág. 72900 and commented by Luis de Freitas J, 'A posse das terras tradicionalmente ocupadas pelos Índios como

property title of Indigenous Peoples which distinguishes indigenous possession from mere civil possession. According to Article 20, § XI of the Federal Constitution of 1988, the territories traditionally occupied by Indigenous Peoples are classified under the Federal Union's assets. Following article 231(2) of the Constitution and article 22 of the Lei 6.001/73, Indigenous Peoples have the permanent possession of their territories and the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein. The natural consequence, as established by Article 231(4) is that these lands are inalienable and non-disposable, the rights are not subject to limitation, as Indigenous Peoples cannot be removed from their territories.

Tribal peoples' land rights instead, stem from the collective acquisition of lands that took place during the *caos fundiario*[355] of the 70s in the Amazon. During the military

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um instituto diverso da posse civil e sua qualificação como um direito constitucional fundamental' (2010) Universidade de Fortaleza, Fortaleza CE, 82: 'Ementa: Processo Civil. Arguição do 'decisum' rejeitada. São bens da União terras tradicionalmente ocupadas pelos índios. Instituto do indigenato. Direito congênito. Inaplicabilidade à espécie do conceito de posse civil. [. . .] 3. O fundamento do direito dos silvícolas repousa no indigenato, que não se caracteriza como direito adquirido, mas congênito'. Translation of the author: 'Traditionally occupied lands by Indigenous Peoples, are to be included in the Union's assets. The category of the *indigenato.* Original right. Non-applicability of the category to the concept of civil possession. […] 3. The principle of the right of the people from the forest lie in the *indigenato,* which is not to be intended as an acquired right, but congenital'.

355. Ana L Santos Rocha and Rafaela Teixera Neves, 'Posse Agroecológica e a Proteção Socioambiental na Jurisprudência da Corte Interamericana de Direitos Humanos: Repensando Conceitos' 19º Congresso Brasileiro de Direito Ambiental, 406 <https://www.academia.edu/18294957/POSSE_AGROECOLÓGICA_E_A_PROTEÇÃO_SOCIOAMBIENTAL_NA_JURISPRUDÊNCIA_DA_CORTE_INTERAMERICANA_

dictatorship, the Federal State begun to unlawfully acquire peasants' lands, for economical aims. The public federal power ended up not having a full knowledge of the lands of public or private domain.[356] The Amazonian traditional inhabitants[357] thus, were obliged to use the lands as mere occupiers, without having any property title.

Currently, the Brazilian legal system recognises six juridical categories[358] of right to land of tribal peoples, which consequently results in the acceptance of communal property as a rightful mean of land appropriation.

3.1.1. The Position of the Inter-American Court of Human Rights

Notwithstanding this distinction in the Brazilian legal framework, the IACHR has consistently held that the right to communal property "must be secured under Article 21 of the American Convention[359]". Secondly, it extended it to

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DE_DIREITOS_HUMANOS_REPENSANDO_CONCEITOS> accessed March 2019.

356. I refer to the records' irregularities and falsifications, better explained in B. Brito, P. Barreto (2011), A regularização fundiária avançou na Amazônia? Os dois anos do programa Terra Legal, Belém: Imazon, 39, cit. in. A. L. Santos Rocha, R. Teixera Neves, ibid., 406.

357. Seringueiros, Ribeirinhos, Castanheiros, Comunidades remanescentes de quilomboloas, Faxinais.

358. *The Reserva Extrativista* (Resex), the *Reserva de Desenvolvimento Sustentável* (RDS), the *quilombola* property, *Projeto di Assentamento Agroextrativista (PAE),* the *Projeto de Desenvolvimento Sustentável* (PDS) and the *Projeto de Assentamento Florestal* (PAF).

359. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, n 88 [118]; see also Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005, Merits, Reparations and Costs <www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf> accessed March 2019, [137].

traditional communities on the base of:

> the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples.[360]

Furthermore, the Court adopted this same extensive approach pursuant to Article 29(b)[361] of the American Convention on Human Rights, considering that the rationale of Article 21 and its provisions also 'applies to tribal peoples due to the similar social, cultural, and economic characteristics they share with indigenous peoples'.[362]

Among Indigenous Peoples, hence tribal groups, lands' ownership is not centred on an individual, but rather on the group and its community. It is the expression of a traditional, communal form of collective property, that allows each member of the group to freely live in its own territory.[363] In fact:

> the close ties of Indigenous Peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land

360. Saramaka People v. Suriname (n 257).

361. 'No provision of this Convention shall be interpreted as: b - restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party'.

362. Saramaka People v. Suriname (n 257).

363. ibid.

> is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy [...] to preserve their cultural legacy and transmit it to future generations.[364]

Therefore, pursuant to Article 21 of the Convention, States are obliged to respect the relationship that members of both indigenous and tribal peoples have with their territory, having the positive obligation to adopt special measures that guarantee each member of these groups, 'full and equal exercise of their rights to the territories they have traditionally used and occupied',[365] as well as 'the right to enjoy property in accordance with their communal tradition'.[366] However, in order to give effect to all these material communal lands' rights: 'el Tribunal determinará medidas para garantizar los derechos conculcados y reparar las consecuencias que las infracciones produjeron'.[367] If property is not physically provided by national legislation, communal lands' use and enjoyment merely remains an abstract principle.

In the case Garífuna Triunfo de la Cruz v. Honduras, the Court has suggested for the first time, a specific form of

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364. IACHR, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, Judgment of August 31, 200, Merits, Reparations and Costs <www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf> accessed March 2019

365. Saramaka People v. Suriname (n 257).

366. ibid.

367. IACHR, Caso Garífuna Triunfo de la Cruz y Sus Miembros Vs. Honduras, sentencia de 8 de octubre de 2015, Fondo, Reparaciones y Costas, [255]. <www.corteidh.or.cr/docs/casos/articulos/seriec_305_esp.pdf> accessed March 2019; translation of the author: 'The Court will provide for the measures necessary to provide for a fair remedy of the calculated damages, produced by the action of public authority'.

communal compensation. First of all, it addressed the State the duty[368] to 'demarcar las tierras sobre las cuales ha sido otorgada la propiedad colectiva a la Comunidad en dominio pleno y en garantía de ocupación';[369] secondly, it decided for the establishment of a Fund of US$ 1.500.000, to be emitted by the State to the Community Triunfo de la Cruz, as a whole, in order to:[370]

> i) desarrollar proyectos orientados a aumentar la productividad agrícola o de otra índole en la Comunidad; ii) mejorar la infraestructura de la Comunidad de acuerdo con sus necesidades presentes y futuras; iii) restaurar las áreas deforestadas, y iv) otros que consideren pertinentes en beneficio de la Comunidad Triunfo de la Cruz.[371]

The criterion used by the Court allows the members of the group to benefit from a compensation that still is emitted in cash – thus intending land as an object that can be "owned" – but that regard at the community as a legal entity. The mandatory State responsibility of statutorily demarcate lands' tenure, gives the group an additional security, for future concerns.

368. IACHR (n 367), [259].

369. Translation of the author: 'demarcate the territories in which collective title deeds of full ownership had already been granted to the Community, with the guarantee of their exclusive use and occupation'.

370. IACHR (n 367) [296].

371. Translation of the author: 'I) to develop projects orientated at increasing the agricultural productivity, productivity of other nature, of the Community; ii) to improve the infrastructure of the Community in compliance with its present and future needs; iii) to restore the deforested areas, and iv) other actions considered to be pertinent for the benefit of the Triunfo de La Cruz community'.

Perhaps, the nomination of a Council of representatives from the group, would have facilitated the process of use of the Fund and ensure participation of all individuals. However, the Court did not go so far.

3.2 The *Ribeirinhos* Of Belo Monte

The construction of the Belo Monte Hydroelectric Power Plant is causing the eviction of approximately 40 000 *Ribeirinhos*. *Ribeirinho* is the general term used to appoint a range of denominations of the peasants' groups living in the Brazilian Amazon. It is a category that includes sociologically diverse communities, which have some common features resulting in the strong relationship with the environment and the natural resources therein. In the Xingu Basin, these groups are better known as "*beiradeiros*",[372] literally: "people living in the waters", or "*Povos das Águas*"[373] translated in: "peoples of the waters", since they spend most of their life on the edges of the river.

These peoples are the direct descendants of the migrants that came from the North-East of Brazil in the end of the XIX century, and settled in the rubber extractive region of Altamira, among the *Xingu*, *Iriri* and *Riozinho do Anfrísio* rivers. At the time, the Brazilian rubber industry was flourishing again, after years of crisis due to the harsh competition of the Asian markets. Therefore, workers were attracted by the high chances of employment in the untouched Amazonian lands. They settled down in the area, developing their own resilient forms of adaptation to the environment.

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372. Translated by the author.

373. Elenise Scherer, 'Mosaico terra-agua: a vulnerabilidade social Ribeirinha na Amazônia' (Brasil, VIII Congresso Luso-Afro-Brasileiro de Ciências Sociais, Coimbra, 16-17-18 de Setembro 2004).

Cohabitation between "whites" and Indigenous Peoples was not easy, and often culminated in bloody confrontations, that led the new neighbours to install mostly in the islands. Eventually around the 1970, with indigenous peoples' conciliation and the foundation of the first villages,[374] miscegenation took place and mixed cultural forms emerged, resulting in the incorporation of traditions and cultural expressions and techniques of indigenous inheritance.

3.2.1 Forms of Subsistence and Cyclical Lifestyle

From a sociological viewpoint, the *ribeirinhos* represent a peasantry's fraction, whose livelihood is characterised by the combination of different activities, alternated between subsistence farming and the marketplace.[375]

The rubber extractive activity, indeed, soon started fading or coexisting with other practices, such as fishing, farming,[376] hunting and harvesting local products.[377] This diversity reflects seasonal variations – dry or rainy season – and the availability of natural resources, requiring a high capacity of adaptation to different land's conformations (solid and ebb tide soil; land and islands; dips and hills).

Production depends on a series of elements such as the available working force, the family integration level and the development of the social units for production of each group. As a consequence of that, the configuration of each community requires wide plasticity, and implies a certain degree of unpredictability in the communities' everyday achievements.

374. Sônia Barbosa Magalhães and Manuela Carneiro da Cunha, *A expulsão de Ribeirinhos em Belo Monte* (SBPC 2017) 45.

375. ibid 23.

376. Manioc, sugar cane, juta, malva.

377. Brazil nuts, *babaçu*, rubber, reed.

Undoubtedly, this living pattern reproduces the capitalistic dynamics, without completely depending on them;[378] it has its deeply rooted foundations in a complex tissue of social ties which combines kinship and neighbourhood which, in their turn, support the relationships of exchange and reciprocity.

This way of living implies another very close relationship: the one with the city; the place in which education takes place. The value given by these people to education is nowadays universally shared by the members of these groups. Families are willing to sacrifice the group's unity, in order to move close to the city, or alternate the life along the river with that in the city, to provide access to education to the young generations.

Temporary separations are also necessary for the access to social services and utilities such as hospitals, medical visits or the marketplace. This necessity, generally, explains the reason for a double housing.

On the one hand, there are the forestry areas' dwellings, usually gathered around twenty to thirty buildings, which consists of wooden stilt houses in an area sufficiently close to the river, in order to permit the families to easily reach the water during the dry season. These settlements are often subject to a phenomenon that marks *ribeirinhos'* lifestyle throughout the year: the "*terras caídas*"[379] occurrence. This event, in which lands collapse under the water's strength, bind the communities to move towards the forest and to adapt to a new habitat, until the soil is viable again.

On the other hand, in the urban area, households are settled at the edges of the city, where the *Ambé*, *Altamira* and

378. Magalhães and Carneiro da Cunha (n 374) 30.

379. Translation of the author: "fallen land"; Scherer (n 373) 5.

Panelas streams periodically flood. The proximity to water is crucial in order to grant access to city through the use of the traditional narrow boats.

Staying in the city depends on the group's member decisions to leave the village, though usually it is temporary. Mothers use to reside in the city households with the children, in order to facilitate access to schools, throughout the year. The families that base their subsistence on fishing activities, move to the city during the weekends, to sell the catch, whilst families living out of farming and cropping leave the village more rarely, at intervals of fifteen days.[380]

The social structure of the *Ribeirinhos* depends on the domestic relations of reciprocity and economic cooperation. Domestic groups do not exclusively include family members. They rather extend to other individuals of the same community, profoundly connected to each family *nucleus*, on the basis of a "moral or ritual"[381] level. Hence, cooperation is not based on the neighbourhood assumption, but on knots of abstract nature and solidarity.

3.3 Identification and Record of the Affected Population

In 2010, Brazil issued the *Decreto Federal n. 7.342,*[382]

380. Magalhães and Carneiro da Cunha (n 374).

381. ibid 53.

382. Decreto Federal 7.342. Institui o cadastro socioeconômico para identificação, qualificação e registro público da população atingida por empreendimentos de geração de energia hidrelétrica, cria o Comitê Interministerial de Cadastramento Socioeconômico, no âmbito do Ministério de Minas e Energia, e dá outras providências; de 26 de outubro

which provides the official *Cadastro Socioeconómico*[383] for the identification and record of the affected populations by the construction of the dam, in the event of emission of an act of expropriation for eminent domain.

The Decree lists the violations of rights[384] that would entitle a group, as a whole, to be defined as "affected" by the construction and the development project. Thus, enabling the community's members to receive a prior and fair compensation for eviction, or a form of re-allocation.

In accordance with the *Relatório de Impacto Ambiental do Aproveitamento Hidroelétrico Belo Monte,*[385] the *Plano Básico Ambiental* (PBA)[386] and the *Norte Energia*'s *Plano de Atendimento à*

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do 2010 www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Decreto/D7342.htm accessed March 2019.

383. Translation of the author: «Socio-economic Record».

384. 'i. perda de propriedade ou posse [Article. 2º, II]; ii. perda de capacidade produtiva mesmo que o empreendimento atinja parcialmente as terras utilizadas para a produção [art. 2º, II]; iii. perda de áreas de atividade pesqueira [Article 2º, III]; iv. perda de fontes de renda e trabalho [Article 2º, IV]; v. inviabilização de recursos naturais e pesqueiros ou atividades produtivas locais que afetem a renda, a subsistência e o modo de vida das populações [Article 2º, VI e VII]'. Translation of the author: 'i. loss of ownership or possession; ii. loss of the productive capacity, even if the Power Plant affects only partially the lands used for the production; iii. loss of the fishing activity capacity; iv. Loss of sources of income; v. obstacle to natural resources' use, fishing or local productive activity which might result in the loss or reduction of the income, subsistence or livelihood of the affected populations'.

385. Eletrobrás, *RIMA. Relatório de Impacto Ambiental. Aproveitamento Hidroelétrico Belo Monte* (Ministerio de Minas y Energía 2009) <http://norteenergiasa.com.br/site/wp-content/uploads/2011/04/NE.Rima_.pdf> accessed September 2017.

386. Norte Energia Usina Hidroelétrica de Belo Monte, Relatório Belo Monte Projeto Básico Ambiental Componente Indígena, dialogo permanente com as comunidades indígenas (2016) <http://norteenergiasa.

População Atingida,[387] are to be considered "affected" all those that, to a certain extent, depend on the expropriated territory or on the natural resources therein. More precisely the category includes:[388]

> os deslocados compulsórios (físico-territorial); os que tiveram perdas económicas pela rutura de suas atividades produtivas; os que tiveram comprometidos os vínculos sociais antes existentes (comunitários, familiares, de vizinhança, de compadrio etc); e os que observaram perdas sociais ou de infraestrutura.[389]

In addition to that, a resolution issued by the ANEEL,[390] sets forth a guideline containing the requirements to be complied with, by States and enterprises, when executing the displacement procedure of the affected populations. These rules are in compliance with the rights included in the lands' rights "pack", such as the duty to inform the peoples concerned.

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com.br/site/wp-content/uploads/2016/02/RelatorioPBA-CI_versao-completa-em-PDF-1.pdf> accessed March 2019.

387. Norte Energia S/A, Plano de Atendimento à população atingida (2011) <www2.defensoria.pa.def.br/portal/anexos/File/BeloMonte/PBA/Volume%20II%20-%20Item%2004/VOL%20II%20-%204%20-%20plano%20atend%20pop%20atingida.pdf> accessed March 2019.

388. Magalhães and Carneiro da Cunha (n 374) 242.

389. Translation of the author: 'displaced peoples; those that experience economic losses due to the disrupt of their productive activities; those whose social links of communitarian, family, neighbourhood nature) have been compromised; those who experienced infrastructure or social losses'.

390. Agência Nacional De Energia Elétrica – ANEEL, Resolução n. 279/2007 <www2.aneel.gov.br/aplicacoes/audiencia/arquivo/2011/041/documento/minuta_da_resolucao.pdf> accessed March 2019.

Since the first phase of identification and registry, public authorities need to include the directly affected peoples in the decision-making process:

> comunicar aos proprietários ou possuidores [...] a destinação das áreas de terras onde serão implantadas as instalações necessárias à exploração dos serviços de energia elétrica [Article 10, I]; promover ampla divulgação e esclarecimentos acerca da implantação do empreendimento [...] tratando inclusive de aspectos relacionais à delimitação das áreas afetadas e aos critérios para indenização [Article 10, II]

and: 'desenvolver máximos esforços de negociação [Article 10, III]'[391], keeping this duty effective throughout the whole expropriation procedure.

In the Belo Monte Hydroelectric Power Plant the companies *Carta*, *Diagonal* and *Elabore*, were hired by the *Norte Energia* to perform the *census* (NESA[392]) of the families living in the Xingu Basin. The approach used by the experts, though, turned out to be a breach of the negotiation and communication principles, set forth by the ANEEL. On the one hand, the registry form relied on written questionnaires

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391. Translation of the author: 'Communicate to the landowners or possessors […] the destinations of the areas of land where the necessary facilities for the exploration of the electric power will be installed [Article 10, I]; promote compulsory disclosure and clarify the details in the Power Plant installation […] including the issue of land delimitation and the compensation's criteria [Article 10, II]; put in practice the "highest effort", in order to grant negotiation [Article 10, III]'.

392. *Cadastro Socioeconómicos pela Norte Energia S.A* which includes criteria for the protection of human rights concerning: i. appropriate housing; ii. displacement procedure; iii. fair compensation.

that excluded many[393] from the chance of understanding and participating into the process. Whilst the inspections were often not announced in advance, so that, at the time of the expertise, families were not in their households and listed as "missing".

In the end, the technical evaluations registered around 8.000 families, for a total of 38.000 affected *Ribeirinhos*[394] by the construction of the Belo Monte dams.

3.4 Forms of Compensation

In cases of displacement, pecuniary remedies still remain the most used form of compensation. Irge Satiroglu says that:

> experience suggests that cash compensation frequently failed as the assets were undervalued […] poor people could not manage money well, the prices surrounding lands tended to inflate and money was spent on other causes than restoring livelihoods.[395]

However, this does not automatically imply that re-allocation would represent a fair remedy to expropriation. In Michel Cernea's[396] words: 'é relevante que o processo de deslocamento

393. The illiterates.

394. Michael Fernandes da Rosa, 'Os Atingidos de Belo Monte Experiências de sofrimento e agravos à saúde no contexto de um megaprojeto hidroelétrico na Amazônia brasileira' (2016) Tese de doutoramento em Sociologia, Faculdade de Economia da Universidade de Coimbra, 154.

395. Magalhães and Carneiro da Cunha (n 374) 242.

396. Magalhães and Carneiro da Cunha (n 374).

seja planejado e concebido como processo contínuo'.[397] In line with this interpretation, the PBA acknowledges that social impacts caused by development projects are often related to a Western-based conception of territorialization, and suggests a policy that could strengthen the idea that the affected population 'não deve ser observada do ponto de vista unicamente territorial e patrimonialista, e sim reconhecer uma situação onde prevalece a identificação e o reconhecimento de direitos e dos seus detentores';[398] with the effect of recognizing also the occurrence of moral damages and allow the reconstruction of the life conditions of these peoples.

In a first moment, the evaluator assesses through a *Laudo de Avaliação* the monetary value of the territories and the economic improvements installed therein by the landholders. The PBA, then, provides for remedies that leave family free to choose among a set of remedies, among which: i. pecuniary compensation; ii. assisted re-allocation (*carta de credito*); iii. collective urban re-settlement (RUC).

In the case of pecuniary compensation, the average amount[399] for the evicted recognized as "tribal peoples", in compliance with the *Termo de Autorização de Uso Sustentável* (TAUS)[400] requirements, was of R$ 38.853, while the

397. Translation of the author: 'it is relevant that the displacement process is planned and conceived as a continuous process [a flow]'.

398. Translation of the author: 'do not have to be observed only from the territorial or economic perspective, but rather acknowledge a situation where it is recognized the identification and application of its rights'.

399. Magalhães and Carneiro da Cunha (n 374) 251.

400.Portaria n. 89, de 15 de abril de 2010, which in Article 1 disciplines: 'a utilização e o aproveitamento dos imóveis da União em favor das comunidades tradicionais, com o objetivo de possibilitar a ordenação do uso racional e sustentável dos recursos naturais disponíveis na orla

non-members of traditional groups received R$ 48.058. This discrepancy demonstrates that the traditional manner of occupying and using the land did not have an impact on the valuation process of the possessed territories.

In practice, despite being designated as a "vulnerable" category by the *Decreto* n. 6040/2007,[401] the ILO Convention n. 169[402] (*Decreto* n. 5.051/2004[403]), and the jurisprudence of the I/ACHR[404], the *Ribeirinhos* did not receive specific treatments or an adequate compensation for the suffered concrete and, most of all, moral damages. In fact, the amount of money received, revealed to be insufficient in order to cover the original lands' value, especially for those who could count on a double housing before eviction.

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marítima e fluvial, voltados à subsistência dessa população, mediante a outorga de Termo de Autorização de Uso Sustentável - TAUS, a ser conferida em caráter transitório e precário pelos Superintendentes do Patrimônio da União'. Translation of the author: 'the use and the exploitation of the Union's assets by traditional communities, with the objective of facilitating the ruling of a rational and sustainable use of the available natural resources in the seafront and rivers, in order to grant the subsistence of that population, by granting it the *Termo de Autorização de Uso Sustentável - TAUS*, to be monitored in transitory and precarious character, by the Union's Heritage authorities'.

401. Decreto n. 6040. Institui a Politica Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais; 7 de fevereiro de 2007 <www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/decreto/d6040.htm> accessed March 2019.

402. ILO No. 169 (n 261)

403. Decreto 5.051. Promulga a Convenção no 169 da Organização Internacional do Trabalho - OIT sobre Povos Indígenas e Tribais; de 19 de abril de 2004 <www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5051.htm> accessed March 2019.

404. IACHR (n 367); IACHR (n 364) 200.

The assisted re-allocation took place in two phases: one in 2015 in the form of *Reassentamento em Ilha Remanescente* (RIR),[405] the second in 2016 in the new islands born after the beginning of the dams' construction or on the edges of the Xingu River.

In 2015, twenty-three available areas, measuring an extension of 100x200m, had been assigned to some *Riberinhos* families, prioritizing those that already had their household in one of the submerged islands. Even though there has been the attempt of protecting the link of these groups with their lands, the net of relations between families had not been honoured, as well as the respect of each nucleus' space and their working areas.

The second phase of the re-allocation process took place in 2016, with the settlement of other families in the areas of "permanent conservation" close to the River, in portion of territory measuring 500x250 square metres. In some of these places, the project presented by the *Norte Energia,* did not include spaces exclusively dedicated to farming and cropping.

The criteria used by the NESA for the occupation also included the demarcation of the edges of each area, with the intent to avoid conflicts between new neighbours. Although a social concern was finally taken into consideration, the plan failed, as many of the families that previously lived in these domains had been displaced to other areas and started claiming for their lands.

Moreover, there was a substantial difference in the extension of the new lands in the islands and the ones along the river, which caused conflicts among the re-settled as well as troubles for the traditional means of cultivation.

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405. Settlements in portion of Islands that were emerging after the construction of the dams.

The case of urban resettlement arranged the *Ribeirinhos*[406] in new areas called *Reassentamentos Urbanos Coletivos* (RUCs), in *Água Azul*, *Casa Nova*, *Jatobá e São Joaquim* villages, near the city of Altamira. Despite the fact of being called "collective", this solution did not re-allocate each community altogether, but again broke its social relations. Dwellings did not comply with the traditional living habits of these peoples:[407] the reinforced concrete walls did not allow the inhabitants to install hammocks (which were used in place of beds in the forest) and restrained the heat during the hottest hours.

Moreover, in these sorts of stretches of small houses, an integrated public transport system, which could connect the RUC with the closest inhabited area (Altamira), was lacking. Therefore, no direct access to social services was ensured.

Albeit their isolation, the RUC's are already crowded: of 5.141 people that had to be re-allocated, only 4.100 found a shelter in the collective re-settlement.

Eventually, even with all the actions taken by the *Norte Energia* to identify and negotiate with the *Ribeirinhos* for fair compensations, the displacement procedure caused many damages to the affected population. It disregarded the *Ribeirinhos'* dense social nets, disarticulating the traditional mechanisms of their territorial administration; it reduced their capacity of acting freely in a territory, by delimitating their households; in the RUCs case, it prevented them from having a contact with the River, principal source of income and

406. The ISA "Dossiê Belo Monte", shows that in 2014, 3.000 families already resided in the city; see ISA, *Dossiê Belo Monte, Não ha condições para a licença de operação* (2015) <https://documentacao.socioambiental.org/noticias/anexo_noticia/31046_20150701_170921.pdf> accessed March 2019.

407. Fernandes da Rosa (n 394) 163.

sustenance of the family members; it produced the shift from an economic model based on agro-extractive activities, towards an urban and capitalist pattern; it still excluded many families from the resettlement process.

3.5 Concluding Remarks

The case of the Belo Monte Hydroelectric Power Plant is the example that demonstrates to what extent, a confused ruling on compensation practices for damages of moral nature to the environment, result in destructive consequences for the populations involved.

The lack of involvement of the *Ribeirinhos* in Belo Monte throughout the eviction procedure, the emptiness of the environmental and social studies on pre-emptive measures for appropriate remedies, resulted in a chaotic replacement plan that broke social nets and disregarded tribal peoples' livelihood. Therefore, this Chapter suggests few solutions, that would make the *Ribeirinhos'* involuntary displacement less traumatic.

First, the damages' assessment needs not only to include the evaluation of concrete losses due to eviction, such as detriment of households, working equipment and products, but also all the damages of immaterial and abstract nature. These include the distress for the removal from the water, primary source of income and sustenance for the *Ribeirinhos* families; the grief for the loss of habitats, where traditional peoples used to develop their collective identity; the suffering for the destruction of the environment, towards which these peoples developed a symbiotic relation; the sense of desolation brought by the involuntary break of each family's social links; the discomfort of having to accept an imposed governmental decision. According to that, compensations should not be

issued only in cash, but through a negotiation process that should evaluate the victims' need. These could include the assignment of other lands or the planning of new settlements in the respect of the uses and customs of the affected peoples.

Second, the analogy between IP and TP, suggests that the *Ribeirinhos* and tribal communities in general, should be treated equally to indigenous groups. In this sense, the best compensation solution, is to provide for a remedy that could recognise the lands of communal use and tenures of the group as a whole[408], and consult a hypothetical Council of Representatives throughout the displacement process.

Third, as the Brazilian authorities have granted indigenous communities in the Xingu Basin, the possibility to still occupy their formally recognized ancestral lands, even after the end of the works – by providing for short term specific measures[409] – it is here suggested to demarcate, once and for all, *Ribeirinhos'* traditional territories. Until Brazil will develop an effective criterion, a temporary solution could be that of drawing *Áreas de Proteção Ambiental* (APAs)[410] in the Xingu Basin. These are areas:

> em geral extensa(s), com um certo grau de ocupação humana, dotada(s) de atributos abióticos, bióticos, estéticos ou culturais especialmente importantes

408. See IACHR (n 367).

409. That are still ineffective in order to grant full respect of Indigenous Peoples human rights, but that at least respect their spaces.

410. Art. 15 of the SNUC policy BRASIL, Lei 9.985. Regulamenta o art. 225, § 1o, incisos I, II, III e VII da Constituição Federal, institui o Sistema Nacional de Unidades de Conservação da Natureza e dá outras providências, de 18 de julho de 2000, disponível em <www.mma.gov.br/port/conama/legiabre.cfm?codlegi=322> accessed March 2019.

para a qualidade de vida e o bem-estar das populações humanas, e tem como objetivos básicos proteger a diversidade biológica, disciplinar o processo de ocupação e assegurar a sustentabilidade do uso dos recursos naturais[411], and that could grant the inalienability of tribal peoples' lands.

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411. Translation of the author: 'in general extensive, with a certain degree of human occupation, endowed of a-biotic, biotic, aesthetic or cultural characteristics, especially important for the life quality and the well-being of human populations, whose aim is to protect the biological diversity, discipline the occupation process and assure the sustainability of the use of the natural resources'.

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Indigenous Participation Rights in the Arctic Council

Adrian Forsgren

Abstract

Indigenous Peoples living according to traditional lifestyles with a close relationship to and dependency upon the land and functioning ecosystem have become extremely vulnerable to the effects of global environmental problems, such as climate change. Indigenous peoples, not just in the Arctic but across the whole planet, are predicted to be among the most harshly affected by the impacts of climate change, despite having the smallest ecological footprint. The Arctic is an especially vulnerable region and climate change represent a significant threat to the Arctic Indigenous Peoples living here and their heritage. As part of the indigenous community, Arctic Indigenous Peoples have been recognized under international law to have a vital role in environmental management and protection, especially because of their knowledge and traditional practices. This chapter will look beyond the definitions and inconsistent use of terms and focus on the effective role Indigenous Peoples have in decision-making processes concerning environmental protection in the Arctic and climate change adaptation. This chapter suggests that Arctic Indigenous Peoples should be enabled to take part in decision-making processes in the Arctic Council on the same level as member States. Furthermore, by recognizing and implementing the use of traditional knowledge and practices alongside scientific

and technological research, the vital role of Indigenous Peoples in environmental protection in the Arctic and climate change adaptation can be strengthened. Non-Indigenous Peoples can learn from indigenous traditional knowledge which may provide one of the most effective means for achieving a sustainable future and lifestyle.

Keywords: *Adaptation; Arctic; Climate Change; Ecosystems; Effective Participation; Environmental Management; Decision-making Process; Indigenous Communities; Representation; Traditional Knowledge*

1. Introduction

1.1 Challenges to Traditional Livelihoods and the Role of Arctic Indigenous Peoples

Indigenous Peoples living in the Arctic consists of over forty different ethnic groups and are estimated to constitute ten percent of the total population in the region.[412] Arctic Indigenous Peoples include for example Saami in the circumpolar areas of Norway, Finland, Sweden and Northwest Russia and groups of Inuit people in Canada and on Greenland, living within their national Arctic regions.[413] Traditional lifestyles according to indigenous traditional practices, cultural skills and values are vital to the well-being and sense of cultural identity of these peoples and their communities.[414]

412. Adam Stepien and others, 'Arctic Indigenous Peoples and the Challenge of Climate Change' in Elisabeth Tedsen and others (eds), *Arctic Marine Governance: Opportunities for Transatlantic Cooperation* (Springer 2014) 73.

413. 'Arctic Indigenous Peoples' (*Arctic Centre, University of Lapland,* 2014) <www.arcticcentre.org/EN/arcticregion/Arctic-Indigenous-Peoples> accessed 18 August 2019.

414. ibid.

In general, traditional lifestyles can be said to help foster a close connection to the surrounding environment in the Arctic region where Indigenous Peoples have been living for generations.[415]

Indigenous Peoples living traditional lifestyles with a close relationship to and dependency upon land and functioning ecosystems have become extremely vulnerable to the effects of global environmental problems, such as climate change.[416] Climate change has effects on weather variability and predictability, the thickness and quality of sea ice coverage, freeze-thaw cycles and can cause sudden changes in wind direction.[417] The Arctic is an especially vulnerable region and climate change represents a significant threat to the Arctic Indigenous Peoples living here and their heritage. Climate change has both direct and indirect effects on indigenous communities and traditional livelihoods.[418] Rapid weather changes, severe weather conditions such as strong winds and disappearing sea ice coverage directly impact indigenous livelihood connected with hunting, fishing and herding. As sea temperatures rise, causing the disappearance of sea ice coverage, many species that are subject to indigenous harvesting activities are badly affected. Since Arctic Indigenous Peoples share in common a close connection to

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415. 'Promoting Traditional Ways of Life of Arctic Indigenous Peoples' (*Arctic Council*, 2015) <https://arctic-council.org/index.php/en/our-work2/8-news-and-events/137-traditional-ways-of-life> accesed 18 August 2019.

416. Philippe Sands and others, *Principles of International Environmental Law* (Cambridge University Press 2018) 94.

417. ACIA, *Arctic Climate Impact Assessment* (Cambridge University Press 2005) 141-42.

418. Stepien and others (n 412) 77.

their surroundings and an intimate connection with nature, utilised in reindeer herding, fishing and other harvesting activities and in several cultural aspects, this can indirectly lead to implications on indigenous societies, culture and health.[419]

Arctic Indigenous Peoples have traditionally been adaptive and resilient to change. Colonization and globalization have forced these groups to undergo substantial change and put pressure on their traditional livelihoods. These peoples have been exposed to discriminatory practices as well as wrongful State actions regarding ownership and management of natural resources.[420] In addition, climate change poses new challenges for Arctic Indigenous Peoples that go beyond the indigenous adaptive capacity.[421] The impacts of climate change are of special concern for Indigenous Peoples and their communities, despite having the smallest ecological footprint and whose way of life is based on their use of the land and water of the Arctic.[422]

Arctic Indigenous Peoples have been recognized under international law to have a vital role in environmental management, especially because of their knowledge and traditional practices.[423] International law, described in this chapter, outlines a legal framework for Indigenous peoples' rights to participate in decision making on issues that may affect them. The Arctic Council will be described and discussed

419. ibid.

420. ibid 72-73.

421. ibid.

422. ACIA (n 417) 62-72, 141-142.

423. Rio Declaration on Environment and Development (adopted June 14, 1992) 31 ILM 874 (Agenda 21) principle 22.

as one example of an approach to the effective establishment of indigenous participation rights in the work towards environmental protection and climate change adaptation. Effective participation aims at enabling for Indigenous Peoples to take part in decision-making processes on issues that may affect them. The Arctic Council, established as an intergovernmental forum addressing issues faced by the Arctic governments and indigenous peoples, is one of the main actors in attempts to deal with environmental degradation in the Arctic.[424] State participants within the Arctic Council have taken several steps in creating the arrangement for dealing with these highly emergent issues, some of which have been outlined previously. Representative groups of Indigenous Peoples have been appointed as Permanent Participants in the Arctic Council.[425] These groups are thereby given the right to participate in the work by the Arctic Council. For the representatives of indigenous peoples' organisations, this includes actively taking part in research projects and in intergovernmental decision-making processes addressing issues such as climate change.[426] The role of Indigenous Peoples in the Arctic Council shows potential for how these groups can

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424. The Arctic Council regularly produces environmental, ecological and social assessment reports through its Working Groups; see 'The Arctic Council: A backgrounder' (*Arctic Council*, 2015) <https://arctic-council.org/index.php/en/about-us> accessed 18 August 2019.

425. 'History of the Arctic Council Permanent Participants' (*Arctic Council*, 2012) <www.arctic-council.org/index.php/en/acap-home/313-chairmanship-and-contacts>.

426. Timo Koivurova and Leena Heinämäki, 'The Participation of Indigenous Peoples in International Norm-making in the Arctic' (2006) 42(221) Polar Record 101, 101-109.

become better involved in decision-making processes, which may inspire other international decision-making forums.[427]

However, indigenous representative groups are still not permitted to take part in the decision-making process on the same level as member States. Representatives of indigenous peoples' organisations are part of different working groups within the Arctic Council and work closely together with State representatives. But they are not part of signing agreements that may come as a result of the work that has been done within the working groups. Despite being framed as an example for the establishment of indigenous participation rights, there are still future developments that can be made for the role of Indigenous Peoples within the Arctic Council. The engagement of Indigenous Peoples in the Arctic Council's environmental work is highly dependent on the close relationship these peoples have with their natural habitats.[428]

1.2 Aim of the Chapter and Outline

This chapter discusses the role of Indigenous Peoples in environmental protection in the Arctic region and in climate change adaptation. The primary focus is on indigenous participation rights and how these can take shape in practice. The Arctic Council will be used as one example of how the rights have been recognized and established in contemporary work tackling environmental issues in the Arctic region. This chapter will argue that, in order to strengthen their vital role, Indigenous Peoples in the Arctic should be

427. Margherita P Poto, 'Participatory engagement and the empowerment of the Arctic Indigenous Peoples' (2017) 19(1) Environmental Law Review 30, 40.

428. ibid 41.

allowed to take part in the decision-making process in the Arctic Council on the same level as State participants. Additionally, it will suggest that by recognising and implementing the use of traditional knowledge and practices alongside scientific and technological research, the crucial role of Indigenous Peoples in environmental protection in the Arctic and climate change adaptation can be strengthened. Non-Indigenous Peoples can learn from indigenous traditional knowledge which may provide one of the most effective means for achieving a sustainable future and lifestyle.

Section 2 will outline the international legal regime on indigenous participation rights on issues that may affect them. International law describes Indigenous Peoples primarily as groups of people with a historic presence in a given territory, with distinct culture and who identify themselves as indigenous peoples. Although the definition of Indigenous Peoples is not completely clear under the international agenda, Indigenous peoples' rights and interests to be represented and participate have been recognised. The right to self-determination lays the foundation from which other indigenous substantive rights can be derived and constitutes an integrated part of human rights law. The section will also discuss the role of indigenous traditional knowledge in the protection of biological diversity.

In section 3 follows a discussion on the Arctic Council and its work in the Arctic region. The aim of the section is to outline the basic framework relevant for understanding the functions of the Arctic Council and the role of indigenous peoples. Section 4 discusses what effective participation may mean for Indigenous Peoples in the Arctic. This concluding section will first discuss what the 'role' means from the perspective of indigenous peoples. Secondly, the effective

participation role of Indigenous Peoples will be discussed. Finally, this section tries to connect indigenous participatory rights to the acknowledgment and use of traditional knowledge. Section 5 contains concluding remarks and briefly summarises some suggestions for future developments and improvements.

2. Indigenous Rights and International Environmental Law

2.1 Indigenous Participation Rights

In order to discuss the role of Indigenous Peoples in environmental protection in the Arctic and climate change adaptation, we must first explore the international legal framework applicable to indigenous peoples. There have been several attempts to create a definition of Indigenous Peoples under international law. However, there is no existing universal definition that has been adopted by any United Nations-system body.[429] The predominately-used description is formulated in article 1 of the ILO Convention No. 169 (ILO-Convention or ILO No. 169), adopted by the International Labour Organisation:[430]

> This Convention applies to […] people 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

429. Arctic Centre (n 413).

430. Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 Jun 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO No. 169).

> 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.[431]
>
> 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.[432]

The understanding of who Indigenous Peoples are under the ILO-Convention is based on a formulation in a report by the special rapporteur, Josè Martinez Cobo, of the Sub-commission on Prevention of Discrimination and Protection of Minorities.[433] Rather than functioning as a definition, the provision contains a statement of coverage and is used as a 'working description'.[434] Within the provision, the terms 'indigenous' and 'tribal' are not differentiated. Despite the definition of Indigenous Peoples remaining somewhat unclear, the special interests and rights of these peoples and their communities have been recognized in interna-

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431. ibid art 1 para 1(b).

432. ibid art 1 para 2.

433. José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* (UN Department of Economic and Social Affairs 1987) <www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html> accessed 18 August 2019; see Volume V: Conclusions, Proposals and Recommendations.

434. UN Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples'* (Background Paper to Workshop on Data Collection and disaggregation for Indigenous Peoples, New York, United States, 19-21 January 2004), UN Doc PFII/2004/WS.⅓. 3.

tional law. In next subsection, these interests and rights are discussed with a focus on the role of Indigenous Peoples in environmental management and climate change adaptation and the use of traditional knowledge.

One of the cornerstones for strengthening the fundamental rights of Indigenous Peoples is the right to self-determination. The United Nations Declaration on the Rights of Indigenous Peoples[435] (UNDRIP) outlines the definition and content of indigenous peoples' right to self-determination under article 3 and 4. Self-determination in the context of Indigenous Peoples covers the community's right to choose its political destiny and to freely pursue their economic, social and cultural development.[436] The right to self-determination is interconnected with other Indigenous Peoples rights.[437] In this way, a connection is established to other indigenous peoples' rights, emphasising the pre-eminent role of self-identity.[438] When it comes to the definition of indigenous peoples, the role of self-identity is crucial both within their group and in their surrounding environment. Also, the right to self-determination was not a new concept when it was adopted under UNDRIP.[439] Self-determination lays a foundation in making Indigenous Peoples part of a comprehensive human rights strategy. In recognizing the fundamental rights of indigenous peoples, the right to self-determination shall be granted to these peoples. One

435. Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007), UNGA Res 61/295 (UNDRIP).

436. ibid art 3.

437. Poto (n 427) 34-36.

438. ibid.

439. ibid 35.

further step, as pointed out by Poto, is to 'include the effective participation of Indigenous Peoples in vital decisions as a hard core of their sets of rights.'[440]

Indigenous peoples shall, according to article 19 UNDRIP, be consulted and give their free, prior and informed consent before States adopt national measures that may affect these peoples.[441] Consultation shall be carried out before States undertake projects that will affect indigenous peoples' rights to land, territory and resources.[442] The provision require consultation and it is in just one other case, namely before the relocation of Indigenous Peoples from their land, that an informed consent by Indigenous Peoples is a requirement.[443]

Article 6 of the ILO-Convention recognises the right for indigenous and tribal peoples to participate and to be consulted in decision making concerning them.[444] Based on the ILO-Convention, States are to ensure 'participation of Indigenous Peoples in national legislation and development planning that may affect them'.[445] Only twenty States are

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440. ibid 36.

441. For a comprehensive description and discussion on the right to free, prior and informed consent, see the comprehensive work of Sebastiaan J Rombouts, *Having a say - Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers 2014).

442. UNDRIP (n 435) art 32.

443. ibid art 10.

444. For more on these and other relevant provisions for indigenous participation rights under the ILO-Convention no 169, see Russel L Barsh, 'Indigenous Peoples' in Daniel Bodansky and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012) 842-846.

445. ibid 842.

signatory parties to the ILO-Convention, signalising that many States remains reluctant to adopt binding legal obligations specific to indigenous peoples.[446] The ILO-Convention has frequently been considered of relevance outside of the ILO-system by United Nations committees and regional bodies. For example, as indicated above, is this specifically done concerning who is to be understood as 'indigenous'.[447]

The ILO-Convention is more restrictive in recognising indigenous peoples' rights and interests in comparison to other international agreements. Whilst the ILO-Convention only recognises some aspects of internal autonomy, UNDRIP takes a further step in including the right to self-determination.[448] UNDRIP may be seen as the cornerstone of indigenous rights and can form a part of universal human rights law.[449] Both the ILO-Convention and UNDRIP are based on principles of participation and consultation. Recognising and enabling for indigenous peoples' right to participate in decision-making processes can potentially lead to better and more representative decision making.[450]

2.3 The Role of Indigenous Peoples and Traditional Knowledge

Principle 22 of the 1992 Rio Declaration on Environment and Development recognises that indigenous peoples, alongside other local communities, have a vital role

446. Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016) 8.

447. ibid 6.

448. UNDRIP (n 435) art 4.

449. Saul (n 446) 7-8.

450. Rombouts (n 441) 79.

in environmental management and development because of their knowledge and traditional practices. In the achievement of sustainable development shall the interests of Indigenous Peoples be recognized and supported by States and effective participation shall be enabled.[451] The Paris Agreement established the global goal on adaptation.[452] This goal aims at enhancing adaptive capacity, strengthening resilience and reduce vulnerabilities to climate change. Adaption action should follow a 'participatory and fully transparent approach' and furthermore 'be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples'.[453]

In the negotiations prior to the proceedings of the Rio Declaration, adaptation was not a priority. However, there is an emerging consensus that adaptation will be an important part of the climate change regime.[454] Following the Paris Agreement, mitigation is still the main goal. Mitigation is any human induced effort to reduce the emissions of greenhouse gases or their concentration in the atmosphere.[455] Adaptation shall be done when these efforts are not enough, related to impacts not avoided through mitigation, and covers all human efforts to lessen the impact of climate change on human

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451. Agenda 21 (n 423) principle 22.

452. Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) art 7 para 1.

453. ibid art 7 para 5.

454. Meinhard Doelle, 'The Climate Change Regime and the Arctic Region" in Timo Koivurova and others (eds), *Climate governance in the Arctic* (Springer 2009) 47.

455. ibid 30-32.

or natural systems.[456] Indigenous Peoples can have an important role in the adaptation process, especially 'with respect to the understandings of the impacts of climate change in the Arctic region'.[457]

The 1992 Convention on Biological Diversity (CBD-Convention) was the first international instrument to recognise the rights of Indigenous Peoples and other local communities to the intangible elements of their cultures.[458] Several articles in the CBD-Convention relate, directly or indirectly, to questions concerning traditional knowledge and indigenous societies' use of nature and natural resources. Most relevant for the scope of this chapter is article 8(j) of the CBD-Convention, regarding the use and protection of traditional knowledge that may be of importance in conservation and in situ-preservation.

Article 8(j) of the CBD-Convention obliges parties to the convention, when taking national measures, to respect, preserve and maintain traditional knowledge, innovations and practices by indigenous and local communities.[459] Traditional knowledge have been described by the Arctic Council as a subset of indigenous knowledge including traditional understandings of the relationship between people and the natural environment.[460] The term is relatively new to Western science.

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456. ibid 40-43.

457. ibid 48.

458. ibid.

459. Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) art 8(j).

460. 'Promoting Traditional Ways of Life of Arctic Indigenous Peoples' (*Arctic Council*, 2015) <https://arctic-council.org/index.php/en/our-work2/8-news-and-events/137-traditional-ways-of-life> accessed 18 August 2019.

The use of traditional knowledge according to indigenous peoples' traditions and practices incorporate an important understanding of the environment in relationship to human social impacts. As indicated by Barsh, Indigenous Peoples have managed to link the diversity of their cultures with the protection of biodiversity.[461]

In a report from the 'Centre of Biological Diversity' in Uppsala, Sweden, Tunón states that article 8(j) of the CBD-convention can have a central role in the preservation and recreation of ecosystems and living habitats.[462] These are basic prerequisites for the maintenance of viable living populations. Article 8(j) of the CBD-Convention raises a wide range of questions regarding the understanding of the scope and concept of traditional knowledge and the use of such knowledge in the protection of biological diversity. One issue is to decide who is to be the understood as the holder of traditional and local knowledge, which relates back to the definition of Indigenous Peoples. Another relevant issue is how to find an appropriate way of respecting, preserving and maintaining such knowledge. Additionally, it is necessary to see how the traditional and local knowledge keepers can approve and participate in the wider application of such knowledge.[463]

The international legal regime outlined in this section recognises the importance of the role of Indigenous Peoples and the use of traditional knowledge in environmental protection and management. This indicates the commencement and foundation of Indigenous Peoples' rights to participate in these matters. However, it is important that these groups

461. Barsh (n 444) 842.

462. Håkan Tunón, *Traditionell kunskap och lokalsamhällen: artikel 8j i Sverige* (Centrum för biologisk mångfald Uppsala 2004) 21-23.

463. ibid

are given a real opportunity to participate in this endeavour. Indigenous peoples' right to participation in international decision-making processes has been recognized in some instances in practice. The Arctic Council is an intergovernmental forum for environmental issues in the Arctic where the indigenous participation rights have, even though not completely, been recognized and established.

3. The Arctic Council

The Arctic Council was established through the 1996 Declaration on the Establishment of the Arctic Council (Ottawa Declaration) as a high-level intergovernmental forum addressing issues faced by the Arctic governments and indigenous peoples.[464] It was established as a forum for discussion and administration among the Arctic states. Eight states are members of the Arctic Council; Canada, the Kingdom of Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russia, Sweden and the United States.[465] The mandate of cooperation between these States includes all common Arctic issues, in particular on the achievement of sustainable development and environmental protection. In addition to these member States, the Arctic Council consists of Permanent Participants and observers.

The existence of the Arctic Council and its work is not well-known outside of the Arctic region. Rather than being

464. Declaration on the Establishment of the Arctic Council (adopted 19 September 1996).

465. Member states (*Arctic Council*, 2015) <https://arctic-council.org/index.php/en/about-us/member-states> accessed 18 August 2019.

a regulatory body and in the absence of a permanent secretariat, the Arctic Council functions as a coordinating agency. However, since 2011 the Arctic Council has produced agreements that are legally binding for the member States.[466] The Arctic Council has developed into becoming a hybrid intergovernmental regional organisation, establishing a forum for discussions and negotiations with the mandate to produce legally-binding agreements on Arctic issues. The future development of the Arctic Council will show if it continues evolve towards becoming a platform for decision making or maintaining its original function as a negotiating forum in the Arctic region.

Within the Arctic Council, Indigenous Peoples have been given the status of Permanent Participants. At present, six Indigenous Peoples organisations have been appointed as Permanent Participants.[467] These organisations represent a wide range of Indigenous Peoples groups with different cultural and historical backgrounds, inhabited all across the Arctic region.[468] The status as Permanent Participants gives

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466. For example, the 2011 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue In The Arctic (SAR-agreement), the 2013 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOPPR-agreement) and the 2015 Declaration Concerning The Prevention of Unregulated High Seas Fishing In The Central Arctic Ocean (Oslo-declaration). See Guifang Xue and Yu Long, "The Changing Arctic and an Adaptive Approach to the Protection of Arctic Marine Ecosystems", in Myron H Nordquist and others (eds), *Challenges of the Changing Arctic. Continental Shelf, Navigation, and Fisheries* (Brill Nijhoff 2016) 351-352.

467. Olav S Stokke, 'Protecting the Arctic Environment: The Interplay of Global and regional Regimes' (2009) 1 The Yearbook of Polar Law I 349, 357.

468. ibid.

the representatives the right to active participation and full consultation in the work by the Arctic Council.[469] However, the appointment of Permanent Participant does not give these representatives of indigenous peoples' organisations the same status as member States in the Arctic Council.

As indicated, the work of the Arctic Council primarily takes place through negotiations on State level between the member States. Prior to the decision-making process, the Arctic Council's activities are conducted in working groups. These groups produce action- and assessment-programs.[470] In total there are six working groups, which cover a broad field of subjects from climate change to emergency responses. Currently, there is no existing working group that focuses solely on indigenous issues in the Arctic, although these issues are accounted for within the different working groups. The Sustainable Development Working Group (SDWG) was partly established 'to protect and enhance the environment and the economies, culture and health of Indigenous Peoples and Arctic communities'.[471] The working group of Arctic Contaminants Action Program (ACAP) has the objective of preventing, reducing and ultimately eliminating pollution of the Arctic environment, taking into account 'the needs of indigenous populations in the Arctic'.[472]

469. ibid.

470. 'Working Groups' (*Arctic Council*, 2015) <https://arctic-council.org/index.php/en/about-us/working-groups/36-about-us/working-groups> accessed 18 August 2019.

471. 'Sustainable Development Working Group (SDWG)' (*Arctic Council*, 2018) <https://arctic-council.org/index.php/en/about-us/working-groups/sdwg> accessed 18 August 2019.

472. 'Arctic Contaminants Action Program (ACAP)' (*Arctic Council*, 2016) <https://arctic-council.org/index.php/en/about-us/working-groups/acap> accessed 18 August 2019.

Finally, both the working group on Arctic Monitoring and Assessment (AMAP) and the working group on the Conservation of Arctic Flora and Fauna (CAFF) exist to examine the impact of pollution on Arctic flora and fauna, 'especially those used by indigenous people'.[473]

The CAFF working group consists of representatives of the eight Arctic Council member States, representatives of indigenous peoples' organisations and Arctic Council observers.[474] Indigenous Peoples are thereby given a role within the working group to take part in the agenda of information sharing and the development of common responses on issues regarding Arctic flora and fauna.

4. Evaluating the Role of Indigenous Peoples in the Arctic Council

4.1 What Does This 'Role' Mean?

In order for Indigenous Peoples to participate in local and global environmental issues, such as climate change, partaking in decision-making processes at the international level is crucial. Indigenous Peoples have been recognized under international law as having a vital role in environmental management and effective participation shall be enabled

473. 'Arctic Monitoring and Assessment Programme (AMAP)' (*Arctic Council*, 2018) <https://arctic-council.org/index.php/en/about-us/working-groups/amap> accessed 18 August 2019.

474. 'Conservation of Arctic Flora and Fauna' (*Arctic Council,* 2015)

for these peoples.[475] The ILO-Convention and UNDRIP recognise the right to be consulted regarding measures that may affect indigenous peoples. The international regime is not fully consistent when defining how Indigenous Peoples shall be enabled to take part in the work and decision-making process with regards to environmental protection and climate change adaptation. The role of Indigenous Peoples in these issues can be said to come in different forms; it is largely recognized through 'participation' or 'consultation'. Another term used is 'representation', which can be identified by looking at article 8(j) of the CBD-Convention and the relevant issues and questions that the provision poses. Based on this, the term 'representation' is used on account of who indigenous interests shall be considered for and how it shall be exercised.

Indigenous Peoples need to be represented and have an effective role in decision-making processes. In achieving sustainability, from the perspective of indigenous peoples, this role should be exercised in the form of a partnership in decision making and implementation on the ground.[476] Following this, it can be assumed that governments and State representatives working under the international agenda 'should respect the distinctive interests and perspectives' of indigenous communities.[477] Indigenous Peoples living traditional lifestyles, historically and currently, have 'accumulated valuable knowledge of the dynamics of the ecosystems'.

<https://arctic-council.org/index.php/en/about-us/working-groups/caff> accessed 18 August 2019.

475. Agenda 21 (n 423) principle 22.

476. Barsh (n 444) 839.

477. ibid.

Also, these peoples have 'devised ways of managing living resources to ensure their long-term survival.'[478] Seeing the role of indigenous groups from the spectre of a partnership give rise to new forms of the relationship between States and indigenous communities based on reciprocity. For a healthy partnership, between Indigenous Peoples and State representatives working under the international agenda, it is necessary to have a genuine respect for each other's interests, having decision-making based on informed consent and share the benefits gained from the collaboration.[479] Enabling for Indigenous Peoples to participate in decision-making processes regarding the protection of the environment ensures that these peoples, who live in closest proximity to the natural landscapes, oceans and other critical ecosystems, can continue to have an important stake and a direct voice in these matters.[480]

4.2 Effective Participation in the Arctic Council

The establishment of Indigenous Peoples as Permanent Participants is an achievement that has been completed by Indigenous Peoples in the Arctic Council. As Permanent Participants, Indigenous Peoples have gained almost equal participatory rights as member States. The one exception relates to the decision-making process, as the appointment of Permanent Participant does not give representatives of indigenous peoples' organisations the same status as States.[481] These representative groups are thereby not part of the decision making

478. ibid 840.

479. ibid 839.

480. ibid.

481. Poto (n 427) 40.

on the same level as State participants, or can take part in the signing of agreements and other relevant documents produced by the Arctic Council. Suggestively, it would be an important step in fully recognising the important role of Arctic Indigenous Peoples and strengthening their role in the Arctic Council, by making these groups part of the decision-making process on the same level as member States.

It can therefore be said that the role of Arctic Indigenous Peoples is currently not fully effective and recognized regarding decision making on environmental issues in the Arctic region. From the perspective of international law, a reason for this may be that international agreements are directed to contracting parties which, in most cases, are States. Indigenous Peoples are not States and international law is not directly applicable to these peoples.[482] Additionally, the Arctic Council as a regional organisation is not directly appointed to comply with certain provisions under international law, although so are the member States. This indicates that States are still in control of the development of the regime relevant for environmental protection in the Arctic. States have the principal responsibility to represent Arctic interests, indicating that the role of non-State actors, such as indigenous peoples, is mainly recognized and exercised through the work of States.

In the achievement of enabling for representatives of indigenous peoples' organisations to have a more effective role in decision-making processes in the Arctic Council, it is important to consider the heterogeneity of groups of indigenous peoples.[483] Arctic Indigenous Peoples consist of various and diverse peoples with different interests, cultural practices

482. ibid 43.

483. Stepien and others (n 412) 73-78.

and traditional knowledge. This is of great importance to consider when defining Indigenous Peoples as well as in the future work under international law and in practice, to ensure the recognition of effective participation rights for Indigenous Peoples with regards of environmental issues.

Technological and social development improvements have given great social impacts for both indigenous and non-indigenous communities. Ensuring that development efforts in the climate change adaptation process do not compromise and overshoot the boundaries of what our planet can take, it is necessary to find ways of balancing modern development with indigenous heritage. It is not an easy task; it involves finding a good balance between indigenous values, national identity and development. In trying to consider the perspective of indigenous peoples, it might be said that they have and may continue to absorb some helpful modern technologies, such as the use of internet, smartphones and modern medicine. Technology provides opportunities that can give tools to create complex communities and lead to advancements in hunting or agricultural activities. At the same time, traditional ideas and practices need to be kept alive. Introducing technology can change or alter traditions.[484] Decision makers are thereby faced with the challenge of making it easier for Indigenous Peoples to adjust according to their needs.

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484. As technology and modern medicine can increase the lifespan, history shows how the introduction of a number of diseases may endanger the existence of large parts of certain population; see 'The Pros and Cons of Technology for Indigenous Tribes' (*Mukurtu*, 2018) <www.mukurtuarchive.org/pros-and-cons-of-technology-for-indigenous-tribes.html> accessed 18 August 2019.

4.3 Indigenous Participation Rights and Traditional Knowledge

This chapter suggests that representatives of indigenous peoples' organisations in the Arctic Council should be enabled to participate in the decision-making process on the same level as member States. This can be a step towards the full acknowledgement of the vital role that Indigenous Peoples have in finding solutions on environmental issues. In addition, acknowledging the use of traditional knowledge and practices alongside scientific and technological research can further strengthen the vital role that Indigenous Peoples have in environmental protection in the Arctic and climate change adaptation. Arguably, this establishes a link between the recognition of participation rights and the acknowledgement of traditional knowledge.

In dealing with environmental protection in the Arctic and other regions in the world, the incorporation of local and indigenous traditional knowledge in decision-making processes is of fundamental importance for the future of the Arctic.[485] Environmental issues such as climate change represent a significant threat to indigenous heritage. As described in section 2.3, article 8(j) of the CBD-Convention sets out the obligation for State parties to respect and maintain indigenous traditional knowledge and practices. Following the discussion in that section, the provision can have a central role in the preservation and recreation of ecosystems and living habitats. Damaged environments can be recovered through planned traditional management, allowing for the creation

485. Nordic Council of Ministers Secretariat, *Local knowledge and resource management: On the use of indigenous and local knowledge to document and manage natural resources in the Arctic* (Nordic Council of Ministers 2015).

of diverse landscapes that can be used in the rehabilitation of ecosystems and threatened species.[486]

However, the inclusion of indigenous traditional knowledge is not highlighted as one of the objectives of any of the working groups. The Arctic Council has attempted to promote traditional ways of life of Arctic indigenous peoples.[487] In a campaign of spreading knowledge about traditional living, the Arctic Council has stated that 'a greater awareness of the importance of the traditional ways of life for Arctic Indigenous Peoples could lead to better decision making by those outside the Arctic circumpolar region.'[488] This statement may also be directed to the decision-making processes within the circumpolar region and the Arctic Council. It is of importance to include Arctic Indigenous Peoples traditional knowledge into scientific efforts in order to fully understand climate change in the Arctic region.[489] For example, scientists are to this day not understanding the essential components of the Bering Sea, one of the Earth's last relatively intact marine ecosystems, and their relationship to form a complete understanding of the ecosystem as a whole.[490] In future scientific research in the Bering Sea, indigenous traditional knowledge, together with ecosystem based and single species research can 'offer a more thorough and effective process for uncovering the causes of widespread wildlife

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486. Tunón (n 462) 23.

487. Arctic Council (n 460).

488. ibid.

489. Ilarion Merculieff and others, *Arctic Traditional Knowledge and Wisdom: Changes in the North American Arctic* (Conservation of Arctic Flora and Fauna International Secretariat 2017).

490. ibid 36.

declines and responding accordingly'.[491] Similarly, McKay argues from the perspective of Maori Indigenous Peoples living in New Zealand, that learning from indigenous traditional knowledge may provide one of the most effective means of reaching a sustainable future and lifestyle.[492]

In the conceptualisation of knowledge and common sense, anthropologist Robin Horton makes a distinction between what is referred to as primary and secondary theory.[493] Primary theory is knowledge and common sense which can be found in all cultures and in all human beings. This conceptualisation consists of basic theoretical beliefs, both 'folk' and 'rational'. Secondary theories are, by contrast, including collections of beliefs which are distinctive to particular social settings. These consist of both scientific theories of physical phenomena and also of 'folk' beliefs. In several respects, primary theory will be incomplete without fundamental understandings deriving from secondary theory. Whilst primary theory differs hardly at all from culture to culture, secondary or 'constructive' theory differences in emphasis, degree and content depending on the culture and community.

In some ways, this distinction may relate to our understanding of modern scientific knowledge in contrast to traditional knowledge. In light of this distinction, primary theory may be said to cover Western scientific knowledge,

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491. ibid 41.

492. D J McKay, 'Education for survival, resilience and continance: Matauranga Taiao, Maori and Indigeneity' (2013) 36(1) Journal of the Victorian Association for Environmental Education 1, 6-9.

493. For the following, see Robin Horton, 'Tradition and Modernity Revisited' in Martin Hollis and Steven Lukes (eds), *Rationality and Relativism* (Blackwell 1982) 201-260.

and secondary theories cover traditional knowledge of indigenous peoples. Fundamental understanding of climate change today is primarily recognized through scientific findings. Scientific knowledge also plays a part in finding ways of adapting and adjusting to these changes. Since primary knowledge, as indicated by Horton[494], can be incomplete it becomes necessary to include traditional knowledge in finding best possible solutions when dealing with environmental protection and climate change adaptation. The rice of sea temperatures causing disappearance of sea ice coverage, rapid weather changes, and unpredictable freeze-thaw cycles are highly urgent issues and the Arctic is a specifically vulnerable region. The lack of scientific understanding of the marine ecosystems in the Bering Sea highlights the need for including understandings from indigenous traditional knowledge in order to gain a holistic understanding of the region and its ecosystems. Based on this, the relationship between scientific and traditional knowledge can be viewed as subsets of knowledge sources that complement each other in an integrated way to solve mutual issues.

5. Concluding Remarks

The Arctic region is home to many groups of Indigenous Peoples with different cultural, social and historical backgrounds. These peoples share common challenges with regards to indigenous traditional livelihood, threatened by environmental issues such as climate change. It is necessary to keep in mind that the Arctic is not just a romanticised

494. ibid.

pristine region, but a place where the survival of Indigenous Peoples is dependent on the environment. Through cultural traditions, practices and rituals, these peoples and their communities are deeply connected to the natural land and sea where they live. It is necessary to protect the environment in the Arctic in order for indigenous cultural heritage to strive and be kept alive. The Arctic region is not empty, and it has not been for thousands of years.

From the perspective of international law, Indigenous Peoples are framed as carriers of a vital role in environmental management. Traditional knowledge and practices of Indigenous Peoples are of specific importance for the vital role Indigenous Peoples have in dealing with environmental issues, such as climate change. The role of Indigenous Peoples as Permanent Participants in the Arctic Council is one example of how the role can be solidified. It remains to be seen how the future development of the Arctic Council and the role of Indigenous Peoples will come to evolve. Traditional knowledge plays an important part and can be used to better understand and deal with climate change by incorporating it alongside scientific knowledge. Connecting the implementation of indigenous participation rights with the acknowledgment of traditional knowledge may be one step in making Indigenous Peoples role in decision-making processes fully effective.

By acknowledging traditional knowledge alongside scientific and technological knowledge, Indigenous Peoples may be given a more effective role in the work and decision-making process on environmental issues. In general, Indigenous Peoples are believed to have a specific connection to the land and sea that they have inhabited and lived in according to traditional lifestyles. This has been done and

kept alive through traditions and practices according to traditional livelihoods. Historical accounts show how human greed through neglected and disrespectful acts and flagrant carelessness have caused damage to Indigenous Peoples and their communities. It remains to be assessed whether we can expect anything better now and, in the future, as climate change is adding new and even more severe consequences, particularly to Indigenous Peoples living in the Arctic region.

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PART III
COEXISTENCE

From Theory to Practice: Tracing Law through the Study of Coastal Sámi Marine Tenure

Apostolos Tsiouvalas

Abstract

Although significant progress on indigenous studies has been made since the second half of the 20th century, the development of methodological approaches for the study of indigenous legal traditions is something rather new. The past two decades have witnessed a significant number of publications related to indigenous legal traditions around the world, particularly in Canada. However, the field still lags behind with regard to indigenous communities in Fennoscandia (Scandinavian Peninsula, Finland, Karelia, and the Kola Peninsula) and in particular concerning the Coastal Sámi communities of Northern Norway. Indeed, the characteristics that distinguish the Coastal Sámi from the rest of the population of the Northern Norwegian fjords and the background of cultural assimilation that the Indigenous Peoples of the region experienced, render the development of such approaches complicated. However, the study of indigenous legal traditions can be an extremely valuable tool for indigenous communities, government policy-makers, judges and scholars, contributing to the decolonization process. Accordingly, this Chapter attempts to conceptualize the rationale of legal scholars in studying indigenous legal orders and to develop a methodological approach for a case-study with the Coastal Sámi communities of Kvænangen fjord in Troms County. Emphasis is

placed on the exploration of Coastal Sámi customary tenure, as well as on the value of indigenous law embedded in it.

Keywords: *Coastal Sámi; Indigenous Legal Orders; Marine Tenure; 'Mea'*

1. Introductory Remarks

It is widely accepted that Indigenous Peoples have been governing their lands and marine territories using their own legal traditions since time immemorial, and long before the arrival of settlers and the establishment of sovereign States.[495] However, colonization led to socio-economic dislocation among indigenous communities, which dramatically obscured and undermined these traditions.[496] In terms of an ongoing decolonization process, it has recently become clear that the co-existence of both local and indigenous social and legal organizations with wider political and economic networks deriving from State entities is necessary, contributing to the formation of legally pluralistic societies.[497] Therefore, indigenous legal orders should be understood as a necessary part of governance in contemporary societies aiming at the

495. Georgia Lloyd-Smith, *An Ocean of Opportunity: Co-Governance in Marine Protected Areas in Canada* (West Coast Environmental Law 2017) 3.

496. Val Napoleon and Hadley Friedland, 'An inside job: engaging with indigenous legal traditions through stories' (2016) 61(4) McGill LJ 725, 741.

497. Franz von Benda-Beckmannn and Keebet von Benda-Beckmannn, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 38(53-54) The Journal of Legal Pluralism and Unofficial Law 1, 2.

protection of indigenous peoples[498] and the expression of the inherent right of self-determination that they enjoy.[499] In these terms, scholars around the globe[500] often attempt to deploy indigenous epistemologies in research approaches and discuss indigenous legal traditions.

1.1 Defining Indigenous Legal Orders

The turn towards specific indigenous traditions in legal scholarship is a very recent phenomenon and has been flourishing in Canada, where the theoretical background of this contribution principally originates. Val Napoleon defines indigenous law as *"law that is embedded in social, political, economic,*

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498. Gordon Christie, 'Aboriginal Nationhood and the Inherent Right to Self-Government' (2007) Research Paper for the National Centre for First Nations Governance, 2.

499. The right to self-determination is widespread in the text of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), ensuring the right for Indigenous Peoples to pursue their political, economic, social and cultural development within the framework of an existing State; see Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007), UNGA Res 61/295 (UNDRIP) preface, art 3, 4, 23, 32, 33, 35.

500. See, for instance, Donald R Davis Jr, 'Recovering the Indigenous Legal Traditions of India: Classical Hindu Law in Practice in Late Medieval Kerala' (1999) 27(3) Journal of Indian Philosophy 159, 159–213; Mark A Michaels, 'Indigenous ethics and alien laws: native traditions and the United States legal system' (1997) 66 Fordham L. Rev. 1565, 1565-1584; James W Zion and Robert Yazzie, 'Indigenous law in North America in the wake of conquest' (1997) 20(1) BC Int'l & Comp. L. Rev. 55, 55-84; Michael Coyle, 'Indigenous Legal Orders in Canada – a literature review' (2017) 92 Law Publications. Eduard T Durie, 'Will the Settlers Settle'(1996) 8(4) Otago L. Rev. 449, 449-466; Kim Akerman, 'The renascence of Aboriginal Law in the Kimberleys' in Ronald M Berndt and Catherine H Berndt (eds), *Aborigines of the West* (University of W.A. Press 1980).

and spiritual institutions of indigenous peoples," distinguishing it from state-centred legal systems.[501] Indigenous legal traditions are not relevant to the current concept of rights that is traditionally accepted in Western legal systems.[502] In contrast, literature developed by both indigenous and non-indigenous researchers, universally treats indigenous law as a living force that embodies the distinct traditions and knowledge of Indigenous Peoples which have been historically marginalized and replaced by contemporary legal systems.[503] Legal scholars, when observing indigenous traditions, must examine in depth how indigenous legal orders and norms work, whether through social services, direct political action, or in other capacities, in order to ensure that their research can have practical value and does not simply perpetuate the *status quo* research systems that oppression and colonization have established.[504]

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501. Val Napoleon, 'Thinking About Indigenous Legal Orders' in R Provost and C Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer Dordrecht 2013) 231.

502. For a more detailed explanation of the differences between Western and indigenous law See Natalia Loukacheva, 'Indigenous Inuit Law, "Western" Law and Northern Issues (2012) 3(2) *Arctic Review on Law and Politics* 200, 207-208.

503. ibid 206; See also Coyle (n 500) iv;

504. Although the scope of this study is not to sketch the ethical responsibilities of the researcher towards indigenous communities, ethical considerations have been taken into account during the fieldwork of this project; for more information about ethics in indigenous studies see Linda T Smith, *Decolonizing Methodologies - Research And Indigenous Peoples* (Zed Books UK 2002); Gabrielle Russell-Mundine, 'Reflexivity in Indigenous Research: Reframing and Decolonising Research?' (2012) 19 *Journal of Hospitality and Tourism Management* 85, 87.

1.2 Research Goals and Outline

In a Sámi context, there exists a significant body of published literature related to indigenous rights in general, as well as Sámi rights in particular, examining both domestic and international legal frameworks and their application. In Norway, while significant efforts have been devoted to the study of unwritten customary Sámi legal traditions,[505] the majority of the studies concerning the Coastal Sámi communities prioritize to address law that stems from centralized State authorities.[506] For Indigenous Peoples, though, the acknowledgment of former decentralized legal traditions with current centralized State authorities and legal systems is necessary;[507] although still limited in the Norwegian political scene. Accordingly, this study attempts to examine the potentials of such an approach in Norway and to indicate remnants of indigenous law through ethnographic research in Coastal Sámi communities of Kvænangen fjord in Troms County.

The Chapter is organized into the following core sections. This first section of the study presents the theoretical background of this project, illustrating the main concerns of scholars with regards to the study of indigenous legal traditions. The second part sketches out the specific circumstances and methodological reflections that the legal researcher

505. See, for instance, Øyvind Ravna, 'Sámi Legal Culture – and its Place in Norwegian Law,' in Jørn Øyrehagen Sunde and Knut E Skodvin (eds.), *Rendezvous of European Legal Cultures* (Fagbokforlaget Bergen 2010) 149-165; Susann Funderud Skogvang, *Samerett* (Universitetsforlaget Oslo 2009).

506. See, for instance, Steinar Pedersen, 'The Coastal Sámi of Norway and their rights to traditional marine livelihood' (2012) 3(1) Arctic Review on Law and Politics 51.

507. Napoleon (n 7) 244.

needs to take into consideration when dealing with Coastal Sámi communities. The third part of this contribution describes the results of a case study conducted in November 2018 in Kvænangen fjord of Northern Norway, shedding light on a Coastal Sámi system of marine tenure. By analyzing this system, the author endeavours to illustrate and discuss indigenous law in a Coastal Sámi context. The last section summarizes the outcomes of this study, concluding with recommendations for future research.

2. Thinking about Coastal Sámi Legal Orders

The Coastal Sámi (or Sea-Sámi)[508] have historically inhabited the coastal fjord areas of Northern Norway, with the majority living in Finnmark and Troms counties.[509] Settlements in these areas date back to approximately 10,000 years ago, while the origins of the Sámi people can be traced to an era when the first distinct ethnic groups in Northern Fennoscandia[510] emerged.[511] The Coastal Sámi have traditionally relied on subsistence activities such as fishing, hunting,

508. *Sjøsamer* in Norwegian.

509. Angelika Lätsch, 'Coastal Sami revitalization and rights claims in Finnmark (North Norway) - two aspects of one issue? Preliminary observations from the field' (2012) 18 Skriftserie, Senter for Samiske studier 60, 63.

510. Fennoscandia (Finnish: Fennoskandia; Swedish: Fennoskandien; Norwegian: Fennoskandia; Russian: Фенноскандия Fennoskandiya) or the Fennoscandian Peninsula is defined as the geographical peninsula comprising the Scandinavian Peninsula, Finland, Karelia, and the Kola Peninsula. The northern parts of Fennoscandia belong to the Sápmi, the cultural region traditionally inhabited by the Sámi people; see Vicki Cummings and others, *The Oxford Handbook of the Archaeology and Anthropology of Hunter-Gatherers* (Oxford University Press 2014) 838.

511. Pedersen (n 506) 52.

farming, gathering and limited trading relationships.[512] The distinction of the Coastal Sámi as a separate ethnic group from the rest of the Norwegian population was not often discussed until the late 1980's, when an ecological crisis in Barents' cod stocks led to profound changes in the State's fisheries policy which strongly impacted small-scale fisheries.[513] In response to this 'cod crisis', the Ministry of Fisheries amended the existing fishing regulations and introduced an individual-vessel quota system.[514] The individual-vessel quota system favoured those fishers[515] with a certain level of income from fisheries in the years preceding the introduction of the system.[516] This regulation had dramatic consequences for small-scale fishing communities in Northern Norway including the Coastal Sámi,[517] who characterized this amendment as a violation of their historic and collective right to livelihood and culture.[518] Since its establishment

512. Lars I Hansen, 'Sámi Fisheries in the Pre-modern Era: Household Sustenance and Market Relations' (2006) 23(1) Acta Borealia 56, 59.

513. The 'cod crisis' was an ecological crisis in the Barents Sea cod stocks which posed siginifcant impacts on fisheries; See Camilla Brattland, 'Mapping Rights in Coastal Sami Seascapes' (2010) 1(1) *Arctic Review on Law and Politics* 28, 32.

514. For a more comprehensive analysis of the impacts of the 'cod crisis' on small-scale fisheries, see also Svein Jentoft, 'Governing tenure in Norwegian and Sámi small-scale fisheries: from common pool to common property?' (2013) 1 Land Tenure Journal 91, 94.

515. The majority of the Coastal Sámi engaged in the sector of fisheries have always been males. However, in this manuscript the term 'fisher' is used as gender neutral term also including the female individuals involved in fisheries.

516. Brattland (n 513) 32.

517. ibid.

518. Jentoft (n 514) 94.

in 1989,[519] the Sámi Parliament began to gain influence in the Norwegian fisheries governance system in order to secure Sámi rights to fisheries as part of the material basis of Sámi culture,[520] and protect Coastal Sámi fisheries from the ongoing issues that the State's regulations raised.[521] The discourse over the Coastal Sámi rights has been intensified since 2008,[522] and Coastal Sámi identity has become important in many coastal areas of the counties of Finnmark and Troms.[523] To date, it is crucial for the Coastal Sámi people that their historical rights to fisheries will be officially acknowledged by the State,[524] and the Sámi customary tenure would be accommodated within State law. In an attempt to contribute to this endeavour, this study endeavours to discuss Coastal Sámi legal traditions embedded in a system of customary marine tenure in Troms County.

2.1 Coastal Sámi Legal Traditions in the Shadow of Norwegianization

Prior to the development of a relevant methodology for researching indigenous legal traditions in contemporary

519. Else G Broderstad and Einar Eythórsson, 'Resilient communities? Collapse and recovery of a social-ecological system in Arctic Norway' (2014) 19(3) Ecology and Society <www.ecologyandsociety.org/vol19/iss3/art1/> accessed 11 March 2019.

520. ibid.

521. Jentoft (n 514) 94.

522. In 2008 the Coastal Fisheries Commission (CFC) proposed to the Ministry of Fisheries far-reaching fisheries governance reforms in Finnmark, supporting both indigenous rights and traditional use rights for the coastal population; Brattland (n 513).

523. Lätsch (n 509) 80.

524. ibid.

Coastal Sámi communities, the process of Norwegianization needs to be understood, as well as its consequences for Coastal Sámi communities. Norwegianization (*fornorsking* in Norwegian) is defined as the consistent policy of assimilating the Indigenous Peoples of Norway, particularly Sámi and Kven people,[525] into mainstream Norwegian society and culture. Historically, compared to other indigenous communities in the country, the Coastal Sámi were the most severely affected by the Norwegianization policy[526] lasting more than a hundred years.[527] In the middle of the previous century, there was a social stigma attached to the Sámi identity,[528] which was associated with backwardness

525. The Kven people are descendants of early Finnish-speaking immigrants from the northern part of Sweden and Finland to Northern Norway; see Siv Kvernmo and Sonja Heyerdahl, 'Ethnic Identity and Acculturation Attitudes Among Indigenous Norwegian Sami and Ethnocultural Kven Adolescents' (2004) 19(5) Journal of Adolescent Research 512, 512.

526. Bjørg Evjen, 'A Sea-Sámi's story. From fishing-farmer to miner, from "Sea-Sámi" to "Norwegian"?' (Forum Conference: Aspects of Migration and Urbanization, Tromsø 2007) 43-44.; see also Apostolos Tsiouvalas, Margherita P Poto, 'Indigenous Rights to Defend Land and Traditional Activities: A Case-Study of the Sámi in Northern Sweden' (2018) 5(1) Revista de Direito da Faculdade Guanambi 13, 14-15.

527. The policy of Norwegianization began around 1850 and continued until approximately 1980; Henry Minde, 'Assimilation of the Sami - Implementation and Consequences' (2005) 3(1) gáldu čála – journal of indigenous peoples rights 1, 6; Carsten Smith, 'Fisheries in coastal Sámi areas: Geopolitical concerns?' (2014) 5(1) Arctic Review on Law and Politics 4, 9; Henry Minde, 'The challenge of indigenism : the struggle for Sámi land rights and self- government in Norway 1960-1990' in Svein Jentoft and others (eds), *Indigenous Peoples Resource Management and Global Rights* (Eburon Publishers 2003) 76-77.

528. Harald Eidheim describes the issues of ethnic identity in Norway after WWII; Sámi identity was strongly associated with social stigma or taboo stereotypes; Harald Eidheim, 'When ethnic identity is a social stigma' in

and poverty, being diametrically opposed to the Norwegian identity.[529] Subsequently, after WWII, the Sámi identity was stigmatized in coastal areas, leading to the self-classification of many Coastal Sámi as Norwegians in the post-war census that followed.[530] This ongoing cultural extinction had placed Coastal Sámi culture and their legal traditions in obscurity for over a century. As discussed, only during the last few decades a constant debate over Coastal Sámi livelihoods and the protection of their traditional rights to fisheries has come to the forefront,[531] although the impacts of Norwegianization on the Coastal Sámi culture are still apparent.[532] Therefore, the revitalization of remnants of indigenous legal orders in Coastal Sámi communities seems to be of great importance, as the Coastal Sámi cultural basis has been strongly impacted[533] and an effort for cultural reinforcement has only recently been initiated.[534]

Thomas Hylland Eriksen (ed), *Sosialantropologiske grunntekster* (Ad Notam Gyldendal Oslo 1996) 281-291.

529. Einar Eythórsson, 'The Coastal Sámi: a 'Pariah Caste' of the Norwegian Fisheries? A Reflection on Ethnicity and Power in Norwegian Resource Management' in Svein Jentoft and others (eds), *Indigenous Peoples Resource Management and Global Rights* (Eburon Publishers Delft 2003) 151.

530. ibid.

531. For a better understanding of the present situation of the Coastal Sámi, their fisheries and their livelihoods, see Camilla Brattland, 'Coastal Sami communities and the Material Basis for Sami Culture' in Randi Nygård and Karolin Tampere (eds), *The Wild Living Marine Resources Belong to Society as a Whole* (Ensayo#4 2017) 353-359.

532. Lätsch (n 509) 61.

533. Carsten Smith considered in 2013 that Sámi fisheries, as well as Coastal Sámi culture, were in a precarious state and required immediate attention; see Smith (n 527) 9.

534. Lätsch (n 509) 68.

2.2 Methodological Concerns in Doing Fieldwork in Coastal Sámi Communities of Troms County

The integration of indigenous legal traditions into contemporary legal and political systems has pivotal significance, especially for the establishment of indigenous forms of self-governance and self-determination, or cooperative and co-management mechanisms.[535] Additionally, it could provide indigenous communities with opportunities for further participation in decision-making processes,[536] as well as conserve the cultural identity of Indigenous Peoples.[537] This is because indigenous law reflects the unique cultures of Indigenous Peoples in contrast to the positivist and rights-based approach that Western legal systems focus on.[538]

However, for the development of a relevant methodology in order to shed light on Coastal Sámi legal traditions, specific parameters have to be taken into account which distinguish such an approach from similar projects conducted abroad. Indeed, indigenous legal orders are spatially and temporarily unique and affect the life in a community at a microlevel, as well as its interaction with outside instruments, such as State law[539] and legal traditions developed

535. Julie Raymond-Yakoubian and Raychelle Daniel, 'An Indigenous approach to ocean planning and policy in the Bering Strait region of Alaska' (2018) 97 Marine Policy 101, 101-108.

536. A core element of participation is the principle of free, prior and informed consent (FPIC), that is directly derived from the right to self-determination of indigenous peoples. For more details about participation and FPIC See Margherita P Poto, 'Participatory rights of indigenous peoples: the virtuous example of the Arctic region' (2016) 28 ELM 81, 83.

537. Loukacheva (n 502) 211; See also Coyle (n 500) 15.

538. Coyle (n 500) 1.

539. Loukacheva (n 502), 206.

by other indigenous communities.[540] Thus, for the Coastal Sámi, three significant considerations have to be taken into account prior to the development of a methodology that could identify indigenous law: The first is the specific point in time that the researcher must start from when investigating Coastal Sámi legal traditions; second the limited availability of sources of knowledge that the researcher can use and; third, the present structure of coastal communities. These important parameters are illustrated in the following three subsections.

2.2.1 Looking for a Starting Point of Research

Val Napoleon argues that accessing and articulating indigenous laws is challenging precisely because the scholar should start in a space of a 'deep absence' constructed by colonialism.[541] Looking at a 'deep absence' in a costal Sámi context, the impacts of Norwegianization and the assimilation processes that took place in Fennoscandia, and led to the loss of big part of Coastal Sámi culture including legal traditions, need to be taken into account. Tracing knowledge derived from a precolonial past seems problematic at first glance, however, not impossible, since the strength of an indigenous legal tradition is not how closely it adheres to its original form[542] but, in contrast, how well it is able to develop with the passage of time and remain relevant under

540. Napoleon (n 501) 242.

541. Val Napoleon and Hadley Friedland, 'Gathering the threads: developing a methodology for researching and rebuilding Indigenous legal traditions', (2015) 1(1) Lakehead Law Journal 16, 44.

542. Napoleon (n 501) 243.

changing circumstances.[543] Indigenous legal traditions are a dynamic phenomenon, revealing both consistency and continuity over time, involving responsiveness and adaptability to changing contexts.[544] They exist to address current and future needs of the communities that practice them. Therefore, the observation of the contemporary livelihoods and activities of the Coastal Sámi seems to be adequate for producing knowledge and a fruitful way for the articulation of indigenous law.

2.2.2 Seeking Sources of Coastal Sámi Law

Stories are highly important sources of knowledge in indigenous studies since they convey values, attitudes, beliefs, and assumptions that are critical to constructing the meaning of the self and the society revolved around it.[545] For instance, Hadley Friedland and Val Napoleon, describe a methodology for researching and revitalizing indigenous legal traditions, using stories as a starting point for research.[546] In addition to storytelling, myths, art, music, handicrafts and customs can be used as valuable sources of indigenous law.[547] It has been also argued that the concept of indigenous law is most appropriate to be conceived as it is described and meant in indigenous languages,[548] since language and legal traditions

543. John Borrows, 'Indigenous Legal Traditions in Canada' (2005) 19 *Wash.* U. J. L. &Pol'y 167, 175.

544. Napoleon and Friedland (n 541) 38; Coyle (n 500) 8.

545. Stan Bird, 'Indigenous peoples' life stories: Voices of ancient knowledge' (2014) 10(4) Alternative 376, 389.

546. Napoleon and Friedland (n 541) 21-26.

547. Borrows (n 543).

548. Coyle (n 500) 7; See also Napoleon (n 501) 230.

are closely interrelated.[549] In Northern Sámi, the most suitable word for law is the term *riektevuogádat*, which means legal system, or an aggregate of normative principles.[550] However, among the aftermath of Norwegianization was the near loss of the Sámi language, as well as a considerable part of Coastal Sámi traditions especially in the coastal communities of Troms County, where the fieldwork was conducted. As a result, neither the direct questioning of the existence of legal traditions using Sámi terms, nor the presentation of a story that reveals law could lead to direct findings of indigenous legal orders, since identifying these sources in the cultural basis of Coastal Sámi in Troms County could be practically rather difficult.[551]

2.2.3 Structure of Coastal Communities

Third, the present structure of indigenous communities certainly plays a role in the identification of legal traditions, taking into account that in certain places around the world indigenous communities are still distinctly conserved, preserving their integrity and continuing to live with unique and specific cultural characteristics.[552] As mentioned, the

549. John Borrows argues that indigenous languages and legal traditions are tightly connected since language forms the basis for the development of law; see John Borrows, 'Language and Anishinaabe Consultation Law' Indigenous Law Association at McGill Blog <https://indigenous-law-association-at-mcgill.com/2018/04/14/language-and-anishinaabe-consultation-law-by-john-borrows/> accessed 11 Mar 2019.

550. 'Riektevuogádat' (*Dinordbok*) <www.dinordbok.no/en/sami-norwegian/?q=riektevuogádat> accessed 18 August 2019.

551. Lätsch (n 509) 60-61.

552. Rauna Kuokannen, 'Indigenous Peoples on Two Continents: Self-Determination Processes in Sámi and First Nations Societies.' (2006)

cultural distinction of the Coastal Sámi among the rest of the population of the northern fjords of Norway is hard to define due to the loss of language skills and identity of Coastal Sámi as a distinct group in many places.[553] The discourse over indigenous rights and the material basis of the Coastal Sámi culture had never been a matter of discussion until very recently.[554] Based on linguistic criteria, Northern Norway is recognized as Sámi land (part of *Sápmi*),[555] although there are no specific coastal communities inhabited exclusively by Sámi people. Subsequently, someone could argue that in many coastal communities of the northern of Norway a 'coastal culture' has prevailed over the Sámi one, a fact that needs also to be taken into consideration before developing a methodology for the identification of indigenous law.

2.2.4 Summary

So far literature on indigenous studies and remarkably the Canadian legal scholarship provides valuable information

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20(2) European Review of Native American Studies 25, 28; The author presents a comparative analysis of the different approaches taken between the First Nations in Canada and the Sámi people in Fennoscandia, concluding that Indigenous Peoples in Canada strive toward replacing and rebuilding the governing structures from the bottom up, which better preserves their distinct cultural institutions. In contrast, the Sámi have been widely assimilated in the societal structures of the sovereign States in which they reside, focusing mainly on the conservation of their language and their participation in consultation processes.

553. Lätsch (n 509) 60-61.

554. See previously Section 2.

555. For the officially defined Sámi regions of Norway See Ministry of Local Government and Modernisation, Act of 12 June 1987 No. 56 concerning the Sameting (the Sami parliament) and other Sámi legal matters (the Sami Act).

about the characteristics of indigenous legal traditions, and the concerns in respect to their study. However, prior to conducting fieldwork and attempting to identify law in Coastal Sámi communities of Troms County, the three methodological concerns presented in Sections 2.2.1-2.2.3 need to be taken into account. In doing so the most appropriate way to discuss Coastal Sámi legal traditions was deemed to be the observation of the current practice of law in marine activities which are nowadays, and have been since time immemorial, the main occupation in the coastal communities of Norway, built on intergenerational knowledge transfer.[556] The ocean has always been the main source of living for coastal communities and the source of the material and cultural basis of the Coastal Sámi as a coastal people. Therefore, if there are characteristics left from an ancestral Coastal Sámi legal tradition, they could be sourced from traditional activities on the sea.

556. For a definition of 'intergenerational knowledge transfer' See Kerstin Kuyken, 'Knowledge communities: towards a re-thinking of intergenerational knowledge transfer' (2012) 42(3) VINE 365, 365-381.

3. Case Study from Kvænangen

Around the globe,[557] coastal and Indigenous Peoples have been managing the marine resources attached to their communities for hundreds of years, often based on systems of customary marine tenure.[558] Despite their diversified characteristics among different places, most marine tenure systems include water landmarks, controlled access, self-monitoring, defined geographical areas and the enforcement of rules and regulations by local people and their traditional leaders.[559] In these terms, traditional and indigenous law often exists in the absence of, or in addition to, State law in relation to marine resource management.[560] Similarly, since the pre-modern area,[561] and up to World War II, the inhabitants of coastal districts of northern Norway, the majority of whom were

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557. See, for instance, Miguel González, 'Governance and governability: indigenous small-scale fisheries and autonomy in coastal Nicaragua' (2018) 17 Maritime Studies 263, 265; Gregory Bennett, 'Customary marine tenure and contemporary resource management in Solomon Islands' (*Proceedings of the 12th International Coral Reef Symposium, Cairns, Australia*, 9-13 July 2012) <www.icrs2012.com/proceedings/manuscripts/ICRS2012_22A_3.pdf> accessed 11 March 2019; David Hyndman, 'Sea tenure and the management of living marine resources in Papua New Guinea' (1993) 16(4) Pacific Studies 99, 99-114.

558. Marine tenure systems are sets of mechanisms frequently encountered in a region and widely interpreted as a form of management of marine resources; See Philip D Townsley and others, 'Customary Marine Tenure in the South Pacific : the uses and challenges of mapping' (1997) 30 PLA Notes IIED 36, 36.

559. Bennett (n 557).

560. González (n 557) 263.

561. Lars Ivar Hansen defines as 'pre-modern era' the time between the Middle Ages and Early Modern Times; see Hansen (n 512) 56.

Sámi,[562] had developed local tenure systems for the management of the fjord's resources.[563] In this context, the coastal communities of Northern Troms, as Ivar Bjørklund describes using an example from Kvænangen fjord, exclusively managed the access to marine resources in the waters[564] attached to their communities, based on norms that derive from traditional and historical use.[565] In December 2018, almost three decades after Bjørklund's article, fieldwork conducted in Kvænangen fjord identified remnants of customary tenure in contemporary Coastal Sámi marine activities. A more detailed description of this customary marine tenure system follows, as well as the methodology and the results of the fieldwork.

3.1 Theoretical Background: the *Mea* System of Marine Tenure

According to Ivar Bjørklund, studies in the 1920s and 1930s showed how coastal people on Spildra in Kvænangen fjord and in neighboring communities developed a marine tenure system based on indigenous and traditional ecological knowledge such as sea currents, climatic factors, fish migration, spawning grounds and habitation.[566] Most of these fishers were Coastal Sámi, who were the majority of the

562. Ivar Bjørklund, 'Property in common, common property or private property: Norwegian fishery management in a Sami coastal area' (1991) 3(1) North Atlantic Studies 41, 42.

563. ibid.

564. The terms 'water', 'sea', 'ocean', and 'marine space' are used in the text interchangeably.

565. Bjørklund (n 562) 42.

566. ibid 43.

population in the northern Norwegian fjords, at the time.[567] This system that the inhabitants of Kvænangen developed was the *mea*[568] (*vihtat* in Northern Sámi)[569] and was used as a topographic coordinator in order to determine the exact spot to fish, as well as to delimit the individual area for access to marine resources and navigation in the fjord.[570] Bjørklund further mentions that breaches of this system by fishing in neighboring territory used by other households meant the moral stigmatization of the fisher within the community.[571] Therefore, aside from the topographic and navigational value that *mea* offers, a legal dimension can be identified, since it has been generally accepted that tenure systems around the world define and regulate how people, communities and others gain access to natural resources. The legal dimension of tenure systems has been widely recognized because the rules of tenure determine who can use which resources, for how long, and under what conditions.[572] Accordingly, the delimitation of individual areas for exclusive use of marine resources that the *mea* determined, can be interpreted as an

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567. ibid 42. See also Hansen (n 512);

568. In the Norwegian language *mea* refers to a specific *me* which is the general term.

569. Bjørklund (n 562) 42

570. ibid 44.

571. ibid.

572. Marine tenure systems may be based on formal written policies and laws, as well as on unwritten customs and practices and informal arrangements, as seems to be the case for the project participants; See The Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Responsible Governance of Tenure: At a glance* (Office of Knowledge Exchange, Research and Extension Rome 2012) <www.fao.org/3/a-i3016e.pdf last> accessed Mar 11, 2019.

indigenous tradition that reveals law which indicates the establishment of a sense of ownership[573] over marine resources.[574]

The *mea* as a system of regulating specific fishing areas for each household seems to meet the theoretical expectations of an indigenous legal order. The perception of exclusivity over the marine resources for the inhabitants of the fjords cannot be translated into contemporary property concepts, but reveals a local and indigenous understanding of access consolidated through centuries of continuous use.[575] Similarly the fact that the local fishers were morally sanctioned for breaches of these coordinates cannot be placed within the contemporary understanding of breaches of property rights.

3.2 Methodology

Taking into consideration the three parameters sketched above in Sections 2.2.1-2.2.3, a methodology that could articulate indigenous legal orders through the direct inquiry of the existence of legal traditions using the Sámi language, or presenting a story that reveals law, as has been widely used in Canada,[576] may lead to incomplete findings. For the purposes of a wider project on marine resource management,[577]

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573. Anni Arial and Vladimir Evtimov, 'Thematic Issue on the Voluntary Guidelines on the Responsible Governance of Tenure' Land Tenure Journal 1, 22.

574. Bjørklund (n 562) 43.

575. See, for instance, Sandra Pannell, 'Homo Nullius or 'Where Have All the People Gone'? Refiguring Marine Management and Conservation Approaches' (1996) 7(1) The Australian Journal of Anthropology 21, 25.

576. See above Section 2.2.2; see also Estella White (Charleson), 'Making Space for Indigenous Law' (2016) JFK Law Corporation <http://jfklaw.ca/making-space-for-indigenous-law/> accessed 11 Mar 2019.

577. Apostolos Tsiouvalas, *Redefining the management of living marine resources*

fieldwork was conducted in Coastal Sámi communities of Kvænangen fjord. In addition to other strategies of inquiry, participant observation was selected as a rather valuable method for a case study relevant to indigenous peoples. Participant observation is a way of observation which enables researchers to learn about the activities of the people participating in the study in their natural setting through observing and participating in these activities.[578] Participant observation in small-scale fishing activities in Kvænangen fjord offered a deep and detailed view of the project participant's culture and the issues that fishers currently face in the fjord. Among other results, participant observation was also important for the observation of remnants of Sámi legal traditions in current marine practices.

3.3 Discussion

Participant observation in fisheries and cargo activities in Kvænangen indicated that contemporary boats that belong to local Sámi fishers are well-equipped with both modern equipment and GPS navigation systems. However, the knowledge of *mea* that Bjørklund describes,[579] even if it is no more determined as *mea* or *vihtat* since the Sámi language is not used anymore in the coastal communities of Kvænangen, has been transferred through the passage of time to the project participants. The *mea* as an aggregate of knowledge

from the bottom-up: a coastal Sámi conceptual framework (Polar Law LL.M. Thesis, University of Akureyri, Iceland 2019).

578. Barbara B Kawulich, 'Participant Observation as a Data Collection Method' (2005) 6(2) Forum: Qualitative Social Research, <www.qualitative-research.net/index.php/fqs/article/view/466/996#g2> accessed 11 March 2019.

579. See, previously, section 3.1.

is still occasionally used as a topographic tool in order to define landmarks and determine the coordinates that will allow fishers to navigate within Kvænangen and to throw their nets.[580] The fishers do not fish randomly in the fjord; they still use this knowledge in order to distribute the area in which they will fish exclusively and treat the marine resources accordingly. Indeed, the participants of the project claimed that they do not know if this knowledge system had been developed by the Coastal Sámi or by Norwegian fishers. This seems to be obvious, taking into account the impacts of Norwegianization, as well as the fact that the State had not traditionally differentiated its policy between Sámi and ethnic Norwegian fishers who often live side by side in the northern fjords.[581]

However, defining its origins is not an issue for sketching an indigenous legal tradition in this case. What matters is who the subject related to this tenure system is and what it presently means for the project participants. The participants of this project have been using the knowledge of *mea* for centuries at a local decentralized level of marine resource management, determining amongst one another the individual

580. Similarly, research has shown that marine tenure systems are still in use in other regions of Troms apart Kvænangen. For instance, Camilla Brattland and Reni Wright present a short ethnographic film, showcasing the traditional knowledge of an old Coastal Sámi fisherman which demonstrates how landmarks are used for setting the gill nets in order to catch cod; See Reni Wright, Camilla Brattland, *Learning hoavda's seascape* (10:36 min), (Kunnskapsformidling and Visual Cultural Studies, Department of Archaeology and Social Anthropology University of Tromsø 2012).

581. Svein Jentoft and Siri Ulfsdatter, 'Securing Sustainable Sámi Small-Scale Fisheries in Norway: Implementing the Guidelines' in S Jentoft and others (eds), *The Small-Scale Fisheries Guidelines* (Springer 2017) 268.

space for fishing. Of course, this perception of access to marine resources is incompatible with the State's understanding of access to marine resources as stated in Section 2 of the Marine Resources Act[582] which reads that *"The wild living marine resources[583] belong to Norwegian society as a whole,"* securing equal access to all Norwegian citizens. Accordingly, the locals of Kvænangen, following the State's regulations, cannot prevent others from fishing in the fjord. However, in their interactions with each other, they still distribute the marine resources in a traditional way, sharing the access to them as it has been practiced since time immemorial. Therefore, even if there are not sufficient and accurate sources about the roots of this ancient system of knowledge, this project showed that the local sailors and fishers of Kvænangen, Sámi or not, still use it as a topographic tool in order to determine the coordinates that will allow them to navigate and to throw their nets. Besides that, even if State law provides access to marine resources for the entire Norwegian population, in practice the project participants still use this tradition in order to distribute the area in which they will fish and treat the resources accordingly.

This tenure system, as long as it regulates exclusive access to marine resources, reveals an indigenous legal tradition, which, even not legitimized by the Norwegian legal system, is still practiced by the Coastal Sámi participants of this project. Indigenous concepts of law cannot be understood within

582. Lov 2008-06-06 nr 37: Lov om forvaltning av viltlevande marine ressursar (havressurslova)

583. According to Section 3 of the Marine Resources Act, wild living resources include *"fish, marine mammals that spend part or all of their life cycle in the sea, plants and other marine organisms that live in the sea or on or under the seabed and that are not privately owned"*.

the European concepts of law, or the Western contemporary conception of indigenous rights.[584] In theory, the principle that the marine resources equally belong to all Norwegian citizens, as the Marine Resources Act states, might be implemented across the entire Norwegian coast, overlapping local and indigenous forms of marine tenure. This study showed that inside the fjords customary use of indigenous law continues among the local fishers who remain holders of this tradition. What is truly challenging though is how the common access principle that stems from State law could be dovetailed to embody the Sámi practice of *mea*.

4. Conclusions

This paper has addressed the challenges of discussing indigenous legal traditions in Coastal Sámi communities of Troms County in Northern Norway, through a case study of a marine tenure system that is still occasionally used in Kvænangen fjord. The outcomes of this research could be summarized into three main conclusions. First of all, there are certain practical realizations and parameters that the researcher has to take into consideration when attempting to trace indigenous law in a Coastal Sámi context. These parameters give to the research a different character in comparison to similar approaches developed abroad. The second conclusion reached is that indigenous legal traditions are still alive in coastal communities of Troms County and co-exist

584. J Borrows and Leonard I Rotman, 'The Sui Generis Status of Aboriginal Rights: Does It Make a Difference?' (1997) 36(1) Alberta Law Review 9, 37.

with State law. The project participants remain the custodians of those traditions, maintaining them, and applying them in the conduct of their lives. The third conclusion of this chapter is that what certainly needs to be done, is further research by scholars. Indeed, indigenous communities themselves must lead these efforts to preserve and revitalize their legal traditions and to implement legal orders that would reflect their own needs, beliefs and values. A general shift in the mentality of the legal researcher in approaches concerning Sámi issues shall happen if these projects were supported by further funding and capacity-building, in order to complete this challenging task.

Despite Norway's initiatives for the reinforcement of indigenous rights and its commitment to implement corresponding domestic and international law mechanisms, the engagement with the Sámi (and by extension the Coastal Sámi) legal traditions is still preliminary in Norwegian policy. Recognizing and reinvigorating indigenous legal orders is an extremely valuable project that can support the survival of distinct indigenous societies and the overall goal of the Sámi people to move further away from colonial control and be in charge of the governance over their lands, waters and resources. Indigenous law continuously develops to meet the needs of each generation and its study is crucial for the future of indigenous peoples. Yet, in a Coastal Sámi context there is a lot of research to be done, while the recognition of Sámi legal traditions by State authorities is imperative.

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Effect of Legal Transplant on Customary Law in Kenya

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Abstract

Customary law in Kenya remains an integral source of law for many communities. This form of law is dynamic, and has over time evolved in tandem with the natural pace of social change. Despite the weak legal pluralism in Kenya, in which formal (state) law is viewed as the dominant source of law, customary law has remained resilient and robust due to its 'living' nature and the fact that it derives from, and defines, the values and norms of indigenous peoples. However, despite the statutory recognition of customary law under the Constitution 2010 and the Judicature Act (Cap 8), its application is subject to restrictions inherited from the British legal system. In what follows, this paper critically examines the concept of customary law in Kenya in the wake of legal pluralism. Part of this includes the emergence of legal pluralism, effect of legal transplant on customary law, interaction between colonial-induced formal law and customary law in Kenya, functional areas of customary law and how the concept has been reconciled with human rights under the current constitutional order in Kenya. It is demonstrated in respect to human rights, that, certain customary law practices in Kenya are inimical to the Bill of Rights and international law, and legitimately warrant the limitation encapsulated in Article 159(3) of the Constitution. Yet, the fact that

the elements of 'justice' and 'morality', as contained under this provision, are not properly defined makes the entire repugnance clause ambiguous.

Keywords: *Customary law; legal pluralism; legal transplant; repugnance; human rights; Kenya*

1. Introduction

Kenya is a pluralist state where diverse legal and normative systems operate. Section 3(1) of the Judicature Act[585] recognises this pluralist state by envisaging the sources of law in Kenya as the Constitution, Acts of Parliament, common law, doctrines of equity, statutes of general application, and customary law. These sources may be categorised into formal and customary normative frameworks. They operate within the same social context involving personal law aspects like land, marriage, divorce and inheritance. Customary law consists of the unwritten norms and practices that define the identity of different communities and mediate their relationships and entitlements.[586] It may be defined as human law that is embedded in traditional social and psychological fabrics of the human society.[587] According to Tobin and Taylor, this form of law is dynamic and constantly evolving, and often differs

585. Cap 8 Laws of Kenya.

586. Winifred Kamau, 'Customary Law and Women's Rights in Kenya' (2014) Equality Effect 2 <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> accessed 14 March 2019.

587. Peter Onyango, *African Customary Law System: An Introduction* (LawAfrica Publishing Ltd 2013) 18.

from community to community.[588] On the other hand, formal legal system comprises a legal framework that was handed down by the colonial powers. Following the advent of colonialism in Kenya, the adoption of the English legal system saw the gradual subjugation of customary law. The effect of this transplant, and the interaction between customary law and the colonial-induced positive (or formal) law constitutes the subject of this paper. The paper also paints a picture of how customary law has been reconciled with human rights under the new constitutional order in Kenya.

2. Legal Pluralism, a Consequence of Legal Transplant in Kenya

The idea of legal pluralism derives from the concept of living law, as propounded by Eugen Ehrlich.[589] It connotes a situation in which a country's justice system draws the rules and institutions of its laws from two or more legal systems.[590] This is true of most post-colonial African countries such as Kenya, which are grappling with the need to function as a formal legal regime even as they attempt to preserve cultural heritage embedded in the diverse customary laws.[591] The

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588. Katrina Cuskelly, *Customary and Constitutions: State recognition of customary law around the world* (IUCN 2011) 1.

589. See generally, David Nelken, 'Eugen Ehrlich, Living Law and Plural Legalities' (2008) 9(2) Theoretical Inquiries in Law 443, 443-471; Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press 1936).

590. Oladapo Kayode Opasina, 'Legal Pluralism in Contemporary States: Between Traditional and Formal Justice Mechanisms in Nigeria and Côte D'Ivoire' (2017) 1(6) Glocalism: Journal of Culture, Politics and Innovation 1, 4.

591. David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking

underlying theme in legal pluralism is that there is no single legality, but diverse legalities. According to Griffith, the true opponent of legal pluralism is legal centralism where a State considers 'its' justice system as universalistic (or at least superior) and exclusive of others.[592] Griffith identifies two types of legal pluralism: weak and strong. He describes weak pluralism as the "state legal pluralism" in which the living laws have been embraced and subjugated by the formality of state law.[593] In other words, the state is characterised by diversity of legal sources but with a dominant formal law. In contrast, strong legal pluralism means that not all of the law is state law, nor is all of it administered by a single set of justice system.[594] This is a purely balanced system.

The conception of legal pluralism in Kenya was marked by the introduction of the English legal system following the signing of the Treaty of Berlin in 1878 and the subsequent declaration of Kenya as a British protectorate.[595] Prior to this, Indigenous Peoples in Kenya were regulated by traditional normative order which derived from an inimitably African ontological metaphysics.[596] Arising from this was

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Statutory and Customary Adjudication in Mozambique' (2011) 14(1) Yale Human Rights and Development Journal 59.

592. John Griffith, 'What is Legal Pluralism' (1986) 24 Journal of Legal Pluralism 1, 1-55.

593. ibid.

594. ibid.

595. Paul N Ndungu, 'Tackling Land Related Corruption in Kenya' <http://siteresources.worldbank.org/RPDLPROGRAM/Resources/4595961161903702549/S2_Ndungu.pdf> accessed 14 March 2019.

596. John Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1(1) Strathmore Law Journal 41, 43.

an epistemologically distinct concept of law that operated within the lens of culture, religion and collectivism.[597] The indigenous society was predicated on family and larger kin groups, cemented by strong extended family ties. Social cohesion within families and clans was obtained through custom and consensus, and normative adaptations were in tandem with the natural pace of social change.[598] Thus, indigenous communities coexisted, and territorial conflicts were resolved without coercive laws issuing from official governance systems.[599]

The advent of colonialism overturned the natural pace of social ordering by introducing the English legal system and its capitalist nuances.[600] The colonial power established a Supreme Court and subordinate courts to administer this system of law. Under the East Africa Order in Council of 1897 (which was later repealed in 1921), the courts were required to exercise jurisdiction in conformity with the Civil Procedure and Penal Codes of India and other Indian Acts then in force in the colony, as well as the substance of common law, the doctrines of equity and the statutes of general application

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597. See, e.g. Dial D Ndima, *Reimagining and Reintegrating African Jurisprudence under the South African Constitution* (Doctor of Laws Thesis, University of South Africa 2013) 2.

598. Ali A Mazrui, *The Africans: A Triple Heritage* (Little, Brown and Co. 1986) 69 (Cited in Ambani and Ahaya (n 596) 44). See also Linda James Myers and David H Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World' (2010) 2(1) Black Diaspora Review <www.scholarworks.iu.edu/journals/index.php/bdr/article/download/1220> accessed March 2019.

599. ibid; see also Tom O Ojienda, *Conveyancing: Principles and Practice* (LawAfrica Publishing Ltd 2008) 13.

600. Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27(1) Journal of African Law 42-61

in force in England on 12th August 1897.[601] In addition, some of the ordinances introduced were a replica of corresponding English Acts.[602] A parallel system of courts was established specifically for Indigenous Peoples, with restricted application of customary law.[603] In particular, Article 2(b) of the Native Courts Regulations Ordinance, 1897 allowed the application of African customary law to Africans,[604] provided it was not repugnant to justice and morality.[605] Equally, section 13(a) of the 1930 Native Tribunals Ordinance empowered native tribunals to administer customary law provided it was not repugnant to justice or morality or inconsistent with any Order in Council or with any other law in force in the colony. Unfortunately, the standards of morality and justice were defined, not according to the African understanding, but according to the British perception.[606] In 1938, for example, a

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601. ibid.

602. Examples include Crown Lands Ordinances of 1902 and Land Titles Ordinance 1908 (later Cap 282). The East African (Lands) Orders-in-Council of 1895 and 1901 substantively borrowed from the Foreign Jurisdiction Act, 1890, which gave Her Majesty power to control and dispose of *terra nullius* land in protectorates where there was no stable government.

603. Ndima (n 597) 2. See also Hastings W Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' (2003) 1 University of Nairobi Law Journal 107, 107-117.

604. Article 57 of the 1897 Native Courts Regulations Ordinance also allowed Muslims to apply Muslim law.

605. For instance, Article 52 of the 1897 Order-in-Council provided that African customary law applied to Africans provided it was not repugnant to justice and morality.

606. *Regina v Luke Marangula*, Reports of Northern Rhodesia (1949-1954) 140; Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya* (Legal Resource Foundation Trust 2010) 5.

British in an East African colonial court overtly stated that, 'I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery.'[607]

Thus, Africans had little if anything to say on what they considered morally right or just. According to Ibhawoh, the British standard of morality was that of civilised values in the contemporary world.[608] The repugnance doctrine was often invoked to modify customs that the British considered uncivilised or outmoded to conform to the western concepts of humanity, due process and fair trial procedure.[609] Where the African customary rule in question failed the test of repugnance, the colonial officials decided the matter based on the presumed universal standards of natural justice, equity and conscience.[610] Ibhawoh affirms that the repugnance test was not based on the conscience of the African community practicing a custom; it was based on "higher" and more universal standards of British justice and morality.[611] To the

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<www.chuitech.com/kmco/attachments/article/111/paper%FINAL.pdf> accessed 19 August 2019.

607. *Gwao bin Kilimo v Kisunda bin Ifuti* (1938) 1 TLR (R) 403.

608. Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford, United Kingdom: Oxford University Press 2013) 59.

609. ibid.

610. ibid. It should be noted that, while natural justice and equity are important standards of justice even in the current constitutional order in Kenya, the British's understanding of morality based on civilised values was incompatible with the African understanding. For instance, slavery was immoral to Africans.

611. ibid 58.

formal courts, African customary law practices were archaic and uncivilised.[612] The colonial government therefore established native tribunals to administer justice to the Indigenous Peoples using customary law, and used this to gradually transform the indigenous legal system.[613] This is evidenced by the transformations that took place between 1930 when the Native Tribunals Ordinance was enacted to establish native tribunals, and 1967 when the Magistrate's Courts Act, was enacted to replace all African Courts with District Magistrate's Courts.[614]

After independence, Kenya continued to apply the Western legal system, inherited from the British, alongside diverse customary laws. This has created a plurality of legal systems under which customary law still remains integral among Indigenous Peoples.[615] Section 3(1) of the Kenyan Judicature Act[616] recognises this pluralist state by envisaging

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612. For instance, in *Re Southern Rhodesia* (1919) AC 211, the Privy Council remarked that, 'Some tribes are so low in the scale of social organisation that their usages and conception of rights and duties are not to be reconciled with the institution or legal ideas of civilised society'.

613. Brett L Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60' (1999) 40 The Journal of African History 411, 412.

614. Abel Richard L, 'Customary Laws of Wrongs in Kenya: An Essay in Research Method' (1969) 4013 Faculty Scholarship Series 573, 582-586.

615. Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' (2014) 2(1) Alternative Dispute Resolution Journal 206; John W van Doren, 'African Tradition and Western Common Law: A Study in Contradiction' in Jackton B Ojwang and Jesse N K Mugambi (eds), *The SM Otieno Case: Death and Burial in Modern Kenya* (Nairobi University Press 1989) 332.

616. Cap 8 Laws of Kenya.

the sources of law in Kenya as the Constitution, Acts of Parliament, common law, doctrines of equity, statutes of general application, and customary law. These sources operate within the same social context.

3. Positive Law Interactions with Customary Law in Kenya

Despite the extensive reach of positive law, customary law in Kenya has remained resilient and robust among most communities, especially those living in rural areas.[617] The continued application of customary law in Kenya is attributed to its 'living' nature and the fact that it represents law that derives from the Indigenous Peoples in the most direct sense.[618] Thus, where there is a conflict between customary law and a statute, Indigenous Peoples are likely to view customary law as having greater legitimacy. However, this is not the view entrenched in positive law under the transplanted British legal system in Kenya. Article 2(4) of the Constitution of Kenya 2010, for instance, provides that, "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." While this provision puts customary law in the same rank as other sources of law, it underscores the supremacy of the Constitution, previously anchored under section 3 of the repealed Constitution of Kenya, 1969. The provision expressly establishes a

617. Aninka Claassens and Ben Cousins, *Land, Power and Custom* (Jutap 2008) p 99.

618. ibid.

first most important constitutional yardstick against which the relevance and constitutionality of all other laws, customs, religious beliefs and practices are measured. Thus, before a court of law or tribunal applies customary law or any other law in any particular case, it must be sure that the particular rule or custom is consistent with the Constitution.

The question whether Kenya has a strong or weak legal pluralism, as described by Griffith, is best answered by the Judicature Act (Cap 8). Section 3(1) of this Act establishes the sources of law in a hierarchical order, whereby the Constitution appears at the top followed by all written laws, the substance of English common law, and the doctrines of equity and statutes of general application. The Act goes further to provide that, 'the High Court, the Court of Appeal and all subordinate courts shall be *guided* by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.'[619] This provision overtly limits the application of customary law in a number of ways. First, courts are not required to apply customary law as a binding source of law, but only as a guide. While the section does not clearly state where customary law lies in the hierarchy of laws, the word "guided" implies that African customary law is ranked at the bottom of other source of law, including common law and principles of equity which are taken judicial notice of under section 60 of the Evidence Act.[620] It only ranks above common law after codification, for example under section

619. Judicature Act Cap 8 Laws of Kenya, s. 3(2).

620. Cap 80 Laws of Kenya.

3(5) of the Law of Succession Act[621] and the customary law marriage provisions under the Marriage Act 2014. Consequently, courts may refuse to apply customary law even in appropriate cases since it is only a guide.

Secondly, section 3(2) of the Judicature Act restricts the application of customary law where the court is of the opinion that it is repugnant to justice and morality. Any customary law practices, such as murder of twins, female genital mutilation and widow inheritance, which offend justice and morality, fall within the purview of section 3(2). For example, in *Katet Nchoe and Nalangu Sekut v R*,[622] the High Court held that the Maasai custom of circumcising females was repugnant to justice and morality. The courts disregarded the customs and practices of the Maasai and adopted the definition of repugnance to justice and morality under the Ghanaian Constitution that defines a repugnant custom as one that is harmful to both the social and physical well-being of a citizen. The Court held that since female genital mutilation caused pain, it was repugnant to justice and morality based on the Ghanaian definition.

Section 3(2) above is restated in Article 159(3) of the Constitution of Kenya, which provides that traditional dispute resolution mechanisms (TDRMs) should not be applied in a way that contravenes the Bill of rights, is repugnant to justice and morality, or is inconsistent with the Constitution or any other written law.[623] TDRMs are a creature of customary law. They are deeply anchored in the traditions,

621. Cap 160 Laws of Kenya.

622. Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.

623. Constitution of Kenya, 2010, art 159(3).

customs and practices of Indigenous Peoples. Their success in promoting access to justice, therefore, depends on the recognition of culture, customs and practices as important aspects that define Indigenous Peoples in Kenya. Any reference to such aspects may be construed to include the law that governs them. In other words, while extending the limitation grounds, the 2010 Constitution expressly restates the repugnance clause in section 3(2) of the Judicature Act. One problem with this clause is that the law does not define what justice and morality entail. Thus, courts have wide discretion to determine what constitutes justice and morality.

4. Functional Areas of Customary Law in Kenya

Customary law in Kenya reflect the diverse customs, practices and beliefs of the 43 tribes. Each tribe has its unique body of law embedded in culture, customs, and traditional knowledge; but there are commonalities in the scope of application across all the tribes. Kenyan statutory law has attempted to identify these commonalities. Section 16 of the Magistrates' Courts Act 2015 provides that a magistrate's court may call for and hear evidence of the customary law applicable to any matter before it. Under section 7(3) thereof, a magistrate's court has jurisdiction in any of the following civil matters under African customary law: land held under custom¬ary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of, or adultery with a married person; matters affecting the status of widows and children, including guardianship, adoption, custody and legitimacy; and intestate succession and administration of intestate estates, so far as they are not governed by any written law.

This list was held in *Kamanza Chiwaya v Tsuma*[624] to be exhaustive and excluded claims in tort or contract. However, given the fluidity of customary law, the list should be expanded to include other aspects of law, such as livestock, pasture and water (which are common in pastoral communities). Further, under section 30(1) of the Protection of Traditional Knowledge and Cultural Expressions Act (No. 33 of 2016), a claim about ownership of rights under the Act shall be resolved in accordance with customary laws and practices or such other means as are agreed to by the parties. This qualifies traditional knowledge and expressions as a key component of customary law, which can be placed under the broader functional area of property.

The Magistrates' Courts Act is silent on the application of customary law in criminal matters. Under section 3(2) of the Judicature Act, customary law shall only apply to civil matters that affect either party to the dispute. This implies that the entire body of African customary criminal law has no place under positive law. Article 50(2) of the Kenyan Constitution affirms that no one shall be tried for a criminal offence unless it amounts to an offence under the laws of the State or under international law. However, pre-2010 jurisprudence indicates that customary law may apply in certain criminal matters, but subject to section 176 of the Criminal Procedure Code.[625] For instance, in *Kosele African Court*

624. High Court Civil Appeal No. 6 of 1970 (Unreported).

625. Cap 75 Laws of Kenya. Section 176 provides that, 'In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.'

Criminal Case no 33 of 1966, the accused was charged with indecent assault contrary to section 144 of the Penal Code. The Court found that he was guilty for breaking the virginity of his victim. Instead of imprisoning him, the Court fined him a customary compensation of a heifer. Similarly, in *Bungoma District African Court Criminal Case No 493 of 1967*, the accused was charged with common assault contrary to section 250 of the then Penal Code. The court found him guilty and imposed a customary fine of a sheep

Questions have emerged as to whether the concept of customary compensation can apply on felonies despite the limitation under section 176 of the Criminal Procedure Code. In *R v Mohamed Abdow Mohamed*,[626] the High Court marked the murder case settled based on Islamic customs and laws, citing Articles 159(1) and 157 of the Constitution. It was claimed that the accused person's family had compensated the deceased's family in form of camels, goats, and performed blood money rituals. The Court stated that the "ends of justice will be met by allowing rather than disallowing the application." However, in *Republic v Abdulahi Noor Mohamed* (alias Arab), the High Court raised alarm against the above ruling, stressing the need to have guiding principles on the application of customary law and its institutions in felonies.[627]

Laws enacted after the Constitution 2010 also provide for the application of customary law in certain cases. For instance, under section 39(4) of the Community Land Act 2016, a court or any other dispute resolution body shall apply the customary law prevailing in the locality of the parties to

626. *R v Mohamed Abdow Mohamed* [2013] eKLR.

627. [2016] eKLR.

a dispute in settling community land disputes to the extent that it is not inconsistent with the Constitution and repugnant to justice and morality. Section 11 of the Matrimonial Property Act 2016 provides for the consideration of customary laws of communities involved in the division of matrimonial property between and among spouses, subject to the values and principles of the Constitution. This includes the customary law relating to divorce or dissolution of marriage. Under section 68 of the Marriage Act 2014, a dispute relating to customary law marriage may be resolved, in the first instance, through conciliation or customary dispute resolution before resorting to court.

5. Reconciling Customary Law and Human Rights in Kenya

Proponents of the repugnance test rightly anchor their position on the Bill of Rights.[628] The rationale is that certain customary law practices, such as widow inheritance, child marriage, domestic violence (portraying male dominance) and female genital mutilation, are inimical to the fundamental human rights under the Constitution and international law. Gender roles often work against the woman, whose place is traditionally seen as the homestead. Practices, such as widow inheritance, common among the Luo community in Kenya, portrays a woman as a chattel. The Luo customary law requires that, upon the death of the husband, his family has a responsibility to get her an inheritor, particularly one of the

628. See, e.g. Constitution of Kenya, 2010, art 19(1).

deceased's brothers.[629] The widow is accorded an opportunity to choose whoever she wants to care for her from the deceased's family.[630] The inheritor must meet all the widow's marital requirements. In some cultures, the widow is regarded as the first suspect when the husband dies, and is therefore required to be cleansed accordingly.[631] Idalu argues that, in the African culture, no man dies naturally, even at an old age.[632] Someone must be behind his demise, and that person is likely to be his wife. These practices, including the denial of women's succession rights, represent the most notorious and discriminatory features of customary law that run counter to the principles of equality and non-discrimination under the Constitution.

The Constitution provides an important restraint against harmful and discriminatory cultural practices. Article 11

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629. Elizabeth Asewe Oluoch and Wesonga Justus Nyongesa, 'Perception of the Rural Luo Community on Widow Inheritance and HIV/AIDs in Kenya: Towards Developing Risk Communication Messages' (2007) 4(1) International Journal of Business and Social Science 213 <http://ijbssnet.com/journals/Vol_4_No_1_January_2013/24.pdf> accessed 14 March 2019.

630. Ogolla Maurice, 'Levirate Unions in both the Bible and African Cultures: Convergence and Divergence' (2014) 4(10) International Journal of Humanities and Social Science 289.

631. FIDA-Kenya and The International Women's Human Rights Clinic (IWHRC), 'Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights', *A Supplementary Submission to the Kenyan Government's Initial Report under the ICESCR*, October 3, 2008, 21, <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDAKenya41.pdf> accessed 16 March 2019.

632. Ethel E Idialu, 'The Inhuman Treatment of Widows in African Communities' (2012) 4(1) Current Research Journal of Social Sciences 8 <http://maxwellsci.com/print/crjss/v4-6-11.pdf> accessed 14 March 2019.

thereof provides for the right to culture. Article 2(4) limits this right if the custom or the conduct in relation to such custom is inconsistent with the Constitution. Article 60(1) (f) provides for the elimination of gender discrimination in law, customs and practices related to land and property in land."[633] In addition, husband and wife are 'entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.'[634] Under section 15 of the Marriage Act, 2014,[635] widows and widowers are free to remarry. They should not be forced to comply with superstitious beliefs that are dehumanising and dangerous to their health. Any union to which either party has not given informed consent is void under the Marriage Act.[636] Cultural practices that are harmful to children are prohibited under Article 53(1) (d) of the Constitution. The Constitution also provides for women's rights.

International law forms part of Kenya's law by virtue of Article 2(6) of the Constitution of Kenya.[637] The most definitive human rights instrument that requires respect for and compliance with the fundamental rights and freedoms of women is the 1979 Convention on the Elimination of

633. See also the Land Act 2012, ss 4(2), 106(1) (c) (ii) and 134(4); Land Registration Act 2012, ss 91(8), 92 and 93(1) and (2); Matrimonial Property Act 2013; Law of Succession Act 1981, s 29.

634. Constitution of Kenya 2010, art 45.

635. No 4 of 2014.

636. Marriage Act 2014, s. 11(1)(e).

637. Article 2(6) of the 2010 Constitution provides that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

All Forms of Discrimination Against Women (CEDAW).[638] Article 5(a) of CEDAW identifies cultural practices that violate women rights, and enjoins Member States 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.' According to the CEDAW Committee, any law or custom that gives men a right to a greater share of property at the dissolution of a marriage or de facto union, or upon the death of a spouse or relative, is discriminatory and will seriously affect the woman's ability to support herself or her family, and have a dignified life.[639] Similarly, according to the Human Rights Committee, a widow should be guaranteed inheritance rights equal to those of men upon the demise of her husband.[640] Article 23(4) of the International Covenant on Civil and Political Rights (ICCPR) requires states to guarantee spouses equal rights during the marriage and at its dissolution.[641]

The above provisions constitute unambiguous standards upon which customary law should be reconciled with the

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638. Convention on the Elimination of All Forms of Discrimination against Women (adopted December 18, 1979, entered into force September 3, 1981) 1249 UNTS 13 (CEDAW).

639. CEDAW Committee, *General Recommendation 21*, *Equality in marriage and family relations* (Thirteenth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 90 (1994) [28].

640. Human Rights Committee, General Comment 28, [26].

641. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

Bill of Rights. However, this can only be possible if the subjects of customary law are aware of the contents of the Bill of Rights. The duty to observe, protect, respect, promote and fulfil these rights is a constitutional one basically preserved for the State and any State organ.[642] Thus, Kenya should develop appropriate measures to eliminate all aspects of customary law that are harmful and discriminatory. This will ultimately reverse the positive law perception that customary law is patriarchal and discriminatory.

6. Conclusion

The link between customary law and formal (positive) law in the wake of legal pluralism in Kenya is generally weak. Griffith vividly explains the difference between weak and strong legal pluralism. It should be noted that, while the Constitution 2010, as the supreme law of the land, recognises customary law as one of the sources of law, interpretation of different provisions under the Constitution and the Judicature Act portrays customary law as an inferior source of law. Customary law is dynamic and is subject to change with time. Thus, continued subjugation of this form of law through validation tests, such as the repugnance clause transplanted from the British legal system, will undoubtedly place this form of law 'in a juridical morgue waiting to be buried beneath unyielding legislative tombstones.'[643] As demonstrated, the repugnance clause is conceptually ambivalent in

642. The Constitution of Kenya 2010, art 21(1)

643. Hastings W Okoth-Ogendo, 'Customary Law in the Kenyan Legal Systems: An Old Debate Revived' 136.

so far as it is not clear what 'justice and morality' constitutes. The discretionally power accorded to courts, albeit impliedly, means access to justice will largely depend on how the court interprets this concept. It is not guaranteed that the court will not rely on a foreign customary interpretation that is inconsistent with the customs and practices of the parties before it. In light of this, there is need to define this concept under the law or develop guidelines or directions on what it constitutes in the Kenyan context to ensure predictability, taking into account the commonalities that characterise the diverse customary laws in Kenya.

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Indigenous Law in Latin America Constitutionalism: the case of Indigenous Jury in Brazil

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Abstract
Through the presented article we seek to analyze the way Indigenous Peoples insert themselves in the context of the new Latin American constitutionalism, with a special focus on the aspect of the legal pluralism and on the way the Indigenous Peoples act towards the Judiciary. For that, the paradigmatic cases of the Ecuadorian, Bolivian and also the Brazilian constitutions are analyzed. From there, we go to the concrete cases, where factual situations are verified, at least in theory, where the natives had an active participation in the judiciary criminal process in Brazil. The main goal of this article is to scrutinize how those cases configure what denominates as legal pluralism and in what standards the Brazil differentiates from the other Latin American countries on the legal custody of the indigenous rights and the recognition and respect of "the other", here understood as a native.

Keywords: *Legal Pluralism; New Latin American Constitutionalism; Indigenous Rights*

1. Introduction

The indigenous school was historically decimated and subdued. Seen by settlers as inferior, they were expelled from their lands, separated from their families, violated and even subjected to forced labor. This was a reality that marked the emergence of what is now called Latin America. There are various countries, mainly colonized by Spaniards, with the exception of Brazil, whose histories have been tainted by indigenous blood.[644]

Today, years after the arrival of the first European vessels at the American continent, the natives remain marginalized from mainstream society. Indeed, there have been many efforts to recognize rights to Indigenous Peoples and what is termed as the new Latin American constitutionalism was the main reason for this. At the end of the 1990s, a process of amendments of the Latin American Constitutions began, triggered especially by the end of authoritarian regimes in those countries, like Brazil and Bolivia, for instance. One of the main consequences of this process was the introduction of the indigenous in the constitutional texts, as subject and not as object of rights. In this context, the Ecuadorian Constitution of 2008 and the Bolivian Constitution of 2009 were highlighted.[645]

However, despite these efforts, indigenous communities are not protected by the State in the way they should. This is because there is a profound practical difficulty in conferring effectiveness on the constitutional commandments, especially because the power's structure.

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644. The article is an updated version of Legal pluralism: an approach from the new latin american constitutionalism and the jury of the indigenous court, published in 2019 in the Revista de Investigações Constitucionais.

645. Julio J Araújo Jr., Direitos territoriais indígenas: uma interpretação intercultural (Processo, 2018) 74.

The natives are able to physically speak, but, at the same time, they are seen as subaltern, who cannot express themselves without the intervention of others, which reproduces structures of oppression and keeps them in silence.[646] It is, basically, the silencing of the other by recognizing their inability to express his own opinions, that is, by the – mistaken – realization of the intellectual incapacity of the native to recognize what is right and wrong within society.

In this context, the legal space was characterized as a mechanism of oppression and silencing. The Law can be used - and often is - as an instrument of colonial domination, imposition of standards, marginalization of the "other one", the different, that does not fit into the European social standards of behavior. In the case of indigenous communities, these have been removed from the legal spectrum. Although the new Latin American constitutionalism recognized rights to them, this was not enough.

For all that is stated above, it is essential that there is a transformation in the political-juridical structure in Latin America, so as to concretely insert native people, respecting their traditions and cultures and allowing the system to adapt to their specificities and concrete needs.

It is under this bias that this article is inserted, whose primary objective is to analyze, without pretending to be exhaustive, the Brazilian, Ecuadorian and Bolivian Constitutions, verifying how their commandments are executed in practical reality, so that it is then possible to glimpse forms of legal pluralism[647] which allow Indigenous peoples' consultation without the need of intermediaries.

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646. ibid 63.

647. The legal pluralism is, roughly speaking, a possibility of coexistence of more than one legal system at the space and at the same time. For the purposes of this article, it can be understood as a coexistence of the common legal system and the indigenous legal system. It opposes the legal monism, based on the idea of oneness.

Thus, the first chapter objective is to contextualize what is called the new Latin American constitutionalism and to study the Brazilian Constitution of 1988, in order to elucidate how the native is treated in the country, and the more recent Ecuadorian and Bolivian Constitutions, which are highlighted by the extensive list of rights granted to indigenous communities. Subsequently, it discusses how effectively these rights are conferred. Finally, the focus becomes the legal pluralism as a way of respecting and adapting the system to the natives. At that moment an actual case is analyzed in which there was participation of tribes in a criminal process in Brazil.

To this end, a legal-normative research part will be adopted, through a documentary and bibliographical research source. The method of research employed is logical-deductive reasoning.

2. New Latin American Constitutionalism

The new Latin American constitutionalism was inaugurated with the promulgation of several new Constitutions in the countries of the region, such as Brazil (1988), Mexico (1992) and Paraguay (1992), which brought many advances, especially in social aspects and inclusion of minorities.

> The theme of cultural diversity influenced the Constitutions promulgated in several countries of the American continent. The debate on multiculturalism and the strengthening of new social movements, which brought together ethnic groups and historically discriminated segments, were incorporated into constitutional texts through the constitutional recognition

> of pluralism in their respective societies and the establishment of guidelines related to the fight against inequalities and the appreciation of different forms of life. Over time, the texts that emerged incorporated new guidelines of legal pluralism and interculturality (ARAÚJO JR., 2018, p.91).

Raquel Z. Yrigoyen Fajardo,[648] exponent on the subject, subdivides the process of Latin American constitutional transformation into three different cycles, namely:

Multicultural (1982 - 1988): at that moment there was the initial recognition of multiculturalism, with the attendance of some basic indigenous demands. It includes the Brazilian Constitution of 1988, for example;

Pluricultural (1989-2005): it was marked by the replacement of the multicultural perspective by the pluricultural one,[649] in which the recognition of indigenous rights

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648. Raquel Y Fajardo 'Pluralismo jurídico y jurisdicción indígena en el horizonte del constitucionalismo pluralista' in César A Baldi, *Aprender desde o sul: novas constitucionalidades, pluralismo jurídico e plurinacionalidade* (Fórum, 2015) 35.

649. About the subject, it is worth noting the lessons of Araújo (n 644) 118: "The doctrines of multiculturalism - especially its more official aspects - do not meet the demands of the subaltern peoples who live the coloniality of the power, especially from ethnic groups (...) It is common for multiculturalism to think of difference as a data to be accommodated, recognized and isolated ... The dangerous of essentialisms lies in the requirement of a distinct and pure act (language, clothing, practices, religion), whose absence entails the questioning of identity (...) The multiculturalism also fails to give due the correct value to the historicity and depth of the colonial wound (...) In the legal system, the first step is to remove the hierarchy of knowledge and reject an interpretation based on a single world view. The respect for legal pluralism is an important task, and the projects of the new Latin American constitutionalism will emphasize it."

deepened. Rights arose, such as identity, languages, bilingual education, etc. The main innovation, however, came from the recognition of legal pluralism, although incipient. Included in this cycle, for example, are the Mexican (1992), Paraguayan (1992), and Peruvian (1993) Constitutions;

Plurinational (2006 - 2009): This is the most radical phase of the three, in which there were very significant structural changes. Countries that adopted Constitutions at that time recognized that Indigenous Peoples are original nations, collective subjects of rights, with autonomy and self-government. In this context came ideas such as the good life ousumak kawsay and pachamama. Classical examples of constitutions promulgated in this period are Ecuadorian (2008) and Bolivian (2009). It is noteworthy that in these two countries a large part of the population declares themselves to be native, which certainly had relevance in determining these new policies.

As far as indigenous communities are concerned, these three cycles have brought about very significant transformations, especially with regard to the recognition of Indigenous Law, so that it is possible to say that the new Latin American constitutionalism inaugurated a new moment for these peoples, progressively removing them from obscurity and making them subjects of constitutionally assured rights.

2.1 Brazilian Federal Constitution from 1988

As seen earlier, the 1988 Constitution is part of the first cycle of constitutional changes and ruptures that Latin America has undergone in recent years. Of all the phases, this was the most "timid", most probably because it was the first step towards the insertion of Indigenous Peoples in the constitutional text.[650]

650. Yrigoyen Fajardo (n 648) 35.

Although not as grandiose as the later Constitutions, enacted in neighboring countries, the 1988 Constitution brought with it great victories for indigenous communities. This meant that, at that moment, the small advances that had taken place meant a break with the previous policy, which for years had silenced and subjugated the natives.

A factor that contributed decisively to the recognition of indigenous rights in the constitutional text was the intense participation of indigenous communities and leaders in the process of creating the Constitution. The presence and effective participation of the natives in the National Constituent Assembly meant for them the recognition of their existence and their autonomy, as well as overcoming the idea that they were irrational, wild animals incapable of determining their own future.[651] To then were given the word and the power to decide jointly with others on the directions of public policies that concerned their communities and ethnicities.

Chapter VIII of Title VIII of the Major Charter specifically covers indigenous communities and, essentially, deals with the recognition of certain rights. This represents a very great transformation, since no other national constitution had dealt with the subject in this way, dedicating a whole chapter to it. The caput of article 231 of the Constitution, for example, advocates that:

> Indigenous Peoples are recognized for their social organization, behaviours, languages, beliefs and traditions, and the original rights to the lands they traditionally occupy, and it is up to the Union to demarcate, protect and enforce all their property.

651. Rosane Lacerda, *Os povos indígenas e a Constituinte: 1987 – 1988*. (Conselho Indigenista Missionário 2008) 141.

The referenced article "is acclaimed by all for the constitutional innovation of considering indigenous lands accrue from an original right, which means that it precedes the arrival of the Portuguese".[652]

Despite all this, there is still a long way to go in Brazil. As stated earlier, the 1988 Constitution brought transformations, but not so deep. In this sense, according to Alcida Rita Ramos:[653]

> It is true that the 1988 Constitution, for the first time in the country's history, assumes that being a native is a legitimate state and not a temporary condition. But that does not mean giving him full, or even less, dual citizenship. The natives are still protected, they still have their rights limited, even if they give all the demonstrations of civic knowledge and resourcefulness in the national life. As much as the new Constitution has advanced the previous issues on the indigenous issue, it has not yet exorcised the specter of marginalization that sometimes serves by the euphemism of "emancipation".

It apprehends, from this, a problematization referent to the full citizenship of the natives. There were, indeed, advances with the advent of the 1988 Constitution, but there are still many rights to be recognized and, above all, made effective. In addition, the rights stipulated, by the Constitution of 1988, aligned with the fear of the constituent:

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652. Mercio P Gomes, *Os índios e o Brasil* (Contexto 2012) 111.

653. Alcida R Ramos, 'Os direitos do índio no Brasil: na encruzilhada da cidadania' (1991) Série Antropologia 1, 5-6.

> In this context, the concretization of territorial rights is analyzed by the lens of a mirror, as if the integrationist norms of the recent dictatorial period were still in force. The constitutional practice thus enables an assimilationist interpretation of the constitutional text, as demonstrated by the adoption of the so-called "time frame" by the Federal Supreme Court (STF) in the Raposa Serra do Sol Case. By requiring the physical presence of the natives on their lands in 5 of October 1988, the court naturalized the relations of domination to which the natives were subject in the previous constitutional order. The impacts of the Constitution on the ethnic assertion and territorial claims of the present, which should be treated positively because the legislation ensures rights, received distrustful treatment, which regards the growth of the indigenous population as a fraudulent practice. Additionally, the law remains very attached to a uniform treatment of these groups, paying little attention to their specificities, their knowledge and legal pluralism. The door opened by the Constitution with the recognition of rights is promptly closed, by means of the permanent attempt of framing the Indigenous Peoples in certain pre-established hegemonic models. The internal and external conflicts involving these groups are usually analyzed from the viewpoint of the surrounding society, which abstractly selects the priority legal assets (such as national security and private property), relegating territorial rights to a lesser extent.[654]

In this way, the constant distrust of the Federal Supreme Court has affected the very recognition of indigenous rights

654. Araújo (n 644) 5.

after the enactment of the Constitution. There are still many steps to be taken in Brazil, with the purpose of consolidating the rights guaranteed by the Constitution to the natives. Their territorial rights, as has been observed, continue on the verge of being violated.

It is known that there was, in fact, a constitutional provision regarding the fundamental rights of indigenous groups. However, the consolidation of these rights is a deficiency of the State, which has not subsidized efforts to effectively protect the rights of these groups. Thus, indigenous justice can be a measure to be adopted in Brazil, just as occurred in Ecuador.[655]

2.2 Equatorial Constitution from 2008

At this moment, the specific analysis of the Ecuadorian Constitution is important because, together with Bolivian, it represents the greatest advance in relation to indigenous rights in Latin America.

Already in 1998 the Ecuador Constitution that recognized the State as plurinational had been promulgated. However, considering that the country is composed mostly of natives, there was a great deal of pressure to make the transformations even deeper. Thus, after years of debate, a new Constitution was approved, in 2008, whose norms were more protective and radical, not only in relation to Indigenous Peoples, but also in relation to the environment, originating what is called a "biocentric turn".[656]

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655. Edna R Hogemann, Constituição, 'Direitos Humanos e Pluralismo Jurídico: a possibilidade de controle à jurisdição indígena no Brasil a partir da comparação com a Constituição equatoriana' (2018) 4(1) Revista Brasileira de Teoria Constitucional 114, 115.

656. Araújo (n 644) 92.

The Nature or Mother Earth, free translation of the term *pachamama*, in the old *aymara* language, was recognized like subject of rights. In the same sense, the idea of *buen vivir* or *sumak kawsay*, which means, basically, that people have the right to exercise their rights in harmonious coexistence with Nature.[657]

The Ecuadorian Constitutional Charter followed the line of the Brazilian, and dealt with indigenous affairs in several articles, besides having a specific chapter to do so. As in Brazil, there was intense participation of indigenous communities in their elaboration.

It recognized indigenous languages as an official language (Article 2),[658] and determined the recognition by the State of the social, political and economic organization of these ethnic groups (Article 57). However, its main innovation was to recognize the existence of an indigenous jurisdiction, based on ancestral traditions and on its own law, whose decisions must be respected by the institutions and public authorities (article 171).

The existence of an indigenous jurisdiction ensures that these ethnic groups are represented and have their rights guaranteed in a more effectively manner. In other words, it gives them a voice, allows them to decide on their own course, according to their convictions and traditions.

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657. Both terms - *buen vivir* and *pachamama* are difficult to conceptualize, precisely because they originate in indigenous worldviews, which the non-natives have difficulty understanding. However, they can be understood, in general terms, as living well, in harmony with nature, which is not an object but a subject, and must be respected.

658. Spanish is the official language of Ecuador; Castilian, Kichwa and Shuar are official languages of intercultural relationship. The other ancestral languages are of official use for the Indigenous Peoples in the areas where they live and, in the terms, established by law. The State will respect and encourage its conservation and use.

According to Hogemann, there are limits, in the Ecuadorian Constitution, regarding indigenous justice:

> Therefore, even constitutionalizing the acknowledgment of the Indigenous Jurisdiction and the respect for the institutions and legal manifestations, the Equatorial Constitution of 2009, impose material limits (at the constituted precepts and recognized human rights in international instruments) and territorial (limiting the manifestations of the extension of the indigenous communities) and those manifestations, allowing, if necessary, the possibility to verify the decisions coming from the this jurisdiction in the process of constitutionality control.[659]

The occurrence of limits to be followed by the indigenous communities is one of the reasons why Hogemann supports the approximation between the Ecuadorian Constitution and the Brazilian, and it should be allowed, in Brazil, the existence of a justice that is not state-owned. The control of constitutionality, for the theoreticians opposed to the recognition of a jurisdiction distinct from the state-owned, may be an alternative.

2.3 Bolivian Constitution from 2009

The Constitution of Bolivia was the one that advanced the most, since it established a true Plurinational State. This can be seen from the preamble to the Constitution, which states that "*el pueblo boliviano, de composición plural, desde la profundidad de la historia, inspirado em las luchas del pasado,*

659. Hogemann (n 655) 120.

en la sublevación indígena anticolonial (…) construímos un nuevo Estado". [660]

Its promulgation counted of ample indigenous participation and had close relation with the election of a President also indigenous. Like the Ecuadorian Constitution, it declared the indigenous languages as official and increased the list of constitutionally guaranteed rights.[661]

However, as far as legal pluralism is concerned, it went further. Indigenous jurisdiction was created, with the same legal authority and hierarchical structure as the Brazilian nation-state (article 179), with indigenous authorities and their own procedures based on cultural precepts (article 190). A Plurinational Constitutional Court was also created, composed of elected magistrates, with representation of the ordinary and indigenous system (article 197). This is another step towards the representativeness and effective participation of the indigenous population.

According with Wolkmer and Ronchi,

> The Constitution of 2009, when bringing all the news mentioned by Santos, recognized the authenticity of indigenous justice by admitting legal pluralism, in an equal coexistence between state and indigenous justice. The changes aimed at breaking definitively with the colonialist system, and having broken -even if it was not considered to have been definitive- became a milestone for all of Latin America and enshrined the new emancipatory constitutionalism. It can not be said that there has been a

660. "The Bolivian people, of plural composition, from the depth of history, inspired by the struggles of the past, in the anticolonial indigenous uprising (...) we built a new State".

661. Araújo (n 644) 95.

> definitive break with colonialism and capitalism, but it is on the way. It is important that there are no setbacks, only advances.[662]

The equality between state justice and indigenous justice, within the constitutional framework, provided a great advance in the context of legal pluralism. The explanation of this movement is based on the emancipation to which the new Latin American constitutionalism aims. As Wolkmer and Ronchi warned, the recognition in the Constitution of pluralism does not completely end the cycle of domination. There is a process of disruption in the gears that are affected by colonialism, gradually seeking measures to meet the essence of Latin America, in the figure of the roots, for example, of indigenous culture.

2.4 The Problem of (In)Effectiveness of the Constitutional Commandment

The main problem that we can point out in relation to this scenario is that despite the fact that several indigenous rights have been affirmed, these Constitutions maintained the same legal-political system based on hyper-presidentialism and the hypertrophy of the Executive Power, which prevented their implementation.

It's what Gargarella calls the "machinery house of the Constitution",[663] that is, an organic part of the Constitutions that remains intact despite the great transformations

662. Antonio C Wolkmer and Maria L Ronchi, 'Processos constituintes latino-americanos e a presença dos movimentos sociais no Brasil e na Bolívia (2016) 6(3) Revista Culturas Jurídicas, 167.

663. Roberto Gargarella, *La sala de máquinas de la Consituición: dos siglos de constitucionalismo en América Latina (1810-2010)* (Katz Editores 2014) 247.

that occur in the dogmatic part. This mismatch between the organic and the dogmatic generates conflicts between them and the those who suffers the consequences of this are those that see their rights only in the paper. On the subject, Araújo Jr. elucidates that:

> The implementation of the Andean constitutional projects is a complex process, since certain guidelines conflict with private economic interests and divergent understandings about the role of the State in the promotion of citizenship and in the fight against inequalities.[664]

The impediments imposed are of various natures. As an example, the Jurisdictional Discipline Law, approved in 2010 in Bolivia, imposes restrictions without numbers on the exercise of indigenous jurisdiction in the country.[665]

Thus, in order to ensure that constitutional predictions are put into effect, bringing about a transformation in social reality, it takes much more than simply giving rights or creating institutions. A radical change is required in the state model and in the legal-political form adopted, which has not occurred in any of the Latin American countries. Perhaps that is why today there is a conservative wave so strong that it spreads across the continent and threatens the indigenous conquests that theoretically are already consolidated.

Despite this, it is necessary to give due importance to the transformations brought by the new Latin American constitutionalism. From the recognition of indigenous rights in

664. Araújo (n 644) 99.

665. ibid 98.

the Constitutions, these peoples came to be understood as subjects of rights, as part of the community, even if only on paper. This provide them access to the heart of the political community to be progressively opened for the indigenous.

3. Legal Pluralism

In Latin America, the new constitutionalism is associated with the yearnings of groups, until then, completely outside the egalitarian principle. The legitimacy of the representatives of the sovereign states in this path was questioned and, with this, the society began a process of analysis on the structure conveyed by the government. The indigenous, in the context under examination, have consolidated the need to recognize their rights at the state level.[666]

It's noted thus "The continuous struggle of indigenous groups, characterized by a set of demands and political practices that call for a deepening of democracy and participation, with the disruption of clientelism".[667] The State justice, therefore, in the reality of some sovereign States of Latin America, is no longer unified, giving a portion of its space to indigenous justice, theoretically fomenting legal pluralism embodied in the Constitution. However, the true scope of indigenous justice and its observance is problematic, since the confirmation of the existence of this justice by the State can generate the dissatisfaction of several power holders in the society.

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666. Marina C Almeida, 'A cultura legal emergente latinoamericana: o pluralismo jurídico rompendo os laços imperialistas no direito' (2011) 1(1) Revista Brasileira de Estudos Latino-americanos 38, 43.

667. ibid.

Legal pluralism comprises several legal systems in a specific territory. The plurality of cultures, it is worth mentioning, is reverberated in the manifold manifestations tangent to the legal systems. As explained in the other section, referring to the new Latin American constitutionalism, sovereign states such as Venezuela,[668] Ecuador and Bolivia, at least theoretically, allowed a manifestation of the indigenous legal system in constitutional seat. There was the consubstantiation of an elementary measure for the even broader recognition of indigenous rights. Legal pluralism in this sense can be defined as follows:

> By Legal Pluralism one must understand the possibility that, in the same territory (space-time context), different normative statements and with them, a plurality of legal systems coexist; in other words, appropriate legal statements or corresponding to a real-factual world.[669]

From the concept brought up, there remains the understanding according to which pluralism is based on differences. Thus, the plural perspective is one that recognizes, among the particulars of each grouping, sufficient reasons for a distinct regency in the legal fields. Pluralism thus opposes

668. The Constitution of Venezuela was enacted in 1999 and, as early as its preamble, recognized the importance of the struggles perpetrated by Venezuelan ancestors. The rights of Indigenous Peoples are reflected in the Charter of the Venezuelan Republic. There is a chapter destined, therefore, to the prediction of the mentioned rights, being assured the participation of the natives in the formation of the collective will of the Venezuelan State (VENEZUELA, 1999).

669. Carlos A Castañeda and others, 'Pluralismo Jurídico: implicaciones epistemológicas' (2013) 15(1) Inciso 27, 33.

legal monism. While the former contemplates the essence of each group, especially in the theoretical aspect, the latter derives from a look limited to generalization, mirrored in the colonizing interference before the colonized.

Legal pluralism, in addition to its comparison with monism, requires a rupture concerning the prospect of domination exercised by laws rooted in colonizing precepts. The occurrence of pluralism is based on the constitutional commitment to an equitable valuation of ordinary and indigenous justice. Indigenous justice, in the meantime, must have the same importance attributed to the ordinary one. In addition, the hierarchy between the aforementioned subdivisions of justice must be the same.[670]

When investigating legal pluralism, exemplified by indigenous practices, plural understandings need to be embraced by recognition. It's denied, in this sense, a higher hierarchy of one view over another. The new Latin American constitutionalism has, as one of its pretensions, the development of a more pluralistic view in the context of Latin America. The central figure of the State, in Law, tends to rule out any other consolidation of legal pluralism. Indigenous justice, as a source, can help in the deconfiguration of a system that is generically put and accepted by society.[671]

Still related to the debate regarding the hierarchy between state and indigenous jurisdiction, Curi explains:

> Certainly, Indigenous Peoples have their own complexity and their norms are not restricted to a simplicity determined by tradition and servile obedience, by

670. Wolkmer and Ronchi (n 662) 166.

671. Araújo (n 644) 88.

> means of a mental inertia, as many scholars want to suppose. But with particular characteristics, which should not be placed in a value judgment if they are better or worse, they have their own way of expressing their right, which is through behaviours, orally, passing from generation to generation, in a movement alive and continuous.[672]

Curi's thesis, thus, removes a vision directed to the merit of the cultural expression of the natives. Their Law is based on the protection on habits, which derive from accumulated knowledge over the years. Its form of organization and the decisions handed down by its authorities are based on the culture of these peoples. The vision of reality changes according to the culture and the main aspect of interculturalism is the protection of the forms of expression in society.

In addition, it is concerned with possible divergences in the coexistence of different legal regimes. This is because it is possible to see the occurrence of conflicts between members of groups in which there is a different application of legal regimes. The search for congruence and, therefore, for the solution on these occasions, needs to be analyzed.[673]

The subject of indigenous law provides doctrinal reflections regarding its characterization as customary law or, if its classification is not admitted in this category, it would need to be observed in a different way, as if it were an autonomous category.[674]

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672. Melissa V Curi, 'O Direito Consuetudinário dos Povos Indígenas e o Pluralismo Jurídico' (2012) 6(2) Espaço Ameríndio, 230, 232.

673. Araújo (n 644) 88.

674. AC Wolkmer, *Pluralismo Jurídico: fundamentos de uma nova cultura no Direito*. (Saraiva, 2015) 235-236.

In Wolkmer words,

> It is imperative to open up to an anthropological, sociological and historical perspective if one accepts the legal nature of the normative systems of the indigenous populations. Contemporarily in-laws of Indigenous Peoples (peasant communities). Two moments are relevants to clarify the plurality of expressions and uses, in the treatment of Indigenous Law: a) Firstly, the adequacy or otherwise of qualifying Indigenous Law with the adjectival of being customary or not. To what extent is the term Indigenous Law confused or not with Common Law? b) In the Latin American tradition, how have the relations between Indigenous Law and State Law been presented? A relationship of subordination, autonomy or interaction? For many theorists, Indigenous Law is a customary law, for others, it deals with distinct manifestations with their own specialties.

Melissa Curi,[675] guides indigenous law from her customary practices. Thus, it establishes the behaviours as nodal for the identification of customary law in the indigenous field. From the point of view of positive law, behaviours are not forgotten as sources of lesser relevance. The indigenous Law, thus, backed by behaviours, is linked to the structure of the indigenous group and its manifestations.

Fajardo discusses the substantive competence of indigenous justice in sovereign states that have recognized their coexistence with state justice:

675. Curi (n 672) 231.

> The indigenous special jurisdiction is competent to know all the matters it deems appropriate, within its own territorial scope (of the indigenous people) and, even extraterritorially, with respect to its members, provided that certain conditions are respected. Neither the constitutional texts of the Andean countries nor ILO Convention 169[676] establish a limit on the matters or the seriousness of the facts that the Indigenous Law may know.[677]

In short, despite the essence of the constitutional predictions in the Andean countries, it is close to recognizing a special indigenous justice, coordinated by the authorities of the indigenous groups, there are peculiarities regarding specific considerations in the regulation of that justice, as can be seen from Constitutions of each State.[678]

The Brazilian reality demonstrates the lack of concern of the authorities with the possibility of an indigenous jurisdiction, in the core of which there is protection of cultural diversity. ILO Convention 169 allows for a more careful reflection on the subject. The State, thus disregarding the peculiarities of indigenous culture, subjects the indigenous groups to their decisions, the content of which can often

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676. The Convention nº. 169 of the International Labor Organization (ILO) began its international operation on September 5, 1991. Under Brazilian law, it entered into force on July 25, 2003. The international treaty in question deals with the Indigenous Peoples and tribal peoples, especially in the respect for the fundamental rights of these peoples (Brasil, 2004).

677. Raquel Y Fajardo, *Pluralismo jurídico, derecho indígena y jurisdicion especial en los países andinos.* (2004) 30 El otro Derecho 171, 182.

678. ibid 182-184.

dissipate completely from the behaviors and manifestations of those groupings, breaking their essence.[679]

Legal pluralism, as far as indigenous groups are concerned, was closely reflected in the Andean countries as a result of the movement of the new Latin American constitutionalism and consideration of Convention 169 of the ILO. With the recognition, by the State, of the indigenous justice, the violence diminishes and the democracy is strengthened. Indigenous jurisdiction is exercised by authorities belonging to indigenous groups. This performance of jurisdiction is regulated by the behaviors and practices of the groups in question and there is a territorial restriction, since the indigenous authorities have the jurisdictional power in the indigenous lands.[680]

ILO Convention 169 advocates the recognition of indigenous jurisdiction, but the need for protection of human rights is ascertained. In summary, the decisions handed down within the scope of indigenous justice conform to certain limits, which relate mainly to the rights of the human person and to the essential purposes of the constitution of a certain sovereign State. The Latin American states, in which there was recognition of indigenous jurisdiction, as a rule, determine that specific laws resolve conflicts between jurisdictions. Thus, in such cases, the States allow the formulation of decisions regarding the jurisdiction devoid of their interference, in spite of the fact that limits are exalted.[681]

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679. Hogemann (n 655) 125.

680. Fajardo (n 677) 174.

681. ibid 174 - 175.

3.1 The Indigenous Jury in Brazil

This Chapter would like to open a debate about the possibility to effectively implement legal pluralism in Brazil, especially with regard to indigenous legal systems. The case under analysis was judged on April 23, 2015, in the State of Roraima (Brazil), where the competent Court undertook an innovate initiative: a jury composed only by Indigenous Peoples was established for the purpose of judging an assassination attempt. The parties involved in the case were from the Macuxi ethnic group.

On January 23, a fight between three natives broke out in the Municipality of Uiramutã, in Raposa Serra do Sol. The Public Ministry denounced Elsio and Valdemir da Silva Lopes for the attempted murder of the victim Antônio Alvino Pereira. The arm and neck of the victim were injured because of the occasion. The accused were justified, claiming that they acted in self-defense, since Antonio was subjugated to the entity Canaimé,[682] which, in the local indigenous culture, is related to evil. On the other hand, local indigenous leaders were not convinced of the reasoning, carried out by the accusatory defense, about the presence of the Canaimé entity. According to the leaders, the consumption of alcoholic beverages by those involved resulted in the practice of the alleged crime.[683]

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682. Emily Costa, 'Júri indígena em Roraima absolve réu de tentativa de homicídio' (*Roraima,* 2015) < http://g1.globo.com/rr/roraima/noticia/2015/04/juri-indigena-absolve-reu-de-tentativa-de-homicidio-e-condena-outro-em-rr.html> accessed 19 August 2019.

683. 'Roraima tem primeiro júri popular indígena' (*UERR*, 2015) <www.uerr.edu.br/roraima-tem-primeiro-juri-popular-indigena/> accessed 19 August 2019.

With a view to a multidisciplinary analysis, in the plan, in the journalism, it is pertinent an allusion to the report developed by Otacílio Gabriel for a National Radio Agency, a qualification to the Brazilian Company of Communication. Under the terms of journalism:

> Roraima holds a trial with the country's first indigenous jury. The unpublished trial was conducted in the community of Maturuca, located in the Raposa Serra do Sol Indigenous Reserve, in Uiramutã, a municipality located north of Roraima. Innovative experience began to be planned five months ago and was only possible after several meetings between representatives of the local judiciary and indigenous leaders. The judged crime was an attempted homicide that occurred on January 23, 2013, the *tuxaua* Jacir de Souza explains why the case was taken to the jury and not resolved within the community as established by the indigenous custom. According to Judge Aluizio Ferreira, the initiative of the Court of Justice of Roraima aims to approximate the state of the indigenous populations.[684]

Based on the report, the positive aspects of the constitution of a popular jury by members of indigenous communities, who can see the process in a different way, are highlighted. The traditional way of conducting the proceedings, especially in criminal cases, leads to the imposition of a sentence as a response to the practice of a conduct conforming

684. Gabriel Otacílio, 'Roraima realiza julgamento com primeiro júri popular indígena do País' (*EBC*, 2015) <www.ebc.com.br/cidadania/2015/04/roraima-realiza-julgamento-com-primeiro-juri-popular-indigena-do-pais> accessed 19 August 2019.

to a criminal type. In the case under examination, even if there is the possibility of punishment by one of the accused, as it was condemned, there is a possible way, with such a precedent, towards the recognition of a legal pluralism in Brazil, even though it is distant from other sovereign states, such as Venezuela and Bolivia. It is reasonable to adopt the expression "mitigated pluralism", a nomenclature already used by Catusso.[685]

On the case judged by the Court of the Jury, since the Judgment Council was composed only of indigenous members, it is stated that:

> If indigenous peoples, living in a context different from that faced by the rest of society, have their own rules, fight for them and apply them when necessary, it is not necessary to speak of the scope of the Judiciary in this respect, by the common procedure or by the procedure of the Popular Jury. Otherwise, the accused would be punished twice for practicing the same fact, for the rules of tribe and for the Judiciary. In this way, it is concluded that the best solution to the exposed demand, with indigenous defendants, the trial must be formed by a fully indigenous judgment council, presided over by a Judge of Law, who will apply the decision of the jury. Thus, it will be applied the norms in force on the Brazilian legal system in accordance with what the tribe judges to be more fair to the case in question, not hurting the cultural environment of the indigenous ethnic groups.[686]

685. Joseane Catusso, 'Pluralismo jurídico: um novo paradigma para se pensar o fenômeno jurídico' (2007) 1(2) Revista Eletrônica do CEJUR 119, 130.

686. Isabela N Ferreira and others, 'A competência do Tribunal do Júri para

The above analysis approaches the so-called "mitigated pluralism", since, despite the fact that there is no confirmation by the State of the existence of an indigenous jurisdiction, there is an attempt to reconcile the customary law of the Indigenous Peoples with state-owned justice. In the case of the trial mentioned in Roraima, the Judgment Council of the Court of the Jury was composed only of Indigenous Peoples. It is known that, in the jury, jurors vote, by means of ballots, in accordance with their intimate conviction.

The assessment of the evidence and arguments of the parties to the proceedings at the heart of the Jury's Court is therefore subject to the filter of intimate conviction. Such a conclusion comes, in particular, from the experiences and, hence, from the culture of the jury. Therefore, with the choice of indigenous jurors, it is possible that the accused will be acquitted in a claim whose contents would be totally disregarded if judged by members outside the indigenous community and unaware of their particularities.

Within the scope of the Research Center on Practices and Legal Institutions of the Federal Fluminense University (NUPIJ-UFF), there was a debate on the First Jury Tribunal, composed only of Indigenous Peoples, held in Brazil.[687]

Speaker Edson Damas[688] presented his vision as a member of the Public Prosecutor's Office. In his understanding,

julgar os crimes cometidos por indígenas' (2016) 9(1) Revista Fafibe 88, 101.

687. Ronaldo Lobão, *I Júri Popular Indígena realizado no Brasil* (Seminário do Laboratório de Estudos da Cidadania, Administração de Conflito e Justiça do Departamento de Antropologia da Universidade de Brasília CAJU-UnB). (Universidade de Brasília 2015) <www.youtube.com/watch?v=oYRkFl5OhSw> accessed 10 January. 2019.

688. ED Silveira, *O olhar de um membro do Ministério Público* (Universidade Federal Fluminense, 2016).

the ideal is for indigenous culture to be respected, so that internal conflicts within the community can be resolved through the Indigenous Peoples themselves, that is, the interference of the Judiciary should not occur with regard to the groups on display.

Judge Aluízio Ferreira,[689] who was in charge of the presidency of the Court of the Indigenous Jury, explained that there were already talks and previous experiences regarding the possibility of this Court of the Jury, looking for a suitable place for the trial. Previously to the Jury, numerous discussions took place and the judge understands it as constructed. According to him, the Jury took place in April 2015. Individuals participating in the community were selected for the draw. Thus, the Jury was established with respect to the guidelines contained in ILO Convention 169. The judge said that the prosecutor was present at the time of the draw and at all times.

Regarding the role of the operators of the Law, the magistrate reported it as "normal". The anthropologist Prof. Ronaldo Lobão intervened and problematized the expression "normal", opting for "usual". At this point, the pertinence of the Professor's comment is emphasized, since the "normal" nomenclature is imprecise and designates, from an unequivocal and unilateral parameter, specific practices.[690]

The judge reported on this path an incompatibility between the culture of the Indigenous Peoples present in the Jury and recurrent judicial practices, such as defense and prosecution under a kind of theatrical form. The magistrate

689. A Ferreira, O olhar do magistrado que presidiu o Tribunal do Júri Indígena. (Universidade Federal Fluminense, 2016).

690. Lobão (n 687).

also pointed out that the Court of Appeal, through tools of state law, confirmed the decision from the Jury on the formal aspect.

The defense lawyer at the Jury Court held in Roraima, Thais Lutterback,[691] in the lecture, exposes the differences as important in the analysis of the Jury Tribunal composed only by Indigenous Peoples. The lawyer argued that, even from a law-only perspective, she invoked in the defense legal figures such as self-defense and the unenforceability of different conduct.

It appears from the lawyer's discourse that there was a didactic importance with the community about the role of the Jury. The interculturalism and the distance between theory and practice regarding indigenous rights were supported by the patroness of the defense. The defense, according to Lutherback, aimed at the reflection among communities related to the commission of the alleged crime of attempted murder. According to Julio Macuxi (2016), authority in the indigenous community determines the measures appropriate to the conduct practiced by members of said community. As explained in the resolutions of conflicts before the community, there are no figures of the defense and the Public Prosecutor.

According to Macuxi (2016), there are three degrees of justice in the indigenous legal system of that region. The indigenous authorities are responsible for judging the conduct contrary to, for example, respect. An interesting point was that the prosecutor was sentenced, later to the Jury, by the community leaders because of the incisive way in which

691. TM Azevedo, *O olhar de um dos advogados de defesa*. (Universidade Federal Fluminense, 2016).

the accusation was brought before the jury court within the indigenous community. This elucidates, once again, the difference between cultures, visualized by the binomial of state justice and the customary law of indigenous communities.

Macuxi[692] presented the discussions in the community about the effects of the Jury Court. The leaders drew up a new decision. He informed that some Indigenous Peoples of the group participating in the Jury called it a failed attempt. He stated that, in the indigenous community, imprisonment is not perceived as just. Macuxi explained that there was an earlier understanding, of 1977, which curtails the consumption of alcoholic beverage and the victim did it, reason for which already it would be punished. The objective of the Indigenous Peoples, for Macuxi, is the independence of the community for the solution of their own conflicts. He also argued that cases brought to justice were not usually met with satisfaction by the victim's next-of-kin.

Given the explanation provided above, there is a clear divergence between the idea of justice in state jurisdiction and in indigenous practices. The usual element, in Macuxi's speech, can be recognized in the understanding of community leaderships since 1977.

The professor and anthropologist Ronaldo Lobão, who was present at the trial by the indigenous jury court of indigenous defendants in Roraima, gave a speech at the Seminar held at the Institute of Social Sciences of UnB on May 11, 2015. One of the *malocões*,[693] according to the professor, has

692. J Macuxi, *O olhar de um dos advogados de defesa*. (Universidade Federal Fluminense, 2016).

693. According to Marques (2014), "malocão is a community space used by Indigenous Peoples in the Amazon region and specifically in Roraima. Each village has its own structure of maloca, with unique characteristics that help distinguish one people from another. The term maloca is known

a special meaning for the natives and was chosen for consubstantiation of the Court of the Jury.

Lobão[694] dissected the composition of the Jury's Court, mentioning his co-director of the PhD in Sociology and Law, Thais Lutterback, as one of the defense attorneys. The professor at the Federal Fluminense University emphasized that in Roraima, the Judiciary has been involved in innovations related to crimes committed by Indigenous Peoples in the face of Indigenous Peoples in the territorial field of the groups inhabited by them. In Lobão's words,

> Dr. Aluisio invoked another principle and this principle, let us say, not yet established in the field of law, yet to be established, which is the idea of a double *ius puniendi*. Thus, in the Brazilian society, because of the Constitution, the Convention 169 and the inter-ethnic relationship itself in a post-colonial concept, the idea of a double right to punish, a double meaning of punishment, a double sense of justice, in which he more or less enunciated some determinants of the idea that, when indigenous groups deem indigenous crimes on indigenous lands, such a judgment would precede the State's right to make judgment , that is to say, the State should not judge, then it is not even a sealing discussion of the *bis in idem*.[695]

The so-called principle of double *ius puniendi*, in this plane, would not be equivalent to the *ne bis in idem* fence.

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by the Macuxi peoples as a large house (a place where they meet for various activities such as community luncheon, parties, meetings and other events of community interest).

694. Lobão (n 687).

695. ibid.

The idea of *ne bis in idem* presupposes the recognition of the indigenous jurisdiction as an alternative to the state. That is why, technically, since indigenous jurisdiction in Brazil is not yet recognized, the principle of double *ius puniendi* may be a response. The possibility of two trials, then, would suggest, to state justice, a departure from hypotheses already judged by the natives.

The lawsuit, referring to the first Judgment Council formed by Indigenous Peoples in Brazil, came from an attempted murder allegedly perpetrated by two Indigenous Peoples of a given community in relation to an indigenous person from another community. The alleged crime did not occur specifically on indigenous land. The matter was referred to the police station. The defense argument of the defendants related to the fact that they saw in the victim a representation of an evil illustration, which would have to be eliminated. If the hypothesis were analyzed with a non-indigenous perspective, there would be no understanding related to the defense of the defendants.[696]

Regarding the reason why the natives agreed with the Jury Court in the community, Lobão[697] stated that it would be an expectation of learning, as if it were an ethnography. The natives would thus try to understand the circumstances of the trial in state justice. The anthropologist worried about the outcome of the Jury Court in the community. The objective would be not to blame the victim and to make conversation between communities and peace possible.

On November 13, 2018, a seminar entitled "Indigenous Rights and Causes: The Federal Supreme Court in the field

696. ibid.

697. ibid.

of observation" was held at the Faculty of Law of the Federal Fluminense University, in which issues such as indigenous rights were debated. The defense lawyer, at the jury court studied in this research, Thais Lutterback, gave a speech on the occasion.

In the seminar, Lutterback extolled the case as an attempted murder, in which the native defendants attempted measures to marshal another native life because they believed the victim was possessed by a bad spirit. The belief of the accused in the presence of the spirit at that moment, according to the defense, was due to the constant, unexplained deaths in the indigenous community. The criminal situation, according to the lawyer, occurred in the village and not in the indigenous territory. There was, thus, arrest in flagrant.

The day after the trial by state court, Lutterback said that the community resorted to the case, but from their behaviours. The lawyer detailed that in the state justice, even with the composition of the Council of Sentence by the natives, one defendant was punished and the other, acquitted. The natives, in this way, were not compatible with the state attempt to approach, because the founding characteristics of the cultures are intrinsically different. The state response, therefore, did not live up to the expectations of the Indians, who, according to Lutterback, considered the trial as disrespectful and brutal.

4. Conclusion

The new Latin American constitutionalism represented, for indigenous groups, a response to long-awaited expectations. From this constitutional movement, the natives

obtained the recognition of rights by the State. Thus, from a theoretical point of view, their rights were constitutionally foreseen.

With the prediction of their rights in the Constitution, a real expectation regarding respect to the particularities of the indigenous groups is allowed. In some Latin American states, such as Ecuador and Bolivia, also supported by ILO Convention No. 169, the existence of an autonomous indigenous justice system was established in what concerns state justice. This means, in practice, that the solutions to conflicts by the authorities of indigenous communities are constitutionally protected.

The theoretical framework, however, indicated the determination, in some legal systems, of limits on possible decisions originating from indigenous justice, which would be covered by Convention 169 of the ILO. An example is the prohibition of human rights abuses, which are essentially covered by international treaties relating to the human person.

In addition, it was approached the distinction between monism and legal pluralism, as well as the relation between them and the historical roots of Latin America. Monism is linked to a European and liberal perspective of domination, of colonization. The figure of the "other", under the bias in question, is subject to the orders of the holders of power. The cultural peculiarities of the Indigenous Peoples, due to colonization, were, in many cases, compromised.

The monism throws, above all, the vision according to which only the state jurisdiction must be observed. Any attempt away from the state purpose must, under this argument, be curtailed. Monism is directed to one-sidedness and therefore despises the plural.

Legal pluralism, on the other hand, means the simultaneous existence of disparate legal systems. For example, in the pluri-national State of Bolivia, there is both state jurisdiction and indigenous jurisdiction, simultaneously. The power to "say the right" does not belong, therefore, only to a certain group. Indigenous jurisdiction affords decimated groups the chance of resolving conflicts among their members in the territory of which they are a part. The constitutional recognition of the indigenous special justice is a great step for the protection of the particularities and, consequently, of the indigenous culture.

In the course of the study, a certain divergence between the nomenclature related to "Indigenous Law" was verified. Some authors opt for the understanding of this Law as customary, while others defend the existence of an indigenous legal system, depositing, in the nomenclature "Law", a connotation of legal monism.

Another noteworthy aspect is that only the constitutional provision of legal pluralism does not automatically lead to the guarantee of the rights contained in the Constitution. The sectors that hold power in the social sector, often dissatisfied with the recognition of the rights in question, are trying to stop it.

Faced with this dilemma associated with monism and legal pluralism, two visions were highlighted: that of mitigated pluralism, illustrated by the concrete case studied, related to the Court of the Indigenous Jury and that of full juridical pluralism. The final opinion on the subject will be exposed later to brief considerations regarding the hypothetical case investigated in this research.

The concrete case in which the current search was conducted covers the first Jury Court formed exclusively in the Corps of Jurors by indigenous members. The trial materialized

on April 23, 2015. The narrative of the facts shows the commission of an alleged crime of attempted homicide by two Indigenous Peoples of a specific community through an indigenous person from another community.

According to the lectures researched on the event itself, the participants reported on the will to learn from the Indigenous Peoples and from various discussions so that the judgment by the state justice judge materialized in an environment of the indigenous community. In addition to this case, others have already been tried in Roraima and the Judiciary has shown a posture sensitive to the voice of the Indigenous Peoples.

The mitigated legal pluralism, as it developed in the Court of the Jury studied in Roraima, was the subject of much questioning by the natives. This is because a completely different congruence between reality was attempted, in a manner that the behavior of those involved, such as the Public Ministry and the defense, did not make sense to the natives.

Thus, in view of the research carried out, it is defended a perspective of complete and not mitigated legal pluralism. As a suggestion, the production of a constitutional amendment is added to guarantee the existence of an indigenous justice system, which, in line with ILO Convention 169, must respect basic principles, such as respect for human rights.

It is known that, initially, there will be several questions about the compatibility of indigenous justice with the traditional legal system. However, in spite of eventual appends to be repaired and complemented, cultural diversity must materialize not only at the theoretical level, that is, in official researches and documents, but in reality, whose implications define respect for the particularities of a culture, as is the case of the indigenous.

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PART IV
RESILIENCE

Climate Change Implications for Mental Health in Inuit Communities: An Intersectional Perspective

Elizabeth Wallace

Abstract

The environmental landscape of the Arctic and sub-Arctic is changing at an unprecedented rate due to anthropogenic climate change. These environmental changes are inextricably linked to sociocultural changes in Indigenous communities, as cultural and spiritual ties to the land shape community and individual identity. The interaction between loss of natural environment and traditional way of life has been identified as a risk factor for mental health challenges experienced by Inuit in the Circumpolar North. An important lens through which to examine this impact of climate change on mental health is gender. It is important to consider gender roles in this dialogue because these roles determine power dynamics, which have far-reaching implications for vulnerability and adaptation capacity. Using an intersectional approach, the gender dynamics of the relationship between Inuit mental health and climate change in the Inuit Nunangat region of Northern Canada will be analyzed and discussed in relation to the current literature.

Key Terms: *Climate Change; Mental Health; Gender; Inuit; Canada*

1. Introduction

The 2018 report on climate change and health published by the World Health Organization (WHO) states that "climate change is the greatest health challenge of the 21st century".[698] Climate change, as defined by The United Nations Framework Convention on Climate Change (UNFCCC) 1992 Article 1(2), is "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". A hallmark feature of this anthropogenic climate change is global warming, the impacts of which are felt world-wide to differing extents. The circumpolar north is warming at a rate well above the global average,[699] with significant implications for Canada's northern populations. Those living in the Arctic region are highly susceptible to experiencing greater lived effects of environmental degradation associated with climate change, including possible mental health challenges.[700] A significant body of research exists characterizing the climate changes in the Arctic, and the associated lifestyle changes for Inuit of northern Canada. Attention has been given to how these climate and lifestyle changes can impact mental health, considering the multi-dimensional mechanisms for this in the social and economic context of the north.

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698. Diarmid Campbell-Lendrum and others, *COP24 Special Report: Health and Climate Change* (World Health Organization 2018) 10.

699. Andrew R Friedman and others, 'Interhemispheric Temperature Asymmetry over the Twentieth Century and in Future Projections' (2013) 26 Journal of Climate 5419.

700. Campbell-Lendrum (n 698).

The way these environment and lifestyle changes are felt is dependent in part by gender roles and associated socio-economic power. Literature has documented climate change-associated environmental changes affecting the ice, ocean, rivers, glaciers, land, animals, plants, and weather systems. Men and women interact with these aspects of the environment differently as a result of cultural gender roles; therefore, the associated changes can be felt differently. The ability to adapt to these changes can be largely dictated by access to resources, primarily financial. Together, the changes are felt with the sum of this impact extent and adaptive capacity. This overall climate change impact is often related to a risk or protective factor for mental health status. Gender identities and roles within this Inuit context further dictate how climate changes are felt with respect to mental health impacts, as gender can impact the exposure to risk factors and access to protective factors. Literature identifies that often the overall climate change impact exacerbates already existing risk factors and reduces the access to protective factors. This link between climate changes and mental health risk and protective factors is embedded in Inuit identity with the land and is confounded by socio-economic inequities experienced by this population in comparison to the rest of Canada. The literature exploring the relationship between climate change and mental health is well established, however the incorporation of a gender perspective in this field is less robust. Given the vulnerable state of mental health for Inuit of all demographics, and the proximity to climate changes in the Arctic, the intersection of gender and Inuit indigeneity within the mental health and climate change literature warrants exploration. A better understanding of this relationship is important going forward with climate change adaptation

policy and suicide prevention policy, to ensure they are inclusive for all members of Inuit society.

2. Purpose and Method

Using an intersectional lens, this article will look at the literature exploring climate change impacts on mental health in Inuit communities. The question: 'How does gender influence the ways in which climate change impacts Inuit mental health?' will be used to guide analysis through an examination of the current academic literature, government, and non-governmental reports. It will be argued that the climate change dimensions of mental health in Inuit communities are influenced by gender, and subsequently that an intersectional perspective is required in further research to better characterize this interaction. First, Inuit mental health will be considered in the context of past assimilation policies, and current social, cultural, and economic inequities. Gender as a concept in traditional Inuit knowledge will be discussed in relation to roles in the family and community, and then in a mental health context looking at risk and protective factors. For the purpose of this chapter, a risk factor will be defined as "an aspect of the person or the environment that increases an individual's likelihood of developing an illness" and a protective factor will be defined as "an aspect of the person or the environment that reduces an individual's likelihood of developing an illness or increases his or her resilience".[701] The climate changes taking place in Inuit communities and

701. Laurence J Kirmayer and others, *Suicide among Aboriginal People in Canada* (Aboriginal Healing Foundation 2007) xiii.

the associated changes for Inuit lifestyle will be discussed, and finally the interaction of gender and climate change in impacting mental health will be analyzed. Recommendations based on the literature will be made for future research within the climate change and mental health sphere.[702]

3. Inuit & Canada: A Brief History

In Canada, a significant portion of the Arctic region are traditional Inuit lands, collectively known as Inuit Nunangat. This region spans two provinces and two territories and is home to a majority of the Inuit population within Canada.[703] The population of Inuit within Canada is 65 000 as of 2016, representing roughly 0.02% of the total population.[704] Nunavut is the largest region and exists as its own territory under the Nunavut land claim finalized in 1999. The other three regions, Inuvialuit, Nunavik, and Nunatsiavut exist within the territory of the Northwest Territories, provinces of Quebec and Newfoundland and Labrador, respectively, and have self-governing authorities over their regions within their respective provincial and

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702. This analysis comes from the perspective of a non-Inuit female of mixed European descent. Therefore, the experiences, biases, and history that contribute to the perspective framing the analysis. The perspective comes from this lived experience, and I hope to provide an intersectional perspective to the existing literature on climate change and Inuit mental health while acknowledging that I do not share those lived experiences.

703. Inuit Tapiriit Kanatami, *Inuit Statistical Profile 2018* (ITK 2018) <www.itk.ca> accessed 19 August 2019.

704. ibid.

territorial governments.[705] Like other Indigenous Peoples of Canada, Inuit were subjected to colonialism and assimilation through government policies, including the residential school system, the high arctic relocation, and dog killings.[706] These experiences had negative effects on the culture and cultural identity of Inuit, and the effects are still felt directly by survivors and indirectly through intergenerational trauma passed on to younger family members.[707] This history contributed to a significant change in way of life, from semi-nomadic hunters and gatherers to living in permanent communities.[708] Despite the resilience and adaptive capacity of communities, a number of socio-economic inequalities are prevalent in all four regions of Inuit Nunangat, including food insecurity, crowded and inadequate housing, low education levels, lack of access to health services, job insecurity, and family violence.[709] These conditions have been linked to the high-rates of suicide that impact communities within Inuit Nunangat. While rates vary between communities, they have been up to 11 to 40 times higher than the national average in Nunavut and Nunavik, respectively.[710] These high rates of suicide are indicative of a

705. ibid.

706. ibid.

707. ibid; The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission of Canada 2015) <http://epe.lac-bac.gc.ca/100/201/301/weekly_acquisition_lists/2015/w15-24-F-E.html/collections/collection_2015/trc/IR4-7-2015-eng.pdf> accessed 21 June 2019.

708. Inuit Tapiriit Kanatami (n 703).

709. ibid.

710. Inuit Tapiriit Kanatami, *National Inuit Suicide Prevention Strategy* (ITK 2016) <www.itk.ca/wp-content/uploads/2016/07/ITK-National-

mental health crisis for communities in Inuit Nunangat, requiring a comprehensive understanding of the complex causes for effective intervention. Many suicide prevention strategies are founded in culturally relevant practices, and acknowledge the social, cultural, and economic dimensions of communities that contribute to this health issue.

4. Gender and Inuit Mental Health

4.1 Mental Health in Inuit Communities

The working definition of mental health used in this chapter will be mental health as "... [not only] mental illness, mental problems, and mental disorders, but also includes states of mental wellness, emotional resilience and psychosocial well-being".[711] Mental health challenges are prevalent among Inuit communities; a severe symptom of this being the high rates of suicide in Inuit communities across all four regions of Inuit Nunangat.[712] There are a number of suicide risk factors identified in the literature, which include mental illness

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Inuit-Suicide-Prevention-Strategy-2016.pdf> accessed 19 August 2019; Michael J Kral, 'Postcolonial Suicide Among Inuit in Arctic Canada' (2012) 36 Culture, Medicine, and Psychiatry 306.

711. Katie Hayes and others, 'Climate Change and Mental Health: Risks, Impacts and Priority Actions' (2018) 12 International Journal of Mental Health Systems 1 <https://ijmhs.biomedcentral.com/articles/10.1186/s13033-018-0210-6> accessed 20 June 2019.

712. Eduardo Chachamovich and others., 'Suicide among Inuit: Results from a Large, Epidemiologically Representative Follow-Back Study in Nunavut' (2015) 60 The Canadian Journal of Psychiatry 268; Inuit Tapiriit Kanatami (n 710); Kral (n 710); Michael J Kral, 'Suicide and Suicide Prevention among Inuit in Canada' (2016) 61 The Canadian Journal of Psychiatry 688.

and overall mental health and well-being. Suicide risk factors identified are drug or alcohol misuses,[713] violence or abuse,[714] anger, suicide bereavement,[715] childhood abuse, family history of depression, and suicide completion.[716] Kral[717] argues that high suicide rates should also be attributed to the historical traumas from colonization processes, as they play a role in the risk factors identified. This is echoed by the Inuit Tapiriit Kanatami's (ITK) National Inuit Suicide Prevention Plan[718] which identifies the risk factors of historical trauma, community distress, wounded family, traumatic stress and early adversity, mental distress, and acute stress or loss. These risk factors all stem from past and current impacts of colonization on Inuit communities and individuals and characterize the social and cultural components of suicide and overall mental health for Inuit.

Protective factors are also centred around cultural values, including family and kinship,[719] cultural engagement,[720]

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713. Chachamovich and others (n 712); Michael J Kral and others, 'Unikkaartuit : Meanings of Well-Being, Unhappiness, Health, and Community Change Among Inuit in Nunavut, Canada' (2011) 48 American Journal of Community Psychology 426.

714. Chachamovich and others (n 712); Kral and others. (n 713).

715. Kral and others (n 713).

716.Chachamovich and others (n 712).

717. Inuit Tapiriit Kanatami (n 710); Kral (n 710);

718. Inuit Tapiriit Kanatami (n 710).

719. Laurence J Kirmayer and others, 'Rethinking Resilience from Indigenous Perspectives' (2011) 56 The Canadian Journal of Psychiatry 84; Michael J Kral and others, '*Tunngajuq* : Stress and Resilience among Inuit Youth in Nunavut, Canada' (2014) 51 Transcultural Psychiatry 673.

720. Gilbert J Botvin, 'Advancing Prevention Science and Practice: Challenges, Critical Issues, and Future Directions' (2004) 5 Prevention Science 69.

connection with land,[721] talking to someone,[722] continuous sense of self and self-sufficiency.[723] Many of these protective factors against suicide mirror general circumpolar mental health protective factors for youth identified in the literature, which include practicing and using traditional knowledge, being a part of and contributing to one's community, family cohesion, land-based activities.[724] The importance of cultural connection and values is central to the overall mental health and well-being for Inuit.[725] Resilience is fostered through increased access to the identified protective factors and enables adaptation to risk factor exposure.[726] The ways that these risk and protective factors interact with each other and overlap with socio-economic context is complex and multidimensional and requires both health-focused and social equity-focused interventions.

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721. Kirmayer and others (n 719); Kral and others (713); Kral and others (n 719).

722. Kirmayer and others (n 719); Kral and others (n 719).

723. Michael J Chandler and others, 'Personal Persistence, Identity Development, and Suicide: A Study of Native and Non-Native North American Adolescents.' (2003) 68 Monographs of the Society for Research in Child Development 1.

724. Joanna Petrasek MacDonald and others, 'Protective Factors for Mental Health and Well-Being in a Changing Climate: Perspectives from Inuit Youth in Nunatsiavut, Labrador' (2015) 141 Social Science & Medicine 133; Joanna Petrasek MacDonald and others, 'A Review of Protective Factors and Causal Mechanisms That Enhance the Mental Health of Indigenous Circumpolar Youth' (2013) 72 International Journal of Circumpolar Health 21775.

725.Kirmayer and others (n 701).

726.ibid.

4.2 Gender in Inuit Culture

Exposure to risk factors and access to protective factors can be experienced differently between genders due to traditional and contemporary gender norms in Inuit communities. Traditional Inuit gender roles were seen as equal yet different, a pragmatic division of tasks to enable life in the Arctic. Men's roles centred around hunting, fishing, trapping, going out on the land and being over all family providers, while women's roles centred around the domestic sphere with berry picking, making clothing, and childcare.[727] Decisions were made collectively in communities, with men and women participating equally in this process.[728] While gender roles existed, they were flexible, and it was common for men and women to assume roles dependant on whatever tasks needed to be completed.[729] The concept of gender and sexuality was also fluid, with stories and instances of transitioning to, or being raised as, a different gender than the sex one was born with.[730] Therefore, gender roles existed for division of tasks and roles, but did not hold the same determinant power over expectations and were not bound to a man/woman binary. However, through colonization, Eurocentric concepts of gender have become prominent in Inuit society.[731] While

727.Chachamovich and others (n 712).

728. Tina Minor, 'Political Participation of Inuit Women in the Government of Nunavut' (2002) 17 Wicazo Sa Review 65; Pauktuutit Inuit Women of Canada, *The Inuit Way A Guide to Inuit Culture* (Government of Canada 2006).

729. Pauktuutit Inuit Women of Canada (n 728); Laakkuluk Jessen Williamson, 'Inuit Gender Parity and Why It Was Not Accepted in the Nunavut Legislature' (2006) 30 Études/Inuit/Studies 51.

730.Williamson (n 729).

731. Minor (n 728); Pauktuutit Inuit Women of Canada (n 728).

traditional roles within the family are often maintained,[732] there are gender inequities in Inuit societies that affect both men and women. Women face a number of social inequalities, including lack of political representation,[733] higher rates of sexual and domestic violence,[734] and greater food insecurity.[735] Men on the other hand have lower education levels and employment rates than women.[736] However, due to the nature of women's work being in service, housekeeping, or clerical duties, they make less and have less job security than men who are employed, therefore still end up with a financial disadvantage in many ways.[737] These employment

732. Pauktuutit Inuit Women of Canada (n 728).

733. ibid; Williamson (n 729).

734. Sarah L Fraser and others, 'Changing Rates of Suicide Ideation and Attempts Among Inuit Youth: A Gender-Based Analysis of Risk and Protective Factors' (2015) 45 Suicide and Life-Threatening Behavior 141; Jacqueline Quinless and Jeff Corntassel, 'Study of Gender-Based Violence and Shelter Service Needs across Inuit Nunangat' (Pauktuutit Inuit Women of Canada 2019) <www.pauktuutit.ca/wp-content/uploads/PIWC-Rpt-GBV-and-Shelter-Service-Needs-2019-03.pdf> accessed 19 August 2019.

735. Maude C Beaumier and James D Ford, 'Food Insecurity Among Inuit Women' (2010) 101 Canadian Journal of Public Health 196; Maude C Beaumier and others, 'The Food Security of Inuit Women in Arviat, Nunavut: The Role of Socio-Economic Factors and Climate Change' (2015) 51 Polar Record 550; Lewis Williams and others, *Women and Climate Change Impacts and Action in Canada: Feminist, Indigenous, and Intersectional Perspectives* (Canadian Research Institute for the Advancement of Women and the Alliance for Intergenerational Resilience 2018).

736. Pauktuutit Inuit Women of Canada (n 728); Pauktuutit Inuit Women of Canada, 'Angiqatigik: Strategy to Engage Inuit Women in Economic Participation' (2016) <http://proxy.library.carleton.ca/loginurl=https://www.deslibris.ca/ID/10066061> accessed 20 June 2019; Williamson (n 729).

737.Pauktuutit Inuit Women of Canada (n 728).

issues for men and women are exacerbated in single-parent families.[738] It is clear that gender inequities across Inuit communities are complex, therefore warrant further research to allow for community-focused understanding. There is a lack of inclusion of LGBTQ2+ perspective in Inuit research that incorporates a gender perspective, as social inequities are described as affecting men, women, or both, and do not address inequities for those who do not identify with a gender binary. Looking at Inuit identity and gender identity as a spectrum can shed light on how these identities intersect in social and economic systems of oppression to shift power for and within communities. This power shift contributes to the way that climate change impacts are felt and adapted to at individual and community levels. It also plays a role in mental health risk and protective factors, thus calling for a better understanding of gender in these contexts.

4.3 Gender and Inuit Mental Health

Analysis of gender differences within mental health risk and protective factors is limited, as many studies provide generalized risk and protective factors. However, identification of potential differences can give insight into how these suicide and mental health factors interact with the social and economic disparities experienced by Inuit communities, and allow for more targeted mental health interventions. One study found that women experience greater rates of psychosocial distress, sexual and physic abuse, and greater suicidal thoughts and attempts compared to men.[739] Women and men have differing exposure to risk factors, such as

738.ibid.

739. Fraser and others (n 734).

women being more vulnerable to sexual and physical abuse, psychosocial distress,[740] and food insecurity.[741] Studies also show however, that cultural connectivity and being on the land may provide greater protective effects for women than men.[742] It is suggested that men may feel that their societal roles have been reduced through moving to less hunting and fishing in lifestyles, whereas women's roles still include traditional tasks such as sewing and childcare, but also have grown to include hunting and working.[743] Given these differences in how men and women interact with associated gender roles and engagement with culture in the context of mental health, there are no clear generalizations that can be applied to a one-size fits all mental health solution. Culturally relevant and community-based research is warranted to establish gender inequities for both men and women in communities and be informative to mental health and suicide prevention strategies. Given the relationship between social and economic disparities and mental health challenges, it is crucial to incorporate research with an intersectional lens into community development strategies at both local, provincial/territorial and federal levels as well.

It is important to note that there is a significant absence of mental health research focusing on individuals who do not identify with a male/female gender binary or heterosexual/

740. ibid.

741. Beaumier and Ford (n 735); Beaumier and others (n 735).

742. Fraser and others (n 734).

743. Richard G Condon and Pamela R Stern, 'Gender-Role Preference, Gender Identity, and Gender Socialization among Contemporary Inuit Youth' (1993) 21 Ethos 384.

homosexual sexuality binary. Cisnormative and heteronormative Eurocentric societal values are prevalent now in Indigenous and non-Indigenous communities, contributing to an overall environment where deviation from male female binaries are not widely accepted.[744] Reports show that due to higher suicide rates for LGBTQ2+ youth in Canada, and higher rates of suicide among Indigenous Peoples of Canada, Indigenous LGBTQ2+ people in Canada are possibly at greater risk for greater mental health challenges.[745] Given that suicide rates tend to be lower in indigenous communities where cultural connectivity is strong, a 2012 study suggests that the importance of cultural factors and support is protective for LGBTQ2+ individuals as well.[746] Indigenous LGBTQ2+ also face challenges accessing services for health concerns other than mental health, which can be an added variable by reducing overall health and well-being.[747] These studies are limited and give generalized information for the Indigenous LGBTQ2+ population across Canada and acknowledge the diversity of experiences within this population.[748] More research is required to assess the

744. Sarah Hunt, *An Introduction to the Health of Two-Spirit People: Historical, Contemporary and Emergent Issues* (National Collaborating Centre for Aboriginal Health 2016).

745. ibid.

746. National Aboriginal Health Organization, *Suicide Prevention and Two-Spirited People* (NAHO 2012) <https://ruor.uottawa.ca/bitstream/10393/30544/1/Suicide_Prevention_2Spirited_People_Guide_2012.pdf>.

747. Hunt (n 744); Ayden I Scheim and others, 'Barriers to Well-Being for Aboriginal Gender-Diverse People: Results from the Trans PULSE Project in Ontario, Canada' (2013) 6 Ethnicity and Inequalities in Health and Social Care 108.

748. Hunt (n 47).

mental health status, risk, and protective factors for LGTBQ2+ youth in Inuit communities so that their experiences are not silenced or overlooked in mental health interventions and suicide prevention strategies.

5. Climate Changes, Lifestyle Changes

Communities in Inuit Nunangat are observing significant environmental and climatic changes which are attributed to the greater phenomenon of climate change. These include alterations to ice coverage, water systems, permafrost, plants, and animals, which have been well documented in the literature. Due to the relationship with these environment systems, the aforementioned changes have significant implications for the way of life and overall health and well-being of Inuit.[749] Research in many communities describe the lifestyle changes that arise from the alterations to the environment. In Rigolet, Nunatsiavut, engagement in hunting, fishing, foraging, trapping, and visiting cabins out on the land were all reduced because of dangerous travel conditions and

749. Ashlee Cunsolo Willox and others, "From This Place and of This Place:" Climate Change, Sense of Place, and Health in Nunatsiavut, Canada' (2012) 75 Social Science & Medicine 538; Ashlee Cunsolo Willox and others, 'The Land Enriches the Soul: On Climatic and Environmental Change, Affect, and Emotional Health and Well-Being in Rigolet, Nunatsiavut, Canada' (2013) 6 Emotion, Space and Society 14; David L Driscoll and others, 'Initial Findings from the Implementation of a Community-Based Sentinel Surveillance System to Assess the Health Effects of Climate Change in Alaska' (2013) 72 International Journal of Circumpolar Health 21405; Joanna Petrasek MacDonald and others, 'A Necessary Voice: Climate Change and Lived Experiences of Youth in Rigolet, Nunatsiavut, Canada' (2013) 23 Global Environmental Change 360.

possibility of severe weather systems.[750] Ability to hunt and gather berries has also decreased, due to changing caribou migration patterns and the berries growing in different regions.[751] Women in Iqaluit also experience decreased ability to access berry pick areas as they are no longer as close to the communities, citing expenses time and resources as limits to adjust to the new picking location.[752] Women in Iqaluit also noted changes in the seal skins used to make clothing, in that they rip easier and are lower quality. This results in a change of the quality of traditional clothing made, and also leads to a practice of purchasing skins from other hunters, rather than obtaining from a family member.[753] Similar experiences are noted for residents of Igloolik, Nunavut, where ice patterns are creating challenges for hunting walrus and seal.[754] As a result, the ability to pass on traditional knowledge used for this hunting to younger generations is limited.[755]

Due to the difficulty going out on the land to hunt, trap, forage, and fish, the number of families and individuals accessing traditional foods for themselves has reduced. Previously

750. Cunsolo Willox and others, 2012 (n 749).

751. Anna Bunce and others, 'Vulnerability and Adaptive Capacity of Inuit Women to Climate Change: A Case Study from Iqaluit, Nunavut' (2016) 83(3) Natural Hazards 1419 <http://link.springer.com/10.1007/s11069-016-2398-6> accessed 20 June 2019; Tristan Pearce and others, 'Inuit Traditional Ecological Knowledge (TEK) Subsistence Hunting and Adaptation to Climate Change in the Canadian Arctic' (2015) 68 ARCTIC 233.

752. Bunce and others (n 751).

753. ibid.

754. Gita J Laidler and others, 'Travelling and Hunting in a Changing Arctic: Assessing Inuit Vulnerability to Sea Ice Change in Igloolik, Nunavut' (2009) 94 Climatic Change 363.

755. ibid.

mentioned challenges with seal and walrus hunting in Igloolik are primarily due to changes in ice patterns, thickness, and season.[756] While this community is able to adapt to these changes, this adaptation is dependent on teaching this traditional knowledge to younger generations, who are unable to engage in hunting full time due to employment and education commitments. Coupled with the rate of environmental changes, which outpace natural climatic and environmental changes observed in the past, adaptation is not as effective as it once may have been.[757] Accessing country foods is more expensive as required equipment is costly to invest in for a family, and as a result, country food often needs to be purchased from other hunters, also high in price to accommodate for the cost of hunting equipment.[758] Alternatives to country food are no more affordable, given that they are flown up to the communities from the southern parts of Canada. These cultural and health effects are directly linked to climate change and have many implications for Inuit lifestyle.

Climate changes are also having effects on housing, with the structural integrity of many buildings threatened by thawing permafrost. This compromises the foundation, leading to houses being unsafe for living or community structures unfit for use.[759] Rising sea levels are also a housing concern, where

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756. ibid.

757. ibid.

758. Scott Heyes and Martha Dowsley, 'Practices and Processes of Placemaking in Inuit Nunangat (The Canadian Arctic)' in Elizabeth Grant and others (eds), *The Handbook of Contemporary Indigenous Architecture* (Springer Singapore 2018) <http://link.springer.com/10.1007/978-981-10-6904-8_11> accessed 20 June 2019; Laidler and others (n 754).

759. Donald S Lemmen and others (eds), 'From Impacts to Adaptation: Canada in a Changing Climate 2007' (Government of

coastally situated houses built at what was once thought to be a safe distance from the waterline are now threatened by encroaching tides.[760] With sea ice melting at higher rates and quantities than other years, it is suspected that this is to blame for rising sea levels. Glacier melt is also threatening houses situated near river banks, where one community issued an evacuation of houses near the river whose banks were eroding from higher than normal water levels.[761] With proper housing already an issue across Inuit Nunangat, to evacuate or lose houses to structural damage, rivers, and oceans is to aggravate an already stressed system. The changing environment as a direct result of climate change is no small phenomenon in the Canadian north, and it has serious implications for day-to-day life in Inuit communities.

6. Climate Change, Gender, and Mental Health

Climate changes and associated impacts on way of life can interact with exposure to risk factors and access to protective factors identified with suicide and mental health issues. The gender roles and gender dimensions of social

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Canada 2008) <https://geoscan.nrcan.gc.ca/starweb/geoscan/servlet.starweb?path=geoscan/fulle.web&search1=R=226455> accessed 24 June 2019.

760. Susan Ormiston and Mia Sheldon, 'How Climate Change Is Thawing the "Glue That Holds the Northern Landscape Together"' (*CBC News*, June 2019) <www.cbc.ca/news/canada/north/the-national-permafrost-thaw-inuvik-tuktoyaktuk-1.5179842> accessed 24 June 2019.

761. 'Inuit knowledge and climate change' (*Isuma TV*, 2010) <http://www.isuma.tv/inuit-knowledge-and-climate-change/movie> accessed 19 August 2019.

inequities which play a role in mental health determinants also interact with lived climate change effects, as well as individual adaptive capacity. This creates a triad of factors which all exist together to impact the state of mental health in Inuit communities.

6.1 Risk Factors

Risk factors for suicide such as food insecurity, housing, community brokenness, and reduced mental well-being are experienced by both men and women in Inuit communities, and exposure to these risk factors can be exacerbated by the effects of climate change. Due to challenges in hunting, trapping, fishing, and foraging, and the high costs for proper gear to engage in these activities, country foods are becoming more difficult to access. This increases the risk of food insecurity for many families who do not have a full-time hunter, which can contribute to poor mental health and risk for suicide. Additionally, women are disproportionately impacted by food insecurity, and are therefore more likely to suffer the negative effects of reduced access to country foods.[762] Not only is the pre-existing issue of food insecurity exacerbated, a lack of country foods is also a point of sadness for many as consumption of traditional foods is a connection to culture and facilitates good overall mental well-being.[763] Country foods are also more nutritious than market foods often available for purchase, therefore restriction of country foods in the diet can contribute to physical health issues such

762. Beaumier and others (n 735); Beaumier and Ford (n 735); Williams and others (n 735).

763. Cunsolo Willox and others, 2012 (n 749).

as obesity and diabetes.[764] This myriad of direct and indirect links between accessing country foods and exposure to suicide and mental health risk factors of food insecurity, cultural disconnect, and physical health issues highlights one of the ways in which climate change can influence mental health in Inuit communities. Furthermore, the gendered impacts of food insecurity warrant further exploration to characterize any differences in exposure to these risk factors between men and women.

Over-crowded housing is also a risk factor identified for suicide that is exacerbated by climate change. With permafrost thaw threatening structural integrity of houses, and coastal and river bank erosion encroaching on properties, many families are living in unsafe houses. Options for relocation are limited as there are either no other places to live, or families are relocated to even less sufficient housing.[765] This can impact many houses in communities, again stressing resources for communities to provide safe housing to members. Creating additional barriers for crowded housing can also exacerbate instances of family violence, putting women especially at risk due to the increased incidence of women who experience domestic or sexual violence.[766] If there is no alternative housing option for women and children suffering from domestic abuse, it is difficult or impossible to leave that

764. Cunsolo Willox and others, 2012 (n 749); Cunsolo Willox and others, 2013 (n 749).

765. Inuit Tapiriit Kanatami and Crown-Indigenous Relations and Northern Affairs, *Inuit Nunangat Housing Strategy* (Government of Canada 2019) <http://publications.gc.ca/collections/collection_2019/rcaanc-cirnac/R5-737-2019-eng.pdf> accessed 24 June 2019. Pauktuutit Inuit Women of Canada and Quintessential Research Group (n 734).

766. Quinless and Jeff Corntassel (n 734).

environment. These experiences can contribute to feelings of family and community brokenness, both identified as suicide risk factors in Inuit communities, and are at risk for becoming more prevalent as global warming accelerates the rate of permafrost thaw in the Arctic.

The changing climate, environment, and ecological landscape itself can directly impact mental well-being. The term 'ecological grief' has been coined to describe the sadness associated with the effects of climate change, defined as "the grief felt in relation to experienced or anticipated ecological losses, including the loss of species, ecosystems, and meaningful landscapes due to acute or chronic environmental change".[767] Losses of the land are felt personally for many, one study conducted in Rigolet, Nunatsiavut citing "changes in land, snow, ice, and weather elicit feelings of anxiety, sadness, depression, fear, and anger, and impact culture, a sense of self-worth, and health".[768] It was also noted by study participants that impacts of not going out on the land are felt in a community way, as once one family first feels the impacts, others begin to feel that as well. There is also a connection with the land of a specific place, which further gives meaning to the environment for overall health and well-being.[769]

The housing, food, and land dimensions of health determinants can contribute to overall feelings of community

767. Ashlee Cunsolo and Neville R Ellis, 'Ecological Grief as a Mental Health Response to Climate Change Related Loss' (2018) 8 Nature Climate Change 275, 275.

768.Cunsolo Willox and others, 2013 (n 749) 14.

769. Cunsolo Willox and others, 2012 (n 749); Heyes and Dowsley (n 758); Susan M Koger and others, 'Climate Change: Psychological Solutions and Strategies for Change' (2011) 3 Ecopsychology 227.

brokenness, where the mental well-being of the community as a whole is impacted by climate changes. This is identified as a risk factor for suicide by the ITK,[770] thus is an additional consideration for mental health at a community level, not simply an individual level.

6.2 Protective Factors

Climate changes can also impact the access to protective factors identified for mental health and suicide, including family, community, self-sufficiency, and connection to cultural identity. The way that climate change impacts these protective factors is primarily through activities on the land, such as food sourcing, travel, and leisure activities. As the land and weather changes, and it becomes more difficult to engage in these activities, these avenues for engaging in culture are reduced. Numerous studies suggest that the impact climate change has on the ability to go out on the land and use traditional knowledge is putting it at risk for transmission to the younger generations, who have less traditional knowledge than community elders.[771] Going out on the land is also identified as a coping mechanism for acute stress, and for a way to connect with friends and community members, both of which are important protective factors against poor mental health.[772] Being able to go out on the land and engage in traditional activities gives a sense of self-sufficiency which

770. Inuit Tapiriit Kanatami (n 710)

771. Heyes and Dowsley (n 758); Laidler and others (n 754); Pearce and others (n 751).

772. Cunsolo Willox and others, 2013 (n 749); Petrasek MacDonald and others, 'Protective Factors for Mental Health and Well-Being in a Changing Climate' (n 724).

is protective against poor mental health. Gathering country foods by hunting, fishing, trapping, or berry picking is also a way of being on the land and engaging in culture. Some of these activities are associated with gender roles, particularly hunting, trapping, and berry picking. As men typically assume the role of hunting and fishing, while women typically berry pick, both of these activities are altered due to decreased ability to go out on the land. However, the impacts of this alteration in traditional lifestyle roles are often felt by the adaptive capacities for individuals to find alternative ways of engaging in this activity. Adaptive capacity will be discussed in detail in the following section; however, it is crucial to mention here as it is linked directly to access to protective factors.

6.3 Adaptive Capacity

As described previously, access to hunting fishing and trapping can be reduced due to high costs of appropriate gear, and economic means to invest in this cost can enable families or individuals to adapt to changing environment and maintain some level of traditional food sourcing activity. Economic autonomy also plays a role for women regarding berry picking, as women in Iqaluit noted that travel is required to reach the cites where berries now grow.[773] Women with the financial means to make that travel were able to continue food gathering to some extent, enabling them to maintain that cultural activity and access to traditional food. The access to financial means can be impacted by gender, as noted previously that women on average make less than

773. Bunce and others (n 751).

men, despite having higher rates of employment.[774] This can mean that women are spending more time at work, which limits the time available to go out on the land, which is also limited if women are responsible for child rearing or the head of a one-parent family. This difficulty was noted by the women in Iqaluit, as berry picking used to be done close to home and enabled childcare to happen simultaneously, whereas if travel is required this can be logistically an economically challenging to transport children.[775] Thus, the economic dimension of adaptive capacity is influenced by gender differences in employment and financial status, warranting greater understanding of the way gender can limit or enhance adaptation to climate change.

7. Recommendations

A significant portion of the research conducted in the field of climate change and mental health in Inuit communities employs a vulnerability approach, seeking to holistically assess the multitude of factors that interact with each other to characterize the impact of climate change on mental health.[776] Going forward with climate change adaptation

774. Pauktuutit Inuit Women of Canada (n 736).

775. Bunce and others (n 751).

776. James D Ford and others, 'Vulnerability of Aboriginal Health Systems in Canada to Climate Change' (2010) 20 Global Environmental Change 668; James D Ford and others, 'Mapping Human Dimensions of Climate Change Research in the Canadian Arctic' (2012) 41 AMBIO 808; James D Ford and others, 'The Dynamic Multiscale Nature of Climate Change Vulnerability: An Inuit Harvesting Example' (2013) 103 Annals of the Association of American Geographers 1193; Pearce and others (n 751).

research and the interconnection with mental health, intersectional approaches are imperative to conducting inclusive research. The current status of gender incorporation into climate change research has been noted to be insufficient, and when present, tokenistic.[777] Literature describing experiences of the LGBTQ2+ population in both lived climate change effects and mental health struggles is even more sparse, thus this warrants further attention to ensure that further marginalization of this population is not perpetuated through research. Future research requires authentic inclusion of the experiences of those most marginalized in society so that their positions and perspectives can be integrated into the knowledge base used to move forward with mental health programs and climate change adaptation strategies. This strategy will complement the current vulnerability approach by expanding the scope of factors considered in the dialogue surrounding climate change vulnerability and adaptation.

A second recommendation, echoed by many other studies, is for community-based research.[778] The community experiences described are not necessarily the same experience of other communities, as Inuit Nunangat is geographically diverse and community capacities and contexts vary.

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777. Margaret Alston, 'Gender Mainstreaming and Climate Change' (2014) 47 Women's Studies International Forum 287; Anna Bunce and James D Ford, 'How Is Adaptation, Resilience, and Vulnerability Research Engaging with Gender?' (2015) 10 Environmental Research Letters 123003; Natalia Kukarenko, 'Climate Change Effects on Human Health in a Gender Perspective: Some Trends in Arctic Research' (2011) 4 Global Health Action 7913.

778. James D Ford and others, 'Climate Change Policy Responses for Canada's Inuit Population: The Importance of and Opportunities for Adaptation' (2010) 20 Global Environmental Change 177; Pearce and others (n 751).

For example, some communities obtain their country food sources on the land, such as Arviat in Nunavut whose residents rely primarily on caribou and char. This community is therefore currently experiencing less land-related country food accessibility challenges than those who rely on the ice for hunting and fishing and are susceptible to the drastic changes in ice quality and quantity.[779] It is noted however, that changes are predicted and starting across the whole Arctic, in this case with caribou herd sizes likely to decline, therefore the urgency associated with mapping the impacts of these changes on lifestyle and health are ubiquitous across Inuit Nunangat. Thus, it is imperative that future research is community-based to represent the context of that community in development of local, territorial, and national climate change adaptation programs. Community-based knowledge and context is also an important component of implementation of adaptation programs so that the community's unique needs are addressed, and adaptive capacity is optimized. A key component of this research is that communities are resilient and have already established adaptation, that can be enhanced to empower communities to mitigate harmful impacts of climate change.[780] This is the basis for the community-based adaptation work that is on-going in Canada's north, and can be optimized when specific needs for and within communities are addressed.[781]

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779. Beaumier and others (n 735).

780. Ford and others, 2012 (776); Pearce and others (n 751).

781. Ford and others, 2012 (776); James D Ford and others, 'Preparing for the Health Impacts of Climate Change in Indigenous Communities: The Role of Community-Based Adaptation' (2018) 49 Global Environmental Change 129.

8. Conclusion

Climate change continues to pose a threat to Inuit livelihood in the Canadian north. These lifestyle changes and changes in the environment themselves can impact mental health and well-being of individuals and communities. Gender identity and associated social roles and inequities can influence both how climate change impacts mental health, and the adaptive capacity to mitigate these mental health impacts. The current literature describing the interaction of climate change and mental health for Inuit in Canada addresses this role of gender, but it is limited regarding the perspective of women, and silences members of the LGBTQ2+ community. Integrating an intersectional perspective into the already established vulnerability approach to research can facilitate a more inclusive perspective into the complex community factors that interact to characterize vulnerability and adaptation capacity. This research is warranted to address the current mental health crisis faced by Inuit in Canada, as well as the current and forecasted climate changes that are happening in the Arctic region of Inuit Nunangat.

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Arctic Indigenous Peoples: From Climate Change Challenges to Food System Resilience

Valentina De Gregorio

Abstract

Temperature rise is severely threating the survival of indigenous populations. This is true all over the world, especially in the Arctic region. There, the high increase of carbon dioxide (CO2) and greenhouse gas emissions combined with the rise of sea levels are not part of a relatively recent story, but rather phenomena steadily caused by man's overexploitation of natural resources, including oil and gas extraction projects, commercial fishing activities as well as the systematic deforestation of large parts of the Great Northern Forest by the paper industry. What previously was part of Earth's elements, over the years has become a commodity, with devastating effects on those pristine territories which Arctic Indigenous Peoples had lived in and had carefully nurtured. Food insecurity, contaminations and loss of livelihood are concrete risks faced by native communities in their daily lives. Some take refuge in urban settlements within their country, thus leaving huge rural territories in the hands of myopic local and global policies. Others decide to stay, making climate-resilient solutions a reality. By exploring the current situation of the race for the Arctic, in terms of available resources and the geopolitical sphere of influence, the author will focus on the impacts Arctic climate conditions have on the survival of indigenous Arctic people, contributing towards shedding light

on the role that indigenous traditional food systems have in offering new, alternative and efficient solutions to poverty and misery in Arctic and Sub-Arctic rural areas.

Keywords: *Indigenous Peoples; Arctic; Food System; Migration; Resilience*

1. Introduction

The article is based on the premise that problems such as hunger and malnutrition are not only occurring in Africa, South-America and Southern Asia.[782] Even the richest countries of the Global North that border the Arctic region are affected by these phenomena, especially the Indigenous Peoples who have been living there for years. Sámi from the northern territories of Norway, Sweden, Finland and the Kola Peninsula; Nenets from the Siberian Arctic; Aleut People, or "Unangan", as they use to call themselves, from Aleutian Islands in Alaska; Tungusic Peoples of Siberia; Yakuts from northeastern Siberia; Inuit, or Eastern Eskimo, in Alaska, Canada and Greenland; Yupik, or Western Eskimo, between Siberia and Alaska. These are just some of the indigenous populations to whom the Arctic is home. As for all Indigenous Peoples in the world, their survival is closely linked to the region in which they reside, but if their access to it or their subsistence is undermined, they are in danger of disappearing without a trace.

782. The Food and Agriculture Organization of the United Nations and others, *The State of Food Security and Nutrition in the World 2018. Building climate resilience for food security and nutrition* (FAO 2018) <www.fao.org/3/I9553EN/i9553en.pdf> accessed 20 August 2019.

Considering the diverse definitions of the term *indigenousness*, according to the geographical area of reference, with subtle differences also in relation to the local Arctic communities,[783] in these pages it will be given a broad definition of Arctic Indigenous Peoples, as communities who not only live in the Arctic territory – meaning lands, coasts and seas – for thousands of years, but also retain its knowledge, uphold traditions and preserve biodiversity. For each indigenous community in the world, these elements contribute to the shaping of their own food systems, which determines their history and identity.

High latitudes and extreme temperatures do not necessarily imply poor and non-diversified diets. The Arctic food system is the direct consequence of years of humankind's adaptation to Arctic territory and encompasses a highly complex set of animal and plant-based nutrients, food production and processing techniques, all representing the backbone of the indigenous diet. However, the challenges that Indigenous Peoples have been facing over the last decades[784] are affecting directly and invasively the space they occupy to supply from and use to implement essential subsistence activities.

Investments from non-Arctic peoples that see the ice melting as economic and geopolitical potentials for the

783. Elizabeth Ferris, 'A Complex Constellation: Displacement, Climate Change and Arctic People' (2016) Brookings 1, 11. <www.brookings.edu/wp-content/uploads/2016/06/30-arctic-ferris-paper.pdf> accessed 20 August 2019.

784. The rush for resources in the Arctic region began around 1970s when some of the States bordering on the Arctic (United States, Canada, Norway and Russia) started to extract oil and gas resources; see Henry P Huntington and others, *Arctic Oil and Gas* (AMAP 2007) <https://govmin.gl/images/stories/petroleum/Oil_Gas_Assessment_Overview_Report_2008.pdf> accessed 20 August 2019.

opening of new business opportunities are not without consequences for the inhabitants of the Arctic. Depleted of their natural resources, indigenous Arctic peoples are engaged in environmental matters on a daily basis, including the previously mentioned, and premature, melting ice, the loss of local biodiversity and the lack of access to traditional and adequate food. Reactions to the Arctic process of impoverishment, in addressing major challenges such as combating climate change and reversing biodiversity, can be different. Among them, some Indigenous Peoples decide to leave for cities, where indigenous identities inevitably take on blurred and pale contours. For instance, urban lifestyle contributes to a loss in indigenous customs, in terms of traditional knowledge and native language, completely severing their connection with nature and everything coming from the earth, such as food. Others decide to stay to make native Arctic rural areas better territories, using the available resources for adapting and resisting the changes that both climate and globalization forcefully impose.

Conscious of the limits that a desk research has, the article is divided the in three main sections. In the first section, the author intends to provide a mapping of many of the environmental disasters caused by the excessive burden of human activities on territories that were almost untouched until the last century. The second aims to address how the appetites of the extraction, fishing and paper multinationals on Arctic and Sub-Arctic rural territories may result in decreased food security conditions for Arctic indigenous hunters and gatherers, facing concrete and chronic situations of malnutrition and lack of traditional food. For those remaining in the Arctic, weakness in responding to a changing environment grows over the years: migration from Arctic rural areas

to large settlements, in search of better living conditions, appears as the only solution, accepting the consequences of any change of habits, including the eating ones. Finally the third section stands for a celebration of small but significant seeds of change put in place by the commitment and enthusiasm of a multitude of actors, at any level, from grassroots to political ones, towards the construction of a resilient Arctic rural ecosystem, capable of withstanding a climate that gradually becomes warmer and the continuous shockwaves deriving from an unsustainable model of economic development.

In this article, food will be not merely understood as nourishment and a source of life, but its ambivalent features are enhanced, sometimes being a problem with serious political, environmental and social repercussions – representing, for instance, the loss of belonging to a given social system of shared values, as in the case of the indigenous food system - and sometimes being a solution. In this respect, indigenous culinary traditions preserving biodiversity, ensuring nutritious diets for their communities, while taking care of natural ecosystems, are excellent recipes for building an ecologically and socially sustainable food production and consumption system, giving back food, land, and its native inhabitants the value they deserve.

The author has achieved the objective of exploring the role that existing Arctic indigenous food systems have in their ability to counter the current climate and environmental Arctic crisis by stimulating the reader to reflect on the responsibility that each individual on this Planet should assume to become the first actor of change. This work is based on a multi-disciplinary approach combining elements of desk research of most of the cited sources with concrete working experiences in the fields of rural transformation and

migration that helped the author to consider the conceptual framework that is being developed within the international political context. Furthermore, data and information arising from this document has been marked by a series of considerations aimed to facilitate critical challenge, which is a complement regarded by the author as key in building individual opinions. The author takes full responsibility for applying this methodology and providing a meaningful voice to thoughts she firmly believes in.

2. The Impact of Anthropogenic Activities on Arctic Climate and Indigenous Peoples

2.1 An Arctic Scenario

All around the world the effects of climate change are clearly visible. Sudden floods, prolonged droughts, and tornadoes are part of an evolving worldwide scenario.[785] However, there is another side of climate change that cannot be seen immediately, acting in a silent way but at an ever-escalating pace. That is the one affecting the Arctic region, whose ecosystem, one of the most fragile in the world, is changing faster than others.

"*The Arctic has traditionally been the refrigerator to the planet,*"[786] said Jeremy Mathis from the National Oceanic and Atmospheric Administration (NOAA), the U.S. Federal agency dealing with issues connected to climate, weather,

785. Quirin Schiermeier, 'Droughts, heatwaves and floods: How to tell when climate change is to blame' (2018) 560 Nature, 20-22.

786. 'Arctic permafrost thawing faster than ever, US climate study finds' (*The Guardian*, December 2017) <www.theguardian.com/environment/2017/dec/12/arctic-permafrost-sea-ice-thaw-climate-change-report> accessed 20 August 2019.

oceans and coasts. The polar cap is essential in reflecting solar radiation, then sending energy and heat back out into the atmosphere.[787] Furthermore, a large amount of greenhouse gas is released due to the degradation of permafrost, a layer of eternally frozen ground, significantly influencing the global average surface temperatures. "*But the door of the refrigerator has been left open*"[788] added Jeremy Mathis. In the Arctic, the speed of temperature rise is contributing to melting ice, [789] reducing local biodiversity and imposing a different rhythm to the lives of Indigenous Peoples. This is highlighted in several sources. The report released by the NOAA itself at the end of 2017 - the *Arctic Report Card 2017* - reads as follows on the first page: "*the unprecedented rate and global reach of the Arctic change disproportionally affect the people of northern communities, further pressing the need to prepare for and adapt to the new Arctic*".[790] A statement as such is not insignificant, especially considering the large extension of the Arctic region, whose scale also includes the sea and the polar cap.

Four million inhabitants live in the Arctic, including 400,000 Indigenous Peoples. Classified according to the linguistic group they belong to, in the Arctic there are more than 40 different indigenous populations. It is thus possible to identify the Na'Dene family (mainly in Alaska and Canada),

787. Leslie Field and others, 'Increasing Arctic Sea Ice Albedo Using Localized Reversible Geoengineering' (2018) 6 Earth's Future 882, 882–901.

788. ibid.

789. The first studies on the phenomenon has been published by Peter Wadhams at beginning of the 1990s; see Peter Wadhams, 'Evidence for thinning of the Arctic ice cover north of Greenland' (1990) 45(3) Nature 795, 795-797.

790. Jacqueline Richter-Menge and others, *Arctic Report Card 2017* (NOAA 2017) <ftp://ftp.oar.noaa.gov/arctic/documents/ArcticReportCard_full_report2017.pdf> accessed 20 August 2019.

the Eskimo-Aleut family (mainly in Northern East America and Greenland), the Indo-European family (mainly in North America and Greenland), the Uralic-Yukagiran family (prevalent in Northern Europe and Northern West Russia) and the Altaic family (mostly in Northern Central and East Russia).[791]

Equally rich in diversity is the variety of plant and animal species they keep through a food system based on a small scale and family production model.[792] "*If you look at a map of global agrobiodiversity hotspots you soon realize that they are identical with indigenous peoples' habitats,*"[793] said Phrang Roy, coordinator of the Indigenous Partnership for Agrobiodiversity and Food Sovereignty. As for all indigenous peoples, even in the Arctic, the maintenance of biodiversity is made possible by a spiritual and historical connection with the rural territories and natural resources they have been living for years. Unpolluted air, water and land are essential elements for hunting, fishing and harvesting, the activities traditionally being at the core of indigenous food systems, which create a system of values defining their identity.

2.2 Arctic: A Matter of Resources and Geopolitics

Climate change is putting the indigenous people's survival under serious pressure, as they are directly dependent

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791. 'Demography of indigenous peoples of the Arctic based on linguistic groups' (*Arctic Centre*) <www.arcticcentre.org/EN/communications/arcticregion/Arctic-Indigenous-Peoples/Demography> accessed 20 August 2019.

792. The Food and Agriculture Organization of the United Nations, Centre for Indigenous Peoples' Nutrition and Environment, *Indigenous Peoples' food systems: the many dimensions of culture, diversity and environment for nutrition and health* (FAO 2009) 15-18 <http://www.fao.org/docrep/pdf/012/i0370e/i0370e.pdf> accessed 20 August 2019.

793. Slow Food, '*Indigenous Terra Madre'* (Slow Food) <www.slowfood.com/our-network/indigenous/> accessed 20 August 2019.

on climate conditions to provide food for themselves and their own households.

The rapid increase of carbon dioxide (CO2) and greenhouse gas emissions combined with the rise of sea levels are not part of a relatively recent story, but rather phenomena steadily caused by anthropogenic activities of the overexploitation of natural resources. Interested in the widespread presence of raw materials in the Arctic region, industrialized countries and transnational companies have played a key role in their research and extraction.[794] According to the United States Geological Survey (USGS), in the Arctic waters off Greenland "*the total mean undiscovered conventional oil and gas resources of the Arctic are estimated to be approximately 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids*". [795] The multi-number figures give a good idea of the amount of natural resources present in the Arctic backdrops, on which the interests of the largest extractive industries are channeled.

Since the first years of the XX century,[796] the attention to those territories increased exponentially. A race that still lasts and proves anything but beneficial for the environment and the indigenous populations that inhabit those areas. To

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794. GEDI Gruppo Editoriale SpA, 'Rivista Italiana di Geopolitica' (2019) 1 La Febbre dell'Artico.

795. Bird J Keneth and others, *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle* (USGS 2008) <https://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

796. In 1920 first oil deposits have been found in the Canadian area of Norman Wells, followed by the discovery of other basins in the 1960s in Russia (Tazovskoye) and Alaska (Prudhoe Bay), in addition to natural gas fields explored in Canada, United States and Norway; Danilo Giordano, La corsa alle risorse dell'Artico (The Alpha Institute of Geopolitics and Intelligence 2016) <www.alphainstitute.it/wp-content/uploads/2016/11/La-corsa-alle-risorse-dellArtico_Giordano.pdf>.

extract oil and natural gas, companies unearth hydrocarbon at great depths through an air gun system, the Seismic Airgun Blasting, by which submarine cannons are fired from surface vessels to map the bottom and detect possible deposits. Despite the precision and reliability of such a technique, it poses serious threats to marine fauna, on which the social and economic development of certain coastal communities are highly dependent. Additionally,[797] this system runs the risk of permanent damage to animals' hearing, due to exposure to noise emissions 100,000 times greater than an airplane and audible up to 15,000 miles away.[798]

Access to offshore resources – currently arduous due to the extreme climatic conditions and lack of adequate infrastructures – may become easier with the gradual melting of Arctic ice, which would, *inter alia*, allow the opening of new commercial routes. In addition to the well-known North-West Passage, which naturally made its way through ice in 2007,[799] thus linking for the first time the Atlantic and Pacific Oceans, the author is here referring to the so-called New Polar Silk Road, announced by the State Council Information Office of the People's Republic of China in January 2018.[800] This connection would enable China to avoid

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797. 'Seismic Airguns' (*Ocean Conservation Research*) <https://ocr.org/sounds/seismic-airgun-surveys/> accessed 20 August 2019.

798. ibid; Melody Schreiber, *How One Inuit Community Won Against Big Oil* (*The New Republic,* October 2018) <https://newrepublic.com/article/151559/one-inuit-community-won-big-oil> accessed 20 August 2019.

799. For more information, please visit the website of the European Space Agency (ESA) <www.esa.int/Our_Activities/Observing_the_Earth/Envisat/Satellites_witness_lowest_Arctic_ice_coverage_in_history>.

800. The State Council Information Office of the People's Republic of China, *China's Arctic Policy* (2018) <http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm>.

crossing the Suez Canal to reach Europe, thus undertaking a faster and cheaper travel route.[801] China's presence is affording it a more dominant position in the Arctic region, as in the case of its partnership in the construction of a Russian plant for the production of natural gas.[802] Oil and gas are not the only natural resources to be exploited with these changes. China has set its sights on the Arctic, and in particular on Greenland, due to the large presence of raw materials such as uranium, zinc, iron and rare earths, the latter mainly used for the production of electric machines, computers, mobile phones and military technologies. Rare earths are in fact so tempting to the Chinese market that in 2016 they bought a part of the Australian company Greenland Minerals and Energy, planning to open a pit mine in the Southern part of Greenland, in Kvanefjeld.[803] A presence, which should not be underestimated, especially since in 2013, China assumed the role of Permanent Observer within the Arctic Council,[804] the intergovernmental forum responsible for promoting Arctic cooperation among Arctic countries, local and indigenous communities on Arctic environmental protection

801. D Degeorge, 'Guerra Fredda al Polo Nord' (2018) 1284 Internazionale 46, 46-60.

802. Vladimir Soldatkin and Oksana Kobzeva, 'Russia offers to sell gas to Saudi Arabia from Yamal LNG' (*Reuters*, 2017) <www.reuters.com/article/us-russia-lng-novatek/russia-offers-to-sell-gas-to-saudi-arabia-from-yamal-lng-idUSKBN1E22HR>.

803. Maurice Walsh, 'You can't live in a museum': the battle for Greenland's uranium' (*The Guardian*, January 2017) <www.theguardian.com/environment/2017/jan/28/greenland-narsaq-uranium-mine-dividing-town>; Marzio G Mian, *Artico: La battaglia per il Grande Nord* (Neri Pozza 2017).

804. 'Observers' (*Arctic Council*, 2018) <https://arctic-council.org/index.php/en/about-us/arctic-council/observers> accessed 20 August 2019.

and sustainable development. The presence of new actors in such a delicate ecosystem is likely to raise not a few concerns, because the good health of the Planet Earth depends on the environmental and geopolitical equilibrium of the Arctic.

2.3 Fish (not) for All

The Arctic sea, in addition to containing large quantities of hydrocarbons, is also a rich and biodiverse habitat, a resource threatened by the melting of the ice. In the Arctic, summers without ice are becoming more frequent, with the risk of becoming permanent across the hemisphere by 2100, according to the 2017 report on *Snow, Water, Ice and Permafrost* in the Arctic by the Arctic monitoring and assessment program of the Arctic Council.[805] The Report predicts that the increased penetration of sunlight through water would encourage the exponential proliferation of plankton, with tragic consequences for the entire ecosystem.[806] The marine fauna accustomed to relying on ice is likely to disappear, giving way to a more prosperous population of fish eaters of such microorganisms, such as the Arctic cod. However, the increase in quantity of this species is not synonymous to greater availability and access for all. This is exactly the point: the more abundant the fish resources in the Arctic

805. AMAP, *Snow, Water, Ice and Permafrost. Summary for Policy-makers* (Arctic Monitoring and Assessment Programme 2017) <www.amap.no/documents/doc/Snow-Water-Ice-and-Permafrost.-Summary-for-Policy-makers/1532> accessed 20 August 2019.

806. Harry Cockburn, 'Plankton moving into Arctic waters previously covered with ice could have 'drastic consequences'' (*Independent*, October 2018) <www.independent.co.uk/environment/phytoplankton-spring-blooms-arctic-sea-ice-decline-climate-change-global-warming-a8588396.html> accessed 20 August 2019.

area become, the greater the interest of appropriating them by those few predominant actors who have the possibility of navigating the maritime territories of the North for extended periods with large fishing boats.[807] Cod is actually one of the most tradable marine species, and therefore endangered, because it is at the center of the fishing industry's interests as an essential ingredient in the production of frozen sticks for large distribution chains and fast food.[808]

At the end of 2017, an important milestone was marked. Canada, United States, Norway, Russia, Denmark, Iceland, Japan, South Korea and the European Union signed an international agreement aiming to protect 2,8 million square kilometers of Arctic Ocean from intensive fishing.[809] This binding agreement will be in effect for a sixteen-year period, renewable every five years with the consent of all the contracting parties. Moreover, the process for adopting the moratorium has been inclusive, with the participation of the Inuit Circumpolar Council Canada, advocating the interests of Inuit people. "*This is a historic win for Arctic protection,*"[810]

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807. Greenpeace International, 'Arctic Ocean fisheries' (*Greenpeace*, 2013) <www.greenpeace.org/sweden/Global/sweden/miljogifter/dokument/2013/the-risks-with-industrial-arctic-oceans-fisheries.pdf> accessed 20 August 2019.

808. Greenpeace International, 'Fishing industry strike groundbreaking deal for Arctic protection' (*Greenpeace*, May 2016) <www.greenpeace.org.uk/press-releases/fishing-industry-strikes-groundbreaking-deal-arctic-protection-20160525/> accessed 20 August 2019.

809. 'Meeting on High Seas Fisheries in the Central Arctic Ocean, 28-30 November 2017: Chairman's Statement' (*U.S Department of State*, 2017) <www.state.gov/e/oes/ocns/opa/rls/276136.htm> accessed 20 August 2019.

810. Greenpeace International, 'Historic agreement reached to protect the Arctic' (*Greenpeace*, 2017) <www.greenpeace.org/international/press-release/11864/historic-agreement-reached-to-protect-the-arctic/> accessed 20 August 2019.

declared Jon Burgwald from Greenpeace Nordic, the international non-governmental organization that among others supported this claim through the campaign *Save The Arctic*. "*Whilst giant steps have now been taken to protect the Central Arctic Ocean, it is important that these countries also take a progressive role in the United Nations negotiations on high seas protection. The UN process has the potential to safeguard all oceans in the high seas, and these countries must step up their game and support a global and ambitious agreement*," Jon Burgwald further explained.[811]

Fishing, at any scale, large or small, needs to deal with the pollution of marine waters. Heavy fuel oil is "*the most significant threat from ships to the Arctic marine environment*",[812] a study conducted by the Arctic Council in 2009 revealed. This is true both for coastal indigenous communities, and for marine wildlife itself. The risks of leaks or accidents are not rare. For example, on February 28, 2018 strong gusts of wind destroyed a dock nearby Shuyak Island (Kodiak, Alaska), throwing into the sea 3000 gallons of tar-like heavy fuel oil.[813] To give an idea of the scope of the disaster, the explosion of the Deepwater Horizon oilrig in April 2010 dispersed an amount of oil equivalent to almost 5 million barrels of raw oil in the waters of the Gulf of Mexico.[814] A similar event

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811. ibid.

812. Jonathan Saul and Nina Chestney, 'Arctic thaw opens shipping waterways, risk to environment' (*Reuters*, February 2016) <www.reuters.com/article/us-climate-shipping-arctic-idUSKCN0VY1N9>.

813. Alaska Department of Environmental Conservation, Division of Spill Prevention and Response Prevention Preparedness and Response Program, *Situation Report* (2018).

814. Alice A Jarvis, 'BP oil spill: Disaster by numbers' (*Independent*, 2010) <www.independent.co.uk/environment/bp-oil-spill-disaster-by-numbers-2078396.html> accessed 20 August 2019.

could easily occur in the Arctic, given the huge number of ships that cross it for transporting commodities, with very high risks for local biodiversity, given the ability of the oil to penetrate waters and permanent ice. Regardless of the single episodes of polluting materials leakages, others reside permanently in the waters of the Arctic. High concentrations of mercury have been found in the waters of northern Canada,[815] as well as persistent organic pollutants (POPs), heavy metals, and radionuclides in the whole Arctic ecosystem. As the Steering Committee of the Circumpolar Inuit Health Strategy reports, due to their very small size, these substances are able to affect the entire food chain to the point that they are also found in human blood and breast milk.[816]

2.4 The State of Forests and Their Inhabitants

After having analyzed the state of the waters, issues concerning the soil need to be addressed. The Subarctic region – meaning the area immediately to the South of the Arctic, is characterized by a large expanse of forests and fauna such as reindeer –¯ constitutes one of the most important forests in the world, the Great Northern Forest, which covers 16 million square kilometers from Alaska to Russia, crossing Scandinavia and Canada. A large part of this green lung lies to the north of Sweden, Finland and Russia,[817] in the so-called

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815. Youssef H El-Hayek, 'Mercury Contamination in Arctic Canada: Possible Implications for Aboriginal Health' (2007) Journal on Developmental Disabilities 13(1).

816. Inuit Circumpolar Council, *Circumpolar Inuit Health Strategy* 2010-2014 (ICC 2010).

817. Precisely 60 %; Greenpeace International, *Eye on the taiga* (Greenpeace 2017) <www.greenpeace.org/archive-international/Global/international/publications/forests/2017/Eye%20on%20the%20Taiga_Greenpeace_full_report.pdf> accessed 20 August 2019.

Barents Euro-Arctic Region (BEAC), the European Area by the Barents Sea. Being one of the most important biodiversity basins in the world, northern forests are also essential to combat climate change, since they contain an amount of carbon that is far superior to the one found in tropical forests, thanks to the presence of peat and permafrost. Not to mention the Indigenous Peoples who have lived for years on those territories, in particular the Sámi people.[818]

A report released by Greenpeace International in 2016, *Wiping Away The Boreal*, reveals how entire areas of this forest have attracted the interest of SCA, a Swedish forest products company, and its right-hand man, Essity, a Swedish company that holds first place in Europe for the production of paper fabric articles. The production of cellulose-based disposable products is literally clearing entire forest areas in the North.

> "Between 2012 and 2017, SCA itself and all three of the external suppliers named logged over 23,000 ha of forest within High Value Forest Landscapes (HVFLs), with another 22,000 ha still threatened by logging under plans they submitted during the same period. Collectively, their landholdings encompass over 1.2 million ha of HVFL – around a fifth of the total HVFL area identified"[819] reports Greenpeace International. "Some 96% of the SCA forest land that lies within identified HVFLs lacks any level of formal protection".[820]

818. Greenpeace International, *How Europe's tissue giant is wiping away the Boreal* (Greenpeace 2017) <www.greenpeace.org/archive-international/Global/international/publications/forests/2017/GP_Essity_forests_report.pdf?utm_campaign=Press%20Release&utm_source=Link&utm_medium=AMS> accessed 20 August 2019.

819. ibid 6.

820. ibid.

Not only production but also their consumption is increasing. Martina Borghi, Forestry campaigner for Greenpeace Italy, stated that in Italy the per capita use of handkerchiefs and paper products amounts to around 9 kg per year (data for 2016). "*It is shocking to think that trees grown for decades, or even centuries, are cut down to produce handkerchiefs or kitchen towels that will be used for a few seconds and then thrown away*"[821] continues Martina Borghi. Once entire areas have been deforested, paper companies are intent on replanting non-native species, for instance the *Pinus Contorta*, which, as non-native, is thought to alter the local ecosystem, thus endangering the entire food chain. In fact, the rapid growth of *Pinus Contorta* does not allow the proliferation of lichens. The progressive reduction of this precious source of nourishment for reindeer during the winter season is forcing reindeer herders to move elsewhere. The drop of lichens has strong repercussions on the lives of the Indigenous Peoples of that area, especially the Sámi, the community that is more widespread in the Swedish area affected by deforestation, so much so that in 2008 "*the national association of the Swedish Sámi, Sámiid Rikkasearvi (SSR), called for an end to the planting of exotic species including lodgepole pine in the legally defined reindeer husbandry area*",[822] says Greenpeace. A request

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821. Greenpeace Italia, 'Fazzoletti e altri prodotti di carta usa e getta consumano la foresta boreale. In Italia uso pro capite 9 chilogrammi all'anno' (*Greenpeace*, 2017) <www.greenpeace.org/archive-italy/it/ufficiostampa/comunicati/Fazzoletti-e-altri-prodotti-di-carta-usa-e-getta-consumano-la-foresta-boreale-In-Italia-uso-pro-capite-9-chilogrammi-allanno/> accessed 20 August 2019.

822. Greenpeace International (n 818) 6; Sámiid Rikkasearvi, *An exotic tree species destroys reindeer pastures and Sami reindeer herding* (SSR 2018) <www.sapmi.se/wp-content/uploads/2018/05/Contortaplantage-%C3%A4r-

that the Swedish company SCA did not accept, wishing to implement a reforestation of *Pinus Contorta* by 2035.

The mobilization of Indigenous Peoples is particularly strong in Finland, where civil society organizations, including Greenpeace and the Indigenous Sámi youth organization, Suoma Sámi Nuorat, have been protesting not only against the exploitation of one of the most important forests in the world, but also against the decision of the Finnish government to build a railway system linking those territories to the northern coast of Norway.[823] This last project is part of a more complex plan by Scandinavian countries, which sees the ice melting as an important opportunity. Not only that the disappearance of such a natural structure would shorten the journey times taken in transporting raw materials from the Arctic Ocean to the mainland, but data shows also that the construction of the so-called Arctic Railway would be able to quickly transport raw mining and extraction materials from Kirkenes in Norway to Rovaniemi in Finland[824] and the rest of Europe. A new investment that would do nothing but advance the interests of the mining industry, to the detriment of an environment that for Indigenous Peoples represents the primary source of survival.

Indigenous demonstrations are not frequent in the Russian region of Arkhangelsk, where the Dvinsky Forest stands.

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ett-rensk%C3%B6tselimpediment-engelsk-version.pdf> accessed 20 August 2019.

823. Greenpeace International, 'Industrial railway line and logging threaten the Sámi homeland' (Greenpeace, 2018) <www.greenpeace.org/international/press-release/18253/railway-logging-threaten-sami/> accessed 20 August 2019.

824. 'Growth through arctic resource' (*Arctic Corridor*) <http://arcticcorridor.fi/> accessed 20 August 2019.

There, although entire forests of conifers count as I*ntact Forest Landscapes (*IFLs), the 2017 Greenpeace International report, *Eye on the Taiga*, reveals how over 300,000 hectares of Dvinsky Forest have been lost since 2000. The paper industry is in fact interested in those endless mines of timber, whose erosion is granted by the same Russian laws. "*The government's 'primary development of the Taiga' policy has seen much of the region's forests suffer severe fragmentation or fundamental transformation,*" [825] Greenpeace states. "*Decades of extensive clear-cutting and a lack of effective reforestation have resulted in a serious depletion of valuable coniferous species, leading logging companies to turn their attention towards ever more remote IFLs across the region. Unfortunately, many of these areas have no protected status*".[826]

3. The Consequences of Climate Change on the Food Security of Arctic Indigenous Peoples

3.1 Dietary Transition in Arctic Rural Areas

The above-mentioned examples have drawn a disturbing picture: entire territories of the Arctic, marine and terrestrial, are at risk of disappearing under the unpredictability of climate change and the weight of huge investments that bear the signature of the largest industries and world powers. A real colonization of the Arctic region, one could say, a scenario in which the 400,000 Arctic Indigenous Peoples struggle to have a voice. The consequence is that what previously was a part of the earth, over the years has become a commodity[827] with devastating effects on those

825. Greenpeace International (n 818) 14.

826. ibid.

827. The concept of commodity has been translated by the author from

pristine territories where Indigenous Peoples had resided in and carefully nurtured. This is a threat to the integrity of resources on which Arctic indigenous communities depend for their existence and way of life, nowadays faced with increasingly serious and frequent incidents, even chronic situations, of food insecurity,[828] malnutrition and lack of local food. Data regarding the Arctic region are indeed alarming.[829] The

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Jose L Vivero Pol, 'Food as a Commons: Reframing the Narrative of the Food System' (2013) SSRN Electronic Journal.

828. The term food security was broadly defined in 1996 during the World Food Summit in Rome as a condition that exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life. This definition has its roots in the article 11.1 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognizes the right of everyone to an adequate standard of living for her/himself and her/his family, including the access to adequate food. Moreover, and even more important, it has its roots in the subsequent Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security issued by the Food and Agriculture Organization of the Unites Nations (FAO) in 2004, that, although they have not been designed exclusively for Indigenous Peoples, recognize Indigenous Peoples as vulnerable groups of people whose needs States should pay attention to. Particularly in the specific case of native people, there is no right to food if the right to access natural resources is not guaranteed as well: only the connection with the earth allows them to sustain themselves and self-determine as people, as enshrined among others in the Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly of the United Nations in September 2007; Lidija Knuth, *The right to adequate food and indigenous peoples. How can the right to food benefit indigenous people?* (FAO 2009); Harriet V Kunhlein and others, *Indigenous peoples' food systems and well-being. Interventions and policies for healthy communities* (FAO Centre for Indigenous Peoples' Nutrition and Environment 2013).

829. Several studies focus on the Northern part of Canada where in 2016 on almost 1,700,000 Indigenous Peoples, the percentage of communities at risk of food insecurity was increasing. According to the official findings

former United Nation Special Rapporteur on the right to food, Olivier De Schutter, confirms this during his mission to Canada in 2012, by pointing out how

> *"issues with accessing traditional foods include the impacts of climate change on migratory patterns of animals and on the mobility of those hunting them; limited availability of food flora and fauna; environmental contamination of species; flooding and development of traditional hunting and trapping territories; lack of equipment and resourcing to purchase equipment or inputs necessary for hunting, fishing and harvesting; and lack of requisite skills and time".*[830]

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from the Canadian Community Health Service, in 2008 the percentage of off-reserve aboriginal households suffering food insecurity was 20.9, "*three times higher than among non-Aboriginal households where 7.2% were food insecure, including 2.5% with severe food insecurity*". A remarkable number, considering that in 2012 the same updated survey showed that "*among off-reserve Aboriginal households, 22.3% were food insecure, including 8.4% with severe food insecurity*". If the field is then restricted to the indigenous population of the First Nations only, the study reveals that the average of moderately food insecure households in Canadian rural areas was 39.9%, against an average of 11.9% of severely food insecure households in the most remote areas of the country. A real whammy for Canada, one of the richest countries in the world; 'Household Food Insecurity in Canada in 2007-2008: Key Statistics and Graphics' (Government of Canada) <www.canada.ca/en/health-canada/services/food-nutrition/food-nutrition-surveillance/health-nutrition-surveys/canadian-community-health-survey-cchs/household-food-insecurity-canada-overview/household-food-insecurity-canada-2007-2008-key-statistics-graphics-food-nutrition-surveillance-health-canada.html>; 'Household food insecurity in Canada statistics and graphics (2011 to 2012)' (*Government of Canada*) <www.canada.ca/en/health-canada/services/nutrition-science-research/food-security/household-food-security-statistics-2011-2012.html> accessed 20 August 2019.

830. UNCHR 'Report of the Special Rapporteur on the right to food' (2012) UN Doc A/HRC/22/50/Add.1, 19.

For Arctic indigenous households, traditional activities and local products are still the main source of livelihood for family consumption, to be nevertheless integrated with the purchase of basic goods, whose prices may be extremely high because of the impenetrability of Arctic areas. Referring to the specific case of Inuit communities in Northern Canada, the Steering Committee of the Circumpolar Inuit Health Strategy reports, "*remoteness, limited transport infrastructures, difficult climatic conditions, high global prices for food commodities and oil all combine to make the cost of food and its distribution a significant driver of food insecurity for many Inuit communities*".[831] Studies conducted on the Inuit population of Nunavut (northern Canada) between 2007 and 2008 speak of at least 7 out of 10 children living in families that experience food insecurity in their daily lives.[832] This is a predictable situation considering that food prices can undergo considerable differences depending on the geographical area of distribution.[833]

Decreased consumption of local food, combined with an increase of dependency on ultra-processed food, is thus challenging the endurance of the indigenous food systems in the Arctic region. Even those who still try to rely on traditional food as a basis for their diets, are actually influenced by a huge amount of industrial food that abounds on supermarkets shelves. Globalization is able to reach the most pristine

831. Inuit Circumpolar Council (n 816).

832. Hilary Ferguson, 'Inuit Food (In)Security in Canada: Assessing the Implications and Effectiveness of Policy' (2011) 2 Queen's Policy Review 56.

833. In this respect, the same document by the Steering Committee of the Circumpolar Inuit Health Strategy reveals that if in the South of Canada a basket of food for feeding a family for 7 days approximately costs C200 dollars, in the North can on average double.

areas of the planet, the Arctic included.[834]. For this reason, thinking of the Indigenous Peoples as communities completely detached from the globalized world would in fact be both an anachronistic and untruthful image.[835] Sometimes moved by necessity, sometimes by the desire to approach a standardized food consumption model, food choices of the Arctic natives are being directed towards the purchase of ultra-processed food and beverages, less rich in vitamins and proteins, but more in fats, preservatives, salt and sugar.[836]

Industrial food supply – generally justified to feed, in the short term, a worldwide growing population – will not remain exempt from consequences in the long run, especially for the indigenous of the Arctic, who historically based their livelihood on food systems rich in vitamins, micronutrients, animal proteins and omega 3 deriving from fish, whales, seals

834. Sam Grey and Raj Patel, 'Food sovereignty as decolonization: some contributions from Indigenous movements to food system and development politics' (2015) 32 Agriculture and Human Values 431-444.

835. The consumption of such products, including their plastic packaging, is now much more consolidated in many Indigenous Peoples of Central America, as in Guatemala is for example· where the proliferation of junk food among Maya peoples of the rural areas of the country compensates not only the lack of availability of healthy and adequate food, but mainly the desire to feel part of a dominant imaginary that sponsors a certain food consumption pattern. Despite the different latitudes, the same phenomenon also occurs in the Arctic, so much so that in Nunavut supermarkets (Canada) are available the same pre-packed products that can be found in any other large town of the world; Meghan F Webb and others, 'Exploring mechanisms of food insecurity in indigenous agricultural communities in Guatemala: a mixed methods study' (2016) BMC Nutrition.

836. Harriet V Kuhnlein and others, 'Arctic Indigenous Peoples Experience the Nutrition Transition with Changing Dietary Patterns and Obesity' (June 2004) 134(6) Journal of Nutrition 1447-1453.

and land mammals.[837] It is true that "*industrialization and the cash economy have partially reduced hunger in* […] *the communities north of the Arctic Circle, but at the expense of good health*".[838] The increase in obesity and diabetes rates connected to malnutrition is a widespread health issue among the Indigenous Peoples of the Arctic region. The apparent comfort and richness that industrial food has brought to even the most isolated territories of the Arctic, has increased the transition of their original food system,[839] resulting in changes significantly affecting their bodies, identities and system of values.

3.2 The Impact of Rural-urban Migration on Arctic Indigenous Dietary Transition

When the effects of long-term investment projects by transnational corporations and the consequent climate change "*exacerbate the weak realization of [the indigenous] human rights [such as the right to food] enshrined in the UN Declaration on the Rights of Indigenous Peoples*",[840] and make rural areas deprived of what Indigenous Peoples considered their basic livelihood, they have no other choice than move somewhere else, thereby completely breaking the physical and spiritual

837. Ed Struzik, 'Food Insecurity: Arctic Heat Is Threatening Indigenous Life' (*Yale Environment 360*, 2016) <https://e360.yale.edu/features/arctic_heat_threatens_indigenous_life_climate_change> accessed 20 August 2019.

838. Lou Del Bello, 'Globalisation and global warming threaten Inuit food security' (*Rethink*, 2017) <https://rethink.earth/globalisation-and-global-warming-threaten-inuit-food-security/> accessed 20 August 2019.

839. Kuhnlein and others (n 836).

840. '*UN Special Rapporteur: Indigenous Peoples' rights must be respected in global climate change agreement*' (*Victoria Tauli-Corpuz*) <http://unsr.vtaulicorpuz.org/site/index.php/press-releases/61-clima-change-hrc> accessed 20 August 2019.

connection with their original ecosystem – notwithstanding the social and emotional effect of displacement as well.[841]

Generally speaking, rural-urban migration is the result of global and local policies mainly focused on urban progress to the detriment of the rural areas,[842] causing their metamorphosis, abandonment and depopulation. This is true for the most vulnerable territories of the world, and even more so for the Arctic.[843] Although the nomadic and semi-nomadic nature of

841. Notable witnesses to these environmental transformations are the inhabitants of the island of Kivalina. This small strip of land that stretches in the Chukchi Sea in the Northwest Arctic (Alaska) bases its survival on whaling, an activity that is made dangerous, and almost impossible, by the climate changes that are melting ice of that geographic area. Eskimo people of Kivalina risk actually to disappearing together with their land. Going away from there, is not easy though. Former President Barack Obama had proposed allocating a figure of 50,4 million dollars to support indigenous communities in dealing with climate change difficulties. However, "*there's no government agency that has the responsibility to relocate a community, nor the funding to do it*," revealed to the Washington Post Robin Bronen, the director of the Alaska Immigration Justice Project. "*It means that for communities like Kivalina, they don't know what steps they need to take to get which government agencies involved*". In short, a deadlock situation, where moving away is an opportunity that not everyone can afford; Chris Mooney, 'The remote Alaskan village that needs to be relocated due to climate change' (*The Washington Post*, 2015) <www.washingtonpost.com/news/energy-environment/wp/2015/02/24/the-remote-alaskan-village-that-needs-to-be-relocated-due-to-climate-change/?noredirect=on&utm_term=.d5aad2cbdf9e> accessed 20 August 2019.

842. Siri Damman and others, 'Indigenous peoples' nutrition transition in a right to food perspective' (2008) 33(2) Food Policy 135, 135-155.

843. In Canada, the ever young and growing aboriginal population is becoming increasingly urban. According to the 2006 Census, "*in 2006, 54%* [of them] *lived in urban areas (including large cities or metropolitan areas and smaller urban centers) up from 50% in 1996*". "*In 2006*" continues the report, "*Winnipeg was home to the largest urban Aboriginal population (68,380). Edmonton, with 52,100, had the second largest number of Aboriginal people. Vancouver ranked third, with 40,310. Toronto (26,575), Calgary*

some Indigenous Peoples of the Arctic must be recognized - think of Sámi, for example, Nenets, or even the Siberian Yakuts - moving to a completely different context, as the urban one, may not be that easy for Arctic Indigenous Peoples. City life, as such, does not allow one to carry on family farming activities, historically made by the indigenous on ice, in forests or with animals. In cities, the greater availability of industrialized and nutritionally poor food has accentuated the shift from an Arctic indigenous food system to a more standardized one, increasing the probability for Indigenous Peoples to develop cardiovascular diseases,

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(26,575), Saskatoon (21,535) and Regina (17,105), were also home to relatively large numbers of urban Aboriginal people". A similar story can be the one happening to Alaska natives, who have experienced a rural-urban migration between 2000 and 2010, due to a better urban management in communications and transportations, or to Greenland, where the vast majority of indigenous population currently live in urban settlement. Greenland in particular, "*has had a similar internal migration pattern as many other Arctic regions with depopulation of many rural villages and increased concentration into larger settlements, usually the capital. One factor driving this trend in Greenland*" Timothy Heleniak says in his paper *Migration in the Arctic, "has been a deliberate government policy towards centralization of government services because a decentralized system of settlements is expensive and faster and more dynamic growth can be achieved by focusing on the larger urban settlements. The policy of equal prices for consumer goods in all settlements was abolished in 1994 and in 2005, the equal price system for electricity and water was replaced by a more market oriented system causing huge price increases in smaller settlements and inducing some to migrate*"; '2006 Census: Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census: Highlights' (*Statistics Canada*) <www12.statcan.gc.ca/census-recensement/2006/as-sa/97-558/p1-eng.cfm> accessed 20 August 2019; Timothy Heleniak, 'Migration in the Arctic' in Lassi Heininen (ed), *Arctic Yearbook* (Northern Research Forum 2014) 11; Jack Kruse and others, 'Survey of Living Conditions in the Arctic (SLiCA)' (2008) 33 Barometers of Quality of Life Around the Globe 107, 107-134.

obesity and diabetes.[844] The full realization of own's right to food may be even harder in cities for Arctic Indigenous Peoples. There, the lack of adequate income can lead to denied access to services and decent housing conditions, as well as to quality food, exacerbating further the effect of being socially excluded and poor, compared to Arctic rural areas.[845] Poverty is in fact the greatest barrier to accessing healthy and adequate food, because it does not allow the purchase of it. Marginalization and socio-economic inequalities go hand in hand in this sense, problems that can then lead to domestic violence, abuse of narcotic substances[846] and suicide attempts.[847] These are phenomena that rural Arctic Indigenous Peoples are often able to escape from,[848] but which urban solitude may reinforce.

Having said that, the author would not simply praise the rural life as such. Rural life may also be synonymous with violence and patriarchy, where Arctic indigenous women

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844. Sangita Sharma, 'Assessing diet and lifestyle in the Canadian Arctic Inuit and Inuvialuit to inform a nutrition and physical activity intervention program' (2010) 23(1) Journal of Human Nutrition and Dietetics 5, 5-17.

845. Eduardo L Moreno and others, *Urbanization and Development: Emerging Futures, World Cities Report 2016* (United Nations Human Settlements Programme 2016) <www.unhabitat.org/wp-content/uploads/2014/03/WCR-%20Full-Report-2016.pdf> accessed 20 August 2019.

846. Paul J Seale and others, 'Alcohol problems in Alaska natives: lessons from the Inuit' (2006) 13(1) Am Indian Alsk Native Ment Health Res 1.

847. Sigmar Arnarsson and others, *Strategic Assessment of Development of the Arctic* (Arctic Centre, University of Lapland 2014), available at <http://library.arcticportal.org/1905/1/SADA_report.pdf>; Kruse and others (n 843).

848. Anne Silviken and others, 'Suicide among Indigenous Sami in Arctic Norway, 1970–1998' (2006) 21(9) European Journal of Epidemiology 707, 707-13.

may be victims.[849] The author rather aims to spotlight the ongoing hardships rural areas are nowadays experiencing, especially those analyzed through these pages, seriously affected by human action and consequent climate change. Malnutrition, lack of a means of livelihood, infrastructures, and adequate transportations has actually made it compulsory for many Indigenous Peoples to move from Arctic rural areas towards large urban centers. If on the one hand, concepts such as security and progress are often combined with the image of urban hubs, where access to more diverse products, as well as quality services, financial resources and information is available, on the other in cities, challenges such as slums, poverty and social exclusion,[850] precariousness, changing dietary patterns and access to less nutritious food have been emphasized. Trauma and detachment from original Arctic lands, representing a cultural identity, involves a total rupture from indigenous customs, including the ways of supplying and consuming food. More than men, the most threatened by these processes are youth[851] and indigenous women. The latter, in particular, are important stewards of these territories insofar as maintaining traditional knowledge from generation to generation, as well

849. Tahnee L Prior and Lena Heinämäki, 'The Rights and Role of Indigenous Women in The Climate Change Regime' (2017) 8 Arctic Review 133; Pauktuutit Inuit Women of Canada, *Understanding the needs of urban Inuit women* ((Government of Canada 2017) <www.pauktuutit.ca/wp-content/uploads/358996508-Final-Report-UAS-Urban-Research-April-2017.pdf> accessed 20 August 2019.

850. For reasons such as gender, age, ethnicity, race, religion, or social class. Eduardo L Moreno and others, *State of the Worlds' Cities 2012/2013* (United Nations Human Settlements Programme 2012) <https://sustainabledevelopment.un.org/content/documents/745habitat.pdf> accessed 20 August 2019.

851. UNCHR (830) 11.

as ensuring food security and sovereignty for their communities. They play a key role in the progressive realization of the right to food in the Arctic, especially in rural native communities, and are responsible for a large part of food production and transformation. However, this continuity is broken at the very moment in which women emigrate.[852]

4. Arctic Food Insecurity: The Way Out

4.1 International Outcomes

Due to a common understanding concerning the importance of Arctic rural areas and the role indigenous communities

852. Attracted by the greater economic and work opportunities the city offers compared to those in countryside, the rate of Arctic indigenous women moving to urban centers is high. As the *Demographic variation and change in the Inuit Arctic* points out, this is a relevant phenomenon in situations in which a rapid social change occurs, as happened also in East Germany. In the early 1990s, the indigenous rural communities of Alaska saw the displacement of a considerable number of girls rather than boys, who had shown their intentions to move permanently out of their communities. Men stayed, as much more dedicated to activities such as and fishing. "*Regional excess of males*" have been registered in rural areas of Newfoundland, Greenland, Faroe Islands, northern Scandinavia, and Russia. Gender imbalances that an exodus of this kind has brought with the years may be conceivable. On one side, indigenous male-dominated communities residing in the countryside were unable to give continuity both to territories and traditions. On the other, young indigenous women started to transplant themselves into urban contexts where the preservation of their cultural identities was not as secure as access to health and education services - for those who could obviously afford them; Lawrence C Hamilton and others (2018) 13(11) Environmental Research Letters, 8; Tim Leibert, 'She leaves, he stays? Sex-selective migration in rural East Germany' (2016) 43 Journal of Rural Studies 267, 267-279; Gail Fondahl and others, 'Indigenous Peoples in the New Arctic' (2015) The New Arctic 7, 7-22.

play in keeping local biodiversity alive,[853] efforts are required at the policy level to revalue both, ensuring that their native ecosystems have a future and do not lag behind as ecological and social wastelands. Except for the historical legal instruments recognizing the rights of Indigenous Peoples,[854] at the international level a number of outcomes have been made to recognize the rural dimension of Indigenous Peoples and better support rural-urban linkages for achieving adequate levels of food security and nutrition in both areas. They are the Voluntary Guidelines on the Right to Food and the Responsible Governance of Tenure, issued by the Food and Agriculture Organization (FAO) and the Committee on World Security (CFS);[855] the Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development; the New Urban Agenda;[856] the UN Decade of Action on Nutrition adopted at Habitat III;[857] and the just adopted

853. These being the territories where most of food consumed worldwide comes from; High Level Panel of Experts on Food Security and Nutrition, *Investing in smallholder agriculture for food security* (Committee on World Food Security, 2013) <www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE_Reports/HLPE-Report-6_Investing_in_smallholder_agriculture.pdf> accessed 20 August 2019.

854. Here referring to the UN Declaration on the Rights of Indigenous Peoples.

855. The Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Right to Food and the Responsible Governance of Tenure issues by the Food and Agriculture Organization* (FAO 2012) <www.fao.org/docrep/016/i2801e/i2801e.pdf> accessed 20 August 2019.

856. UNGA A/RES/71/256 (2017); United Nations, *New Urban Agenda* (Habitat III Secretariat 2017) <http://habitat3.org/wp-content/uploads/NUA-English.pdf> accessed 20 August 2019.

857. The Food and Agriculture Organization of the United Nations, *World Health Organization, United Nations Decade of Action on Nutrition 2016-2025* (FAO 2016) <www.fao.org/3/a-i6130e.pdf> accessed 20 August 2019.

UN Declaration on the rights of peasants and other people working in rural areas.[858] Driven by the necessity of creating a continuum between the rural and urban spaces, which can positively build up the resilience of rural-urban ecosystems and the needs of their indigenous dwellers, these proposals reframed "*the* [international] *policy environment around a more holistic approach to integrated policies*",[859] marking "*a significant and unprecedented shift towards de-constructing the rural-urban dichotomy*".[860] Nevertheless, the adoption of a comprehensive global framework remains a guiding principle, which should be followed by the translation into practice and monitoring of "*concrete models of inclusive public policies, multi-sectorial and multi-level governance, where the development and support of those most affected by food insecurity*".[861]

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858. UNGA A/C.3/73/L.30 (2018).

859. Committee on World Food Security, *Addressing Food Security and Nutrition in the Context of Changing Rural-Urban Dynamics: Experiences and Effective Policy Approaches with Draft Decision* (FAO 2017) 7 <www.fao.org/3/a-mu135e.pdf> accessed 20 August 2019.

860. ibid.

861. To better understand this concept, although referring to the issue of food sovereignty, the author considers it may be worth to mention the following extract: "*As a political project, food sovereignty will not succeed without building alliances between peasants and other social classes. […] It is only through active social mobilization and pressure from below that public policies that strengthen food sovereignty and are based on the Right to Food will crystalize. In this sense, it is important not to limit the understanding of public policies to a strictly legal, administrative or technocratic point of view but rather to view public policies as the outcome of a constant process of negotiation, contestation and state-society (duty bearers, rights holders) interaction. The outcome of this process is then contingent on the balance of social forces and the power of reform and radical minded groups within government and society to push through progressive agendas*"; Sylvia Kay and others, 'Public Policies for Food Sovereignty' (Routledge 2018) 5.

4.2 The Bottom-up Initiatives

The above mentioned international legal instruments - the Voluntary Guidelines on the Right to Food and the Responsible Governance of Tenure, the Sustainable Development Goals, the New Urban Agenda, the UN Decade of Action on Nutrition, UN Declaration on the rights of peasants and other people working in rural areas - can be distinguished for having drawn attention to the unequal treatment between worldwide urban and rural areas. However, internationally adopted solutions always require political commitment at the local level and long-term processes to be implemented. Top down actions should be nurtured from below, through a range of initiatives put in place by civil society actors, including the Indigenous Peoples themselves, who are embedded in specific contexts and struggle, day by day, to involve the most affected on a path toward change. This is the example of Slow Food, one of the most important non-profit organizations dealing with the protection and maintenance of biodiversity in the world, in terms of food, crops, seeds and knowledge. An organization with Italian roots,[862] Slow Food has been able to build a worldwide network of peasants, small farmers, breeders, cheese producers and many others working together to produce a new consciousness around food, advocating for the creation of a good, clean and right food system, made up of a quality food, produced without human and environmental exploitation and in harmony with taste.

Among the social constituencies Slow Food intends to safeguard, there are indigenous peoples, organized within

862. Slow Food was founded by Carlo Petrini in 1989 in Piedmont (Bra, Cuneo); C Petrini and G Padovani, *Slow Food. Storia di un'utopia possibile* (Slow Food Editore 2017).

the Indigenous Terra Madre (ITM) network. Bringing together 370 indigenous communities in more than 60 countries, including those in the Arctic region, since 2011 - the year of the first Slow Food event dedicated to ITM - this network is committed to raising awareness on the importance of keeping indigenous food systems alive, promoting their knowledge and visions on food production and transformation. Starting from the premise that Indigenous Peoples hold 67% of worldwide agrobiodiversity, Slow Food strongly believes in the potential of indigenous food systems, as one of the most resilient in tackling climate change issues and the consequent disappearance of natural resources generated by over-exploitation of rural areas and an intensive production and development system. Among the indigenous Arctic peoples who enthusiastically joined the creation of these communities, the following deserve to be mentioned: the Inupiat Campaigners for Traditional Alaskan Foods,[863] fighting for the preservation of their traditional diet, essentially based on products derived from fishing. Likewise, the Finnish association "Snowchange",[864] gathering representatives from Sámi, Chukchi, Yukaghir, Inuit, Inuvialuit and Inupiat people, are constantly struggling for the protection of Arctic biodiversity and conducting important research in this regard, thanks to their partnership with local communities and organizations such as the Arctic Council, the Intergovernmental Panel on Climate Change, the Indigenous

863. 'Indigenous Inupiat Campaigners for Traditional Alaskan Foods' (*Terra Madre*) <www.terramadre.info/en/food-communities/indigenous-inupiat-campaigners-for-traditional-alaskan-foods/> accessed 20 August 2019.

864. 'Snowchange' (*Terra Madre*) <www.terramadre.info/en/food-communities/snowchange/> accessed 20 August 2019.

Peoples Climate Change Assessment and the National Science Foundation of the USA.

Promoting indigenous food systems in an increasingly standardized world and leveraging local food production at risk of disappearance are thus the main goals of the Slow Food ITM. To support them, it is important for them to rely on a specific project put in place by Slow Food itself, aiming at denouncing the disappearance of certain indigenous animal and vegetable species, as well as the processing techniques relating to specific indigenous knowledge and traditions, thus launching a worldwide warning to take concrete action to safeguard them. This is the Ark of Taste, a sort of catalogue that, for the Arctic region, collects several traditional indigenous products, including the Sámi Mountain Sorrel,[865] the Sámi Ember Flat Bread,[866] the Sámi Reindeer Cheese[867], the Arctic bramble also known as *Åkerbär*,[868] the Nenets Bread,[869] the Nenets Jutu

865. 'Mountain Sorrel' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/ark-of-taste-slow-food/sami-mountain-sorrel/> accessed 20 August 2019.

866. 'Sámi Ember Flat Bread' (*Slow Food Foundation for Biodiversity*) <hwww.fondazioneslowfood.com/en/ark-of-taste-slow-food/sami-ember-flat-bread/> accessed 20 August 2019.

867. 'Reindeer Cheese' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/ark-of-taste-slow-food/reindeer-cheese/> accessed 20 August 2019.

868. 'Arctic bramble' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/ark-of-taste-slow-food/arctic-bramble/> accessed 20 August 2019.

869. 'Nenets bread' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/ark-of-taste-slow-food/nenets-bread/> accessed 20 August 2019.

Fish[870] and Nenets Fish Oil,[871] the Sámi Reinder Gurpi[872] and Reinder Suovas.[873] These last two, in particular, are also defined as Slow Food Presidia, another historic project by the Piedmont organization, that not only spotlights the disappearance of certain types of food, but also takes action to ensure their production in the years to come, directly connecting with local producers and planning concrete initiatives together to support them.

Both projects, the Ark of Taste and Slow Food Presidia, have been designed by Slow Food to be accessible to everyone: citizens, rural indigenous communities and food professionals. This is possible during events that Slow Food has been organizing since 1996 – such as Terra Madre Salone del Gusto, Slow Fish and Cheese – or by promoting experiences of responsible tourism. The latter is meant to be an important factor for raising social and cultural development of rural landscapes, which can be translated into economic potential and empowerment for indigenous communities, as well as for nourishing territories that would be otherwise grabbed by an aggressive model of exploitation by

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870. 'Nenets jutu fish' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/ark-of-taste-slow-food/nenets-jutu-fish/> accessed 20 August 2019.

871. 'Nenets oil fish' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/ark-of-taste-slow-food/nenets-oil-fish/> accessed 20 August 2019.

872. 'Sami cure reindeer meat' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/slow-food-presidia/sami-cured-reindeer-meat/> accessed 20 August 2019.

873. 'Reindeer suovas' (*Slow Food Foundation for Biodiversity*) <www.fondazioneslowfood.com/en/slow-food-presidia/reindeer-suovas/> accessed 20 August 2019.

non-Arctic indigenous peoples. On this subject, Slow Food has recently launched a new project called Slow Food Travel that will allow travelers to get in touch with local food communities, including indigenous ones, so they can personally support the Ark of Taste and Slow Food Presidia products. Being a young project, Slow Food Travel has not reached the Arctic region yet. However, regardless of the timing needed to fully implement such an initiative, it is here understood that projects of this type are interesting ways to bring remote territories and the food systems included therein into focus, push for a new attitude towards food, and return to rural life and bring indigenous productions the value they deserve.

4.3 Resilience Stories

The engagement of indigenous local actors is particularly crucial to overcoming food challenges that climate change, the consequent impoverishment of rural areas, and the increasing standardization of food pose every day, mostly in those regions where the institutional apparatus is fragile. An example of good practice for the enhancement of Indigenous Peoples local knowledge is the one provided by the reindeer herders in Siberia, where their knowledge, combined with that of scientists, have resulted in elaborating concrete measures to bridge the distance between indigenous and scientific expertise, thus safeguarding animals from the severe effects of climate change, development, tourism, damming of rivers, cultivation, oil and gas development, as well as roads and power lines.[874] This is true for the northern part of Norway,

874. Nancy G Maynard and others, *Eurasian Reindeer Pastoralism in a Changing Climate: Indigenous Knowledge & NASA Remote Sensing* (NASA 2008) 3 <https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20080041555.pdf> accessed 20 August 2019.

Finnmark, but also in Yamal-Nenets Autonomous Region of Russia. Given the high concentration of Sámi and Nenets people, these are the two regions where funding was allocated. From this mixture of know-how, IPY EALAT (standing for "Reindeer Herding in a Changing Climate") was born,[875] a project contributing to creating shared solutions to combat climate change and the way it impacts on reindeer pastures, modifying, as set out in the previous paragraphs, nutrition and transhumance. Thanks to the collaboration between the National Aeronautics and Space Administration (NASA) and the Association of World Reindeer Herders, reliability and predictability of new technologies could identify factors capable of influencing reindeer pastures (*ealat* in Sámi language), including climate change, thus allowing the concerned indigenous shepherds to change the pasture paths of animals.[876] Like Slow Food, IPY EALAT can be regarded as a genuinely innovative project where Indigenous Peoples are not under study, but rather active subjects in developing solutions enabling them to observe the variability of the climate, be aware of changes and make decisions in this respect.

A similar participatory methodology was also applied to conduct a study about the promotion of traditional knowledge and country food as a means for the Inuit community members livelihood in Pangnirtung, indigenous settlement in the region of Qikiqtaaluk (Nunavut, Canada), to improve their well-being and adopt healthier lifestyles. Since the end of the 1990s, the survey has seen the direct involvement of

875. ibid 2.

876. These technologies are optical sensors for pasture quality, microwave sensors for pasture quality, radio tracking of reindeer herds; for more information, see Maynard and others (n 874).

the Centre for Indigenous Peoples' Nutrition and Environment (CINE), as well as other indigenous organizations and local institutions, including the Inuit Tapiriit Kanatami and the Government of Nunavut Health and Social Services Department. This work has photographed the local indigenous food systems by identifying 79 food species and varieties at the foundation of traditional Inuit nutrition, including their nutritional values, at the same time highlighting the major challenges for its maintenance, such as transition to diets more rich in saturated fat, scarcity of traditional ingredients, with few possibilities to afford healthy meals. Data have then been transposed into concrete and creative actions by the Inuit themselves, spanning from story-telling to radio entertainment, directly engaging with local community, youth and grocery stores [877] on the importance of a healthier and sustainable food system, as a pattern capable of restoring knowledge on what traditional food actually means for them.

The willingness to adapt and respond positively to a quickly occurring transition, the ability to promptly and creatively organize, as well as the flexibility in combining one's own customs with a science-based methodology, enable indigenous communities to work out creative methods that would allow them to stay on their land of origin, thus becoming resilient. Resilience stories form part of a universe of independent initiatives that make sure that the cultural, social and economic needs of Arctic indigenous communities are embraced, making these experiences concrete models of inclusiveness and activism at the local level, where the support of rural indigenous communities is highlighted and

877. The Food and Agriculture Organization of the United Nations (n 792) 9-22.

prioritized. As Vandana Shiva recalls, "*the social perspective constitutes a new kind of approach to food related problems*" - and to the climate change the author would dare to add – "*different from the merely political one*".[878] Indigenous Peoples struggles have the possibility to trigger a change in the way Arctic landscapes are portrayed. This would mean reframing rural-urban dynamics by contributing to rural repopulation, giving control over land, water and other natural resources back to indigenous peoples, improving diets and taking into account the dignity of the Arctic human and cultural heritage. Such stories help to build ecological and local food systems where Indigenous Peoples can enhance sovereignty on what they historically produce and eat. In other words, spaces where the use of traditional knowledge and agricultural biodiversity trigger autonomous innovations and sustainable models of production. Furthermore, they need to rely on solidarity economics and networks, each of them substantially leading to an inclusive access to Arctic biodiversity, employment creation, social cohesion and virtuous economic dynamics.[879] There is nothing surprisingly new in such a process. Resilience-based indigenous food systems, as well as the way they carry on family farming activities, can be a new old alternative to the violent development policies that contributes to rural depopulation, fomenting rural-urban migration and social inequalities. Starting from the priority of rediscovering a sense of identity, oneness and belonging to a certain community, resilience stories stand for political symbols of transition that deserve to be told.

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878. Carlo Petrini, *Loving the Earth* (Slow Food Editore 2014), 13.

879. Emily A Frison, *From uniformity to diversity: a paradigm shift from industrial agriculture to diversified agroecological systems* (International Panel of Experts on Sustainable Food systems 2016).

4.4 The Role of Civil Society

In order for these initiatives to be scaled up further, in addition to building and strengthening indigenous networks and alliances, nationally and internationally, it ought to be always borne in mind that a constant and horizontal dialogue with governments is fundamental to politicize these connections and incorporate solidarity and ecology into the political debate. An example is the Arctic Council, whose governance can be defined as participatory, and is composed of representatives of indigenous peoples, local communities, and governments. Or still, at the international level, the unique sharing space of the Civil Society Mechanism (CSM) within the Committee on World Food Security in Rome (CFS).

Since 1974, the CFS has had its seat in Rome, within the headquarters of the specialized agency of the United Nations (UN) for Food and Agriculture (FAO). It is the foremost inclusive international and intergovernmental body, engaging those key actors who contribute to achieving world food security and nutrition. The UN's Rome-based agencies,[880] national governments, and private sector and civil society representatives take part in the organization, debating and working towards the issuing of policy outcomes that recommend Member States making political commitments to implement appropriate measures in the fight against food insecurity. Over the years, civil society organizations have reinforced their worldwide role on food governance matters, by designing an international meeting and discussion space within the CFS. This is the Civil Society Mechanism

880. These are the Food and Agriculture organization (FAO), the World Food Programme (WFP), the International Fund for Agricultural Development (IFAD).

(CSM) for the relations with the UN CFS. There, different sections of civil society, including indigenous peoples, rural workers, women, youth, smallholders, fishermen and many others, gather several times a year to meet and debate with government representatives on the main challenges affecting food security and nutrition all over the world.

Urbanization and rural transformation is one of the issues about which indigenous communities, urban consumers, rural workers and NGO representatives have been debating, in order to advocate for more coherent policy recommendations that adopt a more integrated and holistic approach to ever-evolving rural-urban dynamics. The "Urbanization, rural transformation and implication for food security and nutrition" workstream is one of the eleven Policy Working Groups established by the CSM.[881] Set up in 2016 to develop a clear civil society position within the CFS Policy Agenda addressing the threats and opportunities arising from urbanization and rural transformation processes. This Working Group is built on the understanding that the metamorphosis of rural areas represents a challenge for inclusive growth, poverty eradication, economic, environmental and social sustainability, economies, and local and indigenous food and nutrition systems. Therefore, the CSM Working Group on Urbanization and Rural Transformation is making an effort to push governments to approve policy outcomes that contribute to bridging the rural-urban gap and find coherence between food security and nutrition and the broader rural development and social protection

881. Among others should be mentioned Argoecology, Connecting Smallholders to Market, Global Food Governance, Nutrition and Food Systems, Protracted Crises, SDG, Sustainable Forestry and Women.

objectives and actions. However, no comprehensive policy recommendation on urbanisation, rural transformation and their implications for food security and nutrition has been approved yet by the CFS. Assuming that this will happen soon, the author is firmly convinced that it would be a useful opportunity for the states to commit themselves to empowering rural areas and their Indigenous Peoples, scaling up the experiences already in place and providing the conditions for many others to follow.

Every single actor has an important role to play to this extent. State and civil society organizations play a crucial role in making the grassroots experiences more visible, shaping the future of rural areas and the indigenous food systems within. This would pave the way to, first, receiving attention from institutions at any level of governance; second, to being translated into further comprehensive policy instruments and rebalancing power relations. Certainly, this is not something that will be reached in one day, but is a rather long-term process, which runs into the complexity and diversity of contexts and local communities, as well as the evolving nature of territorial dynamics – the latter even more delicate when referring to the Arctic region. This implies the need to keep the balance among several components, such as indigenous rights, landscape protection, and inclusive systems of governance. Only by valuing each of them in connection with the others, the survival of Arctic spaces will be guaranteed, without leaving their Indigenous Peoples behind.

5. Conclusion

The indigenous question connected to climate change, abandonment of rural areas and radical changes in indigenous dietary habits and lifestyles is a complex issue that cannot be solved in isolation from other political considerations. What has been conveyed through these pages is a critical vision of the different issues at stake, then proposing a positive agenda for change, made up of small examples and concrete resilience experiences already in place. In order to ensure that a real and lasting change in the world's most troubled regions will be fully realized, special attention should be paid to a careful assumption of responsibility by corporations and consumers, more and more eager to have access to exhaustible resources. For this reason, it is key to deal with the phenomenon with great attention, considering it not as a distant problem, but the consequence of policies and short-sighted choices that concern citizens of a globalized world closely.

It is everyone's responsibility to be aware of the historic change going on around, and because of a certain development model. And, *a fortiori*, it is a collective responsibility to change the path that has been taken up to this point, endorsing a paradigm shift, a new collective narrative. Globalization and neoliberal policies have had disastrous consequences on world's natural equilibrium, especially for the most vulnerable areas to the effects of climate change, such as the Arctic region. Echoing the words of Amitav Ghosh in his book, *The Great Derangement*,[882] the science that now warns about climate change and its disastrous implications

882. Amitav Ghosh, *The Great Derangement: Climate Change and the Unthinkable* (University Of Chicago Press 2016).

for society and environment, is the same science that constantly triggers the capitalist system and the inequality of wealth distribution under which people live, often too blind - or better deaf - by the promise of endless growth. As on a pool table, every action has an equal and opposite reaction: what happens in the Arctic does not remain only in the Arctic, as also said by the NOAA chief Timothy Gallaudet,[883] but it also impacts on southern countries and people, including indigenous ones.

Climate changes, in terms of weather and temperatures, have always occurred in the long life of the Planet: glaciations, for instance, the enormous cataclysms that have created the most famous deserts on Earth, or even hydrocarbon reserves. What is extracted from the subsoil, mainly known as oil or natural gas, is nothing but residue of organic material, including animals, lands and forests, sunk millions of years ago. The geological era currently ongoing, the so-called Meghalayan, began 4200 years ago with a severe drought, causing the collapse of many civilizations, including those living in Egypt, Greece, Syria, Palestine, Mesopotamia, the Indus and the Yangtze River Valley.[884] In short, a set of not necessarily anthropogenic transformations that the Earth witnessed in the past have made life possible. On the

883. 'Arctic permafrost thawing faster than ever, US climate study finds' (*The Guardian*, 12 December 2017) available at <www.theguardian.com/environment/2017/dec/12/arctic-permafrost-sea-ice-thaw-climate-change-report>.

884. Mike J C Walker and others, 'Formal subdivision of the Holocene Series/Epoch: a discussion paper by a Working Group of INTIMATE (Integration of ice-core, marine and terrestrial records) and the Subcommission on Quaternary Stratigraphy (International Commission on Stratigraphy)' (2012) 27(7) Journal of Quaternary Science 649, 649-659.

contrary, since the beginning of the industrial revolution, human-induced climate change is accelerating a process of environmental metamorphosis, whose consequences are taking place at an uncontrolled speed, with no turning back.

A culture of planning, prevention and resilience are a prerequisite for actively working towards putting an end to exploitation of natural ecosystems, while supporting Indigenous Peoples with new technologies that contribute to a more efficient climate change reduction. Resilience should certainly be combined with an early cessation of new lifestyle choices, mostly spreading in emerging countries and driven by the immediate and rapid increase in individual well-being, that unfortunately also entails large and polluting energy waste. This, in conjunction with the necessity of having an informed public able to leverage governments and states to shift from predatory environmental and food policies into more inclusive and viable ones. In other words, a multilevel commitment needs to be pursued. The inadequacy and limits of our current exploitation pattern should be disclosed, while recognizing that the knowledge coming from the complexity and diversity of local and indigenous systems is a true heritage and not only folklore.

A broader, longer-term and prompt vision is needed, to safeguard those lands, peoples and food traditions that have existed for thousands of years. To make this possible, small experiences of change coming from the custodians of biodiversity, as Arctic indigenous communities are, should be carefully cultivated and underpinned. It does not matter if these experiences are too small to counter the strong powers of the world leading economies. Their strengths, voices and multitude, should be listened, because, as Carlo Petrini says:

"*someone who loves the Earth is there, we are many, and when we count ourselves we remain almost thrilled for what has been built and for what we can still achieve*".[885]

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885. "*Qualcuno che vuole bene alla terra c'è, siamo in tanti, e quando ci contiamo rimaniamo quasi basiti per quello che è stato costruito e per quello che possiamo ancora realizzare*"; Petrini (n 878) 8.

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