Traditional knowledge and customary law

Recognizing indigenous peoples for environmental conservation

Giada Giacomini 2020-06-25T09:00:44

While the world's 370 million of persons belonging to an Indigenous people account for less than five percent of the total human population, they hold tenure over 25 percent of the world's land surface. These lands represent about 80 percent of the global biodiversity. This blog post critically reflects on the role of Indigenous peoples in the conservation of the environment, considering the legal analysis of the biodiversity conservation regime provided in Federica Cittadino's book discussed within this book symposium. It serves a twofold purpose: on the one hand, it highlights the crucial legal aspects mentioned in the book and relates them to the inclusion of Indigenous peoples in the Convention on Biological Diversity (CBD) context. On the other hand, it seeks to put Cittadino's critical aspects in a different light mainly by considering issues of legal pluralism and the inclusion of non-Westernized governance systems. My approach focuses more on the political sciences than on the legal perspective of the topic. This comprises the consideration of power dynamics and imbalances, historical exclusion and indirect perpetuations of colonial dynamics.

Cittadino's book provides a punctual and exhausting analysis of the CBD regime with regard to the incorporation of Indigenous peoples' rights. In the first part of the book, the author duly presents a detailed analysis of past and current developments in the human rights realm aimed at the protection of Indigenous' rights with a stimulating focus on the interplay between human rights and the environment. The author emphasizes the constant tension between States' prerogatives, such as the principle of sovereignty over national resources, and Indigenous rights. In fact, Indigenous peoples – having their own culture, languages and territories – might qualify as nations within the borders of the State they live in. Legal regimes aiming to protect Indigenous peoples might foster the concern of States about a possible loss of territorial sovereignty.

The author gives evidence that the core rights intended to shield the cultural survival of Indigenous peoples, namely right to self-determination, right to land and resources, and Free Prior and Informed Consent, are by no means intended to provoke a secession of Indigenous nations from States. Historically, they are a result of the negotiations between Indigenous leaders and States that led to such compromises. Rather, they aim at granting the collective right to existence as a people and to maintain cultural distinctiveness.

Legal Interplay of Different Regimes

The book analyses the interplay between and coexistence of international human rights law and biodiversity and conservation law, considering the necessity of preserving Indigenous prerogatives in the context of access to Traditional Knowledge (TK), conservation projects and benefit-sharing. Cittadino applies a human rights approach in the interpretation of the norms contained in the Convention on Biological Diversity (CBD) and in the Nagoya Protocol and voluntary guidelines, highlighting their complementary and mutually enhancing function. This "interpretative approach", as defined by the author, seeks to read the conservation regime together with current developments in international human rights law, and vice-versa, ensuring the respect of the highest standards possible for Indigenous peoples' rights.

Throughout her book Cittadino points to different critical aspects of the CBD regime regarding the protection of Indigenous peoples' rights. From my own perspective, particularly significant are the debates around recognition of Indigenous TK and the "legal pluralistic fashion" put forward in the Nagoya Protocol (p. 199). Another crucial theme concerns the participation of Indigenous peoples in the negotiations of Mutually Agreed Terms (MATs) in relation with access to genetic resources and benefit sharing, in light of the fact that the Protocol "delegate[s] to state parties individually to develop model contractual clauses and voluntary standards" (p. 228).

However, practical issues concerning the meaning and challenges in the actualization of such provisions are not addressed in the book – for example, the conceptual underpinnings of Indigenous legal pluralism in light of this broad manoeuvring space left to States. Indigenous peoples' distinctive cosmovisions and non-anthropocentric conceptions of law consistently differ from Westernized legal systems. Thus, Indigenous narratives need to be addressed when considering the concept of legal pluralism. How has the recognition of Indigenous legal pluralism and TK enshrined in the Nagoya Protocol to be interpreted in light of these blind spots of the CBD regime?

Some Light on the Blind Spots of the Nagoya Protocol

In response to this question, the next sections of the blog post suggest an interpretation of the Nagoya Protocol to curb current problems of global environmental governance. It considers the challenges deriving from the recognition of Indigenous TK and customary law in Western legal systems.

Presently, the profound, varied and locally rooted Indigenous knowledge can help to improve biodiversity conservation, managing protected areas and even tackling climate change impacts. Whilst their important role is recognized and enhanced through the CBD regime, Indigenous peoples still face dramatic issues of forced relocation, misappropriation of their lands, cultural losses due to modernisation processes and generalised violations of their human rights, including disrespect of the obligation to obtain consent and killing of environmental defenders. It is particularly pressing to consider global justice and ethical aspects when dealing with questions of Indigenous peoples' rights.

The incorporation of non-Western legal systems in national and international governance mechanisms is crucial in terms of meaningful participation of Indigenous peoples in environmental governance, as prescribed by international human rights law and by the CBD regime. The author addresses the issue of participation Chapter Four by providing a detailed analysis of the CBD Programme of Work on Protected Areas. However, meaningful participation is by no means a straightforward process and poses constitutional and legal questions. It would require accepting and including Indigenous views in a positivistic system of law that traditionally considered customary law as a non-law, or at least hierarchically inferior to Western law.

In fact, the State-centred structure of the CBD system, although recognizing customary law and community protocols as legitimate sources of law, could in practice result in a translation of different levels of recognition between States and non-State legal subjectivity. States acting "in accordance with domestic law" rely on legal sources that follow fixed criteria. In this case, Indigenous legal systems are subjected to the positivistic rule of law as a standard to determine what must be considered law.

The term "customary law" has been rejected by Indigenous peoples when applied to their living law. Such definition might imply a certain degree of denigration of their legal regimes and subordination to the positive law of the State. This is due to the legacy of colonial and post-colonial regimes and their logic of subordination of Indigenous culture and its unfair consideration as 'primitive'. Customary law is not, indeed, at the basis of all Indigenous law, which may also be in written from, positivistic-derived or based on natural law. The term customary law is wrongfully applied to all types of Indigenous peoples' legal systems, but this reference continues to be used by contemporary legal scholars, Indigenous representatives and academics, playing a significant role in international negotiations. Seemingly the book adopted a general definition of Indigenous customary law, without delving into considerations stemming from other disciplines such as legal anthropology. However this aspect is made clear in the introduction, where the author states: "From a methodological perspective the questions asked and the tools used in this research are perfectly in line with a classic approach to international law, as a law made by States for States […]this book is mainly concerned with the classic sources of international law and the parallel obligations incumbent on States" (p. 5).

Non-anthropocentric Approaches to the Environment

Another concern that arises from the previous considerations, regards the integration and translation in Western systems of law of Indigenous peoples' worldviews and cosmologies. Whilst it is out of the scope of the book to address such themes, it is central to consider that Indigenous customary law is often intrinsically embedded in their ancestral lands, spirituality and culture. This underlying connection is due to the particularity of Indigenous cosmovisions that perceive the territory and natural elements as sacred; thus, the law is not man-made but derived from the natural world, which human beings have the duty to preserve. For example, in Yanesha cosmology, the landscape is seen as "sacred" because forests, mountains and other geographical sites represent the physical places where Yanesha ancestors lived,

and still watch over their children. The preservation of forests is seen as a duty towards present and future generations.

Indigenous law and TK denote a non-anthropocentric conception of the environment, prescribing communal and collective aspects of ownership grounded in a spiritual value system that includes the rights of future generations. In many Indigenous cosmovisions, natural resources and landscapes are not something to "own". On the contrary, they are "inherited" from ancestors and they need to be preserved avoiding the long-term effects of environmental degradation for the use of present and future generations. The challenge ahead is to find ways and best practices to mediate and reconcile States and Indigenous legal conceptions in order to guarantee a fair benefit sharing and respect of the rights of Indigenous peoples when accessing their TK.

A possible way to achieve this objective is represented by the institution of redress mechanisms. According to the Nagoya Protocol, States must take into consideration customary law even in the resolution of disputes. But the actualization of this disposition in practice poses several challenges, like proof and application of customary law and ensuring ways of securing access to justice. Cittadino addresses these challenges in Chapter Three, dealing with the tools for reconciliation provided by the CBD regime, arguing for the auxiliary function of the UN Declaration on Indigenous Peoples Rights within the MATs and benefit-sharing contexts. Such issues need to be faced through cooperation with and participation of Indigenous peoples in decision-making procedures in order to protect TK from inappropriate and predatory use. By using these tools, the risk of inequitable transitions among Indigenous peoples, States and third-party users of TK would be avoided.

In light of these considerations, the book certainly offers a thorough and consistent legal analysis of the CBD regime in light of fundamental Indigenous rights. It shows how the environmental conservation regime provides a superior protection to Indigenous peoples' rights compared to the instruments of international human rights law – for example, with regards to TK. It offers an outstanding legal basis for future research and advocacy work for the protection of Indigenous peoples' rights in relation to TK and biodiversity conservation. Similarly, the book provides interesting legal insights for what concerns participatory rights of Indigenous peoples, which could be analysed by taking into consideration the non-anthropocentric approach of Indigenous customary law suggested in this post, not only in the CBD context but also in the climate change law realm.

Giada Giacomini is a researcher in International Order and Human Rights at La Sapienza University of Rome. She recently completed her Ph.D. degree with a research project entitled Indigenous Peoples and Climate Change: Addressing Environmental Injustice*. She was appointed as Visiting Researcher for two academic semesters at the Strathclyde Centre for Environmental Law and Governance, respectively in 2018 and 2019. She completed an investigation project in Peru with Yanesha Indigenous communities, hosted by the Indigenous NGO Chirapaq, in October and November 2018. She also worked as invited scholar at Nottingham*

Trent University (UK) and Temuco Catholic University (Chile). Giada's background in in International Cooperation (M.A.) and Political Sciences (B.A.).

Cite as: Giada Giacomini, "Traditional knowledge and customary law – Recognizing indigenous peoples for environmental conservation", *Völkerrechtsblog*, 25 June 2020.
