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EXPLORING PLURALISM: BUILDING RESILIENCE AND RESPECT

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Abstract

When the British came to Australia in 1788, they brought with them notions of land governance based upon commerce and individual ownership that were in sharp contrast with those of the original inhabitants whose land governance systems were underpinned by communal ownership and inalienability.

Ignoring the knowledge and techniques of the Aboriginal people well adapted to the land, the British settlers dispossessed the original inhabitants of their land. Despite the impact of dispossession, Aboriginal governance systems and relationships to land remain strong.

Even after recognition of Indigenous land rights, traditional land governance systems are required to give way to Western notions of land management. The challenge is to reconcile Western land policy approaches with Indigenous concepts. The way forward is a dialogue based on respect for Indigenous land governance systems, rather than a desire that they "yield" to, and conform with, non-Indigenous land policies.

Key Words: land governance, pluralism, resilience, respect

LEGAL PLURALISM

Legal pluralism is the corollary of colonialism.

It is usually taken to refer to a situation where two or more different legal systems exist within the same geographical area. It is not restricted to developing countries, nor is it a recent phenomenon (Tamanha 2008).

Research on legal pluralism began in the study of colonial societies where the colonisers imposed their legal systems on societies with far different legal structures. This kind of legal pluralism more often gives rise to, or perpetuates, unequal power relations (Merry 1988: 874). Yet even in the face of dominant colonial legal systems, the legal systems of colonized peoples have shown great resilience.

There are a variety of terms used to discuss the systems or normative orders that are the components of a legally plural system. The dominant system is commonly termed "law" or "state law" or sometimes "positive law". A distinction is then drawn between "law" and "custom".

In an early influential article on legal pluralism, the relationship between law and custom was described dichotomously (Diamond 1973: 322-323):

> *Custom – spontaneous, traditional, personal, commonly known, corporate, relatively unchanging – is the modality of primitive society; law is the instrument of civilization, of political society sanctioned by organized force, presumably by society at large, and buttressing a new set of social interests. Law and custom both involve the regulation of behaviour but their characters are entirely distinct; no evolutionary balance has been struck between developing law and custom, whether traditional or emergent.*

The argument continues that the advance of law contradicts and extinguishes custom.

In colonial settings, pre-colonial law of the territory which was recognized or accepted by colonial governments was labelled "customary law". It was predominantly oral, rather than written, and derived from sources outside the colonial state; hence the term *sui generis*.

The notion of an unchanging custom or customary law was a myth of the colonial era; numerous writings illustrate how customary law changed or adapted in the context of colonisation. Further, the versions of customary law which were recognized or accepted more readily by European colonisers were those which best fitted western ideologies of land ownership and other legal relations (Merry 1998: 875).

INDIGENOUS PEOPLES AND CUSTOMARY LAW

There are significant differences between customary laws of Indigenous peoples and state law. Those differences as not so much in terms of oral versus written traditions. Rather, the difference is more in terms of the nature, rationale and principles of these two legal frameworks.

Customary laws embody the cosmologies and values of Indigenous societies that have evolved from their fundamental and unbreakable relationship with land and waters and the creator(s) of their cosmos. For example, the notion of property ownership as understand in western legal systems, which focuses on the right of the individual and is intrinsically economic in nature, does not exist in many Indigenous communities. Rather, the emphasis in Indigenous communities is placed instead on sacredness, spirituality and relational value of resources, and the collective ownership and responsibilities of property (Shimray 2011: 8).

In short, Indigenous peoples legal systems are embedded in their complex relationships with their ancestral lands. It is a natural system of obligations and benefits flowing from a belief in a "person-land-ancestral" relationship which encompasses all dimensions of life.

By way of example, in reference to Mayan law (Shimray 2011: 11-12, citing Mayen 2006):

> *Customary indigenous law aims to restore the harmony and balance in a community; it is essentially collective in nature, whereas the western judicial system is based on individualism. Customary law is based on the principle that the wrongdoer must compensate his or her victim for the harm that has been done so that he or she can be reinserted into the community, whereas the western system seeks punishment.*

The differences between the customary law of Indigenous peoples and westernized state law is most acute when considering land tenure. For many Indigenous peoples around the world, the land is life itself. As a Palyku woman from the Pilbara region on north-western Australia explains (Kwaymullina 2005):

> For Aboriginal peoples, country is much more than a place. Rock, tree, river, hill, animal, human – all were formed of the same substance by the Ancestors who continue to live in land, water, sky. Country is filled with relations speaking language and following Law, no matter whether the shape of that relation is human, rock, crow, wattle. Country is loved, needed, and cared for, and country loves, needs, and cares for her peoples in turn. Country is family, culture, identity. Country is self.

Every aspect of Indigenous peoples lives is connected to the land, and the relationship is often expressed as "the land owns us". The relationship with land is communal.

European concepts of land and property focus on land being something owned by an individual, a commodity to be bought and sold, an asset to make a profit from, but also a means to make a living off, or simply to live upon.

These European understandings of the relationship between land and property rights have their genesis in the theories of John Locke, whose labour theory of property as propounded in the seventeenth century, was used as a basis to justify colonial expropriation of land. If land was left "unused" or "uncultivated" by its Indigenous inhabitants, Europeans had the right to take possession of it, and bring it into production. This developed into the doctrine of *terra nullius* (land without occupiers) in international law, and the notion of "desert uninhabited" or "desert uncultivated" which was deployed to justify colonial dispossession of Indigenous peoples from their lands.

It is therefore no surprise that the derivatives of the "colonization", which is a process by which a central system of power dominates the surrounding land and its components, import these notions. The term "colonization" derives from the Latin words **colere** ("to cultivate, to till")**, colonia** ("a landed estate", "a farm"), **colonus** ("a tiller of the soil", "a farmer"), then, by extension "to inhabit".

SHORT HISTORY OF EUROPEAN COLONIALISM

Colonialism began in the fifteenth century with Portugal's conquest of Ceuta. It was led by Portuguese and Spanish exploration of the Americas, and the coasts of Africa, the Middle East, India and East Asia. Despite some early attempts, it was not until the seventeenth century that England, France and the Netherlands successfully established their overseas empires.

At the end of the eighteenth and early nineteenth century came the first era of decolonization when most European colonies in the Americas gained their independence. Spain and Portugal were irreversibly weakened after the loss of their New World colonies, but Britain, France and the Netherlands turned their attention to the Old World, particularly South Africa, India and South East Asia, where coastal enclaves had already been established. Germany also sought colonies in German East Africa.

The industrialization of the nineteenth century led to what has been termed the era of New Imperialism, when the pace of colonization rapidly accelerated, the height of which was the Scramble for Africa. During the twentieth century, the overseas colonies of the losers of World War I were distributed amongst the victors as mandate. It was not until the end of World War II that decolonization began in earnest.

As that short history shows, although Europe represents only about 8 per cent of the planet's landmass, between 1492 to 1914, Europeans conquered or colonised more than 80 per cent of the entire world (Hoffman 2015).

INDIGENOUS PEOPLES AND COLONIALISM

Being dominated for centuries has led to lingering inequality and long-lasting effects in many formerly colonised countries, including poverty and slow economic growth. The impact on Indigenous rights in most places has been profound and is on-going.

When the British came to Australia in 1788, they regarded it as *terra nullius* or an empty land. Due to the absence of European farming techniques, the land was considered unaltered by man and therefore treated as uninhabited, despite the obvious presence of Indigenous people.

Early explorers had painted a picture of an immense tract of land sparsely populated by a few primitive people who were unclothed, with rudimentary shelter who knew nothing about cultivation – and who wandered around in small parties from place to place searching for food. This portrayal was part of the argument used by white settlers to justify dispossession of the original occupants from their lands.

In 1840, Lieutenant William Hobson, following instructions of the British government, proclaimed British sovereignty over all of New Zealand; the North Island on the basis of cession through the Treaty of Waitangi and the southern island by pronouncing the southern island of New Zealand to be uninhabited by civilized peoples (Williams 1985: 44), which qualified the land to be *terra nullius*, and therefore fit for the Crown's political occupation.

The term "territorium nullius" was used in the late nineteenth century to describe the situation where European powers were taking possession of colonies with the claim that the local people did not have sovereignty, although their land ownership may be recognised (Fitzmaurice 2007: 12-13). An example of this approach was "the Scramble for Africa" in the late nineteenth century.

A counter-part to this was the Doctrine of Discovery which provided a framework for Christian explorers, in the name of their sovereign, to lay claim to territories uninhabited by Christians. If the lands were so vacant, then they could be defined as "discovered" and sovereignty claimed.

When Christopher Columbus, sponsored by King Ferdinand of Spain, arrived in the Americas in 1492, it is estimated that there about 100 million Indigenous peoples who had been living their traditional lives on the land since time immemorial. But because they were not Christians the land was deemed *terra nullius* and available to be claimed by Spain.

The indoctrination of the legitimacy of colonisation is pervasive. Justification for the European claims to the territories of non-Christian (or in later versions, uncivilised) inhabitants of the rest of the world derived from the "doctrine of discovery", underpinned the European conquests of the Americas.

The extent of the diminution of Indigenous entitlement and rights accorded to them in colonised territories tended to reflect the balance between European powers in the area.

For example, in Australia, where British dominion was effectively unchallenged by other European powers, Aboriginal people were accorded no rights to their territory, with *terra nullius* being taken for granted in the settler culture (Wolfe 2006: 391). In 1992 (over 200 years after colonisation) the case of *Mabo v Queensland* formally acknowledged the misuse of terra nullius, but its justification – that Aboriginal people were roaming savages without agriculture or infrastructure - persists within the Australian psyche today.

The ingenuity and extent of Aboriginal agriculture had, until recently, been buried by false histories – despite attempts to retell Australian history by recording evidence that Aboriginal Australian agricultural systems are the oldest and most sustainable in the world.

By contrast to the diminution of rights of the original inhabitants in Australia and disregard of any sovereignty, in North America treaties between Indian and European nations were based on a sovereignty that reflected Indians' capacity to change alliances from among rival Spanish, British, French, Dutch, Swedish and Russian presences.

But even where native sovereignty was recognised, ultimate control over the territory in question resided in the European sovereign, in whose name it had been "discovered". One constant theme in many parts of the world is the distinction between "dominion" over territory which was held by the European sovereign alone, and the "natives" right of occupancy (also expressed in terms of possession or usufruct) which entitled natives to pragmatic use of a territory – understood as hunting and gathering, rather than agriculture – of a territory that had been "discovered" by Europeans (Wolfe 2006: 391).

This distinction between dominium and occupancy highlights the goal of settler colonisation which looks towards the ending of colonial difference in the form of a supreme and unchallenged settler state and people. This is not a drive to decolonise, but rather an attempt to eliminate challenges to settler sovereignty by Indigenous peoples' claims to land. There are various mechanisms used to achieve this result, including elimination by massacres, removal of children and assimilationist policies. Underpinning these mechanisms is the continued assertion of false narratives and structures of settlers belonging to the country they have bravely occupied.

Twentieth century history books in Australia told stories of brave and intrepid explorers and pioneers who battled with fierce murdering savages. They did not include stories of massacres of Aboriginal men, women and children murdered over the loss of a sheep, or being driven from cliffs into the sea, or of the disease and degradation visited on Australia's Indigenous people over many, many decades. Nor did they include

any stories of the demonstrated ability of Indigenous people to adapt to, and survive in, some of the world's harshest environments for over 65,000 years.

In America, the nineteenth century conflicts between settler Americans and native peoples became, in popular culture, Cowboys and Indians - painting a picture of an imagined past of heroic Americans in the frontier of the west seeking their fortunes in a lawless land. Gun battles and skirmishes between American cowboys and Indians are the way that many people imagine the past, but the reality was quite different. For over five decades, conflicts with the tribes raged as American settlers, miners and ranchers occupied and annexed native lands.

During this period in America, whole villages Native people were wiped out if they resisted "takeover" of their lands. Even when the tribes were removed to reservations, miners tried to engage in mining operations on the reservation. No land was sacred for the tribes as settlers believed "they had every right to take all the land, all the resources, as their manifest destiny"(Lewis 2016: 2).

Settler colonies around the world tended to rely upon remarkably similar spatial constructs, power structures, and social narratives. Beginning with the fiction of terra nullius – the perception that lands in long term use and occupation by Indigenous people are empty or unused – settler colonialism proceeded to dispossess the original inhabitants and carve up their lands into private property. As the settlers invested their identities and material belongings in these properties, they simultaneously created or empowered a state to "defend" these properties from Indigenous peoples who were seen as inherently threatening.

Frontier police forces, like the Royal Canadian Mounted Police, various Australian mounted police forces, and the American cavalry of the "Wild West" embodied the power of the settler state. These government officials and other bureaucratic agencies often wielded (and in some cases continue to hold) extraordinary power over Indigenous peoples.

This included the ability to remove children from their families, to prevent people from leaving "reserve" land or entering into towns, to control employment, prevent "interracial" relationships, and even to direct police or military forces against Indigenous people. The exercise of these extraordinary powers was based upon carefully constructed racial narratives portraying Indigenous people as savage, violent, backward, uncivilised and in need of care (or protection) from the "civilised" settler state.

The narrative dehumanisation of Indigenous peoples in these terms supports parallel narratives of peaceful, adventurous and virtuous settlement and expansion as "brave pioneers" are held up as paragons of new settler nations through their dispossession of the original inhabitants of the land.

As Europeans settled in these regions, Indigenous people were forced out, and lost control, of their lands; power was transferred to the colonialists, with the consequence that local customary practices were disrupted and communal autonomy destroyed.

Colonies established in the United States, New Zealand, South Africa, Canada, Australia and parts of South America are examples of settler colonialism where the impacts on the original inhabitants have been profound.

In truth, this form of colonialism attempts to expunge Indigenous peoples from the territory's history. This erasure creates the illusion that the land was free for the taking, thus justifying theft of Indigenous lands. Land is accumulated as a source of resources or real estate for settlers. Settler colonialism's organising principle is therefore inherently eliminatory, aiming to liquidate Indigenous peoples such that colonists may acquire more land and settle permanently in new communities (Kawatra 2018: 2).

Assimilation then becomes a core doctrine and apparatus of settler colonisation for managing Indigenous populations that survive the massacres and violence, in particular directed at children. In its various forms, it has a long and complex history.

In the global context, assimilation is an enduring Western ideology and strategy that goes in and out of fashion with changing social and political circumstances. It endures in some countries to this day. Assimilation also plays a vital role in nation building: by celebrating unity and conformity over pluralism and diversity it builds identity with the "imagined community" of the nation – demanding conformity to the dominant culture, while it erases others.

Removing children from their families to institutions to be assimilated drove on-going dispossession, cut transmission of knowledge and culture down the generations, and contributed to elimination of local populations by preventing their reproduction. Assimilation in nineteenth century missions was limited to basic numeracy and literacy, menial work skills and rudimentary religious instruction. This is not really assimilation for sameness, but reinforces the view that the dominant culture is superior and ensures that to be the case for the future.

In the mid-20th century, British colonial administrators in some regions, particularly South Africa, decided to adopt a policy of "separate development" (apartheid) of different groups. Although it appeared to call for equal development and freedom of cultural expression, in practice apartheid's basic principles did not differ much from the previous policy of segregation. The system of government based on apartheid (literally meaning "apartness") separated people according to race in every aspect of daily life. Its effect was to entrench white minority rule and discriminate against non-white groups in South Africa. Apartheid may no longer be the national policy in South Africa but the system certainly took its toll on the country.

In 1998, the Canadian historian and politician Michael Ignatieff wrote (Ignatieff 1998: 170):

> *All nations depend on forgetting: on forging myths of unity and identity that allow a society to forget its founding crimes, its hidden injuries and divisions, its unhealed wounds. It must be true, for nations, as it is for individuals, that we can stand only so much truth. But if too much truth is divisive, the question becomes how much is enough.*

Despite the difficult question – "How much truth can a nation bear?"- Canada has engaged in "collective remembering of one of its hidden injuries—the Indian residential schools—through a Truth and Reconciliation Commission 2009 to 2015" (Jacobs 2018).

Since the 1990s Australia, too, has dealt in some part with its own unhealed wounds—the separation of Aboriginal and Torres Strait Islander children from their families, or, in common parlance, the "Stolen Generations".

Significantly, in 1992, more than 200 years after settlement, the High Court, *Mabo No 2 v Queensland (*1992) 175 CLR 1, recognized that at the time of colonization there were existing indigenous owners of the land with their own legal systems and land tenure law, thus negating legally the concept of *terra nullius* as a basis for colonisation of Australia. The following year, native title rights of Indigenous Australians, which were recognized by the High Court were then "recognised and protected" by the *Native Title Act 1993* (Cth).

South Africa established the Truth and Reconciliation Commission in 1995 to help heal the country and bring about a reconciliation of its people by uncovering the truth about human rights violations that had occurred during the period of apartheid.

Despite governments increasingly using the terms "recognition" and "reconciliation" in relation to Indigenous peoples, use of these terms may still serve to legitimate on-going settler colonialism, by perpetuating colonial subjectivity among Indigenous peoples. The use of the terms "recognition" and "reconciliation" do little to address the deep-seated structures of colonialism and serve to undermine Indigenous world-views and claims. The terms are coined and interpreted in a settler way, not an Indigenous way. It is at the discretion of the government as to how to realise these terms, not the discretion of Indigenous people.

Recent events in Australia amply illustrate this point. A reconciliation process formally commenced in Australia in 1991, and push for constitutional reform to recognise the original inhabitants of Australia in its Constitution began in 1995.

In 1999 a new preamble was put to the people in a national referendum along with the question whether Australia should become a republic. Both proposals failed.

In the lead up to the 2007 election, there was bipartisan support for a referendum on constitutional recognition for Indigenous Australians. Over the next 10 years, three bodies were established to consider and consult on the issues. In 2015 a Referendum Council was established to consult specifically with Aboriginal and Torres Strait Islander peoples on their views of meaningful recognition of Indigenous people in Australia.

As a result, Twelve First Nations Regional Dialogues were held across Australia, culminating in the National Constitutional Convention at Uluru in Central Australia in May 2017. First Peoples from across the country were empowered to form a consensus position on the form constitutional recognition of Indigenous people in Australia should take. This is the first time in Australia's history that such a consultation process has been undertaken.

After the Convention at Uluru, attended by more 250 community leaders, the Uluru Statement from the Heart was delivered, rejecting the idea of mere constitutional recognition and instead asking for a constitutionally enshrined Indigenous voice in parliament and a Makarrata Commission to supervise a process of agreement making between governments and First Nations and truth telling about Australia's history.

The Indigenous focus in Australia has moved away from symbolic constitutional recognition to a process of constitutional reform that seeks to empower Aboriginal and Torres Strait Islander peoples to have control of their own destinies. The Uluru Statement from the Heart refers to taking "*a rightful place in our own country".*

This statement emphasizes the gap between the aspirations of First Nations people in Australia who continue to see themselves as the owners of their traditional lands as their ancestors were at settlement, with obligations and responsibilities to it, and the mindsets of many non-Indigenous Australians still wedded to the colonial idea of Crown control over the use and distribution of land. Land governance continues to be viewed as a matter for government policy, even in respect of traditional lands.

While the government response at state and territory level has been mixed, the Federal government rejected the Uluru Statement in October 2017 and has reaffirmed that rejection ever since, thus ignoring one of the few deliberative constitutional processes in Australia's history.

As Professor Megan Davis, Pro Vice-Chancellor Indigenous and Professor of Law at the University of New South Wales, said (Davis :2017):

> *"Recognition" involves two parties: the recogniser and the recognised. The settlers may well pursue symbolism unilaterally, but they cannot call it "recognition." It is not "recognition" if the to-be-recognised reject it.*

One difficulty is that settler colonial ideology remains prevalent among many non-Indigenous Australians. For example, whilst most Australians note a large gap in the standard of living between Indigenous and non-Indigenous Australians, many non-Indigenous people do not consider that Indigenous people have any unique rights as the original inhabitants of Australia. Many also consider that Indigenous people themselves are the biggest obstacle to achieving a better standard of living. Not only are many Australians largely uninformed of the early violence and massacres committed by settlers that eliminated almost all Indigenous peoples and attempted to wipe out their cultures, they are generally unaware of how the nation continues to prosper based upon perpetual settlement. Reports from Canada describe similar ideology and mindsets of non-Indigenous Canadians (Kawatra 2018: 4, citing Environics Institute, 2016: Barsh, 1994: Mackey, 2013).

Even when it comes to terms like; apology, reconciliation, and recognition as they relate to Indigenous peoples, many non-Indigenous people interpret them in a way that rejects relationships of mutuality and respect because they unwaveringly consider the State's sovereignty as supreme. Discourse and opinion coming from government and many non-Indigenous people carry with them these deeply ingrained mindsets.

Recently Aboriginal academic, Professor Mick Dodson, warned that simmering anger in Indigenous Australia over a failure to make good for past wrongs could easily turn into organised armed resistance, referring to "unsatisfied anger" of Indigenous Australians over historical and ongoing dispossession, and the lack of an adequate place at the modern political table (Dodson 2018).

This paper has concentrated thus far on settler colonialism. But another variety of colonialism – that based on exploitation of resources – is also relevant. In these colonies, foreign citizens conquer a country in order to control and capitalise on its resources and Indigenous population. Since colonisers were not driven by any incentive to invest in institutions or infrastructure which did not support their immediate goals, authoritarian regimes, with no limits on states powers, were often established.

The policies and practices in the Belgian Congo are an extreme example of this approach. There all traditional, commercial markets were eliminated in favour of pure exploitation. Under the guise of bringing humanitarian assistance and civilisation to the natives, in about 1885, European leaders officially recognised King Leopold of Belgian's control over the 2,350,000 km2 of the notionally-independent Congo Free State. All vacant land, including forests and areas not under cultivation, was decreed to be "uninhabited" and thus the possession of the state, leaving many of the Congo's resources (especially rubber and ivory) under direct colonial ownership, effectively controlled by King Leopold.

The system of government implemented in the Congo by Belgium was exploitative, authoritarian and oppressive. At one time consisting of unified and advanced chiefdoms and kingdoms that acted as local governments, the Congo became a country "completely beleaguered by poverty and political oppression". During the period of King Leopold's exploitation of the Congo (from 1885 to 1908) millions of people died. The exploitative and authoritarian regimes continued after King Leopold sold the Congo to Belgium in 1908, who then supported Mobuto in continuing those regimes from 1965 to 1997. It can reasonably be seen that "the ethnic conflicts, political oppression and economic woes" that the Congo faces are "inevitably linked to its exploitative colonial past (Johnson 2014: ii-iii).

Systems of colonial rule can be classified as direct and indirect rule. During the era of colonisation, Europeans had the monumental task of administering the vast colonial territories around the globe. The initial solution to this was direct rule by a centralised European authority within a territory run by colonial officials. In such a system, the Indigenous population is excluded from all but the very lowest level of colonial government (Doyle 1986), if they have any involvement at all. It is perhaps best described as centralised despotism: a system where natives are not considered citizens (Mamdani 1996). In this context it may be noted that it was not until 1962 that Indigenous people in Australia were entitled to register to vote, and not until 1967 that they were to be included in the census of Australian citizens.

Turning to Southeast Asia, the colonial influence began in the region in 1511 when a Portuguese fleet captured Malacca. Malacca later came under Dutch rule in 1642. Throughout the rise and fall of Malacca, new sultanates were emerging elsewhere in the Malay world. They usually were situated at the mouth of a major river and sought to control trade to and from the interior, which often was populated by seminomadic peoples such as the aboriginal Orang Asli of Malaya and the various Indigenous peoples of Borneo.

Except for Malacca, Western influence was negligible in Malaya and northern Borneo until the late 18th century, when Britain became interested in the area. The British sought a source for goods to be sold in China, and in 1786 the British East India Company acquired the island of Penang.

By a series of treaties between 1873 and 1930, the British colonial Administrators took control of the foreign affairs of the nine Malay sultanates on the peninsula. In 1896 the Federated Malay States (Selangor, Negeri Sembilan, Perak and Pahang) came into existence, with Kuala Lumpur as the capital. The sultanates of northern Borneo – Brunei, Sabah and Sarawak – also became British protectorates.

The British presence in Southeast Asia reflected several patterns: direct colonial rule in the Straits Settlements, relatively indirect control in some of the peninsula's east-coast sultanates, and family or corporate control in Borneo. Regardless of the political form however, British rule brought profound changes, transforming the various states socially and economically.

It is indisputable that the many changes brought by colonialism in Southeast Asia have directly impacted on the rights of the Indigenous people of the region, particularly in respect of their customary tenure systems and maintenance of their cultures. No doubt these problems will continue to arise in part due to the shaping of the modern Malaysian and Indonesian nation-states on post-colonial political systems and laws on land tenure, for as long as the colonial model of land tenure is used against local customary law.

Treatment of Indigenous peoples in Malaysia is reflected in a case study about "park people" relations in Malaysia (Salleh & Bettinger 2007). In it attitudes to Indigenous peoples are described in a very similar fashion to Australia. The case study describes the "relationship of grudging tolerance on the part of the park administration towards a small and truly nomadic group of indigenous people" (Salleh & Bettinger 2007: 289).

Two quotes in particular reflect similar attitudes in Australia (or Canada or the Americas) coming from deeply ingrained colonial attitudes.

> *It is apparent that some people have already learned how to live in balance with their available resources. Sadly, these people are now considered 'primitive', even though their technology has sustained their society for hundreds of generations in a quite satisfying way. Few would suggest that such people should be kept in a 'backward' state if they desire to become part of modern 'television society', but it is important to document the traditional wisdom of these people before it is lost.* (Salleh & Bettinger 2007: 290 quoting from McNeely & Miller 1983)

> *At the current level of discussion in many park systems, indigenous peoples at best are 'stakeholders who must compete with…other interest groups to get their voice heard'. Most interactions between indigenous people and parks are marked by conflict rather than cooperation. In many instances indigenous people are marginalized and their concerns are given mere lip service.* (Salleh & Bettinger 2007: 291 quoting inter also from Colchester 2002: 27)

Yet there is an increasing comprehension of the reach and gravity of colonialism, and many people are now challenging the idea that Indigenous issues are an "Indigenous problem". They are instead realising that colonialism and its impact on Indigenous peoples is also a "non-Indigenous" problem. Realising that the colonisers themselves have a responsibility for the negative impacts of colonialism precedes a country developing accountability to the future of Indigenous people in accordance with their cultures, customs and beliefs, not those of the dominant cultures of the region.

INTERNATIONAL LAW

Indigenous peoples have for the last 100 years resorted to international bodies and forums in their search for justice. The International Labour Organisation, as early as the 1920s, and later the United Nations

system, provided venues for international norm setting and conscious development of an international indigenous movement.

There is a wide diversity in the history of settler/coloniser and Indigenous peoples in each country, demanding different solutions for different countries and regions. So much is recognised in the preamble of the UN Declaration on the rights of Indigenous Peoples:

> *Recognising* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.

There are, in effect, many treaties and other international instruments containing different ways of regulating the basic relationship between majority societies and indigenous peoples. There are five main models or frameworks that have developed. From the more modest to the more ambitious, they are:

- Indigenous peoples assimilated into the mainstream population
- Indigenous peoples as minorities
- Indigenous and mainstream societies evolving in parallel
- Relationship based on historic treaty
- Self-determination of indigenous peoples on the basis of their relationship in the mainstream society in the State

Assimilation, I have already mentioned by reference to the Australian experience. Even if the first ever international treaty focussing exclusively on indigenous peoples, the ILO Convention No 107 1957, gave a number of important rights to indigenous peoples, it had as its final goal the assimilation of indigenous groups into the mainstream society. The ideology underlying this Convention is abandoned now, but there are still some countries that adhere to this treaty. An example is Bangladesh, which has an on-going armed conflict with its indigenous peoples in the Chittagong Hills.

Article 27 of the 1966 International Covenant on Civil and Political Rights provides:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

What this expects of State parties is only passive minority protection, namely that States are only required not to prevent certain phenomena – for example the indigenous peoples speaking their own language to each other.

The only modern international convention specifically addressing the situation of Indigenous peoples is the 1989 ILO Convention No 169 (Indigenous and Tribal Peoples Convention) which is based upon the idea that Indigenous society can live a separate existence but in parallel to the dominant society. The Convention requires the State to identify the traditional territories of Indigenous peoples and to hand them back to the original occupants of the region, even if this may prove difficult in practice. It also implicitly requires States to recognise some form of self-governance for Indigenous peoples.

Treaties negotiated in the past to govern the relationship between the settlers and indigenous peoples are endorsed and supported in the 2007 UN Declaration of the Rights of Indigenous Peoples by the preambular paragraph that recognises "…the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States".

A good example of such a historic treaty is the 1840 Treaty of Waitangi, which still functions as the basis for European settlers' and Mäori peoples' legal relationship. The model of treaty-making to organise the relationship between the native population and European settlers was a central feature of particularly British colonialism. Yet, the treaty making process and their subsequent application very often lead to expropriation. Historical treaties and modern agreements, in particular land claim agreements, still constitute a major pillar of indigenous policies and regulatory frameworks in Canada and the United States.

The most ambitious approach from the viewpoint of indigenous peoples is to invoke the body of law that helped the colonised peoples of Africa and Asia to gain, via their self-determination guaranteed in international law, the status of independent States. Self-determination of Indigenous peoples was the cornerstone principle that was the basis of the Draft UN Declaration on the Rights of Indigenous Peoples when it was adopted by the Working Group on Indigenous Populations in 1993 and the Sub-Commission on the Promotion and Protection of Human Rights in 1994. Full self-determination was expressed in Article 3 of the draft in the following terms:

> *Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Finally the UN Declaration was adopted in modified form by a majority of States in 2007 - Australia, Canada, New Zealand and the United States voting against, and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Indigenous people had to compromise their self-determination stance to the effect that Article 4 was inserted after Article 3, making it clear that self-determination for Indigenous peoples meant self-governance and autonomy in their local and internal affairs. Article 46 was also inserted, ensuring that nothing in the Declaration threatens the territorial integrity and political unity of independent States.

Over eleven years have passed since the UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly. Since then, the four countries voting against have reversed their position and now support the Declaration. Colombia and Samoa have also endorsed the Declaration.

Today the Declaration is the most comprehensive international instrument on the rights of indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.

CONCLUSION

The key to the successful implementation of these standards around the world is to build within the populations of each country: a willingness to acknowledge the resilience of Indigenous peoples in overcoming the challenges they have faced; respect for the unique cultures, protocols, practices and traditions of Indigenous peoples; and a reciprocity for Indigenous communities.

Customary law regimes have been and continue to be flexible systems of local governance capable of adapting to the changing needs and realities of the societies they govern. However, achieving a genuine recognition of customary laws with a renewed vision of legal pluralism will require strong political will and commitment, particularly at the State level. The effectiveness of its operational mechanisms and enforcement will depend on the level of recognition and autonomy given to traditional authorities. The key issue will be the extent to which institutional arrangements and the application of customary laws will conform to the underlying principles of indigenous legal regimes and their cultural, spiritual and moral beliefs. (Shimray 2011:14-15)

Often, even in cases where there is strong recognition of customary laws and autonomy is given to traditional authorities, the tendency for State structures (based on the principles of positive law) to undermine and supersede traditional governance structures (based on the principles of customary law) remains a serious problem. Frequently, bureaucrats and State agencies, who are ill-equipped to handle customary procedures, are the final arbiters or authority in matters concerning communities. They are also responsible for developing and implementing operational mechanisms for the implementation of the provisions of the Constitution or State law. The tendency to automatically assume that bureaucrats and State agencies have the knowledge to develop appropriate institutional modalities and mechanisms as well as the capacity to handle customary procedures, defeats the very purpose of such constitutional provisions. The result is the bureaucratisation of procedures and the deformation of customary governance structures. A genuine legal pluralism framework will require appropriate institutional support mechanisms that facilitate the restructuring of the fragmented legal order and governance structures, and nurture its growth in

accordance with the underlying principles of customary laws and the cultural, spiritual and moral beliefs of indigenous communities. (Shimray 2011:15)

An honest dialogue around these issues, coming from a place of respect for Indigenous culture and land governance systems, rather than a desire that they "yield" to and conform with, non-Indigenous land policies, is surely overdue in many parts of the world.

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