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Actual Challenges in the Protection of Indigenous Peoples

Theses of PhD dissertation

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List of Abbreviations

Documents

CCPR= International Convention on Civil and Political Rights

ICESCR = International Convention Economic Cultural and Social Rights

ILO Convention 169 = Convention concerning Indigenous and Tribal Peoples in Independent Countries

UNDRIP = UN Declaration on the Rights of Indigenous Peoples

Organisations

ACHPR = African Court on Human and Peoples Rights

ACHPR Working Group = ACHPR Working Group on Indigenous Peoples in Africa

ACtHPR = African Court of Human and Peoples Rights

ECHR = European Commission on Human Rights

ECtHR = European Court of Human Rights

IACHR = Inter-American Commission on Human Rights

IACtHR = Inter-American Court of Human Rights

ILO = International Labour Organization

UN = United Nations

UN Working Group = UN Working Group on Indigenous Populations

UNECOSOC = UN Economic and Social Council

UNHRC = UN Human Rights Committee

I. The delimitation of the subject and the aim of the research, the structure of the thesis

1. The subject and the aim of the research

The aim of the current thesis is to examine the rights of indigenous peoples – which is a special branch of human rights – and the concerning international standards. Only in the last two decades did international community start to pay attention to indigenous peoples, when they started to stand for themselves and fight against historic injustices instead of passively suffering and bearing them. As *Siegfried Wiessner* says: 'The Fourth World had found its voice, and it soon found entry into the institutions of the First World.'[1] The attitude of international community and international law has gone through a significant change since then.[2]

Of course one may ask with good reason, how studying the results of protecting indigenous peoples' rights may contribute to the development of domestic jurisprudence, if indigenous peoples live in remote, exotic places. The author says it does *so* in many ways. *First* of all indigenous peoples are not only found in the jungles of *South-America* and *Asia* or in the prairies of *Africa* and *North-America*: the *Sami* people[3] of the Scandinavian countries and Russia have been fighting for a long time to be recognised as indigenous and to be protected according to that – e.g. by accepting their communal property rights – by the European Human Rights Mechanism. The European Mechanism, which – due to its historical heritage – stands on an individualist ground, cannot give adequate answer for the most important questions concerning indigenous peoples and minorities. The author believes that studying the case law of the UN mechanism and the other regional mechanism in a comprehensive way, can contribute to the development of the European Mechanism, since the practice of the aforementioned mechanisms more or less shifted towards the recognition of collective rights. – Not to mention other developments. – These achievements could help to increase the standard of minority protection. Furthermore, studying the topic has other advantages as well: applying the knowledge of indigenous groups opens up new possibilities in the realization of sustainable development. Furthermore plants with substances so far unknown for western medical science

[1] WIESSNER, Siegfried, Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples. *Vanderbilt Journal of Transnational Law*, 2008. (Vol. 41.) Issue 4, pp. 1141-1176.

[2] XANTHAKI, Alexandra, Indigenous Rights in International Law over the Last 10 Years and Future Developments. *Melbourne Journal of International Law*, 2009. (Vol. 10.), Issue 1., pp. 27-37

[3] AHRÉN, Mattias, Indigenous Peoples' Culture, Customs, and Traditions and Customary Law – The Saami People's Perspective. *Arizona Journal of International and Comparative Law*, 2004 (Vol. 21.), Issue 1., pp. 63 – 112.

– but well known for indigenous communities – are still being found in the rain forests making the production of new medications possible.

Having regard that the rights of indigenous peoples and the recognition of these rights is the result of a long evolution – which took almost forty years –, the foreign literature can be evaluated as rich; during the course of writing the current thesis, tremendous amount of case law, report, article and book stood at the author's disposal. The same cannot be said in regard of the Hungarian literature: such a complex and interdisciplinary elaboration of the topic is missing,[4] therefore the author believes that the topic is suitable to serve as the basis of an independent PhD research.

2. The structure of the thesis

In the first chapter the author analyses the problematic nature of the universal definition of indigenous peoples and the cause of the lacking definition, examining the distinction between indigenous peoples and minorities, paying special attention to the so called *firewall model*. – One of the most important questions regarding the latter one is the moral inconsistency and its untenable position from a practical point of view. In the *second* chapter, the author introduces the most important human rights documents and the concerning case law of the human rights mechanisms, starting with the UN mechanism and then continuing with the regional *ones*. The latter ones are introduced in a sequence that reflects their achievements and merits in the field of human rights. In the *third* chapter the author introduces the three most important rights for indigenous people – namely the right to self-determination and land, furthermore the cultural rights –, and any other related rights. Namely the three highlighted rights serve as an umbrella for other rights and could be discussed in connection with them. Consequently the author in his thesis introduces a wide scope of rights – e.g. the inner side of self-determination, intellectual property rights. Finally, in chapter *four* the author draws his conclusions and develops his theses.

[4] My consultant Anikó Raisz and László Dux carried out specified researches regarding some aspects of indigenous rights, other authors only dealt with the topic in connection with other questions. –
RAISZ Anikó: Indigenous Communities before the Inter-American Court of Human Rights – New century? New era? *Miskolc Journal of International Law*. 2008. (Vol. 5.) issue 2., pp. 35-51.; DUX László: Az ogoni-ügy az Emberek és Népek Jogainak Afrikai Bizottsága előtt, *Jogelméleti Szemle*, 2005 (5. évf.), 2. szám.

II. The method of the research

The main method of the writer is the studying of literature and case law, the preceding typically means the publications of foreign academics, since – as mentioned earlier – the topic with a few exceptions can be regarded unprocessed in the domestic literature. The analysis of the domestic case law can be regarded as an important part of the thesis: the author analyses the practice of the UN organs and the regional mechanisms – including reports, decisions and judgements –, furthermore pays attention to the practice of national courts. Regarding the latter ones, those worth particular attention in which national courts recognised the rights of indigenous peoples and those in which the national courts referred to the UNDRIP, in some of the cases even before it was adopted by UN General Assembly.[5]

During his research the author dealt with branches of law other than international law – however his focus remained on the latter one –, and in some instances even areas outside the scope of law, therefore the current research can be regarded as interdisciplinary in nature. The author examined the practice of the universal and regional mechanisms, furthermore applied comparative method in order to cross-check national regulations, since there is a significant difference in the indigenous specific laws of the Anglo-Saxon and other – e.g. Scandinavian – countries. The most important areas of concern touched by the author are the following: the importance of preserving *biodiversity* and the *role of indigenous peoples* in achieving this goal.[6] Probably the most important development of the last decades is the recognition of indigenous farming methods and economy management by states instead of prohibiting them as wasteful and polluting practice. On the contrary: states are making efforts to utilize the traditional knowledge of indigenous peoples in order to achieve sustainable development. [7] The other potential beneficiary of the utilization of indigenous knowledge is the *pharmaceutical industry*, which increasingly recognises the value of this knowledge and tries to capitalize it, sometimes in an honest way and sometimes by infringing the intellectual property rights of indigenous peoples.[8] – The latter one raises interesting questions as well, which the author endeavours to

[5] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples. Resolution adopted by the General Assembly, 2 October 2007, A/RES/61/295

[6] 1992 Rio Declaration on Environment and Development (A/CONF.151/26), Principle 22.

[7] See: *UN REDD Program Strategic Framework* 2011-2015.

[8] See: WYNBERG, Rachel, Rhetoric, Realism and Benefit Sharing: Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant. *The Journal of World Intellectual Property*. 2004. (Vol 7.), Issue. 6. pp. 851-876.

answer. – The theoretical grounding of the indigenous peoples' participation in decision making necessarily touch certain areas of legal theory, political science and constitutional law, since the basic question is whether affirmative measures can be made consistent with the conception of formal equity. Regarding this, the parliamentary quota system which aims to enforce the preferences of indigenous peoples is particularly interesting, as it is clearly against the one vote per voter principle.[9] During the course of the research the author sometimes not only left the area of international law, but the area of law itself: the author dealt with sociology, cultural anthropology and ethnography, since it was necessary to understand the very nature of their society and culture,[10] which serves as a ground for their demands. The land-owner system of the indigenous peoples and their attitude towards nature could hardly be understood by a person socialized in a western culture, therefore one should try and examine the question from their point of view.

[9] CHARTERS, Claire, Do Maori Rights Racially Discriminate against Non Maori? *Victoria University of Wellington Law Review*, 2009. (Vol. 40.), Issue 3., pp. 649-668.

[10] AHRÉN, pp. 63-112.

III. Summary of the research

1. Basic thesis, basic question, basic problem

The *principle* of the author was that the protection of the indigenous rights is guaranteed in substantial norms, which reached a proper level due to the efforts of the indigenous peoples and the organizations acting on behalf of their interests. The *basic problem* however, is that despite the above mentioned positive changes, these norms are not implemented properly. Regarding the principle and the basic problem, the *basic question* is what the possible ways to improve the jurisprudence are, and how can the willingness of the states to cooperate be enhanced.

2. Hypotheses

In order to answer this question the author established three hypotheses to serve as a ground for his theses and examined the possible answers to the question.

The first hypothesis states that widespread recognition of the rights of the indigenous peoples is mainly attributable to the successful application of *Will Kymlicka's firewall model*. The above-mentioned theory is based on the implantation of the idea that any rights guaranteed for the indigenous peoples will not induce any widening of the rights of the minorities. That is to say, the indigenous communities – which are typically few in number –, unlike the minorities, are not considered by the state as a threat to the integrity of the state.

According to the second hypothesis the breakdown of the firewall is inevitable due to its moral inconsistency and to the unmaintainable practical consequences. This breakdown has two possible outcomes, but only one of them is desirable however. The *first* possible outcome is the eroding of the indigenous peoples' right as a result of the fears of the states mentioned above. The *second* possible outcome is the strengthening of the minority protection. The author quests for the possibilities to avoid the first outcome. The best method is the persuasion of the majority of the population and the political leaders that granting wider rights for sub-state groups – including the indigenous peoples – does not necessarily result in the curtailing of state integrity.

According to the third hypothesis the traditional knowledge of the indigenous peoples can attribute to the realization of the sustainable development. This realization is not new-fangled: Article 22 of the *Rio Declaration* states this, however state actors and transnational corporations tend to subordinate other factors – e.g. the consequences of the soil erosion caused by monoculture methods and the effects of the production of biofuels on food security – to the goal

of achieving short-term profit. According to this, the goal is to make the international stakeholders realize the possible benefits of involving indigenous peoples in the decision making regarding the utilization of the natural resources.

In order to prove his hypotheses the author has built the structure of his PhD thesis based on a logic that – according to the author – makes the understanding and proving of the hypotheses and the allegations made in the thesis book possible. According to this, he first discussed the question of definition – that is to say the lack of it –, than he examined whether the rather artificial distinction between minorities and indigenous peoples can be justified or not. Subsequently, the author introduced both the general and indigenous shaped international human right documents and their respective control mechanisms. In the second chapter the author gave an overall picture of three rights – the rights to self-determination, the right to land and the right to culture respectively – which play a key role in the protection of the rights of the indigenous peoples according to the author. Within this framework, the author examined their content and the evolution of the rights mentioned above. In the third chapter, the author examined the jurisprudence of the universal and the regional human rights mechanism in order to determine how the rights set in chapter two are implemented. After doing so, the author drew his conclusions in the fourth chapter regarding the justification of his allegations set in the thesis book and the hypotheses

The author firmly believes that his hypotheses and the theses set in the thesis book stand fast: the substantial norms offer a decent level of protection; it is the turn of those who are in charge to apply the norms. The most important task is to persuade the majority of the society and the politicians that the right of self-determination – and any other rights – granted for the indigenous peoples – or to the minorities who have a rather common characteristic – does not threaten the integrity of the state, on the contrary it can facilitate the achievement of the sustainable development.

3. Theses

Several general remarks can be made as a result of the research: *the first one* is that there is still no common definition, current debates are coming about. True that international organisations[11]

[11] ILO Convention No. 169. Concerning Indigenous and Tribal Peoples in Independent Countries (27th of June 1989)

and academics[12] have been trying hard to come up with a universal definition, it is almost mission impossible to do so. The historic background and the current situation of certain indigenous peoples so much vary that it is impossible to ground them in one strict definition. This realisation was one of the reasons why drafters abandoned providing an exact definition. Had not they done so, the UN General Assembly may not have accepted the document[13] even up until today. Despite the lack of an overall, universal definition, this is not mission impossible to identify indigenous peoples. Just consider what the criteria system ILO Convention No.169 contains[14] could be a perfect starting point, and also, we have seen examples of definitions by regional mechanisms, which is quite suitable on the given continent.

The author concludes that it is worth putting an emphasis on the creation of regional definitions and accepting *ACHPR Working Group* list of indigenous peoples in Africa.[15] This is a practical solution because considering regional qualities indigenous peoples can be easily identified. Furthermore, sort of temporization – by questioning their indigenous status[16] at international bodies and their proceedings – can be evaded. While preparing these lists, the concern – naturally – came up how the emergence of political influence can be eliminated. Also important what criteria system used for identification is selected by the authorised body. The author in his thesis is trying to investigate these issues.

The *second thesis* is that the recognition of the rights of indigenous peoples is more and more widespread. To mention but a few: their right to participate in the decision making process on

[12] RAISZ, 2008; COBO, Martinez, *Study of Discrimination against Indigenous Populations*. Report of the UN special rapporteur (E/CN.4/Sub.2/1986/Add.4)

[13]DAES, Erica Irene: Report of the chairwomen of the UN Working Group (U.N. Doc. E/CN.4/Sub.2/ACA1996/2), 1996.

[14] ILO Convention No.169, Article 1.

[15] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission at its 28th ordinary session held in Cotonou, Benin in October 2000, IWGIA & ACPHR, (2005)

[16] Like Suriname did it in the Saramaka case. – IACtHR, *Saramaka peoples vs. Suriname*, 28th November 2007, Series C. No. 172.

investments that are in concern to these peoples[17] and more generally in social policy making[18] has been granted by several international bodies. The very same tendency is emerging as for their cultural rights: the earlier predominant cultural hierarchy theory has discredited. There is a tendency to equally acknowledge the indigenous peoples' culture which includes the following: the acknowledgement of their social institutions, their traditional decision-making mechanism and norms.[19] Their right to land is also more and more acknowledged. Land demarcation[20] – at least partially – and their return to their original owners, remedy of historical injustice all contribute to the preserving biodiversity and the general condition of the environment. Mono-cropping preferred by multinational enterprises and other environment damaging practices are taken over by the traditional agriculture of the indigenous peoples respecting nature.[21]

In relation to the right to land and culture, *collective rights*[22] are to be highlighted: culture as such can only be maintained and handed down by groups, individuals cannot do so. Private land property as such is absolutely meaningless to indigenous peoples. As of ancient times, they have been using the land collectively in a way that each and every member of the group is proportionally entitled to use the natural resources to make a living. Based on this, the representatives of indigenous peoples have, primarily, been fighting for the recognition of their collective rights in the past decades.[23] This fight has had its result, which, the author believes, is also applicable in minority protection. True, minorities do not come up with the need of collective land protection, but the protection of their cultural rights can get under way. Based

[17] IACtHR, *Saramaka peoples vs. Suriname*, 28th November 2007, Series C. No. 172. para 129.; UN HRC, *Ángela Poma Poma vs. Peru*, 27th March 2009. (CCPR/C/95/D/1457/2006), para. 7.6.

[18] CHARTERS, Claire, A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making. *International Journal on Minority and Group Rights.* 2010. (Vol. 17.), Issue 2., pp. 215-240.

[19] AHRÉN, pp. 63-112.

[20] IACtHR, *Mayagna (Sumo) Awas Tingni vs Nicaragua*, 31st August 2001. (merits) Series C No. 79., para. 173.

[21] DE SCHUTTER, Oliver, The Emerging Human Right to Land. *International Community Law Review*, 2010 (Vol. 12.), Issue 3, pp. 303-334.

[22] XANTHAKI, Alexandra, *Indigenous Rights and United Nations Standards. Self-Determination, Culture and Land.* Cambridge University Press, New York 2007.pp. 29-38.

[23] XANTHAKI, Alexandra, The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women? In: XANTHAKI, Alexandra – Allen, Stephen (ed.), *Reflections on the UN Declaration on the Rights of the Indigenous Peoples.* Hart Publishing, Oxford, 2011. p. 417.

on the thinking of the author, the biggest shortcoming of the European human rights protection mechanism is, namely, that it sets the base only for individual rights and individual law enforcement, which does not provide enough protection for a whole group. This also correlates with the experience of some other human rights mechanisms.

The *third thesis* is that the above-shown results – with certain restrictions – are also applicable for minority protection. Will Kymlicka says that the pre-condition for the acknowledgement of the widespread indigenous peoples' rights was that the indigenous peoples successfully made heads of the States believe that the rights granted to them would not result in the broadening of minority rights. Kymlicka calls it the firewall model, which is untenable both morally and also practically in the long run. The reason for moral untenability is that there is created certain difference between groups that bear similarities in a number of qualities, and the distinction between them is rather artificial, than based on their very nature. The root of the practical problems is that certain minority groups, realising that it is more favourable for them to be recognised as indigenous, have defined themselves to be indigenous.

Should this tendency continue, it is sure to result in the degradation of rights granted to indigenous peoples.[24] The author believes that the most effective way of breaking down the firewall is to make the heads of the state and the majority of the society understand that granting these extra rights, especially autonomy, is not a step towards independence. This statement is also supported by the 2014 Scottish decisive vote and the indecisive Catalan one. The previous one is an ample example: if the parent state is approaching the issue through democratic rules, and if the area which is inhabited by minorities has some financial gain, by sustaining the given state-framework, they will not vote for independence in their best interest. Besides economic difficulties, we need to consider political realities as well. The example of Kosovo is rather an exception fix[25] in this regard. The goal is to break down the firewall in a way that the rights to be granted to minorities do not endanger the results that have been achieved so far as for the protection of indigenous peoples.

[24] KYMLICKA, Will, *Beyond the Indigenous/Minority Dichotomy*. In: ALLEN, Stephen – XANTHAKI, Alexandra (eds.): Reflections on the UN Declaration on the Rights of Indigenous Peoples. Hart Publishing, Oxford, 2011. pp. 183-208.

[25] SZALAI Anikó: 5. A kisebbségvédelem az ENSZ Közgyűlésében. Dr. Szalai Anikó Honlapja: Gondolatok a nemzetközi jog világából, 2014. április 25. Online elérhető: http://drszalaianiko.hu/2014/04/25/a-kisebbsegvedelem-az-ensz-kozgyuleseben/ (2015. augusztus 31.)

The *fourth thesis* deals with the valuableness and the importance of the protection of the intellectual property of the indigenous peoples. Based on their knowledge, indigenous peoples can contribute to the development of medical sciences apart from maintaining sustainable development. The previous thinking, which considered their medical methods charlatanry, has been changing: it is being realised that the plants used by these people do have curative effects also supported by scientific experiments. These are to the benefit of humankind, and are also enormous profit-making options for the pharma industry. Considering the fact that these companies are not always willing to pay for the traditional knowledge,[26] the author believes that in the interest of the indigenous peoples it would be considerate to come up with new international indigenous peoples' rights standards.

The *fifth thesis* came to the author's interest when studying the practice of regional human rights mechanisms and the social participation of indigenous peoples: the acknowledgement and protection of indigenous people's rights require certain maturity of the society, since the effective protection of rights cannot be granted compulsively. In case the authorities and the majority of the society are hostile to the indigenous peoples and their needs, the decrees and judgements of international bodies can bring about small changes: the indigenous peoples need to make use of these bodies case by case and it requires a lot of sources. The author argues that this should be evaded: on one hand, this is fully contrary to the role of international bodies and on the other hand it is more fortunate for the indigenous peoples to vindicate their rights at local level. The key to changes overall is the mind-set shift of the society and that of the political leaders.[27] Based on this promotion of multi-cultural communication is of crucial importance, which contributes to the elimination of negative attitudes reflective of the society in general and also to the equal recognition of the indigenous peoples' culture.[28] If it does not take place, the affirmative measures might result in lack of comprehension or in given cases the society might feel inconvenient towards the indigenous peoples as it happened in the USA regarding the

[26] WYNBERG, Rachel, Rhetoric, Realism and Benefit Sharing: Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant. *The Journal of World Intellectual Property*. 2004. (Vol 7.), Issue. 6. pp. 851-876.

[27] Canada grants territorial autonomy to the Inuit people by creating Nunavut administrative region. Scandinavian countries provide participation in social policy making by the so called Saami Parliaments. In all the above mentioned countries prolonged debates and seek of compromise preceded the reforms. – XANTHAKI 2007. pp. 161-165.; JOSEFSEN, Eva, The Saami and the national parliaments: Channels for political influence – Elérhető: http://www.ipu.org/splz-e/chiapas10/saami.pdf (2014. május 17.)

[28] See Ahren's article on cultural hierarchy!

casino and tax rules.[29] The New-Zealand quota system is yet another example, which also generated heated social debate.[30]

The *sixth thesis* of the author is that the possibilities of information technology make it much easier for the indigenous peoples to represent their interests, to protect their culture, and, also, their involvement in modern economic processes is ensured. As seen in the Ogoni case,[31] the power of publicity is a serious weapon: it could even make a multinational company retreat, and the internet is an excellent way – even for a most unprotected group – of calling the attention of the world's population to legal injustices. Besides these, this type of knowledge transfer can also be playing essential role in eliminating negative social attitudes. IT, above all, promotes their economic activities as well and a good number of indigenous groups make use of this option. Attention must be paid to two phenomena, which might cause serious problems: the so-called *digital divide* can come about, and digital self-determination can be lost. Digital divide means that inequality between indigenous peoples – who are already in different social and economic situations – can become even wider with regard to the access these groups have. The reason for the emergence of this divide can be twofold: the indigenous peoples living in under-developed geographic areas do have less adequate access compared to those ones in more developed areas. On the other hand, indigenous peoples in first-world countries are averse from internet usage fearing the erosion of community values. The loss of digital self-determination means that indigenous peoples are unable to influence the web page content due to their low level of IT literacy and they use the internet not on their own but through some support. Based on the above, the author argues the future importance of IT-related knowledge transfer for the indigenous peoples and also calls for infrastructural developments to resolve their fears.

Last but not least, the *seventh thesis* of the author is that human rights mechanisms approach the protection of indigenous rights in different ways, and these approaches have their own pros and cons, yet they seem to be adequate to the needs of the indigenous peoples on the given

[29] Wood, Robert W., Native American Casino And Tax Rules That May Surprise You. *Forbes*, 2012. október 11. – Online elérhető: http://www.forbes.com/sites/robertwood/2012/10/11/native-american-casino-and-tax-rules-that-may-surprise-you/ (2015. szeptember 21.)

[30] JOSEPH, Philip, The Maori Seats in Parliament. Treaty Debate Series on Maori Rights, Wellington, February 5, 1999. (a továbbiakban: JOSEPH) – Elérhető: http://nzinitiative.org.nz/site/nzinitiative/files/speeches/te_papa_debate_maori_seats.pdf (2015. január 26.)

[31] ACHPR, The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria, 27th October 2001. (Case No. 155/96) (hereafter: Ogoni-case)

Continent. The *Inter-American System*, which can be considered as a pioneering one amongst the regional mechanisms, and which is examined by the author first, bases the indigenous peoples' right protection on propriety rights and judicial protection.[32] This approach can be considered extremely efficient in spite of all its deficiencies.[33] IACtHR in its practice has worked out the criteria system for the utilization of natural resources. It requires to obtain the free, prior and informed consent of indigenous peoples, to agree on profit-sharing with them and to prepare a preliminary impact study.[34]

IACtHR has recently shown a move towards the protection of collective rights, and also, in a latter case, based indigenous peoples' protection on the right to life. The African Mechanism – with the fact that its base document[35] is reflective of forward-thinking regulations – utilises the practices of the Inter-American System, [36] i.e. as for the safeguards regarding the utilization of natural resources.[37] The mentioned mechanism itself is based on the grounds of evolutive interpretation:[38] it protects the *right to cultural integrity*,[39] *the right to food*[40] and also *the right to housing.*[41] The practice of the African Mechanism is acknowledged by the IACHR in a way that it has referred to it in one of its cases.[42] Compared to the two mechanisms above, the European Mechanism is relatively reluctant: true, its preliminary viewpoint has softened, but

[32] IACtHR, *Mayagna (Sumo) Awas Tingni vs Nicaragua*, 31st August 2001. (merits) Series C No. 79.

[33] ORELLANA, Marcos A.: Saramaka People v. Suriname. *American Journal of International Law.* 2008. (Vol. 102.), Issue 4., pp. 841–847.

[34] IACtHR, *Saramaka peoples vs. Suriname*, 28th November 2007, Series C. No. 172. para 129.

[35] *African Charter on Human and Peoples' Rights* (Adopted on the 27th of June 1981, Entered into force on the 21st of October 1986)

[36] ACHPR, Ogoni-case, para 57.

[37] ACHPR, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya, 25th November 2009. (Case No. 276/2003), para. 266.

[38] The evolutive interpretation was first elaborated by the European Mechanism. On the concept of the 'living instrument' see: SZEMESI Sándor: A diszkrimináció tilalma az Emberi Jogok Európai Bíróságának gyakorlatában (PhD dissertation) – Online available at: http://www.uni-miskolc.hu/~wwwdeak/szemesis_ertmh.pdf (23th December 2014.)

[39] ACHPR, Endorois-case, paras. 168.,172., 173.

[40] ACHPR, Ogoni-case, paras. 60-66.

[41] ACHPR, Ogoni-case, paras. 43-48.

[42] IACHR, *Maya Indigenous Community of the Toledo District vs. Belíz, 12nd October* 2004, Series C. No. 12.053; para 149.

there is still no revolutionary turning-point until today.[43] The author is convinced that it is not even to be expected based on the latter court case[44] in relation to indigenous peoples.

Contrary to the regional human rights mechanisms, UN bodies protect indigenous communities based on cultural rights. In this regard the author examined the UNHRC practices. Since the ICCPR[45] does not contain any *expressis verbis* reference to indigenous peoples the UNHRC applies the ICCPR Article 27 – which is supposed to protect the cultural rights of minorities –, to protect indigenous peoples.[46] Despite it can be regarded only as a solution of necessity – which is the result of the lack indigenous specific norms –, it can provide effective protection since evolutive approach is not unknown for the UNHRC. In one of its latter cases regarding indigenous peoples it has stated the importance of free prior and informed consent.[47] The biggest shortcoming of the practices of the UN bodies is that they are unwilling to acknowledge indigenous groups as peoples. As a result practices of UN bodies do not grant them the right to self-determination.[48] Regarding this attitude the author does not believe there is likely any change in this respect as seen in an indigenous peoples' law case.[49]

Certain human rights mechanisms have different enforcement tools, which are differently utilized. Although the European Mechanism is empowered with several effective tools according to the underlying document,[50] which could enforce its court decisions on indigenous peoples' rights, however its realization has not yet taken place. Sadly, the ECtHR has, so far, been rejecting – during its preliminary procedure – the majority of cases concerning indigenous peoples. In opposition to this, the African Mechanism is trying hard to utilize its available tools,

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[43] On the cases of the European Mechanism's attitude see: KOIVUROVA, Timo, Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects. *International Journal on Minority and Group Rights, 2011.* (Vol. 18), pp. 1-37.

[44] ECtHR, *Chagos Islanders vs. UK*, 11th December 2012. (35622/04)

[45] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[46] Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).

[47] UN HRC, *Ángela Poma Poma vs. Peru*, 27th March 2009. (CCPR/C/95/D/1457/2006), para. 7.6.

[48] UN HRC, Lubicon Lake Band vs. Canada, 26th March 1990 (U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990)). paras. 5.1.-6.3. , 13.3.-13.4.; Human Rights Committee, General Comment 23.

[49] See Poma Poma case!

[50] RAISZ Anikó: Az emberi jogok fejlődése az Emberi Jogok Európai és Amerikaközi Bíróságának kölcsönhatásában, Novotni Kiadó, Miskolc 2010

though it has less option compared to its European counterpart. Among others, NGOs are of help to do so: in case they are able to provide enough publicity, a moderate human rights mechanism with low control options could grant effective protection. The ample example is the Ogoni case of the ACHPR.[51] On the other hand publicity is not always enough as the Endorois case exemplifies,[52] in which execution of the decision is still ahead of us despite the pressure on the Kenyan government.[53] Regardless the author believes that the power of publicity and especially internet options are effective tools to enforce decisions.

The author believes that out of the discussed regional human rights mechanism – summarising what has been said above – the Inter-American Mechanism seems to grant the most effective protection for the indigenous peoples. The next one to come is the African one. Its possibilities are somewhat more limited, but using the power of evolutive interpretation and publicity, it is striving to make full use of the current possibilities. The European mechanism could be really effective if there were political willingness to protect indigenous peoples' rights. The same applies to UNHRC, basically the lack of political willingness is the root of unsatisfactory protection: if it were not reluctant to acknowledge the right to self-determination of indigenous groups as peoples, than they would be entitled to several other rights based on the Covenants.[54] The author stands for the creation of an indigenous specific document of whatever kind for each mechanism with a list of indigenous peoples, taking into consideration the legal practices and evolutive interpretation of the respective regional mechanisms. This would pave the way for the discussed mechanism to protect the indigenous groups based on strict substantive norms. Only the Inter-American System is preparing some indigenous declaration, though its enforcement is still a long way to go. For the other mechanisms, there is no such document on the way. Based on the strong similarity between the minorities and indigenous peoples and also on the untenability of the firewall model, it would be considerate – in case of the European mechanism where the indigenous peoples are still considered to be minorities – to come up with

[51] See the article of Dux

[52] ACHPR, Endorois Case

[53] The author believes that *one* of the possible causes for the lack of implementation is the less severe nature of human rights violations in Endorois-case compared to those in the Ogoni-case, triggering less indignation in the public opinion of the World. The *second* possible cause is while the new government of Nigeria was seeking possibilities to implement the decision from the beginning, this determination was absent in the case of Kenya, despite of the changes in the governmental system.

[54] ICCPR and ICESCR

a forcible document, which could be protecting the rights of the indigenous peoples and the minority groups as well.

After accepting the document, yet another essential move would be to have some collective viewpoint, since its lack can be considered to be the major shortcoming of the protection of the European mechanism: namely, individual rights are non-applicable for indigenous peoples. It also turns out from some UNHRC and ECtHR law cases in relation to the limitation of their traditional agricultural activities. The creation of a document also suggested by the author would be advantageous, because several minority groups are to be found in Europe and in their cases the minority status is only question of definition. Most of the minority groups of the Russian Federation could be defined as indigenous peoples as well. It is not without reason that the Russian regulation requires low number of population.

This could be the base for decent human rights protection for indigenous peoples, which is also supporting the collective approach.

Publications related to the PhD thesis

Publications already published

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