# TRADIČNÉ PRÁVO DOMORODÝCH NÁRODOV V MODERNEJ PRÁVNEJ KONŠTELÁCII
# INDIGENOUS LAW IN THE MODERN LEGAL CONSTELLATION

**Lilla Garayová**[1]

DOI: https://doi.org/10.24040/pros.13.11.2020.sdtsp.5-15

**Abstrakt**

*Nepísané právne systémy nazývané tiež zvykové, ľudové alebo domorodé právo, nepatria iba do minulosti. V mnohých spoločnostiach sú súčasťou komplexnej právnej konštelácie. Spravujú také rozmanité oblasti, ako sú práva na pôdu, vodu a lesy, príbuzenstvo a dedičstvo, ale aj politické úrady. Tieto systémy prešli a stále podliehajú veľkým zmenám pod vplyvom štátnych právnych systémov a ekonomických a politických zmien a sú stále predmetom horúcej politickej aj vedeckej diskusie.*

**Kľúčové slová**

nepísané právo; domorodé právo; tradičné právo

**Abstract**

*Unwritten legal systems, also called customary, folk or indigenous law, are not just a thing of the past. In many societies, they are part of a complex legal constellation. They manage such diverse areas as land, water and forest rights, kinship and heritage, but also political authorities. These systems have undergone and are still subject to major changes under the influence of state legal systems and economic and political changes, and are still the subject of heated political and scientific debate.*

**Keywords**

unwritten law; indigenous law; traditional law; folk law

[1] JUDr. PhDr. Lilla Garayová, PhD. – Ústav medzinárodného a európskeho práva, Fakulta práva, Paneurópska vysoká škola

## Introduction

There is unwritten law in every culture - commands and prohibitions that are understood and passed on from generation to generation; offenses that are punished. The proposed article deals with the clash of folklore and jurisprudence, examines the historical significance and implications of traditional law, its enduring impact on the world, and the conflicts that arise when indigenous law differs from state law. The unsuspecting reader may encounter many ways these indigenous nations and their legal systems are named, as these cultures have been surrounded by long-standing terminological confusion in the legal and anthropological literature. The main reason for these terminological contradictions are the various worldviews and methodological peculiarities observed in Western science. In the late 19th and early 20th centuries, these nations were perceived as *"savages", "barbarians"* or *"primitives"* and these categories were included in the terminology of scientific works as well as in the titles of articles or textbooks (wild society, primitive law, the law of primitive man, etc.).[2] Following the abandonment of the Eurocentric worldview, these terms could no longer be used, but no universally accepted name appeared on the scene to replace them.

In the Anglo-Saxon literature, the introduction of the word *"folk law"* has been proposed since the 1970s, which has become popular in many languages (e.g. *"Volksrecht"* in German), but some theorists prefer the terms "traditional law", "customary law" "indigenous law" or "original law", which are often used interchangeably.[3] Each of them has its own connotations and has its specific advantages and disadvantages. The problem with concepts such as customary and traditional is that they refer to an assumed unchanged past, when in fact every kind of law is subject to constant change. Sometimes and in some places, changes occur quickly, other times changes in the law occur slowly and gradually. However, there is no legal system that does not change at all. Assuming absolute continuity presents both analytical and political problems. This leads too easily to a strong and traditional representation of local law, which has little to do with social reality. This argument reinforces the impression by government officials that traditional law is an obstacle to development. The struggle for the self-determination of the indigenous population also suffers from the traditionalization of unwritten law. The problem is further complicated by the fact that there is

[2] HSU, F. L. K. (1964). Rethinking the concept "primitive.". Current Anthropology, V.5, No. 3. pp. 169–178.
[3] VON BENDA-BECKMANN, K. (2001). Folk, Indigenous, and Customary Law. 5705-5708.

usually more than one version of indigenous law; traditional law as used and maintained by local communities themselves and traditional law as interpreted by government institutions.

## Who are the Indigenous and Tribal Peoples? – an Attempt at Definition

Unwritten legal systems, also called customary, folk or indigenous law, are not just a thing of the past. In many societies, they are part of a complex legal constellation. They manage such diverse areas as land, water and forest rights, kinship and heritage, but also political authorities. These systems have undergone and are still subject to major changes under the influence of state legal systems and economic and political changes and are still the subject of heated political and scientific debate. For indigenous peoples, customary law is an important source of identity. Traditional law is a central element of the very identity of indigenous peoples and local communities, that determines the members' rights, duties and responsibilities.

Traditional law can cover the use of natural resources, rights and obligations relating to land, heritage and property, access to them, the conduct of spiritual life, the maintenance of cultural heritage and knowledge systems, and many other matters. Maintaining traditional laws can be crucial to the continued viability of the intellectual, cultural and spiritual life and the heritage of indigenous peoples and local communities, which also require various forms of respect for and recognition of customary laws beyond their own communities.[4]

Traditional law is a set of customs, practices and beliefs that indigenous peoples and local communities recognize as binding rules of conduct.[5] It is an integral part of their social and economic systems and way of life.

Traditional law consists of a group of customs that are jointly recognized and shared by the community, people, tribes, ethnic or religious groups. It is the opposite of a written law based on an established political authority. The main attributes of traditional law may include, depending on the context, its legitimacy, flexibility and adaptability. In some countries, it is

[4] NAFZIGER, J. A. R., PATERSON, R. K., & RENTELN, A. D. (2019). Cultural law: international, comparative, and indigenous. pp 45-47

[5] Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues, WIPO Secretariat, 2013, www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf., accessed online 11.11.2020

recognized as a source of law, in others its role is limited to the exercise of internal autonomy or self-government by indigenous peoples and local communities.[6]

Among the most distinctive features of indigenous peoples are their unique cultural patterns, social institutions and legal systems. These features vary in different parts of the world according to different social and political systems. Although indigenous peoples around the world live in state systems with formalized constitutional and legal systems, many of their social and cultural practices continue to be regulated by traditional law. This is, of course, only if their institutions, laws and practices have not been completely disrupted or assimilated beyond recognition. Traditional law and indigenous institutions suffer from neglect as a result of discriminatory or assimilationist policies of the state. Indigenous peoples are often exposed to social, political and economic marginalization, especially conquest and colonization. Only in a few cases has it been able to maintain a substantial level of political and legal autonomy.[7]

The systems and practices of most indigenous peoples have been disrupted or assimilated to some extent. The challenge is different in each case; in some societies, the highest priority is to strengthen the legal systems of indigenous peoples and their traditional legal institutions. These struggles are often part of a movement for autonomy or self-determination. In other cases, the biggest challenge is to cope with the changing social dynamics in indigenous societies. Information on the lifestyles and social systems of indigenous peoples is generally limited due to their social, political and economic marginalization and their relatively remote locations. In addition, formal and informal writings in these cases are sometimes limited to the original or local languages. In addition, because the traditional laws of indigenous peoples tend to be in oral form, little information about these laws is available in an easily accessible form, even among the people or community concerned.

There is no generally accepted definition of *"indigenous peoples"*. International Labor Organization (ILO) Conventions No. 107 and 169 contain subjective and objective criteria for identifying indigenous and "tribal" nations and populations, but without clarifying the meaning of the term. For example, the World Bank takes a broad perspective and recognizes certain criteria for identification, including ties to ancestral territories, self-identification, and

[6] WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf, accessed online 11.11.2020
[7] For further reading: Database of legislative texts on the protection of traditional knowledge and traditional cultural expressions and legislative texts relevant to genetic resources, www.wipo.int/tk/en/legal_texts/

unique common institutions and languages in order to distinguish indigenous peoples from others.[8]

The Bank accepts the terms "indigenous peoples" as well as the terms "tribal peoples", "indigenous ethnic minorities", etc. According to the definition of the bank, peoples are usually described as indigenous when they maintain traditions or other aspects of an early culture that is associated with a given region. They are usually historically and culturally connected with the given territory and are excluded from the surrounding population or the majority or immigrant population.[9] These inhabitants are characterized in this way thanks to the observance of traditions that are specific to the area. However, not all natives share this characteristic, as some have adapted to modern times. Indigenous peoples can be found anywhere in the world. For centuries since their colonization, conquest, or occupation, indigenous peoples have documented a history of resistance, demonstrating their conviction and determination to survive with their distinct sovereign identities.

A more detailed definition, which has received considerable respect within the UN system, is as follows: Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.[10] Although this working definition does exist, the UN did not officially incorporate it into the United Nations Declaration on the Rights of Indigenous Peoples. In the Declaration, instead of offering a definition, it merely underlines the importance of self-identification, that indigenous peoples themselves define their own identity as indigenous. Article 33 of the Declaration states: *"Indigenous peoples have the right to determine their own identity or*

[8] For further reading: Inspection Panel. 2016. "Indigenous Peoples." World Bank, Washington, DC.
[9] C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 1. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 Accessed online on 11.11.2020
[10] Martínez Cobo, José R. Study of the Problem of Discrimination against Indigenous Populations. Study of the Problem of Discrimination against Indigenous Populations. New York: United Nations, 1987.

*membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live."*[11]

**Indigenous Laws – Do They Matter Today?**

Irrespective of the formal status of the relevant traditional laws or legal systems, indigenous peoples generally adjust their internal customary legal and social affairs, including any reforms therein, in a manner of their choice, unless expressly prohibited. Such systems form an integral part of their identity. To understand the legal systems of indigenous peoples, it is important to look at the functional side of the relevant institutions and laws. Customary laws can be divided in different ways. For our purposes, they are divided into two broad categories. The first category includes personal laws, such as those governing rules on marriage, divorce, inheritance, child custody, etc. The second group contains laws concerning different types and levels of ownership of forests, land, water bodies and other natural resources. The nature and extent of formal state recognition of customary laws of both kinds varies from case to case, from country to country, in different regions of the country, from people to people, and from one clan or other subgroup of the same people to others. Tribal peoples, and in particular their customs, have not been the subject of scientific research for a long time, essentially for two reasons. One of the reasons was the supremacy of Roman law, which led to jurisprudence focusing primarily on the history of Roman law, its institution and the later history of its adoption. This was later supplemented by a study of the law of nation-states, but this did not include an examination of the nations of distant continents. Another reason is the restrictive interpretation of the term law, which saw in the legal system merely as a system of norms imposed by a state body, the observance of which can ultimately be enforced by the use of legitimate violence. Because neither the state nor the system of institutions functions between natural nations, their legal system cannot be in line with this concept. Therefore, the subject of the research did not exist either. Thus, in order for the customary system of tribal peoples to be integrated into the research framework, the perception of law had to change and at the same time the geographical horizon had to be broadened.

[11] United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples. www.un.org. Accessed online 11.11.2020

The historical framework for this shift was provided by the colonization, during which Western civilization collided on the spot with conflict management techniques that were completely different from its usual civilizational processes. As a result, the study of the habits of indigenous peoples has slowly come to the fore in European science, but the contemporary thinking of the era still prevailed, especially Eurocentrism and the closely related evolutionism. Evolutionism has emerged through the transposition of biological observations into the social sciences, and its essence is that societies are evolving in the same way as can be observed in the plant and animal worlds.[12] As a result, the evolution of human societies can also be described as evolving from a primitive, basic state to more complex structures. Primitive people are primitive in this respect because they are stuck at this early stage of development, while other civilizations have moved above this level and developed much more complex institutional forms: first new states and then state bodies, which are further divided into legislative, executive and judicial. According to this view, there has been a similar development in the law: initially, a mixture of customary, moral, religious and ethical norms can be observed, while individual groups of norms do not separate from each other and represent a set of norms that jointly regulate people's behavior in society. However, at a later stage of development, the law becomes separate from customary and religious norms and, as a separate group of legal norms, has special characteristics. Needless to say, this approach poses a lot of problems and it does propose, that indigenous legal systems are somewhat inferior – stuck in an earlier stage of development. The author of this paper however is inclined to challenge this notion and emphasize that indigenous legal systems are of immense cultural, historical, spiritual and economic value to the study of law and simply categorizing them as inferior or primitive would be a disservice to all.

The great geographical discoveries inevitably raised the question of how to behave towards other civilizations. Legal anthropology examines the processes of iuridization of human existence in order to explain the laws of social and legal existence of human communities. This process takes place through the analysis of oral and written sources of law, as well as the practice of social life and traditions. Law is a complex and multidimensional phenomenon that has changed in content, scope and form as a result of changing living conditions. The study of world legal systems and comparative law are the most effective ways to realize the cultural diversity of legal solutions to the same problems of human existence. In

[12] For further reading on the Evolution Theory in Law: SINCLAIR, M. B. W., "The Use of Evolution Theory in Law" (1987). Articles by Maurer Faculty. 2271. https://www.repository.law.indiana.edu/facpub/2271

some cases, traditional legal systems have independently developed the same principles that continental European law has created with considerable delay. Religious and ethical norms and value concepts of a given culture are decisive for traditional legal cultures. In recent decades, traditional legal systems, natural nations and micro-communities have become the subject of comparative legal research.

The beginning and formation of indigenous legal systems are always historically veiled, and even modern science cannot determine the exact beginnings of the creation of these systems. Many legal cultures have existed for centuries, millennia, but in reality, they do not have a documented history, they simply exist. Customs and traditions are part of oral culture, so their main feature is orality. Not only because writing has not often developed in these societies, but in some cases also because they have purposefully safeguarded their laws within the community. While the law is oral, it belongs to everyone, but as soon as the law becomes written, a large part of the community is pushed out of the process and the creation of the law belongs to the legislators. It follows from the oral nature that these legal systems focus mainly on the content of specific rights and orality also guarantees the flexibility of the law, as it can adapt to the changing conditions of community life without formal proceedings. In most tribal nations, the whole community is involved in some form of law-making - both by applying the law to a specific case, but also by passing the law on to future generations.

These customs are closely related to the reality of everyday life, are based on its reality and, as a result, there is no separation of law and social reality, which is characteristic of more developed modern legal systems. Academic case law is not necessary because everyone knows the content of law, as the law is deeply rooted in the customs of society. In case of doubt, the collective memory and what the community thinks about a particular case is crucial. The law therefore exists completely without formalities and offices. The traditional legal system of indigenous peoples is therefore barely institutionalized.

The customs of indigenous peoples are usually characterized as very conservative, rigid and resistant to change. This is not entirely true. Conservatism guarantees the continuity of tradition and thus the identity of the community, but this does not preclude acceptance of change if it is slow and does not mean sudden breakthroughs caused by new ideas. It follows from this basic view that they only accept bottom-up organic change on the basis of a consensus of the community, they are mostly opposed to "reforms" coming from above or from outside (foreign influences, colonization, etc.).

Another feature of these systems is that they take into account ideas that modern man is only beginning to realize now: an ecological approach. Nature is sacred, souls, spirits and gods live in it, or the deity itself (animism), animals are a gift from the forest and gods, so they cannot be abused because it leads to immediate punishment (lack of booty, disease, etc.). Harmonious coexistence with nature is an essential feature of these societies, and customs make a significant contribution to maintaining this path for future generations. The rainforests have been preserved by those who have survived there for millennia, only the modern state destroys them to the greatest astonishment of those who still live there, as they not only lose their homes and livelihoods, but witness an attack on what is considered sacred.

While the previous statements might sound very far-fetched for someone in the modern Western world devoted to the study of written law, we have to understand that even though all tribes live on the territory of a certain state, with its written laws – the jurisdiction of these legal institutions is not almighty. Even though we do live in the 21st century, in the era of unprecedented legal improvements, for the indigenous peoples certain things have not changed. They have retained their original legal systems, which is the basis of their identity and part of their cultural heritage. It could be argued that today there is no longer a purely indigenous legal system, because all nations live within the borders of a formally recognized state, even though statehood is a foreign phenomenon for many of these tribes.

As a result of colonization, the customs and traditions of many tribes have changed considerably in recent centuries. The author of this paper believes that all aspects of a community's past and present are part of their cultural heritage, it is considered valuable and should be safeguarded and shared with future generations. In this context, the original cultural heritage is important, because it is a trace of the past that reminds us of the diverse history of human civilization.

## Conclusion

Indigenous laws have always been central to the self-determination of tribal peoples. Indigenous peoples are the holders of unique languages, traditional knowledge systems and customs. They also have an immense insight into the sustainable management of natural resources. Their ancestral land has a crucial importance for their collective survival as peoples

– physically and culturally speaking as well. Indigenous peoples hold their own diverse concepts of law, based on their traditional values and customs.

These traditional laws are intertwined with their everyday lives and maintaining them is fundamental for the continuing vitality of the heritage of local communities, who have been very vocal about calling for respect and recognition of tribal laws beyond their own communities. Naturally claims over land and natural resources might raise complex issues in national constitutional law, but even so, we are seeing many countries gradually recognizing indigenous laws as an official source of law, in alignment with United Nations recommendations. Many countries have yet to give formal recognition to indigenous law and as such, its role is limited to the exercise of internal autonomy or self-government by indigenous peoples and local communities.

## BIBLIOGRAPHY

C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 1. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 Accessed online on 11.11.2020

Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues, WIPO Secretariat, 2013, www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf., accessed online 11.11.2020

Database of legislative texts on the protection of traditional knowledge and traditional cultural expressions and legislative texts relevant to genetic resources, www.wipo.int/tk/en/legal_texts/

HSU, F. L. K. (1964). Rethinking the concept "primitive.". Current Anthropology, V.5, No. 3. pp. 169–178.

Inspection Panel. 2016. “Indigenous Peoples.” World Bank, Washington, DC.

Martínez Cobo, José R. Study of the Problem of Discrimination against Indigenous Populations. Study of the Problem of Discrimination against Indigenous Populations. New York: United Nations, 1987.

NAFZIGER, J. A. R., PATERSON, R. K., & RENTELN, A. D. (2019). Cultural law: international, comparative, and indigenous. pp 45-47

SINCLAIR, M. B. W., "The Use of Evolution Theory in Law" (1987). Articles by Maurer Faculty. 2271. https://www.repository.law.indiana.edu/facpub/2271

United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples. www.un.org. Accessed online 11.11.2020

VON BENDA-BECKMANN, K. (2001). Folk, Indigenous, and Customary Law. 5705-5708.

WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf, accessed online 11.11.2020