

NEWSLETTER XXXIX

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The views expressed in this publication are those of the authors. They do not necessarily represent the opinions of the Editor of the Newsletter, or of the Board of the Commission on Folk Law and Legal Pluralism.

NEWSLETTER XXXIX

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**INTERNATIONAL UNION OF ANTHROPOLOGICAL
AND ETHNOLOGICAL SCIENCES
COMMISSION ON FOLK LAW AND LEGAL PLURALISM**

The Commission on Folk Law and Legal Pluralism was established in 1978 by the International Union of Anthropological and Ethnological Sciences (IUAIES), and affiliated with the International Association of Legal Science (IALS), on the initiative of Professor G. van den Steenhoven, of the Institute of Folk Law, Nijmegen, the Netherlands.

By September 2000 more than 350 lawyers, anthropologists and other social scientists, representing all regions of the world and concerned with folk law in both theory and practice, were participants in the activities of the Commission. The growth of the Commission reflects a growing awareness of the contemporary existence of legal plurality, not only in countries with indigenous peoples and ethnic minorities, but also in the industrialised societies as such. The Commission's primary purpose, according to its Constitution, is "to further knowledge and understanding of folk law and legal pluralism, with a focus upon theoretical and practical problems resulting from the interaction of folk law and state law". Its activities include, where appropriate, "assisting in making sympathetic and constructive contributions to the solution of problems connected with the interaction of folk law and state law, and thus to the future of indigenous, ethnic and social groups, governed by folk law, in the modern world".

The Commission's four major current activities are the issue of a Newsletter (thrice every two years); the organization of international symposia; hosting international courses; and the initiation and encouragement of Regional Working Groups in different parts of the world.

The Commission's first scientific symposium was held in Bellagio, Italy, in 1981 on the theme "State Institutions and their Use of Folk Law". The second, on "The Actual and Legal Position of Ethnic and Cultural Minorities", took place in Vancouver, in 1983. Two symposia were held in 1986: in Tutzing, Bavaria, Germany, on "Formal and Informal Social Security", and in Sydney, on "Folk Law and Indigenous Rights - A Comparative Perspective". Since 1986, a long series of symposia have been held in Zagreb (Croatia, 1988), Ottawa (Canada, 1990), Amsterdam (Netherlands, 1991), Wellington (New Zealand, 1992), Mexico City (Mexico, 1993), Accra (Ghana, 1995), Moscow (Russia, 1997), Williamsburg (U.S.A., 1998), Arica, (Chile, 2000) and Chiang Mai (Thailand, 2002).

Publications of the Commission include: *People's Law and State Law: the Bellagio Papers* (eds. Antony Allott and Gordon R. Woodman, Foris, Dordrecht 1985); *Papers from the Vancouver Symposia*, a special issue of the Journal of Legal Pluralism (no. 23, 1985); *Indigenous Law and the State* (further papers from the Vancouver symposia, eds. Bradford W. Morse and Gordon R. Woodman, Foris, Dordrecht 1988); *Between Kinship and the State: Social Security and Law in Developing Countries* (eds. F. von Benda-Beckmann et.al., Foris, Dordrecht 1988); *Group Rights: Strategies for Assisting the Fourth World* (eds. R. Kuppe, M. Wiber and A. Griffiths), in: *Law and Anthropology* 5/1990; *The Socio-Legal Position of Women in Changing Society* (C. La

Prairie and F. Baerends), in *Journal of Legal Pluralism* - special double issue, no. 30/ 31, 1990-1991; and *Legal Pluralism in Industrial Societies*, (eds. Carol Greenhouse and Fons Strijbosch), in *Journal of Legal Pluralism* 1993 (special issue). The Commission has also produced proceedings from each of the congresses listed above.

Membership is open to anyone with a serious and substantial scholarly or practical commitment to or involvement in the field of folk law and legal pluralism. Those interested in joining are invited to communicate with the Executive Secretary, Prof. Melanie Wiber, c/o Anthropology Department, University of New Brunswick, p/o Box 4400, Fredericton, N.B. Canada E3B 5A3
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For further information, back issues of the newsletter, news on upcoming conferences, and for membership forms, please see the website at www.unb.ca/cflp/

1. From the Editor

Melanie G. Wiber

This has been an extremely busy year for the Commission, with an international congress in August, hosted by the University of New Brunswick and funded through the generous support of the Ford Foundation (India and Indonesia offices), the Social Sciences and Humanities Council of Canada, the Canadian Department of Indian and Northern Affairs, and by the University of New Brunswick. In association with the congress, Gordon Woodman and JoAnne Fiske also organized a four-day international course in legal pluralism (see the report this issue). The Commission is extremely grateful to those members who made their expertise available for this course (Franz and Keebet von Benda-Beckmann, Arnaldo Godoy, Anne Griffiths, Brad Morse, Jacques Vanderlinden, Gordon Woodman, and Werner Zips). We also have to thank the regional volunteers who provided excellent context on the case studies, including Chris Milley (Canada- East Coast), David Trigger (Australia), Peter Grant (Canada – West Coast), and Natasha Novikova (Russian North). Finally, I would like to thank one of the participants, Dr. Surinder K. Shukla (India) who volunteered at the last moment to assist Anne Griffiths in exploring the gender aspects of legal pluralism. The feedback from the participants was that the course was a very worthwhile experience. One of the students will be publishing his impressions of the course in the next issue of the newsletter.

An interesting feature of the congress itself was the Special Panel Discussion on the Treaty Process since Marshall, which brought together First Nation representatives from the province of New Brunswick and the Chief Federal Negotiator (Mr. Thomas Molloy) in an exploratory discussion of the longstanding treaty issues in that province. The Commission thanks Brad Morse and Robert Groves, as well as Melanie Nice-Paul from the New Brunswick Aboriginal People's Council for organizing this event. The position papers presented by most parties are available on the website (www.unb.ca/cflp/ under the link for the Canada Congress 2004). I have also included Tom Molloy's paper in this issue, to provide the Newsletter readers with access to a brief outline of the negotiation process as the federal government sees it.

I have also followed a longstanding practice in the Commission, and have included a list of members' contact information in this issue of the newsletter. There are at least two reasons for this. One reason is that it allows members to check the list for accuracy (and please let me know if there are any problems with your entry, or with the entry of someone you know well). The other reason is that it provides an excellent resource for those of us interested in legal pluralism issues in other regions around the globe. As the process for maintaining this membership list is a bit more complicated than you might think, please let me know if you see any errors or omissions in the list.

In terms of upcoming issues, once again I encourage all members to use the newsletter to communicate with each other and with the Commission executive. News, events, research plans, research reports, small essays on topical problems, book reviews and other submissions are all very welcome. In the next issue, I will be contributing a review essay based on *Information Feudalism. Who Owns the Knowledge Economy?* by Peter Drahos and John Braithwaite, as well as a recent court decision in Canada on genetically modified agricultural crops.

And since I am writing this in early December, I take the opportunity to wish a very Merry Christmas and a Happy New Year to those of us following that tradition.

2. Minutes of the Executive Body, June 17, 2004

Present: Anne Griffiths (President and Chair), Melanie G. Wiber (Secretary), Keebet von Benda-Beckmann (past president), Franz von Benda-Beckmann, Werner Zips

Regrets: Gordon Woodman, René Kuppe

Agenda

1. Welcome

Anne Griffiths welcomed the members of the EB to Edinburgh and expressed the regret of both Gordon Woodman and René Kuppe who were unable to attend.

2. The agenda was approved as circulated.

3. Announcements:

- a) Anne Griffiths noted that the Canada Congress planning was coming along well, and she congratulated the organizers of both course and congress.
- b) Keebet von Benda-Beckmann announced plans for a Conference on Law and Religion to be held next August at the Max Planck Institute. In addition, there are plans underway to hold a Law and Development meeting this fall in Germany, and an Order and Disorder workshop in the coming months. Finally, Keebet and Franz von Benda-Beckmann have been invited to lecture at Onati in June 2005.
- c) Anne Griffith reported on the ongoing series of meetings on Developing the Anthropology of Law in a Transnational World. The first of these meetings was held in Halle on critical issues in legal anthropology (2001), as was the second on mobile law and mobile people (2002). A London meeting (2003) attracted in the range of 50 participants and primarily involved graduate students from Great Britain and Scotland. The upcoming June 2004 meeting in Edinburgh, focusing on governmentality and the state, had invited an international set of scholars, with a good response from that community. September 2004 meetings were also planned, organized by Jane Cowan. Finally, there were plans to hold another international gathering in Edinburgh summer of 2005 which would focus on space, territoriality and time. Publication plans from these meetings were well advanced: the mobile law volume will appear in Ashgate, and publishers were already expressing interest in the Edinburgh 2004 volume.

3. Approval of the Minutes of July 5, 2003

The minutes were approved without correction. It was noted that the only business arising was covered under the existing agenda.

4. Canada 2004

- a) Report of the Local Planning Committee – Melanie Wiber distributed a written report on the upcoming Canada Congress, to take place in August 2004. This outlined the budget (174,738 CAD) – much of which was funding tied to travel costs of regional participants (Ford India, Ford Indonesia, DIAND). Core funding was received from SSHRC (30,000 CAD). All panels had sufficient contributions to go forward with the exception of “Legal Constructions of Nature”. Two options for organization of concurrent sessions were presented, and the members of the EB discussed these and recommended arranging more rooms so that morning might be devoted to plenary sessions. The report also specified the arrangements worked out with the Department of Foreign Affairs and Trade, with respect to visa applications for participants traveling from countries requiring visa approval. A book table was suggested and Melanie agreed to notify participants of the opportunity to advertise recent publications. Given a reduction in the funding requested for the congress, plans for proceedings are to distribute the papers via CD.
- b) Report of the Course Organizers – Melanie Wiber presented a report on the course on behalf of Gordon Woodman. A final list of instructors was approved, and a provisional program for the four day event was discussed.

5. Publications

- a) A publication from the Chiang Mai proceedings is in the final stages of production by Dik Roth and his colleagues, and a small amount of production funding has been allocated from the Chiang Mai Ford fund to support this.
- b) No other publications from Chiang Mai are currently being considered.
- c) Melanie Wiber reported that René Kuppe expressed interest in a special issue of the journal *Law and Anthropology*, based on the papers of the aboriginal panel from the Canada Congress 2004. Gordon Woodman had also expressed interest in publishing select papers in the *Journal of Legal Pluralism*.

6. Report of the Secretary

Melanie Wiber reported that 64 members were currently in good standing, plus the non-dues paying members from developing nations. The membership currently stands at just over 300 members. The same difficulty in transferring dues continues. At our last EB meeting there was some discussion of opening a European account, since European members would be able to transfer funds to such an account without a fee under the new EU banking policy. We need to revisit this idea.

Melanie once again thanked the Max Planck Institute for Social Anthropology, which made possible the production and distribution of our latest newsletter. This has saved the Commission considerable resources.

7. New Business:

- a. International Law and Society Association – Anne Griffiths and Keebet von Benda-Beckmann had received a letter suggesting the creation of an international law and society association. This letter was signed by Manolo

Calvo, Bill Felstiner and Volkmar Gessner. However, there was some doubt about the support for such a movement, and it was also noted that many international organizations exist, without being well connected one to the other. It was suggested that Anne respond with the observation that the Commission would endorse any effort to increase contact between existing organizations, but was not prepared at present to support a new organization.

b. Next Congress of the Commission

Some plans to hold an upcoming meeting of the Commission in Europe seem to have lost momentum, and several other options were suggested, including Indonesia. Anne suggested that the next Congress of the IUAES should be a priority for the Commission, as we missed the last one in Florence. The IUAES is planning a workshop in India in 2005, which Werner Zips hopes to attend. However, there seems little time to plan a panel for that workshop on behalf of the Commission. The next World Congress of the IUAES will be in China in 2008. It was decided to put the question before the General Meeting of the Commission to be held in association with the Canada Congress in August and see if local organizers could be identified for specific locales.

3. Minutes of the General Meeting, August 28, 2004

1. Welcome from the President:

Anne Griffiths welcomed those present and introduced the members of the Executive Body of the Commission (Keebet von Benda-Beckmann, past president; Melanie Wiber, secretary; Werner Zips, publications; Gordon Woodman, Franz von Benda-Beckmann). She extended the regrets of Rene Kuppe who could not attend.

Anne reminded the members that the Executive Body was drawn from the Board of the Commission, which in turn is elected every three years. The last elections took place in 2003 and they will again take place in 2006. She encourages anyone interested to become involved in that election.

2. Announcement of the Agenda:

Proceedings of the 2004 Congress
Publications of the Commission
Report of the Asian Working Group
Plans for Future Congress of the Commission
New Business

No additions/amendments to the Agenda were proposed.

3. Proceedings of the 2004 Congress

Melanie Wiber reported that due to funding considerations, the 2004 Congress Proceedings would be published and distributed in CD format, rather than as hard copy volumes. It was also suggested that the papers could be mounted on the Commission website if there were no objections. There were questions about the subsequent publications of any selected papers from the Congress in journals or alternative volumes. After further discussion, it was decided that the publication of papers on the website would not be useful, but that the proceedings, which will be an unedited collection of the papers as distributed at the Congress, should not be an impediment to further publication plans.

Participants in the Congress were requested to submit electronic copies of their papers to Melanie Wiber by October 15th for inclusion in the proceedings. Melanie agreed to make an announcement about this on the final day of the Congress.

In a response to a question about timing of the distribution of the proceedings, Melanie reported that she hoped to have the CD created and distributed by the end of October.

4. Publications of the Commission

- a) Werner Zips reported that there will be an edited volume from the Chiang Mai congress, based on the papers from the water panel.
- b) The Corruption panel organizers (Monique Nuijten and Gerhard Anders) announced that they have publication plans for their Congress 2004 panel papers, in the form of an edited volume.
- c) Melanie Wiber reported that Rene Kuppe had expressed interest in producing a special issue of the journal *Law and Anthropology*, to be based on the papers from the aboriginal panel (Congress 2004).
- d) Gordon Woodman reported that he is interested in a number of papers from the 2004 Congress for publication in the *Journal of Legal Pluralism*. He will be contacting individual authors after the distribution of the proceedings. Gordon also announced that the *Journal of Legal Pluralism* will soon be available electronically, and that it was moving to a new publisher and that he hoped this would solve any problems with subscriptions and distribution.

5. Report of the Asian Working Group

Sulis Irianto reported that the Asian participants who were attending Canada Congress 2004 had held a planning meeting on August 27th. The minutes of the meeting would be sent to Melanie Wiber to be included in the next Commission Newsletter, but a verbal report could be made here at the General Meeting of the Commission.

The members attending the Asian working group planning meeting agreed to organize an Asian Initiative on Legal Pluralism, with the following organizational structure and officers: K.T. Thomson (Coordinator), Sulis Irianto (secretary), Country Representatives (drawing first on participants of the Chiang Mai congress and expanding from there). The following activities were listed as priorities for the group: development of a directory of members with institutional affiliation; the organization of a planning/training workshop in Cochin, Delhi or Rajasthan for April or early March 2005; network building; establishment of a working relationship with the Commission; establishment of a method of communication (elist of members, Pampa Mukerjee to moderate) and a website; creation of regional projects to generate core funding.

Franz von Benda-Beckmann reported that Ford India has approved expending the remainder of the Chaing Mai grant on encouraging such an Asian network. He requested that the Asian Group submit a proposal to him, for presentation to Ford India, and including the plans for a meeting to take place before August 2005.

6. Future Congress Plans

Anne Griffiths discussed some alternative sites under discussion for the next Congress of the Commission. As we are a daughter organization of the IUAES, the Executive Body hopes that the Commission will participate in their upcoming World Congress in China in 2008. However, it would be useful to have a Commission meeting before that time, and she invited proposals from the

floor for a location. It was mentioned that the IUAES will be holding a workshop in India in 2005, but the members agreed that there was little time to plan a panel for that workshop on behalf of the Commission.

K.T. Thomson suggested that the Asian Working Group could host a congress in Indonesia in 2006. This had been discussed as one activity during their planning meeting, and Sulis and Yonariza agreed to look into this option. Franz von Benda-Beckmann suggested that linking up with a regional institution was useful, and suggested that they identify a local planning committee for the congress as soon as possible.

The discussion then turned to potential panel topics and several were suggested: subsoil resources and mining; transnational soft law (including development agencies); several headings under Trade Relations (quality management and international standards; corporate or business law; Bioprospecting; TRIPS; Intellectual Property rights); Conservation and Human Rights; state/governance and community-based management; religion; poverty; sovereignty (emerging); democracy and participation (which Natasha Novikova reported will be the theme of the next summer school on legal pluralism in Russia).

The Commission Executive Body thanked the members present for their ideas and the Asian group committed to further dialogue with the Commission on planning the next Commission Congress.

Meeting adjourned.

4. Report on the International Course on Legal Pluralism, August 21-24, 2004

Gordon Woodman, October 2004

The Commission on Folk Law and Legal Pluralism held a four-day International Course on the subject “Plural Society and Social Cohesion: Challenges under Legal Pluralism” immediately before the XIVth Congress of the Commission at the University of New Brunswick, Fredericton, Canada. This was the latest in a series of pre- and post-Congress courses held in Wellington, Accra, Moscow, Arica and Chiang Mai, on which there have been reports in earlier numbers of the Commission *Newsletter*.

Objectives

The announcement of the course stated: “The course aims at capacity building on the complex issues of legal pluralism by drawing on the expertise of international scholars in the field who attend the conference. It will provide a combination of practical and theoretical insights into some of the central questions and problems facing those concerned with all aspects of social cohesion in plural societies today. The course will enhance the capacity to develop the necessary legal anthropological techniques and skills to understand and reshape problems of legal pluralism. The purpose of the course is to familiarize the participants with current international debates and to offer them a comparative perspective that allows them to rethink their own research and practical work. Special attention will be given to the position of indigenous peoples.”

Programme

The course extended over four full days. With some exceptions the timetable for each day provided for one morning and one afternoon session, each session lasting a total of three hours including a break for refreshments. Each session consisted of two or more presentations by instructors, followed by discussion among participants and instructors, often divided into four separate groups.

The topics of sessions and the presenters were:

Developments of the theory of legal pluralism in the course of the last quarter of the XXth century up to now (Jacques Vanderlinden).

General Theory of Legal Pluralism (Franz von Benda-Beckmann, Werner Zips)

Natural resources and the claims of indigenous minorities - rights, control, conservation (David Trigger, Peter Grant)

Gender issues in the debate about social cohesion and legal pluralism (Anne

Griffiths, Surinder Shukla)

Human Rights Issues (Brad Morse, Natasha Novikova)

Transnational issues - transnational law, globalizing influences, migration (Keebet von Benda-Beckmann, Arnaldo Godoy)

There were also

presentations by representatives of first nations;

a Roundtable Discussion on Activism by and on behalf of folk-law groups (with presentations by Chris Milley and Peter Grant, and contributions by David Trigger, Brad Morse, Natasha Novikova, and Arnaldo Godoy as discussants);

a Field Trip to a local salmon stock preservation hatchery and a nature reserve.

Attendance

There were 24 participants. The number had been expected to be higher, but problems arose over funding which was called into question by the authorising agency after the organisers had been led to believe that it had been fully authorised. This happened one week before the course was due to start and forced a number of intending participants to cancel at a date too late to fill their places with others who had previously shown an interest.

Participants were professionally concerned with aspects of legal pluralism in a total of 14 countries. 7 were concerned with various communities in Indonesia and another 7 with communities in India. There were 15 instructors and organisers, also from a variety of countries; two others were prevented by last-minute problems from attending.

Appraisal

At the end of the course participants were asked for their views through a written questionnaire consisting of a few general questions and a request for comments at large. 9 responses have been received. I would like to conclude that the majority did not reply because they had no criticisms, but no doubt the experts in social scientific research among us would quite rightly see this as a conclusion unsupported by adequate evidence. It may however be noted that all the responses received contained complimentary comments. These were much appreciated, although for the purpose of learning lessons for the future I concentrate in this report on the more critical comments.

Virtually all respondents showed a desire to relate the course to their own particular fields of work, and many had suggestions as to how this might have been done more intensively. Five suggested that it would have been helpful to encourage more discussion of individual experiences, the presentation of case-histories or more group discussion. It was suggested that the group discussions which took place were

especially useful, although one respondent considered that they became “too conceptual” at times (perhaps because of attempts by participants to find analogies between widely different experiences?) Related to these were a number of comments with respect to the concentration (to a certain degree) in the presentations on issues concerning minority indigenous peoples. Four comments were to the effect that this concentration was more than they would have liked. Some of these respondents and others said that they would have liked more attention to be given to the philosophy of law and the theory of legal pluralism. Some had suggestions as to particular topics which might have been discussed, such as the challenges presented by legal pluralism in the wake of decentralisation of governmental functions.

There were several helpful comments about the practical arrangements. Two respondents mentioned that they would have liked the reading materials to be distributed some time in advance of the course – and a number of comments by participants and instructors which I heard during and after the course confirmed that there was disappointment about the failure to do this very effectively. (I might add that it was our intention, as it was in previous courses, to distribute the materials a month or so in advance, and that various practical difficulties, as in previous courses, held up and frustrated the process.) I have mentioned that some would have liked more small-group discussion. Two also said that it would have been desirable to have more diversity in the modes of presentation by instructors, one pointing out that more use of visual aids could have been especially helpful for those participants who were not native English speakers.

I believe that the general atmosphere of the course was summed up by a respondent who remarked on the features of “dialogue and mutual respect”. These were to be expected in a Commission event, but it is pleasing to hear that they were noticed. My own impression as one of the organisers was that everyone concerned, participants and instructors, found the course interesting and stimulating, and the days enjoyable. I believe also that the fact of the course contributed significantly to the success of the conference.

Finally, Persons

Thanks are due to the instructors. I think it was obvious that every one had devoted significant time and care to preparing their presentations, some had made sacrifices to attend, and all made real contributions, in addition to their presentations, by spending as much time as they could mixing with participants and continuing the discussions informally. The participants – I find it quite unacceptable to speak of “students” in this context, except in so far as all of us are life-long students in our fields – were without exception as amiable and lively as anyone could have hoped.

Vital aspects of the financing were handled by Keebet and Franz von Benda-Beckmann, Anne Griffiths and Melanie Wiber. The organisers of the course were Joanne Fiske, Melanie Wiber and Gordon Woodman. Joanne put in substantial work beforehand but was very unfortunately prevented by a family tragedy from attending. Melanie also put in a great deal of work, and, luckily for all of us, could not escape from Fredericton for the duration (although it would have been understandable had she wished to) as she lives there. She solved a myriad of problems and averted

various disasters before and during the course by the simple expedient of devoting 24 hours a day to working on and worrying about the organisation of the course and the Congress. Shirley von Sychowski as administrative assistant also contributed hugely in time and effort, and Melody Nice-Paul somehow fitted in time to ensure that we had practical and sensitive input from local indigenous groups and local activities relevant to our interests.

5. News: We Received

5.1 Announcement of a New Resource

I've the pleasure to introduce you, and the CFLP, to our /Legal Cultures & Law of Culture/ International resources Page <http://www.estig.ipbeja.pt/~ac_direito/cultura.html>, one of the few centered on these subjects. This Page was built by the Law Area of Beja Polytechnic (Portugal) in order to allow a web-based teaching of Law <http://www.estig.ipbeja.pt/~ac_direito/>, also with a simplified index in English <http://www.estig.ipbeja.pt/~ac_direito/res.html>.

Best regards,

Manuel David Masseno, Professor of Law

masseno@netvisao.pt

5.2 International Congress on Developing the Anthropology of Law in a Transnational World

Anne Griffiths

Many of you will be aware that over the last three years we have been working on developing the Anthropology of Law by integrating and extending the theoretical, methodological and empirical approaches that have underpinned the field. A first meeting funded by the Max Planck Institute for Social Anthropology in Halle in 2001 asked scholars to reflect on their own research and on the critical issues in anthropology of law today. A second Halle (2002) conference 'Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World' followed, the papers from which are now being published in a book by Ashgate in Austin Sarat's series Law, Justice and Power, and edited by F. and K. von Benda-Beckmann and Anne Griffiths.

We then shifted our venue for discussions to Edinburgh to open up the dialogue with more scholars from the UK and received funding from the ESRC (UK) and the Wenner Gren Foundation (USA) to explore the theme of Developing Anthropology of Law in a Transnational World: Governmentality, the State and Transnational Processes of Law, at an international conference in Edinburgh in June 2004. Building on discussions about the transnational nature of law the

conference aimed to examine 1) the operation and effects of legal pluralism at multiple levels; 2) the ways in which states regulate and respond to pluralism in contexts where they can no longer be viewed as the central standpoint from which to analyse law and its impact on communities and social actors; 3) the role of international human rights as perceived and utilised by various constituencies including indigenous people, minorities, states, non-governmental organisations and individuals. A volume is also under development from this set of June 2004 meetings, possibly to appear in Berghahn Press.

As part of the second year programme on Developing Anthropology of Law in a Transnational World, workshops on the theme of Space, Territoriality and Time, will be held at the University of London, 25th-27th April and University of Edinburgh, 10th – 12th June 2005. These workshops aim to bring together an interdisciplinary group of scholars to develop a more integrated approach to an anthropology of law in theory and practice that strives to integrate a cartography and geography of law in society. Building on discussions about the transnational nature of law which were centred last year on Governmentality, the 2005 workshops will explore the following:

- 1) How do we approach the temporal and spatial “existence” of “law in society”?
- 2) how do we conceive of law’s existence in time and space, other than through an assertion of normative validity based upon legal or socio-legal dogmatics?;
- 3) How do we address the problem of scale and the relationship between “micro- action” and “macro-structures” and between micro-processes and macro-scale processes and outcomes in the field of law?;
- 4) how can we talk about the existence and maintenance of law at a larger geographical scale than the time - and space - bound scale at which single processes of reproduction take place?;
- 5) What are the social consequences of the ways in which law and rights are actually localised in places?

Any Commission members who are interested in acquiring more information about the workshops should contact Peter Fitzpatrick about the London workshop or Anne Griffiths about the Edinburgh workshop at peter.fitzpatrick@clickvision.co.uk or Anne.Griffiths@ed.ac.uk

5.3 Call for Papers: Law's Empire Conference

Robert Menzies

*10 December 2004
2nd Call For Papers
Law's Empire Conference
Harrison Hot Springs Resort, British Columbia
Saturday, June 25 to Thursday, June 30, 2005*

Critically engaged socio-legal scholars around the world are increasingly taking on the challenge of understanding "Law's Empire" both in relation to the contemporary wave of globalization and in tracing out the socio-legal history and historical carry-forwards from the last age of Empire. This theme will form the focus for a conference to be held on 25-30 June 2005 and hosted by the Canadian Law and Society Association in collaboration with the Association for Canadian Studies in Australia and New Zealand; the Australia and New Zealand Law and History Society; and a number of co-sponsoring faculties and institutes. Though particular emphasis is placed on comparative literatures being developed in relation to socio-legal issues in Canada and the Antipodes, other law and society scholarship is also very much welcomed.

Please send proposals of papers or panels to menzies@sfu.ca using the form available at:

http://www.law.ubc.ca/events/2005/june/06_25_2005_empire.html

Graduate students are encouraged to submit papers. For information on student financial support and application procedures please refer to the conference web site.

Papers may be presented in English or French. Proposals will be accepted on a rolling basis. No proposals received after Monday, April 4, 2005 can be considered. Delegates are responsible for making their own travel arrangements. All bookings of accommodation and payment of registration fees are arranged directly with the conference hotel.

The additional conference information is available at the above web site. To be added to the conference announcements e-list please send a request to [<pue@law.ubc.ca>](mailto:pue@law.ubc.ca)

(With apologies for redundant postings)

10 Decembre 2004

2e Appel de communications

Conférence: L'Empire du droit

Centre de villégiature Harrison Hot Springs, Colombie-Britannique

Du samedi 25 juin au jeudi 30 juin 2005

De par le monde, des analystes critiques du courant droit et société entreprennent l'étude de «L'empire du droit». Ils s'y consacrent tant au regard de la vague actuelle de mondialisation que de l'histoire socio-juridique de l'époque des Empires dont ils dégagent les vestiges. Ce thème est au cœur d'une conférence qui aura lieu du 25e au 30e juin 2005, programmé par l'Association canadienne droit et société avec le co-patronage de l'Association for Canadian Studies in Australia and New Zealand; the Australia and New Zealand Law and History Society; et plusieurs corps enseignant et instituts participants. Bien que l'accent soit mis sur le traitement comparatif de questions socio-juridiques au Canada et aux Antipodes, nous accueillerons tout aussi favorablement d'autres types d'analyse s'inscrivant dans la mouvance droit et société.

Veillez faire parvenir vos propositions de communications ou de panels à <menzies@sfu.ca>, à l'aide du formulaire reproduit à:

http://www.law.ubc.ca/events/2005/june/06_25_2005_empire.html

Nous invitons les étudiant(e)s aux cycles supérieurs à présenter des communications. Pour obtenir des détails au sujet d'aide financière d'étudiant et des procédures d'applications, référez-vous svp au site Web de conférence.

Communications en français et anglais acceptées. Les propositions seront choisies à mesure qu'elles seront déposées. Aucune proposition reçue après le lundi 4 avril 2005 ne sera acceptée. Les participants sont responsables de leurs propres dispositions de voyage. Les réservations se font directement auprès de l'hôtel, de même que le paiement des frais d'inscription.

L'autre information de conférence est disponible au site Web ci-dessus. Afin de s'inscrire à l'e-liste de conférence, svp adressez un email à pue@law.ubc.ca

(Nos excuses pour tous messages doubles)

W. Wesley Pue, Faculty of Law, University of British Columbia
 Hugo Cyr, Département des sciences juridiques, Université du Québec à Montréal
 Fiona Kelly, Faculty of Law, University of British Columbia
 Robert Menzies, School of Criminology, Simon Fraser University

6. Regional Working Group Reports

6.1 Minutes of the Asian Initiative Group, August 2004

Prepared by Ruchi Pant

The Asian Participants at the XIV International Congress of Folk Law and Legal Pluralism met in the Common Lounge of the Harrington Hall, St. Thomas University on 27th August 2004 to discuss the formation and proposed activities of an Asian Network Forum.

An agenda was enlisted with consensus as follows:

1. Name of the groups
2. Organisational Structure and its relationship to the Commission
3. Plan of Activities
4. Communication
5. Fund raising

Name of the Group

Different names were proposed for the group such as the Asian Forum for Folk Law and Legal Pluralism, Asian Committee on Legal Pluralism, Asian Working Group on Folk Law and Legal Pluralism, etc. But finally it was felt that as it is a fledgling initiative with a modest beginning, lets all call it the **Asian Initiative on Legal Pluralism**. When there is a better representation of other Asian countries, perhaps we could call it either a working group or a committee. Hence the association will henceforth be known as ‘Asian Initiative on Legal Pluralism’.

Organisational Structure

It was felt that there should be a coordinator, a secretary and country representatives for the functioning of the Initiative. Just like the Commission where the President is from one country and the Secretary from another country, the Asian Initiative should also have the Coordinator and Secretary from different countries. Dr. K.T. Thomson from Cochin University of Science and Technology, School of Industrial Fisheries, Cochin, Kerala, India has been nominated as the Coordinator of the Initiative. Dr. Sulistyowati from Indonesia has been nominated as the Secretary of the Initiative. The nominations are for a period of two years. The country representatives are as follows:

Ruchi Pant and Nidhi Gupta, India

Bishnu Raj Upreti, Nepal

Huma (Sandra Moniaga/Herlambang) and PSA Univ. Andalas (Yonariza/Helmi), Indonesia

Ranjit (Sri Lanka)

Masami (Japan)

Some participants suggested that we should have an executive committee or board for the Asian Initiative but the idea was dropped as it was too early for such a formal structure of the initiative. It was understood that the country representatives have to support the Coordinator and Secretary of the Initiative.

The other point under Organisational matters was to assess the relationship between the Asian Initiative and the Commission. Some felt that the Asian Initiative should be independent while others felt that at such formative stages, it will be better for the Initiative to be part of the Commission for the Initiative will gain credibility and funding possibility by being part of the Commission.

Membership: Since many countries were not represented and we cannot just invite members from all Asian countries at random to become members. It would be better that the Initiative has an organic growth. It was felt that at this juncture, only those other Asian countries would be contacted who had participated at the XIII International Congress of Folk Law and Legal Pluralism held in Chiang Mai in April 2002. These countries are Nepal, Philippines, Thailand, Vietnam, etc. Current members could contact these representatives from other countries and introduce them to the Initiative and the Coordinator will induct them.

Plan of Activities

It was felt that activities should be planned as short term, medium term and long term. After having discussed various activities, it was felt that the foremost thing would be to have the Asian Regional Meeting at the earliest. In a preliminary meeting held on the same day (27th August, 2004) before the meeting of the Asian Initiative, Prof. Franz von Benda Beckmann explained the requirement of the Ford Foundation grant, which necessitated the holding of this meeting by August 2005. Ford also required that a short-term course on Legal Pluralism be incorporated in the Asian Regional Meeting. Two countries- India and Indonesia were short-listed for holding the Asian Regional Meet in 2005. The participants felt that the Asian Regional Meet could be held in India as the next Congress is being held in Indonesia. The Indian participants were of the opinion that the Meet in India could be held either in Cochin in April 2005 or in Alwar, Rajasthan, in March 2005. The participants felt that the programme of the Asian Regional Meet should focus on brain storming and working paper presentations, besides the course which could be held simultaneously. The venue would be finalised once Dr. Thomson is able to make an estimate of the expenses involved in bringing people from different countries together and the other costs for organising such a meeting. Dr. Thomson said that he would be able to work out the expenses by third week of September. Given the limitations of funds, it was felt that the participation from each country may have to be restricted to a maximum of two from each country. Huma (Indonesia) said that it could support one extra persons travel. Similarly other organisations or institutions could also try to do this, i.e., look for additional funds for attending the meeting.

It was felt that the duration of the meeting would be three days. The meeting would be in the nature of a Planning workshop to develop medium and long-term goals of the initiative. One day would be devoted to sharing of institutional and individual experiences in the field of legal pluralism (research, education, advocacy etc.). Some medium and long term collaborative activities will be arranged based on lesson learned gathered from the first day workshop. The other day could be for planning ahead and the long-term activities for the Asian Initiative and also for discussing some of the joint collaborative projects in the region depending on the interests of the members. One day for field trip. A two-day long course could run simultaneously while the planning meeting is being held.

Due to paucity of funds, no other activity is being planned for the time being. One of the activities that could be done in the short run with absolutely no funding is compilation of a directory and a database on the profile of each member of the Asian Initiative and their specialisation/ expertise as to how they could contribute or help the Initiative. Sandra, Sulis and Ruchi volunteered to prepare a format and compile information and send it by email to all.

It was also decided that the process of developing joint projects on different subjects of interest should be initiated prior to the Asian Initiative meeting so that some of these could be finalised or be in advanced stage of formulation at the meeting.

Communication

Two things were discussed – first, preparing an e-list of the members. Pampa Mukerjee from India agreed to do the needful and circulate the list. It was also felt that the group would need a moderator for regular communication amongst the group to keep the initiative going. Pampa Mukerjee also agreed to do this if she can cope with it.

Dr. Thomson offered that he could have a web – page designed for the initiative. It was felt that it would be useful if this web site could be a link to the Commission website. It was decided to check if permissions would be required from the University of New Brunswick as the commission's web site is a part of the University website.

(Note: this was discussed with the commission members later and they have given the permission for including the Asian Initiative information and updates to the Commission website)

Fund Raising

Some suggested that it would be a good idea to have a nominal membership fee to start building a corpus for the Asian Initiative. While others felt that collection of membership may entail a cumbersome process requiring a Constitution/ byelaws of the network, resolution from the board, a bank account, etc. Hence this idea was dropped.

Another way of building a corpus was suggested by Dr. Thomson. Whenever any joint project under the Asian Initiative receives funds, 10-15% goes to the Corpus building for the Initiative. The participants accepted this. This would entail opening a bank account

and would require further discussion as to where the bank account should be opened and who will operate the account.

The meeting was attended by:

K.T. Thomson, India
Bishnu Upreti, Nepal
Ruchi Pant, India
Myrna Safitri, Indonesia
Pampa Mukerjee, India
Sulistyowati Irianto, Indonesia
Yonariza, Indonesia
W.A. Ranjit Wickramasingha, Sri Lanka
Sandra Moniaga, Indonesia
Herlambang Pradana, Indonesia
Aceng Hidayat, Indonesia (Berlin)
Vishal Narain, India
Rival G. Ahmad, Indonesia
Surinder Shukla, India*
Ronald Titehelu, Indonesia*
Masami Moki Tachibana, Japan*

Note *

These three persons were not present in the Asian Initiative meeting but were present in the preliminary meeting held on the same day at the Anthropology Department, University of Brunswick and showed interest in the setting up of the Asian Initiative and participating in it actively.

6.2 About the Asian Initiative in Legal Pluralism

The initiative

The Asian Initiative on Legal Pluralism is a network of scholars concerned with the social dynamics of Asiatic societies through the application of concepts and ideas broadly provided in the discipline on Legal Pluralism. This initiative was evolved at the 13th international congress of the Commission on Folk law and Legal Pluralism held in New Brunswick University, Fredericton, Canada in August 2004

Objectives

1. To conduct socially relevant research that provides deeper understanding of the social dynamics of Asian economies
2. To facilitate exchange of ideas among its members
3. To organize training programs for researchers, government officials and social activists in the non governmental sector on the applications of legal pluralism and
4. To empower their problem solving capabilities through the application of knowledge on Legal Pluralism.

Activities

1. To design and inaugurate website of the Initiative discussions are ongoing with experts and the website will be launched in January 2005
2. To organize a training workshop for policy makers, government officials and selected social activists on the relevance of legal pluralism for understanding use of natural resources and environment.

3. To network the relevant agencies (academics, research institutes, local governments, non governmental and social activists in Asia) and ensure their cooperation and assistance in the activities of the Initiative.

News and Announcements

The Asian Initiative on Legal Pluralism in association with Cochin University of Science and Technology, Cochin, Kerala, India announces its first training workshop

Topic

**NATURAL RESOURCE CONFLICTS AND RESOURCE GOVERNANCE
IN ASIA: LEGAL PLURALIST PERSPECTIVES**

Venue Cochin, Kerala, India

Time and Duration 3 days in April 2005

Budget

Activities	Amount Rs.	US\$
Hosting website and maintenance 2005-06	1,50,000	3333.33
Training workshop 2005	12,00,000	26666.67
Networking local governments and other interest groups	1,00,000	2222.22
Travel and administrative costs	1,50,000	3333.33
	16,00,000	35555.55

Note: 1 US\$ =Indian Rs. 45.

Additional funds will be collected internally through national funding agencies

Details of Cochin workshop 2005

The Asian Initiative on Legal Pluralism in association with Cochin University of Science and Technology, Cochin, Kerala, India announces its first training workshop

NATURAL RESOURCE CONFLICTS AND RESOURCE GOVERNANCE IN ASIA: LEGAL PLURALIST PERSPECTIVES**Context**

This theme is selected due to its practical significance in Asian economies in general and the recent socio economic dynamics of Kerala in particular. The Kerala economy and society of late have been struggling hard to make rational decisions on the uses of its natural resources due to escalating conflicts among various stakeholders involved in the decision making processes. The recent decisions of the State to liberalize access to the uses of natural resources and environment have been objected sharply by various local communities and political parties. These conflicts have been greatly witnessed in the use of coastal resources like fisheries, tourism and mining, water harvesting and forest resources. The recent attempts of the State to crush the struggles of tribal communities for their rights over forestlands have been widely criticized by the world community as anti-human and uncivilized. We believe that this is not an isolated instance limited to the boundaries of this State. Similar instances have been reported from other Asian countries as well.

Many scholars have been analyzing similar issues in other parts of the world using legal pluralist framework suggesting practical solutions to redress conflicts over use and abuses of natural resources. Hence the Initiative decided that such issues need to be addressed through a training program designed exclusively for State officials, bureaucrats, political managers, people's representatives of the local state, legal experts

and other social activities interested in this dynamics. In fact, the Legal Pluralism perspective provides a number of practical suggestions for the rational use of resources under such conflicting situations. The workshop will debate these issues and evolve practical solutions to resource management using legal pluralism perspectives.

<i>Venue</i>	Cochin, Kerala, India
<i>Time and Duration</i>	3 days in April 2005
<i>Sectors</i>	Fisheries, Water resources, Coastal zones and Forest resources
<i>Participants</i>	State officials, bureaucrats, political managers, legal experts people's representatives of the local state, environmental NGO's and other social activities interested in this dynamics.
<i>Experts</i>	International experts on legal pluralism and Asian Scholars

7. Report on the conference “Law as resource and obstacle in development”, September 30th – October 1st, 2004

Eva Diehl, André Pessoa

From September 30, 2004, until October 1st, 2004, a workshop on “Law as resource and obstacle in development” took place in the Max Planck Institute for Social Anthropology. The workshop was organised jointly by the Institute and the Workgroup Development Anthropology (Arbeitsgemeinschaft Entwicklungsethnologie, AGEE). Its aim was to discuss the interrelation between interventions of international development cooperation and the legal structure of social, economic and political living conditions. On the one hand, the question was whether law can be utilised as a resource in order to implement certain development goals (legal engineering), and under which circumstances this is possible. On the other hand, it was to be examined how the law existing in a particular region influences measures aimed at development, including legal measures. Through exchanging ideas and experience, policy makers, development practitioners and scientists aimed at developing an understanding of the kind and scope of influences that law can have on societal processes of change. At the same time, it was hoped to find a common language between scientists and practitioners of development cooperation and to call attention to the constraints under which both have to operate.

Introduction and general debates

In a first presentation, Franz von Benda-Beckmann gave an overview over the increasing integration of law and the idea of legal pluralism into development cooperation. He traced the rise and initial euphoria of the law-and-development-movement in the 1960s and its disillusionment because of failures in the 1970s – failures which resulted from a naive belief in the capability of law to automatically generate desired forms of conduct.

In the beginning of the 1990s, the World Bank redefined law as an “economically relevant” factor, and law once again became an integrated part of the development discourse. Since then, according to Benda-Beckmann, development policy makers increasingly think in terms of legal pluralism, such that instead of one single law, the relationship between state law, international, local and religious law as well as project law is considered. He pointed out that law as a developmental resource can easily be used as a means of privileging minority elites, but that it is much more difficult to employ it for the benefit of the powerless. However, many of the undesired consequences of legal development activities are predictable today.

In the following presentation, Friederike Diaby-Pentzlin elaborated the difficulties in the communication between development cooperation and social science and argued that different expectations and constraints could inhibit collaboration between the two. In her view, researchers had left chances for intervention unused and rather taken to a habit of producing ex post evaluations, which were often negative. It would be better if researchers were already involved in the planning phase. She explained that the German Agency for Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit, GTZ) had learnt from its mistakes and was quite capable to implement regionally adapted programmes with a multi-level approach. Yet there remained problems because programmes were often too complex, and because mainly short-term successes were rewarded. This is complemented by political constraints and, for scientists, by the problem of receiving much less recognition for practical recommendations of a development policy nature, than for approved publications. Talking about the interrelation between different types of law, Diaby-Pentzlin diagnosed a worrying lack of legal institutions on the meso-level in many countries. In some development projects, therefore, an attempt is made to conjoin local and national

law on that level. Projects taking legal pluralism as their starting point already exist, but in practice there is relatively little experience with this approach.

In the discussion, it was stressed that while the concept law does not only refer to state law, even from a legal pluralist point of view not every norm or habit could be considered a legal norm. The participants then turned to the question of in how far legal pluralism can contribute to the cohesion of a society, and whether the parallel existence of different legal systems might not rather constitute an obstacle for the developmental goal of inclusion. While conventional legal advice is generally directed exclusively at a state-legitimated legal order, it is not sufficient to “improve” state law only. After all, a practice valued as not in accordance with state law might at the same time represent compliance with another type of law. Moreover, changes in the use which people make of law and rights are usually achieved through non-legal techniques.

In the following comment, Michael Schönhuth pointed to the role of culture in development cooperation. Throughout the 1990s, the German Federal Ministry for Economic Cooperation and Development (Bundesministerium für Entwicklung und Zusammenarbeit, BMZ) had tried to operationalise the “cultural dimension” several times according to its concept of socio-cultural factors, but without success. After identifying fields of tension between which international development discourses on culture are moving, Schönhuth highlighted the importance also as legal anthropologists to be familiar with these discourses, even if these did not employ a social-anthropological concept of culture. In his view, culture – as factor, dimension or object – could become a key to the dialogue with practitioners of development. In the reaction to his contribution, culture was labelled a cross-sectional theme: cultural practices are relevant in every field of development cooperation. For instance, cultural knowledge is also transferred through the construction of a well.

Mechthild Rüniger then spoke about the implications of legal pluralism for legal security and democracy as developmental goals, introducing approaches of advising governments in developing countries. According to Rüniger, advice on legal pluralism is a highly sensitive, political issue because of the parallel existence of law and power structures and particularly different structures of resource allocation. Legal matters thus cannot be regarded in isolation from conflicts of power and distribution. Therefore, legal advice can lead to tensions regarding values codified in the constitution and regarding the integrative capabilities of structurally different legal systems within one national territory. As a result, the rule of law and a national legal unity - which could be a tool of identity formation - could be jeopardised.

Rüniger highlighted possibilities of cooperation for social scientists and development institutions in the scientifically founded impact assessment of legal interventions by partner organisations, drawn up under the restrictions of project reality. She stressed the importance of building up local scientific resources as well as creating quick methods of assessing the impact of development projects in a form differentiated according to target groups and continued over a certain period of time.

In the discussion some participants pointed out that despite social scientists' interest in impact assessment, a difficulty in their cooperation with practitioners could be that developmental themes often changed more quickly than a corresponding research project could be completed. Others emphasized that the implementing institutions in turn had to adapt to changing political partners and their different priorities.

Law-making in international cooperation

Using the example of the Souss-region in Southern Morocco, Bertram Turner explained how the initiatives of several development agencies in that region had activated local potentials of violence resulting from the tension between local law and international concepts of sustainable development, environmental protection and the fight against poverty. Among other factors, the single-sided support of certain groups of the population and resource scarcity resulting from a successful

marketing project had led to the escalation of violence. Apart from this, a fragmentation of the juridical set-up in the region had ensued. According to Turner, another shortcoming of development cooperation had been that the projects were implemented through local environmental organisations without consulting local *Sufis* or other legal authorities. Turner explained that conflict avoidance could not be an imperative goal of development cooperation since conflicts were a necessary element accompanying processes of social change.

Nevertheless, Oliver Meinecke pointed out in his comment on the presentation, peaceful mechanisms of conflict resolution should be considered in the design of all projects, not only in programmes focusing on conflict prevention. Friederike Diaby-Pentzlin explained that a comprehensive cross-department approach was indeed necessary, but that a division into departments like “resource management” and “conflict prevention” might prove to be a hindrance to this.

In the following presentation, Markus Weilenmann asked whether “project law” functions as a “vicarious agent” of development organisations. He pointed at parallels between development projects and legal norms: both stipulate a desired causal relationship between a normative starting point and a future reality. Like law, development projects derive their existence from the gap between “is” and “should”, and both aim at congruence of the required and the actual reality. Weilenmann used the term “project law” on the one hand as a label for those organisational regulations which control the making of development projects, and on the other hand, as a term designating those norms devised by the project personnel during implementation. These include rules prescribing a certain conduct required from the local population. Weilenmann considers project law an instrument of power regulating the relationship between donor and receiving society as well as between the project personnel and the target group. It would therefore be crucial that donors surrender their project law to democratic control.

Shalini Randeria, who unfortunately could not be present in person, pointed out in her comment that not every development policy concept can be called project law. Moreover, different forms of project law operate in a country at the same time, each for the duration of the corresponding project. Furthermore, she discussed the implications which project law can have for state sovereignty. She used the term “scattered sovereignty” in order to describe the breaking-up of state sovereignty under the influence of transnational actors.

In the discussion it was emphasised that since development cooperation is always process-oriented, project law, like all law, should not be seen as rigid entity. However, it was stressed that the export of procedures and concepts of development cooperation does have a normative character. Since this export follows certain rules, one could indeed speak of project law. Some participants inquired where the limits of flexibility could be found in a project. Further, they said that the donor country’s values should be made visible in the project design. It was suggested to examine more in depth in how far development organisations produce law; this could be done, for example, in a workshop on good governance.

In the first presentation of the following day, project law and the relationship between development policy makers and target groups continued to be the topic. Referring to her research in the Dutch Development Ministry and on the implementation of Dutch development projects, Jilles van Gastel favoured the term “policy practices” over “project law“. According to her experience, the guidelines or policy for a project are not fixed in advance, but develop continually during its implementation. Using the “Ganuza dilemma” as an example, van Gastel showed how a term had come to live a life of its own in the Dutch development discourse, floating freely until it hardly bore any more resemblance to its original meaning. Ganuza, working with the Swedish Agency for Research Coordination with Development Countries, had called attention to a dilemma in the relationship between donors and recipients of development assistance. According to him, the governments of recipient countries often could not be regarded as representatives of their own people because of the lack of a serious debate between the scientific community, the productive sector and the political society. Moreover, donor countries often set priorities according to their own values and objectives,

despite the claim that it is the recipient country that should set the priorities. The question is, then, how foreign scientists can draft development policies and strategies if there is not even a consensus on priorities and the course of action in the development country itself.

A “stakeholder-approach”, according to which the civil society in the recipient country should decide on its own about desired strategies, was criticised as merely shifting the Ganuza-dilemma south: as a result, decisions would be produced by power relations there.

In her comment, Veronika Fuest pointed at the increased complexity of institutions on the local and national level as a result of interventions of development assistance. She criticised development organisations as lacking sufficient means of correcting their errors. According to her the policy debate continues to oscillate between two opinions, i.e. that either the donor organisations or that the government of the recipient country know what its needs are. In addition, Fuest observed an increased interest in research about development planning and policy making in northern countries, as van Gastel’s project exemplified.

Representatives of the GTZ confirmed that their organisation was indeed interested in research on its own decision-making processes and said this could be a field of study for social anthropologists interested in development cooperation. In the course of the discussion it was suggested that the terms “policy practices” and “project law” should be seen as complementary rather than as oppositions. It was furthermore observed that a similar discrepancy as described by van Gastel between normative claims and actual practices could be found in other development organisations and in religions.

The “Icarus-effect”

In the following presentation, Philip Quarles van Ufford discussed this discrepancy by means of the Icarus metaphor, according to which the targets of development politicians and practitioners are set so high that failure is predestined. While the idea of “development” had been much more linked to international relations in the 1950s, a great number of concepts have now deteriorated to become mere commodities on the market of development policies. According to van Ufford, an ever repetitive use of the same objectives and plans for realisation can be observed. Using the example of an unsuccessful project of Dutch development cooperation in Indonesia, van Ufford showed that the same project approach continued to be used despite the fact that the activities were extended from “physical engineering” (infrastructure) to “social engineering” (issuing land rights).

Commenting on his talk, Keebet von Benda-Beckmann took up van Ufford’s analysis of the ahistorical mode of thinking in project cycles as a reason for hectic planning and exaggerated expectations. In the course of projects, sharp breaks frequently occur, rendering projects instable and unreliable for the recipients of development cooperation. This is in contrast with the demanded sustainability of programmes. Accordingly, difficult questions arise concerning the rule of law, which requires reliability which then is prohibited by the cyclical character of monitoring and control. Furthermore, an assumption of order inherent in development planning produces an inability to cope with complex situations and contexts and the lack of order in the target society.

The workshop then discussed how stakeholders could be involved earlier in project planning and considered some of the difficulties in issuing land rights that could have. For instance, it was explained, a frequent consequence of land reform is land accumulation in the hands of a minority elite. A trans-migration project like the one described by van Ufford in effect amounted to an expropriation of the people affected.

Examples of success

In the two final presentations Rita Schäfer and Juliane Osterhaus introduced two more successful projects and approaches. Rita Schäfer reported on the research network Women and Law in Southern Africa (WLSA), which carries out comprehensive and country-

specific, interdisciplinary legal research in southern Africa and makes great efforts to make its research results locally available.

In the discussion it was pointed out that in contrast to the development activities in Turner's example, the work of WLSA did not interfere directly with local constellations of power. Nevertheless, parts of the male population felt threatened by WLSA in their domains of power. It was emphasised that an association with WLSA might create problems for socio-anthropological fieldwork, e.g. because it might hamper access to informants like local chiefs.

The next example was a project of the NGO Hunde in Oromia, Ethiopia, aimed at strengthening women's rights through non-state legal institutions. In her description of the project, Juliane Osterhaus explained that there had been complaints in the region that women's legal claims could not be pursued and enforced through state institutions. In the work of the NGO, which was later admitted as a member to the advisory board on local GTZ projects, elders proved to play a key role in their capacity of calling attention to some nearly forgotten cultural traditions for the protection of women. Thus it became possible to replace a more recently invented tradition, which had been used to justify the oppression of women, with local customary law based on an older tradition. Osterhaus further indicated that women could access non-state institutions more easily and felt they were treated more respectfully there. According to her, the example shows that local law is flexible and projects can therefore try to accommodate local law with international human rights standards, instead of relying on state law exclusively. In the discussion, the project was also rated as an example of how local activities could be incorporated into development programmes in the future.

Conclusions and outlook

In the final discussion the results of two days were summarised and the question raised whether the attempt to create a common language between scientists and practitioners had been successful. Helen Ahrens and Christoph Antweiler pointed out that while there had been a consensus on legal pluralism being a useful concept, there remained different opinions on which norms should be regarded as legally valid, i.e. only those acknowledged or at least tolerated by a country's government, or other norms as well.

In two small groups, the participants discussed the most important points of contact and collaboration between social scientists and practitioners, as well as requests directed at one another. One possible goal of cooperation that emerged was to involve social anthropologists in project planning and impact monitoring. The GTZ representatives highlighted that the organisation had local know-how and the project structure to offer to social scientists, and that it was interested in enabling research for master, PhD or postdoctoral theses conducted in the framework of their projects. On the other hand, some researchers expressed an interest in collaborating in projects. Some are already involved in the evaluation of projects or as supervisors for researchers collaborating with GTZ. In the discussion, the participants cautioned against creating an artificial opposition between fundamental research and development cooperation. The mere fact that many participants worked at the interface between social anthropology and development cooperation and could not be readily labelled either "scientist" or "practitioner" proved the appropriateness of a final comment calling social anthropologists and development practitioners "natural allies". The atmosphere during the whole conference was extremely agreeable and conducive to the mutual exchange of knowledge. Vivid debates were continued during the coffee breaks and in an informal environment during common dinners. At the end of the workshop, all parties desired a continuation of the dialogue. Since in the present workshop development cooperation was mainly represented by members of the GTZ, it was also emphasised that the dialogue should be extended to other development organisations in the future.

8. The Made-in-Atlantic Process: Aboriginal and Treaty Rights Negotiations in the Maritimes and Quebec

Presented by: Tom Molloy, O.C., Q.C., LL.B.

XIVth International Congress of the Commission on Folk Law and Legal Pluralism

Hosted by the University of New Brunswick

August 26, 2004

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Abstract

The Made-in-Atlantic Process: Aboriginal and Treaty Rights Negotiations in the Maritimes and Quebec, by Tom Molloy, O.C., Q.C., LL.B.

Canada has a treaty-making tradition which began with the Peace and Friendship Treaties between the British Crown, Mi'kmaq and Maliseet First Nations in 1725 and continued post-confederation with the numbered treaties in the prairies and in the north.

Federal policies for negotiating modern treaties and agreements exercising existing treaty rights have adapted over time to the changing legal, political and cultural landscape and due to the Government of Canada's preference to negotiate rather than litigate rights issues with Aboriginal groups. Modern treaty-making is a unique accommodation amongst all parties and requires a lot of creativity to address the diverse circumstances and interests of all parties. However, the negotiation process does tend to follow a number of steps or stages: historic and legal research, exploratory discussions, framework agreement negotiations, negotiations on an agreement-in-principle, and signing and ratifying a final agreement.

In response to the Marshall decision and as part of the Government of Canada's desire to negotiate with Aboriginal groups and interested provinces in the Maritimes and Gaspé region, the federal government launched a strategy to address socio-economic pressures and begin a long-term process to seek agreement on how existing Aboriginal and treaty rights will be exercised. There is continuing progress toward establishing negotiations processes in each province.

There is no model to follow in the Atlantic to negotiate treaty and Aboriginal rights and title - a situation unique to Atlantic Canada. The parties are designing and implementing a unique, made-in Atlantic process which is shaping the future of modern treaty-making in Canada.

The Made-in-Atlantic Process: Aboriginal and Treaty Rights Negotiations in the Maritimes and Quebec

Introduction and History

It seems very fitting for the University of New Brunswick to host a conference on plural societies and social cohesion at a time when Atlantic Canada is celebrating its unique and diverse cultural heritage. The year 2004 is the 400th anniversary of Champlain's settlement in the new world: the birth of Acadian culture in North America and the first attempt by the French at year-round colonization in what they called La Cadie. This auspicious anniversary is also an opportunity to recognise the vital contribution of the peoples of the Passamaquody, Maliseet and Mi'kmaq First Nations to the survival and adaptation of our European ancestors in this new world.

According to Champlain's accounts, the first settlers on Saint Croix Island had many interactions with the Native people of the region. Settlers across what is today New Brunswick, Nova Scotia, Prince Edward Island and the Gaspé traded with local First Nations out of necessity in difficult times. These early trade relations and later strategic alliances with the Passamaquody, Maliseet and Mi'kmaq were of significant importance as the British and French competed for control of North America.

The Mi'kmaq of north-eastern Canada inhabited a traditional territory comprised of Cape Breton Island, mainland Nova Scotia, Prince Edward Island, the eastern and north-eastern portions of New Brunswick, and the Gaspé Peninsula. Their long-established hunting and fishing patterns led to a lifestyle along the seacoast and inland on major river systems and lakes, and they traded and interacted with other Aboriginal peoples such as the Maliseet, Mohawk and Inuit.

The Maliseet lived in western New Brunswick, as far north as Rivière du Loup and west into Maine. Hunting territories were passed down through families, and permanent fishing and agricultural settlements were established along the St. John River. The Maliseet and Mi'kmaq became allies as members of the Wabanaki Confederacy opposing the English, and the Maliseet also interacted with the Iroquois and Mohawk on the edges of their territory.

In an effort to encourage First Nations to ally and cooperate with the British instead of the French, and to ensure that the Mi'kmaq and Maliseet were able to continue to provide for themselves through their traditional livelihood, the British Crown entered into a series of Peace and Friendship treaties with Mi'kmaq and Maliseet First Nations between 1725 and 1779. These treaties set out long-standing promises, mutual obligations and benefits for both parties. Unlike later treaties signed by the British Crown in other parts of Canada, the Peace and Friendship treaties did not require First Nations to surrender any of their rights to the lands and resources they had traditionally used and occupied.

Following Britain's acquisition of all of the Maritimes and Gaspé at the end of the Seven Years War in 1763, European settlers and later Loyalists settled and consolidated power over the present day Maritime provinces. The development of the fur trade and European occupation of coastal and riverside areas significantly impacted traditional hunting, fishing, gathering and trapping practices for both the Mi'kmaq and Maliseet, and First Nations' territories and livelihoods went through a period of unprecedented upheaval.

Canada's Treaty-Making Traditions¹

In 1763, the British Crown issued a Royal Proclamation providing that only the Crown should enter into arrangements with Aboriginal peoples regarding their land rights. Subsequently, treaties became the standard mechanism by which the Crown addressed Aboriginal rights and interests in lands to facilitate settlement. Following the creation of Canada in 1867, the Canadian federal government assumed responsibility for Indians and lands reserved for Indians. From 1867 to 1923, the Canadian government negotiated treaties covering most of central and western Canada and parts of the north.

From 1923 to 1973, treaty-making in Canada came to a halt. The political and treaty relationships between the Crown and Aboriginal peoples increasingly gave way to a wardship relationship, during which time the federal government assumed responsibility for the administration of Indian communities, their lands and assets, and for the provision of programs and services. However, Aboriginal political movements in Canada began in the 1960s to mount court challenges and political actions to reassert and protect both Aboriginal and treaty rights.

The federal government's policy on modern treaty-making was introduced in response to the 1973 Supreme Court decision in *R. v. Calder* that recognized the continuing existence of Aboriginal rights in Canada. The federal government's policy response re-affirmed Canada's commitments to honour historic treaties and was the first in a series of policies to address outstanding Aboriginal and treaty rights in Canada. This policy was entitled the federal Comprehensive Land Claims Policy, and it started the federal government and Aboriginal parties upon a path of reconciling different objectives and views of negotiations and Aboriginal rights in Canada by building modern-day treaties.

In 1982, existing Aboriginal and treaty rights were recognized and affirmed in the Constitution of Canada. This constitutional recognition places significant limits on the ability of government to interfere with Aboriginal or treaty rights, and creates duties on government to justify any limitation on their enjoyment. The Comprehensive Land Claims policy was revised in 1983 to acknowledge the constitutional recognition of rights acquired through modern land claim agreements, and then

¹ I would like to acknowledge the work of Barry Dewar (Director General, Director General of the Comprehensive Claims Branch, Indian and Northern Affairs Canada) on Canada's history of Treaty Making, contained in his paper entitled: Analysis of Principles, Processes and the Essential Elements of Modern Treaty-Making: The Canadian Experience, presented to the United Nations Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, in Geneva on December 2003.

significantly amended in 1986 following an extensive period of consultation with Aboriginal and other groups. The revised policy allowed for greater flexibility in land tenure, provided a clearer definition of the topics for negotiation, established a requirement for implementation plans, and allowed for the retention of Aboriginal rights on land which Aboriginal people will hold following the conclusion of a claim settlement, to the extent that such rights are not inconsistent with the settlement agreement.

In 1995, the federal government recognized the Inherent Rights of Self-Government as an existing Aboriginal right within section 35(1) of the Constitution Act, 1982. In doing so, the government set out a policy for implementing this inherent right through negotiating practical arrangements which operate within the framework of the Canadian constitution. Negotiating both Aboriginal land rights and self-government has expanded the focus of modern treaty-making from reconciling legal rights to establishing the foundation of an ongoing relationship between Aboriginal governments and other governments within the Canadian federation.

The federal approach to dealing with certainty has evolved over time. In the past, to achieve certainty over land and resources, treaties in Canada have required the Aboriginal party to surrender their rights to lands and resource in exchange for the rights and benefits set out in a treaty. However, alternatives to ceding, releasing or surrendering rights have been developed. The parties to the Nisga'a treaty (signed 2000) agreed that Aboriginal rights would continue as modified by the treaty. The Tlicho treaty (signed 2003) includes a provision which states that the Tlicho will not assert or exercise their rights to lands and resources except as set out in their treaty. Federal policies for negotiating modern treaties have adapted over time to the changing legal, political and cultural landscape and due to the Government of Canada's preference to negotiate rather than litigate rights issues with Aboriginal groups.

Modern Treaty-Making Process

Modern treaty-making is a unique accommodation amongst the Aboriginal parties and the federal and provincial/territorial governments involved, and therefore requires significant innovation to address the diverse circumstances and interests of all parties. Negotiating these treaties does tend to go through a number of steps or stages.

The process generally begins with historical and legal research to determine the likelihood that Aboriginal rights and title continue to exist. The historical research can be undertaken cooperatively, and all parties who wish to negotiate may also enter into a preliminary Umbrella Agreement to set the foundation for future negotiations. The research process can take a number of years, as can creating an Umbrella Agreement.

The federal government must secure authority or a mandate from the federal Cabinet to begin negotiations. This authority provides the chief federal negotiator with general permission to enter into Framework Agreement negotiations, and to participate in exploratory discussions with the provincial/territorial government and Aboriginal parties to set up a process and identify subject-matters for negotiation. Negotiating a Framework Agreement can take a number of years.

Once a Framework Agreement is signed and ratified by all parties, the federal government must secure another, more specific mandate to begin negotiations on an Agreement-in-Principle. This agreement is far more detailed, covering a broad range of areas and issues, and can take five years to negotiate and have been known to take many years.

Once the Aboriginal, federal, and provincial/territorial parties have signed and legally ratified an Agreement-in-Principle, the federal government must again secure a mandate to negotiate a Final Agreement. Settling a Final Agreement can again take many years. An Implementation Agreement is also negotiated simultaneously with details on how the modern treaty will be realised.

Marshall Decision and Federal Response

Courts have long called for the resolution of treaty and Aboriginal right issues, including title, through negotiation. Prior to 1973, 40 percent of Canada was covered by treaties, and now modern treaties have addressed Aboriginal land rights in an additional 40 percent of Canadian territory. Through these modern treaties, Aboriginal groups have secured ownership of over 600,000 square kilometres of land, gained control over capital transfers exceeding \$2.4 billion, obtained a variety of economic and resource development benefits, and created political self-government arrangements.

Great gains have been made through modern treaty-making in the north, and the federal government is now shifting its focus south and east to the Quebec and Atlantic regions.

Uncertainty remains in the Atlantic region concerning the meaning and effect of the Peace and Friendship Treaties with the Mi'kmaq and Maliseet. Because these treaties did not involve the surrender of rights to land and resources, there is the likelihood that both treaty and Aboriginal rights continue to exist and are therefore protected under s. 35 of the Constitution Act, 1982.

On September 17, 1999, the Supreme Court of Canada in the Marshall decision found that the Peace and Friendship Treaties of 1760-61 affirmed the right of certain Aboriginal groups to provide for their own sustenance by taking the products of their hunting, fishing and gathering activities, and trading them in the pursuit of a "moderate livelihood." This decision potentially affects 34 Mi'kmaq and Maliseet First Nations in Nova Scotia, New Brunswick, Prince Edward Island and the Gaspé Region of Québec.

On February 9, 2001, the Minister of Indian and Northern Affairs announced the launch of the Government of Canada's long-term strategy to address the Marshall decision. This strategy is unique to the Maritime and Gaspé regions, and it combines short term measures to address social-economic problems, with a longer-term strategy for addressing outstanding treaty and Aboriginal rights issues.

The federal response has three main components:

- Negotiate immediate measures to address socio-economic pressures facing Mi'kmaq and Maliseet (e.g., economic development, capacity building, and cooperative management opportunities in relation to National Parks and migratory birds);
- Consult on the possible creation of Mi'kmaq and Maliseet Treaty Commission(s); and,
- Begin long-term processes to consider issues of Aboriginal and treaty rights with Mi'kmaq and Maliseet groups and interested provinces in Nova Scotia, New Brunswick, Prince Edward Island and the Gaspé region of Quebec.

Economic development and capacity building initiatives have been undertaken to address pressures facing Mi'kmaq and Maliseet such as pursuing additions to reserves; increased support for workshops, consultation and policy development; a focus on resolving specific claims; and a range of other measures to improve socio-economic conditions of the Mi'kmaq and Maliseet in the Atlantic.

After lengthy consultation with all parties, I as Chief Federal Negotiator concluded that Aboriginal organizations and provincial governments are not interested in creating a Treaty Commission(s) at this time on the East Coast. It was felt that continued work on capacity-building and the identification and potential resolution of issues associated with long-term processes dealing with Aboriginal and treaty rights should take precedence.

At the same time, in February 2001 the Minister of Fisheries and Oceans had a mandate to facilitate the immediate participation of Mi'kmaq and Maliseet communities in the commercial fishery. The Department of Fisheries and Oceans, and successfully negotiated short-term agreements with 31 of the 34 First Nations potentially affected by the Marshall decision between 2001 and 2004.

Where We Are Today

Canada received a mandate to begin long-term processes to consider issues of Aboriginal and treaty rights with Mi'kmaq and Maliseet groups in Nova Scotia and New Brunswick in February 2000, and in Prince Edward Island and the Gaspé region of Quebec in September 2003. The goal of these negotiations is to seek agreement on how existing Aboriginal and treaty rights will be exercised, not to renegotiate treaties or seek extinguishment of existing treaty and Aboriginal rights.

Canada, Nova Scotia and the Mi'kmaq of Nova Scotia have agreed to enter into a Made-in-Nova Scotia Process to provide a constructive and practical way forward. This is part of the unique process set out in the 2002 Umbrella Agreement, which among other things set out an agreement to resolve outstanding Aboriginal and treaty rights issues through negotiation instead of relying on the courts or resorting to confrontation. Framework Agreement negotiations which commenced in November 2003 are progressing well and the parties are optimistic that agreement can be reached.

In PEI and the Gaspé region of Quebec, First Nations have agreed to participate in tripartite exploratory discussions and in the proposed negotiations. Both provincial governments are in the

process of clarifying their mandates to participate in these discussions. Tripartite negotiations or exploratory discussions are expected to begin in each province later this year.

In New Brunswick, technical-level tripartite exploratory discussions began in January, 2004 between the federal and provincial governments and representatives from Mi'kmaq and Maliseet groups. These discussions are providing a valuable opportunity for the parties to raise issues of concern and to determine if there is enough common ground to warrant negotiations. Aboriginal leadership will be meeting internally to develop a unified approach to the proposed negotiations. The province has indicated that it will participate in negotiations as well, and once it has a better sense of First Nations interests relating to the proposed process it will seek a negotiating mandate. Canada will continue to work with the provincial government and Mi'kmaq and Maliseet groups in New Brunswick so that negotiations can begin as soon as the other parties are ready.

Challenges, Opportunities and Conclusions

Negotiation is the most practical and constructive means to address treaty obligations, address other potential Aboriginal rights, and help build a new relationship between governments, Aboriginal peoples and Atlantic Canadians. It's a flexible instrument, allowing the parties to come up with a plan together for what will be negotiated and how, and it's the method advocated by the courts.

The long-term or Marshall process in the Maritime and Gaspé regions is designed to consider issues of Aboriginal and treaty rights with Mi'kmaq and Maliseet groups and establish the foundation of an ongoing relationship with Aboriginal governments as part of the Canadian federation.

Negotiating treaty rights at the same time as Aboriginal rights creates a special situation unlike any other found in Canada. There is no model or generic approach to follow on how to proceed in these negotiations, because this is the only region in Canada where treaty rights coexist with Aboriginal rights. We will only succeed if there is understanding, good will and cooperation on all sides. We are designing and implementing a process unique to the Maritimes and Gaspé; made for the Atlantic in an effort to integrate discussions on self-government and land with negotiations on treaty and Aboriginal rights. The future of modern treaty-making is being created today, right here in the Atlantic. After all, as Justice Lamer said in the *Delgamuukw* decision, "Let us face it, we are all here to stay."²

² *Delgamuukw v. BC*, (1997) 3 S.C.R. 1010, Lamer C.J. at para 186

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