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2006

The role of customary law in sustainable development

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Publication Details

Antons, C. (2006). The role of customary law in sustainable development. *Environmental Conservation*, 33 (4), 364-365.

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The role of customary law in sustainable development

Abstract

Book review of

The Role of Customary Law in Sustainable Development BY PETER ØREBECH, FRED BOSSELMAN, JES BJARUP, DAVID CALLIES, MARTIN CHANOCK AND HANNE PETERSEN xix + 502 pp., 23.5 × 15.5 × 3 cm, ISBN 0 521 85925 5 hardback, GB£ 60.00, Cambridge, UK: Cambridge University Press, 2006

Keywords

law, development, role, customary, sustainable

Publication Details

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BOOK REVIEWS

doi:10.1017/S0376892907213657

The Role of Customary Law in Sustainable Development

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DAVID CALLIES, MARTIN CHANOCK AND HANNE PETERSEN

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Customary law has recently experienced a comeback, mainly owing to the notion of sustainable development and the increasing influence of non-governmental organizations (NGOs) and theories that move away from state planning towards local self-government and administration. This excellent book provides a detailed jurisprudence of customary law and a very valuable introduction to this difficult topic.

Chapter 1 introduces the reader to the terms and the linkages between them. Peter Ørebech and Fred Bosselman explain how the notion of sustainable development goes back to the 1970s environmental movement. The 1992 Rio Declaration was the first international treaty to regulate both sustainable development and the so-called precautionary principle to avoid environmental harm where there are significant risks. As for customary law, the authors regard the distinction between legal and extralegal norms as false. Hence, custom becomes law when the public acts as if observance is legally obligated. The question of court recognition is not decisive and customary law is not an inflexible notion. In fact, static notions of customary law developed from the interpretations of colonial authorities unfamiliar with such law. Notions of rights 'since time immemorial' are historically inaccurate. Instead, customary law must be understood as a process to validate primary rules. In the context of sustainable development, customary law may help to overcome the so-called 'tragedy of the commons', that is the theory that open access to common property may lead to overexploitation by self-interested individuals. By way of contrast, customary law systems mostly provide limited common rather than public property. Property in such systems is commonly owned, but not open to public access.

Chapter 2, written by David Callies, Peter Ørebech and Hanne Petersen, brings case studies from Hawaii, Norway and Greenland. In contrast to American Indians, native Hawaiians have generally not been recognized in American law as being able to assert special status. The chapter follows the approaches of the Hawaiian courts in granting limited recognition to Hawaiian customary law. Accordingly, customary law may be exercised on non-developed land and government agencies have to take it into account for development proposals. It is for the claimants to prove the authenticity of the custom and their entitlement under it. The chapter then moves on to examine the fishing rights of coastal Saami in Norway, which, in contrast to inland Saami, have strongly intermingled with Norse settlers. Thus, their customs have become indistinguishable. Local customary law that allowed open access to coastal fishing grounds may now be used to oppose the privatization policy of the Ministry of Fisheries that threatens the fishing rights of Saami and other local communities. In Greenland, major changes in society occurred with the shift from traditional hunting to fishing and from smaller

to larger settlements, the establishment of fishing plants and finally the establishment of home rule. EC influence and the conscious fostering of an international image mean that, paradoxically, the role of customary law is waning. Customs related to traditional gender roles are also coming under pressure as women are finding it easier to find work in factories and are becoming financially independent of their husbands.

In Chapter 3, Jes Bjarup explains the philosophical foundations of customary law showing the influence of Hume's naturalistic approach to reasoning on Henry Maine and Frederick Pollock. The Scottish philosopher Reid developed this position further, focusing on an interpersonal perspective and the social operations of the mind. This equally leads to different interpretations of morality as either based on feelings (Hume) or practical reason (Reid) and of law as motivated by utilitarian considerations or justice. As far as customary law is concerned, Hume's personal perspective has influenced all of the more recent theories about customary law. The chapter concludes by advocating the interpersonal perspective of Reid as basis for the formation of customary law.

Chapters 4 and 5, by Callies and Ørebech respectively, provide detailed accounts of the position of customary law in the legal systems of England and Norway respectively. There is extensive case law in England distinguishing customs from the common law based on criteria developed by William Blackstone. Blackstone's criteria such as immemoriality are still influential, and not just in England. In fact the somewhat shorter list of preconditions for recognition of customary law in Norway is not entirely dissimilar to the Blackstonian principles. However, as the comparison with other Scandinavian countries shows, not all civil law countries are as open minded about customary law as Norway.

Bosselman begins Chapter 6 by reviewing some of the more recent management literature on change and adaptation and moves on from there to the necessity for resiliency of legal rules in the face of rapid environmental change. Ecosystems are in flux and short-term natural resource management solutions often inappropriate. Bosselman continues by identifying some of the main features of systems that have proven to be resilient such as the ability to change rules, absorb feedback and create a balance of rights and responsibilities.

In Chapter 7, Ørebech examines the place of customary law in democratic societies. He stresses the 'bottom-up' democratic character of customary law systems and addresses the concerns of legal positivists about the transparency, predictability and coherence of these systems. In the second part of the chapter, he uses game theories to show the effects of different property models on fisheries. A public property model based on customary law may become a viable alternative to market-based solutions on the one hand and state interventionist models on the other.

In Chapter 8 (Customary law, sustainable development and the failing state), Martin Chanock turns to customary law in developing countries. He leads the reader away from the jurisprudential paradigms of Blackstone, Maine and Weber, which have little to contribute to explanations of law and custom in what he refers to as 'failing states'. Centralized planning in these states has failed, and this has led to an increasing role for local self-management and a renewed emphasis on custom and customary law. International rights discourses and the growing influence of NGOs also play a role in this regard. However, this may again lead to distorted versions of customary law, which may not be able to fulfil the many conflicting goals and expectations it is supposed to serve. Nevertheless, customary law has to be understood as a process rather

than a set of rules, and it may still offer the most fruitful resources for struggling states and communities.

In Chapter 9, Ørebech and Chanock contrast the lack of recognition of customary principles at the national level in both developing and developed countries with the growing consideration and validation of sustainable development and customary law on the international stage.

Bosselman, Petersen and Ørebech revisit their earlier case studies in Chapter 10. They contrast the ethnicity-based approach of Hawaii with the locality-based approach of Norway. The Greenland example shows that there may be less emphasis on customary law in a setting of self-rule, where cultural values are perceived to be less threatened. In Chapter 11, Bosselman summarizes arguments in favour and against the choice of customary law. In the final chapter, Bosselman and Ørebech summarize the main arguments of the book and recommend further study and research into customary law in a globalizing culture.

The book is an insightful introduction to the topic, which will be of interest to academics and students in areas such as law, environmental studies, sociology and anthropology, as well as to development planners at the local, national and international level. It discusses the theoretical foundations for the recognition of customary law in Western jurisprudence and adds interesting case studies. It fills a gap in the current literature regarding the difficult link between customary law and sustainable development, which is all too often taken for granted. While the authors plead for a more detailed study of the potentials of customary law, they remain critical of their subject and do not fail to mention potential shortcomings of customary rules, especially where they are connected to exclusive notions of ethnicity or status derived from age or gender. The case studies relate to indigenous minorities and areas under self-rule in developed countries. As Chanock points out in his excellent chapter, the problems in these settings may be quite different from those facing developing countries. While a further developing country case study would have been useful, the book is, with over 500 pages, already quite voluminous. Therefore, the authors are correct in referring to further comparative studies in their conclusion.

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doi:10.1017/S0376892907223653

Under Ground. How Creatures of Mud and Dirt Shape our World

BY YVONNE BASKIN

237 pp., 23.5 × 16 × 2 cm, ISBN 1 59726 003 7 hardback,
 US\$ 26.95, Washington DC, US: Island Press, 2005

Soils are, literally, fundamental to the support and sustenance of all terrestrial systems. The ecosystem functions, goods and services

they provide keep civilizations going, and as the historical record shows, where land degradation goes too far, societies collapse. Soil conservation is a very significant challenge for humanity both now and in the future. But there is a woeful general ignorance of the roles and importance of soils, and an even greater lack of awareness of the life that resides below-ground. This may be because the majority of the soil biota are microscopic and hence invisible to the unaided eye; out of sight is out of mind. But the living biomass in most soils equals, and usually exceeds, that aboveground in virtually all terrestrial ecosystems, and levels of biodiversity below-ground exceed those above-ground by orders of magnitude in all cases. The soil biota form an astonishingly complex biological engine of the Earth, driving myriad key processes and underpinning environmental quality, as this book engagingly explains. *Under Ground* arose as a project carried out under the auspices of SCOPE (Scientific Committee on Problems of the Environment). Yvonne Baskin is a science writer who spent time with many soil ecologists in their respective field and laboratory habitats in order to learn first-hand about their research and associated perspectives on the below-ground ecosystem. Her writing style here is a form of easily read and accessible 'learned journalism', akin to a series of magazine-style articles, which keeps the pace high, never dwelling for long on one particular topic, and consistently accurate. She mixes vignettes of the personalities involved and their associated research in equal measure, with a liberal use of quotes. Although quite short relative to the magnitude of the topic, this is a reasonably comprehensive book covering below-ground ecology in many ecosystems, and a large share of the key contemporary issues and research going on in the discipline. These include what regulates below-ground biodiversity, the functional consequences of such diversity, how organisms act as ecosystem engineers, how land management affects biota and associated functions, and soil conservation and restoration. The latter is crucially important since within societal time-frames, topsoil is effectively a non-renewable resource, and in many regions of the world it is being degraded unsustainably. Most of the major groups of soil biota and many of their interactions are described, but refreshingly via a series of ecosystem-orientated case studies rather than a taxonomic or systematic approach. The range considered is broad, from the dry valleys of Antarctica to European grasslands, American forests and rangelands, tropical agriculture and beyond, including a chapter on marine sediments. There are many unobtrusive cross-references to the scientific literature given in a notes section at the end of the book. The high production values are let down by several line drawings that vary in quality from poor to uninspiring, and actually add little to the text; this is my only real criticism. If part of the ignorance of soil biota is because it is invisible, then a chapter on visualization of the soil habitat and the truly remarkable variety of form in its denizens, a theme barely touched on, is perhaps a missed opportunity. Nonetheless I unequivocally recommend this book to anyone who has a professional or personal interest in the environment, and most especially anyone who has not previously considered what is going on underground. You might be surprised, and you will certainly be enlightened.

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