

The significance of indigenous customary law according to the international law on indigenous peoples

Law is the base of human civilization, without law there is no civilization. During ages, people, gathered in different kinds of groups, invented, created and developed various legal systems. Logical aim and, in the same time, consequence of the creation of any legal system is the assumption that this law will be recognized and complied with. In a world of different legal systems attached to different states, it is nowadays common standard that group or subject governed by one law must recognize law of the other group. This is vastly accepted view, but derives from times of state-centred theories. Today international community faced the aspect of recognition of indigenous peoples' legal systems, which are often significantly different than "standard" systems. In those legal systems customary law, which in "western" law culture almost fall into disuse or is treated as inferior, is the most characteristic form. This is great challenge for international community to go through the problem of this legal diversity according to old prejudices. Yet, it has to be seen how and why indigenous customary law is so significant.

To understand the significance of indigenous customary law in the light of international regulations concerning indigenous peoples it is necessary firstly to explain the idea of customary law itself and signifi-

cance of this law for indigenous peoples. Next, it is worth to ask about the recognition of indigenous customary law by other legal systems and grounds for such a recognition. Only then it will be possible to discuss the significance of indigenous customary law in the light of the international law and it will be easy to understand why international mechanisms preventing and strengthening indigenous customary law should be improved and promoted and why this view should find acceptance also in the policies of non-governmental organisations.

The idea of customary law is well-known to people from ancient times. It was arising in any place where people gathered in a community. Traditional and accepted rules of conduct became legal norms on the ground of undisturbed practice or common rule.¹ Customary law could be codified and become written law, which is now so characteristic for most of modern legal systems. Customary law played important role in the time of Middle Ages when European legal systems were forming. Now its role is significant on the field of international law, but in domestic systems it had been abolished or its role diminished drastically in favour of written law.² Today customary law is still core of legal thinking in tribal and indigenous societies. Legal norms grounded on practice and traditions are characteristic for small or distinct communities. And it is worth to point out that those legal systems based on a custom and realized in indigenous societies are effective. Significance of customary law for indigenous peoples is very viable. If there exists a community it must function according to some rules. Those rules, here customary law, are the essence of a social organization of this community. People must comply with those norms if they want to create and maintain their community.³ What is more, this law, legal thinking and norms of conduct are guarantying them certain rights in this community and in case of the interaction with people from outside of the community this customary law of indigenous should still protect its own subjects. It also should not be forgotten that the law is an emanation of culture and way of living of certain society. It protects values and traditions of community as well

1 *Customary law*, BusinessDictionary.com, <http://www.businessdictionary.com/definition/customary-law.html> [available: 30.11.09].

2 However, in some legal systems of modern states customary law has still strong position.

3 J.B. Henriksen, M. Scheinin, M. Åhrén, *The Saami People's Right to Self-determination*, Gáldu Čála. Journal of Indigenous Peoples Rights, 2007, no. 3, p. 93.

as enables this community proper functioning. To conclude it can be said that the law for indigenous peoples is very important segment and product of own culture which enables this culture ongoing existence and survival in its proper form.

In light of arguments presented above there is no doubt that preservation and recognition of indigenous customary law is part of guaranteed cultural integrity based on non-discrimination norm viewed under values of right to self-determination.⁴ This point of view is indirectly supported by CERD General Recommendation on Indigenous Peoples underlined by James Anaya.⁵ If international community guarantees, by various legal instruments, right of self-determination to indigenous peoples, it is obvious consequence that in the same time right to exercise and maintain own legal system as a part of culture is also guaranteed under granted right of self-determination. In literature of the topic there can be found clearer statements providing that respect for indigenous peoples' customary law (or common law) is a significant aspect of right to self-determination.⁶ Under that statements, which are supported by various international acts providing preservation of indigenous culture, customs and practice, it should be clear that indigenous customary law have to be recognized, respected and protected in light of commonly accepted (in international law and custom) right of indigenous peoples' to self-determination.

Significance of indigenous customary law according to international law is placed in the area of recognition of that law, granted on the ground of indigenous peoples' right to self-determination. Nowadays, some indigenous societies are governing themselves by enacted by own institutions norms, but customary law linked with indigenous cultures plays important role which is often ignored by the states governing themselves by statutory written law systems.⁷ The difference between main-society legal system usually based on written statutory law and indigenous legal system, consisting of customary law in great part, sometimes can lead to incorrect conclusion that indigenous customary law is inferior according

4 S.J. Anaya, *Indigenous Peoples in International Law*, 2nd edition, Oxford University Press 2004, p. 131.

5 *Ibidem*.

6 J.B. Henriksen, M. Scheinin, M. Åhrén, *op. cit.*, p. 93.

7 M. Åhrén, *The Saami Convention*, Gáldu Čála. Journal of Indigenous Peoples Rights, 2007, no. 3, p. 18.

to state written law. This point of view may come from various regulations in domestic law of different states, which are putting custom as an inferior source of law in comparison with statutes and other enactments. Yet, this way of thinking is false due to the fact that in case of indigenous customary law there are two coexisting legal autonomous systems: main-society state system and indigenous legal system. Subordinating one (indigenous) legal system to the other (state) by sole regulation of that other system is impossible. That way of thinking, as Mattias Åhrén noted, is in collision with acceptance of the fact that different peoples are living on the same territory and both of them have right to self-determination.⁸ However, despite the lack of any difference between state written legal system and indigenous customary law which could justify any superiority or predominance of state law⁹ there exists in many countries regrettable concerns, showed by practice, about inferiority of indigenous customary law. And that is why the significance of indigenous customary law is situated, according to the international law, in legal instruments of international community, which could help indigenous peoples to defend their legal systems against the diminishing of the customary law's role by domestic states. It is obvious on the ground of indigenous peoples' right to self-determination and various international norms and acts elaborating that right, that indigenous culture, practices and customs are guaranteed, protected and recognized. However, different states do not derive from those regulations that indigenous customary law also have to be preserved and treated as equal according to domestic codified law. What is more, lack of precise formulations concerning indigenous customary or common law in some acts and regulations may result in situation when states become in power to treat indigenous customary law only as customs or traditions. This situation could significantly weaken the position of indigenous customary law, especially in comparison to domestic main-society statutory law. The problem deriving from not enough precise regulation concerning indigenous customary law was underlined by Gunnar Eriksen in the case of Saami customary law in Norway. Eriksen noted that dependable on the domestic state legal doctrine, concerning difference between customary law and customs, state and courts have possibility "(...) to conduct a kind of »censorship«,

⁸ *Ibidem*, p. 19.

⁹ *Ibidem*, p. 18–19.

to determine whether custom deserved the status of customary law".¹⁰ That situation strengthens the belief that in case of their customary legal systems, regulations in international law, which precisely provides that indigenous customary law have to be preserved and recognized as equal, are significant for indigenous people.

Basic grounds, in the field of international law, for recognition and preservation of indigenous customary law can be found at least in three crucial covenants: International Convention on the Elimination of All Forms of Racial Discrimination of October 13, 1966, International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights of December 18, 1972. These three corner stone acts of international human rights system could apply to recognition of indigenous customary law in some extent.¹¹ Yet, those acts, which are general in kind, do not provide precise provisions concerning recognition or preservation of indigenous customary law, whereas in the case of indigenous customary law, as an aspect of cultural integrity and right to self-determination, real significance may be attached only to such concrete and detail provisions relating to indigenous customary law or just indigenous law, legal system or at least legal thinking or indigenous legal practice.

Two main global acts in international law concerning indigenous peoples: ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries¹² and UN Declaration on the Rights of Indigenous Peoples¹³, provide significant regulations of the issue of indigenous customary law. Provisions of the ILO 169 convention concerning indigenous law issues could be presented as a good example of regulation concerning that kind of matters which should be promote. Article 8 of the ILO 169 convention stipulates that: "1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal

¹⁰ G. Eriksen, *Quod non est in actis, non est in mundo!*, JUR-3605 5. Avdeling Master I Rettsvitenskap, Universitetet I Tromsø 2009, p. 6–7.

¹¹ R. Sarre, *Aboriginal Customary Law*, <http://138.25.65.50/au/special/alta/alta95/sarre.html> [available: 01.12.09].

¹² Further in text as "ILO 169".

¹³ Further In text as "UN Declaration".

system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle. 3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.”¹⁴

The point 1 of that article stipulates clearly about recognition of the indigenous customary law. In light of that point it is obvious that state should recognize indigenous peoples' right to possess and maintain own legal system based on customary law. What is more, convention states about “customs and customary laws”¹⁵. Putting the term “customs” in this article concerning legal culture of indigenous peoples indicates that customs of indigenous peoples should be also recognised as a part of indigenous legal system if they are acting as a part of that system in opinion of the concrete indigenous people.¹⁶ It is good solution which is facing the problem, mentioned by Eriksen, of doctrinal diversity of customary law and customs in case of indigenous peoples in some states.¹⁷ However, the point 1 of the article cited above is not recognizing indigenous customary law as a part of separate legal system of indigenous peoples which is not a part of state system. Although phrase: “In applying national laws and regulations (...)”,¹⁸ indicates, in an adequate interpretation, that indigenous customs and customary laws are different sphere than national–state legal system. The point 2 of the article 8 embodies a special mechanism in the case of conflict between national or international law and indigenous law. According to that point, state legal system or “internationally recognised human rights”¹⁹ can prevail indigenous customary law. Yet, that situation should be stated in appropriate procedures and, what is more important, superior position of state legal system is possible in the case of fundamental rights as well as the superior

14 International Labour Organisation convention no. 169: Indigenous and Tribal Peoples Convention, 1989, art. 8, ILOLEX Database of International Labour Standards, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> [available: 01.12.09].

15 *Ibidem*.

16 *Ibidem*.

17 G. Eriksen, *op. cit.*, p. 6–7

18 International Labour Organisation convention no. 169: Indigenous and Tribal Peoples Convention, 1989, art. 8.

19 *Ibidem*.

position of international law is possible only in the case of recognised human rights.²⁰ This regulation indirectly but strongly indicates that indigenous customary law is not inferior to any other legal system and the situation when other legal regime is prevailing is a rare exception which must be grounded on fundamental legal principles. The subsequent article of the ILO 169 convention (article 9) deals with the controversial and problematic issue of indigenous criminal regulations according to national law. Indigenous customary law often includes way of reacting to a commission of a crime by a member of the community. Recognition of these criminal and penal norms of indigenous customary law is very important due to the fact that in distinct indigenous cultures the idea of a punishment could be different than in a dominating main-society culture. As well as understanding of crimes and theory of the guilt can be also different. In light of those issues article 9 is an attempt of solution of these problems, it stipulates that: "1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases."²¹

It is hard to conciliate existence of two legal systems with a criminal judiciary effectuated over the whole state territory of one of them according to the fact that this another system exists in the boundaries of the same state territory. Article 9 of the ILO 169 convention attempts to solve this complex and difficult problem in compromise way. Article 9 provides recognition of the indigenous customary law on the field of committed offences (in point 1) and on the field of penalties (in point 2). Although criminal jurisdiction is prescribed for state's courts, they must recognize and take into account indigenous customary norms. The recognition and possible application of indigenous norms is in this sphere limited also, like in article 8, by international human rights and by compatibility with national legal system,²² which is necessary for duly functioning criminal justice system.

²⁰ *Ibidem.*

²¹ International Labour Organisation convention no. 169: Indigenous and Tribal Peoples Convention, 1989, art. 9.

²² *Ibidem.*

UN Declaration on the Rights of Indigenous Peoples is another significant for indigenous customary law international act. Declaration recognises indigenous legal institutions in article 5 which provides that: “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”²³

The significance of maintaining and strengthening indigenous customary law²⁴ under international law can be seen in further provisions of this UN Declaration. Realization of demands deriving from rights granted under indigenous customary law and on the basis of rules of that law will allow the full and just realization of indigenous people as distinct cultures and communities. And this is necessary for the solid realization and implementation of the right of indigenous people to self-determination.²⁵ As it is underlined in literature: “(...) respect for indigenous peoples’ common law systems is a central element when the right to self-determination is to be implemented”.²⁶

It is obvious that the law regulates daily life of every society and is mirroring and protecting its culture. In case of indigenous peoples it is the same. As a result of that it is impossible to maintain and develop own and distinct culture in full and just scope without effective and recognized law. State must respect their customary law as a way of self-determination to enable self-determination of indigenous people. This makes preservation of distinct culture possible, because indigenous peoples’ customary law is not only mirroring and protecting their culture, but also it is strictly bound with this culture as an inherent part of it.²⁷ Indigenous customary law is so significant, because without recognition and enabled realization of its norms it would be not possible to implement the principle of self-determination of indigenous peoples in various areas. Every field touched by concrete indigenous customary law is a part of broadly understand indigenous distinct culture and for effective protection needs recognition and respect for indigenous custom-

23 United Nations Declaration on the Rights of Indigenous Peoples, 2007, art. 5, <http://www.un.org/esa/socdev/unpfi/en/drip.html> [available: 01.12.09].

24 *Ibidem*.

25 J.B. Henriksen, M. Scheinin, M. Åhrén, *op. cit.*, p. 94.

26 *Ibidem*.

27 *Ibidem*, p. 93.

ary law managing that field.²⁸ Adopted in 2007, UN Declaration on the Rights of Indigenous Peoples meets this in some extent. Article 34 of that declaration develops the recognition of indigenous legal institutions, stipulating that: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”²⁹ Formulation of this provision indicates that customs, traditions, practices, procedures and juridical systems or customs,³⁰ which all are usual factors creating customary legal system, have a right to exist, function and develop limited only by human rights standards. For duly working maintenance of those factors the indigenous customary law should be treated with respect as a normal and effective legal institution. When issue of the recognition and respect for indigenous customary law is undoubted, UN Declaration provides pure examples of the significance of indigenous customary law according to international law which obligates states to obey it. The point 2 of the article 11 of the mentioned UN Declaration states that: “2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”³¹

Under regulation of this article one can see that when it comes to the violation of indigenous customary law (consisting of laws, customs and traditions, which all are enumerated in the article) then: “States shall provide redress through effective mechanisms (...)”³². This is the significance of customary law of indigenous peoples according to the international law. To be precise: international law, as it is visible for example in mentioned above provision, provides indigenous peoples measures to persuade or even force states to treat indigenous customary law with all due respect and to comply with this law. In the light of such interna-

²⁸ *Ibidem*.

²⁹ United Nations Declaration on the Rights of Indigenous Peoples, 2007, art. 34.

³⁰ *Ibidem*.

³¹ *Ibidem*, art. 11(2).

³² *Ibidem*.

tional provisions it will be much more difficult for states to violate indigenous customary law, because in the same time it would be a violation of the international law, and the violation of norms of the international law is much more visible and put a state under threat of some sanctions as well as criticism of the international community. It is also an issue of the prestige on the international arena of states which are carefully avoiding violations of international norms. That shows the signification of the international law norms concerning indigenous customary law: they are strengthening realization of the right to self-determination as well as effective preservation of distinctiveness of indigenous culture and communities. If respect and recognition of indigenous customary law enables indigenous peoples to protect and preserve their culture and way of living, then norms strengthening this respect and recognition on the international level have a key function for effective preservation of indigenous societies. If state is violating or ignoring indigenous customary law there is little hope that in such kind of state judicial way could effectively protect indigenous people against this violation. International law regulations concerning indigenous customary law open a door to solve this problem and force the state to stop violating indigenous law. It is very important because such violations may touch such lively matters for indigenous peoples as lands or resources which are always strictly tied with indigenous culture and are often managed by indigenous customary law.³³ That is why indigenous customary law and due respect for it is so significant for indigenous people. That significance according to UN Declaration on the Rights of Indigenous Peoples is mirrored in some way by article 27: "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."³⁴

UN Declaration also provides that in the case of conflict on some field between a state and indigenous peoples due respect should be paid

33 J.B. Henriksen, M. Scheinin, M. Åhrén, *op. cit.*, p. 94.

34 United Nations Declaration on the Rights of Indigenous Peoples, 2007, art. 27.

to the indigenous legal systems,³⁵ so to the indigenous customary law as well. Article 40 of the UN Declaration stipulates that: “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”³⁶

That provision is strengthening position of the indigenous customary law and it also puts bigger responsibility on states for respecting such customary law. Article 40 also emphasises significance of indigenous legal systems’ rules and traditions as a necessary factors which should be taken into account during solution of disputes between states and indigenous peoples.

ILO 169 convention and UN Declaration on the Rights of Indigenous Peoples are two main international acts concerning indigenous aspects in global scope and they take into account issue of the indigenous customary law or, broadly, of the law of indigenous peoples in vast sense. However, there are also regional international acts or drafts concerning indigenous peoples and underlining the significance of the indigenous legal systems. Proposed American Declaration on the Rights of Indigenous Peoples and the Nordic Saami Convention (still unfortunately not ratified) are good examples which are worth to adduce here.

Proposed American Declaration on the Rights of Indigenous Peoples in a version approved by the Inter-American Commission on Human Rights in 1997 includes two articles concerning indigenous law. However, both articles, XVI and XVII, are treating broadly about indigenous law or legal systems, so for sure customary law as well, they are presenting idea of the incorporation of indigenous legal systems into states’ systems. Points 1 and 2 of article XVI stipulate that: “1. Indigenous law shall be recognized as a part of the states’ legal system and framework in which the states’ social and economic development takes place. 2. Indigenous peoples have the right to maintain and reinforce their legal systems and apply them to affairs within their communities, including systems addressing such matters as conflict resolution, crime prevention and the maintenance of peace and harmony.”³⁷

35 *Ibidem*, art. 40.

36 *Ibidem*.

37 Proposed American Declaration on the Rights of Indigenous Peoples (1997), art. XVI, <http://www.cidh.oas.org/indigenas/chap.2g.htm> [available: 02.12.09].

The point 1 provides that indigenous law will be recognized but as a part of state's legal system which brings with it a danger of inferiority of indigenous customary law in such combined legal system. On the other hand, the point 2 guarantees in some way distinction and freely functioning of indigenous legal systems, but it does not change the fact that incorporation of indigenous customary law in the light of point 1 may threaten applicability of that law in comparison with state systems.³⁸ It should be underlined that if indigenous customary law would be recognized as a part of entire state legal system, state authorities would gain a decisive power to rule this law as a part of whole system. That regulation, in the concern of the author of the paper opens a door to violations of the indigenous peoples' rights. It seems to be obvious that that regulation of Proposed American Declaration on the Rights of Indigenous Peoples desires to be mentioned as a provision clearly recognizing indigenous law, but it is not perfect. Next article XVII is written in the same spirit. Even the title of this article indicates way of thinking proposed in this text: "National incorporation of indigenous legal and organizational systems".³⁹ However, the text of this act is only proposal, which has been changing from the 1997 and various versions were prepared during negotiation process. That situation puts more weight on the importance of recognition of indigenous customary law than on proposed ways and procedures of such recognition.

In that moment it is necessary to mention the case of the *Awas Tingni Community v. Nicaragua*, decided by the Inter-American Court of Human Rights on August 31, 2001, to underline significance of indigenous customary law according to international law. This well-known case is treated as a big step for defence of indigenous peoples' rights on the international arena. The significance of any international regulations concerning indigenous customary law lies in possibilities of defence against violations given by those regulations. In the case of *Awas Tingni* state violated rights of indigenous people by licensing logging industry on lands traditionally used by *Awas Tingni* community.⁴⁰ In that case, from the point of indigenous customary law, it is important that traditional usage of lands by *Awas Tingni*

38 *Ibidem*.

39 *Ibidem*, art. XVII.

40 C. Grossman, *Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System*, <http://www.wcl.american.edu/hrbrief/08/3tingni.cfm> [available: 02.12.09].

ni was regulated by community's customary tenure system.⁴¹ The case was brought before The Inter-American Court of Human Rights associated with the Organization of American States by the Inter-American Commission on Human Rights as a representative of the *Awas Tingni* community.⁴² Court held inter alia that Nicaragua violated rights of indigenous *Awas Tingni* by failing to recognize and protect customary tenure of *Awas Tingni*.⁴³ Here it is necessary to add that customary tenure system is a part of customary law of the community, because those norms treats among others about the usage of lands. Separation or rather autonomy of the indigenous customary law according to state legal systems and position of indigenous customary law as a system of norms which must be respected was underlined precisely by James Anaya and Claudio Grossman: "(...) the communal property of indigenous peoples (...) is defined by their customary land tenure, apart from what domestic law has to say".⁴⁴

However, that case was resolved mostly on the base of the American Convention on Human Rights⁴⁵, yet it shows how significant the recognition of indigenous customary law and its institutions, like tenure system, is for indigenous peoples on the ground of international law. Such recognition enables realization of main principles derived from the right of self-determination as well as it opens practical ways of defence against violations in international courts' system. As James Anaya and Claudio Grossman report, in the case of *Awas Tingni* American Court of Human Rights agreed with the statement of the Inter-American Commission on Human Rights that: "(...) in its meaning autonomous from domestic law, the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions (...)".⁴⁶

Indigenous customary law is construed from such factors as customs and traditions. The phrase quoted above treats about indigenous right of

41 S.J. Anaya, C. Grossman, *Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, Arizona Journal of International and Comparative Law, 2002, p. 2, <http://www.ajicl.org/AJICL2002/vol191/introduction-final.pdf> [available: 02.12.09].

42 C. Grossman, *op. cit.*

43 S.J. Anaya, C. Grossman, *op. cit.*, p. 2.

44 *Ibidem*, p. 12.

45 C. Grossman, *op. cit.*

46 S. J. Anaya, C. Grossman, *op. cit.*, p. 12.

property defined by indigenous tradition and customs, which is recognised by international regulations as a duly right of property.⁴⁷ In light of that it is sure that, despite the fact that it is not named in case of *Awas Tingni*, we have here in fact case concerning protection of norms of indigenous customary law because customary law of *Awas Tingni* was a base for efficient protection of the land and resources of *Awas Tingni* community.

Mentioned earlier Saami Nordic Convention is an example of regional international act on a smaller scale than Proposed American Declaration on the Rights of Indigenous Peoples. Unfortunately Saami Nordic Convention is still a draft, which needs ratification of three state-parties: Norway, Sweden and Finland. The Saami people living in all mentioned countries are the fourth *quasi*-party of that convention. Drafters of the Saami Convention were aware of the significance of indigenous customary law for correct protection and preservation of indigenous Saami culture.⁴⁸ Representatives of indigenous Saami, understanding that recognition and respect for their customary norms is condition *sine qua non* for full realization of their right to self-determination, put strong attention on this issue during drafting negotiations.⁴⁹ However, as it is noted in literature of this topic, claim of clear and full recognition of indigenous customary law met strong resistance from the side of state-parties, which could not understand and accept in full extent the idea of “multiple legal systems” operating in a sphere of the same state.⁵⁰

That phenomenon of, pointed out by Mattias Åhrén, “mental block”⁵¹ existing in minds of states’ lawyers and representatives is not only a problem occurring in case of Saami people. This characteristic state-centred legal theory is still huge obstacle on the way to full recognition and respect for indigenous customary law all over the world. However, as a result of compromise between Saami and state-parties⁵² in the draft of Nordic Saami Convention the article 9, titled “Saami legal customs” can be found⁵³. That article stipulates: “The states shall show due respect for the Saami people’s

47 *Ibidem*.

48 J.B. Henriksen, M. Scheinin, M. Åhrén, *op. cit.*, p. 93–94

49 M. Åhrén, *op. cit.*, p. 19.

50 *Ibidem*.

51 *Ibidem*.

52 *Ibidem*.

53 Nordic Saami Convention (unofficial English translation), art. 9, http://www.saa-micouncil.net/includes/file_download.asp?depid=2213&fileid=2097&file=Nor

conceptions of law, legal traditions and customs. Pursuant to the provisions in the first paragraph, the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist, and if so, consider whether these customs should be afforded protection or in other manners be reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.”⁵⁴ First phrase of that article realizes significant objective for indigenous people: recognition of their customary law under international provisions. Used terminology: “conceptions of law, legal traditions and customs”, indicates strongly that there is no doubt in case of the protection and recognition of indigenous customary law. Second phrase of the article, apart from the inclusion of the protection measures of the Saami customary law, unfortunately, as it is pointed by Mattias Åhrén, leaves for states decisive power in “what extent they shall acknowledge the Saami’s customary norms”.⁵⁵ In spite of the fact that Nordic Saami Convention is still not ratified, article 9 of this convention, its interpretation and history of its negotiation indicate how important customary law is for indigenous peoples in the light of international regulations.

Summarizing, it should be said that customary law is a typical form of indigenous peoples’ legal systems. As in every society, in indigenous communities law is a great part of culture. Moreover, the whole legal system mirrors the culture of society, values appreciated by the society and behaviours condemned by it. Legal systems, especially those based on a customary law, are strictly bound with the culture and specific conditions of daily life of people of concrete culture.⁵⁶ Conclusion which I derive from above stated facts is that it is impossible to separate any society or community from its law. The law, in any form, is an absolutely necessary foundation for any society. Without law there is only anarchy of individuals. That is why in light of commonly accepted right of indigenous peoples to self-determination we have to establish and promote effective regulations guaranteeing recognition and due respect for indigenous customary law.

dic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc [available: 02.12.09].

⁵⁴ *Ibidem*.

⁵⁵ M. Åhrén, *op. cit.*, p. 19.

⁵⁶ J.B. Henriksen, M. Scheinin, M. Åhrén, *op. cit.*, p. 93–94.

Indigenous customary law which is essential for the preservation of distinctiveness of indigenous cultures and societies should find strong protection in international law. Although taking into account an old state-centred comprehension of legal systems as unified and singular for each state it is a big challenge to provide precise regulations strengthening recognition of indigenous customary law. Significance and essentiality of the customary law for indigenous peoples is unquestionable. However, domestic regulations of states or legal doctrines are not always as effective in the recognition of the indigenous customary law as they should be. There is another argument which speaks in favour of precise international norms concerning indigenous customary law. Current international law in different acts deals in some extent with this important issue. Significance of existing international provisions concerning indigenous law is located in the possibility of effectuating those norms on the international arena in the case of violations. Norms provided by international acts which are still not ratified marks also international standards in the field of indigenous customary law.

In every international act, considering indigenous customary law, stipulations providing due respect to indigenous law and customs are placed in field of culture and necessary conditions for preserving indigenous peoples' distinctiveness itself. There are other acts not mentioned in that paper concerning this issue and most of them situate indigenous customary law or its aspects as an essential part of indigenous peoples' life. If we deny protection and recognition of indigenous customary law on the international law level, we will reject the whole idea of preservation and rights of indigenous peoples. Without law there is no civilization, without duly recognition of indigenous customary law in international law there may not be indigenous peoples in future at all.