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Managing Mutual Exclusivity: Recognising Both Culture and Development in Environmental Regulation through Self Determination

John Pearson

Abstract

The inclusion of culture as a consideration in the regulation of projects with the potential to cause environmental damage is indisputably fraught with difficulty. Indeed the question of whether an approach based on cultural relativity or universalism in this regard is far from being answered. A variety of approaches have been attempted to achieve the delicate balance required to at least respect the plethora of stakeholders in something as integral as the environment. As a result of the innumerable potential factors involved in this endeavour, the paper will attempt to identify pertinent and successful practices from the field of legal regulation in achieving both cultural and environmental protection. Specifically, the piece will consider the notion of environmental self-determination, the choice of interested parties and peoples to exploit or to preserve environmental resources in a manner relevant and respectful to themselves and their social and cultural idiosyncrasies. In conclusion, the piece will assess whether by combining the aforementioned examples of good practice a model for regulation can be achieved which represents this aspirational notion of environmental self-determination. The focus of the analysis will be upon extraction industries, primarily the involved in the exploitation of hydrocarbon energy sources, the colloquial fossil fuels, and their interactions with indigenous and minority groups. These case studies will be utilised particularly owing to the acute clash between inimitable cultures and unparalleled economic and developmental benefits to wider society they represent. The adoption of these scenarios in particular is an attempt to suggest that should these fundamentally opposed and matchless interests be shown to not be mutually exclusive, a framework imposing environmental self-determination with the potential for broad application will have been discovered.

Key Words: Indigenous peoples, minorities, human rights, environmental damage, hydrocarbons, culture, self-determination.

The balance between development and the harms it causes is far from a new concern in the regulation of projects with the potential to cause catastrophic environmental damage. Striking said balance is inevitably difficult where concerns revolve around only broad environmental concerns based upon notions of conservation and the preservation of biodiversity. Where the protection of inimitable cultures, or aspects thereof, is also added to this equation the difficulty

of managing the variety of factors to be considered is vastly increased. This is exacerbated by the well documented lack of ability to measure culture, or the significance of tangible assets, features and resources in relation to it. As Klamer asserts, ‘Measurements of cultural capital, if possible at all, are far off.’¹ This is by contrast to, ‘accounting for economic value [which] has become quite sophisticated.’²

This reality is of particular concern in relation to minorities and indigenous peoples, as they are often inextricably linked to a particular environment by virtue of their culture and expressions thereof. Assessing this ‘distinctive relationship to those lands’³ and placing a value upon it in order to balance the competing demands of varied social groups in the context of development is therefore further complicated by the fact that, ‘public institutions...lack knowledge of indigenous peoples’ life, culture and needs.’⁴ Similarly, the varied nature of cultural beliefs and modes of expression within relatively small geographic regions can complicate considerations regarding that which is crucial to them and their ways of life. Once such wide ranging considerations are aligned to the pre-existing plethora of issues and stakeholders which must inevitably be taken into account in modern regulatory frameworks, the assertion of the title of the piece that culture and development are often mutually exclusive becomes undeniably tenable.

Culture is, however, not alone in its definitional idiosyncrasies, development too suffers from something of an identity crisis. ‘There are many definitions and theories of development...But certain major ‘conceptual models’ used or assumed in definitions may be noted,’⁵ McGranahan suggests. In the legal context, there is also ‘no single definition of development’⁶; however, for the purposes of the piece, the broad conception espoused in the United Nations Declaration on the Right to Development will be used as a basis for the contentions of the piece. The Declaration defines the concept of development as;

‘a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.’⁷

Application of the concept of development in practice thus focuses on utilitarian considerations, achieving the best outcome for the populace of a jurisdiction as a whole. As Gasper states, ‘utilitarian perspective is seen in economic cost-benefit analysis of projects, and underlies much wider areas of mainstream economics treatment of choices in policy and legislation.’⁸ As such, ‘the dominant mode of development thinking [is] based on...utilitarianism [and]... has not been conducive to natural environment and ecology,’⁹ considerations.

Whilst counterarguments to this assertion are undeniably present, the focus of the piece on hydrocarbon extraction industries considerably reduces such contentions. The position of Resources for Future, a conservation research body in relation to the exploitation of Arctic Oil is illustrative of the acute prevalence of utilitarian thinking in relation to as significant a resource in modern society as oil. The research body stated that, ‘a 10 percent reduction in gasoline consumption would make Arctic oil development unnecessary,’¹⁰ which Coates suggests is ‘classic utilitarian conservation.’¹¹ Whilst Coates’ analysis was made over a decade ago, unchanged attitudes towards extraction of oil from such a sensitive region as the Arctic remain focused on narrow conceptions of cost and benefit and clearly align with a utilitarian approach to development of hydrocarbons. Indeed, the reality remains that, ‘decisions on oil and gas are inextricably interwoven with attitudes on general political and economic issues’¹² and ensures that as a result of our dependency on oil such an attitude is also unlikely to alter in the relatively near future.

The struggle between the cultural value of natural resources and their utilization for the ‘common good’ of the majority of society is reminiscent of the ongoing debate between universalism and cultural relativism in international human rights law.¹³ Indeed, in the context of balancing developments with negative environmental consequences and culture, the universalist approach of applying human rights identically to all peoples bears considerable similarities to traditional utilitarian thinking. By contrast, the approach of cultural relativism presents a framework for the regulation of hydrocarbon extraction, which is inclusive of broader considerations than the undeniable economic benefits of such projects alone. The relativity of regulation to subjective considerations of the cultural significance of environments would ensure that where appropriate, extraction could continue for the broader benefit of society whilst ensuring the survival of inimitable cultures via the preservation of environmental features to which they were inextricably connected.

In order to outline the conceptual regulatory framework suggested above a review of relative regulatory successes, or elements thereof, and their inadequacy for the context at hand is necessary. A *prima facie* consideration of the relative framework outlined above bears considerable links to the notion of a ‘margin of appreciation’ afforded to States in their application of human rights obligations. The doctrine, well established in the jurisprudence¹⁴ of the European Court of Human Rights (amongst others), ‘embraces an element of deference to decisions taken by democratic institutions...deriving from the primordial place of democracy,’ essentially permitting justifiable restrictions on human rights based on national characteristics and concerns. The margin is lauded as a useful tool in ensuring compliance on the part of States with the underlying core elements of protection afforded under the European Convention on Human Rights¹⁵ and its enforcement mechanisms instead of allowing relatively minor contentions to

develop into wider non-acquiescence. As such, the doctrine is described as ‘the means through which the ECHR has sought to reconcile protection of fundamental rights standards with the concerns and demands of contracting states.’¹⁶ The doctrine is therefore the embodiment of a solution to a competing demands ‘balancing’ issue akin to that existing between cultural and development considerations in the regulation of hydrocarbon extraction projects.

The margin of appreciation doctrine, however, deals with instances of the inhibition of individual rights in favour of a wider social issue. Balancing here is between two fundamentally mismatched parties, the individual and the State. The ‘margin’ recognizes the widely accepted necessity of certain limits on freedoms to ensure a greater social good, an obvious example being the incarceration of those convicted of crimes accepted as being worthy of such a reprimand. The balancing of culture and development is not, however, such a simple and broadly accepted relationship. There is no widely accepted necessity of the destruction of inimitable cultures in order to ensure a ‘constant improvement of the well-being of the entire population.’¹⁷ The margin of appreciation allows the distinction between, ‘matters that can be decided on a local level from the matters that are so fundamental that they should be decided regardless of cultural variations.’¹⁸ However, as Kratochvil highlights, rarely is this balance defined. Instead, it is described merely as a ‘certain margin of appreciation’ or is utilized in the concluding remarks of a judgment to justify an act not having given rise to a breach of rights.¹⁹ As such, whilst a balance is struck this is often only in relation to a particular governmental act (or omission) rather than a definitive statement as to the extent to which an inhibition on rights is allowed in a broader context. Thus an individual hydrocarbon extraction project which had environmental impacts of a harmful nature both ecologically and to cultures inextricably linked to it might be deemed as having gone beyond the margin of appreciation given for the wider economic gain of society. This was deemed to be the case by the court in *Hatton v UK*²⁰ in relation to the importance of night flights into and out of Heathrow Airport for the UK economy. To use the margin of appreciation to solve the balance between culture and development when regulating hydrocarbon extraction projects would therefore be remiss. Such an approach would provide a result only on a case-by-case basis, and in no way solve the broader issues raised by the piece by suggesting a broadly applicable regulatory framework capable of handling these competing interests.

As discussed, approaches to evaluating the legitimacy of projects in regulatory frameworks has been some variant of cost-benefit analysis. Campbell and Corley go so far as to describe it as, ‘one of the fundamental tools in a policy analysts tool kit.’²¹ With the predominance of this approach to balancing competing interests in environmental features however comes an inextricable link to monetary value, an ‘important feature of [cost benefit analysis] is that all relevant effects are expressed in monetary values, so that they can be aggregated,’²² and a quantitatively

justifiable decision reached. An oft repeated criticism of cost benefit analysis in relation to environmental matters has been that, 'for some 'goods,' like biodiversity and river water quality, no market exists at all from which a price can be observed.'²³ In spite of this, the notion of ecosystem services has developed to assess the benefits of environmental features with no immediately discernible economic value. By doing this, a monetary value can be placed on the features and their utility in natural form, and this value contrasted to that to be gained by exploiting it.

This approach is, however, widely criticised on a number of bases. Firstly, the nature of the assessment is inevitably based solely upon estimation. The exact ramifications of the exploitation of an ecosystem or feature thereof cannot be accurately measured. As Corovolan et. al. state, 'major adverse social surprises are likely to be precipitated by reductions in ecosystem services'²⁴ regardless of their absolute eradication. The second and most pertinent criticism to the case at hand is that the measurement of the value of the, 'cultural, non-material ecosystem services [which] provide cerebral, aesthetic and recreational experiences'²⁵ is impossible to undertake with any degree of accuracy. As Postel and Carpenter state in their assessment of the ecosystem services of water courses and bodies, 'The total global value of all services and benefits provided...is thus impossible to measure accurately.'²⁶ Similarly, the amount estimated is not necessarily representative of a value the wider world would be willing to pay for its preservation. Put simply, the economics of supply and demand governing hydrocarbon prices do not apply as fluidly to ecosystem services with no inherent or market-created price. This flaw is illustrated clearly by the circumstances of the Yasuni people of Ecuador. The government of the State offered to preserve their lands, representing one of the most biodiverse regions on earth, provided a sum equivalent to approximately half potential oil revenues was generated by an international fund collected from other States to offset the development lost by not exploiting the oil reserves beneath the region. As a result of the insistence that the national government would get to decide how the fund was spent, as it would were oil exploited to the same value, the initiative failed in July 2013.²⁷

Both the margin of appreciation and cost benefit analysis employing ecosystem services methods face the same fundamental problem when being employed to balance cultural and developmental concerns in the regulation of hydrocarbon extraction projects. This is that, neither adequately accounts for the inimitable and inextricable links to particular environments that certain cultures possess. This is in spite of relative success in managing broader societal environmental concerns and their consideration against the economic, political and social benefits of hydrocarbon industry expansion. The root of this issue is, it is contested, in a basic misunderstanding of the cultural significance of ecosystems or features thereof, which can only be truly comprehended by those who habitually express them.

In the field of human rights law, a degree of recognition which accounts for this irreplaceable relationship has begun to emerge. The result has been the immovable protection of the ‘survival’ of minority and indigenous cultures. In essence this ensures protection for, as a minimum obligation, those features on which inimitable cultures are predicated. This balance, an inversion of the margin of appreciation it could be argued, allows for clearly defined and recognisable limits to be set on State and thus State-sanctioned industrial impacts upon culturally significant environments and their features. Said limits are, however, rarely set prior to them having been initially breached by the impact, which is in itself the basis for the contention that greater protection should be afforded. The *ex post facto*²⁸ protection this system affords is thus undermined considerably by the fact that the majority of damage contested is often irreparable, at least with regards to full restoration to the state of the environment prior to the contested adverse impact.

Such recognition again fails therefore to identify the specific elements of cultural significance and place limits upon impacts to them prior to them having been realised. Protection is instead based upon the identification of certain tracts of culturally and historically important land (or land on which environmental or man-made features of significance are situated) and the granting of limited proprietary rights in line with the hegemonic approach to land ‘ownership’ which dominates legal discourse. Whilst some groups adhering to cultural norms of the type outlined by the piece operate proprietary approaches to land allocation within their communities, rarely are these included within, able to be translated into, or respected by dominant regional or federal land ownership infrastructures. The protection of delineated geographically identifiable parcels of land in its entirety for minorities and indigenous groups does little to quell opposition to the inevitable impact this has upon development (as defined above) on the part of States. This opposition is largely owing to the absolute nature of the protection afforded in many instances. In essence the ensuring of cultural survival in seminal cases such as *Saramaka People v Suriname*,²⁹ *Lubicon Lake Band v. Canada*,³⁰ and *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*³¹ prevents almost all regulatory control over land which might result in environmental damage of a culturally harmful nature. The protection afforded although not always explicitly being defined as by the judicial bodies implementing it as such, is representative of a degree of self-determination for the groups concerned.

One of the most controversial concepts in public international law and human rights law, self-determination suffers from similar issues with regard to definition as most the terms with which the text is concerned. However, for the purposes of the piece, the concept can be broadly regarded as the right or ability to, ‘determine freely by themselves without any outside pressure their political and legal status,’³² and is regarded as coming in two forms. Crawford is one of the most prominent exponents of this separation of the concept of self-determination, suggesting that it

should be considered as being either internal or external in nature.³³ In simple terms, these two formulations refer to government and authority within an established State (internal) and authority beyond an established State (external), in essence to achieve autonomy in the international sphere, and thus Statehood. By way of illustration, autonomous regions within States internally self-determine with regard to defined aspects of their political, economic, social and even legal situations, potential examples being the situations of Quebec within Canada, Scotland within the United Kingdom, and Hong Kong within China.

A limited variant of internal self-determination based upon ‘free prior and informed consent’³⁴ over governmental actions or those sanctioned by such authorities which might reasonably be foreseen to harm specified culturally significant features is therefore suggested as the solution to the plethora of issues outlined by the piece. In order to balance these two groups of inherently opposing interests, it is argued that a degree of relativity is required. However, as highlighted by the discussion of human rights based approaches to ensuring cultural survival, uninhibited cultural relativism is doomed to be faced by a level of State opposition which would undermine the efficacy of any regulatory framework imposing it.

By specifying the environmental features of inimitable and irreplaceable significance through consultation between minority and indigenous cultures, anthropologists and governmental authorities, their protection can be placed at the determination of those who know its significance best, the peoples themselves. As a result, assessments could be made as to the reasonableness of any encroachment on protected land and resources, inhibition of enjoyment (*usus fructus*),³⁵ or damage to the land itself.³⁶ This would thus allow for projects with no, or negligible, impact to culturally significant ecosystems and tangible benefits to development for wider society to continue whilst ensuring the ability of those most vulnerable to their environmental effects. Such a system would ensure the perpetuation of cultures which have existed, in many cases, for centuries if not millennia and represent inimitable connections to our heritage and the environments that development inevitably threatens.

Notes

¹Arjo Klamer, ‘Cultural Goods’, in *Culture and Public Action*, ed. Vijayendra Rao and Michael Walton (Stanford University Press, 2004), 153.

² *Ibid.*

³ Gerald Torres, ‘Indigenous Peoples, Afro-Indigenous Peoples and Reparation,’ in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, ed. Federico Lenzerini (OUP, 2009), 131.

⁴ Jakob Kronik and Dorte Verner, *Indigenous Peoples and Climate Change in Latin America and the Caribbean* (World Bank Publications, 2010), 127.

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- ⁵ Donald McGranahan, 'Development Indicators and Development Models,' in *Measuring Development: The Role and Adequacy of Development Indicators*, ed. Nancy Baster (Psychology Press, 1972), 95.
- ⁶ Paul de Waart, 'Implementing the Right to Development: The Perfection of Democracy,' in *The Right to Development in International Law*, ed. Subrata Chowdhury, Erik Denters and Paul de Waart (Martinus Nijhoff, 1992), 191.
- ⁷ Preamble to the United Nations Declaration on the Right to Development, A/RES/41/128 4 December 1986.
- ⁸ Des Gasper, *The Ethics of Development: from Economism to Human Development* (Edinburgh University Press, 2004), 62.
- ⁹ Shamsul Haque, *Restructuring Development Theories and Policies: A Critical Study* (SUNY Press, 1999), 151.
- ¹⁰ As referenced by, Peter Coates, *The Trans-Alaska Pipeline Controversy: Technology, Conservation, and the Frontier* (Lehigh University Press, 1991), 240.
- ¹¹ Ibid.
- ¹² Peter Odell, *Oil and World Power* (Routledge, 2013), 150.
- ¹³ See in this regard; Jack Donnelly, *Universal Human Rights in Theory and in Practice* (Cornell University Press, 2013).
- ¹⁴ See in this regard the case of *Handyside v The United Kingdom* (1976) 1 EHRR 737.
- ¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005. 3 September 1953
- ¹⁶ Anthony Gordon, *UK Public Law and European Law* (Hart Publishing, 2002), 71.
- ¹⁷ Preamble to the United Nations Declaration on the Right to Development. A/RES/41/128 4 December 1986.
- ¹⁸ Kanstantsin Dzehtsiarou, 'Interaction between the European Court of Human Rights and Member States: European Consensus, Advisory Opinions and the Question of Legitimacy,' in *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength*, ed. Spyridon Flogaitis, Tom Zwart, and Julie Fraser (Edward Elgar Publishing, 2013), 120.
- ¹⁹ Jan Kratovchvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights,' *Netherlands Quarterly of Human Rights* 29 (2011): 324-357.
- ²⁰ *Hatton v UK* (2002) 34 EHRR 1; (2003) 37 EHRR 28.
- ²¹ Heather Campbell and Elizabeth Corely, *Urban Environmental Policy Analysis* (M.E. Sharpe Inc, 2012), 78.
- ²² Nick Hanley and Edward Barbier, *Pricing Nature: Cost Benefit Analysis and Environmental Policy* (Edward Elgar Publishing, 2009), 3.
- ²³ Ibid.

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- ²⁴ Carlos Corvalan, Julius Fobil, Hillel Koren, Prabhu Pingali, Elda Tancredi, Monika Zurek, Simon Hales, Colin Butler, and Willis Oluoch-Kosura, 'Human Well-Being across Scenarios,' in *Ecosystems and Human Well-Being: Scenarios: Findings of the Scenarios Working Group*, ed. Stephen Carpenter (Island Press, 2005), 412.
- ²⁵ Gary Grant, *Ecosystem Services Come to Town: Greening Cities by Working with Nature* (John Wiley and Sons, 2012), 59.
- ²⁶ Sandra Postel and Stephen Carpenter, 'Freshwater Ecosystem Services,' in *Nature's Services: Societal Dependence on Natural Ecosystems*, ed. Gretchen Daily (Island Press, 1997), 210.
- ²⁷ 'Yasuni-ITT Initiative', last modified 30 July 2013, Viewed 9 May 2014 <http://yasuni-itt.gob.ec/inicio.aspx>.
- ²⁸ Translation: After the fact.
- ²⁹ *Saramaka People v Suriname*, IACHR Series C No 185, IHRL 3058 (IACHR 2008).
- ³⁰ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).
- ³¹ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).
- ³² Frank Przetacznik, 'The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace: Its Philosophical Background and Practical Application,' *Revue de droit international* 69 (1991): 259-317, 263.
- ³³ See in this regard: James Crawford, *The Creation of States in International Law* (OUP, 2007).
- ³⁴ This phrase is itself a heatedly debated concept found in numerous international legal texts, notably the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, 13 Sept. 2007. The contention surrounds primarily the seemingly absolute decision making power it grants to minority communities in light of their significance in relation to culture and heritage.
- ³⁵ Refers to a usufructuary right, a legal term meaning the holder can enjoy the use of a thing without gaining title to (ownership of) it.
- ³⁶ These three designations of impact are commonplace means of establishing liability in civil actions in numerous legal jurisdictions.

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