ALTERNATIVE SOLUTIONS:

INDIGENOUS HUMAN RIGHTS AND THE MINING INDUSTRY – EXPERIENCES FROM MEXICO AND AUSTRALIA

by Ingrid Hammer

What do Australia and Mexico have in common as far as Indigenous communities, mining and human rights are concerned? The answer can be characterised in terms of the mineral rich soils that have attracted many a transnational company to the shores of both countries, together with the vague controls and oft-cited conflicts between the major players in this field: the mining companies, the government and the community. Regulation of the mining industry presents various difficulties, often with the concerns of the communities that find themselves affected by mineral concessions playing second fiddle to the deeply rooted and powerful interests of mining companies and governments. Given the situation, where the neo-liberal paradigm compels governments to open their borders to international trade and commerce, the protection of less potent interests tend to become a minor concern. With this in mind, how can Indigenous communities exercise their rights? How can communities achieve emancipation through the law?

HUMAN RIGHTS AND INDIGENOUS PEOPLE: KEY INSTRUMENTS AND THEIR APPLICATION

Since the foundation of the *Universal Declaration of Human Rights* ('UDHR') in 1948, various instruments have sought to guarantee and protect human dignity. The human rights of Indigenous people have been recognised both explicitly and implicitly in instruments such as the *International Covenant on Civil and Political Rights* ('ICCPR'), the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *Declaration on the Rights of Indigenous Peoples,* the *Convention on Biological Diversity*, and *International Labour Organization Convention 169*. These rights, however, are afforded varying levels of protection depending on the social and political factors in the countries that subscribe to them.

Despite state ratification of international human rights instruments, the strength of such instruments in the domestic sphere radically varies according to the system of law of the given state party. Australia is considered a dualist system whereby international law creates domestic obligations only when the Federal Government legislates to incorporate the obligations into domestic law. In this sense, a government might ratify a treaty but its potency at a national level remains uncertain until such time as the legislature enables it via legislation.[1] Some argue, however, that this general principle should be considered with reference to the legitimate expectation doctrine established by the High Court in the case *Minister for Immigration v Teoh*.[2] In that case the majority held that when the executive enters into a human rights treaty, this in itself is sufficient to give rise to a legitimate expectation that state agencies will comply with the treaty obligations.[3]

Conversely, according to the monist tradition of law, as is the case in Mexico, when the federal executive ratifies an international instrument it shall immediately be considered part of domestic law, irrespective of the existence or not of national legislation that recognises the instrument. In 2011, the Mexican Supreme Court handed down its decision in the case *Rosendo Radilla vs. México*,[4] significantly modifying this principle by expressly requiring all judges, regardless of hierarchy, to exercise *ex officio* conventionality control in cases that concern human rights. Judges must, therefore, now undertake to interpret the law in conformity with the Constitution and international treaties.[5] Essentially, this means that when a court is presented with a case that involves alleged human rights violations, the judges must apply the legal norm (irrespective of its origin) that most favours the individual (the principle of *pro homine*), leaving aside any norm that is inconsistent with international treaties ratified by Mexico. This principle is now provided for in Article 1 of the Mexican Constitution.

In the mining sector, the emphasis given to the guarantee of recognised human rights in relation to Indigenous communities is often insufficient. This insufficiency is particularly evident with respect to cultural rights. The right to culture is manifested in various instruments. The *ICESCR* defines this right in Article 15(a):

> The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life

Similarly, the UDHR recognises cultural rights in Article 27(1):

> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

The ICCPR refers, in Article 27, to the right to culture, requiring:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Finally, *International Labour Organization Convention 169* refers to the right to culture in a number of provisions. Mexico is one of the 22 countries that has ratified this Convention, however Australia has not yet adopted the instrument. Some of the key provisions with respect to cultural rights include:

> Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned – article 4;
>
> In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship – article 13.

Despite the recognition of Indigenous specific rights in international and domestic instruments, cases of violations continue to present themselves in the court rooms. Currently in Mexico one case in particular has attracted not only local, but also international attention—the fight of the Wixárika community to save the sacred site of Wirikuta from 22 concessions granted to a Canadian mining company to extract various metals from the region. Similarly, in Australia there have been a number of contentious cases in recent years, one being the efforts of the Wiradjuri people to protect Lake Cowal from the hands of Canadian mining company, Barrick Gold, and its extraction of metals from this sacred region.

THE BATTLE FOR WIRIKUTA

The Wixaritari people are an Indigenous group whose traditional lands cover four states in the centre of the country: Zacatecas; Jalisco; Nayarit; and, Durango. Since before recorded history the Wixaritari have undertaken pilgrimages to Wirikuta, a sacred zone in the heart of the desert of San Luis Postosí. In the Wirikuta region, a species of cactus grows which survives only in this area of Mexico and in the south west of Texas in the United States of America. This cactus is known as *jikuri* (peyote), a hallucinogenic cactus that is consumed by the Wixaritari in its natural state. The peyote is considered a vital tool for the Wixaritari shamans in retelling the story of the creation of the universe according to the Wixárika tradition.[6] Not only is peyote found in this region, but there are numerous sites considered sacred to the Wixaritari, such as the *cerro quemado* (the burnt peak) where, according to Wixárika mythology, the sun was born. To the Wixaritari people the Wirikuta region is considered the centre of the world (*Kutsaraipa*) where the ancestors meet to help the sun to rise.[7]

The importance of Wirikuta has been recognised by the states of San Luis Potosí and Zacatecas, which have declared the region a natural sacred site.[8] In addition, the Federal Government sought UNESCO categorisation of the site as 'Patrimony of Humanity' in 2004.

Despite this recognition, the Mexican Government granted First Majestic Silver, a Canada-based mining company, concessions to mine precious metals in the Wirikuta region. While representatives from the Wixárika community sucessfully sought the remedy of *amparo* in 2012,[9] and this effectively has put a hold on mining activities, the licences remained valid. For the Wixaritari, a declaration on 24 May, 2012, by First Majestic Silver, that the company would hand-back a number of concessions, and the announcement by the Federal Government the area would become a national mineral reserve, represents a token acknowledgement by the company and the state towards respecting the cultural integrity of the area. The surrender of the concessions represents only 761 hectares of the 140,212 hectares that is Wirikuta. There remains 79 active concessions in the region, which covers approximately 70 per cent of the sacred trerritory.[10] This move by First Majestic Silver may be attributed to the mounting pressure from a range of sectors, including well known musicians, politicians, community groups and international bodies such as the United Nations ('UN'), but also is perhaps an opportunistic move given that the weekend following the announcement a major music festival in support of Wirikuta was to be staged.

The major human rights grievances in this case extend from the lack of consultation with the Wixaritari. For the Wixaritari, Wirikuta is a zone that cannot be bought. The value of the sacred site is worth more than the money or benefts that the company may offer. The site that was declared in May a natural mineral reserve by

the Government ecompasses the *cerro quemado*, but for the Wixaritari this is one, coherent sacred site—the zone cannot be segmented and protected in parts. Indeed, the very act of declaring the area a natural mineral reserve has been met with controversy, given that the government never consulted the Wixaritari about the proposal. It is clear from this case that despite the supposed protection of Wirikuta under national and international instruments, and despite the ratification by Mexico of international law instruments, the rights of the Wixaritari remain vulnerable.

In a case such as this, how do aspirations in universally recognised instruments come into play? When basic rights such as the right to free, prior and informed consent are denied, how can the right to culture be contemplated?

As a response to these difficult questions, in Mexico there has been an increase in social movements that aim to guarantee the rights of Indigenous communities, particularly where the mechanisms of the law seem to have failed them. In the case of Wirikuta there have been protests, attempts for UN intervention and encounters with the directors of First Majestic Silver. Also, in the State of Guerrero, a community police agency has been established. It consists of a body of citizens who, dissatisfied with the deficiencies of the local police, organised themselves to create a law enforcement unit to battle the lack of security in the region. The community police force is made up of representatives from 65 communities in the region, the majority being Indigenous. Similarly, in the State of Guerrero, the construction of La Parota Dam on the traditional territory of Indigenous communities and local farming communities has seen strong resistance by the local population. The lack of consultation and information prior to beginning the works has resulted in violence, threats and even assassinations. Likewise, this movement has relied on protests, forums and the UN to intervene in the project.

Taking the Mexican experience and comparing it with Australia, it is evident that there are many similarities between the battles fought by Indigenous communities in both territories in relation to mining. A prominent illustration of the tension experienced in Australia is the case of the Barrick Gold mine at Lake Cowal in New South Wales ('NSW').

SAVING LAKE COWAL

In 1999, Barrick Gold, a Canadian mining company, received consent from the NSW Government to develop a mine at Lake Cowal, located in NSW, approximately 350 kilometres west of Sydney. The mine consists of a 100 hectare open pit site with a 325 metre deep perforation.[11] The mine, however, is located at a significant cultural site for the local Indigenous nation, the Wiradjuri. The site not only has spiritual significance, there are also relics and artefacts located around the lake. In conformity with NSW law an environmental impact statement was prepared prior to approval of activity in the area, identifying various significant sites. In addition, a heritage survey found that artefacts could exist buried under the surface of the approved corridor of activity, and that consultation with traditional owners was necessary. Traditional Owner and native title claimant, Neville Chappy Williams, sought a declaration that consent for the project was invalid on the grounds that despite his applications to be involved in the site survey process, he was not adequately consulted and, therefore, was denied natural justice and procedural fairness.[12] This action was successful. Further legal activity has since ensued with Williams appealing to the NSW Court of Appeals in 2004 to prevent the expansion of the mine, again with success.[13] In the most recent hearing in 2011, an appeal by Williams to have quashed a decision to allow yet another modification to the mine was unsuccessful.[14] Despite court cases, protests and support from Amnesty International and other international groups, the mine went ahead, however not without continued opposition.

CONCLUSION

Cultural rights are a type of rights that once lost, are lost forever. In the case of Wirikuta, the mine will impede the ability of the Wixaritari to practice their traditional activities. For the Wiradjuri, the potential loss of cultural heritage through the destruction of artefacts and relics is a central concern.

The politics of development along with the economic policy model preferred by governments in the 21st century may be identified as a key cause for the tensions in the mining sector. For Portugese sociologist Boaventura de Sousa Santos, the situation that we see today is best described as modernity not achieving the promises that it pledged: the expectations exceed the actual experience. The idea of progress vindicates all the promises that modernity has offered, but in reality cannot deliver.[15] Indeed, de Sousa Santos proposes that the paradigm of modern legal systems is comprised of two basic pillars: the regulatory pillar (the legal norms, institutions and practices that guarantee our 'expectations'); and, the emancipative pillar (the aspirations and oppositional practices that allow society to challenge the status quo).[16] For de Sousa Santos, we find ourselves in a situation where the regulatory pillar has surpassed the emancipatory pillar,

leaving citizens little faith in their capacity to achieve justice through the law.[17] The answer for the author rests with the reconceptualisation of human rights—a movement away from the logic of the universality of rights, to an intercultural conception of rights that is developed horizontally, with communal participation and the notion of multiculturalism as its basis.[18] In the meantime, however, the pursuit to demand recognition of rights will continue to be sought through alternative mechanisms, as has been demonstrated in the cases of Lake Cowal and Wirikuta.

Restoring faith in the capacity of the law to assure dignity and justice is a cornerstone to protecting the fundamental human rights of Indigenous communities. In the mining sector, despite international instruments that seek to protect human rights, violations continue to occur. Until such time as confidence is restored in the capacity of the law to deliver justice, it is inevitable that conflicts will continue to arise and alternative means to protect rights will be sought by affected communities.

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1 Antonio Cassese, *International Law in a Divided World* (Clarendon Press, 1992) 15.

2 *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

3 Ibid.

4 *Rosendo Radilla vs. México* Excepciones Preliminares, Fondo, Reparaciones y Costas [Preliminary Exceptions, Background, Damages and Costs] Sentencia de 23 de Noviembre de 2009, Serie C No 209.

5 Ibid, 339.

6 Kurt Hollander, 'Batalla en el desierto: La lucha entre la plata y el peyote en Wirikuta' [Battle in the desert: The fight between silver and peyote in Wirikuta], *Letras Libres* (Mexico) Febrero 2012, 44.

7 Olivia Selena Kindl, *La jícara huichola un microcosmos mesoamericano*, [The Huichol *jícara* a mesoamerican microcosmos] (Tesis de licenciatura en Etnología, Escuela Nacional de Antropología e Historia, Mexico, 1997) 137.

8 Acuerdo Legislativo aprobado 7 de junio de 2011, Gobierno de Jalisco, Poder Legislativo, Secretaria del Congreso, 8; Según este acuerdo la solicitud de protección UNESCO pertenece al expediente con número 1959 [Legislative agreement passed 7 of July 2011, Government of Jalisco, Secretary of the Congress; According to this agreement the application for UNESCO protection pertains to record number 1959].

9 *Amparo* is a remedial mechanism under Mexican law that amounts to a constitutional guarantee to protect fundamental individual rights. *Campos Montejo* has defined the mechanism as an extraordinary means of defense that constitutes the final instance to challenge a judicial, administrative or legislative decision. Rodolfo Campos Montejo, 'El Juicio de Amparo (Carencias, Imperfecciones y Puntos Patológicos a sus 154 años de Nacimiento)' [The Judgment of amparo (Gaps, Imperfections and Pathological Points at its 154 years since Birth)] (9 June 2000) *Jurídicas UNAM*, 145 <www.juridicas.unam.mx/publica/librev/rev/refjud/cont/1/.../cle13.pdf>.

10 Ariane Díaz, 'Falso, que gobierno protegerá Wirikuta: consejo regional' [False, that the government will protect Wirikuta: regional council], *La Jornada*, (Mexico), 26 May 2012, 33.

11 Lake Cowal Foundation, *Cowal Gold Mine*, About Lake Cowal <http://www.lakecowalfoundation.org.au/index.cfm?objectid=9f3c50fa-e67e-2e13-4c6b7017229037ae>.

12 *Williams v The Director General of the Department of Environment and Conservation (formerly National Parks and Wildlife Service) v (2) Ors* [2004] NSWLEC 613 (5 November 2004).

13 *Williams v Minister for Planning* [2009] NSWLEC 5.

14 *Williams v Minister for Planning and Anor (No 2)* [2011] NSWLEC 62.

15 Boaventura de Sousa Santos, *Sociología Jurídica Crítica. Para un Nuevo Sentido Común en el Derecho* [Critical Legal Sociology. Towards a New Legal Common Sense], (Editorial Trotta, 2009) 30.

16 Ibid 30-1.

17 Ibid 41.

18 Ibid 513.

Entrance Door
Wayne 'Liwingu' McGinness