

ROGER COTTERRELL'S REVISED IMAGE OF COMMUNITY AND THE PROTECTION OF INDIGENOUS PEOPLES' OWN CULTURE

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In his quest for theoretical, legal-sociological approach that would enable legal regulation to more efficiently fulfil local, human-inspired needs in the society it governs (see Cotterrell 1997, 76), Roger Cotterrell has studied the images that law has of its environment, and evaluated the appropriateness of these conceptions for capturing modern, plural and fragmented civic society. In Cotterrell's opinion, the diversity of social relationships in the contemporary social context requires regulation that recognises this diversity in its conception of society (ibid., 79). In this paper, I will examine Cotterrell's proposal by way of relating it to the general problematic of the protection of indigenous peoples' own culture.

1. Images

The images that Cotterrell discusses, and that together with other defining dichotomies constitute part of law's 'social characteristics',¹ are the image of community and the image of imperium (see Cotterrell 1995, 244). The relationship of law to its audience differs fundamentally between the two conceptions.

The traditional image of imperium places human beings in a subordinate position in respect to norms. In this image, people are subjected to the exercise of political power, which is considered *the* justification for the regulation. The common good is known by law itself as something either wielded by a (rational) sovereign power or ascertained through legislative action (see ibid., 225). Power, authority and obedience constitute the essence of the relationship between legal rules and their subjects and function as the justification or explanation for rights and obligations. It follows that there is no need for a coherence of values, needs or the like among the

¹ The other dichotomies that Cotterrell presents and discusses are order and justice as legitimating values of law and *voluntas* and *ratio* as components of legal doctrine; see Cotterrell 1995, 315. On the analytical relations of these dichotomies, see ibid. 315-325.

people subjected to the administration of justice. Thus, 'law governs the society' (ibid., 223, 227). The traditional image of community, on the other hand, turns this configuration upside down, seeing law's ultimate justification, its 'foundation,' in the values that are cohesively shared by autonomous people to whom the law is directed (see ibid., 223, 226). Law's function is to reflect and mediate this cohesiveness, which provides the substance of what is to be regarded as the 'common good' in the community (ibid., 224-225).

In Cotterrell's opinion, neither of the images succeeds, at least in its traditional form, in capturing the plurality so inherent to society and so necessary in creating 'morally meaningful legislation' (Cotterrell 1997, 76), i.e., legislation in which the varying requirements posed by a community have been appropriately understood and defined. Whereas the image of imperium seems, by nature, to distance regulatory processes from the people they concern, the image of community, by definition the more appropriate image, oversimplifies the sociological character of its object. It presents the community as homogeneous and assumes problematically an 'inner coherence and universality' of the values that are regarded as common in the community (Cotterrell 1995, 228-230).

What Cotterrell suggests is that in order to create regulation in a way that would obviate or reduce the weaknesses embodied in the conventional use of the two conceptions, one should apply a revised, diversified image of community. In his view, the image of community should be revised by establishing abstract communities based on the Weberian ideal-types of social action. The analysis of real communities would occur by applying the new image as a means to make explicit and clarify the different relationships that exist in a given community (see Cotterrell 1997, 80). The ideal types of communities would be, to cite an exhaustive list of the forms of interaction, traditional community, instrumental community, community of belief, and affective community, with each representing an ideal community defined by the nature of the particular relationships and the interaction it entails.

2. On Culture

Among the important, yet less frequently discussed features pertinent to contemporary Sami people is the internal heterogeneity of their community in respect to the societal environment that surrounds them (see Hirvonen 2003, 234). The differences, which can be geographical, regional or political in nature, have an impact on the relationship each individual group member has to the Sami cultural markers, i.e., the different traditions,

customs and customary symbols that shape the external and internal conceptions of 'Sami-ness.'² Accordingly, the perceptions of what is essential to and in the culture, and in what sense, may differ within the group.³ Disparities in personal conceptions are reflected as a change in cultural structures. They influence the discourse on, i.e., the ongoing negotiation of, the 'common,' or communally accepted, content of the culture. Thus, they shape the norms, values and expressions whose status and position within the culture have been either maintained and strengthened or established in the discourse. Such disparities mould 'the appearance' of the community in general, presenting an image of 'Sami' that blurs the boundary between what is traditionally perceived as Sami and non-Sami culture.

Heterogeneity of this kind, in its dependency on the interaction between the community (or communities) and its culture, is, in my opinion, analogous to conventional cultural change and also, by definition, to the concept of culture. Indeed, this has been recognised in various disciplines that focus on the study of culture and cultures. The general definition of culture has changed such that earlier ideas about its being fixed, isolated and static in nature have been replaced with conceptions that describe it as 'an ever-changing process' that is constructed by 'actions and struggles over meaning' (Merry 2001, 39). Moreover, the idea that the value of a certain culture, and of culture in general, could be estimated objectively from the outside has been questioned⁴ in a manner that, in my opinion, poses challenges to any judicial action whose purpose is to establish or define norms that are in some manner linked to culture.

These revised perceptions of culture have been adopted in the international legal discourse as well, with their impact being seen especially in the dissociation of general cultural rights from the arrangements protecting minority and indigenous cultures. In dealing with these issues, the contemporary human rights discourse uses the term 'culture' in a 'broad sense,' referring to 'a way of life' and highlighting groups' cultural distinctiveness vis-à-vis people not belonging to the groups. In the interpretation of article 27 of the International Covenant on Civil and Political Rights

² The term has been adopted from Harold Eidheim; see Eidheim 1997, 53.

³ Lindgren 2000, 55, quoting Vigdis Stordal's paper 'How to be a real Sámi? Defining and maintaining ethnic identity in a context of (inter)national integration and ethnic revitalization' presented at the First International Congress of Arctic Social Sciences. Université Laval, Ste-Foy, Quebec, Canada; Eidheim 1997, 51-52.

⁴ This was done for the first time by Frans Boas, whose approach to the issue was further developed by, among others, Ruth Benedict and Melville J. Herskovits. See Donders 2002, 28, note 16.

(the ICCPR, the Covenant),⁵ the most important international provision linking human rights to the rights of minorities, the right to enjoy one's own culture is considered 'to be more' than just a right to take part in cultural life. In its original form, at the time when the two universal human rights instruments that recognise it – the ICESCR⁶ and the UDHR⁷ – were drafted, the right to participate in cultural life perhaps represented a more conventional conception of culture, a conception that emphasises the material and institutional aspects of the notion.⁸ In the determination of the scope of the concept in article 27 of the ICCPR, the objective is clearly to diverge from this approach and to embrace views adopted in anthropology in this regard.⁹

Yet it seems plausible to argue that, despite the revisions made in legal discourse, plurality, in both the conceptions of culture and the social conditions in which a culture exists, is not acknowledged and brought to the fore to the extent possible. Instead, the attained and proclaimed broadness of the concept seems to become more ambiguous when the notion and the norm attached to it are related to indigenous peoples. In the concomitant normative statements, the content of the concept is made more specific by underlining the importance of the land and natural resources in the determination of these peoples' culture, and by emphasising the significance to them of traditional means of livelihood.¹⁰ I argue that the expression 'way of life'

⁵ Signed 16 December 1966 in New York, entered into force 23 March 1976.

⁶ The International Covenant on Economic, Social and Cultural Rights; signed 16 December 1966 in New York, entered into force 3 January 1976.

⁷The Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

⁸ On the definitions within human rights discourse, see Stavanhagen 2001, 87-90; and Nowak 1993, 658. When article 27 of the ICCPR was being drafted, these issues did gain attention, but their significance in the interpretation of the article has nevertheless been quite modest. On the drafting, see Bousst 1987.

⁹ See Stavanhagen 2001, 89. This 'transition' can be seen vividly, for instance, in the themes that gain relevance in the interpretation of the article, e.g., issues related to customs, morals, traditions, types of housing and eating habits; see Nowak, 501.

¹⁰ This interpretive development can be identified in the statements that the monitoring body of the Covenant, the Human Rights Committee (the Committee), has made in its considerations of periodic reports by states parties and in its rulings under the First Optional Protocol of the Covenant (adopted 16 December, entered into force 23 March 1976) concerning the application and implementation of article 27 of the ICCPR in the event of indigenous peoples' involvement. See, e.g., UN Doc. A/55/40 paras 498-528; UN Doc. CCPR/CO/75/NZL 7 Aug 02, UN Doc. CCPR/C/79/Add.47; A/50/40 paras 166-191 3 Oct 95; UN Doc. CCPR/C/79/Add.63 3 Apr 96. The Committee has since confirmed its views in its general comment on the article. See CCPR General Comment 23; U.N. Doc.

connected to these in themselves vital aspects of indigenous culture is, when used excessively, in danger of turning into a phrase that in practice refers exclusively to the traditionally culture-bound social and economic activities of the group in question. What happens, in a sense, is that those right-holders, who belong to cultural sub-groups having relationships to and conceptions of their own culture that differ from those held by the majority of the group or by the authorities, are easily overlooked when the essence of the concept and the right are considered.

The central role of power becomes explicit here. Although the normative considerations are based on the evaluation of a single, particular and concrete situation or event, the very nature of these considerations is general in that they are used in national legal praxis and in academic research, both of which seek to establish a systematic and general line of interpretation on the scope of the concept and the norm. In the particular reality of legal discourse, i.e. in the seized time and isolated place of the juridical evaluation, the image formed of a particular culture also transforms eventually into something that is seen as embodying the features of the culture in general when legally analysed and systemised. This transformed image 'may produce new social reality' in a 'postmodern' sense if it becomes accepted by the target group as a valid or, more precisely, politically effective description of the group and is further strengthened by the group and by the subsequent interpretative praxis. This process may cause the same kind of identity conflicts among persons that do not fit that reality in full as, for example, the definitions of indigenous peoples have caused (see, e.g., Kingsbury 2001, 106-107).

3. Analysis

Why should we connect the analysis of law's image of society to the critique of the interpretation of specific human rights norms? As Cotterrell's model seeks to provide a generally applicable method to acknowledge the diversity and heterogeneity of contemporary society, it would be tempting to apply it, at least in theory, when trying to establish a more pluralistic foundation for the protection of minorities and indigenous peoples' cultures in the human rights context. Several reasons speak in favour of this undertaking. The model, for instance, captures more accurately than its predecessors the postmodern rootlessness in contemporary societies as well as the lack of fixed

CCPR/C/21/Rev.1/Add.5; Scheinin 2000, 195.

boundaries and self-evident, unquestioned foundations of the different cultural communities and groups living in these societies. Equally, as Cotterrell points out, in its ability to recognise four significantly separate forms of interaction that define the relations between social actors, the model enables law to redefine in a more plural way 'its tasks, capacities and limitations' in accommodating the different relationships that exist in contemporary society (see Cotterrell 2000, 21). The fact that Cotterrell accepts power as an essential element of a community (Cotterrell 1995, 330) makes it even more legitimate to consider the significance of the model for obtaining information on the linkage between social phenomena and the power struggle in which these phenomena are given their meanings. The matter is also of utmost importance in the study of the culture of indigenous peoples.

Still, in the end, one needs to reject the idea of applying Cotterrell's revised model in seeking a foundation for human rights protection that would more efficiently recognise the cultural plurality and heterogeneity of indigenous peoples. First, using the model means, in my opinion, choosing an approach that fails to give due consideration to the multiplicity of reasons that may have an impact on the process by which the legal image of indigenous peoples' culture is established and developed. For example, there are pragmatic and structural limits on the possibilities of the interpretive body to highlight issues and to examine them. Yet an even more profound problem follows from the use of the model for the purpose discussed here. When trying to understand why the practice of legal interpretation itself and the image it produces are seen here as problematic, application of the model will steer us in the wrong direction. The misplacement of the question, following from the application of the model in the case at hand, becomes explicit, however, only after actual application of the model,¹¹ i.e., in the evaluation of the results of that application.

What would follow from the application of the model in the evaluation of indigenous Sami culture and cultural change? The basic idea of Cotterrell's revised model is, in my opinion, to provide a more realistic, objective and empirically observed image of the society being studied (see, e.g., Cotterrell 1995, 325). This objective is perfectly valid in any sociological research, and the method chosen to carry it out definitely also provides highly significant information to legal actors in their work in general. However, the special legal context in which the observations and statements about indigenous peoples' culture are made involves antecedent value determinations that, together with the utilisation of the model, may generate problematic outcomes. While formally correct, these outcomes may be substantially doubtful from the

¹¹ I would like to thank Kaarlo Tuori for drawing my attention to this matter.

perspective of those indigenous groups whose members' socio-cultural living conditions are not homogeneous, for example. This problem seems to have its origin in, among other things, the rhetoric that is used in human rights discourse and that has its foundation in the idea of difference as a definable, evaluative feature of indigenous peoples' own culture. The problem can be illustrated by examining more thoroughly the essence of cultural change as part of identity formation and by relating this examination to the different ways in which the rhetoric is used.

It seems plausible to argue that Sami culture, constituting part of the process in which the contemporary ethnic-politic identity of the group is formed, has been and still is undergoing a revitalisation that resembles the early nation-building process and nationalism (cf., e.g., Pääkkönen 1999, 34; Eidheim 1997, 55). The similarities between the revival of a culture and nation building can be found, in my opinion, both in the necessary preconditions that enable these transformations and in the transformations themselves, which are at once fundamentally historical and 'non-historical' (see Anderson 1991, 5). While having their roots firmly in the past and traditions, both processes, the cultural revival and the nation building, are necessarily based on an inventiveness and modernity that function as fuel for change.¹² Thus, they simultaneously include incidental and arbitrary as well as consciously controlled and generated substance. In addition, both the changes in and the existence of Sami culture are enabled, in my opinion, by a fundamental interaction between the internal and external view, the view from within and the view from outside, to what is regarded as 'own' or 'alien' to a group. These aspects of Sami culture (and, perhaps in a general sense, of culturally distinct groups living in contact with other cultural groups) make it difficult to establish any general criteria in evaluating the culture and to observe it in terms of the indicators 'authentic,' 'original' or even 'own.'¹³ The extreme case, in which the difficulty becomes both obvious and problematic, is where change means adopting new or foreign elements into the culture to the extent that it turns out to be difficult, for both outsiders generally and for the members of the culturally distinct group unanimously, to articulate any observable difference that distinguishes the group from the society at large.

Nonetheless, the capability and feasibility of establishing and 'making visible' the difference, and thereby defining what can be protected as part of communities' *own*

¹² On the modernity and inventiveness enabling nation building, Anderson 1991, 4, 6-7, 16-17 and 67-76.

¹³ Here my thinking can be traced to Tuija Pulkkinen's considerations on postmodernity and modernity. See Pulkkinen 1998, 41-64.

culture, lies at the heart of the discourse on both minority and indigenous peoples' rights. It gives the rights their ultimate justification as entities apart from general human rights (see, e.g., Thornberry 2002, 3; Eide 1995, 88), and constitutes a prerequisite for anyone to enter the discourse. Even more important, however, is that where indigenous peoples are concerned, distinctiveness as a ground for protection seems to gain complementary attributes that closely resemble those that appear problematic in the evaluation of culture, i.e., authenticity, originality, typicality and attachment to history. Distinctiveness defined in this way appears at several levels of the human rights discourse; for instance, it gives substance to the definitions of minorities and indigenous peoples in the form of a requirement that they possess 'cultural characteristics.'¹⁴ This qualified distinctiveness also in a way moulds authoritative legal views on the survival or non-existence of a particular minority or indigenous culture in the event of profound modernisation of the community¹⁵ and, in my opinion, together with other reasons, constrains the interpretation of the concept 'culture.' That is, in the manner noted earlier, it limits in practice the number of issues that are discussed in conjunction with relevant human rights norms. These constraints apply despite the fact that the oversimplifying, static conceptions related to the concept of culture are continually and explicitly rejected in the interpretation processes,¹⁶ in the occasions where the decision has already been made about whether something falls within the scope of the concept or not.

On balance, the essential question is to critically observe, and perhaps even to redefine, the criteria by which the determination of difference is made. Otherwise, the difference-similarity evaluation can work against indigenous claims by denying protection due to a lack of justification where the difference sought cannot be detected by the actor determining the need for protection. This is, however, a question that even the revised model of community does not seek to answer. The epistemological criticism

¹⁴ Thornberry 2002, 151, quoting F. Capotorti, Study on the Rights of Persons Belonging to Minorities (NY, UN 1991), para. 568.

¹⁵ Here I refer to the discussion on proper approaches to the social situation where an indigenous community gains its subsistence from activities whose significance for the 'distinctive culture' of the community has been questioned. On this, see, e.g., Scheinin 2000, 197-198 and 204, and the cases analysed there.

¹⁶ This occurs, for example, in recognising the 'entitlement' of a group to evolve its traditional means of livelihood using modern technology and in pointing out that it is not necessary to 'turn the clock back' in order to secure the sustainability of the traditional forms of economic and cultural life of certain indigenous groups, see *Länsman v. Finland*, Communication No. 511/1992 paras 9.2 and 9.3; views in U.N. Doc. A/50/40, 66-76; CCPR/C/SR.1856 para. 65, quoted by Thornberry 2002, 165.

which the model is supposed to address is not, in my opinion, directed at the underlying conditions that govern the legal attitude towards the new information obtained. Instead, it is directed at the *object* of that information. For this reason, in applying the theory one enters the discourse on divergence only after the criteria (for divergence) have been defined. This results in sophisticatedly classified, legitimate material about the subject matter, which makes it all the easier to perform the difference-similarity evaluation in a manner that maintains and reproduces the problematic discourse itself. What happens is that the difference continues to be evaluated by using the named attributes in a way that, in my opinion, ignores both the most sophisticated views on the 'essence' of culture and the conceptions of those indigenous persons whose opinions differ from the views supported by the majority in the group. This is the fundamental legal and moral dilemma that needs to be resolved somehow. It should not be done only by gaining a more accurate picture of the societal reality but also by redefining, or at least becoming conscious of, the ways in which this reality is dealt with. This cannot be done by applying a theory – any theory – whose paradigmatic, epistemological objective is to produce information *about society for law* and not the other way round.

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