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RECOGNITION OF THE CUSTOMARY LAW OF INDIGENOUS PEOPLES IN THE ILO CONVENTION 1989: PRACTICES FROM ECUADOR AND NORWAY

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Abstract

Recognition of the customary law of indigenous people is an integral part of the recognition to their existence as a whole. The 1989 ILO Convention concerning Indigenous and Tribal People in Independent Countries is an international instrument which obligates its parties to recognize indigenous people as well as its customary law. Ecuador and Norway are parties to the convention which will be used as examples for the implementation of the convention in recognizing respective indigenous people and laws. The indigenous people of both countries have similar history of struggles in obtaining the state's recognition, and at the end they're recognized through the constitution of their respective states. In the process of recognition, however, Ecuador and Norway have different but unique and typical characteristics with different results. These different characteristics and results are related to the different situations and conditions of the indigenous people and the political environment in Ecuador and Norway.

Keywords : *indigenous people, C169, customary law, constitutional recognition, Ecuador, Norway*

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I. INTRODUCTION

The position of indigenous people as an integral part of what forms a country was in an alarming situation by the middle of the 20th century. At that time, indigenous people were considered as an alien element that existed beyond the development, customs, and national mainstream of the country they live in. As a result, they faced discrimination in a horizontal and vertical manner. Horizontally, they were regarded as a low-class citizen, a primitive and backward society, and even deemed dangerous; while vertically, the authorities often put them aside during the process of nation building, ignoring their aspirations (especially towards activities conducted by the state which affects their traditional land), and systematically forcing the application of national regulations to them. These horrible conditions were due to the absence of recognition by the state towards them, including their customs and traditions which

have already been practiced for a millennia, even before the country was born. The absence, at the end, would result in conflicts between them.

Conflicts between indigenous people and the government were triggered frequently by contradictory interests between them. The interests of indigenous people are very related to their traditions, customary laws, indigenous authority which governs them, and especially to the lands they occupy traditionally for living and for their normal activities. On the opposite side, the government's interest is general (public), like natural resource exploitation (particularly ones located in the traditional lands of the indigenous people), national development, and the enforcement of national laws on individuals and goods all across the state. These different interests frequently triggers general discontent such as nation-wide demonstrations that may last for weeks or months, vandalism, horizontal conflicts, and even armed conflicts.

Looking at those situations, some states experiencing upheavals will then subsequently attempt to recognize the indigenous people living in their territory. The state's recognition towards their existence is then not only because of the fact that indigenous people had forced the state to recognize them but also because the state had obligations to comply with the provisions of an international convention regarding indigenous people namely The ILO Convention 1989 (the C169). One of the provisions, the recognition to their customs or customary laws, is an integral part of state recognition to their existence and rights. This recognition happens in two countries which the author will use as examples, which are Ecuador and Norway.

On those two countries, the author finds that the recognition towards customary law in Ecuador and Norway has the same struggle in the beginning but with different processes and results. Initially, indigenous people in both countries had experienced government injustice with regards to national policies which affected them negatively due to the absence of state recognition. With support and endless efforts from indigenous groups/organizations, both states eventually recognized their existence through constitutional recognition. In the case of Ecuador, after ratifying the C169 in 1998, it manifested the provisions directly

into its constitution in the same year. Meanwhile, in the case of Norway, it recognized the indigenous people first by amending its constitution in 1987. Unlike Ecuador, Norway does not incorporate the C169 into its constitution after ratifying it in 1991. Instead, Norway issued two Acts namely The Finnmark Act of 2005 and The Reindeer Husbandry Act of 2007 where its application must be in accordance with the provisions in C169.

II. A QUICK BRIEF OF THE ILO CONVENTION 1989

The ILO Convention 1989 or C169 is not the first international convention dealing with the rights of indigenous and tribal people.¹ It is a revised version of a similar one created in 1957, the ILO Convention 1957 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (famously known as C107). It was ratified by 27 countries, mostly Latin American countries, but also in South Asia, and in several African and European countries.² Recently, ten countries denounced it, amongst them were nine countries (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, And Peru) who had ratify C169 and one country, Portugal, that denounced it but is not a party thereto. The convention had been closed for ratification after the C169 has entered into force in 1989, but still remains binding to those countries who have already ratified it.³

At first, in the middle of the 1970's, growing criticism of the C107 from scholars, international organizations, non-governmental organizations, and by the organizations of indigenous people themselves heated the debate in the UN.⁴ The critics pushed the ILO for revision due to several reasons – by comparing C107 with C169 – as follows :

1. First, the C107 focuses on the program of assimilation and

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¹ -----, “History of Indigenous Peoples Within the ILO,” <http://pro169.org/c-107-and-ilo-history/>, accessed on 21st October 2018.

² *Ibid.*

³ *Ibid.*

⁴ Lee Swepston, “Indigenous Peoples In International Law And Organizations,” In *International Law And Indigenous People*, ed. Joshua Castellino And Niamh Walsh, (Leiden: Martinus Nijhoff Publishers, 2005), page 56.

integration for those indigenous and tribal people.⁵The program aims to put them into the national mainstream rather than protecting their unique characteristics. In other words, for them to survive and to preserve their culture, integration and assimilation are the keys.⁶

2. Second, the C107 regards the indigenous and tribal people as ‘less advanced’⁷ and ‘temporary’. It means that their living condition needs social and economic developments to improve their standard of living. This development along with ‘putting’ them into the national mainstream will gradually integrate and assimilate their indigenous values, making them lose their unique characteristics.⁸
3. Third, it enables the government of the state they live in to continuously occupy their indigenous lands. Even if it obligates parties to provide them with lands of quality at least equal to the lands previously they occupy, as stated in article 12 paragraph 2 of C107, it does not grant them an opportunity to return back as in C169.
4. Lastly, C107 restricts the application of indigenous laws and its legal system. That is clearly stated in Article 7 paragraph 2; thus parties may act arbitrarily and prohibit the application on the basis of incompatibility with the national law or legal system or integration programs.

Given the weakness of C107 as stated in the previous part, countries then agree on creating a revised version (convention) which puts aside integration and assimilation programs, and emphasize the self-determination principle more. The C107 was officially revised and replaced in 1989 with the adoption of C169. To date, it has been ratified by 22 countries which are mostly from Latin America,⁹ and the last was

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⁵ Article 2 paragraph (1) letter c of C107

⁶ Fergus MacKay, “A Guide to Indigenous People’s Rights in the International Labour Organization”, 1st edition, (Gloucestershire: Forest People Program, 2003), page 8

⁷ Article 1 paragraph (1) letter a of C107

⁸ Fergus MacKay, *Loc. Cit.*

⁹ -----, “Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)”, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314, accessed on 21st September 2018.

ratified by Luxembourg in 2018 and will enter into force on 5th June 2019.¹⁰

Like the old convention, the C169 does not have a definition of indigenous or tribal or as such. It rather provides a provision, as stated in article 1 paragraph (1) letter a and b, that it covers tribal people (those who live within certain conditions and beyond the national mainstream) and indigenous people (those who at the time of colonization or the formation of newly independent state retain some or all aspects of their institutions).¹¹

The C169 takes a broader approach to protect the rights of indigenous and tribal people. The principal parts call on parties for the need to recognize and respect their existence and unique ways of life and to encourage and involve them in policy or decision making, particularly ones affecting their lands.¹² It provides them with rights to lands they traditionally have occupied as well as the natural resources therein.¹³ The convention also covers rights, in certain situations, which are intended to guarantee them to the highest degree of autonomy and self-government in the regions they live.¹⁴

Concerning the customary/indigenous law of the indigenous and tribal people, Article 8 paragraph (1) of C169 obligates parties to have due regard thereto if they apply their national laws/regulations. Moreover, it also revises the provision regarding the application of customs (this also includes indigenous/customary laws/regulations) and institutions (this also includes legal institutions) which in the old convention requisites compatibility towards the national legal system or objective of the integration programs¹⁵. The new one, substantially subordinate but still better, rather renews and broadens the limitation into fundamental human rights defined by the national legal system and with internationally recognized human rights, as stated in Article 8 paragraph (2). These two dimensions of human rights are cumulative criteria which have two meanings :

¹⁰ *Ibid.*

¹¹ Lee Swepston, *Op.Cit.*, page 57.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Article 7 paragraph (2) of C107

1. They are at an equal level. Thus, national law cannot be used as the basis for revoking indigenous customs and institutions if the internationally recognized human rights do not conflict with them and *vice versa*.
2. The revocation shall be executed if the customs and institutions are against them both and *vice versa*.

Speaking about internationally recognized human rights as one of the requisites, the C169 does not define nor give clues to what ‘internationally recognized human rights’ is. This phrase could refer to a wide variety of sources of international law, including customary law (Universal Declaration of Human Rights/UDHR), widely ratified treaty laws (such as ICCPR, ICESCR, United Nations Declaration on the Rights of Indigenous People, CEDAW, Convention on the Rights of Child, and Convention Against Torture), and even regional human rights instruments for instance the European Convention on Human Rights (ECHR).¹⁶ Other sources that may encompass ‘internationally recognized human rights’ are international courts’ jurisprudence (such as the International Criminal Court/ICC) and decisions made by international governmental bodies that both contain human rights provisions.¹⁷

III.CONSTITUTIONAL RECOGNITION OF INDIGENOUS PEOPLE

Generally, recognition of the existence of indigenous people, particularly to their customary laws, is conducted through constitutional recognition.¹⁸ Recognition through the state constitution is carried out because the nature of the constitution itself is as a basic law which is

¹⁶ Rebecca Young, “Internationally Recognized Human Rights Before the International Criminal Court,” *The International and Comparative Law Quarterly* (January, 2011), page 199.

¹⁷ *Ibid*.

¹⁸ In relation to the C169, parties to the convention recognize indigenous people in respective territories through constitutional recognition except for Spain, Netherland, Denmark, Chile, and Dominica. For non-parties to the C169, recognition is also performed constitutionally such as Panama, Indonesia, Australia, India, Russia, Canada, etc. Thus we can assume that recognition of indigenous people through a state constitution is a common practice by the majority of global states.

the main source of every national legislation of a country, and also the nature of constitutional rigidity makes it harder to be amended or revised, unlike Acts or local regulations. Recognition through the constitution also have other purposes. Gussen on his paper “*A Comparative Analysis Of Constitutional Recognition Of Aboriginal Peoples*” mentions that it has three essential purposes :¹⁹

- a. To know and remember;
It refers to the indigenous people and their customary laws that have existed long before the country they live in is born. This element essentially reminds the state and nationals thereof that there are some parts of the nation whose socially, culturally, and/or economically different wholly or partially from the national mainstream and live with their traditional cultures and customary laws.
- b. To accept as true and existing; and
It means their existence along with their cultures and customary laws are accepted to be an inseparable part of the national mainstream. Therefore, protections to their existence is necessary.
- c. To accept and approve of as having legal authority.
It is basically ensuring that their existence, culture, and customary laws recognized by the state have the power to continue to exist in the future, including opportunities to develop. It is then followed by recognition, which is about accepting the legitimacy and legal authority of the indigenous people.²⁰

Basically, the three main purposes of recognition above will have maximum success if they are supported by several factors. These factors, though not binding, determine the success of a constitutional recognition of the indigenous people,²¹ even reforming it to a higher level. The factors are as follows :

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¹⁹ Benjamin Franklen Gussen, “A Comparative Analysis Of Constitutional Recognition Of Aboriginal Peoples,” *Melbourne University Law Review* Vol.40 (2017), page 6.

²⁰ *Ibid.*

²¹ *Ibid.*, page 22-23. An exception is in the case of New Zealand. The recognition of Indigenous People of Maori along with their rights and possessions to their lands are subject to the Treaty of Waitangi signed between Maori chiefs and representatives of the British Crown in 1840. The recognition through a bilateral treaty is a result of no written constitution established in New Zealand.

A. POPULATION OF THE INDIGENOUS PEOPLE

Population should be the foremost factor to be addressed by the state in determining what rights the country should grant to the indigenous people in its constitution. Recognition has a better chance of happening if they have a larger percentage of the population.²² This is due to an understanding that a large population needs a system, maybe even a complex one, to control each individual or the whole society to enforce order, justice, and harmony among them. Under the system, lies various civil matters and activities which are then governed by executive and judicial powers. These things have the opportunity to be recognized within the state's constitution or national laws.

B. TERRITORIES OCCUPIED BY INDIGENOUS PEOPLE

The territory is another crucial and determining factor in order for the indigenous people to be recognized by the state. Indigenous or tribal people absolutely have certain territories they occupy for their set of diverse activities, the most important part is that it is a sign of the existence of an authoritative body that rules the population, territory, and activities therein. Territories occupied by indigenous or tribal people varies from mountainous to coastal areas and on each area lies different systems and activities. Recognition of their rights on these particular areas can only happen if a sufficient percentage of the population is concentrated on such geographical conditions²³ and they settle in a large size of territory.

An evident example can be found in Nicaragua where Miskito is the largest indigenous group living in the Caribbean/Atlantic Coast and it comprises 43,4 percent of total indigenous people population recorded in 2005.²⁴ They are scattered in the Northern and Southern Atlantic Autonomous Region.²⁵ Most Miskitos make a living through marine-related activities such as fishing and scuba diving for lobsters,

²² *Ibid*, Page 4.

²³ *Ibid.*, page 28.

²⁴ José-María Arraiza, "Weaving Miskito and Mestizo Imaginations: the Atlantic Coast Autonomy of Nicaragua," in *Autonomy Arrangements around the World: A Collection of Well and Lesser Known Cases*, ed. Levente Salat, et.all, (Cluj-Napoca: Romanian Institute for Research on National Minorities, 2014), page 86

²⁵ -----, "RANN," <https://vianica.com/nicaragua/raan>, accessed on 3rd October 2018.

turtle, and shellfish.²⁶ The Nicaraguan Constitution grants Miskitos and other indigenous groups of the Atlantic Coast the use of waters for their benefits,²⁷ such as marine-related activities already mentioned above.

C. INDIGENOUS PRESSURE ORGANIZATIONS

A state indeed has the power to exercise and enforce its sovereignty and jurisdiction on its territory and in some cases it may not be contrary to the rights of the indigenous people concerned. Unfortunately, when it possesses the contrary, protests could arise among them and perhaps an uprising may erupt to demand the government's recognition of their rights. This uprising may be brought by indigenous pressure organizations comprising of an indigenous or several ethnic groups that form a united front against the government. It would have a better chance to succeed if the groups as well as the indigenous people itself have bigger numbers/population.

Indigenous pressure organizations play the most important role to create or even widen constitutional recognition. From the beginning, the organizations have a principal role to push and demand the state to recognize various indigenous rights on its constitution. Over the years ahead, along with the development of indigenous people to become a more complex society with complex systems, the organizations could ask the government for constitutional reformation that includes adding new rights for the indigenous people.

Some indigenous organizations have been successfully pushing the government of the state they live in to recognize or to expand the rights of indigenous people on the state's constitution. CONAIE in Ecuador,²⁸ EZLN in Mexico,²⁹ and MISURASATA (Miskito, Sumo, Rama, and Sandinistas Working Together) in Nicaragua³⁰ are three best

²⁶ -----, "Nicaragua : Indigenous People," <https://minorityrights.org/minorities/indigenous-peoples-5/>, accessed on 3rd October 2018.

²⁷ Article 89 Paragraph 3 of Nicaraguan Constitution

²⁸ Benjamin Franklen Gussen, *Op.Cit.*, page 29

²⁹ Iker Reyes Godelmann, "The Zapatista Movement: The Fight for Indigenous Rights in Mexico," <http://www.internationalaffairs.org.au/news-item/the-zapatista-movement-the-fight-for-indigenous-rights-in-mexico/>, accessed on 5th October 2018.

³⁰ Vincent J. Schodolski, "Nicaragua, Indians Sign Peace Accord," <https://www.chicagotribune.com/news/ct-xpm-1985-04-23-8501240170-story.html>, accessed on 5 October 2018.

examples, since they started popular uprisings against respective central governments for constitutional recognition.

IV. STATE PRACTICES : ECUADOR AND NORWAY

A. ECUADOR

Ecuador has one of the largest and the most diverse indigenous population in Latin America. A national census carried out in 2001 announced that the indigenous population was seven percent of the total national population, while CONAIE claimed it was 40 percent.³¹ The majority of the population lives in the highlands and speaks ‘Kichwa’, part of the larger ethnolinguistic Quechua group which is the largest surviving indigenous language in the entire American Continent.³² Other Kichwa speakers also live in the eastern Amazon region. Besides Kichwa, seven indigenous nations namely the Shuar, Cofan, Secoya, Huaorani, Achuar, Siona, and Zapara live in the Amazon.³³ Other identifiable indigenous nations also live in the Ecuadorian coastal regions.³⁴

Before Ecuador recognizes the existence and the rights of its indigenous people through its constitution, it had fallen into a conflict started in 1990. The background of this conflict was based on several major factors namely the new integrationist policy after Ecuador’s independence from Spain added with other political and economic issues. Under the spanish rule, the colonial government applied segregationist policies that enabled indigenous people in Ecuador to maintain and practice their customary laws with the purpose to keep them separated from the colonizers.³⁵ When Ecuador gained independence from Spain in 1830, the newly formed government introduced an integrationist model policy which aimed to unite all individuals in Ecuador into

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³¹ Marc Becker, *Pachakutik : Indigenous Movement and Electoral Politics in Ecuador*, 1st edition, (Plymouth :Rowman & Littlefield Publishers, 2011), page 3.

³² *Ibid.*, page 4.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Marc Simon Thomas, *Legal pluralism and Interlegality in Ecuador : The La Cocha Murder Case*, 1st edition, (Amsterdam : Centre for Latin American Research and Documentation, 2009), page 36.

‘one sole nation’, meaning one people, one culture, and one normative system.³⁶ This policy made the customary laws of indigenous people illegal and made Ecuador a country of legal monism, yet it could still be practiced in remote areas due to the weak government controls.³⁷ In 1969, Ecuador ratified the ILO Convention of 1959 (C107) which aims was the integration of indigenous people into the national mainstream. Ratifying the convention justified government efforts to push for stronger integrationist policies and also to gain international support and therefore keep away foreign states from criticizing.

Intense regime changes (from military to democratic regimes) and little involvement from indigenous people to shape the state’s political agenda contributed to the political factor.³⁸ The major drive was in the 1970s when the world’s economy was booming because of a hike in oil price which also provided the government and foreign investors with significant revenues.³⁹ The boom then ended in the 1980s due to a decrease in oil prices, which in turn results in an economic downturn and create foreign debt traps. The economic downturn brought suffering conditions to the indigenous people of Ecuador, who did not get any profit from the 1970s oil boom, or much/any improvement in standards of living, while also seeing declining demands for their local products.⁴⁰ Ecuador’s internal turmoil eventually drove to the creation of CONAIE (the Confederation of Indigenous Nationalities of Ecuador).

CONAIE was not the first indigenous organization that fought for the rights of Ecuador’s indigenous people. The two first were Ecuarrunari, the indigenous organization of the Kichwa people from the central mountainous region and CONFENIAE (*The pan-Amazonian Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana*) which consists of indigenous people from the Ecuadorian

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³⁶ *Ibid.*

³⁷ *Ibid.*, page 36-37.

³⁸ Emma Bainbridge, “Indigenous Movement in Ecuador : The Emergence of CONAIE,” <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-6-the-andes/moments-in-andean-history/indigenous-mobilization-in-ecuador/>, accessed on 12th October 2018.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

Amazon.⁴¹ There were another twenty-seven indigenous organizations established in Ecuador, and together with the representatives from another nine indigenous nationalities founded CONAIE in November 1986 at the Nueva Vida camp.⁴² Later, CONAIE would become an umbrella organization for the most important regional indigenous organization of Ecuador⁴³ that brought it a decade of upheavals.

Ecuador faced the first major upheaval in 1990, led by CONAIE and other indigenous movements, with several main roads blocked and a sit-in in several cities by indigenous peoples which disturbed economic activities. They urged the government to accept their 16 demands,⁴⁴ the main part of which was the making of Ecuador as a plurinational state and included land reform, long-term financing for bilingual education, and rights over access to water for indigenous communities.⁴⁵ CONAIE and other indigenous movements started a second major upheaval in 1994, organizing a “Mobilization for Life”. It campaigned to protest against neo-liberal economic reforms that would take indigenous lands by force, privatize their water resources, and undermine their economic

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⁴¹ Marc Becker, *Op. Cit.*, page 5.

⁴² *Ibid.*, page 8.

⁴³ Margarito Ruiz Hernandez and Aracely Burguete Cal y Mayor, “Indigenous Peoples without Political Parties: the Dilemma of Indigenous Representation in Latin America,” in *Challenging Politics : Indigenous People’s Experiences With Political Parties and Elections*, ed. Kathrin Wessendorf, (Copenhagen : IWGIA, 2001), page 50.

⁴⁴ The other 15 demands are : 1) absolution of debts to FODUREMA and the National Development Bank, 2) freezing of consumer prices, 3) conclusion of priority projects in the communities, 4) non-payment of rural land taxes, 5) free importation and exportation of commercial and artisan products for CONAIE members, 6) control, protection, and development of archeological sites, 7) legal recognition and funding by the state of indigenous medicine, 8) cancellation of decrees that created parallel institutions to local governments, 9) real respect for the rights of the child, 10) the fixing of fair prices for farm products and free access to markets, 11) immediate granting of budgetary funds for Indigenous nationalities, and 12) Expulsion of the Summer Language Institute, 13) land reform, 14) long-term financing for bilingual education, and 15) rights over access to water for indigenous communities. See more at http://www.yachana.org/earchivo/conaie/hoy_en.php, accessed on 11th November 2018.

⁴⁵ Kenneth P. Jameson, “The Indigenos Movement in Ecuador : The Struggle for Plurinational State,” *Latin American Perspective* (January, 2011), page 65.

livelihood.⁴⁶ The third and the most successful one occurred in 1997 in which CONAIE announced national demonstrations against the government for its lack of will to accommodate indigenous aspirations for constitutional reform. The 1997 upheavals succeeded in tumbling Abdala Bucaram's regime through the Ecuadorian Congress⁴⁷ and was also successful in bringing Ecuador to ratify the ILO Convention of 1989 (C169) in 1998 and manifest it into the new constitution in the same year. The new constitution was established on 10th August 1998 by the new Constituent Assembly⁴⁸ which declared Ecuador as pluri-cultural state rather than plurinational one which was previously demanded by CONAIE.⁴⁹

With the ratification of C169, Ecuador is obliged to implement its articles and it chose, rather than enacting a new Act, to reform its constitution, adding C169's provisions into it. Several articles on Ecuador's 1998 Constitution reflects the state's recognition to recognize indigenous rights in C169 and thus its implementation of the convention can be found in article 84 and 191 of the Constitution.⁵⁰ These two articles reflect all recognized indigenous rights in C169, except rights to recruitment and conditions of employment, rights to vocational trainings, and rights to social security and health. The indigenous rights recognized in the Constitution are in line with the demands asked for by CONAIE and other Ecuadorian indigenous movements.

After reforming the constitution, the problem concerning

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⁴⁶ -----, "Ecuador, Indigenos Uprising In," https://www.yachana.org/research/oxford_uprisings.html, accessed on 11th November 2018.

⁴⁷ Margarito Ruiz Hernandez and Aracely Burguete Cal y Mayor, *Op.Cit.*, Page 52

⁴⁸ *Ibid.*

⁴⁹ Kenneth P. Jameson, *Op.Cit.*, page 66.

⁵⁰ Article 84 contains the recognition of indigenous rights such as preserving their identity or cultures, land ownership, enjoying natural resources, prior consultation of exploring and exploiting non-renewable resources, compensations caused by socio-environmental damages, preserving indigenous authority and social organization, preserving historical heritages, having an intercultural bilingual education system, political representatives, self-determination of social and economic activities, and preserving traditional knowledge. Article 191 grants the indigenous peoples rights to exercise indigenous juridical system in accordance with their custom or customary law.

harmonization between the customary law of the indigenous people and the national law was not one-hundred percent successfully solved. This was because the Ecuadorian government didn't establish a secondary law that stipulated boundaries between national law and indigenous customary law.⁵¹ An example of this issue can be found in the murder case of La Cocha in 2002. After proven guilty, the three men who murdered Maly Latacunga, a member of the La Cocha indigenous community, was sentenced by the indigenous local tribunal in accordance with the local customary law, including expulsion from their village for two years.⁵² Few weeks after the tribunal closed the trial, the case came back to the surface again after it was nationally televised and gained national attention. Subsequently, it was brought before the national court and the judges declared them guilty and sentenced to three years in prison.⁵³ The judges gave their legal reasoning that the murder was a serious crime and indigenous customary law could legally be applied to internal family disputes only.⁵⁴

To solve the aforementioned issue and other issues concerning indigenous rights which have not yet been solved through the 1998 Constitution, on September 28th, 2008, an assembly approved a new reformed constitution drafted largely under the influence of the second period of Rafael Correa's presidency⁵⁵. It was also influenced by CONAIE's principal demand for Ecuador to be a plurinational state⁵⁶

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⁵¹ Anna-Karin Engström, "Indigenous Justice From a Human Rights Perspective - A field study of Kichwas in the Andean region of Ecuador," (A Bachelor Thesis of Malmö University, Malmö, 2009), page 33.

⁵² Mac Simon Thomas, *The Challenge of Legal Pluralism : Local dispute settlement and the Indian-state relationship in Ecuador*, 1st edition, (New York : Routledge, 2016), page 217.

⁵³ *Ibid.*, page 219

⁵⁴ *Ibid.*

⁵⁵ Marc Becker, *Op.Cit.*, page 127.

⁵⁶ CONAIE : "*The plurinational state is the construction of a new political structure : administratively decentralised, culturally heterogeneous, and open to the direct and participatory representation of all indigenous nationalities and social sectors, particularly those that have been marginalised and excluded from the state structure and dominant socio-economic development models ... implying ... an institutional expansion ... within a new concept of State, Development and Citizenship*", in Robert Andolina, "The Sovereign and its Shadow: Constituent Assembly and Indigenous Movement in Ecuador," *Journal of Latin American Studies* (November, 2003), page 727.

and for broader indigenous rights. In the new 2008 Constitution, Ecuador attempts to give a solution to prevent the same case in the future by applying the concept of *ne bis in idem* in article 76 paragraph 7 letter i.⁵⁷ It provides Ecuadorians with legal certainty that once a case has been settled in either the national or indigenous legal court, another legal proceeding for the same case is unnecessary. However, the new concept of legal certainty above doesn't seem to be supported by a secondary or additional law which is intended to set out mechanisms to apply customary law in the courts.⁵⁸

B. NORWAY

In contrast to Ecuador, Norway only has a small population of indigenous people, by percentage and number, and the only existing indigenous ethnicity is the Sámi People. They settled not only in Norway but also in neighboring countries i.e Finland, Sweden, and the western part of Russia bordered with Finland.⁵⁹ In the late 20th century, the estimated Sami population was around 30.000 to 40.000 in Norway, 20.000 in Sweden, 6.000 in Finland, and 2.000 in Russia.⁶⁰ In Norway, they mostly settle in Finnmark – the heart of Sámi land and also the largest county – Troms, and Nordland.⁶¹

Struggles for the recognition of the Sámi people started since the post-World War II era. Among many driving factors, the two most important were the Norwegianization Policy and the Alta Dam Project. The former was a policy first introduced by the Norwegian parliament in 1851 with the purpose of assimilating the Sámi people into Norwegian culture and the modern lifestyle and later restricting use of Sámi language

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⁵⁷ Marc Simon Thomas, "Legal pluralism and the continuing quest for legal certainty in Ecuador: A case study from the Andean Highlands," *Oñati Socio-Legal Series* (2012), page 66.

⁵⁸ *Ibid.*

⁵⁹ The Editors of Encyclopaedia Britannica, "Sami People," <https://www.britannica.com/topic/Sami>, accessed on 22 November 2018.

⁶⁰ *Ibid.*

⁶¹ Jan Norem and Carsten Nieder, "Socioeconomic characteristics and health outcomes in Sami speaking municipalities and a control group in northern Norway," <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3424492/>, accessed on 22nd November 2018.

in schools.⁶² In the post-world war II era, the Norwegian government had moved into a more civilized and liberal attitude and finally have the willingness to recognize the Sámi culture. The Norwegianization Policy then ended after the Government appointed the Sámi Committee in 1956 which brought cultural integration or integrational pluralism of Sámi to the Norwegian national policy.⁶³

The second driving factor, The Alta Dam Project, was a turning point for the Sámi's who were fighting for recognition. The Dam was intended to produce hydro-electric power while at the same time it threatened the environment the Kautokeino-Alta river which is the heart of Sámi area across Norway.⁶⁴ It was introduced by the Norwegian Water Resources and Electricity Board in the 1970s and began producing electricity in 1987.⁶⁵ In that period, there were not only protests from Norwegian environmentalist and the Sámi people itself but also from the Sámi Rights Commission, formed by the Government in 1980.⁶⁶ The Commission reported its publication in 1984 with bold recommendations that led to the amendment of the Norwegian constitution ensuring protections toward Sámi cultures, language, and its way of life.⁶⁷

In 1987, Norway amended its constitution to recognize the Sámi as a part of Norwegian society. The new constitution includes recognition of the Sámi culture rights, language, and its way of life as stated in article 110a of the Norwegian Constitution: "*It is the responsibility of the authorities of the State to create conditions enabling the Sámi people to preserve and develop its language, culture and way of life*". In the same year, Norway enacted the Sami Act of 1987 that founded the Sámi

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⁶² Oystein Steinlien, "The Sami Law: A Change of Norwegian Government Policy Toward the Sami Minority?," *Canadian Journal of Native Studies* (1989), page 2-3.

⁶³ *Ibid.*, page 4.

⁶⁴ *Ibid.*, page 7.

⁶⁵ William Lawrence, "Sámi and Norwegians protest construction of Alta Dam, Norway, 1979-1981," <https://nvdatabase.swarthmore.edu/content/Sámi-and-norwegians-protest-construction-alta-dam-norway-1979-1981>, accessed on 22nd December 2018.

⁶⁶ *Ibid.* The protesters consisted of various rally groups ranging from national Sami organisations such as NRL (*Norsk Reindriftssamers Landsforbund*), NSL (*Norske Samers Riksforbund*), and SAG (Sámi Action Group) and Norwegian environmentalist groups (PAG or People's Action Group); the protests took the form of road blocks, hunger strikes, and setting up tents outside the Norwegian parliament building.

⁶⁷ *Ibid.*

Parliament (the *Sameting*) in 1989. The foundation of the *Sameting* was the direct result of the implementation of article 110a.

These three factors, the constitutional recognition of Sámi in 1987, the Sámi Act and establishment of the *Sameting* in 1989, were in line with the political and social movements of the Sámi to preserve its tradition and enforce its customary law. These movements eventually entered a new phase when Norway, through votes made by the Norwegian Parliament (*Storting*), decided – and also became the first country – to ratify The ILO Convention 1989 (C169) in 1991. The *Sameting* had a strong role and influence in pushing the *Storting* ratify C169, mainly through inter-parliamentary consultation processes.⁶⁸

In the process of C169's implementation, Norway enacted two Acts that gave positive impacts towards the Sámi culture, customary law, and especially the use, cultivation and ownership of their ancestral lands namely the Finnmark Act of 2005 and the Reindeer Husbandry Act of 2007. The Finnmark Act 2005 is the result of C169's incorporation into it, which was stated in Section 3. The Reindeer Husbandry Act of 2007 is a complementary law regarding reindeer husbandry as an inseparable part of the Sámi custom. These two regulations have become a source of law for Norwegian courts dealing with cases involving the Sámi.

The Finnmark Act of 2005 is a breakthrough for the recognition of Sámi's traditional lands after a long debate and consultation between the Norwegian government and the *Sameting* regarding the ownership and possession thereof in Finnmark.⁶⁹ The Act is built upon the Sámi's legal tradition where it doesn't interfere with individual or collective rights of lands possessed by their people through prescription or immemorial usage.⁷⁰ It also reflects the implementation of article 13 paragraph (1) and 14 paragraph (1) of C169, which says that the Sámi have collectively and individually acquired rights to land in Finnmark. However, the use

⁶⁸ Kanako Uzawa, "A comparison between Japan and Norway regarding ILO Convention No. 169", (Thesis of Master in Indigenous Studies University of Tromsø, Tromsø, 2007), page 14.

⁶⁹ Peter Johanson, "Indigenous Self-Determination in the Nordic countries: The Sami, and the Inuit of Greenland," in *Handbook of Indigenous Peoples' Rights*, ed. Corinne Lennox and Damien Short, (New York : Routledge, 2016), page 426.

⁷⁰ Øyvind Ravna, "The Legal Protection of the Rights and culture of Indigenous Sámi People in Norway," *Journal of Siberian Federal University* (2013), Page 1586.

of such rights is governed under the body named the Finnmark Estate (*Finnmarkseiendommen*) which consists of six members, three are appointed by the *Sameting* and the other three by The Finnmark County Council.⁷¹ The Estate also, according to Section 10, have to assess the significance of a change in the use of uncultivated land that affects the Sámi in which it is in accordance with article 8 (1) C169.

The Reindeer Husbandry Act of 2007 contains Sámi customs regarding its traditional reindeer herding. It establishes reindeer grazing areas for the Sámi population in the counties of Finnmark, Troms, Nordland, Nord-Trøndelag, Sør-Trøndelag and Hedmark where they have practiced reindeer husbandry since old times,⁷² they can also ask for a special permission from the King of Norway if they want to conduct reindeer husbandry outside these areas.⁷³ It also recognizes the Sámi's traditional herding community called *Siida*, and also contains grazing regulations based on the principles of good reindeer husbandry of the Sámi tradition and custom.⁷⁴ In relation to the C169, the establishment of grazing areas is relevant with article 14 paragraph 1. The recognition of *Siida* is also part of the Norwegian government's efforts to carry out the mandate of article 8 paragraph 2 of the convention.

Although Norway has put much concern for Sámi in the 1980s up to the early 21st century, yet the use of Sámi customary law *in concreto* faces difficulties and is often barred by Norwegian courts. This reflects the reluctance of the courts to consider using their customary law which in fact is more appropriate than national laws. The Supreme Court of Norway also has placed narrow requirements on quality and clarity in the Sámi customary law. Examples of this situation are reflected in two cases in 2001 and 2006. In its 2001 ruling, the Supreme Court decided that letting dogs running free in the woods in the summer, which might be done by the Sámi people, was not in accordance with the Wildlife Act.⁷⁵ In the same year, it was also decided that duck hunting during the spring in the Sámi municipality of Kautokeino could not be considered

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⁷¹ Peter Johanson, *Loc.Cit.*

⁷² Section 4 of the Norwegian Reindeer Husbandry Act 2007.

⁷³ Section 8 of the Norwegian Reindeer Husbandry Act 2007.

⁷⁴ Øyvind Ravna., *Op.Cit.*, page 1580.

⁷⁵ *Ibid.*, page 1587

to be a custom that needed legal protection.⁷⁶ In 2006, the Supreme Court, hearing the case of fishing in the River Tana, put aside the Sámi customary law when it contradicts the Tana Act of 1888. In its decision, the Court stated that the customary law saying that “a person outside the household is allowed to fish with the concern and authority of the right holders” was against the Tana Act of 1888, thus making it unlawful.⁷⁷

Despite the recognition of the Sámi people through constitutional recognition, if we take a look at the examples above we can see that the application of their customary law in national courts faces many difficulties. However, we also cannot deny that the Norwegian government had issued regulations that supported Sámi customary law such as Regulation July 30th, 2008 which allowed them to use Sámi’s traditional curved knife for reindeer slaughtering and Regulation May 2, 1994 allowing spring hunting for ducks limited by quotas.⁷⁸ The issuance of both regulations was indeed in accordance with article 8 of C169, yet it cannot be said that Norway has fully implemented it. Thus, the Norwegian courts and/or government should take into account Sámi customary law in its decisions and/or regulations involving and affecting the Sámi people.

V. CONCLUSION

The ILO Convention of 1989 requires parties to recognize the existence of indigenous peoples and the right to use customary laws in accordance with the provisions therein. This convention is an amended version of the previous one, the ILO Convention of 1959, which puts forward the aspects of assimilation of indigenous people into the national mainstream rather than accepting and recognizing them as groups that have the right of self-determination guaranteed by the country in which they live. This convention is detrimental to indigenous people because it can eliminate their distinctive characteristics, open up opportunities for the forced takeover of their traditional lands without opportunities of return, and can limit the application of customs or customary laws on the pretext of violating national law and/or the state’s integration

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⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

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In practice carried out by countries, recognition of indigenous people is generally carried out through constitutional recognition with the intention to know and remember, to accept as truly existing, and to accept and approve of having legal authority. Constitutional recognition has three factors which, although not cumulative, determines the success of recognition. These factors are, the population of the indigenous people, the distribution of their inhabited areas, and indigenous pressure groups. These three factors underlies the basis of recognition in the two countries that the author made as examples, namely Ecuador and Norway. The author finds that the indigenous people in both countries have the same background in obtaining constitutional recognition from the state but with different processes and results.

In the case of Ecuador, the indigenous people there were discriminated due to the integrationist policies of the then new country of Ecuador influenced by the segregationist policy previously introduced by the Spanish colonizers. This integration policy was compounded by the presence of economic inequality, frequent changes in regimes, and the absence of representatives of Ecuador's indigenous people in decision makings. In fighting such injustice and in an effort to gain state recognition, CONAIE and several indigenous organizations rebelled against the state and eventually succeeded in making the government amend the constitution in 1998 which recognized indigenous and tribal people, including their rights to implement customary law. The success of these indigenous peoples was supported by the large indigenous population of Ecuadorian which were spread over a wide area. Then Ecuador again amended its constitution in 2008, which was strongly encouraged by CONAIE. In its latest constitution, Ecuador declares itself as a plurinational state and gives wider rights to its indigenous people and puts forward legal certainty to avoid court dualism.

In the case of Norway, the struggle of the Sámi people in gaining recognition from the state was triggered by two main factors, namely the Norwegianization policy in 1851 and the construction of Alta Dam Project on the Kautokeino River. The Norwegianization policy ceased in 1956 after the government formed the Sámi Committee aimed at integrating the Sámi people into the Norwegian population. The

construction of Alta Dam was a turning point for the Sámi people to gain state recognition. However, the dam was completed and began producing electricity in 1987, in the same year Norway amended its constitution. This constitutional amendment confirms that Norway recognizes the right of the Sámi people to develop their language, culture, and their way of life. In carrying out this constitutional mandate, the Sámi Parliament, *Sameting*, was formed in 1989 through the Sami Act of 1987. *Sameting* had a significant influence in pushing the *Storting* to ratify the 1989 ILO Convention in 1991. In the process of implementing the convention, Norway stipulated two regulations, the Finnmark Act of 2005 and The Reindeer Husbandry Act of 2007 which were formed on the basis of the rights of the Sámi people to their ancestral lands, Sámi legal traditions, as well as the customs and customary laws of the Sámi people relating to the tradition of grazing and reindeer slaughtering.

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