# Traditional Justice:
## Practitioners' Perspectives

**WORKING PAPERS**

**Paper No. 6**

# Interaction between Customary Legal Systems and the Formal Legal System of Peru

Ellen Desmet

IDLO CUSTOMARY JUSTICE WORKING PAPER SERIES


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Published by:

International Development Law Organization in conjunction with the Van Vollenhoven Institute, Leiden University.

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## DONOR SUPPORT

This publication is based on research funded by the Bill & Melinda gates Foundation.

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The *Traditional Justice: Practitioners' Perspectives* online series is part of a broader research program featuring research activities in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda, aimed at expanding the knowledge base regarding the relationship between the operation of customary justice systems and the legal empowerment of poor and marginalized populations. Articles in the series discuss key aspects of traditional justice, such as for example the rise of customary law in justice sector reform, the effectiveness of hybrid justice systems, access to justice through community courts, customary law and land tenure, land rights and nature conservation, and the analysis of policy proposals for justice reforms based on traditional justice. Discussions are informed by case studies in a number of countries, including Liberia, Eritrea, the Solomon Islands, Indonesia and the Peruvian Amazon.

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# Interaction between Customary Legal Systems and the Formal Legal System of Peru

Ellen Desmet[1]

## EXECUTIVE SUMMARY

On paper, the Peruvian state legal framework has made some progress in incorporating respect for customary legal systems. For the greater part, however, the recognition of customary norms, organizational forms and decision-making mechanisms is subsequently weakened or invalidated in various strategies, such as: the addition of qualifying language limiting application; the requirement of compatibility with national state law and/or international human rights law; and the imposition in the law of norms, organizational structures or decision-making processes that are foreign to the customary legal systems concerned. This is demonstrated through the analysis of three themes: the organizational and judicial autonomy of indigenous peoples, land rights and nature conservation. The Peruvian national legislation is studied, as well as its impact on the daily life and organization of an indigenous people living at the border Peru-Colombia, the Airo Pai (Secoya).

This analysis of the Peruvian legislation on autonomy, land rights and nature conservation demonstrates that, in the end, there is no real space for customary institutions and decision-making processes to function.

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# 1. Introduction

This article analyses the interaction between customary legal systems and the formal legal system of Peru. It will show that the recognition of customary law by the Peruvian state legal system does not lead to real acceptance of customary norms and structures. This is demonstrated by the Peruvian legislation on autonomy, land rights and nature conservation. The implications of such a half-hearted recognition of customary law in state legislation at the local level are illustrated with the experiences of the Airo Pai (Secoya), an indigenous people living in the extreme north of the country.

The article is based on extensive field experience in the Peruvian Amazon. Doctoral fieldwork during six months in 2006 (April-September) and five weeks in 2009 (April-May) was complemented by annual research visits from 2003 until 2007. Multiple data collection techniques were used. At the national level, the main sources of information were semi-structured interviews, document analysis and, to a more limited extent, attendance at meetings. At the local level of the Airo Pai territory, these data collection techniques were combined with participant observation.

The two most important sources of document analysis were legislation and scholarly literature. Interviews were conducted with representatives of the Peruvian state, indigenous organizations, non-governmental organizations (NGOs), independent experts and local people. The interviews were held in the national capital of Lima, in the regional capital of Iquitos, and in the ancestral territory of the Airo Pai. The interviews were structured around some general topics, leaving sufficient room for delving into subjects of particular interest to, or in areas of particular expertise of the respondents. All taped interviews were transcribed.

The interviews with the Airo Pai were characterized as follows: the younger, male population communicated directly in Spanish; whereas the elderly and women needed interpretation between Spanish and their mother tongue *Pai Cocua*, "language of the people", which was mainly conducted by a family member or a local Airo Pai teacher. In addition to these interviews, information was gathered through informal conversations.[2]

After an introduction on the Airo Pai, the relevance of customary law with respect to the organizational and jurisdictional autonomy of indigenous peoples is reviewed. Subsequently, the two central themes of this article are addressed: land rights and nature conservation. Both themes follow the same structure. First, there is an explanatory note on the different concepts of lands, territories and property, and on the ambiguous relationship between nature conservation and indigenous peoples. Second, the growing recognition of the relevance of customary legal systems at the international level is reviewed with regard to both land rights and nature conservation. Third, some aspects of the customary legal systems on land rights and nature conservation among the Airo Pai are described. Finally, the Peruvian legal system is examined in terms of how it incorporates and respects customary legal systems, and the impact that this has had on the Airo Pai.

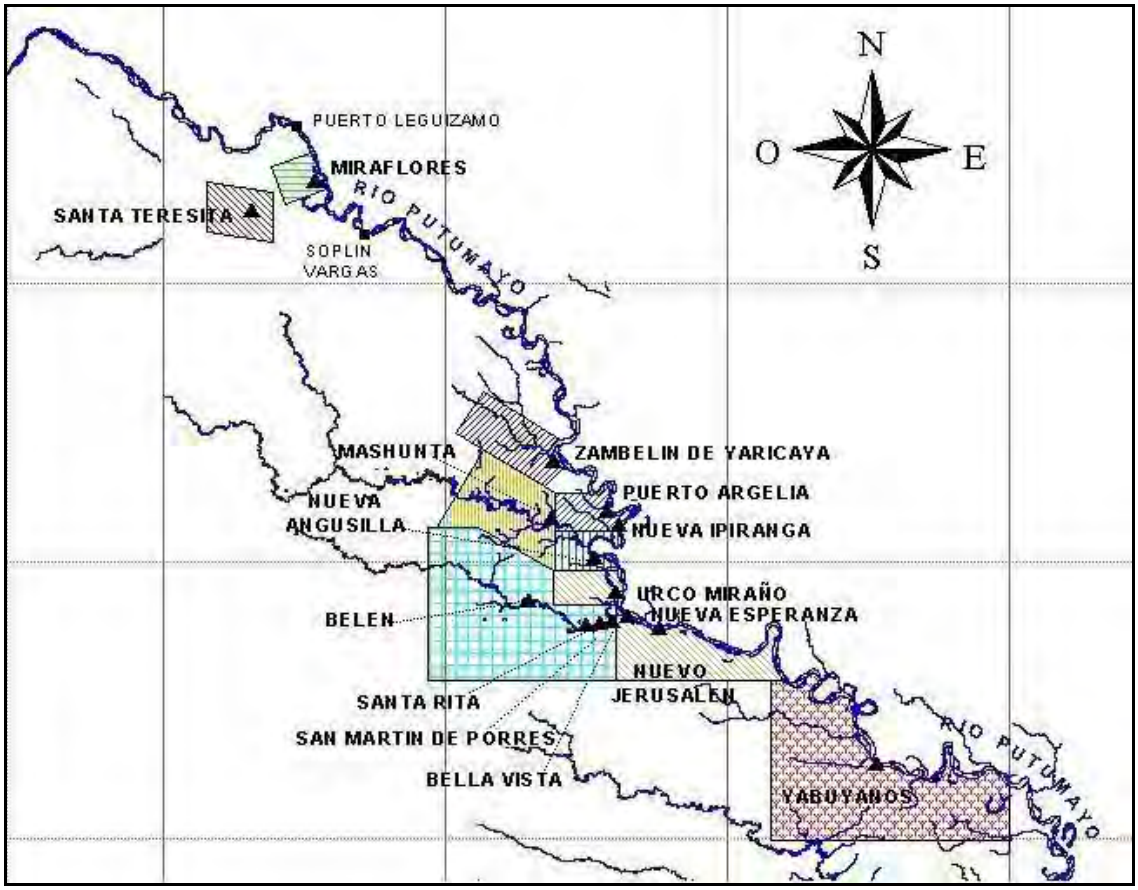
# 2. The Airo Pai

The Airo Pai (Secoya) are the ancestral inhabitants of the region, today situated in the north of the Peruvian Amazon. The analysis focuses on the experiences of the Airo Pai communities of the Putumayo basin. The Putumayo River forms the natural border between Peru and Colombia. The other population groups of the Upper Putumayo region are the indigenous peoples of the Kichwa and Huitoto, and mestizos.

[2] This could be while rolling the spears of the chambira palm before sunrise, bathing and washing clothes in the river, working on the field, having dinner, navigating in a canoe, or participating in a festivity. Notes were written down immediately afterwards whenever possible.

There are eight Airo Pai communities in Peru, which have a total population of about 588 inhabitants. Six of these communities are situated at the tributaries of the Putumayo River. Navigating the Yubineto affluent upstream, one successively encounters the villages of Bellavista, San Martín de Porres, Santa Rita and Nuevo Belén. The community of Mashunta lies at the Angusilla tributary, while Zambelín de Yaricaya is named after the Yaricaya River. One community, Vencedor Guajoya, lies at the Santa María River, a tributary of the Napo River, while the community of Puerto Estrella was recently established at the Lagartococha River.

Map 1. The titled native communities in the Teniente Manuel Clavero District




Source: Detail adapted from the map "Territorio de las Comunidades Nativas Tituladas del Río Putumayo", Information System on Native Communities of the Peruvian Amazon (SICNA), Instituto del Bien Común (April 1998). The map was adapted to the actual ubication of the communities of Bellavista, San Martín de Porres and Santa Rita.

*Airo Pai* can roughly be translated as "People (*Pai*) of the Forest (*Airo*)". The auto-denomination of this people already indicates their strong identification with their ancestral territory, rooted in their cosmology and daily life.[3] The outside world knows the Airo Pai from Peru and their relatives in Ecuador as *Secoya*, a Spanish adaptation of *Sieco Pai* (people painted with rainbow colors). This is the name of a now extinct clan and refers to the custom that continues today of facial and corporal painting using natural pigments.[4]

The Airo Pai belong to the linguistic family of western Tucano. The first missionary chronicles designate these Tucano-speaking groups as "the nation of the *encabellados*", because of the custom of the men to wear their *cabello* (hair) long.[5] Other descendents

[3] J Casanova, 'Migraciones aido pai (Secoya, Pioje)' (1980) III(5) *Amazonía Peruana* III 75, 101.
[4] L E Belaunde, *Viviendo bien. Género y fertilidad entre Los AiroPai de la Amazonía Peruana* (2001), 31–33.
[5] J Chantre and Herrera, *Historia de las misiones de la Compañia de Jesús en el Marañõn Español 1637–1767* (1901), 62–63.

of these Tucano-speaking groups today are the Mai Huna in Peru, the Coreguaje and Macacuaje in Colombia, and the Siona and Secoya in Ecuador.[6]

# 3. Autonomy

## 3.1 Organizational autonomy

The Constitution of Peru does not recognize 'indigenous peoples' as a legal subject, but only recognizes *comunidades campesinas* (peasant communities) and *comunidades nativas* (native communities).[7] The indigenous peoples of the Andean Highlands and the coastal areas are organized in peasant communities. The indigenous peoples of the Peruvian Amazon were requested to organize themselves in native communities. These communities are historical constructions; their establishment has led to the fragmentation of the indigenous peoples of Peru in various legal entities. Today, both types of communities have the same constitutional rights. Nevertheless, their legal histories and their past social contexts are very different.

The Constitution of Peru 1979 provided for the first time that peasant and native communities "are autonomous in their organization, in their community work, and in the use of their land, as well as in the economic and administrative management within the framework established by law".[8] The 1993 Constitution added that the communities were also autonomous "in the free disposition of their land".[9] The inclusion of the latter phrase undermined the security of indigenous land rights. Indeed, granting the communities autonomy to freely dispose of their land – which is in general foreign to their traditions and norms – could lead to the risk that these communities will be put under pressure by external actors to transfer their land to them. Examples include companies wanting to acquire the land in order to extract natural resources.

The qualification "within the framework established by law" in the constitutional provision strongly limits the apparent autonomy of the communities.[10] In the different areas where autonomy is granted by the Constitution, Peruvian law imposes its own regulations. As such, peasant and native communities are not free to organize themselves according to their traditions and/or present views. The Regulations of the New Law on Native Communities of 1979 prescribe an organizational structure consisting of an *asamblea general* (General Assembly) and a *junta directiva* (Board of Directors).[11] The General Assembly is the supreme organ of the community and is composed of all the registered community members.[12] The Board of Directors is responsible for the government and administration of the community, and consists of a President, a Secretary and a Treasurer.[13] According to the Civil Code, the Directors are periodically elected, by means of "personal, equal, free, secret and obligatory" vote.[14] Gray observes that these provisions have had "the effect of superimposing a western representative democratic system on top of the customary direct democratic system in which decisions were taken

[6] Ibid 34-35; M S Cipolletti, 'Jesuitas y Tucanos en el Noreste Amazónico del siglo XVIII. Una Armonía Imposible', in S Negro and M M Marzal (eds), *Un reino en la frontera. Las Misiones Jesuitas en la América colonial* (1999), 223, 230.
[7] See generally M Ludescher, 'Las sociedades indígenas de la Amazonía en el derecho peruano: La 'comunidad nativa' – institución jurídica y realidad social' (1986) 1 *Law and Anthropology* 131-176.
[8] *Constitution of Peru 1979*, art 161.
[9] Ibid art 89.
[10] See generally M Ludescher, 'Indigenous peoples' territories and natural resources: international standards and Peruvian legislation' (2001) 11 *Law and Anthropology* 156-178.
[11] *Regulations of the New Law on Native Communities 1979*, Supreme Decree No. 003-79-AA.
[12] Ibid art 21. See also *Civil Code 1984*, art 138.
[13] *Regulations of the New Law on Native Communities 1979*, art 22.
[14] *Civil Code 1984*, art 138.

by consensus. In fact, most communities have adapted the law to fit in with their own customs and the two systems co-exist, but not without tensions."[15]

How does this restricted constitutional autonomy then materialize in the daily life of the Airo Pai? The Board of Directors of an Airo Pai community consists of the *Cacique* (Chief/President), the *Vice-Cacique* (Vice-Chief/Vice-President), a Secretary, a Treasurer and one or two *vocales* (persons responsible for reminding the community members about upcoming meetings). Elections take place every two years *a la pizarra* (at the blackboard). Adult members of the community, men and women, mark a line next to the candidate of their preference. In contrast to what the Civil Code prescribes, there is no secret vote. Also, the free character of the vote is doubtful, because it is plausible that the first voters will influence those who vote after them.[16] It was observed that candidates who did not receive votes in the beginning, did not receive votes later on, and that influential people in the community affected the voting behavior of people after them. On the other hand, some persons strategically waited to vote until the end.

Also, with respect to land use and economic issues, peasant and native communities are not as autonomous as the Constitution states. In reality, economic policies are decided by the national government, principally the Ministry of Agriculture and the Ministry of Energy and Mines, with little or no involvement of the indigenous peoples.

The lack of autonomy of the Airo Pai in the use of their land and in economic management is apparent from the natural resources policy of the Peruvian Government. Driven by a neoliberal economic vision, the Peruvian state has given in concession the major part of the Peruvian Amazon to transnational companies for the exploration and exploitation of hydrocarbons. For example, in March 2006, the Peruvian state signed an agreement with the company Petrobras Energía Perú S.A. for 30 years of petroleum exploitation and 40 years of gas exploitation in Block 117. This block covers the ancestral territory of the Airo Pai, Kichua and Huitoto peoples. They were not consulted prior to the concession, which constitutes a violation of International Labour Organization (ILO) Convention No. 169.[17]

Finally, the autonomy in administrative management is limited by the system of *gobernadores* and *teniente gobernadores* (local authorities representing the central government) installed by the Peruvian state. These local authorities represent the Executive Power within the ambit of their jurisdiction and oversee the implementation of government policies. They are charged with monitoring compliance with the Constitution and laws, and oversight of the internal order. In principle, there is a *teniente gobernador* in each peasant or native community. The "autonomy" of rural and native communities is thus much more restricted than appears in the Constitution.

It is worth noting that the system of *teniente gobernador* is rarely implemented in the Airo Pai communities of the Upper Putumayo region. The principal authorities in the daily life of the Airo Pai are the *caciques* of the communities and the president of the *Organización Indígena Secoya del Perú* (OISPE, Indigenous Secoya Organization of Peru), the local, representative indigenous organization.

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[15] A Gray, *Indigenous Rights and Development. Self-determination in an Amazonian Community* (1997) 78. An example of this adaptation of the law to local customs is the electoral process among the Airo Pai, as elaborated further in the following paragraph.

[16] E Desmet, 'El impacto de procesos transnacionales en la organización de los Airo Pai (Secoya) de la Amazonía Peruana' (2009) 71 *Nueva Antropología* 162.

[17] *Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169)*, opened for signature on 27 June 1989, 72 ILO Official Bull 59 (entered into force 5 September 1991) ("ILO Convention No. 169"). Approved in Peru by Legislative Resolution No. 26253 on 2 December 1993 and ratified by the Executive Power on 17 January 1994. The Convention entered into force on 2 February 1995. Article 15(2) states: "In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."

### 3.2 Judicial autonomy

Article 149 of the Constitution of Peru 1993 states that "[t]he authorities of the Peasant and Native Communities ... may exercise judicial functions within their territorial ambit in accordance with customary law, always providing that they are not violating the fundamental rights of the person".

The *caciques* of the Airo Pai communities identify the following as belonging to their functions: organizing communal work; representing the community in meetings with external actors; negotiating for the benefit of the community; and giving advice to their people. The education of children mostly takes the form of advice on how to work and behave.[18] The advisory function is also used to maintain peace within the community and to mediate conflicts. In addition, the *caciques* do not identify conflict resolution as one of their tasks, but only provide advice. Not only the *caciques*, but also the elderly, teachers and other wise persons may give advice. Conflicts are rare and of a minor nature, mainly occurring during drinking events, but have become more frequent as people are turning away from religious convictions that prohibit alcohol. Sources of frictions are, for example, jealousy, or livestock roaming and dirtying community patios.

Among the Airo Pai there is little familiarity with the rules of the formal judicial system, and access to the state judicial system is weak. Until 2004, the Airo Pai villages fell under the jurisdiction of the Putumayo District, Maynas Province, Department of Loreto. The nearest state court was a justice of the peace,[19] situated in the capital of the Putumayo District, San Antonio del Estrecho, various days of boat travel from the Airo Pai communities. The remaining state judicial institutions were located in the regional capital of Iquitos. The large distances and the high transport costs implied that there was little interaction between the Airo Pai and state actors.

In 2004, the Teniente Manuel Clavero District was created, with the village of Soplín Vargas as its capital.[20] This new jurisdiction, covering the Upper Putumayo region, seceded from the Putumayo District. A justice of the peace was established in the community of Tres Fronteras, a few hours by boat from the Airo Pai communities. In this way, state institutions became closer and thus more accessible for the Airo Pai communities of the Upper Putumayo region. To facilitate implementation of the state policy of access to justice, in March 2010 the judiciary of Peru donated a solar panel to the justice of the peace of Tres Fronteras, because the village does not have electricity.

In conclusion, until recently, the physical remoteness of judicial institutions implied the weak influence of the state judicial system in the Airo Pai's daily life. With the recently created justice of the peace situated closer to the Airo Pai communities, this may change in the future.

## 4. Land rights

### 4.1 The relationship between indigenous peoples and their territories

Indigenous peoples have a unique relationship with their territories. In the Indigenous Peoples' Earth Charter[21] of 1992, indigenous peoples described this bond as follows:

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[18] Belaunde describes different ways of giving advice. Formal advice is provided before sunrise or on important occasions such as the first wedding. Advice is also given in humorous myths or when consuming important plants such as *yoco*. Belaunde, above n 4, 111-117.

[19] The justice of the peace is at the lowest hierarchical level of the judicial power; in principle, each district has a justice of the peace.

[20] *Law Creating the Teniente Manuel Clavero District in the Province of Maynas, Department of Loreto, 2004*.

[21] The Indigenous Peoples' Earth Charter was the outcome of the Kari-Oca Conference, an event organized by indigenous peoples to have their voices heard, in parallel with the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro.

> 31. Indigenous Peoples were placed upon our Mother, the Earth, by the Creator. We belong to the land. We cannot be separated from our lands and territories.
> 32. Our territories are living totalities in permanent vital relation between human beings and nature. Their possession produced the development of our culture. Our territorial property should be inalienable, unceasable [sic][22] and not denied title. Legal, economic and technical backup are needed to guarantee this.
> 34. We assert our rights to demarcate our traditional territories. The definition of territory includes space (air), land and sea. We must promote a traditional analysis of traditional land rights in all our territories.

The Charter of the Indigenous and Tribal Peoples of the Tropical Forests of 1996 states:

> Our territories and forests are to us more than an economic resource. For us, they are life itself and have an integral and spiritual value for our communities. They are fundamental to our social, cultural, spiritual, economic and political survival as distinct peoples.[23]

The indigenous and tribal peoples of the tropical forests demand:

> [s]ecure control of our territories, by which we mean a whole living system of continuous and vital connection between man and nature; expressed as our right to the unity and continuity of our ancestral domains; including the parts that have been usurped, those being reclaimed and those that we use; the soil, subsoil, air and water required for our self-reliance, cultural development and future generations.[24]

On the basis of the views of indigenous leaders of the Amazon basin, the indigenous territory was defined by Chirif, García and Smith as:

> the mountains, valleys, rivers and lagoons that are identified with the existence of an indigenous people and that have provided it with its means of subsistence; the richness inherited from their ancestors and the legacy they are obliged to transmit to their descendants; a space where every little part, every manifestation of life, every expression of nature is sacred in the memory and in the collective experience of that people and which is shared in intimate interrelation with the rest of living beings, respecting its natural evolution as a unique guarantee of mutual development; the environment of freedom on which that people exercises control, permitting it to develop its essential national elements and for the defence of which every member of the people is prepared to shed his blood, rather than supporting the shame of having to look in the eyes of his dispossessed people.[25]

According to indigenous peoples' views, the land not only provides them with their means of subsistence, but also has a spiritual meaning and constitutes the source of traditional knowledge of fauna and flora, such as medicinal plants. Moreover, the territory usually forms the basis of their political organization and socio-cultural interactions. The description also refers to the collective and intergenerational dimensions of the relationship to the territory. However, it must be noted that there is not always a physical link with the ancestral territory, for example, when indigenous persons migrate to cities or have been displaced.

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[22] The Earth Charter uses the term "unceasable", although the idea was presumably to state that the territorial property of indigenous peoples is to be "unseizable", that it cannot be seized.
[23] International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests, 'Charter of the Indigenous and Tribal Peoples of the Tropical Forests' (Established Penang, Malaysia, 15 February 1992; Revised Nairobi, Kenya, 22 November 2002), art 3.
[24] Ibid art 14.
[25] A Chirif Tirado, P García Hierro and R Chase Smith, *El indígena y su territorio son uno solo: estrategías para la defensa de los pueblos y territorios indígenas en la cuenca amazónica* (1991) 27–28.

In the struggle to defend their territorial rights, indigenous peoples used in their language a legal concept of the dominant Western order, "property".[26] As Pedro García Hierro describes, some attributes of the property concept were deemed helpful by the indigenous movement to protect indigenous territoriality, especially the absolute, exclusive and permanent nature of the power that a right of property confers to its titular. Given that most legal systems do not offer other possibilities to protect the indigenous territory, using the concept of property seemed the most appropriate option.

Nevertheless, there are some fundamental differences between indigenous and Western concepts of property and ownership, which interfere with the use of the property concept to adequately protect indigenous territories. The concept of private property lies at the core of the Western economic system, providing the basis for the free and unlimited circulation and accumulation of goods. While indigenous peoples do have a sense of ownership, for example, with regard to certain artifacts, traditionally they will rarely use the property concept in relation to the land. In Western legal systems, the property of land corresponds to an individual or a legal entity, such as a company or association; these natural or legal persons can freely dispose of the land. In contrast, according to the indigenous view, the land is not an individual property, but rather is linked to a people.

Because various characteristics of the private property concept collide with indigenous conceptions, some "adaptations" were introduced. For instance, one of the essential qualities of private Western property is that the owner can freely dispose of the property and mortgage it. Given the threats this poses to the tenure security of indigenous territories, indigenous peoples claim that their land is inalienable and unseizable. Also, because the subject of Western property is a natural or legal person, García Hierro notes how, in the Peruvian legal order, a new legal subject was created, the "community", in order to reflect – albeit inadequately – the collective relationship of indigenous peoples to their territories. These adaptations do not accurately reflect and protect the relationship between indigenous peoples and their territories; rather, they denaturalize the classical private property concept. Therefore, the concept of territory more appropriately reflects indigenous views and rights than the Western property concept.

## 4.2 On the international scene

The particular attachment of indigenous peoples to their lands, territories and resources is reflected in various international legal instruments. ILO Convention No. 169 recognizes the "special importance for the cultural and spiritual values" of indigenous peoples of their relationship with their lands or territories.[27] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) refers to the "distinctive spiritual relationship" of indigenous peoples with their "traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources".[28]

For indigenous peoples, "territory" is thus a much broader concept than land. Article 13(2) of ILO Convention No. 169 states "[t]he use of the term *lands* … shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use". In contrast, the UNDRIP uses the expression "lands, territories and resources" without further specification.

The customary land rights of indigenous peoples have been recognized in particular within the Inter-American human rights system. The landmark case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* of 2001 was the first instance where an international court issued a legally binding decision recognizing the collective rights of

[26] P García Hierro, 'Territorios indígenas: tocando a las puertas del derecho' in A Surrallés and P García Hierro (eds) *Tierra Adentro. Territorio Indígena y Percepción del Entorno* (2004) 277, 279–283.
[27] ILO Convention No. 169, art 13, 1.
[28] UN General Assembly, Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 61st session 2007, art 25, UN Doc A/RES/47/1 *(UNDRIP*).

indigenous peoples to their lands, territories and resources.[29] In this case, the Inter-American Court of Human Rights stated that "[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration".[30] The land, territorial and resource rights of indigenous peoples do not therefore depend on prior recognition within the national state legal framework.

In addition to pecuniary redress, the Court ordered two measures in the *Awas Tingni* case. First, pursuant to article 2 of the *American Convention on Human Rights*,[31] Nicaragua was ordered to adopt in general "the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, *in accordance with their customary law, values, customs and mores*".[32] Second, in the specific case under consideration, the Court ordered the state to "carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community" and until then, "to abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live and carry out their activities".[33] As Anaya puts it, the Inter-American Court "affirmed not only a right against state interference with indigenous peoples' rights in lands and resources without their consent, but also an affirmative right to state protection from such interference by private parties".[34] The road to enforcement of the judgment was not straightforward. In 2002, the Court ordered provisional protection measures for the members of the Awas Tingni community on the use and enjoyment of the property of their lands and natural resources, with the aim of avoiding immediate and irreparable damages caused by natural resource exploitation activities by third parties on these lands.[35] In 2007, these provisional measures were lifted, but the Court continued to supervise the enforcement of the judgment.[36] On 14 December 2008, the Government of Nicaragua finally handed over the property title to 73,000 hectares of its ancestral territory to the Awas Tingni community.[37]

## 4.3 Customary land rights among the Airo Pai

As mentioned, the Airo Pai are the original inhabitants of the land situated between the Upper Putumayo River and the Aguarico, Largartococha and Upper Napo Rivers in Peru. It has been estimated that they have been present in this region for 1,500 to 2,000

[29] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Ser C no 79.
[30] Ibid para 151.
[31] In the American Convention on Human Rights article 2 states: "Where the exercise of any of the rights or freedoms [recognized in the American Convention] is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."
[32] Emphasis added. Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Ser C no 79, para 164. In the case of the *Sawhoyamaxa Indigenous Community v Paraguay*, the state was similarly obliged to take the "legislative, administrative and other measures necessary to provide an efficient mechanism to claim the ancestral lands of indigenous peoples enforcing their property rights and *taking into consideration their customary law, values, practices and customs*". Emphasis added. Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Ser. C, no. 146, para 235 (29 March 2006).
[33] Inter-American Court of Human Rights, above n 29, para 164.
[34] J Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources" (paper presented at the American Association of Law Schools Conference, January 2005, 14).
[35] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Provisional Measures (6 September 2002).
[36] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Provisional Measures (26 November 2007).
[37] See, e.g. Inter-American Commission on Human Rights, 'IACHR hails titling of Awas Tingni Community Lands in Nicaragua', Press Release no, 62/08 (18 December 2008).

years.[38] Their greater presence at the tributaries of the Putumayo River is recent. Until some decades ago, they held a semi-nomadic lifestyle.

Different clans lived separately at small tributaries deep in the forest, each in a *maloca* (oval multi-family house). Every three to four years, the clan moved for a variety of reasons: the death of a shaman or another important member of the community (because according to custom, they must be buried in their own homes); the creation of new families; natural events such as a river silted with sand or the exhaustion of nearby firewood; or boredom.

From the 1970s onwards, the presence of mestizo teachers, the establishment of health posts and evangelization all led the Airo Pai to create stable and more accessible villages, closer to the principal rivers. The first such village was San Martín de Porres at the Yubineto River.

Every family has two or three agricultural fields on which manioc, maize and banana are cultivated based on a shifting cultivation system.[39] Each household cultivates its "own" agricultural fields. Belaunde notes that "[t]he personal property of the fields is based on the notion that a plot of land belongs to who works and organizes its management. The forest around the community is like a large parcelled garden."[40] Also, when the field is left as a *purma* (abandoned field) to recover, the link with the household that first cultivated the field remains. If other persons want to establish a new field on the *purma*, they need to ask permission to that household.

There are various fruit trees in the agricultural fields, such as *pijuayo* (*Bactris gasipaes*). These trees are "like a stamp that marks the territory with the identity of those who sowed them".[41] The landscape is also modified by cemeteries of the ancestors. Casanova has noted "[a] river may be uninhabited for decades, but there remain the marks of their ancestors, present in the *purmas* … and in the thinking of the elderly of today."[42] The forest is therefore not an empty or virgin place, untouched by people; its current state is the result of an age-long interaction between man and nature.[43]

Various agricultural tasks are carried out on the basis of a *minga,* which is an organizational form of communal work whereby a family invites relatives and friends to work together on its field. In exchange, the organizing family brings *masato* (manioc beer) and sometimes food. They commit themselves to return the favour at a following *minga*.

The remainder of the forest, outside the agricultural fields, is considered common property. Within the Airo Pai villages, every family has a house with an adjacent garden, where peppers (*ají*) and fruit trees are grown. The members of the community can precisely indicate the borders between the different gardens, although generally they are not physically demarcated.

In addition to subsistence, the territory is also essential for the identity and cultural reproduction of the Airo Pai as a people. Various places of historical-mythical importance can be identified. Moreover, the forest provides the Airo Pai with a range of plants

[38] W Vickers, *Los Siona y los Secoya. Su Adaptación al Medio Ambiente* (1989).
[39] Traditionally, the Airo Pai practise agriculture according to the moon. The moon indicates the start of a different phase in the agricultural cycle; a complete cycle consists of five moons. For a detailed analysis of the agricultural system of the Airo Pai, see J Casanova, 'El sistema de cultivo Secoya' in A Chirif (ed), *Etnicidad y Ecología* (1978) 41–53.
[40] Belaunde, above n 4, 169.
[41] Ibid 68.
[42] J Casanova, 'Parentesco, mito y territorio entre los aido pai (Secoya) de la Amazonía peruana' (2005) 15(IX) *Investigaciones Sociales* 15, 18.
[43] A Gomez-Pompa and A Kaus, 'Taming the wilderness myth' (1992) 42(4) *Bioscience* 271–279.

essential for their livelihood and cultural identity, such as medicinal plants, *ayahuasca (yaje)*, *yoco* and the chambira palm.

### 4.4 Peruvian legislation and land rights

The Peruvian state has been particularly reluctant to recognize the territorial rights of indigenous peoples. This is evidenced by Peru's abstention from voting on ILO Convention No. 169 at the International Labour Conference due to, among other reasons, its concern over the use of the term "territories".[44] The Peruvian Parliament subsequently approved the Convention, which came into force in February 1995. Legislation was not adapted to the international standards, however, as the concept of indigenous territories is not recognized. The peasant and native communities can only acquire collective rights over limited lots of land. Indigenous peoples cannot obtain state legal recognition of the totality of their ancestral territory as such.

In the course of the years, four Airo Pai native communities have been registered and titled. In the Putumayo basin, the communities are: i) San Martín de Porres with its annexes Bellavista, Santa Rita and Nuevo Belén, at the Yubineto River; ii) Mashunta, at the Angusilla River; iii) Zambelín de Yaricaya, at the Yaricaya River; iv) Vencedor Guajoya, at a tributary of the Napo River at the Santa María River.

However, the Airo Pai ancestral territory is considerably larger than the sum of the titles of these four native communities. Important mythological cultural places, such as the *Hupo* (also called "the historical monument of the man of stone") and the *cochas encantadas* (bewitched lakes) at Lagartococha, as well as a large number of cemeteries of the ancestors are not included in these titles. Moreover, the title of the community Vencedor Guajoya at the Napo River is very small, only 1,000 hectares; the village today is situated outside its borders. The community of Puerto Estrella at the Lagartococha River has not yet been titled.

Moreover, within the native communities, only agricultural lands are transferred as property to the communities; the forest areas within their communal lot are given in concession.[45] Given that most of the lands in the Amazon are forests, on which the native communities depend for their subsistence activities and cultural reproduction, this provision constitutes a serious limitation of their rights. The measure may stimulate the slashing and burning of the forest, with the objective of sowing and requesting titling.[46]

At present, the effects of these different regulations for agricultural lands and forest lands seem to be limited. Natives use the whole of their lands irrespective of whether they are agricultural lands given in property or forest lands given out for use. Nevertheless, there remains a situation of legal insecurity, which is potentially dangerous. Usage rights are less secure than property rights: at any moment, the state may decide to assign these lands to another use. According to a lawyer associated with the indigenous rights movement: "[u]ntil now, there is kind of a dormant situation, in the sense that people occupy their space and their forests, but that does not mean that the situation is not dangerous."[47]

## 5. Nature conservation

Peru hosts a rich biological diversity. The creation of protected areas by the state is often considered by conservationists as the preferred way of protecting biodiversity *in situ*. Nevertheless, indigenous peoples and local communities often engage in ways of nature

[44] J Anaya, *Indigenous Peoples in International Law* (2nd edition, 2004) 85–86, 100 and 103.
[45] *New Law on Native Communities 1978*, art 11, Decree Law No. 22175.
[46] B Monteferri, 'Áreas naturales protegidas: los efectos jurídicos de su establecimiento sobre predios de propiedad privada' (2008) 6 *Revista de Derecho Administrativo* 338-361.
[47] Interview on file with the author (7 September 2006, Iquitos).

conservation other than the typically Western protected areas established and managed by government actors.

## 5.1 The ambiguous relationship between indigenous peoples and nature conservation

Perspectives on the relationship between nature conservation and indigenous peoples are very divergent: from a proclaimed incompatibility of interests between nature conservation and local people to a fundamental interdependence between the future of both. Some conservationists perceive the goals of nature conservation and the interests of indigenous peoples and local communities as contradictory. In their view, conservation of nature requires strict preservation, which cannot be reconciled with human presence or resource use.[48] Other actors perceive a convergence between the aims of nature conservation and the interests of local people. Given that most local communities depend on their natural environment for their subsistence and well-being, it is in their own interests to conserve their natural resources.[49] This convergence of interests has been particularly advanced with respect to indigenous peoples. Indigenous peoples have been represented as 'the stewards of Mother Earth', those who live in harmony with nature. The Romantic image of Indians as noble savages, promoted by Locke and Rousseau was taken up again in the 20th century with a focus on the allegedly balanced relationship of native people with nature. The term "ecologically noble savage" was created; indigenous peoples were represented as "natural conservationists".[50]

A more nuanced position is proposed here: indigenous peoples and local communities are neither intrinsic destroyers of nature nor ecologically noble savages. First, indigenous peoples and local communities are not natural conservationists, at least not as understood by Western conservationists.[51] Philosophical or rhetorical declarations of harmony with nature do not suffice to conclude that effective conservation is taking place.[52] Not all local norms and practices were, are, or will be sustainable or conservationist. Some may even have the opposite effect. For instance, some groups used to employ poisonous substances to fish in small pools. Also, land scarcity and poverty, a growing interaction with the liberal market economy and the introduction of new technologies that facilitate rapid resource extraction may induce more depredatory practices.[53] These accelerating changes often endanger a continued sustainable relationship between the community and its natural environment. In fact, few indigenous peoples have managed to "develop a sustainable life-style once technological inventions or social and economic opportunities have entered their lives".[54]

However, "to reject environmental myths about native peoples does not mean suppressing their historical associations with the land".[55] Various authors observe that many indigenous peoples and local communities are not familiar with the word "conservation".[56] Just like "biodiversity", the concept of "conservation" seems to be a

[48] See, for example, R Kramer, C van Schaik, and J Johnson (eds), *Last Stand: Protected Areas and the Defense of Tropical Biodiversity* (1997); J Terborgh, *Requiem for Nature* (2004).
[49] J O Lynch and J B Alcorn, 'Tenurial rights and community-based conservation' in D Western and M R Wright (eds) *Natural Connections: Perspectives In Community-Based Conservation* (1994) 373, 385.
[50] K H Redford, 'The Ecologically Noble Savage' (1991) 15(1) *Cultural Survival Quarterly*.
[51] N Rouland, S Pierré-Caps and J Poumarède, *Droit des minorités et des peuples autochtones* (1996) 430.
[52] E A Smith and M Wishnie, 'Conservation and subsistence in small-scale societies' (2000) 29 *Annual Review of Anthropology* 493, 501.
[53] M Colchester, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*, World Rainforest Movement and Forest Peoples Programme (2003).
[54] K von Benda-Beckmann, *'The environmental protection and human rights of indigenous peoples: a tricky alliance' (1997) 9 Law and Anthropology* 302, 303.
[55] R H Keller and M F Turek, *American Indians & National Parks* (1999) 239.
[56] See, for example, A Gray, 'Indigenous peoples, their environments and territories' in D A Posey (ed), *Cultural and Spiritual Values of Biodiversity* (1999), 61-66; D A Posey, 'Interpreting and applying the "reality" of indigenous concepts: what is necessary to learn from the natives?' in K H Redford and C Padoch (eds) *Conservation of Neotropical Forests* (1992) 21–34.

creation of Western rational culture. This does not imply that conservation – understood as a cultural and political process of protecting nature – is not practised in non-Western societies, but it is conceived differently.

Indigenous peoples and local communities are not inherent destroyers of nature either. In many different times and places, local people have managed their communal resources through cultural practices, attributing "symbolic and social significance to land and resources beyond their immediate extractive value".[57] Indigenous peoples and local communities have protected certain areas, species or ecosystems for a variety of reasons, which may be livelihood-related or cultural-spiritual. It is difficult, however, to ascribe such practices and outcomes to an explicit and conscious conservation ethic. As Little concludes, "cases in which local communities in low-income regions manage their resource bases with the prime objective of conservation – rather than improving social and economic welfare – are virtually nonexistent".[58]

Nevertheless, many indigenous peoples and local communities have acquired deep knowledge about the ecosystems with which they have been interacting on a daily basis for so many years. This traditional knowledge is still largely unknown and/or insufficiently appreciated by Western conservation. For instance, the combination of the semi-nomadic lifestyle of Amazonian peoples with slash-and-burn agriculture left enough time for the forest to recover, which is necessary due to the limited soil fertility. Slash-and-burn agriculture has long been negatively perceived in conservation science; it is now recognized that this practice relies on a sustained knowledge of and insight in the functioning of forest ecosystems.[59] Thus, although in most cases no explicit conservation ethic can be attached to local practices, they often entail beneficial consequences for the natural environment.

## 5.2 On the international scene

The relevance of customary legal systems within nature conservation initiatives has been recognized at the international level. For example, the Corobici Recommendations, adopted at the international Expert Meeting on the Implementation of Traditional Forest Related Knowledge and the Implementation of Related International Commitments in San José, Costa Rica, in 2004, address the issue of traditional forest-related knowledge.[60] The following recommendation on conservation and protected areas was included:

> 6. Reform national forest and conservation policies, laws, institutions, and land tenure regimes to recognize indigenous peoples' unambiguous and secure rights to collectively own, manage, and control their territories, forests and other natural resources, *taking into account their* traditional lifestyles and *customary systems of tenure*, especially those relevant to traditional knowledge.[61]

In recent years, the concept of Community Conserved Areas (CCAs) was proposed by the World Conservation Union (IUCN)[62] to refer to conservation initiatives of indigenous

[57] Gomez-Pompa and Kaus, above n 43.
[58] O J Little, 'The link between local participation and improved conservation: a review of issues and experience', in D Western and M R Wright (eds) *Natural Connections: Perspectives in Community-Based Conservation* (1994) 347, 350.
[59] Gomez-Pompa and Kaus, above n 43.
[60] International Expert Meeting on the Implementation of Traditional Forest-Related Knowledge, 'Corobici Recommendations' (2004).
[61] Emphasis added. Ibid para 17.
[62] The International Union for Conservation of Nature (IUCN), also known as the World Conservation Union, is an NGO with a remarkable membership, as its members include states, government agencies, national and international NGOs. IUCN has taken a leading role on the international environmental scene in general, and in promoting the integration of the rights and interests of indigenous peoples and local communities in conservation policy, in particular.

peoples and local communities.[63] At the fifth World Conservation Congress in Barcelona, the terminology was refined to Indigenous Peoples' and Community Conserved Areas (IPCCAs). Three key conditions must be fulfilled for an area to qualify as an (IP)CCA:

(i) a *strong relationship* exists between a given ecosystem, area or species and a specific indigenous people or local community concerned about it because of cultural, livelihood-related or other strongly felt reasons;

(ii) the concerned indigenous people or local community is a major player in decision making about the management of the ecosystem, area or species; in other words, the community possesses – *de jure* or *de facto – the power to take and enforce the key management decisions* regarding the territory and resources (a community institution exists and is capable of enforcing regulations);

(iii) the voluntary management decisions and efforts of the concerned community *lead to the conservation of biodiversity, ecological functions and associated cultural values*, regardless of the objectives of management originally set out by the community.[64]

There is a huge diversity of IPCCAs, including sacred lakes and forests, indigenous territories, community forests, and formal protected areas managed by local communities. Borrini-Feyerabend and Lassen have distinguished four governance sub-types of IPCCAs. In two types, IPCCAs are governed by traditional institutions; in the two other types, IPCCAs are governed by "relatively new institutions", which make use of modern techniques such as written rules and voting systems. Traditional institutions may have maintained their basic characteristics over time (sub-type T1), or may have recently been tailored to new conditions, such as the interaction with the Government. However, the traditional institutions maintain their unique character and accountability towards the communities (sub-type T2). IPCCAs may also be governed by relatively new institutions. These may have developed spontaneously within the community, without substantial external influence (sub-type N1), or may be the result of the impact of government agencies, NGOs, and/or conservation and development projects. In this case, the rules and governance institutions match external (legal) criteria (sub-type N2).

IPCCAs may also differ in their relationship with the government. One of the three essential characteristics of an IPCCA is that indigenous peoples or local communities have *de facto* authority over the IPCCA. A distinction between four sub-types may be made: two subtypes of *de facto* IPCCAs and two subtypes where IPCCAs are formally recognized by the government. First, there are IPCCAs governed by indigenous peoples or local communities without any interference by government agencies or incorporation in state legislation (sub-type DF1). Second, some IPCCAs are in an uncertain situation, "with the power relationship between the state and the indigenous peoples or local communities being unclear and at times negotiated on an *ad hoc* basis" (sub-type DF2).[65] Third, the community institutions governing IPCCAs may be formally recognized by the government, but this recognition does not curtail local autonomy or decision-making authority. On the contrary, the position of the IPCCAs is reinforced and supported by legal authority (sub-type DJ1). Finally, the community institutions governing the IPCCAs may be formally recognized by the government, but in a way that requires modifications to the prior governance institutions, to comply with legal or other criteria (sub-type DJ2).

[63] G Borrini-Feyerabend and B Lassen, 'Community Conserved Areas: A Review of Status & Needs after Durban 2003 and CBD COP 7 2004. Preliminary Synthesis' (2008) 7.
[64] It has also been accepted that the management decisions and activities "are well in the process of leading to" conservation.
Ibid 9.
[65] Ibid 12.

Two types of IPCCAs seem to be particularly successful: i) IPCCAs situated in remote areas, outside the influence of government agencies or private actors (sub-types DF1/T1); and ii) IPCCAs benefiting from "an appropriately supportive legal and policy framework, matching community institutions able to take advantage of it".[66] With respect to the latter situation, Borrini-Feyerabend and Lassen state:

> Although many CCAs are based on customary law and traditional practice, the level of recognition and support by the state and other social actors can be decisive for their survival. … CCAs that are most "visible" and important in terms of ecological values and natural resources are critically dependent on the ability of indigenous peoples and local communities to be recognized as legal subjects, to make decisions about land and resource uses, to hold secure tenure over resources, and to exclude outsiders from appropriating these resources.[67]

In October 2007, the Second Latin American Congress on Protected Areas was held in Bariloche, Argentina. In the Bariloche Declaration, the concept of Indigenous Conservation Territories was proposed as a "legitimate governance model for protected areas established in indigenous peoples' ancestral territories".[68] IUCN was requested:

> to consider integrating the concept of Indigenous Conservation Territories as a legitimate governance model for protected areas established in indigenous peoples' ancestral territories, whatever the management category may be, and to recognize in that model the integration of culture and nature, the *role of customary rights*, the traditional institutionality and the exercise of indigenous authority in such territories.[69]

## 5.3 Customary conservation-related norms among the Airo Pai

Various places within the Airo Pai ancestral territory can be categorized as culturally protected areas.[70] These areas are avoided or left untouched for cultural-spiritual reasons and thus strictly conserved in practice. This is the case for *Hupo*, where, according to their mythology, the Airo Pai originated. This place is also called "the historical monument of the man of stone", because it is told that once there was a young man laying there in a hammock. According to the mythology, the young man was too lazy to go hunting and despite various invitations, he always insisted on being left to sleep. In the end, his hammock was shaken; the young man fell out and was converted into a stone. Today, if one goes there, the animals can talk but one is not allowed to speak. To sharpen a machete on the rock, one must first strew *no'cua cono* (traditional banana beer) and if not, blood will come out of the stone. It takes five days to get there and one day to return.

Another example of culturally protected areas is the *cochas encantadas* (bewitched lakes), which are mostly found in the Lagartococha area but also elsewhere. The Airo Pai

[66] The authors do not link a specific sub-type of IPCCA to this second category of successful IPCCAs.
[67] G Borrini-Feyerabend and B Lassen, 'Community Conserved Areas: a review of status & needs after Durban 2003 and CBD COP 7 2004. Preliminary Synthesis' (2008) 14.
[68] IUCN, 'Indigenous Conservation Territory: A New Option for Governance of Protected Areas' (2008), <http://www.iucn.org/about/union/commissions/wcpa/wcpa_focus/?11/Indigenous-Conservation-Territory-A-new-option-for-governance-of-protected-areas>.
[69] Emphasis added. Second Latin American Congress on National Parks and Other Protected Areas, 'Bariloche Declaration' (2007) para 17, <http://www.rlc.fao.org/es/tecnica/parques/pdf/BariDecl.pdf>.
[70] In general, biological investigations in the region demonstrate that the Airo Pai ancestral territory is characterized by a rich biodiversity and high species endemism. These data support the proposition that the Airo Pai traditionally lived in a more or less ecologically balanced way. See W Alverson *et al* (eds) *Ecuador-Perú:Cuyabeno-Güeppí*, Rapid Biological and Social Inventories Report 20 (2008); Asociación Peruana para la Conservación de la Naturaleza – ECO Studien Sepp & Busacker Partnerschaft, *Estudio de Línea de base biológico y social para el monitoreo en la Zona Reservada de Güeppí* (2006).

say that “if one goes there, even if it is one o’clock in the afternoon it will become dark with flashes of lightening and rain. One cannot walk there”.[71]

These culturally protected areas can be qualified as indigenous peoples’ and community conserved areas (IPCCAs) because they fulfill the three requirements proposed by IUCN (cf. supra): i) a strong relationship between the given area and a specific indigenous people; ii) the indigenous people concerned has (or had) *de facto* the power to take and enforce the management decisions as regards the territory; and iii) the voluntary management decisions lead to the conservation of biodiversity and associated cultural values.

An example of a conservation-related norm recently agreed on is the establishment of fish quota by the families living in the community of Zambelín de Yaricaya. In contrast to the other Airo Pai communities, in Zambelín, fish can be sold to Colombian merchant boats. This is because of the geographical location of Zambelín de Yaricaya at a tributary more upstream the Putumayo River and closer to the Colombian city of Puerto Leguízamo, the main commercial centre of the region where the fish can be put up for sale. At a certain point in time, this economic opportunity was leading to overfishing. To counter this, the community of Zambelín agreed in a communal assembly to establish fish quotas per family. At the time of the fieldwork in 2006, these norms were relatively well complied with, and new resource management rules were adopted in response to overexploitation.

## 5.4 Peruvian conservation legislation

The Protected Natural Areas Law of 1997 lays the foundations for the current legal regime on protected areas in Peru. Since May 2008, the responsible state institution for protected areas is the *Servicio Nacional de Áreas Naturales Protegidas por el Estado* (SERNANP, National Service of Natural Areas Protected by the State), which falls under the newly created Ministry of the Environment.[72]

There are three types of protected natural areas: national, regional and private. The protected areas at the national level are divided into nine management categories, depending on their objectives and the degree of natural resource use allowed. These nine categories are grouped together into “indirect use” protected areas and “direct use” protected areas.[73]

In indirect use protected areas, both the extraction of natural resources and the modification of the natural environment are prohibited. Only indirect uses are permitted, such as non-manipulated scientific investigation, education, recreation, tourism and cultural activities. There are three categories of indirect use protected areas: national parks, national sanctuaries and historical sanctuaries. In direct use protected areas, on the other hand, natural resource use or extraction is allowed, primarily for the local population, in the manner provided for in the management plan. Other uses and activities carried out must be compatible with the objectives of the protected area. Direct use protected areas include: landscape reserves, wildlife refuges, national reserves, communal reserves, protection forests and hunting refuges. Here, the focus is on the category of communal reserves, because the local population enjoys more extensive management and resource use rights in these areas than in other categories of protected areas.

[71] Similarly, with respect to the Kayapó, Posey noted that they “believe that old, abandoned village sites are full of spirits. Fear of spirits puts these old sites off limits for many Indians. Only those that deal with spirits – shamans – and special hunting parties go to these sites. Thus, these abandoned camps and villages effectively become protected reserves with a high diversity of secondary growth that also attracts many animals. The spirits effectively serve as ecological protective agents.” Posey, above n 56, 25.
[72] Until May 2008, the state authority responsible for protected natural areas was the *Instituto Nacional de Recursos Naturales* (INRENA, National Institute of Natural Resources).
[73] *Protected Natural Areas Law 1997*, art 19.

Pursuant to the Protected Natural Areas Law of 1997, communal reserves are defined as "areas destined to the conservation of wild flora and fauna, to the benefit of the nearby rural population".[74] The Protected Natural Areas Regulations of 2001 explicitly include "peasant or native communities" among the beneficiary population.[75] Given that communal reserves, in contrast to the other protected areas, are established to the benefit of the neighbouring population, a special regime of administration applies to this category. The 2001 Regulations envision the central tenets of this regime along the following lines:

> The administration of the Communal Reserves corresponds to a Special Regime ... Their management is done directly by the beneficiaries in accordance with their organizational forms, in a long-term process, wherein they consolidate their knowledge associated with conservation and sustainable resource use, exercising their rights and obligations with the State, for the administration of the Patrimony of the Nation.[76]

The aim of the special regime is therefore that the beneficiaries themselves directly administer the communal reserve "in accordance with their organizational forms". This phrase seems to open up the possibility for the application of customary norms and organizational structures.

In 2005, the Special Regime for the Administration of Communal Reserves (Special Regime) was adopted. According to this norm, the management of communal reserves aims at "strengthening the strategic alliance" between the state and the beneficiaries for the conservation and sustainable use of biodiversity.[77] The glossary annexed to the Special Regime describes the term "strategic alliance" as a "voluntary union, long-term agreement".

The communal reserves are administered on the basis of a contract of administration between the Peruvian state and the beneficiaries of the communal reserve, who are represented by the Executor. The national protected areas institution SERNANP is represented in the communal reserve by the Chief of the protected area. The actual management of the communal reserve is entrusted to the *Ejecutor del Contrato de Administración* (Executor of the Contract of Administration), who represents the beneficiaries. The beneficiaries are the peasant or native communities, or the local organized population who complies with the criteria of "proximity, traditional use of the natural resources and conservation of biodiversity".[78] The Executor is a non-profit legal person created by the beneficiaries with the aim of managing the communal reserve. When the communal reserve involves two or more indigenous peoples, the Executor is multicommunal and intercultural. The Special Regime prescribes that, as a minimum, the Executor consists of two organs: a General Assembly and an Executive Committee.

The General Assembly consists of the direct representatives of the beneficiaries — "presidents, chiefs, *apus* (leaders) or other denominations of these representatives of the native and peasant communities and of the local organized population, and other members of the community or local organized population adjacent to the Communal Reserve, expressly elected to represent them through assembly minutes." No attention is paid to guaranteeing the participation of women. Pursuant to Article 13 of the Special Regime, the representative organizations of the peasant and native communities belonging to indigenous peoples and the local organized population can also participate in the General Assembly.

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[74] Ibid art 22(g).
[75] *Protected Natural Areas Regulations 2001*, art 56.1.
[76] Ibid art 56.2.
[77] *Special Regime for the Administration of Communal Reserves 2005,* arts 11, 19, 48.
[78] Ibid art 6.

The members of the Executive Committee are elected among the beneficiaries of the General Assembly. The Committee is responsible to SERNANP for compliance with the contract of administration. The Special Regime thus assigns the task of representing the Executor to the Executive Committee as a whole. Given that in the Executive Committee, there is no clear definition of the competence of its members, this may cause problems of representation. For instance, the President, the Secretary and the Treasurer take decisions independently such as on reaching different agreements with the Chief of the communal reserve. Logically, one might deduce and accept that the President of the Executive Committee has the competence and power to represent the Committee and the Executor. However, an interviewed expert described the mentality in Peru in this regard as follows:

> So says the law, so it must be done [*Tal como dice la ley, se debe dar*]. The law does not explicitly state that there must be a representative person, who can be the president, it can be whoever. It does not say it; therefore who reads [the law] – and especially all those that are in the state always have a very faithful reading of what is said [in the text] – will always wait until 4 or 5 persons are together [before doing] anything.[79]

The beneficiaries can decide to create other organs of the Executor, in accordance with the characteristics of the communal reserve, taking into account various factors such as its location, extension, the number of ethnic groups, and the number of beneficiary communities. Aspects concerning the establishment of the Executor that are not regulated by the Special Regime are subject to the norms of the Civil Code and "where appropriate", to their own traditional mechanisms of decision-making. This formulation subjects the application of traditional mechanisms to arbitrary interpretations, as discussed below.

The original idea expressed in the Protected Natural Areas Regulations of 2001 that the beneficiaries manage the communal reserve "in accordance with their organizational forms" has thus been seriously mitigated in implementation. The beneficiaries are not free to organize themselves as they see fit given that the Special Regime imposes the basic structure of the Executor: a General Assembly and an Executive Committee. This structure reflects the organizational structure of a native community as prescribed by the Regulations of the New Law on Native Communities of 1979, which consists of a General Assembly and a Board of Directors, as explained above (section 2.1).

This organizational system at the communal level is thus replicated for the Executor of the Contract of Administration, where the Board of Directors is called the Executive Committee. Not only is this organizational system unconnected with indigenous tradition and limits the announced freedom of organization, but it may also be inappropriate because the Executor does not represent one, but various communities. During an interview, an expert expressed doubt as to the appropriateness of applying the internal organizational structure of the community to a multicommunal entity.[80]

With respect to the right of self-determination and the autonomy of indigenous peoples, the author believes that it should have been left to the beneficiaries to determine their organizational structure among themselves. An agricultural engineer with long-standing experience in the administration of communal reserves suggested that the only binding requirement, necessary for the appropriate operation and coordination, would be the explicit designation of the representative of the Executor answering to SERNANP.[81] The structure of a General Assembly and Executive Committee could then have been provided as a subsidiary system. It can be concluded that the original idea expressed in the

[79] Interview with Soplín Vargas (27 April 2006).
[80] Interview (Iquitos, 8 September 2006).
[81] Interview (Iquitos, 7 September 2006).

Protected Natural Areas Regulations of 2001, i.e. that the beneficiaries would manage the communal reserve "in accordance with their organizational forms", has been seriously mitigated in its further development in the Special Regime of 2005.

The Special Regime for the Administration of Communal Reserves contains various other illustrations of the ambiguous manner in which the state legal system is dealing with customary law. In some cases, no further requirements are attached to the application of customary law. An example is the system of vigilance and control of the activities carried out within the communal reserve. In case of peasant and native communities, these actions of vigilance and control are established "considering the norms of customary law, ILO Convention No. 169 and, where applicable, the provisions of Article 149 of the Political Constitution of Peru".[82]

In other cases, the application of customary law is subordinated to standards of "appropriateness" and/or compatibility with other interests. For example, the Special Regime states that for issues not regulated by it, the general norms on protected areas apply, and "where appropriate, the customary norms compatible with the objective of the Communal Reserve".[83] The use of customary norms is thus subject to a rather vague norm of "appropriateness". Moreover, customary norms may only be applied when they are in line with the aims of the communal reserve, thus subordinating the application of customary law to conservationist interests. Similarly, the supervision of the communal reserve is carried out "in harmony with the provisions of the Special Regime and, where applicable, with the traditional government systems of the beneficiary indigenous peoples".[84] No further guidance is provided on the situations in which traditional government systems would apply.

To date, no communal reserves have been effectuated in the Airo Pai ancestral territory. In 1997, a provisional protected area, the Güeppí Reserved Zone, was superimposed on the Airo Pai territory. Nevertheless, as of January 2011, the proposal to categorize this area as one national park and two communal reserves had not yet been endorsed at the national level. Therefore, the impact of the organizational structure of communal reserves on the Airo Pai as prescribed by Peruvian law could not be assessed.

# 6. Conclusion

In this country-specific study of Peru, it was illustrated how the recognition of indigenous customary law and traditional forms of organization and decision-making has often been nullified or seriously mitigated by the subsequent imposition in legislation of rules, organizational structures, and decision-making processes that are at odds with the indigenous systems concerned.

The constitutionally enshrined "organizational autonomy" is restricted by legal provisions on the organizational structure of peasant and native communities. The lack of indigenous autonomy in the use of their land and in economic management is apparent from the natural resources policy of the Peruvian Government. The autonomy in administrative management is limited by the system of political authorities installed by the Peruvian state. As regards judicial autonomy, it was noted that, until recently, the Airo Pai enjoyed judicial autonomy in practice because of the physical remoteness of the state judicial system; this may be about to change, however.

The customary land rights of indigenous peoples have been recognized at the international and Inter-American levels. And yet, in Peru, peasant and native

[82] *Special Regime for the Administration of Communal Reserves 2005*, art 44.
[83] Ibid art 4.3.
[84] Ibid art 37.

communities can only acquire rights over limited lots of land. Moreover, only agricultural lands are given in property; forest lands are ceded in use.

Also, with regard to nature conservation, the relevance of customary legal systems is being increasingly acknowledged at the international level, as shown, for instance, from the advancement of the concept of Indigenous Peoples' and Community Conserved Areas. Although in Peru the protected area category of communal reserves to some extent accommodates the customs and traditions of indigenous peoples, there are some legal clauses limiting the weight given to customary legal systems.

Provisions on the recognition or application of customary law are therefore often mitigated by qualifiers that pave the way for arbitrary interpretations. Customary law or traditional decision-making mechanisms are, for instance, only applied "where appropriate". No real and effective space is given to the application of rules other than those originating in the state legal system.