

## 7. Hunter-Gatherers and the Law

### 16528 - Writing up the law of the San in Namibia: a challenge to tradition or inventing new traditions?

Presentation type: Oral presentation

**Author(s):** *Hinz, Manfred O. (University of Bremen and Jacobs University, Bremen, Germany / Deutschland)*

In cooperation with the Council of Traditional Leaders in Namibia, a customary law ascertainment project has been conducted in the whole of the country by the Human Rights and Documentation Centre of the University of Namibia directed by the author of this abstract. The objective of the customary law ascertainment project is not to codify customary law, but to make the so far orally transmitted law more accessible by putting certain parts of the law into writing. The philosophy of the project is to engage the various traditional in writing up their customary laws. What will be written up, is left to the communities. It is to the communities to self-state their law. With the statement of the law, the orally transmitted law does not cease to exist. With self-stating, the communities also keep their right to change and develop their law, as it is found necessary. Of the five San groups enjoying recognition under the Namibian Traditional Authorities Act, 25 of 2000, four responded with the submission of their self-stated law: the Ju/'hoan of Tsumkwe East, the !Kung of Tsumkwe West, the Hai//om in Central Namibia, and the Xoo in the eastern part of the country. The purpose of the paper "Writing up the law of the San in Namibia: a challenge to tradition or inventing new traditions?" is to assess the submitted laws as to whether and to what extent they reflect the socio-traditions of the San. The submitted texts give rise to at least two main questions: What is the concept of authority employed in the laws? What are the wrongs and the social consequences to them based on the values and principles of the San? Answers to these questions will be sought by referring to anthropological literature with information on the legal traditions of the San, by comparing the self-stated laws of the San with the self-statements by other traditional communities, but also by referring to the debate on the succession in one San community, the !Kung community, after the death of the last chief.

## **16239 - Grave Amusements: Race, punishment, and resistance on nineteenth and early twentieth century Australian telegraph lines**

Presentation type: Oral presentation

**Author(s):** *Rowlands, Shawn (Bard Graduate Center/American Museum of Natural History, New York, USA); Fisk, Catriona (University of Technology, Sydney, Sydney, Australia / Australien)*

In late nineteenth and early twentieth century colonial Australia the destruction of telegraph insulators—harmless amusement for European Australian youths—could have dire and deadly consequences for Aboriginal people. The expansion of local commercial industries and telecommunication networks afforded ways in which the Aboriginal population of Australia came into contact with the material produce of settler society and, at the same time, the operation of state law enforcement. The production of Aboriginal glass points (often using telegraph insulator glass), and the expansion of telegraph lines into the frontier, offers a cogent example of interaction between hunter gatherers and settler law enforcement. These interactions could be rare instances where hunter gatherer populations showed agency - for example the production of glass points for a collector market—yet the inexorable expansion of telegraph lines and, thus, settler commerce and society into the contact zone lead to conflict, appropriation, and depopulation.

The legal status and rights of Aboriginal people in Australian society was complicated and contradictory. Government efforts to extend benevolent protection were inconsistent and ineffective while the legal reality of the frontier often saw a marked dichotomy between treatment of Aboriginal and European alleged offenders. For example, for acts of petty vandalism—which were nonetheless believed by the authorities to have serious ramifications—European Australian youths received lenient punishment. When similar acts were undertaken by Aboriginal people further from the metropolis, these were dealt with harshly. This research draws on newspaper articles, police archives, and associated documents, as well as the material culture record of early twentieth-century Aboriginal Australia. In examining these sources we will discuss the entanglement of hunter gatherer craft production, settler expansion, and the nature of punishment, violence, and resistance on the frontier.

## **16130 - Law against hunters: double reality in regulation of indigenous hunting in Siberia**

Presentation type: Oral presentation

**Author(s):** *Klokov, Konstantin (Saint-Petersburg State University, Saint-Petersburg, Russian Fed. / Rus Föd.)*

Hunting has always been and remains the main source of income and important source of food supply for many indigenous communities, living in Siberian taiga. The research carried out in some Evenks' and Tofalars' communities in Eastern Siberia (Yakutiya, Evenkiya, the Baikal region, Tofalariya), in Arctic Domus project framework, showed that big game hunting (the wild reindeer, the elk, the Far Eastern red deer, the musk deer) and sable trapping are of great importance for them. Besides, hunters-reindeer herders have to defend their reindeer from wolves and bears. Squirrel shooting that used to be of great importance in the past have stopped because of its price fall.

In general hunting in Russia is regulated by the Federal Law "On Hunting" (2009) and Game laws and regulations (passed by RF Ministry of Natural Resources, 2012). These documents provide for special, simpler way of indigenous hunting permits handling procedures (hunting "for the sake of the North indigenous peoples' traditional life pattern provision..."). However the use of fire-arms is regulated by another law (Federal Law "On Arms" № 150, 1996) which does not contain any privileges for indigenous people.

The above mentioned laws and regulations on hunting do not take into account indigenous hunters' interests and in fact run contrary to legal guarantees having been given to indigenous peoples by other RF laws (e.g. Federal Law "On guarantee of the RF indigenous minorities' rights, № 82, 1999").

Thus, Evenks and Tofalars go big game hunting without licences not paying attention to officially established hunting period, sometimes using forbidden traps (loops). They would use poisons for wolves elimination. Now it is forbidden, and it is difficult to get poisons. As a result wolves' number have grown significantly, and they are a serious threat for Evenks' traditional reindeer herding.

The local knowledge of Siberian indigenous peoples is not used while managing big game populations. Bagging quotas in each region are defined by special agencies, basing on the number of previous year's licenses and the results of animals census carried out rarely and on a small scale. However, the real number of hunted animals is much higher than established limits as hunters have to conceal the real bagging. Harvesting rates computation does not take into account adequate information about the number of animals and their real harvesting volumes. Official data on the animal numbers and harvesting results are far from real, as a result natural resources managing becomes virtual and bureaucratic. In real life the sustainability of the traditional system of game resources usage by indigenous hunters is supported by its self-regulating processes.

## 16116 - Indigenous Rights and Hunter Gatherers - a case study from Namibia

Presentation type: Oral presentation

**Author(s):** Hays, Jennifer (University of Tromsø, Tromsø, Norway / Norwegen); Hays, Jennifer (University fo Tromsø, Tromsø, Norway / Norwegen)

The government of Namibia is considered to be one of the most progressive in southern Africa in terms of openness to indigenous rights - for this reason it was chosen by the International Labour Organisation for their "PRO 169" programme, which promotes the principles of their Convention 169 on Indigenous and Tribal Peoples (ILO C169). Namibia is also in the process of developing a White Paper on the rights of indigenous peoples. Furthermore, the country's existing laws provide plenty of support for the recognition and protection of the rights of San communities. Nonetheless, according to a recent and extensive national survey, the San remain the most marginalised of all ethnic groups in Namibia and face serious difficulties securing their rights - especially land rights (Dieckman et al. 2014). Based on research investigating indigenous rights processes in Namibia over several years, including research for a national study and for the ILO PRO-169 programme, this presentation will highlight key elements of these processes and describe recent advances - and the enormous challenges. To what extent are the challenges related to the recent past of San communities as hunters and gatherers? What challenges might be cultural (such as the avoidance of leadership roles by San individuals), which are structural (such as a lack of recognition of traditional land-use patterns by more dominant groups), and what are the result of active (or passive) discrimination against San communities (such as failure of local and national authorities to enforce national laws in situations where the San are victims)? Through a discussion of the Namibian case, this paper will touch on international patterns regarding the indigenous rights movement and hunter-gatherer populations.

## 16087 - Recover our land allows us to come back to life

Presentation type: Oral presentation

**Author(s):** von Koschitzky, Monica (*Ethnologin und Master of Philosophy in Development Studies, Hamburg, Germany / Deutschland*)

40.036 (INDEC 2005) Wichí live in the Argentine Chaco as transhumant hunters, gatherers and fishers. Since the beginning of the 20th century their land is invaded first by the “criollos” (as the rural immigrants are called) with their extensive pasturing cattle and lumberjacking the forest, today big concerns clear the forest and cultivate soya— many of them illegally. There remains hardly any undamaged forest, where the Wichí can find the resources for their subsistence economy, which is still important because only a few of them have a regular income. It is “5 minutes to 12”, before there is no space left for the first inhabitants of the Chaco.

1985 the national law number 23.302, about ‘indigenous policies’ was promulgated, it regulates the award of land to aborigine communities. But it specifies, that land can only be awarded to those groups, which are recognized as legal entity. This implies that every member is registered by name and has to settle down on the specific land, not allowing them to migrate; otherwise they lose the right to the land.

The first contradiction in the eyes of the Wichí is the fact that they have to ask for land – they were on this land first.

Second: The concept of a self-organization, which lies behind the legally recognized entity, is a mainly imprinted one and can only be understood from the context of social, political and economic structure of the western societies. The national society demands the Wichí to organize, but it fails to recognize, that indigenous people have an internal organization with its own laws, which may not be written down, but nevertheless observed.

Third, but not last, is the fact, that they have to register with their home name and are obliged to settle down, which contradicts their traditional way of life; they are accustomed to change every several months their place according to seasons and natural resources, when fish is abundant they stay at the riverside, when their garden give fruit, they stay near them. It is not wise to stay at the riverside at the time of high water levels, houses and all the property might get flooded.

Procedure and outcome of two examples of Wichí groups dealing with the ambiguous space between law and justice since more than 20 years will be presented: “El Barrio Obrero” in Ing. Juarez, in the province of Formosa, and “Lote 55 y 14” where the organization – composed by members of several ethnic groups - calls itself “Lhaka Honhat” in Salta.

Mónica von Koschitzky, independent Ethnologist

The Presentation is based mainly on the author’s fieldwork.

1992, Koschitzky, Mónica von, “Las telas de malla de Wichí / Mataco, Buenos Aires

2006, Barten, U., Zenteno, L. a Schmitt, M., “Sobre los pueblos originarios en a Argentina” Publicaciones del MEDH, Buenos Aires

2014, página web: [indigenas.Bioetica.org/not/nota74](http://indigenas.Bioetica.org/not/nota74) por Dra. Teodora Zamudio y equipo Docencia e Investigación

## **16047 - The Predicament of Lawful Occupation Chances and Limits of the Rights-based Approach in the Case of the Kalahari San**

Presentation type: Oral presentation

**Author(s):** *Zips-Mairitsch, Manuela (Institut für Kultur- und Sozialanthropologie, Austria / Österreich)*

Following the more or less forceful evictions of the last indigenous inhabitants of the Central Kalahari Game Reserve (CKGR) in 2002 a group of 243 individual claimants decided to clutch to the straw of filing in a suit against the State of Botswana. Surprisingly enough their legal struggle for the “lost lands” of the Kalahari ended with a partial victory in court. This paper takes the conspicuous ruling of the High Court of Botswana in December 2006 on the lawfulness of the relocation from the Central Kalahari Game Reserve as a starting point to review the recent developments in the legal struggles or “lawfare” between the Botswana Government and San individuals and NGOs. Against popular expectations in the local media many successful claimants resettled with their families in strong numbers in the abandoned villages. They had legally established their belonging to the land, but remained caught in a struggle of longing for basic needs of survival. They were still restricted from hunting and even gathering in what they consider as their lands. Special hunting permits were simply not issued by the relevant authorities. Basic services were not restored – in line with the court ruling. The boreholes remained sealed. Tourists were advised not to visit the villages, using the rationale “that there is nothing there...”. In short, the High Court decision in favour of “lawful occupation” became undermined by a governance mode of negligence, marginalisation, prohibition and control. Those “stubborn” enough – seen from government’s perspective – to resettle on a land targeted as a „pristine wilderness area“ with great tourism potential (not to make mention of the contentious mineral resources) were left to perish or at least to suffer and starve. However, law functioned consistently as the major arena for redefining and shaping the relationship between the “inconvenient indigenous” (Sidsel Saugestad) and the state in the first decade following the High Court ruling. The most remarkable law suit that followed in 2009 was the claim to reopen a borehole and thus to restore access to water. On the other hand state officials used legal regimes to restrict all possible means of San in the Central Kalahari to secure their livelihood. Against the background of the international developments of indigenous rights, namely the UN Declaration on the Rights of Indigenous Peoples, and their somewhat reluctant translation into the African contexts, the paper seeks to explore the chances and limits of a rights-based approach. The concrete example of the Kalahari San highlights the inequalities inherent in the legal process, but also points to the meagre potential of alternative approaches in the indigenous urge for justice, which always depends on the willingness of holders of power to privilege right over (their own) might.

## **16004 - Places, People, and Tools: Structures of Legality in Southeastern Cameroon**

Presentation type: Oral presentation

**Author(s):** *Rupp, Stephanie (City University of New York, Lehman College, New York, USA)*

Beginning with colonial-era forestry codes that placed unmanaged territory under the control of the state, through the 1994 national forestry laws in Cameroon, and continuing with recent hunting restrictions, legal codes have been used by those in power to define and structure certain people, activities, and tools. Through the national forestry laws, certain people have been designated as “indigenous,” omitting others from this category and from the rights that such a category confers. Through the national forest law, certain territories were set aside as protected areas, and people’s activities in these territories were also defined and curtailed. And most recently, in the region squeezed between two recently legislated national parks in southeastern Cameroon, conservation and government officials have confiscated forest people’s guns used for hunting. As a result of tightening definitions and permissions under such legal frameworks, social and economic relations of reciprocity have been altered, with a decline in sharing and redistribution of meat. The application of forestry laws in southeastern Cameroon has ruptured social identities and relationships, disrupted economic patterns, altered people’s tools and technologies, and decreased nutritional well being among forest communities. These changes compel us to examine the relationships between codes that determine some places, people, activities, and tools to be legal versus illegal, and the impacts of such designations on the everyday lives of forest peoples.

## **15931 - Filming Torture, Filming Indigeneity: The Use of Video to Secure Baka Rights in Cameroon's Protected Areas**

Presentation type: Oral presentation

**Author(s):** Barber, Nicholas (McGill University, Dept. of Anthropology, Montreal, Canada / Kanada)

In the 1980s and 90s the government of Cameroon demarcated large portions of that country's forestlands as national parks. This expansion of protected areas prevented many communities from accessing territories traditionally used for a variety of economic and cultural activities (Ashley and Mbile 2005). In the case of some protected areas, however, policies and legislation envisioned limited continued usage rights for local Baka communities. These rights were predicated on the idea that Baka, as "primitive" "hunter-gatherers," had a special and sustainable relationship to forest resources, and required that Baka use only "traditional" techniques and equipment for hunting and gathering in protected areas (Rupp 2011, 31-54).

In actuality, however, policies regarding Baka access to protected areas in Cameroon are unclear and not consistently enforced. This opacity makes it difficult for Baka to avoid conflict with government-sponsored "ecoguards", whom they accuse of engaging in the torture and extra-judicial killing of Baka suspected of illegal activities in protected areas.

Drawing on ethnographic research conducted over 16 months with a Baka community video project in southeast Cameroon, this paper discusses the ways in which video-making can serve to protect and promote the human and land use rights of indigenous hunter-gatherer communities through a discussion of two distinct ways in which Baka communities are using video in order to negotiate access to protected areas in Cameroon. First, Baka are using video in order to raise public awareness of the ecoguards' actions, which restrict access through the clear violation of national and international law.

Baka also use video, however, to negotiate access in a broader, less-specific way: The special usage rights that the Baka enjoy (formally if not substantively) are predicated on that group's perceived "indigeneity." By enabling the performance of certain narratives and tropes of indigeneity for distant publics, Baka video thus plays a second, less direct, role in promoting and preserving usage rights.

## **15916 - Inherent Jurisdiction Lawmaking in Hunting-Gathering Societies**

Presentation type: Oral presentation

**Author(s):** *Niezen, Ronald (McGill University, Montreal, Canada / Kanada)*

Some of the early contributions to the anthropology of law concern what might be called legislation through inherent jurisdiction, that is to say, the creation of new laws through customary procedures considered distinct from colonial administration, even though changes imposed by colonization may have produced the need for legislative changes. The politically decentralized and geographically dispersed nature of hunting and gathering subsistence presents distinct challenges to this kind of legislative processes. These include the difficulties of consensus-oriented decision-making in new village settings, the need to create formal "traditional" committees for the elaboration of written laws, and the structural limits of engagement with dominant state systems for laws to be "legible" and legitimate. These issues will be explored both comparatively and using the example of a lawmaking exercise pursued by the Pimicikamak Cree Nation of northern Manitoba.

## **15899 - Subsistence Hunting and Legal Rights to Wildlife Resources in Botswana and Namibia**

Presentation type: Oral presentation

**Author(s):** *Miller, Judith (University of Indianapolis, Indianapolis, USA); Hitchcock, Robert (University of New Mexico, Albuquerque, USA)*

From 1979-2004, Botswana was the only nation-state in Africa (of 54 nation-states) that had a national-level subsistence hunting law. This was made possible through state legislation covering the granting of Special Game Licenses (SGLs) to people who had depended to a significant degree on hunting and gathering for a substantial part of their livelihoods. The purpose of the Special Game License was several-fold. First, it was aimed at legitimizing hunting activity by the poorest members of the population, those people who depended heavily on natural resources (i.e. wild foods) for a living. Second, it was seen as a means of assuring a measure of food security for rural poor people. Third, it was aimed at promoting more equitable access to wildlife resources. In Namibia, on the other hand, the only group that was allowed to hunt for subsistence purposes, although without hunting licenses, were the Ju/'hoansi of the Nyae Nyae area in Otjozondjupa Region. In January, 2014 Botswana imposed a country-wide hunting ban which applied to all citizens as well as to foreigners. A question remained as to whether this ban applied to subsistence hunters and to people hunting on private (freehold or leasehold) land. In both Botswana and Namibia people in community trusts and conservancies had the option of devoting a portion of their wildlife quotas to subsistence use under national community-based natural resource management (CBNRM) policies. In both countries, individuals engaged in subsistence hunting or possession of wildlife products have been arrested for violating wildlife laws. This paper addresses the complexities of the legal regimes relating to hunting and resource management in Botswana and Namibia.

## **15884 - Upriver Battle: Policy Impact on Subsistence Practices of the Upper Copper River Indians of Alaska**

Presentation type: Oral presentation

**Author(s):** *Smelcer, John (Ahtna Native Corporation, Kirksville, USA)*

The indigenous Peoples of Alaska have a precarious relationship with the State of Alaska, which has increasingly challenged and restricted their ability to maintain a traditional lifestyle of hunting and gathering. Today, eighty percent of Alaskans are non-Native, and policies regarding natural resources increasingly favor the non-Native population. For almost thirty years, one of the most important cases about subsistence issues has been *The State of Alaska vs. Katie John*. Katie was an elder of the Ahtna tribe who tried to maintain her traditional lifestyle of catching salmon on a tributary of the Copper River, one of America's richest salmon fisheries. For perhaps a thousand years, her family had caught salmon to smoke and dry for winter. But the State tried repeatedly to stop her, despite numerous rulings in her favor and despite federal government intervention. On March 31, 2014, the U.S. Supreme Court decided it would not review the latest ruling, a huge blow to the State of Alaska. The same tribe (Ahtna), was also impacted by new regulations regarding the harvesting of caribou. For decades, the State used a tier system for allocating hunting permits, which favored the local Natives, but recently, under pressure by the non-Native population, the State changed permit allocation to a lottery system, which favors non-Natives, even though the Ahtna people depend on the resource for their survival, and in fact, the caribou herd's name—Nelcheena—derives from the Ahtna language.

Presenter John Smelcer, Ph.D. is a member of the Ahtna Tribe (Tazlina Village), and for years he was Ahtna, Inc.'s tribal archaeologist and executive director of the Ahtna Heritage Foundation. He is related to Katie John and lived a subsistence lifestyle for much of his life.

## 15763 - Common Law Customary Title in Peninsular Malaysia: "Equality" for Hunter-gatherers?

Presentation type: Oral presentation

**Author(s):** *Subramaniam, Yogeswaran (Centre for Malaysian Indigenous Studies, University of Malaya, Petaling Jaya, Malaysia)*

Applying mainly common law jurisprudence from Canada and Australia within the Malaysian setting, the Malaysian courts have legally recognised the continuance of pre-existing customary land rights of the Orang Asli, the generic term used to describe the Aboriginal peoples of Peninsular Malaysia. In doing so, the Malaysian courts have ruled that the nature of such rights should be determined in accordance with the customs, practices and usages of the particular claimant community. These positive developments have fuelled domestic advocacy and aspirations for substantive equality in respect of Indigenous minority land rights. With particular reference to the requirements for establishing customary title at common law and the content of such title, this paper examines the effectiveness of the common law doctrine as applied in Malaysia in delivering equality to Indigenous groups who are categorised as nomadic or semi-nomadic hunter-gatherers, such as the Batek community of Peninsular Malaysia. It will be observed that existing challenges faced by Aboriginal communities in negotiating a common law doctrine and legal process tainted with incongruous Western property and evidentiary concepts are potentially more pronounced in the case of hunter-gatherer-type societies. It is suggested that these potential challenges are rooted in the way in which "nomadic" or "semi-nomadic" hunter-gatherer societies have been constructed, measured and perceived by external forces compared to more "settled" Aboriginal communities. Consequently, complete reliance on the courts to deliver equal treatment for hunter-gatherer societies without a nuanced appreciation and application of Aboriginal perspectives on territoriality, property, identity, language, alliances, kin ties, spirituality and resource use may potentially risk the injustices that the common law doctrine was intended to remedy in the first place.