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WALIR – Water Law and Indigenous Rights

**LOCAL RIGHTS AND LEGAL RECOGNITION:
THE STRUGGLE FOR INDIGENOUS WATER RIGHTS
AND THE CULTURAL POLITICS OF PARTICIPATION**

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Introduction

In many regions of the world, peasant and indigenous water management systems constitute the fundament sustaining local livelihood and national food security. In most Andean countries, for example, indigenous and peasant communities are the main providers of food for the national populations. Therefore, security of access to water and the means to manage their water systems is of crucial importance. Nevertheless, on top of the historically grown, extremely unequal distribution of access to water, indigenous and customary water rights in Latin American countries and in other continents are increasingly under pressure. Consequently, the millions of indigenous water users find themselves structurally among the poorest groups of society. Moreover, they are usually not represented in national and international decision-making water organs. This contributes to a situation of increasing inequality, poverty, conflict and ecological destruction.

In this context, it is alarming that the during the Second World Water Forum participants reached the conclusion in their final statement that “... having examined the Forum documents, indigenous peoples and their unique systems of values, knowledge and practices have been overlooked in the Global Water Vision process. The session concludes that there is an urgent need to correct the imbalance of mainstream thinking by actively integrating indigenous women and men in subsequent phases, starting with the Framework for Action” (Second World Water Forum, 2000).

While this attention was lacking in the carefully prepared, official March 2000 debate, the situation in ‘the field’ is far worse. Even when indigenous rights and water management practices are *not* simply obstructed by national legislation and intervention policies, attention to the subject is negligible. Governments have paid it mere lip service. Most policies and legislation do not take into account the day-to-day realities and specific contexts of indigenous groups. The Forum rightly concluded that “strong measures should be taken to

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allow indigenous peoples to participate, more actively sharing their specific experience, knowledge and concerns in the Global Water Vision and ‘Framework for Action’” (Ibid.).

In this article, the challenges of a recently set up action-research, exchange and advocacy program are outlined. The program – “Water Law and Indigenous Rights. Towards recognition of local and indigenous rights and management rules in national legislation” (WALIR) – aims to contribute to countering the above mentioned discrimination and injustice. Although the investigations also cover the cases of Mexico and the United States, its main focus of *action* is in the Andean countries: Peru, Bolivia, Chile and Ecuador. Therefore, the article will first address some basic features of the Andean water law, water policy and local rights background. Next, it will present the action-research program and elaborate some of its key conceptual challenges: the concept of *indigenous* water rights and management rules, the concept of official *recognition* of local sociolegal repertoires, and the question of the effectiveness of *legal* (law-oriented) strategies for solving water conflicts and rights issues. The intention is not to give definite answers but to clarify important questions and dilemma’s. Subsequently, the article will focus on the problem of inclusion-oriented water law and policy strategies: the tyranny of modern equality and participation discourses, which deny local and indigenous livelihoods, water rights and management rules.

Notes on the Andean context

Currently, the context for water rights and management rules is changing rapidly in the Andean countries. Increasing demographic pressure, and the processes of migration, transnationalization and urbanization of rural areas, among others, are leading to profound changes in the agrarian structure, local cultures and forms of natural resource management. Newcomers enter the territories of local peasant and indigenous communities, generally claiming a substantive share of existing water rights and often neglecting local rules and agreements.

Further, the Andes is undergoing an era of aggressive neoliberal water reform. In this context, it is common to see that powerful stakeholders manage to influence new regulations and policies or monopolize water access and control rights. National and international elites or enterprises use both State intervention and new privatization policies to nullify and appropriate indigenous water rights.²

But at the same time there appear to be opportunities for customary and indigenous cultures and rights systems. It can be observed that most Andean countries have accepted international agreements and work towards constitutional recognition of ethnic plurality and multi-culturality (or inter-culturality). At a general level ‘indigenous rights’ are associated with or considered to be ‘human rights’. However, when it comes to materializing such general agreements in practice or in concrete legislative fields, such as water laws and policies, particular local and indigenous forms of water management (especially water *control* rights) tend to be denied, forbidden or undermined (Bustamante 1998, 2002; CONAIE 1996; Gentes 2002; Getches et al. 1998; Getches 2002; Guevara and Urteaga 2002; Pacari 1998; Palacios 2002).

In the Andes – and elsewhere -, the denial of contemporary forms of indigenous water management is often combined with a glorification of the past: “Incas yes, Indians no !” (Méndez 2000. Cf Almeida 1998, Baud 1997, Gelles 2000, Flores Galindo 1988). We find a folkloristic attitude towards contemporary indigenous communities. Very common is the use of either romanticized, paternalistic or racist approaches. Policies are oriented towards a non-

² The issue is often related to current land reform policies. Cf. Mayer 2002; Zoomers and Van der Haar 2000.

existing image of ‘Indianness’, a stereotype; or towards the assimilation and destruction of indigenous water rights systems.

As a result of the above, the Andean countries are full with examples of the negative organizational and infrastructural impacts of many top-down water programs. They usually fail to understand the dynamic and plural nature of indigenous rights and management rules (Gerbrandy and Hoogendam 1998, Boelens and Dávila 1998, Mitchell and Guillet 1994).

In the last decade, as a reaction, we see a certain shift from a class-based to a class- and ethnicity-based (*‘indigenous’*) struggle for water access and control rights, especially in countries such as Ecuador and Bolivia. In many regions the traditional struggle for more equal land distribution has been accompanied or replaced by collective claims for more equal water distribution, and for the legitimization of local authorities and normative frameworks for water management. But why, particularly, the theme of *water rights*?

Water rights and WALIR

In these times of growing scarcity and competition regarding access to water resources, water rights become a pivotal issue in the struggle of local indigenous and peasant organizations to defend their livelihoods and secure their future (see Vincent 2002). Water in Andean communities is often an extremely powerful resource. Apart from being a foundation for productive, social and religious practice and local identity, the particular, collective nature of ‘water’ almost by definition forces people to build strong organizations: in most cases, the resource can be managed only by means of day-to-day collective action. Collaboration instead of competition, is the only way to survive and secure water rights in this extremely adverse environment.

This ‘forced’ collective action to manage the resource cannot be romanticized and is not embedded in a presumed ‘Andean solidarity’. It is a form of local, ‘contractual reciprocity’ to sustain and reproduce local water management systems and the households and communities that depend on them (Cf. Boelens & Doornbos 2001; Mayer 2002; Zoomers 1998, 2001). And apart from the local orientation of this collective reciprocal action, it may also create a strong basis for broader political alliances, for example, in order to claim particular water policies and oppose forms of legislation and policies that deny indigenous or customary rights.

Consequently, as field evidence shows, water rights privatization policies create an enormous danger for indigenous and peasant communities in the Andes. This is also the main cause of the recent, very intensive, Water Wars in Bolivia (Assies 2000, Bustamante 2002).

Again, why water rights? In order to deeper penetrate the power of water, it is necessary to understand the multi-layered concept of water rights in most indigenous and peasant communities. Typically, water rights do not refer to rights of access and withdrawal only, but are considered to be authorized claims to use water *and* control decision-making about water management (Beccar et al. 2002, Vincent 2002, Zwarteveen 1997). Therefore, it is a struggle over the following key issues: access to water and infrastructure; rules and obligations regarding resource management; the legitimacy of authority to establish and enforce rules and rights; and the discourses and policies to regulate the resource. And it is precisely the *authority* of indigenous and peasant organizations that is increasingly being denied, their *water usage rights* that are being cut off, and their control over *decision-making* processes that is being undermined.

Fundamentally, a *water right*, more than just a relationship of access and usage between ‘subject’ (the user) and ‘object’ (the water), is a social relationship and an expression of power among humans. It is a relationship of inclusion and exclusion, and involves control

over decision-making. Therefore it is crucial to consider the two-sided relationship between water rights and power: power relations determine key properties of the distribution, contents and legitimacy of water rights and, in turn, water rights reproduce or restructure power relations (see Boelens & Hoogendam 2002).

Based on the above mentioned considerations, the program Water Law and Indigenous Rights was formulated - an international, interinstitutional endeavor based on action-research, exchange, capacity-building, empowerment and advocacy.³ This comparative research program builds upon academic research and action-researchers in local networks – both indigenous and non-indigenous. It attempts to be a kind of think-tank to critically inform debates on indigenous and customary rights in water legislation and water policy, both to facilitate local action platforms and to influence the circles of law- and policy-makers. Equitable rights distribution and democratic decision-making and therefore, support for empowerment of discriminated and oppressed sectors, are major concerns.

In co-ordination and collaboration with existing networks and counterpart-initiatives, WALIR sets out to analyze water rights and customary management modes of indigenous and peasant communities, comparing them with the contents of current national legislation and policy. Thereby, it sheds light on how the first are legally and materially discriminated against and destructed. The aim is to contribute to a process of change that structurally recognizes indigenous and customary water management rules and rights in national legislation. It also aims to make a concrete contribution to the implementation of better water management policies.⁴ As part of its strategy WALIR plans to contribute to and present concepts, methodologies and contextual proposals and to sensitize decision-makers regarding the changes needed for appropriate legislation and water policies.

The program, therefore, is not just academic but also action-based. While especially the indigenous populations are being confronted with increasing water scarcity and a traditionally strong neglect of their water management rules and rights, the current political climate seems to be changing. However, actual legal changes are still empty of contents, and there is a lack of clear research results and proposals in this area. The program aims to help bridge these gaps, facing the challenge to take into account the dynamics of customary and indigenous rules, without falling into the trap of decontextualizing and ‘freezing’ such local normative systems. Fundamentally, the WALIR program is directed towards activities and conclusions that facilitate local, national and international platforms and networks of grassroots organizations and policymakers

³ WALIR is a collaborative program coordinated by Wageningen University and the United Nations Economic Commission for Latin America and the Caribbean (UN/ECLAC) and is implemented in co-operation with counterpart institutions in Bolivia, Chile, Ecuador, Peru, Mexico, France, The Netherlands and the USA. The counterparts with whom they work together, form a much broader group of participants: institutions at international, national and local level. The Water Unit of the Netherlands Ministry of Foreign Affairs funds the program.

⁴ In its initial phase, WALIR has set up an inter-institutional network of institutions, scholars and practitioners of various disciplines and backgrounds, involved in and committed to the above objectives. Preparatory studies conducted so far have focused on current legislation and legal attention to, or neglect and discrimination of, indigenous and customary water rights. The project aims to have an effect beyond this Andean focus, by providing an example and tool for similar action research to be pursued in other regions. Second phase studies of WALIR focus on indigenous water rights in international law and treaties, indigenous identity and water rights, current indigenous water management systems, field case studies, and thematic, complementary research projects (on the relation between “WALIR” and gender, food security, land rights, water policy dialogue methods, among others). Short comparative studies in other countries will further complement and strengthen the project and its thematic networks, and lay the foundation for a broader international framework. Next, a number of exchange, dissemination, capacity-building and advocacy activities will be implemented, in close collaboration with local, national and international platforms and networks.

Conceptual problems and strategic challenges

WALIR itself is based on diversity. It has an interdisciplinary composition with lawyers, anthropologists, water professionals, sociologists and agro-economists. Their social background also differs strongly: from scholars and policy-advisors to action-researchers and legal advisors of indigenous organizations. And obviously, the countries studied and their respective legal structures differ strongly, as do the national debates on indigenous and customary rights, and the languages and concepts that are used. Therefore the challenges are manifold, and they are both practical and conceptual. For example:

'Indigenous'

Half a century ago Frantz Fanon made the following observation, which is useful to recall in the context of the program:

“Colonial specialists do not want to recognize that the culture has changed, and they hasten to support the traditions of native society. It is precisely the colonialists who have become the defenders and advocates of a native lifestyle” (Fanon 1967 (1954)).

It gives a powerful warning to scholars, action-researchers and NGOs, to refrain from naïve participationism or philanthropical imperialism and critically rethink every intent to support so-called ‘indigenous’ knowledge, culture, rights, livelihoods and natural resource management. It also provides a background for the discussions that the program intends to stimulate, and shows partly how complex its objectives are. For example, what is, or who is, ‘indigenous’ ?

In the Andean region, so-called ‘Indians’ were invented and the concept of ‘indigenous’ was constructed by various racist currents, developmentalist paradigms and romanticized narratives, and by the indigenous peoples themselves. Divergent regimes of representation constructed images or projections of ‘indigenous cultures’ or ‘Andean identity’, even long before the year 1492. These projections refer either to the backwardness of the ‘Indians’, populations who therefore should be assimilated into mainstream culture, or to neo-positive, idealized images of ‘real and pure Indians’, isolated from cultural interaction and defenders of original positive human values. Indigenous groups have often adopted or contributed to the creation of these stereotypes, sometimes unreflectively, sometimes with clear ideological and political purposes.⁵

Is it possible to speak of specific ‘indigenous’ or ‘Andean’ cultures, communities, water management forms or socio-legal systems? On the one hand, indigenous peoples dynamically shop around in other normative systems and discourses, selecting and appropriating those elements, tools, and meanings that can strengthen their positions and

⁵ It was therefore not just the dominant, racist class and social Darwinists, but also many ‘indigenist’ (and later ‘indianist’) scholars – e.g. Marxist thinkers and activists, who fought against racial discrimination and racial oppression – who contributed to the great *mestizaje* project, intending to paternalistically ‘include the poor indigenous peoples in modern society’. This was done, among other means, by ‘modern’ irrigation technology, legislation and capitalization of Andean communities, or by defining ‘indigenous’ as synonymous with ‘revolutionary’, in Western schools of thought. Furthermore, some indigenous and Indian scholars and movements tried to create the ‘modern Indian’, rooted in ancient indigenous myths and symbols and pan-Andean discourses, in order to foster regional pride and nationalism or legitimize their political and ethnic (often *mestizo*) positions. The ‘indigenous’ was –and often still is- essentialized by projecting stereotyped images (see, for example, Almeida 1998; Baud 1997; Baud et al. 1996; Boelens and Gelles 2002; Gelles 1995, 2002; Degregori 2000; Iturralde 1993; Kloosterman 1997; Lemaire 1986; Stavenhagen 1994; Stavenhagen & Iturralde 1990).

legitimize their claims. New, diverse indigenous identities are being constructed and strategically strive to represent the indigenous collectivities in their struggle against subordination and discrimination. On the other hand, Andean communities show specific historical and cultural forms of collective action and resource management, embedded in specific Andean cultures with their particular normative repertoires, symbols and meanings, livelihoods and local economies.

Together, both aspects show the importance of analyzing Andean cultures and management forms as dynamic and adaptable to new challenges and contexts. As mentioned by Gelles (2000:12), Andean culture and identity, therefore, is “a plural and hybrid mix of local mores with the political forms and ideological forces of hegemonic states, both indigenous, Iberian and others. Some native institutions are with us today because they were appropriated and used as a means of extracting goods and labor by Spanish colonial authorities and republican states after Independence; others were used to resist colonial and postcolonial regimes”.

Nowadays, we find a mixture of diverging positions with respect to the notion of ‘indigenous’ and its implications in practice, for example, racist constructions of the concept (oriented toward either ‘exclusion’ or ‘bio-political inclusion’), constructs related to developmentalist integration (‘backwardness’), to Maoist-Leninist missions (‘revolutionary nature’), to indigenous-advocates’ or romanticized ways of life (‘cosmovisionist’) or based on postmodern analysis (‘deconstruction’). It is interesting, therefore, to see in this current complex situation a strategic struggle of indigenous water user groups to re-appropriate not just the above mentioned water access rights, water management rules, water organizational forms, and legitimate water authority: they also aim to actively construct their own counter-discourses on ‘Andeanity’ and ‘Indianness’ and the policies to regulate water accordingly. Obviously, this dynamic, strategic-political struggle for counter-identification (self-definition), is not necessarily based on solely ‘local’ truths, rules, rights and traditions.

‘Recognition’

A next main challenge of the program is related to the notion of ‘legal recognition’. In order to confront the processes of discrimination, subordination and exclusion, indigenous and advocacy groups often aim for political action with clear, collective, unified objectives and answers. However, the struggle for formal and legal recognition poses enormous conceptual problems and challenges with important social and strategic consequences.

In another paper we have discussed the dilemma regarding ‘recognition of legal hierarchies’ arguing that a distinction must be made between analytical-academic and political-strategic recognition⁶. “In an analytical sense, legal pluralistic thinking does not establish a hierarchy (based on the supposedly higher moral values or degrees of legitimacy, effectiveness or appropriateness of a legal framework) among the multiple existing legal

⁶ “Taking ‘recognition’ as a point of departure implies that there is a ‘recognizing party’ and a ‘party being recognized’. This would put us in the kind of state-biased position in which matters are decided upon according to a state-determined hierarchy of legal systems’ validity and capacities of validation. Such a position, needless to say, would invalidate the insights derived from attention to legal pluralism. On the other hand, it is important to be aware of the possible opportunities involved in (state) recognition, taking into account and taking seriously the fact that many local groups of resource users, ethnic and other minorities actively aspire and strive for this form of recognition. As we have mentioned before, water users (and especially marginalized actors) are often constrained by state law, but at the same time they can (try to) approach it as a powerful resource for claiming or defending their interests and rights” (Boelens, Roth and Zwartveen 2002. See also Benda-Beckmann 1996, Moore 2001).

frameworks or repertoires. In political terms, however, it is important to recognize that in most countries the existing, official legal structure is fundamentally hierarchical and consequently, in many fields state law may constitute a source of great social power – a fact that does not deny the political power that local socio-legal repertoires may have. Recognizing the existence of this political hierarchy and the emerging properties of state law in particular contexts offers the possibility to devise tools and strategies for social struggle and progressive change. In the discussion about ‘recognition’ as a way of giving legal pluralism a place in policy-related issues, both the political-strategic and analytical-academic aspects of recognition combine” (Boelens, Roth and Zwartveen 2002).

Thus, instead of collective and unified claims, many questions arise in the debates and struggles for ‘recognition’, for example:

- Do indigenous peoples and their advocates claim recognition of just ‘indigenous rights’ (with all the conceptual and political-strategic dilemmas of the ‘indigenous’ concept), or do they also struggle for recognition of the broader repertoires of ‘customary’, and ‘peasant’ rights prevailing in the Andes? And what precisely is the difference in concrete empirical cases?
- There are no clear-cut, indigenous socio-legal frameworks, but many dynamic, interacting and overlapping socio-legal repertoires: should indigenous peoples try to present and legalize *delimited frameworks* of own water rights, rules and regulations? Or should they rather claim the recognition of their water control rights and thereby the *autonomy to develop* those rules, without the need to detail and specify these rules, rights and principles within the official legal framework?
- Or would it be a more appropriate and effective strategy to claim and defend legalization of their water *access rights* – since these are increasingly being taken away from them - and assume that water management and control rights will follow once the material resource basis has been secured?
- Do recognition efforts only focus on the legal recognition of explicit and/or locally formalized indigenous property structures and water rights (‘reference rights’, often, but not always, written down), or do and should they also consider the complex, dynamic functioning of local laws and rights in day-to-day practice? These ‘rights in action’ and ‘materialized rights’ emerge in actual social relationships and inform actual human behavior, but are less ‘tangible’.
- How to define and delimit the domain of validity of so-called indigenous rights systems, considering the multi-ethnic compositions of most Andean regions and the dynamic properties of local normative frameworks? In terms of exclusive geographical areas, traditional territories, or flexible culture and livelihood domains?
- How to avoid assimilation and subsequent marginalization of local rights frameworks when these are legally recognized? And how to avoid a situation in which only those ‘customary’ or ‘indigenous’ principles that fit into State legislation are recognized by the law, and the complex variety of ‘disobedient rules’ are silenced after legal recognition?
- Indigenous socio-legal repertoires only make sense in their own, dynamic and particular context, while national laws demand stability and continuity: how to avoid ‘freezing’ of customary and indigenous rights systems in static and universalistic national legislation in which local principles lose their identity and capacity for renewal, making them useless?
- ‘Enabling’ and ‘flexible’ legislation might solve the above problem. However, enabling legislation and flexible rights and rules often lack the power to actually defend local and indigenous rights in conflicts with third parties. How to give room and flexibility to diverse local water rights and management systems, while not weakening their position in conflicts with powerful exogenous interest groups?

- And what does such legal flexibility mean for ‘internal’ inequalities or abuses of power? If, according to the above dilemmas, autonomy of local rule development and enforcement is claimed for (instead of strategies that aim to legalize concrete, delimited sets of indigenous rights and regulations), how to face the existing gender, class and ethnic injustices which also form part of customary and indigenous socio-legal frameworks and practices?

‘Law-oriented strategies’

Following from the above mentioned dilemma’s or problems, a major conceptual and strategic-practical challenge stems from the fact that national (positivist) legislation by definition claims that law must focus on uniform enforcement, general applicability and equal treatment of all citizens, where local and indigenous rights systems, on the contrary, by definition address particular cases and diversity. How to deal with the conflict and fundamental difference between legal Justice (oriented at ‘right’-ness / generality) and diverse, local Equity (‘fair’-ness / particularity)? Various forms of State legislation have recognized this fact when faced with the problem of law losing its legitimacy in practice: official Justice was perceived of as being ‘unfair’ in many specific cases. Legal rules are general and individual cases are particular, hence common laws were called upon. In many cases this second set of principles (fairness) has been institutionalized. This was not to replace the set of positivist rightness rules, but to ‘complement and adapt it’. In fact, it appeared that official legislation, Justice, often could survive thanks to the ‘fairness’ and acceptability of common laws that were incorporated. More often than not this was done by formulating ‘special laws’. However, this institutionalized equity is a *contradictio in terminis*. It leads almost automatically to the ironical situation in which the set of common or customary rules, ‘equity’, itself becomes a *general*, formalized system and loses its pretensions of ‘appropriateness’, ‘being acceptable’ and ‘doing justice’ in particular cases (Schaffer and Lamb 1981. Cf. Boelens 1998, Benda-Beckmann et al. 1998, Correas 1994, Lauderdale 1998, Vidal 1990).

A closely related dilemma involves the effectiveness of legal recognition strategies. Considering peasant and indigenous communities’ lack of access to State law and administration, this question come prominently to the fore: is *legal* recognition indeed the most effective strategy, or would it be better and more effective for peasant and indigenous communities to defend their own water laws and rights ‘in the field’ ? Moreover, it often is not the State law as such that sets the rules of the game in peasant and indigenous communities, but hybrid complexes of various socio-legal systems. Formal rights and rules cannot act by themselves, and it is only the forces and relationships of society that can turn legal instruments into societal practice. Especially social and technical water engineers, lawyers and other legal advocates have often overestimated the actual functionality or instrumentality of formal law and policies in local contexts. On the contrary, their legal anthropological colleagues sometimes tended to underestimate the power of formal law, assuming that all conflicts are settled by means of local normative arrangements, without any influence from official regulations. However, the neoliberal Water Laws (e.g. Chile) or top-down instrumental water policies (e.g. in Ecuador and Peru) have not only neglected customary and indigenous water management forms, they also have had concrete, often devastating consequences for the poorest people in society.

It is because of this that indigenous and grassroots organizations have fiercely engaged in the legal battle. Moreover, in this regard it is important to consider here that efforts to gain

legal recognition do not *replace* but rather *complement* local struggles ‘in-the-field’. On both levels there is political-strategic action to defend water access rights, define water control rights, legitimize local authority and confront powerful discourses.

In the next section I will elaborate how these four key issues, at the local and national level, shape the complex arena in which local water rights and customary laws confront uniform policies and politics of participation.

Inclusion and exclusion: the cultural politics of participation

National water policies in the Andean countries, and especially their translation in field practice, reflect and deploy the political power and cultural hegemony of a dominant stakeholder group.⁷ This group has historically imposed rules, rights and regulations, and has controlled nation-building processes in the last centuries. As shown by Gelles (1998, 2000), State bureaucracies usually ignore indigenous models of resource management not only because of the alleged superiority of ‘modern’ Western cultural forms and organization, but because the power holders and dominant cultures of these nations regard indigenous peoples as racially and culturally inferior (Gelles 2000:9-10).⁸

Here we need to examine an important change that clearly differentiates power relations in the Republican states from their Inka and Spanish colonial predecessors: there is a move from real political exclusion to an imagined political ‘inclusion’ of indigenous peoples, from a discourse of racial (and thus ‘natural’ social) differentiation to a discourse of equality (Boelens 1998).

In former days, indigenous property rights were taken away through violence, conquest, colonization and oppression, and they were excluded from the benefits of society. In addition to appropriating local cultural norms for their own extractive purposes, the Inka emperors and other indigenous leaders, as well as the kings, *conquistadores* and *hacendados* during the Spanish colonial period, differentiated and elevated themselves by *excluding* the subordinated classes from resources, services, and social life (see e.g. Arguedas 1987, Bolin 1990; Flores Galindo 1988; Patterson 1991; Van der Ploeg 1998). Many different means, including public displays that glorified and reified the might of the groups in power, reinforced this differentiation and social exclusion.

In the post-colonial area the opposite occurs: not the powerful authorities and landlords, but the peasant and indigenous communities and the common people are made visible and brought to the fore, by means of a Foucauldian ‘disciplining,’ ‘participatory’ power of ‘equalizing normalization’, which is present in everyday interactions; ‘it actually manifests and reproduces or transforms itself in the workplaces, families and other organizational settings of everyday life’ (Foucault, 1980). Yet the powerful groups that benefit from this ‘inclusive’ power, as well as the new mechanisms and rules of subordination, in fact remain invisible (cf. Achterhuis, 1988).

New irrigation legislation and state policies are thus often an expression of post-colonial equality discourses; as De la Cruz (1993) observed, ‘the principle of equality before the law is valid for the identical and profoundly unjust for the diverse’ (cf. IUAES-CFLLP, 2000; Stavenhagen and Iturralde, 1990). This horizontal, disciplining power power functions

⁷ This section is based on Boelens and Gelles, forthcoming in 2003.

⁸ This bureaucratic irrigation tradition (Lynch 1988) has been especially powerful in countries such as Peru and Ecuador. As Lynch (1993) and Boelens and Zwarteveen (2002) have shown, its devaluation of particular water use actors extends to women, as the gender discrimination found in the field and in irrigation offices is part and parcel of the bureaucratic tradition.

because it penetrates people and society as a whole. 'This power is exercised rather than possessed; it is not a 'privilege', acquired or preserved, of the dominant class, but the overall effect of its strategic positions - an effect that is manifested and sometimes extended by the position of those who are dominated' (Foucault 1978).

Thus we see, for example, that in the Andes and many world regions, irrigation technicians and development professionals introduce virtually the same irrigation techniques, knowledge, and norms (developed in western research centers, universities, and development enterprises). But they are not just 'imposed' in a top-down way: in many instances, it is the indigenous peasants *themselves*, in the Andes and elsewhere, who ask for this same technology, in order to 'progress' and leave behind their traditional 'backward' technology; in order to become like the western-oriented, 'modern' farmers, in order to gain economic parity' (cf. Boelens 1998; Escobar 1995; Van der Ploeg 2001).

In this way power in modern nation-states seeks for the *inclusion*, rather than the *exclusion*, of Andean communities, indigenous peasants and other oppressed classes (Achterhuis, 1988; Boelens and Dávila, 1998). At the same time this 'uniformity' and 'equality' supposedly makes it easy to measure these social groups: they are individualized, classified, and made 'cases' according to the ways that they do or do not fit the model. Yet, their participation often results in disappointment, in social and cultural disintegration, and in their being defined as 'permanently backward people', due to the impossibility of meeting the norms for being equal. In the words of Fanon (1967): "The western ideology, which is a proclamation of the fundamental equality of men... invites inferior men to become human beings, according to the western example of the humanity that it represents. In spite of being fundamentally racist, it generally succeeds in hiding this racism through ever more subtle modifications; thus, maintaining its proclamation of men's extraordinary dignity".

Another clear example of this is found in the normalizing, 'equalizing' and categorizing properties of neoliberal market ideologies penetrating the Andean nations, including the legal and policy frameworks regarding water management. The neoliberal economic principles are, on the one hand, imposed on Andean states by international institutions and national power groups, but, on the other hand, many of its basic concepts and dynamics have been adopted and internalized by Andean communities, penetrating and subtly transforming local management forms and often disarticulating indigenous water control. Thus, the deployment of secular, rational, universally applicable irrigation models, supported nowadays by water management privatization ideologies, is a powerful means by which contemporary nation-states and private interest sectors extend their control.

In sum, it is clear that contemporary nation-states employ a new and different symbology of power - espoused in modernization and development discourses as well as in neoliberal economic policies - which aims to 'include', not to 'exclude'; it pretends to provide universal benefits, while in fact extending state control and the cultural orientations of national and international power holders. Within this context, the recognition and balanced valuation of local beliefs and practices is necessarily precluded because any legitimization of these local norms calls into question the state's and market ideology's supposed monopoly on rationality and legitimate culture.

The tyranny of participation

Although violent take-overs have not disappeared, as outlined above, the keywords are not anymore exclusion and outright oppression, but so-called 'inclusion', 'integration' and

‘participation’, in the name of ‘equality’.⁹ But then, with these modern concepts, fundamental questions come up:

First, if Equality is strived for, the question is: equal to *what*, equal to *whom*, equal to *which model*? The basic assumption in current Latin American water policies is, that ‘progress’ means: equality to the occidental, technocentric and male-biased water management model. The concept of rational water management is interspersed with non-indigenous norms about efficiency, social security, effective organization, private ownership and economic functionality. In practice, indigenous peoples are forced to “equalize”: In other words, to adopt the norms and practices of white or mestizo water users, which most often run counter to local social relations and environment, and disintegrate local communities and identity.

Second, if Inclusion and Participation is the objective, the obvious question is: inclusion in *what*? Participation in *whose objectives, visions, and terms*? To this respect, the Second World Water Forum (2000) concluded that: “...there is a recurrent problem for indigenous peoples, who are often constrained to deal with vital issues on terms dictated by others. Traditional knowledge is seen as inferior in current political, legal, and scientific systems and therefore their arguments are discarded time and again by courts and other institutions”.

Third, regarding the important current concepts of ‘integrated’ water management and ‘integrated’ policies, there seems to be a general consensus, but: *who* does the integration? Let us have a look at some common, inclusion-oriented, examples.

The famous Majes Project in southern Peru is one of the many cases in which the Andean peasant and indigenous communities, and especially their resources, were *included* in the development process. Major investments were made, US\$ 1,300,000,000 dollars, to capture and conduct the water from the Colca Valley and irrigate the desert lowlands. Only 15,000 hectares have been irrigated, for a total of 3000 families, who each obtained a 5-hectare parcel. This is an investment in the order of US \$ 80,000 dollars per hectare, or , what is even more appalling: US\$ 400,000 dollars *per family* (Hendriks 2002).

The original design excluded outright any provision of water for the upper basin where the indigenous communities live, and where the water comes from. Furthermore, to ‘recover’ investments, those families who *did* acquire land and water rights in the lower basin, had to pay 25,000 dollars per parcel – by no means affordable for an indigenous small-holder family.

Indigenous communities in the Andean catchment were included, however. To undo their ‘backwardness’, they did get the largest share of the *burdens*, for example, the expropriation of land, strong price inflation, depredation of natural resources, destruction of terraces, and debilitation of existing patterns of organization and culture (Tipton 1988).

The United Nations/ CEPAL estimated that barely 0.2 % of total project investment was allocated to the upper basin, where the poorest sectors were in great need for irrigation water. Moreover, comparing this budget with other options at that time, 750,000 hectares of abandoned terraces could have been recovered and brought back into production in peasant and indigenous communities (CEPAL 1988. See also Manrique 1985).

It is interesting to compare this with Ecuador, for example the figures at national level. According to Whitaker’s study (1992) peasant and indigenous farmers with less than 1 ha – who are responsible for the major part of national food production - represent 60 % of all farmers, but they received only 13 % of the benefits of State spending in irrigation. At the

⁹ For an analysis of equality and participation discourses, see, among others, the works of Michel Foucault, Hans Achterhuis, Arturo Escobar, Michael Taussig, Ivan Illich, René Girard, Bernard Schaffer. With reference to the title of this section, see also Bill Cooke and Uma Kothari, 2002.

same time, large landowners represent only 6 % of farmers, and they received 41 % of the benefits of State spending in irrigation. The public financed all this: State irrigation investment in Ecuador at that moment represented 11.6 % of the total foreign debt.

Another example is the inclusion of indigenous water communities in current global water policy models. In Chile, indigenous peoples have become included in the 1981 Water Code, dictating privatization of water rights. While ideological studies continue to praise the model, empirical field studies indicate the disintegration of especially collective, indigenous systems: the individualization of water rights has increased insecurity and disorganization - in stead of decreasing insecurity, as neoclassical theory wants to have it (Bauer 1997, 1998; Hendriks 1998; Dourojeanni and Jouravlev 1999; Castro 2002). Moreover, according to the new legislation, decision-making rights on water management are now attached to economic buying power of individuals: right-holders with more 'water actions' (volumetric rights per time unit) have more decision-making power, contrary to indigenous management and collective interests. In many cases, the interests of a water rights owning elite have been able to effectively deny the interests of the majority (the group of poorer users), and impose their own playing rules (Hendriks 1998).

Next, since individual water property owners can make use of the water entirely according to their personal interests, Chile faces the problem of strong increase in water contamination, and individual property owners are not sanctioned for polluting *their* property. Often, indigenous communities and downstream cities bear the consequences (Bauer 1997, Dourojeanni and Jouravlev 1999).

At the same time, the water market itself has not developed (or in some cases only very marginally), but extreme monopolization, speculation and hoarding of water rights *did*. A few power-generating and mining companies have accumulated the vast majority of rights, most of it is not used at the moment: the Water Code does not request water rights owners to actually make use of these rights, neither are they obliged to pay concession fees. This makes hoarding and speculation of water rights, in a context of scarcity, extremely attractive (Solanes and Getches 1998, Solanes and González-Villareal 1999). A major source for this accumulation and monopolization of water rights was the expropriation of the so-called "unregistered" indigenous community rights (Castro 2002, Dourojeanni and Jouravlev 1999, Gentes 2002, Hendriks 1998).

This relates also to a recurrent problem of universal or national policy models: their validity is based on theoretical models and paradigms, but they usually fail to look at human suffering and internal contradictions *in the field* (Cf. Long and Van der Ploeg 1989, Van der Ploeg 2001).

A final, very common example shows, at field level, the problems of outside-driven integration of indigenous communities in uniform, national legislation, organizational models and engineers designs¹⁰:

The Ecuadorian State intervened in an indigenous area of 20 communities in the Andes, in Licto, to build an irrigation system and carry out an integrated development program. The design was made in the country's capital, without user involvement. The hydraulic design disregarded community production systems and boundaries, and imposed a classic, universal blueprint.

Although the great majority of water users were female, because of male outmigration, the infrastructure had no night reservoirs and the schedule was based on 24 hours irrigation.

¹⁰ Based on the chapter 'Recipes and resistance. Peasants' rights building and empowerment in the Licto irrigation system, Ecuador', of the book *Water Rights and Empowerment* (Boelens & Hoogendam 2002)

Night irrigation, however, would make it impossible for women to make use of water rights – because of reasons such as sexual violence, child care, soil erosion, remote fields, and others.

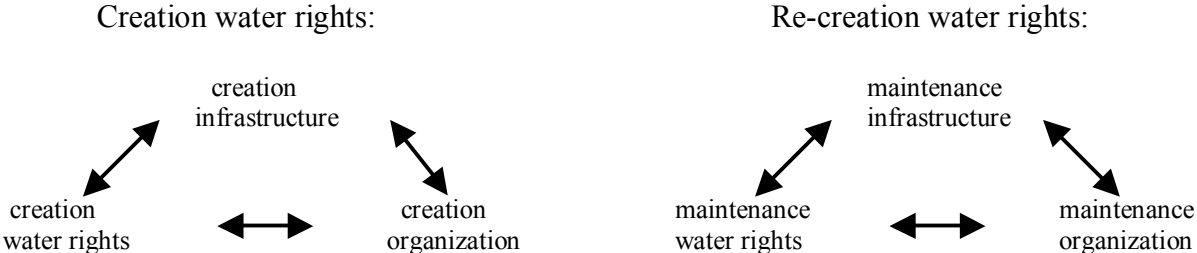
The nation-wide, uniform legal recipe dictated the organization of the system, which would strengthen bureaucratic power and artificial leaders, and weaken community structure and collective action - the only way to survive in this region.

Law also preestablished that most women could not get water rights –unless they were formally recognized as ‘heads of households’-, although *they* were the ones that, according to local indigenous rules, had worked, invested and thus created the water rights.

This, maybe, constituted the major problem according to the indigenous families. The State imposed a model in which water rules and rights were established by uniform government rationality: those individuals who have land and pay fees, get water rights. Indigenous rationality, on the contrary says: you cannot just *buy* rights. Those who contribute with labor, organizational capacities and participate in the meetings, *create* water access and decision-making rights. Thereby, individual rights are derived from the collective ownership of infrastructure.

In many indigenous and peasant communities this is the *motor* of local water management and collective action (see diagram): at the same time that you create your infrastructure, you create your water rights and you create your organization. Then, to maintain and re-create your water rights, you have to maintain and re-create the collective infrastructure, and you strengthen and re-create your organization. There is a dynamic and permanent interaction among the technological system, the normative system and the organizational system

Diagram 1: “Driving force” behind indigenous water management and collective action:



When the State agency, because of financial crisis and lack of capacity, did not complete system construction, the indigenous communities took over its development with the help of a local NGO. They adapted design, management and water rights to local demands and capacities.

Although many had no formal education or were illiterate, the means were developed to collectively discuss the design, the rules and the rights. For example, by using scale models and user-to-user training in local language, in all communities. Through interactive design and visual capacity-building tools, the creation of infrastructure and water rights were linked. Next, combined literacy training and water management capacity-building strengthened the position of female water users and female leaders, since they were to become involved in the management of the system. And especially they were the ones who were in charge of creating and maintaining water rights in the system. Fundamentally, collective action formed the basis for the construction of infrastructure and the construction of water rights. A system was developed which is now managed by the communities themselves, from the main level to the field level.

However, once the 20 indigenous communities had finished the system, with clear rules and rights and strong collective management, the State administration came in again. It did not want to recognize local management, regulations and water rights. Simply because local rules were not sustained by national law, they were declared 'illegal'.

At this moment, the State agency, in their interpretation of the universal Decentralization and Management Turnover policy, claims to get the management of the system back from the indigenous communities. It argues: "How can we hand it over if it is not in our hands?". International and national policies usually have different effects in the field than in the theory, and behind official arguments a powerplay is going on.

Indigenous communities, however, defend their technological, normative and organizational water use system. But they strongly face positivist, uniform law and inclusion-oriented water policies. Ecuadorian Water Law, just as most others, does not allow for local water rights and management principles, and destructs the variety of normative systems which *do* try to find particular solutions for diverse contexts.

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Is it not bitter that precisely those producers of local livelihood and national food security, who developed a variety of water rights and management systems in order to adapt them to the multiple local constraints and opportunities, are the same ones that most suffer from inclusive policies and uniform, positivist legislation? But, if current cultural politics and policies of 'inclusion' constitute the problem, the solution can never be to go back to 'exclusion'. Participation, yes, but with a different rights approach. Taking into account, from a critical perspective, that peasant and indigenous communities want to take part on their *own* terms, considering the plural identities, organizational forms and normative frameworks that govern their water management in practice. And, at the same time, considering the fact that most access and control rights have been taken away from them.

Therefore, In indigenous and peasant communities today, water users claim *both* the right to equality *and* the right to be different. On the one hand, there is a general demand for greater justice and equality regarding the unequal distribution of decision-making power, water, and other water-related benefits. On the other, there are the demands for internal distribution to be based on autonomous decisions, locally established rights and principles, and local organizational forms for water control which reflect the diverse strategies and identities found in indigenous communities today.

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