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Cultural Landscapes Significant to Indigenous Peoples

James A.R. Nafziger*

Abstract

The core concept of "cultural landscapes" is a tool that has helped shape research agendas and policy in several disciplines. These include, for example, archaeology, anthropology, cultural heritage law, economic development studies, environmental management, environmental and natural resources law, geography, and international law. It is noteworthy that much of the resulting work has been closely linked to the principles of sustainable development and cultural heritage protection, which have thereby served as bases for establishing a shared, multidisciplinary understanding and application of the concept. Accordingly, interdisciplinary work has focused on interactions between humans and their environment and on cultural identity with landscapes as key factors in achieving biodiversity and land-use sustainability.

There is no continuous transition or spectrum between natural and cultural landscapes. Instead, as we shall see, it is precisely the varying types of fusion between natural and cultural phenomena in distinctive ways among different indigenous cultures as well as the corresponding variance of interactions between human cultures and the natural environment that justify the specificity of the core concept of a cultural landscapes. These may variously include, build upon, be projected upon or simply ignore natural landscapes among various different peoples. Significantly, each type of fusion or interaction generates distinctive legal issues. Sometimes, of course, natural and cultural landscapes are one and the same.

A peoples' identity with a particular landscape, as well as the character of that identity, may be fundamental in their lives and livelihood. For example, in the rugged reindeer-herding environment of northern Finland, the landscape enveloping Sami herding is both a natural and a distinctively cultural phenomenon on which their enthusiasm for the traditional means of their individual and

* Professor of Law, Williamette University (US) and President of the Cultural Heritage Committee of the International Law Association. Paper presented on Professor Nafziger's behalf by Dr Lucas Lixinski.

community livelihood relies. For them, herding transcends the obvious exploitation of animal resources: Their landscape is cultural in no small measure. International cooperation is essential in empowering indigenous peoples, protecting their interests in cultural landscapes, and advancing everyone's interest in sustainable development. Towards that end, it is essential to develop a comprehensive typology of cultural landscapes defined by categories that merge natural and cultural phenomena in distinctive ways. Each of these categories will require its own distinctive approach and means of implementation. Moreover, the foundation of the transnational regime to protect the rights of indigenous peoples in and to their cultural landscapes is International Human Rights Law (IHRL), underpinned by the so-called International Bill of Rights, and supported by cultural heritage treaties, especially the 1972 World Heritage Convention (of fundamental importance), treaty law protecting indigenous and tribal peoples' rights and international environmental instruments.
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An exact definition of "cultural landscapes," which should be extended to include seascapes, is not fully settled. The core concept is nevertheless a tool that has helped shape research agendas and policy in several disciplines. These include, for example, archaeology, anthropology, cultural heritage law, economic development studies, environmental management, environmental and natural resources law, geography, and international law. It is noteworthy that much of the resulting work has been closely linked to the principles of sustainable development and cultural heritage protection, which have thereby served as bases for establishing a shared, multidisciplinary understanding and application of the concept. Accordingly, interdisciplinary work has focused on interactions between humans and their environment and on cultural identity with landscapes as key factors in achieving biodiversity and land-use sustainability.

To be sure, the core concept of "cultural landscapes," specifically, may have less traction among those who prefer an exclusive use of the generic term "landscape." On the surface, that preference is appealing in its simplicity. However, the underlying idea of gradual transitions between natural and cultural landscapes unfortunately obscures the markedly different types of fusion between them. There is no continuous transition or spectrum between natural and cultural landscapes. Instead, as we shall see, it is precisely the varying types of fusion between natural and cultural phenomena in distinctive ways among different indigenous cultures as well as the corresponding variance of interactions between human cultures and the natural environment that justify the

specificity of the core concept of a cultural landscapes. These may variously include, build upon, be projected upon or simply ignore natural landscapes among various different peoples. *Significantly, each type of fusion or interaction generates distinctive legal issues. Sometimes, of course, natural and cultural landscapes are one and the same*.

A peoples' identity with a particular landscape, as well as the character of that identity, may be fundamental in their lives and livelihood. For example, in the rugged reindeer-herding environment of northern Finland, both the Sami peoples and the majority Finns identify with nature. But the landscape enveloping Sami herding is both a natural and a distinctively cultural phenomenon on which their enthusiasm for the traditional means of their individual and community livelihood relies. For them, herding transcends the obvious exploitation of animal resources. Instead, the Sami herders "derive meaning from the forest. Their landscape is benign." Their landscape is cultural in no small measure.

The relationship between nature and culture among different peoples and the unsurprising variations among different legal systems is very complex. National and subnational laws therefore need the support of a transnational legal framework. Indeed, international cooperation is essential in empowering indigenous peoples, protecting their interests in cultural landscapes, and advancing everyone's interest in sustainable development. Toward that end, it is essential to develop a comprehensive typology of cultural landscapes defined by categories that merge natural and cultural phenomena in distinctive ways. Each of these categories will require its own distinctive approach and means of implementation.

The foundation of the transnational regime is International Human Rights Law (IHRL), centered on the so-called International Bill of Rights that includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (the ICESCR). More specific agreements include, *inter alia*: the 1972 World Heritage Convention (of fundamental importance); the 1965 Convention on the Elimination of All Forms of Racial Discrimination; and the International Labor Organization's *Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169).* Any responsible enquiry into the place of the cultural landscape of indigenous peoples must take account of these instruments. International environmental instruments, such as those addressed to biological diversity and decertification, are also relevant insofar as the foundation of IHRL enshrines the right of all to cultural development and to participate in cultural life.

Regional treaties are also relevant, beginning with the following foundational human rights instruments, in chronological order of their coming into force: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); the American Convention on Human Rights

(ACHR); and the African Charter on Human and Peoples' Rights (ACHPR) (the Banjul Charter). All three of these fundamental conventions contain similar rights to the enjoyment of culture and cultural life within a community, particularly in the ECHR's Charter of Paris for a New Europe, article 14 of the ACHR's Protocol of San Salvador, and articles 17 and 22 of the ACHPR. All three Conventions also confirm a right to property – in Protocol 1, article 1 of the ECHR, article 21 of the ACHR, and article 14 of the ACHPR.

Two other European instruments are particularly relevant: the European Landscape Convention (the Florence Convention) of 2000; and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice on Environmental Matters of 1998 (the Aarhus Convention). The latter is essential in establishing public access to environmental information, public participation and access to justice.

These treaties are legally binding on States Parties. *Pacta sunt servanda. S*tates parties and their subordinate governments therefore can be held liable not only for violating the stipulated rights but also for failing to respect, protect and fulfil them. Accordingly, if a non-state actor such as a corporation violates such rights, either the actor's national state or the state on whose territory the violation occurred may be held responsible on the basis of an attribution to it of such violations or a lack of due diligence to fulfil its obligations to respect, protect and fulfil the stipulated rights. The state may limit them only on a sound legal basis that is both necessary and proportional.

Numerous non-binding instruments of soft law supplement and reinforce the treaty obligations. The examples include the studies and reports of the International Council on Monuments and Sites (ICOMOS), a global non-governmental organization associated with UNESCO. Its mission is to promote the conservation, protection, use and enhancement of monuments, building complexes and sites. It participates in the development of doctrine, evolution and distribution of ideas and conducts advocacy. ICOMOS is the Advisory Body of the World Heritage Committee for the Implementation of the World Heritage Convention. As such, it reviews the nominations for cultural world heritage sites and helps protect the conservation status of properties. Its National Committees and International Scientific Committees have made particular contributions to the doctrinal heritage internationally.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), though not hard law, establishes a commendable procedure of intercultural collaboration and a set of expectations concerning the protection of indigenous culture as well as land, and hence landscapes and even seascapes, of patrimonial importance to indigenous peoples. It cannot be the last word, of course. UNDRIP does not explicitly include the core concept of cultural landscapes on its extensive list of cultural heritage phenomena. More specific and perhaps divergent initiatives at international, regional, national and local levels may eventually be helpful. For the time being, however, it may be wise to

rely primarily on UNDRIP as a chosen instrument to shape general practices. Even in an age of legal pluralism and overlapping normative ordering (a description rather than prescriptive development, after all), the interests of indigenous peoples may be best served by universalizing and refining a single regime (UNDRIP) to provide an authoritative common language for protecting cultural landscapes and seascapes of significance to indigenous peoples. An obvious model for such an approach has been the Universal Declaration of Human Rights as a foundation for the progressive development of human rights law in all of its complexity today. Then, as empirical evidence accumulates about both the efficacy and limitations of an UNDRIP-based regime, modifications to it and entirely new initiatives will likely be in order.

General principles of law apply as well. Because cultural landscapes are inextricably environmental, the guiding concept or root principle of sustainable development is fundamental as the "contemporary international norm which underpins environmental law generally." It is generally accepted that this multi-faceted concept was first mooted by the World Commission on Environment and Development (WCED) in 1987, calling for "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Whatever has been written of the concept and from whatever angle, position or political agenda, it is clear that sustainable development "attempts to integrate three facets: *environmental protection; economic development;* and *social upliftment* … into decision-making". These three facets will be pivotal in shaping a transnational regime of law to protect cultural landscapes. The ultimate questions are ones of spatial justice.

The need for sustainable development whenever the prospect of development may impact a cultural landscape inevitably necessitates careful risk management or assessment in accordance with the precautionary principle of international law. ICOMOS conducts the Heritage Risk program to identify threatened heritage places, monuments and sites; to present typical case studies and trends; and to share suggestions for solving individual or global threats to our cultural heritage. Each year an invitation is made to all ICOMOS National Committees, International Scientific Committees and ICOMOS's world-wide professional network, to provide short reports outlining risks including case studies. This process is one of soft law in action.

Some risks are linked to the internal environment (for example, operational risks in executing a project or activity, general administration, human capital risks, information technology, and financial risks) whereas others are linked to the external environment (for example, political, economic, and socio-cultural risks; legal or regulatory requirements; and environmental and security risks).

"Risk management" encompasses, first, a "systematic approach to managing risks … by identifying, assessing, understanding, acting on and communicating risk issues;" second, within an organization, risk management "requires a clear delineation of roles based on existing hierarchy, responsibilities and areas of

work. It has to be understood as a collective responsibility--the anticipation and management of risks have to become everyone's concern." Third, risk management contributes to strengthening and maintaining the capacity to enhance the process of decision-making and manage change through a proactive anticipation of negative and positive uncertainties and the development of appropriate strategic plans; to adapt resiliently to unforeseen events or disruptions; to align strategies with the expectations of stakeholders; and to seize opportunities.

Careful risk management can help protect cultural landscapes of significance to indigenous peoples in several ways: by enabling responsible decision-making and priority-setting; by allocating resources in a better way; by increasing efficiency; by avoiding negative surprises; by facilitating innovation; by identifying indicators for change based on experience; by maintaining the trust of stakeholders; by analyzing causes and consequences of potentially difficult situations and disruptive challenges (transparency); by increasing credibility and reputation; and by strengthening foresight and anticipation in order to counter potential threats.

Sustainably developing cultural landscapes of significance to indigenous peoples does not, of course, mean that cultural landscapes are or should always be subject to development. But when development is at issue, as it so often is, it must comply with both substantive requirements, such as the integration of environmental protection and economic development, cultural considerations, and procedural requirements, such as access to information and public participation in decision-making. The procedural elements of accessibility and participation are of crucial importance to indigenous peoples, *as reflected in provisions of* UNDRIP. In 2012 the United Nations General Assembly underscored the importance of participation by indigenous peoples in the achievement of sustainable development when it adopted Resolution A/RES/66/288.

Unfortunately, these procedural elements and hence the interests of indigenous peoples are too often overlooked, even within the supposedly protective regimes of environmental and cultural heritage law. Thus, "[w]hat is also clear is that the impact of World Heritage sites on indigenous peoples has not always been positive". The rapporteur on the rights of indigenous peoples, James Anaya, made the same observation in his 2012 report to the United Nations General Assembly, as follows:

> *33. Indigenous peoples have expressed concerns over their lack of participation in the nomination, declaration and management of Word Heritage sites, as well as concerns about the negative impact these sites have had on their substantive rights, especially their rights to lands and resources.*

In conclusion, it seems clear that the established principle of sustainability must guide the formulation of rules to protect cultural landscapes of

significance to indigenous peoples and to resolve disputes among diverse stakeholders. Representatives of indigenous peoples must be allowed to participate in global initiatives, such as the preparation of the United Nations Sustainable Development Goals (SDGs 2030) and local efforts so as to take fully into account and apply the experience and contributions of these peoples in promoting harmony with the Earth. By the same token, the United Nations organs and agencies should integrate the emerging regime associated with this chapter for protecting cultural landscapes of significance to indigenous peoples. Above all, it should be understood that economic development that encroaches on or impacts such cultural landscapes necessitates careful risk management and assessment.