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PETER OREBECH ET AL., THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2005).

Reviewed by : Roopa Madhav, LEAD Journal

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Peter Orebech, Fred Bossleman, Jes Bjarup, David Callies, Martin Chanock and Hanne Petersen, *The Role of Customary Law in Sustainable Development* (Cambridge: Cambridge University Press, 2005).

Communities that have traditionally lived in harmony with nature have evolved rules and practices based on knowledge accumulated over several hundreds of years. Contemporary legal systems disregard or distrust these customary practices, which have coevolved with, and adapted to the local ecosystem. While healthy scepticism is warranted, the present day approach of most legal systems is unduly critical, ensuing in widespread loss of community control over natural resources. Given the accelerated changes in the global environment, all alternatives that help revive and restore sustainable management practices need to be given serious consideration. This book is one such brave attempt, in a world where '(c)ustomary law is a legal instrument, while sustainability is a political norm that is increasingly being transformed into legal rules' (pg 20).

This book has emerged from a working group meeting on 'The role of customary law in a local self-governing sustainable development model' It is a compilation of contributions that was first debated at the Working Group meeting in the Rockefeller Foundation Study and the Conference Center in Bellagio (1999). The group met again in 2000 at Richardson School of Law, Honolulu and in 2002 at the University of Tromso, Norway for discussions on the prospects of customary law in establishing sustainable societies. This collection of essays explores the extent to which customary law institutions may be able to achieve the goal of sustainable resource management and to understand how they fit into the overall pattern of dominant jurisprudence and existing political systems, while also taking into account the limits of customary law.

Ørebech states that the book seeks to test the hypothesis 'that customs elaborated within non-governmental organs – also called 'quasi-organs' (i.e., non-elected and self-instituted social entities) can sometimes accomplish more comprehensive sustainable systems than does statutory law. This is not self-evident, however, nor is it reflected in all or even many of the theoretical works on common pool self-governing systems.' (pg. 305) He goes on to conclude that '(i)n some instances customary law is the only ruling alternative. … For loopholes of law and for complicated legal areas that fail to find their textual expression, there is but one solution – namely customary law. Here the legislator has tacitly or expressly renounced the severe difficulties of getting things down on paper' (*Id.*).

Essays contained in the book seek to build an argument in support of this conclusion. Ørebech in his essay 'The place of customary law in democratic societies' tackles the tricky poser: does statutory law work more efficiently to cure the problems of overexploitation? 'Is statutory law really as good as claimed?' In this chapter, Ørebech also examines whether customary law making is inimical to democratic thinking or immature in relation to systems of parliamentary thinking. In doing so he raises three specific but pertinent issues: First, do *de lege lata* systems recognize customary law? Second, what is the historic background for customary law systems? The third issue is the legislative concern: is customary law as democratic as top-down solutions? The ensuing analysis, albeit sketchy, is informative and thought provoking.

Why examine customary law in achieving sustainable development? 'An important reason for considering self-governing strategies of local societies is the lack of success of the public control and command systems, and the often unjust results arising from the market mechanism. Even the poorest of the poor and the least assertive individuals have a voice under the customs regime.' The underlying premise reflected in this statement provides interesting clues to the prism through which this exploration is furthered by the author. Juxtaposed against the popular economic theory promoting private property regimes, the concerns of equity and democracy, become weightier in a third world context.

Do customary rules and processes work to enable a sustainable management of resources? Or is this a much romanticized understanding, workable in tiny pockets with limited reach? Is the search for an alternative to both privatisation and centralised state control, necessarily limited to community ownership and management? Collective action and the commons, has been much maligned following Hardin's essay on the 'Tragedy of the Commons'. Abundant literature has been produced countering this essay and in defence of the importance of collective action and customary practices in protecting valuable natural resources. Two chapters in the book are devoted to examining specific

case studies from countries in the global North. Highlighting the impact of changes in the legal systems the case study demonstrates how fishing in Norway and Greenland and hunting, gathering practices in Hawaii are transforming the customary law and subsequent legal systems and in turn the sustainability of resources.

Custom, if the law is to so declare, should be immemorial in origin, certain, reasonable in nature and continuous in use. However, this rigidity of the common law understanding of customary law needs reviewing as it fails to intersect with idea of customary law as essentially a flexible and elastic system that can ensure sustainable resource management practices. Fred Bosselman examines through case studies, systems that have demonstrated resilience in resource management and flowing from this review, five characteristics have been identified as good indicators of whether the systems will be able to adapt in sustainable ways: (1) Does the system have a good historical record, oral or written, of the way the system has worked in the past under different environmental conditions? (2) Is an effective procedural mechanism for making rule changes built into the system? (3) Does the system feed back the right information on current operations into the rule modification process? (4) Are the rules sufficiently finely detailed so that they can be 'tweaked' without wholesale revision? (5) Do the rules facilitate negotiation of modifications by providing for a balance of rights and responsibilities relating to a wide range of ecosystem functions? (pg. 246).

However, not all essays in the book examine the interface between customary law and sustainable development. Two chapters explore the legal processes of how custom becomes law in the England and in Norway. Literature on custom and customary law, invariably begin with a premise and understanding of the concept as contained in English jurisprudence. This book is no exception in exploring further the common law jurisprudence. An expansive theoretical exploration of how social interaction forms the foundation of customary law is contained in Chapter 3. Here, Jes Bajrup examines at great length the differing perspectives of David Hume and Thomas Reid. Hume believes that human beings are rational but solitary agents, whereas Reid states that human beings are rational and communal agents having the capacity to engage in the exchange of beliefs concerning what there is reason to believe and to do using the method of customary law to create valid rules of their own making based upon the exercise of practical reason that legislates universally in relation to human ends.

The editors claim that 'despite the many authors and their sole responsibility for their contributions, the chapters are in many ways linked together. Hopefully the reader will find at least one 'red thread'!'(pg. ix). The broad thematic, though evident from the title of the book, is probed specifically only by Martin Chanock. Superbly done, this essay explores the world of customary law in the third world, the role of customary law in the absence of a powerful state legal system and the impact of international organizations/international law in validating customary law. The transformation effected by the application of Western notions of customary law to indigenous systems, across the colonized world, evidently has reordered societies and rewritten 'traditional' ideas and notions.

Chanock explores the inherently dynamic nature of the customary law. Quoting Fikret Berkes: 'Traditional does not mean inflexible adherence to the past: it simply means time-tested and wise' (pg. 254). 'Scientists increasingly recognize that successful customary resource management systems often rely on very intricate patterns of knowledge developed over long periods of observation. Studies of Australian Aboriginal resource management systems suggest that some 'traditional environmental knowledge is rich with understanding of how their environment has changed over time. These include changes caused by cyclones, increased human populations, and new agricultural practices.' It is emphasized that to enable adaptive resource management systems it may be important to reduce law's traditional concern for predictability and certainty in favour of more flexibility to respond to changing conditions. (pp 248-249).

The book acknowledges that sustainable development is easier to achieve when resources are abundant. It warns that situations of scarce resources cry out for more careful consideration. It does not succeed in dealing with the more difficult issues of the workings of customary law in inherently hierarchical and heterogeneous communities morphed through colonization, state regulation and increasingly influenced by modernity. It is ironic that the sharpest criticism of the book is buried within the book. Chanock at page 352 notes 'Many of the difficulties in understanding customary law are

caused by the conflation of the search for ways of using customary law as mode of regulation with the ideological search for alternatives to private property and market. The 'other' becomes the source of the communal, but it is a western model of the 'communal' that is being found.' The search for the authentic and contextualized 'communal', coupled with a deeper analysis of what one may term 'modern customary law' may meander along different paths. In this, there may be another enquiry that this book points towards!

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