

# INDIGENOUS WATER RIGHTS IN THE ANDES: STRUGGLES OVER RESOURCES AND LEGITIMACY

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In the Andean countries, water rights are a source of intense conflicts. National and international policies and legislation commonly challenge local and Indigenous water rights, while corporations encroach on their habitats and claim their sources. Legislation promoting extractive industries at the expense of Indigenous access to land and water prevails over locally-rooted and formally-recognized Indigenous rights. While peasants and Indigenous people deploy legal and political resources to defend their water, elites and governments increasingly tend to marginalize and even criminalize rightful Indigenous claims. Although they pay lip service to decentralized water governance, law and policy models currently applied in the region have yet to address adequately issues of power, fair redistribution and effective recognition of local and Indigenous normative frameworks. Formally recognizing plural rights systems by incorporating them into national frameworks is not enough and usually entails negative impacts at the local level. Alternatives need to be developed.

### 1 INTRODUCTION: LOCAL AND INDIGENOUS WATER RIGHTS IN THE ANDEAN COUNTRIES

As elsewhere in the world, in the Andean countries new policies for water management and regulation are being developed as an answer to what is commonly known as 'the growing water crisis'. As water becomes scarcer, disputes over access and control intensify, and new law and policy reactions focus on how to control this contested resource. Current policy proposals often refer to participation, decentralization, and transferring management to local government. The question is whether this policy and legislative change in the Andean region is an attempt to respect and strengthen local water rights systems and user organizations, granting smallholder and Indigenous communities greater rights security and autonomy for water control according to their needs and potential, or a new policy effort towards state downsizing, abandoning essential public tasks and cutting back on public spending for water management.<sup>1</sup> Another rightful question is whether

such decentralization policies are also a strategy to strengthen rather than weaken state control over water at the local level.<sup>2</sup> As evidence in countries such as Peru, Chile and Colombia shows,<sup>3</sup> proposals tend to be strongly influenced by private-sector projects to accumulate water rights, gain control over water supply services, and multiply business profitability, free from government control and public regulation.<sup>4</sup>

In the Andean countries, the challenge of water law and policy-making is made more complicated by the many ways in which water is used. All these countries show remarkable differences in ecology and climate as well as in institutional and technological developments. They also feature diverse political structures, cultural backgrounds and production rationalities. No replicable external models can be applied to Indigenous small-scale farming and community water control. Moreover, the extremely skewed distribution of water resources has been and continues to be a source of recurrent conflict; rather than resolving this fundamental societal contradiction, law and policy-making seem to have contributed to deepening it.<sup>5</sup>

Neoliberal Utopia and the Disempowerment of Collective Action' in R Boelens, D Getches and A Guevara-Gil (eds) *Out of the Mainstream. Water Rights, Politics and Identity* (Earthscan London 2010).

2 R Boelens 'The Politics of Disciplining Water Rights' (2009) 40 *Development and Change* 2 pp 307–31; A Bebbington, D Humphreys Bebbington and J Bury 'Federating and Defending: Water, Territory and Extraction in the Andes' in *Out of the Mainstream* (n 1) pp 307–27; compare A Panfichi (ed) *Participación Ciudadana en el Perú: Disputas, Confluencias y Tensiones* (Fondo Editorial PUCP Peru 2007).

3 For example, M T Oré *Agua, Bien Común y Usos Privados. Riego, Estado y Conflictos en La Achirana del Inca* (Wageningen University WALIR and PUCP Peru 2005); J Budds 'Water Rights, Mining and Indigenous Groups in Chile's Atacama' in *Out of the Mainstream* (n 1) pp 197–212; J Rojas 'Estudio Nacional Sobre la Situación de Injusticia Hídrica en Colombia' (paper presented at the International Justicia Hídrica Conference, 22–28 November 2009, Cusco, Peru).

4 See R Boelens, M Zwarteveen 'Prices and Politics in Andean Water Reforms' (2005) 36 *Development and Change* 4 pp 735–58; K Bakker *Beyond Privatization: Water, Governance, Citizenship* (Cornell University Press NY 2010).

5 Boelens 'The Politics of Disciplining Water Rights' (n 2); A Panfichi and O Coronel 'Elementos para Entender las Estrategias y Alianzas de los Conflictos Sociales en el Perú: el Caso de los Conflictos Hídricos' (paper presented at the International Justicia Hídrica Conference, 22–28 November 2009, Cusco, Peru); A Guevara-Gil (ed) *Derechos y Conflictos*

1 J E Castro *Water, Power, and Citizenship: Social Struggle in the Basin of Mexico* (Palgrave Macmillan 2006); E Swyngedouw 'Dispossessing H<sub>2</sub>O: The Contested Terrain of Water Privatization' (2005) 16 *Capitalism, Nature, Socialism* 1 pp 81–98; H Achterhuis, R Boelens and M Zwarteveen 'Water Property Relations and Modern Policy Regimes:

Consequently, water policy debates are fierce, since they relate both to the struggle for access to water and other natural, material or financial resources, and to questions of who has legitimate authority to define and sanction water rights frameworks. The concept of water rights in Andean Indigenous and peasant communities involves rights of access to water and system facilities, and claims to control decision-making about water management. In this context for Beccar et al<sup>6</sup> 'water rights' express an agreement about the legitimacy of right-holders' claim to water and to decision-making power about managing this resource.

One can talk of 'rights' only when water use is certified by an authority with *legitimacy and ability* for enforcement within a particular normative framework and is recognized by users and non-users alike. Users orient their behaviour by this framework and incorporate it into their actual social relationships.<sup>7</sup> In complex settings such as Andean watersheds, this water authority will not always be recognized by all users, and competes with other authorities representing different (socio)legal systems – whether local or national.<sup>8</sup> The social complexity of state-prescribed water user organizations gives an insight into this tension. For example, while Peruvian law recognizes only *juntas de usuarios* (water user boards) and *comisiones de regantes* (irrigator committees) as legitimate forms of user association, watersheds and user systems in the Andes are in fact being managed by a great variety of local irrigation organizations, communities, and complex customary law bodies specialising in water control. The latter lack legal backing. As long as the state or the *juntas* and *comisiones* do not interfere with these local irrigation systems there is no major problem of rule-enforcement, but the execution of water development projects (which involve the 'formalization' of water rights) and the increasing pressure by new users on local watersheds (hydropower plants, mines, cities) trigger conflicts over the legitimacy and enforcement capacity of local authorities and organizations.<sup>9</sup>

Although state officials commonly equate the concepts of 'legal' and 'legitimate' water rights and management forms, local and Indigenous user groups often challenge this. 'Legal' refers to recognition and faculties that are grounded in official law – according to Webster's definition<sup>10</sup> it refers to what is recognized or made effective under positive law *rather than in equity*. The concept of 'legitimate', however, does not

necessarily refer to positive law, but may be related to norms associated with many of the other sociolegal repertoires that are present. 'Legitimate' refers to what is 'in accordance with accepted standards',<sup>11</sup> and this notion of 'accepted or acceptable standards' may relate to both the official 'right-ness frameworks' and the diverse, non-official 'fairness or equity frameworks'.<sup>12</sup> Behind the struggle for water and water rights in the Andean countries is an intense battle to establish what these accepted standards should be and who has the authority to establish and sanction them.

From the side of local water use groups (eg peasant and Indigenous) this 'struggle for legitimacy' takes place not only as a legal battle aiming for official recognition of particular equity constructions. It also unfolds in daily struggles to gain legitimacy 'in the field', within and among households, communities, water use systems and water control and policy institutions. The struggle for the legitimacy of local water rights in the Andes therefore provides an insight into both the political construction of positive justice and the way 'equity' is socially and politically constructed in local, Indigenous and customary law systems.<sup>13</sup>

This article analyzes the frictions between Indigenous water rights and the interests of dominant players in Andean societies. The main focus is on water use for agricultural purposes, although inter-sector disputes are also covered since they form an integral element of Andean water rights battles. The next section analyses interaction between the region's national, local and Indigenous law systems. Section 3 deepens this analysis of legal pluralism by examining the hybrid nature of water rights and water user identities, as shaped in processes of social confrontation. The fourth section outlines the region's water control history to understand the 'hydraulic traditions' that have coloured the current complex Andean waterscape. Sections 5 and 6 aim to place the struggle for contemporary water rights defence in the Andes in the context of the huge threats to Indigenous and peasant livelihoods from legal and policy measures and discourses and from the intervention of dominant, extractive water use sectors. The conclusion reflects on the problems and opportunities of local and Indigenous water rights recognition, within an arena where struggles evolve around the distribution of resources and the quest for legitimacy.

## 2 NATIONAL AND LOCAL LAWS: LEGAL PLURALISM AS A STRUCTURAL PHENOMENON OF ANDEAN SOCIETIES

Andean societies are typically heterogeneous, economically, politically, socially and culturally. Unfortunately, their nation-states have been unable to understand or adequately handle this enormous diversity and have generally attempted to govern it by applying

*de Agua en el Perú* (WALIR Concertación Pontificia Universidad Católica del Perú Lima 2008).

6 L Beccar, R Boelens and P Hoogendam 'Water Rights and Collective Action in Community Irrigation' in Boelens and Hoogendam (eds) *Water Rights and Empowerment* (Van Gorcum Assen 2002) pp 1–21.

7 F von Benda-Beckmann, K von Benda-Beckmann and J Spiertz 'Equity and Legal Pluralism: Taking Customary Law into Account in Natural Resource Policies' in R Boelens and G Dávila (eds) *Searching for Equity: Conceptions of Justice and Equity in Peasant Irrigation* (Van Gorcum Assen 1998) pp 57–69.

8 Beccar et al 'Water Rights' (n 6).

9 J Hendriks 'Water Laws, Collective Rights and System Diversity in the Andean Countries' in Boelens et al *Out of the Mainstream* (n 1) pp 165–82; A Guevara-Gil 'Water Rights and Conflicts in an Inter-Andean Watershed: The Achamayo River Valley, Junin, Peru' in *ibid* pp 183–96.

10 Webster's *New Encyclopedic Dictionary* (Konemann Cologne 1994) 571.

11 *ibid* 572.

12 Boelens 'The Politics of Disciplining Water Rights' (n 2).

13 For this reason, although it tends to be grounded in local context, the concept of equity as a sociopolitical construction of fairness and social justice perceptions, norms and procedures is not necessarily 'better' or 'more harmonious' but may incorporate many 'inequalities' and 'injustices'.

universalizing, homogenizing policies and norms. The conflict between state law and Indigenous-rural normative structures is particularly visible in the management of resources such as water.<sup>14</sup> Since state law, Indigenous law, customary regulations, development project-inspired 'law' and other rights repertoires co-exist, overlap and contradict each other, legitimate authority in Andean water management is not restricted to state agencies, nor do legitimate rights refer only to those emanating from state law.<sup>15</sup> In the Achamayo River Basin (Junín, Peru), for example, as well as in thousands of other Andean watersheds, peasants claim territorial and riparian water rights on the grounds of mythical and historical accounts, in clear contradiction of the official water licence system enacted by state law.<sup>16</sup>

Several elements must be considered in order to understand the fluid relationship between the sources of water rights legitimacy claimed by local Indigenous/peasant users and the authorities involved in affirming their societal relevance and access to and effective control over the resource. First, the relationship between the dominant mixed-ancestry society and the Indigenous peoples must be fully appreciated, transcending the reductionism entailed by the category of 'Indian/Indigenous'. Created as a colonial category for laws and taxation to encompass an amazing constellation of peoples and cultures, even as described by colonial chroniclers, to this day this misleading, homogenizing label fails to cover a complex human diversity that must be appreciated in all of its exuberant multiplicity.<sup>17</sup> This diversity is clearly expressed in water rights and systems. Using evidence from the Tiquipaya water system (Cochabamba, Bolivia), Hendriks<sup>18</sup> documents the complexity of the water rights and user organizations involved, where even a single farm may receive water based on several historical and social grounds: historical rights originating in the fifteenth and sixteenth centuries, rights stemming from territorial property relations, rights derived from participation in recent development projects, state-conceded water rights, and so on.

Secondly, their own inability to consolidate as hegemonic political bodies has prevented Andean nation-states from effectively establishing norms and institutions. This has left plenty of room for local power groups to develop and to affirm local autonomy (whether Indigenous or not). If taxation is an index of the state's efficiency, Andean watersheds provide

ample examples of the state's inability to enforce its own water tariffs. In the Achamayo River, for example, local water user organizations set their own fees to finance their waterworks and refuse to pay the official duty, arguing that they have been forsaken by the state.<sup>19</sup> Even so, the role of distant government norms and authorities is not negligible when invoked and activated by local water users. This vague political and normative situation is a kaleidoscope in which different authorities, legitimacies and regulations may be invoked at once and against each other.<sup>20</sup>

Thirdly, to debunk a false anthropological caricature, Indigenous and other rural water control and management systems are quite flexible, changing and dynamic.<sup>21</sup> Their norms, for example, are not age-old but constantly evolving through social experimentation and cognitive synthesis by local users and leaders to reproduce and regulate their water systems. In the process, normative frameworks, disciplinary practices and conflict management are informed by a diverse range of sources and influences that can include government law, international law (eg ILO Convention 169), rules proposed by development agents, the legal practices of nearby peoples or communities, dissemination of universal ideas (eg human rights, neoliberalism) and local innovation. For example, in Peru, following successful Indigenous identification struggles in neighbouring Ecuador and Bolivia, peasant communities and supralocal organizations are increasingly reclaiming their Indian ancestry in order to benefit from the international law on Indigenous rights and the environment.<sup>22</sup>

Fourthly, official recognition of legal plurality – boosted by the anthropological caricature mentioned above – has generated a body of law that simplifies and distorts the complex regulatory processes created and re-created by rural and Indigenous societies as norms for their societal lives.<sup>23</sup> This mismatch may prove crucial when rural and Indigenous peoples invoke that 'Indigenous legislation by lawyers' to defend their rights, or when government authorities deny them legal protection by accusing them of having acculturated and 'de-indigenized', thereby forfeiting the protection of indigenist legislation. Perversely, rural and Indigenous people can enjoy such legal protection only if they behave according to official precepts, as folksy caricatures.<sup>24</sup>

Rural and Indigenous water rights face a serious challenge when wielded against aggressive legal regimes

14 Boelens *Out of the Mainstream* (n 1); P H Gelles *Water and Power in Highland Peru: The Cultural Politics of Irrigation and Development* (Rutgers University Press New Brunswick 2000); G Gerbrandy and P Hoogendam *Agua y Acequias. Los Derechos al Agua y la Gestión Campesina de Riego en los Andes Bolivianos* (Plural Editores Bolivia 1998).

15 Compare B Santos *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge New York 1995); H de Vos, R Boelens and R Bustamante 'Formal Law and Local Water Control in the Andean Region: A Fiercely Contested Field' (2006) 22 *International Journal of Water Resources Development* 1 pp 37–48.

16 Guevara-Gil 'Water Rights and Conflicts' (n 9).

17 A Guevara-Gil *Diversidad y Complejidad Legal. Aproximaciones a la Antropología e Historia del Derecho* (Fondo Editorial, Pontificia Universidad Católica del Perú Lima 2009) p 79ff.

18 Hendriks 'Water Laws' (n 9).

19 *ibid*; Guevara-Gil 'Water Rights and Conflicts' (n 9).

20 *ibid* p 63; C Wolkmer 'Pluralismo Jurídico: Nuevo Marco Emancipatorio en América Latina' (2003) <http://bibliotecavirtual.clacso.org.ar/libros/derecho/wolk.rtf> (5 March 2010).

21 Boelens et al *Out of the Mainstream* (n 1).

22 Guevara-Gil 'Water Rights and Conflicts' (n 9); Hendriks 'Water Laws' (n 9).

23 L Giraud (ed) *Derechos, Costumbres y Jurisdicciones Indígenas en la América Latina Contemporánea* (Centro de Estudios Políticos y Constitucionales Madrid 2008); Guevara-Gil *Diversidad y Complejidad Legal* (n 17); F Salomon 'Unethnic Ethnohistory: On Peruvian Peasant Historiography and Ideas of Autochthony' (2002) 49 *Ethnohistory* 3 pp 475–506.

24 E Sánchez 'La Jurisdicción Especial Indígena. Nueva Estrategia de la Máquina de Captura' in Giraud *Derechos, Costumbres* (n 23) pp 215–31.

promoted by extractive industries and infrastructure projects. Whether in neoliberal Peru, indigenist-governmentalist Bolivia or national-populist Ecuador, the states' obsessive drive to pay for national development by selling off natural resources (natural gas, petroleum, minerals) has led to increasing conflict between state-backed investors and the peoples and communities affected by this development-driven extractive scourge. It is not surprising that governments have reacted to Indigenous protests and mobilization for water rights by criminalizing them as they become louder and better-founded. It is therefore essential to recognize the legitimacy and diversity of rural and Indigenous water rights in order to formulate a democratic, redistributive resource allocation system.

### 3 WATER RIGHTS CULTURES AND IDENTITIES AS HYBRID OUTCOMES OF HARSH CONFRONTATION

Apart from the struggles between competing water sectors, water is fiercely contested within 'the field of irrigation'. Economic and political control over water and the divergent meanings and values assigned to it are at stake.<sup>25</sup> Water, more than other resources, is a basic means of mobilizing people and the driving force behind the formation of strong common-property institutions, grounded in shared rules and collective rights.<sup>26</sup> These management norms and practices are the backbone of Andean water control systems, interwoven with the cultural and political foundations of past and present Andean societies.<sup>27</sup>

Local water control has always influenced identity formation in many Andean communities.<sup>28</sup> However, the national and global contexts in which these communities operate change rapidly, with major impact on their material, political and symbolic orders. Increasing demographic pressure and the processes of migration, transnationalization and urbanization of rural areas among others, lead to profound changes in agrarian structure, local cultures and forms of natural resource management. Local territories are invaded and existing water rights often neglected. Indigenous peasant communities suffer most from these contemporary developments.

Official water policies are not generally supportive of local communities. In most parts of the Andes, water rights are held by a few powerful stakeholders. This unequal distribution is grounded in the colonial experience and triggered by contemporary state policies. For a long time, water allocation and investment policies have prioritized large-scale irrigation for hacienda or lowland plantation agriculture, water-intensive

extractive industries (mining, factories, etc), and, more recently, drinking water and hydro-power for cities. Water is increasingly defined as an exclusively economic resource that must be allocated to the 'most profitable economic use', threatening the position of communities and their water rights systems.<sup>29</sup>

Over the last two decades, water has been a prominent issue in many protests against economic marginalization, ethnic discrimination and undemocratic governance. These struggles question privatization plans and encroachment on Andean users' collective water rights, and advocate recognition of territorial rights, fair water distribution, and the legitimization of local authorities and normative frameworks. Struggles increasingly involve larger coalitions, particularly in countries such as Ecuador and Bolivia, indicating a strong shift from class-based to class- and ethnicity-based claims for rights. Water rights are becoming arms in a struggle for recognition of diversity and redistributive social justice.

The struggles of Indigenous and peasant water collectives in the Andean highlands give a deeper insight into how the 'mutual bonds of rights and obligations' and the 'sense of belonging' among water users and their water sources is strengthened; how a common 'hydraulic property' is created and re-affirmed; and how 'water cultural identities' acquire their substance. To operate adequately, Indigenous communities and water user collectives must establish membership criteria and boundaries, defining their identity and exclusiveness within the political field in which they operate. Such political fields have many levels, ranging from the household to the national domain. Simultaneously, dominant players on, for instance, a national scale, try to impose a 'proper blue-print for behaving' on their members, with a design for identity and belonging. Therefore, to understand the water cultures of the subjugated it is crucial also to focus on the water cultures of the subjugating. Ethnicity, identity, and subject-formation stem not just from the self but also, importantly, from the confrontation with the other and the ways in which the self is 'othered'.

Gelles<sup>30</sup> rightly observes that the submission of local water control systems to the state takes on an added dimension in ethnically differentiated, culturally plural Andean societies. Ruling groups have aimed to supplant the diversity of water cultures and rights to make everyday water management easy to grasp and control by installing the dominant water players' rights, categories and frames of reference, often presenting them as objective, universal schemes of rational water culture. As Boelens<sup>31</sup> elaborates, Andean countries' policies of recognition often imply a 'politics of

25 Gelles *Water and Power in Highland Peru* (n 14); Oré *Agua, Bien Común y Usos Privados* (n 3).

26 Beccar et al 'Water Rights' (n 6).

27 R Boelens and B Doornbos 'The Battlefield of Water Rights: Rule Making Amidst Conflicting Normative Frameworks in the Ecuadorian Highlands' (2001) 60 *Human Organization* 4 pp 343–55; P H Gelles 'Cultural Politics and Local Resistance in Highland Irrigation Development' in *Water Rights and Empowerment* (n 6) pp 22–35.

28 R Boelens and P H Gelles 'Cultural Politics, Communal Resistance and Identity in Andean Irrigation Development' (2005) 24(3) *Bulletin of Latin American Research* pp 311–27.

29 Budds 'Water Rights' (n 3); A Guevara-Gil 'Official Water Law versus Indigenous and Peasant Rights in Peru' in R Boelens, M Chiba and D Nakashima (eds) *Water and Indigenous Peoples* (WALIR UNESCO Paris 2006) pp 126–43; T Perreault 'Custom and Contradiction: Rural Water Governance and the Politics of *Usos y Costumbres* in Bolivia's Irrigator Movement' (2008) 98 *Annals of the Association of American Geographers* 4 pp 834–54; compare D Getches 'Using International Norms in Indigenous Water Rights Struggles' in *Out of the Mainstream* (n 1) pp 259–79.

30 Gelles 'Cultural Politics' (n 27).

31 Boelens 'The Politics of Disciplining Water Rights' (n 2).

recognition' that aims for the correction of deviant groups' rights and behaviour to keep them from 'wrong-doing'.

Indigenous water user groups also define their own cultural-political projects refusing to accept selfhood as a mechanical reflection of prevailing power relations. They react to, modify and strategically use the ruling symbolic order, picking and choosing from national and other normative systems and discourses, appropriating elements that can legitimize their claims. Here, ethnicity and Andean or Indigenous identity can be considered as a political strategy in the struggle by local communities and supralocal organizations to defend their rights vis-à-vis the colonial and post-colonial state and other powerful water interest groups. Andean communities show specific historical and cultural forms of collective action and resource management, embedded in Andean cultures with their particular normative repertoires, symbols and livelihoods. Their water identities and boundaries are not only 'limitless', 'tactical', 'fluid' and 'disposable', they show that the Andean highlands are 'a place of synthetic, shifting identities that have grown out of the multi-layered interactions of the local, the regional, and the global since pre-Columbian times'.<sup>32</sup> Ethnicity and identity in contemporary Andean society are the outcome of intensive interaction between different classes and cultures.

#### 4 IRRIGATION TRADITIONS AND POLICY TRANSITIONS IN A HISTORICAL PERSPECTIVE

In the Andean region, interest groups base their water rights on different sociolegal repertoires and 'hydraulic traditions'. As Lynch has observed,<sup>33</sup> Andean irrigation represents the convergence of different roads, each with its own set of relationships between people, land and water, personified in institutions. It is possible to distinguish between the Andean, Hispanic, bureaucratic, and latest neoliberal traditions, all of which have their own historical development and combine in multiple patterns.

The principles comprising the *Andean irrigation tradition* have their origin in Indigenous irrigation practices developed before the Spanish conquest. This tradition did not have one centralized source for rule-making but many local normative frameworks adjusted to diverse environments. Society was generally organized in kin-based communities, *ayllus*, and in many regions these communities formed *cacicazgos*, headed by a *cacique* or chief, who was usually also in charge of handling irrigation.

Despite the diversity of rule systems, there were attempts to unify and subordinate these ethnic groups in larger polities. Pre-Columbian civilizations such as the Moche, Huari-Tiahuanacu and the Incas are famous for building pan-Andean empires, and also for their impressive irrigation systems and the high

quality of their hydraulic technological development. In the past, this has led to intensive debates about the 'hydraulic hypothesis' (by Karl Wittfogel in 1957, later extended and applied to Peru by Julian Steward).<sup>34</sup> This hypothesis stated that the organizational requirements associated with (large-scale) irrigation in arid regions such as the Andes would inevitably lead to centralized despotic political organizations.

However, subsequent research has questioned whether irrigation could itself have caused the development of pan-Andean polities. In fact, Andean water systems are too small and localized to establish large hydraulic societies; rules and sanctions associated with Andean irrigation are flexible compared with other (eg rainfed) agricultural activities by the same community, which makes centralized water control implausible; the enforcement of irrigation rules fluctuates widely in the Andes, undermining attempts at constant hierarchical control; and there are still many different local rules, showing that attempts to centralize and standardize were either unsuccessful or not powerful enough. Furthermore, the Inca state did not usually impose its water regulations on conquered communities. The Andean irrigation tradition is a heterogeneous set of local water management systems, which may or may not have incorporated rules and practices from the great Andean 'water societies'. Even present-day peasant and Indigenous systems share ancient social, religious and economic patterns in similar contexts of 'highland water scarcity agriculture'.<sup>35</sup>

In the colonial period after 1532, a new set of principles was introduced and imposed. The fundamental principle of the *Hispanic tradition* was the hierarchy of royal ownership (eminent domain) and individual property rights, originally granted by the Crown. Water rights were not taken away from the Indigenous peoples. The Laws of the Indies recognized Indigenous water rights, and even protected them against expropriation. However, in practice the provision that private water entitlements were to be used 'for the common good' was confined to Eurocentric notions of rational water use, and the new landlords usually managed to expropriate the water from *los indios*.<sup>36</sup> Although differing in many aspects, colonial water law and private hacienda water rule were mutual companions in water rights practice.

During the colonial and republican periods, and particularly under hacienda rule, Indigenous communities were given access to some land and water, often under extremely unfavourable conditions, in exchange for compulsory labour and other services. Only in 'free' Indigenous communities was water distribution not conditioned by external rules.

The nineteenth-century liberation wars of independence from Spain did not bring any substantial change. First, unfair water allocation and distribution was consolidated or worsened and private property rights

32 O Starn 'Rethinking the Politics of Anthropology: The Case of the Andes' (1994) 35 *Current Anthropology* 1 pp 13–38 at 20.

33 B Lynch, R Flores and J Villarán 'Irrigación en San Marcos. Transición a la Tradición Burocrática' (1986) 28 *Allpanchis* pp 9–46 at 10.

34 K A Wittfogel *Oriental Despotism: A Comparative Study of Total Power* (Yale University Press 1957).

35 Gelles *Water and Power in Highland Peru* (n 14).

36 Guevara-Gil 'Official Water Law versus Indigenous and Peasant Rights in Peru' (n 29).

to water increasingly accumulated in the hands of the few. Governments continued to use colonial water codes, and in most regions landlords enacted their own norms based on private property accumulation and enforced with private militias and, eventually, state support. While colonial water policy had to some degree respected traditional forms of Indigenous control, one of the central objectives of nineteenth and early twentieth century governments in Peru, Bolivia and Ecuador was to transform existing Indigenous agriculture. These governments enacted legislation abolishing the collective property titles of Indigenous communities. Laws and policies in Peru and Ecuador were very similar: Indigenous collective land and water systems were (and still are) seen as obstacles to 'progress'.<sup>37</sup>

After the nineteenth century, the hydraulic engineer entered the arena of irrigation development, in charge of new, more complex irrigation infrastructure and distribution schedules. The professional influence of engineers increased during the early and especially mid-twentieth century, along with speedy change towards a bureaucratic water regime in which the state began to intervene in the Andean region by planning and constructing major irrigation systems.

During the same period, the extreme differentiation between land-and-water lords and Indigenous peasant communities gave rise to increasing conflicts. Massive peasant and Indigenous rebellions in the 1950s, 60s and 70s triggered major sociopolitical changes in rural areas of the Andes, followed by successive periods of agrarian reform. Rural change was originally supported by liberals because outdated means of production in the countryside counteracted the process of modernization and capitalist development of the rural economy.

Initial mild attempts at land and water reforms were radicalized by subsequent nationalist-revolutionary regimes, marking an important phase in bureaucratic transition from irrigation systems based on hacienda-style domination and management towards systems based on centralized state control. In the 1960s and 70s, most Andean countries declared water to be public property. Although according to official policy, nationalizing water was intended to prevent its accumulation by haciendas and encourage its redistribution to the poor, it was far easier for landlords to register their rights than for the Indigenous peasantry to do the same. Meanwhile, official government policy based on the class concept of *campesino* (peasants) made Indigenous water redistribution systems invisible. In their attempts to modernize highland political structures, the regimes imposed bureaucratic norms taken from international irrigation traditions, challenging Indigenous ways of organizing water management, production and ethnic identity.<sup>38</sup>

The new *bureaucratic tradition* was most visible through the work of state agencies in charge of 'applying the law' and prescribing the rules, rights and obligations of user groups. Water user associations were often set up by the agencies themselves. Even in locally-managed

systems based on common-property rules, state agencies often tried to increase their influence through development projects.

Since the early 1990s, bureaucratic tutelage has been dismantled in the Andes. Under the names of 'decentralized decision-making' and 'user-controlled water management', the transition has been swiftly implemented. This policy fosters irrigation management transfer (IMT) to the local government or user organization, eliminates subsidies, deregulates management, promotes self-regulation of water systems and water service provision, and sponsors the involvement of private (and currently public-private) enterprises in water infrastructure. While national authorities and elites advocate this new wave of modernization, expressed in new national policies and legislation, peasant and Indigenous water users are protesting fiercely. They view it as the return of private water regimes, although this time the rules and models are set by international policy-making institutions, not by local or national elites.

This 'decentralization' policy (based on subsidiarity principles) has a clear objective: to streamline market-based exchange between local, national and international levels, making the rules and rights the same for all. Over the last two decades, these new international policies have spread through the Andean region, riding roughshod over most Indigenous and peasant water users. The market-oriented discourses, policies and practices of the 1990s have dismantled not just state bureaucracy but also its capacity to help local government and water user organizations manage their own affairs.<sup>39</sup>

Current water policy transitions are diverse, with outright neoliberal regimes as in Chile, neoliberal proposals to change the state-centred systems as in Peru, indigenist, mixed state-community laws as in Bolivia, and government-centred 'human rights' proposals as in Ecuador. A mixture of all these traditions can sometimes be found in a single irrigation system. Some systems have never experienced direct intervention by landlords, state agencies or development institutions, while others have been constructed and managed by the latter. 'Foreign' norms or user groups who use state law to meet personal interests can be found in Indigenous systems, and many 'illegal' or 'tolerated' practices originating in Indigenous normative frameworks can be found in bureaucratically managed systems. This apparently chaotic legal situation, which according to De Soto's neoliberal analysis<sup>40</sup> explains 'the mystery of legal failure' and poses a fundamental obstacle to the development of his 'people's capitalism', often blocks contemporary power games aimed at externalizing and taking over Indigenous water management systems.

37 Oré *Agua, Bien Común y Usos Privados* (n 3); Boelens et al *Out of the Mainstream* (n 1).

38 Gelles 'Cultural Politics' (n 27).

39 L Cremers, M Ooijevaar and R Boelens 'Institutional Reform in the Andean Irrigation Sector: Enabling Public Water Agencies for Strengthening Local Rights and Water Management' (2005) 29 *Natural Resource Forum* pp 37-50; Castro *Water, Power and Citizenship* (n 1); Budds 'Water Rights' (n 3); Guevara-Gil *Derechos y Conflictos de Agua en el Perú* (n 5).

40 H De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books New York 2000).

## 5 INDIGENOUS TERRITORIES AND WATER SOURCES: ENCROACHMENT, DEFENCE AND MOBILIZATION

The development models pursued by the governments of García in Peru, Morales in Bolivia, and Correa in Ecuador, while ideologically different, share their dependence on extractive activities for export, especially mining and hydrocarbons. Most of these activities take place in ancestrally Indigenous territories; highland communities, Amazonian plains or coastal valleys along Peru's strip of desert. The core nature of extraction for export and the sizable investments required has earned these activities special treatment; Peru is the most extreme case of violating Indigenous rights to water resources.

In Peru, large-scale investments have occupied the territory of native and peasant communities, transforming their environment and resource management. This is often illegal, without the legally established two-thirds minimum vote by community members accepting the occupation. Plundering water sources and concentrating them under private ownership is made easier because many Indigenous communities have no property title to their lands, even if they have lived there for many generations. Taking advantage of this situation, as in Chile three decades ago, large companies have begun aggressively seizing communities' water sources, in some cases purchasing the rights for a song, in others using state powers and force to evict or expel Indigenous people.

In 1981, Chile's military junta enacted the Water Code, strongly influenced by neoliberal ideology and forcefully introduced by General Pinochet's dictatorship.<sup>41</sup> The code favoured profit-seeking sectors of the economy and traditional collective economies were legally circumscribed. Contrary to Indigenous customs, water rights were separated from land rights and transformed into a tradable commodity, with private property status. To facilitate the transfer from one type of use to another, social priorities for water allocation (in the previous 1969 law) were eliminated, allowing, for instance, the transfer of water from subsistence users and drinking water supply to more profitable uses such as industry. When several rights applications compete for use of the same water sources, the concession may be auctioned off to the highest bidder. Again, the commercial function of water prevails over its social functions and uses. The code also established that, once water rights have been delivered, there are no new charges (eg taxes) for holders – although this changed slightly in 2005. Rather than the intended increase in water use efficiency, the law paved the way for intense speculation and monopolization, especially in arid and semi-arid regions.<sup>42</sup>

41 Based on R Boelens and others 'Special Law: Recognition and Denial of Diversity in Andean Water Control' in D Roth, R Boelens and M Zwartveen (eds) *Liquid Relations. Contested Water Rights and Legal Complexity* (Rutgers University Press New Brunswick, New Jersey, London 2005) 144–171.

42 I Gentes 'La Interacción de los Derechos Locales e Indígenas de Agua con la Legislación Chilena' in R Boelens, D Getches and A Guevara (eds) *Agua y Derecho* (Quito AbyaYala and Lima IEP) pp 255–84; Budds 'Water Rights' (n 3).

Indigenous water problems were largely ignored in the 1980s, and most water rights were allocated to large farmers, agro-industries, mining and logging companies. In many cases, complete settlements that had previously had natural access to water were given restricted and irregular access. Local water distribution regulations were overlaid by new market practices and the individualization of former collective rights and management systems has created internal chaos in many communities.

To counteract the drastic consequences for Indigenous peoples of neoliberal legislation, the Indigenous Law was enacted in 1993 (No 19, 253). This law recognizes that land is the cornerstone of the existence and culture of Indigenous peoples. Water sources on Indigenous community land are considered to be goods belonging to these communities, without precluding third-party registered rights. Although the Indigenous Law has managed to fill some gaps in the Water Code, it continues to be difficult to defend Indigenous rights against third parties or to register exclusive Indigenous water concessions. Many Indigenous organizations feel that the Indigenous Law is a dead letter.<sup>43</sup>

The difficulty of protecting community laws in an overall neoliberal framework that destroys collective organization and favours individual and private rights is a fundamental problem.<sup>44</sup> State agencies assume that Indigenous groups must either fit into the market or count themselves out of the process of globalization. Economically profitable water projects are given priority, often with coercive state support enforcing national security laws. In practice, the Water and Mining Codes usually override the Indigenous Law.<sup>45</sup> For example, the state, as owner, shareholder and grantor of mining concessions, is directly interested in 'suitable, convenient mining exploration and exploitation' (Mining Code Article 120). The national picture is completed by international jurisdiction. There is a tendency to establish bilateral and multinational treaties, which put increasing pressure on local groups to allow companies to tap their water resources. The seriousness of the transnationalization of the water business is demonstrated by the project to export water from Bolivian peasant communities and Indigenous territories to Chile. Many mining companies continue to tap the aquifers around the wetlands that are the water source for many Indigenous communities in northern Chile.

It is no surprise that this invasion and seizure of territories, endorsed by the state without consulting the population, has moved Indigenous and Amazon communities to protest. Using their repertoire of collective actions, they have protested against water distribution in practice all the way up to national and international lawsuits. These water conflicts over the amount, quality and timing of water use are increasing rapidly.<sup>46</sup> In

43 Gentes 'La Interacción de los Derechos Locales' (n 42).

44 Achterhuis 'Water Property Relations' (n 1); Hendriks 'Water Laws' (n 9).

45 Gentes 'La Interacción de los Derechos Locales' (n 42).

46 C Pereyra 'Causas y Tendencias en los Conflictos por el Agua en el Perú' in *Conflictos por el Agua en la Región Andina: Avances de Investigación y Herramientas de Manejo* (Concertación-IPROGA Lima 2009) pp 49–60.

Peru for example, according to the National Water Authority (ANA), there were 244 conflicts over water resources in February 2010 alone. The actual number is probably higher, as other conflicts over water are counted by official statistics as socio-environmental, local or community conflicts, when in fact the issue is water control.

Water conflicts appear episodically but repeatedly through an array of direct actions going beyond the political system's institutional intermediation, ranging from challenges tolerated by the state to self-controlled acts of violence against well-defined local objectives, to pressure for negotiation. Unlike national protests and mass mobilizations by rural and Indigenous peoples in Ecuador and Bolivia, in Peru these conflicts are fragmented: although practically nationwide, those protesting have not united in a national movement or organization. This would call for an organizational structure linking all the conflicts into one overarching social movement with the capacity to change state policies, and reinforcing the regulations that defend Indigenous water rights.

In Peru, this fragmentation also results from the local nature of conflicts, which are not coordinated through broad, strong networks as in Ecuador and, to some degree, Bolivia. Each conflict is limited to its local territory and issues, which tends to prevent respect for Indigenous rights from becoming a national issue. Elites are too racist and classist to recognize Indigenous people as equals or recognize the rights they hold over natural resources in their territories. In turn, Indigenous communities and peoples mistrust authorities and institutional forms of political representation that have ignored them for centuries, preferring to appoint their own leaders and take direct action against the state. They also distrust national political parties of all leanings. This autonomy must be understood as the defence of a lifestyle and worldview in which water resources are a mainstay of their rights as peoples and communities.<sup>47</sup>

Despite their diversity, most water rights conflicts are between government and customary law. All the stakeholders in these conflicts believe that legitimate authority and law are on their side. Learning how each stakeholder understands these rights is a determining factor for analyzing the conflict and seeking answers.

## 6 THE CRIMINALIZATION OF INDIGENOUS WATER STRUGGLES AND LIVELIHOOD DEFENCE: THE POLITICAL CONSTRUCTION OF 'ECOLOGICAL TERRORISM'

Of all the Andean countries, the criminalization of social protest has reached the most alarming levels in Peru and Colombia. In Peru, this dates back to the 1990s, when the authoritarian government of Alberto Fujimori issued a series of repressive norms and

suspended a number of civil and political rights in response to the armed uprising by the Communist (Mao-ist) Shining Path organisation. Although Shining Path, along with other smaller subversive groups, has been defeated, this so-called anti-terrorist legislation is still being used to stifle protests and persecute Indigenous leaders and societal activists, even under the democratic governments of Alejandro Toledo (2001–2006) and Alan García (2006–present).

In 2007, during García's second administration, Congress empowered the president to legislate without any prior debate. Eleven legislative decrees were enacted restricting people's fundamental rights. People can be held incommunicado for longer periods of time, and penalties have been raised disproportionately. Police and military personnel can use their weapons with impunity in social confrontations, even if demonstrators are killed.<sup>48</sup>

In general, the justification used by most Andean governments is that anyone opposing the plunder and takeover of natural resources by large extraction companies is betraying the country, which depends on these investments for its development. The official view is that the nation's progress is linked to advancing extractive investments. The belief is that the Indigenous 'don't understand' this situation but are being manipulated or have been infiltrated by subversive agents or by rival countries in the region. Such claims can be found in articles published by Peruvian President García in several newspapers under the heading 'Dog in the Manger', stating that underground resources in Indigenous territories belong to all Peruvians and that people protesting by blocking highways and rivers or occupying other facilities are terrorists disguised as ecologists, who refuse to accept Peru's development. The president accuses the protestors of manipulating and fooling the Indigenous, taking advantage of their poverty and ignorance. The term 'ecological terrorism' was coined.

As a result, the criminalization of social protest has intensified. In 2008, the Majaz mining company in Peru accused and prosecuted as terrorists 36 people who opposed the beginning of mining operations without agreement from the people living in the affected territories. Of the 36 accused, nine were rural community leaders, eight district mayors, four Indigenous activists, three defence front leaders, seven rural security activists, four staff of an NGO and one priest. In June 2009, a protest by Amazon Indigenous people against laws affecting their rights to natural resources in their territories, which had been decreed without any prior consultation, unfortunately led to a confrontation in which both local residents and police suffered many casualties. The government reacted by calling Indigenous leaders terrorists, forcing several of them to seek asylum in Nicaragua while others are under arrest or facing trial for these charges. The criminalization of protests is part of the construction of a new charge we must pay attention to: eco-terrorism.

47 W Assies and A Gundermann (eds) *Movimientos Indígenas y Gobiernos Locales en América Latina* (Universidad Católica del Norte, El Colegio de Michoacán, IWGIA, Santiago de Chile 2007); Guevara-Gil 'Official Water Law versus Indigenous and Peasant Rights in Peru' (n 29).

48 W Ardito, R Peñafiel and K Pinedo *Serios Peligros para los Derechos Humanos. Los 11 Decretos del Gobierno de Alan García* (APRODEH Lima 2007).



## 7 CONCLUSION: THE DEMAND FOR LOCAL RIGHTS RECOGNITION AS A STRUGGLE FOR RESOURCES AND LEGITIMACY

Community water control in Indigenous and peasant territories harbours a tremendous diversity of 'living water rights'; normative frameworks and repertoires which are seldom understood by western or Latin American governments and schools of water policy thought. The latter focus almost exclusively on 'modern' water laws and their theoretically optimal relation to 'advanced' water technology and 'should-be' (often neo-institutional) policy-models. In most water governance reforms, the effective rule of law is considered to be both the instrument for planned change and its final objective.<sup>49</sup> Since local practice is judged according to this objective, the reality of water rights and how they function in local and Indigenous communities is neglected. However, comprehending users' reasoning and Indigenous expressions of water rights – and the ways in which official law is used as a strategic resource – is fundamental to understanding actual water management, Indigenous claims for 'water rights' and livelihood sustainability, and the actions users develop to defend their territories.

Recently, more attention has been paid to customary and Indigenous culture and rights systems in the Andean region. Most countries have accepted international agreements and are working towards constitutional recognition of ethnic plurality and multiculturalism. Ratification of the International Labour Organization (ILO) Convention 169, on Indigenous and Tribal Peoples in Independent Countries, is an important example. Over the last decade, changing constitutions in the Andean countries, ratifying their multicultural roots and peoples, is another. However, reflecting such general agreements in more concrete water legislation (or in actual policy practice) is difficult. One major problem is political power games and structures, which mean that context-specific local and Indigenous forms of water management (especially forms of autonomy and decision-making rights) tend to be denied. The imposition of bureaucratic nationwide regulations, or adhesion to universal market prescriptions, fiercely challenges local (collective) water rights frameworks and their dynamics.

One important challenge is related to the notion of 'legal recognition'. When dealing with the issue of rights recognition and thus the recognition of legitimacy of legal hierarchies, it is crucial to distinguish between analytical-academic and political-strategic recognition. In an analytical sense, legal pluralist 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 multiple existing legal frameworks. It rather concentrates on the academic quest to find out how plurality is ordered. In political terms, however, recognition implies a hierarchy among 'recognizers' (accredited by legal powers) and 'the recognized' (subordinate or to be subordinated cus-

tomary laws).<sup>50</sup> While the official legal structure of the recognizers is often based on dominant interests, it also offers Indigenous water user groups the chance to devise strategies for social struggle and progressive change.

The strategic political question regarding whether and how this plurality is (or is to be) embedded in a political and legal hierarchy, taking into account existing power structures that establish the faculties and properties of the recognizers and the recognized, is fundamental to Indigenous water struggles. 'Recognition' is a strategic but also dangerous concept that may support or frustrate local rights struggles and may either challenge or reinforce domination practices. Too often, 'recognition policies' are permeated by 'recognition politics' aiming to discipline local and Indigenous rights according to established hierarchies and powerful interest groups.<sup>51</sup> Indigenous and other hybrid local sociolegal repertoires make sense only in their own contexts, while national laws demand general applicability. How can 'fossilizing' customary, peasant and Indigenous rights systems in static, universalistic national legislation in which local principles lose their identity and capacity for renewal, making them useless, be avoided? How can assimilation and subsequent marginalization of local rights frameworks be avoided when they are legally recognized? How is it possible to avoid recognition by law of only those 'customary' or 'Indigenous' principles that fit into state legislation or the dominant society's interests, while the complex variety of 'disobedient rules' is made illegal and silenced after legal recognition? The answers to questions such as these indicate directions where frameworks of collective rights and rule-making autonomy for local Indigenous collectives are combined with establishing supralocal institutions and rules guaranteeing protection for individual and minority rights.

Experience shows that legal recognition tends to have an important effect on the daily lives of Indigenous and peasant populations. For example, neoliberal water laws (eg in Chile) or recent top-down instrumental water policies (eg in Ecuador and Peru) have not only neglected customary water-management forms but have also had concrete and often devastating consequences for the poorest people in society. The negative impact of applying existing law has often caused Indigenous and grassroots organizations to engage fiercely in the legal battle. It is not just a question of establishing the 'right laws and policies'. As Moore<sup>52</sup> once argued, formal rights and rules cannot act by themselves; only the forces and relationships of society can turn legal instruments into societal practice. In elite-dominated countries, the poorest people often see protest as necessary to make their demands heard.

To counteract encroachment on their livelihoods, territories and water sources, and to defend themselves

<sup>49</sup> *ibid.*

<sup>50</sup> Boelens 'The Politics of Disciplining Water Rights' (n 2).

<sup>51</sup> S F Moore *Law as Process. An Anthropological Approach* (Routledge and Kegan Paul London 1978).

<sup>49</sup> D Roth et al *Liquid Relations* (n 41).

against the criminalization of their rightful protests by dominant discourse and 'national security laws', Indigenous communities and peasant federations in the Andes do not only engage in legislative struggles or open conflicts. The continued application and proliferation of 'Indigenous water rights frameworks' in everyday water control – mostly not formally

sanctioned, or even illegal – is a powerful way of contesting dominant power structures and fostering claims to water resources and legitimacy. Indigenous and peasant communities and water-user collectives engage in political-strategic action to defend water access rights, define water control rights, legitimize local authority and confront powerful discourses.