



**The discourse of Indigenous Land Rights and Regional Autonomy in
Nicaragua: A matter of cultural identity**

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“Yo soy de Nicaribia, Nicaribe soy – I am from Nicaribbean, I am Nicaribbean”

Carlos Rigby, Creole Poet

I. Introduction

The decision of the Inter-American Court of Human Rights against Nicaragua in the *Awás Tingni Case* of 2001 marked a precedent for indigenous rights. Moreover, it challenged the liberal notion of the right to private property in acknowledging the existence of alternative forms of property like the communal land ownership practiced by the Mayagna community in the Nord of Nicaragua's Atlantic Coast. The recognition of the right to communal land property by an international court was celebrated by human rights advocates all around the world as a victory for indigenous groups and. At the same time it exposed the challenges linked to the materialization of such rights.

Surprisingly, Nicaragua's domestic legal system of protection comprises far-reaching legislation in term of self-determination and indigenous land rights.¹ While disregarding the existence of a favourable legal framework, the Nicaraguan government has often violated its own constitution, the autonomy statute and several international treaties. Even though the Nicaraguan government has complied to some extent with the land demarcation demanded by the Inter-American Court for Human Rights, indigenous communities are still unable to enjoy their rights. Autonomy is not independent as it should be, while political influences, corruption and the greater influence of national parties in both Regional Councils show the flaws within the institutional autonomy. This raises the question whether territorial autonomy, which first served the purpose of conflict resolution in the 1980's, is still the most suitable model for guaranteeing indigenous land rights.

This essay will analyse how the model of autonomy present in the autonomous regions of Nicaragua has failed to guarantee the rights of the indigenous population and ethnic groups by imposing decision making processes unfamiliar to the popular tradition. Moreover, this has led to the creation of peripheral satellites that still foster the central government's interests. I will argue that the cultural, historical and ethnical differences of the Pacific and the Atlantic make the territorial autonomy necessary for the realization of indigenous land rights, whereby the latter should primarily be understood

¹ Binder 2004: 251.

the means by which multi-ethnic political arrangements might be remodelled. The analysis from the perspective of indigenous land rights will allow an in-depth understanding of the struggle for self-determination and recognition of a multi-ethnic Nicaraguan identity.

II. The Atlantic Coast: A history of resistance

In order to understand indigenous land rights in the Nicaraguan context, it is crucial to outline the historical developments that led to the complex dynamics inherent to the construction of the “costeño” (coastal) identity and the arrangement of land ownership in the Atlantic Autonomous Regions. This complexity is directly related to the divided history of the Pacific and the Atlantic coastal regions of Nicaragua and the rather conflictive relations between the *mestizo* central government, and the indigenous and afro-descendant (Creole) communities of the Atlantic region. Moreover, outlining the background of indigenous land rights in the light of the historical development of the Atlantic Coast of Nicaragua is essential to understanding the indigenous struggle for the assertion of rights as an antagonistic issue between Pacific and Atlantic that transcends ethnic differences.

1. The British Protectorate and the reincorporation of the Moskitia

In contrast to the successful Conquista and the establishment of the Spanish colonies in the Pacific region of Nicaragua, the Atlantic Coast and its people preserved certain sovereignty because they resisted the Spanish colonization and maintained good relations with Great Britain.² These relations were based on alliances against the Spaniards such as the British Protectorate of the Kingdom of the Moskitia until 1860 in which the British had recognized the Miskito’s rights to their land, giving them economic power and thus ensuring their loyalty to Great Britain.³ “[T]he Spanish demanded assimilation and, hence, the destruction of traditional ethnic ties, whereas the English, whose religion was arguably more expedient, and hence more tolerant,

² Epperlein 2001: 633 ff.

³ St. Clair 2008: 5 ff.

permitted the maintenance of indigenous cultures”⁴. This “tolerance” towards indigenous cultures was mainly motivated by the economic interest of the British, which focused on trade relations while maintaining a strong influence in the region, rather than conquering the population.

Through the Managua Treaty of 1860 Great Britain recognized the sovereignty of the Nicaraguan State over the territory of the protectorate. Moreover, the year 1905 finally marked the withdrawal of the British from the region after the signature of the Harrison-Altamirano Treaty that “reincorporated” Moskitia to Nicaragua.⁵ A Nicaraguan historian, Edgard Palazio Galo, makes a hard criticism towards the “reincorporation” of the territory of the Moskitia. The military occupation of Moskitia in 1894 by general José Santos Zelaya, president of Nicaragua, was violent and, as Palazio argues, was not genuinely driven by a patriotic aim of unification. It was rather determined by an economic interest that had a strong racial character since the “black” and “indio” “other” was never considered part of Nicaragua and thus had to be fought against.⁶ This approach serves the understanding of the historical resistance of the Atlantic regions against the Pacific. The central government of the Pacific compulsorily annexed the Moskitia in a military move that could be understood as a neo-colonialist expansion. Subsequently, the discourse of the “reincorporation” should be problematized as it was an invasion of territories that historically had been sovereign. Even though the latter Harrison-Altamirano Treaty of 1905 granted some communal land titles, it classified the rest of indigenous lands as National Land-state property⁷ and thus forced the indigenous and ethnic communities of the Atlantic to integrate into the Nicaraguan nation-state. As the Council of Elders stated in its letter to the Organization of American State in 1998, “this colonization [the Spanish] meant the disappearance of all indigenous nations, culturally speaking”⁸. Once again, it is important to bear in mind that the Spanish colony could never access and colonialize the Atlantic region and consequently, its indigenous people could maintain to a greater extent their own cultural heritage. The

⁴ Gabriel 1996: 163.

⁵ Revista Envío, No. 4, 1981.

⁶ Palazio 2000.

⁷ Howard 1998: 20.

⁸ Translation from Spanish by the Author, in Guill/Scott 1998.

early recognition of the right to self-government of indigenous groups in Nicaragua by the Austrian Emperor in 1881 still remains a highly interesting historic event. In his arbitral decision he stated that “[t]he sovereignty of the Republic of Nicaragua, recognized in [...] the Managua Treaty of the 28 January 1860, is not full and unlimited with regard to the territory assigned to the Miskito Indians [...], but limited by the self-government recognized by the treaty”. He adds, “[t]he Republic of Nicaragua has no power to grant concessions for exploitation of natural products of the territory assigned to the Miskito Indians. This power corresponds to the government of the Moskitia”⁹.

In addition to the British influence, which marked political structures such as the Kingdom of the Moskitia and the Creole Language of the afro-descendants, a second actor was crucial in the development of a differentiated culture, namely the Moravian Church. The evangelization started in 1847 and influenced the region’s culture e.g. by being the first to write down the Miskito Language and establish Moravian schools and other welfare institutions.¹⁰ This most certainly fostered the dichotomies between the two regions: the mestizo catholic Pacific contrasting the indigenous and afro-descendant protestant Atlantic regions. The Moravian Church will later also play a crucial role on which I shall elaborate in the section regarding the Sandinista Revolution.

2. The Sandinistas Revolution: A cultural-insensitive drive for equality?

The complexity of land ownership in the Atlantic regions was deepened in the 1980s when the revolutionary Sandinista government granted land titles to individual peasants and co-operatives in a rather arbitrary manner.¹¹ The logical consequence of this practice was an overlapping with existing communal land. Nevertheless, the tensions with indigenous communities in the Atlantic Coast were rather of political character, than an issue of land dispute.

The relationship between the revolutionary Sandinista Government and the indigenous communities, mainly the Miskitos, was not of a negative nature from the beginning on. The fall of the Somoza Dynasty represented a victory for the oppressed Nicaraguan

⁹ Idem.

¹⁰ Gabriel 1996: 164.

¹¹ Howard 1998: 20.

population, including the population of the Atlantic Coast. It fostered a sentiment of justice, which promoted a revolutionary thought. Albert St. Clair, former vice-director of the University of the Autonomous Regions of the Nicaraguan Caribbean Coast – URACCAN and a participant of the agrarian reform of the 1980s, argues that the resistance of the indigenous communities and the population of the Atlantic Region backfired on the Sandinistas. The revolutionary discourse itself was an empowering factor leading to the demand of indigenous rights and the general drive for self-determination.¹² In the early months of the Sandinista government the political indigenous alliance of Sumus and Miskitos renamed itself to MISURASATA, meaning Miskito, Sumus, Ramas and Sandinistas all together. The latter and the Sandinistas shared an anti-imperialistic ideology¹³, with the name of the organization itself suggesting cooperation. However, as John Gabriel from the Department of Cultural Studies at the University of Birmingham points out in his analysis on the mobilization of ethnicity and the struggle for autonomy in the Atlantic region, the Sandinista’s revolutionary project represented the struggle of the “national urban working and peasant classes” and hence, failed to properly integrate the concerns of indigenous groups into its programmes.¹⁴ “In the western Nicaragua, the emergence of a politically dominant Mestizo class diminished ethnic consciousness, as did the development of a national class-based liberation struggle, most recently expressed in the formation of the Sandinista National Liberation Front (FSLN) in 1972”¹⁵.

The failure to address the issues affecting the indigenous communities was acknowledged by the Sandinista Government of the 1980s. A study of the Investigation and Documentation Centre for the Atlantic Coast (Centro de Investigación y Documentación Sobre la Costa Atlántica, CIDCA) published in the left-wing magazine ENVIO, tries to argue that the hostilities of the population of the Atlantic Region towards the central government of the Sandinistas was due to the manipulation of the errors committed by the Sandinistas when they tried to bring the revolutionary changes to the Atlantic Coast in a rather “precipitated matter and with little sensitivity in regard

¹² Interview (in Spanish) with Albert St. Clair, Vienna/Puerto Cabezas, 23 May 2014.

¹³ Baracco 2011: 122.

¹⁴ Gabriel 1996: 164-165.

¹⁵ Cf. Supra note 12.

to traditional cultural forms and the rising sense of indigenous dignity”¹⁶. This study aimed at dismissing Reagan’s genocide accusations as well as those from several Miskito leaders against indigenous communities located in the northern border to Honduras in the early 1980s. A report by the Inter-American Commission of Human Rights in 1983, on the situation of a Miskito population sector ¹⁷ included the observations from the in loco visit of the Commission’s delegates in 1982. The results included information confirming the destruction of houses and lands, as well as the killing of animals belonging to the communities ¹⁸. Furthermore, and even more revealing, the Commission’s Delegation determined that the Miskitos under custody for counterrevolutionary activities were subject to degrading treatment and were denied medical treatment.¹⁹

The accusation for genocide of the Miskitos and other indigenous groups, e.g. Mayagnas, was brought to the public Prosecutor in 2006 and included charges for systematic homicides, torture and enforced disappearances during the Sandinista Military’s resettlement action of 1981 and 1982, which affected around 8 500 persons. The case was dismissed in 2010 under the argument that there were no evidences for deliberative and systematic human rights violations and that at that time there was a civil war going on in the country. The dismissal of the case led to its presentation to the Inter-American Commission for Human Rights.²⁰ This case is called “Navidad Roja” and, whereas it was a systematic human right violation or a violation by negligence (or as the Sandinista like to denominate it “lack of experience”) committed by the central government, it represents a traumatic experience which even deepened the already existing antipathy towards the central government. This essay will not further address whether the “Navidad Roja” should be understood as genocide or not as it is a topic for a separate investigation. Nevertheless, the commission of serious human rights

¹⁶ Translation from Spanish by the Author. Revista Envio, no. 36, 1984.

¹⁷ Comisión Interamericana de Derechos Humanos, OEA/Ser.L/V/II.62 doc. 10 rev. 3, 1983.

¹⁸ The official version of the Sandinista Government was that they did so in order to avoid the counterrevolutionary groups “CONTRAS” to use these houses and lands as strategic points. Revista Envio, No. 36, 1984.

¹⁹ Comisión Interamericana de Derechos Humanos, OEA/Ser.L/V/II.62 doc. 10 rev. 3, 1983.

²⁰ Romero 2010.

violations is a key element in the discussion of territorial autonomy as a settlement mechanism, even a form of remedy, when human rights violations are committed against a population settled in a specific territory.

Finally, one aspect that should be taken into consideration is the role of the Moravian Church. The latter had gained great influence, among others, due to the fact that the central government had neglected the region (during the Somoza dictatorship the indigenous communities were completely ignored²¹) and thus, the welfare institutions established by the Moravians fostered good relationships to the population. In her analysis on indigenous mobilisation and Protestantism, Hawley takes upon a crucial issue linked to the peaceful cultural resistance against the Mestizo hegemony. When the Nicaraguan state started to build schools and pushed for a Spanish education, the Miskito reacted by only reading books in their native tongue. The Moravian Church was the only institution which had written down in Miskito language, and thus the only texts available where Christian.²² The writing down of the Miskito language by the Moravian Church should not be underestimated, since it reinforced the consciousness of the indigenous identity of Miskitos and established a strong link of this identity to protestant religious believes.

The relationship with the Sandinista revolutionary central-government and the Moravian Church during the civil war in the 1980s was anything but harmonious. In this period the resistance of the Miskito against the central government, and more specifically the revolutionary project of the Sandinistas, had turned into an armed conflict. If one considers the high involvement of the Moravian Church in political and cultural indigenous institutions²³, a link to the organized armed resistance of Miskitos against the Sandinista government could be hardly dismissed. Under this justification the Sandinistas had targeted the Moravian Church as they were considered contra-revolutionary. One of the biggest errors of the Sandinistas was to shut down the Moravian Hospital in Puerto Cabezas, the biggest city in the North Atlantic region, for

²¹ Binder 2004: 25.

²² Hawley 1997: 117.

²³ Once again, this can attributed to the disregard of the Nicaraguan state in issues related to the Atlantic Coast and its people. Additionally, the withdrawal of US companies in the 1960's enhanced the monopoly of the Church in the cultural and economic sphere. Hawley 1997: 115.

military purposes.²⁴ This affected the entire population, rather than indigenous groups in particular. Moreover, the access to health care was obstructed, which further encouraged the discontent of the population with the new government. The persecution of the members of the Moravian Church came along with deterioration of relations with MINSURASATA, whose leaders, Brooklyn Rivera and Stedman Fagoth both had become Moravian in their first years of political leadership. Rivera and Fagoth were accused of counter-revolutionary activities and arrested, then released after negotiations.²⁵ It is important to note at this point that the majority of indigenous communities or individuals participation in the insurrection against the Sandinistas were Miskito, and that other ethnic groups like the Mayagna cooperated with the Sandinista government during the 1980s.²⁶

The revolutionary government of the Sandinistas in the 1980s was somehow a paradox period for indigenous rights. On the one hand the overthrow of the Somoza dictatorship was a momentum for indigenous peoples to assert their rights. On the other hand, national security had become a priority for the Sandinistas when the civil war against the Contra (counterrevolutionaries) broke out, leading to violent resettlement of indigenous communities and the imprisonment of many of their leaders. Nevertheless, the Sandinistas promptly recognized the need for a truce with the indigenous communities and the overall population of the Atlantic region. As of 1984, the Sandinista government started a process of reconciliation with the indigenous communities by offering unconditional amnesty to those who had taken up arms, and finally by announcing its support for the autonomy of the entire Atlantic coast. The government established the National Commission of Autonomy which was responsible for the required negotiations. This commission encountered certain resistance, which ultimately led to the unilateral formation of another commission in the regions of the Atlantic coast, which was later recognized by the central government.²⁷ The creation of this latter commission and the acceptance of the central government are remarkable for

²⁴ Interview (in Spanish) with Albert St. Clair, former vice-director of University of the Autonomous Regions of the Nicaraguan Caribbean Coast – URACCAN, Vienna/Puerto Cabezas, 23 May 2014.

²⁵ Hawley 1997: 125.

²⁶ St. Clair 2014.

²⁷ Dunbar 1987: 45.

two reasons. First, the population of the Atlantic coast invoked the principle of self-determination by creating their own representative institution to deal with the negotiations and by rejecting the commission imposed by the central government. Second, the central government was forthcoming in accepting the new body as well as the role of the original commission as an advisory body. It is important to point out that, even though the negotiations on autonomy were of no precedent and a crucial step towards the realization of indigenous rights, it was primarily conceived as a way out for the armed conflict and was thus limited.

By January 1987 the central government had passed a new constitution which recognized the self-determination of peoples and served as prelude for the Autonomy Statute (Law 28) in September the same year. I shall discuss these documents in the light of indigenous land rights and the principle of self-determination in the section on the domestic legal framework.

3. 1987 onwards: Autonomy regime?

Although the Autonomy Statute was critical for the peace process in the Atlantic regions, it was not until 1990 that the civil war ended through general democratic elections when the Sandinistas were defeated. Even though the two Regional Councils had been established according to the Autonomy Statute, the autonomy itself remained a pure formality. Until 2003 there was no law that specified any regulation on the land tenure. The Autonomy Statute had somehow appeased the population of the two now autonomous regions of the Atlantic, RAAN-North and RAAS-South (Regiones Autónomas del Atlántico Norte y Sur). However, the new regime led to confusions in matters of competences and uncertainty about the role of the new institutions. Unfortunately the territorial autonomy has failed in many cases to efficiently protect indigenous rights. I will illustrate this on the case of Awas Tingni and the dynamics and constraints of autonomous institutions.

III. Self-determination and territorial autonomy: an theoretical approach in the international context

The Nicaraguan Autonomy model can be considered very advanced when put in an international context since it does not limit itself to decision-making mechanisms bound to a specific territory. Moreover, it builds on a direct link between territorial autonomy and indigenous rights by recognizing for example communal land ownership in its Autonomy Statute. Thus, and for the sake of a better understanding of the issues discussed in this paper, I shall outline a general introduction of the concepts of self-determination and autonomy in the light of indigenous peoples' rights.

According to Northcott, most of the States have been reluctant to accepting diverse forms of self-determination because of “deep-seated fears of threats to their territorial integrity and political stability, fuelled by racist and paternalistic ideologies”²⁸. To many states, self-determination equals secession and the loss of natural resources and with it also political power. Even though self-determination will always lead to power limitations for the state, it is essential to overcome this almost paranoiac fear of secession in order to open the space for dialogue in which the right to self-determination of indigenous peoples (and other peoples) is not seen as a threat to the nation-state's integrity.

The immediate link between state integrity and state sovereignty is an additional component. In democratic regimes the state sovereignty derives from the people and thus is an expression of popular sovereignty. Conveniently, one example of the limitation to state sovereignty concerning indigenous rights, specifically with regard to land rights, can be found in the Austrian Emperor's arbitrary decision of 1881 concerning the Nicaraguan Miskito territory.²⁹ Nevertheless, “the exercise of State sovereignty has led to the unwarranted and unjustifiable deprivation of human dignity”³⁰. Paradoxically, state sovereignty has also been decisive in developments closely linked to human rights as former colonies appealed to the sovereignty of the new state to regain control of their natural resources and resist violent foreign

²⁸ Northcott 2012: 75.

²⁹ Cf. supra note 8.

³⁰ Araujo 2000: 1480.

occupation.³¹ Instead of conceiving state sovereignty as a hindrance to indigenous (land) rights, I suggest an approach that transfers the idea of sovereignty to the right of indigenous peoples to regain power over their ancestral lands not from the European colonial powers, but from the internal and more recent national colonizers without compromising the state's integrity. This is also what Northcott suggests, namely a strategic reconceptualization of self-determination in which autonomous arrangements should be included.

The complexity of the issue of self-determination starts with the question whom to grant these rights since there is no consensus on which groups fall under the categories of "peoples", "indigenous" or "minorities". International Human Rights treaties started dealing with minority rights at an earlier stage. An example for it is the Article 27 of the International Covenant on Civil and Political Rights (ICCPR) of 1966: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess their own practice their own religion, or to use their own language". The ICCPR, although calling for the respect for minority rights, does not contribute to the definition of what a minority group is. The absence of a definition or specific regulation to determine a minority will probably remain since in this way it hinders to impose ethnic, racial, cultural or religious categories to a group of persons. In the last two decades there has been an increase of the recognition of the minority right of self-identification, which grants the individual the freedom to choose whether to belong to a minority or not.³² The lack of a definition and the ambiguous phrasing of certain international Human Rights treaties and documents can also be explained by diversity of indigenous communities around the world³³, which makes it almost impossible to find a common basis for the development of a universal, non-regional instrument.

³¹ Northcott 2012: 78.

³² See in particular articles 30-37 of the "Document of the Copenhagen Meeting of the Conference on the Human Dimension" CSCE/OSCE 1990 and the article 3 of the "Framework Convention for the Protection of National Minorities" of the Council of Europe 1995.

³³ Northcott 2012: 76.

The individual right to identify oneself with a minority or specific indigenous group, and subsequently acquire a set of rights, is a matter of cultural identity which will be central in further analysis on the issue of Nicaraguan-Caribbean, or as the creole poet Rigby says, a “Nicaribbean” identity. Even though indigenous people do classify as minorities, they assert rights that go beyond minority rights. As Lapidoth argues:

“Indigenous populations do not consider themselves as minorities because their forefathers inhabited the respective countries before the arrival of those who later became the majority, and they further claim rights which go beyond those recognized to minorities. In particular, they emphasize their right to traditional economic systems, to land and its resources, and they demand to maintain their traditional way of life within the framework of self-government or autonomy”³⁴.

The struggle for land rights does not limit itself to the right to their natural resources; it is most certainly so vehement because of the other rights that derive from land tenure. Subsistence is only a fragment of the need for the protection of land rights. Most of all it is about preservation of the cultural identity. Indigenous peoples have a special bond to their lands since these have spiritual meanings.³⁵ As the Mayagna Charly Webster Mclean Cornelio stressed in his testimony before the Inter-American Court in the *Awas Tingni* Case, these lands are sacred, “[w]hen the inhabitants of Awas Tingni go through these places, which date 300 centuries, according to what his grandfather said, they do so in silence as a sign for respect for their dead ancestors, and they greet Asangpas Muigeni, the spirit of the mountain, who lives under the hills”³⁶. In the same judgment, Stavenhagen Gruenbaum, an anthropologist stated that, “[p]hysical health, mental health, and social health of indigenous peoples is linked to the concept of the land. Traditionally, indigenous communities and peoples of the various countries of Latin America have had a communal concept of the land and of its resources”³⁷. This close relationship to land changes the ways in which land is perceived, namely not as a resource but as part of life itself. This has serious implication for the possibility of

³⁴ Lapidoth 1994: 273.

³⁵ Binder 2005: 211.

³⁶ *Mayagnas Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, 2001. p. 20.

³⁷ *Idem.*, p. 24.

communities resettling for any given reason. Their ancestral lands cannot be replaced by other lands or by monetary compensations.

IV. Domestic Legal Framework

As stated in the introduction of this essay, the legal protection for indigenous rights and the autonomy formally granted by the Nicaraguan legal system is impressive. The comprehensive legal reforms carried out by the Sandinista in the field of regional autonomy transcend indigenous land rights and the recognition of communal land, but also confirm the right to self-determination of the entire population of the Atlantic coast.

Nicaragua has ratified most of the central international human rights treaties, including the Indigenous and Tribal Peoples Convention number 169 of the International Labour Organisation.³⁸ Because of the lack of an adequate human rights legal structure, after the revolution in 1979 “the new leaders of Nicaragua embraced international laws as fundament basis of domestic law. Consequently, indigenous peoples of the Americas looked with hope to the Nicaraguan revolution to establish precedents for positive state initiatives in favour of indigenous rights”³⁹. By outlining the existing legal provisions I will underline their potential in terms of the respect, the protection and the fulfilment of human rights. I shall do so by using the decision of the Inter-American Court of Human Rights in the Awas Tingni Case in 2001 as a turning point.

1. Nicaraguan Constitution and Autonomy Statute of 1987

The Nicaraguan Constitution of 1987 recognizes Nicaragua’s ethnic pluralism and the respect for self-determination. All provision regarding indigenous rights and the Atlantic regions have remained in force until the present day. In its very fundamental principles the constitution explicitly targets indigenous land rights by stating that:

³⁸ The ILO convention No. 169 was ratified in 2010, and while Nicaragua is party to the American Convention of Human Rights since 1979 it did not accepted the jurisdiction of the Inter-American Court of Human Rights until 1991. For more details on the international treaties to which Nicaragua is party: <http://www.cidh.oas.org/basicos/Basicos3.htm>, http://www.ilo.org/dyn/normlex/es/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102780

³⁹ Dunbar 1987: 43.

“The State recognizes the existence of indigenous peoples who enjoy the rights, duties and guarantees designated in the Constitutions, and especially those to maintain and develop their identity and culture to have their own forms of social organization and administer their local affairs, as well as to preserve the communal forms of land property and their exploitations, use, and enjoyment, all in accordance with the law. [...] The various forms of public, private, associative, cooperative, and communal property shall be guaranteed and encouraged without discrimination in order to produce wealth and shall serve social needs by operating freely”.⁴⁰

The constitution also dedicates two chapters to the rights of the communities of the Atlantic Coast. Considering the fact that the constitution of 1987 came into force in January before the Autonomy Statute of September the same year, it shows that the central government was already working towards the autonomy of the Atlantic regions. All of the provisions have a strong focus on communal land rights and the exploitation of natural resources. As article 89 underlines again the recognition of “communal forms of land ownership of the communities of the Atlantic Coast. Equally it [the State] recognizes their enjoyment, use and benefit of the waters and forest of their communal land.” As of the political powers and the decision-making process the constitution guarantees the free election of authorities and representatives of the Atlantic regions.⁴¹ Finally, the constitution introduces a form of veto right for the Regional Councils established by the Autonomy Statute of 1987.⁴²

“[I]n Latin America and other regions of the world, the Indian populations having [!] been subjected to a process of impoverishment, segregation, marginality, assimilation, oppression, exploitation, and extermination are demanding a deep going political, economic, and cultural transformation so that they can effectively achieve their demands and have their aspirations met.”⁴³

The wording of the introduction to the Autonomy Statute is one that integrates the characteristically Sandinista discourse of the struggle of the oppressed. However, it shows certain commitment to overcome the oppression in which indigenous communities have lived in Nicaragua. This statute creates a regime of regional autonomy not only for the indigenous peoples (Miskitos, Mayagnas, Rama), but for all

⁴⁰ Nicaragua's Constitutions of 1987 with Amendments through 2005. Oxford University Press.

⁴¹ Art. 180. Nicaraguan Constitution. Cf. supra note 31.

⁴² Art. 181. Nicaraguan Constitution. Cf. supra note 31.

⁴³ Nicaragua Autonomy Statute, Law 28, September 1987.

inhabitants of the regions including the afro-descendant Creole and Garifuna⁴⁴ population and Mestizos who have lived in the region for many generations.

Following the Statute, the northern and southern Regional Councils, as well as regional coordinators and municipal authorities, were established. Finally, and central to the discussion on land rights, the Statute reinforces what has already been established through the Constitution. It reaffirms that the “communal property is constituted by the land, waters and forests which traditionally has [!] belonged to the communities of the Atlantic Coast”. It goes even further by determining that communal lands are indissoluble, for they cannot be donated, sold, leased nor taxed, and that they are eternal.⁴⁵

2. The Awas Tingni Case

When assessing the Nicaraguan Constitution and the Autonomy, as Binder says, one would assume that it would be sufficient to protect indigenous land rights. In her analysis titled “The case of the Atlantic coast of Nicaragua: The Awas Tingni Case, or realizing that a good legal system of protection of land rights is no guarantee of effective implementation”, she points out the weak implementation of this “outstanding” legal provisions. I shall integrate her analysis into the further discussion of the Awas Tingni case and other constrains of the Nicaraguan model of territorial Autonomy.

In the early 1990s the Nicaraguan government engaged in a trilateral agreement⁴⁶ between the logging company, MEDENSA, the central government and the Mayagna community of Awas Tingni. This agreement showed great participation of the community, which would benefit from sustainable timber harvesting and also obliged the government to initiate a demarcation process. It looked like a triple win situation

⁴⁴ Garifunas are indigenous peoples whit afro-descendant and thus are not ancestral indigenous communities because their origin is one of African slaves brought by the British empire.

⁴⁵ Art. 34. Autonomy Statute, Law 28. Nicaragua, September 1987.

⁴⁶ Awas Tingni was assisted by the World Wildlife Fund (WWF) and the University of Iowa by means of a team of attorneys and a forestry expert. Anaya/Grossman, 2002: 3.

until the central government signed another concession with a second logging company, SOLCARSA, without consulting the Awas Tingni Community in 1996.⁴⁷

Since the Awas Tingni community already counted with great support from an international legal team, it was very quick in reacting to this violation of the right to their communal land and the overall illegal decision of the central government. Even before the concession was signed the community brought the case to the competent court of appeal who then dismissed the emergency relief (*amparo*)⁴⁸ demanded by the community to stop the signature of this concession. This led to the petition to the Inter-American Commission on Human Rights alleging several violations including the right to property and to cultural integrity. Although the case was being considered at the time by the Inter-American Commission, two members of the Regional Council of the North supported the community and succeeded when the Nicaraguan Supreme Court decided to nullify the concession granted to SOLCARSA because it lacked the approval of the Regional Council (North) and thus was unconstitutional. However, it was the Regional Council who tried to give the concession green light by a post hoc ratification, which failed because members of the Council itself filed a request for execution of the prior Supreme Court's decision of unconstitutionality.⁴⁹

This first victory of the Awas Tingni community within the domestic legal system was regrettably limited to nullification of the concession for SOLCARSA and thus was no sustainable solution. Nevertheless, the Supreme Court's decision and the engagement of two members of the Regional Council should be acknowledged as proof that the regional autonomy can indeed protect indigenous land rights. At the same time it also revealed one of the biggest constraints of the regional autonomy, namely the personal interests of Regional Council members who had been supporting the central government in pushing for the concession instead of representing the interests of the community. Binder stresses the issue of the deficient representation of the indigenous communities by the Regional Council by attributing it to the financial pressure by the central

⁴⁷ Anaya/Grossman, 2002: 3 -4.

⁴⁸ The Nicaraguan legal system foresees the "amparo" remedy which protects constitutional rights and controls the application of norms in specific cases. See also GARCIA PALACIOS, Omar A., *El recurso de amparo en el ordenamiento nicaragüense*, pp 201-215, in *Rev. IUS*, vol. 5, no. 27, 2011.

⁴⁹ Cf supra note 37, p. 7-8.

government, as well as to the inexistency of a proper communication between the indigenous communities in the rural areas and the Regional Council.⁵⁰

In the meantime, the Inter-American Commission decided to file a complaint before the Inter-American Court of Human Rights, because the Commission was “dissatisfied with the continued lack of action by the Nicaraguan government to demarcate and otherwise secure Awas Tingni traditional lands”⁵¹. The rather specific claim of the Awas Tingni community to stop the concession became a broader demand to finally initiate a proper demarcation and titling process which would once and for all guarantee the community’s land rights. It also touched central issues of the regional autonomy since the Inter-American Commission was also charging Nicaragua for the violation of judicial protection; the central government had violated the autonomy of the northern Autonomous Region and the constitution by negotiating a concession without the approval of the Regional Council.

Ultimately, the Inter-American Court took the demands even further in its decision of 2001. The Court not only sustained that Nicaragua violated the rights to property of the Awas Tingni community, but also demanded that their lands and those of other indigenous communities should be demarked and titled. The struggle of Awas Tingni, which began as a matter of the state’s obligation to respect the communal lands, turned into one of the state’s obligation to protect and fulfill indigenous land property deriving from their customs and traditions. It also put into evidence that the Awas Tingni case was not a local question, but a regional and moreover global matter of recognition of the right of indigenous peoples to own their communal land as well as the state’s obligation to ensure the enjoyment of this right.

3. Law 445: Communal property regime

The Autonomy Statute of 1987 had remained a mere formality without any regulation law. It is surprising how fast the Nicaraguan government reacted to the Inter-American Court’s decision in the case of Awas Tingni, by endorsing Law 445 in 2003. Central aspects of this law are the competence of the Autonomous Regional Councils and the

⁵⁰ Binder 2005: 215.

⁵¹ Anaya/Grossman 2002: 8.

required proceedings for the exploitation of natural resources affecting indigenous lands. The law stresses the obligation of the Council to consult the communities when granting concessions or contracts and to negotiate with their traditional authorities. It excludes the possibility of displacement or resettlement of communities and foresees the equal distribution of the taxation for the exploitation of natural resources for the community, the municipality, the Regional Council and the central government. An interesting and new institution is introduced by Law 445; the National Demarcation and Titling Commission which is integrated by representatives of the Regional Council, several state officials, representatives from each of the ethnic groups and the major of the corresponding municipality.⁵²

4. Constrains of the Autonomy Regime

The central hypothesis of Larson and Lewis-Mendoza about decentralization and governance of Nicaragua's North Atlantic Autonomous Region states "that the multi-level governance has led to important new opportunities for indigenous communities to exercise their right to free determination. The overall structure would appear to be ideal: multi-community indigenous territories, with elected leaders, are titled under an autonomous, also elected, regional government"⁵³. Even though the authors acknowledge that legal ambiguity and lack of accountability makes the decision-making processes inaccessible to indigenous groups, they omit that the decision-making structures introduced by the Autonomy Statute and Law 445, though granting certain rights and recognizing indigenous structures, are structures unknown to the indigenous communities, namely the Regional Councils, the division of the territory in municipalities and the titling Commission. In the case of Awas Tingni we saw how the Regional Council disregarded the community's right to decide on its communal property. It is no rush to assume that in many cases the Regional Council has acted, and probably will act, as an extended arm of the interest of political parties ruling in the

⁵² Law 445. Law of communal property regime of the indigenous peoples and ethnic communities of the autonomous regions of the Atlantic coast of Nicaragua and the rivers Bocay, Coco, Indio and Maiz. 2003.

⁵³ Larson/Lewis-Mendoza 2012: 181-182.

central government.⁵⁴ Although corruption is not specific to the autonomy regime, but an overall problem in Nicaragua, it has considerably weakened the potential of autonomy. Indigenous leaders themselves have been involved in the illegal selling of communal land. Currently, the person responsible for land registration in the area of Puerto Cabezas (RAAN) has been suspended and is under investigation for granting titles for indigenous lands to particular persons.⁵⁵

Municipalities also divide indigenous land in administrative and political units which do not necessarily match with the territory in which a community lives. “Indigenous leaders have argued that the municipal structure was imposed by the central government and should be eliminated and replaced by territories”⁵⁶. If the process of autonomy is genuinely been taken seriously, adapting decision-making institutions to the traditions of the communities of the Atlantic, as provided in the Autonomy Statute, is essential. Additionally, the administrative body in charge of titling is mainly composed by state officials, that is, representatives of the central government. This, in turn, leads to a representation and participation gap of the communities.

V. Regional Autonomy and why it is a matter of cultural identity

Trying to answer whether regional autonomy is a matter of cultural identity or not leads us directly to the Autonomy Statute itself, as follows:

“[T]he Autonomy process enriches our national culture; recognizes and strengthens ethnic identity; respects the particular aspects of the cultures of the different Communities of the Atlantic Coast and preserves their history; recognizes the right to religious freedom; and, without deepening differences, recognizes the different identities which lay the basis for building national unity”.⁵⁷

It is true that regional Autonomy in Nicaragua has failed to a great extent to protect and fulfill the rights of indigenous peoples and other ethnic groups which culturally

⁵⁴ YATAMA, the indigenous political party led by the Miskito Brookly Rivera, who also is congressman to the National Assembly, build an Alliance with the FSLN in 2002. Treminio/Centeno 2002.

⁵⁵ Albert 2014.

⁵⁶ Larson/Lewis-Mendoza 2012: 189.

⁵⁷ Nicaragua Autonomy Statute, Law 28, September 1987.

significantly diverge from the Pacific. Consequently, one could argue that regional autonomy would not be necessary for indigenous land rights if there would be effective legal protection to these rights. This could be indeed an approach to address the protection gap of many indigenous peoples around the world, but not in the case of the Nicaraguan Atlantic region. A form of regional autonomy existed by custom even before 1987 due to the resistance against Spanish colonization, the British protectorate and the subsequent obliviousness. The Atlantic regions have been seen as the somewhat ‘backyard of Nicaragua’, which has been taken into account only when natural resources were needed, commerce relied on the Caribbean shores or as a strategic point in the combat against insurgent movements.

Regional autonomy is imbedded in the discourse of indigenous land rights because both entail a territoriality where indigenous communities or ethnic communities, like in the language of the Nicaraguan legal system, can enjoy their right to self-determination. The struggle of the indigenous peoples for the recognition of their communal land rights has been an element of the overall struggle of the Atlantic communities for recognition of their cultural identity as equal, yet heterogeneous Nicaraguans.

Certainly the Nicaraguan model of regional autonomy was established as a mean of conflict resolution during the civil war of the 1980s, but it has acquired new meanings in the last two decades. The enrichment of the national culture addressed in the provision cited above, does not limit itself to safeguarding an ancestral indigenous heritage. To put it in simple words, the regional autonomy is the possibility to make things differently. Indigenous land rights and the communal land ownership is just one example of the alternatives to the western-pacific-mestizo model because it questions the idea of private property. One should not underestimate the consequences of this different perception regarding land. As St. Clair writes, “for mestizos land is only a property, it can be bought and sold at any time, the land is yours and you can do with it whatever you like because it is your private property”⁵⁸. This has environmental

⁵⁸ Translated from Spanish by the Author. St. Clair 2008: 39.

consequences such as the deforestation caused by the incursion of Mestizos in Bosawás, the biggest rain forest in Central America.⁵⁹

VI. Challenges

Land demarcation and titling is at a very advanced level, but the presence of Mestizos on indigenous communal land has posed a challenge for the clearance of these lands since many mestizos settled in these lands long ago, while others occupied them in recent years.⁶⁰ Although Law 445 seems to merely implement the demands by the Inter-American Court and the already existing Autonomy Statute, two interrelated concepts should be further discussed, namely “ethnic community” and “third parties”. In an interview Albert St. Clair expressed his concern with the novelty of excluding Mestizos as an ethnic group of the Autonomous Regions.⁶¹ The definition of “ethnic community” only integrates the families of Afro-Caribbean ancestry, disqualifying “Caribbean mestizos”, meaning mestizo families who have lived in the Atlantic Coast for several generations, as beneficiaries of the regional autonomy. This makes them third parties on communal land, and considering that according to Article 35 of Law 445 the “property ownership rights and historic occupation of the indigenous and ethnic communities shall prevail over the titles issues in favour of third parties”, this withdraws any right to land property. This also has an impact for dynamics to cultural identity. It is true that by means of the regional Autonomy the indigenous and afro-descendant population has struggled for the recognition of a Nicaraguan identity which differs from the one of the Mestizo Pacific region. However, this does not necessary exclude a Mestizo element in the cultural identity of the autonomous regions. This leads to the issue on how to implement indigenous land rights and the regional autonomy without violating the rights of “costeños” of mestizo origin.

⁵⁹ See Howard 1998 and St. Clair 2008.

⁶⁰ St. Clair 2014.

⁶¹ Cf St. Clair, *supra* note 12.

VII. Conclusions

Autonomy is a gradual process⁶² and, notwithstanding the constraints mainly due to the lack of political will and corruption, Nicaragua's model of autonomy is remarkable because the way it has integrated indigenous rights and the recognition of Nicaragua's ethnical diversity. This paper has tried to show how autonomy has been historically inherent to the peoples (including ethnic communities) of the Atlantic regions of Nicaragua.

In short, regional autonomy and the struggle for indigenous land rights create a material space where an alternative Nicaraguan identity can be not only protected from disappearing, but can also find nourishing ground within Nicaragua.

Although indigenous land rights are far from being materialized and the model of regional autonomy has not efficiently fulfilled its goal, the case of Nicaragua has opened room for discussions around indigenous rights and the possibilities to grant the right to self-determination without threatening national integrity. On the contrary, it has shown the potential of the right to self-determination through regional autonomy to enrich national culture.

⁶² Lapidoth 1994: 279.

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