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Indigenous justice systems and harmonisation with the ordinary justice system – information submitted to the Special Rapporteur on the Rights of Indigenous Peoples (07.04.2019)

Some remarks on the Indigenous justice systems and coordination with the ordinary justice system

1. Normative basis of the right to resort to indigenous justice

While this section is mostly descriptive, its aim is to indicate the normative basis of the indigenous justice or juridical systems. In 1994 the UN General Assembly declared years 1995-2004 the International Decade of the World's Indigenous Peoples[1]. The second decade (2005-2015) was the continuation of the first one[2]. The first decade was supposed to be crowned by the issuance of the UN declaration on indigenous peoples but this happened in the middle of the second decade when in 2007 the UN Declaration on the Rights of Indigenous Peoples was adopted (hereinafter: UN Declaration). UN Declaration is the most important, however non-binding, instrument on the rights of indigenous peoples. It affirms that indigenous peoples "contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind"[3]. According to the UN Declaration, indigenous peoples have a collection of rights: individual ones that persons have as members of the group and collective ones that inhere in the group as a whole (such as land rights) (Art. 1 of the UN Declaration). However, in 1989 the international community gathered in the International Labour

[1] UN GA res. 48/163 of 21 December 1993 is available at http://research.un.org/en/docs/ga/quick/regular/48 (06.04.2019).
[2] UN GA res. 59/174 of 20 December 2004 is available at http://research.un.org/en/docs/ga/quick/regular/59 (06.04.2019).
[3] *UN Declaration on the Rights of Indigenous Peoples* (UN GA res. 61/295) preamble; available at http://research.un.org/en/docs/ga/quick/regular/61 (06.04.2019).

Organisation also adopted a binding treaty – the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries[4].

The above mentioned international instruments strengthen the normative basis for the indigenous justice, including indigenous transitional justice. The UN Declaration provides in Art. 5 that "[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State"[5]. Arts. 34 and 35 add that indigenous peoples have the right to promote, develop and maintain their juridical systems and customs. This should however happen "in accordance with international human rights standards"[6]. Indigenous peoples are also entitled "to determine the responsibilities of individuals to their community"[7]. The UN Declaration also provides the right to self-determination of indigenous peoples which may be regarded as a prerequisite for exercising other rights (Art. 3[8]). ILO Convention 169 similarly emphasizes the need for indigenous peoples to have the right to maintain their own customs and institutions in compatibility with the human rights standards. In case there is a conflict between national legal system and indigenous legal system appropriate procedure should be established (art. 8 (2)). In this respect autonomy of indigenous peoples should be constantly taken into account. Art. 8 (1) prescribes – when applying national laws to the indigenous peoples – to include the latter's customs and customary law. Art. 9 is even more explicit when it provides that "1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases". All of those rights of indigenous peoples and obligations of States have been reiterated in the *Study*

[4] *The ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* is available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (06.04.2019).
[5] *UN Declaration*, *supra* note 3.
[6] *Ibid*.
[7] *Ibid*.
[8] Art. 3 of the UN Declaration states that: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". In the *Study by the Expert Mechanism on the Rights of Indigenous Peoples. Access to justice in the promotion and protection of the rights of indigenous peoples* of 30 July 2013 it was argued that "[t]he right to self-determination is a central right for indigenous peoples from which all other rights flow. In relation to access to justice, self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws" – *Study by the Expert Mechanism on the Rights of Indigenous Peoples. Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50, 30 July 2013, para. 19. Art. 4 of the UN Declaration relates to the autonomy of indigenous peoples.

by the Expert Mechanism on the Rights of Indigenous Peoples. Access to justice in the promotion and protection of the rights of indigenous peoples of 30 July 2013 where it was stressed that justice system "should be adapted to ensure cultural appropriateness and consistency with customary legal practices and concepts concerning justice and conflict resolution"[9]. It adds that "[t]he cultural rights of indigenous peoples include recognition and practice of their justice systems […] as well as recognition of their traditional customs, values and languages by courts and legal procedures"[10] and "[c]onsistent with indigenous peoples' right to self-determination and self-government, States should recognize and provide support for indigenous peoples' own justice systems and should consult with indigenous peoples on the best means for dialogue and cooperation between indigenous and State systems"[11]. In the *report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* of 2004 there was also a significant statement that "due regard must be given to indigenous and informal traditions for administering justice or settling disputes to help them to continue their often vital role and to do so in conformity with both international standards and local tradition"[12]. The report refers to transitional justice but the above remark also applies to justice system in general.

2. Strengths and weaknesses of indigenous justice mechanisms

What is common to all indigenous and tribal peoples is their understanding of justice. They believe that the aim of justice is to restore peace and harmony within the community by achieving reconciliation of the perpetrator of a crime or a harm with the victim and community at large. According to the Western approach, justice is aimed at controlling actions that violate legal rules and are considered harmful to the society[13]. The aim of Western justice is to in a way validate the broken rules and to repair the broken human and social relationships. The emphasis is placed on the breached legal norm rather than the welfare of the victim and individual/social relations. In the indigenous justice systems victims are in the centre of decision making and final solution cannot be settled unless the victim, as well as the offender, agrees to it. In the

[9] *Study by the Expert Mechanism on the Rights of Indigenous Peoples. Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50, 30 July 2013, para. 85.
[10] *Ibid*., para. 28.
[11] *Ibid*., para. 6 (p. 24).
[12] The UN Secretary General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, UN Doc. S/2004/616, para. 36.
[13] H. S. Laforme, *The Justice System in Canada: Does it Work for Aboriginal People?*, "Indigenous Law Journal" vol. 4 (2005), p. 4.

formal justice systems victim is usually only a witness in the criminal case[14]. Keeping in mind the above examined examples and considerations one may attempt to point to the strengths and weaknesses (or in other words pros and cons) of resorting to the indigenous/tribal justice mechanisms.

1.1. Strengths

There are the following strengths or advantages of resorting to indigenous justice mechanisms:

- High level of public participation (sometimes regarded as a weakness when treated as a form of mob justice or justice administered by the traumatized and divided population)[15]. This, in turn, is linked to another strength of communal ownership – resort to the traditional instruments allows the community to have this sense of communal ownership, real influence on doing justice[16]. Participatory character of such proceedings also has bearing on the education of the whole community[17].
- It helps to discover the truth and as a consequence it helps the survivors or the relatives of the deceased victims to handle their emotions of anger and loss and to understand what happened, in the end contributing to reconciliation[18]. Apart from establishment of the truth, reconciliation, retribution and compensation indigenous justice instruments have also such benefits as strengthening of the communities, empowering the populations, giving them already mentioned sense of communal ownership and promotion of the democratic and rule of law values[19];
- In case of serious crimes or human rights violations indigenous justice mechanisms may contribute to reconciliation and communal stability as the perpetrators – after revealing the truth, acknowledging their crimes, expressing remorse and apology and compensating the victim – may return to the community and their own families. This

[14] Penal Reform International, *Access to justice in sub-Saharan Africa. The role of traditional and informal justice systems*, 2000, p. 23.
[15] P. Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, "The George Washington International Law Review" no. 39 (2007), p. 795-796, 808. As stated in the L. Huyse, *Justice* [in:] D. Bloomfield, T. Barnes, L. Huyse (ed.), *Reconciliation After Violent Conflict. A Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm 2003: "Family relations and friendships would render the trials partial. It would be very difficult to make people tell the truth, and in some parts of the country there would be nobody left to testify" (p. 37).
[16] B. Connolly, *No-State Justice Systems and the State: Proposals for a Recognition Typology*, "Connecticut Law Review" no.38 (2005-2006), p. 243.
[17] *Ibid*., p. 244.
[18] Clark, *supra* note 15, p. 797.
[19] E. Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, "N. Y. U. Journal of International Law and Politics" no. 34 (2001-2002), p. 376.

also prevents the families of the perpetrator from falling apart. On the hand as Padraig McAuliffe warns, search for communal stability may favour the interests of the community over the interests of the victims. "Superficial reintegration of offenders into communities and <<pretended peace>> on the part of victims have been the order of the day in many communities"[20]. On the other hand as Brynna Connolly adds, indigenous or tribal justice systems may be "the most appropriate option for local communities whose members must continue to live closely with their neighbors, particularly when the infraction is relatively minor"[21]. Yet, in the case of transitional justice the infractions are usually serious, still this does not undermine this argument;

- Indigenous justice systems may benefit from higher degree of legitimacy as they reflect the norms and values recognized for ages by their communities[22];
- It is relatively cheap (judges or persons taking part in indigenous processes are not paid, there is no need for the expensive services of the lawyers), more accessible because of its proximity, informality, flexibility and lower costs which is also linked to the above mentioned public participation[23]. Such indigenous justice proceedings are accessible even in highly rural areas and they are conducted in local languages[24] which additionally contributes to their openness and accessibility[25].

1.2. Weaknesses

With regard to the weaknesses perhaps one should begin with a statement that lists of such weaknesses or cons are usually formulated from the Western point of view on the rule of law[26]. Despite my Western origins I will do my best to put my Western attitude aside, however I humbly agree with the statement that it is impossible to describe and sometimes understand

[20] P. McAuliffe, *Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse*, "Goettingen Journal of International Law" no. 5 (2013), p. 69.
[21] B. Connolly, *supra* note 16, p. 243-244.
[22] *Ibid*., p. 244.
[23] McAuliffe, *supra* note 20, p. 52.
[24] B. Connolly, *supra* note 16, p. 243.
[25] For more details on the strengths of the indigenous justice systems see Penal Reform International, *Access to justice in sub-Saharan Africa. The role of traditional and informal justice systems*, 2000, p. 126-127.
[26] L. Huyse, Conclusions and recommendations, [in:] L. Huyse, M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences*, Stockholm 2008, p. 191.

indigenous (customary) legal systems by using Western concepts[27]. Keeping this in mind the most common and harshest weaknesses listed are the following:

- Such mechanisms are regarded as a form of "mob justice" where the rights of the accused are sacrificed at the altar of expeditious and cheap prosecution of the perpetrators[28];
- They may violate individual rights such as fair trial guarantees. For example in the Rwandan *gacaca* courts resorted to after the 1994 genocide there is no legal assistance available. This was the result of the lack of lawyers participating in the proceedings. The legal resources were scarce and this in turn would lead to the unequal access to legal advice[29]. On the other hand usually there is a right of appeal from the decisions of such informal mechanisms, for example in the case of the *gacaca* courts there is an appeal to the higher jurisdiction[30]. There were also doubts whether the plea-bargaining would not encourage the false confessions in order to reduce the severity of the penalty[31]. The right to appeal to the formal State system is one of the possible forms of oversight with regard to the decisions of the indigenous mechanisms, the other being some form of incorporation or recognition of the indigenous justice systems into the official State justice system[32]. But as Brynna Connolly rightly noted, "[n]umerous justice systems [also State systems] suffer from many of the same problems of gender or ethnic bias of which the [non-State justice systems] are accused. [Naturally, there are differences between State and non-State justice systems but] these differences are of degree rather than kind"[33];

[27] D. Bunikowski, P. Dillon, *Arguments from Cultural Ecology and Legal Pluralism for Recognising Indigenous Customary Law in the Arctic*, [in:] L. Heinämäki, T. M. Herrmann (eds.), *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples. The Sacred Arctic*, 2017, p. 42.
[28] Clark, *supra* note 15, p. 767.
[29] Daly, *supra* note 19, p. 368.
[30] Clark, *supra* note 15, p. 795 and 821; McAuliffe, *supra* note 29, p. 53.
[31] Daly, *supra* note 19, p. 382.
[32] Connolly, *supra* note 16, p. 246, 248.
[33] *Ibid*., p. 257. On the other hand there contrary opinions expressed pointing to the fairness of the indigenous/tribal justice instruments such as that "One can go so far as to say that in an African tribunal the individual probably had a better guarantee of procedural fairness than in a Western court, for African tribunals sought a reconciliation of the parties approved by the community. Because reconciliation required a slow but thorough examination of any grievance, litigants had every opportunity to voice their complaints in a sympathetic environment. By comparison, the highly professionalized Western mode of dispute processing is calculated to alienate and confuse litigants" – Penal Reform International, *Access to justice in sub-Saharan Africa. The role of traditional and informal justice systems*, 2000, p. 139.

- Some of those mechanisms are selective, for example *gacaca* courts did not try cases of crimes committed by the Rwandan Patriotic Front[34];

3. Concluding remarks

In accordance with the trend of legal pluralism national justice systems must be constructed in a holistic and integral manner, embracing State-justice systems, indigenous justice systems as well as various political, social and other legal instruments and all this in order to strengthen the possibilities of achieving the intended aims. The use of indigenous justice mechanisms is increasingly popular and not only for the classical dispute resolution but in the framework of transitional justice as a response to international crimes such as genocide, crimes against humanity and war crimes. In the latter case the goals of the transitional justice may be multiple and not only limited to punishing the perpetrators although it is difficult to imagine successful transitional justice without some form of responsibility of the perpetrators. I believe the perspective of the victims is crucial here and their voice should be decisive. Such a voice may be expressed through the indigenous channels of justice. It is important to keep in mind that the Western attitude to justice that does not necessarily have to be superior to the indigenous or traditional justice concepts. Such instruments are rather non-legal or not only legal and their equally important goal is reconciliation. State justice model and indigenous instruments should be regarded as complementary and supplementary. Depending on the will of the population, especially taking into account the voices and needs of the victims, such a hybrid transitional justice model may have retributive, deterrent and restorative outcome. The dominant outcome will vary. As stated in the *Peace First, Justice Later* report "[i]ndeed, there is growing support in favour of combining customary models with Western models to form a kind of "state law pluralism," in which official state law accepts both customary and modern laws. […]"[35]. The fact is that in the real-life transitional justice framework elements of both justice systems – State and indigenous – are/may be necessary in order to achieve the intended goals. This again shows that in practice the best model is for those systems to complement each other.

For all the above reasons, particularly taking into account the strengths of indigenous legal practices, such practices should be rediscovered, revitalized and recognized. Indigenous justice

[34] Clark, *supra* note 15, p. 806. For more details on the weaknesses of the indigenous justice systems see Penal Reform International, *Access to justice in sub-Saharan Africa. The role of traditional and informal justice systems*, 2000, p. 127-128.

[35] *Peace First, Justice Later. Traditional Justice in Northern Uganda*, 2005, p. 49, available at http://www.refugeelawproject.org/resources/working-papers/73-peace-first,-justice-later-traditional-justice-in-northern-uganda.html (22.04.2017).

systems are bottom up alternatives to formal justice frequently regarded as imposed by the colonizers. As Padraig McAuliffe eloquently summarizes, "[t]hrough the process of integrating indigenous justice with the formal system, justice sector reformers endeavor to <<build mutually beneficial linkages between the system […] to harness the positive aspects of each system and mitigate the negatives>>"[36]. For complementary and holistic model to work efficiently it is indispensable to overcome the sense of resistance to non-State (indigenous and/or traditional) forms of justice that – to certain extent – are and have to be outside the State control. On the other hand, those that opt for or support a legal-pluralist model need "to overcome an aversion to state influence on indigenous justice"[37].

Such complementarity may be achieved by way of incorporation of the indigenous justice system into the State system. Formal or official incorporation or partial incorporation has some benefits but also causes or may cause some problems. The outcome may benefit from such values as impartiality, uniformity of the law and legitimacy accompanying State justice system but on the other hand it inevitably leads to indigenous justice losing some of its informality, flexibility, dynamism and voluntary character. This marriage of both of those forms of justice also demands from States higher level of sensibility to indigenous justice customs and institutions and also co-operation to strategically and sustainably delineate "the blurry lines between formal and informal law"[38]. Due to those doubts and fears many commentators claim that those two systems should remain separate and independent from each other[39]. Separation however is not to mean "the insulation of community courts from supervision or accountability. A system of regional (or provincial) ombudsmen should be established to oversee the work of community forums and to enforce uniform standards"[40].

The complementary function of the indigenous and formal justice systems may also be achieved by way of their coexistence similar to the model adopted by the United States of America towards the Native justice system. It exists along the State justice system with its jurisdiction clearly delineated. The rule is that the jurisdiction of those two systems is divided and neither system may encroach upon the jurisdiction of the other. It may partly resemble the independence of different State justice systems[41]. So maybe the better solution would be parallel

[36] McAuliffe, *supra* note 20, p. 44.
[37] *Ibid*., p. 54.
[38] *Ibid*., p. 56. For more on the advantages of integration see: *ibid*., p. 60-62 (the author lists: alleviation of case-loads in the overburdened State system, oversight of the indigenous system, mitigation of the effects of forum shopping and recognition of multiculturalism. For more on the possible way of recognizing indigenous or informal justice systems see also Connolly, *supra* note 16, p. 239-294.
[39] Connolly, *supra* note 16, p. 247; Penal Reform International, *supra* note 14, p. 129.
[40] *Ibid*., p. 98.
[41] Connolly, *supra* note 16, p. 248-249.

independence with some links with the State justice system like the right to appeal to State courts. Still some parts of the indigenous justice probably should stay outside the State control. On the basis of indigenous sovereignty it should be the indigenous communities that have the last word on this issue. In the same line of argument the Penal Reform International stated that "informal justice processes… should not exist as adjuncts of the court process, rather they should function as alternatives wholly separate from the established court system… [T]he professionalisation/ formalisation of informal justice processes with its resultant production of professionals is tantamount to a negation of the objectives of these processes because not only will the cost of justice remain high but the delays associated with formal adjudication will infect these processes. The mixture of the two would at best be described as a marriage of inconvenience which will not augur well for the realisation of the objectives behind the use of informal processes"[42]. Still, it is important to remember that informal mechanisms are not to replace the formal justice systems for the poor but to complement it and offer satisfactory alternatives[43]. Moreover, those two systems may borrow from each other that what at the moment is needed and helpful. This in turn reflects and contributes to constant evolution of the indigenous justice systems. Despite the need for indigenous justice system to remain largely independent it does not mean that they do not deserve governmental support, quite contrary – as part of the cultural heritage of human kind they should be preserved as much as possible[44].

In the hybrid model of justice system indigenous justice mechanisms must be adjusted where there is such a need and respect international human rights because only in this way fair and stable legal system and social order may be preserved (respect for human rights is included in Art. 34 of the UN Declaration). One should also remember that States are responsible for respecting, ensuring and fulfilling human rights and by recognizing indigenous practices and customs incompatible with such duties States may be held accountable[45]. However, when regarding the mutual relations between State forms of justice and human rights on one hand and indigenous justice on the other, one must remember about the autonomy of indigenous peoples and their right to self-determination which should be treated as an important interpretative principle and an instrument shaping the perspective towards indigenous peoples. This could lead to less formalistic and more modified implementation of, for example, fair trial guarantees without undermining the indigenous laws. Patronizing should be avoided.

[42] Penal Reform International, *supra* note 14, p. 135.
[43] *Ibid*., p. 4.
[44] See also Penal Reform International, *supra* note 14, p.147.
[45] McAuliffe, *supra* note 20, p. 61.

Indigenous sovereignty existed long before the colonial or dominant authorities and societies took power. As Padraig McAuliffe argues, although in the transitional context, human rights concerns should be ameliorated to some extent[46]. In other words, "[i]n that fusion, a clear commitment to human rights […] must be matched by a demonstrated commitment to cultural diversity as well"[47].

Clearly the indigenous justice mechanisms allow to fill some gaps. The resort to them is motivated by the rising legal pluralism which in turn is a result of a rejection of legal centralism. Another reason lies in the dissatisfaction with the formal justice mechanisms applied within the "one size fits all" formula that may be and is regarded as imposed from the outside[48]. Every situation is different, it requires case by case analysis and appropriate, tailor-made tools. Very often the decontextualized instruments are not able to meet the challenge and this gap may be fulfilled by the indigenous justice mechanisms. In the context of transition from authoritarianism or conflict the reason for resorting to indigenous justice mechanisms may be the frequent breakdown of formal justice system.

To conclude, all the justice systems should be part of the same whole and they should complement each other in a synergistic way, utilizing the positives of them both and minimizing or eliminating the negatives. If the goal is to achieve reconciliation, compensation to the victims and also some kind of penalty, retributive or restorative, all the various instruments could be adopted including the indigenous justice systems as "[f]or a dispute to be settled and to end in a sustainable solution it does not necessarily have to be taken before the police, or to the courts or tribunals"[49]. The indigenous legal customs are part of the human culture or even human heritage that should not be lost, that must not be lost. Dawid Bunikowski and Patrick Dillon claim that "[c]ustoms, religious beliefs, traditions, rules, social morality are often better regulators of human behaviour than state law"[50]. They also argue that courts and justice system should be in the hands of indigenous communities: "There would be separate courts and jurisdictions for indigenous and non-indigenous citizens of the same state, and a special court to resolve conflicts that may arise between representatives of the two different groups of citizens (a crown court). […] This is real political-cultural autonomy and legal pluralism that respects

[46] *Ibid*., p. 79.
[47] T. Nhlapo, *Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously*, "Third World Legal Studies" 1994-1995, p. 63.
[48] McAuliffe, *supra* note 20, p. 63. For more on the top down approach see: S. Golub, *Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative*, Carnegie Endowment for International Peace, Number 41, October 2003, available at: http://carnegieendowment.org/files/wp41.pdf (06.04.2019).
[49] A. Naniwe-Kaburahe, *The institutions of bashingantahe in Burundi*, [in:] L. Huyse, M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences*, Stockholm 2008, p. 165.
[50] D. Bunikowski, P. Dillon, *supra* note 127, p. 42.

multiculturalism, cultural diversity and indigenousness"[51]. As an example of the most developed and advanced system that is advantageous for indigenous peoples that describe the Nisga'a self-government in Canada: "the Nisga'a have a democratic and accountable self-government […] Their agreement with the Canadian government is one of the latest on self-government and land claims, which is why it is so advanced. Nisga'a have their own government, jurisdiction, constitution, laws, citizens, corporations, self-government in their villages, other authorities like police, and natural resources management"[52]. In conclusion they rightly state that "[]it is the action of a mature democracy to give indigenous people the means to rule and govern on their own, on behalf of their own communities, on the grounds of their own laws. The argument is about a wider political autonomy or, in a broad sense, the notion of 'independence': independence understood not in terms of international public law but real autonomy in small communities of people. The world is constantly changing through globalisation, the advent of new technologies, and new styles of living. Nevertheless, legal pluralism is a good response and a means to retaining diversity inside contemporary societies and to guarantee a diversity of laws within a given society and around the world"[53].

Indigenous instruments are ages long and express the common wisdom of the generations of indigenous peoples and as such should gain even more attention.

[51] *Ibid*., p. 44.
[52] *Ibid*., p. 52.
[53] *Ibid*., p. 55.