



Communities' Sacred Mountains vs. State-owned Natural Resources – Towards a Rights-based Governance of Cultural and Biological Diversity in China

Yong Zhou

To cite this article: Yong Zhou (2021) Communities' Sacred Mountains vs. State-owned Natural Resources – Towards a Rights-based Governance of Cultural and Biological Diversity in China, Nordic Journal of Human Rights, 39:4, 508-529, DOI: [10.1080/18918131.2021.1991619](https://doi.org/10.1080/18918131.2021.1991619)

To link to this article: <https://doi.org/10.1080/18918131.2021.1991619>



© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 16 Mar 2022.



Submit your article to this journal [↗](#)



Article views: 71



View related articles [↗](#)



View Crossmark data [↗](#)

Communities' Sacred Mountains vs. State-owned Natural Resources – Towards a Rights-based Governance of Cultural and Biological Diversity in China

Yong Zhou

Faculty of Law, University of Oslo, Oslo, Norway

ABSTRACT

In the multi-nation society of China, disputes related to the beliefs and customs of indigenous communities in the process of the state's natural resources management have been increasing because of sports activities, tourism, extractive industries, hydropower and other infrastructure constructions. From a legal pluralism perspective, with a focus on the Tibetan mountain cult in the Kawagebo (Mt. Meili) mountain area, this research argues the existence of two types of governances based on different worldview, beliefs, normative frameworks and management practices: the community spiritual governance (CSG) and the state resources governance (SRG). By analysing the institutional constraints to, and the potentials of recognising the spiritual significance of, sacred mountains and rights of indigenous communities, this research justifies a pathway of turning SRG towards a 'rights-based governance' for coordinating these conflicts.

KEYWORDS

sacred mountain; rights-based governance; freedom of religion and beliefs; cultural heritage; biological diversity; natural resources; local or indigenous community; cultural autonomy; Tibet; China

1. Introduction

On 4 January 1991, when the joint Japan–China expedition team almost had reached the summit of the untrodden snow-capped peak of Kawagebo (6740 metres) in Southwest China, the entire 17-member team suddenly disappeared under an avalanche. The day before there had been a shocking cultural clash: while the team celebrated successfully reaching the 6400-metre point, thousands of local Tibetans prayed to the Mountain God for the expedition's failure. In the winter of 1996, the Academic Alpine Club of Kyoto University and their Chinese partner co-organised a second attempt at scaling Kawagebo. This time, hundreds of thousands of local villagers blocked the road entering the area. They complained that a series of harmful accidents had happened after the

CONTACT Yong Zhou  yong.zhou@jus.uio.no

I am grateful to Bill Derman, Gentian Zyberi, Maria Lundberg, and two anonymous reviewers for their comments on the earlier version of the article. Thanks to Dirk Hanschel for his invitation to present this research at the Max Planck Institute for Social Anthropology. Parts of this work were undertaken at University of Cambridge, funded by the Norwegian Research Council. Special thanks to Uradyn E. Bulag and other colleagues at MIASU, Department of Social Anthropology, University of Cambridge.

© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

previous expedition, and the Mountain God would punish them even more severely if the folk rules were violated again. They argued that it was unfair that the central or local authorities had the power to give people permission to climb their holy mountain, because they could not move to another place to avoid the predicted punishment by the Mountain God. Nevertheless, the team insisted on continuing its mission and disregarded the strong resistance of local Tibetan believers. Their expedition also failed due to mysterious weather conditions.

These frustrated attempts in the 1990s inspired more mountain climbers to take on the summit. Climbers argue that the spirit of their sport decrees that no mountain cannot be trodden by human feet. It is also argued that the Chinese official ideology is atheism, which should not give room to other alternative beliefs, and that these sports activities could also bring more openness and economic development to the local communities. There were reports on several plans to scale the summit.¹ Local believers, however, considered such behaviour to be a serious assault on their beliefs and customary law. They believed that the failures of the expeditions and ensuing incidents were the expressions of the god's anger and punishment of offenders. They were therefore compelled to prevent any further mountain climbing to defend their mental, physical, and social well-being. Proposals by scholars of culture and environmental NGOs reflected on ways to resolve the tensions. In 2000, the Friends of Nature presented a proposal to the Chinese central government for a ban on climbing Kawagebo.² The proposal was halfway successful, in that the central authority temporarily agreed to grant no new permissions, but did not expressly forbid climbing the mountain.

A sacred mountain is one of various kinds of sacred natural sites (SNS), meaning areas of land or water having special spiritual significance to peoples and communities.³ The increasingly numerous disputes concerning sacred sites in China are not limited to sports activities. Other major threats to local or indigenous communities' SNS, including forests, rivers and lakes, are extractive industries, hydropower exploitation, infrastructure construction, and tourism.⁴ These disputes raise a major legal question: what would be a justified normative framework on sacred mountains in the Chinese context to guide the solution of such conflicts?

Through a review of related normative frameworks in the fields of human rights, cultural heritage, and natural resources, this article locates the favourable conditions and the challenges of moving towards the viable protection of SNS in various legal sources. On the one hand, it is clear that the People's Republic of China (PRC) is legally bound by its Constitution to protect the freedoms of religion and belief (FoRB Article 36) and relevant minority rights of cultural autonomy (Article 4),⁵ which are consistent with key UN human rights conventions ratified by China, such as the International Covenant

¹One of these plans was 'The Chinese Shall Climb the Meili Snow Mountain', *China Youth Daily* (Beijing, 24 December 1999).

²Liang Congjie, director of the Friends of Nature, the first environmental NGO in China, presented the proposal. Yang Fuquan, 'Memorizing Mr. Liang Congjie' (2010) <<http://www.aisixiang.com/data/37709.html>> accessed 5 May 2020.

³This is a broad working definition on sacred natural sites (SNS) formulated by the International Union for Conservation of Nature (IUCN). See R. Wild and C. McLeod, *Sacred Natural Sites: Guidelines for Protected Area Managers* (edn, IUCN 2008) p. 3.

⁴Many such conflicts have occurred in Sichuan, Yunnan, and Qinghai Tibetan areas. One example concerns road construction in the sacred Gemu mountain of the Mosuo people in Yunnan.

⁵Article 4 of the PRC Constitution reads: 'All nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs.'

on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). In addition, ongoing practices of governance of cultural heritage and biodiversity that recognise the spiritual link between sacred mountains or other SNS and local or indigenous communities, exist in China. The state has legal obligations under the UNESCO conventions on cultural/natural heritage (1972), intangible cultural heritage (2003), and the diversity of cultural expression (2005). China has further accepted a legal obligation to acknowledge the key role of traditional knowledge and practices of indigenous and local communities for the conservation and sustainable use of biological diversity under the UN Convention on Biological Diversity (1992). Domestically, the central and local authorities have also adopted relevant laws on intangible cultural heritage (2011) and national parks (2016) for cultural conservation.

On the other hand, however, it has been observed that domestic constitutional principles malfunction. Certain ideas and the institutionalised legal order of the Communist Party's governance can contradict these principles in the Chinese 'party-state' context. In addition, although China internationally supports the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), it denies the existence of indigenous peoples in the country. This official standpoint not only means that the government neglects the relevant rights, but also limits the ability of these peripheral peoples in China to voice their interests and claim the rights of indigenous peoples.

The existing disputes on sacred mountains in peripheral peoples' homelands⁶ in China suggest a pressing demand for exploring the issues around integrating indigenous peoples' rights into the country's domestic law. By assuming that fundamental human rights principles could provide a justified normative framework for bridging the governance gap on natural resources between the orders of folk law and state law in general, this paper narrows down its discussion to the two fundamental principles articulated in the PRC's Constitution: FoRB and cultural autonomy. Its central question is therefore: what are the constraints, potentials, and possible ways of institutionalising the two constitutional freedoms for conflict resolution on SNS?

This research adopts the methodology of 'a descriptive conception of legal pluralism' in observing and analysing the given conflicts. To use the term 'legal pluralism' in this perspective means acknowledging that, as Griffiths describes,

law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.⁷

⁶There is an essential rule of self-identification as 'Indigenous peoples' in international law. Although I have established the existence of 'Indigenous peoples' and the relevance of 'Indigenous peoples' rights' in China in my previous research (Zhou 2016), I cannot define or judge who are 'Indigenous peoples' in the given case in the region. As a researcher, I have therefore coined the term 'peripheral peoples' to avoid confusion of various folk terms with specific contexts such as 'minority nationality' in the Chinese law and 'Indigenous peoples' in international law. These 'peripheral peoples' are the socially marginalised and geographically inhabited in remote areas of political and economic centre in China. In this paper, I also use 'local or indigenous communities' referring to the same notion.

⁷John Griffiths, 'What is legal pluralism?' (1986) *The Journal of Legal Pluralism and Unofficial Law*, Issue 24, p 39.

This article will first explore the sacred mountain conflicts as expressions of two types of governance, one based on folk law and the other on state law, with different postulates. These can be called *community spiritual governance* (CSG) and *state resources governance* (SRG). Second, assuming that the two fundamental constitutional principles of FoRB and cultural autonomy could bridge the gap between CSG and SRG, the article explores the existing institutionalised normative order that constrains the functioning of these principles. Third, by observing the potential of recognising the link between sacred mountains or other SNS and indigenous or local communities in the recent practice of cultural heritage and biodiversity governance, this research finds that these normative frameworks and social practices thus produced provide dynamics and possibilities which may break through the above constraints. However, I argue that the key element for closing the gap between the two types of governance is to make a turn towards a ‘rights-based governance’ within SRG. For this purpose, I propose a two-step pathway towards creating a normative framework for such conflict resolution in Chinese state law.

2. Two Types of Governance in Conflict

‘Sacred mountain’ is a common cultural phenomenon around the world. The sacredness of mountains manifests itself in various ways, including religious beliefs, myths, histories, or evocative beauty.⁸ Disputes on sacred mountains are different with regard to state law and the spiritual beliefs, social institutions, customary practices in the folk law of specific local or indigenous communities.⁹

Kawagebo is one of the most important sacred mountains of Tibetan Buddhism, Bon, and folk animistic believers in the local communities.¹⁰ Yet the authorities at central and local levels knew little about it, even its real name, before the 1980s.¹¹ In 2003, the ‘Mt. Meili region’ became one of the eight clusters of the newly declared Three Parallel Rivers of Yunnan Protected Areas (the TPR area),¹² a UNESCO natural world heritage site. International Union for Conservation of Nature (IUCN) experts reported that most of the mountains in the TPR area (Gaoligong Mt., Baimang-Meili Snow Mt., Laowoshan, Yunling Mt., Laojunshan, Haba Snow Mt., Red Mt., Qianhu Mt.) are regarded as sacred, together with various lakes, springs, rivers, and individual trees.¹³ However, neither the UNESCO nor the IUCN document raises questions about the recognition of the sacredness of mountains in the TPR area, although it is also the homeland of various ‘Southwest China nationalities’ with ‘unique living habits’.¹⁴

⁸Edwin Bernbaum, ‘Sacred Mountains of the World’, *Mountain Research and Development* [1999] 19(1), 75.

⁹See the Tromsdalstind sacred mountain case in Norway, Siv E Kraft, ‘The making of a sacred mountain’ *Religion* 40 (2010) 53–61, and the Uluru climbing ban case in Australia, ‘Uluru climbing ban: Tourists scale sacred rock for final time’ 25 October 2019. <<https://www.bbc.com/news/world-australia-50151344>> accessed 26 December 2020.

¹⁰Keith Dowman, *The Sacred Life of Tibet* (Thorsons 1997).

¹¹The People’s Liberation Army made a mistake in mapping this area and called the mountain ‘Mt. Meili’ in the early 1960s. When Japan sought the permission to climb it, local officials did not know which mountain they were referring to. Local Tibetan communities still call the mountain, the peak summit, and the mountain god Kawagebo. It sits at the eastern end of the Great Himalaya Range covering an area of about 6000 sq. km (its north–south length is 200 km, and its east–west width 30 km).

¹²The site is a centre of Chinese biodiversity and one of the richest temperate regions of the world in biodiversity terms. <<http://whc.unesco.org/en/list/1083>> accessed 15 March 2020.

¹³Tilman Jaeger and Bruce Jefferies (2013) IUCN, Report on the Mission to Three Parallel Rivers of Yunnan Protect Areas, P.R. China, p. 5.

¹⁴World heritage scanned nomination, File 1083. p.143 <<http://whc.unesco.org/uploads/nominations/1083.pdf>> accessed 15 March 2020

Disputes over sacred mountains in the area are complicated by the coexistence of different legal orders with various sources, institutions, and degrees of religious belief among the local or indigenous communities, which include Tibetan, Naxi, Bai, Yi, Lisu, Pumi, Nu, and Dulong people. About 86.6% of the local population of 800,000 persons have been living in the TPR area for ‘over thousands of years’, and some of them belong to indigenous groups unique to China.¹⁵ The application documents submitted to UNESCO also describe the spiritual significance of these mountains and the existence of relevant indigenous laws. The file reads that religion

... as the top maxim of daily life, is being strictly and conscientiously practiced. [...] each Tibetan village will divide a patch of nearby mountain ‘holy mountain’ where every tree and bush should be absolutely protected. Naxi people who believe in Dongba religion regard nature as god, holding that damage of nature will bring about great disaster ... Religion-driven worship of nature and sense of natural protection have become residents’ motivation for protection of natural resources.¹⁶

Indigenous legal orders exist based on their traditional rules: ‘As a primitive way of law, village rules are the norms of behaviour agreed upon and abided by villagers. In the rules in the property area, more than 200 articles concern natural protection’.¹⁷ The ideology of legal centralism, which assumes that law is and should be the law of the state dominantly functional in the given case, is an illusion. Legal pluralism is a fact, but the complexity of sacred mountains and their spiritual significance for local communities needs to be further explored.

Anthropological research has identified two kinds of local community in the region: ‘mountain deities society’ and ‘heroic ancestor society’.¹⁸ The former includes the Qiang and Tibetan communities, characterised by their territory-based social identity, including attachment to territories and related boundaries of self and others; they tend to be unwilling to move and have a relatively shallow family genealogical memory. In contrast, groups such as the Yi are ‘heroic ancestor societies’, who are less likely to insist on living in one place and are willing to move to a new habitat, have consanguinity-based social identity and abundant genealogical memory. However, in this research I only focus on the ‘Tibetan mountain cult’ phenomenon in the area and call the local indigenous beliefs, rules, and practices CSG, based on the findings of Bellezza (2005), Studley (2019), and my own fieldwork in the region.¹⁹

Bellezza has examined the character and functions of the divine mountains on which the lha-pa (spirit-mediums) rely in Upper Tibet.²⁰ He found six principal mountain deities used by the lha-pa, which have influence over the entire 700,000-square kilometre region. The roles of mountain gods in the religious and cultural life of the inhabitants of the region are vibrant and compelling, and they take five principal forms: (1)

¹⁵File 1803, the Master Plan (2001-2020) of TPR by the Yunnan provincial government, 205–206

¹⁶File 1083, para 4.5.1.1.

¹⁷File 1083, para 4.5.14.

¹⁸Ming K Wang, ‘Territory, migration and Historical Memory: An Analysis of Two Types of Societies in the Qinghai-Tibetan Plateau’ (2014) *East Asian Sociology of the 21st Century* No. 6

¹⁹I have been continuously carried out fieldwork on the issues of legal ethnography and the implementation of law in the TPR area since 1997. The observations in this paper were made over a long period of time, and some interviews were made in May 2020.

²⁰John Vincent Bellezza, *Spirit-mediums, sacred mountains and related Bon textual traditions in upper Tibet: calling down the gods* (Brill 2005).

embodiments of Buddhist and Bon tenets; (2) territorial defender gods; (3) clan, family, and personal protective deities; (4) objects of pilgrimage and geographic lore; (5) the focus of spirit-mediumship.²¹ Through interviews of the lha-pa, religious text, and archaeological materials, his findings increase the understanding of the role these mountain deities play as an integral part of Tibetan religion in the life of local communities past and present.

Studley has used the term ‘spiritual governance’ to describe his findings in Tibet and other areas regarding sacred mountains inhabited by deities or numina, more commonly known as nature spirits. His research shows that these spirits play an important role in the everyday life of indigenous and local communities, which maintain intricate relationships with them through ritual, ceremony, offerings, prayer, and meditation. These practices are mostly aimed at consulting or appeasing the spirits who may punish people for disobedience or harmful behaviour. Spirits possess agency and hold power over local communities and the ways in which they manage and govern their territories.²²

CSG is therefore a belief-based governance. In the Tibetan area, the sacred mountains play a role in defining territories or social space for local communities in their economic activities and use of resources. There are multiple categories and levels of sacred mountains in relation to families, clans, tribes, and regional or national religions (Buddhism or Bon) or their sects. However, it is common that the cult of indigenous deities is predicated on the premise that a line of communication is open between humans and sacred topography. In essence, the tradition holds that the mountains (and sometimes lakes) are sentient and affect one’s life and fortune, just as other members of society do, which is reflected in CSG.

In contrast, SRG is the kind of natural resources governance based on the normative framework formulated by the Chinese Communist Party (CCP) and state authorities. This research assumes that the conflicts relating to SNS are expressions of the contradictions between the two types of governance. Some of the main differences are listed in [Table 1](#).

First, the legal postulates are different in the two types of governance. The postulates of state law on natural resources are engrained in modern scientific materialism with a human-centric worldview. State law concepts and classifications of the landscape do not reflect or interpret any cultural meaning or values of the special spiritual relationships between the land and indigenous or local communities. By institutionalising atheism and the CCP’s ideology on social evolution, the party-state law does not recognise the cosmological space or the hierarchical tiers of the pantheon of local believers. The normative frameworks of CSG are based on the worldviews in the local communities with multiple kinds of animism or religious beliefs, which cannot accept the basic assumption of material resources owned by the state.

Second, legitimacy in each case is based on the different sources of norms and their performance. State law regards natural resources as key means of production engrained in the ideology of socialism. The state normative framework for natural resources articulates state ownership of mineral resources, wildlife, forest, barren mountain lands, and

²¹Ibid., p. 38.

²²John Studley, *Indigenous Sacred Natural Sites and Spiritual Governance: The Legal Case for Juristic Personhood* (Routledge 2019).

Table 1.

Items	Community Spiritual Governance (CSG)	State Resources Governance (SRG)
Worldview	Multiple: animism or other institutional religious beliefs	Monistic: atheism, scientific and material
Territory	Local and en-spirited or culturally edited landscape	National and physical landscape
Sources and Forms of Norms	Myths, legends, and beliefs; taboos and customary rules	CCP policies and norms, state legislation, and administrative regulations and decisions
Contents of Norms	Contractual reciprocity between local believers and their spirits; equilibrium maintaining	Ownership of natural resources; management and institutional rules of the CCP/state
Performance and Communication	Rituals of sacrifice ceremonies, pilgrimage, obedience to taboos and customary law; communication with spiritual media through rituals, dreams, omens, etc.	Norm-making and norm-using processes under the leadership of CCP in the Party-state context
Agents and Actors	Spirit-mediums, shamans, indigenous or local community organs, monks and temples	CCP units, governmental departments, courts of justice and state-owned enterprises
Result (Reward or Punishment)	Epiphany involving good health/sickness, good/bad crop yields, good fortune or disaster according to folk law	Administrative or judicial remedies according to state law, the CCP disciplinary committee's penalties

surface and underground water resources.²³ Legislative norm-making and administrative decision-making processes do not require any special procedure of consultation or participation of local or indigenous communities. CSG legitimacies stem from myths, legends, religious beliefs, taboos and customary rules, which are deeply embedded in local daily practices through language, medical treatments, weddings and funerals, and festivals and other folkloric expressions.

Third, obligations and the results of violating the norms of the two types of governance differ. The contractual reciprocal relationship between local believers and their local protective spirits (*numina*) under CSG is essential. The *numina* own the place, and are *de facto* and *de jure* custodians of the flora and fauna. Local people are obligated to treat animals and plants as 'part of a reciprocating matrix of persons'.²⁴ Local believers agree to protect the site and its flora and fauna, and the *numina* agree to guard and bless the local people with good health, wise political leadership, and bountiful crops. CSG aims to maintain the equilibrium among all participants, including human, biophysical, and spiritual worlds, by following the rules of contractual reciprocity. Local communities institutionalise norms and rituals to implement the contract. However, the state does not consider this contractual reciprocal relationship when it takes legislative or administrative measures. The state authorities dominate natural resources management, and no legal requirements on social and cultural impact assessment exist as a precondition for planning or operating projects. Detrimental spiritual, cultural, and social impacts are basically unfamiliar to legislators and decision-makers. In the process of dispute resolution, courts have never called on indigenous spirit-mediums or cultural experts as witnesses or for evidence. SRG mechanisms cannot recognise any claims by local or

²³There are a series of articles on the state ownership of natural resources in the Water Law, Land Law, Forest Law, Wildlife Law and Mineral Resources Law.

²⁴E. Oriol 'Whom Would Animals Designate as "Persons"? On Avoiding Anthropocentrism and Including Others'. (2014) *Journal of Evolution & Technology* 24(3), 44–59.

indigenous communities that result from disaster or good fortune based on the contractual reciprocity principle.

To find a pathway to dispute resolution in the case of Kawagebo it is therefore key to understanding the contractual reciprocal relationship around it. Bellezza's findings show that the oral and literary aspects of tradition in Tibet agree that mountain deities have a wrathful side:

Tibetans perceive this ferocity as being expressed in terms of the destructive side of natural forces as in violent storms, earthquakes, droughts, epidemics, etc. As local participants in natural processes, the mountain deities are closely allied with both the good and bad that result from them ... the wrathful predisposition of the mountain gods ... is essential for the domination of diseases-causing, harm-engendering elemental spirits, who attack human beings with great persistence and regularity. The mountain gods also rule over the plants and animals in their locale, which serve as instruments for their largesse or devastation.²⁵

In other words, these deities are powerful guardians that protect the interests of individuals, communities, and livestock. Their presence in local culture is ubiquitous and tangible.

To sum up, conflicts are unavoidable when these two types of governance coexist and interact. Local communities for whom a sacred mountain is a landscape inhabited by spirits who safeguard their well-being under CSG, cannot accept the perception that the sacred mountain is only a kind of 'natural resource' owned and managed by the state. As a result, to achieve conflict resolution it is necessary to re-conceptualise SRG by integrating folk law.

3. Institutional Constraints: Constitutional Freedoms and Sacred Mountains

The constitutional wording for the principles of FoRB and minority nationalities' freedom to maintain or reform their customs (cultural autonomy) provide a justified basis for respecting the rights of local or indigenous communities to their sacred mountains.²⁶ However, the observable malfunction of these constitutional principles indicates a need to investigate the constraints on institutionalising these freedoms in the Chinese party-state context.

3.1 Understanding FoRB in the Party-state Context

As a universal constitutional freedom, FoRB has philosophical, religious, and moral justifications.²⁷ The main justification for including this freedom in Article 36 of China's 1982 Constitution, however, was the CCP's political aim of presenting a 'united front'. The CCP's Document No. 19 (1982) expresses the CCP's approval of FoRB: 'for working toward national stability and ethnic unity, for developing international relations while resisting the infiltration of hostile forces from abroad, and for constructing a

²⁵Bellezza (2005), p. 39.

²⁶PRC Constitution (1982) articles 4 and 36.

²⁷Tore Lindholm, 'Philosophical and Religious Justifications of Freedom of Religion or Belief' in Tore Lindholm, W. Cole Durham Jr. and Bahia G. Tahzib-Lie, *Facilitating freedom of religion or belief: a deskbook* (edn, Martinus Nijhoff 2004).

Socialist civilisation with both material and spiritual values'.²⁸ Having learnt from failures that occurred during the three decades prior, the CCP warned that:

... it would be fruitless and extremely harmful to use simple coercion in dealing with the ... religious questions. ... The Party's basic task is to unite all the people (and this includes the broad mass of believers and non-believers alike) in order that all may strive to construct a modern, powerful Socialist State. To behave otherwise would only exacerbate the estrangement between the mass of believers and non-believers as well as incite and aggravate religious fanaticism, resulting in serious consequences for our Socialist enterprise.²⁹

The 2018 restructuring that shifted the administrative power on religious affairs from the State Council – namely the State Administration for Religious Affairs (SARA) – to the United Front Work Department (UFWD) directly under the CCP Central Party Committee was a significant measure to fuse the party-state by strengthening the party's leadership. New measures along the same lines have been taken through the implementation of the Regulations on Religious Affairs (revised in 2018).³⁰

In China, the CCP has played a leading role in drafting and revising the Constitutions since 1954.³¹ But the constitutionally-designed organ, the Standing Committee of the National People's Congress, has never exercised its powers to interpret the Constitution. Document No. 19, adopted by the Central Committee of CCP the same year of the existing Constitution, is therefore crucial to understanding the essence of the freedoms included in the constitution.

Neither the Constitution nor Document No. 19 define 'religion' or 'religious belief'. However, official statistics on the believers of the five religions listed in the document – Buddhism (including Lamaism), Roman Catholicism, Protestantism, Islam, and Daoism – and numerous regulations on the administration of religious affairs imply that only these institutional religions can be regarded as relevant to FoRB. This makes the legal status of many other religions or beliefs uncertain. Belief in sacred mountains within minority nationality areas is regarded as a kind of 'primitive religion', a term commonly used to refer to various animistic beliefs, but it is not legally recognised or protected under the Constitution.³² Thus, the conceptual framework and administration for believers of institutionalised religions and of other 'primitive' or folk beliefs is discriminatory.

'Superstition' is another word much used in the official discourse to refer to various beliefs linked to SNS. However, indigenous and local communities do not themselves distinguish between religion and superstition as classified by the state.³³ But the situation is changing in China. In recent years, the Chinese term 'folk religion' has often replaced 'primitive religion', and 'folk culture' or 'traditional custom' has replaced 'superstition'. These changes

²⁸The official title of this document is 'The Basic Viewpoint and Policy on the Religious Question during Our Country's Socialist Period', Document No. 19 (1982), Issued by the Central Committee of the Chinese Communist Party on 31 March 1982.

²⁹Ibid., IV.

³⁰For example the adoption of the 'Administrative Measures for Religious Groups' in 2019 and its application in 2020. <<http://m.stnn.cc/particle/703584>> accessed 20 May 2020.

³¹The Central Committee of the CCP has played the leading role in drafting four Constitutions since 1954 and four revisions after the adoption of the existing Constitution in 1982.

³²'Citizens of the People's Republic of China enjoy freedom of religious belief,' Article 36, Constitution.

³³Koen Wellens quotes an interlocutor: 'what is religion, what is superstition, we common people do not know.' Koen Wellens, *Religious Revival in the Tibetan Borderlands: The Premi of Southwest China* (University of Washington Press 2010).

are positive in that they show acceptance of various SNS-related beliefs of indigenous and local communities as a kind of ‘cultural (intangible) heritage’, but uncertainty about whether these beliefs are included in the protection of FoRB remains. It is still risky to practice such beliefs since registration is actually impossible, and the practice may be deemed an ‘illegal religious activity’ with the potential of criminal or administrative penalties.

3.2 Institutionalised Atheism and Unilineal Evolutionism: Discrimination Against SNS-related Belief

The doctrine of atheism and unilineal evolution in China are institutionalised as scientific truths by the party-state. The ideology of the party-state is atheism; CCP policy states that ‘Communists are atheists and must unremittingly propagate atheism’.³⁴ CCP members are not allowed to have any religious belief or undertake religious activities. Following lessons learnt from the ‘Cultural Revolution’, this self-contradictory rule was deleted from the wording of 1982 Constitution. Nevertheless, propagating and promoting atheism remains institutionalised through various social and political modes of life.

The teaching of atheism is mandated in all educational institutions. The Constitution states: ‘No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state.’³⁵ In addition, CCP members and members of the armed forces are required to be atheists and are forbidden to engage in religious practice. Since key positions of government or other public organisations must be held by persons with CCP membership, this institutionalised atheism establishes a discriminatory distinction between different believers in China. At the top of the pyramid are atheism and atheists. They represent the truth, or the modern scientific rational worldview. At a lower level are those believers and beliefs of the five state-recognised religions. Minority nationalities or indigenous peoples with so-called primitive religion or any form of animism or shamanism are at the bottom level. In this context, institutionalised atheism discriminates against the beliefs or practices around sacred mountains and prevents sustainable cultural inheritance in indigenous communities.

Unilineal evolution theory was the designated ethos for the state-initiated ‘Social Nature Investigation’ into China’s minorities in the 1950s. The subordinate status of minority nationalities was cemented through this institutionalisation of social evolutionary theory, which provides moral and legal justification for not respecting and indeed eradicating ‘backward social systems’. Unilineal evolutionary theory outlines the three stages of human social progress: from savagery to barbarism and then to civilisation.³⁶ Once institutionalised, this ideology enabled the classification of peripheral communities into different stages of social progress and the imposition of radical social reforms on these so-called ‘primitive’, ‘slavery’, ‘feudal-slavery’, or ‘feudal’ societies. Minority nationalities’ ways of life and social organisations were seen as only having value in terms of research; even as they were reformed in order to be improved into civilised socialist society, they were used as ‘living fossils’ for understanding humans’ social past. This

³⁴CCP Document No. 19.

³⁵Article 36, Constitution.

³⁶Lewis Henry Morgan (1877), *Ancient Society, or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization*, Macmillan & Company, London.

idea not only provided justification for the social reforms (i.e. so called ‘democratic reform’ and ‘socialist reform’) enacted in minority areas by the state in the 1950s and 1960s, but has also been continuously treated as a truth-guiding law and policymaking as well as cadres training and school education in China.³⁷

The combination of this social evolutionary theory and the state’s use of its power to present it as an objective truth is a typical example of what Rorty (1979) called knowledge as the ‘social justification of belief’. In response to this prejudiced conceptual interpretation, local or indigenous communities have been trying to use terms such as ‘culture’, ‘folklore’, ‘customs’, or ‘folk religion’ to justify a social space in which to practise their religion and to negotiate with authorities over this hermeneutical injustice. Nevertheless, the subjectivity of indigenous peoples and the idea of cultural self-determination are still lacking in current processes of ethnic culture conservation. The state can intervene and define what kind of local or indigenous customary practices or beliefs are ‘good’, ‘harmful’, or ‘neutral’ based on whether its agenda prioritises maintaining social stability, conserving biodiversity, or promoting economic development. Thus, the space for making rights arguments for FoRB or cultural self-determination is limited.

3.3 FoRB and Cultural Autonomy: A Group-rights Perception of Sacred Mountains

The party-state’s existing approach is to make religious belief a private matter and an individual choice.³⁸ This narrow interpretation of FoRB constrains its application for a group-rights-oriented approach to cases concerning SNS.

The issues around SNS are closely related to the customs and folkloric expressions of local communities. Similar to the situation of FoRB, institutionalisation processes have failed to define the rights-holders and the procedures that would enable minority nationalities, as groups, to exercise their fundamental freedom to retain or reform their customs and languages by themselves. By combining this cultural autonomy principle and the need for FoRB in practice in the case of SNS, a normative argument for a group-rights approach can be elaborated and justified in terms of health, physical space, and social well-being in the given conflicts.

Sacred mountains or lakes in Tibet are essential to the health and social well-being of local communities. This relates to the concept of *bla*, roughly translated as ‘soul’, ‘life power’, or ‘life-force’, and connected with a particular place or being. It is believed that, for example, that Yamdrok lake is the ‘life-power lake’ (*bla mtsho*) of all Tibetans; should it dry up, then the whole population of the Land of Snows will meet its death.³⁹ This perspective is important to understand the collective resistance against the hydro-power projects on Yamdrok Lake and Megoe Tso Lake and against mining in the TPR area. Physically, ethnographical research in the Mt. Meili area shows that there is a division between the *living space* of local communities and the *divine space* of the mountain gods and their retinue and martial spirits.⁴⁰ The living space includes the villages and

³⁷Frederick Engels’ *The Origin of the Family, Private Property and the State* (1884) responded to *Ancient Society* (1877) written by Lewis Henry Morgan. Engels’ book is used as one of the Marxist classics in all educational activities in China.

³⁸CCP Document No. 19.

³⁹Rene de Nebesky-Wojtkowitz, *Oracles and Demons of Tibet: The Cult and Iconography of the Tibetan Protective Deities* (Pilgrims Publishing House 1956).

⁴⁰Yang Fuquan, ‘Comparative Study on the Mountain Cult and Nature Perspectives between Tibetans and Naxi’, (2005) *Journal of Southwest University of Nationalities* 12.

surrounding farming or herding areas, while the divine space can be described as wilderness lands. This space is important to access for hunting, gathering, and recreational activities, but its users must follow the spiritual contractual relationship between the mountain god and local indigenous communities.

These spiritual beliefs and approach to material resources are linked to social life and institutions. The social and physical significance of SNS is deeply embedded in the indigenous and local communities' way of life, and may not be visibly or spatially distinct from other aspects of their social lives. Even when indigenous peoples have undertaken some form of conversion to mainstream religions, their traditional spiritual worldview and practices remain omnipresent in their cultural values, languages, medical treatments, wedding or funerals, festivals, and other folk customs.⁴¹

Religion in FoRB should therefore be understood in the broad sense that includes believing, belonging, and behaviour.⁴² It is clearly crucial that FoRB extend to integrate the spiritual, physical, and social elements in this context. In addition, a legitimate group-rights mechanism is necessary for an effective application of all aspects of FoRB. This constitutional freedom should include positive and negative aspects: the state should respect and not intervene or destroy the material basis of minority nationalities' freedom to retain or reform their customs, but also take positive measures to facilitate minorities' practice and revitalisation of their cultural traditions and customs in relation to SNS.

3.4 Lack of Remedies

Since the adoption of the 1982 Constitution, neither the FoRB (Article 36) nor the cultural autonomy principle (Article 4) has been interpreted, reviewed, or applied. The Standing Committee of the National People's Congress has never exercised its power to interpret or oversee their implementation according to the Constitution.⁴³ Furthermore, claims based on these rules cannot be presented for administrative or judicial remedies. PRC criminal law states that: 'Any functionary of a State organ who unlawfully deprives a citizen of his or her freedom of religious belief or infringes upon the customs and habits of an ethnic group, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention'.⁴⁴ Yet not one such case has emerged since the law entered into force in 1980.

Much the same is true for the implementation of relevant international human rights conventions, such as the CERD and the ICESCR.⁴⁵ For example, China ratified the CERD in 1981, but no legislation or case has been based on the application of this convention in the four decades since. In 2009, the CERD Committee called upon China to examine why there have been few judicial cases in this regard.⁴⁶ It also required China to pay attention

⁴¹H. Bielefeldt, N. Ghana and M. Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016) p. 462.

⁴²H. Bielefeldt's keynote speech at the 5 June 2020 Oslo conference.

⁴³PRC Constitution, Article 67.

⁴⁴Article 251 of the Criminal Law of PRC.

⁴⁵The Committee of ICESCR asked the State to indicate the extent to which the ICESCR can be invoked before the courts in China. E/C.12/Q/CHN/17 June 2004, para. 1.

⁴⁶Concluding observations of the Committee on the Elimination of Racial Discrimination on China, CERD/C/CHN/CO/10-13, 15 September 2009, para. 26.

to its General Recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system.⁴⁷ Furthermore, the Committee expressed concern about the harassment of lawyers taking up cases of human rights violations, especially those introduced by members of ethnic minorities. The Committee called upon China to take all appropriate measures to ensure that lawyers can exercise their profession freely, in law and in practice, and to promptly and impartially investigate all allegations of harassment, intimidation, or other acts impeding lawyers' work. The Committee recommended that China revise all laws and regulations that are inconsistent with the Lawyers' Law and international standards.⁴⁸

Observing dynamic interactions between the party-state and the international human rights regime that can break through the institutional constraints of the party-state seems to be key to approaching rights-based governance in this context.

4. Instrumental Potentials: SNS in Conserving Cultural and Biological Diversity

In contrast to its negative attitude toward FoRB, the party-state is taking a positive stance to recognising the role of sacred mountains and other SNS in conserving cultural and biological diversity. China has been very active in nominating sites for UNESCO's heritage lists. Following the conflicts described above of the 1990s, the state adopted legislation to protect the natural and cultural heritage of the Mt. Meili region. In addition to becoming a UNESCO-protected area in 2003, the indigenous sacrifice ceremony of Mt. Meili was entered into the Representative List of the National Intangible Culture Heritage of Humanity in 2014.⁴⁹ The ongoing practice of establishing a national park system in the region resulted in a new local regulation in 2016 to protect the mountain areas.⁵⁰ However, recognition of the rights of local or indigenous communities relating to the spiritual significance of the mountain remains unclear.⁵¹

4.1 Cultural and Spiritual Dimensions of Conserving Biodiversity in Practice

From the natural sciences perspective, high mountains are biological hotspots with ecological value. Biological diversity conservation has been linked to an array of human cultures that hold such areas sacred.⁵² Sacred mountains and other SNS may be seen as an early form of natural reserve established by local communities in line with their beliefs and institutions, comparable to contemporary protected natural areas. As SNS are generally subject to restricted access, natural resources in these areas have had less direct human impact related to economic exploitation, and therefore often comprise important reservoirs of biological diversity.⁵³ Researchers have specifically proven the important

⁴⁷Ibid.

⁴⁸Ibid., para. 19.

⁴⁹Description on the sacrifice ceremony see The Intangible Cultural Heritage in Diqing, <<http://dqjich.cn/baohuminglu/detail/21/155>> accessed 25 May 2020.

⁵⁰2016 National Park Regulations in Yunnan Province.

⁵¹In May 2021, this author undertook interviews with local officials, lawyers and scholars concerning the case. No publicised rules or norm-making procedures were found.

⁵²Verschuuren et al., *Sacred Natural Sites: Conserving Nature and Culture* (Earthscan 2010).

⁵³Main researches can be found in the 'Tibetan Plateau Landscape Culture' series, Lausanne Lingzhi Dorje, editor-in-chief, China Tibetan Studies Press, 2018.

role of sacred mountains in conserving biological diversity in the indigenous and local communities in Southwest China.

Case studies reveal the relationship between state policies and their results in past decades. In the Dai people's homeland, Xishuangbanna, before 1958 almost every Dai village had a sacred forest managed by their traditional institutions. The number of these sacred forest sites were about 1000, and they covered about 100,000 hectares. The non-recognition of SNS in the Dai area from 1958 to the 1970s had catastrophic results. Attempts to eradicate relevant beliefs and institutions severely weakened sacred forest governance among local and indigenous communities. Forestlands were converted for other uses and invasive species increasingly occupied habitats of indigenous species. Traditional knowledge of forest management was almost lost among indigenous communities. There are now only about 250 sites left, with a size of about 1000–1500 hectares; in the area, non-recognition of SNS has resulted in the destruction of about 90% of the sacred forest.⁵⁴

Other research reveals the positive role of Tibetan sacred mountains and forest conservation has had since the late 1980s as a result of the renaissance of sacred mountain worship and management by the local Buddhist communities. It has been found that conservation of sacred forests largely relies on the strength of local religious institutions. Integrating community-based conservation within the governmental conservation network would therefore benefit the Tibetan region.⁵⁵

Previous practices teach us that state governance can be improved by involving the spiritual and cultural dimensions of local communities. There is a lot of space for NGOs to work in this field. For example, in 2004 two environmental NGOs carried out investigations into the resources of six sacred lakes and 68 sacred mountains for biodiversity protection in six Tibetan counties in Sichuan. Local authorities commended this work because the results were useful for achieving the governmental goal of environmental protection.⁵⁶ The Mt. Meili region is one of the places in China where local authorities have cooperated with domestic experts and international NGOs to undertake such projects on SNS and biodiversity conservation.⁵⁷ In the 2000s the Nature Conservancy, an international non-profit conservation organisation, initiated an experiment to establish a national park in the region, one which combines the protection of ecosystem and cultural values.⁵⁸ As a result, in 2016, Yunnan became the first Chinese province to adopt local regulations on national parks. China has also actively cooperated with relevant UNESCO programmes. UNESCO's Man and the Biosphere (MAB) programme is tasked with exploring how to reconcile the conservation of biodiversity, the quest for economic and social development, and the maintenance of associated cultural values.⁵⁹ One of its core values concerns the participation of local communities due to their interest in and contributions to the management of biosphere reserves. Its organisational arrangements require certain degrees of local or indigenous communities' involvement

⁵⁴Findings by researchers at the Kunming Institute of Botany, Chinese Academy of Sciences based on interviews.

⁵⁵Xiaoli Shen, Sheng Li, Dajun Wang and Zhi Lu, 'Viable contribution of Tibetan sacred mountains in southwestern China to forest conservation', *Conservation Biology*, 29(6), 1518–1526.

⁵⁶This project was jointly carried out by the Shanshui Nature Protection Centre and Green Kham Ba Association in 2004.

⁵⁷In 2014, the Kunming Institute of Botany, Chinese Academy of Sciences, undertook a research project to investigate SNS in Yunnan and their use in biodiversity conservation.

⁵⁸This was a part of the 2005 EU–China biodiversity programme.

⁵⁹<<https://en.unesco.org/mab>> accessed 20 January. 2021

in the design and functioning of each biosphere reserve.⁶⁰ There are 34 designated biosphere reserves in China.

4.2 Useful Notions in Conserving Cultural/Natural Heritage and Diversity

Several UNESCO conventions provide useful notions for recognising the values of sacred mountains. These include ‘cultural/natural heritage’,⁶¹ ‘intangible cultural heritage’,⁶² ‘cultural landscape’,⁶³ ‘cultural dignity’,⁶⁴ and ‘interculturality’.⁶⁵ Over the years, UNESCO’s normative frameworks have gradually improved from an overwhelming focus on the tangible remains of cultures to include intangible or spiritual aspects of culture, intercultural communication, and indigenous or local communities’ participation. The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage classifies objects of conservation based on a dichotomy between culture and nature. This distinction is especially problematic in the cosmology of local or indigenous communities with sacred mountains, where nature has been ‘en-spirited’ or ‘culturally edited’. In the UN, debates on the concept of ‘cultural heritage’ from a human rights perspective have broken through this rigid separation.⁶⁶ The recognition of ‘cultural landscapes’ as a new category for the World Heritage List in 1992 was a crucial development for bridging the nature-culture division.

Cultural landscapes are cultural property and represent the ‘combined works of nature and of man’ designated by Article 1 of the World Heritage Convention.⁶⁷ ‘They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.’⁶⁸ Cultural landscapes here include three categories: landscapes designed and created intentionally by humans; organically evolved landscapes; and *associative cultural landscapes*. The Convention states that the inscription of associative cultural landscapes on the World Heritage List ‘is justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence,

⁶⁰Article 4 Statutory Framework of the World Network of Biosphere Reserves, <[http://www.ddbra.ro/media/The%20Statutory%20Framework%20of%20the%20World%20Network%20of%20Biosphere%20Reserves\(3\).pdf](http://www.ddbra.ro/media/The%20Statutory%20Framework%20of%20the%20World%20Network%20of%20Biosphere%20Reserves(3).pdf)> accessed 19 January 2021.

⁶¹The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, China ratified 1985.

⁶²The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. For the purposes of the Convention, ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. The 2003 UNESCO Convention, Article 2 (1)

⁶³Guidelines for the inscription of specific types of properties on the World Heritage List under the 1972 World Heritage Convention, UNESCO.

⁶⁴The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

⁶⁵Ibid.

⁶⁶Report of the independent expert in the field of cultural rights, Farida Shaheed, 2011, A/HRC/17/38, para. 4.

⁶⁷Operational Guidelines for the Implementation of the World Heritage Convention, WHC.19/01, Annex 3.

⁶⁸This text was prepared by an Expert Group on Cultural Landscapes (La Petite Pierre, France, 24–26 October 1992) (see document *WHC-92/CONF.202/10/Add*). The text was subsequently approved for inclusion in the *Operational Guidelines* by the World Heritage Committee at its 16th session (Santa Fe 1992) (see document *WHC-92/CONF.002/12*).

which may be insignificant or even absent'.⁶⁹ The sacred mountains in the TPR area, inhabited by various local or indigenous communities, have the potential to be recognised as 'cultural landscapes' and to gain protection accordingly.

The disputes caused by attempts to climb Kawagebo or Mt. Meili concerned 'cultural dignity'. The principle of 'equal dignity of and respect for all cultures' in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions articulated this term. Its Article 2(3) reads: 'The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.' The 2005 UNESCO Convention reminds us that 'culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity'.⁷⁰ In addition, the notion of 'interculturality' is adopted to refer to 'the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect'.⁷¹ It aims 'to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples'.⁷²

Despite the lack of a clear definition for the key term of 'cultural dignity', the notions of cultural diversity and equal exchange or respect of cultures could therefore provide guidance for respecting local or indigenous sacred mountains or other SNS in the area.

4.3 Integrated Impact Assessment Under the CBD

In 1993, China ratified the UN Convention on Biological Diversity (CBD) and adopted its national action plan (2011–2030).⁷³ One of the basic principles and priority areas of the action plan is the establishment of a system for regulating the rational use and benefit-sharing of biological genetic resources and associated traditional knowledge. According to Article 8(j) of CBD, traditional knowledge refers to 'knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.⁷⁴ The legal protection of traditional knowledge in relation to SNS suggests four interrelated aspects: (1) local knowledge of land and animals; (2) knowledge of land and resource management systems; (3) knowledge and analysis of social institutions; and (4) knowledge and analysis of worldview.⁷⁵ These aspects provide a useful framework for considering the particular relevance of traditional knowledge and beliefs and practices around SNS.

⁶⁹Operational Guidelines for the Implementation of the World Heritage Convention WHC.19/01, Annex 3: Guidelines for the inscription of specific types of properties on the World Heritage List, para 10 (iii).

⁷⁰2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, <https://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf#page=15>.

⁷¹Ibid. Article 4 (8).

⁷²Ibid. Article 1 (d).

⁷³China National Biodiversity Conservation Strategy and Action Plan (2011–2030). <<https://www.cbd.int/doc/world/cn/cn-nbsap-v2-zh.pdf>> accessed 12 January 2021.

⁷⁴It is confirmed by recognising the need to exchange information in conjunction with technology transferred pursuant to Article 16(1) of CBD and its COP Decision III/14.

⁷⁵F. Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Taylor & Francis 1999).

In 2004, the Secretariat of the CBD proposed the Akwé: Kon Voluntary Guidelines.⁷⁶ These are a protocol 'for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities'.⁷⁷ They specify that possible impacts on the respect, preservation, protection, and maintenance of traditional knowledge, innovations, and practices should be investigated in land-use planning and environmental impact assessments.⁷⁸ According to the Guidelines, culture impact assessment is a process of evaluating the likely impacts of a proposed development on the way of life of a particular group or community of people. Such an assessment generally addresses the impacts, both beneficial and adverse, of a proposed development that may affect, for example, the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, social organisation, and traditions of the affected community.⁷⁹

The Guidelines include concrete norms for integrating cultural impact assessments into environmental impact and social impact assessments as a single process. Through this process, particularly during the screening and scoping phases, the issues of particular cultural concern should be identified. These include cultural heritage, religions, beliefs and sacred teachings, customary practices, forms of social organisation, patterns of land use, places of cultural significance, economic valuation of cultural resources, sacred sites, ceremonies, languages, customary law, and political structures. Considerations on all aspects of culture, including sacred sites, are part of an integrated impact assessment.⁸⁰ When proposed development projects are likely to impact sacred sites in lands traditionally occupied or used by indigenous communities, personnel associated with such projects should undertake such assessments with due diligence. The Guidelines explicitly state that sacred sites may have important functions with respect to the conservation and sustainable use of biological diversity, and the maintenance of the natural resources upon which indigenous communities rely for their well-being.

Furthermore, integrated assessments require the full involvement of local and indigenous communities. In assessing the potential impact of a proposed development on a sacred site, the assessment process should also select an alternate site for development in consultation with the site custodians and the affected community as a whole. Where a sacred site is to be affected by a proposed development, and in cases where no law exists to protect the site, the Guidelines suggest that the concerned indigenous and local community may wish to develop protocols regarding the site in the context of the proposed development.⁸¹

⁷⁶The full name of this instrument is: The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, 2004.

⁷⁷Secretariat of the CBD 2004: 5.

⁷⁸Ibid., 12.

⁷⁹Ibid., 6 (a).

⁸⁰Ibid., 24.

⁸¹Ibid., 31 and 32.

5. Normative Pathways: Towards a Rights-based Turn for SRG on Sacred Mountains

All the above perceptions, norms, and guidelines on the conservation of cultural and biological diversity and activities provide instrumental support for extending the social space in which to institutionalise the constitutional freedoms of FoRB and cultural autonomy. Embracing a rights-based turn for SRG is necessary to bridge the gap between the two types of governance. The following factors should be considered in outlining the normative pathways toward this aim.

First, it should be highlighted that articulating the duties of the state does not mean the confirmation of the rights of indigenous or local communities in the Chinese context. The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage viewed cultural heritage as a responsibility of both states and the international community. Member-states of the Convention have a duty to ensure the identification, protection, conservation, presentation, and transmission to future generations of cultural and natural heritage. They shall take effective measures using their own resources, and it is the duty of the international community as a whole to co-operate.⁸² While the Convention recognises these state duties, no rights of individuals or groups are articulated. In the Chinese practice, the rights and roles of local or indigenous communities who live in and around world heritage sites have long been neglected in the governance processes aimed at conservation.

Second, the construction of a normative framework for local or indigenous communities' cultural heritage needs a holistic approach. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage offers new, supplementary provisions relating to intangible cultural heritage. China ratified this convention in 2004 and adopted domestic legislation on intangible cultural heritage in 2011. Several related events, including the Ritual Ceremony of Meili Snow Mountain, the Gesar Epic, and the Ritual of Qiang New Year, were listed as either national or world intangible heritage. However, the categorisation of heritage as 'tangible' and 'intangible' is limited in the case of sacred mountains; for example, 'tangible heritage carries out meanings, while intangible heritage is often embodied in specific objects'.⁸³ The 2015 study of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) suggests a holistic approach to cultural heritage of indigenous peoples that acknowledges not only related beliefs, behaviours, and institutions, but also guarantees the physical or material basis and the social space for accessing the natural entities in question. The 2003 UNESCO Convention recognises the important roles of communities, in particular indigenous communities, groups, and individuals in safeguarding and recreation processes.⁸⁴ It stipulates their widest possible participation in management.⁸⁵ The state is obliged to specify these principles with relevant rights in its domestic law.

Third, new initiatives such as the establishment of the national park system in China require taking local communities' cultural values seriously.⁸⁶ In 2017, the CCP Central Committee issued Document No. 55 on the General Plan of Establishing a National

⁸²The UNESCO 1972 Convention, Articles 4, 5 and 6.

⁸³The 2015 Study by the Expert Mechanism on the Rights of Indigenous Peoples, 'Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage' A/HRC/30/53, <<https://undocs.org/A/HRC/30/53>>, para. 8.

⁸⁴Convention for the Safeguarding of the Intangible Cultural Heritage.

⁸⁵The 2003 UNESCO Convention, Articles 1(b) and 15.

⁸⁶The General Plan of Establishing a National Park System, the Central Committee of CCP Document No. 55, 2017.

Park System in China.⁸⁷ This is a step toward reforming the existing natural reserves institution through reference to the internationally common practice of using the IUCN's protected-area management categories.⁸⁸

Based on the above considerations and previous arguments on the unjustified institutional constraints on the two constitutional freedoms discussed, a proposal for a rights-based turn on SRG on sacred mountains can be justified. However, one of the primary challenges for such an institutional change is how to take FoRB and the cultural autonomy principle together with the party-state's commitments on human rights, cultural heritage, and biological diversity protection seriously. More concretely, in the case of sacred mountains, the legal framework for rights-based governance must not only respect the freedom of related beliefs, local or indigenous norms and customary practices, but also protect the physical nature (in this case the mountain and its plants and animals) as the cultural space and material basis of the indigenous or local communities' distinctive way of life.

In light of existing institutional space and possibilities, the proposal for a turn towards rights-based SRG on sacred mountains must include procedural and substantive rights through two steps. The first step involves setting up procedures for revealing a different worldview and understanding various negative social-cultural impacts. The second step is to substantively institutionalise the constitutional freedoms to empower local or indigenous communities to negotiate with the state and other powerful stakeholders. Procedural rules must (1) ensure cross-cultural understanding and communication among stakeholders by integrating cultural impacts assessment into environmental and social impact assessments; and (2) recognise the rules of free, prior, and informed consent (FPIC) under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP 2007) in relation to sacred mountains and other SNS, as the fundamental procedural guarantee to empower indigenous or local communities to participate and negotiate to achieve their self-determined sustainable development.⁸⁹

The substantive rules for the rights of cultural autonomy and FoRB of local or indigenous communities in relation to sacred mountains should include the following six elements.⁹⁰

(1) Maintaining (retaining or upholding)

Local or indigenous communities shall have the right to maintain their distinctive beliefs, spiritual relationship with their lands, institutional structures, customs, and traditions. They shall have rights to access their cultural sites, to control their ceremonies, to retain their own language and names for places. The state should recognise the spiritual significance of their lands and respect the FPIC rule when considering a resettlement

⁸⁷Ibid.

⁸⁸National Park is one of the six IUCN categories of protected area.

⁸⁹For the elaboration of FPIC rules and development in the indigenous lands of China, see Yong Zhou, *Free Prior Informed Consent (FPIC) and Hydropower Development: Institutional Constraints on Indigenous Peoples' Rights in the Party-State China* (University of Oslo 2016), p. 102.

⁹⁰The relevant articles under the UNDRIP include: Art 3 & 4, Art 11 (1), Art 12, Art. 25, Art. 32 (1), Art. 34, Art. 19, Art 32 (2); and Art 32 (3).

plan. It is the state's duty to guarantee the material basis and social space for the indigenous and local communities to realise these rights.

(2) Manifesting (expressing or practicing)

Local or indigenous communities shall have the right to manifest their spiritual and religious traditions, customs, and ceremonies. They shall have the right to express their folklore and to present their perspectives on history and their aspirations in education and public information.

Since these activities are normally linked to the natural entities – such as accessing sacred mountains or hunting culturally important animals – the state shall guarantee the cultural space and the material basis for the continuation of this way of life.

(3) Transmitting

Local or indigenous communities shall have the right to transmit to future generations their histories, languages, oral traditions, philosophies, and other cultural expressions in relation to sacred mountains and other SNS. The state has the duty to confine its propagation of atheism so that it is not discriminatory, as with other illegal interventions. The state shall recognise that change toward sustainability can occur only with community-based approaches that take local cultures seriously.

(4) Developing (revitalising or reforming)

Local or indigenous communities shall have the right to revitalise their cultural traditions and customs in relation to sacred mountains and other SNS. The state should not regard the culture of minority nationalities in a static way. This is the key to respecting the fact that indigenous and local communities are their own masters in reforming or developing their customs autonomously through their own representative organisations.

(5) Benefiting

Local or indigenous communities shall have the right to participate in and to spiritually, socially and economically benefit from the governance of sacred mountains and SNS-related activities. The state should pay special attention to fairly sharing benefits in its ongoing legislation on the institutions of ecological compensation and national parks.

(6) Redressing

The state shall provide effective mechanisms for just and fair redress, and respond appropriately to mitigate adverse environmental, economic, social, cultural, and spiritual impact. Effective mechanisms for redress or remedy are essential in the context of China.

To sum up, the legal status of sacred mountains should be recognised through a combination of substantive and procedural rules containing individual as well as group

rights. In the process of approaching a rights-based turn for SRG, the party-state plays a key role in institutionalising fundamental freedoms of the PRC Constitution.

6. Conclusion

In the multi-nation society of China, disputes related to the beliefs and customs of peripheral peoples in the process of the state's natural resources management have been increasing. Legal pluralism is a concomitant with social pluralism and an attribute of the social field in governing natural resources. Understanding the sacred mountain conflicts in Southwest China as a result of the expressions of two types of governance, SRG and CSG, reveals the contradictions of folk law and state law in their postulates, normative frameworks, and their performance. Constitutional freedoms, together with state commitments on human rights of international conventions, provide the general normative basis for accommodating the different worldviews and distinctive customs of local communities under CSG within the state governance on natural resources. However, research reveals the existence of competing legal postulates within state law in the Chinese party-state context. The party-state propagation of atheism as the only correct worldview creates an institutional discrimination against other beliefs and values in a culturally diverse society. In addition, the limited interpretation of FoRB as the concerning rights of individuals cannot be justified in the situation of sacred mountains, especially combined with the principle of cultural autonomy. Together with the institutionalised doctrine of social evolution and socialist ideology on property ownership, SRG has unjustifiably been practised without respecting FoRB or the cultural autonomy principle.

Recent initiatives and practices that involve sacred mountains or other SNS in conserving biological diversity extend the institutional space to include the values and knowledge basis of CSG. The normative framework on conserving cultural/natural heritage has been improved in terms of recognising the values of cultural diversity and involving the perspectives or participation of local or indigenous communities. Through dynamic interactions, a consensus is evolving that a sustainable governance of natural resources in local or indigenous lands is not only grounded in scientific knowledge, but also depends on the spiritual beliefs, social institutions, and cultural practices of local communities. If development is to be good change, its goals should be rooted in the local or indigenous communities' values, priorities, and well-being.

Therefore, further institutionalising the two constitutional freedoms towards a rights-based governance of resources is not only justifiable but expected. This rights turn in SRG could bridge the gap between the two types of governance, as well as confirm local or indigenous communities' as role contributors to cultural and biological diversity conservation. To construct a justified normative framework to prevent or resolve current conflicts on sacred mountains, a two-step pathway can be taken: the first step is to undertake integrated environmental-social-cultural impact assessments for development planning and operation that reveal different worldviews and the potential negative social-cultural impacts on indigenous and local communities. The second step is to empower local or indigenous communities to negotiate with the state and other powerful stakeholders. The institutionalisation of the FPIC rule together with minority nationalities'

group rights to exercise cultural autonomy in their homelands would help regulate competing interactions among the various actors of the pluralistic legal institutions at international, domestic and local levels in China.

Funding

This work was supported by NFR (Grant Number 287365).