Rights of Indigenous Peoples Under International Law:

A Critique

Thesis submitted to Jawaharlal Nehru University

for award of the degree of

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DECLARATION

I declare that the thesis entitled **"Rights of Indigenous Peoples under International Law: A Critique"** submitted by me for the award of the degree of Doctor of Philosophy of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other university.

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CERTIFICATE

We recommend that this thesis be placed before the examiners for evaluation.

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To my family. . . .

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List of Abbreviations

ABS	Access-Benefit Sharing
AITN	Asian Indigenous and Tribal Network
ARIPO	African Regional Intellectual Property Organisation
CANZUS	Canada, Australia, New Zealand and United States
CBD	Convention on Biological Diversity
CEACR	The ILO Committee of Expert on the Application of Conventions and Recommendations
ECOSOC	Economic and Social Council
EMRIP	UN Expert Mechanism on the Rights of Indigenous Peoples
EPTA	Expanded Programme Technical Assistance
GATT	General Agreement on Tariff and Trade
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on All forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILCs	Indigenous and Local Communities
ILO	International Labour Organisation
IMF	International Monetary Fund
OAS	Organisation of African States
TCEs	Traditional Cultural Expressions
The CERD Committee	The Committee on Elimination of Racial Discrimination
TK	Traditional Knowledge
UNCG	UN Convention on Prevention and Punishment of the Crime of Genocide
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNPFII	United Nations Permanent Forum on Indigenous Peoples
WGDD	Working Group on Draft Declaration
WGIP	Working Group of Indigenous Populations
WGIPC	Working Group on Indigenous Populations/Communities in Africa
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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Chapter 1

Introduction

1. Background

Indigenous peoples are the most socially, politically, and economically marginalised groups in the world. They are the most oppressed on account of the fact that the values sustaining the moral roots of their culture are considered incompatible with the values of modern culture. In the past, indigenous peoples remained a primary target of persecution and genocide, their existence and identity was always under threat. Indigenous peoples continues to struggle to seek justice for historical wrongs and recognition as a subject of international law. Indeed, international law was developed out of the peculiar issues triggered by the meetings of the indigenous peoples and European colonizers. The principles of natural law, a legacy of the Western political thinkers, which formed the basis of early international law was perceived as universal and any deviations, notably with regard to basic postulates, were looked upon as violations.

There was indeed a scale of civilisation, which in due course of time became more sophisticated, both overt and implied, that was applied to ascertain to what level those who do not fall in the basket of civilized nations could exercise universal rights. What this study intends to argue is that when natural law is believed to be universal, their application can be manipulated for oppression. They are the formulation of a philosophical understanding belonging to a specific culture. Which when extended to indigenous societies, their members may perpetually fail to meet those norms in vital aspect. This in turn may be judged as breach of natural law. Such infringements stimulate differing reactions, but were often used as an explanation for applying force over indigenous peoples. The thesis will demonstrate how universal moral criteria may be applied not as an agent of liberation but of dominance. In doing so it will adopt Third World Approaches to International Law (TWAIL). The objective of TWAIL include (a) deconstruction of international law as a medium for the development and

continuation of a racialized pecking order of international norms and institutions (b) it aspires to present an alternative normative legal framework for global governance.[1]

In recent times, the groups identified as "indigenous" are increasingly making their presence felt on the international stage. As a result the issue of protection and promotion of indigenous peoples' rights is considered an integral part of the global movement for the protection and promotion of human rights. The adoption of the Declaration on the Rights of Indigenous Peoples (UNDRIP hereinafter) by UN General Assembly in September 2007 (G.A. Res. 61/295) is commonly viewed as a watershed moment for indigenous peoples. The UNDRIP symbolises the general recognition of the oppression of indigenous peoples that has led to the subjugation of their own political institutions and cultural heritage, and divested them from their ancestral lands and territories. The salient features of the UNDRIP are: (a) a minimum standard of achievement to be pursued, but does not preclude the development of additional rights in the future; (b) entitlement to the full enjoyment of all the human rights and fundamental freedoms recognized in international law, and also to the right to be free from discrimination in exercise of such rights and freedoms. (c) the right to self-determination which allows indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development[2] ; (d) the protection of indigenous culture prohibits forced assimilation of "indigenous peoples" and (e) the recognition that territorial lands, territories, and resources are of existential importance to indigenous peoples.

In the aftermath of adoption of the UNDRIP, there is an emerging debate on the status and future of the indigenous rights under international law. Rodolfo Stavenhagen

[1] Makau Mutua and Antony Anghie, *What is TWAIL*, 94 Am. Soc'y. Int.'l L. Proc. 31,31 (2000); See also; B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 Int'l Comm. L. Rev. 3,3-28 (2006); James Thuo Gathii, *A Brief History of Its Origin, Its Decentralized Network, and a Tentative Bibliography*, 3 Trade L. & Dev. 26, 26-64 (2011); It is alleged that Indian TWAIL scholars have not emphasized on specific problems indigenous and tribal peoples, See, Prabhakar Singh, *Indian International Law*: *From Colonized Apologist to a Subaltern Protagonist,* 23 Leiden J. Int'l L. 79, 95-96 (2010)

[2] However, it is clarified that "nothing in this Declaration may be interpreted as implying for any State, people, group, or person any right to engage in any activity or to perform any act contrary to the Charter of United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states", See, Article 46 of the UNDRIP

reckons that the UNDRIP is a "statement of redress" besides "map of action".[3] Patrick Glenn pinpoints the usual paradox rooted in the UNDRIP: it fosters indigenous law by employing "profound western notion of international law"[4], a discipline primarily responsible for oppression of indigenous peoples across the globe and it defines indigenous peoples understanding of the "world in the idiom of 'western cultural theory'".[5]Against the backdrop of divergent views, the thesis aims to critically analyse the provisions of the UNDRIP and measure its normative resonance in international law.

International law has been dealing with the concerns of indigenous peoples even before the adoption of UNDRIP. Some of the issues affecting indigenous peoples had been addressed within the human rights framework. The International Labour Organisation (ILO) promulgated the Convention Concerning Indigenous Peoples in Independent Countries, 1989 (ILO Convention 169). It revised the preceding ILO Convention Concerning the Protection and Integration and Other Tribal and Semi-Tribal Population in Independent Countries, 1957 (ILO Convention 107). ILO Conventions essentially adopts the 'integration and assimilation' principle which bears appearance of less respect for indigenous peoples culture. Indigenous peoples rights to their traditional knowledge has been affirmed in the Convention on Biological Diversity of 1992 (CBD). The CBD under Article 8(j) provides that States shall:

> . . . respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with approval and involvement of the holders of such knowledge, innovations and practices and encourage equitable sharing of the benefits arising from the utilisation of such knowledge innovation and practices.

The World Intellectual Property Organization (WIPO) also discusses the protection of traditional knowledge and cultural expressions. In 2005, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources,

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[3] Rodolfo Stavenhagen, *Making the Declaration Work*, IN MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 354 (Claire Charter & Rodolfo Sravebhaged eds., 2009).

[4] H, Patrick Glenn, *The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples*, IN REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 171 (Stephen Allen & Alexandra Xanthaki eds. 2011)

[5] *Ibid*.

Traditional Knowledge and Folklore came up with two sets of draft provisions for the protection of traditional cultural expressions/folklore and for the protection of traditional knowledge against misappropriation and misuse. The "indigenous peoples" rights were also recognized in some of the judicial decisions of national courts. For example, in *Mabo v. Queensland* (No.2)[6], the High Court of Australia rejecting the t*erra nullius* argument held that denials of native titles were "discriminatory [and]denigration of indigenous inhabitants, their social organization and habits". These were important measures but the need for comprehensive protection of "indigenous peoples" rights with global impact continued to remain a need.

A significant foundational question in the study of indigenous peoples' rights relates to the meaning of term "indigenous peoples". It has attracted significant theoretical discussion to a level that scholars polemicized for years, whether even to have or not to have a definition of indigenous peoples. In this regard, 'self-identification' policy appears to have gained momentum in recent times. The UNDRIP is also silent over the definition of "indigenous peoples". But the debate over defining the concept of "indigenous peoples" has generated confusion and indecision with regard to eligibility of a group to claim protection under indigenous rights framework. Scholars like Ronald Niezen, Anthony Smith reject the demand of a precise definition.[7] In contrast, scholars like Martin Scheinin and Benedict Kingsbury favour a functional definition of "indigenous peoples" as the lack of a definition would be hindrance in effective implementation of indigenous rights under international law.[8]

The above mentioned dilemma deepens as many Asian countries like China, India, Bangladesh, Myanmar maintain that concept of "indigenous peoples" has no relevance within the domestic context. These countries argue that the concept of "indigenous populations" is inextricably bound up with, and indeed a function of, European colonialism. India, for example, argues that concept of "indigenous peoples" cannot

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[6] Mabo v. Queensland (No.2) (1992), 175 CLR 1

[7] RONALD NIEZEN, THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY 19 (2003); Anthony D. Smith, *When is a Nation?*, 7 Geopolitcs 5, 5-32 (2002).

[8] Martin Scheinin, *What are Indigenous Peoples?* IN MINORITIES, PEOPLES AND SELF DETERMINATION 4-13 (Nazila Ghanes and Alexandra Xanthaki eds. 2005); Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach*, 92 Am. J. Int'l L. 414, 414-457 (1998).

apply in the Indian context because after centuries of migration, absorption, and differentiation, it is impossible to say who came first.[9] They are informally referred to as 'adivasi' but under the Constitution for the purpose of effective implementation of benefits and concessions available to them under the law they are called 'Scheduled Tribe'. In India there have been waves of movement of population dating back to thousands of years. This being the case, it is not easy to make a neat divide between original settlers (to be regarded as indigenous) and migrants. In fact, groups described as tribes have at time been late comers to India as those described as non-tribal groups. The counterpoint to this view is that the recognition of indigenous people is not a conceptual or terminological question but is a political demand for human rights and a quest for social justice. The thesis shall provide an opportunity to understand the concept of "indigenous peoples" under international law and scope of its application in the Indian context.

With the sense of what is the available legal framework regarding indigenous rights under international law, the thesis proceeds in analysing some of the distinctive core indigenous rights. One of the most pressing issues related with indigenous rights is the concept of "indigenous sovereignty". Generally speaking, the traditional notion of sovereignty had been developed around the structure of State. Consequently indigenous peoples were denied sovereignty in Eurocentric international law. In the present time, however, the notion of sovereignty is being redefined. It can be reconceptualise in two distinct forms—external and internal. The indigenous peoples have made significant claims on the right to self- determination. The plea of indigenous peoples is that it is no less than colonization even when hegemony is made by territorial contiguity than by an overseas expansion. This contention opens up the debate on the internal and external colonization aspects. However such contentions have been largely dismissed on the premise that they pose threat to the sacrosanct principles of territorial integrity and State sovereignty.

Further, dispossession from the traditional lands and territories in the name of national economic development is a major challenge to the "indigenous peoples". Land and related resources rights are of fundamental importance to "indigenous

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[9] Andre Beteille, *What Should we Mean by "Indigenous People"* IN INDIGENEITY IN INDIA 19-33 (Bengt T. Karlsson and Tanka B. Subba eds., 2006).

peoples" since these constitute the basis of their economic livelihood and are the source of their spiritual, cultural and social identity. Historically, the expropriation of indigenous peoples land was fortified by draconian legal principles, such as doctrine of discovery (under it, discovery gave title to the government whose subject discovered new territory), *terra nullius* (it was a leading principle of the 19th century which held that if an indigenous society was not up to the European standards in terms of social and moral values, their land could be considered as unoccupied). In the contemporary times, various factors such as the neo-colonial industrial expansion, the drive to exploit virgin natural resources, industry based development and market reforms in countries having Indian population continues to threaten the indigenous peoples land.

Additionally, indigenous peoples also found themselves at a loss in the protection of their religious freedom, language, home craft activities, dress, diet, education, communal ownership of goods and traditional knowledge resulting into the misappropriation of the intangible cultural property.

In defence of their rights "indigenous people" started organizing and asserting themselves, nationally and globally. The small protests in 1960s grew into movement in the year 1972 when members of the American Indian Movement (Group of Native American) gathered from across the country to march to Washington, DC to protest what they called the "Trail of Broken Treaties". While the international "indigenous peoples" movement is intensifying globally there is a strong voice for giving right to participation in the development projects and in the decision making process which is to ensure that their concerns are properly addressed in the policy matters. However, the states largely seem to be reluctant in giving adequate space to the "indigenous peoples" in policy issues and very often disregard their rights.

2. Definition, Rationale and Scope of the Study

The present study aims to reflect key theoretical and legal issues pertaining to indigenous peoples and aims to discuss the status of the United Nations Declaration on the Rights of Indigenous Peoples. The endeavour is to assess the legal framework for the protection of indigenous peoples rights in international law. It seeks to

evaluate the normative value of the United Nations Declaration on Rights of Indigenous Peoples. The thesis analyses the ongoing debate among the scholars as well as practitioners regarding the definition of the 'indigenous peoples'. The study also undertakes to examine serious concern among the indigenous peoples related to their rights such as the right to self-determination; land/resource rights; the right to restitution; cultural rights; the right of indigenous peoples to participate in governmental decision making process that affect them; and right to treaty recognition. In evaluating the concerns of indigenous peoples, the study examines the connection between loss of indigenous peoples traditional land and situations of their marginalisation and discrimination. The thesis thereafter proceeds to examine ways in which rights for indigenous peoples can be strengthened under the international law. This include examination of implementation mechanism for enforcing indigenous rights under international law.

However, the scope of the study will not examine the issue of criminal justice system of indigenous peoples; environmental governance in their habitat, as well as gender issues. They remain beyond the scope of study. The analysis of state practice in respect of indigenous peoples land rights will cover four countries, namely, U.S.A., Canada, Australia and New Zealand and India specific study will be dealt separately.

3. Research Questions

1. What are the elements that should constitute the definition of "indigenous peoples" under international law?
2. In what ways has indigenous peoples' right evolved under international law?
3. What is the legal status of UN Declaration on Rights of Indigenous Peoples, 2007?
4. What does the term "indigenous sovereignty" imply and do indigenous peoples have right to remedial secession?
5. What are the legal issues relating to the claims of "indigenous peoples" over their land and natural resources?
6. Does international law provide protection to the unique cultural heritage of the indigenous peoples especially in the context of protection of traditional knowledge?

7. What are the implementation mechanisms for the enforcement of indigenous rights at the international level? Whether these has been effectively used?

4. Hypotheses

The Study will attempt to test the following hypotheses related to indigenous peoples and their rights

1. The lack of a precise definition of "indigenous peoples" can prove an obstacle for raising specific claims and rights in international law.
2. The non-existence of a comprehensive and binding international legal regime can become an obstacle to the protection and preservation of inalienable and basic rights of "indigenous peoples".

5. Research Methodology

The study is mainly analytical. It is based upon both primary and secondary sources. The primary sources include various international conventions, declarations, resolutions of international organizations as well as decisions of national and international tribunals. In addition to this, there are documents related to the negotiating history of UN Declaration on the Rights of Indigenous Peoples. The domestic, legislative and judicial decisions of some of the countries including India is studied to make critical assessment of the status of indigenous peoples and their rights. Further, for a better understanding of the subject; interviews are conducted with experts on the subject of research and tribal rights activists. In order to have first-hand information about indigenous peoples issues, field study in the areas having such population is conducted. The secondary source include important books, relevant articles and authentic information available on internet websites.

6. Chapterisation

The study is organised into six chapters including Introduction and Conclusion.

Chapter 2 traces the development of international law and its treatment of "indigenous peoples" over time. It discuss the problems of defining on the definition of "indigenous peoples" and identifies key element necessary to accord indigenous status. It also evaluates the debate on the Indigeneity of tribal

peoples in India and determine the scope of indigenous rights under international law in the Indian context.

Chapter 3 critically examines the ILO policy on “indigenous peoples” including the ILO convention169 and the ILO Convention 107 on “indigenous peoples”. Further, it critically analyses the legal framework for the protection of “indigenous peoples” under the United Nation system. It also reflect on the wider challenges that confront the realization of rights of indigenous people’s vis-à-vis the adoption of the Declaration.

Chapter 4 critically examines the nature, content and scope of indigenous rights. In doing so, it examines three vital rights comprising of (i) indigenous sovereignty and right to self-determination (ii) indigenous peoples land and natural resource rights and (iii) indigenous peoples’ cultural and intellectual property rights.

Chapter 5 critically examines the available implementation mechanisms for enforcing indigenous rights at international and regional levels.

Chapter 6 contains the finding of the study.

Chapter 2

Definition and Historical Aspects of Indigenous Rights

2.1. Historical Aspects of Indigenous Rights under International Law

2.1.1. Introduction

Legal system as an institution is a social and historical construct, a structure built of words and meanings, designed to promote certain values in an ordering system. The overall character of a legal system itself is based on a vision of how society should be structured and how the law, as an intrinsic component of society, should work within this structure.[1] This is also true for the international legal system wherein "international law", as observed by B. S. Chimni, "represents a *culture* that constitutes the matrix in which global problems are approached, analyzed and resolved. This culture is shaped and framed by the dominant ideas of the time".[2]Therefore, to understand the matrix of indigenous rights one has to traverse through the history of international law. Traversing in the past, one can find that the relationship between indigenous peoples and international law date back to the time of the 16th century when Europe began to colonize Latin America.

Two components of this relationship, that is between indigenous peoples and international law, predominately shaped the legal status of these peoples—first, the members of the international society were not obliged to treat 'the external other'—according to the norms that applied to the relation between States in the international society. Second, international law acted as a tool of European imperialism. [3]

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[1] Gordon Christie, *Law, Theory and Aboriginal Peoples*, 2 Indigenous L. J. 67, 69 (2003).
[2] B. S. Chimni, *Third World Approaches to International Law*, 8 Int'l Comm. L. Rev. 3, 15 (2006).
[3] B. S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 Melb. J. Int'l L. 499, (2007); LINDSEY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSED INDIGENOUS PEOPLES OF THEIR LANDS, (2005); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNITY, AND THE MAKING OF INTERNATIONAL LAW, (2007); Brett Bowden claims international law was an abettor of imperialism and incriminated in the "western imperial project" , see , Brett Bowden, *The Colonial Origin of International Law: European Expansion and Classical Standard of Civilization*, 7 J. Hist. Int'l L. 1,3,13 and 23 (2005).

This historical background exhibits the derivative character and role of international law in relation to the aims of empire that engulfed indigenous peoples. The present form of international law has its early roots in the philosophies of natural law articulated by European theologians. The scholars of natural law attempted to expound the legal and moral relation between the European States and indigenous peoples. With the rise of positivism in the 19th century international law cast off its naturalist frame and developed around the sovereign State centered system. This turned against the interests of indigenous peoples as only nation-states could act and hold legal rights and duties under international law. It is therefore necessary to explore and review the evolution of international law, including the historic linkage between international law and indigenous peoples, as has applied to indigenous peoples world-over. Such an enquiry will serve as a prologue to more complex issues found in the field of indigenous rights, which includes the definition of indigenous peoples, their present and future status and their rights under international law.[4] This part of the Chapter is divided into four sections. The first section traces the origin of indigenous peoples' rights under natural law paradigm. The second section looks at the treatment of indigenous peoples under the positivist construction of international law. Section three evaluates the growth of indigenous peoples' rights under human rights era. Section four shall conclude the issue with observations on the overall approach of international law vis-à-vis indigenous peoples.

2.1.2. Natural Law Framework

As mentioned earlier, a realist portrayal of evolution of indigenous rights is not possible unless the relationship between natural law, international law and imperialism is understood—a thing which has still remained esoteric. International law grounded in the universal moral values had used legal rhetoric, in the name of 'development', to perpetuate European supremacy and to subjugate indigenous peoples and their land.[5] The study attempts to examine the intricacies complex relationship between international law, natural law and indigenous peoples .

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[4] Odette Mazel, *The Evolution of Rights: Indigenous Peoples and International Law*, 13 Austl. Indigenous L. Rev. 140 (209); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 1 (2004).

[5] Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 4-5 (Chicago. John M. Olin Law & Economics Working Paper No. 108 (2D Series), 2000), *available at*, http://papers.com.taf?abstract_id=250042 ; Prabhakar Singh, *From*

2.1.2.1. International Law and Natural Law

In all the social milieus where human activity had ever taken place, the 'international' is one of the most composite and complicated. [6]Realising this complexity, it was imperative that *ius gentium* principles should have been impregnated with the idea of universality and sacrosanct in its nature. Particularly when it was designed on behest of European encounters within themselves or with the 'other world'.[7]Therefore, natural law was consciously made the logical basis for international law.

The so called "natural law" is a system of "natural law of morality" devised and exhorted by the early European theologians and philosophers, and recognized and accepted by later naturalists and eclecticists.[8]

The notion[9] of "*jus naturale"* may be traced back to Stoicism of the Ancient Greek of about the third century A.D. Stoicism taught that man was a reasonable being, and the basis of natural law was the reason of man.[10]"*Jus Gentium*" of the Ancient Romans was a system based on the adoption of the concept of natural law.[11] The instruction of Saint Thomas Aquinas (1225-1274), an Italian theologian and philosopher of medieval times, represented a historical vertex in the progress of natural law. It is observed that, according to Aquinas, "all human laws derive from and are subordinate to, the law of God. This law is partly reflected in the law of nature, a body of

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'Narcissistic' Positive International Law to 'Universal' Natural Law : The Dialectics of 'Absentee Colonialism', 16 Afr. J. Int'l & Comp. L. 56, 57 (2008).

[6] STEPHEN D. KRASNER, SOVEREIGNITY: ORGANIED HYPOCRISY, 42 (1999).

[7] The celebrated Canonist, Gratian, who compiled his collection of juridical principles during twelfth century, observes that:

[t]he law of nations deals with the occupation of habitations, with building, fortification, war, captivity, servitude, postliminy, treaties, armistices, truce, the obligation of not harming ambassadors.

See, GRATIAN, THE TREATISE ON LAWS (Dectrum DD. 1-20) WITH THE ORDINARY GLOSS, 7 (Augustine Thompson, O.P. & James Gordley trans, 1993).

[8] JOHN FINNIS, NAURAL LAW AND NATURAL RIGHTS, 26 (1980); Joseph Raz, *Kelson's Theory of Basic Norm*, 19 Am. J. Juris. 94,100 (1974); Jianming Shen. *The Basis of International Law: Why Nation Observe,*17 Dick. J. Int'l L.287, 292 (1998-1999).

[9] The author is limiting its inquiry to occidental philosophy.

[10] H. Lauterpacht, *The Law of Nations, The Law of Nature, and The Rights of Man*, 27 Transactions of Grotian Society: Problem of War and Peace, 4 (1942); Max Radin, *Natural Law and Natural Rights*, 59 Yale L. J. 214, 225 (1950);

[11] A. G. Chloros, *What is Natural Rights*?, 21 M.L.R. 609, 609-610 (1958); Quincy Right, *Towards a Universal Law of Mankind*, 63 Col. L. Rev. 435, 437 (1963); Frededrick Pollock, *The Law of Reason*, 2(3) Mich. L. Rev 159, 159-162 (1903); Gordon E. Sherman, *Jus Gentium and International Law*, 12 Am. J. Int'l L 56, 56-59 (1913).

permanent principles grounded in the Divine Order, and partly revealed in the Scripture."[12]

Nevertheless, the shaping, development and ascendancy of naturalism as a matured theoretical school was largely done by scholars of the 16th, 17th, and 18th centuries.[13]Among early writers on international law, belonging to school of natural law, include the two well-known Spanish theologians and jurists, Francis de Vitoria (1486-1546) and Francisco Suárez (1548-1617). For Vitoria, the law of nations "was founded on the universal law of nature."[14] Similarly, Suárez thought of international law as a derivative or extension of natural law, and that natural was the basis of international law.[15]

Theories based on "natural law" became even more popular and dominant in the 17th and 18th centuries. As far as international law is concerned, celebrated German jurist, Sammuel Pufendorf (1632-1694) had been a leading pioneer and advocate of the 17th century doctrines of natural law. An utmost naturalist, Pufendorf denied the existence of any positive rule, holding that only natural law contains legally binding norms. Pufendorf not only based international law on natural law philosophies, but also viewed international law as a part of natural law. At times he completely identified the two as one and the same.

This whole idea of linking international law with natural law was done with the intention of globalizing of values and morals. The study will demonstrate in the

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[12] LOUIS HENKIN, ET AL.,INTERNATIONAL LAW :CASES AND MATERIAL, xxiv (1993); JOHN F. MURPHY, THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW:HARD CHOICES FOR THE WORLD COMMUNITY, 13 (2010); Michael Milgate quoting Aquinas observes that, "every human law [that] is incompatible with the natural law, will not be law, but a perversion of the law", see, Michael Milgate, *Human Rights and Natural Law: From Bracton to Blackstone*, 10 Legal Hist.53, 63(2006); THOMAS AQUINAS, SUMMA, part I-II, Question 95 Article 1 (1981),

[13] Jianming Shen, *supra note* 8, at 292; This period can be identified with European Colonialism.

[14] MALCOM N. SHAW, INTERNATIONAL LAW 22 (2010); Vitoria's two lectures *De Indis Noviter Inventis* translated as " On the Indians Lately Discovered" and *De Jure Bellis Hispannorum in Barbaros* translated as "On the Law Made by the Spaniards on the Barbarians" are collected in one volume FRANCISCUS DE VITORIA, DE INDIS ET DE IVERE BELLI RELECTIONES (Ernest Nys ed.) (1917); See, J.H. PARRY, THE SPANISH THEORY OF EMPIRE (1940); J.H. PARYY, THE AGE OF RECONNAISSANCE (1963); J.H. PARRY, THE SPANISH SEABORNE EMPIRE (1966).

[15] MALCOM N. SHAW, *supra note* 14 at 23; See, FRANCISCO SUAREZ, *Tractatus De Legibus Ac Deo Legislatore* (reprint 1679); Heinrich Rommen, *Francis Suarez,* 10 Rev. Politics 437 (1948); Jose Ferrater Mora, *Suarez and Modern Philosophy,* 14 J. Hist. Ideas 528-547 (1953).

ensuing section, these values became instrument of structured oppression in the pretense of philanthropic extension of the principle of universal rights . [16]

2.1.2.2. Naturalists as Patrons of Indigenous Rights: The Myth

At the outset emphasis shall be laid on highlighting the reasons for which the founding fathers of international law have generously been described as benevolent friends of humanity,[17]especially in the contrarian of all the sufferings meted out by Europeans to indigenous peoples of the New World.

Vitoria had gained popularity as a defender of mankind for playing a pivotal role in protection in the human rights of native peoples. He is regarded as an advocate of indigenous rights in the European world. He came to rescue American Indians the only way he could— as a Scholastic, as an academic employing the valuable resources of the Catholic intellectual tradition— in an endeavor to uphold the inherent dignity of all peoples including those who lived in the territories of the New World.[18]

Perhaps the most cited work in which in Vitoria's description of the *jus gentium* comes into light vis-à-vis indigenous peoples of America is his *De Indis*. An excerpt of his work, which is often used for glorification is mentioned below. This excerpt is seen explaining positively the question whether indigenous peoples were rational beings, and it is as follows:

> [Indians] are not of unsound mind, but have, according their kind, the use of reason. This is clear , because there is certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops and a system of

[16] DAVID BOUCHER, THE LIMITS OF ETHICS IN INTERNATIONAL RELATIONS: NATURAL LAW, NATURAL RIGHTS AND HUMAN RIGHTS IN TRANSITION, 10 (2009). Boucher aptly observes that:
The application of natural law and the Law of Nations, uniquely the product of Western political experience, was conceived as universal, and from which local variations, at least in terms of fundamental beliefs, were regarded as violations.
Id.
[17] HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, xv-xvi (1866).
[18] Victor M. Salas, *Francis De Vitoria on The Ius Gentium and The American Indians*, 10 Ave Maria L. Rev. 331, 332 (2011-2012).

exchange , all of which call for the use of reason; they also have a kind of religion.[19]

Authors like Pablo Zapatero, Robert John, Kann observes that in dealing with the issue of the Spanish conquest of the Indies, Vitoria maintained that no authority could be reasoned out from celestial, natural or even positive law that would allow the Emperor Charles V to extend his sovereignty over other peoples. As the Indians were the original and rightful owners and lords of their land prior to the arrival of the Spanish, in his opinion, "legal claims of title to their lands in favour of the Spanish monarchy have no more value than any title they [the Indians] might have claimed had it been they who had discovered us [the Spanish]."[20] For Vitoria, even the Pope did not possess lordship over the whole world.[21]

Attention must however be drawn, that though Vitoria rejected the title by discovery or papal grant, he made grounds fertile for colonialism by advancing propositions as norms of *jus gentium* such as: (a) everyone has a right to citizenship; acquiring citizenship in foreign land is not a privilege but matter of right and it included citizenship by birth as well as by naturalization[22]; (b) there is a right to travel and trade in foreign land and enjoy things which indigenous people hold in common[23];(c) Christians have a right to preach and declare the Gospel in barbarian lands[24] and (d) every person is entitled to human rights and there is a 'right' to protect these human rights.[25]Violation of any of these norms by the Indian's were reason sufficient enough for Spaniards to wage 'Just a War' against them. Thus, observes Zapatero, Vitoria envisaged, "the 'rules of game' for the world as a political community by re-

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[19] VITORIA, *supra note* 14 at 127 *cited in* ANAYA, *supra note* 4 at 17.
[20] Pablo Zapatero, *Legal Imagination of Vitoria. The Power of Ideas*, 11 J. Hist. Int'l L. 221, 226-227 (2009); Robert A. Kann, *The Law of Nations and the Conduct of War in the Early Times of the Standing Army*, 6 J. Politics 77, 80 (1944);
[21] I*d*.
[22] JAMES BROWN SCOTT, LAW, THE STATE AND THE INTERNATIONAL COMMUNITY, 319 (1939).
[23] ANTHONY PAGDEN AND JEREMY LAWRENCE (eds.), VITORIA: POLITICAL WRITINGS, 231-292 (1991) *cited in* David Boucher, *supra note* 16 at 107; Antony Anghie aptly notes, while Vitoria trims the strength of the pope, once he establishes " the authority of a secular *jus gentium* that is administered by the sovereign , he introduces Christian norms within this secular system; proselyting is authorized now, not by divine law, but the law of nations, and may be likened now to the secular activities of traveling and trading." See, Anthony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, in LAWS OF THE POSTCOLNOLIAL, 97 (Eve Darian Smith & Peter Fitzpatrick eds. 1999).
[24] VITORIA, *supra note* 14 at 156;
[25] DAVID BOUCHER, *supra note* 16 at 106.

engineering the doctrine of the *jus gentuium*. To this end, he modified the concept into something newly applicable as an *instrument* by which to regulate that world political community."[26]

Alberico Gentili (1552-1608) was another distinguished internationalist[27] who figured out the true intentions of Spaniards by suggesting that the Spanish were not there to oversee commerce but to exert ascendancy under a conviction that they have right to appropriate lands that have recently been discovered, "just as if to be known to none of us were the same thing as to be possessed by no one."[28]However, Ivan Strenski notes that though Gentili departed in many ways from his Spanish forebears, nonetheless, he upheld that the nations are obliged to permit international trade and commerce and any failure to do so could be treated as an offence against the law of nations and as a valid cause for a'Just War'.[29]Further, Gentili regarded that there exists a pressing need of 'just war' in cases where innocent Indians are subjected to actions that are criminal violation of natural law. Gentili agrees with those who think that Spaniards had a just cause for war in chastising the Indians, "who practiced abominable lewdness even with beasts, and who ate human flesh, slaying men for that purpose."[30]

The advent of seventeenth was marked with changes in discourse of international law. With the receding role of religion as a source of legal authority, human reason began

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[26] Pablo Zapatero, *supra note* 20 at 228.
[27] For an overview of Gentili contribution to international law, See, Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 Am. J. of Int'l L. 713 (1998).
[28] ALBERICO GENTILI, DE JURE BELLI LIBRI TRES, 138 (John C Rolfe tras. 1933) *cited in* BOUCHER *supra note* 16 at 111; Lauren Benton and Benjamin Straumann, 28 Law Hist. Rev. 1, 25 (2010); Frank Frost Abbott, *Alberico Gentili and His Advocatio Hispanica*, 10 Am. J. Int'l L. 737, (1916); Thomas Willing Balch, *Albericus Gentilis*, 5 Am. J . Int'l L. 665, (1911).
[29] Ivan Strenski, *The Religion in Globalization*, 72 J. Am. Acad. Relig. 631,642 (2004); Richard Waswo, *The Formation of Natural to Justify Colonialism,1539-1689*, 27, New Literary Hist.743,747 (Autumn 1996).
[30] GENTILI, *supra note* 28 at 198-199; Meron quoting from *De Jure Belli Libri Tres* observes that:
[Gentili] espoused the right of humanitarian intervention on behalf of non-citizens(Gentili, just like post-United Nations Charter writer on international law, supported the right of the state to protect ["defend"] its citizens abroad ["whether what is defended is near or at distance"] as an exercise of necessary defence.
See , Theodar Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 Am. J. Int'l Law 110, 115 (1991). He then quotes Gentili:
"But so far as I am concerned, the subjects of others do not seem to me to be outside of that kinship of nature and the society formed by the whole world. And if you abolish that society, you will destroy the union of the human race….And unless we wish to make sovereign exempt from the law and bound by no statutes and no precedents, there must also of necessity be someone to remind them of their duty and hold them in restrain".
Id. See, GENTILI *supra note 28* at 74-75.

to shape the emergent modern international law. This evolution may be discerned from the movement in the writings of Vitoria to the work of Hugo Grotius, who was the most celebrated and influential teachers of seventeenth-century international law.[31]

Grotius is often revered as a humanist and as someone who were pivotal in developing 'secular international law'. [32]Jermy Rabkin observes, that Grotius departs from his medieval predecessors by denying that the law of nations rests specifically on Christian or theological bases. Similarly, Grotius had also denied that the residual legal authority vests in the Holy Empire.[33]On the other end of the spectrum, Grotius can be condemned as biased, because his theory "did not in any way restrict the endeavour of subjugating the non-European nations to European authority. Grotius' system could afford a pretext for every desired act of violence."[34]What Grotius did was that he set the stage for colonial international law by Firstly, constructing 'sovereignty' as the foundation of law of nations. As Grotius wrote, "sovereignty is a unity, in itself indivisible".[35] In this view, a State is either sovereign—or it is not a

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[31] Kim Benita Vera, *From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundation of International Law,* 42 Cal. W. Int'l L.J. 453, 460 (2011-2012); Peter Geyl, *Grotius*, 12 Transactions of the Grotius Society: Problems of Peace and War 81 (1926); For brief biographical sketch See, W. S. M. Knight, *Hugo Grotius: His Family and Ancestry*, 6 Transactions of the Grotius Society: Problems of Peace and War 1-24 (1920).

[32] Peter Borschberg, *East India Trade and the King of Johor*, 30 J. South-East Asian Stud. 225 (1999).

[33] Jermy Rabkin, *Grotius, Vattel, and Locke: An Older View of Liberalism and Nationality*,59 Rev Politics 293,296 (Spring 1997); The statement of Grotius which is often cited to prove his secular credentials is that "What we have seen saying would have a degree of validity, even if we should concede that which cannot be conceded without the utmost, wickedness, that there is no God"(*Et haec quidem qua jam diximus, locum aliquem haberant etiamsi daremus, quod sine summo seclere dari niquit, non esse Deum, aut non curare ab eo negotia humana)*See , HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: IN THREE VOLUMES (Jean Barbeyrac trans. 2005, Introduction by Richard Tuck); *also cited in* Esther D. Reed, *Property Rights, Genes, and Common Good*, 34 J. Relig. Ethics 41, 42 (2006); M. B. Crowe , however, notes that " Grotius was and remained a theologian. He had no intention of divorcing the natural law from theology". He cites Grotius :

"„..Herein, then is another source of law besides the source in nature, that is, the free will of God, to which beyond all cavil our reasons tells us we must render obedience.

Further, Crowe observes that Grotius defines natural law in entirely traditional terms:

" Natural law is the dictate of right reason indicating that an act, according to conforms to or is in disagreement with nature , individual and social, is either wicked or morally necessary and in consequence such an act is commanded or forbidden by God, the author of nature".

See, M. B. Crowe, *The "Impious Hypothesis'': A Paradox in IN Hugo Grotius*, 38 Tijdschrift Voor Filosofie 379,381 (1976).

[34] Rosalyn Higgins, *International Law in the UN period*, in HEDLEY BULL, BENEDICT KINGSBURY, AND ADAM ROBERTS (eds.), HUGO GRATIOUS AND INTERNATIONAL RELATIONS, 278 (1990).

[35] EDWARD KEENE, BEYOND THE ANARCHIAL SOCIETY: GROTIUS, COLONIALISM, AND ORDER IN WORLD POLITCS, 44 (2002) *quoted in* David A. Lake, *The New Sovereignty in International Relations*, 5 Int'l Stud. Rev. 303, 305 (2003).

State,[36]thereby, maintaining 'indigenous peoples' out of the realm of sovereignty and depriving them of holding any rights under international law. Besides that, even though Grotius is identified with the view that sovereignty is indivisible he is also credited with laying a large number of exceptions to this principle. Chimni, quoting Anthony Pagden, observes that Grotius did not construct a unified concept of absolute sovereignty but detailed the bases for divided sovereignty, especially in cases of non-European states with which European powers were increasingly embroiled in their path to commercial and imperial expansion.[37]

Georg Cavallar, notes that the evidence of Grotius being partisan to European imperial cause "revolves around three issues: the political purpose of his writings; his theory of punishment; and his doctrine of property."[38]

In a detailed study, Martine van Ittersum has exposed Grotius as a lobbyist and advocate for Dutch colonialism, writing *De Jure Praedae* (1604-1606) on behalf of the United Dutch East India Company (VOC or *Vereenughde Ostindische Copmaigne).* This work was meant to justify the VOC's privateering operations in East Indies.[39] Grotius had advanced statements and reasoning's on the rights of the Native peoples and their political freedom from the dominium of Christian kings and popes to counter-balance the Portuguese monopoly; to ensure the Dutch right to free trade in the native regions. Further, Grotius redeemed the policy of rejection of righteousness of any war, inspired by a goal to convert, in order to invalidate the arguments supporting the Portuguese prerogative to dominion in the Spice Islands.[40] It was not that Grotius completely abjured "just war", it was all there but only with reasons that suited the Dutch: (a) on the grounds of self-defense (b) to secure the rights of free trade as it were part of natural law (c) for recovery of property and injunctions for possession of property (d) for exaction of debt and (e) for

[36] I*d*.
[37] B.S. Chimni, *A Just World Under Law: A View From the South*, 22 Am. Uni. Int'l Law Rev.199, 202 (2007); Anthony Pagden, *The Empire's New Clothes: From Empire to Federation, Yesterday and Today*, 12 Common Knowledge 36, 41 (2006); STEFANO RECCHIA, JENNIFER M. VELSH (eds.), JUST AND UNJUST MILITARY INTERVENTION : EUROPEAN THINKERS FROM VITORIA TO MILL, 137 (2013).
[38] Georg Cavallar, *Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitan?*, 10 J. Hist. Int'l L. 181, 195 (2008).
[39] *Id.*; Martine Julia van Ittersum, *Mare Liberum Versus the Propriety of the Seas? The Debate between Hugo Grotius (1583-1645)and its Impact on Anglo-Scotto-Fishery Disputes in the Second Decade of the Seventeenth Century*, 10 Edinburg L. Rev. 239 (2006)
[40] Joan-Pau Rubies, *Hugo Grotius's Dissertation on the Origin of the American Peoples and the Use of the Comparative Methods,* 52 J. Hist. Ideas 221, 235 (1991).

punishment.[41]Grotius made it clear that natural individuals had the power to "[p]unish persons over whom they don't possess rights if they (allegedly) grievously violate the law of nature or nations".[42] This was particularly applied to 'civilize' indigenous communities indulged in, as part of native cultural practices, cannibalism, sodomy or any other practices contrary to Christian values. [43]

Lastly, Grotius' theory of property buttresses the European imperialist agenda in the following manner. First, he lays down the notion of 'common property' by arguing that under the terms of the original Divine gift to mankind, there was no scope for private ownership:

> God has not given all things to this individuals or to that, but to the entire human race, and thus a number of persons, as it were en masse, were not debarred from substantially sovereigns or owners of the same thing.[44]

Thus naturally occurring elements like the open sea, flowing water, air, flora and fauna in the forests were referred to common property. For Grotius, this principle of commonality was a part of liberal rules of commerce, where "[n]o one . . . has the right to hinder any nation from carrying on commerce with any other nation at distance".[45]Grotius, quoting Libanius, notes that:

> God did not bestow all products upon all parts of the earth, but distributed the gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another. And so He called commerce into being, that all men might be able to have common enjoyment of the fruits of earth, no matter where produced.[46]

Second, he presents an embryonic form of the "agricultural argument" that a man could convert common property into private property by engaging his labour. Thus,

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[41] Benjamin Straumann, *"Ancient Caesarian Lawyers" in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius's "De iure praedae",* 34 Polit. Theory 328, 343 (2006)
[42] Georg Cavallar, *supra note* 38 at 196.
[43] *Ibid.*
[44] John Slater, *Hugo Grotius: Property and Consent,* 29 Polit. Theory 537, 539 (2001)
[45] HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 199 (Gwladys L. Williams and Walter H. Zeydel Trans. , 1950) *cited in* Julie Stone Peters, *A "Bridge over Chaos": "De Jure Belli", "Paradise Lost", Terror, Sovereignty, Globalism, and the Modern Law of Nations*, 57 Comp. Lit. 273, 285 (2005).
[46] *Ibid.* at 199-200.

through ‘cultivation’, Europeans were enabled to convert common territory of natives into ‘private’ property.[47]

The present debunking is fair and appropriate given the credulous and often anachronistic hagiography of certain natural law scholars —defender of human rights, as founder of native rights.[48]

2.1.3. Positivist Conception of International Law

2.1.3.1. The Era of Early Positivism

If the natural law foundations in international law laid the ground for the European imperial project, it was the positivist construct of international law which sealed the beginning of ‘Eurocentric world order’. From the above discussion, it would be safe to propound that the theoretical framework of natural law basis of international law tried its best not to be directly discriminatory against indigenous peoples’ rights. In fact, to all appearances natural law basis of international law advocated for certain set of indigenous rights within its scheme of ‘universal human rights for all peoples’.

However with rise of positivism in 19th century, the legal policy and jurisprudence advanced in the line of positivist fabric systematically deprived indigenous peoples’ rights under international law. Firstly, by rejecting the natural law construct of law of nations as universal, applicable law to all humanity.[49] Secondly, the European State system became the focus of international law and only nation-states could possess rights and duties under international law.[50] The status of statehood was itself made contingent on a pre-condition of having ‘civilization’ based on Christian values:

> Is there a uniform law of nations? There is certainly not the same one for all the nations and states of the world. The public law, with slight exceptions,

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[47] Julie Stone Peters, *supra note* 45 at 286; MARTINE JULIA VAN ITTERSUM , PROFITS AND PRINCIPLES: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES (1595-1605) XXVIII (1950).

[48] Georg Cavallar, *supra note* 38 at 197.

[49] Catherine J. Iorns Magallanes, *International Human Rights and Their Impact on Domestic Law and Indigenous Peoples’ Rights in Australia, Canada and New Zealand*, IN INDIGENOUS PEOPLES’ RIGHTS IN AUSTRALIA, CANADA AND NEW ZEALAND 235-236 (Paul Havemann ed. 1999).

[50] Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis,* 12 Harv. Hum. Rt. J. 57, 98 (1999).

> has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origins.[51]

This division between 'civilized' and 'uncivilized' "was a fundamental tenet of positivist epistemology and thus profoundly shaped the concepts constituting the positivist framework".[52] Once the uncivilized [indigenous peoples] world was placed beyond the domain of international legal system. Positivist theories and methodologies were carefully arranged to tide over and allow non-European [indigenous peoples] units to enter the domain of international law as per the colonial agenda.[53] Accordingly, a "racialized scientific lexicon of positivism" steered the *assimilation process* through which non-European were to be imported within the domain of international law. [54]

Thirdly, this cultural distinction between 'civilized' and 'uncivilized' was closely related to the classifying of the 'sovereign' and definition of 'sovereign'. Strictly speaking, cultural variance was diligently translated into legal difference. Positivist scholars exemplified, repeatedly and articulately, why barbarian [indigenous] nations, "a wandering tribe with no fixed territory to call its own", a "race of savages" and a "band of pirates" could not be licensed as sovereign. International law and settling nations regarded indigenous nations as too little Christian or civilized to justify classifying them as someone authorized to enjoy sovereignty over their land and peoples. As a result, indigenous peoples were not considered subjects of International law.[55]

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[51] HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 15 (1866); Oppenheim defines international law as: "Law of Nations or International Law is the name of for the body of customary and conventional rules which are considered as legally binding by civilised States in their intercourse with each other", *See*, LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 1 (Ronald F. Roxburgh ed., 2005 vol.1); "International law consists in certain rules of conduct which modern civilized states regard as being binding in their relation with one another", W.E. HALL, A TREATISE ON INTERNATIONAL LAW 1 (8th edn. A.P. Higgins ed. 1924); See for detail discussion on definition of international law in Ronal R. Foulke, *Definition and Nature of International Law*, 19 Colum. L. Rev. 429 (1919); The use of word 'civilized states' clearly reflects Euro-centric origins of international law and arguably used to debar indigenous nations from being the subject of international law.

[52] ANTONY ANGHIE *supra note* 3 at 56.

[53] Francesca Panzironi, *Indigenous Peoples' Right to Self-Determination and Development Policy* 31 (200) (unpublished Ph.D thesis, University of Sydney).

[54] *Ibid*.

[55] THOMAS J. LAWRENCE, THE PRINCIPLE OF INTERNATIONAL LAW 57,58 (1895); For positivist scholars, indigenous peoples were barbarous and lacked "reciprocating will" which would justify them to be recognized as a member of society of international law, see, Ronal R. Foulke *supra*

2.1.3.2. Rise of New Pragmatic Positivist International law

The Jurisprudence of 'personality' which have a bearing on the problem of determining the legitimate subject of international law[56], stayed on to be primary concern for early twentieth-century legal positivists. This era could be really written off as the period of positivist denial of indigenous peoples as subject of international law. Their omission from international showground was based upon Eurocentric conception of law of nations. Undeniably, the positivist precept of 'effective occupation of territory' and the theory of recognition of statehood overwhelmed the legal status and the rights of indigenous peoples under international law. Indigenous peoples were disqualified to possess legal personality due to the fact that they were not recognized by the 'civilized society of nations'. The decisions of International tribunals during the 1920s and 1930s affirm to this development.[57] In *Cayuga Indians (Great Britain) vs. United States*, it was ruled that "tribe is not a legal entity".[58] Moreover, the legitimacy of treaties was pull to bits as judicial reasoning affirmed that "contracts between a State . . . and native princes of chiefs of peoples not recognized as members of the community of nations. . . are not, in the international law sense, treaties, or convention capable of creating rights and obligation".[59]

However, the advent of international organizations in the form of the League of Nations, and introduction of Mandate System, marked the beginning of alignment of world order based on "common economic interest" of States.[60] The science of economic development acquires cardinal rule—a game changer— for the twentieth-century international law. International law precisely began to trash topics of racial superiority and espoused a new set of models supposed as impartial and universal since they were based on science of economics. Consequently, the 'dynamic of

note 51 at 441; Phillips M. Brown, *The Theory of the Independence and Equality of States* 9 Am. J. Int'l L. 305, 315 (1915).

[56] Oleg I. Tiunov, *The International Legal Personality of States: Problems and Solutions*, 37 St. Louis U. L. J. 323, 323-325(1992-1993).

[57] Francesca Panzironi, *supra note* 53 at 35-36.

[58] Cayuga Indians (Great Britain) vs. United States 6 R. Int'l. Arb. Awards 173, 176 (1926) cited in Francesca Panzironi, *supra note* 53 at 36.

[59] Islands of Palmas case (or Miangas), United States vs. Netherlands, 2 R. Int'l Arb. Awards 829, 858 (1928).

[60] Mónica García-Salmones Rovira, *The Politics of interests in International Law*, 25 Eur. J. Int'l L. 765, 773-785(2014).

difference'[61] expressed with regard to the distinction between the 'civilized' and 'uncivilized', is reconstructed into the dichotomy of 'backward' and 'advance'.[62] Twentieth-century international law and organizations switched gears from a race base discourse to an economics-based discourse.

Economic development notably swayed policy-making and policy choices of the League of Nations. Especially, the conceptualization of labour executed, in the Mandate System, the identical role that the "universal human being" did in Vitoria's naturalistic framework.[63] The discipline of economics was thus perceived as universally valid since it incarnated the processes through which the native people could be civilized.

The importance of the Mandate System prevailed, argues Anghie, due to the fact that it created a novel structure of control and management which was based upon more advanced models of legitimization. The new 'science of colonial administration' that the mandates invented is, in its most essential features, the new 'science of development' which constitutes the legitimating basis of modern-day development organizations such the [World] Bank.[64] It is in the Mandate System that an unified administration is set up for the task of accumulating tremendous array of information from the outskirts, scrutinizing and processing this information by a generic branch of knowledge such as economics, and making a so-called universal science, a science whereby all societies may be appraised and directed on how to accomplish the aim of economic development.[65]

The conversion of colonial territories is not anymore initiated by colonial powers in the hunt for pushing their private interests; instead, it is pushed forward by a nonpartisan body of colonial expert's determined on annexing the knowledge of

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[61] "[d]enote, broadly, the endless process of creating a gap between two cultures, demarcation one as 'universal' and civilized and other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society", see, ANTONY ANGHIE *supra note* 3 at 4.

[62] *Ibid* at 189.

[63] Antony Anghie quotes an excerpt from the *Report of the 17th Session of the Permanent Mandate Commission* (1930): " The Law of labour is law of nature, which no one would be allowed to evade. And if this is true of organised and highly developed societies, the same must be admitted for peoples on the road to civilization and for countries which are on threshold of development", See, ANTONY ANGHIE *supra note 3* at 165.

[64] ANTONY ANGHIE *supra note 3* at 264.

[65] *Ibid*.

indigenous practices, customs, psychology, indigenous institutions.[66] Moreover the apparent objective, of this acquisition of knowledge, was to ensure development within the indigenous societies. The characteristic that requires to be highlighted is that the ‘dynamic of difference’ is replicated in the constitution of the Mandate System. The new set of dichotomy —developed and underdeveloped—substituted the old sets —civilized and uncivilized.

It is relevant to note that the League of Nations was also significant to indigenous voices and concerns as it became first international forum to which indigenous peoples tried to address and raise awareness of their way of life and to aver their natural rights.[67] Throughout the term of the League of Nations, somewhat four times effort were made by indigenous leaders to plea in front of the international society through the League.[68] Those cases are testimonial to indigenous peoples resoluteness and determination to resist the encumbrance of an international legal regime that denied them any global legal personality or right to approach international dispute settlement bodies. However, there was no move made by the League of Nations to ameliorate indigenous peoples as there was no provisions on indigenous rights in the Covenant of the League of Nations.[69]

It is in the third quarter of the twentieth–century that indigenous peoples began to steadily assert their presence and raise their claims within the international legal system. The establishment of the United Nation mechanism and the rise of international human rights law inducted a new chapter in indigenous peoples and international relations.

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[66] *Ibid*; Loytard in his seminal work *The Postmodern Condition: A Report on Knowledge* exhibits that knowledge has turned into commodity and intimately linked with power structure in a society. He observed “Knowledge in the form of an informational commodity, indispensable to productive power is already, and will continue to be, major —perhaps *the major*—stake in the worldwide competition for power”, see, SIMON MALPS, JEAN-FRANCOIS LYOTARD 18 (2003).

[67] Les Malzer, *Permanent Forum on Indigenous Issues: Welcome to the Family of the UN*, IN INTERNATIONAL LAW AND INDIGENOUS PEOPLES 67,73 (Joshua Castellino and Niamh Walsh eds., 2005)

[68] *Ibid*

[69] See, WARWICK A. MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW (1983)

2.1.4. Human Rights Era

In the wake of the barbarousness of the Second World War and the ratification of the *Charter of the United Nations*, the United Nations (UN) undertook to reconsider the discretionary powers States in their dealings with their own citizens. The prevalent philosophy continued as positivist, but human rights

> became a proper subject for international law as international legal theorist accepted that natural law's moral concepts of rights could form the basis of what states adopted and recognized as international law.[70]

The modern human rights discourse cherished the wellbeing of human beings over the convenience of the State, and believed that rights "belong to any individual as a consequence of being human, independently of acts of law".[71]

The *Charter of the United Nations*, adopted in 1945, was the earliest universal treaty to manifest human rights and self-determination of peoples, and to uphold fundamental freedom for all as the foremost ambition of the UN.[72] While restricting official membership to States and preserving respect for 'sovereign equality', 'territorial integrity' and non-intervention in domestic affairs[73], the *Charter* paved the way for non-state involvement in the deliberative process of the UN Economic and Social Council through several non-governmental organizations together with experts acting in their individual capability.[74]

As if now, the political philosophies that had reinforced colonialism had eventually be, as Anaya submits, vilified for disinheriting people of their own self-rule and were being battered by the opposing political philosophies of Western democracies and Marxism in several forms. The decolonization policy executed by the *Charter* necessitated States administering non-self-governing territories to report to the UN on

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[70] Catherine J. Iorns Magallanes, *supra note* 49 at 237.
[71] Odette Mazel, *supra note* 4 at 142.
[72] The UN Charter, Article 1 (2), 1 (3), 55, 56 & 57.
[73] The UN Charter, Article 2(1), 2 (4) & 2 (7).
[74] The UN Charter Article 71.

progression with regard to self-government. The thrust of decolonization thus took hold along with "a new anti-colonial and anti-racist consciousness and discourse".[75]

For indigenous peoples, captivating on the decolonization movement that empowered former colonies to attain independence was not so straightforward, as the legal provisions enabling decolonization applied only to the population of colonial lands as an integral whole and "largely passed indigenous patterns of association and political ordering".[76] Belgium tried to bring in the universally recognised self-determination norm to indigenous peoples at the UN, stating that:

> [a] number of states were administering within their own frontiers territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogenous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the world.[77]

What was later known as the Belgian 'thesis' was, however, discouraged as States considered indigenous peoples as minorities living within the respective territories, consequently they were entitled for no extra benefits other than general minority rights. In the words of Gordon Bennett :

> It was the putative threat to sovereignty of newly independent States that secured the final rejection of the Belgian Thesis and the purported restriction of Chapter XI to colonial territories; and the vagaries of international politics thereby imposed upon the United Nations a hypocritical stance towards the problems of indigenous peoples which was to frustrate organized efforts on their behalf for more than a decade.[78]

An outgrowth of the spotlight on the colonial provincial unit was the "salt-water doctrine" or "blue-water thesis" demanding that "salt water separate the people claiming self-determination under the United Nations Charter from the metropolitan

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[75] Elsa Stamatopoulou, *Indigenous Peoples and the United Nations: Human Rights as Developing Dynamics*, 16 Hum. Rt. Quart. 58, 60 (1994).
[76] ANAYA, *supra note* 4 at 23.
[77] PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 92,93 (2002)
[78] GORDENN BENETT, ABORIGINAL RIGHTS IN INTERNATIONAL LAW 13 (1978) cited in Odette Mazel, *supra note* 4 at 142

area of the nation-state".[79] Such conceptualization had the preferred result of excluding the right to secede from indigenous peoples and other living within the territorial boundaries of a nation-state. Whereas initial human rights actions and the accompanying decolonization measures functioned for the advantage of external colonial powers, global normative structure were yet short-handed to include the plight of indigenous peoples within the domain of international concerns.

Worldwide recognition of the importance of indigenous peoples concerns within the normative human rights structure did emerged, and the "conceptual and institution medium" of human rights turned out to be "the basis of much enhanced international concern" for indigenous peoples rights.[80] In 1957 the *International Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries* (ILO Convention No. 107) emerged as the first binding instrument within the UN framework which was exclusively designed for the protection of the rights of indigenous peoples.[81] The ILO Convention No. 107, developed in conjunction with decolonization movement was centered around the 'ignoble primitive' image of indigenous peoples and "the civilization of indigenous peoples, the assimilation of their retrograde cultures into modern world, is understood to be desirable and just".[82] It echoed an integrationist approach, commonly practiced in the 1950s, and it enlists a patrimonial and integrationist language. Nonetheless, the ILO Convention No.107 was vital in getting recognition of indigenous peoples to the front and is praiseworthy for its recognition, however limited, of indigenous customary practices and law and the right of collective land ownership.

Various other international human rights legal documents emerged thereafter with varied bearing on indigenous peoples issues. For example, The International Bill of Human Rights, which may not have any exclusive article on indigenous rights, nevertheless it may be invoked to address the concerns of indigenous peoples. The limiting role is due to the fact that the Human Rights Committee has failed to clear the doubt over the subject matter of the 'peoples' to whom Article 1 of the ICCPR

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[79] Catherine J. Iorns Magallanes, *supra note* 49 at 237.
[80] ANAYA, *supra note* 4 at 56.
[81] Odette Mazel, *supra note* 4 at 143.
[82] Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993*, 16 Hum. Rt. Quart. 1, 7-12 (1994)

applies, and how indigenous peoples claims might be appropriately brought before the Committee.[83]

Article 27 of the ICCPR, which categorically provides protection for the minorities, has been invoked with some success in case of violation of indigenous peoples' rights. It states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[84]

Whereas States argued that the provisions of Article 27 of the ICCPR casted a negative duty not to violate rights, it has been implemented in manner that it seems to be a positive duty for States to preserve the 'minority' culture.[85] In case of Indigenous peoples there has been some success stories pertaining to their claims under Article 27 to the Human Rights Committee, in accordance with the *First Optional Protocol* to the ICCPR, which envisages individual communications once "all domestic remedies" have been exhausted.[86]

The ICESCR contain a catalogue of economic, social and cultural rights," [i]n the enjoyment of which indigenous peoples consider several disadvantage".[87] For example, Article 15 of the ICESCR requires State parties to protect the right to culture by requiring them to recognize the right of everyone to take part in cultural life. Moreover, the Committee on Economic, Social and Cultural Rights, while commenting on Article 15, in relation to indigenous peoples, observed:

> Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and

[83] See, *Chief Bernard Ominayak and the Lubicon Lake vs. Canada*, Communication No. 167/1984 UN Doc. CCPR/C38/D/167/1984 (1990).
[84] The ICCPR, Article 27.
[85] The UN Human Rights Committee, *General Comment 23: The Rights of Minorities* (50th session 06 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.5
[86] The ICCPR Article 2
[87] Sarah Pritchard and Charlottee Heindow-Dolman, *Indigenous Peoples and International Law: A Critical Overview*, 3 Austral. Indig. L. Rep. 473 (1998)

> protected, in order to prevent the degradation of their particular way of life. [88]

Apart from the Bill of Human Rights, the *International Convention on the Elimination of All forms of Racial Discrimination* (ICERD) is another significant legal document which could be evoked to prevent racial discrimination against indigenous peoples. Though the ICERD did not have any specific provisions related with indigenous people, the Committee on Elimination of Racial Discrimination reaffirmed that the provision of the ICERD shall be applicable to indigenous peoples. Other instruments relevant to indigenous peoples includes *The Convention on the Prevention and Punishment of the Crime of Genocide 1948, The Convention on the Eliminations of All Forms of Discrimination Against Women 1993*.

The above mentioned legal instruments have extended protection to some of the important rights of indigenous peoples and caters significant areas of disadvantage. Yet, the question continued to persist as to whether the protection is enough to address the special concerns of indigenous peoples, or whether a distinctly framed response to their condition is indispensable and/or suitable? As Patrick Thornberry refers to:

> indigenous individuals may and do benefit from navigating their way through charters of undifferentiated human rights or utilizing rights of minorities . . . The problem with focusing on 'undifferentiated' instruments is that the specific indigenous voice may be lost.[89]

In same league Richard Falk argues that "indigenous peoples are in situation where their claims for protection cannot be coherently understood except when treated separately".[90] It is not that indigenous society have not understood the need of specific rights. In fact, indigenous peoples as part of global civil society have continuously, with help of international community, struggled to achieve their own "socio-political and socio-economic" framework in order to preserve their 'socio-cultural' environment. The influence of indigenous peoples and activists have manifested into, in first instance, in the replacement of ILO Convention No.107 with ILO *Convention*

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[88] The ICESCR, Article 15.
[89] PATRICK THORNBERRY *supra note* 77 at 4 cited in Odette Mazel, *supra note* 4 at 144.
[90] Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)* IN THE RIGHTS OF PEOPLES 21 (1988)

Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (ILO Convention No.169). And more recent triumph in indigenous rights discourse came with the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*.

2.1.5. Conclusion

As the European nations initiated the colonization of indigenous peoples' territories, they developed a discourse to rationalize it. They turned to legal codes of classical past for justification. The law was the early Roman *ius gentium*, which was based on natural law. First, the prescript of mutual affiliation of common humanity based on "natural sociability and fellowship" gave birth to 'right to settlement' and 'right to free trade and commerce' on indigenous lands. Second, the advancement of Christian values based meant that indigenous peoples were members of an 'uncivilized', 'backward' group. Any resistance from the indigenous peoples against the colonial agenda gave the Europe a right to wage 'just war'. This Eurocentric bias continued even in the era of positivist international law. Indigenous peoples were deprived of any membership to "civilized international society" during this period. International law was primarily concerned with "society of States, having European civilization". The distinction between 'civilized' and 'uncivilized' continued to shape the global world order which with the rise of pragmatic international law undergoes transmutation, resulting into new sets of differences— 'developed' and 'backward'.

However, as international law emerged with the introduction of human rights and the increasing numbers of States, Eurocentric principles/axioms were increasingly mitigated in global decision-making. The evolution necessitated to incorporate indigenous voices and concerns in international human rights discourse. It called for revisiting the status of indigenous peoples under international law. While international law continues to be State-centered, it is profoundly influenced by the concerns of individuals as well as groups and is increasingly "determined on the basis of vision of *what ought to be,* rather than simply on the basis of *what is*".[91] In this backdrop, indigenous rights have been receiving much needed attention in international law.

[91] JAMES ANAYA *supra note* 4 at 55 cited in Odette Mazel *supra note* 4 at 152.

2.2. Definition Debate

2.2.1. Introduction

One of the baffling problems in 'indigenous' rights movement[92] have had been to define the concept of 'indigenous peoples'.[93] Scholars polemicised for years, even to have or not to have a definition of indigenous peoples.[94] Noted scholar Benedict Kingsbury identifies two approaches to the conundrum of defining indigenous peoples'.[95] The first, termed as a positivist approach, treats indigenous peoples as a legal category requiring precise definition, so that pragmatic functionality could be achieved as it would be possible to determine, on the basis of definition, precisely who shall avail the benefits and responsibilities accrued as a subject of international law.[96]The second approach, referred as constructivist approach, takes the international concept of indigenous peoples not as distinct entity identifiable by universally applicable criterion, but as personifying a perpetual process in which claims and practices in several specific cases are absorbed in the global institutions of international society, then made specific again at the point of practical application in the political, legal and social process of specific cases and societies.[97]

The other predicament in defining the concept of 'indigenous peoples' is its application in Asian-African context. This has been referred to as the "Afro-Asian

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* This part of the chapter was published as an requirement towards the award of doctoral degree, See, Rashwet Shrinkhal, *Problems of Defining 'Indigenous Peoples' under International Law*, 7 Chotanagpur L. J. 187 (2013-2014)

[92] It includes efforts which have helped indigenous peoples to alter their status in international law from object to actors. See, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 56 (2004).

[93] Mireya Maritza Pena Guzman, *The Emerging System of International Protection of Indigenous Peoples' Rights*, 9 St. Thomas L. Rev. 251, 253 (1996-1997).

[94] Karin Lehmann, *To Define or Not to Define- The Definitional Debate Revisited*, 31 Am. Indian L. Rev. 509, 512 (2006-2007); Lillian Aponte Miranda, *Indigenous Peoples as International Law Makers*, 32 U. Pa. J. Int'l L.203, 243 (2010).

[95] Benedict Kingsbury, *'Indigenous Peoples' in International law: A Constructivist Approach to the Asian Controversy*, 92 AJIL 414 (1998).

[96] See generally, Rachel San Kronowitz et al., *Towards Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 Harv. C.R.- C.L. L. Rev. 507 (1987); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 Harv. Hum. Rts. J. 57, 58 (1999); Indigenous questions has moved from having merely normative status to being a "hardened norm", *see* , Siegfried Wiessner, *Joining Control to Authority : The Hardened 'Indigenous Norm'*, 25 Yale J. Int'l L. 301, 305 (2000) cited in Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of Regime*, 30 Queen's L.J. 348, 350 (2004-2005).

[97] Benedict Kingsbury, *supra note* 95, at 415.Kingsbury observes that "[t]he constructivist approach to the concept better captures its functions and significance in global international institutions and normative instruments.", *Id.*

problematique", which essentially claims that Asian and African peoples are all indigenous to their lands therefore no one population should be afforded special indigenous rights.[98] This issue shall be addressed later in the Chapter. This Part proceeds in following ways: First section contains the discussion on salient features of existing definition on 'indigenous peoples', along with definitional complexities. Further, deliberations have been made on Asian-Afican problamtique and commonalities and differences between 'indigenous peoples' and 'minorities'. Second section argues for the need of defining 'indigenous peoples' and identifies cognitive element on which definition should be based. Section three concludes the definition debate.

2.2.2. Meaning of Indigenous Peoples

2.2.2.1 Definition of Indigenous Peoples: Salient Features

It is of paramount importance to have definition of indigenous peoples, so that one could envision as to which group of population may be referred as indigenous peoples. Within the legal discourse as well in ordinary parlance, 'indigenous' is taken to mean as 'native' or 'originating or occurring naturally'. However, it is the locution and specification of the concept which remains highly inconclusive and problematic.[99]Despite lack of consensus, various scholarly definition of the term indigenous exists. Anaya defines the term "indigenous peoples" as "the living descendants of preinvasion inhabitant of lands now dominated by others" who are "culturally distinct groups that find themselves engulfed by settler societies born of the forces of empire and conquest".[100]The most widely publicised definition of

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[98] The Special Rapporteur on Indigenous Peoples, *Study on Treaties, Agreements, and Other Constructive Agreements Between States and Indigenous Population, delivered to the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities,* U.N. Doc. E/CN.4/Sub.2/1999/20, 91 (June 22, 1999)(*submitted by* Miguel Alfonso Martinez)[hereinafter *Final Report: Study on Treaties*]

[99] Javaid Rehman, *International Law and Indigenous Peoples: Definitional and Practical Problems*, 3 J. C.L. 224, 226 (1998); "[n]o single agreed upon definition of the term 'indigenous peoples' exist", *Robert K. Hitchcock, International Human Rights, the Environment, and Indigenous Peoples,* 5 Colo. J. Int'l Envtl. L. & Pol'y. 1,2 (1994); "[i]t has thus far proved impossible to arrive at a commonly accepted definition of 'indigenous peoples'", H. HANNUM, AUTONOMY, SOVEREGINITY AND SELF DETERMINITION: THE ACCOMODATION OF CONFLICTING RIGHTS, 88 (1990);Thornberry points out an intriguing instance of Kennewick case to prove the complexities involved in the concept of indigenous peoples. See, P. THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS, 35-40 (2002).

[100] ANAYA, *supra note* 92, at 3; S. James Anaya and Robert A. Williams, Jr. , *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human*

indigenous peoples is the one put forward by the United Nations Special Rapporteur José R Martínez Cobo. According to him:

> Indigenous communities, peoples and nations are those which, having continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

> (a) Occupation of ancestral lands, or at least of part of them;
> (b) Common Ancestry with the original occupants of these lands;
> (c) Culture in general, or in specific manifestation (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc;
> (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
> (e) Residence in certain parts of the country, or in certain regions of the world;
> (f) Other relevant factors.[101]

A variant of the Martínez Cobo definition has been adopted by the ILO *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989.[102] A

Rights System, 14 Harv. Hum. Rts. J. 33 (2001); Condé observes that the common usage of the term refers to " a body of persons who are united by common culture, tradition, ethnic background, and sense of kinship that often constitutes a distinct, politically organised group." See, VICTOR H CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 107 (1999); Kuper reiterates that what notionally unites indigenous people is that they "are all (or once were) nomads or hunter gatherers" and "indigenous stands in for primitive", cited in ANDREW CANESSA, POWER, INDIGENITY, ECONOMIC DEVELOPMENT AND POLITICS IN CONTEMPORARY BOLIVIA, 197 (2007); see also, ADAMS KUPER, THE REINVENTION OF PRIMITIVE SOCIETY: TRANSFORMATION OFA MYTH, (2007).

[101] The Special Rapporteur on Indigenous Peoples José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, paras. 379-80 (1986).

number of distinct features are evident in the definition provided by Martínez Cobo as well as by ILO Convention 169. These includes historical continuity, with preinvasion and precolonial societies, non-dominance, distinctive culture, and determination to preserve, develop and transmit to future generations, their ancestral territories and ethnic identity. Let us also observe, before scrutinizing them, standards ascribed to 'indigenous peoples' by some modern-day scholars. Thornberry derives four strands of indigenousness; first, association with a particular place, grounding the idea of 'indigenous peoples' as territorialized societies; second, historical precedence over subsequent societies; third, indigenous societies being not only prior societies but also the first inhabitants of the given territory; and fourth, the cultural distinctiveness of indigenous societies when compared with dominant societal groups.[103]

Kingsbury also proposes four elements, which he considers to be precondition to the recognition of 'indigenous status': first, the indigenous society distinguish itself as a distinct ethnic group; second, it has experienced severe disruption, dislocation or exploitation; third, it can manifest a significant historical connection with a particular territorial unit; and, finally, it wishes to retain its distinctive identity.[104]Daes also tenders a number of criterion for the purpose of determining 'indigenous status', including: priority in time, voluntary perpetuation of their cultural distinctiveness,

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[102] Art 1 (1) of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries Stipulates that the Convention applies to:

(a) tribal peoples in independent countries whose social, cultural, and economic condition distinguish them from other sections of the national community, any whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhibited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries,1989 (No.169) *entry in force* Sep. 05, 1991, http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO:12100_ILO_CODE:C169 [hereinafter ILO Convention 169].

[103] He also recognizes the criterion of self identification, Thornberry, *supra note* 99, at 37-40 also cited in Stephen Allen, *The Consequences of Modernity for Indigenous Peoples: An International Approach*, 13 Int'l J. on Minority & Group Rts. 315, 316 (2006);

[104] Benedict Kingsbury, *supra note* 95, at 453-455.

self-identification as indigenous and experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant society.[105]

Broadly the notion of 'indigenous peoples' could be understood from three perspectives: (i) chronological (ii) relational (iii) normative. When used in chronological sense, 'indigenous' means earliest inhabitants if not autochthones. Use of term 'indigenous' in relational sense is conceptualized as poor and marginalized position in national societies. In normative sense, it covers people who feel rooted in their surroundings, entertain a custodial sense about their territory and resources, are bound together primarily through moral bindings and entertain a sense of reciprocity and mutuality reinforced by egalitarian ethos.[106]The perplexities of conceptualizing the term 'indigenous peoples' will be dealt with in the ensuing section.

2.2.2.2. Definitional Complexities

The development of concept of indigenous peoples involves law, politics and self-interest of regions, nations and groups. Consequently, there lies certain ambiguities which may have introduced more questions than it has answered while defining the concept of 'indigenous peoples'.[107]

These definitions rely upon a 'critical date': a point in time when inhabitants of a particular territory are to be regarded as 'indigenous'. [108]By recomposing invasion and colonization as contingent fact, for determination of indigeneity, the ILO and Cobo definitions have moved towards excluding 'indigenous peoples' of Europe which clearly reflect Eurocentric biasness of the definitions. This would restrict the problem of indigenous peoples to everywhere but Europe. The Washington based Centre for World Indigenous Studies, however, has identified 120 groups striving for indigenous status in Europe including Skanians in Swedan, Cornish in Wales, Shetlanders in UK, Basques in France and Spain and number of peoples in Italy and beyond.[109] It is in

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[105] The Special Rapporteur of the UN Sub-commission for the Promotion and Protection of Human Rights, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/2000/10.
[106] B. K. Roy Burman, *Indigenous and Tribal Peoples in World System Perspective*, 1 (1) Stud. Tribes Tribals 7, 8-9 (2003).
[107] Amelia Cook and Jeremy Sarkin, *Who is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana*, 18 Tul. J. Int'l & Comp. L. 93, 115 (2009-2010).
[108] Javaid Rehman, *supra note* 99, at 228.
[109] B. K. Roy Burman, *supra note* 106, at 13.

this perspective Rehman observes that "colonization is no less colonization if it is made by territorial contiguity rather than by overseas expansion".[110]

There is also a possibility that some set of complexities may weed while linking indigeneity with culture. Defending 'indigeneity' based on obsolete cultural traditions can mean that "[a]ppeals to stereotypes of hunter-gatherers also make it hard for local people to argue for goods that don't fit the image, like goats or cattle, or farm land. Economic priorities are distorted to fit the illusions of foreign romantics".[111] In this sense, defining the term 'indigenous' too rigidly could possibly limit the capacity of indigenous group to exercise their basic right to self-determination, which might include a desire to shift away from historic modes of traditions and adapt their culture in such a way that allows these groups to coexist successfully with the modern world around them.

It is absurd that 'indigenous' groups now and again have had to "reformulate their ethnic identities in order to get access to resources". For example, "the San are still expected to perform as authentic 'bushmen'…if…land claim-judges are not to dismiss their identity claims as false and opportunistic," yet "[n]o one expects 'the English' to perform their Englishness," even though "being English allows one both to be 'modern' and to make claims on an idealized English past of kings and queens, castles, medieval villages, and pastorals landscapes".[112]

Another aspect of definition which leads to convolution is the concept of 'self-identification' of indigenous peoples. The term self-identification is defined as the right of both individuals and groups to identify and proclaim their indigenous identity independent of authorization by any certifying institution at any level, either by local community, "host" state, or international organization.[113]

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[110] Javaid Rehman, *supra note* 99, at 231; J. Kunz, *Chapter* XI *of the United Nations Charter in Action*, 48 Am. J. Int'l L. 103-111 (1954).

[111] *Discussion on the Concept of Indigeneity,* 14 Soc. Anthropology 17, 22 (2006) (comments of Adam Kuper) *cited in* Amelia Cook and Jeremy Sarkin, *supra note* 107, at 113.

[112] Adam Kuper, *The Return of the Native*, 44 Curr. Anthropol. 389, 398 (2003).

[113] Jeff J. Corntassel and Thomas Hopkins Primeau, *The Paradox of Indigenous Identity*: A levels-of-Analysis Approach, 4(2) Global Governance 139 (1998).Corntassel and Hopkins observes that the concept of self-identification can be analyzed at four different levels: The individual and the right to self-identify one's own nationality; the group and the collective right of a group to define its own membership within its host state; the host state and its regulation of groups within its borders; and the UNWGIP (international level) and its unrestricted right of recognition of a group's indigenous status. *Id* at 142.

Based on the diagnosis of Mancur Olson, what he called the "free-rider problem",[114] Corntassel and Hopkins observe that an unlimited right to indigenous self-identification has serious implication as it has encouraged other minority group, such as the Namibian Bastar and South African Boers, in their claims of having "indigenous status" in order to obtain benefits of rights detailed in the declaration. In a similar context, however, Burman is against any warrant on the right of self-identification by others who are recognized as initiators of the indigenous people's right agenda. For him, such a provision would amount to veto right to a constellation of people which may not be in the best interest of indigenous peoples in general.[115]

The above discussions demonstrate some of the intricacies of defining 'indigenous peoples'. Probably for these reasons scholars have debated over reification of 'indigenous peoples' through a strict definition. The next section will touch on the quandaries of 'indigenous peoples', as a concept, in the African and Asian context.

2.2.2.3. Afro-Asian Problematique

Indigenous Peoples, just like any legal category is capable of redistributing political or economic capital, substantive scope of such category is not free from controversies.[116] During the United Nation decolonization process in the early 1960's nearly all countries of Africa and Asia were rewarded from decolonization. However, the subjects who lived in enclave territories in the rest of the world, including indigenous peoples of the Americas, Australasia and the Arctic regions, did not gain independence from non-indigenous powers. This dichotomy is result of the salt-water theory.[117] The salt-water theory restricted the right to self-determination to those non self-governing territories separated by salt-water from the administering power and denied the right to self-determination to those peoples engulfed by the contiguous

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[114] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971), Corntassel and Hopkin observes "free-rider problem" as tendency in minority groups "not traditionally conceived" as indigenous to claim indigenous identity, because it has come to be viewed by ethnic groups as an "empowering internationally". ; The Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Standard- Setting Activities: Evolution of Standards Concerning Rights of Indigenous People, *Working Paper by Erica Irene A. Daes*, *on the Concept of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/AC.4/1995/3, 1-12.

[115] B. K. Roy Burman, *supra note* 106, at 10.

[116] Lillian Aponte Miranda, *Indigenous Peoples as International Law Makers*, 32 U. Pa. J. Int'l L. 203, 243(2010).

[117] Chidi Oguamanam, *supra note* 96, at 369-390.

territory of a metropolitan State.[118]The salt theory was introduced into the U.N. "Charter of Decolonization". This partly explains international law's narrow abstraction of indigenous peoples and the imprecision associated with the term.

The categorization between African and Asian 'indigenous populations' on the one hand and enclave population on other has its own oddity. Partly because of the obscurity caused by the salt water theory, most African and Asian countries deny the existence of 'indigenous peoples' within their territories or have best remained ambivalent about it. The difference with which claimants of Afro-Asian indigenous population and enclave population are viewed is manifested by the views of Miguel Alfonso Martinez, drafter of the important report, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*.[119]In the course of this report, Alfonso Martinez expressed his belief that "the term 'indigenous'—exclusive by definition—is particularly inappropriate in the context of Afro-Asian *problematique* and within the framework of United Nations activities in this field."[120] He then concluded that all African on the African continent are "autochthonous".[121]

Correspondingly, there is no fixed ground for opposition among Asian governments with regard to existence of distinct category of population as indigenous. Benedict Kingsbury observes that at least three kinds of arguments are involved: definitional, practical and policy. The definitional arguments are lexical, based on view of "indigenous" as entailing prior occupancy, with an assumption that it is deeply associated with the deleterious effects of European colonialism. The practical argument is that it is impossible or spurious to seek to identify the prior occupants of countries and regions with such long complex histories of influx, movements and melding. The policy argument is that recognizing rights on the basis of prior occupation for particular sets of groups will spur and legitimate mobilization and

[118] John T. Paxman, *Minority Indigenous Populations and Their Claims for Self-Determination*, 21 Case W. Res. J. Int'l L. 185,198 (1989); FRANKE WILMER, THE INDIGENOUS VOICE IN WORLD POLITICS: SINCE TIME IMMEMORIAL, 177-178 (1993);
[119] *Final Report: Study on Treaties*, supra note 98.
[120] *Id*. at 91.
[121] Karin Lehman, *supra note* 94 at 513.

claims by vast range of groups, undermining other values with which the state is properly concerned. [122]

2.2.2.4. Indigenous Peoples and Minorities: Commonalities and Differences

The identification and definition of 'indigenous peoples' are often, if not always, commensurate with those of 'minorities'. Symmetrization of two distinct legal concepts is not free from controversies. Even scholars are divided over the logic of alchemizing the two concepts. Commonalities lie with the fact that in a number of instances 'indigenous peoples' are reduced to 'minorities' and being weak and marginalized, many of their demand coincide with other minorities. The Human Rights Committee also turned to minority protection clause of *International Covenant on Civil and Political Rights*, while protecting the cultural rights of an indigenous woman in the *Lovelace v Canada*, which involved the deprivation of Aboriginal status of a woman for marrying a non-Aboriginal man. The Human Rights Committee remarked that the "Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant." [123]

On the other hand, while similar concerns are shared as regard both 'indigenous peoples' and other minorities, there remains a marked difference between both categories. In this regard, based on the work of Asbjorn and Erica-Irene Daes, the then chairpersons, respectively of the UN's Working on Minorities and Working Group on Indigenous Populations, the difference between 'minorities' and 'indigenous peoples' can be figured out as: (a) minorities seek institutional integration while indigenous peoples seek to preserve a degree of institutional separateness; (b) minorities seek to exercise individual rights while indigenous peoples seek to exercise collective rights ; (c) minorities seek nondiscrimination while indigenous peoples seek self-government.[124]This, in fact, is the established view of the indigenous peoples

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[122] Benedict Kingsbuy, *supra note* 95 at 433.

[123] See the Jurisprudence of Human Rights Committee in *Lovelace v Canada*, Human Rights Committee, Decision under the Optional Protocol (13th Session) UN Doc. CCPR/C/13/D/24/1977 (July 30,1981).

[124] U.N. Economic & Social Council [ECOSOC], Commission on Human Rights, Sub-Commission on Promotion & Protection of Human Rights, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples*, U.N.Doc.E/CN.4/Sub.2/2000/10 (July19,2000) (prepared by Asbjorn Eide & Erica Irene Dias) cited in Will Kymlicka , *The Internationalization of Minority Rights* , 6 Int'l J. Const. L. 1, 4-5 (2008)

themselves- a longing which was categorically expressed by a representative of the Indian Treaty Council when he stated that '[t]he ultimate goal of their colonizers would be achieved by referring them to minorities'.[125]

Despite of the difference between the two concepts, having been primary target of genocide, persecution and discrimination, indigenous peoples deserve to be the beneficiary of whatever norms relating to minorities have to offer.

2.2.3. Land and Indigeneity

In spite of contentious issues involved in defining 'indigenous peoples', there lies necessity of minimizing the vagueness involved in the concept. Therefore it is essential to determine focal point of the concept so that outlines could be delineated. Martin Scheinin aptly remarks " [t]he pragmatic approach of not including a definition, as in the Draft Declaration, is tempting but the victories resulting from this pragmatism may be Pyrrich in nature : the international community – which still today is primarily constituted of states –will not grant far reaching rights to indigenous peoples unless the scope of application of the legal concept of indigenous peoples is at least reasonably precise".[126]

The focal point for indigenous peoples could be none other than their special relationship with land. This special relationship is fundamental both for material subsistence[127] and for cultural integrity[128] of 'indigenous and tribal peoples'. The Inter American Commission on Human Rights [IACHR] has categorically explained, in this regard, that "the indigenous population is structured on the basis of its profound relationship with the land"; that "land, for indigenous peoples, is a condition of individual security and liaison with the group"; and that "the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural

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[125] PATRIK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES, 331 (1991) cited in Javaid Rehman, *supra note* 99, at 230.
[126] NAZILA GHANEA & ALEXANDRA XANTHAKI (eds.), MINORITIES, PEOPLES AND SELF-DETERMINATION, 13.
[127] The safeguarding of indigenous peoples culture comprehend the preservation of aspects linked to their productive organization, it includes, *interalia* , the issues of ancestral and communal lands, *Maya Indigenous Communities of the Toledo District* (Bleize), Case 12.053 Inter-Am. Comm'n H.R., Report No. 40/04 , 120 (Oct 12, 2004).
[128] The notion of family and religion are closely connected to traditional territory, where the ancestral graveyards, religious sites and kinship patterns are associated with the occupation and use of physical territories, *Id* at 155.

survival and for maintaining the community's integrity."Likewise, the *Kimberley Declaration*, 2002 reflecting the sentiments of indigenous peoples, solemnly proclaimed that "Our land and territories are at the core of our existence—we are the land and the land is us…...we are the original peoples tied to the land by our umbilical cord and the dust of our ancestor."[129]

2.2.4. Conclusion

Issues pertaining to 'indigenous peoples' have been debated since the inception of modern international law. Nomenclatural reference from barbarians to fourth world itself speaks about the success story of their struggle for identity and respect from other worlds. However, in the era of globalization cross cultural communication is inevitable which in turn has brought serious threats to 'indigenous peoples' in connection with cultural preservation, both from other worlds and within itself. It can safely be stated that it is absolutely essential to identify the 'indigenous peoples' and their emotional cord to land as a determining factor to establish the 'indigeneity'.

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[129] International Indigenous Peoples Summit on Sustainable Development, The Kimberly Declaration (Aug 20-23, 2002).

2.3. Indigeneity Debate in India: A Critical Analysis

2.3.1. Introduction

Who are indigenous peoples in India? Whether tribal peoples in India are indigenous peoples or not? These questions are highly controversial and have a polarising power which is exhibited by the divided scholarship over the issue of Indigeneity in India. Moreover, polarising effect at the society level is gaining strength in the Indian society with the import of 'indigenous discourse' in the Indian context, where voices from eighty million 'scheduled tribes' are echoing for recognition as indigenous peoples as part of their struggle for socio-cultural, economic and political rights. One cannot turn blind eye to the question that whether this deepening of Indigeneity sentiments among the tribes of India is natural or an impact of colonial construct from the scholars who are perceived as being motivated by imperialist agenda or a residual of diabolical perception on Ancient Indian history by mainstream Marxist scholars in order to make India a candidate for dialectical and historical materialism?[1] These questions are significant in the sense that they lead to another pertinent question, whether the tribal peoples of world in general and India in particular can benefit from indigenous rights discourse under international law beyond the terminological polemic over 'indigenous-tribal' constructs?[2] This Subchapter is divided into three sections. First section critically examines the idea of Indigeneity in India. It will argue that in case of India it is difficult to determine Indigeneity based on 'first occupancy'. Second section argues that in case of India, a dynamic approach must be adopted in defining the concept of Indigeneity. In this sense, Indigeneity must be seen as a social fact. Section three will conclude the issue of Indigeneity debate in India.

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[1] See, BRENDAN O' LEARY, THE ASIATIC MODE OF PRODUCTION: ORIENTALISM, HISTORICAL MATERIALISM AND INDIAN HISTORY (1989); E.M.S. Namboodiripad, *Adi Shankara and His Philosophy: A Marxist View*, 17 Soc. Scientist 3-12 (1989); Sharad Patil, *Dialectics of Caste and Class Conflicts*, 14 Econ. Polit. Weekly 287-296 (1979); Murzban Jal, *Asiatic Mode of Production, Caste and the Indian Left*, 59 Econ. Polit. Weekly 41-49 (2014); Joseph Benedict Huang Tan, Marx, Historical Materialism and the Asiatic Mode of Production (2000) (unpublished M.A. thesis, Simon Fraser University) (On file with the National Library Canada).

[2] Ulrike Barten, *What is in the Name? Peoples, Minorities, Indigenous Peoples, Tribal Groups and Nations*, 14 J. Ethnopolitics & Minority Issues Eur.1-26 (2015).

2.3.2. The Idea of Indigeneity in India

The last few decades have witnessed the prowess of global indigenous movement resulting in globalisation of the concept of indigenous rights[3] and raised indigenous political activism searching expressions of Indigeneity in the countries other than settler colonies. India does not remain untouched from the valorisation of Indigeneity of tribes.[4] In the era dominated by 'struggle for recognition'[5], the idea of interchangeability of notion of tribal peoples with indigenous peoples have had created ripples of contentions in academia as well as political arena.[6] Before I present the contested positions of scholars on issue of tribal status as indigenous peoples it will be relevant to throw light on the conceptualization of tribes in India.

2.3.2.1. The Tribe

In the post-Independence tribal discourse, '*tribe'* emerged as a separate class of population for administrative and political considerations.[7] At present, there are 705 notified Scheduled Tribes distributed over 30 States/UTs of India, constituting 8.6 % of total population of the country.[8] Conceptualisation of 'tribe' was a colonial construct popularized by colonial administrators and Christian missionaries for targeted policy ensuring better control and administration of the people. Tiplut Nongbri reflecting on the purpose of colonial construct observes that British intended to contain "barbaric and wild characters of tribes".[9] Moreover, isolating tribal peoples from Hindu civilization paved the way for missionizing the tribes. Refocusing on the concept of 'tribe' in India,

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[3] B.A. Conklin and L. H. Graham, *The Shifting Middle Ground: Amazon Indians and Eco-Politics*,97 Am. Anthropol. 695, 695-696 (1995).
[4] Amita Baviskar, *The Politics of Being "Indigenous",* IN INDIGENEITY IN INDIA 35 (Bengt G. Karlsson & T.B. Subba eds., 2006).
[5] Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation,* IN THE TANNER LECTURE ON HUMAN VALUES (Delivered at the Stanford University April-May 2, 1996) available http://tannerlectures.utah.edu/_documents/a-to-z/f/Fraser98.pdf [Accessed on 01..08.2015]; Nancy Fraser, *Social Justice in the Knowledge Society : Redistribution, Recognition and Participation*, available at http://wissensgesellschaft.org/themen/orientierung /socialjustice.pdf [Accessed on 01.08.2015]
[6] RODOLFO STAVENHAGEN, THE EMERGENCE OF INDIGENOUS PEOPLES, 81 (2013).
[7] VIRGINIUS XAXA, STATE SOCIETY AND TRIBES: ISSUES IN POST-COLONIAL INDIA 28 (2008)
[8] Demographic Status of Scheduled Tribe Population and its Distribution *available at* http://tribal.nic.in/WriteReadData/userfiles/file/ScheduledTribesData/Section1.pdf [Accessed on 02.08.2015]
[9] Tiplut Nongbri, she puts a caveat on the use of the phrase "barbaric and wild characters of tribes" as it has Euro-Centric biasness. The use of phrase is merely intended to reflect colonial view point, see, Tiplut Nongbri, *Tribe, Caste and the Indigenous Challenge in India*, supra note 4 at 75.

emphasis has been laid out to identify tribe than to define the concept.[10] This could be vindicated by the fact that Constitution of India does not define the term 'scheduled tribe'; it only refers that 'scheduled tribes' are "such tribes or tribal communities or parts of groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purpose of this constitution".[11] Article 342 of the Constitution of India simply lays down that the President may "by public notification specify the tribes or tribal communities which shall for the purpose deemed to be Scheduled Tribes . . .".[12] Lack of definition does not mean that tribal status is accorded without any understanding of tribes whatsoever.

A common overriding component to be seen running in the various tribal studies is to establish contradistinction between tribe and caste. Forerunners of this prescription were early colonial officials especially engaged in tailoring census reports of India. In earlier stage, the attempt to categorised 'tribe' as distinct category by the Indian Census was based on heading of 'Animism'.[13] Later on, considering the "difficulty from distinguishing a Hindu from Animist", the criterion was changed to 'Tribal Religions'. Dr. J. H. Hutton, the commissioner of the Census of 1931, points a separate category of 'Tribal Religion' under the chapter on Religion. Differentiating the 'Tribal Religion' with Hinduism, he maintained that the "tribal religions represent, as it were, surplus material not yet built into the temple of Hinduism".[14] In addition to religious accounts, subtle line was also drawn to distinguish 'caste' and 'tribe' on the basis of 'occupation' by J.A. Baines. In the Census Report of 1891, Baines formulated a new sub-division of traditional occupations—'Forest Tribes' under the heading of Agriculture and Pastoral Castes.[15] The early conceptualisation of tribes by the census officers was based on idealization of tribes as different entity from Hindu community. Such a conceptualisation was highly unsatisfactory and deceptive but gained currency over the period of time.

[10] Virginius Xaxa, *Tribes as Indigenous Peoples of India*, 34 Econ. Polit. Weekly 3589,3589 (Dec.,1999).
[11] Constitution of India 1949, Article 366(25).
[12] Constitution of India 1949, Article 342(1).
[13] *Report of the Census of India 1911*, Chapter 1 *available at* http://www.censusindia.gov.in/Census_And_You/old_report/Census_1911.aspx [Accessed on 03.08.2015].
[14] *Report of the Census of India 1931,* 391-398 (1931) *cited in* G. S. GHURYE, SHEDULED TRIBES OF INDIA 4 (1980)
[15] G.S. GHURYE, *supra note* 14 at 7.

Scholarly endeavours were also carried out to establish that the distinction between 'tribe' and 'caste' was recognised in ancient and medieval times. In this formulation, 'tribe' was analogous with 'jana' resembling 'communities of people' outside the stratified system of 'caste' referred as 'jati'.[16] However, there has been contradictory opinions from scholars on the existence of a neat divide between 'jana' and 'jati' akin to that of 'tribe' and 'caste', as it is understood in present day. It is relevant to quote Andre Beteille, as he contends that:

> It is not easy to determine the exact connotation of term *jana* , and the distinction of *jana* and *jati* must have been even less clear in ancient times than corresponding distinction today between tribe and caste. Each category was heterogeneous and there was always some overlap between them.[17]

In spite of all, it was largely distinctive approach towards the meaning of 'tribe' that dominated the tribal discourse in India. The nineteenth-century ethnographers expounded that the term 'tribes' implied both a "*particular type of society* based on kinship ties and *stage of evolution*".[18] The first perspective suggests that 'tribe' is a "social group usually with a definite area, dialect, cultural homogeneity and unifying social organization".[19] A combination of several characteristics attributed to tribal groups includes: common name; common dialect; common culture; territorial integrity; propensity of an egalitarian society; practice of endogamy; cooperation; moral bonds of kinship; self-sufficient economy; ecological society; lack of structural differentiation in roles of political system due to intermixing of political and socio-religious roles and less dependence on modern era technologies.[20] The second perspective represent tribal societies as 'primitive societies' in the sense that such societies are less advanced as a

[16] ROMILA THAPPER, EARLY INDIA: FROM THE ORIGINS TO A.D. 1300 66 (2004).

[17] ANDRE BETEILLE, SOCIETY AND POLITICS IN INDIA: ESSAYS IN A COMPARATIVE PERSPECTIVE 67 (1991)

[18] *Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India*, by Virginius Xaxa, chairman (New Delhi: Ministry of Tribal Affairs, Government of India, 2014), 51.

[19] E. A. HOEBEL, MAN IN THE PRIMITIVE WORLD: AN INTRODUCTION TO ANTHROPOLOGY 513 (1949) cited in L.P. VIDAYARTHI & BINAY KUMAR RAI, THE TRIBAL CULTURE OF INDIA 167 (1985)

[20] L.P. VIDAYARTHI & BINAY KUMAR RAI, *ibid* at 167.

species. They are generally perceived as barbaric, uncivilized, savage, and non-literate.[21]

The two perspectives are related in the sense that tribes were conceptualised as groups retaining primitive social organization. Consequently, a conclusion is drawn that tribal peoples represent an early stage of human evolution which is reflected in their socio-cultural and political structures, often been distinguished as less complex and these peoples are relatively isolated from any change in the 'other world'. Thus the dominant view on the notion of 'tribe' that succeeded for future discourse was that they are *backward* and *isolated from Hindu civilization*.[22] I will be arguing in opposition to the dominant view in the ensuing subsection.

In the post-Independence era, the colonial construct of 'tribe' continued to prevail in the legal discourse as well. The 1950 Constitutional Amendment order prescribed a list of Scheduled Tribes based on the notion of 'backwardness', envisaged by the British government in 1936.[23] The First Backward Commission in 1955 also laid over the criterion for determination of 'Schedule Tribe', prescribing the traits of primitiveness as a prominent determining element, the Commission argued that the tribe:

> lead a separate exclusive existence and are not fully assimilated in the main body of people. Schedule Tribes may belong to any religion. They are listed as Scheduled Tribes, because of the kind of life led by them.[24]

In 1951, the Tribal Welfare Committee under the aegis of Indian Conference of Social Work recommended following criteria for differentiation in 'Tribe':

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[21] Virginius Xaxa, *Transformation of Tribes in India: Terms of Discourse*, 34 Econ. Polit. Weekly 1519, 1519,1524 (June, 1999); Ajay Skaria portrays this kind of colonial thinking in his work, *see*, *Shades of Wildness Tribe, Caste, and Gender in Western India*, 56 J. Asian Stud. 726-745 (1997).

[22] See, Ratnagar Bhengra, C.R. Bijoy, and Shimreichon Luithui, *The Adivasi of India,* AN MRG International Report No. 98/1 (Minority Rights Group International: London);Xaxa argues that " the Influence of Hinduism on tribes, *though present* [in other words not in past], is not adequate grounds for describing tribes as Hindus", See, VIRGINIUS XAXA, *supra note* 7 at 78.

[23] Anand Teltumbde, "SC/STs and the State in the Indian Constitution" (62nd Republic Day Special Lecture at Dr. BR Ambedkar Research and Extension Centre, University of Mysore: Manasgangotri, Mysore, 2012) *available at* http://www.countercurrents.org/teltumbde060212.pdf [Accessed on 04.08.2015]

[24] *Reports of the First Backward Classes Commission 1955*, by Kaka Kalekar, chairman *cited in* L Lam Khan Piang, *Moving Backwards:Meitei's Demand for Scheduled Tribe Status*, 59 Econ. Polit. Weekly (2014) *available at* http://www.epw.in/reports-states/moving-backwards.html [Accessed 05.08.2015]

> 'tribal' communities are those section of population who are restricted to early forest habitat and exhibit distinctive socio-cultural pattern in their lifestyle; 'Semi-tribal' communities are those who rely on agricultural occupation for their livelihood; 'acculturated' tribal communities are those who have migrated to urban or semi-urban areas and employed in 'modern' industrial based occupations; 'totally assimilated tribal' are those population which are completely absorbed in 'mainstream' society.[25]

In 1960, the President of India appointed the Scheduled Areas and Scheduled Tribes Commission under the Article 339 of the Constitution under the Chairmanship of U.N. Dhebar, he was entrusted to produce a report on the problems of Scheduled Tribes. The Commission reiterated that the Constitution of India did not define the concept of 'tribe' and opined that 'tribal' are groups of people living a secluded life and are not assimilated within the mainstream society.[26] It is significant to understand that in India the legal tribal status is not a permanently accorded identity. In 1965, the government appointed B.N. Lokur committee in its report provided certain criteria for inclusion of tribe as 'Scheduled Tribes' which are as follows: "indication of primitive traits, distinctive culture, geographical isolation, shyness of contact with community at large, and backwardness".[27] It is quite evident that these criteria continues to romanticize the stereotype "frozen picture"[28] of tribes in portraying the "oddities".[29]

While knitting the legal notion of 'tribe', an inconspicuous but highly significant move was made by providing a vent through which evangelisation among tribal communities could easily proliferate. For the legal tribal status, adherence to Hindu religion is not compulsory as "Scheduled Tribes may belong to any religion".[30] Such a provision paved the way for establishment of caste and tribe dichotomy, on religious grounds, in legal discourse as well. Further, it covertly removed the complications in 'missionisation' of tribal areas. Thus, a non-Hindu scheduled tribe can continue to avail

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[25] Maya Ghosh, *Tribal Culture in the Matrix of an Inclusive Society: A Case of Marginality of Tribes in Terai and Dooars Region of West Bengal in India*, 12 Stud. Tribes Tribals 71,74 (2014).
[26] *Report of the Scheduled Areas and Scheduled Tribes Commission* 1962, by U.N. Dhebar chairman (Government of India: New Delhi) *cited in* Virginius Xaxa *supra note* 18 at 54.
[27] *Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes* 1965, B.N. Lokur, chairman para 12 at 7 (Government of India:New Delhi)
[28] Vinay Kumar Srivastava, *Concept of 'Tribe' in Draft National Policy*, 50 Econ. Polit. Weekly 29, 30 (2008)
[29] *Ibid.*
[30] Kaka Kalekar commission report, *supra note* 24 cited in Virginius Xaxa *supra note* 18at 54.

optimum constitutional benefits. The expression finds its support from the conclusion of B. S. Niyogi committee report. It stated, inter alia, that:

> Evangelisation in India appears to be part of the uniform world policy to revive Christendom for re-establishing Western supremacy and is not prompted by spiritual motives. The objective is apparently to create Christian minority pockets with a view to disrupt the solidarity of the non-Christian societies, and the mass conversions of a considerable section of Adivasi [tribal peoples] with this ulterior motive is fraught with danger to the security of the State.[31]

In sum, the colonial administrator's attempts for institutionalising the difference between 'caste' and 'tribe' ended in a robust concept in the post-colonial legal framework. This in turn paved the way for the emergence of 'tribal consciousness' struggling, for 'equality', 'respect' and 'participation', not only on the basis of the 'marginality' but also on the politics of 'indigenous identity'.

2.3.2.2. Tribal-Hindu Interface

There is wide-ranging writings on Indian tribes, which offer both general overview of the tribal communities in the nation as a whole and its diverse regions, and also detailed narratives on individual tribes. Generally, these literatures hints that the tribal people are among the earliest residents of the regions in which they are found.[32] Moreover, the dominant and established academic orthodoxy warrants for tribal society as a cumulative of primitive social group that were isolated and disconnected from Hindu society and whatsoever relationship found was a result of coercive integration. Before entering into the contested terrains of Indigeneity debates in India, it will not be out of context to discuss tribal-Hindu interface particularly in the ancient times. In what follows, I will briefly describe that tribal and Hindu society has grown upon a common substratum and there has been dynamic interaction between these groups, contrast to the projected dichotomy. The ensuing paragraphs describe firstly, the intergroup communication, assuming that caste and tribes are different groups, between tribal and

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[31] *Report of the Christianity Missionary Activities Enquiry Committee* 1956, B.S. Niyogi chairman (Government of Madya Pradesh:Nagpur) *cited in* CHRISTOPHER JAFFRELOT, THE HINDU NATIONALIST MOVEMENT AND INDIAN POLITICS: 1925 TO THE 1990s 196 (1999).

[32] IWGIA, holding consultative status with ECOSCO, refers in its official website that Scheduled Tribes are "considered to be India's indigenous Peoples", see, http://www.iwgia.org/regions/asia/india [Accessed on 03.08.2015]; STEPHEN FUCHS, THE ABORIGINAL TRIBES OF INDIA (1977).

non-tribal peoples. Thereafter, tribal-caste interface on religious plane shall be examined.

In his pivotal work, G. P. Singh has recognised that 'Kiratas' and their cognate groups as among the oldest inhabitants of the India, spreading over a vast region ranging from Himalayan ranges to Central Plains and Deccan.[33] Reference of 'Kiratas' are available in *Yajur Veda* as a group of people dwelling in caves and mountain regions. Mentioning of families of 'Kiratas' or *Kirata kul* in the *Panchavinsa Brahmana* and *Shatapatha Brahmana* indicates their ancient origin.[34] The term generally referred to all those people who resides in the hills, forests and caves and dependent on hunting.[35] However, literary evidences are found for their prowess in agriculture, trading and fighting war.[36] 'Kiratas' include cognate tribes such as the Pulindas, Sabaras and Mutibas of Vindhya region, who were traditionally held to be descendants of fifty sons of Vishwamitra, the famous Vedic saint.[37] The Mahabharata highlights the wealth and variety of 'Kiratas' economic life. Several Kirata kings of the northern Himalayas, the Karusa region, both sides of the Lahutiya Mountains and frontier areas, paid tribute to Yudhisthira and accepted his dominium.[38]

The Northeast region of India is cradle to primordial Kirata tribes such as the Nagas, Khasi-Jaintias, Garos, Kacharis, Chutiyas, Hill Tepperahs, Akas and Mishmis.[39] The Mishmis have deep relationship with *Brahma kunda,* the eastern-most Hindu pilgrimage seemingly visited by Parshuram.[40] The primordial roots of the Kiratas in this region go back to their king Ghatak, who was defeated by Naraka, and to their participation in the Mahabharata war along with Chinas and other tribes in the army of King Bhagdatta, successor of Naraka.[41]

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[33] G. P. SINGH, KIRATAS IN ANCIENT INDIA 59-60 (1990) cited in SANDHYA JAIN, ADI DEO ARYA DEVTA: A PANORAMIC VIEW OF TRIBAL HINDU CULTURAL INTERFACE 28 (2004).
[34] SANDHYA JAIN, *supra note* 33 at 29
[35] *Ibid.*
[36] G.P. SINGH, RESEARCHES INTO THE HISTORY AND CIVILIZATION OF KIRATAS 32-33 (2008)
[37] J. MUIR, ORIGINAL SANSKRIT TEXTS ON THE ORIGIN AND PROGRESS OF THE RELIGION AND INSTITUTION OF INDIA 80-84(1860).
[38] SANDHYA JAIN, *supra note* 33 at 34.
[39] *Ibid.* at 32.
[40] M C BEHRA, *Brahaminical Tradition in Foot Hill Areas of Arunachal Pradesh: A Case Study of Parushram Kund,* IN RELIGIOUS HISTORY OF ARUNACHAL PRADESH 330-333 (B. Tripathi and S. Dutta eds., 2002).
[41] SANDHYA JAIN, *supra note* 33 at 32.

The epic *Ramayana* also contains references of some of tribes. To begin with Valmiki, the chronicler, is believed to be a member of Kirata tribe.[42] The epic endorses the existence of tribes such as the Rakshas, the Vanaras, the Nishadas, the Grdhraj, the Sabras, the Yakshas and the Nagas.[43] There are interesting plots reflecting deep bonding between the Nishada king Guha and Rama. After the exile, Rama arrives at the Shringverpura (Place near Allahabad) where the Guha welcomed Rama with clasped hand offering him his hospitality. Rama in turn embraces Guha as a friend.[44] Guha's desolation due to woeful condition of Rama and his intention to ameliorate Rama is best expressed by the south Indian saint Tirumangai Azhvar in his *Periya Thirumozhi*:

> O Rama! You never looked away
> Considering him as poor, inimical,
> Of a despicable caste; you poured
> Love upon GUHA and said:
> This gentle, doe-eye Sita is your friend, this is my brother Lakshmana
> Is your brother too; you said further:
> 'Ah, you are my friend stay with me'.
> All this has seized my heart
> O Compassionate Ranga! Hence
> I have reached your feet for refuge [45]

Sociability of Rama with ancient tribes of India is also evident with the description of Vanaras. The Vanaras formed an alliance with Rama and helped him to reach out to Sita. Some scholars are of the opinion that that the description of Vanara belong to that of Savara and Korku tribes of Central India.[46] However, an important deduction that can be safely pronounced is that the reverence and reliance on the members of the Vanara community including Hanumana, Sugriva, Angad ,Nal and Neel, epitomises

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[42] ROSHEN DALAL, A CONCISE GUIDE TO NINE MAJOR FAITHS 381-382 (2010); There is no denial in the fact that the *Ramayana* has different versions both in space and time, *See*, A.K. Ramanujan , Three Hundred Ramayanas: Five Examples and Three Thoughts on Translation, IN THE COLLECTED ESSAYS OF RAMANUJAN 561-564 (Vinay Darwadkar ed., 1999) but *Valmiki Ramayana* is the most influential and authoritative, See, Paula Richman, *Whose Ramayana is It?* IN RAMYANA STORIES IN MODERN SOUTH INDIA: ANTHOLOGY 9 (Paula Richman ed., 2008).

[43] L.P. VIDAYARTHI & BINAY KUMAR RAI, *supra note* 19 at 26-27.

[44] B.R. KRISHNA, RAMAYANA 41 (2005); BISHNUPADA CAKRABARTI, THE PENGUIN COMPANIAN TO THE RAMAYANA 180 (2006).

[45] Anonymous, *Guha: Dear to Him as his own life, available at* http://anudinam.org/2011 /12/10/guhadear-to-him-as-his-own-life/ [Accessed on 05.08.2015]

[46] L.P. VIDAYARTHI & BINAY KUMAR RAI *supra note* 19 at 27

solidarity between non-tribal king Rama and his contemporaneous tribal lords.[47] Moreover, there are certain subordinate plots in the Ramayana bearing solicitous relationship between tribes and non-tribal king Ram. This includes stories of moksha or release from cycle of birth and re-birth of Sabri—a member of Saora tribe[48] and Jatayu and Samapati self-sacrifice who were from Gridha Tribe.[49]

The intergroup relationship between tribal and non-tribal communities of Ramayana and Mahabharata is further advanced by superimposition of religious figures into each other's culture. If it had ever been a case of Hindu imperialism, admiration and incorporation of tribal deities into Hindu culture would have been impossible phenomena. In this context Sandhya Jain observes that whenever a tribal deity was incorporated into the Hindu pagoda it owned its primordial uniconical symbol along with its priest.[50] Prominent illustrations of this outward mobility embraces deifying snakes (*Nag*) and Earth Mother (*Devi*).[51] For, ages tribal peoples and caste Hindus alike have deified the supremacy of cosmos in the form of the sun or fire (Agni), forest supremacies (Vandevi, elephant, lion, eagle), vegetation (tulsi) sacred trees (pipal) river water and natural springs.[52] It is also argued , Shiva and Vishnu, the two principal deities of the Hindu trinity of Gods, have tribal lineage. K. S. Singh notes that Shiva was deified by forest-dwelling people in many parts of the country.[53] In the legends of the Gonds, *Mahadeo* or Shiva is the creator of Gond tribe and he holds a position of *Baradeo*—the supreme God.[54] K. C. Mishra affirms that the tenth chapter of the *Bhagvad Gita* registers approximately thirty chief tribal Gods who were fused in the Hindu house of Gods as partial incarnations of Krishna.[55] *Jagannath*, the sovereign of entire world, is another vivid example of transmutation of tribal God into Hindu pantheon. The wooden image of the Gods in *Jagannath* temple of Puri and traditional

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[47] See, PHILP LUTGENDROF, HANUMANS TALE: THE MESSAGE OF A DIVINE MONKEY (2007); Leonard T. Wolcott, *The Power-Dispensing Monkey in North Indian Folk Religion*, 37 J. Asian Stud. 653-661(1978).
[48] STEVEN L. DANVER, NATIVE PEOPLES OF THE WORLD :AN ENCYCLOPEDIA OF GROUPS, CULTURES AND CONTEMPORARY ISSUES Vol. 1-3 561 (2013).
[49] L.P. VIDAYARTHI & BINAY KUMAR RAI *supra note* 19 at 28.
[50] SANDHYA JAIN, *supra note* 33 at 4.
[51] *Ibid* at 5.
[52] *Ibid.*
[53] *Ibid.* at 7.
[54] B. H. MEHTA, GONDS OF THE CENTRAL INDIAN HIGHLANDS: A STUDY OF THE DYNAMICS OF THE GOND SOCIETY Vol. 1 38 (1984).
[55] SANDHYA JAIN, *supra note* 33 at 5.

priests from tribal community, referred as Daityas, corroborate to the deity's tribal ancestry.[56]

The composite nature of interaction between tribe and caste, conceived as different, from very ancient period prompts that any dichotomy perceived is synthetic in nature.

2.3.2.3. Tribal Peoples as Indigenous Peoples: The Debate

In the recent past, mobilisation of tribal peoples for protection of their interests in land and natural resources, preservation of their culture and customary practices and demand of more 'autonomy' has been articulated in different ways. An important component of collective tribal assertion was developed on the grounds of being original inhabitants of India or *Adivasi*—an equivalent term for 'indigenous' in India. Claims for indigenous slot by tribal peoples is no more confined to textbooks, it has emerged as a rallying point for disgruntled tribal communities. Scholars have argued that, besides the strong connotation of 'autochthonicity', the term *Adivasi* symbolises certain "social facts".[57] Accordingly, in the modern India, being *Adivasi* represents "shared experience of the loss of forests, the alienation of land, repeated displacement, since independence in the name of 'development projects'".[58] This may be true but the dominant gene carried with terminology 'indigenous' or 'Adivasi' is the connotation of 'autochthonicity'.[59] Corollary, there are growing sentiments of 'insider' versus 'outsider' or 'tribal' versus 'non-tribal' due to the politics of Indigeneity. In this sense, the term 'indigenous' or 'Adivasi' becomes an ideological agenda rather than the special category. And, Indigeneity as an ideology did not remain unchallenged. In that spirit, I examine the debate over tribal peoples as indigenous peoples of India. In the following, I will briefly reflect on scholarly arguments against Indigeneity of tribes. Thereafter, I will review the arguments in favour of Indigeneity of tribes. I will endorse the former view and argue against Indigeneity as an Ideology.

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[56] HERMANN KULKE AND DIETMAR ROTHERMUND,A HISTORY OF INDIA 146 (2004).
[57] Amita Baviskar, *supra note* 4 at 37.
[58] AJAY SKARIA, HYBRID HISTORIES: FORESTS FRONTIERS AND WILDNESS IN WESTERN INDIA 281 (1999).
[59] The term *Adivasi* was coined in 1930s in the Chotanagpur region representing both inter-tribal solidarity and autonomy claims on the basis of original inhabitants of the region. See, Shashank S. Sinha, *Patriarchy, Colonialism and Capitalism: Unearthing the History of Adivasi Women Miners of Chotanagpur* IN WOMEN MINERS IN DEVELOPING COUNTRIES: PIT WOMEN AND OTHERS 89 (Kuntala Lahri-Dutt and Martha Macintyre eds., 2006).

Among the torchbearers of school of thought arguing against the Indigeneity of tribes, Andre Beteille remains a central figure as his logic shaped the stand of government of India at the international levels. The main points responsible for his position are as follows: (a) since ancient time, the tribal and non-tribal population in India lived together both in space and time. Though conflict and takeover took place among them but not necessarily tribal peoples were always at the receiving end. These conflicts and takeover were not analogous in any consequential manner to that of indigenous peoples encounter with settler populations; (b) Unlike Australia and North American, in India there is no sharp divisions between tribal and non-tribal peoples based on physical and racial characteristics. Moreover, there is likely chance that a tribe may resemble more with a non-tribal in terms of physical attribute than other tribal communities; (c) Mythological and historical accounts reflect that migration in the tribes could be a result of either tribal defeat or tribal victory. There are instances where large agriculture tribes attacked small tribal community dependent on hunting gathering resulting in the displacement of the former; (d) in contemporary India, it is difficult to identify distinctive tribal language and dialect for every tribal communities. Several tribes including the Oraon and Gonds, expressed their thoughts in dialect belonging to Dravidian family, which is also source of languages such as Tamil and Telegu. And, there is no convincing evidence to support that Kurukh, traditional speech of Oraon, precedes Tamil in its origin.[60]

In sum-up, Andre Beteille argument is that it is "difficult to draw any absolute line of distinction of 'tribe' and 'non-tribe' in either habitat, mode of livelihood, or form of clanship or kinship".[61] He is also dismissive of the idea that the concept of Indigeneity, as understood in settler colonies, should be applied in *toto* in the Indian context. Applying an alien concept in different context has its own peril, in the words of Andre Beteille :

> Intellectual disciplines are so organised today that concepts and terms that emerge in response to a particular experience in a particular part of the world travel to other parts of where they lodge themselves and acquire a life of their own. There they not only breed intellectual confusion but, as in the present

[60] Andre Beteille, *The Idea of Indigenous People*, 39 Current Anthrop. 187, 187-192 (1998).
[61] Andre Beteille, *What Should We Mean by " Indigenous People"?* IN Bengt G. Karlsson et al. *supra note* 4 at 27.

> case, also provide ideological ammunition to those who would reorder the world according to the claims of blood and soil.[62]

If Beteille's observations defined the stand of government of India, it was Ghurye's classic work on the subject, *The Aborigines—So Called—and their Future* (1943), which not only challenged the 'autochthonicity'[63] of Indian tribes, but also exhibited that tribes are Hindus or 'Backward Hindus' and integral component of larger Hindu society. He argued that present demographic dimensions of tribes is a result of ubiquitous internal movements in past. Therefore, "the so-called aboriginal tribes . . . cannot . . . be considered to be autochthones of their present tract".[64] He confines his study in the book to the western and central belts. This region extends from "Aravali hills in the West, through the Vindhyas, the Satpuras, the Mahadev hills, the Maikal range, and through Chotanagpur region to the Rajmahal hills, including plains and plateaus contiguous to many of them". Based upon Forsyth account, he argues that the tribes such as, Baiga Bhil, Gond, Kol, Korku and Santhal are likely to be stemmed from two distinct families, chiefly, Kolarian and Dravidian.[65] There is no categorical evidence to prove that which of these families are autochthonous of the land or who were the earliest settlers among them?[66] He quotes Bradley-Brit and present that in the Chota Nagpur region, the Laraka or Fighting Kols went further south, displaced the traditional occupants (Bhuiyas) and occupied Singhbum.[67] This great race movements of the Pahariyas, the Santhals and the Bhuiyas continued till the last period of Muslim rule in India, resulting in total disappearance of Jains from the boundaries of the region.[68] He further notes that, based on Russel and Hiralal, Gonds and the Khonds migrated from southern part of India towards the Central Province and Orissa region. Similarly, a group of Phararias of Rajmahal hill and Oraons of Chota Nagpur region speak dialect which has its source in Karnatic region.[69] Even the Baigas who are considered as original tribe of Central Province are a branch of the Bhuiyas of the Chota

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[62] Andre Beteille, *supra note* 60 at 190.
[63] The term is primarily used in geological discourse especially in the study of migration of species. Here it denotes the native origin of a tribe.
[64] G. S. Ghurye *supra note* 14 at 11-12
[65] The distinction is based on different types of language families found in India , See generally, THOMAS BENEDIKTER, LANGUAGE POLICY AND LINGUISTIC MINORITIES IN INDIA: AN APPRAISAL OF THE LINGUISTIC RIGHTS OF MINORITIES IN INDIA 18 (2009);
[66] G. S. Ghurye *supra note* 14 at 12.
[67] *Ibid* at 10.
[68] FRANCIS BRADLEY BRADLEY-BRIT, THE STORY OF AN INDIAN UPLAND 41,131 (1905) cited in G. S. Ghurye *supra note* 10.
[69] *Ibid*.

Nagpur region.[70] Ghurye emphatically claims that in the absence of any historical folklore narrative and scientific basis of tribal classification it would be "hazardous to look upon particular section of the population as the aborigines of India".[71]

B. K . Roy Burman, the doyen of Indian anthropology, throughout his life was critical about the geopolitical ramifications of indigenous politics, especially in case of Scheduled Tribes in India being referred as analogous to the 'indigenous' peoples of settler colonies. He argues that any such understanding is devoid of Indian history which is marked by the medley of tribal and non-tribal populations, language, habitat and culture.[72] Divulging Brentwood Woods Institution's as the hegemonic structure of post-world war, Burman argued that the World Bank's conceptualisation of Scheduled Tribes as indigenous peoples is "nothing but uninformed interference".[73] He remained critical of stand taken by the delegates of the Indian Council of Indigenous and Tribal Peoples (ICITP) in open meetings convened by the WGIP. Moreover, without naming, Burman, directly attacked the founder member of ICITP for the manner in which the founder member was selected as spokesperson. Burman writes:

> As claimed by him in several publications, he was traveling in Europe in 1985 and *by chance* came to know of the meeting. He attended it and since then he is functioning as the spokesperson of the 70 million tribal peoples of India. On his initiative an Indian Council of Indigenous and Tribal Peoples (ICITP) has been established, the effective membership of which is confined to a few significant personalities of Chota Nagpur region.[74]

Burman does not stop here but continues to be dismissive about the amateurish attitude of ICITP representatives in these meetings. He alleges that the ICITP representative's used these forums as a "mofussil court to make informed and uninformed charges against the government of India"[75] and were unaware of the fact "that the UN Working Group was, through the Universal Declaration on the Rights of the Indigenous Peoples,

[70] *Ibid* at 11.
[71] *Ibid*at 13.
[72] B. K. Roy Burman, *Indigenous and Tribal Peoples in World Perspective System*, 1 Stud. Tribes & Tribal 7, 19-22 (2003); See also, B. K. ROY BURMAN, INDIGENOUS AND TRIBAL PEOPLES: GATHERING MIST AND NEW HORIZON (1994).
[73] *Ibid* at 21.
[74] B.K. Roy Burman, *Indigenous and Tribal Peoples—Global Hegemonies and Government of India*, IN TRIBAL AND INDIGENOUS PEOPLES OF INDIA: PROBLEMS AND PROSPECTS 21 (Rabindra Nath Pati and Jagnnatha Dash eds., 2002)
[75] *Ibid.*

evolving an operative framework of far reaching implications for the international economic and political order".[76]

To conclude, the key arguments of prominent scholars contesting exclusive autochthonicity of 'tribes' are following: First, there is a long history of internal movements in India which has resulted in intermixing of tribal and non-tribal culture, language and habitat. Therefore, there is no historical and scientific basis for any claims to the fact that which tribe is more original than other in their present state of habitat. Moreover there is a sharp contrast between internal movements of tribal groups in India and that of the indigenous communities in settler colonies. The latter represents dark picture of usurpation of indigenous communities by the dominant colonial population. Second, contrary to the established orthodoxy of tribe and caste dichotomy, the most summary scrutiny of the spiritual-cultural landscape discloses a profound collegial affiliation between tribal and non-tribal peoples from very ancient times.

The above arguments are, however, perceived either as a postcolonial reaction or subdued as a fanatical patriotism.[77] There are many scholars who don't subscribe to the view that the Indigeneity concept is not applicable within the India's boarder. This school of thought compares *Adivasi* [78]*or* Tribal peoples of India with the indigenous peoples of settler colonies and considered them completely analogous to each other. Earlier through the language of racial discourse, its chief protagonist Herbert Risley, the caste-tribe dichotomy was infused with racial overtones. He gathered a large serious of anthropometric measurement of castes and tribes.[79]Subsequently on the basis of nasal index, he concluded that those with the finest nose (and lighter complexion) were scions of Aryan Invaders forming the upper castes and those with black snub nose race (with dark complexion) were the indigenous primitive tribes occupying the lowest

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[76] *Ibid* at 22.

[77] CHRISTOPHE JAFFRELOT, RELIGION, CASTE, AND POLITICS IN INDIA 131-132 (2010); SYLVIE GUICHARD, THE CONSTRUCTION OF HISTORY AND NATIONALISM IN INDIA: TEXTBOOKS, CONTROVERSIES AND POLITICS 131 (2010).

[78] The term 'Adivasi' is of recent origin, probably coined in 1930s in the present State of Jharkhand which implies someone living from old times, See, DAVID HARDIMAN, GANDHI: IN HIS TIME AND OURS 151 (2005).

[79] HERBERT RISLEY, THE PEOPLE OF INDIA (W. Crooke ed., 1999); J. F. Hewitt, *The Tribes and the Caste of Bengal, H. H. Risely. Vols. I. and II. Ethnographic Glossary, Vol. I and II. Anthropometric Date*, J. R. Asiat. Soc. GB. Irel. 237, 240-241 (1893); P. C. Mahalanobis, *A Revision of Risley's Anthropometric Data Relating to Tribes and Caste of Bengal*, 1 Sankhyā: India. J. Stat. 76, 76-105 (1933); H. H. Risley, *Study of Ethnology in India*, 20 J. R. Anthroppol. Inst. GB. Irel. 235, 235-263 (1891).

strata. Later on the colonial administration along with physical anthropologists institutionalised this racism by introducing it into the Census of India. For example, W.G. Lacey [80]and W. H Shoobert[81] ethnographic reports formed key component of Census of India Reports 1931, wherein Lacey conclusively maintained that the tribes are aboriginal peoples he referred others as member of "Aryan races". Similarly, Shoobert expressed that the tribal peoples of the Central Province belong to "the true autochthonous stock". He observes that:

> The bare fact is that the descendants of the original inhabitants of the Province, who before repeated invasions withdrew to hills and forests where they have lived their own lives and for centuries developed their own lines, from more than 20 percent of the population. [82]

The applicability of concept of aborigine to tribal peoples of India gained momentum with the entry of Verrier Elwin in the Indian anthropological discourse. He was of the opinion that "the aboriginals [tribal peoples] are the real swadeshi [indigenous] products of India, in whose presence everything is foreign. They are the ancient people with moral claims and rights of thousand years old. They were here first: they should come first in our regard".[83] He was determined on the natural existence of Tribal-Hindu dichotomy and impetuously opposed any notion, howsoever osmotic, of Tribal-Hindu integration. He noted that:

> It seems to be the aim of Congress politicians to bring the aboriginals within the Hindu fold and then to treat them as though they had no special claims; they resent the establishment of Excluded and Partially Excluded Areas [Reserve Parks for tribal peoples]. . . This company of vegetarians and teetotallers would like to force their own bourgeois and Puritan doctrines on the free wild people of the forests.
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> . . . I myself consider the aboriginals to be pre-Hindu and the adoption of Hinduism will be a major disaster for them; I welcome the Excluded Areas, and only wish that there were many more of them; I consider that scientific

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[80] W.G. Lacy, *Report VII on Bihar and Orissa*, *Census of India 1931*, cited in G. S. Ghurye *supra note* 14 at 5.
[81] W.H. Shoobert, *Report on Central Province and Berar, Census of India 1931*,cited in G. S. Ghurye *supra note* 14 at 5.
[82] *Ibid* at 312,346,397 cited in G. S. Ghurye *supra note* 14 at 9.
[83] VERRIER ELWIN, THE ABORIGINALS 32 (1943).

> anthropology should guide and regulate the administration of all primitive peoples. . . [84]

Elwin's ideas of 'Reserve Parks' for tribal peoples met with harsh criticism so much so that he himself had to clarify that he did not happen to be either an isolationist or a no-changer. He argued that his suggestions, as mentioned above, must be evaluated "under the circumstances of the time". He expressed that there is need to "fight for the three freedoms—freedom from fear, freedom from want and freedom from interference".[85] And he also accepted gradual integration of the tribal society with rest of the nation.

Virginius Xaxa, present day leading tribal expert, defends Indigeneity of tribes in India by arguing that it is essential to make a distinction between identification of indigenous people in the context of country as a whole and tribes being indigenous at the local or regional level. He justifies tribes being indigenous at the regional level for being a prior occupant, in any given territory, and by the reason that "they have developed special relationship with the territory in question".[86] This relationship is so intense, as Xaxa argues, that it is natural to member of that territory to have a homeland of their own. For example, he explains:

> The Bengalis for example have a very strong sense of attachment as Tamilians to Tamil Nadu. There is in this indication of the recognition, implicit though it may be, that certain people have a prior right over the territory they occupy.[87]

This approach has its own problems and give rise to problems of somewhat different nature. First, in a given State, it is possible that a tribe which seems to be indigenous may fall behind in terms of prior occupancy to some other tribes. For example, Munda, Oraon and Ho are later entrant in Chotanagpur region than Asura tribe but acquired more dominant position than Asura people. This paradox is well portrayed by Alpa Shah, she writes:

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[84] Statement of Verier Elwin, cited in RAMCHANDRA GUHA, SAVIGING THE CIVILIZED: VERRIER ELWIN, HIS TRIBALS, AND INDIA 104-105 (2014).

[85] Verrier Elwin, *Beating a Dead Horse,* available at http://www.india-seminar.com/2001/500/500%20verrier%20elwin.htm [Accessed on 05.02.2015]

[86] Virginius Xaxa, *supra note* 10 at 3593

[87] *Ibid* at 3590.

> Ironically, the imagery of adivasi as being rooted in the land, and resulting desire to control their migration, seems to ignore both the local origin myths of the Ho, Mundas and Oraons of Jharkhand and well known historical account which stress that all these groups were in fact migrants to the Chotanagpur Plateau. [88]

Second, if sense of attachment and special relation over a territory coupled with long duration of occupancy gives a prior right over others. Thus, can we apply the same analogy to the demand of Hindu homeland, as the sacred sites of other religion lies beyond the sub-continent, unlike those of Hindus? In other words, can Hindus of India be justified to have more rights than citizen of the other religions living in the country or at least in part where they are in majority? This is a dangerous idea and goes against the secular fabric.

Thirdly, there is a dark side to identity politics as pointed out by Nancy Fraser, that identity politics "often recycles stereotypes about groups, while promoting separatism and repressive communitarianism". Thus over emphasis on Indigeneity as ideology may lead to Balkanisation of the country.

Similarly Jaganath Pathy recognising the problem of indigenous people is essentially a product of predatory economic policies, modern development model and lack of internal democracy within the modern states. He tends to draw parallel between external foreign colonization and 'internal colonization' by dominant populations from contiguous areas and argues that both are similar in nature. Thus he proposes that tribes and indigenous peoples are homologous categories. He also rejects the arguments against the Indigeneity on the ground that it antagonises and complicate the problem rather than to resolve the tribal issues.[89]

The *case for* Indigeneity of Indian tribes cannot be complete without discussing the judgment by the Supreme Court of India in *Kailas & Ors vs State of Maharashtra.*[90] In a criminal appeal, the Supreme Court Bench, made up of Justice Markandey Katju and Gyan Sudha Misra, obtruded a historical thesis that "92 % of population of India consist

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[88] ALPA SHAH, IN THE SHADOWS OF STATE: INDIGENOUS POLITCS, ENVIRONMENTALISM, AND INSURGENCY IN JHARKHAND 138 (2010)

[89] Jaganath Pathy, *What is Tribe? What is Indigenous? Turn the Tables Towards the Metaphor for Social Justice,* 1 Samta 6, 6-11 (1992).

[90] Kailas & Ors vs State of Maharashtra, (2011) 1 SCR 94.

of descendants of immigrants" and the "original inhabitants of India known as the 'aborigines' or Scheduled Tribes (Adivasi). . . comprise of only 8% of India". The case involved Nandabai—the victim, a pregnant women from the Bhil community having Scheduled Tribe status in the State of Maharashtra. She was beaten, kicked, and stripped by four accused including a women on the account of having illicit relationship with Vikaram, who was the father of victim's daughter and unborn child. From the judgment it appears that the Vikram was from "higher caste" and all the accused were powerful persons "in the village inasmuch as that all the eye witnessed turned hostile".[91] Though Vikram corroborated his relationship with the Nandabai but he denied occurring of any such incident.

In dismissing the appeal, the court observed that the severity of crime required a stringent punishment than what the appellants were sentenced to suffer at trial. The Court also registered its surprise on the appellant's fractional victory before the High Court on "hyper technical grounds".[92] The "mentality" regarding "tribal people as inferior or sub-humans", the Court observed, "is totally unacceptable in modern India".[93] There is no escaping the fact that in a multicultural society such incidents should be condemned and met with harsh punishment. What is also required is the higher moral imperative to ensure greater respect towards marginalised section of society. Equality is the need of the hour and stands against the Brahminical hegemony is part of that process. But in doing so, it is not always desirable to create binary opposite social structures. In the present case, however, the Court recklessly opined that all Scheduled Tribes are "original inhabitants" and rest of the population are "immigrants".[94] Such conclusion fails to understand that Scheduled Tribe status is permeable politico-administrative category.[95] And in doing so, the Court relied on two theories: (a) Aryan Invasion Theory (AIT) and (b) Brahui has traits of Dravidian language and therefore, Dravidian language entered into South India from Northwest region of the Indian sub-continent.[96] Thereafter, he assigns entire tribal population to

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[91] *Ibid* at para 12.
[92] *Ibid* at para 10.
[93] *Ibid* at para 16.
[94] *Ibid* at para 19, 24 .
[95] Virginius Xaxa, *supra note* 18 at 24; JAGANATH PATHY, TRIBAL PEASANTRY DYNAMICS OF DEVELOPMENT 3 (1984); ARVIND N. DAS, INDIA INVENTED: A NATION-IN-THE MAKING 60 (1992)
[96] Kailas & Ors vs State of Maharashtra *supra note* 90 at para 24,

have Austric origin (Obvious logical inference that can be drawn from his 08:92 mathematical split of original inhabitants versus immigrants).

The Judges' simplistic view[97] towards to migration history had failed to account that there are many tribes in India who belong to Indo European and Dravidian language families. Even in the present case, the Bhil community speaks Indo European language. Moreover, the theory which suggests Brahui as first split of Proto-Dravidian language is still in nature of speculation and unaccepted by many scholars. For example, Bhadriraju Krishnamurti an eminent scholar on Dravidian language notes that:

> Most of the proposals that the Proto-Dravidians entered the subcontinent from outside are based on the notion that Brahui was the result of the first split of Proto-Dravidian and the Indus civilization was most likely to be Dravidian. There is not a shred of concrete evidence to credit Brahui with any archaic features of Proto-Dravidian.[98]

Moreover, nothing could be more complex, politicised, used and misused than the theory of AIT in the quest of Indian history. This theory, first and foremost spun-out as a conserve of the mainstream academic Indologists, advocates that Vedic Hinduism was imported and imposed on the Indian soil by fair-skinned Aryan race who overpowered the indigenous dark-skinned Dravidians of the county. The Aryans demolished the Indus Valley Civilization, driving out the indigenous peoples to the southern locations of India. The servitude of native populations was standardised through the caste system, which conceded the Aryans to restore their supremacy even as they integrated with sections of indigenous communities. The theory indicates that Brahmin and upper caste Hindus are progenies of foreign Aryan race while lower caste and tribal communities are scions of original overwhelmed inhabitants of India.[99] The

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[97] For an alternative view to that of the author, See, Pooja Parmar, *Undoing Historical Wrongs: The Law and Indigeneity in India*, 49 Osgoode Hall L. J. 491 (2011)

[98] BHADRIRAJU KRISHNAMURTI, THE DRAVIDIAN LANGUAGES 27 (2003).

[99] Romila Thappar, *The Theory of Aryan Race and India*: *History and Politics* 24 Social Scientist 3, 3-29 (1996); A.A. Macdonell, *The Early History of Caste,* 19 Am. Hist. Rev. 230, 230-244 (1914) ; For biblical origin of Aryans, see, William Jones, *On the Gods of Greece, Italy, and India*, 1 Asiatic Researches 391, 391-403 (1788); William Jones, *On the Chronology of the Hindu*, 2 Asiatic Researches 111, 111-147 (1790); William Jones, *A Supplement to the Essay on Indian Chronology,* 2 Asiatic Researches 391, 391-403 (1790); For German Connection of Aryans, see, KARL PENKA, ORIGINIES ARIACAE (1883); THEODRE POESCHE, DIE ARIER (1878); For Central Asian origin, though in terms language rather than a race, See, F. MAX MULLER, BIOGRAPHIES OF THE WORLD AND THE HOME OF THE ARYAS (2004) (originally published in 1887); F. MAX MULLER, HISTORY OF ANCIENT SANSKRIT LITERATURE (1968) (originally published in 1859); See also, R. S. SHARMA, LOOKING FOR THE ARYANS (1995); R. S. Sharma, *Rg Vedic and Harappan Cultures:*

theory does not remain unchallenged. In the year 1990, an eminent British Anthropologist, Edmund Leach wrote a paper, few years prior to his death, entitled "*Aryan Invasion over Millennia*". In his paper, he asserts that the invasion of Indo-Aryan speaking race and proliferation of Indo-European language is fabricated and make-believe story. This was fabricated by famous philologists including, Max Muller, William Jones and Dumzeil, and anthropologists, for instance Mortimer Wheeler and many more. He notes that:

> Why do serious scholars persist in believing in the Aryan Invasion? . . . Why is this sort of thing attractive? Who finds it attractive? Why has the development of early Sanskrit come to be so dogmatically associated with the Aryan Invasion?. . .
>
> Where the Indo-European philologists are concerned, the invasion argument is tied in with their assumption that if a particular language is identified as having been used in particular locality at a particular time, no attention need be paid to what was there before; the slate is white clean. Obviously, the easiest way to imagine this happening in real life is to have a military conquest that obliterates the previously existing populations!
>
> The details of the theory fit with the racial framework . . . Because of their commitment to a unilineal segmentary history of language development that needed to be mapped onto the ground, the philologists took it for granted that proto-Indo-Iranian was a language that had originated outside either India or Iran. Hence it followed that the text of the Rig Veda was in language that was actually spoken by those who introduced this earliest forms of Sanskrit into India. From this we derived the myth of the Aryan Invasions.
>
> The origin myth of the British colonial imperialism helped the elite administrators in the Indian Civil Service to see themselves as bringing 'pure' civilization to a country in which civilization of the most sophisticated(but 'morally corrupt') kind was already nearly 6,000 years old. Here I will only remark that the hold of this myth on the British middle-class imagination is so strong that even today, 44 years after the death of Hitler and 43 years after the creation of an independent India and independent Pakistan, the Aryan

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Lexical and Archaeological Aspects, 30 Social Scientist 3, 3-12 (2002); J. Gonda, *Some Observation of Dumezil Views of Indo-European Mythology*, 13 Mnemosyne 1, 1-15 (1960).

> invasion of second millennium BC are still treated as if they were an established fact of history. [100]

In its conclusion, Leach asserted that it shall be hard to believe on what he had suggested in his paper. His fear was not unfounded because it is very difficult to revise the evidences of hegemonic assertions. As hegemonic foundations are habitually structured to not to confirm, not give authority to disagreeing opinions. Notwithstanding any vilification there is an increasing trend in quality research in the field of Indology, still in minority, challenging the conventional AIT in academic discourse.[101] Recent scientific papers even tends to suggest that: (a) the present population of India is largely result of admixture of two divergent ancestral populations Ancestral North Indians (ANI) and Ancestral South Indians related (distantly) to native population of Andaman Islanders; (b) There was no genetic influx in the ANI from the West Eurasia at least not within past 12,500 years; (c) Indian Brahmins, Tribal groups and Dalit's and other Castes shares the common ancestry.[102]

In the light of above discussion and availability of contradictory opinions and evidences it would be safe to argue that the borrowed concept such as 'Indigenous Peoples' cannot have the same room when applied to the local circumstances of India. Another point which is not unwarranted is the calculation of 'critical date period' to determine Indigeneity in international law is believed to be the 'beginning of colonization era', this entails a history of roughly 500 years before present time. Ironically, when the arguments for tribes as indigenous is mooted in India, the 'critical

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[100] Edmund Leach, *Aryan Invasion Over Four Millennia*, IN CULTURE THROUGH TIME 242-243 (1990)

[101] EDWIN BRYANT, THE QUEST FOR THE ORIGINS OF VEDIC CULTURE: THE INDO-ARYAN MIGRATION DEBATE (2001); EDWIN BRAYANT AND LAURIE PATTON (eds.), THE INDO ARYAN CONTROVERSY: EVIDENCE AND INTERFERENCE IN INDIAN HISTORY (2005); Nicholas Kazanas, attacking AIT notes in his conclusion that: "what magnificent opportunity for fresh research", see, Nicholas Kazanas, *The RgVeda and Indo-Europeans*, 80 A. Bhandarkar Orient. Res. Inst. 15 (1999); Nicholas Kazanas, *Establishment of a View*, 83 A. Bhandarkar Orient. Res. Inst. 179 (2002); B.B. Lal, *One Give up All Ethics for Promoting One's Theory*, 53 East & West 285, 285-288 (2003); DAVID FRAWLEY, THE MYTH OF INDIA (1995); NAVRATNA S. RAJARAM, ARYAN INVASION OF INDIA: THE MYTH AND THE TRUTH (1993); SHRIKANT G. TALAGERI, THE ARYAN INVASION THEORY: A REAPPRAISAL (1993).

[102] Gutala V. Ramana et al. *Y-Chromosome SNP Haplotypes Suggests Evidence of Gene Flow Among Caste, Tribe, and the Migrant Siddi Populations of Andra Pradesh, South India*, 9 Eurp. J. Hum. Genet. 695, 695-700 (2001); Richard Cordaux et al., *Mitochondrial DNA Analysis Reveals Diverse Histories of Tribal Populations From India*, 11 Eur. J. Hum. Genet. 253, 253-264 (2003); Swarkar Sharma, *The Indian Origin of Paternal Haplogroup R1a1 Substantiates the Autochthonous Origin of Brahmins and The Caste System*, 54 J. Hum. Genet. 47, 47-55 (2009); Priya Moorjani et al, *Genetic Evidence of Recent Population Mixtures in India*, 93 Am. J. Hum. Genet. 422, 422-438 (2013).

date period' is shifted to roughly 5000 years before present time. It is impossible for me to foresee the relevance of Indigeneity issues based on "first occupancy" even in settler's colonies, after the passage of 5000 years. Another problem with "first occupancy" quest in India is, drawing on Jeremy Waldron argument, that it reduces essentially a multicultural society into a "bi-cultural, for certain legal and political purpose".[103]

2.3.3. Indigeneity as a Social Fact: A case for Indian Tribal Communities

As discussed above, Indigeneity is not self-evident category in India. In this sense, arguments of "historical roots" may not be sufficient to offer firm basis for tribal communities to avail benefits from rhetoric of indigenous discourse in international law. But to assume that indigenous discourse centres around on "prior occupancy" would be too simplistic and inaccurate. Discourse on indigenous rights should be a malleable social tool, capable of addressing injustice suffered by peoples having strong emotional affinity for land, environment and cultural values build thereupon. Thus indigenous discourse should aim to ensure collective rights in lands and natural resources, protection and preservation of culture, appropriation of sovereign rights and challenge adverse socio-economic consequences of neo-liberal economic policies. In this sense, Indigeneity can be expressed in non-sectarian terms to make common cause with other marginalised social groups affected by the same external and internal forces.

In reference to the above, Benedict Kingsbury in his analysis notes that "indigenous peoples" is not a "precise term of art with a single fixed meaning".[104] He argues for a more flexible approach to promote the fundamental values underlying the concept of indigenous peoples. And in doing so, he suggests that "historical continuity" or "prior occupancy" be a relevant criterion rather than essential criterion for determination of indigenous communities.[105] There is no denial that there is a distinction between tribal peoples of India and indigenous peoples in settler colonies when the term 'indigenous' is used in literal sense. But on a substantive plane they share many similarities than

[103] Jermy Waldron, *Who Was Here First? Two Essays on Indigeneity and Settlement* 2 (Victoria University of Wellington, Quentin-Baxter Memorial Lecture, December 5, 2002).
[104] Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 Am. J. Int'l L. 414, 420 (1998).
[105] *Ibid* at 456.

differences as regard to their social conditions. I shall figure out some of the similarities in their social conditions.

First, ecological ethnicity, it refers to the "territorialised, localised ethnic identity of tribes and communities".[106] Indigenous societies lived in a high-spirited alliance with the entire environment, evolving their spiritual, political, social and economic structures over and around this alliance. 'Ecological ethnicity' discerns the indigenous communities as custodian of genuine knowledge of landscape because of its totemic bond with land. It forefront human identity as closely connected to the local land, organic and inorganic wealth, flora and fauna. In India also, we observe human life—land—environment linkage as part of tribal identity. For example, the slogan of "*Jal, Jungle aur Zameen Azad hai*" (Water, Forest and Land are free) as a *mantra* in tribal struggle for justice and recognition. In this connection, Pramod Parajuli observations are notable:

> For the people struggling for struggling for identity and autonomy, the territory of Jharkhand is not merely a biological entity—a repository of forest, minerals, and water—it is a social entity . . . Their position as defenders of ecology derives not from the concept of "nature under thread," as the conservationist define it, but rather from a relationship with the land, water forest as the fundamental basis of their own elemental struggle to survive.[107]

Second, land alienation, displacement and enforced migration. The tribal peoples are linked with a terrain or '*des*' in their native phrasing.[108] However with emergence of India as a Nation-State, the wide-ranging resources in the traditional provincial span of the tribal peoples together with part of those in their occupancy and in regular use of livelihood, accordingly, fell into public domain. This implied, in particular, that it could be well taken by the State or even other interested parties in achievement of the requirements of relevant laws, or even otherwise, contingent on the circumstances in every single case. This is not deleterious *per se*, what was alarming that tribal peoples

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[106] Pramod Parajuli, *Beyond Capitalized Nature: Ecological Ethnicity as an Arena of Conflict in the Regime of Globalization,* 5 Cult. Geogr. 186 (1998)

[107] Pramod Parajuli, *Rethinking Ethnicity: Developmentalist Hagemonies and Emergent Identities in India*, 3 Identities-Glob. Stud. 15, 42 (1996) cited in Andrea Muehlebach, *"Making Place" at the United Nations Cultural Politics at the U.N. Working Group on Indigenous Populations*, 16 Cult. Anthrop. 415, 425 (2001).

[108] B. D. SHARMA, UNBROKEN HISTORY OF BROKEN PROMISES: INDIAN STATE AND THE TRIBAL PEOPLE 9 (2010).

were nowhere to be seen in the decision making. The worst was the predatory, dysfunctional and ostensible beneficial development projects on tribal areas resulting in mindless displacement with catastrophic effect on tribal communities.[109] Recently, Virginius Xaxa committee noted that in the process of nation-building, tribal areas encountered large scale development of industry, excavation of natural resources, infrastructural development, hydraulic projects such as dams and irrigation. Committee also observes that what followed infrastructure driven development in tribal areas was enforced displacement. The figure below (Table 6.1), further research required, gives a clear indication that tribal populations is seriously affected and least rehabilitated.

[109] De Debasree, *Development-Induced Displacement: Impact on Adivasi women of Odisha*, 50 Community Dev. J. 448, 448-462 (2015); Nalin Singh Negi and Sujata Ganguli, *Development Project vs. Internally Displaced Populations in India*: *A Literature Based Appraisal*, (COMCAD Arbeispapiere-Working Paper No. 103, 2011) available at https://www.uni-bielefeld.de/tdrc/ag_comcad/downloads /workingpaper_103_negi_ganguly.pdf [Accessed on 14.09.2015]

Table 6.1:

Conservative Estimate of Persons and Tribals Displaced by Development Projects in India, Percentage of STs (1951-1990) (in lakhs)													
Types of Project	**All DPs**	**Percentage of DPs**	**DPs Resettl-ed in Lakhs**	**Percentage of Resettl-ed DPs**	**Backlog (lakhs)**	**Backlog (%)**	**Tribals Displaced (in lakhs)**	**Percetage of All DPs**	**Tribals DPs and Resttled (in lakjs)**	**Percentage of Tribal DPs**	**Backlog of Tribal DPs**	**Percentage of Backlog**
Dams	164	77	41	25	123	75	63.21	38.5	15.81	25	47.4	75
Mines	25.5	12	6.3	24.7	19.2	75.3	13.3	52.2	3.3	25	10	75
Industries	12.5	5.9	3.75	30	8.75	70	3.13	25	0.8	25	2.33	75
Wildlife	6	2.8	1.25	20.8	4.75	79.2	4.5	75	1	22	3.5	78
Others	5	2.3	1.5	30	3.5	70	1.25	25	0.25	20.2	1	80
Total	213	100	53.8	25	159.2	75	85.39	40.9	21.16	25	64.23	79

Source: Walter Fernandes (1994)[110]

[110] WALTER FERNANDES, DEVELOPMENT INDUCED DISPLACEMENT IN THE TRIBAL AREAS OF EASTERN INDIA (1994) *cited in* Virginius Xaxa *supra note* 18 at 260

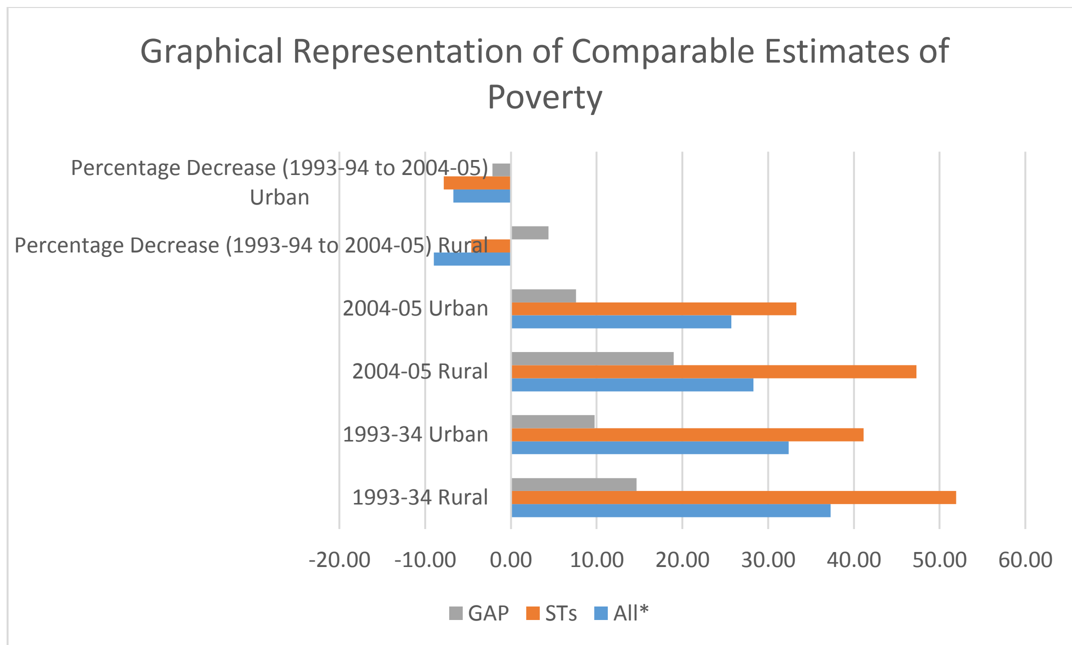
Third, generally there is a higher degree of marginalization of tribal communities among the socially marginalized groups in India. In spite India achieved rapid economic growth in the last two decades, tribal population lagged behind in socio-economic parameters. They unjustifiably symbolize the population living below the poverty line (BPL), have lower literacy rate and agonized from awfully lowly physical health. To illustrate, 45.7% of the population as a whole was BPL in 1993-94. In the same year, 63.7% of tribal people were BPL population. In the year 2004-2005, 37.7% of total population fall under BPL category, however in case of tribal population it was 60.0%.The following chart clarifies in more detail on the poverty profile of population under BPL.

Table 6.2 Comparable Estimates of Poverty among ST groups and 'Others'

Category	**1993-34 Rural**	**1993-34 Urban**	**2004-05 Rural**	**2004-05 Urban**	**Percentage Decrease (1993-94 to 2004-05) Rural**	**Percentage Decrease (1993-94 to 2004-05) Urban**
All*	37.30	32.40	28.30	25.70	-9.00	-6.70
STs	51.94	41.14	47.30	33.30	-4.64	-7.84
GAP	14.64	9.76	19.00	7.60	4.36	-2.16

Source: Arvind Panagariya and Vishal More[111]

[111] Arvind Panagariya and Vishal More, *Poverty by Social, Religious and Economic Groups in India and its Largest States 1993-94-2011-12*, (Working Paper No. 2013-02, University of Columbia) 6-7 (2013).



Source: Arvind Panagariya and Vishal More (2013)

The poverty of tribal communities is usually associated with lack of access to productive services, whether land based or industrial-urban. In the same spirit, B.D. Sharma, former Commissioner of Scheduled Castes and Scheduled Tribes, alleges that "the tribal is not poor but disinherited". The situation has been alike in the field of education and health. The literacy rates of tribes in 2001 was 47% as compared to 69% for the general population.

Lastly, socio-economic deprivation is further marred by absence of political ascendancy. Absence of political ascendancy has two dimensions, first, there has been political subordination for a long period of time especially in the pan-India scenario. Second, the emergence of regional tribal leadership has yet not reached at the level where they are accepted as the leader of all masses and classes.

2.3.4. Conclusion

Reflecting on the question of addressed in this part of the Chapter as to whether the tribal peoples of India are indigenous or not, there is no clear-cut answer as scholars are of divided opinion. The response depends upon how the term 'Indigeneity' is construed. If the 'idea of indigeneity' is equated with 'prior occupancy', as in the case of settler colonies, then its application in the Indian context is ill-suited as it is difficult to

determine with precision as to who preceded whom. Moreover, there are evidences which manifests that tribal and non-tribal societies have peacefully coexisted, in the historical past.

Nevertheless, it is argued that dynamic approach is required in interpreting the ‘idea of indigeneity’, and in doing so, ‘Indigeneity’ should be seen as a social fact. In this sense, the tribal people of India do share similarities with indigenous peoples and can avail benefits under international law.

2.4. Conclusion

The European expansion in the New World during 16th and 17th century was facilitated by international law which is a product of Western Christian civilisation. It was based on the presumption that indigenous peoples were “uncivilised” thus lack the capacity to undertake membership of international society. The ‘standard of civilisation’ continued under positive international law to ostracize and exploit indigenous communities. However, the development of international human rights movement paved the way for indigenous peoples struggle for recognition in international law.

In recent past, there have been increased efforts by indigenous groups to claim rights in international law. Under such circumstances, a functional definition is desirable to root out dilemmas over the construction of indigenous identity. Indigenous peoples definition should be centred around, inter-alia, the special relationship with their traditional land.

The application of ‘idea of indigeneity’ in Asian countries is complex. In case of India, Indigeneity based on “prior occupancy” is ill suited. However, tribal peoples share many similarities with indigenous peoples of settler colonies. They both are highly marginalised groups and share totemic bond with nature. Hence it is suggested that a dynamic approach be adopted in interpreting the ‘idea of indigeneity’ in India. Accordingly, Indigeneity should be seen as a “social fact” and tribal peoples are entitled for the protection under international law.

Chapter 3

A Survey of the Existing Legal Framework for the Protection of Indigenous Peoples Rights

3.1. Introduction

Indigenous peoples across the world share common history of discrimination and mistreatment. A range of problematic practices has forced indigenous peoples to margins of the societies in which they live. Moreover, there has been reluctance to recognise, both at international and domestic level, collective rights by which indigenous peoples can affirm their equal worth and dignity as distinct group. On the other hand, historical injustice necessitated the demand for exclusive legal provisions which could protect and promote distinctive identity of indigenous communities. The voice of indigenous peoples have been recognised in the ILO Conventions on Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples, 2007. The UNDRIP has served two purposes. First, it symbolises the general recognition of the oppression of indigenous peoples. Second, it defines, along with ILO Conventions on Indigenous and Tribal Peoples, the normative structure especially designed to engage indigenous peoples' issues. This chapter aims to critically analyse the provisions of the UNDRIP and the ILO Conventions developed under international law—a discipline primarily responsible for oppression of indigenous peoples. It is divided into two parts. First part will deal with status and scope of indigenous rights under ILO regime. The second part shall focus on the provision of the UNDRIP

3.2. Indigenous Rights under the ILO Regime

3.2.1. Introduction

The question as to why do a body such as the International Labour Organization (ILO) enter into the regulation of indigenous peoples is both obvious and important. Or in other words what is the interest of the ILO on the indigenous peoples issues?

The ILO advanced interest in 'protection of indigenous workers' may be explained as the consequence of the interaction between, observes Luis Rodriguez-Pinero, "organization ill-defined mandate to procure 'social justice' with the enlightened initiative of number of international bureaucrats of the possibility of combining a 'social justice' and the pervasive continuity of colonialism."[1]

From the standpoint of official historical account, since its creation in 1919, the ILO has been solicitous about the dismal situation of indigenous and tribal peoples. It undertook studies as early as 1921 on the situation of indigenous workers,[2] and in 1926 the ILO's Governing Body established a Committee of Experts on Native Labours to formulate international standards for the protection of the adoption indigenous workers. The work of this committee served as the basis for the adoption of a number of Conventions, including the Forced Labour Convention, 1930 (No. 29) as well as the other Convention more directly concerned with indigenous workers.[3]

The ILO official history, however, fails to notice the fact that the organization's concern for emancipation of indigenous workers was colonial in nature. Van Daele, identifies some of the ulterior motives behind ILO proactive steps in protecting indigenous peoples as follows: (i) reforms were part of 'civilization' mission targeted on indigenous peoples so as to prepare them for next educative stage; (ii) the regard for native labour was part of a strategy to prevent the spread of communism in

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[1] LUIS RODRIGUEZ-PINERO, INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919-1989), 23 (2005); See Constitution of the International Labour Organisation, Part XIII of the Treaty of Peace between the Allied Powers and Associated Powers and Germany, Versailles, 28 June 1919 (entry into force:10 April 1920), 225 CTC 196 (1919) (*hereinafter*, 'ILO Constitution') preamble para 1 (stating the principle that 'universal and lasting peace can also be established only if it based upon social justice').

[2] ILO, International Labour Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (107)*, Report VI (1) 75th Session 1988, 3 (Geneva, 1988).

[3] All three instrument – the *Convention Concerning Forced or Compulsory Labour, 1930 (No.29)*; ILO *Recommendation No 35 (1930) Concerning Indirect Compulsion to Labour; and the* ILO *Recommendation No.36 (1930), Concerning the Regulation of Forced or Compulsory Labour*, collective constituted the Native Labour Code . The other prominent ILO recommendation or convention of that period were: ILO *Recommendation Concerning the Progressive Elimination of Recruiting, 1936 (No46);* ILO *Recommendation Concerning Labour Inspectorates for Indigenous Workers, 1939* (No 59); ILO *Convention Concerning the Regulation of Certain Special Systems of Recruiting Workers, 1936* (No 50); ILO *Convention Concerning the Regulation of Written Contracts of Employment of Indigenous Workers, 1939 (No 64); Convention Concerning Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers,1939 (No 69).*

colonies and the Southern hemisphere; (iii) by developing a native labour policy it hoped to avoid racial warfare on a word scale.[4]

The ILO instruments of 1930s shared the common objective of 'disciplining of the exploitation' of 'indigenous workers' according to 'civilized' standards, with the implicit effect of legitimizing the exploitation.[5] Thus, ILO's first colonial discourse adopted the 'dynamic of difference' articulated by international law to justify colonialism. It was done through narratives of western 'civilization' expressed in the form of economic welfare of labourers.[6] The ILO colonial discourse can be better understood if analysed from the perspective of international society interest's in the fate of indigenous peoples. The internationalization of the 'indigenous problem' as a matter of global concern requiring concentrated international action, took place within the framework of an emerging international regime constructed around the dubious objectives of 'development'.

Luis R. Pinero points out that the outgrowth of the UN development regime is usually associated with Trueman's Four-Point Programme[7], delivered in 1949-the same year

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[4] J. Van Daele, *Industrial States and Transnational Exchanges of Social Policies: Belgium and ILO in the Interwar Period, in* SANDRINE KOTT AND JOELLE DROUX (eds.), GLOBALIZING SOCIAL RIGHTS, (2013).

[5] For example, ILO *Convention Concerning the Regulation of Certain Special Systems of Recruiting Workers, 1936* (No 50) fell short of banning the recruitment of 'person who do not spontaneously offer their services' , See Art 2(a) of the convention. On the contrary it subjected this practise to number of formalities and 'humanitarian' considerations, Art 11-16. Further, *Convention Concerning Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers,1939 (No 69)* did not automatically abolish the widespread colonial practice of penal sanctions for breach of contracts, but rather stated that the principle that this practise should be abolished 'progressively as soon as possible' , Art. 2(1).

[6] Antony Anghie defines 'dynamic of difference' as the process of establishing the gap between two cultures and then seeking to bridge the gap by developing techniques to normalize the aberrant society. See, ANTONY ANGHIE, IMPERIALISM SOVEREIGNITY AND MAKING OF INTERNATIONAL LAW, 4 (2005); Antony Anghie, *The Evolution of International Law: Colonial and postcolonial realities* in RICHARD FALK, BALAKRISHNAN RAJAGOPAL, JACQUELINE STEVENS (eds.), INTERNATIONAL LAW AND THIRLD WORLD: REHSAPING JUSTICE, 38 (2008).

[7] United States of America President Harry S. Truman in his inaugural address on January 20, 1949 expressed his now famous "Fourth Point" :

"I believe that we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspiration for a better life. And, in cooperation with other nations, we should foster capital investment in areas needing developing. Our aim should be to help the free peoples of the world, through their own efforts, to produce more food, more clothing, more material for housing, and more mechanical power to lighten their burdens. We invite other countries to pool their technological resources in this undertaking. Their contribution will be warmly welcomed. This should be a cooperative enterprise in which all nations work together through the United Nations and its Specialized Agencies wherever practicable. It must be world-wide effort for the achievement of peace, plenty, and freedom."

See, Hooker A. Doolittle, *Point Four Programme*, 2 Pakistan Horizon 181 (1949); D McFadden, *The Evaluation of Development of Progrmmes*, 34 The Rev. Econ. Stud. 25-50 (1967); Robert H Ferrell,

in which Montevideo Plan of Action was adopted. And, also in that year the 'Expanded Programme of Technical Assistance' (EPTA) was set up within the UN framework-the immediate predecessor of the United Nations Development Programme (UNDP). Established on the idea of 'international economic and social co-operation' set forth in the UN Charter, the EPTA was established by the General Assembly and ECOSOC, with the express purpose of bringing 'economic and social development' to 'underdeveloped' countries.

The United Nation was cardinal in the formulation of the discourse on development. As James Ferguson observes 'development' became 'a central organizing concept' of the scholarly and political domain of the post-war era.[8] 'Development' as a concept was composed of complex set of principles, institutions and practices Conceptualisation around an intricate set of principles, institutions and practices, 'development'. It was established as instructive tool for understanding the world, while creating the object of which it spoke: namely 'underdevelopment'.[9] It seems as if indigenous population entered the agenda of international organisation as an object of the discourse of development.

In 1949, the U.N. General Assembly adopted a resolution recommending that the Economic and Social Council conduct a study on the "social problem of the aboriginal population and other under-developed social groups of the American

Continent."[10] This was followed by two resolution by ECOSOC. However these resolution did not lead to any clear result but it became part of institutional framework

Truman's Face in History, 18 Rev. Am. Hist. 1-9 (1990); Thomas G. Paterson, *Foreign Aid under Wraps: The Point Four Programme*, 56 Wis. Magz. Hist. 119-126 (Winter 1972-73).

[8] JAMES FERGUSON, THE ANTI POLITICS MACHINE: "DEVELOPMENT," DEPOLITICIZATION AND BUREAUCRATIC POWER IN LESOTHO, 4 (1990).

[9] ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT MAKING: THE MAKING AND UNMAKING OF THE THIRD WORLD TO KNOWLEDGE AS POWER, 39-44 (1995).

[10] UNGA Res 275 (III) (11 May 1949). The resolution is founded on the opinion that 'there exist on the American continent a large aboriginal population and other under developed groups that is necessary to study in the field of international cooperation'. See ibid, preamble para 2 (emphasis added). The resolution called on ECOSOC to conduct a study on the 'special problem' of American 'aboriginal groups and [other] *Underdeveloped* social groups'. Ibid, preamble at para1 (emphasis added). The study should be undertaken with the assistance and co-operation of 'the special agencies concerned with the '*Instituto Indigenista Interamericano*', ibid. Reference to the 'underdeveloped groups' derives from the proposal tabled by the Haitian government, that the study should also incorporate all the 'coloured population of the continent' . See, UN Doc A/AC.24/27; GA Ad Hoc Political Committee: Official records, UN Doc GA/III/1949,376-7 also *cited in* LUIS R PINERO, supra note 1 at 84.

that mark the beginning of the Andean Indian Programme, the most visible expression of such concerns in the post-war era.[11]

The discussion in the UN context reveals that States regarded the persistence of indigenous peoples distinct ways of life, and their depleted standards of living, as a matter of 'humanitarian' concern—a striking instance of the 'backwardness' that the international community was called on to combat in the post-war era —and also as a major barrier to the objective of 'development' and 'modernization'. Hence, indigenous problem was theorized as a problem of 'underdevelopment', falling within the objectives of the recently started regime of development aid, to the ruling out of alternative approaches to indigenous issues.[12]With the above background, this part of the Chapter proceed to critically analyse the two ILO Convention dealing with indigenous rights.

3.2.2. The ILO Convention No. 107

In 1957, in the course of the 39th session of the International Labour Conference, the Committee on Indigenous Population (Conference Committee) discussed the draft text of a convention and a recommendation relating to indigenous population in independent countries. Based on the member states' response of a questionnaire, the International Labour Conference adopted at its 40th session the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi Tribal Population in Independent Countries (Convention No. 107) and its accompanying Indigenous and Tribal Population Recommendation (Recommendation No. 104). Convention No. 107 was the first international convention that focused exclusively on the rights of indigenous peoples in a comprehensive manner.

It is worth mentioning that final form of the legal standards in the Convention No. 107 was target of sharp disagreement from the beginning of its drafting process. Among

[11] The Andean Indian Programme (*hereinafte*r AIP) was aimed to improve the standard of living of indigenous groups along with objective of 'integration'. The AIP involved other international bodies, such as FAO, UNESCO, WHO and later UNICEF, with ILO being responsible for its general management. The programme was implemented in Bolivia, Ecuador and Peru and later it was extended to Argentina, Chile, Columbia and Venezuela. See, ANTONY ALCOCK: HISTORY OF THE INTERNATIONAL LABOUR ORGANIZATION, 251 (1971); J. Rens, *Le Programme andin: Contribution de l'OIT à un project-pilote de cooperation technique multilaterale* (1987).

[12] See, Statement by Matienzo, Bolivian government representative, GA Ad Hoc Political Committee: Official Records, 53rd session, UN Doc/GA/III1949, 375.

other issues, there was debate over the ultimate character of final standards to be adopted i.e. policy versus law or recommendation versus Convention.[13] Strong supporters of the option of recommendation included the governments of Canada, New Zealand, and the United States. Luis R. Pinero summaries the arguments of these groups against the convention. He observes, firstly and most importantly, a number of delegates dwelled on the *technical* —as distinct from *legal*—nature of the standards under discussion. The logic behind such an argument was that a convention "'[would be] too legalistic as an instrument…and would not be workable in practice". [14]

Second, recommendation was considered flexible and more suited handling an issue where extremely divergent circumstances existed among member States. As in the words of one of the delegate: "The instrument should be *as flexible as possible* to meet the variety of situations in which indigenous peoples lived". Usually considered not legally binding instruments, recommendation do not create a formal, enforceable commitments to implement the standard set forth therein.[15]

Thirdly, procedure of a recommendation was also supported in terms of simplicity and effectiveness. This logic was linked to a larger critique concerning the ILO's standard setting policy, historically, identified by an unrestrained over production leading towards a low level of effectiveness of both the standards and the organisation's related supervisory procedures.[16]

However, during the plenary meeting, an overwhelming majority of delegation consolidated in favour of a convention. Arguments in favour of the Convention

[13] According to the ILO Constitution, international labour recommendation only provides the duty of 'submission' to the competent authorities, and, occasionally, to periodic reporting on their implementation. See, ILO Constitution, *supra note* 1, Art. 19(6).
[14] See, Statement by Mr Finley, Liberian government delegate, ILC, International Labour Conference, 39th Session (Geneva: 1956), Minutes of the Committee on Indigenous Populations (1956) at ILC 39/CIP.VII/4.
[15] The USA noted: "The problems to be faced in each country differs so greatly and the means at the disposal of each country vary so much that it would appear necessary to have flexibility in planning and executing measures to accomplish the protection and integration of these populations."
See, Replies from the Government in ILO Off,: Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries, Report VI(2), International Labour Conference, 40th Session (Geneva: 1957) , p.9 cited in ALEXENDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE, LAND, 50 (2007).
[16] Statement by Mr Hodgets: "[t]he more the ILO produced lengthy and detailed instrument , the more they are likely to receive less effective implementation", See, Minutes of the Conference Committee, *supra note* 14 at ILC39/CIP/IV/2 cited in LUIS R. PINERO *supra note* 1 at 136.

essentially focused on the idea that the situation of the world indigenous populations required a formal, solemn commitment on the part of international community. A commitment grounded in feeling of human solidarity well beyond the somehow bare prescription of recommendation.[17]

The Conference's final decision was the 'mixed formulae' of adopting a convention backed by a recommendation. This kind of mixed formulae is not unusual in the ILO's standard setting pursuit. Despite the fact that the standards in Convention No 107 were endowed an international legal status. They were primarily designed as technical recommendations for government's development policy concerning indigenous groups, defining few obligations for ratifying States and affirming fewer rights for the population concerned. In the words of Luis R. Pinero, "the convention thus landed on the list of what would become known as 'promotional convention', *rarae aves* half way between binding convention and policy recommendation".[18]

3.2.2.1. Provisions of ILO Convention No.107

3.2.2.1.1. Scope of the Convention

One of the outcomes of the drafting of Convention No 107 and Recommendation No 104 was the architecting of the first international legal definition of 'indigenous' in the *modern* sense.

The final definition incorporated in Article 1 of both Convention No. 107 and Recommendation No.104 reads as follows:

> This Convention applies to
>
> (a) members of tribal and semi-tribal population in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, any whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

[17] See, Statement by Puig Montenegro, Guatemela workers' delegate, "Convention implied responsibility for governments [whereas] [r]recommendations are often not effective", See, Minutes of the Conference Committee, *supra note* 14 at 39/CIP/VI/3

[18] LUIS R PINERO, *supra note*, 1 at 139.

> (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of the nations to which they belong.[19]

"For the purposes of this Convention" the definition continues, "the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal, characteristics, are not yet integrated in the national community".[20]

The first paragraph of the abovementioned definition refers to a category which includes shifting cultivators and nomadic tribes who may not have ancient relationship with a specific area of land. [21] Xanthaki , observes that the phrase "less advanced stage" reflects a negative approach on indigenous lifestyles : it is assumed that the majority of the society is at a more "advanced stage" than indigenous peoples. According to the Convention, 'backwardness' of these communities prevent them from 'sharing fully in the progress of the national community of which they form part'.[22]She further notes:

> [t]he notions of inferiority and superiority serve as basis for the continuation of the oppression of indigenous identities; it is particularly unfortunate when such notions are included in human rights instrument. [23]

The second paragraph of the definition refers to groups characterised as indigenous because of their association with a distinct territory. The element of historical descent is central to this part of the definition. Thus the paragraph, applies the more apparent, etymological sense of the term 'indigenous'. This meaning, and the legal

[19] See, Convention No. 107, art. 1 (1) ; Recommendation No. 104, art. 1 (1).
[20] See, Convention No. 107, art 1 (2).
[21] The use of terms 'tribal' and 'semi-tribal' represents a good example of penetration of social science understandings into the standard ascribed under the convention. These terms were technical t concept critical to anthropological discourse.
[22] Preamble, ILO Convention No. 107.
[23] ALEXENDRA XANTHAKI, *supra note* 15 at 53.

consequences therein, was the subject of debate during the deliberations of the ILO instruments on indigenous peoples– and still is.[24]

3.2.2.1.2. The Language of Integration

Pursuant to the comprehensive theoretical foundation of the 1957 ILO instruments, the definition of 'indigenous, tribal and semi-tribal population' is conceptually conditional on the notion of 'integration'.[25] Article 1 of the Convention provides a guiding information when defining 'semi tribal population' as 'groups and individuals who….are not yet integrated in the notional community'.[26]

This 'not yet integrated' represent the real pith and substance of the ILO definition of indigenous population. The component of non-integration as a definite benchmark of the definition of 'indigenous' is regularly found in the ILO's texts prior to 1956, enlaced with the concept of the 'indigenous problem'. In reference to the Office's report to the first session of the Committee of Experts on Indigenous Labour, the problem of 'indigenous workers' is the difficulties associated with a segment of population which, due to historical reasons, are habitually not fully integrated into the social and economic life of national community.[27]

The ILO thus linked the definition of 'indigenous' to the similar insight of an 'indigenous problem' that had spirited organisations involvement in this issue since 1930s, by which historical or cultural factors where actually sensed as signifier, in a condition of poor integration which precluded these groups from receiving the fruits of 'development'.[28]

The conceptual dependency between the definition of 'indigenous' and the notion of 'integration' reflect *temporal* dimension of notion of 'Indigeneity', coherent with the perceived dynamic character of the process of 'integration' and the principle of temporality that circumscribed the protection programme in the convention.

[24] PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS, 35-40 (1953).
[25] LUIS R. PINERO, *supra note* 1, at 164.
[26] See, Convention No. 107, art 1(2); Almost same design is found in the preamble, stating that "[t]here exists in various independent countries indigenous and other tribal and semi-tribal population *which are not yet integrated into the national community"*, Id.
[27] *Report of the ILO Committee of Experts on Indigenous Labour, Indigenous Workers in Independent Countries: General Report*, ILO Doc CEIL/I.3.1950 at 5
[28] LUIS R. PINERO, *supra note* 1, at 164.

The temporal dimensions of the notion of 'integration' posited as the ultimate criterion for the definition of the personal scope of the standard set forth in the 1957 ILO instrument. Convention No. 107 was thus meant to apply only to 'indigenous' population that were 'not yet integrated'. Correspondingly, the convention in theory ceased to apply when, by virtue of their becoming 'integrated' into the 'national' society, these populations lost their 'tribal characteristics' —and should no longer be considered as 'indigenous' within the scope of the instrument.

The next obvious question is, what does 'integration' signifies in the context of indigenous rights discourse? The term 'integration' is attached to a complex conceptual universe, including different level of connotation that is delimited only by specific circumstances in which it is used. More than a single, unequivocal content, the term has plurality of sifting, interrelated meanings. Thus, for instance we speak for 'social integration', of 'political integration', of 'economic integration', or of 'national' and 'regional integration', designating a plurality of social process normally denoting a process of homogenization of dissimilar social units.

The Conference Committee decided against defining 'integration', on the ground that "any definition of integration would necessarily be restrictive and therefore might not cover all the many aspects of the problem".[29] The term 'integration' in the text of the ILO instruments on indigenous population talks of a process. The desired end of this process in the process referred to in the convention as "integration…into the national community"[30] and 'integration into the life of their [indigenous peoples] respective countries', while the recommendation refers to a horizon of 'adaptation…in modern society'. So understood 'integration' describes a process of socio-cultural change that can be either natural or induced.

Luis R. Pinero analyses the meaning of 'integration' in the ILO instruments on indigenous populations, according to three basic objectives that formed the basic normative consensus underlying those instruments: development, acculturation, and equality.

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[29] ILO, *Report IV* (40th session 5 June 1957) cited in ALEXENDRA XANTHAKI, *supra note* 15 at 54.
[30] See, Convention No. 107, art 2 (3).

Firstly he observes that if the ILO instruments on indigenous populations are subjected to close scrutiny, the perception rises that the means of 'integration' are not other than the means of 'development'. Apart from the general statement of policy and the provisions concerning the protection of indigenous peoples, cultures and property, the main body of the instrument is devoted to the definition of general objectives of economic and social development in various fields, including the promotion of handicrafts and rural industries, health, and education—all fields that would fall within the modern understanding of 'social' or 'community development'.[31]

Second, tightly connected with the idea of 'development' is the idea of induced cultural change. He continues to observe that the objective of 'acculturation' was implicit in the entire anthropological conceptual ammunition incorporated in Convention, aimed precisely at promoting effectiveness of economic development programmes. The role of applied anthropology is critical in this sense. [32]

The idea of 'integration' as a planned acculturation is crafted in the convention by negative reference to two related concepts, which draw line between scientific and unscientific methods of 'integration'. First being *artificial assimilation and* Second of 'forced integration'. It is important to understand that more than specific concerns about the human rights of indigenous populations this provision was guided by anthropological concern on policy effectiveness: 'forced acculturation' was perceived simply as 'counterproductive'. [33]It should be noted that the framers of the ILO standards on indigenous population limited the uses of force to integration measure but not to other state measures vis-à-vis indigenous population.[34]

[31] See, Convention No. 107, art 2(2)(b); The broad aim of 'development' is reiterated in Article 6 of the convention , declaring that betterment of the status of life ,work and degree of education of indigenous peoples shall be given *high priority* in programmes for the *overall economic development of* areas populated by indigenous peoples, See, Convention No. 107, art 6; Further, the objective 'development' is advanced by way of promoting handicrafts and rural industries which as per the convention , 'shall be encouraged as factors in the economic development of the population concerned'. See, Convention No 107, art 18 (1); LUIS R. PINERO, *supra note* 1, at 164.

[32] LUIS R. PINERO, *supra note* 1, at 164.

[33] some of the resistance movement like Alcatraz, Wounded Knee, Longest Walk ,See PAUL CHAAT SMITH & ALLEN WARRIOR , LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE.

[34] See, Statement by Acland, Canadian delegate, International Labour Conference Committee on Indigenous Population, 40th session (Geneva, 1957): Minutes of the Conference Committee at ILC 40/CIP/V/4

Thus the whole idea of 'integration' is to foster gradual and irreversible cultural change in the society construed by indigenous population. In line with this objective Article 22 of the Convention requires 'ethnological surveys' prior to the 'formulation of [integration] programme'.[35]This set up is also visible in the case of recommendation, which advocates that staff working among indigenous groups should be well versed with anthropological and psychological techniques as a prerequisite for reconciling their work to the cultural characteristics of indigenous population; and stressing the need to have scientific research with view to deciding the most suited pedagogy in education and related fields.[36]

Lastly, Pinero associate 'integration' with the international norm of equality and non-discrimination. Article 2 of the Convention manifests the intention of making indigenous peoples "benefit on an equal footing from the rights and opportunities which a national laws or regulation grant to the other elements of the population".[37]The author attempts to explain that 'integration' as equality has two different facet. First, a progressive proposition based on principle of non-discrimination against indigenous peoples, while the condition of 'absence of integration' symbolizes a situation of discrimination that result in compromising with 'principle of equality'.[38] Article 15 of the Convention incorporates the principle of non-discrimination 'between workers belonging to the population concerned and other workers' in employment and remuneration; in access to public social services; and in rights of association. There are certain other articles of the Convention which also provides non-discrimination qualification in particular sectors of government undertakings, as well as number of arrangement for positive action plan in some of these fields.[39]

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[35] See, Convention No 107, art 22(2); The same understanding is required in the convention in connection with designing of vocational programme, health services, and educational programme, See Convention No 107 art 17(2), 20(3).

[36] See, Recommendation No 104, arts 27, 29(1), art 20(3) & art 16.

[37] See Convention No 107, art 2(2)(a) (emphasis added).

[38] See, Convention No.107, art 15 (declaring the principle of non-discrimination "between workers belonging to the population concerned and other workers"). The convention identifies four premises of anti-discrimination as (i) equal opportunity in employment; (ii) equal pay for equal work; (iii) protection and safeguarding of social and health security and (iv)right to association and related rights.

[39] See Convention No 107, art (9) (denouncing the forced labour of indigenous populations "[e]xcept in cases prescribed by law for all citizens"); art 14 (" National agrarian programmes shall secure to the population concerned treatment equivalent to that accorded to other sections of the national

Second, the principle of equality also bear a discrete structure in dealing cultural heterogeneity. In this context 'equality' has its connection with historical-normative discourse of the first UN human rights regime, a framework distinguished by the potent contention of the principles of equality and non-discrimination, pronounced overtly as a substitute to the League of Nation's minority regime. The motive behind the promotion of equality and non-discrimination principles was assimilation of diverse groups into majority dominant culture. Under this scheme, the understanding was that with focus on individual rights at global level will led to disappearance of minority groups in the due course of time. Hence, the issues of 'nationality' would desist to challenge world stability.[40]

The aims and belief of the early international human rights course was in accordance with political plan of 'universal citizenship' advanced by classic Liberal theory, usually transforming the demand of equal right into the enforcement of an inflexible legal framework coupled with unitary mode of political governance structure, whereas divesting cultural distinctness of any institutional construct except for private realm.[41]

Thus the ILO Convention should be studied with the understanding that it is a part of international human rights regime for the 'prevention of discrimination' rather than 'protection of minorities', where discrimination is assumed to trigger schism in a unitary citizenry. Advancing the same ideology, an ILO report suggests 'integration' should ultimately be constructed as a process of "facilitat[ing] the access of [indigenous] populations to full membership in the national community".[42]

3.2.2.1.3. Protection of Indigenous Rights

In-spite of its integrationist agenda Convention No. 107 declares the protection of many indigenous rights. There are number of provisions focusing on different aspects such as protection of cultural and religious rights of indigenous peoples; protection of customary law and political design; protection of indigenous land tenure etc.

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communit"); art 16 ("Persons belonging to the population concerned shall enjoy the same opportunity to acquire education at all levels on a equal footing with the rest of the national community")

[40] LUIS R. PINERO, *supra note* 1 at 196.

[41] Iris M. Young, *Polity and the Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *Ethics* 250,250 (1989).

[42] *Report of the Committee of Experts on Indigenous Labour, Living and Working Conditions of Aboriginal Forest-Dwelling Populations* ILO Doc CEIL/II2, 1954 at 3.

Special emphasis is given in the Convention to rights related to life, liberty, and the prohibition of slavery. According to Alexendra Xanthaki, this was so, partly because these were core issues baffling indigenous population, partly because they are related with the mandate of ILO and partly because these were the least controversial rights.[43] Unfortunately these provisions are still material to indigenous realities. For example, Patricia Trindade observes that indigenous Amerindians were forced to work in unsafe environment. They are enslaved to work in sugar fields in the State of Mato Grosso do Sul.[44]

Article 9 forbid compulsory service, whether paid or unpaid. This has been particularly relevant in countries where concept of 'debt bondage' still prevails. In Peru, lately a research has verified the existence of bonded labour in relation with unauthorised logging activities in the country's Amazon basin and large number of indigenous peoples are forced to suffer. [45]The prohibition of Article 9 is in accordance with international instruments on slavery, including the 1930 ILO Forced Labour Convention.

Article 10 of the Convention No. 107 summarizes the primacy and frailty of the text. The article begins by indicating that indigenous peoples should not be arbitrarily arrested and they should have a right to legal recourse. In the Conference Committee, it was pointed out that this article 'merely affirmed that the general principle should apply to them…defending themselves against possible abusive practises by giving guarantees established by law'.[46]On the other hand one could hold that the pertinent provisions in general human right framework make Article 10 superfluous.

Rodolfo Stavanhagen observes that the State penalties are not invariably proper for indigenous people. Large number of indigenous cultures do not endorse the pre-eminence of state criminal justice system on punishment and imprisonment, but prefer to value restitution, indemnification and restoration of communal harmony.

[43] ALEXENDRA XANTHAKI, *supra note* 15 at 57.
[44] PATRICA TRINDADE MARANHAO COSTA, FIGHITING FORCED LABOUR: THE EAMPLE OF BRAZIL, 45 (2009).
[45] See, Garland Bedoya & Silva-Santisteban, *El Trabjo Forzoso en la Extraccion de la Madera Amazonia*,ILO Working Paper No. 40 , 2005.
[46] See, *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries*, Report VI(1), International Labour Conference, 40th Session (Geneva: 1957), p.17

Indigenous peoples would gain from these kinds of reparation modalities. Article 2 para 3, seek to propose positive action with respect to sanctions. The article becomes more relevant as indigenous peoples representative were unsuccessful retain such provision in the UN Declaration of Rights of Indigenous Peoples, 2007. The Convention also suggest states to consider customary laws of indigenous peoples [47]and to use the indigenous ways of social control and indigenous customs in punitive cases.[48]However, these provisions are subject to their agreeability with national system.

3.2.2.1.4. The Protection of Indigenous Lands

Part II of the Convention incorporates provisions recognizing land rights. The two central articles in this part are Article 11, which 'recognizes' indigenous peoples' 'right of ownership' of their traditional lands; and Article 12 , systemizing situations of eviction of those peoples from their traditional land .

Article 11 of the Convention manifested the assertions of indigenous peoples right to the land in the ensuing manner:

> The right of ownership, collective or individual, of the populations of the members concerned over the lands which these population traditionally occupy shall be recognised

The interpretation of individual and collective or cooperative ownership to indigenous peoples was highly debated during the *travaux*.[49]The Western nations stressed on the significance of individual ownership. The British government argued that the rights of non-integrated segment of the society and the economic prosperity of the non-integrated society in general may not certainly, or always, be optimally obtained by the construction or continuation of collective land ownership such as those which seem to be conceived in Article 11 of the Convention.

However, the Communist nations advanced the idea of collective ownership. For example, USSR argued that the Convention should incorporate provisions which enable indigenous peoples to acquire or lease lands in all parts of country; that in

[47] See, Convention No. 107, art 7.
[48] See, Convention No. 107, Art 8.
[49] ALEXENDRA XANTHAKI, *supra note* 15 at 60.

locations occupied by indigenous populations where there is inadequacy of land as a result of usurpation or colonisation, there should be arrangements for apportionment of lands in favour of indigenous populations.

Though the Convention mentions about—but does not underscore—the significance of community ownership. As a result the provision draws major criticism from indigenous peoples and their patrons. Notwithstanding, on must always reckon that in 1957 the Convention incorporated collective land rights, while at present there are many countries which show their reluctance in accepting collective ownership right for indigenous peoples. Moreover, the Article operates by using the expression 'recognised' rather than the expression 'grant'. Consequently, it implies that the rights of ownership hitherto remained with indigenous peoples, and it was not bequeathed through the State action.

According to the provisions, if the land is 'traditional', occupation must turn into ownership. The CEACR has observed that occupation need not necessarily be authorised by the government; the Committee in its report noted:

> traditional occupation, whether or not it has been recognised as authorised does creates rights under [Convention No.107]. In, addition, use of forests or wastelands, title of which is held by the Government, or hunting and gathering –again, whether or not this has been authorised –satisfies the use of the term 'occupation', and if it is traditional it meets the requirement of [Article 11 of the Convention].The term 'traditional occupation is' is imprecise, but it clearly conveys the lands over which these groups' land rights should be recognized are those whose use has become part of their life.[50]

The quality and effectiveness of the declaration of indigenous peoples ownership right in the Convention is better exposed by Article 12, which explains dubious trait of this declaration by enabling the opportunity to remove indigenous peoples from their traditional lands by reason of state conventional policies relating to national security, or in the national interest related to economic development and health of the indigenous population.[51] The article also provides for compensation for forcedly

[50] See, Committee of the Experts on the Application of Convention and Recommendations (CEACAR), *Individual Observation concerning Convention* No. 107, *Indigenous and Tribal Populations , India*, Publication: 1990, para 16 *cited in* ALEXENDRA XANTHAKI, *supra note* 15 at 62.
[51] See, Convention No. 107, Art. 12(1).

removed indigenous individual either monetary or in kind or lands of quality equal to that of seized by the state.[52] However, the provision does not appear to care much about the unwholesome consequences of displacement upon indigenous peoples or culture, rather it seems to branch from a desire for equality with non-indigenous segment of population and thus envisaged in wholly monetary terms.

The Convention also demands regard for indigenous customs in the transfer of proprietorship to the extent that such custom satisfy the needs of indigenous population and is not detrimental in their social and economic development. However, the power to decide as to what is detrimental to indigenous people lies with the State.

The above study indicates that the Convention has some substantive and significant propositions and guidelines concerning indigenous land rights. However, most of the articles are drafted with a paternalistic tone and the Convention itself provide escape route for states to compromise with rights of indigenous peoples.

3.2.2.1.5 Education and Language

The Convention No. 107 also lays down provisions dealing with education and cultural rights of indigenous peoples. However in doing so, the primary objective is to integrate indigenous communities under the guise of 'equality' and non-discrimination rather than persevere and promote education and cultural aspects of indigenous identities. The general formula for the right to education is set up by article 21 which provides that indigenous peoples must "have the opportunity to acquire education at all level on an equal footing with rest of national community".[53]Noxiously, dedicated to its integrationist agenda, the Convention No.107 overlook to institutionalise the education of indigenous culture as one of the goals of educational rights of indigenous peoples; instead, as per Article 22 (1) the main aim is "the process of social, economic and cultural integration into the national community". Though Article 23 progressively attempts to recognise indigenous culture by observing that "appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language".[54] Further, it emphasised on providing primary education in vernacular or indigenous language to the children of indigenous population. This is an important provision as studies shows that mother

[52] See, Convention No. 107, Art. 12(2).
[53] See, Convention No. 107, Art. 21.
[54] See, Convention No. 107, Art. 23.

tongue based instruction can boost a child's confidence.[55] But, the scope of the provision if limited by addition of paragraph 2, which states:

> Provision shall be made for the progressive transition from mother tongue or the vernacular language to the national language or one of the official languages of the country.

Such an addenda is part of larger linguistic imperialism[56] coupled with integrationist objectives.

Generally believed that the Convention No. 107 has completely lost its relevance as study of handbooks resolved to support cause of indigenous people's rights often embody limited or misses out the Convention No.107 completely.[57] However, the present status of this Convention No. 107 is that it is still legally binding on eighteen states.[58] The Convention is a pioneering instrument, nevertheless its discourse was always on 'integration' than on rights. The history of emergence of Convention No.107 in international law also marks the beginning of *sui generis* regime under the modern international human rights discourse.

3.2.3. The ILO Convention No. 169

Resurrection of indigenous issues at global level in the late 1970s under the patronage of United Nations gave life to the possibility for the Office's resolution to rethink and revise the Convention No.107, which culminated in the enactment and adoption of the ILO Indigenous and Tribal Convention, Convention No. 169.

Swepton and Tomei, while analysing the historical reasons for revision of the Convention No. 107 notes that "[u]rged by the indigenous peoples and various bodies

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[55] See, R. Appel, *The Language Education of Immigrant Workers' Children in the Netherlands,* In MINORITY EDUCATION FROM SHAME TO STRUGGLE, 57-78 (T. Skutnabb-Tangas, & J. Cummins eds., 1988); Stephen C. Wright & Donald M. Taylor, *Identity and Language of the Classroom: Investigating the Impact of Heritage versus Second Language Instruction in Personal and Collective Self-esteem*, 87 J. Educ. Psychol. 241-252 (1995).

[56] Phillipson functional definition of linguistic imperialism is that "the dominance of English is asserted and maintained by the establishment and continuous reconstitution of structural and cultural inequalities between English and other languages", See, ROBERT PHILLIPSON, LINGUISTIC IMPERIALISM 47 (1992).

[57] For example, S. James Anaya authoritative work, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004) does not refers much about the Convention No. 107.

[58] See, *available at* http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm [accessed on 05.11.2014]. The eighteen countries are: Angloa, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, EL Salvador, Ghana, Guinea Bissau, Haiti, India, Iraq, Malawai, Pakistan, Panama, Portugal, Syrian Arab Republic, Tunisia.

in the UN system, the Governing Body of the International Labour Office decided to begin the work that led to the adoption of a revised Convention in 1989".[59]

Pinero contends that the decision for appraisal of the Convention No. 107 was basically an internal driven process motivated by events outside the ILO.[60]

The interlinked external factors which played major role in setting the stage for reforms are, first, many indigenous groups had strong reservation against the integrationist agenda of the Convention No. 107 and they were not interested to be assimilated to the national culture. Second, there was emergence of voices within the discipline of anthropology where the next generation scholars of critical anthropology attacked the manner in which social science was used as a tool of governmental integrationist policies.[61]The members of the academia were committed to reform the discipline so that it is not received as something "which relates to Indians [indigenous] as object of study, but rather that which perceives the colonial situation and commit itself to the struggle for liberation". [62]Third, cases of atrocities on indigenous peoples violating their human rights, successively spotlighted by global media, helped to generate public sympathy as well as consolidated indigenous peoples of the world as a new force with an opinion for taking indigenous rights movement to new level.[63]

In 1983, accomplishment of the Martinez Cobo Report established to be promising for gathering UN support for the revision process. The Report supported the revision and concluded that:

> [The] ILO should be supported in its effort to effect a revision of Convention No. 107 and recommended No. 104 , so as to take into account the wishes and demands of indigenous population, and at the same time

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[59] L. Swepston & M. Tomei, *The ILO and Indigenous Tribal Peoples*, IN INDIGENOUS PEOPLES AND INTERNATIONAL ORGANIZATIONS 56, 58 (L. van de Fliert ed., 1994) *cited in* LUIS R. PINERO, *supra note* 1, at 264.

[60] LUIS R. PINERO, *supra note* 1, at 258, 265.

[61] See, *Declaration of Barbodas* , World Council of Churches, Programme to Combat Racism PCR 1/71. The final Declaration was adopted by the anthropologist participating in the symposium on Inter-Ethnic Conflict in South America, Barbodas, 25-30 January, 1971, *available at* http://www.nativeweb.org/papers/statements/state/barbados1.php [accessed on 05.11.2014].

[62] *Ibid*.

[63] See, ALISON BRYSK, FROM TRIBAL VILLAGE TO GLOBAL VILLAGE: INDIAN RIGHTS AND INTERNATIONAL RELATIONS IN LATIN AMERICA 249-252 (2000)

> work , if competent bodies of the United Nation so decides, towards the adoption of UN Convention on indigenous populations.[64]

The Governing Body's 1984 decision to call a Meeting of Experts on the Revision of Convention No.107, and eventually deciding to uphold the committee's opinion on the agenda of the 1988 and 1989 International Labour Conference pronounced the commencement of process resulting in the revision of the Convention No. 107.[65]

However, the limited character of the revision was reflected from the very inception as the item on the agenda of 1988 session of the International Labour Conference renders "Partial Revision of the Indigenous and Tribal Populations Conventions Convention, 1957 (No.107)".

Pinero, baptizes the process of birth of the Convention No. 169 as "original sin"[66] on the account of the facts that the ILO institutional setting was inadequate for dealing highly sensitive issues such as of sovereignty; self-determination; control over lands and over the use of 'peoples' and participation of indigenous peoples organization was restricted due bureaucratic attitude of the ILO officials they were not serious to build consensus with indigenous peoples in relation to revision of the Convention No.107.[67]

It was on 26th of June 1989, the International Labour Conference adopted the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (Convention No.169), which came into force on 5th of September, 1991.[68]

3.2.3.1. The Underlying Trajectory of the Convention No.169

In spite of born from DNA of the Convention No. 107 the new convention had certain distinctive characteristics which could be deduced from the scope revision of Convention No. 107 itself which read as:

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[64] The Special Rapporteur on Indigenous Peoples José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, paras. 335 (1985).
[65] LUIS R. PINERO, *supra note* 1, at 283.
[66] *Ibid.* at 300.
[67] *Ibid.* at 312—313; Discussion on the reserve attitude of ILO officials toward the participation of NGO's in internal matters, *see*, E. HAAS, BEYOND THE NATION-STATE:FUNCTIONALISM AND INTERNATIONAL ORGANIZATION, 206-208 (1964).
[68] See, Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 Okla. City U. L. Rev 677 (1990).

(a) modifying the basic approach of the Convention away from integrationism as the principal objective of programmes dealing with indigenous and tribal populations, and its replacement by the principles of effective involvement of these peoples in decisions affecting them and respects for their cultures, ways of life and traditional institutions. . .

(b) re-examining the land rights provisions (Articles 11 to 14) in order to provide additional procedural safeguards in case where displacement from their traditional territories is being contemplated, in relation to the restitution of lands they have lost, to required demarcation of the lands to which they have rights, and to consider the extent to which they should have rights to sub-soil, water and other resources pertaining to these lands,

(c) re-examining Article 15 of the Convention concerning protection of the labour of these peoples in order to determine whether additional safeguards are required. [69]

In the midst of controlled change, the Convention No.169 was significant in the sense that it registered the fall of integrationist agenda. As the preamble to the Convention No.169 paragraph 4, goes to read that it is "appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of earlier standards".

The ILO convention on Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) was endorsed by drafting committee by consensus, and eventually adopted by the International Labour Conference on 27 June 1989.[70]

In spite of absence of 'integration' in the Convention No. 169, it was alleged by indigenous representatives that the convention fell short of indigenous peoples expectations.[71] The compromise, in reference to the indigenous peoples demand, reflected in the normative structure of the Convention No. 169 pertains to terminological issues. Firstly, non-use of 'peoples' as understood in terms of international law for the right of self-determination was tremendous blow from the

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[69] ILO*, Fifth Item on Agenda*: *Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention No. 107*: Addendum, ILO Doc/GB 234/5/4 Add, Governing Body 234th Session (Geneva, 1986).

[70] The Convention No. 169 was adopted with following vote pattern: 328 votes in favour, 1 against and 49 abstentions. *Ibid*, 32/6.

[71] See, ILC, International Labour Conference, *Records of the Proceedings*, 76th Session 31/6ff (Geneva, 1989).

indigenous peoples perspective.[72] Second compromise was on the use of the word 'territories' as the term was vehemently opposed by the governments because of its inference in terms of 'national sovereignty'.[73] As a compromise formulae text adopted use of terms "lands and territories, or both as applicable" and the term 'territory' as the *Report*, does not carry the implication of legal titles, but only a geographical area subject to a particular jurisdiction.[74]Third, the use of word 'consultation' instead of 'consent' in connection to any administrative or legislative operation encroaching on the rights of rights and interests of indigenous peoples.[75]

Probably due to above mentioned contentious issues the indigenous scholars and activist were not hesitant of reproving the Convention No. 169 on the account of it being subtly assimilationist as "opposed to being blatantly assimilationist".[76]

3.2.3.2. The Provision of the Convention No. 169

3.2.3.2.1. Scope of the Convention

Instead of adopting a bounded definition of indigenous peoples, ILO preferred to provide a statement of coverage [77]or rather a practical definition[78] thus describing the beneficiaries it aims to protect.

> Article 1 provides that this Convention applies to:
>
> (a) tribal peoples in independent countries whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or

[72] See, The Convention No.169, Art 1(3).
[73] ILO*, Fourth Item on Agenda*: *Partial on the Revision of the Indigenous and Tribal Populations Convention No. 107*, Report IV (2A)), ILC 76th Session, 30-33 (Geneva, 1989).
[74] *Ibid,* at 35.
[75] *Ibid,* at 5
[76] Statement by Mr. Sayers, Canadian Indigenous Worker's Advisor, in the ILC, International Labour Conference, *Records of the Proceedings*, 76th Session 31/10 (Geneva, 1989).
[77] L. Swepston, *Economic, Social and Cultural Rights under the 1989 ILO Convention,* IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF SAMI, INTERNATIONAL AND NATIONAL ASPECTS 38 (F. Horn ed.,1998) cited in ALEXENDRA XANTHAKI, *supra note* 15 at 70.
[78] Tanja Joona, *The ILO Convention No.169-with Special Reference to Articles 1 and 13-19,* 12 Int'l Comm. L. Rev. 213, 236 (2010).

partially by their own customs and traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations who inhabited the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provision of the convention applies.

The ILO Convention No.169 was the first international instrument which pronounced indigenous groupings as 'peoples' because of the strong aspirations and emotions manifested by the indigenous groups themselves.[79] However, in doing so the Conference placed a rider which took away the spirit attached with the term

'peoples'—the right to self-determination.[80] The Article 1(3) read as:

> The use of the term 'peoples' in this Convention shall not be construed as having any implication as regards the rights which may term under international law.

The ILO in the pretext of tactical manoeuvre passed the buck of incorporating right to self-determination by referring the UN as competent forum to decide on the issue.[81]Nevertheless, according to Anaya, "even the qualified usage of term *peoples*

[79] ILO, International Labour Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (107)*, Report VI (1) 75th Session 1988, 31 (Geneva, 1988).

[80] In every other occasion in which the phrase 'peoples' is used in international law, it is made in reference to an independent people, or one with right to aspire and avail freedom, free from foreign governmental subordination. See, Common Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966 and International Covenant on Civil and Political Rights 1966 reads as "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." See also, KRISTINA ROEPSTORFF, THE POLITCS OF SELF-DETERMINATION: BEYOND THE DECOLONISATION PROCESS 26 (2013).

[81] See, Note by International Labour Office, *Comment on the Draft United Nations Declaration on the Rights of Indigenous Peoples,* UN Doc. E/CN.4/1995/119 para. 15 6 February 1995 *Cited in* Athanasios Yupsanis, *ILO Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview*, 79 Nordic J. Int'l L. 433,445 (2010).

[in Convention No169] implies a certain affirmation of indigenous groups' identities and attributes of community".[82]

The ILO Convention No. 169 statement of coverage revise the depiction of indigenous peoples and in the process opt to drop the term 'semi-tribal populations' as the term was considered both irrelevant and unsympathetic by several states.[83]

The ILO Convention No.169 also became the first international instrument which introduced a unique principle relevant to determine the Indigeneity by the process of 'self-identification'. The principle of self-identification have its own repercussion especially in the backdrop of political leverage due to politics of Indigeneity. [84] Jens Dahl, citing Friedman, puts an important observation that "Self-definition does not occur in vacuum, but in a world already defined".[85] Group identity cannot be ascertained on a precondition of rights and demands alone but has a temporal and spatial elements involved with strong urge to preserve and protect distinct identity. Jens Dahl further argues that construction of self-identification as the only point of convergence may get in the way of a better understanding of identification as social categorization.[86]The ILO therefore cleared the air, as many states opposed this principle, by stating that self-identification will not be the only criterion in determining indigenous status as per the Convention.[87]

3.2.3.2.2. Collective Rights

Exemplified by the acknowledgement of indigenous peoples as 'peoples', Convention No. 169 endorses the collective nature of indigenous rights, reconstructing what the prior Convention construed as an 'object' of applied anthropological responsibility to

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[82] S. JAMES ANAYA *supra note* 57 at 49.
[83] Replies received and Commentaries in ILO, International Labour Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (107)*, Report VI (2) 75th Session 1988, 16-17 (Geneva, 1988).
[84] Andrew Canessa, *Who is indigenous? Self-Identification, Indigeneity, And Claims to Justice In Contemporary Bolivia*, 36 Urban Anthropol. Stud. Cult. Syst. World Econ. Dev. 195, 209 (2007);
[85] JENS DAHL, THE INDIGENOUS SPACE AND MARGINALIZED PEOPLES IN THE UNITED NATIONS 196 (2012).
[86] *Ibid*. Social categorization can be understood as a "process of bringing together social objects or events in group which are equivalent with regard to an individual's actions, intentions and system of beliefs". *See*, HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY 254 (1981).
[87] *Partial Revision*, Report VI (2A), *supra note* 73 at 13.

a collective subject of rights.[88]In the 1986 Meeting of Experts, the Report on the Meeting observed that:

> The present concentration on individual rights [in Convention No.107] was therefore misplaced because it ignored the fact that indigenous and tribal peoples were struggling for their rights as collectivities.[89]

Along these lines ILO attempted to resolve the difference between modern political theory and human rights law on the issue of individual versus collective rights by candidly declaring that indigenous rights has both collective and individual disposition and each set [collective or individual] of rights are equally important.[90]

There are various provisions in the Convention No. 169 affirming the collective rights as a part of indigenous rights discourse: Article 8-9 provides the institutional rights and the right to have their [indigenous peoples] own legal system; the collective rights in reference to intuitional rights can also be inferred from language of Article 6 which says "Governments shall . . . consult the peoples concerned, through appropriate procedures and in particular through their representative institutions''; Article 12 points that indigenous peoples can bring legal reparation "either individually or through their representative bodies"; Article 13-18 incorporate collective factor of the connection of indigenous peoples with their lands .

The recognition of collective rights in no way undermine the prospect of individual rights pertaining to the members concerned: Article 3(1) affirms that the "provision of the Convention shall be applied without discrimination to male and female members of these peoples"; Article 4 refers to the safeguarding of persons from the indigenous community through adoption of special measures; Article 8(3) categorically mentions that operation of indigenous law "shall not prevent members of these peoples from exercising the rights granted to all citizens".

The incorporation of collective and individual rights with same fervour in relation to indigenous rights discourse was certainly a new and welcomed step by the ILO.

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[88] LUIS R. PINERO *supra note* 1 at 321.
[89] ILO Working Document entitled *International Standards and Indigenous Tribal Populations*, presented to the ILO Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 10 (Geneva, 1986).
[90] LUIS R. PINERO *supra note* 1 at 322.

3.2.3.2.3. Protection of Indigenous Culture

The ILO Convention No. 169 recognizes and provides a lay out to protect indigenous culture and their way of life, with an objective to provide an atmosphere where indigenous peoples distinct culture outlast. Article 2(1) assigns the duty on governments, in collaboration with indigenous peoples, to protect the "rights of these [indigenous] peoples and to guarantee respect for their integrity". Article 2(2)(b) that action by the states shall include measures for:

> Promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and their traditions and their institutions.

Article 5(a) states that in applying the provisions of the Convention No.169 "the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected". Article 7 provides that indigenous peoples shall enjoy, to the maximum of scope possible, right to their cultural development. Article 23 recognizes traditional subsistence activities of indigenous peoples as "important factors of their cultures".

ILO Convention No.169 attempts to incorporate notions of multiculturalism is echoed from the language of Article 28 which states that "the children of the [indigenous] peoples concerned shall, *wherever practicable*, be taught to read and write in their own indigenous language". Unlike the previous convention, the Convention No. 169 does not claim indigenous language to be a mere bridge between dominant cultures but it does ensure that indigenous peoples are trained in the national language. This might seem to be a subtle form of integrationist methodology but it may be helpful in a sense that it prepares indigenous communities to communicate with the other cultures and affirm their rights and demands in much effective way.[91]Article 29 also provides that the state shall take measures to ensure that the non-indigenous peoples in general and those living in the direct contact with indigenous peoples in particular must be educated in a manner which removes cultural biasness against indigenous peoples. To this end, "efforts are to be made to ensure that history textbooks and other

[91] ILO Convention No.169, Article 28.

educational material provide a fair, accurate and informative portrayal of the societies and cultures" of indigenous peoples.[92]

The text also has certain limitations, Xanthaki highlights them and observes that framework cultural rights provided under the Convention No. 169 are quite general in nature; protection is nonspecific on the issues of cultural objects; and claims of intellectual property over traditional knowledge and traditional cultural expressions are missing.[93]Notwithstanding these criticism, ILO Convenion No. 169 deserves praise for its admiration of indigenous culture.

3.2.3.2.4. Participatory Rights

The structural and behavioural characteristic emerging from the acknowledgment of participatory rights within the indigenous rights discourse is the special importance on their right to participate in, and to consulted on, all decisions capable of casting deep impact on their life, especially in the initiating and administering any developmental projects in their inhabited by indigenous peoples. The ILO Convention No. 169 adopts 'participation-consultation' principle in relation to State measures having its footprints in indigenous lands.[94]

Article 6 is the key Article which lays down the 'participation-consultation' principle. Article 6(1)(a) provides that "whenever consideration is being given to legislative or administrative measures which may affect them directly" the States shall "consult the peoples concerned [indigenous peoples]".Consultation is understood as:

> the process by which a government consults citizens about policy or proposed actions. It is not consultation unless those who consulted have a chance to make their views known, and to influence decision.[95]

At first instance it seems to be a strong provision providing functional autonomy to indigenous peoples strengthened further by Article 6(2) which lays down that

[92] ILO Convention No.169, Article 31.
[93] Alexandra Xanthaki, *Indigenous Cultural Rights in International Law*, 2 Eur. J. L. Reform 343, 347 (2000).
[94] Luis Rodriguez- Pinero, *Political Participation Systems Applicable to Indigenous Peoples*, IN POLITICAL PARTICIPATION OF MINORITIES: A COMMENTRY ON INTERNATIONAL STANDARDS AND PRACTICE 313 (Marck Weller and Katherine Nobbs eds., 2010).
[95] M. TOMEI AND L. SWEPSTON, INDIGENOUS AND TRIBAL PEOPLES: A GUIDE TO ILO CONVENTION NO. 169 V (1996) cited in ALEXENDRA XANTHAKI, *supra note* 15 at 77.

consultation must be done in good faith with the aim of achieving "[t]he agreement or consent [of the people concerned] to the propose measure".[96]However on the fear expressed by some of the States that a veto power is incorporated in the text ILO secretariat clarified that "the Office had not intended to suggest that the consultations . . . would have to result in obtaining result or consent . . . but rather to express an objective for the consultations".[97]This explanation certainly reduced the impact of indigenous voice in decision making but nonetheless it does require honest and substantive communication between governments and concerned indigenous peoples.[98]This explanation falls in line with observation and opinion of the tripartite ILO *ad hoc* committees constituted to look into the cases concerning non-observance of the Convention. It notes that:

> the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith and the sincere desire to reach a consensus. A meeting conducting merely for information purposes cannot be considered as consistent with the terms of the Convention. Furthermore, according to Article 6, the consultation must be "prior" consultation, which implies that the communities affected are involved as early on as possible in the process, including environment impact studies.[99]

Thus what could have been the most powerful provision for indigenous peoples is somewhat diluted.

Article 7 further strengthens the participative right of indigenous peoples by granting indigenous peoples autonomy "to decide their own priorities for the process of development". It also provides indigenous peoples right to "participate in the formulation, implementation and evaluation of plans and programmes" that have an

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[96] Athanasios Yupsanis,*supra note* 81 at 439.

[97] ILO, International Labour Conference, *Report of the Committee on Convention No. (107)*, Provisional Record 25 at para 74 76th Session 1989, (Geneva, 1989) cited in Lee Swepston, *supra note* 68 at 691.

[98] Lee Swepston, *The ILO Indigenous Tribal Peoples Convention (No. 169) : Eight Years After Adoption*, IN HUMAN RIGHTS OF INDIGENOUS PEOPLES 23 (C. P Cohen ed., 1998).

[99] See, *Report of Committee Set Up to Examine the Representation on Alleging Non-Observance by Columbia of the Indigenous and Tribal Peoples Convention 1989 (No.169)*, made under Article 24 of the ILO Constitution by the Central Unitary workers, para. 90 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507143,en [Accessed on 10.01.2015]

impact on their life or culture. Commenting on the general impact of participative rights ensured by the ILO Convention No. 169 Swepston states that the indigenous peoples will be no more treated as silent spectators in the process of development.[100]

3.2.3.2.5. Land Rights

The land rights under the revised Convention No. 169 was expected to be framed in such a manner which provide separate land rights regime for indigenous peoples within the national legal system. [101]This expectation of indigenous peoples was not so simple to turn into reality with an ease. More than hundred amendments were submitted to protest reservation against the land rights provisions.[102]

During the drafting process, one of the most contentious issues within the Convention No. 169 was to build consensus on the scope of term ‘land’. The previous Convention No. 107 used the words ‘land’ and ‘territory’ interchangeably. Several States proposed to replace the word ‘territory’ with ‘land’ as they feared the term ‘territory’ may accrue ‘sovereign rights’ to indigenous peoples who are in conflict with States.[103] However, the Convention No. 169 did stick to a broader interpretation of the term ‘land’ as it includes the “concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.[104]

One of the most significant provision on land rights is Article 14, its opening line states that: “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised”. The highlight of this provision is that it ensures what was already there by the virtue of ‘traditional occupation’ by making it obligatory on States to ‘recognize’ land rights of indigenous peoples. The use of word ‘traditional’ should not be misinterpreted as if the Convention No. 169 recognised historical claims of indigenous peoples. In order to claim land right it was required to have some linking with the present, at least recent

[100] Lee Swepston *supra note* 98 cited IN S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 140 (2009)
[101] Lee Swepston *supra note* 68 at 696.
[102]
[103] *Ibid* at 81.
[104] ILO Convention No.169, Article 13 para. 2.

expulsion or loss of title.[105] In doing so it does recognises the collective nature of land rights as it uses the term 'peoples'. However, what remained contingent was the nature of land rights. It could be either be ownership or possessory rights over ancestral lands or both.[106] Xanthaki, expresses her annoyance over dilution of land rights by introducing the concept of 'possession' which was not there in the ILO Convention No. 107. She maintains that it should be no less than 'ownership' rights for indigenous peoples.[107]

Concomitantly connected with land rights is the right over natural resources. The Convention No. 169 takes reassuring step in the form of recognition of rights of indigenous peoples over natural resources. Article 15 (1) makes it clear that indigenous peoples rights over "natural resource" includes the right to "[p]articipate in the use, management and conservation" of natural resources.[108]However, there is greater probability of the fact that several States may have already appropriated mineral and other natural resources and established their claim of ownership. In such case Article 15(2) comes with great relief for indigenous peoples as it provides that "[g]overnment shall establish or maintain procedures through which they shall consult these [indigenous] peoples, with a view to ascertaining whether and what degree their interest would be prejudiced".[109] It shall be the responsibility of the governments to create conducive atmosphere so that indigenous people may freely express their concerns during consultation process. For instance, they may put forward the justifications to why the government should refrain in exploiting natural resources or why certain land should not be disturbed for being sacred or what environmental concerns would the project bring and how it may have an adverse effect on their life.[110]

Article 16 of the ILO Convention No. 169 deals with critical issue of 'forced displacement'. It enunciates the basic principle that "indigenous peoples shall not be removed from their land"[111], under normal situations. If there arises certain

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[105] INTERNATIONAL LABOUR OFFICE, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (No.169): A MANUAL 31 (2003)
[106] Lee Swepston *supra note* 98 cited in S. JAMES ANAYA *supra note* 100 at 140.
[107] ALEXENDRA XANTHAKI, *supra note* 15 at 82.
[108] ILO Convention No.169, Article 15(1).
[109] ILO Convention No.169, Article 15(2).
[110] INTERNATIONAL LABOUR OFFICE, *supra note* 103 at 107.
[111] *Ibid.* at 98; ILO Convention No.169, Article 16(1).

exceptional conditions, States may relocate indigenous population. However, any such relocation shall be made after free and informed consent of indigenous peoples. Even after having all the relevant information amidst continuation of exception circumstance, if indigenous peoples decides not to move than State can relocate them according to appropriate procedure established by law.[112] In case of normalcy, indigenous peoples have a "right to return"[113] and if the situation does not favour their return, they are entitled to have the rights to "lands of quality and legal status at least equal to that of the lands previously occupied by them".[114] Moreover, such person who are permanently relocated shall be entitled for compensation for injury and loss suffered due to displacement. [115]

3.2.3.2.6. Labour, Health and Education Rights

Generally indigenous peoples have incorporated skills pertaining specialized occupations based upon conditions of their surrounding environment. Such traditional work includes "hunting, fishing, trapping and gathering". In many cases traditional work of indigenous peoples also define their identity. Article 23(1) of the ILO Convention No. 169 acknowledges such work and demands respect for indigenous peoples indulged in such traditional occupation.

Article 20 deals with a burgeoning problem among indigenous societies due to increased pressure on their lands and resources. It is usually found that both parastatal and private companies have increased their venture, mainly extracting business, on indigenous peoples territories. As a result many indigenous persons have to move outside their land leaving beside their traditional work. Even if they wish to stay, they are forced to adopt new occupations, primarily as a labourer. Article 20 categorically provides that governments shall ensure that indigenous peoples are not discriminated at workplaces and special provisions shall be made to protect rights of migrant indigenous labourers, to secure their life from hazardous working conditions, to protect indigenous women from sexual exploitation at workplace. Article 21 calls for the State government to impart vocational training to indigenous peoples without any discrimination.

[112] ILO Convention No.169, Article 16(2);
[113] ILO Convention No.169, Article 16(3);
[114] ILO Convention No.169, Article 16(4);
[115] ILO Convention No.169, Article 16(5);

Special provisions is made for the social security and health rights of indigenous peoples. Several indigenous peoples are adversely affected due to colonisation by Europeans. Aboriginals in Australia suffer from high rates of mental health problem. Average suicide rate among aboriginal youth are three to six times higher than general youths of Australia.[116] Mental disorder due to racism is a quite common phenomena in aboriginal peoples. They also bear high risk for cardiovascular diseases.[117] For indigenous peoples health rights should not be seen as a minimum guarantee scheme ensuing hospital or doctors. Instead, health condition is linked with "control over their physical environment, of dignity, of community self-esteem, and of justice".[118] Article 24 provides that social security schemes shall extend to indigenous peoples without any discrimination.[119] Article 25 is significant in sense that in addition to regular health facilities, State government shall encourage community based indigenous medical practises.[120]

Lastly, provisions ensuring indigenous peoples right to education are of significant importance because prominent reason behind social exclusion of indigenous community is lack of quality education.

Article 26 and 27 incorporates both the individual right to education and indigenous peoples collective right to education that cater their special requirements of protection and profession of their own culture. Article 27 explicitly lays that education programme for indigenous peoples shall inculcate "[t]heir histories, their knowledge, and technologies, their value systems and their further social, economic and cultural aspirations".[121] The Convention No. 169 in addition to this, ensures that non-indigenous peoples shall also be trained to develop respect for indigenous ways of life

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[116] Laurence Kirmayer, Cori Simpson and Margaret Cargo, *Healing Traditions: Culture, Community and Mental Health promotion with Canadian Aboriginal Peoples,* 11 Australasian Psychiatry S15, S16 (2003).
[117] Tom Calma, *Social Detriments and the Health of Indigenous Peoples in Australia—A Human Rights Based Approach,* International Symposium on the Social Detriments of Indigenous Health (29-30 April 2007) available at https://www.humanrights.gov.au/news/speeches/social-determinants-and-health-indigenous-peoples-australia-human-rights-based [Accessed on 11.03.2014]
[118] *Ibid*.
[119] ILO Convention No.169, Article 24
[120] ILO Convention No.169, Article 25 (1) ; Article 25(2).
[121] ILO Convention No.169, Article 27.

and text book should not incorporate any provision which is disrespectful of indigenous peoples' dignity.[122]

3.2.4. Conclusion

The question of indigenous peoples' human rights first appeared in the UN in the ILO as early as 1920s, arguably with the motive of addressing the exploitation of indigenous labour. There was concern about the protection of indigenous peoples' labour rights as they were considered 'backward peoples'. Accordingly, a paternalistic was justified towards them. The first comprehensive set of international standards on indigenous rights appeared in the form of ILO Convention No. 107. It attempted to deal with the marginalization of indigenous peoples through special protective enactments but disturbingly echoed an "integrationist and assimilationist" approach in promoting indigenous rights. As time went on, this approach met with sharp criticism. This was largely due to a growing consciousness of indigenous peoples rights, and the increasing numbers of indigenous and tribal peoples participating at international fora, such as in the UNWGIP. In response, the ILO adopted Convention No. 169 which formally rejected the integrationist and assimilationist approach of its predecessor.

Convention No. 169 makes a substantial advance over Convention No. 107 in several areas. It approaches indigenous peoples as equal partners in the development and evolution of national societies. This is evident from the emphasis on collective rights that recognises indigenous identities. Additionally, it also recommends States to observe the principles of participation and cooperation with indigenous peoples in every aspects of their life and culture. More specifically, the text strengthened land rights and established the principle of self-identification.

Together the Convention No. 107 and Convention No. 169 are the only international legally binding instruments on indigenous peoples rights. However, these Conventions have been ratified by a handful of countries only. The ILO Conventions also failed to ensure the most sought after right by indigenous peoples— the right to self-determination. In fact , ILO Convention No. 169 categorically watered down the prospects of self-determination when its Article 13 stated that "[t]he use of term

[122] ILO Convention No.169, Article 31.

‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term international law”.

3.3. The UN Declaration on the Rights of Indigenous Peoples, 2007

3.3.1. Introduction

The *Declaration on Rights of Indigenous Peoples* (UNDRIP) was adopted on 13 September 2007 after years of negotiations.[1] It is the first universally, acclaimed text to set out the rights of indigenous peoples. It denotes a momentous development in many ways. For example, it breaks new ground by recognising the past and present injustice done to indigenous peoples and identifies the rights and measures needed to address them. The UNDRIP aims to enhance "harmonious and cooperative relations between the states and indigenous peoples, based on principles of justice, democracy, respects for human rights, non-discrimination and good faith"[2] by means of a policy centred on participatory self-governance. Ban Ki-Moon, the former UN Secretary General, expressed his praise by observing hat:

> The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which states can build or re-build their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for states and indigenous peoples to strengthen their relationships, promote reconciliation, and ensure that the past is not repeated. I encourage Member States and indigenous peoples to come together in a spirit of mutual respect, and make use of the Declaration as the living document it is so that it has a real and positive effect throughout the world.[3]

Undoubtedly, the UNDRIP can be viewed as breakthrough in distinct indigenous discourse under international law, however, the UNDRIP has its own limitation. The present subchapter will attempt to critically analyse the provisions of the UNDRIP. It is divided into four sections. The first section will discuss the background under which the UNDRIP has emerged. The second section will provide an overview of UNDRIP. The third section will evaluate the legal status of UNDRIP and final section will conclude the discussion.

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[1] Declaration on the Rights of Indigenous Peoples, G. A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter, the UNDRIP]

[2] Paragraph 18, Preamble to the Declaration on the Rights of Indigenous Peoples, 2007.

[3] *Cited in* , Kanchana Kariyawasam, *The Significance of the UN Declaration on the Rights of Indigenous Peoples : The Australian Perspective*, 11 Asia-Pac. J. on Hum. Rts. & L. 1, 1-2 (2010).

3.3.2. Background of UNDRIP

Prior to1969, the difficulties and desires of indigenous peoples had not been on the agenda of human rights agencies and bodies of the UN. In that year, the former Sub-Commission on Prevention of Discrimination on Minorities was involved in a Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres, which incorporated a chapter on actions taken with the purpose of protecting indigenous peoples.[4] The chapter provided the foundation for further dialogue inside the sub-commission which led to its recommending in the year 1970 that a detailed study be carried out on the problem of discrimination against indigenous peoples. The recommendation moved to the Commission on Human Rights (the Commission) and the ECOSOC took the cognizance of the matter and adopted a Resolution 1589 (L) of 21 May 1971 in which it sanctioned the expansion of such a study. The Ecuadorian Mr. Jose Martinez Cobo was entrusted with the charge for the study and the report. However, the face behind the scene working on the project was of Mr. Willemsen Diaz who took it as a mission.[5] The study was lastly accomplished between the years 1981 and 1984 and comprises a number of significant conclusions and recommendations.

Notwithstanding of the varied fiscal, political and social conditions in which the world's indigenous peoples dwell, the chronicle of the indigenous suffering echoed misappropriation of lands, deprivation of autonomy and control, loss of culture and discrimination in civic laws and policies. The UN has projected the world's indigenous population to be over 300 million in over 70 different countries. Moreover, indigenous consciousness raising concentrated on techniques in which the UN could offer better scrutiny of the way in which States control indigenous peoples behind the defence of State sovereignty. This consciousness raising led to the formation of the UN Working

[4] Erica-Irene Daes, *The United Nations and Indigenous Peoples from 1969-1994*, available at http://www.sami.uit.no/girji/n02/en/102daes.html#Anchor-39228 [Accessed on 05.01.2014].

[5] Henry Minde, *The Destination and the Journey Indigenous Peoples and the United Nations from 1960s through 1985*, IN INDIGENOUS PEOPLES: SELF-DETERMINATION, KNOWLEDGE, INDIGENEITY 55 (Henry Minde ed., 2008)

Group on Indigenous Populations ('WGIP'), the first human rights mechanism established to reflect indigenous issues.[6]

The WGIP was set-up by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1982 as ratified by the ECOSOC. It consisted of five independent members and its mandate was to review "developments pertaining to the promotion and protection of the human rights and fundamental freedoms of [i]ndigenous populations . . . [and] to give special attention to the evolution of standards concerning the rights of such populations".[7]

At the time when WGIP commenced its work, the sole international binding document concerning with the rights of indigenous peoples was the ILO Convention No.107. It had restricted scope due to less number of States parties and was perceived as an assimilationist document by most indigenous peoples. In this context, the WGIP began to act on the draft declaration on the rights of indigenous peoples. The WGIP was indeed the first international platform for indigenous peoples at the UN, and indigenous experts and supporters participating in the meetings referred to the want of international standards. Based on the set virtues of the WGIP, which rests as an open forum for indigenous peoples, the Working Group commenced to draft a text drawing into the observations and recommendations of indigenous peoples' representatives. At its 11th session, in July 1993, the Working Group settled on a final text for the 'Draft UN Declaration on the Rights of Indigenous Peoples' and submitted it to the Sub-Commission.' The final draft was subsequently adopted by the Sub-Commission in 1994.[8]

The final version of the Draft Declaration was sent to the Commission for its adoption. The Commission constituted an inter-sessional working group, the Working Group on the Draft Declaration (WGDD), to adjudge and examine the provisions of the Draft Declaration. The WGDD consisted of officials of member States of the Commission.

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[6] Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 Melb. J. Int'l. 439, 444 (2008).
[7] ECOSOC, *Study of the Problem of Discrimination against Indigenous Populations,* ESC Res 1982/34, ESCOR 28th Plen. Mtg, UN Doc E/RES/1982/34 (7 May 1982) cited in Megan Davis, *supra note* 6 at 444.
[8] The draft Declaration appears in an annex to the sub-commission resolution as the "Draft Declaration on the Rights of Indigenous Peoples", U.N. Doc. E/CN.4/ 1995/2, E/CN. 4/Sub.2/1994/56, at 105 cited in S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 84 (2004).

Through the years, the WGDD has been meeting numerous times both officially and informally, meanwhile resolutions from the Commission and the General Assembly called for the adoption of the Draft Declaration. Furthermore, with the declaration of the first UN decade on the rights of indigenous peoples (1994-2004), the chance of the adoption of a declaration on the rights of indigenous peoples by the General Assembly got strengthened. Notwithstanding such calls, participants to the deliberations of the WGDD could not reach to an agreement for specific reasons. Therefore, twelve years after its adoption by the Sub- Commission, the draft was still far from being ready for adoption as only two out of the forty five Articles of the Draft Declaration had been adopted.[9]

Megan Davis, analysing the probable reasons for delay in the draft process observes that there are "two main reasons behind the slow progress of the WGDD".[10] She figures out that one of the major reason for the delay was due to the obstructionist attitude adopted by the Canada, Australia and the U.S.A. (the CANZUS). The bone of contention was issues relating to self-determination, and land rights. The New Zealand representative Ms. Rosemary Banks, expressing concerns on the issue of right to self-determination, issued a collective statement on behalf of the CANZUS group:

> [s]elf-determination . . . could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States.[11]

Similarly, another objection registered by Ms Banks was in reference to the nature of rights enshrined under the draft Declaration. She charged, on behalf of the CANZUS group, that the draft Declaration did not value to the notion of 'universality of human rights' and in all probability it is against equality:

> It seems to be assumed that the human rights of all individuals, which are enshrined in international law, are a secondary consideration in this text. The intent of States participating in the Working Group was clear that, as has

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[9] Jeremie, Gilbert , *Indigenous Rights in Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 Int'l J. on Minority & Group Rts. 207, 213 (2007).
[10] Megan Davis, *supra note* 6 at 447.
[11] Statement by H.E. Ms. Rosemary Banks Ambassador and Permanent Representative of New Zealand *cited in* Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 Eur. J. Int'l L. 141, 146 (2011)

> always been the case, human rights are universal and apply in equal measure to all individuals. This means that one group cannot have human rights that are denied to other groups within the same nation-state.[12]

There was discordant position adopted by indigenous observers, many members of the indigenous caucas called for the speedy adoption draft Declaration as adopted by the Sub-Commission without discussion and modification.[13]

From the initial period, 'indigenous caucus' exhibited a resilient emotional connexion to the original version of the draft because many felt that any revision would undermine the spirit of original draft, devalue the efforts of those indigenous leaders who contributed in WGIP drafting - many of them were no longer alive. Whereas the first WGDD was comparatively quiet and the least contentious articles were provisionally adopted. In the course of second WGDD, the 'indigenous caucus' adopted a 'no change' strategy and called for the prompt adoption of the draft 'without alteration, revision or deletion'. Finally the indigenous observers demonstrated their protest because of differences in opinion about the proposed work plan and by the third session the 'indigenous caucus' firmly established the policy of 'no-change' to any modification in the draft.

The 'no change' policy ended in the turndown of any proposals for revision in the original draft. The 'indigenous caucus' contended that any indigenous participation in plenary discussion over alternate wordings and expressions would endorse modifications to the draft and mean that all aspects of the Declaration would be open for negotiation. The 'indigenous caucus' perceived that it would be "equivalent to inferred authorisation of the certainty of textual amendment, and to transfer command to those States most belligerently pursuing to dilute the existing Declaration". Indigenous observers also maintained that there was a danger of indigenous rights being officially jeopardised in international law through a soft and diluted text.[14]

The strategy of 'no change' turned to be a major reason in the time consuming advancement of the WGDD. The strategy was unmaintainable and it echoed the

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[12] *Ibid* at 149.
[13] SARAH PRITCHARD, SETTING INTERNATIONAL STANDARDS: AN ANALYSIS OF THE UNITED NATIONS DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 10 (1998) cited in Megan Davis, *supra note* 6 at 450.
[14] Megan Davis, *supra note* 6 at 450

distinctly different outlook and anticipations of the indigenous peoples and Member States regarding indigenous rights standard-setting. The 'indigenous caucus' strategy echoed the distrust and disbelief that most indigenous groups discern toward the state. Indigenous activist's oral interventions often raised the issue of state's irreverence in implementing indigenous treaty agreements and mentioned to the prosperity of several States, particularly the CANZUS States that had been attained by the misappropriation of indigenous lands and robbing of indigenous peoples. Contrastingly, Member States, skilled in multilateral negotiations, would under no circumstance ready to adopt an international text without ensuring that their stakes and interests are intact.

While the 'no change' strategy assisted the indigenous caucus to show the distrust indigenous peoples have for the State. However in long run it turn to be an unsustainable approach. And, several indigenous observers were reluctant to stretch the 'no-change' strategy any further.[15]

For instance, in the year 2004, the AITN submitted their expression to the Chairperson on the stubborn and unyielding of indigenous caucus:

> The adoption of the 'no change' position by the Indigenous Caucus appears to be unreasonable, even to sympathetic countries ... It is a delusion to think that Indigenous peoples' cause is advanced by sticking to present stalemate situation [sic] ... Unless something drastic happens, after the deluge of the International Decade, the [WGDD] will end up being a damp squib. Ultimately, it all boils down to whether Indigenous peoples will give up their infamous 'no change' position.[16]

Lastly, indigenous observers settled to think about the modification in the draft to the extent that any proposed amendments must be in accordance with the principles of international law enshrined in the UN Charter and particularly the principles of equality and non-discrimination.[17] In general, the discussions at the WGDD level were considered by majority of indigenous peoples as a historic fight for the prospect of upcoming indigenous rights discourse. As most of the indigenous representatives

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[15] UN Commission on Human Rights, *Written Statement Submitted by the Asian Indigenous and Tribal Network*, 60th Session, Agenda Item 15, UN Doc E/CN.4/2004/NGO 138 (9 March 2004). (hereinafter, AITN)

[16] Ibid.

[17] Jeremie Gilbert , *supra note* 9 at 214.

pointed out in 2005: "[I] t has become increasingly clear that there is an urgent need to improve the current U.N. standard-setting process on the rights of Indigenous peoples."[18]

In February 2006, eventually during the 11th meeting of the WGDD, the Chairperson-Rapporteur of the Working Group, Mr. Chavez, attempted to start the ball rolling by proposing that a reworked version of the draft integrating amendments , 'compromises' in the words of Karen Engle,[19] would be presented to the Commission on Human Rights (at present, Human Rights Council) for adoption. These amendments, however, fell short to ensure the Declaration's adoption by the General Assembly. In November 2006, the Third Committee resolved in favour of a non-action resolution on the Declaration, ensuing deferral on the adoption of declaration afterwards. The non-action resolution was officially proposed by Namibia on behalf of the African Union, partially for the reason that "the vast majority of the peoples of Africa are indigenous to the African Continent"[20], and that "self-determination only applies to nations trying to free themselves from the yoke of colonialism."[21]

The pressing concerns proposed by the African states, *inter alia*, were successful in including a separate sentence in the preamble: "[r]ecognizing the situation of [i]digenous peoples varies from region to region and from country to country."[22] Further, there was as addition of Article 46 (1) which categorically defined the scope of the right to self-determination. It states that the Declaration should not be:

Construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.

[18] See, the joint statements issued by various indigenous organization, *Urgent Need to Improve the U.N. Standard-Setting Process Importance of Criteria of 'Consistent with International Law and its Progressive Development,* UN Doc. E/CN.4/2005/WG.15/CRP.3 (24 November 2005) *cited in* Jeremie Gilbert , *supra note* 9 at 214.
[19] Karen Engle in his work has used the word 'compromises' for the amendments, *See*, Karen Engle, *Supra note* 11.
[20] See, the Proposal of Namibia, *Amendment to the Draft Resolution on Behalf of Group of African States*, UN GAOR, 3rd Comm, 61st Sess, Agenda Item 68, UN Doc A/C.3/61/L.57/Rev.1 (21 November 2006).
[21] Cherrington, *United Nations General Assembly Declines Vote on Declaration on Indigenous Rights* (8 Dec. 2006), available at: www.culturalsurvival.org/news/mark-cherrington/united-nations-general-assembly-declines-vote-declaration-indigenous-rights cited in Karen Engle, *Supra note* 11 at 144.

[22] Megan Davis, *supra note* 6 at 45.

The above saving clause was in the same vein of excerpt from the *Declaration on the Friendly Relations*, ensuring territorial integrity and respect for the notion of State.[23]While backing for the non-action resolution, agues Karen, mirrored a reversal for many states that casted their vote in favour for it, and a big section of observers suggested that African States brought the proposal for the non-action resolution due to insistence and persuasion from the United States, Canada, New Zealand, and Australia, these African states remained resolute and united in their position.[24]

Later, on 10 May 2007, sixty seven Member States put forward a wide-ranging letter to the President of the UNGA, H.E. Mrs. Seikha Haya Rashed Al Khalifa, essentially contending that reworking of the draft Declaration would possibly result into another prolonged process with an indeterminate conclusion. They conveyed the belief that indefinite delay with no outcome was never the intent of the UNGA, when it favoured non-action resolution thereby deferring its consideration of the Declaration. Moreover, with the intent to resolve through middle course they attached a transcript of a first draft for a new resolution that was developed among the co-sponsors of a draft resolution A/C.3/L.18 and declared their willingness to have dialogue with concerned States to discuss the recommendations, which they expected in breaking the ice leading towards adoption of the UNDRIP.[25]

The President of the UNGA selected Hilario G Davide Jr., the Permanent Representative of the Philippines to the UN, to execute on her behalf more consultations on the *Declaration on the Rights of Indigenous Peoples*. The President appealed that she must be informed on the results and conclusions of the consultations at the earliest, and in no case later than mid-July 2007.[26] On 29 June 2007, in accordance with the directives, Ambassador Davide summoned open- ended informal consultations of the plenary on the draft Declaration in direction of purposeful discussion on a balanced and concrete approach that would dispense some spirit of compromise for the rigid positions

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[23] UNGA, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, UNGAOR, 25th Sess, Supp No 18, UN Doc A/8018 (1970).
[24]. Karen Engle, *Supra note* 11 at 146.
[25] Erica-Irene Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, IN REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 35 (Stephen Allen and Alexandra Xanthaki eds., 2011).
[26] See, Letter From H.E. Haya Rashed Al Khalifa to All Permanent Mission and Observers, *Regarding the Appointment of H.E. Hilario G. Davide Jr, to Conduct further Consultations on the Declaration on the Rights of Indigenous Peoples*, dated 6 June available at http://www.un.org/ga/president/61/letters/PGA-Letter-060607.pdf [Accessed on 1 January 2015].

on the draft Declaration. He submitted his first report to the President on 13 July 2007.[27]

Subsequent, on 18 July 2007, in reply to the above stated report, a letter was sent to H.E. Mr. Davide by the Permanent Missions of the eight Member States, arguing that only possible way out for their support to adoption of UNDRIP is through amendments to the text of the draft declaration, resolving their important issues.[28] They renewed their backing for a limited re-opening of the draft, founded on thematic methodology and with aim of achieving net positive with no compromise on certain minimum number of amendments. They annexed to the letter Non-Paper of 29 June 2007, which sketched the thematic methodology mirroring their concerns. They thought that such a methodology would secure the essential flexibility of the stake holder to attain an irreducible minimum. In an endeavour to mitigate concerns, revisions were discussed in eight themes in connection with 16 Articles: these were self-determination, self-government and indigenous institutions (Articles 3, 4, 5 and 33); lands, territories and resources (Articles 2 and 29); redress (Article 11, 27 and 28); free, prior and informed consent (Articles 19 and 32(2)); rights of third parties (Article 46); intellectual property rights (Articles 11 and 31); Military issues (Articles 10 and 30); and education. They specified that these amendments to the draft declaration were essential to make it compatible with international law.[29]

Subsequently, the President of the UNGA addressed a letter to the Permanent Representatives, dated 2 July 2007, attaching the report of the Ambassador Davide, dated 1 July 2007, as well as his supplementary report dated 20 July 2007. She underlined, inter alia, that the reports outlined a proposed way forward which would enable all parties concerned to implement the mandate of the UNGA and adopt the draft declaration before the end of 61st session.

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[27] H.E. Mr. Hilario G. Davide, Jr., Permanent Representative of the Republic of the Philippines to the United Nations, *Report to the President of the General Assembly on the Consultations on the Draft Declaration on the Rights of Indigenous Peoples* (13 July 2007) available at http://www.un.org/ga/president/61/letters/23July07/Report-13July07.pdf [Accessed on 1 January 2015].

[28] H.E. Mr. Hilario G. Davide, Jr., Permanent Representative of the Republic of the Philippines to the United Nations, *Supplement to the Report of the Facilitator on the Draft Declaration on the Rights of Indigenous Peoples* (20 July 2007) available at http://www.un.org/ga/president/61/letters/23July07/ReportSupplement-20July07.pdf [Accessed on 1 January 2015].

[29] Erica-Irene Daes *supra note* 25 at 36.

The General Assembly of the UN, taking note of the recommendation of the Human Right Council contained in its Resolution ½ of 29 June 2006, by which the Council adopted the text of the UNDRIP, proclaimed by its historic Resolution A/61/295 on 13 September 2007. The UNDRIP was adopted by an overwhelming affirmative vote of 143; four states were against (Canada, Australia, New Zealand and USA) and 11 states abstained from voting.[30]

3.3.3. UNDRIP: An Overview

3.3.3.1. Aim of UNDRIP

Aiming to protect the cultural uniqueness of indigenous peoples and respect the difference, the UNDRIP is outlined with a clear picture about the contemporary and historical causes affecting indigenous peoples and therefore it is customized to address current the suffering of indigenous peoples by conferring them a set of fundamental rights, mostly framed as collective rights. The term 'indigenous peoples' is not defined in the UNDRIP. However, Article 33 recognises the right of indigenous peoples to "determine their identity or membership in accordance to their customs and traditions".[31] This is in line with the modern trend adopted by several international

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[30] All four of these states subsequently issued statement of support for the UNDRIP, although with different in level. When Canada backed the UNDRIP in November 2009, e.g., it stated that "the Declaration is an aspirational document" but it made clear that "[t]he Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws", *See*, Indian and Northern Affairs Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (12 Nov. 2010), available at: www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp [Accessed 3 January 2015]; The US manifested similar reservation in December 2009, observing that the Declaration, 'while not legally binding or a statement of current international law . . . has both moral and political force", *See*, US Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* (16 December 2010) at 1, available at: www.state.gov/documents/ organization/153223.pdf [Accessed on 3 January 2015]; New Zealand recognised that the Declaration is an "affirmation of accepted international human rights", it remarked on the status of the Declaration that the Declaration "also expresses new, and non-binding, aspirations", *See*, New Zealand Statement, Ninth Session of the United Nations Permanent Forum on Indigenous Issues (19 Apr. 2010) at 5, available at: www.docip.org/ gsdl/collect/cendocdo/index/assoc/HASHe2c9/ a6688410.dir/PF10pita007.PDF [Accessed 3 January 2015]; Australia's statement of support have many positives though it also clears that the Declaration is non-binding and "does not create new rights[,] . . . [it] elaborates upon existing international human rights norms and principles as they apply to Indigenous peoples", *See*, Australian Human Rights Commission, 'Questions and Answers on the UN Declaration on the Rights of Indigenous Peoples' (Apr. 2009), available at: www.hreoc.gov.au/social_justice/ declaration/declaration_QA_2009.html [Accessed on 3 January 2015).

[31] See, The UNDRIP, Art. 33(1).

institutions which shy away in attempting to formulate definition and usually bank on on the so-called criterion of 'self-identification'.[32]

The reason to follow such a pattern can be attributed to the difficulties and complication met in drafting a standard universal definition appropriate to any general discussion about indigenous peoples. Nevertheless, it is apparent from the statements incorporated in the preamble and other provisions of the UNDRIP that it is focused towards the protection of groups exhibiting special and unique characteristics as to their structure—social; political and economic, culture, beliefs, customs and language, which has a tendency to categorise them as 'other' than the 'mainstream' society. In addition, these groups share a common awful experience of social exclusion and discrimination deeply rooted in historical events

The UNDRIP aims to augment "harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy respect for human rights, non-discrimination and good faith"[33] through a policy of participatory self-governance.[34] It is inferred to accord those *'minimum standards'* essential for the "survival, dignity and well-being of the *indigenous peoples* of the world".[35]

3.3.3.2. Indigenous Peoples: Issues of Membership

As stated above that the UNDRIP does not provide a definition or a 'statement of coverage' of indigenous peoples, nonetheless particular traits of indigenousness are dispersed in the text.[36]The UNDRIP adopts the self-identification criterion coupled with certain traits to determine who are indigenous peoples? .Article 33 gives the right to indigenous peoples to "to determine their own identity or citizenship in accordance

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[32]Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview,* 7 Hum. Rts. L. Rev. 741,747 (2007); For Self-Identification, *See*, Andrew Canessa, *Who is Indigenous? Self-Identification, Indigeneity, And Claims to Justice In Contemporary Bolvia*, 36 Urban Anthropol. Stud. Cult. Syst. World Econ. Dev. & Politic. Contemp. Bolivia 195-237 (2007); Jeff Corntassel, *Who is Indigenous? 'Peopleshood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity,* 9 Nationalism Ethn. Polit. 75-100 (2010);
[33] The UNDRIP, Para 18, Preamble.
[34] The UNDRIP, Article 4.
[35] The UNDRIP, Article 15, 43.
[36] ALEXENDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE, LAND, 105 (2007).

with their customs or traditions". There can be a difficult situation if one reads Article 9 which maintains that:

> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.

It is a hard question that how far it is justifiable and to what extent that a community would have the exclusive right to accept and renounce community membership to an individual?[37] There can be situations were individual rights to be part of a community may be jeopardised by the community itself. Sarah Prichard doubts the ability of the provision under the Article 9 to "safeguard [individual from] the [community] option not to identify as indigenous".[38]Nevertheless, argues Xanthaki, that the individual can seek protection from the group by invoking Article 1 of the UNDRIP which protects rights and freedom gained "under international human rights law."[39]

The UNDRIP incorporates an important provision for the protection of the rights of those groups which are, probably as result of emergence of modern-states or for any other reason, divided by international borders. Article 36 ensures that such groups "have right to maintain and develop contacts, relations and cooperation . . . with their own members as well as other peoples across the border". These bonding may be spiritual, cultural, economic or political.[40]

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[37] In *Lovelace Vs Canada,* Communication No. 24/1977; Views adopted on 30 July 1981, See, UN Doc. A/36/40; The crux of the dispute was that Sandra Lovelace had lost her indigenous status and the rights as an Indian appurtenant in accordance with Section 12(1)(b) of the Indian Act of Canada as result of marrying a non-Indian. The HRC interpreting the applications of Article 27 of the ICCPR, concluded that:
"Whatever may be the merits of the Indian Act in other respects, it does not seem . . . that to deny Sandra Lovelace the right to reside on a reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under Article 27 . . . read in the context of the other provisions referred to".
Cited in PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 155-156 (2002).

[38] SARAH PRTICHARD, THE UNITED NATIONS DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: AN ANAYLASIS 54 (1996) cited in ALEXENDRA XANTHAKI, *supra note* 36 at 106.

[39] ALEXENDRA XANTHAKI, *supra note* 36 at 106.

[40] The Article 36 is especially relevant for nomadic peoples in connection with their cross border rights, See, JEREMIE GILBERT, NOMADIC PEOPLES AND HUMAN RIGHTS, 83 (2014).

3.3.3.3. Right to Self Determination

The evolutionary history of the right to self-determination for indigenous peoples is full of thorny patches and its future path is no less murky. It is not an exaggeration to conclude that the incorporation of right of self-determination in the UNDRIP is so far the biggest achievement by indigenous peoples in their struggle for respect, autonomy and dignity.[41] And, without States' recognition of the right to self-determination the list of rights protected in the text of the UNDRIP cannot be operative in true sense.[42] Article 3 of the UNDRIP appreciates that "indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[43]

There were several States favouring the idea that the right to self-determination should be accorded to indigenous peoples. However, there was strong opposition by certain States. Their concerns were founded largely on issues of State sovereignty and territorial integrity. Moreover, anxiety among these States was also about the question of 'control' and the fiscal ramifications of several socio-economic dimensions attached with the right to self-determination.[44] Patronage and abetment for the realization of the indigenous right to self-determination and its addition in the UNDRIP was admonished by many States for the reason that concept of self-determination has its root embedded in the process of decolonization.[45] Hence, any right of self-determination for indigenous peoples was still viewed by States as a claim for independence and thereby threating

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[41] Robert Joseph, *Indigenous Peoples' Good Governance, Human Rights and Self-Determination in the Second Decade of the New Millennium –A Maori Perspective*, Maori L. Rev. (December 2014) available at http://maorilawreview.co.nz/2014/12/indigenous-peoples-good-governance-human-rights-and-self-determination-in-the-second-decade-of-the-new-millennium-a-maori-perspective/ [Accessed on 2 January 2015]

[42] Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 Harv. Hum. Rts. J. 65, 87 (1992).

[43] The UNDRIP, Article 3.

[44] See, UN Commission on Human Rights, *Report of the Working Group on the Elaboration of a Draft United Nations Declaration on the Rights of Indigenous Peoples Fifty-Second Session*, 52nd Sess. Agenda Item 3, UN/Doc. E/CN.4/1996/84 (4 January 1996); UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution1995/32,* 54th Sess., Agenda Item23, UN Doc E/CN.4/1998/ 106 (15 December 1997); UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32,* 56th Sess., Agenda Item15, UN Doc E/CN.4/2000/84 (6 December 1999); UN Commission on Human Rights, *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in accordance with Paragraph 5 of General Assembly Resolution 49/214 of23 December 1994,* CHR Res 2001/58, 57th Sess., 76th mtg, UN Doc. EICN.4/RES/2001/58 (4 April 2001) *cited in* Megan Davis, *supra note* 6 at 458.

[45] Catherine J. Iorns,, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 Case W. Res. J. Int'l L. 199, 212 (1992).

the territorial integrity and sovereignty of States. The fear of such States was further strengthen by the arguments put forward by certain indigenous observers advocating that right to self-determination is *jus cogens*[46] and several scholarly commentaries advancing the ideas that the notion of self-determination, as mentioned in the *UN Charter,* cannot be limited to colonial context but it must be extended beyond. [47]

> Literal as well as more comprehensive interpretation supports the evidence that the words '*all* peoples have the right ... ,' in Article 1 refer to any people irrespective of the international political status of the territory it inhabits. It applies, then, not only to the peoples of territories that have not yet attained political independence, but also to those of independent and sovereign states.[48]

It is submitted that such an interpretation is not tenable. Right to self-determination cannot be considered as a peremptory norm as this will make right to self-determination an absolute right. A right which cannot be derogated by any States. This may prove fatal for the concept of States itself and international law cannot be suicidal bag for States. The stakes of indigenous peoples in the right to self-determination and concerns of several States were perceived to be at binary opposition. Therefore, institutionalising a potent and convincing legal argument to endorse indigenous peoples' claim to the right to self-determination has been a cause in the lagging progress of indigenous rights in international law. Meanwhile, indigenous observers and scholars came with a compelling argument underpinning the idea of democratic governance in international law to be extended to indigenous peoples. The development of this idea stimulated shift in the international perception of the right of self-determination as a right to form independent State to a right of democracy, which indigenous peoples diligently used for advancement of indigenous rights discourse. They produced evidence in the form of scholarly writings postulating self-determination as the right of peoples to decide their political future "in a democratic fashion and is therefore at the core of the

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[46]See, Study Prepared by Hector Gros Espiell, Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, E/CN.4/Sub.2/405/Rev.1 (1980), Para 70, 71, 78-82.

[47] ULRIKE BARTEN, MINORITIES, MINORITY RIGHTS AND INTERNAL SELF-DETERMINATION, 80 (2015).

[48] Antonio Cassesse, *The Self-Determination of Peoples,* IN THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92,94 (Louis Henkin ed., 1981) cited in Megan Davis, *supra note* 6 at 459.

democratic entitlement”.[49] The doctrine of ‘democratic governance’ is generally believed to stem out from the international law norms of self-determination—age old expression of democratic rights. The doctrine of ‘democratic governance’ draws its legality from the right to political participation as provided the *UN Charter*, Article 21 of the UNDHR[50] and Art 25 of the ICCPR.[51] It was an appealing understanding that self-determination could open doors for indigenous peoples to participate in decision making process within the state and preserve, promote and protect their cultural identity without being diametric with the political milieu of the state. The idea of separate State had never been the top priorities in international indigenous movement[52] - though it can’t be completely negated as many indigenous groups aspires for the same.[53] The UNDRIP helps to provide a model framework for the implementation of right to self-determination in a democratic fashion without prejudice to the territorial integrity.

Article 3 of the 1993 draft Declaration was the central point for much of the dispute regarding the adoption of the draft declaration which was retained in the final version. Fearing that the provisions of Article of the 1993 draft Declaration may have similar bearing as common Article 1 of the ICCPR and ICSCER under international law, the CANZUS group, the African Union and many other States expressed the concern that the right to self-determination might be interpreted in such a way that it includes the right to secession. Therefore under the pressure of these States, alteration was done to narrow down the scope by adding Article 4 which reads:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and

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[49] Thomas Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int’l L. 46,52 (1992).
[50] GA Res 217A (II1), UN GAOR, 3 Sess., 183rd plen mtg, UN Doc A/RES/217A (II1) (10 December 1948).
[51] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) , Article 25.
[52] The International Law Association, Interim Report: Hauge Conference , *Rights of Indigenous Peoples*, at 10 available at www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D [Accessed on 2 January 2015]
[53] David Maybury-Lewis, *From Elimination to an Uncertain Future: Changing Policies towards Indigenous Peoples*, IN AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, POSTCOLONIAL STATES 332 (Bartholomew Dean and Jerome M. Levi eds., 2003)

> local affairs, as well as ways and means for financing their autonomous functions.[54]

Thus the tone of the right to self-determination was limited to its internal aspect. In addition, as mentioned earlier, in order to arrest the fear of external aspect of right to self-determination the explicit reference to the *Declaration on Friendly Relation* [55]was assorted in the Article 46 of the UNDRIP, referred as 'saving clause' . Thus Article 46 made the intentions clear that Declaration does not support external self-determination. This compromise language, observes Karen Engel, was the reason for the deadlock, but most of the indigenous observers in the end decided to support it. In return they were able to secure other pertinent provisions including those on land and resource rights and free prior informed consent, "which would in some sense protect indigenous peoples territorial integrity".[56]

3.3.3.3.1. Internal Self-determination: Meaning

The operative part of the UNDRIP helps to understand the jurisdiction of the right to self-determination within the domestic system. As mentioned earlier, the right to self-determination is the mainstay of the UNDRIP and it has articulated the international law principle of self-determination into domestic legal framework. In paraphrasing self-determination into domestic context, the UNDRIP provided broader themes under which states are entrusted for its realization through action and inaction. These themes include: right to life and liberty; right to preserve distinct identity based on culture, religion, language and spiritual belief; educational rights; self-governance and participatory rights; land resource and management. The Article 4 of the Declaration makes it clear that indigenous peoples can also realise their right to self-determination through their own institutions. Such indigenous institution's structural framework and functional autonomy shall vest in the hand of indigenous peoples itself.

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[54] The UNDRIP, Article 4; See also , UN Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session,* 61st Sess., Agenda 15, UN Doc E/CN.4/2006/79 (22 March 2006).

[55] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nation*, GA Res 2626, UNGOR, 6th Comm, 25th Sess.,1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970).

[56] Karen Engle, *Supra note* 11 at 146.

For the better implementation of rights provided under the UNDRIP, the indigenous peoples by the virtue of Article 37 may conclude treaties, agreements or other constructive arrangements with the states. Moreover, States shall also, in consultation with indigenous peoples, will take appropriate measures to implement these rights.

3.3.3.4. Protection of Indigenous Peoples

The UNDRIP is also of extreme relevance in terms of providing a protective regime against the existential threats to indigenous peoples and their culture.[57] The UNDRIP remarkable attempt to bridge the gap between the notions of genocide and ethnocide which was understood as synonyms and the distinction between the terms did not proved to be in the best interest of indigenous peoples.[58] Understanding the significance and value of indigenous peoples and their culture, the makers of the UNDRIP ensured that the indigenous peoples must be shielded against the genocide and ethnocide (cultural genocide).

Article 7 of the UNDRIP proclaims that the indigenous peoples have right to life and personal liberty and they shall not be subjected to any act of genocide.[59]The need of such provision is substantiated by the destruction of aboriginal society in Australia,[60] mass murder of Khoekhoe and San peoples in Southern Africa[61], instances of gruesome cruelty in post-colonial societies[62] and many more. The provision might not be

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[57] PAUL R. BARTROP AND SAMUEL TOTTEN, DICTIONARY OF GENOCIDE, 209 (2008).

[58] Bartolome Clavero argues that the distinction opened up a "path to whole range of terms and concepts for policies and actions that actually quite simply should be termed genocide, suggesting that they were not such things" , See, Bartolome Clavero, *Genocide and Indigenous Peoples in International Law*, at 9 available at http://hrcolumbia.org/indigenous/genocide-br-en-Clavero.pdf [Accessed on 3 January 2015].The point he wants to explain that the term 'genocide' was promoted in international law, leaving the ethnocide without reparation; The present day understanding of the term 'genocide' is generally related to policies and action directed to exterminate physically on the other hand ethnocide is generally understood as annihilation of culture without physical killing, See, Barry Sautman, *"Cultural Genocide" and Tibet*, 38 Tex. Int'l L. J. 173,177 (2003); However, not long before the both the terms 'genocide' and 'ethnocide' was used as synonyms, *See*, RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSAL FOR REDRESS 79 (1944).

[59] The UNRIP, Article 7(1) and7(2)

[60] Asafa Jalata, *The Impact of English Colonial Terrorism and Genocide on Indigenous Black Australians*, Sage Open 1-13 (July-September 2013) available at http://sgo.sagepub.com/content/spsgo/3/3/2158244013499143.full.pdf [Accessed on 3 January 2015]

[61] Robert K. Hitchcock and Wayne A. Babchuck, *Genocide of Khoekhoe and San Peoples in Southern Africa*, IN GENOCIDE OF INDIGENOUS PEOPLES: A CRITICAL BIBLIOGRAPHIC REVIEW (Vol.8) 117-72 (Samuel Totten and Robert K Hitchcock eds., 2011).

[62] Robert Melson, *Modern Genocide in Rawanda: Ideology Revolution and War, and Mass Murder in an African State*, IN THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE 394(Robert Gellately and Ben Kierman eds., 2003)

successful to pin down the perpetrators, mainly governments and corporations, of such horrendous crime against indigenous peoples done in past, but it clearly prohibits such practices and hopefully it may contribute to put a check on such act in the future.[63]Article 7 also prohibits the act of "forcibly removing indigenous children of the group to another group".[64]This provision addresses the issue of forced assimilation of indigenous children in the non-indigenous society by way of adoption without the consent of their parents. The Report on the Stolen Generation[65] in Australia has unmasked the horrifying stories of indigenous children subjected to cruelty and torture. The child's aboriginality was usually either veiled and renounced or vilified. They were often subjected to manual labour. Their living conditions were harsh and without good quality education or no education at all. There were even incidences of murder, physical abuse and assault. And the worst of all for any forcibly removed child was his loss of identity.[66]

Since nomenclature of the term 'ethnocide' by Raphael Lemkin, the notion of ethnocide has often been put into effect as a theoretical framework for the non-physical destruction of a group. As a result of intense debate and concerns over the legality of the concept by member States, ethnocide was expunged from the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG).[67] Consequently, ethnocide was identified distinctly from genocide and its value gained in the academia but denounced as crime particularly when victims were indigenous peoples.[68] In the year 1969, an important development took place with the study conducted by the Special Rapporteur to the Commission on Human Rights, Hernan Santa Cruz on the topic entitled "Special Study on Racial Discrimination in the Political, Economic and Cultural Spheres". The significant outcome of the study was that the problems of indigenous peoples gathered much attention. As mention earlier, in the year 1971, based

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[63] ALEXENDRA XANTHAKI, *supra note* 36 at 113.
[64] The UNDRIP, Article 7(2)
[65] Those aborigines' children of Australia forcibly removed from their parents and forced to live in non-indigenous society, and it was done as a matter of policy, See, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, *Bringing them Home*, available at https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf [Accessed on 3 January 2015]
[66] Andrew Murray, Child Migration Schemes: A Dark and Hidden Episode of Australia's History Revealed, 75 Austl. Quart. 27, 28 (Jan-Feb, 2003)
[67] Shamiran Mako, *Cultural Genocide and Key International Instruments: The Framing of Indigenous Experience*, 19 Int'l J. on Minority & Group Rts. 175, 175-76 (2012).
[68] Bartolome Clavero, *supra note* 58 at 8.

on the recommendations of Santa Cruz report, the Sub Commission for the Prevention of Discrimination appointed J. R.. Martinez Cobo to pursue a comprehensive study of discrimination against indigenous peoples. In its report Cobo, recognised and exposed the attempts to destroy indigenous peoples socio-cultural structure reducing them to set of individuals but not as groups or peoples:

> Much of their [indigenous peoples] land has been taken away. . . Their culture and their social and legal institutions and systems have been constantly under attack at all levels, through the media, the law and the public education systems. It is only natural, therefore, that there should be resistance to . . . the continual linguistic and cultural aggressions and attacks on their way of life, their social and cultural integrity and their very physical existence. They have a right to continue to exist, to defend their lands, to keep and to transmit their culture, their language, their social and legal institutions and systems and their ways of life. . . [69]

Subsequently with the upsurge of the indigenous people's movement, especially in the context of settler-colonies, throughout the 1980s voices for the reparation and prevention of cultural genocide gained momentum in the international arena. The inclusion of cultural genocide in the Draft Declaration on the Rights of Indigenous Populations was major breakthrough in the indigenous rights discourse but it remained highly contested throughout the meetings of WGIP.[70]Article 8 of the UNDRIP in absolute terms prohibits "forced assimilation or destruction of their [indigenous peoples] culture".[71]The UNDRIP moved a step ahead by ensuring that State shall provide effective redressal mechanism against cultural genocide.[72]

The UNDRIP ensures that State shall have special focus and targeted approach towards the economic and social conditions of indigenous women and children in particular. [73]Article 22 of the UNDRIP safeguards indigenous women and children from all form of discrimination and violence. Indigenous women are easy victim of double discrimination: the discrimination is in reference to their gender and Indigeneity. For

[69] Martinez Cobo, *The Problem and Discrimination Against Indigenous Peoples,* U.N. Doc. E/CN.4/Sub.2/1983/21/add.8 at 49.
[70] Shamiran Mako, *supra note* 67 at 176.
[71] The UNDRIP, Article 8(1).
[72] The UNDRIP, Article 8(2); It is to be noted that the Declaration does not explicitly uses the term 'cultural genocide' or 'ethnocide' but the language of the Article 8(2) comprehends the manifestation of ethnocide and protects against it.
[73] The UNDRIP, Article 21.

example, there are often gruesome incidences against indigenous women in Canada so much so that it has turned into a national crisis. A recent report, highly controversial on account of justification, by the Royal Canada Mounted Police reveals that indigenous women in Canada are victim of murder and forced disappearance at a much higher rate than non-indigenous women. However, the Prime Minister Stephen Harper refused to consider this as a sociological phenomenon.[74] In this backdrop, provisions of Article 22 become quite relevant.

3.3.3.5. Cultural and Linguistic Identity

The UNDRIP celebrates the concept of culturally diverse society and lays emphasis on need of helping hand from all peoples to enrich "diversity and richness of civilisation and cultures and cultures, which constitutes the common heritage of humankind".[75] Diversity should be respected rather than denigrated. Article 15 entrust indigenous peoples with right "to the dignity and diversity of their cultures, traditions, histories and aspirations" and this must be "reflected in education and public information"[76] and insists States to take effective measures to eliminate discrimination and establish harmonious relations between indigenous peoples and all other segments of society.[77]

Growing public consciousness of a human rights violations can stimulate community-wide attitudinal reform. Consequently, this can precisely impact decision making and stimulate legal reforms. Control over media can help indigenous peoples to achieve this goal. Article 16 enunciates a right to media deep down the framework of such global normative standards as freedom of expression, access to information, and equal rights policy. Amidst these conventional normative standards, it is the duty of States to make certain that indigenous cultural diversity is properly echoed in non-indigenous media. As media is one dominant medium through which the information regarding indigenous peoples is communicated to other quarters of populations. It functions as an essential

[74] Sophie des Beauvais available at http://www.worldpolicy.org/blog/2015/01/21/inuit-women-canada-no-more-stolen-sisters [Accessed on 4 January 2015]; See, Amnesty International, *Canada Stolen Sister*: *A Human Rights Response to Discrimination and Violence Against indigenous Women in Canada* available at http://www.amnesty.ca/sites/default/files/amr200032004enstolensisters.pdf [Accessed on 4 January 2015].
[75] The UNDRIP, Preamble para 3.
[76] The UNDRIP, Article 15(1).
[77] The UNDRIP, Article 15(2).

tool in State's duty of non-discrimination and the advancement of cultural heterogeneity under Article 15.[78]

The bedrock provisions relating to cultural rights of indigenous peoples under the UNDRIP are Article 11 to Article 13. Article 11 lays emphasis on indigenous peoples' right to observe and revive their cultural traditions and customs which "[i]ncludes the right to maintain, protect and develop the past, present and future manifestation of their culture, such as archaeological and historical sites, artefacts, technologies and visual and performing arts and literature".[79] Article 12 focuses on four sets of interlinked cultural rights of indigenous peoples such as: " to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies"; "to maintain, protect, and have access in privacy to their religious and cultural sites"; "to the use and control of their ceremonial objects"; along with the right "to repatriation of their human remains".[80]

Lastly, Article 13 lays emphasis on the intangible cultural property of indigenous peoples, pointing up that "indigenous peoples have the right to revitalize, use, develop and transmit to future generations their, histories languages, oral traditions, philosophies, writing systems and literature, and to designate and retain their own names for communities, place and persons".[81]The principal exposition on traditional knowledge and its management is inseparably linked with the ideas of cultural identity. The notion of cultural identity incorporates "everything that belongs to the distinct identity of a people and which is theirs to share, if they so wish, with other peoples".[82]Accordingly Article 31 confirms that indigenous peoples have right "to maintain, control and develop their intangible cultural heritage, traditional knowledge and traditional cultural expressions". Moreover, it also proclaims that indigenous peoples can manifest their "sciences, technologies and cultures", this includes display or production of their "human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and

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[78] International Law Association, *Report of the Rio De Janerio Conference on the Rights of Indigenous Peoples*, 73 Int'l L. Ass'n Rep. Conf. 953, 967 (2008); The UNDRIP, Article 16.
[79] The UNDRIP, Article 11.
[80] The UNDRIP, Article 12.
[81] The UNDRIP, Article 13.
[82] Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of indigenous*, UN Doc. E/CN.4/Sub.2/1993/28 para 24 (28 July 1994).

traditional games and visual and performing arts". Lastly, Article 31 affirms that indigenous peoples have the right to maintain intellectual property over cultural heritage—tangible and intangible.[83]

Article 34 is substantial in the protection of cultural rights of indigenous peoples because it focuses on a very important issue pertaining to preservation of special institutions and judicial system of indigenous peoples. It lays that indigenous peoples shall maintain their "distinct juridical systems or customs, in accordance with international human rights standards".[84]

3.3.3.6. Land and Resource Rights

By this time, it is generally acknowledged that a deep cultural, communal and divine relationship with their lands and territories is chief attribute of indigenous peoples and fundamental to their continued existence.[85]However, the journey to present form of normative standards in the UNDRIP is resultant of historical struggle of indigenous peoples over many centuries. Article 25 of the UNDRIP is important in a sense that it acknowledges special relationship of indigenous peoples with their traditional territories:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied or used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generation in this regard. [86]

The key point in this Article is that it affirms the rights of indigenous peoples to maintain *spiritual relationship* over land, territories and resource which were "owned, occupied and/or used historically" even if they have been currently dispossessed or

[83] The UNDRIP, Article 31.
[84] The UNDRIP, Article 34.
[85] Jeremie Gilbert and Cathal Doyle, *A New Dawn over the Land: Shedding Light on Collective Ownership and Consent*, IN (Stephen Allen and Alexandra Xanthaki eds.) *supra note* 25 at 289.
[86] The UNDRIP, Article 25.

deprived of their lands and territories.[87] Article 25 is also unique in a sense that apart from the recognition of spiritual bonding of indigenous peoples in relation to their traditional land, it also acknowledges their inter-generational approach to land rights.[88]

With regard to the content of indigenous peoples land rights, Article 26 lays down that "indigenous peoples have right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional or other traditional occupation or use, as well as those which have otherwise acquired".[89] In formulating extensive pronouncements, the UNDRIP does not get into the controversy of defining the content of indigenous land rights. The issue is already debated as to what shall be the subject matter of land rights such as ownership rights, possessory rights or both. The UNDRIP refrains from answering such question by endorsing a wide approach towards the subject matter of a right to land, which goes beyond rights of ownership and use but also a right to develop and control. But, the recognitions of indigenous peoples' right to "own, use, develop and control" their lands is not free from burden: it is restricted to current occupation. Article 26 creates a difference between "rights to land 'presently' occupied by indigenous peoples and rights to land 'traditionally' occupied by indigenous peoples".[90] Gilbert and Doyle, have referred the discrimination against those indigenous peoples who traditionally owned land but currently dispossessed as an "ambiguous compromise" for the reason that "[i]t will be up to national jurisdiction to interpret what rights indigenous peoples have to the lands that they have traditionally owned, occupied and used in the past".[91]

Article 27 of the UNDRIP demands States to set up and administer process recognising and resolving the rights of indigenous peoples "to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used".[92] The process and the manner in which they are evolved must be transparent, fair and due

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[87] International Law Association, *Report of the Hague Conference on the Rights of Indigenous Peoples*, 22 (2010) available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjMg7b_l_zMAhWGN48KHc1vCwwQFggiMAE&url=http%3A%2F%2Fwww.ila-hq.org%2Fdownload.cfm%2Fdocid%2F9E2AEDE9-BB41-42BA-9999F0359E79F62D&usg=AFQjCNE1MkUiVvWvhka8ocyQgXXflvobcA&sig2=dGPyhb6Cj_4gx0q0VYsTMw&bvm=bv.122676328,bs.1,d.c2I [Accessed on 02.02.2015]
[88] Jeremie Gilbert and Cathal Doyle *supra note 85* at 294.
[89] The UNDRIP, Article 26 (2).
[90] Jeremie Gilbert and Cathal Doyle *supra note 85* at 298.
[91] *Ibid*.
[92] The UNDRIP, Article 27

weightage must be given to the customs and land tenure systems adopted by indigenous peoples. In doing so, indigenous peoples must be involved in the whole process.

Article 29(1) of the UNDRIP affirms that indigenous peoples have the right "to the conservation and protection of the environment and the productive capacity of their lands or territories and resources"[93]; in view of this, States are prescribed to "assistance programmes for indigenous peoples for such conservation and protection, without discrimination".[94] The subsequent passage declares that State must adopt "effective measures to ensure that no storage or disposal of hazardous material shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent".[95] Lastly, Article 29(3) casts an obligation on States to "take effective measures to ensure, as needed, that programmes for monitoring and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented".[96] In the negotiation process of making of the UNDRIP, States have attempted to dilute the obligation to furnish "assistance" to indigenous peoples for conservation of their lands and territories by way of rhetorical twist in the form of "assistance programmes". Thus, instead of taking direct responsibility to conserve indigenous lands and resources, States preferred to play ancillary role.

Article 30(1) of the UNDRIP extends an injunction against military occupation on indigenous land and territories barring three situations: in case of danger to a relevant public interest, or voluntarily subscribed by, or request on behalf of, indigenous peoples is made out. Article 30(2) ensures that without any exception States shall have prior consultation with indigenous peoples before setting out any military activities. These provisions are of significant value given the fact that military activities on indigenous lands is a matter of contention in international human rights law.

Lastly, as stated in Article 32(1) of the UNDRIP indigenous peoples have the right to decide and develop blueprint for the development or use of their land, territories and other resources. According to Article 32 (2), States are under obligation to consult and

[93] The UNDRIP Article 29 (1)
[94] *Ibid*
[95] The UNDRIP Article 29 (2)
[96] The UNDRIP Article 29 (3)

help indigenous peoples to exercise their right of free prior informed consent (FPIC) in case of approval of any project to be launched on their lands or territories or other resources.[97] At the regional level, the IACHR has cited Article 32(2) of the UNDRIP in the case of *Saramaka vs. Surinam* and declared that the principle of FPIC needs to followed. It stated: "the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with Saramaka, but also to obtain their free prior informed consent, according to their customs and traditions".[98]

3.3.4. Legal Status of UNDRIP

In order to have maximum benefit out of the UNDRIP it is necessary that it is used by jurists and activist as an authoritative document on resolution of disputes pertaining indigenous peoples. It may appear prima facie that the Declaration will not be as effective as any Convention would have been because unlike later, the former are not legally binding. Having said that, the Declaration could still turn out to be a key source for guidance on law. The UNDRIP is resultant of continuous struggle for several decade by indigenous peoples and activists in their efforts to come up with a universal framework of indigenous rights. In this sense, it has unparalleled legitimacy as a source of law on indigenous rights. This sentiment is well expressed by the statement of former UN Special Rapporteur Rodolfo Stavenhagen in his report:

> Having been adopted by the Human Rights Council, the Declaration [UNDRIP] is now an essential frame of reference for actions both by the Council itself and the Office of the United Nations High Commissioner for Human Rights, and by other United Nations agencies. The Declaration will also serve as a guide for the actions of international human rights treaty bodies. The Declaration must be a fundamental part of the discussion about future in international standards relating to indigenous peoples, not only at the international level, but also in the regional and specialised areas. Its adoption also gives a strong impetus to the clarification of emerging customary law concerning indigenous rights at the international level, and

[97] See, Joji Carino, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflection on Concepts and Practice*, 22 Ariz. J. Int'l & Comp. L. 19 (2005)
[98] Saramaka People vs. Suriname Inter-Am. Ct. H.R. Series C No. 172 (28 November 2007) at para 134.

> should similarly energize the process of legislative reforms and domestic court proceedings.[99]

In reference to views of former Special Rapporteur regarding the potential of the UNDRIP to culminate as part of customary international law, Baldwin and Morel reaffirms the proposition and advances following reasoning's: First, that the UNDRIP was adopted by an overwhelming majority with support from all around the globe and *oinio juris* in the favour of the UNDRIP may be inferred from the positive language of the provisions "[r]ather than in the form of mere exhortation".[100] It is substantiated by the language of Article 42 of the UNDRIP which categorically states that "States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration".[101]

Second, regional and domestic adjudication bodies have translated the spirit of Article 42 into practical reality. For example, in *Cal vs. Attorney General of Belize*[102], the Supreme Court of the Belize held that, on account of vote casted in favour of adoption of the UNDRIP, Belize is under obligation to respect property rights of indigenous peoples as per the provisions of the UNDRIP. The Court also maintained that the provisions of the UNDRIP embodied "general principles of international law", thus the provisions would have same force as would articles of treaty. In spite of the positive developments regarding the applicability of the UNDRIP, the major concern, argues Kirsty Gover, still remains how the CANZUS States would translate its provision within their domestic legal system. He contends that in the light of persistent objection to binding character of the UNDRIP may derail its prospect of becoming part of customary international law.[103]

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[99] UN Special Rapporteur Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN Doc. A/HRC/4/32 (2007) para 79.

[100] Clive Baldwin and Cynthia Morel, *Using the United Nations Declaration on the Rights Indigenous Peoples in Litigation,* IN REFLECTION ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 124 (Stephan Allen and Alexandra Xanthaki eds., 2014)

[101] The UNDRIP, Article 42

[102] Aurelio Cal and the Maya Village of Santa Cruz vs. Attorney General of Belize; Manuel Coy and Maya Village of Conejo vs Attorney General of Belize (Consolidated) Claims Nos. 171 & 172, 2007 Supreme Court of Belize (18 October 2007) cited in Clive Baldwin and Cynthia Morel *supra note* 100 at 124.

[103] Kirsty Gover, *Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples*, 26 Eur. J. Int'l L 345, 356 (2015)

Much relevant to the above debate, Wheately seeks to adopt a balance approach by raising a point that the pertinent question is not whether the UNDRIP is binding or not, "[b]ut in a system of global governance that relies only to a minimal extent of formal, judicial-type, mechanisms of dispute resolution and coercive enforcement measures whether it is 'law', and the consequences that follow from a determination that the Declaration is international ('soft') law".[104] Further, Vaughan Lowe maintains that the 'soft-law' may not be legally binding yet they constitute major portion of "broader normative context within which expectations of what is reasonable or proper State behaviour is formed".[105]

3.3.5. Conclusion

The UNDRIP represents a significant success in the recognition and preservation of the elementary rights and basic liberties of the indigenous peoples. It is the resultant of sustained work of many people for many years, including indigenous leaders, activists and scholars from all parts of the world. The salient features of the UNDRIP are: (a) a minimum standard of achievement to be pursued, but does not impede the development of additional rights in future; (b) emphasis on equality and accordingly it affirms that indigenous peoples and individuals have the right not to be subjugated to forced assimilation or destruction of their culture; (c) the right to self-determination which allows indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development and (d) recognition of collective rights of indigenous peoples.

The non-binding nature of the UNDRIP doesn't completely water down its relevance as legal instrument. As a soft law its potential for universal acceptance is increased. It has also significant value towards the development of customary international law in future.

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[104] Stephen Wheatley, *The Legal Status of the UN Declaration on the Rights of Indigenous Peoples,* 2010 Inter Alia 60, 62 (2010); Steven Wheatley, *Indigenous Peoples and the Right of Political Autonomy in the Age of Global Legal Pluralism*, IN Law AND ANTHROPOLOGY: CURRENT LEGAL ISSUES 355 (Micheal Freeman and David Napier eds 2009);

[105] VAUGHAN LOWE, INTERNATIONAL LAW 95 (2007)

Chapter 4

The Three Dimensions of the Rights of Indigenous Peoples

4.1. Introduction

The previous Chapter analysed the distinct normative structure especially designed to engage indigenous peoples. The present Chapter addresses the substantive issues which are deeply contentious yet forming the core of indigenous rights regime. These issues are not only significant from the vantage point of indigenous peoples "struggle for recognition" but also has direct bearing on science of international law. Accordingly, the Chapter is divided into three Parts. The first Part deals with the issue of "sovereignty", one of the foundational principles of international law. The scope of sovereign authority under traditional international law was restricted to "civilised" States and indigenous peoples remained merely an object of international law. The indigenous peoples struggle to autonomous space made it necessary to revisit and deal with the right to self-determination. Devoid of sovereign power, indigenous peoples also lost their dominion over traditional land and natural resources. For indigenous peoples, land rights constitute the foundation of their economic subsistence and is deeply related with identity. Hence, the second Part deals with the issue of land rights and indigenous peoples. One of the main purpose of indigenous peoples struggle for self-determination is to protect cultural integrity. It is worth reiterating that the purpose of self-determination does not include the idea of remedial secession. It is loss of land that has further attenuated the prospects for indigenous peoples to preserve cultural property. Part three of the Chapter lays emphasis on the protection of cultural property rights of indigenous peoples.

4.2. Indigenous Sovereignty and Right to Self-Determination

4.2.1. Introduction

Sovereignty—the word so repeatedly used, generally alludes to highest political power, free and unbounded by any other power. Discourse of the term 'sovereignty' in

connection with indigenous peoples, however, must be framed differently.[1]As a matter of academic study, advocacy, governance and civilization advancement sovereignty matters in consequential way to comprehend the political plans, the policies, and cultural outlook of indigenous peoples. It is difficult to postulate that diverse indigenous group's share same meaning of sovereignty and its significance. However, most significant part of their problems and struggle can be reduced to sovereignty as a kind of raison d' etre .Sovereignty appeared as prized term within indigenous discourse to denote an agglomeration of legal, social right, economic, political and cultural rights. In the context of indigenous peoples, sovereignty can have varied meanings, ranging from formulation of rights to reverse continuing experiences of colonialism as well as to carry local efforts at the redemption of particular lands, resources, self-governance and preservation of cultural knowledge and practices.[2] This Part of the Chapter will analyse the concept of 'indigenous sovereignty' and 'self-determination' vis-à-vis indigenous peoples. It is broadly divided into three sections. Section I shall critically analyse the meaning of 'indigenous sovereignty' and its role in the advancement of indigenous peoples rights in international law. The next Section shall will attempt to determine the content and scope of indigenous peoples' right to self-determination. The final Section will conclude the issue with some observations.

4.2.2. Sovereignty

4.2.2.1. Sovereignty: Different Meanings

The idea of 'sovereignty' is multi-layered. It is not possible to dissect here every dimensions of the term .Nevertheless an attempt will be made to understand the basic values that impregnated the term.

'Sovereignty' is a difficult term to define. The difficulty lies in its abstract formulation. However, no other concept in international law and politics have such strong influence in shaping the structure of the world. In general understanding the term implies "[t]he

[1] SOVEREIGNITY MATTERS: LOCATION OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION, 14 (Joanne Barker ed., 2005).
[2] Id.

supreme power from which all specific political powers are derived".[3] Sovereignty is an idea of authority which originated in the controversies and wars, religious and political, of sixteenth and seventeenth century of Europe.[4]It has existed without pause and expanded across the world since that time, and it still under process of continuous evolution.

Stephen, in his book titled "Sovereignty", expounds four different meaning of the term.[5] He argues that the term has been frequently used as: domestic sovereignty, referring to the institution of public authority within a State and to the intensity of operative control employed by those keeping the authority[6]; interdependence sovereignty, referring to the ability of public authority to control movements extending across border[7]; international legal sovereignty, referring to the construction of statehood in international law[8] and

[3] Kirke Kickingbird et al., *Indian Sovereignty*, *IN* NATIVE AMERICAN SOVEREIGNITY 1-2 (John R. Wunder ed., 1999).

[4] ROBERT JACKSON, SOVEREIGNITY: EVOLUTION OF AN IDEA, ix (2007).The author does not wishes to enter into Oriental or Asian discourse on the origin of sovereignty.

[5] STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HIPOCRACY, (1999).

[6] Thus domestic sovereignty deals with the techniques in which structures of authority within state is formulated and how effectively it used in controlling behaviour. See, Stephen D. Krasner, *Abiding Sovereignty*, 22 Int'l Pol. Sci. Rev 229,231 (2001); The classic theorist of sovereignty, Bodin and Hobbes focused basically on realization of domestic sovereignty. Bodin, in his *Methodus ad Facilem Historiarum Cognitionem* (1556) stressed that it is necessary that the state has prevailing authority including the power to control the administration and interpret law, *cited in* C. H. McIlwain, *A Fragment on* Society 94,99 (1933); His intentions are further revealed when he conceptualizes the notion of citizenship. For him citizen is one who is "free because he has certain rights and privileges". However, citizenship is acquired only when one has accepted the authority of supreme to whom he owes obedience. Further he puts forward that state and citizenship is not possible without sovereignty and in absence of sovereignty there is likely chance of lawless freedom transforming into "pure and complete servitude", *See*, W. T. JONES, MASTERS OF POLITICAL THOUGHT: MACHIAVELLI TO BENTHAM, 72-73 (vol.II 1975). Similarly, Hobbes conceptualizes for an artificial person *Leviathan* under which all public rights and powers are bestowed through an agreement by people, in the absence of protection from that artificial person life would be "solitary, poor, nasty, brutish and short", *See*, Thomas Verellen, *What to do With Sovereignty*, 47 Jura Falconis Jg , 417,418 (2010-2011) *available at* https://www.law.kuleuven.be/jura/art/47n3/verellen.pdf .

[7] Thompson referring the works of Cooper, Keohane ,Nye, Morse, and Rosecrance observed that state sovereignty, with the advent of modern technology, are weathered by global economic interdependence and democratic politics. The states fall short of controlling illegal trans-border movements of peoples, ideas, goods and money. *See* , Janice E. Thomson, *State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research*, 39 Int'l Stud. Quart. 213,215 (1995), See also, R. Cooper, *Economic Interdependence and Foreign Policy in the Seventies*, 24 World Politics, 159-181 (1972); TRANSNATIONAL RELATIONS AND WORLD POLITICS (R. Keohane & J. Nye eds. 1972); E. MORSE, MODERNIATION AND TRANSFORMATION OF INTERNATIONAL RELATIONS (1976)

[8] According to Fowler and Bunk, sovereignty is perceived as state's "ticket of general admission to the international arena", MICHEAL ROSS & JULIE MARIE BUNK, LAW, POWER, AND THE SOVEREIGN STATE 12 (1995).

Westphalian sovereignty, referring to the prohibition of foreign actors intervention within domestic authority arrangement of a State.[9]

In sum, one can deduce that scholars have generally developed the notion of sovereignty around the structure of State. The control and authority being the reinforcement material. In addition to what is said above, one striking characteristic of the traditional notion of sovereignty is that it is indivisible and therefore within the State there cannot exist two or more centres of authorities. To put in the words of Derrida:

> Hence the necessity of another problematic, in truth, an aporetic, of divisible sovereignty. For a long now at least since the end of the nineteenth century, people have spoken of nation-states with "limited" or "shared" sovereignty. But is not the very essence of the principle of sovereignty, everywhere and in every case, precisely its exceptional indivisibility, its illimitation, its integral integrity? Sovereignty is undivided, unshared or it is not. The division of the indivisible, the sharing of what cannot be shared: that is the possibility of the impossible.[10]

This traditional notion of sovereignty, however, has been received enthusiastically by the discipline of international yet it is under constant challenge within the academic discourse. At present time, observes Kingsbury, suggestions to desert the normative concept of sovereignty have gained force, rendering on modern time understanding that the traditional concept of sovereignty is an archaic notion might not be apt in a new era of globalisation and democratisation.[11]

Jens Bartelson, analysing *Reconfigured Sovereignty*,[12] observes that sovereignty is much more liquid and ductile concept than its usual portrayal as sacrosanct, indivisible

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[9] Krasner, point outs that rule of non-intervention into international affairs of the state under international law has nothing to do with peace treaty of Westphalia (1648) as this principal was developed later on, *See*, STEPHEN D. KRASNER *supra note* 5 at 20; Equating principle of non-intervention with sovereignty is a result of lack of positive definition , observes Laszlo Valki, under international law. He concludes that "international law has never produced a definition of sovereignty; even the international legal documents signed under the umbrella of the UN, which are supposed to infringe it, only define it in a negative way, saying that what sovereign states cannot do, i.e. what sovereignty is not. For instance, states have to respect other states as equals, must not endanger the territorial integrity of other states and cannot use force to resolve conflict" , *cited in* TURKI ALTHUNYAN, DEALING WITH FRAGMENTED INTERNATIONAL LEGAL ENVIRONMENT: WTO, INTERNATIONAL TAX, INTERNAL TAX REGULATION 97-98 (2010)

[10] JACQUES DERRIDA, PROVOCATION FOREWORDS XX (Peggy Kamuf trans, 2002)

[11] Benedict Kingsbury, *Sovereignty and Equality,* 9Eur. J. Int'l L. 599, 610 (1998).

[12] RECONFIGURED SOVEREIGNITY: MULTI LEVEL GOVERNANCE IN THE GLOBAL AGE (Tomas L Ilgen ed. 2003)

and inalienable in international affairs. And, sovereignty in the present time is hardly monopolised by the State, on the contrary it is fractured and shared among the States and non-State actors in multi-level governance structure. According to Bartelson, Ilgen discuss the friction as result of rise of global market economy which challenges the traditional notion of the State being the ultimate source of authority. It is natural for market economy to expand globally crossing the limits of defined territories of States. As a result there is a dent in certain primary characteristic of State sovereignty and loses its grip on abilities such as to create and implement laws, the power to defend and define territory, and to structure and administer economy. Author refers to Ilgen view that "this has led to the creation of supranational institutions of global governance and to downward diffusion of power to sub-national actors such as cities and regions" [13]

In a similar line of thought Jakson puts forward that in the field of trade and economic law, one realizes several cases of deviation from traditional notion of sovereignty. A noticeable illustration is the General Agreement on Tariff and Trade (GATT), and now the WTO, wherein a custom territory having complete autonomy in the execution of its external mercantile relations. Furthermore, in the era of globalisation and liberalisation there are numerous instances in which powerful nations (both in terms of economic and military capacity) shape and influence the domestic policies of other nations.[14] For instance, strong nations are well-known to affect the domestic election of other nation and to manipulate the national policies in their own advantage and human rights used as political tool.[15]

Writing from the third word perspective, Professor Chimni also argues, that international intuitions have emerged in every sphere of international relations-economic, political and social as result the State sovereignty is constrained. He also explains how international economic institutions—WTO, IMF, and World Bank and

[13] Jean Bartelson, *The Concept of Sovereignty Revisited*, 17 Eur. J. Int'l L 463,466 (2006)
[14] John H Jackson, *Sovereignty- Modern : A New Approach to an Outdated Concept*, 97 Am. J. Int'l L. 782, 789 (2003)
[15] NATO apparently used human rights violations as ground for intervention in Balkans but in reality it was more strategic than anything else, *See*, ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW, 82 (2014); on the politicization of human rights, *See*, Anne Karine Jahren, *The Use and Abuse of Human Rights Discourse in International Relations: The War on Terror and Beyond available at* http://www.e-ir.info/2013/10/27/use-and-abuse-of-human-rights-discourse/ [accessed on 09.12.2014]; for analysis the states sovereignty is traded for resolving human rights disputes, See, JoonBeom Pae, *Sovereignty, Power, and Human Rights Treatise: An Economic Analysis*, 5 Nw. J. Int'l Hum. Rts. 72 (2006); States also trade their sovereignty for their own interest, *See*, Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 Yale J. Int'l L. 1, 13 (1999).

several non-governmental organizations are involved in making, shaping and influencing the universal norms set out to be followed by the state their by impairing decision making authority of the States.[16]

Presumably for this and other pretext some scholars would like to rescript the concept of sovereignty in the modern context and one can find an extreme view in the likes of Louis Henkins who asserts, "For legal purpose, at least, we might do well to relegate the term sovereignty to the self of history as a relic from an earlier era…..to this end it is necessary to analyse, 'decompose' the concept…"[17]However, such an extreme position would not be judicious to opt as there is lack of an alternative concept in international law, notes Kingsbury, which "provides a strong reason to adhere to the existing concept of sovereignty, however much it may be strained by practice and problematized by theory".[18]

So, an obvious question which follows the debate is how one can reinvent the concept of sovereignty? Can there be a shift away from the idea of "sovereignty for the benefit of the nation-state" towards the ideas of "sovereignty of the people" thereby giving way to the idea of 'indigenous sovereignty'? As Jakson puts forward, and rightly so, that in present-day policy debates, sovereignty refers to questions about the quota sharing of power; generally "government decision making power."[19] So is it possible to bring people into decision making process by empowering them with more share in the power allocation construct in the reinvented sovereignty?

Professor Thomas Franck, observing that sovereignty need to devolve to the people and its glimpse are evidenced in state practice, remarks:

> That governments themselves now argue for the entitlement merely indicates their long-overdue recognition of an immutable fact of life: government cannot govern by force alone. To be effective, pace Austin, law needs to secure the habitual *voluntary* compliance of its subjects; it cannot rely entirely, or even primarily, upon the commanding power of sovereign to compel obedience. Consequently, governments no longer blinded by the

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[16] B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 Eur. J. Int'l L. 1,2 (2004).

[17] LOUIS HENKIN, INTERNATIONAL LAW: POLITCS AND VALUES, 10 (1995) *quoted in* Jakson, *supra note* 14 at 789.

[18] Benedict Kingsbury, *supra note* 11 at 600.

[19] Jackson, *supra note* 14 at 790.

> totalitarian miasma seek to validate themselves in such a way as to secure a high degree of voluntary public acquiescence in the governing process. Consent benefits the governing as much as the governed that sociological truism is at last becoming a political axiom. [20]

Before addressing the above mentioned queries, it is necessary to explore the reasons why sovereignty matters to indigenous peoples and then study shall reflect on self-determination and self-government as a strain of sovereignty and indigenous peoples being frame of reference.

4.2.2.3. Does Sovereignty Matters to Indigenous Peoples?

Karena Shaw in her seminal work *Political Theory and Indigeneity: Sovereignty and the Limits of Political* referring and analysing Hobbes, observes that though sovereignty primarily renders just order and peace it has something more to furnish. It produces an epistemological system that legalizes authoritative entitlements. If one agrees with Hobbes, even those who disagree cannot deny the fact that, the world is methodically divided into sovereign and non-sovereign. Those subscribing the tutelage of sovereignty finds a place in the world, an organized conception, a locus from where humanity can progress and one has to act within it which is "inside". All others (indigenous peoples) on the "outside" are within the domain of war and distress due multifaceted magnitude of violence or insufficient amount of security to develop and proceed along the path of knowledge, live sound life.[21]

However Shaw in later part of her book is critical of Tully and other political theorist on their persistence on the construction sovereignty as the precondition for the political ascendancy. And, in doing so she undermines, if not, overlooks the importance of 'recognition' of indigenous peoples.[22]She is not alone in criticizing sovereignty as

[20] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46, 48 (1992).
[21] KARENA SHAW, POLITICAL THEORY AND INDIGENEITY: SOVEREIGNTY AND THE LIMITS OF POLITICAL, 32 (2008).
[22] *Ibid* at 136-156; "Misrecognition shows not a just lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe other people. It is a vital human need." *See*, CHARLES TAYLOR, MULTICULTURALISM AND THE POLITCS OF RECOGNITION, 26 (1992); "To be misrecognized is not only to be thought of ill of, look down on, or devalued in people's attitudes, beliefs or representation. It is being denied the status of full partner in social interaction, as a consequences of institutionalized patterns of cultural value that constitute one as comparatively unworthy of respect or esteem." *See*, Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation,* in The Tanners Lectures on Human Values, *delivered at* Sanford University April 30-May 2, 1996 also *available at* http://www.intelligenceispower.com/Important%20E-mails%20Sent%20attachments/Social%20Justice%20in%20the%20Age%20of%20Identity%20Politics.pdf [accessed on 10.12.2014].

necessary condition for indigenous people's carte blanche. Among many the name of Taiaiake Alfred is at forefront, who argues that "sovereignty is an exclusionary concept rooted in an adversarial and coercive nation of power". [23]And applying it to generalise indigenous histories, governance and epistemologies is not only obscure but inadequate. As such construction are noticed to misrepresent rather than elucidate the representation and so understanding of indigenous epistemologies, customs, governance and culture. He writes that:

> Indigenous peoples can never match the awesome coercive force of the state; so long as the sovereignty remains the goal of indigenous politics, therefore, Native communities will occupy a dependent reactionary position relative to the state. Acceptance of 'Aboriginal rights' in the context of state sovereignty represents the culmination of white society's efforts to assimilate indigenous peoples. . . Native people imperil themselves by accepting the formulation of their own identities and rights that prevent them from transcending the past. The state relegates indigenous peoples' rights to the past, and constraints the development of their societies by allowing only those activities that supports its own necessary illusion: that indigenous peoples do not present a serious challenge to its legitimacy. [24]

He further entrust the task upon Native leaders to expose and debunk the imperial self-deception that underpins the dogma of State sovereignty and white's people supremacy over indigenous peoples and their land. Alfred continues to argue that, any proposal of establishing States legitimacy is derived from rule of law is both hypocritical and anti-historic. To his judgment, "there is no moral justification for state sovereignty".[25]

Dale Turner, also an indigenous activist, interpret the Western European discourse of rights and sovereignty as "the most devastating landscapes that have created discourse on property, ethics, political sovereignty, and justice that have subjugated, distorted and marginalized Aboriginal ways of thinking".[26] Similarly, Glenn T. Morris questions "the

[23] TAIAIAKE ALFRED, PEACE, POWER, RIGHTOUSNESS: AN INDIGENOUS MANIFESTO, 59 (1999).
[24] *Ibid*.
[25] *Ibid*.
[26] Dale Turner, *Vision: Toward an Understanding of Aboriginal Sovereignty,* IN CANADIAN POLITICAL PHILOSOPHY : CONTEMPRORY REFLECTIONS 325 (Ronald Beiner and Wayne Norman eds, 2001).

usefulness of forcing indigenous realities into the forms [semantics] developed by Europeans".

The philosophy behind such an argument is that, as expressed by Alfred, the endeavour to bring about justice in the form of indigenous 'claims' against the State is virtually to concede to the tradition of State sovereignty.Indigenous peoples being original inhabitant of the land, they never consented or ratified European ownership of territory or sovereignty over them and there is no historical document (treaties) to support European claim. So, he argues:

> Why are indigenous efforts to achieve these facts framed as 'claims'? The mythology of state is hegemonic, and the struggle for justice would be better served by undermining the myth of the state sovereignty than by carving out a small and dependent space for indigenous peoples within it.[27]

The argument and logic seems to be stemmed from a highly emotional mind-set. The logic appear to go like that, if my property is misappropriated or I am forcibly deprived of my possession. I will not claim the ownership as I never ever legally transferred it. The argument of Alfred deemed to be convincing in an ideal conditions. But, when confronted with opponent who seized my land, I may choose not fight for ownership as it was always mine but I have to 'reclaim' otherwise my deprivation will be unbroken and endless.`

Moreover it is inconceivable, in pragmatic sense, to overshadow the relevance of the "State" because, firstly, an extreme form of indigenous movement may usher to the emergence of 'indigenous State' or 'indigenous nation' having the elements of power and authority. Second, Indigenous peoples is not altogether a homogenous construct. It is a set of variety of heterogeneous indigenous population. And, they may possess commonality and universality in terms of 'peace' and may display, in modern context, more attributes 'peaceful coexistence' in reference to relations with each other, environment and other world [non-indigenous]. However in past and in modern times, indigenous peoples carry strains of ethnocentrism. They were not entirely uncontaminated when scholars produced anthropological research of violence and war.[28] The central point of the argument is that, even primitive peoples displayed

[27] TAIAIAKE ALFRED, *supra note* 23 at 58.
[28] Doyne Dawson, *The Origin of War: Biological and Anthropological Theories*, 35 Hist. & Theo. 1-28 (Feb 1996); Joseph Schneider, *Primitive Warfare: Methodological Note*, 15 Am. Sociological Rev. 772-

territorial behaviour and apart from few aberration this is a general practice of human being. Hence, idea of 'State' was always there, may be in crude form, since the evolution of humans. Finally, humans are humans, be it 'indigenous' or be it 'non-indigenous', let the identity be preserved but let us not put the human world on opposite axis.[29]

In order to bring indigenous peoples at the "centre" of the political realm it is desirable to reconstruct the notion of traditional sovereignty.

4.2.2.3. Indigenous Sovereignty: Meaning and Scope

Paul Keal, noting Naeem Inayatullah and David Blaney, observes that in addition to symbolising the emergence of modern nation-state system founded on the reciprocal regard of sovereignty, the Treaty of Westphalia delayed handling problems due to cultural difference.[30]Westphalia may have secured forbearance between States, but within them it hatched in cultural separateness exposed to political and social actors discourteous or brazenly xenophobic of diversity. A cardinal development of this was, in the words of James Tully, "Empire of Uniformity". By this he means that "the language of modern constitutionalism …was designed to exclude or assimilate cultural diversity and justify uniformity". So, the important question is, drawing from post-colonial theorist Gayatri Spivak observation on subaltern, "can the indigenous speak?".

Keal, further observes that indigenous sovereignty is a notion that confronts the idea of 'Empire of Uniformity'. It challenges the political and moral authority of States with indigenous peoples and it is crucial in pursuit of respecting the 'difference' at both the domestic and international levels.[31]

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777 (1950); Lawrence Keely argues that a "myth of peaceful savage" was deliberately done and tries to refute the myth, *see*, LAWRENCE KEELY, WAR BEFORE CIVILIZATION: THE MYTH OF PEACEFUL SAVAGE (1997); KEITH F. OTTERBEIN, HOW WAR BEGAN (2004); On the contrary view see, R. Brain Ferguson, *The Causes and Origins of "Primitive Warfare": On Evolved Motivations for War*,71 Anthropological Q. 159-164 (2000); According to Helbert Turney High, condition of true warfare was absent in primitive society, *see*, William N. Fenton, Reviewed Work: Primitive Warfare Its Practice and Concepts by Harry Holbert Turney-High, 52 Am. Anthro. 246, 246 (1950).

[29] JOHN ALAN COHAN, THE PRIMITIVE MIND AND THE MODERN MAN, 2-3 (2010).

[30] NAEEM INAYATULLAH & DAVID L. BLANEY, INTERNATIONAL RELATION AND THE PROBLEM OF DIFFERENCE, 22 (2004) *cited in* Paul Keal, *Indigenous Sovereignty*, in RE-ENVISIONING SOVEREIGTNY: THE END OF WESTPHALIA? 315 (Trudy Jacobsen, Charles Sampford & Ramesh Thakur eds, 2008).

[31] *Ibid.* at 315.

The review of academic literature reveals that 'indigenous sovereignty' does not have fixed contours. Different scholars have different meaning and sometime one can find binary opposite conceptualizations. Attempt has been made to sketch the picture with all shades in the ensuing paragraphs.

Siegfried Wiessner, drawing inspiration from indigenous peoples refers to the idea of 'Authentic Indigenous Sovereignty'. He conceives it as an idea to create a 'safe space' for indigenous peoples; enabling them to live a life with the difference; ensuring their right of free, prior, informed consent; the right to have self-governance; the right to enter into treaties and other agreement; and casting a legal duty on the state to respect, protect and promote indigenous languages and culture.[32]Subsequently, along with Lorie Graham, he argues that indigenous sovereignty should be solely equated in terms of Western notion of "original power over territory".[33]

Social activist and lawyer, Frank Brennan SJ maintain that Aboriginal sovereignty is about recognizing and respecting that there is a "sovereign people within the nation".[34]Brennan contends that for practical purpose sovereignty is of value only in relation to a nation that has "its own land base, economic resources and social structure" which is clearly not enjoyed by indigenous peoples across the globe. Therefore, the goal and objective of indigenous struggle, he argues, should be self-determination.[35]

For Professor Stefano Varese, indigenous sovereignty implies "the recognition that there is no external supreme" and "absolute power over the indigenous community" does not lie somewhere else but "within the community, in the collective body". And, these issues can't be resolved unless "indigenous territorial possession and full jurisdiction are in place". He further explains the meaning of indigenous jurisdiction in terms of rights and authority to interpret and apply law created by indigenous people within the limits of territory controlled by the indigenous communities.[36]

[32] S. Wiessner, *Indigenous Sovereignty: A Reassessment in the Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 Vand. J. Transnat'l L. 1141, 1170-75 (2008).
[33] L. Graham & S. Wiessner, *Indigenous Sovereignty, Culture, and International Human Rights Law*,
[34] FRANK BRENNAN, ONE LAND ONE NATION: MABO-TOWARDS 2001,127 (1995).
[35] *Ibid.* at 159-160.
[36] STEFANO VERESE, WITNESS TO SOVEREIGNTY: ESSAYS ON THE INDIAN MOVEMENT IN LATIN AMERICA, 270 (2006).

Federico Lenzerini traces the roots of indigenous sovereignty in customary international law. He equates the concept indigenous sovereignty which is inclusive of right of ownership over traditional land; to preserve identity and culture; participatory rights in decision making process affecting their culture and life; the right to self-govern through their own customary law. He argues that indigenous sovereignty is 'parallel' to that of State but praxis of the indigenous sovereignty shall in no way traverse the supreme territorial sovereignty of the State.[37]Lenzerini concludes his argument and observes that the exerting indigenous sovereignty helps in "shifting some aspect of State sovereignty, providing indigenous peoples with some significant sovereign prerogatives that previously belonged to the State"[38]

There is a school of thought which vehemently attacks the very notion of the Sovereignty and rejects any idea of indigenous sovereignty in terms of self-government and self-determination within the frame work of the State as a form of indirect colonial rule similar to that of Canadians, Americans, Australians, and New Zealanders subjugation.[39]Taiaiake Alfred another scholar of the same brigade argues that colonial State is based on ignorance and racism and notion of indigenous sovereignty that don't "challenge these principles in fact serve to perpetuate them".[40]Paradoxically these scholars had expressed the necessity for indigenous scholars who could produce "intellectual sovereignty".[41] The "intellectual sovereignty" attempts to decolonize the conceptual and methodological outlook adopted to examine and investigate indigenous histories, culture and their interests in present day world as a part of intellectual colonialism.[42]Thus intellectual sovereignty is way in which indigenous scholars produces indigenous scholarship through indigenous epistemologies rather than western research paradigm.[43]The obvious question which comes in mind: what may be the theoretical underpinnings which could be relevant in identifying differences

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[37] F. Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 Texas Int'l L. J. 155, 188 cited in Steven Wheatley, *Conceptualizing the Authority of the Sovereign State over Indigenous Peoples*, 27 Leiden. J. Int'l Law 371, 381 (2014).
[38] *Ibid.*
[39] James Tully, *The Struggle of Indigenous Peoples for and of Freedom*, IN POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 57-58 (Duncan Ivison, Paul Patton and Will Sanders eds., 2001).
[40] TAIAIAKE ALFRED, *supra note* 23 at 59.
[41] Joanne Barker, *Supra note* 1 at 25.
[42] *Ibid.*
[43] Bronwyn Fredericks, *The Epistemology that Maintain White Race Privilege, Power and Control of Indigenous Studies and Indigenous Peoples' participation in Universities,* 5 Aust. Critical Race Whiteness Studies Aso't J. 1,2 (2009) available at http://eprints.qut.edu.au/26717/2/26717.pdf .

between the State traditional sovereignty and indigenous intellectual sovereignty? It is argued that one of the key element of western State sovereignty notion is its dependence on recognition by others sovereigns. On the other hand, indigenous intellectual sovereignty presupposes that indigenous sovereignty existed even prior to conception of modern nation state system. It therefore inherent and ancient. The main purpose behind the concept indigenous intellectual sovereignty, as put forward by Amanda Cobb, is that:

> [t]he term is intended to empower Native Scholars- to make us [indigenous scholar] consider the possibility that we spend too much time "writing back" to colonizer rather than "writing forward", charting our own course and not looking from outside approval.[44]

On the other hand, Professor Dianne Otto, anticipating the need of indigenous sovereignty advances the idea that in the absence of a notion of indigenous sovereignty it will be difficult to attain recognition of post-colonial indigenous identity.[45] She also believes that indigenous sovereignty would pave the way towards achievement of international personality under international law, which accorded to her is still State centric. And finally she observes that indigenous sovereignty would strengthen indigenous dominium over their traditional land.[46]Drawing from Mick Dodson, she explains that indigenous sovereignty means:

> the power of indigenous communities to imagine themselves, to be creators of themselves as subjects rather than objects of law and history. It enables the reconceptualization of Aboriginal identities as bearers of rights, obligations and unique nationhood, as agents of their own destiny.[47]

Scholars like Larissa Behrendt tries to clear doubts that indigenous sovereignty necessarily should not be seen as anti-State to the extent of complete annihilation of the concept of State. However, she claims that indigenous sovereignty does questions the legitimacy of its authority and blames the State for continued exclusion of indigenous

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[44] Amanda J. Cobb, *Understanding Tribal Sovereignty: Definitions, Conceptualizations and Interpretations*, 46 Am. Studies 115, 128 (Fall-Winter 2005); See also, Robert Allen Warrior, *Intellectual Sovereignty and the Struggle for An American Indian Future*, 8 Wicazo Sa Rev. 1, (1992).

[45] Dianne Otto, *A Question of Law and Politics? Indigenous Claims to Sovereignty in Australia*, 21 Syracuse J. Int'l L. & Com. 65, 74 (1995).

[46] *Ibid*.

[47] *Ibid.*

peoples. Indigenous sovereignty seeks for multifarious efforts which will be responsible for changing the relationship dynamics of indigenous peoples vis-a vis state.[48] Behrendt intends to characterise all the initiatives as self-determination which shall include the "right of self-government and self-management; land and compensation for dispossession; protection of cultural heritage; recognition of customary law; protection of international human rights law and freedom from discrimination."[49]

In nutshell, the notion of 'indigenous sovereignty' is considered by some scholar as critical to recognition of definite and independent indigenous identity and rights. Further, there are certain scholars who regard the entire notion of sovereignty as alien to indigenous discourse and even consider that language of indigenous sovereignty represents the "culmination of white's society effort to assimilate indigenous peoples". However, the refutation of indigenous sovereignty by these scholars in their construct has not led to denial of advocacy for separate power and autonomy to indigenous peoples which paradoxically seems to be the aim of indigenous sovereignty discourse. Thus, it will not be not be unsound to expound that indigenous sovereignty seeks to establish right of self-determination for indigenous peoples.

4.2.3. Self-Determination

Any analysis of self-determination is suitable for easy expression in words which has a universal outreach, theoretically. "Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as rights of all peoples to self-determination".[50] However complications runs immediately at the time of its implementation. The concept becomes eventually complex enclosed with reservations and caveat.[51]

At present time, right to self-determination is considered as one of the most dynamic issue in international law. Highlighting its gravity, Russell Barsh, opined that "all other

[48] LARISSA BEHRENDT, ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA'S FUTURE, 103 (2003)
[49] *Ibid* at 88.
[50] HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION 27 (1990)
[51] Rupert Emerson, *Self-Determination*, 65 Am. J. Int'l L. 459, 459 (1971)

human rights are considered to flow from this one [self-determination]".[52] In spite of coveted emotions attached, the idea of self-determination remained a Pandora box for many states, and rulers and jurisprudential enigma for theorists and thinkers.

Likewise, the apparent queries related with right to self-determination are ordinarily simple and direct. The questions are not so complex but their ambivalent answers are enigmatic. The set of questions which fall under the above mentioned category are: First, what does self-determination mean? Second, what is the status of right to self-determination in international law? Third, Does indigenous peoples, prior to the *United Nations Declaration on Rights of Indigenous Peoples* (UNDRIP), had the right to self-determination and what is the position post UNDRIP? Does indigenous people's right to self-determination includes right to secession? An attempt is made to get down to the nitty-gritty of issues related with indigenous peoples right to self-determination.

4.2.3.1. Defining Self-Determination

Defining self-determination was never easy neither in past and not even in modern times.[53] Within the self-determination conjecture, diverse propositions and conceptualization of the term exist in the domain of academic discourse.

According to Wehmeyer , self-determination refers to "volitional actions that enable one to act as the primary causal agent in one's life and to maintain or improve one's quality of life".[54] He further explains that the conscious choice of action defining self-determination has essentially four characteristics: (a) the action was autonomous; (b) the conduct was self-regulated; (c) the action was performed, as result of some event, in a psychologically empowered manner (d) the decision maker acted in self-realising manner.[55] Thus, Wehmeyer expository definition of self-determination explains that

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[52] Russell Barsh, *Indigenous Peoples and the Rights to Self-Determination in International Law*, IN INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 68,69 (Barbara Hocking ed., 1988).

[53] Lloyd Cutler argues that "[s]elf-determination is one of those unexceptional goal that can neither be defined nor opposed", See, Llyod Cutler, *Foreword,* IN MORTON H. HALPERIN & DAVID J. SCHEFFER, SELF-DETERMINATION IN THE NEW WORLD ORDER (1992).

[54] Michael L. Wehmeyer, *Self-Determination and Individuals with severe disabilities: Re-examining meanings and Misinterpretation*, 30 Res. Pract. Persons Severe Disabl. 113, 117 (2006).

[55] MICHAEL L. WEHMEYER, PROMOTING SELF-DETERMINATION IN STUDENTS WITH DEVELOPMENTAL DISABILITIES 6 (2007).

the process of self-determination involves a free choice making in situation of a problem to achieve certain goal by any person.

Lung-Chen gives special importance to the principle of self-determination with regard to human's quest and desire for dignity and human rights. For Lung-Chen, the central idea of human dignity is the unrelenting desire of individuals to establish groups that can best aid increase his search of "values of both in individual and aggregate terms".[56]

Phillip Alott, argues that 'self-determination' is an intricate and compounded social phenomena and a "contest— between constituted and un or semi-constituted power and among ideas which operate to structure desires, cultural identities, and notion of good life".[57]

The historical instances of principle of self-determination, as it is understood in modern times, within the international political discourse have its roots in American and French Revolution. However it was Wilson concept of self-determination which gained much weight in international law and politics. [58]For the first time, Wilson in his prelude to Four Points address (February 1918) publically uttered the phrase 'self-determination'. For him self-determination was much more than "a mere phrase" as he argued that principle of self-determination was "an imperative principle of action, which statesman will henceforth ignore at their peril". His manifestation of self-determination can be made out from his articulation that "National aspirations must be respected; peoples now may be dominated and governed by their own consent". [59] Thus notion of self-determination included the idea of self-government of 'peoples'.

For V. I. Lenin, the term meant the break-up of colonial dominion that was a critical point in the advancement he envisioned toward world revolution. Lenin defined the

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[56] Lung-Chu Chen, Self-determination as Human Right, IN TOWARDS WORLD ORDER AND HUMAN DIGNITY 242 (M. Reismann and B. Weston eds, 1976).
[57] Phillip Allott, *Self-Determination-Absolute Right or Social Poetry,* IN MODERN LAW OF SELF-DETERMINATION 177-178 (Christian Tomuschat ed., 1993).
[58] "Nearly forty years ago a Professor of Political Science who was also President of the United States, President Wilson, enunciated a doctrine which was. . . widely accepted as a sensible proposition, the doctrine of self-determination." JENNINGS, THE APPROACH TO SELF-GOVERNMENT 55-56 (1956) *cited in* M.K. Nawaz, *The Meaning and Range of the Principle of Self-Determination*, 1965 Duke L. J. 82, 83 (1965);
[59] *Cited in* YVES BEIGHBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 80 (1994).

principle of national self-determination as the right of peoples to secede from tyrannical regimes, was an important tool for undermining the capitalist-imperialist world order.[60]

4.2.3.2. Self-Determination and UN

The bedrock for evolution of legal right to self-determination was the UN Charter. Article 1 (2) of the UN Charter provides the concept of self-determination while enunciating one of the purpose of the UN is to "develop friendly relations among nations based on respect for the equal rights and self-determination". [61]Article 55 lays down that the UN shall promote various goals in order "to the creation of condition of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

Hurst Hannum, observes that the self-determination under the UN Charter was "proclaimed in manner that did not necessarily require the dismemberment of colonial empires" otherwise colonial powers like Britain and France would not have extended their support to the Charter. Simultaneously he also contends that the word "peoples" had larger implication than mere an expression of sovereign equality of states.[62]

In 1960, an important progress in right to self-determination can be seen with the adoption of General Assembly Resolution 1514 (XV) of 14 December 1960 entitled "Declaration on Granting of Independence to Colonial Countries". It provides that "all peoples have right to self-determination" and by virtue of this rights peoples can freely "determine their political status and freely pursue their economic, social and cultural development".[63]

The year 1966 was significant as it witnessed landmark development in the form of legally binding instruments upholding right to self-determination. The common article

[60] EREZ MANELA, THE WILSONIAN MOMENT: SELF-DETERMINATION AND THE INTERNATIONAL ORIGINS OF ANTICOLONIAL NATIONALISM 37 (2007).

[61] Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 Int'l L. Com. Quart. 537,539 (1998).

[62] Hurst Hannum, The Right of Self-Determination in 21st Century, 55 Wash. & Lee L. Rev. 773, 775 (1998).

[63] See, *Declaration on the Granting of Independence to Colonial Countries and Peoples,* G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16 at 66-67, U.N. Doc. A/4684 (1960).

1 of the *International Covenants on Civil and Political Rights* (ICCPR) *and International Covenant on Economic, Social and Cultural Rights* (ICSCER) provides:

> All 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.[64]

Husrt Hannum, makes an important observation and rightly so that "United Nations continued to refer rhetorically to the right of all peoples to self-determination, when what it really meant was the right of colonial territories to independence".[65]

The reason for such an observation is that even after several decades when the ICCPR and ICESCR came into force, there was no consensus as to what constitutes "peoples" under international law? In the words of Jennings ". . . this is one of the biggest controversies surrounding the principle of self-determination".[66]

4.2.3.3. Meaning of the term 'Peoples'

The term 'peoples' as used in international legal documents in connection with self-determination stipulates the collective or group perspective within which the rule functions: the composition and operationalization of political order. The term can also be understood as a declaration of the value of community linkages within and among groups.[67] In its comprehensive, meaning the term 'peoples' may enclose ethnic groups such as Basque, Catlans, Romani as well as groups demarcated by statehood boundaries such as Spanish, Nigerian and the Mexicans. The Characterisation of self-determination as a right of 'peoples,' should not be construed in a manner which refuses individual as a prime beneficiary of the rule. Antonio Cassese points out the close relation between individual and peoples self-determination, as he observes that:

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[64] See, Burak Cop and Dogan Eymirglu Bagazici, *The Right to Self- Determination in International Law Towards the 40th Anniversary of the Adoption of ICCPR and ICESCR*, available at http://sam.gov.tr/wp-content/uploads/2012/02/BurakCopAndDoganEymirlioglu.pdf

[65] Hurst Hannum, *supra note* 63 at 775.

[66] JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF POLITICS OF TERRITRIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL 'NATIONAL' IDENTITY 32 (2000) *cited in* Burak Cop and Dogan Eymirglu Bagazici *supra note* 65 at 121.

[67] S. James Anaya, *A Contemporary Definition of International Norm of Self-Determination*, 3 Transnat'l L. & Contemp. Probs. 131, 137 (1993).

> Plainly self-determination is the *summa* or synthesis of individual human rights because a people really enjoys self-determination only when the rights and freedoms of all individual making up that people are fully respected. On a different level, the enjoyment of individual rights presupposes the realization of (external) self-determination because if a people is oppressed by a colonial or occupant Power, individual cannot really be free to exercise their basic rights and freedom.[68]

The right to self-determination thus involves sharing of values –power, well-being, enlightenment, respect, wealth, skill, rectitude and affection. And, people's self-determination cannot be seen in disunion with individual self-determination though they may have different implication but exhibit common manifestation i.e. human dignity.

Various scholars have construed the use of the term 'peoples' in this import as limiting the scope of self-determination is deemed only concerned with 'peoples' in the sense of a restricted nature of locally defined, mutually exclusive communities. Within this scheme of understanding, categorising the subdivisions of humanity that qualify as 'peoples' is of threshold value since only such 'peoples' are entitled to self-determination. Anaya, identifies two dominant variants of this approach and diagnoses each of them with certain limitation.

One alternative, which normally authorizes the status quo, argue that a 'people' eligible for self-determination is the entire of a population inside the commonly recognized borders of an independent State or a territory of a traditional colonial type. The premise that self-determination is related with the *people* of a State or colonial territory is not at odd with the interpretation of self-determination thus far suggested here, and it elucidates much of international practice including decolonization. The point at issue, argues Anaya, is in the inherent position that *only* such section of human population-the *whole* of the people of a State or colonial territory-are entitled to self-determination. Moreover, such an understanding of self-determination may completely delegitimise

[68] ANTONIO CASSESSE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 337 (1995).

the efforts of several State-groups that correspond to problems created in a post-colonial world.[69]

The other view has its source in the ethno-nationalist thoughts at the early Twentieth Century, observes Anaya, and is mirrored in scholarly works pushing for self-determination of mutually exclusive communities based on ethnicity and historical linkages with territory.[70] This thought has its own limitation as it overemphasises ethnicity and is not capable to explain the decolonization which was not based on ethnic solidarity.

Though the second view has its limitation but it lays down the foundation for right to self-determination to indigenous communities which were, until recently, not considered as 'peoples' in international law and yet there is obscurity, whether indigenous peoples have all the right accorded to 'peoples' or more specifically whether they have a right to external self-determination in international law?

4.2.3.4. Indigenous Communities as 'Peoples' in International Law

The narrative of indigenous population turning into indigenous peoples is reflection of their struggle from being object to subject of international law.[71]Asserting themselves as 'peoples' under the UN Charter, indigenous peoples have had been grappling for the emphatic recognition of their unmitigated right to self-determination.[72]Most of the United Nation members were reluctant to explicitly include indigenous peoples within the understanding of 'peoples' under UN documents. This approach is pronounced by the terminology attached with term indigenous. The *Convention on the Rights of Child*, [73] refers to the children of "persons of indigenous origin". One of the most important piece of work to the explanation of the concept of indigenous peoples is found in the extensive study done by the UN Special Rapporteur J. Martinez Cobo. His report was

[69] *S.* James Anaya, *supra note* 67 at 139.

[70] See, W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 30-31 (1977) cited in S. James Anaya, *supra note* 67 at 139.

[71] Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From the Object to Subject of International Law?*, 7 Harv. Hum. Rts. J. 33, 35 (1994); *See also,* Russel Lawrence Barsh, *Indigenous Peoples and the UN Commission on Human Rights: A Case of Immovable Object and the Irresistible Force*, 18 Hum. Rts. Q. 782 (1996).

[72] *Ibid.*

[73] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, See, Article 29(1)(d) , Article 30

entitled as "Study of the problem of Discrimination against indigenous population". [74]The word population appeared in the title of the WGIP until it was eventually replaced by the Expert Mechanism on the Rights of Indigenous Peoples in 2007. There have also been attempt to restrict indigenous peoples to 'people' and devoid them with the last 's'.[75]As a result the UN proclaimed 1993 as the "International Year of the World Indigenous People" (not 'peoples').[76]

In the year 1992 the Earth Summit, frequently used the term 'indigenous people and their communities'[77]. The World Conference on Human Rights,[78] the UN Conference on Population and Development[79] and the World Summit for Social Development preferred to settle with 'people'.[80]The year 1993 was celebrated as International Year of the World's Indigenous People which was followed by International Decade dedicated to them in the capacity of 'people'. This recurrent of the term 'people' instead of 'peoples' suggests that the international community was still reluctant to accord indigenous population as a group entitled to have right to self-determination. This sentiment is well exhibited by the statement of Chief Ted Moses on behalf of North American Region:

> They have called us populations, 'communities' 'groups', 'societies', 'persons', 'ethnic minorities'; now they have decided to call us 'people' in the singular. In short, they will use any name they can think of, as long as it

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[74] The Special Rapporteur on Indigenous Peoples José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/ and Add. 1 to 4.

[75] Canada in the negotiations on the International Year dedicated to indigenous peoples fostered the term 'people', See, D. Marantz, *Issues Affecting the Rights of Indigenous People in International Fora,* IN PEOPLE OR PEOPLES; EQUALITY, AUTONOMY AND SELF-DETERMINATION : THE ISSUES AT STAKE OF THE INTERNATIONAL DECADE OF THE WORLD'S INDIGENOUS PEOPLES 30-31 (International Centre for Human Rights and Democratic Development, 1996) cited in PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 40 (2002)

[76] United Nations General Assembly Res. 45/75, *International Year of the World's Indigenous People, 1993,*A/RES/47/75 (24 March 1993) available at http://www.un.org/ga/search/view_doc.asp?symbol= A/RES/47/75&Lang=E&Area=RESOLUTION [Accessed on 1 January 2015].

[77] See, Chapter 26 of the Agenda 21 is designated as: Recognizing and Strengthening the Role Indigenous People and their Communities available at http://www.un-documents.net/a21-26.htm [Accessed on 1 January 2015]

[78] UN World Conference on Human Rights, *the Vienna Declaration and Programme of Action* , U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993) available at http://www1.umn.edu/humanrts/instree/l1viedec.html [Accessed on 2 January 2015]

[79] *Report of the International Conference on Population and Development* (Cairo 5-13 September 1994), UN Doc. A/CONF. 171/13 and Add.1 available at http://www.un.org/popin/icpd/conference/offeng/addproga.html [Accessed on 2 January 2015] cited in PATRIK THORNBERRY, *supra note* 75 at 41.

[80] *Report of the World Summit for Social Development* (Copenhagen, 6 -12 March 1995), UN Doc. A/CONF. 166/9, para.26, commitment 4 and 6 cited in PATRIK THORNBERRY, *supra note* 75 at 41.

> is not peoples with an 's'. They are willing to turn universality on its head to avoid recognising our right to self-determination.[81]

The struggle to establish indigenous communities as 'peoples' within the normative structure of international law resulted into partial victory with the adoption of ILO Convention 169.[82]Although the term 'peoples' was adopted but subject to a qualification atomised in Art 1(3) which states that:

> The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.[83]

This qualification was not appreciated by several indigenous scholars and activists as they stressed upon the recognition of indigenous peoples as "peoples" in international law without any discrimination. [84]This claim could be substantiated by reading text, of the ILO Convention No. 169, itself. Article 3 mentions that the indigenous peoples shall "enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination". Further, interpreting the provision in the backdrop of intentions manifested in the Preambular paragraph 3 and 5 :

> Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on Civil and Political Rights, and many international instruments on the prevention of discrimination. . . Recognising the aspiration of these peoples to exercise the control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live. . .

Moreover, what was directly denied by the ILO Convention 169 was that the indigenous peoples covered by the Convention shall not explicitly have the right to self-determination on the ground that the right forum to resolve the question of self-

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[81] Ambassador Ted Mosses, Statement on Behalf of the Indigenous Peoples of the North America Region to the Word Conference on Human Rights, Vienna, June 14-25, 1993 available at http://www.gcc.ca/archive/article.php?id=69 cited in PATRIK THORNBERRY, *supra note* 75 at 41-42.
[82] R. L Barsh, *supra note* 71 at 44.
[83] The ILO Convention No. 169, Article 1(3).
[84] Chairperson-Rapporteur Mr. Jose Urrutia, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995*, 52nd Sess., Agenda Item 3 of the Provision Agenda, E/CN.41996/84 para 46.

determination is the UN. Thus by no means it refers that indigenous peoples are less "peoples". [85]

4.2.3.5. Is Remedial Secession Possible in International Law?

Karen Knop, quotes Michel Virally:

> Un droit imprécis, voire marqué par la contradiction, est aussi un droit éminemment évolutif
>
> A law that is imprecise, or even marked by contradiction, is also a law that is eminently evolutive [Translation, Karen Knop][86]

Knop observes that Virally, relates to the idea that an international norm undergoes mutation to be potentially capable to meet the demands of international community in transition from a coterie of European states to more equal and widespread society. He further argues that the Virally analysis has raised and important question, often overlooked, in reference to right to secede that, "how imprecise the law of self-determination is –and to the implication for diversity".[87]To unfold the above mention quest it is necessary to understand the point of debate under international law over the right to secession and assess the self-determination and territorial integrity dichotomy. The whole inquiry shall be done in the frame of reference to indigenous peoples chance of having right to secede.

There are several reasons stated by States for which demand of statehood by indigenous peoples is either illegitimate or forbidden under international law. Catherine J. Iorns,

[85] International Labour Office, *Comments on the Draft United Nations Declaration on the Rights of Indigenous Peoples* of 6 February 1995, at para 14-15; Ronald observes that "in effect, the ILO, in the interest of realizing a convention that would meet the immediate needs of indigenous peoples, postponed the debate on indigenous self-determination by handing it over to its parent body, the United Nations.", See, RONALD NIEZEN, THE ORIGIN OF INDIGENISM : HUMAN RIGHTS AND POLITCS OF IDENTITY 162 cited in Athnasios Yupsanis, *The International Labour Organization and its Contribution to the Protection of the Rights of Indigenous Peoples* IN THE CANADIAN YEAR BOOK OF INTERNATIONAL LAW 138 (John H. Currie, Ren Provost eds., Vol. 49, 2011); However, Rodriguez-Pinaero observes that "sensitive issues such as compromise over the term 'peoples' . . . were negotiated in private, in closed-door sessions from which indigenous representatives were barred", See, RODRIGUEZ , INDIGENOUS PEOPLES , POSTCOLONIALISM , AND INTERNATIONAL LAW: THE ILO REGIME (1919-1989) 317 (2005)

[86] M. Virally, *Panorama du droit international contemporain* , 183 Hague Recueil 9, 175 (1983-V) cited in KREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (2004).

[87] *Ibid.*

posits all these reason into two broad category. [88] First category corresponds to the reasoning that indigenous peoples does not fulfil the criterion of statehood. [89]However, there are scholars who believe that indigenous nation possess the essential qualities to qualify them as States in international law.[90]There are even instance where it was recognised that indigenous peoples possessed all criterion of statehood and their nation was subjugated by the foreign occupants. In *R v. Calder* (1973), the statement of Mr. Justice Judson exemplifies the point, he said: "when the settler came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. This what Indian title mean".[91] The reason that State still deny the rights of indigenous peoples to secede in international law falls under the second category of objection to secession.

The second category of objection is composed of reasons, argues Iorns, which relates to the possible aftermath of right to session as put forward as a matter of policy. The first reason in this category is associated with the idea that a general right to secession may prove counterproductive to the stability of international order. The statement is exemplified by the remarks of Peter Radan, "the contemporary international law environment is less threatened by conflicts between states than by breakdown of order within states".[92]

The second reason corresponds to policy issue which proclaims that secession violates the basic principles of international law. The two principles which is often considered to be inconsistent with any general right of secession are: (a) the principle of territorial integrity and (b) the doctrine of *uti possidetis*

[88] Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 Case W. Res. J. Int'l L. 199, 317 (1992).
[89] The most quoted and cited formulae for statehood is laid down in the Convention on the Rights and Duties of States (Montevideo Convention) , a) a permanent population; b) a defined territory; c) a government ; d) the capacity to enter into relations with other states, See, Convention on the Rights and Duties of States (Montevideo Convention), 26 December 1933, 165 L.N.T.S. 19, 28 Am. J. Int'l L. (Supp.) 75 (1934); For further details on Montevideo Convention, See, Thomas D. Grant, *The Montevideo Convention and its Discontents,* 37 Colum. J. Transnat'l L. 403 (1998-1999).
[90] John Howard Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native American under International Law*, 27 Buff. L. Rev. 669, 673-679 (1978) cited in Federico Lenzerini, *International Law and Parallel Sovereignty of Indigenous Peoples*, 42 Texas Int'l L. J. 155, 158 (2006)
[91] Calder v Attorney-General of British Columbia (1973) 34 DLR(3d)145, 156 (SCC).
[92] Petern Radan was commenting on the observation of Allen Buchnan that " Future historians may call our era "the age of secession". It may become "the age of war of secession"", See, Allen Buchnan, *Self-Determination, Secession, and the Rule of Law,* IN THE MORALITY OF NATIONALISM 301 (Robert McKim & jeff McMahan eds., 1997); See, Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Badinter Arbitration Commission*, 24 Melb. Univ. L. Rev. 50 (2000) available at http://www5.austlii.edu.au/au/journals/MelbULawRw/2000/3.html [Accessed on 5 Januray 2015]

The principle of territorial integrity is celebrated as one of the cardinal principle which defines post-Second World War international legal order and has source in the UN Charter.[93]This principle in the 'age of secession' stands between the entities aspirations to acquire statehood under international law.[94]The principle of territorial integrity was enshrined in the Covenant of the League of Nation[95] and echoed in the UN Charter. Article 2 of the UN Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State".[96]The *Declaration on Friendly Relations, 1970* mirrors the principle of territorial integrity which runs as a streak in the entire text. However, the principle is used in two context, firstly as a principle of conduct between States in their international relation and in this sense the Declaration provides that:

> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.[97]

Second, as a limitation on the scope of self-determination. The applicable provision provides that:

> Nothing in the foregoing paragraph [referring to the right of self-determination] shall be construed as authorising or encouraging any action which dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.[98]

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[93] Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 Geo. Wash. Int'l L. Rev. 697, 707 (2012).

[94] James R. Crawford, *The Criteria for Statehood in International Law,* Br. Y . B. Int'l L. 93, 168 (1976)

[95] The Article 10 of the Covenant of League of Nations, 1919 provided that :
The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall fulfilled.
See, Covenant of the League of Nations, 1919 , Article 10.

[96] The UN Charter, Article 2, para. 4.

[97] Declaration on Principles of International Law Concerning Friendly Relations & Co-Operation Among States in Accordance with the Charter of the United Nations, G. A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, UN Doc . A /208 (1970) available at http://www.un-documents.net/a25r2625.htm [Accessed on 5 January 2015]

[98] *Ibid*. cited in Jude Vidmar *supra note 93* at 708.

Many of the international organisation lays emphasis on the inviolability of the principle in their founding Charters including, in the Arab League (1945), the Organisation of Arab States (1948), the Organisation of African Union Charter (1963), the African Union (2000), and the Helsinki Final Act (1975).[99]

However, Ara Papian argues that the international instruments prohibits use of force against territorial integrity but what it does not provide is an absolute principle of territorial integrity in international law. [100]He cites States practices that shows that the territorial integrity principles is not an absolute principle as he mentions that the "independence of Bangladesh from Pakistan, Singapore from Malaysia and Bleize (despite the claims of Gautemala)". [101]

The principle of *uti possidetis juris* has its roots in Roman law and the doctrine got internationalised in the context of decolonization. In Roman law, the principle was identified with an interdict of the *Praetor* which prohibited any change in the prevailing state of possession of immovables as between two competing parties. Thereby it was implied that the adversary could not interfere and the possessor had the right to enjoyment due to his possession.[102] As such the *Praetor* held:

> *uti nunc eas aedas, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possideatis, vim fieri veto*.[103]

This expression is commonly referred as '*uti possidetis, ita possideatis*' or 'as you possess, so may you possess'. The crux of the norm in Roman law was that it stayed away from deciding the concluding title of the property but, rather, placed the burden of proof on the party which was not in possession to prove that he is the rightful owner.

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[99] Stuart Elden, Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders, 26 SAIS Rev. 11, 11-12 (2006).

[100] Ara Papian, *Papian: On the Principle of 'Self-Determination' and 'Territorial Integrity' in Public International Law, The Case of Nagorno-Karabagh*, available at http://armenianweekly.com/2010/06/23/papian-on-the-principles-of-%E2%80%98self-determination%E2%80%99-and-%E2%80%98territorial-integrity%E2%80%99-in-public-international-law-the-case-of-nagorno-karabagh/ [Accessed on 7 January 2015];RUDOLF BERNHARDT, URLRICH BEYERLIN, KARL DOEHRING & JOCHEN ABR. FROWEIN, RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES (VOL. 2) 389 (1987)

[101] Ara Papian , *supra note 100*

[102] J. B MOORE, COSTA RICA-PANAMA ARBITRATION: MEMORANDUM ON UTI POSSIDETIS, 5-8 (1913).

[103] Quoted in Ibid at 6: "[w]hichever party has possession of the house in question, without violence, clandestinely, or permission in respect of the adversary, the violent disturbance of his possession I prohibit".
cited in DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 297 (2002).

This signified an advantage for the possessor, who had a better chance, even if he was the aggressor and wrongfully acquired the possession.[104]Thus the doctrine was to maintain status quo until the conclusiveness of matter was decided.

The doctrine of *uti possidetis* transcended the Roman law structure and was applied in the context of decolonization in case of Latin America which was altogether different context and system. As a principle consecrating the administrative contour of ex-colonies, its international application was first seen in South America in 1810 and later to Central America in 1821. The objective of the doctrine was chiefly centred on two subjects: firstly, and primarily, to put a check on any fresh lease to the European colonization based on the yet another colonial theorisation that some parts of the ex-colonial territories are still *terrae nullius* and therefore subject to *occupatio,* and secondly, to avoid any sort of boundary disputes between the newly emerged States.[105]Amercian Jurist Hyde expressing on the practical aspec of the doctrine observes:

> When the common sovereign power was withdrawn, it became indispensably necessary to agree on a principle of demarcation, since there was a universal desire to avoid resort to force, and the principle adopted was a colonial *uti possidetis*; that is the principle involving the preservation of the demarcations under the colonial regimes corresponding to each of the colonial entities that was constituted as a State.[106]

Basically, *uti possidetis* mirrored the idea of stable boundaries in spite of the fact that it was dealing with administrative boundaries. The maintenance of the colonial administrative frontiers after the shift of rule implied the conversion of these borderlines into international boundaries. As a consequence of State practice adhering to the rule, the *uti possidetis* was established as method of setting up of international boundaries. Even in those situations where it was difficult to determine the exact contours of administrative lines drawn by colonial powers, the doctrine was

[104] S. R. Ratner, *Drawing a Better line : Uti Possidetis and the Borders of New States*, 90 Am. J. Int'l L. 590, 593 (1996).
[105] Affaire des Frontières (Colombo v. Vénézuéliennes), Arbitral Award of the Swiss Federal Council of March 24, 1922, RIAA, Vol. 1, p. 227, at 228.
[106] C. C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED BY UNITED STATES: VOLUME 2 , 499 (1947) cited in M. Wesley, *Uti Possidetis: the Procrustean bed of international law*?, available at http://www.academia.edu/7789564/Uti_Possidetis_the_procrustean_bed_of_international_law [Accessed on 7 January 2015].

complemented in the practice of international tribunals with *uti possidetis de facto* (which was fundamentally relation with demonstration of authority or *effectivités*).[107]Due to its application in determining boundary disputes in Latin America, some scholar are of the belief that it is acquired the status of regional customary international law.[108]

The principle of *uti possidetis juris* was later brought in action in the perspective of the decolonization of Africa where it aimed at the perpetuity of boundaries and showed little or no interest on demarcation of boundaries. The main reason for such construction of the rule is that, argues David, the context of the African decolonization have marked difference with the Latin American experience.[109] Moreover, apart from any location left for the application of *terrae nullius* on the African continent at the time of decolonization, a more important factor was the fact that the African colonies were in great extent more diverse and ethnically heterogeneous than the Latin American colonies. In spite of it being significant characteristic it was hardly taken into consideration when imperial power delimited the colonial territories. It is easily noticeable that territorial division by imperial powers on the African continent has no scientific basis. Boundaries on the African continent were drawn in most cases with little or no consideration for elements such as ethnicity, geography, tribal and indigenous culture or economic convenience. Thus the nature of division was more artificial than elsewhere in the world.[110] The lines drawn to divide the Africa was both arbitrary and devoid of local sentiments thus to many it was an act of alien and unjustified. As Shaw observes "it was precisely because of the precariousness of colonial boundaries in their geographical, historical and ethnic context that the principle of *uti possidetis* operating as a guarantee of devolved boundaries fell upon such fertile ground".[111]

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[107] *Case concerning the Frontier Dispute (Burkina Faso v Mali),* Judgment of 22 December 1986, ICJ Rep. 554 at 586-587.

[108] S. R. Ratner, *supra note* 104 at 599; However for a contrary opinion that it was rule of convenient rather than part of regional customary law, see, SUZZANE N. LALONDE, DETERMINING THE BOUNDARIES IN A CONFLICTED WORLD : THE ROLE OF UTI POSSIDETIS 55-56 (2002).

[109] DAVID RAIČ, *supra note* 103 at 299; See also, DAVID BIRMINGHAM, THE DECOLONIZATION OF AFRICA :INTRODUCTION TO HISTORY 62 (2009).

[110] Separate Opinion Judge Ajibola, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 Feb. 1994, ICJ Rep. 6 at 52-53 cited in DAVID RAIČ, *supra note* 103 at 299.

[111] Malcom N. Shaw, *The Heritage of States: The Principles of Uti Possidetis Juris Today,*67 Brit. Y. B. Int'l 75, 102 (1996).

Several States claim the inviolability of these two international law principles as a counter to any claims of secession. It is this argument of 'basic principles' and its protection which deprives indigenous peoples from any quest of statehood. There is always a debate among scholars on the issue of legality of right to secession in international law. Majority response on such question is dismissive in nature, best exemplified by the statement of the then Secretary-General of the United Nations, Mr. U Thant, stated in 1970:

> As far as the question of secession of a particular section of a Member State is concerned, the United Nations attitude is unequivocable. As an international organisation, the United Nations has never accepted and does not accept and I do not believe it will ever accept a principle of secession of a part of a Member State.[112]

On the other hand there are scholarly writings which suggests that international law may not provide right to secession but it does not completely end the possibility of creation of new States. There exits' a possibility of secession only in exceptional case.[113]Catherine J Iorns, brings out four possible approaches under positivist framework of international law with respect to indigenous peoples vis-à-vis right to secession. The first one takes an interesting line of thought by arguing that any demand of separate statehood by indigenous peoples should be seen as a part of exercise of self-determination which is not limited to 'salt-water' colonialism. This line of thought gets its defence from noted scholar Professor Ian Brownlie when he expresses his views in respect of the Dene and Inuit peoples of the Canadian Northwest Territories. Brownlie puts forward following reasoning's:

> In the first place, as a matter of interpretation, the phrase "geographically separate" in Resolution 1541 (XV) may readily include areas such as N.W.T., or Lappland, which *are* in a real sense geographically distinct from other neighbouring areas. Such areas are distinct in character and are *separate.* It is to be remembered that the discussion is about geographically separate *peoples,* in opposition to scattered groups, lacking a *land* focus: for example, Ukranians or Jews within the Canadian population in general.

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[112] *Transcript of Press Conference of January 9, 1970, at Dakar, Senegal,* 7 U.N. Monthly Chron. 34, 36 (1970).

[113] Dietrich Murswiek, *The Issues of a Right of Secession –Reconsidered,* IN MODERN LAW AND SELF DETERMINATION 25 (Christian Tomuschat ed. 1993)

> Secondly, the application of the principle of self-determination in the practice of the organs of the United Nations has not been prevented by the claim by the colonial power that the territory concerned was a *part* of France, Portugal or Spain. The status of Algeria as a part of France made no difference to the general assessment of Algeria as a unit of self-determination.
>
> Thirdly, and most importantly, the wording of the key resolution, General Assembly Resolution 1514 of 1960 [the Declaration on Colonialism], the normative and legal source of self-determination in modem international law, by no means restricts the principle to overseas possessions. The Declaration . . . refers to "all *peoples"* , and the preambular part (second *considerandum)* also refers to "all peoples." Paragraph 5 of the Declaration refers to "Trust and Non-Self-Governing Territories *or all other territories which have not yet attained independence"*.[114]

The rationale for above argued approach is that those indigenous peoples who are in pursuit of separate statehood can be considered as being colonized under Brownlie's understanding, are eligible for self-determination under positive international law and do not require any separate claim in terms of a right of secession.

This proposition, however, does not help to completely resolve the issue of secession especially in the context of indigenous peoples. Firstly, because the States in which indigenous peoples live have well recognized international borders and separate indigenous statehood would not be perceived as indigenous people's independence but as an act of secession. This perception that it is a case of real secession runs against the acceptance of Brownlie's argument.[115]Secondly, due to integration, acculturation, assimilation or migration of indigenous population within their State of habitation they are no longer strictly separate territorial (at least in several cases) group. Therefore, they may not be fit into the Brownlie's notion of colonialism. Therefore, it is imperative to put light on the other approaches dealing with the issue of secession.[116]

The second approach relates to the understanding developed by undersized group of scholars hypothesizing an unlimited jus *secedendi* for all groups which are 'peoples'.[117]

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[114] Ian Brownlie, *Opinion on file with Catherine J Iorns* , 3 November 1977 cited in Catherine J. Iorns *supra note* 88 at 294-295.
[115] Catherine J. Iorns *supra note* 88 at 320.
[116] *Ibid.*
[117] Dietrich Murswiek *supra note* 113 at 24.

Such a notion has limited support both in terms of scholarly evidences and State practices. Scholars advocating for such a line of thought are of belief that "when the associational right of a group to determine its political existence conflicts with an existing State's right of non-interference, the right of secession is paramount".[118]Such an extreme view is neither accepted nor justified as international law cannot be suicidal bag for States.

The third approach refers to conceptual framework which recognise the fact that despite international law denial of positive right to secession it has not absolutely prohibited future recognition of limited right of secession. Beside that, any recognition of limited right of secession shall not be inconsistent with present day international law.[119]Prominent scholars supporting such approach includes Buchheit, Crawford, Nanda, Umozurike, Nawaz etc. Crawford does not rule out possibility of creation of new States through secession, thus for him secession is neither legal nor illegal but it does cast legal implications.[120]Assuming that secessionist movements may be on the rise in future, Buchheit assumes that standardization of 'norms for a legitimate secession would tend to neutralize the friction resulting from the States actions and separatists claims. With the intention to boost order and abridge disorder while dealing with secessionist claims Buchheit suggest to develop utilitarian arrangement "whereby the institution of the existing State will be respected, unless to do so would contribute to more international disharmony than would result from legitimating the separation of a component group".[121] A human right approach is developed by Nanda wherein he posits secessionist claims in a contextual, human right framework. He argues that:

> [t]he severe deprivation of human rights often leave no alternative to territorial separation. The world community must respond efficiently to the consequences of such separation. There is a growing recognition of the close link between human rights and international peace and security. It is not

[118] Unknown, *The Logic of Secession*, 89 Yale L. J. 802, 803 (1979-1980).
[119] Catherine J. Iorns *supra note* 88 at 321.
[120] James R. Crawford *supra note* 94, at 120; JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 247-270 (1979).
[121] LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 227 (1978) cited in LINDA S. BISHAI, FORGETTING OURSELVES: SECESSION AND THE (IM)POSSIBILITY OF TERRITORIAL IDENTITY 45 (2007).

> premature to accord recognition to the right to secession in an effort to promote these goals.[122]

Thus it will be safe to argue that third approach signifies that secession can be justified in certain situation and though secession cannot be a rule of international law but it can be an exception in international law.

The fourth approach is an extension of Nanda utilitarian approach towards any right to secession. It sets for the development of standards and grounds on which issues of secession can be adjudicated thereby ascertaining the legality of the claims. [123]After all the deliberation it can be deduced that indigenous peoples do not have a right to remedial secession but under extreme conditions indigenous peoples may seek some measures in this direction. Any such attempt of remedial secession shall always be treated as an exception in international law

4.2.3.6. Conditions for Remedial Secession: A Critical Analysis

At the outset it is clarified that this section neither aims to promote secession nor intends to set forth a partial/complete, conclusive or rigid set of criteria by which indigenous secessionist claims should be judged, because the legality and potency of the standards *requires* that they be the aftermath of an international consensus. However, based upon review of literature, it was found that the issue of remedial secession have some bearing on indigenous peoples. Therefore, it was felt that there is a need to critically analyse conditions under which indigenous peoples are forced to seek extreme measures.

Large Scale Violation of Basic Human Rights: It is difficult to visualise certain indigenous group demanding secession without some justification. That justification usually is that the State of inhabitation is discriminating against the indigenous population in some way. The maltreatment or discrimination may be political, economic, religious, or cultural. Professor Benyamin Neuberger aptly remarks that:

> The right of secession is seen as a variant of the right of self-defence— you defend yourself by seceding from an oppressive system . . . There can be compelling reasons for secession such as if the physical survival or the

[122] Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, available at http://tamilnation.co/selfdetermination/96nanda.htm [Accessed on 10 January 2015]
[123] Catherine J. Iorns *supra note* 88 at 322.

> cultural autonomy of a nation is threatened, or if a population would feel economically excluded and permanently deprived.[124]

The sense that argument lead to is understanding wherein right to self-determination includes secession if indigenous group's physical existence is threatened or there is intense discrimination of predatory nature. One should also consider the fact that demands of remedial secession may be warranted in acute and rare condition and only allowed as a last resort when all other political arrangements have been exhausted or denied.[125]

Deprivation of Political Autonomy in form of Self-Governance: In addition to the requirement of large scale human rights violation. The remedial claims should also be evaluated on the basis of indigenous people's chance of self-rule. A genuine demand to secede must demonstrate that the group's existence within the integrated State deprive them of the due degree of autonomy to which they are rightful claimant. Political pundits have argued that for the purpose of securing legitimate claim to secede, a sufficient degree of deprivation in political decision making process must be evidenced. In this sense indigenous peoples right to secede is "not a general entitlement for any particular type of collectivity but rather an extraordinary exception to the universal right to self-government"[126] argues Diane Orentlicher. She further observes that democratic entitlement of a group should be "conceived in terms that contemplate full realization *within* established states and not through withdrawal *from* them —except, that is, last-resort remedy".[127]

Buchanan sees self-governance as part of larger intrastate autonomy for indigenous people and lays down its justification. He provides four arguments— first, the formation of intrastate autonomy system for indigenous peoples may be prescribed for the purpose of securing rectificatory justice in the interest of reinstating the self-governance of which these peoples were deprived by colonization. Second, intrastate autonomy can ensure a non-paternalistic system for defending indigenous individuals from sufferings and abuses resulting in infringement of their individual human rights

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[124] BENYAMIN NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 71 (1986) cited in Hurst Hannum, *Rethinking Self-Determination*, 34 Va. J. Int'l L 1, 44 (1993-1994).

[125] Onyeonoro Kamanu, *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 J. Mod. Afr. Stud. 355, 359, 362 (1974).

[126] Diane Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant?,* IN SECESSION AND SELF-DETERMINATION 25 (Stephen Macedo & Allen Buchanan eds., 2003).

[127] *Ibid.*

and for offsetting the continuing damaging effects of historical injustice towards them. Third, it may be necessarily required to institutionalise the concept of self-government for indigenous peoples in order to realise resolution of land disputes aroused due to violation of treaty by the colonizers and their successors. Fourth, rectificatory justice can entail actions to safeguard indigenous peoples from the harmful effects of the discontinuation or non-recognition of the indigenous customary law that shaped and promoted their distinct culture and lifestyle. [128]

However, some scholars including Jeremy Waldron argues that re-establishment of some form of territorially based autonomy may be part of rectificatory justice but in reality it has tendency to defeat principles of distributive justice within the State and pulverize legitimate expectations of many innocent non-indigenous population. Waldron's intends to point that it is immoderate to extinguish rights of millions of people who were not responsible for destruction of indigenous society. As they may be unduly be made dependent on minority indigenous population. Hence any grievance redressal mechanism to rectify unfairness towards indigenous peoples must in some way consider the demands of distributive justice concerning the majority non-indigenous society co-existing with indigenous societies.[129]

Caution should also be maintained while overemphasising the value of self-governance aspect as doing so we get along with the possibility that an indigenous group may use self-governance as a justification for secession. The key point is that there should be an existential crisis—either washing out of their culture or life coupled with the denial of self-governance demand to avert the crisis.

Traditional Criteria of Statehood: The parameter for assessing the intrinsic worth of any indigenous secessionist claim ought to take in some of the traditional standards for recognizing a sustainable State.[130] The traditional standards for statehood not only have a distinct legality accepted under international law, but also have capacity to examine real worthiness of a secessionist conditions. For all practical purposes any real State must have certain determinable territory and population, and a government apt for maintaining operative control. Necessitating *actual* control over the territory may

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[128] ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 415 (2004).
[129] *Ibid.* at 417; Jeremy Waldron, *Superseding Historical Injustice*, 103 Ethics 4, 4-28 (1992).
[130] The Montevideo Convention lays down the following standards for the statehood: 1) a permanent population ; 2) a defined territory; 3) government and 4) capacity to enter into relations with other states , See, The Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 (1933), Article 1 (hereinafter, The Montevideo Convention).

countenance use of force and violence therefore as a pre-condition it should be de-emphasized. Preferably, the government should have democratic ethos[131] and non-discriminatory in nature, the admiration and support of the people both indigenous and non-indigenous, and be "in place" in the territory.[132]

4.2.4. Conclusion

Sovereignty exhibits temporal relativism in terms of its meaning and scope. What it used to symbolise and what it presently stands for depends upon the political subjects who have unfolded its ambit and continue to do so in defining relationships with one another; setting their political agendas; and their plans for attaining and sustaining autonomy and social justice. Thus to appreciate how sovereignty matters and for whom, historical and cultural context must be taken into account. In connection with indigenous peoples, traditional notion of sovereignty carries the atrocious traits of colonialism.[133] But it has met serious challenge and redefined by redefined by indigenous peoples. For them indigenous sovereignty is linked with identity and right to self-determination. Self-determination should be understood as power of peoples to control their own destiny. Therefore for indigenous peoples, right to self-determination is instrumental in the protection of their human rights and struggle for self-governance. However the indigenous peoples' right to self-determination inherently carries a gene of secessionist tendency which should be democratically neutralised to the maximum possible extent by ensuring international autonomy to indigenous communities and respecting their human rights.

[131] It would be difficult to conceptualize democratic indigenous government based on equality of votes in a territory which has both indigenous and non-indigenous societies. However, measures can be taken where a balance is maintained for example, that the head of the government may be from indigenous community while non-indigenous representatives may also be made part of the government. The point is that the indigenous government should not be oppressive in the same manner as they had suffered.
[132] Lawrence M. Frankel, *International Law of Secession: New Rules of a New Era*, 14 Hous. J. Int'l L. 521, 550 (1991-1992)
[133] Joanne Barker, *Supra note* 1 at 26.

4.3. Indigenous Peoples' Land Rights

4.3.1. Introduction

Probably no development in the modern era has been more discerning with far-reaching results than the European discovery of "Dark Continent"[134], "New World"[135] and "Australasia".[136] The discovery of the indigenous world forced Europeans to adapt methods to put their foot prints on the landfalls. For political and cultural imperial intentions, the intellectual framework they sooner or later proposed to define the specification of their affiliation to this "indigenous world" was legal. Throughout several centuries, Europeans formulated rules and principles designed to vindicate the dispossession and conquest of the native peoples of indigenous world. Among that set of rules and principles the most counterproductive were those regulating the ownership of land.[137] In the process of colonization, indigenous peoples lost most of their traditional lands — by conquest, waiver, or occupation of their lands as *terrae nullius.*[138] This had resulted into loss of their identity, social exclusion, and indigence. Consequently, indigenous peoples in all part of the were forced to live in unfavourable conditions leading to a vicious circle disadvantaged by almost every yardstick compared to the 'mainstream' society, including , education, housing, wages, standard of health, and life expectancy, and thus are often designated to as "Fourth World".[139] In addition to this distressed condition, the concerns and claims of indigenous peoples have for a long period been totally unheard with no reparation for their grievances both

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[134] The word was popularised by US journalist and explorer Henry Stanley in his book *Through the Dark Continent (1988)*. The intent of the author is not to belittle the African continent and its peoples but to demonstrate the underlying mindset in Euro-American discourses by using such metaphor. See generally, Lucy Jarosz, *Constructing the Dark Continent : Metaphor as Geographic Representation of Africa*, 74 Geogr. Ann. Ser. B 105, 105-115 (1992); On the discriminating mindset Nancy Stepan writes "A fundamental question about the history of racism in the first of the nineteenth century is why it was that, just as battle against slavery was being won by abolitionists, the war against racism was being lost. The Negro was legally freed by the Emancipation Act of 1833, but in the British mind he was still mentally, morally and physically a slave", see, NANCY STEPAN, THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN :1800-1960 1 (1982).

[135] It includes the continent of North America and South America. For historical and geographical analysis , see, J. H. PARRY, THE DISCOVERY OF SEA 209-233 (1981).

[136] It includes the area of Australia and New Zealand.

[137] LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LAND IX (2005)

[138] Rigoberta Menchύ, "*Doctrines of Dispossession"-Racism Against Indigenous Peoples* available at *http://www.un.org/WCAR/e-kit/indigenous.htm* [Accessed on 20 January 2015]

[139] The term was coined by George Manuel in GEORGE MANUEL & M. POSLUNS, THE FOURTH WORLD: AN INDIAN REALITY (1974).

at the national and international level. Instead, indigenous peoples were viewed as backward peoples who are deprived of minimum understanding to decide their own best interest therefore they were forcibly assimilated into mainstream society to lead a 'civilized' life.[140]

This began to change in the 1960s with the onset of decolonization and in the 1970s when indigenous groups all over the world began to organise themselves and marked their presence in international scene through conferences and protests.[141] The indigenous rights movement all over the world paved the way for internationalisation of indigenous issues and helped to initiate discourse on recognition and protection of indigenous culture and their claims. Because of the economic, cultural and identity issues of indigenous peoples was attached with the land, the actualization of the right to ownership and other incidental rights attached to their ancestral lands has been at the core of indigenous rights discourse.[142]

This Part of the Chapter attempts to underpin the claims of indigenous peoples to their land and natural resources. It is divided into four sections. First section critically examines the nature of relationship between indigenous peoples and their lands. Second section explains the methods adopted to divest indigenous peoples from their lands. Third section will engage in the comparative study of treatment of land rights in the settlers' countries (CANZUS group of countries). In doing so, Chapter will identify the content and scope of land rights of indigenous peoples in the present context with focus on the judicial treatment of land rights. Final section shall conclude the findings.

4.3.2. Relationship of Indigenous Peoples to their Land, Territories and Natural Resources

For indigenous peoples their relationship with their land is adoring and multidimensional. Their customary laws on the subject of land usage and ownership

[140] Katza Göcke , *Protection and Realization of Indigenous Peoples' Land Rights at the National and International level,* 5 Goettingen J. Int'l L. 87, 90 (2013).
[141] For detail account on the origin of indigenous movement at international level , See, Bice Maiguashca , *The Role of Ideas in a Changing World Order: The International Indigenous Movement*: 1975-1990 , CERLAC Occasional Paper (June 1994) available at http://www.yorku.ca/cerlac/documents/Maiguaschca.pdf [Accessed on 20 January 2015].
[142] JAMES JUPP (ed.), THE AUSTRALIAN PEOPLE:AN ENCYCLOPEDIA OF THE NATION, ITS PEOPLE AND THEIR ORIGIN 123 (2001).

have substantial political, economic and cultural significance.[143] The study of indigenous customs and patterns of land occupation is grounded on the supposition that 'indigenous peoples' are not a uniform entity but carry certain shared traits that seem to be present between indigenous groups all over the world, as mentioned previously, find expression in the relationship to land. Moreover, it is conceived that indigenous peoples' self-determination stems from the unique multifaceted relationship with ancestral land.

4.3.2.1. Political Dimension

"The right idea of self-determination", argues Sri. Aurobindo, makes it clear that "liberty should proceed by development of law of one's own being, determined from within, evolving out of oneself and not determined from outside".[144] In the twenty first century, this idea of determination by 'self' can be manifested in many forms[145] and one such dimension explained by the opinion of Franck regards self-determination as "the right of a people organised in an established territory to determine its collective political destiny . . . ".[146] The Right to self-determination comprehends the right to land is substantiated by the jurisprudence of Human Rights Committee (HRC) which put emphasis not only on rights to own and dispose land, territories and natural resources but also relates to " control of traditional lands and resources".[147] Erica A. Daes, argues for extension of permanent sovereignty over natural resources to indigenous peoples by which they can have legal and managerial control over natural resources, principally as an endeavour towards realisation of the right to self-determination.[148] Similarly, Aiofe Duffy argues that control over land and natural resources is a step towards the attainment of self-government.[149] Self-determination does not stand on its own but

[143] Erica-Irene A. Daes*, Final working paper prepared by the Special Rapporteur entitled* "Indigenous peoples and their relationship to land", . UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), para 20.
[144] AUROBINDO GHOSH, THE HUMAN CYCLE, THE IDEAL HUMINITY, WAR AND SELF-DETERMINATION 529 (1997).
[145] Hurst Hunnum, *The Right of Self-Determination in the Twenty-First Century* IN HUMAN RIGHTS IN THE WORLD COMMUNITIES: ISSUES AND ACTION 242 (Richard Pierre Claude & Burns H. Veston eds. ,2006).
[146] Thomas M. Franck, *The Emerging Right to Democratic Governance* , 86 Am. J. Int'l L. 46, 52 (1992).
[147]
[148] Erica-Irene A. Daes, *Indigenous Peoples Permanent Sovereignty over Natural Resources,* Lecture Delivered at the National Native Title Conference, Adelaide (3 June 2004) available at https://www.humanrights.gov.au/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources [Accessed on 21 January 2015].
[149] Aiofe Duffy, *Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution*, 15 Int'l J. on Minority & Group Rts. 505, 509 (2008).

draws its support from the implementation of wide range of international human right law that promote interlocution between indigenous people and states, especially on the issue of land rights. On the connection between self-determination and territorial rights it is fruitful to focus on "relational approach" which entails a right for indigenous peoples to go into territorial negotiations.[150] This may lead to customs and rules network with political and social structures aiding group continued existence.[151]

4.3.2.2. Economic Dimension

Indigenous peoples and their civilizations have played substantial role in conserving biological diversity and its related traditional knowledge. They are the inventors and guardians of millennial and vital farming and food production that remain worthwhile in the modern era. Their approach and skills towards management of natural resources necessitates productive sustainable ecosystems. A vast majority of the world's outstanding biodiversity is found within indigenous peoples' territories, explaining the vital linkage between the plethora of plant and animal species and the traditional resource management techniques of indigenous peoples. Article 1(2) of the International Covenant on Civil and Political Rights lays down that "[i]n no case may a people be deprived of its own means of subsistence".[152] Indigenous peoples' economic subsistence derives its nutrients from a respectful relationship with the land. This is further exemplified from the observation of the Inter-American Court of Human Rights (IACHR) in *Saramaka People v. Surinam*, the court observed:

> [E]vidence shows that the members of the Saramaka people have traditionally harvested , used, traded and sold, timber and non-timber forest products , and continue to do so until the present day. Thus in accordance with the above analysis regarding the extraction of natural resources that are necessary for the survival of the Saramaka people, and consequentially its members, the State should not have granted logging concession within territory until unless

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[150] JÉRÉMIE GILBERT, INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIM TO ACTORS 224 (2006).
[151] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 142 (2004).
[152] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (*hereinafter* ICCPR), Article 1(2).

> three safeguards of effective participation, benefit-sharing, and prior environmental and social impact were compiled with.[153]

However, apart from historical injustice, indigenous peoples undergo extreme suffering from the outcome of globalization and trade liberalization through the ecological imbalance, elimination of biological and cultural diversity, and conflict and violence that habitually go together with extensive development.[154] Import liberalization permits cheap, subsidized agricultural yields to enter indigenous markets, seriously undermining their ecological agricultural practices, occupations and food security.[155] Commercial cash-crop farming have replaced farming done chiefly for subsistence and indigenous markets. Increased deforestation and mining and oil development resulted in have led to destruction of several ecological units which happen to be the abode of indigenous groups all over the world, and from which they derive their livelihoods.[156] The destruction has also triggered displacement from their ancestral lands. This further results into mass dislocation of people who then drift to metropolises and often end up jobless and homeless. The existing intellectual property rights regime has enabled patenting of indigenous peoples' biogenetic resources. This has threatened the rights of indigenous peoples to access, control and utilize biological resources.

Thus recognition of indigenous land rights is part of economic self-determination necessary to protect their existence.

4.3.2.3. Spiritual and Cultural Dimension

Securing land rights is central to indigenous peoples' struggle for justice as land constitutes the cornerstone of their spiritual and cultural identity. Safeguarding indigenous peoples' interest in their ancestral land needs more than just recognition of occupancy; it needs an understanding of the special nature of indigenous peoples social, cultural and spiritual relationship with their ancestral lands and natural resources.[157]

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[153] Saramaka People v. Suriname., Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, par. 146. (28 November 2007) .

[154] Cathal Doyale and Gérémie Gilbert, *Indigenous Peoples and Globalisation: From "Development-Aggression" to "self-Determined Development"* , 7 Eur. Y. B. Minority Issu. 219, 220-221 (2008-2009).

[155] Harriet V. Kuhnlein and Olivier Receveur, *Dietary Change and Traditional Food Systems of Indigenous Peoples,* 16 Annu. Rev. Nutr. 417, 432 (1996).

[156] ASTRID ULLOA, THE ECOLOGICAL NATIVE: INDIGENOUS PEOPLES' MOVEMENTS AND ECO-GOVERNMENTALITY IN COLUMBIA 226 (2010).

[157] BRENDAN TOBIN, INDIGENOUS PEOPLES. CUSTOMARY LAW AND HUMAN RIGHTS—WTHY LIVING MATTERS 102 (2014).

Indigenous peoples consider "all products of human mind and heart as interrelated and as flowing from the same source: the relationship between the people and their land, their kinship with other living creatures that share the land, and with the spirit world".[158] On a similar note, Naomi Kipuri argues that "spirituality defines the relationship of indigenous peoples with the environment as custodian of land; it helps to construct social relationships, gives meaning, purpose and hope to life".[159]Reflecting the sheer need to recognise and respect this special relationship, Martínez Cobo in his study put forward that:

> for, indigenous peoples, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is . . . essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all other beliefs, customs, traditions and culture. [160]

The canons of spiritual and cultural linkages to land is well founded even in international human rights instruments. For instance, Article 13(1) of the ILO Convention No. 169 and Article 25 of the UNDRIP, encapsulates the essence of this special relationship. [161]Similarly *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* , the IACHR held that :

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[158] The UN Special Rapporteur on Protection of the Cultural and Intellectual Property of Indigenous Peoples Erica-Irene Daes, *Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples*, U.N. Doc. E/CN. 4/Sub. 2/1993/28 para. 21 (1993); Ahrén reflecting the sentiments of Saami People maintains that "The Saami have never people have never understood land as constituting a form of bartered goods. The value of land is not based on this concept. Rather, the value of land is based on the fact that the individual and his or her family and descendants could live off the land for generations", See, M. Ahrén, '*Indigenous Peoples' Culture, Customs, and Traditions and Customary Law—The Saami People's Perspective*, 21 Ariz. J. Int'l & Comp. L. 63, 65 (2004) cited in Aiofe Duffy, *supra note* 149 at 511.

[159] Naomi Kipuri, *Culture* , IN STATE OF THE WORLD'S INDIGENOUS PEOPLES 60 (2009) available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf [Accessed on 21 January 2015]

[160] The Special Rapporteur on Indigenous Peoples José MartínezCobo, *Final Report on the Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1983/21/Add.8 , paras. 196-197 (1983).

[161] Article 13(1) provides that " [t]he governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the land or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship", See, The ILO Convention No.169, Article 13(1); Article 25 of the UNDIRP recognizes the indigenous peoples right to conserve and strengthen " their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard".

> For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy . . . to preserve their cultural legacy and transmit it to future generations.[162]

Indigenous peoples' tussle for economic and political self-determination, besides safeguarding cultural identity, results in a conflict to defend traditional lands and territories. Thus the composite relationship between indigenous peoples and land needs to recognised and respected.

4.3.3. Loss of Indigenous Lands

Indigenous peoples have been victims of historical injustice in the form of coercive dispossession at the hands of the European colonizers. Any obstruction to settlers' access to land was an invitation to extermination. A good deal of logics, mostly rooted in protection and promotion of human rights, were advanced to cover the ghastly acts of violence towards indigenous peoples.[163] Patrick Wolfe an anthropologist rightly argues that whatever colonisers may pronounce— and they usually have great deal to utter—the main motive for extermination is not evangelism, ethnicity, grade of civilization, defence against human rights violations, etc., but access to territory. *Dominium* over land is settler colonialism's specific, "irreducible element".[164] In the process of colonization, indigenous peoples' loss of dominium over most of their ancestral lands was result of land acquisition by the colonial powers through permutation and combination of any of these modes— conquest, cession/purchase, and

[162] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 9, par. 149. (31 August 2001)

[163] The most 'holy' justifications forwarded by the early European naturalist's for waging 'just war' against indigenous peoples includes: (a) free trade and commerce; (b) protection and promotion of human rights; (c) self-defence and (d) 'mission civilization'. All these justifications were deeply embedded in the imperial agenda and values of the European colonisers. For details see, Chapter I of the work focusing on 'historical evolution of indigenous rights'; See also, ONDER BACKIRCIOGLU, SELF-DEFENCE IN INTERNATIONAL AND CRIMNIAL LAW: THE DOCTRINE OF IMMINENSE 122-130 (2013); M. Evans, *Moral Theory and the Idea of Just War*, IN JUST WAR THEORY: A REAPRAISAL 3-4 (M. Evans ed., 2005); R. A. WILLIAMS Jr. , THE AMERCIAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST 107 (1990); S J. Anaya, *The Evolution of the Concept of Indigenous Peoples and its Contemporary Dimensions*, IN PERSPECTIVES ON THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES IN AFRICA 27 (Solomon A. Dersso ed., 2010).

[164] Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. Genocide Res. 387, 388 (2006).

occupation. Additionally, some States in the name of land reform through legislative means choked all chances of native title over their ancestral land.[165]

To begin at first, when the European countries head off to leech new lands in the fifteenth through twentieth centuries. They justified their claims over these territories and over indigenous peoples with the Doctrine of Discovery (Discovery).[166] The doctrine holds as its fundamental principle that the European nation which stood first in 'discovering' new lands hitherto unknown to Europeans as a result of that secured the sole right to acquire those lands from the prior occupants (indigenous peoples).[167] This legal doctrine was constructed and sanction by religious and ethnocentric thinking of European and Christian hegemony over all other non-Christian world.[168]

In its 1823 decision in *Johnson v. M'Intosh,* the United States Supreme Court held that the Discovery was not merely a recognised legal principle of European and American colonial law but also provides the firm basis for the Indian law and policy in the America.[169] Further, the Supreme Court explained the doctrine and extended the absolute ultimate land rights to discovering European nation , subject only to the Indian

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[165] Katza Göcke, *supra note*, 7 at 91; JÉRÉMIE GILBERT, *supra note* 150 at 3-40.

[166] ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFST DESTINY 17-21 (2006); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325-328 (1990).

[167] Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. Va. L. Rev. 849, 850 (2008-2009); The origin of doctrine of discovery can be traced from the Papal Bull "Inter Caetera", issues by the Pope Alexander VI in the Year 1493, played key role in "the Spanish conquest of the New World", see, The Gilder Lehrman Institute of American History, *The Doctrine of Discovery*, *1493* available at https://www.gilderlehrman.org/history-by-era/imperial-rivalries/resources/doctrine-discovery-1493 [Accessed on 09.03.2015].

[168]The Bull of 1493 categorically stated that "any land not inhabited by Christians was eligible to be discovered, claimed and exploited by the Christian rulers", The Gilder Lehrman Institute of American History, *supra note* 167; As Henry Wheaton states that "According to the European Ideas of that age[15th and 16th centuries] the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors", See, HENTY WHEATON, ELEMENTS OF INTERNATIONAL LAW 305 (1863); "Even the Royal Charter of ", observes Peter L. Berger & Thomas Luckmann, "the discovery era used the term "Christendom" and "Christian," and not the term "Europe" or "European"", cited in Stevan T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 303, 308 (1992-1994). In the State v. Foreman, 16 Tenn. 256, 277 (1835) , Judge Carter holds that the doctrine discovery is part of "the law of Christendom" , particularly, "the discovery gave title to assume sovereignty over, and to govern the unconverted peoples of Africa, Asia, and North and South America." Cited in, Special Rapporteur Tonya Gonnella Frichner, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, Econ. & Soc. Council, U.N. Doc. E/C.19/2010/13, paras. 5-6 (2010).

[169] 21 U.S(8 Wheat.). 543, 547 (1823).

title of occupancy.[170] "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made against all other European governments, which title might be consummated by possession".[171] Consequently, the European discoverer secured real dominium over the discovered lands by simply walking on the beach and fixing a flag on the land. Furthermore, the discoverer also secured sovereign authority and control over the indigenous peoples and their governments, which soaked all the political and economic powers of native peoples and every attempt was made to ruin their culture.

As a conventional rule, the accession of title to land just by means of occupancy is only thinkable if the land had been uninhabited and owned by no one, this was referred as the doctrine of *terra nullius.*[172] However, the colonial powers discriminately extended the doctrine of terra nullius to regions inhabited by indigenous peoples as if they were *ferae naturae*. Indigenous peoples were categorised as "savages", not to be considered as humans—thus legally non-existent. Accordingly, indigenous peoples were completely deprived of the legal capacity to assert any right over their ancestral lands and territories. The best-known case were indigenous territories were subjugated through doctrine of *terra nullius* is Australia.[173] James Matra, who suggested introducing a colony there in 1783, pleaded that many of Australia's favourable factors includes that it was "peopled by only a few black inhabitants, who, in the rudest state of society, knew no other arts than such as were necessary to their mere animal existence"[174], and it was implicit that "[t]he right to the soil, and of all lands in the

[170] Ibid. at 592.
[171] Ibid. at 573, cited in Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho. L. Rev. 1, 5 (2005-2006); Angus Love , Susa & Agatha, in their collective work have argued that " The discovering nation did not claim exclusive right to ownership upon discovery. It was merely recognized as the sole authority able to acquire that property, contingent on Indian possession and use.", See, Angus Love, Susan Feathers & Agatha Koprowski, *The Supreme Court, Tribal Lands Claims, and the Doctrine of Discovery; Trampling on the Walking Purchase*, 65 Guild Prac. 104, 105-106 (2008).
[172] Katza Göcke, *supra note*, 7 at 91-92; Gérémie Gilbert traces the origin of the doctrine in Roman law and argues that *terra nullius* refers to "territory that is not subject to any sovereignty"; See, JÉRÉMIE GILBERT, NOMADIC PEOPLES AND HUMAN RIGHTS 95 (2014).
[173] Anthony Mason, *The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown*, 46 Int'l Comp. L. Quart. 812, 813-814 (1997).
[174] Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia,*23 Law & Hist. Rev. 95,104 (2005); Ged Martin, *The Founding of New South Wales,* IN ,THE ORIGIN OF AUSTRALIA'S CAPITAL CITES 43 (Pamela Statham ed., 1989)

Colony, became vested immediately upon its settlement, in His Majesty, in the right of his crown, and as representative of the British Nation".[175]

In comparison to Australia, the historical narratives of New Zealand does not clearly establishes the applicability of *terra nullius*.[176] In-deed the Europeans stepped in as traders, used tools for missioning and militarization— Christianity, money, force and law—to seize lands of Māori people.[177] Throughout the early phase of European influx, Māori sovereignty and modes of self-governance was not jeopardised by the European peoples landing.[178] On the contrary several aboriginal communities welcomed the Pakeha (foreigner) to nest in proximity on the grounds that "they were useful for their goods and skills and for enhancing the 'mana' of their patron chief".[179] The chief mode for acquisition of aboriginal peoples land in New Zealand was the bilingual treaty of cession. In the year 1840, about 500 Māori chiefs entered into treaty relationship with the Crown represented by Captain William Hobson. The treaty is referred as "te Tiriti o Waitangi/the Treaty of Waitangi".[180] It is a bilingual treaty comprised of three articles articulated in English and Māori.[181] However, there is a stark disagreement over the interpretation of first two articles. Pursuant to the English interpretation, Māori ceded their sovereignty to the Crown, unequivocally and without exception (Article 1) but secured guarantee from the Crown to have peaceful and exclusive right to undisturbed possession of their lands and estates, forest, fisheries and other properties (Article 2). In contrast, in the Māori version, Māori ceded to the crown governance only (Article 1), and retained tino rangatiratanga (sovereignty) over their taonga (treasures). According to the English version, Article 2 granted the Crown an exclusive right to

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[175] R v. Steel , New South Wales Supreme Court Case, 1 Legge 65, 6-69 (1834)cited in Katza Göcke, *supra note*, 140 at 92.
[176] ROBERT J. MILLER (et al.), DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN ENGLISH LAND 260 (2012).
[177] J. Belich, *The Governors and the Māori (1840-72),* IN, THE OXFORD ILLUSTRATED HISTORY OF NEW ZEALAND 80 (Keith Sinclair ed., 1996).
[178] Caren Wickliffe, *Te Timtanga: Māori Women's Access to Justice*, 8 Y.B.N.Z. Juris. Special Issue—Te Purenga 217,226 (2005) available at http://www.waikato.ac.nz/__data/assets/pdf_file/0003/32799/Yearbook-of-NZ-Jurisprudence-vol-8-issue-2-2005.pdf [Accessed on 11.03.2015]; R.Boast, *The Law and the Māori,*IN, A NEW ZEALAND LEGAL HISTORY135-137 (Spiller, Finn & Boast eds., 1995)
[179] C. Orange, *The Maori Peoples and British Crown (1769-1840),* IN Keith Sinclair, *supra note* 44 at 21,30 cited in Jacinta Ruru, *The Māori Encounter with Antoeara: New Zealand's Legal System*, IN, INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 114 (Benjamin J. Richardson, Shin Imai and Kent McNeil eds., 2009).
[180] The copy is available at http://archives.govt.nz/exhibitions/treaty [Accessed on 11.03.2015].
[181] The Comparative analysis between the two version is also available at http://www.nzhistory.net.nz/politics/treaty/read-the-Treaty/differences-between-the-texts [Accessed on 11.03.2015]

purchase property from Māori, on the contrary Māori interpretation suggest that they conceded the Crown first option to purchase their land and Article 3 granted Māori the same rights and privileges as British citizens living in New Zealand.[182] Within the span of merely twenty years the British Crown was able to acquire nearly sixty percent of the New Zealand mostly comprised of South Island and lower part of North Island having more than 10 percent of Māori peoples. Ravaged by the parallels between selling land and loss of sovereignty, the North Island indigenous peoples who still had hold on their land began turning against land sales. Importantly, the pan-tribal sentiment saw the emergence of Māori King Movement.[183] The Settlers introduced the tool of war to curb the indigenous uprising.[184]

Unlike the other settler colonies, the Aboriginal peoples or First Nations dwelling in the regions of present day Canada had developed vibrant, sophisticated cultures that had reflected-centuries long adaptation to place and circumstance. It has also been well documented that these peoples featured developed diplomatic system and exhibited, on rare occasion, warfare skill to protect their land and territories.[185] Seemingly for these reasons Europeans shrouded themselves in the identity of traders concentrated around and finally unleashed their colonial agenda. Thereafter, the allocation of land and territories remained bone of contention between First Nations and the European settlers having their own reasons for encounters—for indigenous peoples land was associated with their 'identity' and non-indigenous peoples looked for property. As J. Borrows observes that the European succeeded in their agenda though numerous ways which included "treaties, executive proclamations, scrip, unilateral legislation, reserve and royal commissions, segregation, assimilation, litigation, land claims processes, expropriation, and war".[186]

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[182] Jacinta Ruru, *supra note* 179 at 114.
[183]HILARY AND JOHN MITCHELL : A HISTORY OF MAORI OF NELSON AND MARLBOROUGH 408 (2007).
[184] For details, See generally, L.COX, KOTAHIATANGA: THE SEARCH FOR MAORI POLITICAL UNITY (1993).
[185] ANTONIA MILLS, EAGLE DOWN IS OUR LAW WISTUWIT'EN LAW, FIEST AND LAND CLAIMS (1994).
[186] John Borrows, *Crown and the Aboriginal Occupation of Land: A History and Comparison*, 14 (2005) available at https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/History_of_Occupations_Borrows.pdf [Accessed on 15.03.2015]; One groups of Native peoples—Iroquois , entered into series of treaties known as 'Covenant chain' with the Europeans . These friendship treaties necessitated peace and co-operation in trade. Through these treaties the Colonial governors became brother and King as 'father'—ally, protector, provider and arbitrator—but not 'sovereign', See,

Katza Göcke made an interesting observation regarding loss of indigenous territory in settler colonies is that the main culprit was not conquest, generally land was acquired through cession treaties and agreement.[187] Even if the settlers initially recognized indigenous people's right to their land, they obtained exclusive right to purchase.[188] The US government also followed the footstep of British Crown and purchased land from the natives once it had secured its independence and between 1789 and 1871, the US Congress ratified 229 treaties relating to cession of indigenous territory and land.[189] As mentioned above similar treaty agreements were executed in New Zealand.[190] However, the points which needs to pondered on regarding the legality of these treaty/agreement based acquisition are as follows: First, does the consent given by indigenous peoples can pass the test of 'consent' requirement in contractual obligation? or in other words whether the consent can be termed as 'free consent'?[191] Second, as a matter of principle for any contract parties must exhibit consensus at idem but most of the times indigenous people's perception of the terms of agreement was different from that of the colonizers. Third, many of the early land purchase agreement were done between the individual native and a European. How is it possible for an individual native to deal in land purchase which was a community property? [192]

Regardless of the uneven strength of the parties and the governments' recourse to fraudulent dealings, some natives were successful in controlling large quarter of their ancestral lands. Through well-organized tribal political structures, in-house unity, and

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Mark D. Walters, *The Emergence of Indigenous Rights Law in Canada*, IN BENJAMIN ET AL. , *supra note* 179 at 26; See also , R.A. WILLIAMS, Jr., LINKINGS ARMS TOGETHER: AMERICAN INDIAN TREATY VISION OF LAW AND PEACE (1600-1800) (1997); When British gained supremacy over French in Canada, for indigenous peoples it was merely an arrangement by which British acquired the status of 'father' left by the Canadian governor, See, in general, G.E. DOWD, WAR AND HEAVEAN:PONTIAC, THE INDIAN NATIONS,AND THE BRITISH EMPIRE (2002) cited in Mark D. Walters at 28;

[187] Katza Göcke, *supra note*, 140 at 94.

[188] The Royal Proclamation of 1763 defined the Indian Territory in North America but under the dominion of the Crown. The King expressed that the Indian lands "were reserve[d] under our sovereignty, protection, and dominion, for the use of the said Indians", See, Proclamation of 1763, *reprinted in* 1 HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY 48 (1968) cited in Robert J. Miller, *supra note* 171 at 32.

[189] D. L. Fixico, *Introduction,*IN TREATIES WITH AMERICAN INDIANS: AN ENCYLOPEDIA OF RIGHTS, CONFLICTS AND SOVEREIGNT (D.L. Fixico ed.,Vol.1, 2007) cited in Katza Göcke, *supra note*, 140 at 94.

[190] Ibid.

[191] See, generally Rashwet Shrinkhal, *Free Prior Informed Consent as a Right of Indigenous Peoples,*2 J. Nat'l L. U. Delhi 54, 54-65 (2014).

[192] Jonathan P. Votto, *Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights*? 22 B.U. Int'l L. J. 219, 226 (2004).

cooperation with other tribes, numerous indigenous groups —especially in the western States of the USA and on the North Island of New Zealand — at the outset registered their resistance against the government action of acquiring their lands. Settler's government's adopted a new method to subdue this resistance: by way of land reforms, the traditional indigenous rights to the land were to be substituted for individual fee simple titles.[193] These reforms eventually resulted in more [mis]appropriation of remaining ancestral lands in control. One of the most repulsive legislation in reference to the US and Native relationship was *General Allotment Act* (Dawes Act)of 1887,which—perverse to earlier treaty promises by the US government—permitted for the assignment of tribal lands to individual Indians . Subsequently with the passage of twenty five years trust period, these allotments were to be converted into fee simple titles which were alienable. The main purpose of the Dawes Act was to eliminate the communal aspect of tribal property and plant private property notions among indigenous peoples.[194] Consequently, Indians lost dominion over 364,000 km^2—nearly seventy five percent of their 1887 land base.[195] To the same end, communal holdings of Māori land was transformed to private ownership by the passage of the *Native Lands Act* 1862. The legislation had two objectives, first, to colonise large tracts of lands left under the control of aboriginal peoples and secondly, to transform communal held land into individual titles as expressed by Honourable Sewell:

> The detribalisation of the Natives—to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as barrier in the way of all attempts to amalgamate native race into our own social and political system.[196]

[193] Katza Göcke, *supra note*, 140 at 95.
[194] STUART BANNER, HOW THE INDIAN LOST THEIR LAND: LAW AND THE POWER ON THE FRONTIER 267-290 (2005); David Gene Lewis, *The Termination of the Confederated Tribes of the Grand Ronde Community of Oregon: Politics, Community, Identity,* 46-49 (Ph.D Thesis, University of Oregon Graduate School, 2009) available at https://scholarsbank.uoregon.edu/xmlui/bitstream /handle/1794/10067/Lewis_Daivd_Gene_phd2009wi.pdf?sequence=1 [Accessed on 15.02.2015].
[195] Katza Göcke, *supra note*, 140 at 96.
[196] The Statement of the then Attorney General, Henry Sewell, New Zealand Parliamentary Debates vol.9 at 361 (1870) cited in John Gerard O'Sullivan, *An Investigation into the Process of Maori Economic Development*, (Master's Thesis, Lincoln University 1994) available at https://researcharchive.lincoln.ac.nz/bitstream/handle/10182/2414/osullivan_mapplsc.pdf;jsessionid=C 53684EFF56C5BCAF852B47CE5AAED18?sequence=6 [Accessed on 15.03.2015]

As a result of this land reform, the Maori lost almost two thirds of their remaining land base, in total almost 58,000 km^2. Thus, irrespective of whether the indigenous peoples' rights to their ancestral lands and territories were initially recognized by the imperial powers or whether their lands were considered as *terrae nullius,* indigenous peoples could ultimately not prevent themselves being colonised. Ultimately, from the end of the 19th century onwards, the actuality of inherent indigenous land rights ingrained specially in traditional use and ownership was usually repudiated. Accordingly, prior treaties determined with indigenous peoples were held as abrogable or simple nullities.

4.3.4. Comparative Study on the Land Rights of Indigenous Peoples in the Canada, Australia, New Zealand and United States

The present section centres on the land rights of indigenous peoples in the CANZUS (Canada, Australia, New Zealand, and United States) countries. These former settler colonies share a common British legacy and their legal structure is based on 'common law system'. Notwithstanding these similarities, the law developed in connection with indigenous land rights exhibit certain unique characteristic in each of these jurisdiction. This section will attempt analyse to what degree the different treatment to indigenous land claims undertaken by national jurisdictions end up in deriving some common features on the issue of indigenous land rights.

The discussion is structured thematically and centred on, but not limited to, judicial approach.

4.3.4.1. The Origin of 'Indigenous Title'

Even though the exercise of Indigenous land rights has long been recognised by governments and courts in the CANZUS countries, the uncertainty of indigenous title as regard to the pluralism—imperialism tension is straightaway ostensible when one ponders on the question of origin or source of the property interest. In other words, whether the concept of indigenous title 'pre-date' colonisation or, instead, is it a creation of colonisation? On the surface, the momentous decision in *Mabo v. Queensland(No.2)*, may demonstrate tremendous effort in legal pluralism—situation in

which two or more legal system exist in same social field.[197] This is best exhibited by the statement of Judge Brennan in *Mabo(No.2)* :

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[198]

However, one must scratch the surface of High Court's seeming assertion of the notion that “Aboriginal law now runs in Australia"[199], to understand that the recognition of indigenous title symbolises an enormously qualified and eventually hesitant 'authorisation' of indigenous laws. Indigenous title is at the mercy of, and defined by, non-indigenous law. It is simply, a certain alignment in a system whose elementary dogma is centralist. Best contextualised by the observation of Griffith: “The very notion of 'recognition' and all the doctrinal paraphernalia which it brings with it are typical reflections of the idea that 'law' must ultimately depend from a single validating source. ‘Legal pluralism' is thus but one of the forms in which the ideology of legal centralism can manifest itself”. [200]

In the context of analysis, Kent McNeil identifies four possible basis for indigenous land rights each one of them reflecting the range of their affinity — towards legal pluralism to legal centralism. First, indigenous legal systems were a priori to the European colonial intervention. Conforming to conventional doctrines of British colonial and international law, when the Crown gained sovereignty over a region the land rights of the native peoples subject to their own legal systems continued, and implemented by the common law courts, through what is known as the doctrine of continuity. Second approach entails that indigenous peoples acquired land rights as a result of recognition by the Crown as annexation has put an end on any pre-existing rights on the land. Third, indigenous land rights finds its source in international law, as

[197] Sally Engle Merry argues that “it is generally defined as a situation in which two or more legal systems coexist in the same social field”, See, S.E. Merry, *Legal Pluralism,*22 Law & Soc’y Rev. 869, 870 (1988).
[198] Mabo v. Queensland [No.2] (1992) 175 C.L.R. 1 at 58
[199] See,Barbara Hocking, *Does Aboriginal Law Now Run in Australia?,*10 Fed. L. Rev. 161,161-187(1979)
[200] John Griffiths, *What is Legal Pluralism*, 24 J. Legal Pluralism & Unofficial L. 1, 8 (1986).

applied by domestic courts. The fourth possibility is that land rights of indigenous peoples is a creation of positive law enacted by the colonial power.[201]

As mentioned earlier that in North America, *generally,* the Crown bought indigenous lands by treaty, an exercise that was legalised by the Royal Proclamation of 1763.The Judicial Committee of the Privy Council in *St Catherine's Milling and Lumber Company v. The Queen (1988[202])*, indicated that indigenous peoples land rights originates from the Royal Proclamation. However in 1973 the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia*[203] held that the Royal Proclamation was not being the only source for indigenous land rights. Justice Judson expressed it this way:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what the Indian title means.[204]

The passage is clear in expressing that the 'occupancy' can be vindicated as a source of indigenous land rights. On the explicit question of the origin of indigenous title Lamer CJ held in *Delgamuukw v. British Columbia*[205] that indigenous title "arises from the prior occupation of Canada by aboriginal peoples".[206] Further, the Chief Justice suggested that there are two sources for indigenous title. The first is the "physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law".[207] The second is "the relationship between common law and pre-existing systems of aboriginal law." This does not necessarily meant that indigenous title is resultant of the indigenous law and the application of doctrine of continuity. Rather than any such construction, Chief Justice made it clear that both physical occupation and indigenous title are trustworthy and potent variables to establish

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[201] Kent McNeil, *Judicial Treatment of Indigenous Land Rights in the Common Law World,* IN INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 260 (Benjamin J. Richardson, Shin Imai and Kent McNeil eds., 2009).
[202] St Catherine's Milling and Lumber Company v. The Queen [1888] 14 App. Cas. 46 (PC)
[203] Calder v. Attorney-General of British Columbia [1973] SCR 313.
[204] *Ibid* at 328 cited in Kent Mc Neil *supra note* 201.
[205] Delgamuukw v. British Columbia [1997] 3 SCR 1010.
[206] Ibid, para. 114.
[207] Ibid at 1102-03 cited in Kent Mc Neil, *The Post-Delgamuukw Nature and Content of Aboriginal Title* at 4 available at http://fngovernance.org/ncfng_research/content.pdf [Accessed on 16.03.2015]

exclusive occupation in the course of Crown assertion of sovereignty that is essential to prove title. It is pertinent to note that the judicial authorisation of the 'relationship model' of Native title in *Delgamuukw* came posterior to the expression of this conceptualisation by the Royal Commission on Aboriginal People (RCAP) in its 1996 report. According to the RCAP:

> [T]he law of Aboriginal title, as initially expressed in British colonial law, emerged out of the very process of colonization and settlement, through practices of Aboriginal people and colonial officials in their attempt to maintain peace and co-operation with each other. The law of Aboriginal title . . . grew quickly to reflect intersocietal norms that enabled the coexistence of colonists and Aboriginal peoples on the North American continent.[208]

While the RCAP's description inclines to idealise and possibly overemphasize the cooperative origins and reciprocally advantageous disposition of Aboriginal title law, it does acknowledge that, in the long run, “Aboriginal interests in land and resources were increasingly ignored in the formulation of public policy designed to open up the continent for non-Aboriginal settlement and exploitation”.[209] Turning back to *Delgamuukw,* the decision pronounced by the Chief Justice failed to decisively clear the air on source indigenous title—whether indigenous title pre-dates colonisation or not?. The ‘relationship model’ leaves the door open to interpret that, to its maximum extent, indigenous interest may pre-dates colonisation rather than the ‘indigenous title’ itself.

Insights into the basis and origin of indigenous title in the Unites States can be traced from the judicial pronouncements in the Marshall’s Trilogy. In the famous case of *Johnson v. M’Intosh,* the Chief Justice Marshall had to decide on the question relating to “the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country [United States]”.[210]Marshall, while endorsing

[208] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*: *Restructuring the Relationship,* vol.2 Part 2, 453 (1996).
[209] *Ibid.*
[210] Johnson v. McIntosh, *supra note* 169 at 572 cited in Robert J. Miller, *supra note* 171 at 65. The fact of the case was that the plaintiffs, Joshua Johnson and Thomas J. Graham, claimed land in Illinois that had been purchased by their grandfather, Thomas Johnson, and others directly from the Illinois and Piankeshaw Nations in 1773 and 1775. These purchases were made in violation of the Royal Proclamation of 1763, which outlawed the private purchase by individuals or companies of any Indian lands in a certain territory without permission from the Crown. In 181, the defendant, William M'Intosh bought some 11,560 acres of the land claimed by Johnson's heirs from the United States. The Court had

the doctrine of discovery held that the Unites States was a legatee in interest to the British Crown's rights of discovery in North America, thereby secure superior title over all ancestral lands—uninhabited or inhabited—of indigenous peoples. Indians were not totally deprived of their land rights, as put forward by Marshall, they retained "Indian title of occupancy".[211] In American Indian legal discourse, 'Indian title' is not a mere equivalent to proprietary rights in land. It embodies and signifies residual sovereignty over territory which includes governmental power and land rights. Such an understanding was set in the second case of Trilogy, Ch*erokee Nation v. Georgia*[212]*, wherein* Chief Justice Marshall opined that Indian tribes are "domestic dependent nations" [213]within the United States and portrayed their relationship to the United States as one "resembl[ing] that of ward to his guardian".[214] This paternalistic tone, however in refined terms, was retuned in defining the United States and Indians relations in the third case of the Trilogy, *Worcestor v. Georgia*[215] wherein it was stated that State laws could not be imposed on the Indians, only federal government, adhering to its treaties, could overrule Indian law :

> The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no rights to enter but with the assent of the Cherokees themselves, or in conformity with the treaties and with the acts of Congress. The whole intercourse between the United Nation and this Nation, is, by our Constitution and Laws, vested in the Government of the United States.[216]

In sum the Trilogy propounded certain critical canons which defined the nature of Indian law related with land. First, Indigenous peoples did not have a freehold right of ownership over their territory and land. Instead it was the United States in which free

to decide whether to recognize the two initial grants and thus recognize tribal rights to sell to whomever the tribe chose.

[211] Johnson v. McIntosh, *supra note* 36 at 584-585 cited in Robert J. Miller, *supra note* 171 at 66.

[212] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[213] *Ibid* at 17 cited in Blythe W. Marston, *Alaska Native Sovereignty: The Limits of the Tribe-Indian Country Test*, 17 Cornell Int'l L. J. 375 , 377 (1984).

[214] *Ibid.*

[215] 31 U.S. (6 Pet.) 515 (1832).

[216] *Ibid. at* 561 , cited in Kent McNeil, *Indigenous Land Rights and Self-Government*, IN BETWEEN INDIGENOUS AND SETTLER GOVERNANCE 138 (Lisa Ford & Time Rowse eds., 2013).

simple title was vested. Second, Indigenous peoples did have right to self-governance over their land but the ultimate authority vests in federal government.

In Australia, prior to *Mabo* case it was almost settled that no indigenous laws and rights including land interests withstood the acquisition of sovereignty by the Crown. This view was backed by the judicial pronouncements in various including *Cooper v. Stuart*[217], where Privy Council briefly pointed that:

> The extent to which English law is introduced into a British Colony and the manner of its introduction must necessarily vary according to circumstances. There is a great difference between the case of a colony acquired by conquest or cession in which there is an established system of law and that of a Colony, which consisted of a tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class.[218]

The above view finds its support in the *Milirrpum*[219] case where court held that after acquiring sovereignty, the British Crown was the source of land title. In *Mabo v. Queensland(No.2)*,the court reassessed the matter, and declared that common law recognises natives land rights that existed at the time of Crown acquiring sovereignty.[220] The decision had three main component. Firstly, the court declared that Australia was not *terra nullius* when Europeans arrived in 1788. Secondly, that there was indigenous interests in land which pre-dates colonisation. Thirdly, court showed light on how native title was to be protected.[221] David Ritter interestingly argues that in the *Mabo* case, rejection of the understanding that Australia being *terra nullius* provided an easy scapegoat to justify why indigenous people's rights in their ancestral land had never been recognised under the Australian common law.[222]

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[217] Cooper v. Stuart, 14 App. Cas. 286 (1889).

[218]Ibid at 291 cited in G.N. Barrie, *Aboriginal Land Rights in Australia Remains an Unruly Horse*,2009 J. S. Afr. 155, 157 (2009).

[219] Milirrpum v. Nabalco (Pty) Ltd. , 17 FLR 14 (1971).

[220] G.N. Barrie, *supra note* 218 at 159.

[221] *Ibid.*

[222] David Ritter,*The "Rejection of Terra Nullius" in Mabo: A Critical Analysis,* 18 Sydney L. Rev. 5,7 (1996).

In order to implement *Mabo* decision, the Australian Parliament enacted the *Native Title Act 1993* (Cth.) which addressed several issues, but the most significant were: First, to validate prior actions which would otherwise have been declared invalid for the reason of actuality of native title. Secondly, to draw roadmap for the protection of native title in future. Thirdly, to implement rights associated with native title.[223] This view is well reflected by the language of S.223 (1) of the Act which lays down that:

> 223. (1) The expression 'native title' or 'native title rights and interests' means the communal, group or individual rights and interests of Aboriginal peoples or Torrres Strait Islanders in relation to the land or waters, where:
>
> (a) the rights and interests are proposed under the traditional law acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders, by those laws customs, have a connection with the land or waters; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

In New Zealand, the question on indigenous title, for a long time, was a subject of dispute within the judicial structure. The first leading judicial pronouncement on the issue of indigenous title was the *Queen v. Symonds*[224]. This case is of significant value for the reason of being recognised as foundational case for advancing the opinion that municipal court don't have the jurisdiction to deal with native title cases despite dichotomy welded in the judgment. Judge Champan at one hand urged that all the title in land originates from the British Crown:

> It is a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all the lands in the kingdom, and consequently the only legal source of private title.... In the language of the year-book - M. 24, Edw. III - 'all was in him, and came from him at the beginning' This principle has been imported, with the mass of the common law, into all the colonies settled by Great Britain; it

[223] Steven Tischo, *Aboriginal Title in Australia*, 1 S.C. J. Int'l L. & Bus. 41, 45 (2003-2004).
[224] Queen v. Symonds (1847) N.Z.P.C.C. (SC), 387.

> pervades and animates the whole of our jurisprudence in relation to the tenure of land. . . .[225]

on the other hand he also acknowledged the common law status of native title as follows:

> The intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called the . . . vice of judicial legislation" They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.[226]

The probable reason behind the contradicting claims as to the source of native title is best explained by Prof. J.W.Tate, who argues that since the subject-matter of the case pertained to status of the Crown's absolute right of pre-emption, therefore the prime attention of the judicial scrutiny was to determine "the legal relationship between the Crown and the settler (non-indigenous) population against whom the right was exercised".[227] Under such circumstances, there was compelling need to declare that all the title originates from the Crown as and the Courts are authorised to recognise only such titles which are endorsed by the Crown. [228]

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[225] *Ibid.* at 388 cited in John William Tate,*Pre-Wi Parata: Early Native Title Cases in New Zealand*, 11 Waikato L. Rev. 112, 134 (2003).
[226] *Ibid.*
[227] John William Tate, *supra note* 225 at 151.
[228] *Ibid*.

The understanding that sole source of indigenous title in New Zealand is not the Crown but the customs and tradition of Maori got major strength from the English Privy Council decision in *Nireaha Tamki v Baker*[229]. The Privy Council admonished ruling of New Zealand judicial court's pertaining to Native's title. The two significant overturn maintained by the Privy Council were: firstly, it turned down the decision of the Court of Appeal, ruling that, in the present case, the Courts did have jurisdiction to examine indigenous title. Secondly, it rebuked the opinion expressed in *Wi Parata v. Bishop of Wellington*[230] that "there is no customary law of the Maoris of which the Courts of law can take cognizance".[231] Lord Davey, pronouncing judgment of the Privy Council, refuted this standpoint of *Wi Parata* judgment as follows:

> [I]t was said in the case of Wi Parata v Bishop of Wellington, which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognizance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss. 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that 'a phrase in a statute cannot call what is non-existent into being'. . . [O]ne is rather at a loss to know what is meant by such expressions 'Native title', 'Native lands', 'owners', and 'proprietors', or the careful provision against sale of Crown lands until the Native title has been extinguished if there be no such title cognizable by the law and no title therefore to be extinguished.[232]

Accordingly, going by the language of the Native Rights Act 1865, with its categorical mentioning to indigenous title, the Privy Council held that native title in New Zealand is well acknowledged in the statutory provisions therefore, they do not fall outside the jurisdiction of Court, consequently enforceable against the Crown. The standpoint that Maori land rights have its origin in Maori custom and usage was reaffirmed by the New Zealand Court of Appeal in *Attorney-General v Ngati Apa*.[233]

[229] Nireaha Tamaki v. Baker (1900-01) [1840-1932] NZPCC, 371.
[230] Wi Parata v Bishop of Wellington (1878) 2 NZ Jur (NS) SC 72.
[231] *Ibid.,* Prendergast CJ cited in Kent Mc Neil *supra note* 68 at 265.
[232] Nireaha Tamaki v. Baker , supra note 95 at 382-383 cited in John William Tate, *The Privy Council and Native Title: A Requiem for Wi Parata?,* 12 Waikato L. Rev. 101, 112 (2004).
[233] Attorney Journal v. Ngati Apa [2003] 3 NZLR 643(CA)

4.3.4.2. The Content of Indigenous Title

Indigenous scholars generally maintains that indigenous land rights possess unique characteristics (sui generis) — they bear distinct interest in land from that claimed under the common law. One can find distinct nature of indigenous land rights among the CANZUS States, which largely depends upon the origin of the indigenous land rights considered in previous subsection. The content of land rights derived from occupation and use is not equal with the content originating from the customary laws of indigenous peoples.

In Canada, as mentioned above, the Supreme Court held in *Delgamuukw* that indigenous title is stemmed out from exclusive occupation of land in the course of Crown affirmation of sovereignty. At common law, the greatest land interest resulting from exclusive occupation is a fee simple interest, which is inferior only to Crown title. However, for the reasons of its origin being prior to Crown sovereignty, and other *sui generis* characteristics, the court refused to correspond indigenous title with a fee simple estate. However, the court also refused to limit indigenous title to occupation and traditional use of land. Chief Justice Lamer said that the "content of aboriginal title, in fact, lies somewhere in between these positions".[234] He observed that:

> I have arrived at the conclusion that the content of the aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected use must be irreconcilable with the nature of the group's attachment to that land.[235]

The Chief Justice's disfavouring the idea to limit the content of indigenous title to exclusive use for traditional purposes finds its support in common law doctrines. At common law, the possessor of land may be allowed to use it for any purpose, subject to the law of the land.[236] Thus indigenous title includes the right to use natural resource on and under the land, irrespective of any previous record to such uses. However, the

[234] Delgamuukw v. British Columbia, *supra note* 205 at para. 111.
[235] *Ibid.* at para. 117.
[236] KENT MCNEIL, COMMON LAW ABORIGINAL TITLE, 6-17 (1989).

second proposition that "uses must not be irreconcilable with the nature of the group's attachment to the land", puts an inherent limit to use of land, authorizing uses which are based upon the cultural-connection to land. The Chief Justice explained the application of limit as follows:

> . . . if the occupation is established with reference to the use of the land as a hunting ground, then the such group that successfully claims aboriginal title to that land may not use it in such fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of the ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g. by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot.) [237]

Rationale behind such an inherent limitation on indigenous title by the Chief Justice Lamer was to ensure that, in his own words, "uses of lands that would threaten that future relationships are, by their very nature, excluded from the content of aboriginal title".[238] However, such an approach may go against the interests of indigenous people in the changing world and undermines the scope of economic self-determination. Lamer nonetheless recommended an alternative to achieve, if indigenous people wishes for, more economic viable use of land by surrendering there land to the Crown in return of some interest. This recommendation has its own demerits as it puts indigenous peoples in a catch 22 situation—either stick with the those occupation's which does not diminish the value of land for its traditionally recognised use, or, part away with the interest in ancestral lands.

Beside the inherent limit and indigenous title's distinctive origin in occupation pre-dating to assertion of Crown sovereignty, Chief Justice Lamer recognised two other *sui generis* features: inalienability and communal nature.[239] The rule that the indigenous title cannot be alienated, except by way of surrender to Crown, has been a matter of both law and policy and affirmed by the court in each of the four jurisdiction under deliberation. Kent McNeil has offered two rationale for inalienability of indigenous land: first the necessity to safeguard indigenous peoples from dishonest settlers; second,

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[237] Delgamuukw v. British Columbia, *supra note* 205 at para. 128 cited in cited in Kent Mc Neil *supra note* 207 at 19.
[238] *Ibid.* at para 117, cited in, Kent Mc Neil *supra note* 207 at 20.
[239] KENT MCNEIL, *supra note* 236 at 221-235.

indigenous title has jurisdictional aspect that cannot be conveyed to private individuals, and therefore only another government can acquire the title. In reference to the communal nature of indigenous title, Chief Justice Lamer observed:

> Aboriginal title cannot be held by individual aboriginal persons; it is collective right to land by all members of an aboriginal nation. Decision with respect to that land are also made by that community.[240]

Turning to the United States, Kent McNeil observes that in the United States judicial treatment to indigenous title has never been rigidly proprietary. Post *Johnson v, M'Intosh*, indigenous title had linkage with elements of indigenous sovereignty. Chief Justice Marshall in said in *Worcester:*

> [T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection. A weak State in order to provide for its safety, may place itself under the protection of one or more powerful without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. [241]

He further concluded that "[t]he Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves. . . .".[242] Thus, the notable feature of the judgment was that the indigenous title entails some aspect of internal sovereignty. Indigenous title, therefore, has a jurisdictional aspect which leads to draw parallel to territory than to land.[243] In other words, indigenous title validates indigenous peoples' jurisdiction over their territory as any other sovereign exercise autonomy over their land which includes the power to make laws to control activities with the territory. However, in connection to indigenous title the 'fee' was in the United States,[244] therefore indigenous peoples could not transfer the land unless the purchaser is the United States.

[240] Delgamuukw v. British Columbia, *supra note* 205 at paras. 115 cited in, Kent McNeil *supra note* 201 at 267.
[241] Worcester v. Georgia, *supra note* 82 at 560-61, cited in, James A. Casey, 79 Cornell L. Rev. 404, 425 (1993-1994)
[242] *Ibid.* at 529.
[243] Kent McNeil, *supra note* 201 at 268.
[244] Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 55 (1947-1948).

Furthermore, the indigenous title in the United States does not suffer from 'inherent limit' prescribed by the judicial system of Canada.

However, the United States apex court showed downside attitude towards indigenous title in *Tee-Hit-Ton Indians v. United States.*[245] Band of the Tlingit Indians in the Alaskan region brought a suit, based on Fifth Amendment, for timber taken by the United States from the lands occupied the group. In reply, the United States pleaded that indigenous title is "merely a usufructuary right"[246] that guarantee nothing more than the right "of a mere licensee".[247] They further argued that indigenous title confers only a permissive right and the real dominium "is in the United States with the Indians having temporary possessory right terminable at will by the United States without Constitutional liability".[248] The court denied maintenance of any claim pertaining constitutional liability to compensate on account of violation of indigenous title by the United States. Justice Reed, delivering on behalf of the Supreme Court, held that Indian title was "not a property right", but merely a "possession not specifically recognised as ownership by Congress."[249] Despite of decision meeting severe criticism, it has not been overruled. However, some repair work has been done through extra-constitutional means to compensate indigenous peoples for loss of their title.[250] Moreover, in spite of the various judicial pronouncements leading to the conclusion that 'indigenous sovereignty' is subservient to the plenary power of Congress, indigenous title does have jurisdictional aspect.

In Australia, the High Court in *Mabo* [No.2] did not set out the definition of native title or its quantum.[251] The Court leaved the room for customary laws of aboriginal peoples for an exposition of content of indigenous title:

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[245] Tee-Hit-Ton Indians v. United States, 348 US 272 (1955).
[246] Brief for the United States in Tee-Hit-Ton Indians v. United States, 348 US 272 (1955) (No.43), cited in Blake A. Watson, *The Doctrine of Discovery and the Elusive Definition of Indian Title*, 15 Lewis & Clark L. Rev. 995, 1008 (2011)
[247] *Ibid.*
[248] *Ibid.*
[249] Tee-Hit-Ton Indians v. United States, *supra note* 112 at 279,289, cited in Blake A. Watson, *supra note* 113 at 1009.
[250] Daniel G. Kelly, Jr., *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 Column. L. Rev. 655, 675-686 (1975).
[251] H. A. Amankwah & P. Poynton, *Mabo: Australian Aboriginal Native Land Title in Two Syllables*, 19 U. Ghana L. J. 145, 145 (1993-1995).

> Native title has its origin in and is given its content by the traditional laws acknowledged by the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidence of native title must be ascertained as a matter of fact by reference to those laws and customs. . . [252]
>
> . . . The common law can, by reference to the traditional laws and customs of an indigenous peoples, identify and protect the native rights and interests to which they give rise.[253]
>
> . . . the incidence of a particular native title relating to inheritance, the transmission of or acquisition of rights and interests on death or marriage, the transfer of rights and interests in lands and the grouping of persons to possess rights and interests in lands are managed to be determined by the laws customs of the indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld . . . of course in time the laws and customs of any people will change and the rights and interests of members of the peoples among themselves will change too. But so long as the peoples remain as an identifiable community, the members of whom are identified by any another as members of that community living under its laws and customs, the communal native, title survives to be enjoyed by the members according to the rights and interests which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.[254]

Kent McNeil argues that the overemphasis on "traditional laws and customs and the doctrine has had a very negative impact on indigenous land rights [in Australia]".[255] Since the content of the rights are based on customary practices, it is most likely that a particular indigenous community shall not possess those rights related to natural resources which were not provided by their customary laws.

As mentioned earlier, in response to the *Mabo* judgment and reactions from the various State governments and indigenous groups the federal government of Australia enacted the Native Title Act of 1993 [NTA].Subsequent to the judgment of *Mabo*, the

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[252] Mabo v. Queensland [No.2], *supra note* 198 at para. 64 cited in Heather E. Maconachie, *Aboriginal Title: The Australian Experience,* 56 Advocate Vancouver 697, 697 (1998).
[253] Mabo v. Queensland [No.2], supra note 65 at para.66 cited in Heather E. Maconachie, supra note 252 at 697.
[254] *Ibid.* at para 201.
[255] Kent McNeil *supra note* 201 at 270.

Australian legal system—legislative and judicial—narrowed the scope of indigenous title. In *Wik Peoples v. Queensland,*[256] the Court had to decide whether the granting of pastoral lease extinguishes the indigenous title applicable to that land? The court held that pastoral lease did not secure exclusive possession to lessee and certainly not possession to the exclusion of natives. This meant that rights and interests of indigenous title holder can co-exist with lessee having pastoral rights.[257] However, in case of any conflict the latter rights shall prevail. In response to the judgment in *Wiki,* the Australian Parliament passed the Native Title Amendment Act 1998 (Cth), which further reduced the scope of indigenous title as being discriminatory against the holders of native title on the account of following : "the validation provisions; the confirmation of extinguishment provisions; the primary production upgrade provisions and restriction on right to negotiate".[258] The content and scope of indigenous title with reference to the statutory provisions of NTA was further analysed in *Western Australia v. Ward*.[259] The case concerned the claims of Miriuwung and Gajerrong people's with respect to native title in the East Kimberly regions of Western Australia. The indigenous peoples contented on the 'occupation approach' in determining scope of native title, which was supported by Lee J in the federal court, and Lee J maintained the communal nature of 'right to land'.[260] Moreover, indigenous peoples consider that:

> [t]he country [land] is not in some sense external to them; they are instantiations of country, which is consequently inalienable from them. . . [and] they speak about their connection to their country in a way that indicates they consider themselves to be consubstantially identified with it, that is, they consider themselves to be of the same essence as the country.[261]

In other words indigenous peoples are "part of their land because they incarnate spirit that comes from it".[262] It followed from such understanding that "there cannot be partial extinguishment of title" and indigenous peoples have "right to speak" for their land.

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[256] Wik Peoples v. Queensland (1996) 141 ALR 129 (HC Aust)
[257] *Ibid.*; Heather E. Maconachie, *supra note* 252 at 700.
[258] Greg McIntyre, *Native Title and the Certainty Created by Racial Discrimination*, 22 U.N.S.W.L.J. 640, 640-641 (1999)
[259] Western Australia v. Ward (2002) 213 CLR 1.
[260] Western Australia v. Ward (1998) 159 ALR 483.
[261] Katie Glaskin, *Native title and the "bundle of rights" model :Implications for the recognition of Aboriginal relations to country*, 13 Anthro. Forum 67, 78(2003).
[262] B Rigsby, *A Survey of Property Theory and tenure types,* IN CUSTOMARY MARINE TENURE IN AUSTRALIA, 32 (N.Peterson & B. Rigsby, eds., 1998) cited in Katie Glaskin, *supra note* 261 at 78.

However, the High Court in their joint judgment preferred 'bundle of rights and interests' approach thereby allowing land rights to be fractioned and disintegrated and subject to partial extinguishment.[263] From this viewpoint, acknowledgement of indigenous title is gradually appearing to be less like a form of 'title' and more like a legal sanction to carry out unchallenged activities —absence of conflicting interest from non-indigenous pastoralists, miners etc.

In New Zealand, observes Kent McNeil, the doctrine of continuity prevailed minus its adverse bearing as seen in Australia. The reason being the source of Maori land rights are tikanga Maori, which includes not only customs but usages.[264] In Ngati Apa, the New Zealand Court of Appeal recognised the right of Maori to claim indigenous title over certain areas of seabed and foreshore. However, the Court didn't sketch the content of indigenous title but nevertheless authorised Maori Land Courts to assume jurisdiction to determine issue pertaining to indigenous title. Fearing floodgates of Maori claims based on customary title as an after effect of *Ngati Apa* decision, the government of New Zealand enacted *Foreshore and Seabed Act, 2004*,[265] this piece of legislation proactively extinguished the indigenous title that the Court of Appeal found may occur in the foreshore and seabed by conferring all title that was not held in fee simple in the government. Thus, indigenous peoples can only claim for the protection of rights less than ownership subject to their customary practices.[266]

4.3.4.3. Proof of Indigenous Land Rights

It is imperative for indigenous peoples to prove their rights in order to have successful claim in issues related with indigenous title. The difficulty, however, lies with the fact that the standards of proof are relatively strict and set up by the legal system which was hitherto alien to their cause. Moreover, the ascertainment of customary law is also

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[263] Francesca Dominello, *Beyond Symbolism: Aboriginal Sovereignty and Native Title*, JALTA 141, 143 available at http://s3-ap-southeast-2.amazonaws.com/resources.farm1.mycms.me/alta-edu-au/Resources/PDFs/JALTA/2008/(2008)%20Beyond%20Symbolism_F%20Dominello.pdf [Accessed on 14.03.2014]

[264] Tikanga can be understood as a general behavior principles for day to day to life in Maori traditions, See, Timoti Gallagher, *The Kahui Kura Maori: Tikanga Maori Pre-1840*, http://nzetc.victoria.ac.nz/tm/scholarly/tei-Bid001Kahu-t1-g1-t1.html [Accessed on 12.08.2015]

[265] This Act was later repealed by Marine and Coastal Area (Takutai Moana) Act 2011.

[266] Louis A. Knafla, "*This is Our Land" : Aboriginal Title at Customary and Common Law in Comparative Context*s, IN ABORIGINAL TITLES AND INDIGENOUS PEOPLES 9-10 (Louis A. Knafla and Haijo Westra eds., 2010)

difficult as being an un-codified legal system and modern judicial system rely more on codified laws.

The Supreme Court of Canada has recognised these problems, and has attempted to resolve the issue to certain degree by instructing trial judges to admit unwritten historical accounts as part of evidence with due weightage. In *Delgamuukw,* the Chief Justice Lamer expressed that "the law of evidence must be adapted in order that this type of evidence [oral history] can be accommodated and placed on an equal footing with the type of historical documents".[267] In this case, the Supreme Court also laid the procedures to be adopted by the claimants of indigenous title, they have to prove that (a) the land was occupied by the group prior to the Crown's assertion of sovereignty, (b) there was no break in the occupation over the land and (c) they were in exclusive occupation at the time of Crown's assertion of sovereignty. Further, the required occupancy may be ascertained by the evidence of physical presence and use of land. The physical presence may be established, explains Lamer CJ, "in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources".[268] In *R.v. Marshall; R. v. Bernard*,[269] the Supreme Court raised the standards of proof that it was near impossible for the indigenous groups to meet the requirement. The present case involved claims of indigenous title and treaty rights to commercial logging in the region of New Brunswick and Nova Scotia. The Supreme Court held that nothing short of "sufficiently regular and exclusive" activity may be shown in order to prove occupancy over a land. Intermittent use of land for activities such as fishing, hunting or gathering may not be adequate to prove continuous occupancy. Alternately, such seasonal activities may be able to secure non-territorial interests in land, not, a real dominium or absolute right in land. This in turn had deleterious effect on indigenous groups found in North America, as mostly were nomadic or semi-nomadic. Katza Göcke writes down that there is hardly any account of successful attempt by indigenous group in their efforts to have recognition of indigenous title by the court. Moreover, he further points out that the claims related to

[267] Delgamuukw v. British Columbia, *supra note* 205 at para 87 cited in, Kent McNeil *supra note* 201 at 271.
[268] *Ibid* at para 149.
[269] R v. Marshal; R v. Bernard [2005] 2 SCR 220

non-territorial rights are put to strict proof.[270] Besides giving out the evidences of the uses of land resources since time immemorial, the claimants' has to prove that such activities are "integral to distinctive culture"[271] and "has continuity with the practices, customs and traditions of pre-contact times".[272] Such a construction was condemned by L' Heureux Dubé J, and she described it as "frozen right approach" which, "implies that aboriginal culture was crystallized in some sort of 'aboriginal time' prior to the arrival of Europeans".[273] In her opinion strict rules of evidence "imposes a heavy and unfair burden [of proof] on natives", and that it "embodies inappropriate assumptions about the aboriginal culture and society".[274]

In the United State, the rules of evidence for proof indigenous title appears to less stringent than Canada. The Supreme Court in *Mitchel v. US,* expressed that:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected until they abandoned them, made a cession to the government or an authorized sale to individuals.[275]

Thus similar to that of Canada, indigenous title in the United States is also based upon occupation but in the Unites States indigenous peoples only have to show the evidence of "continuous use of land and occupancy 'for a long time' prior to the loss of property". In *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, Justice Durfee explained:

> The time requirement, as a general rule, cannot be fixed at a specific number of years. It must be long enough to have allowed the Indian to transform the area into domestic territory [so that the court is not] 'creating aboriginal title in a tribe which itself played the role of conquest but a few years before'.[276]

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[270] Katza Göcke *supra note* 140 at 105.
[271] R v. Van der Peet, Supreme Court of Canada, [1996] 2 SCR 507, 549 para 46
[272] *Ibid* , 556 para 63.
[273] *Ibid* at 596 (dissention opinion) cited in Kent McNeil, *Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty*
[274] *Ibid* at 597-598.
[275] Mitchel v. United States, US Supreme Court, (1835) 34 US (9 Pet.) 711, 746.
[276] Confederated Tribes of the Warm Springs Reservation of Oregon v. United States, 177 Ct Cl 184, 194 (1966) cited in Kent McNeil *supra note* 201 at 275.

This implied that indigenous peoples can also claim title for those lands which were occupied after the American assertion of sovereignty. Moreover, the American courts clarified that, emphasis must be laid on proving use of land more than physical occupation. Justice Collins statement in *United States v. Seminole Indians of Florida,* will explain the proposition:

> the government leans far too heavily in the direction of equating 'occupancy' (capacity to occupy) with *actual* possession, whereas the key to Indian title lies in evaluating the manner of land-use over a period of time. Physical control or dominion over the land is dispositive criterion.[277]

In case of Australia, there is no such specific rule to show exclusive occupation to prove claims regarding indigenous title, however it is necessary to prove that there is connection with the lands through customs and traditional laws. Such a proposition flows from the judgment of Justice Brennan in *Mabo*, subsequently incorporated in S223(1) of the Native Title Act 1993. In *Members of the Yorta Yorta Aboriginal Community v. Victoria*, the High Court held that, apart from proving uninterrupted use and physical occupation of land, the indigenous groups have to produce evidence of "the normative system under which the rights and interests are possessed [the traditional laws and customs] is a system that has had a continuous existence and vitality since sovereignty".[278] The judicial approach to indigenous title claims requires categorical evidence of customary laws to particular uses of lands rather than a general system of customary laws related to land.

In case of New Zealand Act, the Maori Land Act 1993 contains provisions establishing that indigenous title claim can only be held in agreement with *tikanga Māori* that is, "Māori customary values and practices".[279] Thereby even the 'usages' can form the basis of indigenous title in New Zealand. Moreover, the *continuous* uses of land prior to the British assertion of sovereignty is not an essentiality to prove the occupation.

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[277] US v. Seminole Indians of Florida, 180 Ct Cl 345 (1976) cited in Kent McNeil *supra note* 201 at 275.
[278] Members of the Yorta Yorta Aboriginal Community v. Victoria, High Court of Australia, (2002) 194 ALR 538, para. 47.
[279] The Maori Land Act 1994, Section 4.

4.3.4.4. Extinguishment and Infringement of Indigenous Land Title

One of the most distinct disadvantage attached with indigenous title across all the four jurisdictions is their vulnerability due to extinguishment and infringement. The doctrine of extinguishment requires that only those indigenous title may be recognized which have not so far been extinguished. Even if there is recognition of indigenous title it is subject to extinguishment. In sum, extinguishment is equivalent to the "obverse of recognition".[280] Samantha Hepburn defines 'legal extinguishment' as a "termination of native title rights and interests flowing from the implementation of an inconsistent legislative or executive act".[281]

In Canada, the indigenous title is extinguishable by means of: (a) a treaty, wherein indigenous peoples surrender their title; (b) legislative act, especially prior to the Constitutional recognition of indigenous title in the 1982 and (c) judicial discretion.[282]

As regard to extinguishment through treaty, the Canadian government both in past and in present believes that indigenous title shall come to an end by voluntary surrender to the Crown. The Royal Proclamation of 1763 contemplates such a move for accession of indigenous lands by way of purchase as it could be sold only to the Crown or a proprietary government. This was done through treaties. Interestingly, indigenous peoples of Canada argues that their ancestors never transferred land through treaty rather they only shared it with the Crown. However, most of the indigenous treaties (Canadian version) consist of provision on surrender of title to the Crown. For example, Treaty 6 relevant to the area of Central Saskatchewan and Alberta, had a specific clause necessitated surrender of indigenous title to the Crown:

> The Plain and Wood Cree Tribes of Indians, and all other the Indians inhibiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of Dominion of Canada for

[280] Samantha Hepburn, *Statutory Construction and Native Title Extinguishment: Expanding Constructional Choices*, 38 Univ. New South Wales L. J. 587, 588 (2015)
[281] *Ibid*.
[282] Kent McNeil, *Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion*, (2002) *available at* http://fngovernance.org/ncfng_research/extinguish.pdf [Accessed on 30.08.3015]

> Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits. . . [283]

Intricacy lies in the fact that whether indigenous treaties be deemed unenforceable for reason that there was mistake as to the content of subject-matter? This question is not so easy to answer, especially when the interest of State is directly in conflict with indigenous peoples. In attempt to seek answer, McNeil make a relevant point that even if it is assumed that indigenous people surrendered its entire interest to the Crown, though he asserts that the possibility of such an event is very remote, it would not be appropriate to "[m]ean that the surrender provision can be taken at face value. One still has to examine the oral traditions of the nation and evidence of the treaty negotiations and surrounding circumstances to see if that was what was actually intended by the aboriginal parties".[284]

As regard to extinguishment of indigenous title by legislative means, the indigenous peoples have certain amount of constitutional protection. First, by the virtue of the *Constitution Act 1867* the "Indians, and the Lands reserved for the Indians" were exclusively under the subject of Parliament of Canada. Consequently, the Supreme Court of Canada had held that provinces do not carry the constitutional authority to frame rules which has power to extinguish indigenous title.[285] However the Court failed to explain how the provinces are entitled to infringe the indigenous title if not extinguish it.[286] The second shield rendered to indigenous land rights in Canada is conceived in section 35(1) of the *Constitution Act 1982*, which recognized and affirmed the "existing aboriginal and treaty rights of the aboriginal peoples of Canada".[287] The Supreme Court has held that by the virtue of such a provision the indigenous land rights cannot be extinguished. Technically, except constitutional amendment extinguishment cannot occur without the consent of concerned indigenous peoples. In spite such shield, the court in *R v. Sparrow* has laid down the conditions under which the government can

[283] Treaty No. 6, See, Copy of the Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt, and Battle River with Adhesions, *available at* https://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783 [Accessed on 09.09.2015]

[284] Kent McNeil, *supra note* 282 at 5.

[285] *Ibid* at 20.

[286] *Ibid*

[287] Constitutional Act, 1982, Article 35 (1) (Schedule B to the Canada Act 1982 UK), 1982 Ch. 11) cited in Katza Göcke *supra note* 140 at 100.

infringe indigenous lands rights.[288] The first condition required that there exist a "[v]alid legislative objective"[289] for the infringement that is categorical and imperative. The second condition is that the government has acted responsibly in a "[f]iduciary capacity with respect to aboriginal peoples".[290] It can be assessed, *inter alia*, by asking questions such as: "[w]hether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to conservation measures being implemented".[291] Post *Sparrow*, the procedure of consultation became a relevant criterion for determining a legitimate infringement of indigenous peoples land rights.

In the US the federal government enjoys the prerogative of extinguishing indigenous land rights. The States, are deprived of such power, as the Commerce Clause in the US Constitution dispense Congress with an unshared jurisdiction over Indian affairs, and the *Indian Trade and Intercourse Acts*, starting from the year 1790, forbids State acquisition of Indian lands.[292] This position has also been affirmed by the Supreme Court in *United States v. Santa Fe Pacific Railroad Co.(1941)* which also laid the criterion for infringement of Indian land rights. In order to extinguish Indian title, there must be 'clear and plain' intention to do so.[293] In the present case, in the year 1865, the Congress enacted an Act which nominated traditional Walapais land as a reserve land. Subsequently that land was conveyed to the predecessor in the title of Santa Fe Railway Co. The 1865 Act nowhere explicitly referred that in constructing reserve it intended to extinguish rights of Walapais. The court held that there was no extinguishment due to lack of "clear and plain intention" in the 1865 Act that Congress wishes to extinguish Walapais land rights. More light was thrown on the matter that what constitutes "clear and plain" in the *United States v. Dion*.[294]

In case of Australia, the doctrine of extinguishment is subject to two important checks enshrined under the Constitution. First, limitation comes in the form of section 51 (xxxi)

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[288] R v. Sparrow [1990] SCR 1075
[289] *Ibid* cited in, Kent McNeil *supra note* 201 at 281.
[290] *Ibid.*
[291] *Ibid.*
[292] Kent McNeil *supra note* 201 at 278.
[293] United States v. Santa Fe Pacific Railroad Co. 314 US 339 (1941)
[294] United States v. Dion 476 US 734 (1986).

of the *Commonwealth Constitution* which enables the Parliament to frame laws in, relation to the acquisition of property, providing 'just term' compensation. Second, protection comes from the *Racial Discrimination Act 1975 (RDA)*.[295] The RDA provides shield to native title holders against any discriminatory extinguishment by the State governments. In *Mabo (No.2)* their Honours were of the opinion that "any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purpose of s. 51 (xxxi)".[296] It also reiterated that "title is capable of extinguishment by clear and plain legislation or by an executive act authorized by the legislation".[297] The prerequisite of a plain and unambiguous legislative intention is a common feature of the most of jurisdiction recognizing indigenous title. In *Western Australia v. Ward* it was affirmed that intention shall be deduced from the language of the Act and not from the cognitive analysis of legislature mind. Extinguishment of indigenous title have also been realized tacitly through legislative acts with an objective to control the use of land and territories by way of "necessary implications".[298] Samantha Hepburn has observed that Court, in order to assess intention by way of "necessary implication", needs to ascertain "[h]ow the Act intended to deal with the interests, the scope and nature of which were unknown at the date when legislation was introduced".[299] The prevalent practice has been to branch off the possible categorization of the legislative structure as "[e]ither prohibitive (and therefore inconsistent with native title) or regulatory (and therefore not inconsistent with native title)".[300]

In New Zealand, the Court of Appeal in *Attorney-General v. Ngati Apa* without exception held that that common law recognition of native title shall be applicable in the New Zealand until and unless legally extinguished. Referring to the *Sparrow* case, the court noted that "onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain".[301] Moreover, the Court also laid down the possible ways in which indigenous title in New Zealand comes to an end: "[a]by sale

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[295] Samantha Hepburn, *supra note* 280 at 595.
[296] Mabo v. Queensland [No.2] *supra note* 198 at 111.
[297] *Ibid.*
[298] State of Western Australia v. Ward [2002] HCA 28.
[299] Samantha Hepburn, *supra note* 280 at 593.
[300] *Ibid.*
[301] Attorney Journal v. Ngati Apa, *supra note* 233 at 112 cited in Jacqueline F. Pruner, *Aboriginal Title and Extinguishment Not So "Clear and Plain": A Comparison of the Current Maori and Haida Experiences*, 14 Pacific Rim L. & Policy J. 253, 277 (2005)

to the Crown, [b] through investigation of title through the Land Court and subsequent deemed Crown grant, or [c] by legislation or other lawful authority".[302] Subsequently, with the passage of the *Foreshore and Seabed Act*, most of the Maori title over coastline is vested in the Crown and converted into public domain.

4.3.5. Conclusion

Indigenous peoples forceful efforts for economic and political continued existence, along with protection of traditional cultural heritage preservation, end in a campaign to guard ancestral land and territories. In the channel of colonial occupation, indigenous peoples were deprived of the ownership and possession over significant portion their traditional lands. Hence, indigenous peoples have regularly been the sufferers of confiscation that occurred as result of historical wrongs. The problem of land rights has an aspect pertaining to the restoration of restoring lands that were seized under a historical discriminatory initiatives and connected to a ongoing refutation of indigenous peoples' claims. The problem of historical injustice and restitution for historical wrongs is still less developed areas of international law. Nevertheless, significant advances have occurred under the system of common law jurisdiction in the name of a set of law which is ascribed to the doctrine of indigenous/native title.

The doctrine of indigenous title forge to create a cross over between historical wrongs and present day condition. To resolve the issues of the past and present, domestic courts have banked on the customary practices, as indigenous peoples need to establish that they have continued an effective traditional linkage with the ancestral lands. Further, this course of reconciliation also dependent upon the opinion that only indigenous groups that are presently in occupation of the territories would be eligible to avail rights attached with the land, for domestic courts restrict their enquiries to existing occupation.

Moreover, in spite of the fact that common law approach to native title tends to provide some amount of workable and legally binding mechanisms on how decide historical claims pertaining to land rights. The fault line lies with the fact that on the practical level the claims to ancestral land rights is also subject to the 'idea of extinguishment'.

[302] *Ibid*.

4.4. Cultural and Intellectual Property Rights

4.4.1. Introduction

All over generations, indigenous chronicles, folklores, and cultural objects have been the chief tools of endowing indigenous identities from ancestors to descendants. Regrettably, the repression of indigenous peoples by the immigrants and foreigners in the territories they used to live was revealed by brazen abuses of indigenous cultures. Arrangements of cultural onslaught have included the confiscation of ancestral lands, misappropriation and commercialisation of indigenous cultural objects without consent of indigenous communities, misconstruction of indigenous histories, repudiation of indigenous mythologies and cultures, eradication of their languages and religions, and even the compulsory relocation of indigenous peoples from their families and refutation of their indigenous identity. Moreover, in the last couple of decades there has been outbreak of new practices for violating indigenous cultures. With the onset of modernization, States and international corporate houses organised their activities into areas hitherto regarded secluded and inaccessible, including many indigenous territories. Indigenous rights activism brought about publicity regarding the prevalent abuses; yet, it also revived the pursuit for procuring indigenous arts and traditional knowledge which has culminated in the commercialization of indigenous cultures. The latest fashion of aboriginal tourism has also disordered indigenous historical and archaeological sites. Moreover, promoting conservation through bio-prospecting led to incognito licence for bio-piracy.

The present Part of the Chapter dwells with some of intriguing questions considering the protection of indigenous cultural property. First, how to define indigenous cultural property? Second, why is it necessary to preserve and protect indigenous cultural property? Third, does the western view of property is akin to that of indigenous view towards cultural property and whether or not western intellectual property regime be appropriate in the protection of indigenous cultural property? It is divided into three sections. First section will provide critical appraisal of indigenous cultural property. Second section will deal with the issue of protection of traditional cultural property and traditional cultural expressions of indigenous peoples. Third section shall conclude the issue with some observations.

4.4.2. A Critical Appraisal of Indigenous Cultural Property

4.4.2.1. Meaning

During the bygone decades, the politico-economic significance of cultural property is on an upward trajectory, and its global dimensions has been persistently developing. This is chiefly due to the fact that the cultural property signifies the material manifestation of a culture and a civilization that are not always limited to a particular national identity.[303]

In the year1954, UNESCO coined the term ‘cultural property’ in the *Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*. Article 1 of the Hague Convention defines cultural property as:

> (a) moveable or immovable property of great importance to the cultural heritage of every people, such moments of architecture, and or history, whether religious or secular, archaeological sites. . . ; works of art; manuscripts; books and other objects of artistic, historical or archaeological interests. [304]

Cultural property has also been classified as the “fourth estate” of the property—the additional three sphere in that sense are real property, intellectual property, and personal property.[305] Conventionally, cultural property is understood as tangible resources—“including documents, works of art, tools, artefacts, buildings, and other entities that have artistic, ethnographic, or historical value”—were believed to go beyond conventional property notions and to worth unique protection.[306] Subsequently the definition of cultural property expanded to encompass intangible property within its domain. The same shall be discussed in the later section of this chapter.

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[303] Lorenzo Casini, “Italian Hours”: The Globalization of Cultural Property Law, 9 Int. J. Const. L. 369,369 (2011).

[304] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S 215 (entered into force August 7, 1954) (hereinafter Hague Convention 1954), Art 1.

[305] Steven Wilf, *What is Property’s Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 Conn. J. Int’l L. 177,177 (2001).

[306] LAURIA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 110 (2003) cited in Kristen A. Carpenter et al. *In Defense of Property*, 118 Yale L. J. 1022, 1032 (2008).

Focusing back to the conception of cultural property, Patty Gerstenblith has opined that, cultural property is "composed of two potentially conflicting elements": "culture", which represents group-oriented concepts of value, and "property" which conventionally has concentrated on individualistic perspective of ownership.[307] As the conventional outlook of property concentrates on the uniformity and surety of guarding the individual owner's rights of non-admission and alienation chiefly for wealth-aggrandizement reasons. Partly for this reason, transcribing cultural property concept in the trajectory of indigenous rights is not free from paradoxes. As is in actuality, indigenous cultural property rise above the established legal notions of markets, title, and transferability that is usually related with ownership, making it all the more essential for property intellectuals to assess its characteristics.[308] For example, In *Milirrpum v. Nabalco*[309] the Judge measured the bond of Australian Aboriginals to their ancestral land. He held that, instead considering that the land is their proprietary, they maintained that they are part of the land: that it had been relegated to them by their spirit ancestors and that they had special responsibility towards it and need to carry certain rituals on it.[310] By this illustration it is evident that, if term 'property' is used, it must be assigned meaning with great responsibility and attention to detail. Upsurge of such kind of an alternative approach to 'property' have revolutionise the concept of 'cultural property', especially in the context of indigenous peoples. Significant breakthrough in the domain consist of remarkable extension of subject matter, loosening the necessities of physical noticeability from cultural property and into the field of cultural heritage. Accordingly, cultural property has stretched out from the territory of the tangible into the province of the intangible.[311]

In the indigenous civilisations where scholarly and mystical life has found shape not depicted by exceptionally massive structures or the making of a large number of material entities, the protection of cultural identity rests far more on the obligation of tradition and conservation of folklore, rituals and traditional skills.[312] Thus the notion

[307] Patty Gerstenblith, *Identity and Cultural Property*: *The Protection of Cultural Property in the United States*, 75 B. U. L. Rev. 559, 567 (1995).
[308] Kristen A. Carpenter et al *supra note* 306 at 1027.
[309] Milrupam v. Nabalco Pty. Ltd (1971) 17 FLR 141 cited in ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTE 63 (2014)
[310] ALESSANDRO CHECHI, *Ibid*.
[311] Kristen A. Carpenter et al *supra note* 306 at 1034.
[312] Lyndel V. Prott and Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property'?* 1 Int'l J. Cult. Prop. 307,312 (1992)

of indigenous cultural property expands to encompass "all objects, sites and knowledge the nature of use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory".[313] To rethink cultural property in this way has its own complications and paradoxes.

4.4.2.2. Critiques and Paradoxes of Indigenous Cultural Property

Despite some consensus on the concept of cultural property there remains several critiques and unresolved disputes over the notion itself.

First set of critique comes from the scholars who believe that the cultural property is not entitled to differential treatment and it must be subjected to 'market based approach' towards regulation and protection of property. Posner, a prominent scholar of this school, recognises the fact that cultural property protection is essential in upholding the dignity of a particular group of peoples. With such perception, he acknowledges that cultural property is discernible from other natural resources for the reason that it has intellectual and artistic value, because it offers a casement into history, and because its future worth is contingent on its judicious maintenance.[314] Nonetheless these reflection for Posner are essentially emotional and found deficient in justifying any sort of "moral claim" by the [indigenous] peoples to their cultural property.[315] Finally, he reposes in the market and argues that if people look for proprietorship of their cultural property, "they can always purchase it through a government or museum. They do not have any moral right to possession".[316]

Second set of critique comes from scholars who believe that culture is part of public domain and hence concept of 'commons' is applicable to it. In his work titled *Who Owns Native Culture?*, anthropologist Michael F. Brown delve into peculiar questions concerning rights to indigenous cultural property. In the course of offering a judicious recognition of the significance of collective autonomy in conserving cultural heritage, Brown brings out two specific concerns. First, he contends that an unqualified

[313] UN ECOSOC, *Principles and Guidelines for the Protection of the Heritage of Indigenous People*, (E/CN.4/Sub.2/1995/26) (June 21, 1995), available at www.unesco.org/culture/ich/doc/src/00268.doc [Accessed on 05.04.2016]
[314] Eric. A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 Chi. J. Int. L. 213, 225(2007).
[315] *Ibid* at 223.
[316] *Id.* at 224 cited in Kristen A. Carpenter et al *supra note* 306 at 1040.

application of law in cultural conflict inaptly "forces the elusive qualities of entire civilizations—everything from attitudes and bodily postures to agricultural techniques —into ready-made legal categories".[317] Culture withstand and rise above available legal claims, he asserts. Second, Brown contends that the propensity to manifest legal claims in terms of rigid "rights" restricts the scope to reconcile cultural interests that are comparative and collectively experienced among people. Brown chooses as an alternative cultural property plans that enable some degree of access among competing groups (such plans requesting for recreational consumers of the public lands to freely circumvent indigenous peoples sacred sites) over processes that would confer title to one specific group (for example, apportioning copyright for a sacred song or image).[318]

Reason for arguing in above mentioned manner is Brown's deep concern in the world wide public access to information and culture. He put forward that it is the "cultural and intellectual commons"—that is subjected to onslaught.[319] In arguing so, Brown builds his argument based upon the work of Lawrence Lessig who is of the opinion that both culture and intellectual property are intrinsically non-rivalrous[320] and for that reason open to hybridity. Seeing that Culture is fluid[321] and accessible to everyone, to "propertize" it implies a licence to its "owners" to exclude 'others' that is rest of the world.

Brown therefore attempts to tender both "descriptive and normative critiques" of indigenous peoples' struggle to govern intangible facets of indigenous culture.[322] Pragmatically, he refers to "the difficulty—the near—impossibility . . . of recapturing information that has entered the public domain".[323] Further, he highlights the tendency in indigenous peoples' to resist the unrestrained diffusion and commercialisation of indigenous culture, mostly by the way of Internet. In doing so he quotes a person from the Oregon's Klamath Tribe: "All this information gets shared, gets into people's

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[317] MICHAEL F. BROWN, WHO OWN'S NATIVE CULTURE 217 (2003) cited in Kristen A. Carpenter et al *supra note* 306 at 1041.
[318] *Ibid.*
[319] *Ibid* at 212-213.
[320] Non-rivalrous is a term applied usually in the field of economic. It represents such categories of goods which can be consumed simultaneously by several consumers, See, ANDREW MURRAY, INFORMATION TECHNOLOGY LAW: THE LAW AND SOCIETY 11 (2013).
[321] Shannan Spisak, *The Evolution of a Cosmopolitan Identity: Transforming Culture*, 12 Curr. Issues Comp. Edu. 86, 86(2009).
[322] Kristen A. Carpenter et al *supra note* 306 at 1024; A descriptive criticism targets more on facts and Normative Criticism focuses on 'ideological critique' of any subject matter.
[323] MICHAEL F. BROWN *supra note* 317 at XI

private lives. It's upsetting that the songs of my relatives can be on the internet. These spiritual songs live in my heart and shouldn't be available to just any one. It disturbs me very much".[324] It is to be noted that league of scholars, such as Brown, critical about the notion of cultural property maintains that the religious or cultural injury that the members of indigenous communities, as in case of Klamath tribe, discern is nothing but an element of digitized globe that has empowered culture, for good or bad, to be accessible for all. The central point of whole arguments of such critic's is that an open access to culture need to be welcomed rather than criticised, even though it causes some harm to indigenous culture.

Naomi Mezey in her work, *The Paradoxes of Cultural Property* also censure the application of law towards proprietorship or claims over cultural property because of issues pertaining to identity.[325] Using a "cultural critique" analogous to Brown's, Menzey argues that "[t]he problem with the using ideas of cultural property to resolve cultural disputes is that cultural property uses and encourages an anemic theory of culture so that it can make sense as a form of property".[326] As per Menzey, such a theoretical notion spawns an unsolvable anomaly for two reasons. First, "[p]roperty is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things".[327] Consequently, "culture property claims tend to fix culture, which is anything unfixed, dynamic, and unstable".[328]

Placing herself in the same league with Brown, Mezey worries that indigenous assertions to cultural property will dwindle cultural blending and hybridity.[329] She notes that "[i]t is the circulation of cultural products and practices that keeps them meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and in equality".[330] Hence, cultural property will have adverse consequence on an unrestricted spreading of culture, for the reason that "[a]s groups become strategically and emotionally committed to their 'cultural identity', culture tend to

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[324] *Ibid* at 6 cited in cited in Kristen A. Carpenter et al *supra note* 306 at 1042.
[325] Naomi Mezey, *The Paradoxes of Cultural Property*, 107 Colum. L. Rev. 2004-20046 (2007).
[326] *Ibid* at 2005 cited in cited in Kristen A. Carpenter et al *supra note* 306 at 1042.
[327] *Ibid*
[328] *Ibid*; See also, Peter Kabachnik, *To Choose, Fix, or Ignore Culture? The Cultural Politics of Gypsy and Traveler Mobility in England*, 10 Soc'l. Cult'l. Geogr. 461-79 (2009).
[329] See also, Keri Iyall Smith, *The Impact of Indigenous Hybridity on the Formation of World Society* IN WORLD SOCIETY FOCUS PAPER SERIES 1-24 (World Society Foundation ed. 2006).
[330] Naomi Mezey *supra note* 325 at 2007.

increase intragroup conformity intergroup intransigence in the face of cultural conflict".[331]

Mezey eventually emphasises that cultural property's conservationist standpoint provide a passive and theoretically arid construction of culture itself. Accordingly, she argues:

> [T]he idea of property has so colonized the idea of culture that there is not much culture left in cultural property. What is left are collective property claims on the basis of something we continue to call culture, but which looks increasingly like a collection of things that we identify superficially with a group of people.[332]

Mezey's view point, along with some other critiques apprehensiveness about the propertisation of culture, appears to function from an assumed proposition: as property essentially entitle the owners to exclude others[333], any cultural property right will unfortunately stalemate the natural, communion, and free movement of culture.

Third set of critique is from scholars concerning political ramification of propertisation of indigenous culture. Kimberlee Weatherall express her concerns that protection of indigenous cultural property may be condensed in the idea of 'cultural integrity'.[334] She argues that 'cultural integrity' as a rationale for propertisation of cultural property has its own problems. First, overemphasis on cultural integrity has potential divisive side effects: "balkanisation, fragmentation, fundamentalism, illiberalism, segregation and prejudice".[335] Second, similar to previously mentioned, "[c]ultures have no boundaries or fixed existence —they influenced by other cultures".[336] Any attempt or freeze culture

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[331] *Ibid.*
[332] *Ibid.* at 2005
[333] See, David L Callies and J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right,* 3 Wash. U. J. L. & Pol'y 39 (2000); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998).
[334] Kimberlee Weatherall, *Culture, Autonomy, and Djulibnyamurr: Individual and Community in the Construction of Rights to Traditional Designs*,64 Mod. L. Rev. 215, 222 (2001).
[335] Martha Minow, *The Constitution and the Subgroup Question*, 71 *Ind. L. J.* 1, 24 (1995) cited in Kimberlee Weatherall *supra note* 334 at 227.
[336] Kimberlee Weatherall *supra note* 334 at 227.

would be detrimental to its growth. She express herself by quoting Waldron that, "[w]e need culture but we don't need cultural integrity".[337]

Fourth set of critique is offered from scholars having a global, cosmopolitan perspective. One such cultural theorist K. A. Appiah, who takes a somewhat moderate stand on the issues pertaining to the protection of international cultural property.[338] He points out that a lot of the works of cultural relevance are explained these days through the prism of 'cultural patrimony' as if it belongs to any particular group. However, as the time passes and changes are apparent due to globalisation, it becomes more and more critical to demand that a specific group or people have proprietorship over cultural work. Besides his uneasiness with a group-specific conceptualisation of cultural property, Appiah, similar to Brown and Mezey, manifests a much superior doubt with regard to the concept of propertising intangible objects, mainly in the case of indigenous peoples. The moment when the focus is shifted from tangible objects to intangible aspect of an object, Appiah writes, "[i]t's no longer just a particular object but any reproducible image of it that must be regulated by those whose patrimony it is. We find ourselves obliged, in theory, to repatriate ideas and experiences".[339] As a consequence of propertising culture, Appiah contends, we tend to alter the character of culture itself: we scale down ourselves to a level of "mine-and-thine reasoning" that thwarts the expected hybridity of cultural transaction. Moreover, as intellectual property laws be likely credit title holder, they are legally powerful enough to oversee the wellbeing of consumers—"audience, readers, viewers, and listeners".[340]

4.4.2.3. Rationale for the Protection of Indigenous Cultural Property

There is no universally agreed upon justification for the protection of indigenous cultural property. International negotiations takes place despite such lack of a coherent theory. The different justification adopted by the scholars are generally based on equity, property rights, cultural integrity etc. An outline to various justifications are as follows:

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[337] Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property Law*, 68 Chi-Kent L. Rev. 841, 887 (1993) cited in Kimberlee Weatherall *supra note* 334 at 222.

[338] KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006).

[339] *Ibid* at 129 cited in Kristen A. Carpenter et al *supra note* 306 at 1045.

[340] *Ibid* at 130.

4.4.2.3.1. Equity as a Rationale

An important principle that underlines the thought for the protection of indigenous culture is enshrined under the notion of equity.[341] This may be further grouped into distributive justice[342], moral rights[343] and human rights[344].

As a result of colonisation and occupation, indigenous and local communities have been oppressed socially, politically, and economically. The resulting inequalities continue to affect the status of such communities. Given the colonial history in which colonizing powers discredited and exploited indigenous and local communities and the resulting inequality, the strongest argument for the protection of indigenous culture is based on distributive justice. Professor Keith Aoki, analysing the work of W.E.B. Du Bois, observes that "black folk" have had experiencing torture due to theft of their bodies, infants, hard work, labour yield, cultural artefacts and vivid traditions. He further contends that as result of structural inequality in the initial acquisition of intellectual property rights, the black inventors were deprived of beneficial distributive impact of the US patent system.[345] As the said system "[e]ncouraged a more diverse composition of inventors through broadened access to opportunities for investing in, exploiting, and deriving income from inventive activity".[346] Aoki's goal is not to simply argue for restitution for the past injustice of failing to recognise black authorship, but to put intellectual property law in social context. Some historians, for example, suggests that Eli Whitney may have borrowed the central idea of notion of cotton gin from a slave named Sam.[347]

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[341] *Report of a Jointly Convened Meeting of the UNESCO and UNEP on Cultural Diversity and Biodiversity for Sustainable Development* , available at http://unesdoc.unesco.org/images/0013/001322/132262e.pdf (September 3, 2002) [Accessed on 04.04.2016]

[342] Dereck Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Using Environmental Justice to Appraise and Antiquities Disputes*, 20 Va. J. Soc. Pol'y. & L. 43, 68-73 (2012).

[343] Cathryn A. Berryman, *Towards More Universal Protection of Intangible Cultural Property*, 1 J. Intell. Prop. L. 293, 299-301 (1994).

[344] Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation* (NCCR TRADE, Working Paper No. 2009/34), available at https://www.unilu.ch/fileadmin/shared/Publikationen/Human-Rights.pdf

[345] Explaining the notion of structural inequality , Aoki notes that the: " State laws governing property and contract expressly precluded [indigenous peoples] slaves from applying for or holding [intellectual] property", See, Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)* 40 UC Davis L. Rev. 717, 741 (2007).

[346] *Ibid* at 740.

[347] *Ibid* at 745-746.

Another line of equity argument takes on moral rights perspective. Proponents for the protection of traditional indigenous knowledge adopt the moral rights of creator from Continental-Europe legal system and the Berne Convention to claim that the indigenous communities should have right over traditional indigenous knowledge.[348] For example, Stephen Munzer and Kal Raustiala, although noting that moral rights are contested, agreed that such justification should give two sets of rights as conceived by Wesley Hohfeld: the first "narrow liberty-right and/or claim-right would be disclosure (divulgation): to make an item for their TK known to the world . . . but to retain the power to keep that item from being used in any by others"[349] followed by the "claim-right and power . . . to prevent the attribution of an item of TK to any person or group other than the indigenous communities that generated the item".[350] Other scholars have used the principles of unjust enrichment and misappropriation theories. Several pharmaceutical companies tap the indigenous traditional knowledge to develop products and usually don't share the benefits contrary to morality.[351]

The new discourse on indigenous rights under international law have come to fore in direct retort to the determined struggles and demands of indigenous groups as regard to the continued existence and growth of their distinct cultures.[352] And protection of indigenous culture revolves around the principle of inviolable human dignity which may not be in all situation individualist in nature. As Siegfried Wiessner, citing Neil MacCormick, observes that "[t]he Kantian ideal of respect for person implies . . . an obligation in each of us to respect that which in other constitutes any part of their sense of their own identity".[353]

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[348] MOLLY TORSEN AND JANE ANDERSON, INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES: LEGAL ISSUES AND PRACTICAL OPTIONS FOR MUSEUMS, LIBRARIES AND ARCHIVES 38-40 (2010); Daniel Gervais, *Traditional Knowledge and Intellectual Property: A Trips Compatible Approach,*2005 Mich. St. L. Rev. 137 (2005); See the Berne Convention for the Protection of Literary and Artistic Works 1871 (as amended on September 28, 1979) available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693 [Accessed on 05.05.2016]

[349] Stephen R. Munzer and Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 Cardozo Arts & Ent. L. J. 37, 73 (2009)

[350] *Ibid*.

[351] Winsten P. Nagan, *Misappropriation of Shaur Traditional Knowledge (TK) and Trade Secrets: A Case Study on Biopiracy in the Amazon*, 15 J. Tech. L. & Pol'y. 9 (2010).

[352] Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievement and Continuing Challenges*, 22 Eur. J. Int'l Law 121,121 (2011)

[353] NEIL MACCORMICK, LEGAL RIGHTS AND SOCIAL DEMOCRACY: ESSAY IN LEGAL AND POLITICAL PHILOSPHY 261 (1982) cited in Eiegfried Wiesnner *supra note* 352 at 125.

4.4.2.3.2. Need for Property Rights

A traditional view of property recognises that property protects right-holders from other individuals to do just about whatever they wish with it.[354] Element of physicality was intrinsic to the concept of property. In other words, property rights were exercised on tangible objects. Such a conceptualisation of property is best expressed in the definition advanced by Blackstone:

> There is nothing which so generally strikes the imagination, and engages affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[355]

With the emergence of science and technology conception of property underwent transformation wherein dephysicalization and no longer an absolute notion gained recognition. Additionally, many scholars are of the view that in the modern context the metaphor of property as a" bundle of rights"[356] must be replaced with "web of interests".[357] As Bentham put forward that property also transmits certain component of heritage and intrinsic value[358], it shall not be undesirable to incorporate element of heritage in the concept of property and protect cultural heritage of indigenous peoples within property right framework. Among the modern ideologues, who visualises such a broad notion of property, Hanoch Dagan's view would be relevant to note:

> [P]roperty is an umbrella for set of institutions, serving a pluralistic set of liberal values: autonomy, utility, labour, personhood, community and distributive justice. Property law, at least at its best, tailors different configurations of entitlements to different property institutions, with each

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[354] Lior Jacob Stranhilevitz, *The Right to Destroy* (University of Chicago, John M. Olin Law & Economic Working Paper No. 205, 2003).

[355] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Facsimile ed. 1979) cited in Carol . Rose, *Canons of Property Talk*, *or, Blackstone's Anxiety*(Yale Law School, Faculty Scholarship Series, Paper No. 1802, 2009) available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2801&context=fss_papers [Accessed on 04.04.2016]

[356] J. E. Penner, *The "Bundle of Rights" Picture of Property,* 43 U. C.L. A. L . Rev. 711 (1996)

[357] Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as Web of Interests*, 26 Harv. Envtl. L. Rev. 281 (2002).

[358] Abraham Bell and Gideon Parchomovsky, *What Property Is* (University of Pennsylvania, Faculty Scholarship, Paper No. 9 2004)

> such institution designed to match the specific balance between property values best suited to its characteristic social settings.[359]

In the same league, Carpenter et al. advances two major shift in the notion of conventional property in order to incorporate indigenous peoples' aspirations in the protection of their culture. First, from 'personhood' to 'peoplehood' model of property. As they observe that an individual right approach to property is to a great degree formed by a theoretical tradition of personhood based upon the autonomy of individual.[360] On the other hand 'peoplehood' echoes a collective consciousness and loyalty to a group distinguished by "common descendant —a shared genealogy or geography" as well as by "contemporary commonality, such as language, religion, culture, or consciousness".[361] Second, from absolute ownership' to 'stewardship' model of property. Stewardship possibly means that there exists a "[f]iduciary duty of care or the duty of loyalty to something that one does not own".[362] The notion of stewardship has its application in various sectors, for example, in the corporate world it is understood as "the willingness to be accountable for the wellbeing of larger organisation by operating in service, rather than in control, of those around us".[363] In the field of operational management, it used to motivate workers to work in the benefit and best interest of the company in spite of the fact that they are not the owners. Thus the concept of stewardship in property enables to recognise trusteeship consciousness of indigenous peoples towards its cultural property. For Carpenter et al. trail of stewardship in relation to cultural property consist of of three key component: it includes rights of commodification that control the making of end products from cultural properties—goods that are derived from the cultural property, such as replication of religious artifacts; it consist of the right that oversee the acquisition and usage of these end products from cultural properties, including the right to ascertain whether to circulate knowledge with nonindigenous population for commercial purposes, for example in case of "cultural tourism" tasks; and it includes some degree of rights of representation and acknowledgement —in other words, the capacity of indigenous peoples to play a

[359] Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 Colum. L. Rev. 1409, 1419 (2011).
[360] Kristen A. Carpenter et al. *supra note* 306 at 1052.
[361] *Ibid* at 1054
[362] *Ibid* at 1069.
[363] PETER BLOCK, STEWARDSHIP: CHOOSING SERVICE OVER SELF-INTEREST XX (1993) cited in Kristen A. Carpenter et al *supra note* 306 at 1068.

part in the commercialisation of their traditional knowledge and traditional cultural expressions.[364]

4.4.2.3. Domain of Indigenous Cultural Property

Working on the determination of indigenous cultural property realm, Carpenter et al. identifies three broad subset stemming out from the notion of indigenous cultural property: tangible, intangible and real.[365]

Tangible cultural property includes "[h]istoric and prehistoric structures and artifacts, as well as cultural objects of importance to contemporary [indigenous peoples] tribes, such as sacred objects and objects of cultural patrimony".[366] The tangible cultural property is generally understood to mean physical form of property which includes both moveable and immoveable property. Initially the understanding of cultural property was restricted to tangible objects. However, influential novelist Raymond Williams noted that 'culture' is living and evolving concept based on 'structure of feeling' and intangible products are key part of culture. He in reality illuminated the spirit of cultural property, which is an aggregate of not only tangible properties, but also and especially of the vital components signifying the living culture of human communities, their evolution, and their continuing development.[367]

Intangible cultural property consist of, identifies Federico Lenzerni,: "(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship".[368]

For indigenous peoples, continuing possession and safeguarding cultural property have become extremely difficult. Land plays a predominantly influential part in indigenous cultural survival for the following obvious reasons: a traditional land base empowers indigenous communities to dwell in group's, in place where they are free to profess and

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[364] Carpenter et al *supra note* 306 at 1084.
[365] *Ibid* at
[366] Rebecca Tsoie, *Indigenous Peoples' Claims to Cultural Property: A Legal Perspective*, 21 Museum Anthropol. 5, 5 (1997).
[367] RAYMOND WILLIAMS, MARXISM AND LITERATURE 122-132 (1977).
[368] Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 Eur. J. Int'l. L. 101, 107 (2011).

propagate common culture and religion as a unified community. Moreover, it defines their historical events, languages, culture, and enduring peoplehood. Considering the fact that relationship with land defines indigenous peoples, thus traditional land forms the subject matter of real property.[369]

4.4.3. Protection of Cultural Property: Traditional Knowledge (TK) and Traditional Cultural Expressions' (TCEs)

In the human rights discourse, cultural rights remain under the scanning system often because they are essentially linked with aesthetic life and feeling.[370] These consist of the right to sense and feel, the right to think, and the right to recognition. Any encroachment on these cultural rights is an indication for dire consequences as a result of human rights violations in near future.[371] Accordingly, indigenous peoples' traditional knowledge system is called for protection and recognition.

This section of the chapter shall focus on the concept of traditional knowledge (TK) and traditional cultural expressions (TCE's) related with indigenous peoples. I shall also be discussing various strategies for the protection of TK and TCE's

4.4.3.1. Definition

The phrase "traditional knowledge" is shorter form of the phrase "knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles" under the CBD, or "traditional knowledge, innovations and practices" in WIPO's *Report of Fact-finding Missions (FFM) on Intellectual property and Traditional Knowledge*.[372] The term TK is a broad term which denotes logical and practical knowledge framework that was the foundation of historical and developing societies.[373] The skill and wisdom of peoples creating these societies —indigenous and local communities —manifested by way of customary norms and customary 'law' was

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[369] Carpenter et al *supra note* 306 at 1113.
[370] Deborah Kapchan, *Introduction, Intangible Rights: Cultural Heritage in Transit* IN CULTURAL HERITAGE IN TRANSIT (Deborah ed., 2014).
[371] *Ibid*.
[372] WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998-1999) (2001) *available at* http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf [Accessed on 05.04.2016]
[373] Gurdial Singh Nijar, *Traditional Knowledge Systems, International Law and National Challenges: Marginalization or Emancipation?* 24 Eur. J. Int'l L. 1205, 1205 (2013).

the path through which the 'commons' were controlled.[374] It has been defined by the CBD Secretariat:

> Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over centuries and adopt to local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of practical nature, particularly is such field as agriculture, fisheries, health, horticulture, forestry and environmental management in general.[375]

Thus the complexity of the matter lies with the fact that it is not necessary that every traditional knowledge holder belongs to an indigenous community. However, for the purpose of this chapter, I shall restrict the meaning of TK in the context of indigenous peoples. In this vein, there are two important points with regard to TK of indigenous peoples. First, knowledge is not traditional for the reason pertaining to its object, nor its field of reference nor content, nor its historicity, nor its philosophical attributes.[376] What makes it traditional is the manner in which knowledge is preserved and passed from one generation to another within a community. Second, traditional knowledge is not simply "local" knowledge rather knowledge of the universe, which is deeply associated with the moral imperatives of stewardship.[377]

The concept of TCEs was initially conceptualised as part of TK but later on it was demarcated from TK. Michael Blakeney attempts to explain the concept as follows:

> The expression TCEs refers to "any form of (artistic and literary), (creative and other spiritual) expression, tangible or intangible, or a combination

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[374] *Ibid* at 1205-1206.

[375] UNEP, *The Traditional Knowledge and the Convention on Biological Diversity*, *available at* https://www.cbd.int/doc/publications/8j-brochure-en.pdf [Accessed on 05.05.2016]

[376] Antony Taubman and Matthias Leistner, *Analysis of Different Areas of Indigenous Resources: Section 1: Traditional Knowledge,* IN INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 59-60 (Silke von Lewinski ed. 2008)

[377] Caroline Joan S. Picart and Marlowe Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I,* 15 Int'l Comm. L. Rev. 319, 329 (2013).

> thereof, such as actions, materials, music and sound, verbal and written (and their adaptations), regardless of their form in which it is embodied, expressed or illustrated (which may subsist in written/codified oral or other forms).[378]

4.4.3.2. Threat to TK/TCEs

It has been clear now that there are clear cut cases of exploitation of TK/TCEs by parastatal and private multinational corporations under the rhetorical justification of entrepreneurialism and utilitarianism. For all that, they fall short to account for the damaging consequences of their ventures on indigenous communities.[379] Among the illustrations of bio-piracy include: US pharmaceutical Eli Lilly's going for patent of the anti-cancer drugs vinblastine and vincristine from the rosy periwinkle plant in Madagascar.[380]

Bio-piracy adversely affects, explains Vandana Shiva, in such a way: first, "it creates a false claim to novelty and invention, even though the knowledge has evolved since ancient times", second, "it diverts scarce biological resources to monopoly control of corporations, depriving local communities and indigenous practitioners" and third, bio-piracy "creates market monopolies and excludes the original innovators from their rightful share of local, national, and international markets".[381]

Similarly TCEs are continuously targeted by misappropriation, modern-day cases of which encompass, inter-alia, the employment by non-indigenous peoples of native symbols, songs, dance, words, and other forms of TCEs. TCEs misappropriation is far beyond deprivation of mere economic gain, representing rather as sort of human right abuse or, at least, an offense to the community's self-respect and identity.[382]

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[378] Michael Blakeney, *Protecting the Knowledge and Cultural Expressions of Aboriginal Peoples*, 39 U.W. Austl. L. Rev. 180, 190 (2015).
[379] Caroline Joan S. Picart and Marlowe Fox, *supra note* 377 at 330.
[380] *Ibid* at 332.
[381] Vandana Shiva, *War Against Nature and People of South,* IN VIEWS FROM THE SOUTH: THE EFFECTS OF GLOBALIZATION AND THE WTO ON THIRD WORLD COUNTIRES 116-118 (Sarah Denny Anderson ed. 2000)
[382] ANTHONY C.K. KAKOOZA, THE CULTURAL DIVIDE: TRADITIONAL CULTURAL EXPRESSIONS AND THE ENTERTAINMENT INDUSTRY IN DEVELOPING COUNTIRES 11 (University of Illinois, Doctoral Thesis 2014)

4.4.3.3.Strategies for Protection of TK/TCEs

In the light of the problems outlined above, there have been significant efforts to provide for the protection of TK/TCEs within the TRIPS Council of the WTO. However, forms of IPRs under the TRIPS Agreements are inadequate to protect TK/TCEs for a number of reasons.

First, the various kinds of IPRs lays emphasis on, to a great degree, individual intellectual accomplishments. Due to this, the legal identity of right-bearers is intrinsically individualistic or material. Whereas indigenous peoples believe that "innovations are cultural properties" in the sense that by and large, "they are product and property of a group".[383] TK/TCEs are generally considered as "a means of developing and maintaining group identity and survival",[384] than of upholding individual interest. The modern IPRs do not, in most cases, take account of the collective nature of TK/TCEs

Secondly, the essential requirement to become part subject matter of protection in some IPRs is problematic. For example in the case of patents, the requirement of 'novelty' seems out of context in case of protecting indigenous cultural rights. TK/TCEs structure is established gradually in an incremental evolution.[385] The emphasis of existent IPRs on "new knowledge" by the conditions of novelty and originality situates, in case of TK, the subject-matter beyond the purview of protection as TK is created on knowledge accrued over generations and continues to evolve in response to changing and emerging needs.

Thirdly, generally various forms of IP concede their owners a short period of protection. TK/TCEs often displays continuity, and is distinguishable by its evolution over the period and its cross generational nature. Indigenous peoples insist that their TK/TCEs is a heritage that requires protection now and forever, as long as the indigenous culture remains on the earth, not merely for some short span of time.[386]

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[383] Teshager Dagne, *The Protection of Traditional Knowledge in the Knowledge Economy: Cross-Cutting Challenges in International Intellectual Property Law*, 14 Int'l Comm. L. Rev. 137, 147 (2012).
[384] *Ibid*
[385] Chidi Oguamanam, *Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge*, 11 Indiana J. Glob. Leg. Stud. 135, 143 (2004).
[386] Teshager Dagne *supra note* 383 at 148.

Even in the cases where TK/TCEs are found eligible for protection IP regimes some sort of problems become apparent for the group that want to profit from the mechanism. IPRs incline to advance materialistic and other non-indigenous interests, because they are ordinarily subject to the interest of trade and industry organisations. The policy for IPRs registration are, normally, costly, intricate and takes too much of time for most TK/TCEs rights bearers.[387]

For the amount of struggle required in registering TK/TCEs under the IP regimes formulated within the TRIPS framework of the WTO, however, pursuit were directed to other international forums that are responsible for the normative concerns further than IPRs, for example, those based on "[e]nvironment, biodiversity, human rights, health and development".[388] The legal procedure to protect TK/TCEs that are widely accepted in the various forums can generally be grouped into three major categories: an Access and Benefit Sharing Model; Sui Generis model; an IP-based model.

4.4.3.3.1. Access and Benefit Sharing System

Access and Benefit Sharing (ABS) mechanism is provided under the *Convention on Biological Diversity* (CBD) framework to modulate the prerequisite for access to and utilisation of genetic material and the sharing of profits from their use with indigenous communities.[389] The Preamble to the CBD underlines the desirability of equitably sharing benefits emanating out of the application of TK in conserving biodiversity. To achieve the objectives of biodiversity conservation, it provides certain measures which, *inter alia*, include *in situ* and *ex situ* measures of conservation. Article 8(j) lays down the conditions for the enforcement of *in situ* conservation by requiring Contracting Parties to:

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote wider application with approval and involvement of the holders of knowledge, innovations and practices and encourage the equitable sharing of

[387] DARREL ADDISON POSEY, CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY 11 (1999) cited in Teshager Dagne *supra note* 383 at 148.
[388] *Ibid*
[389] Article 15 of the CBD.

> the benefits arising from the utilisation of such knowledge, innovations and practices.

In this effect, the COP of the CBD developed modalities of ABS system —especially in the Bonn Guidelines—which recognised States' sovereignty over resources in their jurisdiction and acknowledges States' rights to determine condition of access to them.[390] The users had to obtain "prior informed consent" (PIC) from the TK holders [indigenous communities] on the "mutually agreed terms" (MAT). The Bonn Guidelines present a suggested list of features that could be considered guiding parameters in contractual agreements as well as basic requirement for MAT, particularly with regard to indigenous peoples and TK:

> a. Regulating the use of resource in order to take into account ethical concerns of the particular Parties and stakeholders, particular indigenous and local communities concerned;
> b. Making provision to ensure the continued customary use of genetic resources and related knowledge;
> c. Provision for the use of intellectual property rights include joint research, obligation to implement rights on inventions obtained and to provide licences by common consent;
> d. The possibility of joint ownership of intellectual property rights according to degree of contribution[391]

Bonn Guidelines was criticised for several reasons including: First, these guidelines were of voluntary nature therefore there was no clarity regarding their legal binding aspect. Second, indigenous peoples were critical of the fact that the guidelines did not differentiate between their role and the role of any other stake holder who might equally contributing in resource management.[392]

ABS system was further developed with the conclusion of the Nagoya Protocol (NP) in the year 2010.[393] With the adoption an international binding treaty in the form of the

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[390] Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization, para 1 *available at* https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf [Accessed on 04.05.2016]

[391] *Ibid* at para 43.

[392] Konstantia Koutouki and Katharina Rogalla von Bieberstein, *The Nagoya Protocol: Sustainable Access and Benefit-Sharing For Indigenous and Local Communities*, 13 Vt. J. Envtl. L. 513, 523 (2012).

[393] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization to the Convention on Biological Diversity, opened for signature 2 February 2011, UN Doc UNEP/CBD/COP/DEC/X/1 (entered into force 12 October 2014) (hereinafter NP)

NP paved the way for the implementation of the ABS provision of the CBD, the Parties of the CBD get ahead in addressing many of the apparent difficulties to implement so far, which includes the role of indigenous groups.[394] It is significant to note that the NP differentiate between benefit arising from the application of genetic resources which falls under the control of "indigenous and local communities" and benefits arising from the application of TK connected with genetic resources:

> [E]each party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in fair and equitable way with the communities concerned. . .
>
> [B]enefits arising from the utilisation of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge.[395]

However with regard to the compliance of ABS mechanism, Article 17 of the NP necessitates Parties to upkeep compliance by monitoring and improving transparency with respect to the utilisation of genetic resources.[396] An equivalent provision of TK is not included, which could have profound impact considering the fact that the NP draws a clear distinction between the utilisation of genetic resources and the utilisation of TK.[397]

Moreover, if viewed from the critics perspective, State sovereignty apparently overrules the rights of indigenous peoples from beginning to the end of the NP. The main points highlighted are following: Firstly, the manner in which text is drafted conceives contrasting principles in case of indigenous and local communities' rights and those of State parties by applying the terms "in accordance with domestic law" "established rights", "as appropriate", "as applicable", and "with the aim of ensuring" whenever it

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[394] Konstantia Koutouki et al. *supra note* 392 at 532-533.
[395] Article 5, Sec 1, Sec. 2 of the Nagoya Protocol.
[396] Evanson Chege Kamau et al., *The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and What are the Implication for Provider and User Countries and Scientific Community?* 6 L. Env't & Dev. J 246, 252 (2010)
[397] *Ibid* 253 *cited in* Konstantia Koutouki et al. *supra note* 392 at 530.

dealt with indigenous local communities throughout the text of the NP.[398] Second set of criticism relates with Article 12.1 of the NP, which entails that references to customary laws shall be made by the contracting Parties in accordance with domestic law thus underestimating the values of customary laws of indigenous peoples.[399] Third, still the NP fails to focus on the issues of intellectual property rights of indigenous peoples TK. This is critical as Koutouki states :

> The discovery-invention distinction and importance of collective are central to a discussion of indigenous traditional knowledge of medicinal plants and patent law. Many patent owners feel that indigenous traditional knowledge is not proprietary-type knowledge, but knowledge that belongs to all hence not patentable. Indigenous traditional knowledge . . . therefore falls into category of discovery, whereas products manufactured by patent owners based on this knowledge fall into the category of invention and are therefore patentable.[400]

Despite these criticisms, TK protection through ABS remains popular in national and international framework especially with the adoption of NP for more transparency and legal certainty.

4.4.3.3.2. *Sui Generis* Model of Protection

Sui Generis is a Latin term meaning “a special kind”. In intellectual property discourse “[t]he terms refers to special form of protection regime outside the known framework”.[401] Sui Generis solutions are developed separately for TK and TCEs

4.4.3.3.2.1. *Sui Generis* Approach for the protection of TK

There are two major varieties of TK protection under the *sui generis* model that are discussed briefly below.

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[398] Konstantia Koutouki et al. *supra note* 392 at 533.
[399] *Ibid.*
[400] Konstantia Koutouki , *A Legal Placebo: The Role of International Patent Law in the Protection of Indigenous Traditional Knowledge of Medicinal Plants,* 26 Canadian Intell. Prop. Rev. 19, 23 (2010).
[401] MONI WEKESA, WHAT IS SUI GENERIS SYSTEM OF INTELLECTUAL PROPERTY PROTECTION? 2 (2006)

4.4.3.3.2.1.1. Defensive Community Patent System

One of the noticeable method in relation to *sui generis* variation is named as the "defensive community patent" system.[402] Provided the given history of open-endedness in the yardstick for patentability in IP law, this scheme appreciates that the framework of IP may "creatively" be altered to extend protection to TK. The "defensive community patent" framework recommends the recognition of a robust IP which is apt to consolidate main features of TK in the utilisation of genetic resources for biotechnological purposes. As holders of IP rights, indigenous peoples hopefully be capable to refrain third parties' from getting hold of IP rights over their resources. In case where TK of indigenous communities are exploited without PIC law would take its own course either in the form of an injunction, indemnification or both.[403]

As operative and effectual the community patent blueprint appears, it can be difficult to integrate it into prevailing regimes of IP law. Considering the restricted role of indigenous and local communities (ILCs) as an international law maker, it is not likely for technologically advanced States delegates to permit a compromise that put up TK in a way proposed under this approach. The business interests are high for industrial nations —for which IPRs-based goods comprise the major chunk of exports.—to make out strong property rights in the way of "communal patent protection" for TK It can be challenging to maintain an equilibrium between the rights of ILCs under a "communal patent system" and the [selfish] desire of transnational companies who are anxious to find substitutes for their patents on money-making drugs and agro-technology yields that are about to expire after twenty of the TRIPS Agreement's implementation.[404]

4.4.3.3.2.1.2. Culture Specific Protocols for Protection

The second approach towards *sui generis* model may be based upon cultural specific protocol derived from the customary laws of indigenous peoples. The idea is to look forward towards the "private law at the community level"[405] for the protection of

[402] Ikechi Mgbeoji, *Patents and Traditional Knowledge of the Uses of Plants: Is a Communal Patent Regime Part of the Solution to the Scourge of Bio Piracy?* 9 J. Global Legal Stud. 163, 186 (2001)
[403] Tesh Dagne, *Protecting Traditional Knowledge in in International Intellectual Law for Protection and Choice of Modalities*, 14 J. Marshall Rev. Intell. Prop. L. 24, 42 (2014)
[404] *Ibid.*
[405] Kathy Bowrey, *Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices,* 6 Macquarie L. J. 65, 83 (2006).

traditional knowledge. The reason for doing is explained by Angela R. Riley. She argues that engaging tribal law to guard the cultural property of indigenous peoples pave the way for several opportunities. Tribal law has its source in the tribes' ancient customary laws, their unique philosophical values and present day norms of tribal governance. Thus, it echoes not only substantive legal doctrines but also the cultural background from which they are originated.[406] She also cites examples *sui generis* model based on customary laws in the protection of TK. For example, Maricopa community of the Gila Indian Reservation have come up with "Native Plant Law" which ensures protection of native plants such as *washingtonia filifera, lysilima thornberi* , because of their for their medicinal properties.[407]

In spite of the above mentioned positive aspects of developing *sui generis* mechanism based upon customary practices there is a flip side to it which represents the challenges and practical difficulties in implementing bottom-upward approach towards the protection of TK. First, customary laws of tribes and indigenous peoples are uncodified principles and in order to develop any indigenous code for the protection of TK it needs to be codified.[408] The very idea of codifying the customary laws may be intimidating to many indigenous peoples who chose to enjoy the flexibility of an oral traditions. Second, indigenous peoples are heterogeneous group with divergent customary laws. There is every likelihood of concurrence of *sui generis* laws within a particular region.

4.4.3.3.2.2. Sui Generis Model for the Protection of Traditional Cultural Expressions

In the context of TCEs, the international community have developed alternative regulatory mechanisms in the form of model norms which may be used by the States to develop their own national legislation. Some of the relevant alternative model laws are:

Model Law	Year	Abbreviation
Tunis Model Law on Copyright for Developing Countries	1972	TML

[406] Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 Washington L. Rev. 69, 90 (2005).
[407] *Ibid* at 108.
[408] *Ibid* at 97.

Model Provisions of the UNESCO/WIPO	1982	MPUW
South Pacific Model Law for National Laws	2002	SPML
WIPO Draft Provisions	2004	WDP
Swakopmund Protocol, ARIPO	2010	ARIPO

Source: Kilian Bizer et al. (2011)

Killan Bizer et al., while analysing the above mentioned model laws points out the salient features which includes: First, the *sui generis* rights includes right of TCEs owners to restrict general public from its use, and provisions on benefit sharing. So the owners of TCEs had both economic and moral rights. Second, these model laws recognised perpetual collective rights of indigenous communities in their TCEs.[409]

WIPO in its endeavour to protect rights of indigenous and local communities with respect to TCEs maintains that in the development of *sui generis* system, the following key issues may be addressed: (a) aims and objective of protection; (b) subject matter of protection; (c) required tests which need to be passed, for example, the matter is not published; (d) who shall be the owner of the rights; (e) procedures and modalities to acquire rights; (f) the enforcement mechanism and sanctions for violation of rights ; (g) duration of rights; (h) Whether the protection is retrospective?; and (i) how the rights shall be recognised beyond the national boundaries?[410]

4.4.3.3.3. Protection under Existing Intellectual Property Rights

Considering the fact that existing IPR regime has more established rather dominant global footprints, however the same has been invoked in several cases to protect TK and TCEs. It is possible that an innovation based on TK may be granted patent. Likewise, illegitimate patent may be challenged on the ground that there was nothing

[409] Kilian Bizer et al., *Sui Generis Rights for the Protection of Traditional Cultural Expressions*: *Policy Implications*, Sui Generis Rechte Zum Schutz Traditoneller Kulureller Ausdrucksweisen 113, 113-114 (2011).
[410] WIPO, INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS 37 (2015).

novel in the innovation. For example, The patent obtained by the US scientist on Ayahuasca (*Banisteriopsis caapi*) for its medicinal property was successfully challenged by Indigenous Organisations of the Amazon Basin.[411] In the same vein, Aboriginal artists from Australia challenged, under copyrights and unfair trade practices, the practice of printing their arts on carpets.[412]

Similarly, the law of confidentiality and trade secrets may utilised to prevent non-disclosed TK from being published by someone not authorised to do so. For instance, in *Foster v. Mountford* , the book entitled "Nomads of Australian Deserts" was restrained from publication on the ground that publication of sacred-secret materials may "undermine the social and religious stability" of the members of Pitjantjatjara Council.[413]

However there are certain drawbacks in the existing IP framework for which it may fall short in the protection of TK and TCEs, some of them are: (a) TK and TCEs are owned collectively by members of indigenous societies while the IP framework lays emphasis on individual rights; (b) Cost of IPR system is on the higher side which almost invariably act as an deterrent for indigenous peoples; (c) protection obtained under existing IP framework are temporary whereas indigenous societies may endeavour for perpetual protection

After analysing different approaches to protect TK and TCEs it would be safe to argue that none of the approach is self-sufficient in providing 'holistic protection' to TK and TCEs linked with indigenous peoples. In same line, Tesh Dagne argues for the development of "pluralistic approach" in protecting TK and TCEs. A synergy of different approach can envisaged from the case of local tribes of Kerala wherein the local tribes instead of going for a defensive protection chose to engage in negotiation with a private corporation and granted them licence to exploit the TK attached with

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[411] Rosa Giannina Alvarez Nunez, *Intellectual Property and the Protection of Traditional Knowledge, Genetic Resources and Folklore: The Peruvian Experience*, 12 Max Planck Yearbook UN L. 487, 510 (2010)

[412] *Protecting Australian Indigenous Art: Ownership, Copyright, and Marketing Issues for NSW School*, available at http://ab-ed.bostes.nsw.edu.au/files/protecting-australian-indigenous-art.pdf [Accessed on 24.09.2015].

[413] Foster v. Mountford and Rigby Ltd (1996) 14 ALR 71.

Kaani plant. In turn they received royalty. The licence was only for ten years thereafter all the rights would rest with local tribes.[414]

4.4.4. Conclusion

Central to the above discussion was the question of legitimacy in protecting indigenous intellectual and cultural property. Protecting indigenous culture as a property right may be justified if the concept of property is premised on stewardship rather the traditional understanding of ownership. Stewardship model of cultural property allows the members of indigenous communities to be collective custodian to their culture. There is constant challenge to indigenous culture amid globalisation and there is need to look beyond traditional intellectual property regime. *Sui generis* model incorporating customary laws of indigenous peoples is a progressive model but it has its own viability issues. It is desirable to have a pluralistic approach incorporating synergy of *sui generis* and existing IPR regime may be developed to protect TK and TCEs of indigenous peoples.

4.5. Conclusion

The concept of *sovereignty* is a dynamic notion. Its scope extends beyond State as such and include 'other' entities living within the State. However, sovereign authority of 'other' entities which include indigenous peoples cannot be assumed to refer to remedial secession. The idea of indigenous sovereignty will merely help indigenous peoples to negotiate with State, in which they live, to have certain rights in a "pluralistic" legal system.

The control over ancestral land is significant to the continued existence of the culture of indigenous peoples. Consequently, the legal status of such lands must reflect the aspirations of indigenous peoples. For any consensus on development project, in the vicinity of indigenous population, State must involve indigenous peoples in decision making process. Eventually it is up to each indigenous groups, and its members, to

[414] R. V. Anuradha, *Sharing with the Kanis: A Case Study from Kerala*, India *available at* https://www.cbd.int/financial/bensharing/india-kanis.pdf [Accessed on 03.10.2015]

exercise their discretion whether or not they choose to live with their traditional lifestyle, amend or renounce them.

In spite of the fact that indigenous peoples have a rich cultural heritage and profound traditional knowledge system they are socially and economically deprived. The theft and misappropriation of indigenous cultural property is adversely affecting such communities' world-wide. For the best protection of cultural property, custodianship may be handed over to indigenous peoples itself. And, a pluralistic approach involving mainstream intellectual property tools and *sui generis* models involving customary laws should be developed to protect Traditional Knowledge and Traditional Cultural Expressions.

Chapter 5

Implementation Mechanisms under International Law

5.1. Introduction

The prior chapters have examined the evolution of international normative structure regarding indigenous peoples. The development of indigenous rights characterise a striking newness in the domain of international human rights. The recognition of pre-eminent rights to indigenous peoples, in the manner that the right to self-determination and collective ownership over their ancestral lands, not only considerably distinguishes the discourse of indigenous rights from that of minority rights but also, and critically, contests conventional notion of state sovereignty and common Western understanding that human rights are primarily individualistic in nature. However the efforts of indigenous peoples for a robust indigenous rights regime essentially requires effective implementation mechanisms. This chapter will critically examine the available implementation mechanisms for enforcing indigenous rights at international and regional levels. To begin with, it briefly discuss the concept of implementation in international law. Thereafter, it reviews the developments towards the implementation of the UNDRIP provisions during the last decade.

5.2. Implementation in International Law

5.2.1. Why do Nations Obey International Law?

A very basic and relevant question under international law discourse is why do States comply with international law?[1] The question is foundational from both practical and theoretical viewpoint in the study of international law. H. H. Koh in his article "*Why do Nations Obey International Law"* attempts to explain the "compliance question"

[1] Lousi Henkin observes that "almost all nations observe almost all principles of international law", LOUIS HENKIN, HOW NATIONS BEHAVE 47 (1979); Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?* 55 Stan. L. Rev. 1901 (2003); Heath Pickering, *Why Does State Mostly Obey International Law?,* available at http://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/ [Accessed on 02.01.2017].

under international law.[2] Koh presents three different perspectives to compliance issue in international law.

First one is proposed by Abram Chayes and Antonia Handler Chayes. They argue that international law is advanced through a "managerial model".[3] In his work *The New Sovereignty,* Chayeses' explain that States obey international law not because of any fear of sanctions, but are induced to observe by the system generated by the treaty regimes to which they are party. Koh quoting Chayeses' observes: "the fundamental instrument for maintaining compliance with the treaties at an acceptable level, they argue, is an *iterative process of discourse* among the parties, the treaty organisation, and the wider public".[4] Chayeses' assign several reasons for non-compliance of international rules by nations. They argue that "enforcement" model based on coercive tools of economic and military sanctions is generally doomed to failure. In their own words: "sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used".[5] Alternatively, they propose "managerial model", which seeks compliance through cooperation among national actors. For them "sovereignty" is not all about freedom *from* external interference but freedom *to* engage external forces as a component of international society. Chayeses' explains that interactive process in "managerial model" advances in the following stages: (a) survey about the situation prevalent in parties under obligation; (b) the behaviour which is the cause of concern for non-compliance; (c) identifying the root cause for defiant behaviour; (d) assessment of the capabilities of violating State in carrying out the obligation; (e) offers of technical assistance if the defying State is short of ability to carry out obligation ; (f)) invocation of dispute settlement mechanism; (g) adjustment of treaty norms to accommodate Sates based on "differential treatment" policy in international relations.[6]

A second set of reasons for compliance is fostered by Thomas Franck in his book, *Fairness in International Law and International Institutions*.[7] Franck argues that

[2] Harold H. Koh, *Why do Nations Obey International Law?* 106 Yale L. J. 2599 (1997).
[3] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY : COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).
[4] Harold H. Koh *supra note* 2 at 2601.
[5] Ibid at 2636.
[6] Ibid at 2635-2640; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823, 183-1833 (2002).
[7] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)

nations obey rules if benefit exceeds the implementation cost. The underlying gist of his argument is that nations finds little or no motivation to comply with international rules if they are not fair. Franck also acknowledges that nations feel "communitarian peer pressure" as part of international society.[8]

Finally, Koh offers his view on the "compliance question" in international law. He argues that transnational actors through "transnational legal process" interact and internalise rules of international law.[9] According to Koh, "transnational legal process has four unique characteristics: (i) it is *non-traditional* in a sense that it rejects the dichotomy between public and private, domestic and international —a key aspect in traditional way of studying international law; (b) it is *non-Statist* as non-State actors also have an important role to play in the development and implementation of international law; (c) it is a *dynamic* process, it transudes both up and down from public to private and domestic to international level; and (d) it is *normative*, the process ends up in rule framing which is thereafter internalised and enforced.[10]

5.2.2. Meaning of Effective Implementation?

There exists a fundamental aspect to the "compliance question" about what constitutes an effective implementation? Daniel Bodansky in his work *Implementation in International Environmental Law* distinguishes between three different meanings of the term "effectiveness".[11] First, *legal effectiveness*, which focuses on actual compliance of legal rules and obligations.[12] For example if an international treaty ascribes certain conduct to be observed by member States then it would be legally effective if States act accordingly. For example arrangements made by States to establish benefit sharing mechanism as contemplated under Article 8(j) of the *Convention on Biological Diversity* for the protection traditional knowledge.[13]

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[8] THOMAS M. FRANCK , THE POWER OF LEGITIMACY AMONG NATIONS 196 (1990)
[9] Harold H Koh, *Transnational Legal Process,* 75 Neb. L. Rev. 181, 184 (1996).
[10] Ibid.
[11] Daniel Bodansky, *Implementation in International Environmental Law,* 54 Japanese Y.B. Int'l L. 62 (2011).
[12] Ibid at 65
[13] The Republic of Kenya enacted "The Protection Traditional Knowledge and Cultural Expression Act, 2016" available at http://www.wipo.int/edocs/lexdocs/laws/en/ke/ke030en.pdf [Accessed on 02.02.2017]; For detail discussion on the protection of traditional knowledge, See, Lindsey Schuler, *Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law*, 21 Mich. St. Int'l L. Rev. 752 (2013).

Secondly he refers to *behavioural effectiveness*, which in the context of indigenous peoples rights would mean that a State or government institutions starts to move forward in the "right direction" towards recognising their concerns.[14] Lastly, he refers to *problem-solving effectiveness* which focuses on the overall capacity of international rules to resolve the problem. In reference to indigenous peoples rights, effectiveness of norms established by international legal regime shall be judged on the basis of overall condition of indigenous peoples at the ground level.[15] The concept of problem-solving effectiveness thus necessitates us to look beyond theoretical level.

5.3. ILO Compliance Mechanism

The ILO supervises States' assurance to meet the ideals outlined in ILO Conventions through its review of States reports and suitably discussing complaints from oppressed groups and individuals commonly implemented via workers institutions. The usual regulatory mechanism is provided under Article 22 of the ILO Constitution, Ratifying States are required to provide an annual report on the steps they have taken to implement the provisions of Conventions to which they are parties.[16] Simultaneously, governments are obligated to send copies of these reports to workers' and employers' organisations within their realm, who then have their own prerogative to make comments. For example, it is possible for them to point that the government is misrepresenting the situations, or has not revealed complete information.[17]

These annual reports are examined by the Committee of Experts on the Application of Convention and Recommendation (CEACR), which meets once a year.[18] According to practice as it has been progressively developed, the Committee of Experts may ask questions or requests clarifications from the Government concerned. If, after repeated

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[14] In 2008 Kevin Rudd, the then PM of Australia, seek apology for "stolen generation", See, http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples [Accessed on 02.02.2017].

[15] Daniel Bodansky, *supra note* 11 at 64.

[16] Constitution of the ILO Article 22, Oct. 9, 1946, 62 Stat. 3485,15 UNTS 35 [hereinafter ILO Constitution] *also available* at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A22 [Accessed on 02.02.2016]

[17] JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 145 (2009).

[18] The ILO CEACR came into existence in 1926 to review the burgeoning figure of government reports on ratified conventions. At present, it involves twenty distinguished jurists appointed by the Governing Body for a period of three years. See, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm [Accessed on 02.02.2016]

requests, the replies provided still do not appear satisfactory, the Committee may formulate observations which are included in its report—referred to as “green book”—that goes to the Tripartite Conference Committee on the Application of the Conventions.[19] The ILO CEACR regularly takes note of the State inefficacy to comfort indigenous peoples with restoration, redress and reparation albeit it frames its recommendations in soft and recommendatory.[20] For example, the ILO CEACR submitted the desired modes of redress for Mexican State inability to recognise Huichol people existence and land rights may consist of “special measure to safeguard the interest of these peoples as such and the way of their life” and “allocating additional land to the Huichol people when their own land ceases to be sufficient to provide the essentials of normal existence”.[21] Similarly, the ILO CEACR subtly expresses its concern on the issue of resettlement of people in India and awarding of low amount of compensation.[22]

The ILO Constitution also provides for two sets of procedures concerning the implementation of the Convention. First of which can be identified with ‘representations’. According to Article 24 of the ILO Constitution, representations are charges submitted to the International Labour Office declaring that a Member “has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is party”.[23] Aforementioned charges can be filed “by an industrial association of employers or workers”.[24] According to the Constitution, the Governing Body of ILO has a broad range of alternatives as regard to the follow-up; it *may* communicate this representation to the Government against which it is made and

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[19] CYNTHIA PRICE COHEN, THE HUMAN RIGHTS OF INDIGENOUS PEOPLES 28 (1998)

[20] Claire Charters, *Reparations for Indigenous Peoples: Global International Instruments and Institutions* IN, REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 175 (Federico Lenzerini ed. 175).

[21] Int’l Labour Conference, 88th Session, *Report of Committee on the Application of the Standards, Direct Request Concerning Convention No. 169, Indigenous and Tribal Peoples, 1989* : Mexico (Geneva 2000) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2179016,102764,Mexico,1999 [Accessed on 02.02.2016]

[22] Int’l Labour Conference, 93rd Session, *Report of Committee on the Application of the Standards, Direct Request Concerning Convention No. 169, Indigenous and Tribal Population, 1957: India* (Geneva 2005) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2236713,102691,India,2004 [Accessed on 02.02.2016]

[23] Constitution of the ILO Article 24.

[24] *Ibid.*

may invite that Government to make a statement on the subject as it may deem appropriate.[25] According to Article 25, “if no statement is received within reasonable time from the Government in question, or of the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and statement, if any, made in reply to it”.[26] Indigenous Peoples have utilised this strategy through workers association (the association in question does not require to prove any connection to harm). When a submission is thought-about as ‘receivable’, the ILO Governing Body institutes a tripartite committee comprising of workers, employees and State representatives, to examine the petition which at that point list down recommendations to be adopted by the ILO Governing Body.[27]

The ILO supervisory system also consist of a more detailed and formal procedure of ‘*complaints’* prescribed under Article 26 of the ILO Constitution. The purpose of the complain procedure corresponds to that of representation.[28] A complaint relates to charges that a Member fails to achieve “the effective observance of any Convention”[29], with the significant transformation that the complaint procedure is accessible to different entities. They can be filed either by another ILO Member State provided it is also party to the same Convention, by a delegate at the Conference, or by the Governing Body itself. The second, and possibly the most noteworthy difference relates to the handling of the complaint and to the possible ‘binding’ nature of the conclusion.[30]

On account of complaint, the Governing Body may, if it thinks fit, assign the responsibility to an independent Commission of Inquiry after communicating the complaint to the Government, the same way as in the representation proceedings.[31] The three-member Commission of Inquiry is instituted on *ad hoc* basis by the Governing Body and set-up its own rules of procedure (based upon standard format) which involves, *inter alia,* the examination of witness.[32] Article 28 categorically states that,

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[25] *Ibid.*
[26] Constitution of the ILO Article 25; “Tripartite means that representatives of workers’ and the ILO’s governance structures, and that the ILO promotes social dialog on the national level on the same basis”, See, Kari Tapiola and Lee Swepston, *The ILO and the Impact of Labour Standards : Working on the Ground After and ILO Commission of Inquiry*, 21 Stan. L. & Pol’y Rev. 513, 513 (2010).
[27] Claire Charters, *supra note* 20 at 176.
[28] Francis Maupain, *The Settlement of Disputes Within the International Office*, 2 J. Int’l Econ. L. 273, 278 (1999).
[29] Constitution of the ILO Article 26.
[30] Francis Maupain, *supra note* 28 at 278.
[31] Constitution of the ILO Article 26(2).
[32] Francis Maupain, *supra note* 28 at 279.

"when the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken".[33]

It is noteworthy that the Commission of Inquiry is exclusively accountable for preparing report on the complaint. The moment the report of the Commission is concluded and signed, it becomes final. Thereafter, it is communicated to the Governing Body and also "to each of the Governments concerned in the complaint".[34] At this phase, the function of Governing Body is restricted to register the report—it cannot give its assent or alter it. The Governments concerned (besides the Government complained of) are free to disagree and reject the content of the report; they have a right to contest the recommendations proposed in the report by referring the matter to the International Court of Justice by the virtue of Article 29(2) of the Constitution for a final decision.[35] According to Article 32, this final decision "may affirm, vary or reverse any of the findings or recommendations of the Commission of enquiry, if any".[36]

While it is not for the Governing Body to approve or disapprove the content of the report, it has the final word as regards the consequences that should be drawn from the failure of the Member concerned to carry out, within the time specified, the recommendations contained in the report of the Commission of Inquiry, or, as the case may be, in the decision of the International Court of Justice. In that case, the Governing Body *may* make recommendations to the Conference to take "such action as it may deem wise and expedient to secure compliance therewith" (Article 33 of the Constitution). Simple examination of the ILO web-based database point out that indigenous peoples have not yet invoked this procedure.[37]

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[33] Constitution of the ILO Article 28.
[34] Francis Maupain, *supra note* 28 at 279.
[35] *Ibid*.
[36] Constitution of the ILO Article 32.
[37] Claire Charters, *supra note* 20 at 177.

5.4. The Human Rights Council Procedures

Consequent to the dissolution of the Human Rights Commission and the creation of Human Rights Council[38], the UN has now more viable and innovative mechanism with which it can address the problems of minority and indigenous rights and shift them from the background to a more upfront position within the UN human rights family. This mechanism came in the form of the Universal Periodic Review (UPR).[39] Under the UPR it is necessary for each member State of the UN to report on their human rights laws and practices every four years to the Human Rights Council. At variance with the treaty body mechanism, in the UPR process States are not exceedingly constrained as to the subject matter of their reports or recommendations, which provides a scope and place of discussion on minority and indigenous people's rights.

There are basically four component to the review process, which is facilitated by a triad of three States, selected by draw. The first phase of UPR is made of information acquisition, which is based on documents, involving (i) a brief report provided by the State under review; (ii) a digest of information from other stakeholders along with NGOs which is prepared by the Office of High Commissioner for Human Rights; and (iii) facts from autonomous human rights experts, human rights treaty bodies and other UN entities. It include information's which has been collected through Special Procedure mechanisms, for instance the Special Rapporteur on the Rights of Indigenous Peoples, besides other UN machinery such as the Expert Mechanism on the Rights of Indigenous Peoples. Questions in writing can be advanced by any member of the UN to the State under review prior to the State giving its oral report.[40]

Second, all through the UPR working group session (which is made up of all 47 members of the Human Rights Council and holds meetings thrice a year), all States

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[38] Human Rights Council came into existence by the virtue of G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (15 March, 2006); The Human Rights Committee was abolished by the ESC Res 2/206, U.N. Doc. E/RES/62/2 (22 March 2006); See generally, Helen Upton, *The Human Rights Council: The First Impression and the Future Challenges*, 7 Hum. Rts. L. Rev. 29 (2007).

[39] G.A. Res. 60/251, U.N. Doc. A/REC/60/251 (15 March 2006); For an overview on the UPR, See, Noelle Higgins, *Advancing the Rights of Minorities and Indigenous Peoples: Getting UN Attention via the Universal Periodic Review*, 32 Neth. Q. Hum. Rts. 379, 385 (2014).

[40] H.R.C. Res. 5/1. U.N. Doc. A/HRC/RES/5/1 ¶ 15 (18 June 2007); See also, Felice D. Gaer, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 Hum. Rts. L. Rev. 109 (2007); Gareth Sweeney and Yuri Saito, *An NGO Assessment of the New Mechanism of the UN Human Rights Council,* 9 Hum. Rts. L. Rev. 203 (2009).

under review provide an oral report on their human rights practices.[41] This is referred to 'interactive dialogue' stage of the review procedure amongst the State under review and all other UN members. States may direct their queries and put forward their observations and recommendations on the report prepared by the State under review.[42] However, paucity of time limits the scope of the interactive stage.[43] The review process continues for three hours in the course of which the State under review is allotted thirty minutes for its presentation, supervened by a question and answer session encompassing all States for next two hours.[44] The review comes to an end with a 30 minute spell in the course of which, the State under review can get back to queries and observations that have been made.[45] The time limitations have exhibited in "many States not being able to speak at all, and diplomats lining up in the pre-dawn darkness to register to speak".[46] It should be noted, however, that to a State which does not get a chance to ask a question or make recommendation to a State under review can note down their comments on the UPR's extranet[47] to which the State under review can answer back before the concluding report is adopted.[48]

Third, subsequent to the interactive dialogue phase the working group submite a report on dialogue and incorporates a rejoinder submitted by the State under review to observations made by other States.[49] A supplementary text is also finalised which consist of State reactions to recommendations made which they have had an occasion to acknowledge. This is generally in the mode of addendum to the Working Group's report.

Lastly, the outcome report, which comprises of the Working Group's report besides any additional comments or promises rendered by the State under review, is adopted

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[41] H.R.C. Res. 5/1 *supra note* 40 at para 18.
[42] *Ibid* at para. 19-21.
[43] Noelle Higgins, *Supra note* 39 at 388.
[44] H.R.C. Res. 5/1 *supra note* 40 at para 22; *Ibid.*
[45] *Ibid.* at para 23.
[46] Edward R. McMahon, *Herding Cats and Sheep: Assessing State and Regional Behavior in the Universal Periodic Review*, available at http://www.upr-info.org/sites/default/files/general-document/pdf/-mcmahon_herding_cats_and_sheeps_july_2010.pdf (2010) [Accessed on 03.02.2016] cited in Noelle Higgins, *Supra note* 39 at 388.
[47] The Extranet of the UPR is a community site where updated documents, statements, and schedules of the UPR are accessible.
[48] Noelle Higgins, *Supra note* 39 at 388.
[49] H.R.C. Res. 5/1 *supra note* 40 at para 29.

in the course of the plenary session of the Human Right Council. A look into the review is then organised during next round of the UPR.[50]

Progression of the first cycle of the UPR initiated in 2008 and concluded in 2011.Forty-eight States were reviewed each year in different sessions of the Human Right Council. The process was tweaked prior to the commencement of Cycle 2 in May 2012 which concluded in 2016, with certain minor modifications being made to modalities, comprising an extension in the time devoted to each State's review before the Human Rights Council and subsequent increase of the time period of Cycle 2 from four to four and a half years.[51]

During the first cycle of UPR a total of 389 recommendations were made by States on the issues of indigenous peoples, positioning it in 33rd place out of the 56 different categories of issue raised. Eighty-one States raised the issue of indigenous peoples and 55 States received recommendations on this topic.[52] Given the relative newness of this issue on the agenda of the UN, with UNDRIP being adopted in 2007 just as the Human Rights Council and the UPR being created, this once again illustrates the prominence of the right of indigenous peoples among States and other stakeholders. There has been a general trend in the interactive dialogue phase with regard to States which have indigenous population to ask question and make recommendation on this issue.[53] The key thrust areas which was discussed in the interactive dialogue phase of the UPR on the issue of indigenous peoples included (a) domestic or constitutional recognition of indigenous peoples; (b) ratification and implementation of ILO Convention No. 169; (c) the adoption and implementation of UNDRIP; and (d) land and cultural rights.[54]

During the second cycle of UPR, till the 22 May 2015, the number of recommendation on indigenous issues increased to 458. This indicates that the issues of indigenous peoples are getting more attention. However, there is a long way to go. The key thrust

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[50] Edward R. McMahon, *The Universal Periodic Review: A Work in Progress*, available at http://library.fes.de/pdf-files/bueros/genf/09297.pdf 8-9 (2012) [Accessed on 03.02.2016]
[51] H.R.C. Res. 16/21, U.N. Doc. A/HRC/RES/16/21 (12 April 2011); H.R.C. Dec. 17/119, U.N. Doc. A/HRC/DEC/17/119 (19 July 2011); Noelle Higgins, *Supra note* 39 at 389.
[52] Statistics of UPR Recommendations, available at http://www.upr-info.org/database/ [Accessed on 02.04.2016]
[53] Noelle Higgins, *Supra note* 39 at 390-391.
[54] Statistics of UPR Recommendations, *supra note* 52.

area were similar to that in first cycle, with added focus on issues of indigenous women and child; asylum; relationship with international institutions.[55]

5.5. The CERD Committee

The *International Convention on the Elimination of All Forms of Racial Discrimination 1966*[56] (the ICERD) is one of the most prominent international legal instrument on race, and its vital principle has a strong prerogative to the stature of a peremptory norm of international law.[57] The Committee on the Elimination of Racial Discrimination (the CERD Committee) is established by Article 8 of the ICERD. The CERD Committee operates basically by reviewing and commenting on reports by States which are lawfully required, as directed by the Article 9(1) of the ICERD .[58] Every two years a State is expected to submit a Report or whenever the CERD Committee expressly demands for. It may also request for additional information from the State Parties.[59] Every single communication with a State Party is followed by a series of concluding remarks by the CERD Committee which consist of token of appreciation, bulletin of concerns and directions for future action. Where deserved, the Committee can identify the problems State have had in implementing the ICERD because of various hardship including man-made ones. Reports behind schedule for five years or above may be subjected to the 'review' procedure under which the CERD committee may decide to examine a country situation in the absence of a Report.[60]

In the recent past, the CERD Committee has considered a number of indigenous peoples rights issues. It has commented on State reports and monitored grave situations under its early warning and urgent action procedure. From the vantage point of reparations it is appealing to note that the CERD Committee has turned out to be more

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[55] *Ibid*.

[56] International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 December 1965 (entered into force 4 January 1969) (hereinafter the ICERD)

[57] BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 249 (2010)

[58] The CERD, *General Recommendation No. 23, Rights of Indigenous Peoples* (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997).[hereinafter the CERD Recommendation No.23)

[59] The CERD, http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx [Accessed on 04.06.2015]

[60] *Report of the Committee on the Elimination of Racial Discrimination*, 27 February 1992, U.N. Doc. A/46/18 at para 27.

direct in its recommendations to States as to how they can better comply with the ICERD.

The CERD Committee's General Recommendation on Indigenous Peoples requires that States shall take "all appropriate means" to prevent and abolish all form of discrimination against indigenous peoples and observes that in several parts of the globe, indigenous peoples have "[l]ost their land and resources to colonist, commercial companies and state enterprises".[61] It calls on State Parties to approve and respect indigenous peoples' cultures, assure equality, support indigenous development, make possible for indigenous peoples effective participation in decision making in matters related with their rights and interests and to make sure that indigenous communities freely follow their traditional customary practices.[62]

In comments on State reports the CERD Committee has in many instances requested to afford reparation for protection of indigenous peoples land rights. For instance, it recommended that Costa Rica take necessary steps to protect indigenous lands from being annexed and to warrant the restitution of those lands that have been misappropriated by members of non-indigenous communities.[63] Likewise, it has frequently commented on the necessity to restitute to indigenous peoples in cases of loss of land as a result of conflict and/or resource development[64], and recommended that institutions established to settle indigenous land issues take indigenous customary practices into consideration.[65]

The CERD Committee's readiness to uphold indigenous peoples land rights, and direct the State to ensure redress, is also mirrored in a series of decisions exercising its early warning and urgent action procedure.[66] This process is devised to empower the CERD Committee, as reflected by the nomenclature, to react expeditiously in conditions

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[61] The CERD Recommendation No.23 at paras 1 and 3 cited in Claire Charters, *supra note* 20 at 182.
[62] *Ibid*.
[63] The CERD, *Report on the Grave and Persistent Violation of Indigenous Peoples' Rights* (87th Session, 3-28 August 2015) available at http://www.forestpeoples.org/sites/fpp/files/publication/2015/07/cerd-report-final-eng.pdf [Accessed on 06.10.2015]
[64] The CERD, *Concluding Observations* (61st session 15 May 2006) UN Doc. CERD/C/GTM/CO/11.
[65] The CERD, *Concluding Observations* (61st session 4 April 2006) UN Doc. CERD/C/GUY/CO/14.
[66] The CERD, *Procedural Decisions of the Committee on the Elimination of the Racial Discrimination*, (42nd session 15 September 1993) UN DOC. A/48/18, Annex III ; Also see, Theo van Boven, *Prevention, Early-Warning and Urgent Procedures; A New Approach by the Committee on the Elimination of Racial Discrimination,* IN REFLECTIONS ON INTERNATIONAL LAW FROM THE LOW COUNTRIES 165 (Denters and Schrijver eds.,1998)

involving discrimination. For instance, in the year 1999, the CERD Committee, discovered that the amendments made by Australian government in 1998 to its Native Title Act 1993 were a contravention of the ICERD on the line of reasoning that they extended the possibility of extinguishment or depreciation of Aboriginal title.[67] Appealingly, the CERD Committee recognised the perpetual repercussions of prejudicial historical practices on Australia's Aboriginals and Torres Strait Islander population, thus clarifying that it has not limited itself with apparent contemporary problems. The CERD Committee recommended, as it has persistently done, discussions between the Aboriginal and Torres Strait Islanders peoples and Australia with "a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention".[68] At the same time, it also requested Australia to forestall the implementation of the 1998 amendments during the process of discussions. This was rare but refreshing example of the CERD Committee rendering detailed orders similar to an injunction. In counter, Australia altogether denied the charges. Moreover, it disputed the authority of the CERD Committee to recommend the suspension of the Native Title Act 1998. Even so, in its response to Australia's subsequent State reports, the CERD Committee maintained its stand that there is insufficient protection of Aboriginal land rights in Australia.[69]

The CERD Committee likewise found New Zealand's Foreshore and Seabed Act 2004, which nullifies existing Maori title in the foreshore and seabed, to embody discriminatory provisions against Maori.[70] It recommended to the New Zealand Government to conceive space for interlocution with Maori to "seek ways of lessening its discriminatory effects" specifically indicating the likelihood of legislative promulgation where necessary.[71] However, New Zealand government refused to accept the CERD Committee decision. Notwithstanding such rejection, the CERD committee did not prevent itself from taking a progressive stand with reference to the protection of indigenous peoples rights.

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[67]The CERD, *Decision 2(54) on Australia* (18 March 1999), UN Doc. A/54/18.
[68] *Ibid* at para 11
[69] *Ibid.*
[70] The CERD, *Decision 1(66): New Zealand Foreshore and Seabed Act 2004*, (11 March 2005), UN Doc. CERD/C/66/NZL/Dec.1
[71] *Ibid* at para 7

Despite progressive advances made by the CERD, it is worth mentioning that the CERD committee is not a court of justice with the authority to establish State violations of international law governing socio-economic human rights of racial minorities. The general recommendations of the CERD Committee are not acknowledged to a greater extent due to the fact that these recommendations are not binding on the State Parties. It appears that, the CERD Committee's function is to aid States in their resolution to observe their commitments under CERD. The bottom line is not to get fix on issues of the conformity or non-conformity of a State with its commitment under CERD. Instead, committee member identify their task as helping States acknowledge and mitigate racial discrimination inside their frontiers.[72]

5.6. The Special Rapporteur on the Rights of Indigenous Peoples

In connection with its increasing focus on the rights of indigenous peoples, the U.N. Human Rights Council's predecessor, the Commission on Human Rights, warranted in 2001 the appointment of a "special rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples".[73] The commissioning of this position supplemented the commission's scheme of thematic mechanism, which involves special rapporteurs or working groups on varied dimension of human rights issues such as torture, religious intolerance, and violence against women. These thematic mechanism have been passed down to the Human Rights Council.[74]

The mandate of the Special Rapporteur on indigenous peoples was established with the authority: (a) to promote good practices in order to implement international standards with reference to indigenous rights; (b) to muster relevant information from every possible source on all seeming violations of the rights to indigenous peoples; (c) to provide roadmap for reparation on violations of the rights of indigenous peoples; (d) to

[72] Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 Hum. Rt. L. Rev. 239, 239-269 (2005).
[73] CHR, *Human Rights and Indigenous* Issues (57th session, 24 April 2001) Comm. H. R. Res. 2001/57, UN. Doc. E/CN.4/RES/2001/57.
[74] JAMES ANAYA, *supra note 17* at 107.

work in association with other ancillary bodies engaged in implementation of indigenous rights especially Expert Mechanism on Rights on Indigenous Peoples.[75]

Within the terms of its mandate the Special Rapporteur on indigenous peoples carry out the work in four interrelated sphere of activities. First, area of work is to "identify . . . and promote best practice".[76] The Special Rapporteur has been deeply engaged in process of advancing legal, administrative and scheduled reforms at domestic level to enforce the norms of UNDRIP and other relevant legal instruments. In this reference, Special Rapporteur has been contacted to render assistance with constitutional and legislative initiative by preparing outlook on how to symphonise those initiative with international norms.[77] The Special Rapporteur has also promoted good practices by cheering positive measures that States have made. For example, In December 2008, the Special Rapporteur received an invitation to be present at a ceremony in Awas Tingni, Nicaragua, in the course of which the Government conveyed to that indigenous group the much-awaited title to its ancestral lands, as ordered by a 2001 judgement of the Inter-American Court of Human Rights. In a media release subsequent to titling, the Special Rapporteur applauded the Government of Nicaragua for taking affirmative steps to implement the judgement.[78]

A second area of work, which is helpful in contributing to ensure good practices in specific country situations, comprises supervising or undertaking studies on problems or themes that are of relevance to indigenous peoples across frontiers and regions of the world. Some of the thematic studies included studies on the impact of development projects on indigenous communities, explicating the idea of free prior informed consent, indigenous peoples and their educations system, corporate responsibility and the rights of indigenous peoples, incorporation of international standards within the domestic laws of the countries having indigenous population, development of indigenous peoples with their culture and issue pertaining to their identity

[75] HRC, *Human Rights Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples*, (6 October 210) A/HRC/RES/1514 available at http://unsr.vtaulicorpuz.org/site/index.php/en/un-mandate/12-hrc-res-15-14-2010 [Accessed on 05.011.2015]

[76] HRC, *Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, (28 September 2007) UN Doc. A/HRC/RES/6/12.

[77] JAMES ANAYA, *supra note 17* at 109.

[78]Statement of James Anaya, *available at* http://www.un.org/apps/news/story.asp?NewsID=29336#.V6G07dJ97IU [Accessed on 06.11.2015]

preservation.[79] In the year 2007, HRC resolution established an Expert Mechanism on indigenous issues with the mandate to provide thematic expertise and recommendations to the Council on issues affecting indigenous peoples.[80] Thereafter, the work of thematic studies became more sort of complementary and supportive assistance to the Expert Mechanism.[81]

A third area of the Special Rapporteur's work consists of probing and reporting on the general human rights conditions of indigenous peoples in selected countries. The reports of the country situations consist of conclusions and recommendations intended to promote good practices, ascertain the key issues, and bettering the human rights conditions of indigenous peoples.[82] The reporting procedure normally requires a visit to the countries under review, together with the capital and specific areas of concern within the country, in the course of which the Special Rapporteur communicate with Government representatives, indigenous communities from diverse regions, and the members of civil society organisations dealing with indigenous issues. In accordance with the Code of Conduct for Special Procedures Mandate-holders, these visits can only take place with Government consent and cooperation. . Over the past year, the Special Rapporteur has visited several countries which includes Brazil, Nepal, Botswana, and Australia to report on those countries.[83]

Lastly, the fourth, and possibly primary, area of work comprises of making responses, on a continuing basis, to specific problems of alleged human rights infringement.[84] The Special Rapporteur's dexterity to focus on peculiar cases of alleged violations counts, to a large extent, on the information received by him through indigenous peoples and their organizations, NGOs and other sources. It is noteworthy that there is no official preconditions for recording information to the Special Rapporteur on alleged violation. Moreover, the usual prior requisite of exhaustion of domestic remedies does not come

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[79]Special Rapporteur James Anaya, *Addendum-Index of Report of the Special Rapporteur on the Rights of Indigenous Peoples*, *James Anaya, by Theme and by Region*, UN. Doc. A/HRC/24/41/Add.5
[80] HRC, *Expert Mechanism on the Rights of Indigenous Peoples*, (6th session, 14 December 2007), UN Doc. A/HRC/RES/6/36. [hereinafter HRC 6/36]
[81] JAMES ANAYA, *supra note 17* at 110.
[82] James Anaya, available at http://unsr.jamesanaya.org/list/country-reports [Accessed on 05.12.2015]
[83] HRC, *Promotion and Protection of All Human Rights, Civil, Political Economic, Social and Cultural Rights, Including the Rights to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* (12th session, 15 July 2009) Agenda Item 3, UN Doc. A/HRC/34 para 30 and 31.
[84] *Ibid* at para 32-35.

as a bar in communicating with the Special Rapporteur. The usual first step in taking action on such information is to write a letter to the Government concerned, along with a request that the Government respond. In some cases, the Special Rapporteur has issued public statements calling attention to, or expressing concern over, the human rights violations alleged. If circumstances warrant it and the Government concerned consents, the Special Rapporteur may conduct a country visit to examine a specific situation.[85]

In spite of the progressive normative structure of the Special Rapporteur mechanism, the key question which still remains pertinent is that how far the recommendations are translated into functional reality in respective State's domestic legal structure. Fleur Adock, in her study on "the impact of UN Human Rights Council's Special Procedures' mechanism on State behaviour" found that the "mechanism's impact although perceptible was slight". Her opinion is based on the study of New Zealand and Guatemala. She maintains that the government of New Zealand response to the Special Rapporteur's recommendation can be categorised as "one of ritualism".[86]

5.7. The UN Expert Mechanism on the Rights of Indigenous Peoples

In the year 2007, the United Nation Expert Mechanism on the Rights of Indigenous Peoples (the EMRIP) was established by the Human Rights Council as its subsidiary body. The mandate of the EMRIP was "to provide the Council with thematic expertise on the rights of indigenous peoples", laying emphasis on, "studies and research based advice". [87] Moreover, the EMRIP may also submit proposal to the Council and after its review the same may be endorsed.

The EMRIP consists of five independent experts on indigenous peoples rights.[88] The members of EMRIP serve for a three-year period and may be re-elected for an additional period.[89] Within its mandate, EMRIP decides its own *modus operandi*.

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[85] JAMES ANAYA, *supra note* 17 at 111-112.
[86] Fleur Adcock, *The Limitation of the Current International Human Rights Law System in Regard to Monitoring of Rights? Does it Encourage 'Right Ritualism'?* 4 available at http://www.un.org/esa/socdev/unpfii/documents/EGM/2015/Concept-note.pdf [Accessed on 06.11.2015]
[87] BERTRAND G. RAMCHARAN, THE LAW, POLICY AND POLITICS OF THE HUMAN RIGHTS COUNCIL 8 (2015).
[88] HRC 6/36 *supra note* 80 at para 3.
[89] *Ibid* at para 6.

EMRIP meets once annually for up to five days.[90] Its session can be a sequence of open and private meetings.[91] There are observers and representatives from States, indigenous peoples, United Nations mechanism, bodies and specialised agencies, international governmental organisations, regional human rights institutions and mechanisms, civil society organisation, domestic human rights institutions and academia.[92] The EMRIP has delivered several important studies including that on the implementation of the right of indigenous peoples to education[93]; another one studied indigenous peoples and the right to participation in decision-making[94]; studies have been conducted on the significance and function of languages and culture in safeguarding and promotion of distinct identity of indigenous communities and on indigenous peoples access to justice[95]; there has been study on the "promotion and protection of the rights of indigenous peoples in natural disaster risk reduction".[96] The study explores the link between disaster risk reduction and human rights. It also examines how indigenous peoples can contribute to disaster risk reduction initiatives.

5.8. UN Permanent Forum on Indigenous Issues

The most momentous accomplishment in the first International Decade of World's Indigenous People was the formation of the UN Permanent Forum on Indigenous Issues (UNPFII)[97], currently the main venue for indigenous peoples at the United Nations. The UN Working Group on Indigenous Populations (WGIP) was at the bottom in the pecking order of UN organisational Structure, notwithstanding its substantial imprint and function. On the other hand, the UNPFII responds directly to the UN Economic and Social Council, one of the principal organ under the UN Charter.

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[90] *Ibid* at para 8.
[91] *Ibid*.
[92] *Ibid* at para 9.
[93] HRC, *Study on Lessons Learned and Challenges to Achieve the Implementation of the Rights of Indigenous Peoples to Education*, *Report of the Expert Mechanism on the Rights of Indigenous Peoples* (31 August 2009) UN Doc. A/HRC/12/31.
[94] HRC, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision Making,* Report of the Expert Mechanism on the Rights of Indigenous Peoples, (17 August 2011) UN Doc. A/HRC/18/42
[95] HRC, *Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples* (16 August 2012), UN Doc. A/HRC/18/42
[96] HRC, *Study on Promotion and Protection of the Rights of Indigenous Peoples in Disaster Risk Reduction, Prevention and Preparedness Initiatives*, Study by the Expert Mechanism on the Rights of Indigenous Peoples (28 April 2014), UN Doc. A/HRC/EMPRIP/2014/2.
[97] ECOSOC, *Establishment of a Permanent Forum on Indigenous Issues*, (28 July 200) E/RES/2000/22.

It was in the year 1993 that the formation of the Permanent Forum was conceived within World Conference on Human Rights held in Vienna.[98] In the meeting it was recommended that the UN General Assembly review the plan of constituting a permanent forum for indigenous peoples in the UN system. This set the ball rolling, ultimately resulting into the formation of UNPFII by the ECOSOC in June 2000 as a subsidiary advisory body with the following mandate:

> to discuss Indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights; in doing show Permanent forum shall:
>
> (a) Provide expert advice and recommendation on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council;
> (b) Raise awareness and promote the integration and coordination of activities relating to Indigenous issues within the United Nations system;
> (c) Prepare and disseminate information on indigenous issues.[99]

The UNPFII, through its annual report issued in 2003, insisted that that the rest of the UN bodies "report regularly to the forum".[100] Later, in the subsequent session, the UNPFII desired to enlarge its mandate this time on the basis of Millennium Development Goals. It specifically requested governments to prepare and submit reports to it on how they were addressing indigenous peoples' health and the MDGs.[101] Ultimately, with the adoption of the UNDRIP in 2007 the responsibility of UNPFII in the execution of indigenous rights gained extra girth. Article 42 of the UNDRIP states that:

> The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States

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[98] CHR, *Report of the Working Group on Indigenous Populations on the Discrimination Against Indigenous Peoples*, (16 August 1996) E/CN.4/Sub.2/1996/21 at para 120.
[99] E/RES/2000/22 *supra note* 97.
[100] Isabell Schulte-Tenckhoff and Adil Hasan Khan, *The Permanent Quest for a Mandate*: *Assessing Permanent Forum on Indigenous Issues*, 20 Griffith L. Rev. 673, 680 (2011).
[101] Victoria Tauli-Corpuz, *Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in Relation to the Millennium Development Goals*, 12 SUR-Int'l J. on Hum. Rts. 79 (2010)

> shall promote respect for and full application for provisions of this Declaration and follow up the effectiveness of this Declaration[102]

This was soon addressed in a report formulated in 2008 by two members of the Forum, Ms Ida Nicolaisen and Mr Wilton Littlechild, to address the existing mechanism to deal with indigenous peoples' rights. As per the report, no fresh set of mandate was necessary by the UNPFII to carry out these new functions that had been bestowed upon it by the UNDRIP.[103]

5.9. World Bank Inspection Panel

The World Bank Inspection Panel (the Panel) was established in 1993 for "the purpose of providing people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures". [104]The Panel has the competence to investigate complaints brought by parties in borrowing countries alleging that the World Bank has failed to follow its own policies and procedures when designing, appraising and/or implementing the Bank financed projects. The purpose is to carry out independent administrative reviews, not to conduct judicial proceedings. It should collect information on matters of complaint, provide and independent assessment and make recommendations to the President and the Executive Directors.[105] For a financial institution, the Inspection Panel was a bold and unique step.[106] The Inspection Panel serves to provide a non-judicial process to ensure accountability in implementation of projects, financed by the World Bank, having adverse effects on people.[107] The Resolution establishing the Panel lays down the condition for initiating an inspection

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[102] The UNDRIP, Article 42.

[103] UNPFII, *Study on the Structures, Procedures and Mechanism that Presently Exist and that Might be Established to Effectively Address the Human Rights Situation of Indigenous Peoples and to Arrange for Indigenous Representation and Inclusion in Structures, Procedures and Mechanisms,* (19 December 2008), E/C.19/2008/2.

[104] Inspection Panel, *The Inspection Panel for the International Bank for Reconstruction and Development and International Development Agency*, *Operating Procedures* , (August 1994) available at *http://ewebapps.worldbank.org/apps/ip/Pages/Panel-Mandate.aspx* [Accessed on 25.12.2016]

[105] IBRAHIM F.I. SHIHATA, THE WORLD BANK INSPECTION PANEL : IN PRACTICE 954 (2000).

[106] Elvira Nurmukhametova, *Problems in Connection with the Efficiency of the World Bank Inspection Panel*, 10 Max Planck Y.B. U.N. L. 397, 398 (2006)

[107] Ole Kristian Fauchland, *Hardening the Legal Softness of the World Bank Through an Inspection Panel,* 12 available at https://www.jus.uio.no/ior/personer/vit/olefa/dokumenter/wb_insp_panel_final.pdf [Accessed on 05.02.2017]

on the request of an affected party.[108] In addition to this there are two other ways by which an inspection by the Panel may be invoked. The Board of Executive Directors is empowered to direct the Panel to conduct an inspection.[109] In special circumstance pertaining to serious violations of World Bank operational policies and procedure, an individual Executive Director is authorised to ask the Panel for an inspection.

After receiving the request for an inspection the Chairperson of the Panel promptly decide whether to register the request or not and accordingly communicate with the Executive Directors and the Bank Management. Within 21 working days of being notified of a request for inspection, the Management of the Bank shall produce evidence sufficient to support that the Bank's relevant policies and procedures were observed.[110] After receipt of the notification of Managements response, the Panel is required to ensure whether the request meets the eligibility criterion.[111] If the request fulfils he eligibility criterion, the Panel recommends to the Board of Executive who would give final decision on initiation of investigation.

Once the investigation is completed the Panel sends its findings to the Executive Director and President. The outcome report of Panel include all relevant facts and final observations as to whether or not relevant policies and procedures had been taken into consideration. The Bank Management has six weeks' time to respond to the findings of Inspection Panel. Based upon the Panel recommendations and response of Bank Management, the Executive Director akes the final decision on what should be done.[112]

The first formal policy on indigenous peoples was adopted by the Bank in the year 1982 as *Operational Manual Statement 2.34 on Tribal People in Bank Financed Projects* (OMS 2.34).Its primary focus was to safeguard the interests of tribes who were relatively isolated. It stated that the Bank:

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[108] Res. No. IBRD 93-10 & Res. No. IDA 93-6 of September 22, 1993 available at http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf [Accessed on 10.01.2017] [Hereinafter the Resolution]

[109] Ibid at para 12.

[110] Ibid at para 19.

[111] World Bank, *1999 Clarification of the Board's Second Review of the Inspection Panel*, para 9 available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf [Accessed on 02.01.2017]

[112] Elvira Nurmukhametova, *supra note* 106 at 400.

> will not assist development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal people unless adequate safeguards are provided . . . The Bank will assist projects only when satisfied that the Borrower or relevant government agency supports and can implement measures that will effectively safeguard the integrity and well-being of the tribal people.[113]

In the year 1991, the Bank came with a separate indigenous peoples policy: *Operational Directive 4.20* (OD 4.20).[114] This directive was responsible for making it essential to involve project-affected indigenous peoples in the decision making process of the Bank-financed projects. It asserted, as a matter of general policy, that development process shall foster "full respect for the dignity, human rights and cultural uniqueness" of indigenous peoples.[115]One of the significant directive was intended to advise and assist borrowers in "establishing legal recognition of the customary or traditional land tenure system of indigenous peoples" or, where traditional lands have already under State control, arrangements be made "to grant long-term, renewable rights of custodianship and use to Indigenous Peoples" over such lands.[116]

The OD 4.20 was replaced by the *Operation Policy/Bank Procedures 4.10 on Indigenous Peoples* (OP/BP 4.10) in the year 2005.[117] The policy aims to achieve three major objectives: First, the development process is designed in a manner which upholds the dignity, culture and human rights of indigenous peoples. Second, to avoid potential damage to indigenous peoples from the project financed by the Bank. Third, in cases when it is not possible to avert damage, efforts be made to minimise or mitigate the loss. As part of project design and implementation, OP/BP 4.10 requires authentication of "free prior informed consultation process". Another notable feature of the OP/BP

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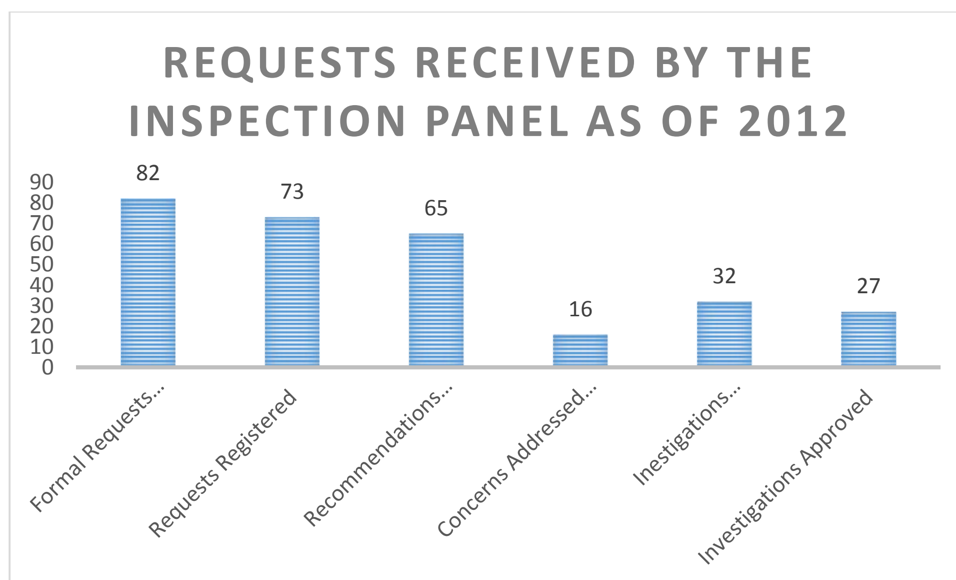
[113] Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law- Making Process: The World Bank and Indigenous Peoples*, IN THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 323-342 (Guy S Goodwin-Gill and Stefan Talmon eds., 1999)
[114] Shelton Davis, *The World Bank and Operational Directive 4.20: The World Bank and Indigenous Peoples*, IN INDIGENOUS PEOPLES AND INTERNATIONAL ORGANISATION (Lydia Van die Fliert ed., 1994).
[115] World Bank, *Operation Policy 4.20 on Indigenous Peoples* (September 1991)
[116] Ibid;
[117]See, Fergus MacKay, *Universal Rights or a Universe unto Itself—Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 Am. U. Int'l Rev. 527 (2002); Fergus MacKay, *The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or more of the same,* 22 Ariz. J. Int'l & Comp. L. 65 (2005).

4.10 policy is that it introduces the concept of benefit sharing from the commercial investment on indigenous peoples land.

In a study published by the World Bank, it was revealed that Inspection Panel has to deal with following issues related to indigenous peoples: (a) identification related issues; (b) consultation and broad community support; (c) social assessment; (d) indigenous peoples plans; (e) supervision; (customary rights). [118]

Inspection Panel is a bold initiative but chances of complaints to have favourable outcome is nearly fifty percent. In study it was revealed that out of eighty two requests up to 2012 only twenty seven have positive final outcome.[119]:



(Source: http://ewebapps.worldbank.org/apps/ip/Pages/Emerging-Lessons.aspx)

In some cases, the request for Inspection did not reached to the level of registration or the borrowing country adopted certain remedial measures, which included development

[118] The Inspection Panel, *Emerging Lesson Series No.2 on Indigenous Peoples*, 4 available at http://ewebapps.worldbank.org/apps/ip/Pages/Emerging-Lessons.aspx [Accessed on 20.01.2017]

[119] Inspection Panel, *Lessons from the Panel Cases: Inspection Panel Perspectives*, Presentation at the Board's Committee on Development Effectiveness (CODE), (22 October 2012) available at http://ewebapps.worldbank.org/apps/ip/Documents/IPNpresentation_CODE__Oct2012.pdf [Accessed on 20.01.2017]

of actions plans. Examples are available where World Bank authorised independent investigation other than that of Inspection Panel[120]or setting up of local monitoring body.[121] In certain cases in spite of Inspection Panel acknowledging violation of World Bank policies and procedures there is no respite. In case of complaint request by group of tribal people from Jharkhand, India under the forum of Chottanagpur Adivasi Seva Samiti(CASS). Inspection Panel submitted its report and found that at least there exist about thirty violation of Banks policies and rules. Notwithstanding such a finding, the Bank Management shied away from taking any responsibility or providing remedial measures.[122]

5.10. Regional Systems and Implementation of Indigenous Rights

5.10.1. Inter-American System

Among the Regional Systems the OAS has traditionally been leading in safeguarding the interest of indigenous peoples.[123] As a matter of fact, the important issue of an "indigenous question" was recognised by the Inter-American System at its very inception in the year 1948. However, resolutions addressing explicitly indigenous rights have been promulgated by the Inter-American Commission on Human Right (the IACHR) only since the early 1970s.[124]

Nevertheless, a methodical approach toward the development of indigenous rights was yet not into existence until the late 1980s. Drawing inspirations from the events happening at the international level, the Inter-American Commission gradually

[120] Dr. Jay Hair was appointed by the then World Bank President Mr. Wolfensohn examine situation in the Pangue Dam in Chile (1995). The request to Inspection Panel was rejected due to lack of jurisdiction as the case was related with IFC projects. See, Statement of IFC about the Report by Dr. Jay Hair on the Pangue Hydroelectric Project (July 15, 1997) available at http://ifcext.ifc.org/ifcext/pressroom/ifcpressroom.nsf/1f70cd9a07d692d685256ee1001cdd37/e1adf9b8ac93575e85256977004e9e54?OpenDocument [Accessed on 20.01.2017]

[121] In case of Singrauli powe plant project. Setting up of local investigation was more of escapist attitude by the World Bank. See, Ama Marston, *No Fairy Tale: Singrauli, India, Still Suffering Years after World Bank Coal Investments*, available at http://www.brettonwoodsproject.org/wp-content/uploads/2013/10/singrauli.pdf [Accessed on 20.01.2017]

[122] Xaviar Dias, *World Bank in Jharkhand—Accountability Mechanisms & Indigenous Peoples*, 1 Law Env't & Dev. J. 71, 71-78 (2005).

[123] Mauro Barelli, *The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime*, 32 Human Rights Quarterly 951, 962 (2010)

[124] *Ibid*; See, *Special Protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination* (adopted 14 March 1973), O.A.S. Doc. OEA/Ser.P.A.G/doc.305/72,rev.1

continued to address indigenous peoples' rights in a more extensive form.[125] In the year 1985 the decision related to *Yanomami* case was the turning point in indigenous rights discourse.[126] In spite of the fact that the Inter-American Commission did not go so far enough to formally recognise specific rights of indigenous peoples, but it was successful in laying down the basis for future developments by emphasising that Brazil's inadvertence in ensuring time bound effective measures on behalf of the Yanomami people finally resulted in the massive violation of, inter alia, their rights to life, liberty, and personal safety. This significant judgment was succeeded by another momentous recognition, to be exact that the legal framework operating during that point of time was inadequate to take care of the "special and unique problems faced by the aboriginal populations of the Americas in the area of human rights."[127] Consequently, in the year 1989 the Inter-American Commission was assigned by the OAS General Assembly with the task of preparing "a juridical instrument relative to the rights of the Indian peoples".[128] Such an effort was succeeded, after few year, by the decision of the UN WGIP to draft a universal declaration on the indigenous rights. Appealingly, lateral measures at the United Nations and OAS sustained in the upcoming years, indicating an essential synergy between the regional and global efforts. In the year 1990 the Inter-American Commission formed the Office of the Special Rapporteur on the Rights of Indigenous Peoples.[129] Approximately ten years later, a similar step was taken by the UN Commission of Human Rights, which appointed a UN Special Rapportuer on the Fundamental Rights and Freedoms of Indigenous People.[130] Pleasingly, in the year 1997 the Inter-American Commission would vote in favour of the text of the Proposed American Declaration on the Rights of Indigenous Peoples.[131] As mentioned above, a few years earlier in 1994, the WGIP had adopted the text of the draft UNDRIP. Ultimately, moving on the path showed by the UN Commission on Human Rights, which in 1995 had conceived the WGDD to further discuss the provision of the draft

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[125] Mauro Barelli, *supra note* 123 at 962.
[126] Inter-American Commission on Human Rights, Res. No. 12/85 (5 March 1985), Case No. 7615.
[127] Inter-American Commission on Human Rights, *The Human Rights Situation of the Indigenous Peoples in America*, (20 October 2000), O.A.S. Doc. OEA/Ser.L/V/11.108 Doc.62 cited in Mauro Barelli, *supra note* 89 at 962.
[128] OAS GA Res. No. 1022/89 (adopted 18 November 1989) cited in Mauro Barelli, *supra note* 88 at 963.
[129] Mauro Barelli, *supra note* 89 at 963.
[130] CHR, *Human Rights and Indigenous Issues*, (57th session 24 March 2001), E/CN.4/RES/2001/57
[131] Inter-American Commission on Human Rights (95th session 26 February 1997) O.A.S. Doc. OEA/Ser/L/V/.II.95, Doc.6 cited in Mauro Barelli, *supra note* 89 at 963.

UNDRIP, the OAS General Assembly in the year 1999 came up with a Permanent Council Working Group with an aim to work upon the feasibility of the text of the Proposed American Declaration. The continuous efforts resulted in the adoption of the American Declaration on the Rights of Indigenous Peoples in the year 2016.[132]

5.10.2. The African System

Mauro Barelli observes that the African and European human rights systems were late in addressing the issues of indigenous peoples as compared to the OAS. Nonetheless, they also played a significant role in development of indigenous rights discourse.[133] One of the central reason for the African delay could be the socio-political conditions prevalent among African States which allowed a delayed development of human rights system in the region. In fact, strong normative structure pertaining human rights issues across the region rose to prominence only in 1981 with the adoption of the *African Charter on Human and Peoples Rights*.[134] As elucidated by Frans Viljoen, that the post-colonial States in the Africa had the propensity to connect nation-building with the sense of identity of a particular dominant ethnic group, as a result many other groups slipped downward in a vulnerable and marginalized zone.[135] It appears that measures that intends to recognize substantial sets of rights for dominant group might have adverse impact on the other members of community.[136]

In the light to above mentioned fact, it is more critical that the indigenous voices founded some positive atmosphere for the advancement of indigenous rights discourse in the region. The initial testimony of a fresh advocacy for indigenous rights at regional level was visible only a decade or so ago. On the other hand during the same period the indigenous rights discourse at international level was entering into its third phase of evolution. Regardless of the delayed action, the mechanism evolved swiftly and meaningfully. The continuing association of the African human rights system with indigenous issues was definitely stirred by the changes occurring at the international

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[132] American Declaration on the Rights of Indigenous Peoples (3rd plenary session 15 June 2016) AG/RES.2888(XL VI-O/16

[133] Mauro Barelli, *supra note* 123 at 964.

[134] African Charter on Human Rights, *adopted on* 27 June 1951 (entered into force 21 October 1986) available at http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf

[135] FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 280 (2007) cited in Mauro Barelli, *supra note* 123 at 964.

[136] *Ibid* at 279.

level.[137] Yet Africa's association logically would significantly contribute towards accomplishment of the global project for the recognition of indigenous rights. Notably, paving the way for indigenous rights to flourish in the region had decisive implications for the declaration of the universal nature of the indigenous rights regime.

The watershed moment in the context of Africa was the decision of the African Commission in the year 2000 to establish the Working Group on Indigenous Populations/ Communities in Africa (WGIPC).[138]The starting mandate of the WGIPC was not predominantly aspiring, as the body was entrusted with nothing but to carry on an elementary investigation on the subject of indigenous peoples' rights in the African context. Nonetheless the study had vital ramifications for the development of African approach towards the "indigenous question". With this significant measure the African Commission had paved the way to further vital developments, which got manifested in very short span of time.[139] Since the year 2001, spokespersons of indigenous peoples/communities have addressed the meetings of the African Commission asserting on their despairing state of affairs and the human rights abuses to which they are prey.[140] In the same context, the African Commission at a regular interval questioned States' spokesperson on the state of affairs of the indigenous communities living within their boundaries, giving much consideration to the concerns of indigenous peoples in its Concluding Observations on State reports.[141] Apart from this, a noteworthy mark of the change shaping the African approach to indigenous rights is the ever more substantial role allocated to the WGIPC. As mentioned above, this body was originally assigned with the mandate of conducting a pilot study on the practical application of the norms of indigenous rights in the region. Due to the resultant outcome of the investigation, however, the mandate of the body was tuned accordingly and renewed.[142]

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[137] Kealeboga N Bojosi and George M Wachira, *Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights*, 6 Afr. Hum. Rts. L. J. 382, 382 (2006).

[138] *Resolution on the Rights of Indigenous Peoples' Communities in Africa, adopted* 6 November 2000, ACHPR/Res. 51 (XXVIII)00 cited in Mauro Barelli, *supra note* 123 at 964.

[139] Mauro Barelli, *supra note* 122 at 965.

[140] *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* 8 (2005) *available at* http://www.iwgia.org/iwgia_files_publications _files/African_Commission_book.pdf [Accessed on 04.12.2015]

[141]ACHR, *Concluding Observations and Recommendations on the Periodic Report of the Republic Cameroon*, available at http://www.achpr.org/files/sessions/39th/conc-obs/1st-2001-2003/achpr39_ conc_staterep1_cameroon_2005_eng.pdf [Accessed on 04.12.2015]

[142] For detail, See, http://www.achpr.org/mechanisms/indigenous-populations [Accessed on 04.12.2015]

The mandate of the WGIPC now includes: mustering information and communications on the cases of human rights violations of indigenous populations', undertaking country visits to study the human rights situation of indigenous populations/communities, and formulating recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/ communities.[143] Another important development is that the WGIPC is now requested to "[c]ooperate when relevant and feasible with other international and regional human rights mechanisms, institutions and organizations".[144] Moreover, on the ground level it is quite apparent that the body has been actively involved for the cause of indigenous rights after being entrusted with a broader mandate.[145] Besides carrying out different country visits and missions, it has made close connection and worked in tandem with several UN bodies, including the Permanent Forum on Indigenous Issues and the Special Rapporteur on the Rights and Freedoms of Indigenous People. The WGIPC has also launched a common project with the ILO on the "Promotion of Indigenous Peoples' Rights through the implementation of the principles of ILO Convention No. 169 and the African Charter on Human and Peoples' Rights".[146]

The rise of a candid political will to set an all-inclusive approach to indigenous peoples' rights in Africa has had significant implication upon the international level. The candid approach of a region habitually unreceptive to minority rights campaigns in general upheld vital support to the enduring worldwide efforts to create a common global regime of indigenous rights. The African Commission's pledge to support the indigenous cause is not likely to disappear in near future, either. Actually, post adoption of the UNDRIP by the UN General Assembly, the African Commission hailed the outcome, feeling optimistic that it would "become a very valuable tool and a point of

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[143] *Ibid*

[144] ACHR, *Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/Committees,* (34th Ordinary Session, 06 to 20th November 2003) *available at* http://www.achpr.org/sessions/34th/resolutions/65/ [Accessed on 04.12.2015]

[145] Mauro Barelli, *supra note* 123 at 966.

[146] *Ibid*.

reference for its efforts to ensure the promotion and protection of indigenous rights in the African continent".[147]

5.11. The Project to Promote ILO Policy on Indigenous and Tribal Peoples (PRO 169)

The ILO has dedicated project that targets to promote and support the implementation of Convention No. 169, the *Project to Promote ILO Policy on Indigenous and Tribal Peoples or PRO 169*. It was started in the year 1996 with the funding from Danish International Development Assistance (DANIDA). PRO 169 functioned at several levels and through diverse methodologies and activities, "including research, documentation, legal advice and technical assistance, facilitation of dialogue and direct support to project implementation by partners".[148] Additionally, it also conduct training programmes as a part of long-term capacity building process as well as highlighting the needs and priorities of indigenous and tribal peoples.[149]

The PRO 169 is indulged in various activities to support and implement ILO Convention No. 169. In Bolvia, the PRO 169, in collaboration with Ministry of the Presidency and UNDP, organised a seminar on "The provisions of Convention No. 169 concerning consultation" which was held in August 2006.[150]In Cambodia ,PRO 169 have been emphasizing on "rights-based" approach to indigenous peoples problem since 2005.[151]A significant breakthrough came in the year 2007 when Nepal ratified ILO Convention 169. It was important because it usually observed that Asian countries have certain reservations against the application of indigenous rights available in international law.[152]

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[147] *Resolution of the United Nations Declaration on the Rights of Indigenous Peoples,* (adopted 28 November 2007), ACHPR/Res. 121 (XXXXII) 07, *available at* http://old.achpr.org/english/resolutions/resolution121_en.htm [Accessed on 15.12.2015]

[148] ILO, *Newsletter 2007, The ILO and Indigenous Tribal Peoples*, at 4 available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_100542.pdf [Accessed on 24.03.2017] [hereinafter ILO Newsletter 2017]

[149] Ibid.

[150] Ibid at 16.

[151] Ibid at 18.

[152] Pro 169, http://pro169.org/implementation-of-169/ [Accessed on 24.03.2017]

5.12. A Decade After UNDRIP

In 2007, after more than two decades of drafting, the UNDRIP was formally brought before the UN General Assembly and passed with 144 votes.[153] The Declaration sets "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".[154] With the adoption of the UNDRIP, States formally recognised the distinct status of indigenous peoples, as well as the international obligation to protect and promote their human rights. The adoption of the UNDRIP serves to reinforce the fundamental rights and protection of indigenous peoples that were already recognised by international law, but often denied by States.

5.12.1 Endorsement by the CANZUS countries

At the time of adoption of the UNDRIP, major settler colonies—Canada, Australia, New Zealand and United States (CANZUS) —voted against it. Canada provided their justification for negative vote against the UNDRIP in a statement expressed by its Ambassador John McNee:

> Canada has a significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as veto; on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties. [155]

Similarly, the other three countries also expressed their concerns/justifications for casting a negative vote. They also had more or less the same set of concerns which include indigenous sovereignty, land rights, cultural rights. Fearing that these rights

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[153] UNGA Res. 61/295 (13 September 2007).

[154] Ibid.

[155] John McNee, Permanent Representative of Canada to the UN to the 61st session of the UN General Assembly, available at https://www.canada.ca/en/news/archive/2007/09/statement-ambassador-menee-general-assembly-declaration-rights-indigenous-peoples.html [Accessed on 24.01.2017]

may accrue veto rights for indigenous peoples CANZUS nations were jittery about it.[156]

However, the perception of CANZUS nations gradually started to change towards the UNDRIP. Ice breaker initiative came in 2009 when Australia decided to retract from its earlier position and supported the UNDRIP.[157] In 2010 New Zealand followed the suit and endorsed the UNDRIP. Speaking on the behalf of New Zealand government, Maori Affairs Minister Dr. Pita Sharples made it clear that the UNDRIP is non-binding document. But it represented a "small but significant step towards building better relationship between Maori and Crown".[158] In the same year Canada also changed its mind and supported the UNDRIP however there were many "qualifiers" used in the support speech:

> Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada[159]

Finally, in 2010 Barak Obama decided that the US would lend its support to the UNDRIP. He asserted that actions are much important than adoption or support of any declaration.[160] The endorsement of the UNDRIP by the CANZUS nations is affirmation of the fact that indigenous peoples issues upholds significant value.

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[156] Robert Hill provided justification for negative voting by the Australian government. He said that "the Australian government had long expressed its dissatisfaction with reference to self-determination" available at http://www.un.org/press/en/2007/ga10612.doc.htm [Accessed on 22.01.2017]

[157] Australian Human Rights Commission, *United We Stand-Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia* (3 April 2009) available at http://www.humanrights.gov.au/news/media-releases/2009-media-release-united-we-stand-support-united-nations-indigenous-rights [Accessed on 02.02.2017]

[158] Hon. Dr. Pita Sharples Minister of Maori "Mihi to United Nations Permanent Forum on Indigenous Issues (Ninth session of the United Nations Permanent Forum on Indigenous Issues)" (19 April 2010) New Zealand Ministry of Foreign Affairs and Trade <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/0-19-April-2010.php> [Accessed on 02.02.2017]

[159] Cultural Survival, *Canada Endorses the UN Declaration on the Rights of Indigenous Peoples,* available at https://www.culturalsurvival.org/news/canada-endorses-un-declaration-rights-indigenous-peoples [Accessed on 02.02.2017]

[160] Valerie Richardson, *Obama Adopts U.N. manifesto on the rights of indigenous peoples,* The Washington Times, available at http://www.washingtontimes.com/news/2010/dec/16/obama-adopts-un-manifesto-on-rights-of-indigenous-/ [Accessed on 02.02.2017]

5.12.2. The UNDRIP and Judicial Decisions

The success story of any international human rights documents also depends upon how often its provisions are utilised by courts at domestic, regional or international level. This is even more true in case of Declarations as they are not legally binding. The endorsement of its provision by courts would provide a more direct way of implementation.

At the regional level, Inter-American Court of Human Rights (IACtHR) categorically mentioned to Article 32 of the UNDRIP while considering whether, and to what limit, Suriname is authorised to grant permission for exploration and extraction of natural wealth in the Sarmaka region.[161] Similarly, in 2012 in the case of *Sarayaku vs. Ecuador* ,where Ecuador was responsible for granting concession for oil exploration and extraction to a Argentinian company in the Sarayaku territory without having any consultation or consent with native people. IACtHR referred to various provisions of the UNDRIP and maintained that Ecuador violated the provisions of Articles 19 and 32 which sets up the practice of consultation to obtain *free prior informed consent* (FPIC). The IACtHR also observed that Ecuador failed to act in accordance with provision of Article 38 which calls for States to take necessary measures to achieve the goals of the declaration.[162]

The above mentioned approach is also reflected in the jurisprudence of African Commission decisions. It fully endorsed the view of IACtHR with regard to land rights of indigenous peoples. In 2010 a milestone decision came which was related with Endorois people of Kenya. The Kenyan government forcefully evicted Endorois people ,a pastoral community, from their ancestral lands to promote tourism at Lake Bogoria in 1970s. The Commission found that eviction violated rights of indigenous peoples

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[161] Saramaka vs. Suriname, Inter-American Court of Human Rights, IACtHR Series C No. 172, Judgment of 28November 2007, para 131 available at http://opil.ouplaw.com/view/10.1093/law:ihrl/3046iachr07.case.1/law-ihrl-3046iachr07 [Accessed on 02.02.2017]

[162] Case of the Kichwa Indigenous Peoples of Sarayaku vs. Ecuador, Inter-American Court of Human Rights, ICtHR Series No. 245, Judgement of 27 June 2012.

which include health, cultural, religious, land and natural resource. In doing so, the Commission expressly quoted Articles 8, 10, 25, 26 and 27 of the UNDRIP.[163]

However small but significant development occurred in the European Court of Human Rights (ECtHR) in relation to use of the UNDRIP. In a partly dissenting opinion in the case of *Handölsdalen Sami Village and Others vs. Sweden* Judge Ziemele referred to Article 26 and 27 of the UNDRIP which provides, respectively, collective rights over traditional lands and cast obligation on States to recognise and protect those rights. The case relates to traditional grazing rights of Sami people over privately owned lands.[164]

If we look at the domestic level, the national courts have gradually started to utilise the provisions of the UNDRIP to prevent indigenous peoples from State apathy. For example, the Plurinational Constituional Court of Bolivia invoked Articles 10, 29 and 32 of the UNDRIP to provide Free Prior Informed Consent (FPIC) rights as a part of land rights of indigenous communities and better State protection against forced evictions.[165] Similarly in a landmark judgment, the Constitutional Court of Columbia stalled three industrial projects due to lack of prior consultation with indigenous communities. Referring to the provisions of the UNDRIP, the Court observed that "an indigenous community cannot be obligated to renounce its way of life and culture for the mere arrival of a development or infrastructure or extractive project".[166] One of the earliest and prominent judgment upholding property provisions under the UNDRIP as a part of "general principle of international law" came from the Supreme Court of Belize in the case of *Cal vs. Attorney General of Blieze*.[167]

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[163] IWGIA, *Kenya: Ruling in the Endorois Case,* (8 April 2010) available at http://www.iwgia.org/news/search-news?news_id=124 [Accessed on 12.02.2017]

[164] Handölsdalen Sami Village and Others vs. Sweden, European Court of Human Rights, Application No. 3901314, Judgement of 30 March 2010, paras 133, 160, 167, 180, 185, 187,201,216. Cited in MAURO BARELLI, SEEKING JUSTICE IN INTERNATIONAL LAW: THE SIGNIFICANCE AND IMPLICATIONS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 65 (2016).

[165] Bolivian Constitutional Court 0300/2012; Carla Garcia Zendejas, *Constitutional Judgement Reaffirms the Significance of Bolivia's Indigenous Rights*, available at http://worldjusticeproject.org/blog/constitutional-judgment-reaffirms-significance-bolivias-indigenous-rights [Accessed on 03.02.2017]

[166] Constitutional Court of Columbia, Case T-129 of 3 March 2011, Section 7.1; Cultural Survival, *Columbian Courts Confirms Indigenous Peoples' Right to Free Prior Informed Consent,* available at https://www.culturalsurvival.org/news/colombian-court-confirms-indigenous-peoples-right-free-prior-and-informed-consent [Accessed on 03.02.2017]

[167] Supreme Court of Belize, Cal vs. Attorney General of Belize, Claim No. 117 of 2007, Judgement 18 October 2007.

There are also positive developments in the domestic courts of CANZUS countries with regard to recognition of the UNDRIP provisions as a source of law. In 2013 the New Zealand Supreme Court made a reference to the UNDRIP in judgment to determine the scope of Maori rights to freshwater and natural resources.[168] In Canada, prior to the formal adoption of the UNDRIP by the UNGA, the Supreme Court of Canada referred to Article 35 of the draft UNDRIP which ensured that the indigenous communities have a right to maintain cross-border relationship.[169]

It is quite obvious that justice to indigenous peoples would be distant dream if the provisions of the UNDRIP are not recognised and implemented in domestic and international courts. There are positive developments but there is still a long way to go.

5.13. Conclusion

Global international legal instruments and organisations cause indigenous peoples' rights to achieve functional reality especially in the situation where they have suffered at the hands of States, and especially in relation to takings of traditionally and currently held lands and cultural rights. However, the burden of the implementation of indigenous rights rests, to great extent, on non-judicial mechanisms. Generally speaking, global institutions having the responsibility to monitor States compliance with international legal instruments. States and indigenous peoples together needs to work out suitable a remedies when dealing with continuing problems. In response, according to Fleur Adcock, the Sates exhibit mere ritualism and most of time States are reluctant to move in accordance with recommendations of international bodies.[170]

[168]New Zealand Maori Council et al and the Attorney General et al SC 98/2012, [2012] NZSC 6 (on 27 February 2013) para 91 and 92 cited in MAURO BARELLI *supra note* 158 at 66

[169] Mitchel vs. M.N.R. [2001] 1 SCR 911, 2001 Supreme Court of Canada 33, para .81 cited in MURO BARELLI *supra note* 164 at 66.

[170] Fleur Adcock, *supra note* 86.

Chapter 6

Summary and Conclusions

Colonial developments played a pivotal role in the evolution of international legal standards relating to indigenous peoples. Colonialism involved a 'civilizing mission' that European States used to justify the oppression of indigenous populations of the newly discovered territories. Europeans considered indigenous peoples as barbaric, underdeveloped and uncivilized. Among the early natural law scholars, Vitoria pleaded that indigenous peoples were not full sovereign and introduced a theory of 'just war' to legitimize the occupation of new territories.

The overall process of incorporating legal rules to 'civilize' the 'uncivilized' is referred to as 'dynamic of difference'. To be sure, various methods have been devised to exemplify and forward the 'dynamic of difference' based upon the cultural divide which has been institutionalised in different form over time. Be it Vitoria's 'just war' construction, the positivist paradigm of international law, the early twentieth-century pragmatism it has driven by that impulse. It is submitted that the notion of 'dynamic of difference' and interrelated concept of 'cultural divide' continues to play major role in the normative structure of international legal system. The agenda of 'global good' of international human rights system continues to harmonise with the institutions of development apparently aiming to bridge the gap between indigenous and non-indigenous world.

The ILO Regime and Indigenous Rights

The adoption of first international standards concerning indigenous peoples—in the modern sense—is only a chapter in the history but a fundamental one. As discussed in Chapter 3, the ILO activities concerning 'native labour' was based on the general mandate of securing 'social justice' in the world, which was further supported by the League mandate to administer "mandates" as a "sacred trust of civilization". Thus from the very beginning, the doctrine of 'dynamic of difference' was placed within the DNA of ILO policy towards indigenous peoples. Consequently, in spite of the fact that ILO Convention No. 107 attempted to address the marginalization of indigenous peoples through range of special protective measures, it overwhelmingly reflected the dominant

'integrationist' and paternalistic approach of its time. In promoting the rights of indigenous peoples the ultimate aim of the Convention No. 107 was to assimilate indigenous population into national societies. The protection recognised in the ILO Convention No. 107 are varied and include both individual and collective ownership of traditional lands, preservation of language , and some degree of protection of indigenous customs and institutions. However, these special measures are viewed as temporary and "not to be used as a means of creating or prolonging a state of segregation". Therefore, the balance between protection and integration is very much biased towards the latter. In this sense, ILO Convention No. 107 is wholly at odd with contemporary norms of indigenous peoples' rights.

The revision of ILO Convention No. 107 and its replacement with ILO Convention No. 169 was brought about in the context of growing indigenous peoples mobilisation within the UN system. ILO Convention 169 reflects greater sensitiveness towards indigenous peoples demands for recognition of their collective rights and categorically rejects the integrationist approach adopted by its predecessor. The basic orientation of ILO Convention 169 is reflected in the preamble which recognises the aspiration of indigenous peoples "to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live". ILO Convention No. 169 has been ratified by only 22 States so far, leaving the majority of indigenous peoples unable to rely on its legal framework. Although its contribution goes beyond the limited number of ratifications, it remains a fact that the instrument cannot be regarded a one of universal scope. The shortcomings of the ILO Convention No. 169 can be deduced from its fragile architecture. Despite representing a vital feature of international law's contemporary treatment of indigenous peoples demand, the instrument refused to recognise indigenous peoples as 'peoples' proper. Thus it limited the opportunity for indigenous peoples to have right to self-determination under general international law. Moreover, Convention No. 169 lacks the strength to address contemporary issues of indigenous cultural property and intellectual property rights.

Significance and Legal Status of UNDRIP

The most visible success in the evolution of indigenous peoples rights under international law was the adoption of the United Nations Declaration on the Rights of

Indigenous Peoples(UNDRIP). It deals with a broad range of indigenous rights. It is a special document in the context of indigenous rights for following reasons: First, UNDRIP is a crucial step towards the world wide acceptance of the normative structure of indigenous rights which in turn ensures, at least in principle, minimum standards of protection to be accorded to the indigenous peoples within the boundaries of States. Second, the background story in the making of draft of the UNDRIP reveals that the Declaration is resultant of collaborative efforts of many people including members of indigenous communities. Thus UNDRIP symbolises the journey of indigenous peoples from being an object of international to subject of international law. Third, the adoption of the UNDRIP marked a big leap forward in the history of indigenous population struggle for their recognition as 'peoples' in international law. The long-standing demand of right to (internal) self-determination was ensured to indigenous peoples. Fourth, UNDRIP recognised collective rights of indigenous peoples over their land and culture. At the same time, a fair amount of space is given to individual rights.

It was further argued that the value of the UNDRIP should not be undermined by the fact that it is a soft law for the following reasons: First, the value of a Convention might have been undermined by a low number of ratifications or due to fragile structure of the text as was the case in ILO conventions. Second, many provision of the Declaration have in all probability become part of customary international law.

Meaning of Indigenous Peoples: Definitional Complexities

In the era of crumbling boundaries of cultures it requires an emphatic effort to maintain a distinct identity. A functional definition of indigenous peoples is required in situations where individual or groups seek protection under international legal system on the basis of their Indigeneity. However, the problem of defining the concept of indigenous peoples is manifold. The definition cannot be too narrow and depict only a stereotypical image of indigenous communities or too broad to include every other ethnic group. It was argued in Chapter 2 that the groups considered as indigenous must meet following criteria: (a) they have been successful in maintaining cultural distinctiveness and are willing to preserve their cultural heritage in future; (b) they have been the subject of historical injustice; (c) they are non-dominant members of the region; and (d) they have intimate attachment with the land and territories as a matter of identity.

The issue of whether indigenous peoples exist in Asian countries is complex. In the case of India, the question of Indigeneity has become extremely debatable and polarising. Nearly eighty million population which fall under the category of 'Scheduled Tribe' aspire to gain international recognition as indigenous peoples of India. The answer depends upon how the 'idea of Indigeneity' is construed. If the 'idea of Indigeneity' is equated in terms of 'first occupancy', as in the case of settler colonies, then its application in the Indian context is ill suited. The reasons to uphold such viewpoint are as following: First, it is difficult to determine with precision that tribal peoples were the first settlers in India. Second, there are evidences which confirms that tribal and non-tribal societies in India peacefully coexisted in past. Third, the 'idea of Indigeneity' based on 'first occupancy' is a foreign construct. Excessive emphasis on 'first occupancy' may perpetuate tension as there is a dark side to Indigeneity in the form of 'son of soil' theory.

It is suggested that a dynamic approach be adopted in interpreting the 'idea of Indigeneity' in the Indian context. Indigeneity should be seen as a 'social fact'. In this sense, the tribal peoples of India share similarities with indigenous peoples in settler colonies: First, both indigenous and tribal peoples share ecological ethnicity as a matter of idenity. In this sense, they both have totemic bond with nature. Second, both indigenous and tribal peoples suffer from problem of land alienation and enforced migration. Third, both tribal and indigenous peoples are highly marginalised. They lag behind non-indigenous societies on all fronts—economic well-being, educational status and political ascendency. In this backdrop, tribal peoples are indigenous peoples and entitled for the protection under international law.

The Three Dimensions of the Rights of Indigenous Peoples

It is worth recalling that the struggle of indigenous peoples to be recognised as "peoples" in true sense was at the forefront of their journey from an object to subject of international law. It has been observed that from the sixteenth century onward the sovereign status has been denied to indigenous peoples under international law. They were not considered as part of international society. Accordingly, for long period of time indigenous peoples had no international legal personality. A review of academic literature reveals that indigenous sovereignty does not have fixed contours. Indigenous sovereignty is a notion that confronts the idea of 'Empire of Uniformity'. It challenges

the political and moral authority of States controlling indigenous populations within their territory. Indigenous sovereignty is crucial in restoring respect and recognising the 'difference' both at domestic and international levels. In this sense, however, indigenous sovereignty should not be seen as anti-State. It is a power for inclusive right of ownership over traditional land; right to preserve identity and culture; right to participation in decision making process affecting indigenous peoples culture and life and it is the source from which right to self-determination stems out.

The indigenous peoples right to self-determination is one of the most complex and contested rights in the realm of international law. Self-determination should be understood as a right of peoples to be governed by their consent. Therefore for indigenous peoples, right to self-determination is instrumental in the protection of their human rights and struggle for self-governance. Generally speaking, indigenous peoples are deprived from the being partner in the decision making within the State they reside. Right to self-determination empowers indigenous peoples to have share in the decision making process through democratic means. By no means indigenous peoples right to self-determination is to be seen as a right to rebellion against State. It cannot also be considered as a synonym of the right of secession. International law cannot be the death knell for States. However, prominence can be given to *internal* self-determination. In the post-decolonisation phase, right to self-determination must be seen as a principle mandating recognition of collective rights and autonomy within the framework of State structures. It also demands proactive steps from States to recognise and protect distinct culture of indigenous peoples.

One of the most grave and complex legal battles between indigenous peoples and the States of their habitat is the demand by former to get recognition, protection and implementation of their right to land and natural resources. The problem is twofold: First, non-recognition of indigenous peoples collective rights over their land and natural resources. Second, the continued dispossession of indigenous peoples from their traditional land. In order to achieve any resolution towards land conflicts it is imperative for States to understand that land is the foundation of spiritual, cultural and economic well-being of indigenous peoples. For such groups, land defines who they are as "people(s)" and thereby it is a matter of their identity. In reference to the contemporary problems of land appropriation in the name of development by the State or private

companies, free prior informed consent (FPIC) is the most potent procedural right in the hands of indigenous peoples. With respect to loss of land due to historical wrongs, the answer is found in the common law doctrine of indigenous/native title. It is very difficult to define native title yet it could be understood as a collective title over ancestral lands by virtue of which indigenous group has right to its use and occupation. However, the scope of common law doctrine of indigenous title has been limited to a great extent by the notion of 'extinguishment'. The notion of 'extinguishment' embraces voluntary buying and sale of title but, more regularly the word is used to represent outright taking or expropriation, almost invariably without just compensation. It is to be understood that issues of indigenous land claims and restitution are not mere matters of any normal legal right but also a question of identity and justice. Therefore, proposed guidelines may be observed by the States while dealing with land associated problem of indigenous peoples: (a) the rule of law must be invariably followed in both legal and administrative measures; (b) respect must be given to the special relationship that indigenous peoples have with their traditional lands; (c) indigenous peoples must be involved in decision making process in matters related with land acquisitions and principle of FPIC must adhered; and (e) effective remedies must be made available to indigenous peoples against violation of their land rights.

Indigenous peoples are facing serious challenges on a variety of others fronts to secure their cultural survival. They have had to discover innovative techniques for asserting their rights and autonomy when confronted with new threats posed by globalisation — theft and misappropriation of indigenous knowledge and culture. One of main emphasis of the study was to stress the need to protect indigenous cultural property. There are of course various critiques against the very idea of looking at culture from a property perspective. First, some scholars believe that cultural property is not entitled to differential treatment; it must be subjected to 'market based approach' towards regulation and protection of property. A second set of criticisms relate to the belief system which sees culture as 'commons'. A third set of criticisms comes from scholars who are of the opinion that idea of indigenous cultural property may be condensed as 'cultural integrity' with political ramifications such as 'balkanisation'. A fourth species of criticism relates to the viewpoint that one culture should be open to sharing the values of other cultures. In spite of these criticisms, it is maintained that there is a rationale behind the protection of indigenous cultural property. First, it is equitable to protect

indigenous culture as it had been targeted for theft, misappropriation and subject to usurpation from dominant culture. Second, the notion of property should be broadly interpreted in the case of indigenous culture so much so that the factor for determining 'base value' may be shifted from 'personhood' to 'peoplehood'.

With regard to the protection of intellectual property rights (IPRs) of indigenous peoples. It was found that there are different modalities available for the protection of traditional knowledge (TK) and traditional cultural expressions (TCEs) of indigenous peoples. The dominant IPR system fall short in protecting the TK and TCEs of indigenous communities. The reason being the unique nature of TK and TCEs, which are collectively owned by the community and requires perpetual protection by its owners. It was observed that the development of *sui generis* model based upon the customary laws of indigenous communities is a progressive bottom-up approach, which seeks to cater the aspiration of indigenous peoples in the protection of their TK and TCEs. However, the *sui generis* system has also its own limitation in terms of world-wide acceptability. Moreover, in many case TK and TCEs protection requires more than the defensive system offered by *sui generis* approach. This necessitates the requirement of a pluralistic approach towards the protection of TK and TCEs be based on the synergy of various models. For example, a trademark law may refuse to grant trademark rights on symbols sacred to indigenous communities. In case of violation, the company may be subjected to public shaming —commonly used deterrent by many indigenous communities.

Implementation Mechanisms

For transformation of indigenous rights into practical reality, it is imperative to have effective and robust international and domestic institutional mechanisms. At present it is observed that: (a) the implementation mechanism of indigenous rights is characterised by non-judicial mechanism, (relying on monitoring/reporting procedures) making it legally non-binding; (b) due to multiplicity of international bodies there is duplication of work and wastage of resources. In view of this, the Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples and the United Nations Permanent Forum on Indigenous Issues (UNPFII) found it challenging to deal with the implementation of specific rights of indigenous peoples. There have been proposal for a new body under the Optional Protocol for the

implementation of UNDRIP; and (c) suggestions are also made for binding convention on the rights of indigenous peoples.

It was argued in Chapter 2 and 5 that for better implementation mechanism following suggestion may be relevant: (a) human rights bodies need to build capacity of the States to deal with issues of indigenous peoples; (b) Optional Protocol may be envisaged with clear defined mandate to monitor violations of the provision of the UNDRIP; (c) it would be premature to call for a treaty based indigenous rights considering the past experience with ILO Conventions. The soft law approach may have a deeper impact than hard law in case of indigenous rights as States may not ratify the treaty; (e) at the regional level, IACHR jurisprudence on indigenous right be utilised as model for domestic implementation of indigenous rights ; and (f) States should act beyond ritualism when dealing with the concerns of indigenous peoples.

In conclusion, the following recommendations may be made to overcome sustained discrimination against indigenous peoples:

(a) In order to provide maximum safety and sustained protection to indigenous peoples, States should take all necessary measures to identify indigenous communities within their territories.
(b) States should undertake measures to ratify the ILO Convention No. 169. Those States that have ratified should ensure periodic reports on the situation of indigenous peoples rights.
(c) States should take steps to incorporate provisions of UNDRIP in their domestic legal framework.
(d) States must adopt policies which calls for greater participation of indigenous peoples in governance structure of the nation. A quota of seats should be reserved for members of indigenous communities in all public institutions.
(e) States must strictly observe the principle of free prior informed consent before initiating development or conservation projects on or in proximity to indigenous peoples' lands. The process of obtaining consent must be done in accordance with good faith principle. The State may also conduct social impact assessment before undertaking developmental projects on indigenous peoples land.

(f) Private enterprises that operate or intend to operate on or in vicinity to indigenous lands must respect indigenous peoples rights in accordance with international human rights instruments, in particular the UNDRIP.

(g) States should adopt measures to ensure respect for indigenous communities and indigenous culture. These should include development of educational material that sensitise non-indigenous population to the indigenous issues. These material may be incorporated in curriculum both at school and university level.

(h) States must make serious efforts in the identification, conservation, preservation and protection of indigenous knowledge and traditional cultural expressions of indigenous communities. In this regard, a national inventory may be established for the documentation of traditional knowledge and traditional cultural expressions.

(i) States must come up with *sui generis legislation* for the protection of indigenous peoples' traditional knowledge and traditional cultural expressions. A pluralistic approach may be adopted in drafting the legislation. Focus must be laid on the optimum utilization of customary laws of indigenous peoples and existing intellectual property protection models.

(j) States must develop a separate redressal mechanism for violation of indigenous peoples rights. The procedures adopted must be simple and adequate importance must be given to the customary law of the indigenous communities in the resolution of the dispute.

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