



# Walking and Learning with Indigenous Peoples

A Contribution to the 5th Anniversary of the International Summer  
Program on Indigenous Peoples' Rights and Policy at Columbia University

Pamela Calla and Elsa Stamatopoulou (Eds.)

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**WALKING AND LEARNING  
WITH INDIGENOUS PEOPLES**

A Contribution to the 5<sup>th</sup> Anniversary of the International Summer Program on Indigenous Peoples' Rights and Policy at Columbia University

Edited by Pamela Calla and Elsa Stamatopoulou

Center for the Study of Ethnicity and Race and Institute for the Study of Human Rights

Columbia University

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*“Words will never be able to explain the love and hope that I now carry home with me because of the Summer Program on Indigenous Peoples’ Rights and Policy at Columbia. I feel so blessed to leave with a wealth of knowledge, valuable experiences, and an international family.”*

*“What formed over the course of the program went beyond the academic discourse of Indigenous ‘issues’ to the construction of a therapeutic landscape—a shared Indigenized space grounded in personal experience and collective compassion. Indigenous epistemologies, histories, and solutions were elevated to a priority position, and the sharing of participant experiences provided support, nourishment, and a degree of healing of the raw scars of colonization. ... Telling our stories with the view to healing our hearts is at the core of the Truth and Reconciliation Movement. Such spaces have an important role to play in strengthening Indigenous resilience, promoting Indigenous healing, and Indigenizing education.”*

*“We should keep this flame burning.”*

**[Words of alumni of the international Summer Program on Indigenous Peoples’ Rights and Policy at Columbia University]**

## Walking and Learning with Indigenous Peoples

*A contribution of alumni of Columbia's International Summer Program on Indigenous Peoples' Rights and Policy on its Fifth Anniversary (2013-2017)*

Elsa Stamatopoulou and Pamela Calla (eds.)

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Since this publication is a celebration of five years of the international Summer Program on Indigenous Peoples' Rights and Policy, we would like to thank all those inside and outside Columbia that contributed tirelessly to the realization of such a learning space of human rights solidarity: Frances Negron-Muntaner, Teresa Aguayo, Josephine Caputo, Stuart Rockefeller, Audra Simpson and Nefert Tadiar of CSER/Columbia University; the instructors Victoria Tauli-Corpuz, Myrna Cunningham, Mattias Åhrén, Kevin Tarrant, Tone Bleie, Karla General, John Henriksen, Raja Devasish Roy and the late Tonia Gonnella Frichner; colleagues at the United Nations that offered briefings including Chandra Roy-Henriksen, Arturo Requesens, Mirian Masaquiza, Rama Rao, Beatrice Duncan, Nicola Brandt and Mitra Motlach; Ambassadors who held dialogues with ISSP participants including Carsten Stauer (Denmark), Yanerit Morgan (Mexico), Ib Petersen (Denmark), Ruben Ignacio Zamora (El Salvador); the Mohawk officials and community in Akwesasne, who offered extraordinary insights and hospitality to the ISSP international groups: the St. Regis Mohawk Tribal Council of Akwesasne and the officials of various departments, the Judge of the Tribal Court, the Chief of Police and his colleagues, the Mohawk Council of Chiefs, and especially Chief Howard Thompsom who received us and taught us in the Longhouse, the director, teachers and children of the Freedom School, the Director of the Museum of Akwesasne, the Rourke family and many other friends.

The co-editors, Elsa Stamatopoulou and Pamela Calla, consider ourselves privileged to have taught all five years of the Summer Program and to have met such

inspiring participants, colleagues with whom we walk together on the paths of social justice struggles. We greatly appreciate the friendship of all those from around the world who participated in this project with dedication to peace and to the vision of the UN Declaration on the Rights of Indigenous Peoples.

Elsa Stamatopoulou and Pamela Calla  
New York, March 2018

## Introduction

Our vision is to make the University a cultural bridge of the world, through strengthening leadership and research in human rights and social justice. The International Summer Program on Indigenous Peoples' Rights and Policy at Columbia University is one of those avenues. This edited volume is devoted to the Fifth Anniversary of the Summer Program. It is a collection of essays by alumni of the program from around the world and is co-edited by two of the professors of the Summer Program, one from Columbia University and one from New York University. It represents a commitment by all of us to continue building community, solidarity and hope across borders in a moment in our histories when the "rights" frame of nation-states is being challenged globally.

Columbia has moved forward on Indigenous Studies since 2010. Through the Center for the Study of Ethnicity and Race, the Institute for the Study of Human Rights (and its Indigenous Peoples' Rights Program) as well as other departments, the University has been securing a home for this field and area of practice in recent years. Why? Because we believe that it is impossible to study the world without including Indigenous Peoples' political practices, cultures, ways of knowing, aspirations and their global movement. It is also incongruous to ignore that Indigenous Peoples are literally changing the face of contemporary politics in every continent and have been and are continuously producing valuable knowledge for both the benefit of Indigenous Peoples and the wellbeing of our entire planet. The international Summer Program thus emerged from the simple fact that we felt the need to invite people from outside and inside Columbia, as teachers and participants, to share and benefit from an international interdisciplinary curriculum based on human rights and for us to engage with the important work being done in the world as well as nurture our own.

The adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007 launched a new era, where various actors at local, national, regional and international levels should be able to engage in dialogue with Indigenous Peoples on the basis of this comprehensive normative framework. The Summer Program on Indigenous Peoples' Rights and Policy is a unique immersion human rights program addressed to researchers and professionals<sup>1</sup>. The program responds to the clear need of researchers, professionals and social leaders, who do not otherwise have access to learning opportunities in this subject matter at a university setting to devote concentrated time (two weeks) to a comprehensive study of the topic in its most cutting edge aspects and in conversation

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<sup>1</sup> The acronym "ISSP" refers to Indigenous Studies Summer Program. The full title of the program for the first five years has been Indigenous Studies Summer Program on Indigenous Peoples' Rights and Policy, or ISSP for short.

with instructors from academia, Indigenous leaders, diplomats, international organizations officials and civil society.

After five years of operation (2013-2017), ISSP is now a mature program, accredited by Columbia University Graduate School of Arts and Sciences starting in 2017 and enjoying a distinguished reputation worldwide. The only such program internationally, ISSP brings together researchers and professionals from around the world to learn about Indigenous Peoples' rights and related policy. To-date, the program has hosted some 135 participants from 40 countries, and from many Indigenous Peoples on all continents. The great majority of participants are Indigenous persons, researchers, academics, professionals and practitioners. Professors at various universities, diplomats, government officials, tribal government officials and officials of intergovernmental organizations and non-governmental organizations are included among the participants.

While engaging with the UN Declaration on the Rights of Indigenous Peoples, the authors of this publication touch on a broad variety of contemporary topics:

In her piece on "Law and the Literary: A Narrative Approach to the United Nations Declaration on the Rights of Indigenous Peoples," Keira Anderson is contributing to a dialogue between literary scholarship and international policy pertaining to Indigenous Peoples' rights. She locates a critical reading of the United Nations Declaration on the Rights of Indigenous Peoples as a possible resource that can contribute to a more engaged and reflexive research methodology in literary scholarship. By focusing on legal and narrative conceptualizations of sovereignty, consent, and understandings of collectivism, she is making a case for the lessons that literary researchers and scholars can learn from the Declaration as well as the lessons that human rights practitioners and scholars can learn from literary approaches. She stresses the importance of self-reflexivity and critical inquiry into the colonial institutions, traditions, and spaces within which this work is carried out and points to critical shifts, both political and epistemological, that establish spaces for possibilities beyond colonial limitations.

Theresa Castillo writes on "Decolonizing Health Policy: An Evidence-Based Conceptual Framework for Addressing the Right to Health for Asian Indigenous Women." She points out that, despite recent global commitments to women's health rights, often Indigenous women are excluded from this discourse. Extreme health disparities fuel an increasing demand for health equity by Indigenous Peoples. Sparse literature is available and the ongoing omission of Asian Indigenous women from national data collection negatively impacts their right to health. The article identifies community-based leader perspectives on the challenges, promising practices, and recommendations for ensuring Indigenous women's health rights in Nepal and Bangladesh.

In her essay "Traditional Tribe or Corporate Entity? The Influence of Treaty of Waitangi Settlements on Tribal Groups in New Zealand," Melissa Derby examines the influence of the Treaty of Waitangi (1840) settlement process on iwi (extended tribe) and hapū (tribe). This article considers how the settlement process affects the structure and

function of these tribal groups, specifically the implications of state definitions and the requirements of these groups during the settlement process. The hapū of Ngāi Tamarāwaho is used as a case study to illustrate the points made in this article. For comparative purposes, parallels are drawn with other Indigenous groups, specifically Hawaiian and Australian communities, to highlight similarities between the experiences of these groups and those of Ngāi Tamarāwaho. The article concludes that, in many instances, the settlement process has played a significant role in redefining tribal groups and the ways in which they operate, and that these challenges require careful and considered navigation as increasingly more iwi and hapū plan for their futures in a post-settlement environment.

Vida Foubister's "The Sixties Scoop: Canada's Legacy of Lost Children," through an account of her family's story, brings out the consistent and deliberate separation and forced assimilation of Indigenous children in Canada combined with chronic underfunding of child welfare services that has profoundly injured Indigenous Peoples and their communities, who continue to experience poor living conditions and substandard schooling, among other issues. The "Sixties Scoop" refers to the pervasive child-welfare approach that was removing First Nation, Inuit and Métis children from their homes across Canada and placing them with non-Indigenous families.

In "Himalayan Indigenous Peoples in Local Election after Twenty Years: The Historical Gendered Perspective from Dolpo," Tashi Tsering Ghale examines the non-inclusive relationship of the state of Nepal with the Dolpo Indigenous Peoples, focusing on state-led federal democratic local elections and the community's gender relations. Local elections conducted by the state have continued the historical gender inequality of the Indigenous community. The paper concludes by emphasizing the importance of effective political participation, especially of women. The research is informed by a year's data collection through primary and secondary sources. Participant observation of the local election, and semi-structured interviews with Dolpo men and women who voted and officials who monitored the voting process, inform the research piece. Materials published through books, personal blogs and national dailies also served as important sources of information for this paper.

In her essay "A Continuation of a Vision for Indigenous Governance through the United Nations," Deanne L. Grant points to an appreciation for Indigenous visioning through the United Nations. She stresses that, although there are legal limitations of UNDRIP *vis a vis* states, the articles articulated within UNDRIP come from Indigenous Peoples' time, energy, knowledge, and visioning. Indigenous Peoples from around the world contribute to and build upon a significant effort to clarify commitments from member states to recognize the unique rights of Indigenous Peoples, starting with Cayuga Chief Deskaheh, who traveled to Geneva in 1923.

Ingrid Johanson's article on "Australia's Human Rights and Wrongs" discusses the difference between dualist and monist structures of power, explaining how international law and domestic law theoretically remain separate in Australia. This essay also draws upon the dismissal of the human rights treaty body authoritative advice

regarding the *Northern Territory Emergency Response Act* as a case study, to highlight the negative impact Australia's approach to international law can have on its Indigenous Peoples. The paper concludes that, until Australia adheres to its international legal commitments, or, alternatively, implements more solid domestic human rights provisions, the rights of all Australian citizens remain alarmingly vulnerable.

The topic of Rachael Ka'ai-Mahuta's essay is "The Right to Return: Challenging Existing Understandings of 'Citizenship' in Aotearoa/New Zealand." Polynesian peoples are increasingly having to face the migration and displacement of members of their communities. It is estimated that at least one in six Māori now live outside of New Zealand, mostly in Australia. The governments born out of colonization dictate the terms of citizenship to the Indigenous communities of the lands over which they rule. This paper explores issues at the intersection of diaspora, identity, and citizenship, specifically, should overseas-born Māori who are not New Zealand citizens be granted an automatic right to citizenship or a multi-generation citizenship by descent clause? This will go some way towards answering the overarching question of what rights, if any, Indigenous people have when they are not citizens of the state that governs their ancestral homeland.

Tilu Linggi writes about "'Forced' Prior Informed Consent at the Barrel of a Gun: A Case of Indigenous Peoples in Arunachal Pradesh." Similar to several alleged human rights abuses documented across various parts of the India, the events that were recorded in the years 2011 and 2016 in the eastern and western parts of the state of Arunachal Pradesh drew mass criticism against the growing tendency of impairing the rights of Indigenous Peoples. These two separate events where Indigenous Peoples were shot and tortured, were seen as the result of the state's underlying failure to address the principle of free, prior and informed consent (FPIC) in relation to the construction of several micro- and mega-hydroelectric power projects planned by the state. While states are under obligation to comply with various international and national laws and to respect and ensure prior informed consent, free from intimidation and coercion, the state's strategy such as discrediting environmental protestors and resorting to violence, has led to widespread concerns that such projects are being forced upon Indigenous Peoples without their consent.

In her article "Our Unique Historical Opportunity: Indigenous-State Relations," Rachael Grace Patten finds that relationships between States and Indigenous Peoples have made substantial and significant strides towards harmony in the last twenty-five years. These changes were brought about by Indigenous Peoples' extraordinary efforts, focused via the Indigenous Peoples movement and fueled by their resilience and dedication. Due to the strength of the Indigenous Peoples' movement, there now exist dynamic models for peaceful and just State-Indigenous People relations. Through the work of Indigenous Peoples within international bodies such as the United Nations, the world now has unprecedented international instruments at its disposal to guide and ameliorate relations. As humanity seeks urgent solutions to climate change and to maintain and enhance biodiversity, we, as citizens, States, and Indigenous Peoples, have

the historic opportunity to improve State-Indigenous Peoples relations. This paper examines where we have come, where we are now, and where we can go.

Saket Suman Saurabh writes about two Indigenous women's testimonies in his article "Rigoberta Menchu and Dayamani Barla: A New Normal in the Hegemonic World." He argues that their lives and the communities they were part of--Maya-Quiché, Guatemala and Jharkhand, India respectively—were shaped by a history of Spanish and English colonialism. Looking at the history of genocide and repression of these communities, he explores and compares the contemporary conditions and the spaces they inhabit as sacrificial zones where the use of land, forests, water and other resources facilitate a form of "development" that exploits them as "unpaid unskilled labor" to the benefit of wealthy elite classes. Through a lengthy discussion of "testimony" as a genre, Saket assesses the way in which Rigoberta Menchu Tum and Dayamani Barla give voice to those silenced by genocide (Guatemala) and displacement, state corruption and extractivism and exploitation in both India and Guatemala.

Vera Solovyeva writes about "Ecology Activism in the Sakha Republic, Russia's "Large-numbered" Indigenous Peoples and the United Nations Declaration on the Rights of Indigenous Peoples." She provides a short overview of the Indigenous movement around the world and in Russia particularly, and analyzes general trends and individual examples of social involvement in her homeland, the Republic of Sakha (Yakutia), explaining the evolution of people's awareness. More attention is paid to the little known information on the Sakha people's ecological and social activism. The author also emphasizes the importance of applying the UN recognized term "Indigenous Peoples" to all non-Russian Natives regardless of their population size, which would allow them to better protect their rights according to the Declaration on the Rights of Indigenous Peoples.

In her essay "From Margins to Center: Untranslatability as a Decolonial Practice," Doro Wiese takes possible constraints experienced by Euro-Western readers in understanding Indigenous articulations as a point of departure. She argues that the limitations experienced when interacting across cultures are productive since they limn out and contour the limits of knowledge and challenge Euro-Western hegemonies. When working across languages, the impossibility to transfer meaning from one culture to the next is called untranslatability. Taking the literary works of Native American Renaissance writer Leslie Marmon Silko as an example, the critical scholarship on her oeuvre is taken one step further by connecting it with the seminal discussion on untranslatability currently led in Comparative Literature. The main goal is to establish untranslatable narrative notions as an analytical object for reading literature across cultures. It is posited that narrative expressions can remain culturally specific and unappropriable when untranslatable. To show the validity of the main idea on the productiveness of untranslatability, a close reading of Silko's novels *Ceremony* and *Almanac of the Dead* will show how the untranslatability of narrative expressions is achieved in these works.

\* \* \*

We are proud to be marking the fifth anniversary of the Summer Program. An alumni page has been created (<http://www.cser.columbia.edu/indigenous>) and this edited volume is being published with contributions from ISSP alumni. ISSP has created a unique space for building knowledge, long-term engagement with the topic and bonds among participants for years to come. Generations of alumni now meet again as they pursue their work at national, regional and international fora, including the United Nations and academia.

Our warmest congratulations go to the authors of this book. We dedicate this volume to all the Summer Program alumni and the community they have become in support of the international movement of the Indigenous Peoples of the world.

Elsa Stamatopoulou and Pamela Calla



## **The Lyrebird Within Me**

**Anthony McKnight**

This painting is a Lyrebird, and it depicts the three knowledge spaces that exist within me in oneness. The Lyrebird in Yuin culture is a sacred and significant Ancestor bird that holds a diverse range of language and story. The Lyrebird is a great mimic and can mimic every bird in Australia except the Kookaburra. The Lyrebird can also mimic most man-made things that are heard within the bushlands of Australia, for example a cross-saw or people cutting trees. The Lyrebird holds the language from the past and present, and young people today still observe the Lyrebird to learn the songs and dances our Ancients sang and danced. My journey so far with the Lyrebird has taught me how to mimic and interpret the teachings from Mother Earth and how to respectfully engage in Western knowledge systems and processes. If I mimic Country<sup>1</sup> respectfully and in relationship, then I can stay grounded with Country when Western knowledge is present by being respectful to the knowledge systems that are present by staying true to self (Country).

In the context of this painting, the Lyrebird represents the language of my Yuin cultural knowledge (Country), Western knowledge and my third or shared space (intersection or coming together of two knowledge systems): me. For my PhD, I had to determine or discover my own understanding of the relationship between my Aboriginal and non-Aboriginal knowledge sites and the space when/where they overlap by force or choice. The Lyrebird is a metaphoric and real representation of myself as I cannot separate the knowledge worlds that I live, learn and behave within. To assist the reader to a degree, I recognize my cultural education and knowledge as the orange-yellow Lyrebird in the painting. The orange represents the knowledge system that keeps me balanced (Country) and the yellow reinforces the importance that Grandfather Sun (Country) plays each day in my life. The green background represents Mother Earth (Country) and the Sacred Mountains of Gulaga and Biamanga that have taught me so much in my cultural education: to breathe like a Mountain. The Black, White and Grey Lyrebird represents my journey within Western knowledge. I have utilized these colors

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<sup>1</sup> Ambelin Kwaymullina (2005), 12, an Aboriginal woman and academic from the Palyku people of the Pilbara region in Western Australia, positions Country through Aboriginal law. “Country is much more than a place. Rock, tree, river, hill, animal, human—all were formed of the same substance by the Ancestors who continue to live in land, water, sky. Country is filled with relations speaking language and following Law, no matter whether the shape of that relation is human, rock, crow, wattle. Country is loved, needed, and cared for, and country loves, needs, and cares for her peoples in turn. Country is family, culture, identity. Country is self.”

to help me see things in Black, White and Grey, with each color having a significant role and responsibility (something to think about). However, more importantly, there is no such thing as Black or White spirit, because spirit is all encompassing. The White also represents Grandmother Moon (Country) and how she influences me on a number of levels, especially my emotions. The darker green circle at the head of the Lyrebirds is the shared space, which is a contested space but at the same time, it cannot be a space for contestation. For me to have respectful reciprocal relationships with diverse knowledge systems, similarities must be identified to balance the creation of a deep understanding in respect to maintaining connectedness to the best of my current ability. The blue also represent Father Sky (Country) and a reminder not to stay too high (intellect) in the mind, but rather to ground myself back to the Mother, like the rain.

The varying spirals that are attached demonstrate that over time and in certain situations I have valued or utilized specific knowledge sites and, especially when I was younger, I got very lost and confused in being and learning how to be respectful in these knowledge relationships. With time, I have also learned that I have never been disconnected as my Ancients and Ancestors have never let go of me. I have gotten lost in some circumstance, but Country (my cultural education system) has bought me back to oneness.

The painting represents many other things that are discussed within my PhD, "Singing Up Country in Academia."

# Law and the Literary: A Narrative Approach to the United Nations Declaration on the Rights of Indigenous Peoples

Keira Anderson

This article aims to contribute to a dialogue between literary scholarship and international policy pertaining to Indigenous Peoples' rights. I locate a critical reading of the United Nations Declaration on the Rights of Indigenous Peoples as a possible resource that can contribute to a more engaged and reflexive research methodology in literary scholarship. By focusing on legal and narrative conceptualizations of sovereignty, consent, and understandings of collectivism, I hope to make a case for the lessons that we, as literary researchers and scholars, can learn from the Declaration as well as the lessons that human rights practitioners and scholars can learn from literary approaches. As Sophia McClennen and Joseph Slaughter argue, "[t]he type of critical thinking needed to seriously engage with the complexities of human rights analysis demands an optic that exceeds the confines of traditional disciplinary formations."<sup>1</sup> As a non-Indigenous researcher, I stress the importance of self-reflexivity and critical inquiry into the colonial institutions, traditions, and spaces within which this work is carried out. During a special event to mark the International Day of the World's Indigenous Peoples on 9 August 2017, UNPFII Chair Dr. Mariam Wallet Aboubakrine stated, "the Declaration represents important shifts in both the structure and practice of global politics."<sup>2</sup> These critical shifts, both political and epistemological, establish spaces for possibilities beyond colonial limitations.

On 13 September 2007, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples. The Declaration's adoption was the culmination of over twenty years of work within the United Nations system, as well as many decades of grassroots and community work outside of that system. I stress this point to combat the risk of locating the United Nations as the sole or primary space for Indigenous Peoples' intellectual and advocacy labor. The most important work is happening within these communities on a daily basis.

Whereas the UN's trajectory of Indigenous involvement in international relations often commences with Cayuga Chief Deskaheh (Levi General) travelling to Geneva in 1923 to advocate for the Haudenosaunee (Iroquois) peoples at the newly-formed League of Nations, it is imperative to acknowledge that Indigenous nations *are* the First Nations. The Haudenosaunee Confederacy is considered to be the world's first League of Nations. Globally, Indigenous Peoples practiced diplomacy for thousands of years prior to the creation of modern states. Deskaheh was not permitted to speak inside the League of Nations' halls, but was provided the opportunity to address the city public of Geneva. James Anaya (former Special Rapporteur on the Rights of Indigenous Peoples) cites a lobbyist in attendance who stated, "[t]he representative of the world's

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<sup>1</sup> Sophia A. McClennen and Joseph R. Slaughter, "Introducing Human Rights and Literary Forms; Or, the Vehicles and Vocabularies of Human Rights," *Comparative Literature Studies* 46, no. 1 (2009), 13.

<sup>2</sup> Mariam Wallet Aboubakrine, "High-level segment: Remarks," International Day of the World's Indigenous Peoples, United Nations Permanent Forum on Indigenous Issues (New York, USA: August 2017).

first League of Peace received no welcome from the world's newest."<sup>3</sup> Maori leader T.W. Ratana travelled to Geneva soon after, joining Deskaheh in providing the foundations upon which the legal language for Indigenous Peoples' rights has developed. The League's dismissal of Deskaheh and Ratana prompts us to pose the questions of when, how, and why the territorial claims of newly-formed states came to supersede the sovereignty of long-existing nations.

We might begin in 1095, with Pope Urban II's "Papal Bull Terra Nullius." This edict, which translates to "empty land," gave European monarchs the right to discover and claim land held by non-Christians. Of course, we can identify the paradox in referring to occupied land as empty land, but in the mind of the Catholic Church this paradox, like the "pagans" to which the decree refers, did not exist. Non-Christians were non-humans. The later "Papal Bulls Inter Caetera," issued by Pope Alexander VI in 1493, followed suit, providing rationalization and incentive for the colonization of the Americas.<sup>4</sup> Today, this "doctrine of discovery" survives as the cartography of empire carved upon the earth. Look to the names of the British and the U.S. Virgin Islands or to the U.S. states of New York and New Hampshire or the Canadian provinces of Nova Scotia and Newfoundland. Whereas the papal bulls provided rationalization and incentive for imperial land-grabbing, the 1648 Peace of Westphalia legitimized the process. If the conquest of non-Christian lands were sketched out in graphite under the papal bulls, the Peace of Westphalia began the process of tracing over those lines in black ink. Westphalia established a political order centered on the sovereignty of the state, challenging all competing claims to territorial sovereignty.

Given this very brief historical overview, we might ask how we arrived at the point at which this new measure of political authority has become normalized. Throughout the West, the general population uses the term "country" to signify "nation-state" with no real inquiry into what a nation is, what a state is, and what the implications are when both terms are "cobbled together" or "solder[ed]" through hyphenation, to borrow Judith Butler's phrasing.<sup>5</sup> I find it useful to approach these questions through Benedict Anderson's definition of the nation as an "imagined political community," from his seminal study on nationalism.<sup>6</sup> Anderson's nation has a two-part structure: it is conceptual because it is imagined and material because it is political. How is it, then, that one politic was able to impose its imagination onto the minds of the entire world? Anderson locates the rise of the printing press as having provided a rhetorical monopoly for imperial powers to disseminate a singular worldview.<sup>7</sup> In a volume of the same title, Stefan Berger argues that it was the literal act of "writing the nation" that elevated imperial powers to political primacy.<sup>8</sup> He outlines the turn of the nineteenth-century shift from the more cosmopolitan "Enlightenment historiography" to that of the modern era which, he argues, "employed history to

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<sup>3</sup> James S. Anaya, *International Human Rights and Indigenous Peoples* (New York, USA: Aspen, 2009), 4-6.

<sup>4</sup> Jens Korff, "How was Aboriginal land ownership lost to invaders?" *Creative Spirits* (May 2016), <https://www.creativespirits.info/aboriginalculture/land/how-was-aboriginal-land-ownership-lost-to-invaders>.

<sup>5</sup> Judith Butler and Gayatri Chakravorty Spivak, *Who Sings the Nation-State?* (Calcutta, India: Seagull Books, 2007), 2.

<sup>6</sup> Benedict Anderson, *Imagined Communities* (New York, USA: Verso, 2006), 6.

<sup>7</sup> *Ibid.*, 37-46.

<sup>8</sup> Stefan Berger, "Introduction: Towards a Global History of National Historiographies," *Writing the Nation: A Global Perspective*, ed. Stefan Berger (New York, USA: Palgrave Macmillan, 2007).

establish the unique character of nations, legitimate their existence in history and justify their alleged superiority over other nations.”<sup>9</sup> As Berger contends, “it was the encounter with Western imperialism which gave national history a new relevance and urgency in the colonial world.”<sup>10</sup> For Indigenous communities particularly, the codification of imperial history served to negate their own claims of nationhood and as such “[t]he coming of modernity was accompanied by the victory of the nation-state over all rival forms of territorial and non-territorial allegiance.”<sup>11</sup> Work in Indigenous Studies calls into question these territorial claims of nation-states, thereby calling into question the entire political organization of the modern world.

I first presented the research for this article, in its initial stages, at an academic conference in San Diego, California during the spring of 2017. I put together a slideshow which began with a brief overview of Indigenous Peoples’ involvement at the United Nations and then presented the voting record for the Declaration. I organized the slides so that the 144 member state votes “for” were shown first and the four member state votes “against” followed (Australia, Canada, New Zealand, and the United States of America). When I switched to the latter slide, many in the audience were visibly and audibly shocked and this point was later highlighted during the questions segment. My argument for this article materialized in that response. Before I continue, I am compelled to acknowledge that my understanding of the Declaration was mostly nonexistent until I attended the Indigenous Peoples’ Rights and Policy program at Columbia University during the summer of 2015. At that point, I had been working on my graduate thesis on the critical writing of Thomas King since the summer of 2013, twice choosing to extend my submission deadline. I began to look back at my sources through this new point of reference and found that most non-Indigenous literary scholars (in works post-2007) provided little to no reference of the Declaration, specifically, and Indigenous Peoples’ involvement in activism, advocacy, and shifts in policy, more generally. What I fear this lack of analysis does is locate cultural production as separate from lived political realities. Referring back to the conference in San Diego, what do we expect the role of the university to be if professors who teach Native literatures at American universities and doctoral students who are writing their dissertations at these same universities are either unaware of the Declaration or unaware that the United States was one of the four votes against the Declaration? Are Indigenous Peoples’ rights movements being discussed in these literature classrooms? For settler scholars and researchers, a lack of engagement with Indigenous policy often corresponds to a lack of critical self-reflexivity. In order to better understand this particular lack of analysis, we must first turn a historical lens to the university as a colonial institution.

From the fierce global debates surrounding academic speech and affirmative action to the rise of Ethnic Studies departments, the university is forced to grapple with its colonial foundations. The “subject/object” research dichotomy and the prioritization of European intellectual traditions have served the purposes of epistemic exclusion and erasure. As Linda Tuhiwai Smith argues, “[t]he academy played a very significant role in upholding Western intellectual superiority; the disciplines of Western knowledge

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<sup>9</sup> *Ibid.*, 9.

<sup>10</sup> *Ibid.*, 6.

<sup>11</sup> *Ibid.*, 4.

were used as a platform for dismissing or denying the existence of indigenous knowledge, a view that still exists in some parts of the academy today.”<sup>12</sup> Elizabeth Cook-Lynn’s 1997 essay “Who Stole Native American Studies?” provides a thorough analysis of the institutionalization of Native Studies in the United States. The Lakota scholar commences with an overview of the First Convocation of American Indian Scholars, held in 1970 at Princeton University. She argues that the meeting in New Jersey asserted “the academic intention of U.S. colleges and universities [...] to use education to affect the policy of this nation in Indian affairs” through “the development by Indians of bodies of indigenous knowledge.”<sup>13</sup> Cook-Lynn elaborates that these knowledges would be referred to as “Native American Studies as an Academic Discipline” and would function “*endogenous[ly]*,” that is, “emerg[ing] from *within* Native people’s enclaves and geographies, languages and experiences”; a challenge to the conventional academic approach of objectivity which Cook-Lynn locates as “the exogenous seeking of truth through isolation.”<sup>14</sup> As Cook-Lynn makes apparent, this discipline was to be both produced and facilitated by Native peoples. However, she contends that the discipline has been “co-opted” by non-Native scholars, as “[t]he college campus and the discipline of social science, and commercial and university publishing houses rather than the tribal institutions based within Native populations dominate the intellectual strategies that influence Native American studies as an academic discipline.”<sup>15</sup> If the discipline were intended to influence policy from a space of Indigenous Peoples’ narrative sovereignty, then its co-optation by non-Native academia has influenced policy from a space of coloniality. The relevance of Cook-Lynn’s essay—having now approached its twentieth year since publication—to contemporary Native scholarship exposes an ongoing definitional struggle against the prevailing attitudes of the academy.

As researchers, we are taught to be concise and definitive in our argumentation, leaving nothing open to possible “misreadings.” It might be a surprise to some then that the Declaration contains no formal definition for Indigenous Peoples. The authors made this choice deliberately, arguing that after having had identities imposed upon them since the first colonial contact, Indigenous Peoples are entitled to the respect to define themselves. The authors were also aware that no single definition could possibly cover the estimated 370 million of the world’s distinct and diverse Indigenous Peoples.<sup>16</sup> There was a fear that if a definition were included in the Declaration, states could use it to deny recognition to the Indigenous Peoples within their political territory. However, many states continue to use the lack of a definition to deny these collective rights and this remains a significant challenge in the Declaration’s implementation at the state level.

Although there exists no strict definition, the most frequently-cited “definitional framework” for Indigenous Peoples comes from the 1981 Martinez Cobo Study on the

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<sup>12</sup> Linda Tuhiwai Smith, *Decolonizing Methodologies* (New York, USA: Zed, 2012), 222.

<sup>13</sup> Elizabeth Cook-Lynn, “Who Stole Native American Studies?” *Wicazo Sa Review* 12 no. 1 (1997): 9.

<sup>14</sup> *Ibid.*, 9, 11.

<sup>15</sup> *Ibid.*, 13, 19.

<sup>16</sup> United Nations Permanent Forum on Indigenous Issues, *State of the World’s Indigenous Peoples*, United Nations Document ST/ESA/328 (New York, USA: 2009).

Problem of Discrimination against Indigenous Populations.<sup>17</sup> Jose R. Martinez Cobo was the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the former UN Commission on Human Rights (replaced by the Human Rights Council in 2006). The Martinez Cobo “working definition” reads:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on 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 manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, 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 on certain part of the country, or in certain regions of the world;
- f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.<sup>18</sup>

The flexibility of the Martinez Cobo framework offers a non-prescriptive means for approaching Indigeneity in the global sense.

Deferring to Indigenous Peoples to define themselves is an integral part of the right to self-determination, a concept which garnered the most resistance from member-states. Article 3 of the Declaration reads:

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<sup>17</sup> Jose R. Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (New York, USA: United Nations, 1981).

<sup>18</sup> *Ibid.*

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>19</sup>

The Declaration's inclusion of the term "peoples" is especially significant. The 1989 International Labour Organization (ILO) Indigenous and Tribal Peoples Convention (No. 169) includes a disclaimer about the use of the term. ILO Convention 169 Article 1.3 reads: "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."<sup>20</sup> Within international law, "all peoples have the right to self-determination," as codified in the International Covenant on Civil and Political Rights.<sup>21</sup> Despite only having twenty-two ratifications, ILO 169 is still in force and still considered a significant document in regard to Indigenous Peoples' rights. The shifting legal language, from "minorities," "populations" and "issues" to "peoples," is a direct result of the work of Indigenous Peoples and non-Indigenous advocates pushing for Indigenous Peoples' right to self-determination as a non-negotiable component of the Declaration.

Anaya explains that the Declaration's allusion to processes of colonization provides a common point of historical reference for Indigenous Peoples.<sup>22</sup> We are reminded that Indigenous Peoples constitute distinct and diverse nations, which happen to share histories of colonization and, often, a political agenda *against* colonialism stemming from those histories. What I find most striking about the two preambular paragraphs that Anaya references in this regard (the fourth and the sixth), is their explicit indictment of colonialism. The latter refers to the historical process of colonization:

...*Concerned* that indigenous peoples have suffered from historical injustices as a result of, inter alia, their colonization and dispossession of their lands, territories, and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests...<sup>23</sup>

And the former refers to attitudes of coloniality<sup>24</sup> which have served to rationalize colonization as process:

...*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable, and socially unjust....<sup>25</sup>

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<sup>19</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations Document A/RES/61/295 (New York, USA: October 2007).

<sup>20</sup> International Labour Organization, *Indigenous and Tribal Peoples Convention, C169* (Geneva, Switzerland: June 1989).

<sup>21</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights* (New York, USA: December 1966).

<sup>22</sup> *Supra* note 3, at 59.

<sup>23</sup> *Supra* note 19.

<sup>24</sup> Aníbal Quijano and Michael Ennis, "Coloniality of Power, Eurocentrism and Latin America," *Nepantla: Views from South* 1, no. 3 (2000), 533-580.

<sup>25</sup> *Ibid.*

Despite the Declaration's direct references to the effects of colonization for Indigenous Peoples as well as the inclusion of Article 3, within the United Nations system, Indigenous Peoples' rights and political decolonization are identified as two separate projects. According to the UN Committee on Decolonization (formally referred to as The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples), there currently exist only seventeen non-self governing territories remaining to be decolonized.<sup>26</sup> Sheryl Lightfoot explains, "indigenous peoples' self-determination was specifically excluded from the decolonization regime by the 'saltwater thesis' (sometimes known as the 'blue water thesis'), which asserted that only overseas colonial territories were eligible for decolonization and self-determination."<sup>27</sup> How, then, do we understand the right to self-determination for Indigenous Peoples, particularly with reference to the Declaration's final article? Article 46 reads:

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 the 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.<sup>28</sup>

Anaya explains that self-determination, as employed in the Declaration, does not call for political secession or statehood.<sup>29</sup> Rather, it more closely resembles the "third space of sovereignty" that Kevin Bruyneel has suggested as a site of dynamic resistance for Indigenous peoples living in settler-colonial states.<sup>30</sup> In the context of U.S. settler politics, Bruyneel argues, "[t]ribal self-determination is sovereignty without the mechanisms of statehood," recognizing the legitimacy and potential of non-statist forms of governance and political organization.<sup>31</sup> Understandings of what self-determination should look like are, of course, going to be diverse and based on the particularities of time, space, and context.

Jace Weaver has argued, "[t]he struggle may be land and sovereignty, but it is often reflected, contested, and decided in narrative."<sup>32</sup> For non-Indigenous literary scholars and researchers, recognizing Indigenous Peoples' sovereignty requires us to recognize and reject the identities and constraints that have been imposed upon Indigenous Peoples within our own fields. Within literary scholarship, the lenses of post-colonial and postmodern theory are those that have been most frequently applied to studies of Indigenous literatures. Thomas King's 1990 essay "Godzilla vs. Post-Colonial" provides both a challenge and an alternative to the use of post-colonial theory, which Western scholars have used overwhelmingly as a template for their studies of

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<sup>26</sup> "The United Nations and Decolonization," United Nations, [www.un.org/en/decolonization](http://www.un.org/en/decolonization).

<sup>27</sup> Sheryl R. Lightfoot, "Indigenous Rights in International Politics: The Case of 'Overcompliant' Liberal States," *Alternatives: Global, Local, Political* 33, no. 1 (2008), 86.

<sup>28</sup> *Supra* note 19.

<sup>29</sup> *Supra* note 3, at 60.

<sup>30</sup> Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S. – Indigenous Relations* (Minneapolis, USA: University of Minnesota Press, 2007), xvii.

<sup>31</sup> *Ibid.*, 152.

<sup>32</sup> Jace Weaver, *That the People Might Live: Native American Literatures and Native American Community* (New York, USA: Oxford University Press, 1997), 41-42.

politically-marginalized groups. Through a tendency toward homogenization of colonial experiences, Western academics have projected a standard of post-colonial universalism. King begins his essay with a personal story, a technique that is prevalent throughout his critical work. He recounts how he was scouted to play basketball as a teenager due to his tall stature. Through this anecdote, King establishes a context for a greater discussion about cultural assumptions. Just as his coach assumed that he would be good at basketball because he was tall—though King confesses, “I wasn’t even mediocre”—he tackles the assumptions made by the term “post-colonial” and how these assumptions function within the discursive constructs both established and upheld by the academy.<sup>33</sup>

King designates post-colonial as “part of a triumvirate”; the “post” implies a “pre” which extends a Eurocentric frame of reference to a period of time prior to the initial point of European-Native contact.<sup>34</sup> Furthermore, he argues, “the term [‘post-colonial’] organizes the literature progressively suggesting that there is both progress and improvement.”<sup>35</sup> Weaver also recognizes the problems associated with arranging a literary tradition upon a colonial trajectory. He references Gerald Vizenor’s term “paracolonial” and offers “pericolonialism” in response.<sup>36</sup> Weaver provides an etymological description for both terms and elaborates, “[p]ericolonialism [...] acknowledges the thorough, pervading nature of settler colonialism and marks it as something that, for indigenes, must be gotten around, under, or through.”<sup>37</sup> Weaver argues that his “pericolonialism” and Vizenor’s “paracolonial,” “[shift] the temporal metaphor (postcolonial) to a spatial one, something that must be overcome here, in this place.”<sup>38</sup> Vizenor and Weaver’s semiotic contributions are pertinent in that they establish a less hierarchical conception of settler-Native relations, while also addressing the continuation of colonial presence in settler-colonial societies. As Cook-Lynn pointedly asserts “[p]ostcolonial study has always been defined by Euro-American scholars as the discourse that *begins from the moment of what is called ‘colonial contact,’* not from the moment that imperial nations reject colonizing as an *illegal* activity, because that time has never come.”<sup>39</sup> In its application to Indigenous Peoples living in settler states, the term “post-colonial” denies the contemporary realities of settler-colonialism.

Arguably his most influential contributions to Native literary theory, King offers four alternative terms for the study of Native literatures: “tribal, interfusional, polemical, and associational.”<sup>40</sup> Through this example, we can see how King is doing theory both *on* his own terms and *with* his own terms. Unlike “post-colonial,” King argues, “these terms are not ‘bags’ into which we can collect and store the whole of

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<sup>33</sup> Thomas King, “Godzilla vs. Post-Colonial,” *Unhomely States: Theorizing English-Canadian Postcolonialism*, ed. Cynthia Sugars (Peterborough, Canada: Broadview, 2004), 183.

<sup>34</sup> *Ibid.*, 184.

<sup>35</sup> *Ibid.*, 185.

<sup>36</sup> Jace Weaver, “Splitting the Earth: First Utterances and Pluralist Separatism,” *American Indian Literary Nationalism*, eds. Robert Warrior, Jace Weaver, and Craig S. Womack (New Mexico, USA: University of New Mexico Press, 2006), 39.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Supra* note 13, at 13.

<sup>40</sup> *Supra* note 33, at 185.

Native literature.”<sup>41</sup> In *American Indian Literary Nationalism* (a collaborative study with Robert Warrior and Craig Womack), Jace Weaver argues for a critical discourse of “pluralist separatism,” which recognizes the legitimacy of tribal nationalisms alongside intertribal (international) alliances.<sup>42</sup> Similarly, in his foundational study *Orientalism*—designated as one of the founding texts of post-colonial theory, along with the work of Gayatri Chakravorty Spivak and Homi K. Bhabha—Edward Said advocates both “general and particular” critical perspectives.<sup>43</sup> Through his terms, King not only establishes a critical discourse that differentiates (North American) Native experience from the experiences of other colonized groups, but also allows for differentiation between the various and distinct tribal nations throughout North America. Craig Womack argues:

Native literature, and Native literary criticism, written by Native authors, is part of sovereignty: Indian people exercising the right to present images of themselves and to discuss those images [...] While this literary aspect of sovereignty is not the same thing as the political status of Native nations, the two are, nonetheless, interdependent. A key component to nationhood is a people’s idea of themselves, their imaginings of who they are.<sup>44</sup>

Postmodern thought also poses significant challenges for Indigenous literary studies. The anti-essentialism of postmodern theory has undoubtedly contributed to a blurring of narrative ethics. Whereas postmodern theory succeeded in opening up a once monologic space to make room for various perspectives and experiences, in doing so, it neglected to establish a capacity for prioritization. Too many non-Indigenous scholars working in the field of Indigenous literary studies are quick to reject Indigenous nationalist claims in favor of postmodern approaches. Womack posits postmodern theory’s critical flaw as the “tendency to decenter everything, including the legitimacy of a Native perspective.”<sup>45</sup> Womack provides the text of his own correspondence with the Abenaki poet Cheryl Savageau who, in a discussion of academic anti-essentialism, writes, “[i]f everybody’s story is all of a sudden equally true, then there is no guilt, no accountability, no need to change anything, no need for reparations, no arguments for sovereign nation status, and their [mainstream] positions of power are maintained.”<sup>46</sup> Non-Indigenous readers must reject Roland Barthes’ famous assertion that “the birth of the reader must be at the cost of the death of the Author.”<sup>47</sup> To suggest that “writing is the destruction of every voice, of every point of origin,” as does Barthes, is incredibly problematic, particularly within the context of cross-cultural scholarship.<sup>48</sup> To argue for the exclusion of authorial intent and social and historical context is to disregard the reality of the imbalanced structures of power that shape cultural production.

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Supra* note 36, at 74.

<sup>43</sup> Edward Said, *Orientalism* (New York, USA: Vintage Books, 1979), 8.

<sup>44</sup> Craig S. Womack, *Red on Red: Native American Literary Separatism* (Minneapolis, USA: University of Minnesota Press, 1999), 14.

<sup>45</sup> *Ibid.*, 6.

<sup>46</sup> *Ibid.*, 3-4.

<sup>47</sup> Roland Barthes, “The Death of the Author,” *The Norton Anthology of Theory & Criticism*, ed. Vincent B. Leitch (New York, USA: Norton, 2010), 1326.

<sup>48</sup> *Ibid.*, 1322.

Postmodern trends toward intertextuality, pastiche, and the idea of an epistemological commons have, perhaps inadvertently, provided a problematic rationalization for appropriation. Conversations on intellectual property, from outside of the Indigenous Peoples' rights framework, have often flirted with the issue of cultural appropriation but, in their lack of engagement with questions of coloniality, they have largely missed the point. In his influential study *Cosmopolitanism*, the philosophy scholar Kwame Anthony Appiah adopts a focused approach on intellectual property in the cultural context, however, he problematically aligns the corporation with the Indigenous nation. Appiah writes, "[t]alk of cultural patrimony ends up embracing the sort of hyper-stringent doctrine of property rights [...] that we normally associate with international capital."<sup>49</sup> Even more explicitly, he claims, "the corporations that the patrimonialists favor are cultural groups."<sup>50</sup> Appiah references the Walt Disney and Coca-Cola companies and adds to the list, "Ashanti Inc., Navajo Inc., Maori Inc., Norway Inc.: All rights reserved."<sup>51</sup> I find Appiah's rhetorical choice here troubling, particularly for a work that is of such high caliber in other regards. Ironically, a critical reading of "all rights reserved" exposes the principle error of his position. For many Indigenous communities and Peoples, rights *are* reserved, as in, denied to them. Anaya explains, "[i]t is precisely because the human rights of indigenous groups have been denied, with disregard for their character as peoples, that there is a need for the Declaration."<sup>52</sup> Article 31.3 of the Declaration reads:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>53</sup>

Additionally, "reserved" takes on a particularly concerning connotation in itself. In the verb form, "reserved" can easily be read as a synonym for government policies of relocation, the forced migration of Indigenous Peoples onto federal reserves and reservations.

In this particular case, I contend that a reading of Appiah's argument would be strengthened by an engagement with the Declaration and its causes for historical remedy. Analyses of cultural appropriation are always tied to the concept of power.<sup>54</sup> The corporations and cultural groups that Appiah so quickly aligns have entirely different stakes in the processes of cultural production and distribution. The most obvious difference is that a corporation is not a people. A corporation may, of course, be

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<sup>49</sup> Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York, USA: W. W. Norton & Co., 2006), 130.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Supra* note 3, at 63.

<sup>53</sup> *Supra* note 19.

<sup>54</sup> Pratima V. Rao and Bruce Ziff, "Introduction to Cultural Appropriation: A Framework for Analysis," *Borrowed Power: Essays on Cultural Appropriation*, eds. Pratima V. Rao and Bruce Ziff (New Brunswick, USA: Rutgers University Press, 1997), 6.

run *by* people but it does not define *a* people. Indigenous patrimonial struggles are protective whereas corporate struggles are exploitative. This distinction is key in any discussion of Indigenous Peoples' claims to intellectual property or cultural patrimony. Glen Sean Coulthard's work, in its Fanonian use of Marxist theory through a decolonial orientation, is particularly useful here.<sup>55</sup> Coulthard argues, "what must be recognized by those inclined to advocate a blanket 'return the commons' as a redistributive counterstrategy to the neoliberal state's new round of enclosures is that, in liberal settler states such as Canada, the commons belong to somebody – the First Peoples of this land."<sup>56</sup> Coulthard's critical application calls our attention to the limitations of conventional theoretical approaches, but also provides an example of the ways in which many of these approaches can be re-oriented for decolonizing purposes.

The concepts of intellectual property, cultural patrimony, and consent are inextricably linked to sovereignty. Indigenous Peoples have immense knowledge which is theirs to share with those outside of their communities only if they so choose. This is a matter of consent. Article 19 of the Declaration reads:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>57</sup>

The Declaration's language of "free, prior, and informed consent" (FPIC) is a shift from the language of "consultation" as outlined in ILO Convention 169.<sup>58</sup> The language of consultation means that states and/or corporations are obligated to hold meetings with representatives of the Indigenous Peoples concerned to discuss projects or actions proposed that would affect them. According to the language of consultation, even if the Indigenous Peoples objected to the project, the state or corporation could still go ahead with it because they had met their requirements by simply taking the meeting. The language of consent gives Indigenous Peoples more agency in these consultations. According to the language of FPIC, Indigenous Peoples have the right to say "no" with hope that their "no" will be respected and upheld.

The Declaration's emphasis on collective rights provides an alternative framework to, but not an exclusion of, the individual referent of the liberal human rights regime. Tuhiwai Smith argues that the West locates the individual as "the basic social unit from which other social organizations and social relations form."<sup>59</sup> Moving from an understanding of the individual to an understanding of the collective also denotes a critical epistemological shift in research methodology. Tuhiwai Smith's discussion about scholarly distance is particularly informative in this regard. She argues that in Western research methodology, "[t]he individual can be distanced, or separated, from the physical environment, the community" which "implies a neutrality and objectivity

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<sup>55</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, USA: University of Minnesota Press, 2014), 34.

<sup>56</sup> *Ibid.*, 61.

<sup>57</sup> *Supra* note 19.

<sup>58</sup> *Supra* note 20.

<sup>59</sup> *Supra* note 12, at 51.

on behalf of the researcher.”<sup>60</sup> This (lack of) relationship represents the “subject/object” research dichotomy, founded on a colonial hierarchy of expertise. Indigenous Peoples’ narrative sovereignty and narrative consent subvert this binary. Narrative consent is also a part of the language of FPIC. Article 15 of the Declaration reads: “Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.”<sup>61</sup> Questions about whether or not Indigenous cultures, traditions, histories, and aspirations are portrayed in an appropriate manner is a matter of consent and will vary by nation, as well as sometimes within nations. Consent is a concept considered far too infrequently in literary scholarship. In the social sciences, for example, field researchers must receive permission to work within a community and can therefore be held personally accountable to that particular community. How can we, as non-Indigenous scholars and researchers, think about consent and permission in the context of literary research, particularly if our work is not specific to one nation or community?

For non-Indigenous literary scholars and researchers, it is critical to always turn toward the work of Indigenous scholars as primary sources. Womack argues for the prioritization of Native perspectives, which “rise out of a historical reality wherein Native people have been excluded from discourse concerning their own cultures.”<sup>62</sup> The common refrain remains “nothing about us without us.” For non-Indigenous literary scholars and researchers, this requires a turn toward Indigenous critical approaches, theoretical frameworks, and research methodologies. Audra Simpson and Andrea Smith remind us that the theoretical work of Indigenous studies is also inherently political work, with particular orientations and commitments. In their editorial introduction to *Theorizing Native Studies*, Simpson and Smith emphasize the connection between theory and practice, arguing for a “politically grounded and analytically charged form of Native studies.”<sup>63</sup> The authors also suggest an “intellectual promiscuity” which encourages engagement with various forms and fields of critique, while remaining committed to the theoretical and political objectives of Native Studies.<sup>64</sup> M. Nourbese Philip argues, “[w]riters coming from a culture that has a history of oppressing the one they wish to write about would do well to examine their motives.”<sup>65</sup> Our interdiscursive analyses must also involve a questioning when working within colonial spaces. To my view, the liberal models upon which these institutions (the state, the university, and even the United Nations as an intragovernmental organization of states) are organized often allows for limitations in their ability to be self-reflexive in sincere and productive ways. This kind of reflexive ethic implores those of us who are non-Indigenous scholars and researchers to constantly think outside of ourselves (to the extent that we can) and critically examine our particular epistemological assumptions as well as what we understand our roles, responsibilities, and commitments to be, and to which communities we remain committed. As Taiaiake Alfred argues, “[a]ccountability in the

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<sup>60</sup> *Ibid.*, 58.

<sup>61</sup> *Supra* note 19.

<sup>62</sup> *Supra* note 44, at 4-5.

<sup>63</sup> Audra Simpson and Andrea Smith, “Introduction,” *Theorizing Native Studies* (Durham, USA: Duke University Press, 2014), 1.

<sup>64</sup> *Ibid.*, 9.

<sup>65</sup> M. Nourbese Philip, “The Disappearing Debate; or, How the Discussion of Racism Has Been Taken Over by the Censorship Issue,” *Borrowed Power: Essays on Cultural Appropriation*, eds. Pratima v. Rao and Bruce Ziff (New Brunswick, USA: Rutgers University Press, 1997), 106.

indigenous sense needs to be understood not just as a set of processes but as a relationship.”<sup>66</sup>

I think of the family that I became a part of during the 2015 Indigenous Studies Summer Program at Columbia University. I was one of seven non-Indigenous people in a group of 26 scholars, activists, government and NGO professionals, and graduate students from 15 countries. We spent our first weekend at the St. Regis Mohawk Nation in Akwesasne, New York and were greatly touched by the warmth and grace with which we were received. It was in Akwesasne that I began to understand what Indigenous ethics like “all my relations” can mean for us all; we were truly welcomed as members of an extended family. I feel incredibly fortunate to have learned both from and with such a remarkable group of people. During our time together, we shared many stories of our diverse experiences, in both the formal setting of our seminar room and in our more informal gatherings. Some of our colleagues shared deeply personal stories. I remain humbled by their trust and it is this trust, as well as my promise to follow their lead as a friend, ally, and accomplice (to borrow my friend Bettina’s phrasing) which gives my work purpose.

Craig Womack has stated of Indigenous Peoples, “We are not mere victims but active agents in history, innovators of new ways, of Indian ways, of thinking and being and speaking and authoring in this world created by colonial contact.”<sup>67</sup> The Declaration serves as an important example of a global and collective Indigenous Peoples’ authorship and leadership. During a special event to mark the tenth anniversary of the Declaration during the 16<sup>th</sup> session of the UNPFII, Evo Morales, President of the Plurinational State of Bolivia and member of the Aymara peoples, stated, “Indigenous Peoples are the moral compass of humanity. [Their] movement is anti-capitalist and anti-colonialist.”<sup>68</sup> In its emphasis on self-determination, consent, and collective rights, the Declaration provides for an alternative orientation (indeed, an alternative ethic) to the liberal system of governance. From within the United Nations system, within the university, and, most importantly, within their communities on a daily basis, Indigenous Peoples continue to challenge the constraints of colonial spaces, providing an example for us all.

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<sup>66</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Ontario, Canada: Oxford University Press Canada, 2009), 116.

<sup>67</sup> *Supra* note 44, at 6.

<sup>68</sup> Evo Morales Ayma, “Remarks,” High-level event of the General Assembly to mark the tenth anniversary of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, United Nations Permanent Forum on Indigenous Issues (New York, USA: April 2017).

# Decolonizing Health Policy: An Evidence-Based Conceptual Framework for Addressing the Right to Health for Asian Indigenous Women

Theresa P. Castillo

## I. Indigenous Peoples: Present, But Not Counted

The United Nations (UN) human rights framework has been a catalyst for achieving gender equality in public policy around the world. Yet despite the recent global commitment to women's health rights, Indigenous women are often excluded from this discourse, especially among Asian countries.<sup>1</sup> Extreme health disparities fuel an increasing demand for health equity by Indigenous Peoples worldwide. However, the ongoing struggle to protect their human rights remains contentious within many States.

In the late twentieth century, the political will of United Nations (UN) member states advanced its commitment to global decolonization, with States pledging to transform public policy.<sup>2</sup> Among the most affected by this policy shift is the world's Indigenous population; approximately 370 million Indigenous people worldwide,<sup>3</sup> with more than two-thirds living in Asia.<sup>4</sup> However, many states in the Asia region have yet to recognize Indigenous Peoples' rights and continue to exclude them from public policy.<sup>5</sup> In most Asian states, the term "Indigenous Peoples" is not used formally or recognized in the national legislation and may deny their existence as Peoples.<sup>6</sup> Without political participation, there is an inherent power differential that influences the decision-making process. Political recognition comes in the form of having quality data to help understand the context in which Indigenous Peoples are living. A 2013 UN report highlighted this need for disaggregated population data.<sup>7</sup> Further, Stephens et al. argue that the "systematic marginalization and isolation" in combination with the vague definitions of Indigenous Peoples posed a challenge to developing Indigenous-specific health policy.<sup>8</sup>

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<sup>1</sup> "Overview of the State of Indigenous peoples in Asia," Asian Indigenous People's Pact Foundation (Chiang Mai, Thailand: AIPP Printing Press, 2014), 10-11.

<sup>2</sup> United Nations Secretary-General, "International Decade for the Eradication of Colonialism Report of the Secretary-General: Fifty-fifth session, Agenda item, 18 Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," United Nations Document A/55/497 (2000), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/55/497](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/497)

<sup>3</sup> United Nations Population Fund, "Population dynamics of Indigenous peoples: Some global and regional highlights," Presented at Annual Meeting of the UN IASG on Indigenous Peoples Issues, (New York, USA: November 2011).

<sup>4</sup> United Nations Department of Economic and Social Affairs, "State of the World's Indigenous Peoples," United Nations Document ST/ESA/328 (New York, USA: 2009), 84.

<sup>5</sup> *The Indigenous World 2013* (Copenhagen, Denmark: International Work Group for Indigenous Affairs, 2013).

<sup>6</sup> *Realizing indigenous women's rights: A handbook on the CEDAW* (Baguio, Philippines: Tebtebba Foundation, 2013), 2-4.

<sup>7</sup> United Nations Special Rapporteur on the Rights of Indigenous People, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Consultation on the situation of indigenous peoples in Asia*, United Nations Document A/HRC/24/41/Add.3 (2013).

<sup>8</sup> Carolyn Stephens, John Porter, Clive Nettleton, and Ruth Willis, "Disappearing, displaced, and undervalued: A call to action for indigenous health worldwide," *The Lancet* 367, no. 9527 (June 2006), 2019-2028.

Building upon the World Health Organization (WHO)'s Social Determinants of Health<sup>9</sup> model and the UN Right to Health<sup>10</sup> model, this chapter will present an evidence-based conceptual framework for reshaping colonizing policies and the health care system to address the invisible right to health for Indigenous women in Asia. The human rights perspective submits a valued interdependency across government sectors, requiring nations to consider inclusivity and parity in their decision-making processes. While Bangladesh and Nepal have signed onto some international agreements that safeguard Indigenous health rights, the present study substantiates the multiple drivers of health inequities for Indigenous women.<sup>11</sup> Further study analysis reveals a conceptual framework defining the associated systemic support and elements needed to decolonize health systems. It expands on existing theoretical models and provides guidelines for policymakers to ensure Asian Indigenous women's right to health.

## II. Inequities & Vulnerabilities: The Status of Asian Indigenous Women's Health

Indigenous Peoples experience similar health issues at higher rates when compared to other populations.<sup>12</sup> Specifically, Indigenous women are at a quadruple disadvantage due to gender, cultural, economic, and geographic discrimination, increasing their susceptibility to compromised rights.<sup>13,14</sup> Mired in poverty, Indigenous women and girls are exposed to inequitable power differentials, placing them at higher health risks than their male or non-Indigenous counterparts.<sup>15,16</sup> Currently, there is no reliable country-specific data available on Asian Indigenous women's health and well-being, leaving huge gaps in knowledge in this area.<sup>17,18,19</sup> Recent research conducted on Indigenous women's health has been mainly in high-income countries.

This omission of Asian Indigenous women from disaggregated national data collection impacts their right to health negatively.<sup>20</sup> High maternal mortality rates have been documented as a salient issue due to weak maternal healthcare services in the

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<sup>9</sup> Michael Marmot, Sharon Friel, Ruth Bell, Tanja AJ Houweling and Sebastian Taylor, on behalf of the Commission on Social Determinants of Health, "Closing the gap in a generation: Health equity through action on the social determinants of health," *The Lancet* 372, no. 9650 (November 2008), 1661-1669.

<sup>10</sup> "The right to health," Joint fact sheet, United Nations Document WHO/OHCHR/323 (2007), [http://www.who.int/mediacentre/factsheets/fs323\\_en.pdf](http://www.who.int/mediacentre/factsheets/fs323_en.pdf).

<sup>11</sup> Theresa Castillo, "A case study approach to the right to health for South Asian indigenous women: Interview findings with community-based leaders in the neighboring countries of Nepal and Bangladesh on challenges, best practices, and recommendations," Doctoral Dissertation (Columbia University Teachers College, New York: 2015).

<sup>12</sup> *Ibid.*

<sup>13</sup> Pan-American Health Organization Gender and Health Unit, *Gender, equity, and indigenous women's health in the Americas*, PAHO/GHU (Washington, USA: Pan-American Health Organization, 2004).

<sup>14</sup> *Supra* note 6, at 4-7.

<sup>15</sup> *Supra* note 4, at 161-162.

<sup>16</sup> *Voices of indigenous women from the Asia-Pacific region*," Asian Indigenous Peoples Pact Foundation, Briefing paper presented at Rio+20 World Conference on Sustainable Development (Rio, Brazil: 2012).

<sup>17</sup> M. Levesque, R. Sidchogan-Batani and S. O'Farrell, *Portrait of the indigenous women of Asia* (Montreal, Canada: Rights and Democracy, 2008), [http://publications.gc.ca/collections/collection\\_2012/dd-rd/E84-37-2007-eng.pdf](http://publications.gc.ca/collections/collection_2012/dd-rd/E84-37-2007-eng.pdf).

<sup>18</sup> Jill Carino, "Putting together a picture of Asian indigenous women," *Tebtebba Magazine* 2 (2000), 1-4.

<sup>19</sup> United Nations Population Fund, "UNFPA Summary Report," Presented at Twelfth Session on the Permanent Forum on Indigenous Peoples Issues (New York: 2013).

<sup>20</sup> *Supra* note 4, at 156-182.

remote regions of Asia, limited access to family planning, and minimal knowledge about formalized healthcare.<sup>21,22</sup> In a recent study, Asian Indigenous women surveyed reported a lack of reproductive health information, provider discrimination and limited access to basic health services.<sup>23</sup> Specifically, child marriage is one of the most commonly identified harmful practices affecting young Indigenous women, leaving them vulnerable to violence, sexual abuse, birth complications, infections and death during pregnancy.<sup>24,25,26</sup> Furthermore, increased reproductive cancer rates and higher numbers of miscarriages and infertility have been documented among Indigenous women living in environmentally contaminated settings.<sup>27</sup> Commonplace issues such as urbanization and seasonal work migration further leave Asian Indigenous women vulnerable to higher rates of HIV infection.<sup>28,29</sup>

Violence against women was cited heavily in the literature consulted as a primary health issue inextricably linked to Indigenous rights and colonization.<sup>30</sup> UNICEF et al. describe violence as a priority Indigenous women's health issue, given the prevalence of sexual slavery and the killing of tribal women in the Asia Pacific region during the past decade of militarization and armed conflict.<sup>31</sup> There are multiple facets of violence that disproportionately affect Indigenous women, ranging from sexual violence in conflict settings, economic violence due to neoliberal policies, and political violence through colonization and forced displacement from Indigenous territories.<sup>32</sup>

### III. Research Study Methodology<sup>33</sup>

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<sup>21</sup> Tuku Talukder, "Report on Sexual health and reproductive rights: Articles 22, 22(1), 23, and 24 of the UN Declaration of the Rights of Indigenous Peoples – Chittagong Hill Tracts context," Presented at United Nations Permanent Forum on Indigenous Issues, International Expert Group Meeting: Sexual health and reproductive rights: articles 22, 22(1), 23, and 24 of the UN Declaration of the Rights of Indigenous Peoples, (New York: January 2014).

<sup>22</sup> United Nations Permanent Forum on Indigenous Issues, "International expert group meeting, Sexual health and reproductive rights: Articles 21, 22(1), 23, and 24 of the United Nations Declaration on the rights of indigenous peoples - Concept note," (New York: 2014).

<sup>23</sup> Asian Indigenous People's Pact Foundation, "Submission of AIPP to UNPFII," Presented at United Nations Permanent Forum on Indigenous Issues, International Expert Group Meeting: Sexual health and reproductive rights: articles 22, 22(1), 23, and 24 of the UN Declaration of the rights of indigenous peoples (New York: January 2014).

<sup>24</sup> Anthony Davis, Claire Postles and Giorgiana Rosa, "A Girl's right to say no to marriage: Working hard to end child marriage and keep girls in school," Plan International (Surrey, United Kingdom: Plan Limited, 2013), 40-43.

<sup>25</sup> International Center for Research on Women, "Child marriage and health" (Washington: International Center for Research on Women, 2006).

<sup>26</sup> "Breaking the silence on violence against indigenous adolescents and young women," United Nations Children's Fund (UNICEF), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the United Nations Population Fund (UNFPA), the International Labour Organisation (ILO) and the Office of the Special Representative of the Secretary-General on Violence against Children (OSRSG/VAC) (New York, USA: UNICEF, May 2013).

<sup>27</sup> Andrea Carmen and Viola Waghayi, "Indigenous Women and Environmental Violence," Paper presented at the United Nations Permanent Forum on Indigenous Issues Expert Group Meeting on Combatting Violence against Indigenous Women and Girls (New York: January 2012).

<sup>28</sup> Minority Rights Group International, "State of the World's Minorities and Indigenous Peoples 2013: Events of 2012," (London, United Kingdom: Minority Rights Group International, 2013).

<sup>29</sup> *Supra* note 4, at 162-175.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Supra* note 26, at 7-35.

<sup>32</sup> *Supra* note 4, at 172, 226.

<sup>33</sup> *Supra* note 7.

This empirical, qualitative study sought to identify community-based leader perspectives on the challenges, promising practices, and recommendations for ensuring Indigenous women's health rights in Bangladesh and Nepal. The case study approach involved semi-structured interviews with 23 community-based leaders across both countries. Participants were selected as field experts based upon the level of knowledge regarding at least one of the criterion areas. Conducted over a two-month period in 2014, participant recruitment used a criterion sampling method with support from two local human rights organizations, Kapaeeng Foundation and Justice for All, until saturation was reached. Interviews were recorded and transcribed for analysis using Atlas.ti 7.0, and two cycles of coding were completed. Among the 12 key study findings, seven of the findings related to the current challenges in women's health: sexual and reproductive health issues, violence, nutrition and food security, communication barriers, geographic/land rights, insufficient resources, and mainstream politics and traditional systems. Some promising practices identified were beneficial traditional practices and multilevel partnership models, such as mobile health systems and female community health worker models. Lastly, three recommendations for addressing Indigenous women's health were identified: strengthening referral systems, increasing tailored health education, and focusing on adolescent girls' health.

#### **IV. Conceptual Framework for Ensuring Indigenous Women's Right to Health**

Almost two decades ago, the WHO and the UN Office of the High Commissioner on Human Rights defined health as a human right, offering a model to guide states in adopting a health for all approach to their national health policies.<sup>34</sup> This approach emphasized achieving a “participatory, inclusive, transparent, and responsive process” by observing the concepts of accessibility, availability, acceptability, quality, equality, and accountability in healthcare.<sup>35</sup> While neither Bangladesh nor Nepal fully realized the model, a complementary conceptual framework emerged during the rights-based analysis of the study findings, offering an expansion on existing theoretical models and guidelines. The UN Permanent Forum on Indigenous Issues emphasized a holistic perspective to ensuring the well-being of the individual—including the whole community's social, emotional, spiritual, and cultural well-being— so that the right to

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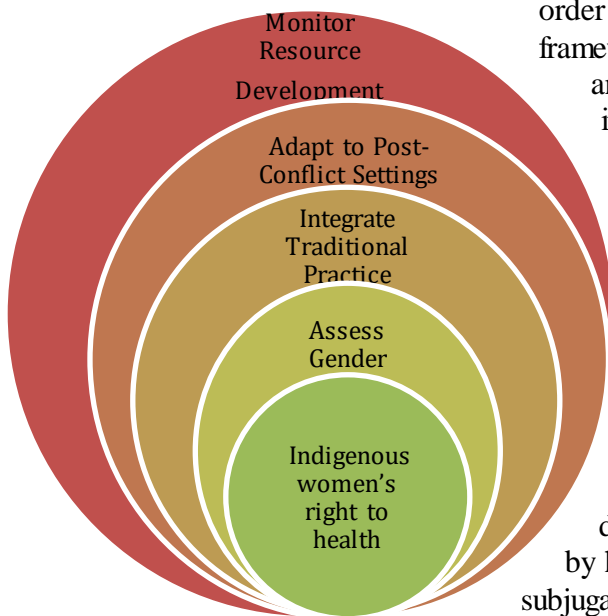
<sup>34</sup> *Supra* note 10.

<sup>35</sup> *Ibid.*; World Health Organization, “Women and children's health: Evidence of impact on human rights” (Geneva, Switzerland: World Health Organization Press, 2013), 13.

health of Indigenous Peoples could manifest.<sup>36</sup> It is through this lens that the conceptual framework emerged from the study results, reinforcing Asian Indigenous women’s right to health. The underlying emphasis is that broad-based healthcare has been excluding Indigenous women, and systems must be decentralized and contextualized for and in partnership with Indigenous women.

The present study findings support a conceptual framework rooted in four pillars for reshaping colonizing health policy, while being central to the holistic health and well-being of Indigenous women. These pillars include: (1) assessing gender dynamics; (2) understanding that traditional medicine and practices can both benefit and harm Indigenous women’s health status; (3) contextualizing healthcare service delivery in post-conflict settings; and (4) monitoring the resource development environment created by international non-governmental organizations (NGOs), corporate globalization, and privatization. Undoubtedly, the study results suggest that ensuring the right to health for Indigenous women is complex and cannot be realized by any one factor alone. It is the web of multiple confounding issues that must be worked on, simultaneously, in

order to achieve health equity. These overlapping framework elements supplement existing health models and highlight the core environmental factors that impact women’s health directly. More focused research exploring these elements, including data disaggregation, is recommended to achieve health equity for Asian Indigenous women.



#### V. Assess Gender Dynamics and Harmful Gender Norms

Gender dynamics and the resulting inequities continue to be drivers for women’s poor health status and well-being.<sup>37</sup> The power differentials experienced by women are exacerbated by harmful social and gender norms that “perpetuate the subjugation of females and condone violence against them.”<sup>38</sup> There are many different forms of gender-based violence experienced by Asian Indigenous women—from food insecurity and early marriage to an absence of land rights and the abandonment of basic schooling for menstruating girls.<sup>39</sup> Other factors impacting poor health status include migration, acculturation struggles, and limited access to education and quality reproductive health care.<sup>40</sup> Since Indigenous women’s health and livelihoods are intertwined with ancestral lands, forced

<sup>36</sup> *Supra* note 22, at 5.

<sup>37</sup> World Health Organization, “Women and health: Today’s evidence tomorrow’s agenda,” (Geneva, Switzerland: World Health Organization Press, 2009).

<sup>38</sup> *Ibid.*, 9.

<sup>39</sup> *Supra* note 11, at 88-151.

<sup>40</sup> Alma Virginia Camacho, M.D Castro and R. Kaufman, “Cultural aspects related to the health of Andean women in Latin America: A key issue for progress toward the attainment of the Millennium Development Goals,” *International Journal of Gynecology & Obstetrics* 94, no. 3 (2006), 357-363.

displacement and globalization directly affect their health rights.<sup>41</sup> Displacement from ancestral lands reduces access to traditional food sources, production and medicine.<sup>42</sup> With the loss of their traditional lands and resources, Asian Indigenous women's livelihoods have shifted toward trafficking and forced prostitution to stave off poverty, which poses increased health risks for HIV, psychological trauma, reproductive health issues, and abuse.<sup>43,44,45</sup>

For this study, globalization was defined as "the increased interconnectedness and interdependence of peoples and countries," underscoring two interrelated elements: "the opening of international borders to increasingly fast flows of goods, services, finance, people and ideas; and the changes in institutions and policies at national and international levels that facilitate or promote such flows."<sup>46</sup> In the context of health, globalization specifically touches on issues related to public health security (i.e., ebola, cholera, HIV and AIDS, etc.), climate change, cross-border migration, access to pharmaceuticals, transnational corporations' practices, health technology advances, and the brain drain of medical human resources.<sup>47</sup> A deeper exploration of the systemic effects of globalization and colonization on gender and health also must be considered when discussing inequities.<sup>48</sup> Women's empowerment may be achieved through shifting cultural norms, as it is "reinterpreted, and even modified by Indigenous women and their communities in order to remove any negative impact on the human development of Indigenous women."<sup>49</sup> National government efforts for gender equality may consider making specific provisions for the inclusion of Indigenous women. In addition, recent literature highlights that tribal governments must begin to open up leadership and decision-making roles to Indigenous women to further facilitate enhanced healthcare.<sup>50,51</sup>

## VI. Integrate Traditional Medicine and Practices

Study respondents noted both beneficial traditional practices that ensure women's health rights, and also harmful traditional practices. Sherwood and Edwards

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<sup>41</sup> International Indigenous Women's Forum, "Position paper of the indigenous women in the framework of Beijing+20," (2015), <http://www.ngocsw.org/wp-content/uploads/2015/03/Position-Paper-Indigenous-Women-on-Beijing-20-ENG.pdf>.

<sup>42</sup> *Supra* note 28, at 16-28.

<sup>43</sup> *Supra* note 1, at 10-15.

<sup>44</sup> United States Department of State, "Trafficking in persons report" (Washington: U.S. Government Printing Office, 2014), 36.

<sup>45</sup> "Gender and Indigenous Peoples: Briefing note no.1-6," United Nations Office of the Special Adviser on Gender Issues and Advancement of Women & Secretariat of the UN Permanent Forum on Indigenous Issues (New York: United Nations Department of Economic and Social Affairs, 2010).

<sup>46</sup> "Globalization," World Health Organization, (n.d.), <http://www.who.int/topics/globalization/en/http://www.who.int/topics/globalization/en/>

<sup>47</sup> Greg Martin, Malcolm MacLachlan, Ronald Labonté, Fiona Larkan, Frédérique Vallières and Niamh Bergin, "Globalization and Health: Developing the journal to advance the field," *Globalization and Health* 12, no. 1 (2016), 6.

<sup>48</sup> Raewyn Connell, "Gender, health and theory: Conceptualizing the issue, in local and world perspective," *Social Science & Medicine* 74, no. 11 (2012), 1675-1683.

<sup>49</sup> *Supra* note 45, at 10.

<sup>50</sup> Ellen Lutz, "Indigenous women's empowerment begins with communication," *Cultural Survival Quarterly* 28, no. 4 (2004), <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/indigenous-womens-empowerment-begins-communication>.

<sup>51</sup> *Supra* note 6.

underscore the demand for health systems to embrace and respect the holistic health worldview that exists among Indigenous Peoples.<sup>52</sup> Through advocacy, Indigenous women are “demanding access to culturally sensitive, rights-based healthcare, including: information and treatment in Indigenous languages; the incorporation of traditional medicine and practitioners into healthcare models; and female and Indigenous health practitioners.”<sup>53</sup> While harmful traditional practices are complex issues to address, many Indigenous women’s rights groups disparaged the frequent use of culture to perpetuate gender inequities in their communities.<sup>54</sup> Consideration for cultural asset-based models of care with respect for traditional medicine and practices is necessary by states and by NGOs. In particular, Indigenous families have a variety of practices that may include a preference for using traditional medicine, or Western allopathic medicine, or both.<sup>55</sup> States should consider decolonizing health systems and seeking out alternative health service delivery models. Traditional medicine and practices can be a tremendous asset for Indigenous women. Community actions facilitate resourceful solutions, such as collectively supporting pregnant women who may need emergency obstetric care by pooling money or physically transporting them to formalized healthcare facilities. In the preservation of the Indigenous ways of knowing, states need to formally recognize and respect traditional knowledge.<sup>56</sup>

## VII. Adapt Services to Post-Conflict Settings

The right to health for Indigenous women has been compromised by the politics of globalization, militarization, climate change, and migration due to forced displacement. Indigenous women have increasing vulnerability to many forms of violence during conflict and militarization, such as sexual harassment and rape throughout Asia.<sup>57</sup> This study substantiated women’s struggles with managing trauma and related health issues in post-conflict settings. Yet, countries in post-conflict settings are struggling with rebuilding their states, inclusive of Indigenous Peoples. Implications for public health practitioners and policymakers include the restructuring of health care systems to be inclusive of Indigenous health practices and experiences post-conflict. To strengthen health systems in post-conflict settings, consideration should be given to fluctuations in local politics and related power dynamics, as well as issues of forced displacement and reintegration. In a recent review, Guerin found that there was no one panacea for decolonization, but rather a requisite need for tailored, context-specific interventions.<sup>58</sup> Data from the Guerin study further suggest that models of care respecting traditional health practices and using multilevel partnerships be explored for each country. After colonization and post-conflict, there is a need to consider which groups may have an economic advantage compared to those Indigenous groups who are

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<sup>52</sup> Juanita Sherwood and Tahnia Edwards, “Decolonisation: A critical step for improving Aboriginal health,” *Contemporary Nurse* 22, no. 2 (2006), 178-190.

<sup>53</sup> *Mairin iwanka raya: A companion report to the United Nations Secretary-General study on violence against women*, International Indigenous Women's Forum (2006), 42.

<sup>54</sup> *Supra* note 13.

<sup>55</sup> *Supra* note 4, at 175.

<sup>56</sup> *Supra* note 11, at 208-222.

<sup>57</sup> *Supra* note 1, at 8-10.

<sup>58</sup> Bernard Guerin, “A framework for decolonization interventions: Broadening the focus for improving the health and wellbeing of indigenous communities,” *Pimatisiwin: A Journal of Aboriginal & Indigenous Community Health* 8, no. 3 (2011), 74-77.

endangered and living in extreme poverty.<sup>59,60</sup> Moving beyond monocultural and multicultural health system models where language is a primary concern, contextualizing healthcare should include the consideration of intercultural health models, which empower Indigenous women and demand mutual respect for their cultural and health rights.<sup>61,62</sup>

### VIII. Monitor Resource Development Environment

Given the interdependent nature of human rights, macro issues such as globalization become central to health discourse. Properly monitoring the resource development environment created by international NGOs, corporate globalization, and privatization is a necessary component of securing Indigenous women's health and well-being. Indigenous women in the Asia Pacific region have been living in unstable, insecure environments because of the expropriations of traditional land by public and private entities.<sup>63</sup> Consideration should be given to local protective mechanisms that can safeguard Indigenous women's health rights, directly and indirectly. For Asian Indigenous women activists fighting development on ancestral lands, they have become targets for intimidation, gang rape, sexual enslavement, and death.<sup>64,65</sup> National laws and policies in most Asian countries do not acknowledge Indigenous Peoples' rights to their traditional lands, territories, and resources, nor do they acknowledge their customary laws regarding land ownership and tenure.<sup>66</sup> As a result, their lands are expropriated for extractive industries, government programs, and other economic development projects. Therefore, a vital implication for governing state bodies is to seek out possible ways to responsibly protect Indigenous Peoples' spiritual connection to lands and territories, which has the potential to gravely affect health status and well-being when lost.

### IX. Discussion

Recognizing health as a human right requires consideration of state accountability, which includes an examination of decolonization, institutionalized racism and their supporting infrastructures.<sup>67,68</sup> Within this defined broader context of health equity, Indigenous Peoples experience unique decolonization vulnerabilities affecting health such as political recognition, conflict settings, land rights, cultural practices and gender norms. The study analysis and resulting framework demonstrate the immense complexity of Indigenous women's health issues. It is a panoply of

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<sup>59</sup> Krishna B. Bhattachan, "Country technical note on indigenous peoples' issues, Federal Democratic Republic of Nepal" (Rome, Italy: International Fund for Agricultural Development, 2012).

<sup>60</sup> *Supra* note 4.

<sup>61</sup> *Ibid.*

<sup>62</sup> David Napier, Clyde Ancarno, Beverley Butler, Joseph Calabrese, Angel Chater, Helen Chatterjee, François Guesnet, Robert Horne, Stephen Jacyna, Sushrut Jadhav, et al., "Culture and health," *The Lancet* 384, no. 9954 (2014), 1607-1639.

<sup>63</sup> *Supra* note 26.

<sup>64</sup> *Supra* note 1.

<sup>65</sup> *Supra* note 26.

<sup>66</sup> *Supra* note 6, at 7-20.

<sup>67</sup> *Supra* note 58.

<sup>68</sup> Institute of Medicine of the National Academies, "How far have we come in reducing health disparities?: Progress Since 2000 – Workshop Summary," Institute of Medicine of the National Academies, (Washington: The National Academies Press, 2012), 12, 71.

sociocultural, political, economic, and spiritual factors that comprise a proper response in safeguarding the right to health for Indigenous women. With sparse literature available on the topic, the inability of states to meet the right to health for Indigenous women suggests that there is still much work to be done. As outlined in the present study findings, the conceptual framework may provide the foundation for a survey assessment of Indigenous women's health regionally within Asia, as well as globally. Further research on the implementation of the right to health framework may also be helpful for states, as it relates to Indigenous women's health.

This essay provides important guidelines for rebuilding health infrastructure and reshaping colonizing policy, while focusing on the needs of a most vulnerable population, Asian Indigenous women. The states' obligation to respect, protect and fulfill the right to health must be inclusive of Indigenous peoples' rights. In the aftermath of the 2015 Nepal earthquake disaster and the 2017 influx of Rohingya refugees to Bangladesh, this essay may be most timely in shedding light on the potential contemporary opportunity for reshaping colonizing policy and healthcare to be responsive to Indigenous women's right to health in the post-trauma (i.e., earthquake, displacement, loss, grief) period.

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# **Traditional Tribe or Corporate Entity? The Influence of Treaty of Waitangi Settlements on Tribal Groups in New Zealand**

**Melissa Derby**

## **Abstract**

The purpose of this article is to examine the influence of the Treaty of Waitangi (1840) settlement process on iwi (extended tribes) and hapū (tribes). This article considers how the settlement process affects the structure and function of these tribal groups, specifically the implications of state definitions and the requirements demanded of these groups during the settlement process. The hapū of Ngāi Tamarāwaho<sup>1</sup> is used as a case study to illustrate the points made in this article. For comparative purposes, parallels are drawn with other Indigenous groups, specifically Hawaiian and Australian communities, to highlight similarities between the experiences of these groups and those of Ngāi Tamarāwaho. This article concludes that, in many instances, the settlement process has played a significant role in redefining tribal groups and the ways in which they operate, and that these challenges require careful and considered navigation as increasingly more iwi and hapū plan for their futures in a post-settlement environment.

## **I. Introduction**

The purpose of this article is to examine the influence of the Treaty of Waitangi (1840) settlement process on iwi (extended tribes) and hapū (tribes). Smith contends that the Treaty settlement process is “one of the most transforming and reforming processes”<sup>2</sup> that iwi and hapū are currently engaged in. This article considers how the settlement process affects the structure and function of these groups, and in particular, explores the implications of state definitions and the state’s requirements of these groups during the settlement process. The hapū of Ngāi Tamarāwaho is used as a case study to illustrate the points made in this article, and pseudonyms are used to protect the identities of hapū members whose comments are published in this article. For comparative purposes, parallels are drawn with other Indigenous groups, particularly Hawaiian and Australian communities, to highlight similarities between the experiences of these groups and those of Ngāi Tamarāwaho. The first section of this article outlines the settlement process and provides some details of the Ngāi Tamarāwaho claim. The major focus of this article is how the state influences iwi and hapū, both during the settlement process and in a post-settlement environment, and attention is given to this in the second and third sections. This article concludes by summarising the points made in the preceding sections.

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<sup>1</sup> Ngāi Tamarāwaho is a hapū of the Tauranga iwi, Ngāti Ranginui. They are descendants of the captain of the Tākitimu waka, Tamatea Arikinui, who is known by many names. To Ngāi Tamarāwaho, he is Tamateapokaiwhenua. The hapū name comes from their ancestor, Kinotaraia, who was the grandson of Tamateapokaiwhenua and son of Kinonui, the great chief of Mauao. After Kinonui was killed at the Battle of Te Kokowai on Mauao, Kinotaraia was given the name Tamarāwaho, the Son of the Sea Breeze, when he moved inland and settled the area “touched by the breeze” that blows from Mauao to Puwhenua.

<sup>2</sup> Cheryl Smith, “Being tangata whenua in Aotearoa in the 21<sup>st</sup> century,” *Alter-Native* 2, no. 1 (September 2006), 91-113.

## II. The Treaty Settlement Process and the Ngāi Tamarāwaho Claim

Political efforts, particularly in the 1970s, from groups such as Ngā Tamatoa and Te Roopū Matakite, which were involved in protests such as the 1975 Land March, placed the New Zealand government under increasing pressure to address the demands made by iwi and hapū<sup>3</sup>; largely in response to the efforts of these groups, the Waitangi Tribunal was established in 1975. Internationally, a similar trend was occurring for other Indigenous Peoples, where their demands for recognition of historical injustices were gaining wider acceptance by non-Indigenous Peoples, and the practice of nation states providing restitution to victims of historical injustices was becoming more prevalent.<sup>4</sup> Ngāi Tamarāwaho filed their Treaty of Waitangi claim, WAI 659,<sup>5</sup> with the Tribunal in 1997. Issues emphasised in the claim were the Church Missionary Society (CMS) purchase of Ngāi Tamarāwaho land; the New Zealand Wars; the relationship between Ngāti Ranginui and Ngāi Te Rangi; the return and subsequent alienation of tribal land following the confiscations in the 1860s; the economic and cultural loss experienced by the hapū; and the alleged failure of the Crown to provide adequate redress for twentieth-century claims.

Some analysts<sup>6,7,8,9</sup> who observe the growing international trend of Indigenous communities seeking restitution from nation states in recognition of historical injustices, also note the implications of negotiating redress within a Western framework. This same trend occurred in New Zealand. Ngāi Tamarāwaho focused their attention on progressing their claim with the Waitangi Tribunal in an attempt to have their historical grievances heard, and to seek redress primarily for the confiscation of tribal lands. Hearings with the Waitangi Tribunal commenced in February 2000.<sup>10</sup> The procedure for lodging and

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<sup>3</sup> Paul Hamer, "A quarter-century of the Waitangi Tribunal: Responding to the challenge," in *The Waitangi Tribunal*, eds. Janine Hayward and Nicola R. Wheen (Wellington, New Zealand: Bridget Williams Books, 2004), 3-14.

<sup>4</sup> Ernesto Verdeja, "Restituting Past Harms: On the Complexity of Satisfactorily Engaging the Past," *H-Genocide* (August 2003), <https://networks.h-net.org/node/3180/reviews/6265/verdeja-barkan-guilt-nations-restitution-and-negotiating-historical>

<sup>5</sup> WAI659 incorporated the previous claims, WAI42 and WAI86, that were filed in the 1980s (Waitangi Tribunal Register of Claims, 2000). For details of the claim, see: [https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_68361657/Te%20Raupatu%20o%20Tauranga%20Moana.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68361657/Te%20Raupatu%20o%20Tauranga%20Moana.pdf)

<sup>6</sup> G.T. Alfred, "Colonialism and State Dependency," *Journal de la santé autochtone* 5, no. 2 (2009), 42-60.

<sup>7</sup> Elazar Barkan, *The Guilt of Nations: Restitution and negotiating historical injustices*, (Baltimore, USA: John Hopkins University Press, 2001), 262-282.

<sup>8</sup> Marcia Langton and Lisa Palmer, "Modern Agreement Making and Indigenous People in Australia: Issues and Trends," *Australian Indigenous Law Reporter* 8, no. 1 (2003), 1-31.

<sup>9</sup> John Altman, "What future for remote Indigenous Australia? Economic hybridity and the neoliberal turn," in *Culture Crisis: Anthropology and Politics in Aboriginal Australia*, eds. John Altman and Melinda Hinkson (Sydney, Australia: University of New South Wales Press, 2010), 259-280.

<sup>10</sup> Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, Report on the Tauranga Confiscation Claims (Wellington, New Zealand: Legislation Direct, 2004).

settling a claim under the Treaty of Waitangi Act is lengthy,<sup>11</sup> and at any stage during this process the claimants may seek to negotiate directly with the Crown via the Office of Treaty Settlements. Ngāi Tamarāwaho chose to settle their claim through the Waitangi Tribunal. Smith argues that the settlement process employed, as a tool of colonisation, the phenomenon of “preoccupation” which he terms the “politics of distraction.”<sup>12</sup> During the settlement process, tribal groups are often “responding, engaging, accounting, following and explaining,” and this “leaves little time to complain, question, or rebel.”<sup>13</sup> Smith argues this is a “typical strategy often used over Indigenous people.”<sup>14</sup> The result of this strategy for Ngāi Tamarāwaho is that some members of the hapū became “tangled up in a grievance space.”<sup>15</sup>

However, O’Regan<sup>16</sup> contends that by participating in the process, claimants are hoping to “shift their focus away from grievances towards growth and development.” The redress Ngāi Tamarāwaho received as recognition of their mana whenua (territorial rights) provides the hapū with access to an economic base, which McKay<sup>17</sup> argues is “critical to Māori development.” Iorns<sup>18</sup> concurs and contends that the provision of capital and resources is necessary to “equalise the economic and social conditions between Māori and non-Māori.” In a discussion on what the settlement means to Ngāi Tamarāwaho, Tane<sup>19</sup> comments: “The settlement gives us many opportunities that we didn’t have before.... Before we had to fundraise.” Ana<sup>20</sup> supports Tane’s comment, and adds: “We no longer have to be a hand-out hapū.... The settlement empowers us, and we don’t have to be reliant.” In addition to this, some theorists argue that an ability to provide for the group to which one belongs results in mana (status) being bestowed on the group, and in

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<sup>11</sup> For details of the process, see: <http://www.justice.govt.nz/tribunals/waitangi-tribunal/the-claims-process/the-claims-process>

<sup>12</sup> *Supra* note 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Piripi Winiata, in personal communication with the author, 23 March 2013.

<sup>16</sup> Tipene O’Regan, *Post Settlement Issues*, Paper presented at the Strategies for the Next Decade Conference (Hamilton, New Zealand: 1997).

<sup>17</sup> Liam McKay, *Waka Umanga: Has The Government Missed The Boat On Māori Collective Assets Management? Rethinking New Zealand Law For The Post-Settlement Era*, Master of Laws Thesis (University of Otago, New Zealand: 2012), 2.

<sup>18</sup> Catherine Iorns, “Reparations for Māori Grievances in Aotearoa New Zealand,” in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, ed. Federico Lenzerini (Oxford, England: Oxford University Press, 2008), 523-564.

<sup>19</sup> Melissa Derby, *Te Whanaketanga o Ngāi Tamarāwaho: The evolution of hapū identity*, Master of Arts Thesis (AUT University, New Zealand: 2016), 116.

<sup>20</sup> *Ibid.*, 116

particular, on its leaders.<sup>21,22,23</sup> Economic power also leads to political power,<sup>24</sup> which Trask<sup>25</sup> argues is pivotal to the decolonisation of Indigenous groups, including Ngāi Tamarāwaho. Nikau discusses the political power that Ngāi Tamarāwaho has as a result of the settlement, and observes:

The settlement process has given us clout in terms of dealing with Councils. You have an Act<sup>26</sup> to back up the demands to engage and to take into account what we as a hapū want to see happening in our city. It has recognised our mana whenua... and increased our confidence in engaging in the system.<sup>27</sup>

Therefore, based on such observations, it can be argued that engaging in the settlement process has had numerous positive outcomes for Ngāi Tamarāwaho.

### III. The Influence of the State During the Settlement Process

In the traditional (pre-colonial) era, Ngāi Tamarāwaho was an autonomous group that played a central role in promoting group identity, language and culture among its members.<sup>28</sup> They had numerous interactions with neighbouring hapū that primarily served to strengthen their position and ensure their survival. Such interactions included intermarriage and unity in times of warfare.<sup>29</sup> However, during the colonisation era, which in the context of this research commenced in 1814 with the arrival of Pākehā (British) settlers and concluded in 1975 with the establishment of the Waitangi Tribunal, the hapū was fragmented to such an extent<sup>30</sup> that its structure and operation is markedly different in contemporary times. The Treaty settlement process has also played a role in bringing about contemporary changes, and has highlighted existing alliances and new structures. Trask<sup>31</sup> notes the impact of state involvement, in particular state definitions, on Indigenous groups globally, and writes, “Who we believe ourselves to be is often not

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<sup>21</sup> Hazel Petrie, *Chiefs of Industry: Māori Tribal Enterprise in Early Colonial New Zealand*, (Auckland, New Zealand: Auckland University Press, 2013), 11-28.

<sup>22</sup> Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i*, (Hawai'i, USA: University of Hawai'i Press, 1999), 23-40.

<sup>23</sup> Maharaja Winiata, *The changing role of the leader in Māori society*, (Auckland, New Zealand: Blackwood & Janet Paul Ltd., 1967), 14-25.

<sup>24</sup> Charles Royal, *Some speculations on Māori identity in the New Zealand of tomorrow*, Paper presented at the Concepts of Nationhood Symposium (Wellington, New Zealand: 2007).

<sup>25</sup> *Supra* note 20, at 23-40.

<sup>26</sup> The Act relating to the Ngāi Tamarāwaho settlement will be implemented following the passage of the legislation, the process of which has yet to be completed.

<sup>27</sup> *Supra* note 17, at 116.

<sup>28</sup> Paul Woller, *Nga Hāhi O Ngāi Tamarāwaho*, Master of Arts Thesis (Massey University, New Zealand: 2005).

<sup>29</sup> *Supra* note 21, at 14-25.

<sup>30</sup> Carrie Wainwright and Karen Feint, *Submissions of counsel for Ngāi Tamarāwaho* (Wellington, New Zealand: Buddle Findlay Solicitors: 2000), 14-56.

<sup>31</sup> *Supra* note 20, at 104.

what the colonial legal system defines us to be....” Joseph<sup>32</sup> supports Trask’s observations, and warns that state definitions of Indigenous groups “strip them of their identity and consequently of their land and resources.” He adds that through the Treaty settlement process, “Māori have had systems of identity, governance and representation imposed upon them,” which has affected the traditional structure of tribal groups.

During the settlement of claims, the Crown (state) prefers to negotiate with what the Office of Treaty Settlements refers to as “large natural groups,”<sup>33</sup> specifically, an iwi, or a cluster of hapū with a significant population and a large distinctive claim area. Their primary reasons for this are that this approach is cost-efficient, it makes it easier to deal with overlapping interests, and it allows the Crown to offer a wider range of redress, which the Crown believes results in more needs being met.<sup>34</sup> However, the Crown’s preference to negotiate with iwi rather than hapū fails to acknowledge the role of hapū as autonomous entities in their own right, who have legitimate individual grievances that may not be felt by the wider iwi. Ngāi Tamarāwaho had the “dubious distinction of being the hardest hit, and the worst affected by the raupatu (confiscations)”<sup>35</sup>; therefore, the hapū sought to have their claim settled in a manner that recognises their experiences separate from those of other hapū and the wider iwi. Trask,<sup>36</sup> in reference to the challenges faced by Native Hawaiians, also notes: “We are constantly in struggle with government agencies and, sometimes, with our own people.” In an attempt to have their grievances addressed separate to those of the wider iwi, Ngāi Tamarāwaho encountered difficulties with members of the iwi. Tai<sup>37</sup> recalls: “Our biggest enemy wasn’t the Crown.... The hard part was dealing with ourselves because not everyone in [Ngāti] Ranginui suffered the same. The [confiscation of the] 50,000-acre block landed on our shoulders.” The hapū did not want to be engulfed by the wider iwi but rather insisted on having their grievances heard as a legitimate entity in their own right.

Ward,<sup>38</sup> conversely, contends that in order for the settlement process to operate cohesively, definitions of tribal groups and claimants had to be made. The Treaty of Waitangi Act 1975 states that “any Māori” could bring a claim to the Tribunal.<sup>39</sup> However, as Ward<sup>40</sup> points out, historical injustices largely occurred within a group setting where Māori possessed land as members of an iwi or hapū, rather than to individuals on their own. Furthermore, Māori protested the injustices collectively as part

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<sup>32</sup> Robert Joseph, “Unsettling Treaty settlements: Contemporary Māori Identity and Representation Challenges,” in *Treaty of Waitangi Settlements*, eds. Nicola R Wheen & Janine Hayward (Wellington, New Zealand: Bridget Williams Books Limited, 2012), 151-165.

<sup>33</sup> “Office of Treaty Settlements,” Department of Justice (2002), [www.ots.govt.nz](http://www.ots.govt.nz).

<sup>34</sup> *Supra* note 30.

<sup>35</sup> *Supra* note 28.

<sup>36</sup> *Supra* note 20.

<sup>37</sup> *Supra* note 17.

<sup>38</sup> Alan Ward, *An Unsettled History: Treaty claims in New Zealand today* (Wellington, New Zealand: Bridget Williams Books, 1999), 28-46.

<sup>39</sup> *Supra* note 30.

<sup>40</sup> *Supra* note 36.

of their respective tribal groups or, in some instances, on a pan-Māori basis.<sup>41</sup> Ward<sup>42</sup> believes that the provision that “any Māori” can lodge a claim means that any existing tribal authorities and structures could be bypassed and the Crown would be left to address a profusion of unrelated or competing claims that lack a common view. This could also lead to division and further fragmentation in tribal groups where there is no requirement to present a united front. In addition to this, Ward argues that hearing Treaty claims at a hapū or even whānau (extended family) level slows direct negotiation and Tribunal hearings, which, in turn, slows the transfer of assets to iwi and hapū who remain largely deprived of an economic base. He also notes that central pooling of assets often maximises the economic leverage of tribal groups, and consequently increases their ability to effect change.

Ngāi Tamarāwaho persevered to have their identity as a hapū recognised and their grievances addressed at a hapū level. The Crown acknowledged the vastly different experiences of loss due to Crown breaches of the Treaty among the constituent hapū of Ngāti Ranginui and agreed to a “hapū centric” settlement, which was a first in the settlement process.<sup>43</sup> However, while Ngāi Tamarāwaho negotiated directly with the Crown via hapū-mandated negotiators, the Crown required the eight hapū of Ngāti Ranginui to form a collective post-settlement governance entity (PSGE) for the return of assets. Te Roopu Whakamana o ngā Hapū o Ngāti Ranginui was mandated in 2008, charged with finalising the Deed of Settlement on behalf of the eight constituent hapū and receiving the settlement assets, which were then passed on to the respective hapū following the establishment of each hapū PSGE. Atawhai did not respond well to the Crown’s insistence that Ngāi Tamarāwaho form an iwi structure with other constituent hapū. She comments:

The settlement has already affected us when we concede four per cent of the 50,000 acres that we lost to other hapū. They didn’t lose what we lost, and they got four per cent off the blood of our tupuna. They should get back in their patch and deal with their own affairs.... I question ourselves though. Why didn’t we have the things in place?<sup>44</sup>

However, Ward<sup>45</sup> suggests that negotiating with the Crown is “precisely the kind of struggle that overarching iwi structures exist for.” Indeed, in the traditional era, Ngāi Tamarāwaho united with constituent hapū and even other iwi, particularly during times of warfare,<sup>46</sup> and it can be argued that the struggle Ngāi Tamarāwaho faced to have their grievances heard by the Crown is a modern-day battle that warrants the joining of Ngāti Ranginui hapū at an iwi level. In wider society, tribal groups united at a pan-Māori level

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<sup>41</sup> Paul Moon, “The Impression of Hybridised Indigeneity: A History of the United Nations’ Permanent Forum on Indigenous Issues and the Emergence of a Globalised Construction of Indigeneity,” *International Journal of Critical Indigenous Studies* 8, no. 1 (2015), 32-46.

<sup>42</sup> *Supra* note 36.

<sup>43</sup> “Ngāti Ranginui Iwi” (2011), [www.ranginui.co.nz](http://www.ranginui.co.nz)

<sup>44</sup> *Supra* note 17.

<sup>45</sup> *Supra* note 36.

<sup>46</sup> Evelyn Stokes, *Te Raupatu o Tauranga Moana: The Confiscation of Tauranga Lands*, Report prepared for the Waitangi Tribunal (University of Waikato, New Zealand: 1990), 70-71.

to increase their political power during the 1970s. Moon<sup>47</sup> recalls that Ngā Tamatoa, an activist group that opposed racism and advocated for greater Māori rights, placed an emphasis on pan-tribalism and established a national framework for protest. The strength gained through numbers meant that the group achieved greater political influence. While some may argue that the Crown's insistence on Ngāi Tamarāwaho participating in the settlement process at an iwi level is detrimental to the operation of the hapū, it can also be argued that uniting at this level is a modern-day demonstration of a traditional aspect of hapū life.

In the present era, some suggest that the Treaty claims process has been influential in the re-emergence of Ngāi Tamarāwaho as a hapū in its own right. The identities of many hapū were engulfed by nineteenth century anthropologists and government administrators who insisted on dealing with Māori at an iwi level,<sup>48,49</sup> but the recognition provided to hapū like Ngāi Tamarāwaho contributes to the revitalisation of the dynamics of society in the traditional era when the hapū was often the main group. Ngāi Tamarāwaho did not want to be submerged in an iwi structure, or to have reparations from the Crown retained and managed at an iwi level. Indeed, Ward<sup>50</sup> acknowledges there is a "tendency, always present in Māori society, for constituent hapū to reassert their identity...." In addition to reasserting hapū identity, Royal<sup>51</sup> observes that hapū research into their own respective oral traditions to support their claims is a source of renewed pride and local strength. Smith<sup>52</sup> notes that the Treaty settlement process has led to a "revival of participation and re-connection" with members to their respective tribal group, and research conducted in 2007 shows that the significance of tribal identity in wider society has become increasingly more important, with 75% of Māori agreeing that tribal identity is important to them, compared with fewer than 50% in 2004.<sup>53</sup> The beneficial role Ngāi Tamarāwaho compiled following settlement indicates that tribal identity and belonging is important to a significant proportion of hapū members.

#### **IV. The Influence of the State in a Post-Settlement Environment**

The preceding section acknowledged that the state has an impact on iwi and hapū during the Treaty settlement process, and this section considers the influence of the state in the post-settlement phase. Before the Crown transfers settlement assets to tribal groups, there is a requirement that these groups establish a "suitable governance entity"<sup>54</sup> that is

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<sup>47</sup> *Supra* note 39.

<sup>48</sup> Angela Ballara, *Iwi: The Dynamics of Māori Tribal Organisation from C. 1769 to C. 1945* (Wellington, New Zealand: Victoria University Press, 1998), 69-73.

<sup>49</sup> Steven Bourassa and Ann Louise Strong, "Restitution of land to New Zealand Māori: The role of social structure," *Pacific Affairs* 75, no. 2 (2002), 227-260.

<sup>50</sup> *Supra* note 36.

<sup>51</sup> *Supra* note 22.

<sup>52</sup> *Supra* note 2.

<sup>53</sup> Debra Emery, *E Hoki Ki Tō Maunga: The Quintessential Elements of Home*, Doctoral Thesis (University of Waikato, New Zealand: 2008), 49-73.

<sup>54</sup> *Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington, New Zealand: Office of Treaty Settlements, 2002).

“acceptable, representative, transparent, and accountable,” and ensures that “any assets or resources will be managed and administered within a proper legal structure.”<sup>55</sup> In response to such requirements, Ngāi Tamarāwaho established the Ngāi Tamarāwaho Tribal Authority Trust, comprised of seven members who administer the settlement assets on behalf of the hapū. The members must be from the hapū. Nikau comments:

I don't think there is any great issue working with a structure that the Crown gave us, or with the entity and how it was structured under the Deed.... It hasn't changed who we are—it would be sad if that happened—it's just affecting how we deal with our affairs.<sup>56</sup>

However, Nikau argues that “the government has corporatized us” and adds:

Under Westminster law, iwi and hapū are not recognised as a structure. For the government to release any money, they require us to create a structure under Westminster law, and we all run along because we want that money. Nobody has stood up and said, ‘Oh you agree that you've done wrong? OK, just give us our money.’ Why should we create any structure?<sup>57</sup>

Joseph<sup>58</sup> argues that the Crown's pressure on tribal groups to codify into “large natural groupings” and establish tribal and, in some cases, pan-tribal associations in a form that is consistent with Crown notions of organisation, representation and governance, has a significant impact on the identity of tribal groups, wherein tribal structures are at risk of being replaced by governance entities. Mikaere<sup>59</sup> suggests that the settlement process, specifically the establishment of Crown-determined governance entities, has an underlying philosophy of assimilation, and Joseph<sup>60</sup> concurs by arguing that tribal governance entities “meet government-driven agendas ... to achieve devolution, mainstreaming and other neoliberal agendas.” Mikaere<sup>61</sup> adds that “corporatized” tribal groups are “rewarded,” and that “this form of neo-assimilation, while less overt than earlier policies, still has a devastating effect on Māori ... [who] need to be mindful of excess corporatization to the detriment of tribal culture and identity.” Durie<sup>62</sup> notes the impact of corporate structures on the identity of tribal groups in Alaska,

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<sup>55</sup> *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Summary* (Wellington, New Zealand: Office of Treaty Settlements, 1994).

<sup>56</sup> *Supra* note 17.

<sup>57</sup> *Supra* note 17.

<sup>58</sup> *Supra* note 30.

<sup>59</sup> Annie Mikaere, “Settlement of Treaty claims: full and final, or fatally flawed?” *New Zealand Universities Law Review* 17, no. 2, (1997), 425-447.

<sup>60</sup> *Supra* note 30.

<sup>61</sup> *Supra* note 57.

<sup>62</sup> Mason Durie, *Te Mana Te Kawanatanga: The Politics of Maori Self-Determination* (Auckland, New Zealand: Oxford University Press, 1998).

and Altman<sup>63</sup> observes the same trend for some Indigenous groups in Australia. Joseph<sup>64</sup> warns that tribal groups are at risk of being replaced by the governance entities, stating: “It is important to remember that the entity and its subsidiaries represent the tribe, they do not replace it... Identity precedes representation, not the other way round.” Indeed, Nikau<sup>65</sup> warns: “We mustn’t let the hapū be replaced by the governance entity. We must remember the entity acts on behalf of the hapū, but it isn’t the hapū.”

The Crown also influences the definition of tribal groups in the post-settlement phase. The Treaty of Waitangi (Fisheries Claim) Settlement Act 1992, commonly referred to as the Sealord deal, is an example of a Crown definition of tribal groups in a post-settlement environment. The Sealord deal transferred 20% of the Total Allowable Commercial Catch (TACC) of all Quota Management System (QMS) current and future stocks to Māori, together with funding to purchase a half share in the Sealord Group.<sup>66</sup> The Crown wrote into the Fisheries Act that it was for the benefit of “all Māori” while, at the same time, stating that fisheries quota should be distributed through iwi, entities that Ward<sup>67</sup> notes are “far from being clearly defined.” Urban Māori groups, which comprise Māori who no longer have a strong connection with their ancestral tribal group, were concerned that they would not be allocated a fair share, if any, of the fisheries quota, and sought a distribution model that recognised them as a modern-day tribal group and legitimate site of belonging.<sup>68</sup>

The Waitangi Tribunal’s “Te Whānau o Waipareira Report,” which was released in 1998, found that this particular urban authority is “iwi-like” in nature, and the urban groups used this finding in support of their quest for recognition in the distribution of the fisheries quota. However, the High Court found that in the context of the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992, “iwi” meant “traditional iwi,”<sup>69</sup> despite no evidence that suggests that hapū and iwi were traditionally fixed entities. Furthermore, Section 3 of the Māori Fisheries Act 2004 is a “legislative prescription of what the ‘tribe’ is to be in a commercial fisheries context and, with limited exceptions, does not allow for any evolution or change of ‘iwi’ group identification.”<sup>70</sup> Joseph concludes that the state defined what a “Māori tribe” is despite this legislative decree not necessarily representing the way in which tribal groups want to be identified. Trask, again in reference to the Hawaiian context, supports such a sentiment, and observes:

If we are tribal, the colonial power defines us so as to minimise the powers of the tribe. If we are not tribal, the colonial power uses our self-definition

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<sup>63</sup> *Supra* note 9.

<sup>64</sup> *Supra* note 30.

<sup>65</sup> *Supra* note 17.

<sup>66</sup> Ministry for Primary Industries (2015), [www.mpi.govt.nz](http://www.mpi.govt.nz)

<sup>67</sup> *Supra* note 36.

<sup>68</sup> *Ibid.*

<sup>69</sup> B.J. Paterson, *Māori Fisheries Case: Decision on Preliminary Question Remitted by Privy Council* (Auckland, New Zealand: High Court, 4 August 1998).

<sup>70</sup> *Supra* note 30.

against us by claiming that we are not Indigenous because we are not tribal.<sup>71</sup>

Urban Māori groups continue to maintain that they represent new and genuine Māori communities, whose members are entitled to a share of the fishing quota but who do not wish to secure their quota rights through membership of a traditional tribal group.<sup>72,73</sup> Conversely, traditional tribal groups tend to question the legitimacy of these new, hybrid groups as valid entities in their own right.<sup>74</sup> Some analysts contend that traditional tribal structures could not have functioned unchanged in a modern world and that, in order to achieve cultural continuity, it is essential to recognise the existence of hybrid or multiple sites of belonging to different places and groups.<sup>75,76,77,78</sup>

## V. Conclusion

Analysis of the Treaty settlement process and its influence on iwi and hapū during and after settlement indicates that the settlement process has played a significant role in defining tribal groups and the ways in which they operate. The settlement process has had some positive outcomes for iwi and hapū, such as Ngāi Tamarāwaho, by providing tribal groups with access to an economic base; contributing to a rejuvenation of hapū knowledge; and facilitating renewed participation for many tribal members. However, the process has also presented challenges for iwi and hapū. A number of groups have had to contend with state attempts to define them and many hapū, including Ngāi Tamarāwaho, successfully persevered to be recognised as a group in their own right separate from the wider iwi. In closing, these challenges require careful and considered navigation as iwi and hapū plan for their futures in a post-settlement environment.

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<sup>71</sup> *Supra* note 20.

<sup>72</sup> *Supra* note 30.

<sup>73</sup> *Supra* note 36.

<sup>74</sup> Jens Dahl and Mariannae Jensen, "Indigenous Peoples and Urbanisation," *Indigenous Affairs* 3, no. 4 (2002), 4-7.

<sup>75</sup> M. Barcham, "The challenge of urban Māori: reconciling conceptions of indigeneity and social change," *Asia Pacific Viewpoint* 39, no. 3 (1998), 303-314.

<sup>76</sup> *Supra* note 72.

<sup>77</sup> Nobuhiro Kishigami, "Urban Inuit in Canada: A case from Montreal," *Indigenous Affairs* 3, no. 4 (2002), 54-59.

<sup>78</sup> Roger Maaka, "The New Tribe: Conflicts and Continuities in the Social Organization of Urban Maori," *The Contemporary Pacific* 6, no. 2 (1994), 311-316.

## The Sixties Scoop: Canada's Legacy of Lost Children

### Vida Foubister

I am four years old and completely focused on scrubbing every crevice of a black-and-white, snakeskin-print high chair with chrome legs. It is January 1973 and the high chair, with its white plastic tray that lifts overhead and absence of any harness, would never meet today's child safety standards. I want the chair, first my sister's and then mine, to be spotless for our new brother.

His name is David. He is chubby with round cheeks and big, brown eyes. He is an Asiniskāwiyiniwak or Rocky Cree from northern Saskatchewan. Today is his birthday, but my mom tells me that it is too much excitement to have a cake with two candles to celebrate on the day he joins our family.

Twenty-three years later, I am sorting through my brother's few possessions, alone in his rooming house in Vancouver's Downtown Eastside. Removed from his community and stripped of his language, culture and religion at birth, David struggled to find his identity. Though heroin took his life, Canada's failed approaches toward Indigenous Peoples was a contributing factor.

"Canada's Indian policy, from its very inception, has sought to undermine the bond between aboriginal children and their families," wrote Suzanne Fournier and Ernie Crey in their 1997 book, *Stolen From Our Embrace*.<sup>1</sup> "Each era saw a new reason to take aboriginal children away from home, placing them in residential schools, foster care or non-aboriginal adoptive families."<sup>2</sup>

This consistent and deliberate separation and forced assimilation of Indigenous children and chronic underfunding of child welfare services in their communities has profoundly injured Indigenous Peoples. Canada's 1.4 million First Nations, Inuit and Métis people<sup>3</sup> continue to experience poor living conditions and substandard schooling, among other issues.<sup>4</sup>

A 2016 study by the Canadian Centre for Policy Alternatives found that 51 percent of First Nations children live in poverty. This number rises to 60 percent for

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<sup>1</sup> Suzanne Fournier and Ernie Crey, *Stolen From Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver, Canada: Douglas & MacIntyre Ltd., 1997), 17.

<sup>2</sup> *Ibid.*

<sup>3</sup> Karen Kelly-Scott and Kristina Smith, "Aboriginal Peoples: Fact Sheet for Canada" (Ottawa, Canada: Social and Aboriginal Statistics Division of Statistics Canada, November 2015).

<sup>4</sup> David Macdonald and Daniel Wilson, "Shameful Neglect: Indigenous Child Poverty in Canada" (Ottawa, Canada: Canadian Centre for Policy Alternatives, May 2016), 5-21, [https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/05/Indigenous\\_Child%20Poverty.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/05/Indigenous_Child%20Poverty.pdf).

First Nations children who live on reserves, with poverty rates as high as 76 percent in Manitoba and 69 percent in Saskatchewan for First Nations children living on reserves.<sup>5</sup>

This same study found poverty rates were 30 percent for non-status First Nations children, 25 percent for Inuit children, and 23 percent for Métis children. (Canada has an overall child poverty rate of 18 percent, ranking it 27 among 34 countries in the Organization for Economic Co-operation and Development.<sup>6</sup>)

## I. The Sixties Scoop

It was only after David's death that I learned he was a victim of what is now commonly referred to as the "Sixties Scoop." Patrick Johnston first used this term in his 1983 book to describe the pervasive child-welfare approach that was removing First Nations, Inuit and Métis children from their homes across Canada and placing them with non-Indigenous families.<sup>7</sup> (Despite the reference to one decade, the Sixties Scoop began in the late 1950s and persisted into the 1980s.)

"During the course of my research for the book, I interviewed a retired social worker in British Columbia, who said that during the sixties, she and her colleagues 'scooped' children from reserves 'almost as a matter of course,'" wrote Johnston. "The phrase was so evocative that I used it as the heading of the chapter in my book that presented the statistics."<sup>8</sup>

"That social worker was in tears when I interviewed her. At the time, she honestly thought that she had been acting in the best interests of the children by removing them from their families. She had come to believe, however, that the wholesale apprehension or 'scooping' of Indigenous children in the sixties had been a terrible mistake. Once admitted into care, the Indigenous children she and her colleagues had apprehended were much less likely to be returned to their parents than other children. If they were placed in foster families or adopted, it was very likely they would be placed with a non-Indigenous family."<sup>9</sup> A 1980 study by the Canadian Council on Social Development, for example, found 78 percent of status First Nations children who were adopted were placed with non-Indigenous families.<sup>10</sup>

The Sixties Scoop statistics are staggering. Based on 1977 data from Indian and Northern Affairs, Health and Welfare Canada, Statistics Canada and provincial departments of social services, an estimated 15,500 Indigenous children were in the care

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Patrick Johnston, *Native Children and the Child Welfare System* (Toronto, Canada: James Lorimer & Company Ltd., 1983), 23.

<sup>8</sup> Patrick Johnston, "Revisiting the Sixties Scoop of Indigenous Children," *Policy Options* (July 2016), <http://policyoptions.irpp.org/magazines/july-2016/revisiting-the-sixties-scoop-of-indigenous-children/>.

<sup>9</sup> *Ibid.*

<sup>10</sup> H. Philip Hepworth, *Foster Care and Adoption in Canada* (Ottawa, Canada: Canadian Council on Social Development, 1980); *supra* note 8.

of child welfare authorities that year.<sup>11</sup> They represented 20 percent of all Canadian children living in care, even though Indigenous children made up less than 5 percent of the total child population.<sup>12</sup> This situation was acute in the four western provinces, where the proportion in care was 39 percent in British Columbia, 44 percent in Alberta, 51 percent in Saskatchewan and 60 percent in Manitoba.

The increase in the number of Indigenous children who were legal wards of the state coincided with a change in the Indian Act in 1951 that shifted responsibility for First Nations health, welfare and educational services from the federal government to the provinces.<sup>13</sup> Provinces and territories initially provided on-reserve services only in extreme emergencies, but extended their reach after receiving federal funds for these efforts.

“By the end of the 1970s, the transfer of children from residential schools was nearly complete in Southern Canada, and the impact of the Sixties Scoop was in evidence across the country,” according to the final report of Canada’s Truth and Reconciliation Commission (TRC), a component of the Indian Residential Schools Settlement Agreement reached in 2006.<sup>14</sup>

The Commission was mandated to document the experiences of Indigenous children who, from 1879 to 1996, were removed from their families and placed in residential schools by the Canadian government, and to share the truth of survivors, families, communities and others affected with all Canadians. The first five of 94 calls to action in the TRC’s final report, released in 2015, focused on child welfare.

## II. Failure to Support Indigenous Mothers

My parents chose to adopt an Indigenous child after my mother learned about AIM or Adopt Indian and Métis at a monthly meeting of the local Women’s Missionary Society, a group that is part of the Presbyterian Church in Canada.

Launched in 1967, the federal and provincial government-funded AIM project promoted the adoption of First Nations children by middle-class, white families. AIM was the only targeted Indigenous transracial adoption program in Canada.<sup>15</sup>

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Supra* note 8.

<sup>13</sup> Vandna Sinha and Anna Kozłowski, “Structure of Aboriginal Child Welfare in Canada,” *International Indigenous Policy Journal* 4, no. 2 (2013), 3-4, <http://ir.lib.uwo.ca/iipj/vol4/iss2/2>.

<sup>14</sup> *Honouring the Truth, Reconciling for the Future* (Winnipeg, Canada: Truth and Reconciliation Commission of Canada, 2015), 69, [http://www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf).

<sup>15</sup> Allyson Stevenson, “Intimate Integration: A Study of Aboriginal Transracial Adoption in Saskatchewan, 1944-1984,” Doctoral Dissertation (University of Saskatchewan, Canada: 2015), 7, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.911.7400&rep=rep1&type=pdf>.

In a *CBC News* clip produced after the project's first year, several Indigenous children are shown playing as the reporter, Craig Oliver, tells viewers that they are only a few of the hundreds of "unwanted Indian and Métis children" ages six weeks to six years who are in need of homes. "They are the products of a sudden and sharp rise in illegitimate births and marriage breakdowns among Indian and Métis people."<sup>16</sup>

Oliver also reported on the "extraordinary" results of the project, which placed 100 children, including several family groups of children, in its first year—none of whom were returned to the agency. "[AIM] organized a saturation publicity campaign with radio and TV advertising and, most effective of all, large photographs in provincial newspapers."<sup>17</sup>

The project, in its fifth year when my parents learned about it, also promised fast adoptions, with placement possible within 10 weeks. David arrived in our Saskatoon, Saskatchewan, home about five months after my parents initiated the adoption process.

Though my parents (and others like them) had the best intentions in opening their hearts and home to an Indigenous child, I now know that my brother's birth mother might not have freely chosen to give him up for adoption. But as a young, single First Nations mother, one who was quite likely struggling with poverty, inadequate housing, and possibly alcohol and/or drug abuse, she would have lacked the support and resources necessary to fight the child welfare system to keep him.

Non-Indigenous agencies often required single, Indigenous mothers to live on their own, as opposed to traditional, multi-generational households, in order to regain custody of their children. "This demand goes against the native patterns of child care," wrote Associate Chief Judge Edwin C. Kimelman, who led an independent inquiry into the adoption and foster placement of Indian and Métis children in Manitoba, in his 1985 report. "In the native tradition, the need of a young mother to be mothered herself is recognized. The grandparents and aunts and uncles expect the demands and rewards of raising the new member of the family. To insist that the mother remove herself from the support of her family when she needs them most is unrealistic and cruel."<sup>18</sup>

Membership changes in the new Indian Act also prevented single Indigenous mothers from living with their children on reserves and complicated placements with family members. Mothers who chose to remain on reserves with their children had to first prove that the father of their children had First Nations status. Additionally, children of unmarried First Nations mothers often could not be placed with families on reserves due to these same membership stipulations.<sup>19</sup>

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<sup>16</sup> Craig Oliver, "Adoption Agency Seeks Homes for Indian and Métis children in 1968,"

*CBC News* (May 1968), <http://www.cbc.ca/archives/entry/adoption-agency-seeks-homes-for-indian-and-metis-children-in-1968>.

<sup>17</sup> *Ibid.*

<sup>18</sup> Associate Chief Judge Edwin C. Kimelman, "No Quiet Place: Review Committee on Indian and Métis Adoptions and Placements, Final Report" (Manitoba, Canada: Department of Community Services, 1985), quoted in Pauline Comeau and Aldo Santin, *The First Canadians: A Profile of Canada's Native People Today* (Toronto, Canada: James Lorimer & Company Ltd., 1995), 149.

<sup>19</sup> *Supra* note 15, at 183-4.

“In the foster and adoptive care system, aboriginal children typically vanished with scarcely a trace, the vast majority of them placed until they were adults in non-aboriginal homes where their cultural identity, their legal Indian status, their knowledge of their own First Nation and even their birth names were erased, often forever,” wrote Fournier and Crey.<sup>20</sup> After his father died, Crey, who was 12, and five younger siblings were removed from their home and placed in non-Indigenous foster homes. The family was never together again.<sup>21</sup>

### III. Absence of Culturally Appropriate Care

Many First Nations, Inuit and Métis children who were adopted already had homes and families. But due to income, cultural and religious differences, these homes did not meet the standards and expectations of Canada’s dominant white, middle-class society. “We must recognize that some children may have been taken into care not because they were unloved or unwanted or neglected, but because they were poor,” wrote Johnston.<sup>22</sup>

Further, not all foster and adoptive homes were appropriately screened and many failed to provide better environments for the Indigenous children placed with them. As experienced by their grandparents and parents in the residential schools that preceded forced placement in foster and adoptive homes, many children suffered from physical and sexual abuse.

Among them is Richard S. Cardinal, a Métis teenager who committed suicide in 1984. Cardinal was removed from his home in Alberta at the age of four and then moved in and out of 28 foster homes, group homes and shelters. The seventeen-year-old left behind a diary he titled “I Was a Victim of Child Neglect.” It documents some of his abuse and neglect and was used as the basis for a documentary about his short life.<sup>23</sup>

Other children whose placements in non-Indigenous homes received significant attention were Carla Williams and Cameron Kerley. Unlike Cardinal, these children were taken out of the country, Williams to the Netherlands and Kerley to the United States. Both children were physically and sexually abused.<sup>24</sup>

Though some parents chose not to tell their adopted children they were Indigenous, my brother knew from a young age that he was Cree. As a young adult, he sought out and obtained his First Nations status card—an identity document that confirms someone is registered as a “Status Indian” as defined by the federal Indian Act—with the Peter Ballantyne Cree Nation located in northeast Saskatchewan.

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<sup>20</sup> *Supra* note 1, at 81.

<sup>21</sup> *Ibid.*, 30.

<sup>22</sup> *Supra* note 8.

<sup>23</sup> *Richard Cardinal: Cry from a Diary of a Métis Child*, Documentary film, directed by Alanis Obomsawin (Montreal, Canada: The National Film Board of Canada, 1986).

<sup>24</sup> Pauline Comeau and Aldo Santin, *The First Canadians: A Profile of Canada’s Native People Today* (Toronto, Canada: James Lorimer & Company Ltd., 1995), 144.

However, David's overall experience was likely fairly typical of Indigenous adoptions into white, Christian homes. Our family did not have a deep knowledge of Indigenous culture and we did not understand the importance of helping him connect with his First Nations community.

In a book documenting her and other families' experiences adopting First Nations and Métis children, Marie Adams wrote that these children carry a double burden. "[T]hey absorb many of society's negative stereotypes of natives and they are isolated from all of the positive aspects of aboriginal culture and values."<sup>25</sup>

It was not until David left home that he slowly began to identify with other First Nations people. But he never reconnected with his family and community; he had paperwork to initiate this process in his room when he died.

David, like many other Indigenous adoptees, turned to alcohol and drugs to numb his pain. "[T]hey are in limbo between two cultures—uncertain of who they are, unsure of where they belong," wrote Geoffrey York, who spent seven years covering native issues in Winnipeg for *The Globe and Mail*.<sup>26</sup>

#### **IV. Shift to Indigenous Child Welfare Agencies**

"Today, the effects of the residential school experience and the Sixties Scoop have adversely affected parenting skills and the success of many Aboriginal families. These factors, combined with prejudicial attitudes toward Aboriginal parenting skills and a tendency to see Aboriginal poverty as a symptom of neglect, rather than as a consequence of failed government policies, have resulted in grossly disproportionate rates of child apprehension among Aboriginal people," wrote the TRC Commissioners in their final report.<sup>27</sup> According to a 2011 Statistics Canada study, 14,225 or 3.6 per cent of all First Nations children aged 14 and under continue to be in foster care, compared with 15,345 or 0.3 per cent of non-Indigenous children.

First Nations communities have responded to the loss of their children and the resulting "cultural genocide" both by repatriating children whose adoptions failed and working to regain control over child welfare practices related to their children, starting in 1973 with the Blackfoot (Siksika) child welfare agreement in Alberta.<sup>28</sup> While there are about 125 First Nations Child and Family Service Agencies across Canada, they operate through a patchwork of agreements that give them authority from the provincial government to provide services and funding from the federal government.<sup>29</sup> There is no

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<sup>25</sup> Marie Adams, *Our Son A Stranger; Adoption Breakdown and Its Effects on Parents* (Montreal, Canada: McGill-Queen's University Press, 2002), xxv.

<sup>26</sup> Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Toronto, Canada: Lester & Orpen Dennys, 1989), 218.

<sup>27</sup> *Supra* note 14, at 138.

<sup>28</sup> Anna Kozlowski, Vandna Sinha and Randy McHugh, "CWRP Information Sheet #99E: First Nations Child Welfare in Alberta (2011)" (Montreal, Canada: McGill University, Centre for Research on Children and Families, 2012), <http://cwrp.ca/infosheets/first-nations-child-welfare-alberta>.

<sup>29</sup> *Supra* note 26.

overarching federal legislation setting standards for child custody proceedings like the Indian Child Welfare Act of 1978 in the United States.

The shift to Indigenous-controlled child welfare services has not progressed without some problems, due in part to the communities' limited experience and professional training. Additionally, many First Nations agencies do not have sufficient funding to provide necessary programs, such as home support, that can help keep families in crisis together.

Funding for child and family services on reserves is insufficient and discriminates against First Nations children, according to Cindy Blackstock, Ph.D., Executive Director of the First Nations Family and Child Caring Society and a professor in the School of Social Work at McGill University. The Canadian government's own documents show Indigenous agencies receive about 22 to 34 percent less in funding than provincial agencies.<sup>30</sup>

Blackstock's organization and the Assembly of First Nations, a political organization representing all First Nations in Canada, took the matter to the Canadian Human Rights Commission in 2007. Their complaint, which alleged that the Government of Canada had a longstanding pattern of providing less government funding for child welfare services to First Nations children on reserves than is provided to non-Indigenous children, was referred to the Canadian Human Rights Tribunal.

The Tribunal ruled in January 2016 that the Canadian government's failure to provide equitable and culturally based child welfare services to 165,000 First Nations children amounted to discrimination.<sup>31</sup> But the government, which spent at least \$5 million Canadian fighting the complaint, has failed to act on this and three subsequent noncompliance orders.

On August 25, 2017, the Committee on the Elimination of Racial Discrimination (CERD) called on Canada to: end the underfunding of First Nations, Inuit and Métis child and family services; to ensure that all children, on and off reserve, have access to all services available to other children in Canada, without discrimination; to fully implement Jordan's Principle to ensure access to services is not delayed or denied because of funding disputes between the federal, provincial and territorial governments; and to address the root causes of displacement, such as poverty and poor housing, that disproportionately drive Indigenous children into foster care.<sup>32</sup>

## V. Sixties Scoop Settlement

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<sup>30</sup> Gloria Galloway, "Ottawa Discriminated Against Aboriginal Children by Underfunding Services, Tribunal to Rule," *The Globe and Mail* (January 2016), <https://beta.theglobeandmail.com/news/politics/ottawa-discriminated-against-aboriginal-children-by-underfunding-services-tribunal-to-rule/article28389918/?ref=http://www.theglobeandmail.com&>.

<sup>31</sup> *Ibid.*

<sup>32</sup> "Concluding Observations on the Twenty-First to Twenty-Third Periodic Reports of Canada," United Nations Committee on the Elimination of Racial Discrimination, United Nations Document CERD/C/CAN/CO/21-23 (August 2017).

As Indigenous communities continue to wait for the government to treat their children equitably, a Canadian judge ruled in February 2017 that the government was liable for the harm caused by the Sixties Scoop.<sup>33</sup> Beaverhouse First Nation Chief Marcia Brown Martel, who suffered emotional, physical and sexual abuse after being placed in the foster system as a child, filed the class action lawsuit in Ontario nearly a decade ago. It was one of a series of class action lawsuits that had been launched in five provinces.

“The ‘scooped’ children lost contact with their families,” wrote Ontario Superior Court Justice Edward Belobaba in his decision. “They lost their aboriginal language, culture and identity. Neither the children nor their foster or adoptive parents were given information about the children’s aboriginal heritage or about the various educational and other benefits that they were entitled to receive. The removed children vanished ‘with scarcely a trace.’”<sup>34</sup>

The \$800 million Canadian settlement, which was announced October 6, 2017, will provide status First Nations and Inuit with \$25,000 to \$50,000 Canadian in compensation, depending on the number of claimants who come forward. It will also establish a \$50 million Canadian endowment for an Indigenous Healing Foundation.<sup>35</sup> Non-status First Nations and Métis will not receive compensation under the settlement.<sup>36</sup>

“Never before in history has a nation recognized, in this way, children’s right to their cultural identities, and a government’s responsibility to do everything in its power to protect the cultural identity of children in its care,” said Jeffery Wilson, the lead attorney for the plaintiffs.<sup>37</sup>

Though it is too late for David, this recognition is a first step towards helping thousands of others affected by the Sixties Scoop to reclaim their identities.

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<sup>33</sup> “Sixties Scoop Survivors’ Decade-Long Journey for Justice Culminates in Historic Pan-Canadian Agreement,” Ontario Sixties Scoop Steering Committee (October 2017), <http://www.newswire.ca/news-releases/sixties-scoop-survivors-decade-long-journey-for-justice-culminates-in-historic-pan-canadian-agreement-649748633.html>.

<sup>34</sup> Tu Thanh Ha and Gloria Galloway, “Ontario Judge Sides with Sixties Scoop Survivors,” *The Globe and Mail* (February 2017), <https://beta.theglobeandmail.com/news/national/ontario-judge-sides-with-60s-scoop-survivors-damages-to-be-decided/article34015380?ref=http://www.theglobeandmail.com&>.

<sup>35</sup> *Supra* note 33.

<sup>36</sup> Lenard Monkman, “Sixties Scoop Compensation Excludes Métis, Non-Status Indigenous Peoples,” *CBC News* (October 2017), <http://www.cbc.ca/news/indigenous/sixties-scoop-settlement-excluded-1.4344355>.

<sup>37</sup> *Supra* note 33.

# **Himalayan Indigenous Peoples in Local Elections after Twenty Years: The Historical Gendered Perspective from Dolpo**

**Tashi Tsering Ghale**

## **I. Introduction**

On May 14, 2017, many Indigenous Peoples from Dolpo came out to choose their candidates for the local election. It was about 8 am that Sunday when the first vote was cast. Many Dolpo women also came together for this electoral democratic practice. There were very few people who were left out of the election. After three days, the counting of votes started clearly showing gender inequality among the winners. In three village bodies of Dolpo, the highest post went to men, with the exception of one village body's (Chharka Tangshyong) deputy chairperson that went to a woman. Gender inequality in such democratic practices led by the state can be traced back to the country's historically non-inclusive relationship with the Indigenous community.

In the present political scenario, Dolpo comprises three village bodies: Shey-Phoksundo (previously Phoksundo, Saldang and Vijer Village Development Committees (VDCs)), Dolpo Buddha (previously Dho and Tingyu VDCs), and Chharka Tangsong (previously Chharka and Mukot VDCs), all located in the northern geographical terrain of the country. Each VDC is separated by a rough terrain including high altitude passes. All these VDCs are at least two days away from Dunai, the district headquarters of Dolpa, which falls in a Karnali Zone, a mid-western development region of Nepal. The remote location of Dolpo also makes the structural exclusion apparent. There are more than 5,000 people relying on high altitude agricultural farming, the barter exchange system and the trans-Himalayan trade for their livelihoods. It has only been a decade since people shifted their livelihoods and started relying heavily on the Yarsagunbu<sup>1</sup> economy, thanks to increasing demand for the product and the higher prices it is now fetching. Meanwhile, in 1998, under the coordination of the Nepal Federation of Indigenous Nationalities (NEFIN), the National Foundation for Development of Indigenous Nationalities (NFDIN) and the Dolpo Indigenous Development Center (DIDC), Dolpo was categorized as one of the Indigenous communities of Nepal. Nonetheless, the Dolpo peoples continue to face marginalization from the socio-cultural and political spheres of the country. This exclusion has highly impacted Dolpo women in particular.

Against this backdrop, this article examines the non-inclusive relationship of the state in regards to the Dolpo Indigenous Peoples, focusing on state-led federal democratic local elections and the community's gender relations. Local elections conducted by the state have continued the historical gender inequality of the Indigenous community. This paper concludes by emphasizing the importance of effective political participation, especially that of women. The paper is informed by a year's data collection through primary and secondary sources. Participant observation of the local election, and semi-structured interviews with Dolpo men and women who voted, as well as officials who monitored the voting process, inform the research piece. Materials

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<sup>1</sup>Yarsagunbu, a rare combination of a caterpillar and a fungus, is the local name for *Cordyceps Sinensis*.

published through books, personal blogs and national dailies also served as important sources of information for this paper.

## II. Discussion and Findings

Geographically, Nepal lies between India and China. Politically, since the Bahadur Company conversion to the East India Company with the invasion of India by the British, several rulers of the country, after King Prithivi Narayan Shah's<sup>2</sup> unification, have sought their legitimacy from the British but have always failed to obtain a consensus from their Indigenous People.

Dolpo, as a community, appears to be part of the Zhangzhung kingdom. According to the historian Nyima Woese Choekhortshang,<sup>3</sup> the Zhangzhung kingdom, which predates Tibet, covered the area of Dolpo in the East and Ladakh (a geographical area of present India) in the South. The kingdom had its own language, different to that of Tibet's Sambotta script, and was only annexed by Tibet's emperor, Trisong Detsen, in the 8<sup>th</sup> century after his killing of King Ligmikya of Zhangzhung, leading to the Tibetan empire then assimilating those communities.<sup>4</sup> Only by the end of the eighteenth century was Dolpo, then in the north-western part of the country, annexed under the current territory of Nepal without any bloodshed and under the control of the Lo Kingdom of Mustang.

Rulers such as the Shahs and the Ranas have succeeded in satisfying the British by helping in their imperial quests while supplying 'brave' Gurkhas from the hill region of Nepal. Though a Nepali-Anglo war did occur between the rulers of Nepal and the East India Company from 1814–1816 as a result of border disputes and ambitious expansionism, the war ended with the 1816 Saugauli Treaty, which forced the ruler of Nepal to surrender around a third of Nepal's territory to the British.<sup>5</sup> While every benefit, including economic incentives and taxes, filled the pockets of these few elites, the people remained impoverished subjects to the ruling elites.

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<sup>2</sup> King Prithivi Narayan Shah completed his unification of Nepal in 1789.

<sup>3</sup> Nyima Woese Choekhortshang (historian) in personal communication with the author, 21 October, 2014, regarding the history of the community, namely Dolpo, and how it is connected with the Zhangzhung kingdom which is later annexed by Tibet. There are no academic books that detail the history of Dolpo, both as a community, including its territorial aspect, and as people. Most of the books written by foreign scholars (Snellgrove, 1992; Matthiessen, 2003; Bauer, 2004) rather see the history of Dolpo connected with Tibet. Starting with that region is problematic, as argued also by Nyima Woese Choekhortshang, as Dolpo was connected with the Zhangzhung kingdom before being annexed by Tibet. Choekhortshang clearly said that the people of the community, the Dolpo, never migrated from Tibet and that Zhangzhung was different from Tibet.

<sup>4</sup> Tsughito Tsughito Takeuchi and Al Nishid, "The Present Stage of Deciphering Old Zhangzhung," *Issues in Tibeto-Burman Historical Linguistics* 75 (2009), 151-165.

<sup>5</sup> Mahesh C. Regmi, *Kings and Political Leaders of the Gorkhali Empire 1768-1814* (Hyderabad, India: Orient Longman Limited, 1995); Leo E. Rose, *Nepal Strategy for Survival* (Kathmandu, Nepal: Mandala Book Point, 2010), 89.

Nepal's unique ethnic and cultural diversity was assimilated and Sanskritized<sup>6</sup> by centralized governmental structures and policies. The process of marginalization and subjugation can clearly be observed historically, socially, culturally and politically.<sup>7</sup> During the period after unification, several communities of the Eastern and Western regions of the country were excluded from a participatory role in politics. Women were not treated any better. During this period, traders, *Zamindars* (landlords), and the elites of the country were busy with their own money-making transactions where the Indigenous Peoples were used either for loans, taxation, heavy bonds, or slaves.

Dolpa<sup>8</sup>, including Dolpo, was not free of the taxation that began and continued under the regimes of Jumla, Mustang, the Shahs and the Ranas.<sup>9</sup> The people of Dolpo supplied shawls, wool and other products to the Kings as taxation. All of these products are still made by women, limiting their roles and experiences to household chores. Taxes were also collected from individual Limbu<sup>10</sup> and Dolpo households by various officials. Dolpo men were especially used by the state agencies to collect those taxes.<sup>11</sup> Collection of taxes also assisted Dolpo men to become political agents without any sort of exchange of information with the women of the community. This directly damaged their religious lives, as their simultaneous economic decline was clearly visible due to the loss of their communal land. The loss of communal land also affected their customary governance system, mainly the gapu (village headman) system. The gapu system led by the headman is pivotal in resolving conflicts, feuds, marriages, divorces and deciding the harvesting time.<sup>12</sup> This provides strong evidence that intentional dehumanization of Indigenous Peoples was exercised by the state, while the state simultaneously enforced unequal gender relationships within these communities.

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<sup>6</sup> The term made popular by Indian sociologist M. N. Srinivas, Sanskritization is a form of social change that can also be found in Nepal where the 'lower' castes are forced to emulate the rituals of the dominant castes. This has also nullified the diversities of the country.

<sup>7</sup> Kumar Pradhan, "Consequences and Conclusion," in *The Gorkha Conquests: The Process and Consequences of the Unification of Nepal with Particular reference to Eastern Nepal* (New Delhi, India: Oxford University Press, 1991), 154-204; Pratyoush Onta, "The Growth of the Adivasi Janajati Movement in Nepal after 1990: The Non-Political Institutional Agents," *Studies in Nepali History and Society* 11(2006), 303-354.

<sup>8</sup> Dolpa is the largest district of Nepal and falls now in Province No. 6 under the new Federal structure of Nepal. Dolpo is one of the Indigenous communities falling within the geographic boundary of Dolpa.

<sup>9</sup> Tashi Ghale, "Nepal's Exclusionary Democracy" *Journal of Indigenous Nationalities* 13 (2014), 153-177.

<sup>10</sup> Limbu is one of the 59 listed Indigenous communities under NEFIN that reside in the eastern part of the country. "The word Limbu means archer, or bearer of bow and arrows. Their ancestral and original stronghold, popularly known as Limbuwan, spans Nepal from Arun River to the east and Sikkim and the West Bengal states of India to the west. In Nepal, Limbus live and work in the districts of Sankhuwasabha, Tehrathum, Dhankuta, Taplejung, Panchthar, Ilam, Jhapa, Morang and Sunsari. Their scripture is called Mundhum. Phedangma, Shamba and Yeba-Yema are their sacred specialists. The population of the Limbus, according to the census of 2001, is 359,255." (<http://www.chumlung.org.np/page.php?page=6>).

<sup>11</sup> Norbhu Ghale (chairperson of the Dolpo Indigenous Development Center) in personal communication with the author.

<sup>12</sup> Kenneth M. Bauer, *High Frontiers: Dolpo and the Changing World of Himalayan Pastoralists*, (New York: Columbia University Press, 2004), 97.

Likewise, the xenophobic nationalism of the country was also formed and aggressively promulgated during this time. The state only prioritized Bhanubhakta<sup>13</sup> to renew *Asli Hindustan*<sup>14</sup> (the pure Hindu State) and the state's idea of a Hindu Kingdom.<sup>15</sup> While renewing these forms of 'pseudo-nationalism,' Onta implicitly confirms that several Indigenous Peoples' cultures, beliefs and customs were also shattered. Under Jumla Kings, the region became part of the Gorkha domain as *Khas kura* (the dialects of the Khas community) became the lingua franca of the whole Dolpo region. This also affected the Dolpo locals in terms of their language and culture as they lost their mother tongue and were forced to learn the non-Dolpo languages. It further affected the women of Dolpo, who remained the guardians of culture and tradition, while silencing their voices typically expressed via songs and language. Those songs and language never made it into the curriculum of any school. Many writings, including a poem written by Bhanubhakta, were only introduced by the Panchayat<sup>16</sup> education into the syllabus, which was disseminated to all parts of the country. Jha discusses King Mahendra's idea of "Nation" and how it materialized via an education policy excluding "other" peoples' cultures and knowledge:

An education policy, with the primary objective of perpetuating the royal regime and its version of nationalism, was introduced. Nepali was the sole medium of instruction. Textbooks told children that Nepal was the creation of the Shah Kings, conveniently glossing over the fact that the unification was seen as a conquest by most indigenous people who cherished their own tale of resistance, and that much of the Tarai's inclusion in Nepal was a result of arbitrary border demarcation after the Anglo-Nepal War of 1816.<sup>17</sup>

It also reconfirmed the state's authoritarianism and narrow understanding of how to deal with Indigenous Peoples and their languages. Amidst the reality of continuing discrimination and marginalization of Indigenous Peoples, the rise of the Indigenous

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<sup>13</sup> Bhanubhakta is a poet and a writer belonging to the upper class Brahmin family. He has contributed a lot in the Nepali literary scenes with his Nepali translation of the religious epic book from Sanskrit, *Ramayana*. According to Onta (1999), "Literary history pivoting around Bhanubhakta, and celebrations (in various modes) of Bhanubhakta as the second 'unifier' of Nepal via the medium of the Nepali language are two important aspects of the dominant national culture... the transportation of the nationalist ideology built around Bhanubhakta to Nepal from Darjeeling, the textual cultivation of Bhanubhakta as the Nepali adikavi (poet with an essence in writing as said by his fellow poet, Motiram Bhatta), the audio-visual dissemination of Bhanubhakta, the celebrations of his birthday as Bhanujayanti and the development of Bhanubhakta's birthplace in Chundi Ramgha in the present day Tanahu district of central Nepal—Bhanujanmasthan—as a site for national pilgrimage" helped to make him the most recognized icon that in turn helped the nationalistic agenda of the king flourish.

<sup>14</sup> Hachhethu (2003) argues "for the successor of P.N. Shah, as *Asli Hindustan* had become mantra in the state-designed project of national integration. It also manifested the source of legitimacy of the Hindu king, derived from divine right."

<sup>15</sup> Pratyoush Onta, "The Career of Bhanubhakta as a History of Nepali National Culture, 1940-1999," *Studies in Nepali History and Society* 4, no. 1 (1999), 65-136.

<sup>16</sup> Panchayat is the name of a rule which briefly ended democracy in Nepal while banning several political parties of the country during the 1960s and helped provide a fertile ground for the authoritarian rule of King Mahendra and King Birendra until 1990. In this context, the education syllabus was also oriented and directed by the appointed chiefs of the former King Mahendra, which basically prioritized the nationalistic agenda that presented the King as a supreme being.

<sup>17</sup> Prashant Prashant Jha, *Battles of the New Republic* (New Delhi, India: Aleph, 2014), 172.

Peoples' movements in Nepal was inevitable. Nonetheless, for nearly thirty years, the country's roads and streets were silenced to prevent any organized protest against the autocratic monarchy. Similarly, any organized effort to preserve and promote Indigenous languages, religions and cultures was charged as "anti-King," "anti-constitutional," "anti-national," and "communal."<sup>18</sup> The last 235 years of monopolistic policies of the 'Hindu' state created marginalized groups.<sup>19</sup> While identifying the processes of the state's homogenization of Indigenous Peoples, the various ethnic/tribal groups were constructed as *matwali* (alcohol drinkers) and their nationalities changed into castes. The *matwali* group of ethnicities was again divided into *masine* (enslaveable) and *na-masine* (non-enslaveable) castes, based on their political relation with the Hindu regime. The intention of the *Muluki Ain*<sup>20</sup> was clearly aimed at internally colonizing the various communities and nationalities interpreted as species (*jat*).

### III. Post-1950s

The state continues to jeopardize Indigenous communities. This is clear through an analysis of the post-1951 period of Nepal and its relationship with the Dolpo people, especially how the pastoral system changed because of Chinese politics and Nepal's rhetorical actions. Bauer discusses both of these relevant social and political relations.<sup>21</sup> He stresses that Dolpo's "trade relationships were based on kinship, language, culture and ecology" and were also affected because of the Dalai Lama's exile from Tibet as Nepal shared its northern borders with Tibet.<sup>22</sup> The Dolpo people used to maintain their relations with the *Thakali subba*<sup>23</sup> and agents of the King of Lo. Nevertheless, the killing of one Nepali frontier guard in Mustang by Chinese guards also affected border relations. Subsequently, with the issue of *Sagarmatha* (Mount Everest) where China also claimed its ownership, Dolpo borders were sealed within Nepal, mainly along the

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<sup>18</sup>K.B. Bhattachan, *Minorities & Indigenous Peoples of Nepal* (Kathmandu, Nepal: Sayami's Studio, 2008) 9.

<sup>19</sup>Harka Gurung, *Trident and Thunderbolt: Cultural Dynamics in Nepalese Politics* (Kathmandu, Nepal: Social Science Baha, 2003), 12.

<sup>20</sup> The first national legal code, pioneered by the Jung Bahadur Rana in 1854, contained a five-tiered national caste hierarchy in which the people of Nepal were divided into the following categories according to ascribed ritual purity: wearers of holy cord (*tagadhari*), non-enslavable alcohol-drinkers (*na masine matwali*), enslavable alcohol-drinkers (*masine matwali*), impure but touchable castes (*choi chito halnya na parne*), and impure and untouchable castes (*choi choi halnya parne*). This code put the high caste hill Hindus (Bahun, Thakuri and Chhetri) at the top and the traditionally non-Hindu groups, today's Janajati, as *matwali*, below the Hindus. Those close to the rulers such as Gurung, Magar, Newar, and others, were kept as non-enslavable *mmatwali* while other peripheral groups, such as Bhote, Chepang, and Tharu, were made to be enslavable *matwali* (Onta, 2006). Following the Kot Massacre of 14-15 September, 1846, in which Jung Bahadur Rana had most of his political rivals killed, real political power of Nepal passed onto the family of the Ranas, who became hereditary Prime Ministers even though the Shah descendants of Prithivi Narayan continued to rule as kings.

<sup>21</sup> Kenneth Michael Bauer, *High Frontiers: Dolpo and the Changing World of Himalayan Pastoralists* (New York: Columbia University Press, 2004) 99.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Subba* is a tag given by the central king which denotes where the tax collectors for the region are appointed. For this function, mainly the influential people of the region were chosen. Thakali was, therefore, an influential group of Mustang and still continues to remain one. They are also one of the 59 Indigenous nationalities of the country recognized both by NEFIN and NFDIN.

Panzang River (the current Tinje VDC). The designation of the area as a “restricted area” prohibited the movement of foreigners in Dolpo and also limited the locals’ trans-Himalayan trade, especially dominated by the Dolpo men. This halted the free mobility of Dolpo men across the borders for trade.

Furthermore, under the Panchayat system, government teams were sent to the northern border regions “to check Nepal’s borders, expel Indian personnel from military checkpoints, and move Tibetan refugees to camps for their eventual transfer to settlements around the globe.”<sup>24</sup> These teams also forced the ethnic enclaves into the centralized state. In 1975, under the village panchayats, small local units were created by King Birendra. This development divided Dolpo into four village panchayats: Do-Tarap, Saldang, Tinje, and Chharka. Examining the current complex relations, one needs to look to the bureaucratization and standardization of the state in the 1970s, implemented by the central state. During that era of Panchayat, representatives who came to power during the local elections appointed district officials and agents of the state to collect taxes. According to Lal, this also continued under the Chandra Shumsher<sup>25</sup> regime, and only benefited the old elites and privileged people, even during the reign of Birendra. These village panchayats were turned into the Village Development Committees (VDCs) after the institutionalization of multiparty democracy in 1990. Moreover, elections were also conducted to bureaucratize the administration in rural areas. According to Bauer, “the first local elections for Nepal’s newly formed Parliament, village-level political offices were held in Dolpa District in 1964..., and the local political lineages retained power.” This election also affected the political relations of the Indigenous community, mainly in Tarap, while reconstituting the “old village assemblies within the Nepali state’s administration.”<sup>26</sup> These institutional offices were filled by centrally appointed elected representatives, district chiefs and agents of the state and many were encouraged to continue even after the end of Panchayat era.<sup>27</sup> This further motivated the Dolpo men to become politically active. None of the Dolpo women were included in these village level committees meant for economic development of the community<sup>28</sup>.

Dunai became the headquarters of Dolpo and also the headquarters for the Dolpo peoples. The ban was only lifted during the 1990s and after that, several programs were

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<sup>24</sup> *Supra* note 20, at 101.

<sup>25</sup> Chandra Shumsher Rana, Jung Bahadur’s nephew and son of his brother, Dhir Shumsher, became the Prime Minister of Nepal in 1901 and controlled the country through authoritarian rule. Chandra Shumsher not only consolidated his family’s rule in Nepal through affiliation with the British, but also opened Nepal’s closed borders to western influence in a tactical manner, one that consisted of a selective imitation of western cultural and political forms. He is also the first Rana Prime Minister to receive an English education. Chandra Shumsher’s inauguration of the Tri-Chandra College in 1918 remained, until the abolition of Rana rule in 1951, the only college in Nepal. He also made attempts at social reform and limited development of bureaucratic and administrative infrastructure, abolishing slavery and the sati system, where women were forcibly burned after their husband’s timely or untimely death. Later, Chandra Shumsher realized, however, that these reforms could prove to be dangerous to the autocratic rule. He even later restricted the promotion of the Nepali soldiers, who served the British, to the rank of a non-commissioned officer (Upriety, 2011); C.K. Lal, *To be a Nepalese* (Kathmandu, Nepal: Martin Chautari Press, 2012), 10.

<sup>26</sup> *102 Supra* note 20, at 102.

<sup>27</sup> Lok Raj Baral, *Nepal: Problems of Governance* (New Delhi, India: Konark Publishers Pvt., 1993), 12.

<sup>28</sup> Norbhu Ghale in personal communication with the author.

proposed and implemented from the center of the country. Subsequently, the natural resources including the Community Forestry Act and Forest User Groups (FUGs) organized under the Forest Act of 1993 put the same old elites in power while excluding the locals. The exclusion of the locals continued even after the decade-long Maoist insurgency and two constituent assembly elections. There is not a single representative from the communities of Dolpo currently in the bureaucracy, the army, the police, or the National Planning Commission (NPC).<sup>29</sup> There is no single individual who understands the culture, language and religion of Dolpo in the district offices, nor in the buffer zone management committee (BZMC), revealing an exclusive situation in the bureaucratic structure of the country. Pandey states:

According to data available from the Public Service Commission, 87 percent of those that passed the exams to enter government service in 2002 were either Bahuns or Chhetris while 8.7 percent were Newars. There was not a single Dalit while Muslims were only 0.5 percent. Similarly, the proportion of ethnic groups in the judiciary in the year 2001 indicates that 87 percent were Bahuns or Chhetris, 9.7 percent were Newars; and Rai, Tharu, Gurung, and Tamang together were 3.6 percent. Among the ministers in the cabinet in 2006, 70 percent were Bahuns or Chhetris from the hills and the Taria while Tharus, Newars, Rais, Thakali, Limbu, and Kami were 5.0 percent each.<sup>30</sup>

According to Norbhu Ghale Dolpo, the government has not tried to include these Dolpo locals even in security positions of the region. Norbhu argues that it would be better if the locals were trained and recruited for security. The method would also make the youth more responsible towards their community and make the community safer from external threats.<sup>31</sup> The Dolpo Joint Struggling Committee (DJSC) asked the government to educate or train the security or district officials regarding the local culture, religion and language, and also to make the BZMC inclusive. The census of 2011 also recorded fewer local people than actually reside in the area.<sup>32</sup> On the other hand, there are several oral narratives of the local Dolpo, which clearly show that this marginalization and suppression also materialized in the region vis-à-vis citizenship.

The use of non-Dolpo language also stopped local Indigenous Peoples from having meaningful participation in the second constituent assembly election. During the time of the second constituent assembly election, Indigenous Peoples suffered due to a lack of voting ID cards, a lack of understanding of the voting process, and from being unaware of the candidates, voting papers and party signs and symbols on voting booths.<sup>33</sup> Such structural exclusion and illicit practices were clearly seen in the last local

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<sup>29</sup> Tashi Tewa Dolpo, *The Contested Local Elections and the customary laws: the case of Dolpo*, Paper presented at the Fifth Annual Youth Researchers Conference, (2015) ([http://www.martinchautari.org.np/files/Schedule\\_FifthAnnualYoungResearchersConference-2015.pdf](http://www.martinchautari.org.np/files/Schedule_FifthAnnualYoungResearchersConference-2015.pdf)).

<sup>30</sup> Ramesh Nath Pandey, *New Nepal, The Fault Lines* (New Delhi, India: Sage Publications, 2010), 43.

<sup>31</sup> Norbhu Ghale in personal communication with the author.

<sup>32</sup> The census report of 2011 shows the population of Dolpo as 4,107 persons. It is the first time that the community member numbers have been recorded. According to Norbhu Ghale Dolpo, chairperson of the the Dolpo Indigenous Development Center (DIDC), the number is contestable as many people are put under either Ghale or Gurung surnames, which automatically puts them into those ethnic groups. Dolpo estimates the population to be more realistically between 12,000-14,000 persons.

<sup>33</sup> Amidst all of these problems, Dhan Bahadur Buda of Sahartara VDC won the second constituent assembly elections for the UML, defeating both Aangad Buda (Independent) and Satya Pahadi (CPN (Maoist)). Some

election. Though the country was declared a Federal Democratic Republic in 2008, the remote Himalayan Indigenous community of Dolpo was rarely allowed to practice their political rights, at least in terms of voting. A political party from the center, namely the Community Party of Nepal-Unified Marxist Lennist (CPN-UML), ensured that Dolpo men could not practice their free will and choose their own candidates. The party forcibly intervened in every major decision-making opportunity the community had. Women were consequently controlled with the forcible limitation of their political rights in addition to those of men. Any man willing to resist was threatened with future repercussions. On the voting day, voting booths were monitored by the political agents and the party got who they wanted as a winner, while clearly restricting the effective participation of Indigenous men and women.

#### **IV. Conclusion**

The relationship of the state and Indigenous communities has usually remained tension-ridden. Gendered tensions within this relationship are frequently neglected, as are gender relationships within the community, thanks to the state's continuous political intervention. Both men and women from Dolpo were first restricted in their mobility and, later, their culture and language were completely negated. The state's domination has continued in every major election that has taken place up until today. Dolpo's participation and the role of Dolpo women in the 2017 local election were clearly thwarted, in particular because of this historically non-inclusive relationship. Dolpo continues to remain a structurally excluded remote Himalayan Indigenous People. To what extent they will be able to assert their political rights in coming times is yet to be seen.

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locals alleged that Buda and his cadres threatened and beat the locals to vote for him, and his competitors blamed him for giving bribes to the locals to vote for him. Most of the locals complained that the security officials did not do anything to stop these cadres from beating the voters. In this atmosphere and context, including both the discriminatory and dehumanizing policies and the attitudes and behavior exercised by both the state and also certain local elites and leaders, the violence in Dho-Tarap, Dolpo, occurred in July 2014.

## **A Continuation of a Vision for Indigenous Governance through the United Nations**

**Deanne L. Grant**

The Indigenous Studies Summer Program with the Center for the Study of Ethnicity and Race at Columbia University in the summer of 2017 provided me with a unique opportunity to appreciate the longstanding efforts of Indigenous Peoples to articulate a vision for the future. To be honest, my prior educational background heavily criticized the United Nations (UN) as a bureaucratic, normative framework that was unhelpful to Indigenous Peoples, especially for those living in settler colonial states, such as the United States. This charge was based on the lack of a legally binding aspect to the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration, or UNDRIP) for those who might seek recourse, causing a skewed and limited perspective that allowed little to no discourse on the benefits of the UN and, more specifically, the United Nations Declaration on the Rights of Indigenous Peoples.

Despite these presumptions, I learned many things to contradict these ideas, and left with an appreciation for Indigenous visioning through the UN. One key point I would like to stress through this chapter is the recognition that, although there are legal limitations of UNDRIP for member states who have approved the Declaration, the Indigenous vision that exists within the Declaration is authentic and meaningful in the way it repeatedly articulates a better world, not only for Indigenous Peoples, but the entire world. Of course, we must acknowledge the reality that the United States has endorsed the Declaration, yet has failed to implement it. The shortcomings of the United States becomes the key talking point on the Declaration, where once again the colonialist view obscures Indigenous perspectives. It is essential to remain critical of these fallacies, while at the same time separating out the views that exist within the Declaration itself and the contrasting perspectives of those countries who fail to implement it. We should not overlook the important fact that the articles articulated within UNDRIP come from Indigenous Peoples' time, energy, knowledge, and visioning. The second point this chapter stresses is the need to continuously criticize settler states when they fail to abide by their international agreements. I specifically draw from the ideas of American exceptionalism to demonstrate how ideologies of exceptionalism cloud the ability to believe injustice towards Indigenous Peoples in the United States continues today.

Indigenous Peoples from around the world have contributed to, and built upon, a significant effort to clarify commitments from member states to recognize the unique rights of Indigenous Peoples, starting with Cayuga Chief Deskaheh, who traveled to Geneva in 1923. Once a person begins to imagine the representation and momentous efforts on the part of Chief Deskaheh to articulate Cayuga visions and perspectives at the League of Nations in the 1920s, it is easier to put a meaningful image behind these efforts. For those of us for whom this matters, one should not overlook the fact that this image is that of an *Indigenous* face.

UNDRIP represents Indigenous visions which, upon reading, should invoke a certain hopefulness for any Indigenous activist. Imagine a world where every article in the Declaration was respected by member states and actually implemented in reality.

The articles represent a variety of powerful rights to live as Indigenous Peoples with topics ranging from the right to determine their own identity or members (Article 33) to having the right to the dignity and diversity of their cultures, traditions, histories and aspirations (Article 15.1).<sup>1</sup> This paper calls for Indigenous activists and Indigenous activist-scholars to recognize the potential of the Declaration to hold settler colonial states accountable to the rights of Indigenous Peoples.

To understand how Indigenous Peoples' advocacy at the United Nations began, one must begin with Haudenosaunee Chief Deskaheh who remains a symbol of Indigenous sovereignty for many. In 1923, Chief Deskaheh traveled to Geneva to denounce Canada because Canada had violated the rights of the Haudenosaunee Confederacy to be independent.<sup>2</sup> It is remarkable to review this powerful historical move, especially as Chief Deskaheh expressed various types of appeals that are represented in UNDRIP, some 85 years after his visit to the League of Nations in Geneva. It should be noted Chief Deskaheh was not admitted into the League of Nations during his visit in 1923 and waited one year, but still received no hearing.<sup>3</sup> Regardless, it is worth the effort to read his last speech given in 1925 to understand how Chief Deskaheh's key points compare to what manifested 85 years later in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). His efforts were not in vain and we know that he believed in the potential political power of the League of Nations.

Within this final speech on March 10, 1925, in Rochester, New York, Chief Deskaheh represents the Haudenosaunee Confederacy as separate from both Canada and the United States. This same sovereign representation of the Mohawk nationhood is present and alive today. Mohawk scholar Audra Simpson states, "Like many other Iroquois people, the Mohawks of Kahnawà:ke refuse to walk on some beams, and through this gesture they refuse to be Canadian or American. They refuse the 'gifts' of American and Canadian citizenship; they insist upon the integrity of Haudenosaunee governance."<sup>4</sup> This is an important expression of self-governance and separate political identity that has continued in today's Haudenosaunee self-governance and current themes within Native American and Indigenous Studies.

Chief Deskaheh acknowledged a legal separation as well, by stating that "we want none of your laws and customs that we have not willingly adopted for ourselves. We have adopted many. You have adopted some of ours—votes for women, for instance. We are as well behaved as you and you would think so if you knew us better."<sup>5</sup> It should not be overlooked that Chief Deskaheh was well aware of the lack of women involved in settler colonial politics, yet the Haudenosaunee continue to recognize the influence of clan mothers upon tribal politics today.

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<sup>1</sup> Walter R. Echo-Hawk, *In the Light of Justice: the Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Golden, USA: Fulcrum Publishing, 2013), 285-296.

<sup>2</sup> Akwesasne Notes, "Akwesasne Notes; Rooseveltown," *Akwesasne Notes* (September 1995), <https://search.proquest.com/docview/202952723?accountid=14503>

<sup>3</sup> Victoria Tauli-Corpuz, "V World Congress of the Finno-Ugric Peoples," Speech in Khanty-Mansiysk (28 June 2008), [www.un.org/esa/socdev/unpfii/documents/statement\\_vtc\\_finnougric08.doc](http://www.un.org/esa/socdev/unpfii/documents/statement_vtc_finnougric08.doc)

<sup>4</sup> Audra Simpson, *Mohawk Interrupts: Political Life Across the Borders of Settler States* (Durham and London: Duke University Press, 2014), 7.

<sup>5</sup> *Supra* note 2.

Throughout this incredible last speech, Chief Deskaheh expresses a desire for his people to be left alone, to live separately from the Canadians and Americans. He clarifies that Haudenosaunee people have their own laws and governance systems and are not asking for Canadian or American citizenship. All of these key points—ranging from acknowledging a political designation that is separate from settler states to observing ways of being that have been adopted by other cultures (such as providing women the right to vote)—are part of a political platform meant to be shared with the world based on Haudenosaunee ways of being. The desires for distinct political representation from settler states and practices, such as the continuation of clan mothers, are still very present in today’s Haudenosaunee belief systems. For Indigenous Peoples to simply disregard these efforts by Chief Deskaheh does not encourage respect for the founding Indigenous political battles that have been fought, nor does it allow one to see the long history of articulating a unique, or in this case Haudenosaunee, perspective to the world that continues today.

There are numerous accusations within Chief Deshaheh’s last speech of dishonesty on behalf of the Canadian and American governments, as well as attempts to demolish the Haudenosaunee form of government. Chief Deskaheh outlines numerous plans made by colonial governments to end the Haudenosaunee system of governance, and the numerous trips to Ottawa and London by the Haudenosaunee to demand their right to be treated as separate people according to established treaties.

Chief Deskaheh accounts the attempts to go to the League of Nations in Geneva to present these disputes, but recalls patiently waiting to be seen for over a year without a hearing. All of these actions demonstrate the deeply held desire of the Haudenosaunee people to keep their forms of governance in operation and to keep them separate from both Canadian and American systems. Chief Deskaheh is so emphatic in this belief that he states, “Our people would rather be deprived of their money than their political liberties—so would you.”<sup>6</sup> Again, Chief Deskaheh reinforces political separation as his overarching grievance and primary concern. This demand to be treated and see as politically separate from the dominant state is inherent in the Declaration.

The Declaration reflects many of these same views regarding separate political recognition, because it was heavily guided and informed by Indigenous Peoples themselves. For example, Article 4 of UNDRIP clarifies this belief by stating, “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>7</sup> Arguably, the majority of articles in UNDRIP relate to the rights to Indigenous self-governance, ranging from development of political systems to the right not to be forced into assimilation. Specifically, Articles 5, 18, 20, and 34 of UNDRIP relate to modes of Indigenous governance.<sup>8</sup> Indigenous Peoples’ ability to self-govern is represented throughout UNDRIP. As described through Chief Deskaheh’s early actions, Indigenous self-governance has been articulated by Indigenous Peoples since the League of Nations if not earlier. Today, in the United States, tribes have “inherent but limited rights of self-governance over their reservation lands and tribal members and exercise these

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra* note 1, at 285.

<sup>8</sup> *Ibid.*, 281-296.

through various forms of tribal government.”<sup>9</sup> In the United States, Indian law is imperfect and very complicated, yet one would rarely call for a complete disregard of Indian law as there have been major successes in its implementation. In a similar manner, UNDRIP should not be neglected as a useful tool for Indigenous Peoples in the United States. As a basic premise, UNDRIP can serve as a vision for legal futurity for Indigenous Peoples. The important point being there is a continuous thread of advocacy for Indigenous self-governance that began with Chief Deskaheh on his trip to the League of Nations that has lasted up to and beyond the creation of UNDRIP. This thread signifies a central component to engaging the United Nations as a possible site of justice for Indigenous Peoples, while also serving as a significant origin point for Indigenous advocacy on the worldwide stage.

Justice is certainly a complicated matter. One of the key criticisms of UNDRIP is that it is unable to be enforced by Indigenous Peoples when their respective states violate the Declaration. Pawnee legal scholar Walter Echo-Hawk says, “After the president’s endorsement in 2010, the provisions of the *Declaration* must be incorporated by the U.S. government, in consultation and cooperation with indigenous peoples, into our law and policy.”<sup>10</sup> Echo-Hawk repeatedly argues that the Declaration is an “authoritative statement” regarding Indigenous rights in the United States, building upon standards set by the United Nations, as the Declaration advances the larger obligation of the United States to forward human rights under the UN Charter.<sup>11</sup> Simply stated, since the United States has signed this Declaration, there are ways to build legal recourse when the U.S. violates the Declaration, even if the Declaration itself is not legally binding.

It is important to critically think about the way the United States treats Indigenous Peoples today, especially when egregious acts continue under settler colonial rule. The United States projects an image of its exceptionalism around the world. These discourses of exceptionalism are part of the history of American nation-state formation.<sup>12</sup> This is problematic because American exceptionalism can be used to disrupt any dissent within the American political sphere. If the United States claims it is the *most* free country and treats its people with adherence to the highest standard of human rights, then it makes it difficult case to say otherwise. This perception of the United States is an incredibly powerful force both internationally and domestically, functioning as an image that does not reflect reality.

If the United States touts itself as the most politically exceptional nation-state in existence, this should be tested by Indigenous Peoples. One idea of American exceptionalism could involve the successful implementation of UNDRIP, allowing America to serve as a model to other members states of how to politically interact with domestic Indigenous Peoples in respectful and meaningful ways that recognize tribal authority and all other aspects of the Declaration. Until then, Indigenous Peoples must continue to articulate their rights, even if the legal recourse for violating the Declaration are limited. Some cases, such as that of American exceptionalism, must be challenged

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<sup>9</sup> Kristen A. Carpenter and Angela R. Riley, “Indigenous Peoples and the Jurisgenerative Moment in Human Rights,” *California Law Review* 102, no. 173 (2014): 216.

<sup>10</sup> *Supra* note 1, at 65.

<sup>11</sup> *Ibid.*, 67.

<sup>12</sup> Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham and London: Duke University Press, 2007), 5.

for the falsehood that it represents not only for Indigenous Peoples in the United States but for many groups of people in America who lack power and respect. This broader visioning allows for the potential between and amongst other groups of people, which is important considering the small population of Indigenous Peoples and the changing racial demographics of the United States.

The creation of the Declaration was monumental and does carry international political power. One example of how these actions hold political recourse and challenge American exceptionalism is through the visit to the United States by the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz. Tauli-Corpuz visited the United States, making sure to visit with the Standing Rock Sioux tribe, which was thoroughly engaged with the Dakota Access Pipeline issue. This important study by Special Rapporteur Victoria Tauli-Corpuz from February 22-March 3, 2017 brought her to multiple states and tribal nations across the United States. She gathered information to be presented to the United Nations Human Rights Council in September of 2017. Acting as a monitor, Tauli-Corpuz aimed to ensure the United States is maintaining its human rights obligations as a signatory to the Declaration.<sup>13</sup> In her preliminary report, Tauli-Corpuz recounts a thorough understanding of this issue, noting the neglect of Indigenous Peoples by extractive industries and energy development corporations. She details these issues by noting that the United States has a commitment to consultation with tribal governments. Despite this commitment marked by the signing of the Declaration, Tauli-Corpuz explains that there are still significant violations to UNDRIP in the United States, due to the neglect of the right to obtain free, prior, and informed consent.<sup>14</sup> This visit from the Special Rapporteur is significant and surely her interactions allow for assessment of the ways the United States treats Indigenous Peoples, particularly when they disagree with corporate actions. American exceptionalism is hardly on display with the case of significant police violence that occurred at Standing Rock against many protectors who are in fact American citizens *and* citizens of tribal nations.

In closing, Indigenous activists and activist-scholars who critique the UNDRIP should consider the longstanding Indigenous history and involvement that exists between the United Nations and Indigenous Peoples. Well after Chief Deskaheh's visit to Geneva, it took several decades to write and agree upon the articles presented in UNDRIP, which is a monumental task within itself when we consider the vastly different cultures, state interests, and beliefs represented around the world. Successfully achieving this undertaking is quite the monumental task, as well as a testament to Indigenous collaboration and negotiation. Since the League of Nations, the common thread of articulating forms of Indigenous self-governance to the global community have continued to be expressed. Expressing Indigenous self-governance matters because Indigenous self-governance is represented throughout the entirety of the Declaration, serving as a foundational and meaningful aspect to maintaining Indigenous identity. Additionally, visits to the United States of America from the Special Rapporteur on the Rights of Indigenous Peoples allows for independent review of the conditions in which Indigenous Peoples live. Discord between the treatment of Indigenous Peoples in the

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<sup>13</sup> *Ibid.*

<sup>14</sup> Victoria Tauli-Corpuz, "End of Mission by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to the United States of America," (New York, USA: United Nations Human Rights Office of the High Commissioner, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E>

United States and the Declaration were no doubt apparent and should be taken seriously by the international community as a challenge to American exceptionalism, as well as the responsibility of the United Nations to hold states accountable under a unifying message of human dignity and respect.

## Australia's Human Rights and Wrongs

Ingrid Johanson

Human rights in Australia are inadequately protected. Lying dormant between the jurisdictions of international and domestic protection, Australians' rights are not sufficiently enforced or safeguarded under either system. While a signatory to all main international human rights treaties, Australia consistently fails to incorporate these commitments into legislation, rendering the commitments non-justifiable before the courts. Although Australia's non-compliance to international law is often justified under the façade of its dualist legal structure, this assumption is inconsistent with multiple international principles and treaties pertaining to the implementation of international law.

This paper will discuss the difference between dualist and monist structures of power, explaining how international law and domestic law theoretically remain separate in Australia. This paper will look at Australia's international legal obligations and its failure to ensure these commitments are justiciable before the courts. The paper will draw upon the dismissal of the treaty body authority advice regarding the *Northern Territory Emergency Response Act*<sup>1</sup> as a case study to highlight the negative impact Australia's approach to international law has had on the rights of its Indigenous Peoples. This paper will conclude that until Australia adheres to its international legal commitments or, alternatively, implements more solid domestic human rights provisions, its citizens' rights are not genuinely protected.

### I. The Relationship between International and Domestic Law

Although Australia has ratified all major human rights treaties to date, the nation's politicians and most jurists claim they are not technically bound by these commitments. Due to the dualist structure of Australia's legal system, it is said that international law is not justiciable until it is expressly stipulated in municipal law.<sup>2</sup> This may contribute to the fact that Australia has seemed willing to sign onto most major human rights treaties, yet continues to have a heavily criticized human rights record. This lack of consistency between a nation's international and domestic commitments is not experienced in all nations, but rather can be traced back to the structure of power introduced by the British.

When incorporating international law into a state's jurisdiction, most nations fall into the category of either monism or dualism.<sup>3</sup> The monist system, as its name implies, takes the approach that there is a single or monistic body of law. Monism, common in many European, American and Asian nations, stems from the natural law philosophy

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<sup>1</sup> Australian Commonwealth Government, Northern Territory National Emergency Response Act, Act No. 129 of 2007 (2007).

<sup>2</sup> Samuels cited Robert French, "Australian nationhood and the interaction between international and domestic law," Federal Court of Australia (2005).

<sup>3</sup> Robert French, "International Law and Australian Domestic Law," Address at Supreme Court of New South Wales Annual Conference (August 2009).

that sees law as universal and “all law as one.” This means that international treaties can become domestic law easily, and not requiring domestic legislation to incorporate treaties.<sup>4</sup> The United States is an example of a monist system, whereby the “entry into force of a treaty has direct domestic law consequences.”<sup>5</sup> This structure is set out by the Constitution of the United States of America, which holds that the President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators concur.”<sup>6</sup> Nations under this system are similarly bound by their international treaty commitments as they are by their domestic law. Although exact interpretations in each country will vary, in the event that the laws in these two bodies clash, Anton et al. write that international law will most often prevail.<sup>7</sup> Monism maintains that all laws are part of one universal order, and will favor international law under the assumption that “it rests at the pinnacle of the posited unitary system.”<sup>8</sup>

Australia, on the other hand, is a dualist nation. This enables Australia’s international legal commitments to remain non-justiciable in domestic courts. Dualism treats domestic and international law as two separate entities, and requires parliament to directly legislate incorporating international law before it can be legally enforced.<sup>9</sup> According to Shearer, dualism rejects the monist theory of natural and universal law in lieu of positivism, a belief that law must be written down in order to be true.<sup>10</sup> Dualism sees the two bodies of international and domestic law as entirely separate entities, and as “fundamentally different in their competences, legal sources, and in the subjects to which (or to whom) their norms are addressed.”<sup>11</sup> Gummow expressed the commonly held belief of Australian courts in *Minister for Foreign Affairs and Trade v. Magno*<sup>12</sup> that it is the responsibility of the Australian parliament and not the executive to make or alter domestic law. Gummow reiterated that, although the executive is responsible for signing treaties, it requires the legislature to react in order “to render international obligations enforceable in courts.”<sup>13</sup>

The separation of powers doctrine in Australia maintains that the legislature, judiciary and the executive must remain separate. This theoretically limits corruption and abuses of political power, as it prevents a concentration of public power in one

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<sup>4</sup> Brian Opeskin and Donald Rothwell, *International Law and Australian Federalism*, (Melbourne, Australia: Melbourne University Press, 1997), 36.

<sup>5</sup> Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law*, (Chatswood, Australia: Butterworths, 2000), 209.

<sup>6</sup> *The Constitution of the United States of America* (formed 17 September 1787 in Philadelphia, Pennsylvania) entered into force March 4, 1789, Article 2, Section 2, Clauses 2 and 3.

<sup>7</sup> Donald Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (Oxford, United Kingdom: Oxford University Press, 2007), 399.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Supra* note 5, at 201.

<sup>10</sup> Shearer cited Brian Opeskin and Donald Rothwell, *supra* note 4, at 37.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Minister for Foreign Affairs and Trade v. Magno* (1992) 112 ALR 592, 534-535.

<sup>13</sup> *Ibid.*

individual or institution.<sup>14</sup> This can, however, have negative consequences on Australia's treaty obligations, as there can be a clash between the executive's official commitments and the legislature's reciprocal actions.<sup>15</sup> There is a lack of domestic legislation implementing international human rights treaties in Australia, which Piotrowicz and Kaye believe may indicate that by signing a treaty the executive is not sufficiently responsible to parliament.<sup>16</sup> The cooperation and coordination between both bodies is crucial to render international protection effective, as while the legislature fails to transpose the executive's commitments into domestic law, Australia's international commitments are superficial.

Although Australian courts and politicians embrace dualism, the legitimacy of the system is internationally contentious. While international law does suffer from a lack of enforceability mechanisms, the dualist system in itself undermines the *raison d'être* of international law.<sup>17</sup> According to Piotrowicz and Kaye, international law relies on states recognizing something above state sovereignty, a philosophy which dualism rejects outright.<sup>18</sup> According to Opeskin and Rothwell, states are obliged to ensure consistency in domestic and international law. If states fail to ensure this, they are liable "towards other states for its failure to carry out its duties under international law."<sup>19</sup> Human rights integration methods evidently vary from state to state, however, by signing a treaty, a state is bound to follow its commitment in "good faith," regardless whether from a monist or dualist structure.<sup>20</sup> In England, the creator of Australia's dualist system, courts are increasingly open to embracing various regional and international human rights standards<sup>21</sup> that highlight Australia's approach as increasingly outdated in modern times.

## II. International Legal Principles

The principles of international treaties were set out in 1949 in the *United Nation's Draft Declaration on Rights and Duties of States*.<sup>22</sup> This declaration maintains in Article 13 that states have the "duty to carry out in 'good faith' its obligations arising under treaties and other sources of international law." It also declares that a state "may not invoke provisions in its constitution or its laws as an excuse for failure to perform

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<sup>14</sup> Catriona Cook, Robin Creyke, Robert Geddes and David Hamer, *Laying Down the Law* (Chatswood, Australia: Lexis Nexis Butterworth, 2012).

<sup>15</sup> *Supra* note 5, at 209.

<sup>16</sup> *Ibid.*

<sup>17</sup> Shearer cited Brian Opeskin and Donald Rothwell, *supra* note 4, at 37.

<sup>18</sup> *Supra* note 5, at 209.

<sup>19</sup> Shearer cited Brian Opeskin and Donald Rothwell, *supra* note 4, at 37.

<sup>20</sup> *Ibid.*

<sup>21</sup> Michael Kirby, "The growing impact of international law on the common law," *Adelaide Law Review* 33, no. 1 (2012), 16.

<sup>22</sup> International Law Commission, *Draft Declaration on Rights and Duties of States* entered into force 6 December 1949, General Assembly Resolution 375 (IV).

this duty.”<sup>23</sup> Under these provisions, it could be argued that Australia and other traditionalist dualist nations are in constant violation of Article 13.

Another important instrument, to which Australia is a party, is the *Vienna Convention on the Law of Treaties*.<sup>24</sup> This convention was developed more recently than the aforementioned Declaration, and adds to the contemporary understating of treaty obligations. This Treaty introduces the notion of “pacta sunt servanda,” meaning “the agreement must be served” and that states have a duty to enforce their Treaty commitments.<sup>25</sup> The convention outlines in the preamble that in addition to “pacta sunt servanda,” the principles of “free consent” to treaties and implementing them in “good faith” are universally recognized rules.<sup>26</sup> In Article 26, the principle of “pacta sunt servanda” is further defined, stating “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>27</sup> Again, this notion seems to contradict Australia’s judicial and political understanding of its obligations and has accordingly earned Australia great amounts of international criticism.

Charlesworth et al. strongly maintain that Australia is bound by its international legal commitments, stating that all states are required to have a reasonable response to treaty body recommendations.<sup>28</sup> As a liberal democracy, Australia has entered into its international treaties voluntarily. Charlesworth et al. believe that with voluntary ratification comes a contract to uphold certain obligations.<sup>29</sup>

### III. Australia Signing Treaties in “Bad Faith”

Australia ratifies a large number of international treaties, in an attempt to appear as a “good international player.”<sup>30</sup> To date, it has signed all major UN human rights treaties.<sup>31</sup> This has meant that “on paper” Australia appears as a champion of the international human rights regime, however in practice the nation is by and large void of enforceable human rights.<sup>32</sup> While it is estimated that Australia is party to well over 1000 international treaties, it has applied corresponding domestic legislation to very few of these commitments,<sup>33</sup> and various judges and academics have offered an explanation for this situation.

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Vienna Convention on the Law of Treaties*, (formed 23 May 1969 in Vienna, Austria) entered into force on 27 January 1980, United Nations Treaty Series, Vol. 1155, 331.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Willams, *The Fluid State: International Law and National Legal Systems* (New South Wales, Australia: Federation Press, 2005).

<sup>29</sup> *Ibid.*

<sup>30</sup> Devika Hovell, “The sovereignty stratagem: Australia’s response to UN human rights treaty bodies,” *Alternative Law Journal* 28, no. 6 (2003), 297.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 206.

Government officials have claimed that because Australia is party to so many human rights treaties, it is too difficult to keep track of them all.<sup>34</sup> This issue arose during the High Court case of *Minister for State for Immigration and Ethnic Affairs v Teoh*.<sup>35</sup> At that time, Australia was party to around 920 international treaties and it was disputed whether there was a “legitimate expectation” for the courts to follow these. French declared that the court saw it as a near impossible expectation, due to the sheer amount of unlegislated treaties.<sup>36</sup> French also noted that a federal minister had stated Australia was party to so many enacted treaties it is inconceivable that “any official decision maker could be expected to know them all.”<sup>37</sup> In a separate High Court case, *Al-Kateb v. Godwin*,<sup>38</sup> McHugh claimed that due to the amount of international law, it was impossible for parliament to consider it all when legislating. Excusing inconsistencies between international commitments and domestic practices, McHugh saw legislating in harmony with international obligations as nearly impossible for anyone other than a legal expert in international law.<sup>39</sup>

In line with the judicial fear of international law, the Department of Foreign Affairs and Trade appears reluctant to encourage the incorporation of international law domestically. The government website states that in Australia “treaty obligations can be implemented progressively and without radical change to existing laws.”<sup>40</sup> The government continues to sign human rights treaties without creating corresponding domestic legislation, believing that the existing Commonwealth or State/Territory legislation is often “sufficient to implement the provisions of the convention.”<sup>41</sup> The significant amount of individual complaints filed regarding violations of Australians’ human rights, however, would suggest that domestic law is not providing sufficient protection.<sup>42</sup>

Australia’s signing of the Convention on the Rights of the Child provides an example of the reluctance towards implementing international legislation at a domestic level.<sup>43</sup> As the most well received and widely ratified human rights international convention to date, the provisions in this Convention were uncontroversial.<sup>44</sup> According to Piotrowicz and Kaye, more than 190 states accepted domestic obligations under this convention.<sup>45</sup> Although Australia is a signatory to this convention, they have still not

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<sup>34</sup> *Supra* note 2, at 78.

<sup>35</sup> *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.

<sup>36</sup> *Supra* note 2.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Al-Kateb v. Godwin* (2004) 208 ALR 124, 169.

<sup>39</sup> McHugh cited Robert French, *supra* note 2, at 60.

<sup>40</sup> Department of Foreign Affairs and Trade, “Treaty Making Process,” Australian Commonwealth Government Website (2013), Para. 36 <http://www.dfat.gov.au/treaties/making/>

<sup>41</sup> *Ibid.*

<sup>42</sup> Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals* (Oxford, United Kingdom: Oxford University Press, 2007), 914.

<sup>43</sup> *Supra* note 5, at 208.

<sup>44</sup> *Supra* note 37, at 920.

<sup>45</sup> *Ibid.*

adopted any domestic legislation or obligations related to this convention. French claims the Australian government believes its citizens' human rights are inherently protected "by virtue of the constitution, its institutional arrangements under the constitution, its statute law and the traditions of common law."<sup>46</sup> On the contrary, Kirby writes that as a nation without a Bill of Rights and no regional human rights court, the importance of international human rights institutions cannot be overstated.<sup>47</sup> If Australia fails to incorporate legislation domestically, the action of signing treaties is entirely superficial.<sup>48</sup> It also means that there is no justiciable outlet for human rights violations provided for citizens, a great anomaly for a developed democracy in the 21st century.

An authority in this area of law, Richard Falk, refers to this situation as a "human rights paradox." This paradox concerns developing nations signing up to human rights treaties while believing these standards are only applicable to nations and jurisdictions other than their own.<sup>49</sup> He describes this paradox as impinging on the successful operation and mutual ownership of human rights globally.<sup>50</sup> Australia is described by Howell as one of the main offenders of Falk's paradox, setting different standards for human rights domestically as opposed to internationally.<sup>51</sup> Howell writes that when contrasting Australia's approach to its domestic human rights issues with Australia's open condemnation of other nations' standards (namely Afghanistan, Iraq and Zimbabwe in recent times), Australia sees "human rights as an item produced purely for export."<sup>52</sup>

#### IV. Human Rights in Other Jurisdictions

While Australia's aforementioned dualist system is the result of English influence, the two nations have gone about international legal obligations in separate ways.<sup>53</sup> England, among other commonwealth dualist nations, now readily embraces the international law as a legitimate source of power.<sup>54</sup> As Kirby stated in the case of *Al-Kateb v. Godwin*, when confronted with Australia's engagement with international law, "whatever may have been possible in the world of 1945, the complete isolation of constitutional law from the dynamic impact of international law is neither possible or desirable today."<sup>55</sup> Other nations sharing a commonwealth past, namely South Africa, Canada and India, are also more willing to interpret international law in constitutional courts, according to Kirby.<sup>56</sup> In Australia, however, judges and politicians remain

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<sup>46</sup> *Supra* note 3, para 55.

<sup>47</sup> Michael Kirby, "Law, like the Olympics, is now international but will Australia win gold?" *James Cook University Law Review* 7, no. 4 (2000), 12.

<sup>48</sup> *Supra*, note 5.

<sup>49</sup> Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York, USA: Routledge, 2000), 57.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Supra* note 24, at 297.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Supra* note 21, at 22.

<sup>54</sup> *Ibid.*, 27.

<sup>55</sup> *Al-Kateb v. Godwin* (2004) 208 ALR 124, 169.

<sup>56</sup> *Supra* note 2, at 63.

increasingly cynical of international law, and the “deep-seated judicial attitudes toward international law have proved difficult to dislodge” in the Australian context.<sup>57</sup> Australia has a clear lack of domestic human rights protection, which has been criticised by internal and external voices.<sup>58</sup> However, French claims that criticisms of human rights protection are “not unusual in modern democratic societies with a traditional respect for individual liberty.”<sup>59</sup> Yet it is alarmingly clear that when it comes to human rights, Australia behaves differently than other “modern democratic societies.”

Australia’s mismatch of human rights protection allows judges and politicians to “cherry pick” their rights. Australia engages in a tokenistic relationship with international human rights obligations to gain international legitimacy, yet solid and consistent commitments do not exist.

## V. Threatening the Rights of Indigenous Peoples

Australia’s willingness to blatantly reject international law was revealed in 2007 regarding the domestic legislation contradicting the ratification of the Convention on the Elimination of All Forms of Racial Discrimination.<sup>60</sup> The Northern Territory Emergency Response Act of 2007 was made in response to a report detailing the high level of sexual abuse suffered by Aboriginal children. Only six days after the report titled *Little Children are Sacred* was released, the government announced the “national emergency intervention” and special measure for Indigenous communities.<sup>61</sup> Within seven weeks, blanket measures restricting the rights of Indigenous Peoples in the Northern Territory had been rolled out, and one of Australia’s few domestic statutes that touches on human rights, the Racial Discrimination Act, was temporarily suspended.<sup>62</sup>

The Emergency Response Act contained various measures to restrict Indigenous Peoples’ rights. These include preventing the purchase of alcohol and pornography, blocking access to welfare payments, and dismissing the consideration of customary law in sentencing.<sup>63</sup> The government also assumed five-year lease control over aboriginal lands and increased federal law enforcement power over aboriginal children victim to abuse.<sup>64</sup> Many of these measures were justified by the government under the Convention on the Elimination of All Forms of Racial Discrimination, Section 4, pertaining to “special measures.” While Australia restricted the domestic provision of human rights by postponing the Racial Discrimination Act, it claimed validity of the

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<sup>57</sup> *Ibid.*, at 27.

<sup>58</sup> *Supra* note 24, at 297-301.

<sup>59</sup> *Supra* note 2, at 1.

<sup>60</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations, Treaty Series, vol. 660 (21 December 1965), 195.

<sup>61</sup> Alison Vivian, “The NTER Redesign Consultation Process: Not Very Special,” *Australian Indigenous Law Review* 14 (2010), 47.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Supra* note 1.

<sup>64</sup> Jenna Gruenstein, “Australia’s Northern Territory National Emergency Response Act: Addressing indigenous disadvantage and non-indigenous inequities at the expense of international human rights?” *Pacific Rim Law & Policy Journal Association* 17 (2008), 468-469.

Act through claiming affirmative action. This again reveals Australia using international law to claim legitimacy in its actions, even though these claims were rejected entirely in the official communication of The Committee on Elimination of Racial Discrimination.<sup>65</sup>

The Committee's Concluding Observations bluntly condemned the Emergency Response Act, stating the Act "continues to discriminate on the basis of race including through the use of so-called 'special measures.'"<sup>66</sup> It criticized Australia's claims of acting using "special measures," emphasizing this measure is for preferential treatment for marginalized groups and not the current negative discrimination it was being used to justify.<sup>67</sup>

Australia's actions fell short of "special measures" for various reasons. Firstly, special measures require prior consultation with the affected community, which was impossible due to the tight timeframe in which the Act was implemented. Secondly, according to the act special measures must be "legitimate, proportionate and necessary," which is questionable given the extreme and blanket nature of this restriction of rights. Finally, special measures can only be used for positive treatment of marginalized groups, as Vivian states the interpretation is for "preferential or favorable" treatment.<sup>68</sup>

The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples was openly scathing about the Australian government's actions, as were multiple major human rights committees and the Aboriginal and Torres Strait Islander Social Justice Commissioner.<sup>69</sup> As the United Nations' expert on Indigenous issues, the Special Rapporteur stated that the policies brought severe stigmatization and indignity to the aboriginal people, which only heightened racist attitudes in Australia.<sup>70</sup> Due to various other reasons, the Special Rapporteur deemed the Act to be entirely illegitimate under international law.<sup>71</sup> The treaty body's criticism fueled the conservative government's rejection of international law and, contrary to the principles of international law, the Minister for Foreign Affairs aggressively responded that "if a UN committee wants to play domestic politics here in Australia, then it will end up with a bloody nose."<sup>72</sup> The rejection of international pressure was echoed by the then-Prime Minister John Howard. In response to the Committee's comments, the Prime Minister said, "Australia decides what happens in this country through the laws and the parliament of Australia, I mean in the end we are

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<sup>65</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, "Concluding Observations; Australia," United Nations Document CERD/C/AUS/CP/15-17, (2010).

<sup>66</sup> *Ibid*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Supra* note 56, at 50.

<sup>69</sup> *Ibid.*, 46.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, 57.

<sup>72</sup> *Supra* note 24, at 299.

not told what to do by anybody.”<sup>73</sup> The case of the Northern Territory intervention reveals that Australia is not only willing to disregard its international human rights obligations, but it can also “suspend” the very limited domestic human rights protections that do exist. If neither international nor domestic protections are justiciable in Australia, then there is genuinely no functional framework for upholding citizen’s human rights.

## **VI. Conclusion**

The protection of human rights in Australia is alarmingly weak as both the limited domestic and numerous international mechanisms can be easily ignored by politicians and courts. While Australia consistently rejects its post-treaty ratification obligations, it does so in violation of various internal legal principles, including the “good faith” provision in the Vienna Convention on the Law of Treaties. While other dualist nations have embraced the proliferation of universal human rights codes, Australia remains politically and judicially conservative to this change. The Northern Territory Intervention reveals Australia’s willingness to reject treaty body authority, as well as how to suspend its limited domestic human rights legislation on a political whim. The calls for a domestic charter of rights in the Constitution are frequently ignored and parliament continually fails to translate executive commitments into action. Until international or domestic mechanisms are embraced in earnest in Australia, the rights of the citizens will remain dangerously vulnerable. While no serious action is taken to address this deficiency, human rights violations will occur in Australia almost entirely unrestricted.

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<sup>73</sup> John Howard cited *Ibid.*

# The Right to Return: Challenging Existing Understandings of 'Citizenship' in Aotearoa/New Zealand

Rachael Ka'ai-Mahuta

*E noho akiko ana ahau, he rawaho ahau.  
I am living at a distance from home, I am an 'outsider'.*

Polynesian peoples are increasingly having to face the migration and displacement of members of their communities. It is estimated that at least one in six Māori now live outside of New Zealand, with most settling in Australia. The governments born out of colonisation dictate the terms of citizenship to the Indigenous communities of the lands over which they rule. For many countries, "citizenship by descent" only applies to one generation beyond the generation that are citizens "other than by descent." Those members of the Polynesian diaspora who are not citizens of their ancestral lands are named at the border as "visitors." They can have that status revoked at any time. Māori who are not citizens of New Zealand can effectively be denied access to their ancestral lands and kinship communities. This is problematic as there is often a continued bond to the homeland and a subsequent natural desire for an eventual return. Essentially, it is a conflict of world-views as Māori emphasize *whakapapa* (genealogy), including ancestral links to land, as the foundation of identity and formal membership in Māori society, not national identity legislation.

This paper will explore issues at the intersection of diaspora, identity, and citizenship, specifically, should overseas-born Māori who are not New Zealand citizens be granted an automatic right to citizenship or a multi-generation citizenship by descent clause? This will go some way towards answering the overarching question of what rights, if any, Indigenous people have when they are not citizens of the state that governs their ancestral homeland.

## I. Māori world-view

World-view is at the core of culture. It is both the influencing factor in the values, customs, and belief system of a people, and the sum of those values, customs, and belief system. The term can be applied to an individual or group when discussing the lens or point of view of that individual or group, that is, world-view acts as a type of filter system. The inherent nature of world-view means that it is difficult to separate oneself from one's world-view.<sup>1</sup>

Jackson argues that a culture cannot be understood without reference to its world-view as it is the basis for core values:

Because each culture is unique, the behavior exhibited by its members has certain unique characteristics. No members of a culture can be understood in isolation from the cultural forces which

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<sup>1</sup> Rachael Ka'ai-Mahuta, "He kupu tuku iho mō tēnei reanga: A critical analysis of waiata and haka as commentaries and archives of Māori political history," Unpublished Doctoral Thesis (Auckland University of Technology, New Zealand, 2010).

shape them, and no culture can be understood unless account is taken of the attitudes, expectations, beliefs and values on which it is based.<sup>2</sup>

The issue of diasporic Indigenous communities being denied an automatic right to citizenship is essentially about conflicting world-views. For Māori in Aotearoa/New Zealand, the emphasis is on *whakapapa*, including ancestral links to land, as the foundation of identity and formal membership in Māori society.<sup>3</sup> This is at odds with a Western world-view which emphasizes national identity and associated citizenship legislation.

Jackson argues that the descriptions of Māori identity are commonly determined by Pākehā (non-Māori New Zealander of European settler descent) and that there is truth in the old adage that “the namer of names is the father of all things.”<sup>4</sup> This is particularly relevant when considering national identity legislation. Gamlen states;

Some groups might argue that current national identity legislation neither reflects nor affects who is and who is not Māori, and that all Māori in diaspora should be able to return to Aotearoa, their *turangawaewae* (home ground), even if they are not New Zealand citizens. Without necessarily advocating this view, one can discern both legal and normative arguments which might sustain it.<sup>5</sup>

*Turangawaewae* refers to a person's “standing place,” a place where one has rights of residence and belonging through kinship and *whakapapa*.<sup>6</sup> Māori tradition dictates that all Māori have a right to return to their *turangawaewae*. That right is based on *whakapapa*, which is considered to be the bedrock of Māori tradition.<sup>7</sup> It is also the condition for being recognised as “Māori.”<sup>8</sup>

Māori identity is also reflected in the term *tangata whenua*, or “people of the land,” which is used to define the people native to a particular area. *Tangata whenua* refers to people born of the *whenua* (land, placenta), that is, “of the placenta and of the

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<sup>2</sup> Moana Jackson, *The Maori and the Criminal Justice System, A New Perspective: He Whaipanga Hou: Part 1* (Wellington, New Zealand: Policy and Research Division, Department of Justice, 1987), 25.

<sup>3</sup> A. Durie, “Te aka matua: Keeping a Māori identity,” *Mai i Rangiātea: Māori wellbeing and development*, eds. P. Te Whāiti, M. McCarthy and A. Durie (Auckland, New Zealand: Auckland University Press, 1997); Alan Gamlen, “Making hay while the sun shines: Envisioning New Zealand's state-diaspora relations,” *Policy Quarterly* 3, no. 4 (2007), 12-21.

<sup>4</sup> Moana Jackson, *The Maori and the Criminal Justice System, A New Perspective: He Whaipanga Hou, Part 2* (Wellington, New Zealand: Policy and Research Division, Department of Justice, 1988), 72.

<sup>5</sup> Alan Gamlen, *supra* note 3, at 13.

<sup>6</sup> *Te Aka Māori-English, English-Māori Dictionary*, <https://maoridictionary.co.nz>

<sup>7</sup> Rachael Ka'ai-Mahuta, “The genesis of waiata and haka,” *Kia Rōnaki: The Māori Performing Arts*, eds. Rachael Ka'ai-Mahuta, Tania Ka'ai and John Moorfield (Auckland, New Zealand: Pearson, 2013).

<sup>8</sup> A. Durie, *supra* note 3.

land where the people's ancestors have lived and where their placenta are buried.”<sup>9</sup> This connection to the land cannot be severed.

## II. New Zealand citizenship

It is a feature of the governments born out of colonisation to dictate the terms of citizenship to the Indigenous communities of the lands over which they rule. In Aotearoa/New Zealand, as with many other states, “citizenship by descent” only applies to one generation beyond the generation that are citizens “other than by descent.”

In one of the most comprehensive breakdowns of the situation to date, *Overseas-Born Māori and New Zealand Citizenship*, Waldron states “While most Māori living in Australia have automatic rights to live in New Zealand, some people with Māori ancestry living outside New Zealand do not have automatic rights to become New Zealand citizens or reside permanently in New Zealand.”<sup>10</sup> Waldron cites a 2006 unpublished internal paper by the Identity and General Policy Team of the Department of Internal Affairs, “Citizenship issues for Māori born outside of New Zealand,” which analysed New Zealand citizenship law, focussing on the implications for overseas-born Māori. According to Waldron, the paper questions “whether the current restrictive approach to citizenship by descent fails to recognise multi-generational cultural and spiritual attachments to New Zealand” which then “raises the question of whether people who can make a claim to be the Indigenous people of the land should have an automatic right to be citizens of that country no matter where they were born.”<sup>11</sup>

The Citizenship Act of 1977, and the amendment to the Act in 2006, are the basis for citizenship rights in Aotearoa/New Zealand. Under the Act, any person born in New Zealand, Niue, Tokelau, or the Cook Islands, before 1 January 2006 is considered a New Zealand citizen *by birth*. The 2006 amendment added the criteria of one parent also being a New Zealand citizen for those born on or after 1 January 2006.<sup>12</sup>

A person born outside of New Zealand on or after 1 January 1978 is a citizen *by descent* if one (or both) of the parents is a New Zealand citizen otherwise than by descent (for example, a citizen by birth).<sup>13</sup> Waldron suggests that the principle that underpins this rule in relation to citizenship by descent, is *jus sanguinis* which translates to the “right of blood.”<sup>14</sup> However, this “right” is only upheld for one generation, as citizens by descent cannot automatically pass on their citizenship to their children if those children are born outside of New Zealand.

Currently, if a citizen by decent wishes to pass on their citizenship to their overseas-born children, they would first have to apply for and receive a grant of

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<sup>9</sup> *Supra* note 6.

<sup>10</sup> H. Waldron, *Overseas-Born Māori and New Zealand Citizenship* (Wellington, New Zealand: Institute of Policy Studies, Victoria University of Wellington, 2011), 1.

<sup>11</sup> *Ibid.*, 9.

<sup>12</sup> Citizenship Act 1997, <http://www.legislation.govt.nz/act/public/1977/0061/latest/whole.html>.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Supra* note 10, at 7.

citizenship, at which point, they would no longer be a citizen by descent, but a citizen *by grant*.<sup>15</sup>

When the restriction on citizenship by descent was being considered in 1977 there was no consideration of the effect on Māori...Not only does this restriction fail to recognise the strong cultural and spiritual relationship that Māori may have with New Zealand, but it also goes against *tikanga* (Māori customary practices).<sup>16</sup>

### III. Te Tiriti o Waitangi

The law regarding New Zealand citizenship not only contradicts *tikanga*, it may also be at odds with Te Tiriti o Waitangi, the Treaty of Waitangi, which is often referred to as Aotearoa/New Zealand's founding document as it marks the beginning of the “official” Māori-Crown relationship.<sup>17</sup>

Te Tiriti o Waitangi was signed on the 6th of February, 1840, between representatives of the British Crown and *rangatira* Māori (Māori leaders, chiefs) as the Indigenous people of Aotearoa/New Zealand. One text was written in English and the other was written in te reo Māori (the Māori language).

Since its signing it has been the focus of controversy and scrutiny due mostly to the fact that two versions of the Treaty were produced. The Māori text, which was signed by both Māori and the Crown, was translated from the English text by a Pākehā missionary. However, the translation was not at all a correct interpretation of the English text. It is the English text which has been used by the Crown as the definitive version and this is the cause of contention to this day between Māori and the Crown.<sup>18</sup>

Te Tiriti o Waitangi was signed under the pretense that it would act to protect Māori rights. Māori also considered Te Tiriti o Waitangi as a charter that was meant to form the foundation of a national dual planning system, a partnership based on power-sharing, incorporating both Māori and Pākehā values into every aspect of decision-making in Aotearoa/New Zealand.<sup>19</sup> According to Jackson, “to many Maori people, the

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 16.

<sup>17</sup> *Supra* note 4.

<sup>18</sup> Rachael Ka'ai-Mahuta, “The impact of colonisation on te reo Māori: A critical review of the State education system,” *Te Kaharoa* 4 (2011), 195-225 at 196.

<sup>19</sup> Ted Glynn, “Bicultural Challenges for Educational Professionals in Aotearoa,” *Waikato Journal of Education* 4 (1998), 3-16; “Read the Treaty,” Ministry for Culture and Heritage (2017), <https://nzhistory.govt.nz/politics/treaty/read-the-treaty/english-text>.

terms of the Treaty provided the ultimate protection for their way of life, their institutions, and their culture: they were mechanisms to protect their taonga.”<sup>20</sup>

However, the Crown failed, almost immediately, to honor the terms of Te Tiriti o Waitangi. “The colonists had gained the benefit of the Treaty by being allowed to emigrate to this country under the British flag, but they were not willing to accept the burden of the bargain from which they had gained so much.”<sup>21</sup> From when it was first signed, the Treaty was largely regarded by Pākehā as being null and void and was dismissed as irrelevant. In fact, the Treaty was intentionally dishonored when Captain George Grey became governor of “the colony.” One of Governor Grey's first acts was the establishment of the office of the Commissioner for the Extinguishment of Native Title.<sup>22</sup> Then, in 1877, during the case of *Wi Parata v The Bishop of Wellington*, Chief Justice Prendergast ruled that the Treaty was “a simple nullity.”<sup>23</sup> This judgment was unfathomable to Māori. According to Jackson, “the law's eventual dismissal of the Treaty confirmed the Maori sense of betrayal.”<sup>24</sup>

In considering the question of the right of the Māori diaspora to New Zealand citizenship, Gamlen suggests that “a legal argument for non-citizen Māori return could begin from articles two and three of the Treaty of Waitangi.”<sup>25</sup>

Under Article Two of Te Tiriti o Waitangi (Māori text), Māori are guaranteed *tino rangatiratanga* (the unqualified exercise of their chieftainship, self-determination, sovereignty) over their land, homes, and *taonga* (treasured possessions—both tangible and intangible).<sup>26</sup> The Māori relationship to tribal land is a key cultural concept that should have been protected, under the Treaty, from external decisions regarding national identity legislation.<sup>27</sup> Furthermore, Article Two applies to all Māori; however, without an automatic right to citizenship, some Māori may be prevented from asserting the claim to *tino rangatiratanga*.

As discussed earlier, there are marked differences between the two texts of the Treaty, particularly in Article Two. Under Article Two of the Treaty (English text), the Crown,

...confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may

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<sup>20</sup> *Supra* note 4, at 48.

<sup>21</sup> Paul Temm, *The Waitangi Tribunal – The Conscience of the Nation* (Auckland, New Zealand: Random Century New Zealand Limited, 1990), 24.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, 24.

<sup>24</sup> *Supra* note 4, at 48.

<sup>25</sup> Alan Gamlen, *supra* note 3, at 13.

<sup>26</sup> *Read the Treaty*, *supra* note 19.

<sup>27</sup> *Supra* note 5.

collectively or individually possess so long as it is their wish and desire to retain the same in their possession...<sup>28</sup>

Article Two explicitly mentions “the respective families and individuals thereof” which acknowledges that the rights are tied to *whakapapa*. Furthermore, Article Two suggests that property rights are protected for as long as Māori wish them to be. Gamlen posits that “this clause might be interpreted as a guarantee that Māori customs of kin-based membership and property rights will be protected in perpetuity by the state.”<sup>29</sup>

According to Temm, “The second article is the most far-reaching. It assures Maori New Zealanders that the Crown will protect all their cultural and property rights - this is no mere protection; it is an explicit guarantee of those rights.”<sup>30</sup>

Article Three of Te Tiriti o Waitangi (Māori text) is recognised as a fair translation of the English text<sup>31</sup> which states that “Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.”<sup>32</sup>

At the signing of the Treaty, British subjects in New Zealand had the right to come and go as they pleased. The idea of a “New Zealand citizen” was conceptualised in the mid-twentieth century,

...through decisions by the British and New Zealand governments, and confers more restricted mobility rights. It might be argued that these decisions did not honour the agreements in the Treaty, were not preceded by adequate consultation with Māori, and therefore do not legitimately limit the ability of non-citizen Māori to reside on their lands.<sup>33</sup>

Under the third article of Te Tiriti o Waitangi, and the promise of the rights and privileges of British subjects (at the time of the signing of the Treaty, in 1840), Māori should not be limited by the current New Zealand citizenship requirements.

Gamlen suggests that the technical arguments regarding citizenship based on the Treaty are far from “clear cut,” but that they draw “emotive strength from norms about post-colonial reparative justice, which underpin broadly similar claims in New Zealand on a regular basis.”<sup>34</sup>

#### **IV. Māori diaspora**

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<sup>28</sup> *Supra* note 26.

<sup>29</sup> *Supra* note 5, at 13-14.

<sup>30</sup> *Supra* note 24, at 18.

<sup>31</sup> *Supra* note 26.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Supra* note 5, at 14.

<sup>34</sup> *Ibid.*, 14.

Diaspora is the dispersal of a people, that is, people who either by choice or by force have left their homelands. Essentially, it encompasses forced or voluntary population mobility. In 2013, it was estimated that at least one in six Māori live overseas.<sup>35</sup> Kukutai and Pawar suggest that it is closer to one in five.<sup>36</sup> As such, it is “no longer tenable to ignore the implications of a growing global Māori diaspora.”<sup>37</sup>

The vast majority of the Māori diaspora lives in Australia.<sup>38</sup> According to Winitana, Māori migration to Australia in recent decades has escalated at “an alarming rate.”<sup>39</sup> However, estimates of the Māori population in Australia vary significantly. In 2008, Hamer wrote: “Recent census practice has improved the quality of data, but still undercounts the number of Māori in Australia by a considerable margin.”<sup>40</sup> In that same article, Hamer provides the following estimates: In 1986, there were approximately one in 17 Māori living in Australia.<sup>41</sup> In 2001, there were around one in seven.<sup>42</sup> By 2006, there were as many as one in six Māori living in Australia.<sup>43</sup>

The Australian-born Māori population has experienced the most rapid growth in recent years. Hamer states:

Another proxy measure for the growth of the Australian-resident Māori population can be found in the ongoing increases in the number of Australian-born Māori living in both Australia and New Zealand. While the New Zealand aspect of this is probably more reflective of patterns of return migration than actual population growth, the combination of the figures indicates significant growth in the Māori population in Australia. Indeed, the number of Australian-born Māori in both countries increased 44.6 percent from 2001 to 2006.<sup>44</sup>

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<sup>35</sup> T. Kukutai and S. Pawar, “A Socio-demographic Profile of Māori living in Australia,” NIDEA Working Papers No. 3 (Hamilton, Australia: National Institute of Demographic and Economic Analysis, University of Waikato, 2013).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 73.

<sup>38</sup> Paul Hamer, “Māori in Australia: Voting Rights and Behaviour,” *Policy Quarterly* 4, no. 3 (2008), 22-29.

<sup>39</sup> Mei Winitana, “Contemporary perceptions of mana wahine Māori in Australia: A diasporic discussion,” *MAI Review* 3, Research Note 4 (2008), 4.

<sup>40</sup> Paul Hamer, “One in Six? The Rapid Growth of the Māori Population in Australia,” *New Zealand Population Review* 33/34 (2008), 153-176, at 153.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 166.

Kukutai & Pawar support this notion, suggesting that between 2001 and 2011, the Australian-born Māori population more than doubled in size, and since 2006 one in three Māori living in Australia was born there.<sup>45</sup>

In terms of citizenship, it is the third generation of Māori diaspora, that is, those individuals that do not inherit citizenship by descent, that are of particular interest. In 2013, the third plus generation made up 5% of Māori in Australia.<sup>46</sup> While this percentage is small, the rapid increase in the number of Australian-born Māori suggests that it will grow in coming years. As Hamer posits, the figures regarding Australian-born Māori “appear to confirm that Māori society has, in part, an increasingly Australian future.”<sup>47</sup>

This is common across the Pacific as Indigenous Peoples are increasingly having to face the migration and displacement of members of their communities. As a result of these migrations, there are now several generations of Polynesian diaspora and a growing number are not citizens of the states that govern their ancestral lands.

The situation of Kānaka Māoli, or Hawaiians, is comparable with that of Māori. Aotearoa/New Zealand and Hawai'i are the two largest Polynesian homelands that also share commonalities in their colonial histories and contemporary challenges, specifically the fact that the Indigenous people are the minority both in terms of ethnicity and government within their respective homelands. It is estimated that at least one in three Hawaiians live outside of the islands.<sup>48</sup> Again, it is difficult to estimate the number of Hawaiians in the diaspora, especially as many Hawaiians move to other states in the United States and, therefore, do not cross international borders. It has also been suggested that more Hawaiians live outside of Hawai'i than at home. In discussing what she labels as outmigration that amounts to diaspora, Trask states:

...so great is the oppression caused outmigration of Hawaiians from their island homes that, despite the highest birthrate in Hawai'i, we remain only twenty percent of the resident population. Some estimates report that more Hawaiians now live on the West Coast of the United States than in their Native land.<sup>49</sup>

In a discussion of “deracination” in the context of Hawaiian migration and mobility, Kauanui points to the generations of Hawaiians who never “left” Hawai'i, but were actually born abroad.<sup>50</sup>

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<sup>45</sup> *Supra* note 35.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Supra* note 40, at 172.

<sup>48</sup> J. Kehaulani Kauanui, “Diasporic Deracination and 'Off-Island' Hawaiians,” *The Contemporary Pacific* 19 no. 1 (2007) 138-160.

<sup>49</sup> Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (Revised ed.) (Honolulu, Hawai'i: University of Hawai'i Press, 1999), 17.

<sup>50</sup> *Supra* note 48, at 147.

Deracination is “to displace a people from their own territory, place, or environment—literally, to uproot.”<sup>51</sup> Kauanui suggests that “this is an enduring problem for off-island Hawaiians, because forms of Hawaiian deracination are produced *through* out-migration from Hawai‘i and Hawaiian diaspora.”<sup>52</sup> Kauanui goes on to state:

The complexity of Hawaiian out-migration necessitates the development of multiple frameworks for studying Hawaiian diaspora. The stakes in understanding out-migration are connected to political recognition, which has become increasingly urgent given the contemporary context of hostility to Hawaiian sovereignty claims - all of which is further complicated by the existence of off-island Hawaiians and their claims to Hawaiian nation(ality).<sup>53</sup>

Indigenous people are often the most vulnerable to displacement as they usually make up the most disadvantaged in society. In discussing the effects of colonisation on Māori, Waldron suggests that it could be argued it has encouraged migration outside of New Zealand, notably to Australia.<sup>54</sup>

The reasons behind the growth of Indigenous diasporic communities differ from one community to another, however, the common thread that runs through them all is the search for a perceived better quality of life, that is, the reasons are largely a result of economic pressures and opportunities.<sup>55</sup> In many cases there is a lack of employment opportunities and/or it has become too expensive to stay at "home." The only option left then, is to leave in order to improve economic circumstances, and ultimately, to survive.

## V. Implications for Māori

There are many social, cultural, and political implications regarding transnational Indigenous communities. For third (plus) generation Māori living overseas, that is, those who do not inherit citizenship by descent, there is the reality of being prevented from contributing to decision-making regarding issues that have the potential to affect all Māori. In order to vote in a New Zealand general election, one must be a New Zealand citizen or a resident in New Zealand for at least one year. The consequence of the growing population of Māori diaspora who are not New Zealand citizens, is the elimination of their Indigenous voices which could otherwise impact important Māori issues. Hamer's research on Māori in Australia indicates that for those overseas-based Māori that are eligible to vote, “continuing to vote in New Zealand is an important element of both maintaining one’s connection to New Zealand and expressing one’s Māori identity.”<sup>56</sup>

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<sup>51</sup> *Ibid.*, 139.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, 140-141.

<sup>54</sup> *Supra* note 10, at 16.

<sup>55</sup> Paul Hamer, *Māori in Australia - Ngā Māori i te Ao Moemoeā*, (Wellington, New Zealand: 2007); Te Puni Kōkiri; *Supra* note 48; *Supra* note 35.

<sup>56</sup> *Supra* note 28, at 25.

Those members of the Polynesian diaspora who are not formal citizens of the states that make up their ancestral lands, are usually named at the border as "visitors." As such, they can have that status revoked at any time. For Māori, being named at the New Zealand border as a "visitor" contradicts a Māori world-view and the terms *tangata whenua* and *tūrangawaewae*. Furthermore, it is at odds with the customary question "nō hea koe?" or "where are you from?" which is traditionally answered with the tribal affiliation of the respondent and, to this day, is the way many choose to reply to the question despite being born and raised outside of their tribal areas.

The process of naming Indigenous people at the border is another example of the power that the state can wield in erasing Indigenous Peoples from their homelands. It could be argued that it is a surreptitious form of ethnic cleansing and continues the colonial tradition of the elimination of the "native problem." Māori who are not citizens of New Zealand can effectively be denied access to their *whenua* (ancestral lands), *marae* (gathering place of cultural significance to a community), and kinship communities. This is problematic as there is usually a continued bond to the *ūkaipō*, to the homeland, and a subsequent natural desire for an eventual return "home."<sup>57</sup>

When discussing the markers of diaspora, which include the homeland as a place of eventual return, Winitana argues that Māori living in Australia "have always considered going back to their home" and that they "maintain continuing relationships with whanau at home."<sup>58</sup> However, the current New Zealand citizenship restrictions fail to acknowledge and foster these connections.

Many members of Polynesian diasporic communities continue to fly back and forth, to cross the boundaries of states, in their quest to maintain the connections to "home." Kauanui argues that Hawaiians who may never have lived in Hawai'i can and do cultivate vital links to Hawai'i, as "home."<sup>59</sup> This process often works both ways as Māori in Aotearoa/New Zealand find ways to reach out to Māori in Australia, to be inclusive, and to strengthen the ties to "home" on this end. Some *iwi* (tribe/s), such as Ngāi Tahu, have established formal *taura here* (binding ropes--refers to a group of people from one *iwi* living in a town or city outside of the tribal area) in many Australian cities to ensure that their people living in those places retain their tribal identity and maintain links to home. Furthermore, those who work for Ngāi Tahu fly to Australia on an annual basis and hold *hui* (meeting/s) with the *taura here* to update them on what is happening with the *iwi* and what resources and programmes they can access. Another example of Māori in Aotearoa/New Zealand being inclusive of the Māori diaspora is the inclusion of Australian *kapa haka* (*haka* group/s, or Māori performing group/s) in Te Matatini, the national Māori performing arts festival, which is the most prestigious and competitive event for *kapa haka*. For over a decade, Australian groups have been involved on a competitive level. In 2016, the Executive Director of Te

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<sup>57</sup> Paul Hamer, *supra* note 55; Ka'ai, Kumar, Ka'ai-Mahuta, Patolo, and Mahuta, "Contemporary issues at the intersection of migration and identity in the Pacific," Ngā Pae o te Māramatanga, International Indigenous Research Conference 2016 Proceedings (Auckland, New Zealand: Ngā Pae o te Māramatanga, 2016).

<sup>58</sup> *Supra* note 39, at 5.

<sup>59</sup> *Supra* note 48, at 146.

Matatini, Carl Ross, stated that “kapa haka is an important way of connecting with our language and culture for Māori overseas.”<sup>60</sup>

Ensuring that the Māori diaspora maintain the connections to home and have a right to return is important both from a Māori world-view, and in light of the Māori sovereignty movement. According to Kukutai & Pawar, “Trans-Tasman migration not only has implications for Māori migrants and their descendants but also has broader relevance for Māori self-determining aspirations in New Zealand.”<sup>61</sup> This is supported by Kauanui in the Hawaiian context. Kauanui posits that “recognising” Hawaiians living outside of the islands “can help to strengthen sovereignty rights based on indigeneity, by acknowledging that even those not in residence have national and citizenship claims.”<sup>62</sup>

Nationality and citizenship affect not only the rights of an individual, but can also have a profound effect on identity and a person's sense of belonging. For example, identity is not formed in isolation, but rather in *relation* to kinship and social groups. This is particularly true for Māori, as it is for other Indigenous Peoples, who place the collective ahead of the individual. Furthermore, identity is developed continually and, in this sense, it is “active.” Freire suggests people must “name the world” for themselves.<sup>63</sup> This highlights the fact that identity is not fixed, but rather it is a process of creation and ongoing transformation. In this way, it is an expression of *tino rangatiratanga*.

Indigenous identities are often challenged, both from within the Indigenous community and from outside of it, by displacement and by being in the diaspora. All of these issues contribute to the growing discourse regarding the politics of identity, particularly in relation to migration and the diaspora.<sup>64</sup>

It should be noted that this argument, for an automatic right to citizenship, is not intended to disregard the complex cultural relationships and tensions between *rāwaho*, or those that live away from home (diasporic communities), and *ahikā*, those who keep the home fires burning (“on-island” identities). That is an important issue, however, it is quite separate from the issue at hand, that is, advocating for *rāwaho* to have the right to go “home” in the first place.

## VI. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

What rights, if any, do Indigenous diasporic communities and individuals have when they are not citizens of the state that governs their ancestral homeland? Further, do Indigenous rights under international law, based on *whakapapa* and ancestral links to land, suggest an automatic right to citizenship be established for Māori from

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<sup>60</sup> Te Matatini, *Te Kuraroa withdraws from Te Matatini 2017* (2016), <http://www.tematatini.co.nz/news-and-events/latest-news/te-kuraroa-withdraws-from-te-matatini-2017>

<sup>61</sup> *Supra* note 35, at 73.

<sup>62</sup> *Supra* note 48, at 146.

<sup>63</sup> Paulo Freire, *Pedagogy of the Oppressed*, (Harmondsworth, United Kingdom: Penguin Books Ltd., 1972), 61-62.

<sup>64</sup> *Supra* note 57.

Aotearoa/New Zealand? The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) may provide some answers.

### *Self-determination*

Under Article 3, Indigenous Peoples have the right to self-determination and “by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>65</sup> This is in line with the *tino rangatiratanga* guaranteed to Māori under Article Two of Te Tiriti o Waitangi. Self-determination is further emphasized in Article 4: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs.”<sup>66</sup> At present, Māori who are not citizens of New Zealand may be prevented from exercising their rights with regard to local, Māori affairs.

### *Participation and decision-making*

Articles 5 and 6 of UNDRIP are particularly interesting when considering the rights of Indigenous diasporic communities. Under Article 5:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.<sup>67</sup>

The “state,” as a term, is ambiguous as presumably states only have responsibilities to the peoples Indigenous to the territories within their borders. Therefore, which “state” is responsible for Indigenous diasporic communities, specifically those individuals who are not citizens of the state that governs their ancestral lands? It seems that those individuals and communities could be without protection under UNDRIP, with no rights as Indigenous People/s in their adopted home and no rights, through lack of recognition, in their ancestral home.

However, while Article 5 does not provide specific details regarding Indigenous diaspora, it could be argued that, when taken in conjunction with other articles in the UNDRIP, it points to the choice for citizenship resting with Indigenous people, not with the state. Article 6 is similarly ambiguous, when considering the Indigenous diaspora, as it states that “every indigenous individual has the right to a nationality.”<sup>68</sup>

Then, in Article 18, “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights.”<sup>69</sup> Māori were never

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<sup>65</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations Document A/RES/61/295 (October 2007).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

consulted about New Zealand citizenship law, particularly the danger of lost citizenship rights for third (plus) generation diaspora. Under Article 18, and the guarantees set out in Te Tiriti o Waitangi, Māori should be consulted and the appropriate amendments should be made to New Zealand citizenship requirements to rectify the situation.

#### *Whakapapa and identity*

Article 9 states 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.”<sup>70</sup> Māori traditions and customs dictate that *whakapapa* trumps everything else when it comes to the right to belong to an Indigenous community or nation. Article 33 (1) goes on to state that “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.”<sup>71</sup> Again, this reinforces the right for Māori to determine their own membership and identity. However, the reference to obtaining citizenship of the states in which Indigenous people live disregards the plight of Indigenous diaspora and their right to citizenship of the states that occupy their traditional homelands.

#### *Access to whenua, tūrangawaewae, and marae*

Under Article 8 (2b & 2c), “States shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of dispossessing them [Indigenous Peoples] of their lands, territories or resources” and “any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.”<sup>72</sup> Indigenous diaspora who do not have an automatic right to citizenship are effectively dispossessed of their traditional territories and resources through restricted access. In addition, it could be argued that the current New Zealand citizenship regulations for third (plus) generation diaspora amount to forced population transfer, which has the effect of violating and undermining Indigenous rights.

Similarly, Article 10 states that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.<sup>73</sup>

Overseas-born Māori who do not qualify for citizenship by descent are effectively being “forcibly” removed from their lands, perhaps not in a physical way, but certainly

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

in a legal sense. What is of particular interest in Article 10 is the “option to return,” which seems to reinforce the idea of “the right to return” with regard to citizenship.

Article 11 (1) and Article 12 (1) refer to historical, religious, and cultural sites. Article 11 (1) states that “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites.”<sup>74</sup> Then, under Article 12 (1), “Indigenous peoples have...the right to maintain, protect, and have access in privacy to their religious and cultural sites.”<sup>75</sup> Once again this reinforces the right of Māori, no matter where they were born, to access and return to their *tūrangawaewae* and *marae*.

Article 25 states that:

Indigenous peoples have the right to maintain 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.<sup>76</sup>

The right to maintain and strengthen the distinctive Māori spiritual relationship with the environment goes back to the argument for access, in the first instance. Furthermore, the reference to the responsibility of Indigenous Peoples to future generations does not explicitly exclude those generations who are a part of the diaspora, therefore, the presumption is that they are *included*. Article 26 (1) supports articles 11 (1), 12 (1), and 25: “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>77</sup>

#### *Indigenous Peoples divided by international borders*

Article 36 (1 & 2) is probably the most relevant article in terms of the rights of diasporic Indigenous communities, despite the likelihood that this article was actually drafted for the purpose of protecting the rights of Indigenous groups still residing on their ancestral lands, only separated by artificial, colonial borders. Under Article 36:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.<sup>78</sup>

An automatic right to citizenship or a multi-generation citizenship by descent clause would go some way to uphold this right for Māori diasporic communities.

## VII. Reflections

Displacement and the migration of Polynesian peoples have created issues around space and place, identity, culture, citizenship, and rights, not just in Aotearoa/New Zealand, but also throughout the Pacific.<sup>79</sup> Furthermore, the growth of these diasporic communities over coming decades is only going to emphasize these issues in the future and the politics of place and identity will become even more significant. This raises the question of whether Indigenous people who are not citizens of the states that constitute their ancestral homelands should be granted an automatic right to citizenship or a multi-generation citizenship by descent clause, regardless of where they were born. It is important to note that a “right to return” in the form of a special route to citizenship for Indigenous people would not be unique as Israel's nationality law includes such a clause for Jewish diaspora,<sup>80</sup> and some self-governing Pacific Islands have recently implemented a similar process.

Implementing an automatic right to citizenship or a multi-generation citizenship by descent clause for Māori would acknowledge the special status of Māori as the Indigenous people of Aotearoa/New Zealand and would align with the promises set out in Te Tiriti o Waitangi. Furthermore, it would be in the spirit of the UNDRIP.

As the dominant and governing majority, Pākehā have defined the place of the Treaty, along with the place of Māori in Aotearoa/New Zealand.<sup>81</sup>

The fact that the law, the education system, and other bases of power in New Zealand have been subject to Pakeha control, has meant that Maori socio-cultural status has been defined by monocultural processes unwilling or unable to adequately serve different cultural needs.<sup>82</sup>

This has led to the current situation of some Māori having to apply for citizenship by grant, along with every other “immigrant” to New Zealand, should they want unrestricted access to their own homeland.

Epeli Hau'ofa suggests that our future “lies in the hands of our own people, not of those who would prescribe for us.”<sup>83</sup> With that in mind, it may be time for Māori to

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Supra* note 57.

<sup>80</sup> *Supra* note 10, at 19.

<sup>81</sup> *Supra* note 4.

<sup>82</sup> *Ibid.*, 173.

<sup>83</sup> Epeli Hau'ofa, "Our Sea of Islands," *The Contemporary Pacific* 6, no. 1 (1994), 147-161, at 159.

test New Zealand citizenship law by lodging a claim with the Waitangi Tribunal. The Waitangi Tribunal was established under the Treaty of Waitangi Act of 1975. It is a permanent commission of inquiry that “makes recommendations on claims brought by Māori relating to legislation, policies, actions or omissions of the Crown that are alleged to breach the promises made in the Treaty of Waitangi.”<sup>84</sup> Alternatively, a claim regarding citizenship and the Māori right to return could be a small part of a larger claim regarding the return of political power, or *tino rangatiratanga*.

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<sup>84</sup> “Waitangi Tribunal - Te Rōpū Whakamana i te Tiriti o Waitangi,” Ministry of Justice (2017), <https://waitangitribunal.govt.nz>

# **‘Forced’ Prior Informed Consent at the Barrel of a Gun: A Case of Indigenous Peoples in Arunachal Pradesh**

**Tilu Linggi**

## **Abstract**

Similar to several alleged human rights abuses documented across various parts of India, the events that were recorded in the years 2011 and 2016 in the eastern and western parts of the state of Arunachal Pradesh drew mass criticism of the growing tendency of the state government to impinge upon the rights of Indigenous Peoples. These two separate events—where Indigenous Peoples were shot and tortured—were seen as the result of the state’s underlying failure to address the principle of free, prior and informed consent (FPIC) in relation to the construction of several micro and mega hydroelectric power projects planned by the state. While states are under obligation to comply with various international laws and national laws including The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA 2006) to respect and ensure prior and informed consent, free from intimidation and coercion, the state’s strategy of discrediting environmental protestors and resorting to violence has led to widespread concerns that such projects are being forced upon Indigenous Peoples without their consent.

## **I. Introduction**

The right to free, prior and informed consent (FPIC) is an extension of the right to self-determination enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007 as well as various other international human rights instruments. This principle is an integral part of international customary practices that allow Indigenous Peoples or tribal, ethnic or local communities around the world to decide their own affairs of life. The aim of this article is to highlight the human rights situation of the Indigenous Peoples of Arunachal Pradesh in the context of violations of FPIC and how these violations are used as a means to implement development projects. First, this article shall attempt to explore the Indigenous Peoples in the region through a historical lens in order to understand their status and how certain special laws that still exist in the state have evolved. This article will also focus on two events that occurred recently in the state as case studies, in light of implementation of FPIC under various international laws and national laws, and especially within the context of UNDRIP and the FRA 2006.

## **II. Indigenous Peoples of Arunachal Pradesh and their Traditional Land Rights: Historical Background**

According to Kingsbury, by the end of the Second World War the idea of Indigenous Peoples as an international legal concept had been shaped by various factors; these include elements of commonality in respect to distinct cultures, historical dispossession, autonomy, lands and territories, and the shared effects of modernity, historical and group priority becoming a part of the international consciousness.<sup>1</sup> Some argue that the

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<sup>1</sup> Benedict Kingsbury, “Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy,” *American Journal of International Law* 92, no. 3 (July 1998), 414-457.

definition provided by the José Martínez Cobo report<sup>2</sup> is believed to be the most widely used understanding of Indigenous Peoples, describing this group as having “...historical continuity with pre-colonial society, possessing some distinctiveness, forming non-dominant sectors of societies, having determination to preserve, develop and transmit their ancestral and ethnic identity in accordance with their own cultural patterns, social institutions and legal systems.”<sup>3</sup> However, this understanding has been deemed unacceptable by many countries.<sup>4</sup> India has dismissed the concept of Indigenous Peoples, arguing it is not applicable to this country.<sup>5</sup> While the term “Indigenous Peoples” was conveniently avoided in international forums for decades, the fundamental criterion of “self-identification” provided in both the Martínez Cobo study and by the International Labour Organization’s (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)<sup>6</sup> is visible within Indian law and policy measures. Though criteria such as “primitive” traits, distinctive culture, geographical isolation, and proximity of contact with community are not legally set out in the Constitution of India, nevertheless these criteria have become well-established and accepted by the Ministry of Tribal Affairs.<sup>7</sup> “Indigenous Peoples” are not mentioned in the Constitution of India but rather the term “Scheduled Tribes” (ST) is used.<sup>8</sup> STs are those tribes or tribal communities or groups which the President<sup>9</sup> may specify by a notification and which Parliament<sup>10</sup> has the choice to include or exclude from the list of notifications issued by the President.

In the case of Arunachal Pradesh, legal and political status of Indigenous Peoples in the pre-independence era provides an understanding of their present way of life and their relationship with the land. Arunachal Pradesh is the land of several Indigenous Peoples.<sup>11</sup> It is argued that until the 19<sup>th</sup> century it was neither part of India

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<sup>2</sup> José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations Document E/CN.4/Sub.2/1986/7/Add.4 (1986), Paras. 379-382.

<sup>3</sup> *Ibid.*, Paras. 379-382.

<sup>4</sup> Megan Davis, “Indigenous Struggles in Standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples,” *Melbourne Journal of International Law* 9, no. 2 (2008), 4-5.

<sup>5</sup> “Universal periodic review (UPR) 2017: India stakeholder’s submission,” Mizoram: Zo Indigenous Forum (2017), 1, [https://www.upr-info.org/sites/default/files/document/india/session\\_27\\_-\\_may\\_2017/universal\\_periodic\\_review\\_upr\\_2017.pdf](https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/universal_periodic_review_upr_2017.pdf).

<sup>6</sup> “The International Labour Organization’s (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169),” 76th ILC session (June 1989), Article 2, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314).

<sup>7</sup> “Annual Report 2016-17,” Ministry of Tribal Affairs, Government of India, Para. 5.10, 38, <https://tribal.nic.in/writereaddata/AnnualReport/AnnualReport2016-17.pdf>.

<sup>8</sup> The Constitution of India, Part XIX, Article 366 (25), <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>.

<sup>9</sup> *Ibid.*, Part XVI, Article 342 (1).

<sup>10</sup> *Ibid.*, Part XVI, Article 342 (2).

<sup>11</sup> There are twenty-six major tribes and more than one hundred sub-tribes each having distinct dialects and cultural practices. See: “A development profile of Arunachal Pradesh,” Department of Planning,

nor China nor Tibet, but rather a region of independent tribes with their own institutions inimical to the outside world. Locals other than Indigenous Peoples were hardly allowed into the region, except for some records of occasional presence of the then-Ahom kings of the undivided State of Assam and Tibetan rulers.<sup>12</sup> With the rise of imperialistic ambitions of the British administration and the industrial revolution's necessity to feed their industries, discovering new colonies became pertinent to British policies.<sup>13</sup> Having occupied a vast part of Assam after the treaty of Yandaboo in 1826, the "discovery"<sup>14</sup> of independent Indigenous tribes in the remote northeastern hill tracts (between Assam valley to the south, Tibetan Autonomous Region to the north, Bhutan to the west and Burma or Myanmar to the east forming the British northeast frontier) was a result of their journey towards finding the place that Kapadia calls "Shangri-La," the popular notion about Tibet that had woven its way into British literature.<sup>15</sup> It is believed that due to the commercial interest of the British East India Company (EIC) in these hilly regions for tea production, forest resources such as timber, rubber and wild animal species were suffering major losses and the Bengal Eastern Frontier Regulation Act 1873<sup>16</sup> (BEFRA) had to be put into place. This also came to be known as the Inner Line Regulations, as it demarcates a territorial line or boundary line preventing the acquisition of land, control of trade and entry of non-natives—including British subjects of certain classes—into the hill tracts beyond the "Inner Line"<sup>17</sup> territory of the Assam region without valid permission (Inner Line Permit) or pass from the district

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Government of Arunachal Pradesh, (Itanagar, India: August 2017), 3-4,  
[http://www.arunachalplan.gov.in/html/docs/1\\_profile\\_arp.pdf](http://www.arunachalplan.gov.in/html/docs/1_profile_arp.pdf).

<sup>12</sup> For instance, according to Phukan, one of the oldest historical records dating back to 1524 A.D. found on the Sadiya Stone Pillar inscription indicated that the Mishmi tribe had an agreement with the Ahom King Chao-pha Siu-hum-mong (also known as Dihingia Raja), who granted them rights to reside in the present day Dibang region within certain terms and conditions. See: J. N. Phukan, "The Date of the Sadiya Stone Pillar Inscription," *Sadiya Stone Pillar Inscription*, ed. Jayanta Bhusan Bhattacharjee (Shillong, India: North Eastern Hill University), 87,  
[http://dspace.nehu.ac.in/bitstream/123456789/13018/1/The%20date%20\(JN%20Phukan\).pdf](http://dspace.nehu.ac.in/bitstream/123456789/13018/1/The%20date%20(JN%20Phukan).pdf).

<sup>13</sup> Sudatta Sikdar, "Tribalism vs. colonialism: British capitalistic intervention and transformation of primitive economy of Arunachal Pradesh in the nineteenth century," *Social Scientist* 10, no. 12 (1982), 19.

<sup>14</sup> Mackenzie argued that the independent frontier tribes were discovered as a larger part of British expedition under the imperialistic ambition of the then-Governor General Lord Cornwallis. See: Alexander Mackenzie, "History of relations of the government with the hill tribes of the north-east frontier of Bengal," The Home Department Press: Government of India (Calcutta, India: 1884), 7.

<sup>15</sup> Harish Kapadia, "The promised land," *The Himalayan Journal* 63, no. 5 (2007), Para 24,  
<https://www.himalayanclub.org/hj/63/5/the-promised-land/>.

<sup>16</sup> The Act was part of the regulations that were made under the then-federal legislations, namely the Government of India Act, 1870, and the Government of India Act, 1915. The regulation that was initially enacted, with the motive of protecting British commercial interests and administration, was later framed as a policy that aimed to protect the hill tribes' way of life until Indian independence and beyond. See: Robert Lyngdoh, "Vision for democratic and progressive Meghalaya," *Vision for Meghalaya on and beyond the inner line permit*, eds. H. Srikanth et al. (Shillong, India: ICSSR-NERC, 2012), 10-11.

<sup>17</sup> This line extended to the foothills of Assam up until which British India exercised their regular and ordinary jurisdiction of the courts of law and claimed their suzerainty. However, in the territory beyond the Inner Line to the Outer Line surrounding the Burmese, Chinese and the Tibetan borders (undetermined or undefined boundaries), British India did not exercise any regular administration except some sort of personal influence with the tribes. *Supra* note 16, at 40-41.

administration.<sup>18</sup> Sir Robert Reid argued that, according to the Government of British India, the jurisdiction of the hill tracts between the Inner Line and the Outer Line was of “loose” control.<sup>19</sup> The setting of frontier limits was a matter of the British administration’s own arbitrary approximation planned according to what suited their purposes.<sup>20</sup>

The Assam Frontier Tract Regulation (Regulation 2) of 1880 was another law that sought to exclude the operation of any existing Act in the inhabited frontier tracts of Assam.<sup>21</sup> These frontier tracts, namely the Balipara Frontier Tract, the Lakhimpur Frontier Tract and the Sadiya Frontier Tract, were declared as “Backward Tracts”<sup>22</sup> under the Government of India Act of 1919, wherein no Act of Provincial Legislature was permitted to apply except at the governor’s discretion.<sup>23</sup> In 1935, these “Backward Tracts” were divided into “Excluded Areas” and “Partially Excluded Areas” whereby Arunachal Pradesh was brought under “Excluded Areas” and therefore excluded from the general administration and application of laws made by provincial legislature, with the governor taking direct control.<sup>24</sup> In other words, while administrative divisions of

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<sup>18</sup> *Supra* note 16, at 30-32.

<sup>19</sup> The then-Viceroy of British India, Lord Hardinge, wrote in December 1910: “...We only claim suzerainty up to the foot of the hills. We have an inner line and an outer line. Up to the inner line we administer in the ordinary way. Between the inner and the outer lines we only administer politically. That is, our Political Officers exercise only loose jurisdiction, and to prevent trouble with the frontier tribes, passes are required for our subjects who want to cross the inner line. The country between the two lines is very sparsely inhabited and is mostly dense jungle.” See: Robert Reid, *History of the frontier areas bordering on Assam from 1883-1941* (Delhi, India: Eastern Publishing House, 1942), 221. Similarly, Lord Minto, the predecessor of Lord Hardinge, wrote on 23 October, 1910: “The question of future arrangements for controlling and safeguarding the area between the administrative boundary and the new external frontier remains to be considered. We consider that our future policy should be one of loose political control, having as its object the minimum of interference....” *Ibid.*, 228.

<sup>20</sup> *Ibid.*, 227.

<sup>21</sup> Section 2 of the Regulation excluded operation of enactments relating to civil and criminal procedure. See: J.N. Das, *Land System of Arunachal Pradesh* (New Delhi, India: Indian Law Institute, 1989), 6, <http://14.139.60.114:8080/jspui/bitstream/123456789/725/7/Arunachal%20Pradesh.pdf>

<sup>22</sup> Until 1914, these tracts were administered under the name of three separate sections: Central Section and Eastern Section (for the administration of Abor, Mishmi and Bor Khampti tribes); Western Section (between Subansiri and Tawang region for the rest of the tribes such as Aka, Dafla and Miris); and the Lakhimpur Frontier Tract. These tracts were renamed as “Backward Tracts.” In 1919, the Central and Eastern Sections were renamed as the Sadiya Frontier Tract and the Western Section was renamed as the Balipara Frontier Tract. In 1943, by carving out certain portions of Sadiya and Lakhimpur Frontier Tract, the Tirap Frontier Tract was created. *Supra* note 19, at 237-249.

<sup>23</sup> *Supra* note 21, at Section 52A.

<sup>24</sup> While partially excluded areas could send representatives to the legislature, the excluded areas had no representatives in the legislature and their administration was therefore vested in the hands of the governor. See: Chai-fong Chan, “British colonial policy in the Naga Hills: With special focus on control area policy,” *The Komaba Journal of Area Studies*, no. 3 (1999), 80. Some argued that such policies did not go well with some of the “mainstream nationalists” who believed that these designs were part of a larger “divide and rule policy” of British India. However, the Constituent Assembly of independent India decided to keep them the way they were after the Administrative Reforms Commission in 1967 interacted with the tribes of the Excluded Area in the North East Frontier Agency (NEFA). See: S. Baruah, “Minority policy in the north-east: Achievements and dangers,” *Economic and Political Weekly* 24, no. 37 (1989), 2087-2091.

the state continued, this area retained its loose administrative character.<sup>25</sup> The tribes, adverse to the advent of outsiders, therefore resisted strongly and were met with punitive expeditions by the British administration.<sup>26</sup> The overall objective of these missions remained the same: to explore and map the region in order to determine suitable international boundaries between Tibet and British India, and to collect taxes. Describing the status quo of the tribes' territories, Hudson argues that since tribes, under international law, coped poorly in transactions as sovereign states, their tracts of land were conceived as *res nullius*. These tracts of land were consequently annexed, deeming them uninhabited despite the obvious presence of Indigenous Peoples.<sup>27</sup>

Further administrative divisions continued years after the British had left. Post-independence India renamed all the tracts and districts together with the Naga tribal area as the North East Frontier Agency (NEFA) on January 5, 1954, and several administrative units were reconstituted accordingly.<sup>28</sup> Thereafter, the three-tiered *Panchayati Raj* decentralization system for local governance was introduced in 1968 based on the recommendations of a federal committee. Accordingly, in 2001, the Arunachal Pradesh Panchayati Raj Act of 1997 came into force. It is argued that, while it introduced the three-tiered system at local levels based on systems prevalent in mainland India and alien to NEFA, it diminished the primacy of traditional local systems of governance that existed prior to the new system.<sup>29</sup> Some argued that India

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<sup>25</sup> Holdich argued that these unadministered tracts with loose political control acted, in a way, as a buffer zone for British India. See: T.H. Holdich, "The north-eastern frontier of India," *Journal of the Royal Society of Arts* 60, no. 3092 (1912), 379-392.

<sup>26</sup> Some of these punitive expeditions included the Abor Expedition of 1893-1894, the Aka Expedition of 1833-1884, the Apa Tanang or Apatani Expeditions of 1896, the Miri Mission of 1911 and the Bebejiya Expedition of 1899 against the Abor (now known as Adi), Aka, Apatani, Miri and Idu Mishmi tribes respectively. Punitive measures included burning down of whole family homes and villages, including food crops and properties, with great disproportionate use of military force. For instance, in the case of the attack on Damroh village during the Abor Expedition, the military forces never determined who was the true culprit even though the villages of Bomjir, Dambuk, Mimasipu, Silluk and Damroh were shellfired, attacked and burned with the help of a large army. *Supra* note 19, at 197. Similarly, during the Aka Expedition, granary and livestock of the Dafla tribe (now known as Nyishi) in Yefan (or Effa), the houses of three village leaders of the raid were set ablaze. *Supra* note 19, at 272-273. In the case of the Bebejiya Mishmi Expedition, 100 men, 90 Madras (Madras) Sappers, 900 Infantry, 95 police and two rocket artilleries were deployed. Eventually, four small villages were burned down, with crops and properties destroyed. According to Reid, the intention of the officers was to punish the whole tribe rather than the main culprit. *Supra* note 19, at 204-205. These measures stood contrary to England's highly esteemed image in the seventeenth century in the Western hemisphere.

<sup>27</sup> G.F. Hudson, "The frontier of China and Assam: Background to the fighting," *The China Quarterly*, no. 12 (1962), 203-206.

<sup>28</sup> J.N. Das, *Supra* note 21 at 7.

<sup>29</sup> The Monpa tribe of Tawang and Kameng districts has their own process of selecting village heads known as *Tsorgens*, indicating traditional political institutions. Similarly, Indigenous Peoples in the state have their own system of administering justice. These judicial systems are still in existence among the Abbala of Idu Mishmi tribe, the Pharai of Kaman Mishmi tribe, the Kebang of Adi tribe, the Builiang of Apatani tribe, the Ngojowa of Wancho tribe, the Jungblu of Shertukpen tribe, the Mokchup of Khamptis, the Mele of Hrusso tribe, and the Nockthung of Tangsa tribe respectively. These institutions vary in their forms such as direct democracies, republics, monarchies or chieftain systems. However, with the introduction of the Assam Frontier (Administration of Justice) Regulation of 1945,

followed an assimilationist and integrationist approach with top-down federal planning, rendering local self-governance a nominal presence.<sup>30</sup> Arguably, the loose administrative control and the space for self-consciousness of tribes to live in their own predetermined cultural, political and economic ways gradually shrunk in the larger discourse of an assertive nation-building process after the 1962 Indo-Chinese War.<sup>31</sup> This included imparting Hindi compulsorily in schools through Hindi medium schools; renaming persons and places with non-Indigenous names; couching traditional folklores in alternative narratives in order to “mainstream” them; hero worshipping of war martyrs; blocking traditional economic trade routes with Tibet; and overhauling the whole sociocultural, economic and political structure of the region. Bhattacharjee sums up this “colonization of psyche” that began with the systematic demolition and dispossession of values, traditional cultural beliefs in inanimate, animate and the human worlds, institutions, and languages of the Indigenous Peoples in the state all through modern statecraft imposition.<sup>32</sup> In 1972, the State attained Union Territory status after bifurcation from Assam. It was rechristened as NEFA, and subsequently proceeded to become a full-fledged state on February 20, 1987, under the name of Arunachal Pradesh.<sup>33</sup>

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the selection of village elders for the administration of justice was subjected to the Deputy Commissioner’s discretion.

<sup>30</sup> The challenge of maintaining the balance between assimilation of tribal peoples into the “mainstream” and securing their identity without changing their way of life and compromising “development” has always been present, even before the Union of India. These challenges are implicitly reflected in the policies of different political parties depending upon who comes in to power, and yet they are seldom discussed. See: Apoorv Kurup, “Tribal law in India: How decentralized administration is extinguishing tribal rights and why autonomous tribal governments are better,” *Indigenous Law Journal* 7, no. 1 (2008), 87-126.

<sup>31</sup> Major restructuring of administrative, legal and policy measures were undertaken in order to “connect” the administratively excluded Indigenous Peoples with the “mainland.” See: V. Bijukumar, “Social Exclusion and Ethnicity in Northeast India” *The NEHU Journal* 11, no. 2 (2013), 19-35. It is believed that, to a large extent, scholars like G.S. Ghurye and N.K. Bose had wider roles in accelerating assimilation and integration processes, as they strongly criticized and denied that the tribes in India were Indigenous Peoples. See also: V. Xaxa, “Tribes as indigenous people of India,” *Economic and Political Weekly* 34, no. 51 (1999), 3589-3595. Some Indian writers even criticized the writing of British officers such as Robert Reid, believing their ideas to be a part of the “divide and rule” policy. The barter system of economy was replaced by the monetized economy. Hindi was “imposed” in the boarding schools of remote villages without any policy option to formally study one’s own mother tongue even as a third language, except for the Bodhi language in a few districts in government schools. The current general situation is that almost all tribes in the state speak Hindi as a medium of inter-tribe communication. Many children and parents no longer speak their own dialect at home however in some communities, the revitalization of local dialects is currently in process. Xaxa uses the term “acculturation” for such phenomena whereby tribes adopt the ideas and values of the dominant community rather than being part of that society. See: V. Xaxa, “Transformation of tribes in India: Terms of discourse,” *Economic and Political Weekly* 34, no. 24 (1999), 1519-1524. See also: E. Mukhopadhyay, “Arunachal: The changing profile of closed culture,” *Social Scientist* 20, no. 3/4 (1992), 68-74.

<sup>32</sup> Sukalpa Bhattacharjee, “Understanding the ‘tribal’: Postcolonial identity and creative writing,” *Man and Society: A Journal of North East Studies*, ed. Udayon Mishra (Shillong, India: ICSSR-NERC, 2011), 1-12.

<sup>33</sup> The naming of the State also resembled the general integrationist mood of mainstream parliamentarians. ‘Arun’ refers to Sun and ‘Aalay’ for the region in Hindi, meaning thereby the region

While some of the laws enacted during the British period of rule continue to exist as instruments of “positive discrimination,” there are State laws that have been created in recent years that arguably cede the rights of Indigenous Peoples to the government. The Arunachal Pradesh (Land Settlement and Records) Act of 2000 invoked the concept of state lands<sup>34</sup> and forest<sup>35</sup> that reduced Indigenous Peoples’ traditional ownership rights to mere “use rights” and made them subject to formal proof of occupancy.<sup>36</sup> Similarly, the Industrial Policy of 2001 sought to significantly lease out land, giving a hundred percent equity ownership to the non-native entrepreneurs if they set up such units.<sup>37</sup> This policy also dropped the requirement for securing business licenses, which once had been difficult to obtain. Such initiatives were seen as bypassing land rights provided for Indigenous Peoples by the State and therefore weakening their claims to land in favor of ever-increasing development projects.

### III. Dams and the Conflicts in Arunachal Pradesh

Some experts claim that while the Central Electricity Authority (CEA) had identified the northeastern States as a “future powerhouse” in 2001, Arunachal Pradesh has the maximum share of hydropower potential.<sup>38</sup> According to the State government’s own report, by 2015 the State government had signed 159 Memoranda of Understanding (MoUs) and Memoranda of Agreements (MoAs) with various public and private companies and received 1495.62 crores (US \$230.09 million) since 2005.<sup>39</sup> Another report stated that hydroelectric power projects were allegedly sold out to the National Hydroelectric Power Corporation (NHPC) in lieu of a 225 crores (US \$34.62 million) loan in 2007 in order to revive public sector banks like State Apex Banks in Arunachal Pradesh.<sup>40</sup> There were no debates or open competitive bidding ever reported.

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that lays in the lap of sunlight or the region which first receives the sunlight in India. Similarly, when Nagaland, a separate state, was being proposed for the Naga tribe, objections were raised in the parliament about the suffix “land” and different terminologies were being suggested. See: S. Nag, “Nehru and the Nagas: Minority nationalism and the post-colonial state,” *Economic and Political Weekly* 44, no. 49 (2009), 54.

<sup>34</sup> The Arunachal Pradesh (Land Settlement and Records) Act (2000), Sections 9 (1) and (2), [http://www.lawsfindia.org/pdf/arunachal\\_pradesh/2000/2000AP10.pdf](http://www.lawsfindia.org/pdf/arunachal_pradesh/2000/2000AP10.pdf).

<sup>35</sup> *Ibid.*, Section 10 (1) and (2).

<sup>36</sup> While the law does not outright reject community ownership and the role of village councils, it does not confirm them either in explicit terms. See: D. Greiger, *Turner in the Tropics: The frontier concept revisited*, Doctoral Thesis (Universität Luzern, Switzerland: 2009), 154.

<sup>37</sup> *Ibid.*, 155.

<sup>38</sup> N. Vaghlikar and P.J. Das, “Damming the Northeast,” *Briefing Paper* (Pune/Guwahati/New Delhi: Kalpavriksh, Aaranyak and ActionAid India, 2010), 3.

<sup>39</sup> “Arunachal Pradesh received Rs 1,495.62 crore as upfront money for hydel projects’: CM Nabam Tuki,” *The Economic Times* (July 2015), [http://economictimes.indiatimes.com/industry/energy/power/arunachal-pradesh-received-rs-1495-62-crore-as-upfront-money-for-hydel-projects-cm-nabam-tuki/articleshow/48100949.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/industry/energy/power/arunachal-pradesh-received-rs-1495-62-crore-as-upfront-money-for-hydel-projects-cm-nabam-tuki/articleshow/48100949.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>40</sup> These projects included the highest megawatt projects, such as the 2880 megawatt (MW) Dibang Multipurpose Hydroelectric Project (DMP), the 600 MW Tawang I and the 800 MW Tawang II HEPs, all projects where human rights abuses were reported. See: T. Rina, “As Arunachal prepares to play the

The human rights abuses that ensued in subsequent years related to several Hydroelectric Power projects (HEPs) raised further questions about the authority's transparency in leasing out natural resources.

It was reported that on October 5, 2011, paramilitary security forces in Roing town, of the Lower Dibang Valley District of Arunachal Pradesh, shot nine students with automatic assault rifles while they were celebrating an annual local festival.<sup>41</sup> While the district administration alleged that Maoist outfits had infiltrated the town, the Indigenous Peoples of the district claimed that the context behind the shooting was the frustration and inability of the state government to obtain the consent of the local community through due process of public hearing, as mandated by law, for the upcoming 2880 MW DMP. The hearing was postponed for the tenth consecutive time as Indigenous Peoples opposed it.<sup>42</sup> The subsequent public hearing was slated for October 24 of that same year. Locals alleged that the Maoist stereotyping of Mishmi Indigenous Peoples was a preemptive plan of the district administration to instill terror; increase large paramilitary forces in a sparsely populated town; and conduct the public hearing process forcefully.<sup>43</sup> Several letters and memoranda were submitted to the Public Hearing Panel of the DMP and to the concerned ministry in New Delhi regarding the vulnerability of the project as per the scientific study undertaken and related seismology, biodiversity and ecology concerns.<sup>44</sup> However, despite all concerns

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part of India's power generator, anxious citizens push back," *Scroll.in* (December 2016), <https://scroll.in/article/print/824982>.

<sup>41</sup> R. Mimi, "Roing police and STF celebrates Durga puja by spraying bullets at citizens," *Arunachal Times* (October 2011), <http://www.arunachaltimes.in/archives/oct11%2008.html>. The authority claimed that the bullets used against the victims were rubber pellets. However, on close examination of medical reports of one of the victims by the author, it was found that metallic pellets were in fact used. The allegation of intrusion of Maoists into the festival area by the district administration has not been proven at the time of this writing and a case against the authority is pending in the court of law.

<sup>42</sup> "Public hearing is an imposition on the will of the people: Idu society," *The Arunachal Times*, (October 2011), <http://www.arunachaltimes.in/archives/oct11%2025.html>.

<sup>43</sup> According to a report, similar tactics were reported in the State of Odhisa when the state government failed to overturn the Gram Sabha or Village Council decisions with regard to bauxite mining in the Niyamgiri hills. Before approaching the Supreme Court in 2016 to overturn its earlier decisions, villagers were reportedly harassed, imprisoned and even killed by armed police forces. See: A. Kothari, "Decisions of the people, by the people, for the people," *The Hindu* (May 2016), <http://www.thehindu.com/opinion/op-ed/Decisions-of-the-people-by-the-people-for-the-people/article14324692.ece>.

<sup>44</sup> The dam originally proposed was 3000 MW. Twice, the MoEFCC Forest Advisory Committee (FAC) rejected it, arguing that the project would result in the destruction of more than 4,000 hectares (9,900 acres) of forests. Some experts argued that construction of this project would lead to threatening important species such as the Bengal Florican, identified as critically endangered by the International Union for the Conservation of Nature (IUCN), as well as different tiger species and several others. Environment Impact Assessment (EIA) studies of NHPC reportedly miscalculated and denied the existence of any major wildlife in the area despite the existence of the Mehao Wildlife Sanctuary in the proposed project vicinity. This project would affect 155 families in five villages. However, the project was cleared on the condition that 10 meters of dam height would be reduced under duress by the Prime Minister's Office. See: T. Wilkes, "India approves projects in dash for growth, alarming green groups," *Reuters* (October 2014), <http://in.reuters.com/article/india-environment-growth-project->

expressed by experts and Indigenous Peoples, the project was finally given clearance by the state government.<sup>45</sup> The then-Prime Minister's inauguration of the foundation stone for the project in 2008 in the state capital, far from the project site, was criticized as a breach of law since public hearing processes had not even started in the project-affected area.<sup>46</sup>

A similar incident of human rights abuses emerged in May 2016 in Tawang, the westernmost district of the same state, resulting in the death of two monks by gunshots. Both the nineteen-year-old and the thirty-one-year-old victims were protesting with several other monks for the release of their arrested leader Lama Lobsang Gyatso, who was spearheading the anti-dam movement under the banner of Save Mon Region Federation (SMRF).<sup>47</sup> SMRF, under its leader, had been campaigning against the 780 MW Nyamjang Chu HEP proposed to be constructed at Zemithang village in Pancheng Valley by Bhilwara Energy Limited (BEL) and against corruptions and malpractices that followed project allotments.<sup>48</sup> Locals argued that the project, if commenced, would affect forty-seven families in Tawang alone. While the project was granted environmental clearance on April 19, 2011, by the Ministry of Environment, Forest and Climate Change (MoEFCC), the National Green Tribunal (NGT) suspended it on April 7, 2016. A shooting incident ensued during the subsequent month of the suspension of the project, as authorities refused to release the SMRF leader on bail. In both instances, authorities have attempted to discredit local movements and disregard the local community's relationship with their land in order to facilitate development. A recent report released by Global Witness estimated that the criminalization, victimization, physical assault, intimidation and state repression of environmental protestors and civic activists around the world has risen in recent years and 40% of these victims are

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idINKCN0HY2GN20141009. See also: S. Chakraborty, "Rejected by experts, Dibang hydro project gets green nod," *Business Standard* (June 2015), [http://www.business-standard.com/article/economy-policy/rejected-by-experts-dibang-hydro-project-gets-green-nod-115062400037\\_1.html](http://www.business-standard.com/article/economy-policy/rejected-by-experts-dibang-hydro-project-gets-green-nod-115062400037_1.html). See also: EIA Resource and Response Centre, "Comments on EIA of Dibang Multipurpose Project by Anwaruddin Choudhury," (New Delhi, India: Legal Initiative for Forest and Environment, n.d.), <http://www.ercindia.org/files/eiadocuments/eiareports/Comments%20on%20Dibang%20EIA%20-%20Anwaruddin%20Choudhury.pdf>.

<sup>45</sup> Janaki Lenin, "India's largest dam given clearance but still faces flood of opposition," *The Guardian* (October 2014), <https://www.theguardian.com/environment/india-untamed/2014/oct/22/indias-largest-dam-given-clearance-but-still-faces-flood-of-opposition>.

<sup>46</sup> "Development with brutality," Editorial in *Economic and Political Weekly* 46, no. 42 (October 2011), 7-8.

<sup>47</sup> It was reported that he was arrested after he declared he was filing a Public Interest Litigation (PIL) against the malfunctioning of the newly built Mukto Shakang Chu HEP that collapsed within three months of its commissioning. The inquiry commission report stated that police did not follow standard procedure and used excessive and indiscriminate force against civilians. Despite such findings, the administration could not reach any meaningful conclusion even after ten months of investigation. See: M. P. Nayak, "Dead of Buddhist lama in police firing: SC notice to Arunachal Pradesh Govt," *Live Law* (19 April 2017), <http://www.livelaw.in/death-buddhist-lama-police-firing-sc-notice-arunachal-pradesh-govt-read-petition/>.

<sup>48</sup> *Save Mon Region Federation v. Union of India and Others*, Appeal No. 39 of 2012, National Green Tribunal (New Delhi, India: April 2016), <http://www.elaw.org/system/files/savemon.pdf>.

Indigenous Peoples.<sup>49</sup> According to the report, India stood as the fourth peak country among twenty-four others that were surveyed in 2016.<sup>50</sup> As per the same report, the root cause of such violence is believed to be the imposition of projects on communities without their free, prior and informed consent (FPIC) around their land resources.<sup>51</sup>

#### IV. The Principle of FPIC under International Law and Indian Law

The principle of free, prior and informed consent (FPIC) has not been defined in any conventions under international law. However, it is linked to treaty norms such as the right to self-determination, the right to maintain culture and the principle of non-discrimination existing under various international human rights instruments. It has also been widely interpreted through the work of the Special Rapporteur on the Rights of Indigenous Peoples, the United Nations Permanent Forum on Indigenous Issues (UNPFII) and the United Nations Expert Mechanism on Indigenous Peoples' Rights (EMRIP), as well as human rights treaty bodies such as the Committee on the Elimination of Racial Discrimination (CERD)<sup>52</sup> and the Committee on Economic, Social and Cultural Rights (CESCR).<sup>53</sup> The basic and general understanding of FPIC is clearly elucidated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007.<sup>54</sup> According to the Declaration, states, without any coercion, intimidation or manipulation, sufficiently in advance before adopting and implementing legislative or administrative measures<sup>55</sup> or undertaking projects,<sup>56</sup> are to seek consultation or consensus of Indigenous Peoples where their land rights may be affected.<sup>57</sup> While Indigenous Peoples themselves are to decide the representative institutions that are entitled to express consent on behalf of the affected community, it is

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<sup>49</sup> The report estimates that while 16 people were reported as killed in India, many killings went unreported. See: Global Witness, "Defenders of the earth" (July 2017), 6-7.

<sup>50</sup> *Ibid.*, 9

<sup>51</sup> *Ibid.*, 7.

<sup>52</sup> United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23. Rights of Indigenous Peoples*, United Nations Document CERD/C/GC/23 (August 1997), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11)).

<sup>53</sup> United Nations Economic and Social Council, *General Comment No. 21, Right of everyone to take part in cultural life* (Article 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), United Nations Document E/C.12/GC/21 (December 2009), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11).

<sup>54</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* (2 October 2007), A/RES/61/295.

<sup>55</sup> *Ibid.*, Article 19.

<sup>56</sup> *Ibid.*, Article 32.

<sup>57</sup> United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, United Nations Document E/CN.4/Sub.2/AC.4/2005/WP.1, (July 2005), Para. 57, [www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc](http://www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc).

the duty of States Parties under Article 32 to obtain FPIC in good faith for the approval of any projects affecting Indigenous Peoples' lands and to ensure and verify effective mechanisms and procedures are followed for FPIC.<sup>58</sup> Daes argued in her report as the United Nations Special Rapporteur on the Rights of Indigenous Peoples<sup>59</sup> that the right to grant or withhold consent is part of or an extension of the right to self-determination, including the right to pursue economic development under common Article 1 of both the International Covenant on Civil and Political Rights (ICCPR)<sup>60</sup> and the International Covenant on Economic and Social Rights (ICESCR).<sup>61</sup> While interpreting Article 27 of ICCPR in General Comment No. 23, the Committee on Economic, Social and Cultural Rights (CESCR) has called upon States to protect the rights of ethnic, religious, and linguistic minorities that are connected to the control over use of lands and resources.<sup>62</sup> Similarly, CESCR has called upon States Parties to respect the principle of FPIC and to ensure protection of Indigenous rights to own, develop, control and use their communal lands, territories and resources under Article 15(1)(a) of ICESCR in General Comment No. 21.<sup>63</sup> The Committee on the Elimination of All Forms of Racial Discrimination (CERD), in its interpretations of the rights of Indigenous Peoples in applying the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>64</sup> has called upon States Parties in General Recommendation No. 23 to not only consult Indigenous Peoples but also to obtain their informed consent with regards to development and resource exploitation within their traditional lands.<sup>65</sup> The CERD has also urged States Parties to recognize the right to own, develop, control and use

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<sup>58</sup> *Supra* note 54.

<sup>59</sup> Erica-Irene A. Daes, *Prevention of discrimination and protection of indigenous peoples: Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur*, United Nations Document E/CN.4/2004/30 (2004), Para. 38, [http://hrlibrary.umn.edu/demo/IndigenousSovereigntyNaturalResources\\_Daes.pdf](http://hrlibrary.umn.edu/demo/IndigenousSovereigntyNaturalResources_Daes.pdf).

<sup>60</sup> United Nations General Assembly, *Resolution 21/2200A: International Covenant on Civil and Political Rights*, United Nations Document A/RES/21/2200A (December 1966), <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

<sup>61</sup> United Nations General Assembly, *Resolution 21/2200: International Covenant on Economic, Social and Cultural Rights*, United Nations Document A/RES/21/2200 (December 1966), <http://www.un-documents.net/a21r2200.htm>.

<sup>62</sup> United Nations High Commissioner for Human Rights, *General Comment No. 23: The rights of minorities*, United Nations Document CCPR/C/21/Rev.1/Add.5 (April 1994), Article 27, Para. 3.2, <http://www.refworld.org/docid/453883fc0.html>.

<sup>63</sup> Committee on Economic Social and Cultural Rights, *General Comment No. 21: Right of everyone to take part in cultural life (Article 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights)*, United Nations Document E/C.12/GC/21, (December 2009), Paras. 36-37, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11).

<sup>64</sup> United Nations General Assembly, *Resolution 20/2106: International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations Document A/RES/20/2106 (December 1965), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

<sup>65</sup> United Nations Commission on the Elimination of Racial Discrimination, *Report of the committee on the elimination of racial discrimination: Annex V – General Recommendation XXIII*, United Nations Document Supplement No. 18 A/52/18 (September 1997), Para. 4(d), <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf>.

Indigenous communal lands, territories and resources.<sup>66</sup> While the right to FPIC under various provisions of UNDRIP is not to be regarded as bestowing a “veto power” to Indigenous Peoples, the same principle should also not be a mere formality of informing Indigenous Peoples their lands will be used for an exploitative purpose.<sup>67</sup> In cases where development projects have significant and direct impact on Indigenous Peoples’ lives, there must be a strong presumption of considering Indigenous Peoples’ consent.<sup>68</sup> However, Indigenous Peoples in international forums have interpreted the FPIC principle as having the right to say “no” to a proposed project during negotiations with the given government.<sup>69</sup> While it is argued that the UNDRIP and general recommendations and comments of the treaty bodies might be short of attaining the status of customary international law in explaining the status of FPIC, they are slowly shaping and challenging state practice which eventually could lead to attainment of legal status for this concept.<sup>70</sup> The minimal consensus demonstrated by international human rights treaties is, nonetheless, the requirement of consultation in good faith towards achieving the objective of consent. In clear terms, it is understood that FPIC is a pathway for Indigenous Peoples to exercise the right to self-determination and participate in public affairs.

India voted in favor of UNDRIP and ratified ILO Convention 107. Apart from from these instruments, India voted in favor of the outcome of the United Nations Conference on Environment and Development of 1992 (also known as the Rio Declaration), which plays a significant role regarding India’s obligation to reflect its basic principles in order to support and enable Indigenous Peoples’ and local communities’ effective participation on matters affecting them, especially those related to environment and development.<sup>71</sup> As a result, public consultation was made one of the mandatory legal requirement in the environmental clearance process for projects

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<sup>66</sup> *Ibid.*, Para. 5.

<sup>67</sup> *Supra* note 57, at Paras. 45-57.

<sup>68</sup> *Ibid.*

<sup>69</sup> Some scholars believe Indigenous Peoples in international fora have interpreted FPIC as having the right to say “no” particularly during the UN Workshop on Indigenous Peoples, Private Sector Natural Resources, Energy and Mining Companies and Human Rights held in Geneva in 2001. See: United Nations Department of Economic and Social Affairs, Workshop on free, prior and informed consent: An overview of the principle of free, prior and informed consent and Indigenous Peoples in international and domestic law and practices, Secretariat of the Permanent Forum on Indigenous Issues, United Nations Document PFII/2004/WS.2/8 (January 2005), [www.un.org/esa/socdev/unpfii/documents/workshop\\_FPIC\\_tamang.doc](http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc)

<sup>70</sup> Tara Ward, “The right to free, prior, and informed consent: indigenous peoples’ participation rights within international law,” *Northwestern Journal of International Human Rights* 10, no. 2 (2011), 84. See also: *supra* note 4, at 27.

<sup>71</sup> For instance, Article 22 of the Rio Declaration declares, “Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.” The Declaration uses the term “Indigenous Peoples”; additionally, India’s voting in favor of UNDRIP in 2007 reaffirms its commitment to promote the rights of Indigenous Peoples.

through a notification in 2006.<sup>72</sup> Public hearings at project sites and obtaining written responses consequently became two mandatory components of public consultations.<sup>73</sup> The Indian Supreme Court and the High Courts of various states have observed that the public hearing process must ensure wide participation of the public in decisions affecting them. However, the criticism of this process has been that, while it seems to act as a “democratic” valve, this consultation typically only comes at a later stage in project cycles, when space for meaningful participation of those affected by the project is not guaranteed.<sup>74</sup> There are no options for public participation in site selection at an earlier stage.<sup>75</sup> Similarly, there is no mechanism to ensure either effective responses by project proponents to queries raised during a public hearing, or to make final Environmental Impact Assessment (EIA) reports public in order to check whether concerns raised at hearings have been accounted for, despite NGT guidelines.<sup>76</sup> In other words, meaningful public consultations through public hearings remain a mere consultation exercise, especially where protests are taking place. Where there are strong laws to ensure certain rights in decision-making, there is an attempt by the state to dilute them. For instance, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006 (also popularly known as the Forest Rights Act or FRA) provides a number of rights to Scheduled Tribes (STs) and traditional forest dwellers (TFDs). These include protection from eviction or being removed from land until the recognition and verification process is complete;<sup>77</sup> the right to live in state forest land under individual or common occupation for livelihood;<sup>78</sup> the right of ownership access to collect, use and dispose minor forest produce;<sup>79</sup> the rights of settlement and conversion of all forest villages into revenue villages;<sup>80</sup> the right to protect, conserve or manage community forest resources;<sup>81</sup> and any other traditional right customarily enjoyed<sup>82</sup> with minor exceptions to some of their uses. One of the significant provisions of this Act is Section 6, which confers powers on the *Gram Sabha* (Village Assembly) to determine the nature and extent of “individual” or “community” forest rights within the local limits of jurisdiction. This right was exercised by 12 *Gram*

<sup>72</sup> The four-step procedures under the notification are Screening, Scoping, Public Consultation and Appraisal according to: Ministry of Environment of Forest, Government of India, S.O. 1533 (New Delhi, India: 2006), [http://www.moef.nic.in/sites/default/files/so1533\\_1.pdf](http://www.moef.nic.in/sites/default/files/so1533_1.pdf).

<sup>73</sup> Ministry of Environment of Forests, Government of India, “S.O. 1533, Notification,” *Gazette of India*, (New Delhi, India: September 2006), Para. 7 (i)(III)(3)(ii), [http://www.moef.nic.in/sites/default/files/so1533\\_1.pdf](http://www.moef.nic.in/sites/default/files/so1533_1.pdf).

<sup>74</sup> *Joint Stakeholders’ submission on the situation of the rights of indigenous peoples in India: Third cycle of the Universal Period Review (UPR) of India*, Asia Indigenous Peoples Pact and ZO Indigenous Forum (April-May 2017), [https://www.upr-info.org/sites/default/files/document/india/session\\_27\\_-\\_may\\_2017/js46\\_upr27\\_ind\\_e\\_main.pdf](https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/js46_upr27_ind_e_main.pdf).

<sup>75</sup> M.P.R. Mohan and Himanshu Pabreja, “Public hearings in environmental clearance process review of judicial intervention,” *Economic and Political Weekly* 51, no. 50 (2016), 68-75.

<sup>76</sup> *Ibid.*, 68-75.

<sup>77</sup> “The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act” (2006), chapter III, section 4(5), [www.tribal.nic.in/FRA/data/FRAAct.pdf](http://www.tribal.nic.in/FRA/data/FRAAct.pdf).

<sup>78</sup> *Ibid.*, chapter II, section 3(a).

<sup>79</sup> *Ibid.*, section 3(c).

<sup>80</sup> *Ibid.*, section 3(h).

<sup>81</sup> *Ibid.*, section 3(i).

<sup>82</sup> *Ibid.*, section 3(j) and 3(l).

*Sabhas* unanimously in 2013 in the Niyamgiri hills in the state of Odhisa, namely to withhold the consent where Vedanta Aluminum Limited (VAL) had started bauxite mining even before the consultation process began.<sup>83</sup> In August 2013, the Supreme Court of India banned bauxite mining after it found violations of several laws, including the right of tribal groups to be consulted under FRA.<sup>84</sup> In determining the cultural, spiritual, historical and customary rights of STs and TFDs with regard to their land, this Court also delved into UNDRIP very specifically.<sup>85</sup> Paragraph 38 quotes UNDRIP as the source of rights for Indigenous Peoples, STs and TFDs:

The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources, have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have the right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.<sup>86</sup>

It stated that the Act did not in any way take away or interfere with the right of the state over mines or minerals lying underneath the forestland, but rather that the state holds the natural resources as a trustee for the people.<sup>87</sup> However, many scholars and Indigenous activists have argued that this significant legislation faces risks of being diluted.<sup>88</sup> The government of Arunachal Pradesh in particular has officially denied FRA's relevance and its applicability in the state, even though it is federal legislation that is legally binding on all states.<sup>89</sup>

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<sup>83</sup> Santosh Patnaik, "12th Gram Sabha too votes against Vedanta mining," *The Hindu* (August 2013), <http://www.thehindu.com/news/national/12th-gram-sabha-too-votes-against-vedanta-mining/article5039304.ece>.

<sup>84</sup> "Orissa Mining Corporation Ltd v. Ministry of Environment and Forest and Other," Writ Petition (Civil) No. 180 of 2011, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=40303>.

<sup>85</sup> *Ibid.*, 53-54.

<sup>86</sup> "Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest and Other," Writ Petition (Civil) No. 180 of 2011, 6 S.C.R. 881, [http://supremecourtfindia.nic.in/pdf/SupremeCourtReport/2013\\_v6\\_piv.pdf](http://supremecourtfindia.nic.in/pdf/SupremeCourtReport/2013_v6_piv.pdf).

<sup>87</sup> *Ibid.*, 79.

<sup>88</sup> T.K. Rajalakshmi, "Subverting FRA," *Frontline* (August 2017), <http://www.frontline.in/the-nation/subverting-fra/article9796409.ece>. See also: PNS New Delhi, "Tribal Affairs Ministry Opposes Dilution of Forest Act," *The Pioneer*, (January 2015), <http://www.dailypioneer.com/nation/tribal-affairs-ministry-opposes--dilution-of-forest-rights-act.html>. See also: A.A. Mahaprashasta, "PMO wants to sidestep gram sabha's consent for underground mining," *The Wire* (May 2016), [http://www.business-standard.com/article/economy-policy/forest-land-govt-finalising-dilution-of-tribal-rights-115010100027\\_1.html](http://www.business-standard.com/article/economy-policy/forest-land-govt-finalising-dilution-of-tribal-rights-115010100027_1.html). See also: N. Sethi, "Forest land: Government finalising dilution of tribal rights," *Business Standard* (January 2015), [http://www.businessstandard.com/article/economy-policy/forest-land-govt-finalising-dilution-of-tribal-rights-115010100027\\_1.html](http://www.businessstandard.com/article/economy-policy/forest-land-govt-finalising-dilution-of-tribal-rights-115010100027_1.html).

<sup>89</sup> Ministry of Tribal Affairs, Government of India, "Status report on the implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 for the period ending 31<sup>st</sup> January, 2017," Letter No. I.D. No. 23011/3/2016-FRA dated 03.03.2017, Annexure I (2017), 7, <http://www.tribal.nic.in/FRA/data/MPRJAN2017.pdf>.

## V. Conclusion

Public sector companies, like the National Hydroelectric Power Corporation (NHPC), have been critical of the World Commission of Dams' (WCD) report of 2000,<sup>90</sup> for it concludes that dams built in this region have systematically failed to address negative impacts and how project-affected people must be treated not just as passive victims but as negotiating partners; furthermore, the report concludes that FPIC should form part of the basic guiding principles for these projects.<sup>91</sup> The state administrations' attempts to link homegrown movements with rebel outfits have only indicated that such strategies are commonly used to deny land rights and discredit environmental concerns. It also indicates the concern that the welfare state would be required to defend the marginalized against the effects of markets that arbitrarily encourage the leasing of this source of livelihood for the interests of the few. With special reference to dam projects in northeast India, CERD, in its concluding observations on reports submitted by India in 2007, expressed its concern that large scale projects like the dams in the northeast are carried out without free, prior and informed consent and have the potential to forcefully resettle people.<sup>92</sup> Therefore, the Committee urged the government of India to fully respect and implement such rights in its practice concerning tribal peoples, in accordance with ILO Convention 107 on Indigenous and Tribal Populations of 1957, the FRA, and other relevant legislations.<sup>93</sup> It also urged India to repeal the Armed Forces (Special Powers) Act of 1958 (AFSPA) that gives arbitrary power to shoot civilians based on mere suspicion, and provides no legal remedy against armed forces.<sup>94</sup> The ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) needs to be on the government of India's agenda without delay, as urged by CESCR in its concluding observations on reports submitted by India in 2008.<sup>95</sup> India's ratification of ILO Resolution 169, endorsement of UNDRIP, ratification of CAT and repeal of AFSPA would encourage Indigenous Peoples and tribal peoples to exercise their land rights

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<sup>90</sup> The World Commission's final report observes that: "In a context of increasing recognition of the self-determination of Indigenous Peoples, the principle of free, prior, and informed consent to development plans and projects affecting these groups has emerged as the standard to be applied in protecting and promoting their rights in the development process." See: World Commission on Dams, "Dams and Development: A new framework for decision-making," (London, United Kingdom: Earthscan, 2000), 112.

<sup>91</sup> Baruah argued that the NHPC was one of the strongest critics against the WCD's report. See: S. Baruah, "Whose river is it anyway? Political economy of hydropower in the eastern Himalayas," *Economic and Political Weekly* 47, no. 29 (2012), 41-52.

<sup>92</sup> United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination*, United Nations Document CERD/C/IND/CO/19 (March 2007), Para. 19, <http://www.forestpeoples.org/sites/default/files/publication/2010/08/indiacerdconcludobsmar07eng.pdf>.

<sup>93</sup> *Ibid.*, Para. 20.

<sup>94</sup> *Ibid.*, Para. 12.

<sup>95</sup> United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights*, United Nations Document E/C.12/IND/CO/5 (May 2008), Para. 15, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/436/08/PDF/G0843608.pdf?OpenElement>.

without any fear of torture.<sup>96</sup> Questioning the existence of Indigenous Peoples through terminological complexities in systematic terms would only lead to further denial of human rights.<sup>97</sup> Considering these factors, it is clear that serious issues regarding tribal peoples, ethnic minorities or Indigenous Peoples in India need urgent redress, as the case of violation of FPIC from Arunachal Pradesh would indicate how consent is not obtained voluntarily but, instead, forcibly.

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<sup>96</sup> India's claims that efforts towards ratification of the CAT are being made since its first Universal Period Review (UPR) in 2008 seem slow as repeated submissions for ratification of CAT, UNDRIP and repealing of AFSPA have been left unaddressed. See: United Nations General Assembly, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/221 India*, United Nations Document A/HRC/WG.6/27/IND/1 (February 2017), [https://www.upr-info.org/sites/default/files/document/india/session\\_27\\_-\\_may\\_2017/a\\_hrc\\_wg.6\\_27\\_ind\\_1\\_e.pdf](https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/a_hrc_wg.6_27_ind_1_e.pdf).

<sup>97</sup> *Supra* note 5. Three UPRs of India have taken place to-date, the latest being the one that took place in 2017. United Nations General Assembly, *National reports submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1\* India*, United Nations Document A/HRC/WG.6/1/IND/1 (March 2008), [https://www.uprinfo.org/sites/default/files/document/india/session\\_1\\_april\\_2008/ahrcwg61ind1e.pdf](https://www.uprinfo.org/sites/default/files/document/india/session_1_april_2008/ahrcwg61ind1e.pdf). See also: United Nations General Assembly, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21\* India*, United Nations Document A/HRC/WG.6/13/IND/1, (March 2012), [https://www.uprinfo.org/sites/default/files/document/india/session\\_13\\_may\\_2012/ahrcwg.613ind1e.pdf](https://www.uprinfo.org/sites/default/files/document/india/session_13_may_2012/ahrcwg.613ind1e.pdf). See also: United Nations General Assembly, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/221\* India*, United Nations Document A/HRC/WG.6/27/IND/1 (February 2017), [https://www.upr-info.org/sites/default/files/document/india/session\\_27\\_-\\_may\\_2017/a\\_hrc\\_wg.6\\_27\\_ind\\_1\\_e.pdf](https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/a_hrc_wg.6_27_ind_1_e.pdf). From the analysis of three UPRs of India, it is observed that except for the enactment of FRA in its national submission to HRC during the first UPR in 2008 and some changes reported in the second UPR submission in 2012 dealing with the introduction of a new chapter on rights of victims and witnesses under the Scheduled Castes and Tribes (Prevention of Atrocities) Act of 1989, India has made no substantial changes to the way the government deals with Indigenous Peoples. The government of India has distanced itself from mentioning the existence of Indigenous Peoples in all three national reports. While ratification of the CAT and repealing of AFSPA have been repeatedly demanded, they are left unaddressed. Instead, during the second UPR with regard to the Scheduled Tribes, the Indian government reported that new special police stations and special courts had been established, although such needed measures have no bearing on ensuring FPIC. *Supra* note 75.

## Our Unique Historical Opportunity: Indigenous-State Relations

Rachael Grace Patten

Relationships between States and Indigenous Peoples have made substantial and significant strides towards harmony in the last twenty-five years. These changes were brought about by Indigenous Peoples' extraordinary efforts, focused via the Indigenous Peoples' movement and fueled by their resilience and dedication. Due to the strength of the Indigenous Peoples' movement, there now exist dynamic models for peaceful and just State-Indigenous People relations. In addition, through the work of Indigenous Peoples within international bodies such as the United Nations (UN), the world now has unprecedented international instruments at its disposal to guide and ameliorate relations. Improved relationships have never had such momentum and moral obligation, as humanity must urgently find solutions to climate change. Multiple international legal instruments have acknowledged Indigenous Peoples' sciences, including, but not limited to, effective methods to maintain and enhance biodiversity. For these three reasons—the urgency of our time, the international legal instruments now available, and current models that provide valuable case studies—we live in a unique time wherein we, as citizens, States, and Indigenous Peoples, have the historic opportunity to improve State-Indigenous Peoples' relations. In this paper, I will explore these three phenomena by examining where we have come from, where we are now, and where we can go.

### I. Where We Have Come From

Before the United Nations came to be, the League of Nations was its predecessor. Two Indigenous leaders came to the League of Nations in 1923 and 1925 to advocate for their Peoples. Chief Deskaheh, a Cayuga Chief from the Six Nations of North America (also known as the Haudenosaunee Confederacy), was the first.<sup>1</sup> While he was not received by the League of Nations, he developed important relationships with the people of Geneva.<sup>2</sup> One such person Deskaheh influenced was a future mayor of Geneva who later helped ensure that the city would honor its pledge to recognize the Haudenosaunee passport.<sup>3</sup> This policy of Switzerland remains true today.<sup>4</sup> The second Indigenous leader was Maori religious leader W.T. Ratana, who visited Geneva to discuss violations of the Treaty of Waitangi between the Maori peoples and the British Crown. He was also rejected.<sup>5</sup> And yet, through Indigenous Peoples' sustained efforts to have their claims heard, the UN established the Working Group on Indigenous Populations in 1982 featuring the voices of Indigenous Peoples' leaders.<sup>6</sup> In 2000, the

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<sup>1</sup> The Secretariat of the United Nations Permanent Forum on Indigenous Issues (UNPFII), Introduction to *State of the World's Indigenous Peoples (SOWIP)*, ed. United Nations Department of Economic and Social Affairs (New York: United Nations Department of Economic and Social Affairs, 2009), 2.

<sup>2</sup> *Ibid.*

<sup>3</sup> Sharon H. Venne, "NGOs, Indigenous Peoples and the United Nations," in *NGOization: Complicity, Contradictions and Prospects*, eds. Aziz Choudry and Dip Kapoor (London: Zed Books, Ltd., 2013), 78.

<sup>4</sup> *Ibid.*, 78.

<sup>5</sup> *Supra* note 1, at 2.

<sup>6</sup> *Ibid.*, 10.

UN Permanent Forum on Indigenous Issues was established with a landmark configuration of eight State-nominated members and eight members nominated by Indigenous Peoples.<sup>7</sup> And in 2001, the UN established a Special Rapporteur on the Rights of Indigenous Peoples. These crucial developments (along with many others that are beyond the scope of this article) were the results, decades later, of the Indigenous Peoples' Movement continuing Deskaheh's and Ratana's work.

The pivotal moment, however, for the Indigenous Peoples' Movement was the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. It was birthed in 1977 when Indigenous leaders from many parts of the world, but mainly from the Americas, demanded the UN's attention in Geneva; and, unlike Deskaheh or Ratana, they were not ignored.<sup>8</sup> Thirty years later, the Declaration was overwhelmingly adopted by the UN General Assembly and nearly all UN member states.

## II. Where We Are Now

The Declaration is an extraordinary international instrument that both affirms the rights of Indigenous Peoples as well as provides the normative framework for future relations between States and Indigenous Peoples. While previous international instruments, especially the International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples, had made reference to or defined these rights, UNDRIP was, and remains, the strongest and most comprehensive of them all. The Declaration consists of 46 articles that cover topics ranging from, but not limited to, land, territory, and resource rights (LTR), intellectual property rights, free, prior, and informed consent (FPIC), the right of self-determination and cultural rights. UNDRIP is a normative framework that sets the *minimum* standards of Indigenous Peoples' rights and provides a foundation from which these rights can expand and Indigenous Peoples can thrive.<sup>9</sup> Its power lies in its wide acceptance amongst nearly the entire international community, combined with the fact that Indigenous Peoples vitally shaped its content. Thus, the Declaration has legitimacy with both States and Indigenous Peoples, and indeed within the international community.

While UNDRIP does not supply a definition for "Indigenous Peoples," it does define many important fundamental rights, such as FPIC and LTR. Nevertheless, non-Indigenous persons, organizations, corporations and States, either wittingly or unwittingly, still often violate many of these rights, sometimes citing contradictions they regard to be true. Thus, it is important to note that Article 46 places the rights of Indigenous Peoples within the international human rights framework (46.2), while simultaneously protecting a State's territorial integrity (46.1).<sup>10</sup> These two topics—balancing Indigenous Peoples' rights with human rights and a State's rights with self-determination rights of Indigenous Peoples—can be misconstrued as obstacles to

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<sup>7</sup> *Ibid.*, 10.

<sup>8</sup> Armstrong A. Wiggins, "A Critical Moment in Indigenous Human Rights History," in *United Nations Declaration on the Rights of Indigenous Peoples* (Washington: Indian Law Resource Center, 2012), 4.

<sup>9</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations Document A/RES/61/295 (2 October 2007), Article 43.

<sup>10</sup> *Ibid.*, Art 46.

improved relationships. However, the Declaration makes clear that established human rights supersede Indigenous Peoples' rights precisely because human rights are defined and understood as inherent and universal. Likewise, the Declaration also distinctly claims that self-determination rights of Indigenous Peoples do not equate to secession. Understanding Article 46 is a useful tool when encountering skeptical or dissenting audiences.

Furthermore, since UNDRIP is a declaration and not a treaty, some may conflate its "soft-law" classification with a lack of power in the legal system. Yet, within international law, declarations serve as international legal instruments that can exercise binding legal power. In 2007, the United Nations Permanent Forum on Indigenous Issues adopted a General Comment on Article 42 of UNDRIP that demonstrates how this is so. The Permanent Forum states that "the binding value of the Declaration must be seen in the wider normative context of the innovations that have taken place in international human rights law in recent years,"<sup>11</sup> and that "the Declaration forms a part of human rights law."<sup>12</sup> Definitively, they conclude (*italics added*):

A number of the articles are based on the human rights covenants and other conventions, or they may already today have the quality of customary law by virtue of policies implemented in national jurisdictions. *As expressions of international customary law, they must be applied regardless of the nature of the document in which they are stated or agreed.*<sup>13</sup>

This legal opinion serves as a useful legal instrument in understanding the significance and power of the Declaration in international law. It helps clarify UNDRIP's legal weight in the international system for those unfamiliar with how international law is formed. More specifically, this Comment states how the importance of international customary law and the existence of UNDRIP's content in other legal expressions, such as treaties, results in a *de facto* legally binding quality of the Declaration.

In addition, the emergence and success of the UN Human Rights Council and regional courts such as the Inter-American Court of Human Rights have provided a pivotal development for the Indigenous Peoples' Movement. The Declaration has been used to successfully argue for Indigenous Peoples' rights with the Inter-American Court of Human Rights and, as such, proves itself to be a powerful international legal instrument.<sup>14</sup> The combination of UNDRIP and the other international legal instruments concerning Indigenous Peoples' rights with their proven legal weight in domestic, regional and international courts gives the Indigenous Peoples' movement an unprecedented strength. This strength is the foundation for today's historical opportunity for peaceful and just State-Indigenous Peoples' relations.

### III. Where We Can Go

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<sup>11</sup> United Nations Permanent Forum on Indigenous Issues, *General Comment on Article 42* (2007), Paragraph 6.

<sup>12</sup> *Ibid.*, Para. 7.

<sup>13</sup> *Ibid.*, Para. 10.

<sup>14</sup> *Kaliña and Lokono Peoples v. Suriname*, Inter-American Court of Human Rights (2015).

As referenced above, UNDRIP clearly addresses Indigenous Peoples' rights to self-determination, FPIC, and LTR. As such, it is an excellent resource for States, and also businesses, to navigate their interactions with Indigenous Peoples. Corporations, especially trans-national corporations (TNCs) and those in extractive industries, can make a significant difference to the lives of Indigenous Peoples by implementing UNDRIP through their corporate policies. While States have been found to be legally responsible for how TNCs conduct themselves within their boundaries, cases can take many years, even decades, to resolve, and the damage can be irreparable. Far better an alternative is for companies to become aware of and understand the rights enshrined within UNDRIP and actively pursue compliance. This is of grave importance because a significant portion of land, "undeveloped" in the eyes of the mainstream development paradigm, overlaps with Indigenous Peoples' territories and the effects of displacement of Indigenous Peoples can be devastating for them. With the internet and the current information age, citizens and consumers are pushing for more socially conscious business practices that are both ecologically friendly and respectful of human rights. If consumers and investors demand that the businesses they support adhere to these internationally-accepted human rights norms, corporations can be swayed. Furthermore, the corporations who proactively implement UNDRIP within their policies and practices stand to gain financially from the emerging market of eco- and socially-conscious consumers.

Not only will TNCs acting in alignment with UNDRIP help Indigenous Peoples at risk of possible rights' violations; it will also benefit non-Indigenous populations. Respecting the rights of Indigenous Peoples goes hand-in-hand with battling climate change. In their judgment on November 25, 2015, in the case of the *Kaliña and Lokono Peoples v. Suriname*, the Inter-American Court of Human Rights stated:

...in principle, the protection of natural areas and the right of the indigenous and tribal peoples to the protection of the natural resources in their territories are compatible, and it emphasizes that, owing to their interrelationship with nature and their ways of life, the indigenous and tribal peoples can make an important contribution to such conservation.<sup>15</sup>

Conclusions such as this, which recognize, protect and promote Indigenous sciences and traditional knowledge, are echoed across multiple international instruments. One example is Article 8(j) of the Convention on Biological Diversity, a legally binding international treaty, which explicitly recognizes that "...the knowledge, innovations and practices of indigenous and local communities..." are "...relevant for the conservation and sustainable use of biological diversity."<sup>16</sup> Biological diversity is a key factor in combatting climate change, an existential threat to our species. Collaboration, based on FPIC, LTR and the other fundamental rights outlined in UNDRIP between States and Indigenous Peoples, is crucial for revitalizing biodiversity globally and ensuring humanity's future on Earth. Thus, climate change is a formidable motivator for improved, peaceful and just relations between States and Indigenous Peoples.

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<sup>15</sup> *Ibid.*, Para. 181.

<sup>16</sup> United Nations General Assembly, *Convention on Biological Diversity* (1992), Article 8(j).

Thankfully, many peoples have fought to create models for these types of new relations. In New Zealand, thanks to the advocacy of the Maori people, a law is currently being considered to require all people in New Zealand to learn both English and the Maori language until the age of sixteen.<sup>17</sup> In addition, guidelines for bilingual public signage are readily available and used, further proving the strides they have made towards better relations.<sup>18</sup> Language rights are solid indicators of how well Indigenous Peoples' rights have been honored, and these developments are very welcome. Of course, each case is dependent on the context of their history and demographics; nonetheless, the Maori people's relationship with the New Zealand state provides a useful model.

Individuals comprise groups of people and it is because of individuals' efforts within collective movements that we find ourselves with this unique historical opportunity for creating peaceful and just State-Indigenous Peoples' relations. Individuals make up the Indigenous Peoples' movement and are responsible for its incredible gains. Just as those individuals have had such an international impact, so too can non-Indigenous state citizens have an impact in creating positive State-Indigenous Peoples' relations based on human rights and fundamental freedoms by using their voice to advocate for Indigenous Peoples' rights within their workplace, community, and government. Our current era and opportunity is unprecedented, for we now have at our disposal multiple international legal instruments through which Indigenous Peoples and States have defined the rights of Indigenous Peoples and States' responsibilities towards these rights. Furthermore, due to the strength and sustained efforts of Indigenous Peoples, we now also have multiple models for how to shape these types of relationships. Finally, due to the urgency and gravity of battling climate change, there exists a moral obligation for these types of relationships to be pursued by all parties, individually and collectively.

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<sup>17</sup> Shannon Haunui-Thompson, "Greens Push for Compulsory reo Māori in Schools" *Radio New Zealand* (February 2017), <http://www.radionz.co.nz/news/te-manu-korihī/323595/greens-push-for-compulsory-reo-maori-in-schools>.

<sup>18</sup> Te Puni Kōkiri and Te Taura Whiri I te Reo Māori, "Māori-English Bilingual Signage, A Guide to Best Practice" (November 2016), <https://www.tpk.govt.nz/docs/bilingual-signage/tpk-bilingual-signage-guide.pdf>.

## **Rigoberta Menchú and Dayamani Barla: A New Normal in the Hegemonic World**

**Saket Suman Saurabh**

The present paper proposes to look at two “texts” from India and Latin America: Dayamani Barla and Rigoberta Menchú. I use the word “texts” as a generic term referring to all of their activism through life experiences, struggles and their writings. I submit that each of these elements complements each other to comprise what I call a “text.” Rigoberta is from Guatemala and belongs to the Maya-Quiché community and Dayamani represents the Munda tribal community from Jharkhand, India. Their communities have always lived on the fringes of society, eking out a living with modest means. An entire civilization, the Mayans, were defeated and labelled as “Indian.” Colonizers attempted to destroy their histories and started doing so by burning their religious icons and other kinds of records. Their peoples were mass-murdered and few survived the European diseases with which they were infected thereafter. Similarly, and in more contemporary times, in India, the government has not provided decent education and healthcare to its Indigenous Peoples and has dishonoured its constitutional guarantee to provide for the “adivasis.”<sup>1</sup>

Colonization has left a devastating impact on Indigenous Peoples both in Latin America and India under the Spanish and English colonizers respectively. The Mayan civilization flourished throughout much of Guatemala and the surrounding regions long before the Spanish arrived. However, the Spanish conquistadores, led by Pedro de Alvarado, conquered this civilization in 1523-1524 (the “Spanish Conquest”). Similarly, English Colonizers used the written word in order to warp the relationship of tribes to their means of production of agricultural products in India. As a consequence of the forests laws introduced by the British, and continued by the governments of independent India, “the tribal who formerly regarded himself as the lord of the forests, was through a deliberate process turned into a subject and placed under the forests department.”<sup>2</sup>

Both in Jharkhand and Guatemala, colonialism changed the lives of the Indigenous Peoples because now these Indigenous and tribal communities had to sacrifice their land, forest and water resources in order to facilitate the “development” of the whole country as unpaid unskilled laborers. Such development did not serve any purpose for the Indigenous Peoples of India and Central America and led, instead, to their complete pauperization. Rigoberta’s people had to shift to other forms of work, and mostly shift to cities and towns to work, so in a way they are on the verge of losing their “Indigenous” identity. Dayamani’s Munda people are also losing their sources of livelihood and are on the verge of collapse. Rigoberta Menchú, an Indigenous woman and a prominent speaker on behalf of the struggles of her community in Guatemala, is the “writer” of the testimony entitled *Me llamo Rigoberta Menchú y así me nació la conciencia (I Rigoberta Menchú: An Indian Women in Guatemala)*. It is among the most famous testimonies written by a Latin American writer in the last twenty years of

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<sup>1</sup> “Adivasi” is a “member of any of the aboriginal tribal peoples living in India before the arrival of the Aryans in the second millennium BC” according to <https://en.oxforddictionaries.com/definition/adivasi>.

<sup>2</sup> Ramachandra Guha, “Unacknowledged victims,” *Outlook India* (14 April 2010) <https://www.outlookindia.com/website/story/unacknowledged-victims/265069>.

the 20<sup>th</sup> century. In her book, Menchú provides a vivid account of the hardships and exploitations she has faced, reflective of the situation of her community at large. In her testimony, she also gives detailed accounts of their customs and traditions, highlighting the unique cultural identity of the Indigenous communities of Guatemala. Indigenous Peoples have no decisive role in the political economy of the country dominated by a small number of wealthy elite classes.

Similarly, Dayamani Barla used to write in *Prabhat Khabar*, a leading regional newspaper of Jharkhand. Through her writings, she gave voice to the thousands of adivasis/tribals who have been exploited for years. There she writes about the plight, sufferings and related struggles due to the displacement of the adivasis; the rampant corruption of the State administration; and the environmental degradation due to exploitation of natural resources and construction of dams.

Dayamani describes that the Indigenous Peoples of Jharkhand and working masses have a mother-son relationship with Nature. Their social, linguistic, cultural, religious, economic and historical existence continues to live in water, forest and land. These communities will exist as long as they are linked with water, forest and land. When adivasis and Indigenous societies are displaced from their land, forests and water, they are not only displaced from their dwellings and livelihoods but also from their social values, language and culture, economy and history. Dayamani considers the land as “heritage” and not “property.”

If we look at the global history of Indigenous Peoples, it becomes clear that Indigenous communities remain alive only in those places where there is water, forest and land, mountains and waterfalls. Indigenous society is part and parcel of nature. By separating them, we can neither conceive of adivasi or Indigenous society, nor of forests, rivers, waterfalls and mountains.

The case of Guatemala is historic in the sense that it gives us an in-depth understanding of the Latin American suffering which has put their perpetually discriminatory society in focus, where Rigoberta Menchú is representing her ethnic Maya community. By giving a human face to her community struggle, her testimony *I, Rigoberta Menchú* received international support and huge sympathy, earning her the Nobel Peace Prize in 1992. She has been associated with many books; I say “associated” because the aforementioned book was Menchú’s testimonial which was given in interview format to Elisabeth Burgos Debray in Paris when Rigoberta was in exile from Guatemala. Due to her limited Spanish fluency, which was of course the colonial language that she had to learn separately from her mother tongue Maya-Quiché, this testimonial represents the perpetual reality of her life which is similar to the realities of other Mayas of her community. Their myopic government has not been able to see these realities for what they are. *Crossing Borders*, *Rigoberta: La nieta de los Mayas*, *The Honey Jar* and *The Girl from Chimel* are prominent books that tell similar stories.

Her struggle did not start abruptly but rather, since childhood, Menchú suffered alongside other members of her family. Menchú said her father Vicente Menchú Tum was very poor and worked very hard. After getting married, he came to settle in *altiplano*, which was in the mountains. “The land up there belonged to the government and you had to pay a fee so that you could clear the land and then build your house.

Through all my parents' efforts in the *fincas*, they managed to get enough money together to pay the fee, and they cleared the land."<sup>3</sup> Her parents had six children, although two of Rigoberta's brother died due to scarcity of food. Her parents had to work in *fincas* that were down near the coast in the coffee/cotton plantations. They worked in the *fincas* for eight months and went back to the *altiplano* to sow maize and beans, which could only be produced after eight to nine years of hard work on that mountainous soil. Rigoberta also started accompanying her mother to the *finca*, first as a baby and then as a worker in the cotton plantations as early as eight years of age.

The death of Menchú's friend Maria, due to poisoning from spraying pesticide in the cotton fields in the *finca*, led to Menchú's realization that the harsh life she and her community lived surrounding the *finca* served only to support the wealthy *Ladinos*. This particular incident put little Menchú in total shock, especially after having witnessed the death of her brothers as well. Meanwhile, due to the distressing economic conditions faced by her family, Rigoberta's elder sister had to go to the city to work as a maid. These incidents, all one after the other, made Rigoberta Menchú desperate to work and earn more so that she could leave the filthy conditions of the *finca* as early as possible. She also went to be a maid in the capital, Guatemala City, at the age of thirteen. She suffered there also, this time at the hands of a mistress who scolded her frequently for petty reasons. Menchú was not very well versed in Spanish at the time. After months of work, Menchú said, "I was pleased because I now understand Spanish very well. But since nobody taught me to memorize word by word, I couldn't say a lot. I could say the main things I needed for my work but I couldn't start a conversation, or answer back, or protest about something."<sup>4</sup>

The land being harvested by Menchú's family in *altiplano* was finally producing a harvest after many years of hard work by her family members along with other community members. Large tracts were now under cultivation, however suddenly big landowners appeared: the *Brols*. Alongside engineers and inspectors, the *Brols* started measuring the land, saying that they were from the Guatemalan government. After collecting the signatures of all community members who were living in the *altiplano*, Vicente Menchú Tum went to the Instituto Nacional de Transformación Agraria de Guatemala (INTA). The officials at the INTA gave a piece of paper to Vicente for him to sign, which he did since he could not read or write. "In fact, the paper said that the peasants confirmed, once again, that they would leave their land. This gave the landowners power, since he, the community's representative, had signed the paper."<sup>5</sup> Explaining further, Rigoberta Menchú said the Guatemalan Government was in collusion with landowners:

The Government says the land belongs to the nation. It owns the land and gives it to us to cultivate. But when we've cleared and cultivated the land, that's when the landowners appear. However, the landowners don't just appear on their own—they have connections with different authorities that allow them to

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<sup>3</sup> Rigoberta Menchú, *I, Rigoberta Menchú: An Indian Women in Guatemala*, ed. Elizabeth Burgos-Debray, trans. Ann Wright (London, New York: Verso, 1984), 5.

<sup>4</sup> *Ibid.*, 97.

<sup>5</sup> *Ibid.*, 104.

manoeuvre like that. So, the first time they threw us out of our homes was, if I remember rightly, in 1967.<sup>6</sup>

As a result of these skirmishes, the families in the community suffered and were living in a perpetually hostile environment. The Menchú family had to work in *finca* and then in *altiplano* to manage their daily needs; meanwhile the landowners were adamant about taking away their lands. Vicente said: “We were the first families to come and cultivate this land and nobody can deceive us into thinking that this land is theirs. If they want to be the owners of more land, let them go and cultivate the mountains. There is more land but it is not land where things grow.”<sup>7</sup> This is also very much true in the Indian case, where in the state of Jharkhand the original landowners are those who were the first settlers according to the *Khuntkattidari* system in the Munda tribe and the *Bhuinhari* system in the Oraon tribe. There are clear similarities in the words of Vicente Menchú and the ancestors of the Munda tribe, which cements the author’s comparative work. However, there are ebbs and flows to these two tropes as well.

There was yet another raid on the village of *altiplano* in 1967 to move out the alleged settlers from their hamlets. INTA came to the village and told everyone they were being given their original land, if only they would sign a few papers. Even small children were made to stamp these papers. The papers were, in actuality, documentation that the community had to vacate the land within the next two years. When Rigoberta Menchú’s father protested and started attending union meetings, he was arrested on charges of compromising the sovereignty of the state. Those days were the most difficult days for the family of Menchú because they had to somehow manage the advocate’s fees, witnesses, documents, and interpreter fees to fight the case, since the lawyer was *ladino* and not able to understand the Maya-Quiché language. Rigoberta remembers, “That was when I told myself: ‘I must learn to speak Spanish, so that we don’t need intermediaries.’”<sup>8</sup> Here we can recall the masterpiece of Gayatri Spivak, the essay “Can the Subaltern Speak?”<sup>9</sup> One can see through the words of Rigoberta Menchú that she is very much willing to learn Spanish, which was the language of the *ladinos*, aside from her knowledge of Maya-Quiché.

Vicente Menchú had to live in prison for one year and two months. He was beaten up for actively pursuing the land holding case with other community members. Again in 1977, he was arrested as a political prisoner. But due to union pressure, the Guatemalan government released him within fifteen days. Only after that did he begin to join up with other peasants to discuss the creation of the Comité Unidad de Campesina (CUC). Rigoberta says:

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<sup>6</sup> *Ibid.*, 105.

<sup>7</sup> *Ibid.*, 106.

<sup>8</sup> *Ibid.*, 110.

<sup>9</sup> Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (Urbana, United States of America: University of Illinois Press, 1988), 271-313.

The CUC started growing; it spread like fire among the peasants in Guatemala. We began to understand that the root of all our problems was exploitation. That there were rich and poor and that the rich exploited the poor—our sweat, our labour. That’s how they got richer and richer. The fact that we were always waiting in offices, always bowing to the authorities, was part of the discrimination we Indians suffered. So was the cultural oppression which tries to divide us by taking away our traditions and prevents unity among our people.<sup>10</sup>

Likewise, we see similar happenings in various countries of the world that are categorized in the binary of “developed” and “developing” countries. The famous Standing Rock and Dakota Access Pipeline case is from the United States of America itself. The schemes of exploitation are the same everywhere, whether in the U.S., Guatemala, India or elsewhere.

As in those days in the *altiplano*, between 1980 and 1983, army attacks were very common in the village and government soldiers would frequently rape the local women and torture the local men; the community would stay in mountain tents as a result, leaving their homes at night. After General Kjell took power, he set into action “agrarian reforms” in which he divided the land into small plots for each community member and finally set up the INAFOR (Instituto Nacional de Forestación de Guatemala), an institution looking after trees and forests in Guatemala. Through this institution, the army metaphorically tied the community’s hands—community members could not cut down trees without INAFOR permission and each tree cost five *Quetzales*. “And we used practically to eat wood—we have no stoves, no gas, nothing. Many of the peasants cut trees down and the INAFOR arrived and took them prisoner because they’d killed a tree.”<sup>11</sup> However, the situation for rich businessmen was different, as Rigoberta Menchú<sup>12</sup> narrates:

But when big businessmen come to cut, I don’t know, huge quantities of wood to sell, to export, of course they were free to cut five thousand, six thousand trees. This made our people even more conscious of their situation. We protested against our little plots, we wanted to grow crops on our own land but not have it divided up. We could not use the wood and we had nothing to sow.<sup>13</sup>

The CUC was formed as a clandestine organization but, due to the demands of the suffering community in the *altiplano*, it became more prominent in May of 1978. Apart from Vicente Menchú, who was its foundational member, Rigoberta Menchú had also joined the group to demand fair wages from landowners; respect for the community; decent treatment as equals to the *ladinos*; and respect for the Indigenous religion, customs and culture.

The following paragraph will give an account of the gruesome tortures and deaths of Menchú’s family members one by one. On 9 September 1979, Menchú’s brother, Petrocinio Menchú Tum, only sixteen years old, was kidnapped and tortured for

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, 158.

<sup>12</sup> *Ibid.*, 159.

<sup>13</sup> *Ibid.*

sixteen days on charges of being a member of a guerrilla army. He was burned alive in front of family members in Chajul. In November of the same year, there was a march on the capital organized for the removal of the army from El Quiche. Vicente Menchú was part of that march, where the group first tried to occupy the Swiss Embassy and then the Spanish Embassy. “The objective was to tell the whole world what was happening in Guatemala and inform people inside the country as well.”<sup>14</sup> In the Spanish Embassy, an event took place that nobody could have foreseen: many of the protestors, including Vicente Menchú, were burned to death, but it is not clear who set the fire as many Spanish nationals were also killed in the event. The kidnapping and death of Rigoberta’s mother occurred in April 1980. “My mother was kidnapped. And from the very beginning she was raped by the town’s high-ranking army officers. And I want to say in advance that I have in my hands details of every step of the rape and torture suffered by my mother.”<sup>15</sup>

Similarly, land had been snatched from Dayamani Barla’s parents, and to retrieve back that very land the *Sahu*, or moneylenders, took all the villagers’ thumb impressions on plain paper; what was written there, nobody knew. “Only when the land had been taken away, people realized what they had signed and, to take it back, my father had to approach the court. They had put their own name in that paper. Before in our village, there were no *Sahu* (moneylenders) people, ours was a very big village named Arahar in the Gumla district in the state. That person was the first *Sahu* who took away my father’s land. When we were fighting the case in the court, during the trial there were witnesses who had been called but nobody went. Due to the power of local musclemen, people were afraid and some gifts like radio, wristwatch, and alcohol had been offered to them to abstain from the trial process. When the verdict came, we lost the case. During the process to fight the case we had to sell small plots, our cattle, etc.”<sup>16</sup> After that, Barla’s father had to go to another village to work in the field as an agricultural laborer. Her mother became a maidservant; two elder brothers had to venture out in the city to work. They had to leave school to work in Ranchi City. Back home, she says, “I and my third brother were left only. My mother used to send money. There was food scarcity and we used to eat fruits from the trees. After passing 8<sup>th</sup> standard from the village school, I came to Ranchi as well. My mother used to work in the household of a Punjabi family. There was the problem, how to continue the studies and where to live? Temporary accommodation had been arranged in the workers’ shed where on one side there were cattle and on the other side we were located. I know that’s how the family breaks up. How the children become homeless and orphan in spite of living parents.”<sup>17</sup>

Dayamani Barla is a vociferous writer, as she started writing about the problems faced by tribal people due to the politico-corporate nexus and their pet project of “developmental works” in Jharkhand. The first confrontation was about the Keol Karo dam and, later, the Nagri protest. February 2, 2001, is a date etched in blood in Tapkara. It was the first major incident of violence in about three decades of protest against the

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<sup>14</sup> *Ibid.*, 185.

<sup>15</sup> *Ibid.*, 198.

<sup>16</sup> Saket Suman Saurabh, “Interview with Dayamani Barla,” *The Writings of Rigoberta Menchú and Dayamani Barla: A Comparative Study*, Doctoral Thesis (Jawaharlal Nehru University, India: 2017), 58.

<sup>17</sup> *Ibid.*, 59.

proposed Koel-Karo dam in the Torpa block of Ranchi district, Jharkhand. Police opened fire on around 2,000 tribal people who had gathered to protest at Tapkara village. Five people died on the spot and three in the hospital. This event, along with the Nagri protest, paved the way for the successful channelling of Barla's inner suffering into activism for her people. Here it should be noted that "her people" are not only the Munda community but also all Indigenous Peoples who are facing injustices. She asks:

Last six years are the testimony of sufferings of Jharkhandi people. Dozens have died in the firing. Those who are raising voices for the freedom from suppression are being tortured. Mass leader Mahendra Singh's murder itself put a question mark on the democracy. Why the Jharkhand state has been turned into the privy purse of mafia cartel, capitalists and criminals? <sup>18</sup>

Carrying forward the struggle, these days Barla is leading the protest against the so-called "developmental works" of the government. The regular confrontations with the government and corporations make the tribal people in general, and the Munda tribe in particular, aliens in their own homeland. The situation is more or less the same in Guatemala as well, as we have just seen through the history of Rigoberta Menchú.

According to Dayamani Barla, "development" has displaced a major chunk of the population of Jharkhand from their land. The actions of the adivasis who agitate, struggle and resist development projects and land acquisition processes have irked the government and thus initiated an onslaught against the adivasis who oppose these projects. The adivasis are being arrested on forged cases, tried in an unjust court of law, and typically subsequently incarcerated. They are arrested for murder and for "Maoist activities" and kept in jail or harassed on a regular basis on flimsy grounds.

In Jharkhand, Barla is protesting against the forceful land grab, plundering of forests, damming of rivers and other such activities which are putting her Munda people in particular, and tribal communities in general, at the crossroads of society. She highlights the notoriety of so-called development projects in the area:

Today Mittal Company is trying to establish them in this area in the name of making availability of public utilities. So, they are talking about opening of school, college, hospital, industrial training institutions. If these measures are meant to bring the tribal people in the mainstream in a selfless manner then it is a welcome step. But the company is talking about these developments because they need the land, forest and water of tribal-Indigenous people where they will establish their plant and industry. Where the population of million will be displaced from their livelihood, society, language-culture, identity including their ancestors' heritage. We all know that once the tribal-peasant is uprooted from their forest land, then their existence vanishes simply.<sup>19</sup>

Jharkhand has one of the largest mineral reserves of India, from metals to non-metals, from coal to iron and from uranium to mica. Such a mineral-abundant state is still lying in neglect. There are railways and roads but these are not to serve the people;

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<sup>18</sup> Dayamani Barla, "Waqt ka Takaja," *Visthapan Ka Dard*, Indian Social Action Forum (INSAF) Pamphlet (2006), i.

<sup>19</sup> *Ibid.*, 13.

rather, they are meant to transport the minerals from mines to the port or to relevant industries. There is electricity for the industry but not for the common people, as they are still living in the dark near the electricity-producing thermal power plants. There is coal not for the local people, but rather for the industries and thermal power plants. There are rivers but due to many dams, these rivers are choking and not able to maintain their flow, and so the adjoining flora and fauna is dying, just as important life-sustaining natural resources needed for the tribal people to survive are dying. In such a scenario, when basic life amenities are not being fulfilled at the local level because of forced land grabbing and the destruction of forests, the local populace has to look for other opportunities for survival and other support systems. Here, in Jharkhand, they have become open to performing odd jobs instead of peasantry or sharecropping; they have to migrate towards the cities near their village and most of the time they move towards a bigger metropolis like Kolkata or Delhi to try their luck, moved by hardships suffered back home.

Bina Agrawal rightly said the following, when it comes to the relationship between Indigenous Peoples and their forests:

Moreover for forest dwellers, the relationship with forests is not just functional or economic but also symbolic, suffused with cultural meanings and nuances, and woven into their songs and legends of origin. Large-scale deforestation, whether or not due to irrigation schemes, has eroded a whole way of living and thinking.<sup>20</sup>

All these conditions are forcing these poor tribal people of Jharkhand to leave their ancestral homes and move towards the “greener pastures” of towns and cities with their family, which itself is creating a particularly vulnerable situation for the females amongst those migrating. Similar perpetually induced subversion and oppression has been taking place in different parts of the world, for example in Africa and Latin America as well.

There was a looming threat to Rigoberta Menchú’s life in Guatemala as one after another of her family members perished. Taking this into consideration, her *compañeros* made their way to exile in Mexico and from there to Paris. Paris was where, during taped interviews with Elisabeth Burgos Debray, Menchú explained all the aforementioned sufferings which were compiled in book form and named *Me llamo Rigoberta Menchú y así me nació la conciencia*.

As Rigoberta Menchú is letting the entire world know what is happening in Guatemala by using Spanish language as a tool to assert herself, aside from her regular use of Maya-Quiché; similarly, Dayamani Barla is writing in Hindi in addition to her own Mundari language to make both the people of Jharkhand and those outside aware of the reality her people are facing. Here, I would like to highlight an observation made by Professor Sharmila Rege: “Can reading and teaching of Dalit autobiographies radicalize the perception of readers? Do readers conveniently consume these narratives as narratives of pain and suffering refusing to engage with the politics and theory of

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<sup>20</sup> Bina Agarwal, “The Gender and Environment Debate: Lessons from India,” *Feminist Studies* 18, no. 1 (Spring 1992), 142.

Ambedkarism? Translator and teacher Arun Prabha Mukherjee argues that autobiographies are not ‘sob stories’ but stories of anger against injustice.”<sup>21</sup> This means that the narratives written in these contexts are loaded with resistance to the hegemonic bourgeoisie that attempts to throttle the marginal discourse and toss a blanket over a rotten society simply to present a utopian image to the rest of the world.

The theoretical perspective of John Beverley in his monumental work *Testimonio: On the Politics of Truth* can be a possible departure point through which one may try to understand the testimony of Rigoberta Menchú and others. He says:

The Spanish word *testimonio* translates literally as “testimony,” as in the act of testifying or bearing witness in a legal or religious sense. This connotation is important because it distinguishes *testimonio* from recorded participant narrative, as in the case of “oral history.” In oral history it is the resulting text that is in some sense “data.” Unlike the novel, *testimonio* promises by definition to be primarily concerned with sincerity rather than literariness. This relates *testimonio* to the generic 1960s practice of “speaking bitterness,” to use the term popularized in the Chinese Cultural Revolution. Production of a *testimonio* generally involves the tape-recording and then the transcription and editing of an oral account by an interlocutor who is an intellectual, often a journalist or a writer.<sup>22</sup>

In this sense, we can see that Beverley is very much concerned about the *testimonio* and its core idea, as we are familiar with how Rigoberta Menchú has used the testimonial mode to present her real story in a number of books. Her method of presenting her testimony demonstrates that:

It is the intentionality of the narrator that is paramount. The situation of narration in *testimonio* involves an urgency to communicate, a problem of repression, poverty, subalternity, imprisonment, struggle for survival, implicated in the act of narration itself. The position of the reader of *testimonio* is akin to that of a jury member in a courtroom.<sup>23</sup>

We can move further in our understanding of oral history with this analysis by Valerie Raleigh Yow:

Oral history is the recording of personal testimony in the oral form. But what is the oral history? Is it the taped memoir? Is it the typewritten transcript? Is it the research method that involves in-depth interviewing? The term used here—such as *in-depth interview*, *life history*, *life review*, *recorded memoir*, etc.—implies that there is someone else who is also involved, frames the topic and inspires the

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<sup>21</sup> Sharmila Rege, *Writing caste/Writing Gender: Reading Dalit Women's Testimonies* (New Delhi, India: Zubaan, 2006), 10.

<sup>22</sup> John Beverley, *Testimonio: On the Politics of Truth* (Minneapolis, United States of America: University of Minnesota Press, 2004), 32.

<sup>23</sup> *Ibid.*

narrator to begin the act of remembering, jogs memory, and records and presents the narrator's words.<sup>24</sup>

After analysing the above fragment, it is clear how oral history functions in general and in the context of Rigoberta Menchú in particular; her testimony is a form of oral history. Taking into account the tedious task carried out by Elisabeth Burgos-Debray as the interviewer of the protagonist, compiling all answers in the written form to produce the output of a book is highly commendable. Here, I want to verify the truthfulness of oral history and compare it to written history, and explore the veracity of these two forms. As rightly said by Yow, oral history depends very much on the interviewer, for example on the agenda with which she/he is working. What exactly does she/he want to take out of this process? Which kind of ideology is she/he following? What message does she/he want to spread to the world? And who are the consumers of the final packaged product?

All this to say that "the narrator in *testimonio*, speaks for, or in the name of, a community or group, approximating in this way the symbolic function of the epic hero, without at the same time assuming the epic hero's hierarchical and patriarchal status."<sup>25</sup> The interviewer also takes the role of the protagonist, as happened in the case of Menchú, who struggled alongside her own family and other community members and now is a celebrated woman and social rights activist for her country. She funnels all of her oral account of her story into the book form, which nowadays we call the *testimony*, which itself is a new genre in the so-called literary world. However, this very form has been trivialized on a number of occasions regarding its truthfulness. American anthropologist David Stoll, in his book *Rigoberta Menchú and the Story of All Poor Guatemalans*, inferred that Menchú had exaggerated her narrative to gain sympathy. But I think she had been fighting against all odds and against false allegations in order to add to the canon of resistance literature of Indigenous Peoples to attract the world's attention to very real situations. Also if there are critics of Rigoberta's testimony, there are conversely other intellectual supporters of her cause too, such as John Beverley, Lynda Marin and many more.

Likewise, many other marginal activists have emphasized the dire situation of the struggle of Indigenous Peoples in Latin America, among whom Domitila Chungara is also quite well known; she has talked about the conditions of the Bolivian mines through the same method of oral history in *Deja me Hablar!* This type of testimonial-giving conserves the form of oral history which is, in today's world, an endangered category of sorts to which the biggest threat is posed by written history, which has very deep roots in the colonial regime. In the Latin context, *Cartas de Hernán Cortés* and *Diarios de Colón* come to mind immediately. These were mediated histories and, since they were written by the dominant people in society at the time, the conquerors of Spanish America, we tend to accept them as the written literature/history of a particular space and time, thereby negating the oral form of history of the Indigenous Peoples of the same region. The passing on of history through oral narration has been practiced by Indigenous Peoples all over the world for thousand years. Valerie Yow continues:

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<sup>24</sup> Valerie Raleigh Yow, *Recording oral history: a guide for the humanities and social sciences* (Maryland: Rowman and Littlefield Publishers, 2005), 3-5.

<sup>25</sup> *Supra* note 19, at 33.

Oral history reveals daily life at home and at work—the very stuff that rarely gets in to any kind of public record. It is through oral history that the dimensions of life within a community are illuminated. Oral history research thus becomes crucial to obtaining a picture of the total society because the viewpoints of the non-elite who do not leave memoirs or have biographies are presented. Oral history testimony is the kind of information that makes other public documents understandable.<sup>26</sup>

The views presented by Yow point towards a system where the downtrodden and the most marginalized people can have their oral accounts of histories validated. Any interviewer can record the statements of the protagonist and frame the questions in such a way so that the voices of the voiceless can be heard in the best possible way and the desired goal of the author can be achieved. This process is about analysing each oral account in conjunction with other oral accounts, where all the information provided and explained by the protagonist cannot be proven verifiable every time since these small details are not always possible to determine. Record keeping may not exist in a particular society, but quite possibly people remember entire incidents orally and have passed them on, generation after generation. Hence, oral history becomes a valid method to obtain information pertaining to community life and past histories, where the poor try to say whatever they have to say to the society at large. They are not affluent enough that their plight and community life can be presented in the form of memoirs and biographies, nevertheless their testimonies are frequently being added to the syllabi of various universities worldwide as they are recognized for the truth they contain. Hence, this point in time is an excellent opportunity for me to put forward the testimony of Rigoberta Menchú within this frame, as the intellectual community can go through the meanings and happenings of her life, her family life and her community life. Her testimony reveals the Mayan history, culture and civilization through an original inhabitant of that great civilization of Mesoamerica, not through the lens of the colonizers.

Edward Said is correct when he said that the discourse of Orientalism was created to highlight the “otherness” in society and always to subvert the unusual.<sup>27</sup> He was speaking in the context of how the countries of the Global South, South-East and Middle East are deliberately not included in mainstream discourses and the intention is therefore to subvert their profound knowledge, history and cherished civilizations. The West considered themselves as the only saviors of humanity and so, before them and after them, nothing of value existed. That very dangerous notion is now taking a heavy toll on the whole of humanity. We see this in the animosity between various discourses, between religions and between sects. Similarly, I wish to argue that these writings of Menchú and Barla are marginal to the major discourses on the subject, however they are still very much in conformity with Professor Rege’s argument. “In consciously violating the boundaries set by bourgeois autobiography, Dalit life narratives became testimonies

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<sup>26</sup> *Supra* note 21, at 11-12.

<sup>27</sup> “Edward Said on Orientalism,” Interview (28 Oct 2012), [https://www.youtube.com/watch?v=fVC8EYd\\_Z\\_g](https://www.youtube.com/watch?v=fVC8EYd_Z_g)

that summoned the truth from the past; truth about the poverty and helplessness of the pre-Ambedkarite era as also the resistance and progress of the Ambedkarite era.”<sup>28</sup>

Walter D. Mignolo has argued that the project of Coloniality was achieved with the “Eurocentric” notion of dominating both historically and temporally, which was very much about power, structure of management, and hierarchy. All these were done in the name of modernity, which he considered to be a mere fiction and the rhetoric of salvation. Furthermore, Mignolo celebrates how Western domination is ending with the irony of “those who classify always forget but those who are classified never forget.”<sup>29</sup> This means that now the center of “Capital” and “Knowledge” is controlled by the colonies who were once in the hands of “white people” 500 years ago, or less. However, while these colonies are flexing their muscles in the international arena, at the same time in the hinterland of those very same colonies there exists a bipartisanship that in a way maintains the concept of *centre* and *periphery*, which is analysed by Angel Rama in *The Lettered City*.<sup>30</sup> Pablo González Casanova thus explains this concept in his famed article “Colonialismo Interno”:

Con el triunfo mundial del capitalismo sobre los proyectos comunistas, socialdemócratas y de liberación nacional, la política globalizadora y neoliberal de las grandes empresas y los grandes complejos político-militares tiende a una integración de la colonización inter, intra y transnacional. Esa combinación le permite aumentar su dominación mundial de los mercados y los trabajadores, así como controlar en su favor los procesos de distribución del excedente en el interior de cada país, en las relaciones de un país con otro y en los flujos de las grandes empresas transnacionales.<sup>31</sup>

Exactly the same case justifies the writings of Rigoberta Menchú and Dayamani Barla. Sharmila Rege says:

My argument here is that Dalit life narratives are in fact *testimonies*, which forge a right to speak both for and beyond the individual and contest explicitly or implicitly the ‘official forgetting’ of histories of caste oppression, struggles and resistance. A *testimonio* is a narrative in book or pamphlet form, told in the first person by a narrator who is also the real protagonist or witness of the events he or she recounts and whose unit of narration is usually a ‘life’ or significant life experience (Beverly 1992: 92-93). In a *testimonio*, the intention is not one of literariness but of communicating the situation of a group’s oppression, imprisonment and struggle. The narrator claims some agency in the act of narrating and calls upon the readers to respond actively in judging the situation (94-97).<sup>32</sup>

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<sup>28</sup> *Supra* note 22, at 13.

<sup>29</sup> Walter D. Mignolo, “The Concept of De Coloniality,” Interview (21 Apr 2015), <https://www.youtube.com/watch?v=skoL6ngD7Gs>

<sup>30</sup> Angel Rama, *The Lettered City*, trans. John Charles Chasteen (Durham, United States of America: Duke University Press, 1996).

<sup>31</sup> Pablo González Casanova, “Colonialismo Interno (Una Redefinición),” *Revista Rebeldía*, no. 12 (October 2003).

<sup>32</sup> *Supra* note 22, at 13.

These writings and their authors' struggles are co-existent with the framework of *testimonio*, which is now very much acceptable in society because it does not demand a specific genre; rather, it is up to the reader to decide how she/he wants to read it. I think the readership has decided these testimonies deserve the respect to which they are entitled, as referenced in *The Death of the Author* by Roland Barthes.<sup>33</sup>

Finally, we can say that both the women writers profiled here are iron pillars in their respective parts of the world. They do not need any intermediaries to explain their history. This has been explained earlier as well in the contexts of the Spanish and Hindi languages that they are using. Nevertheless, women are always active agents in discussions related to carefulness, which is not to be confused with docility and submissiveness. Referring again to the words of Bina Agrawal, "Women, especially those in poor rural households in India, on the one hand, are victims of environmental degradation in quite gender-specific ways. On the other hand, they have been active agents in movements of environmental protection and regeneration."<sup>34</sup> This explains the notion behind eco-feminism about which both protagonists of this paper have discussed.

Joseph Stiglitz analyzed Globalization in his book *Making Globalization Work*, in which he writes:

About 80 percent of the world's population lives in developing countries, marked by low incomes and high poverty, high unemployment and low education. For those countries, globalization presents both unprecedented risks and opportunities. Making globalization work in ways that enrich the whole world requires making it work for the people in those countries.<sup>35</sup>

Similarly, globalization brings its own boon and bane. Policy makers should always keep in consideration the last person in the queue, who may belong to an ethnically, culturally or religiously marginal group; since our discussion revolves around the ethnicity and gender discourses, the activities discussed in this chapter are surely doubly marginalized.

Evidently, The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is one of the most significant developments in human rights. It recognizes that Indigenous Peoples throughout the world have the right to exist as peoples, nations, cultures, and societies. The UN Declaration was adopted by the UN General Assembly on September 13, 2007. The journey to get it passed was not easy, but rather a very arduous one. The Haudenosaunee Chief Deskaheh was the first to go to the League of Nations in Geneva in 1923. He tried hard to get an audience for his voice about the plight of Indigenous Peoples, but it was all in vain. However, he was the first Indigenous leader to use an international organization to express his ideas and believed that this international organization would one day defend Indigenous Peoples' rights.

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<sup>33</sup> Roland Barthes, "The Death of the Author," trans. Stephen Heath (New York, United States of America: Hill and Wang, 1977), 142-147.

<sup>34</sup> *Supra* note 20.

<sup>35</sup> Joseph Stiglitz, *Making Globalization Work* (New York, London: W.W. Norton & Company, 2006), 26.

Hence, step by step, progress was made in this regard since the 1970s and the result is now in front of us, presented as the UNDRIP.

Globalization has also provided a few mediums of social networking and micro blogging through which tribal and Indigenous activists are able to interact with others. A relevant example could be the interaction of Subcomandante Marcos with the people of Chiapas in Mexico through live radio telecasts. Likewise, I refer to Noam Chomsky, who wrote:

The thing I consider inspiring is seeing people struggling: poor suffering people, with limited resources, struggling to really achieve anything. Some of them are very inspiring. For example, a remote very poor village in southern Colombia organising to try to prevent a Canadian gold-mining operation from destroying their water supply and the environment; meanwhile, fending off para-military and military violence and so on. That kind of thing which you see all over the world is very inspiring.<sup>36</sup>

Rigoberta Menchú and Dayamani Barla are using their blogs and other peripheral modes of protest to sensitize those who are still not well-informed about the benefits of environmental protection and nature preservation. They are always in favor of peaceful methods to achieve their genuine and legitimate demands, because “an eye for an eye will make the whole world blind.” I here recall the words of Edward Said in an interview quoting Antonio Gramsci in his *Prison Notebook*: “History has left us an infinity of traces (all kind of marks) but there is no orderly guide to it. Therefore, the task is to compile an inventory of the traces that history has left in us.”<sup>37</sup> He was acknowledging the pain and oppression Indigenous Peoples have gone through over their lifetimes, however the appropriate revenge would not be to indulge in any violent activities. Any message or communication should be through peaceful means, using the same language that the outside community could comprehend easily.

Cultural homogenization is already making its presence felt, but the testimonies of various authors are first-hand examples of the experiences they have had, and there is no doubt that we cannot close our ears and eyes any longer. Therefore, the options available at our disposal vary from making the government of the day fully accountable for actions that negatively affect the lives of marginal and disadvantaged peoples, taming the bulldozing aspect of globalization and finally making the world sustainable, wherein there would be mutual cooperation between the state, market forces and civil society acting at the behest of a multi-actor paradigm. This would more importantly make this earth a holistically liveable earth. The United Nations has established the Human Rights Council, the Permanent Forum on Indigenous Issues, and many other organizations and bodies which are working uninterruptedly day and night for the welfare of the affected.

The concept of globalization has affected the lives of many traditional dwellers of the planet in a more aggravated manner because of their dependence on nature.

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<sup>36</sup> James Resnick, “Noam Chomsky on Globalization, Inequality and Political Alienation,” *Truth-out* (2 July 2016), <http://www.truth-out.org/news/item/36636-noam-chomsky-on-globalization-inequality-and-political-alienation>.

<sup>37</sup> *Supra* note 27.

Rigoberta Menchú and Dayamani Barla have admitted the same in their interviews as well. This awareness is now creeping into society in a very open manner, whereas it entered in the early 1990s in a very subtle manner. This author is not against globalization per se because without globalization it would be difficult to survive on the planet as it has already changed to adjust. However, globalization can and should be managed properly, with the inclusion of people affected the most, through a bottom-up approach, and using decentralized methods of decision making so as not to rob people of their lands, their forests and their water.

The debate of oral history versus written history and the testimonial form of writing versus other forms more prevalent in society, pushes us to think about why the societal structure is skewed and favorable only to the dominant sections of society. As we have seen in the case of Rigoberta Menchú and Dayamani Barla's writings, these authors have talked about the protection of Nature and of Mother Earth. They are supportive of "development" in a holistic manner—without the ill effects of it—to be sustained by those who are dependent on land and nature.

We see that the testimonial form of writing is creating a well-recognized space for itself these days because, since the beginning of the recognition of the validity of testimony during the beginning of the 1980s, the following debate took place: Is this literature? As we know, literature is the mirror of a society. We can then say that testimony fits very much in that frame because, after all, it represents a fuller representation of society and does not merely refer to a fiction or a utopia. It is resistance literature, where the margins are re-claiming their space. Examples can be seen in Bolivian Domitila Chungara's *Let Me Speak* or various "Dalit" writings, for example, those by Sharmila Rege or Kancha Ilaiah; Vivek Kumar has also expanded on this.

Both of the protagonists of this paper have struggled throughout their lives and stood for the peoples. We need to support them as they are not against "development" per se but only demanding that "development" be rolled out in a sustainable manner so that future generations will not be negatively affected as flora and fauna go extinct. The present generation should also have an opportunity to simply live their lives. However, the situation is challenging on the ground level where young people are involved; they have to face the wrath of the administration, of the state. These tellers of oral history are, through their writings, uniting people. They are also taking the help of various available forums to facilitate dialogues, such as through blogs, social networks and other online platforms. Here, we can see that globalization has been used in a positive way. I consider that these writers are creating a new normal in the hegemonic world order today.

### **Glossary**<sup>38</sup>

***Adivasi***: A member of any of the aboriginal tribal peoples living in India before the arrival of the Aryans in the second millennium BC.

***Altiplano***: The high tableland of central South America.

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<sup>38</sup> These definitions have been taken from various sources.

***Bhuinhari and Khuntkattidari system:*** The *Bhuinhari* lands surveyed and recorded under the provisions of Acts of 1869 are tenures. *Mundari Khuntkattidars* are neither *Raiyats* nor tenure-holders. De facto, however, both these classes of tenants approximate to *Raiyats*; and, as the *Bhuinhars* and *Mundari Khuntkattidari* frequently hold *Raiyati* lands, in addition to their privileged tenancies, they are therefore regarded as *Raiyats*. All members of a *Bhuinhari* family and all male members of a *Mundari Khuntkattidari* family, who hold and have continuously held land in the village for 12 years, shall be deemed to be settled *Raiyats*, in respect of any land which they may hold as *Raiyats*.

***Dalit:*** Dalit, meaning “oppressed” in Sanskrit and “broken/scattered” in Hindi/Urdu, is a “defiant” self-chosen political name for the members of lower castes in India.

***Finca:*** A ranch or large farm in a Spanish-speaking country, especially a plantation in tropical Spanish America.

***Ladino:*** From Spanish, Ladino means “sagacious, cunning, crafty.” It was originally “knowing Latin, Latin,” from Latin Latinus. The Spanish word has also appeared in 19<sup>th</sup> century American English in its senses as “vicious horse” and, in Central America, as “mestizo, white person.”

***Quetzal:*** Paper money and also a monetary unit of Guatemala, equal to 100 centavos.

***Raiyat:*** Someone who has acquired the right to hold land for the purpose of cultivating it, whether alone or by members of his family, hired servants, or partners. It also refers to succession rights.

***Sahu:*** Local moneylenders in villages, called by different nomenclature in different states of India.

# Ecology activism in the Sakha Republic: Russia's "Large-Numbered" Indigenous Peoples and the United Nations Declaration of the Rights of Indigenous Peoples

Vera Solovyeva

## I. Introduction

Over the past six years, I have had several opportunities to attend sessions of the United Nations Permanent Forum on Indigenous Issues (UNPFII) in New York as a representative of various non-profit organizations from my homeland—the Republic of Sakha (Yakutia).<sup>\*</sup> My voluntary work was led by a desire to help participants with organizing their accommodations in New York, assist with transportation, and provide translation services to the many participants who were visiting the United States for their first time and amongst whom almost no one spoke English.

During these years, I witnessed changes in my compatriots' attitudes and expectations. First, Sakha people perceived their participation at the UNPFII sessions as "study tours." Their main purpose was to gather information: learn about the UN Permanent Forum on Indigenous Issues, meet Indigenous Peoples from around the world, and likely most importantly, to understand what place Sakha people have in the Indigenous world. This uncertainty among the Sakha is caused by the fact that legal definitions in Russia give little opportunity for self-identification.<sup>1</sup> Under Russian legislation, ethnic groups are officially recognized as "Indigenous" with special protective status only when they are fewer than 50,000 individuals. Other native peoples whose populations exceed 50,000 are not considered as "Indigenous" even if they are within the scope of UN-accepted definitions of Indigenous Peoples. Thus, the Tatar, Buryat, Sakha, Bashkirs, Kalmyks, Komi and other native people of the Russian Federation are not formally recognized as "Indigenous" although many of them still preserve traditional lifestyles on their ancestral land, and have their distinct cultures, traditions, languages and religions. Instead, they are named by the state as "titular nations," "majority in national republics," "large-numbered," and similar terms that do not offer the protective status belonging to Indigenous groups.

As Poelzer and Fondahl note,<sup>2</sup> northern Indigenous Peoples of Russia have greatly suffered from problems caused by Soviet assimilationist policies for decades. These policies negatively impacted all of Russia's ethnic groups. However, Small-Numbered Indigenous Peoples (SNIP) were affected more severely due to their small population. High mortality, together with low rates of fertility, resulted in population loss, high homicide rates, decreased amounts of native speakers, and other social and economic problems that led to the deep demographic crisis among small-numbered northern ethnicities.<sup>3</sup> In response to this formidable challenge, SNIP leaders united for political actions to protect their interests, as well as their cultural and linguistic rights. In

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<sup>\*</sup> Republic of Sakha (Yakutia) is located in the north-eastern part of the Russian Federation.

<sup>1</sup> Marjorie Mandelstam Balzer, "Indigeneity, Land and Activism in Siberia," *Land, Indigenous People and Conflict*, eds. Alan Tidwell and Barry Zellen (London, New York: Routledge, 2016:12)..

<sup>2</sup> G. Poelzer and Gail Fondahl, "Indigenous Peoples of the Russian North," *Cultural Survival Quarterly* 21, no. 3 (1997), 30-33.

<sup>3</sup> Andrey Petrov, "Lost generations? Indigenous Population of the Russian North in the Post – Soviet Era," *Canadian Studies in Population* 35, no. 2 (2008), 269-290.

1990, the “Congress of the peoples of the North of the USSR” was created with Mikhail Gorbachev’s direct support.<sup>4</sup> A few years later, when political conditions changed after the Soviet Union’s collapse, “Small-Numbered” Indigenous Peoples of the North, already being mobilized politically and already being considered as “Indigenous” under Russian legislation, could more readily join the Indigenous People’s Movement. At the same time, relatively “Larger-Numbered” Indigenous Peoples, lured by different legal definitions, fell behind, despite the fact that they faced the same problems as Indigenous minorities throughout the world. These days, “large-numbered” ethnicities have become more aware of their rights, as they are outlined in the UN Declaration of the Rights on Indigenous Issues. This increased awareness is shown in various forms:

- 1) The public movement “Indigenous women of Komi Republic” was created under the influence of the international Indigenous movement.<sup>5</sup>
- 2) Tatar, Bashkir and Chuvash non-governmental organizations created the “Association of Indigenous Peoples of the Russian Federation” in 2014. This association has the purpose of preserving and developing Indigenous Peoples’ lives in accordance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Constitution of the Russian Federation.<sup>6</sup>
- 3) Russia’s legislation introduced the concept of “Indigenous People” in relation to the Sakha people by the Sakha Constitutional Court in 2016 as an attempt to protect Sakha people’s interests in land and nature management.<sup>7</sup>
- 4) Meetings, protests, and pickets took place in Tatarstan, Bashkortostan, and Chuvashiya in defense of native languages<sup>8</sup> as well as in the Republic of Sakha (Yakutia) against industrial development without prior free and informed consent (FPIC), where people not only criticized the neglect of the interests of local people, but also appealed to the United Nations to influence the Russian government to endorse the UNDRIP.<sup>9</sup>
- 5) Ms. Antonina Gavriyeva’s speeches at the UNPFII sessions in 2016 and 2017 included the statement that “Indigenous Sakha people face challenges from transnational corporations that cared only about profit and violated the rights of

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<sup>4</sup> Grigoriy Ledkov, “Living Arctic,” World of Indigenous Peoples, no. 31 (2015), <http://docplayer.ru/30016279-Mir-korenyh-narodov-zhivaya.html>.

<sup>5</sup> Olga Kuzivanova, Korennie narody: dva podhoda, dve kontseptsii. [Кузиванова О.Ю. 2012:251., Коренные народы: два подхода, две концепции. Известия АлтГУ. №4-1 (76)].

<sup>6</sup> Bashgolos.ru, website, <http://bashgolos.ru/policy/2987-tatrskie-bashkirskie-i-chuvashkie-obschestvennye-organizacii-obedinilis-v-associaciyu-korenyh-narodov-rf.html> [Татарские, башкирские и чувашские общественные организации объединились в Ассоциацию коренных народов РФ].

<sup>7</sup> Evgeniy Gunaev, K probleme opredeleniya statusa “Korennih narodov”: pretsident Respubliki Sakha (Yakutia), 2016. [Гунаев Е.А. 2016. К проблеме определения статуса «Коренных народов»: прецедент Республики Саха (Якутия). Вестник ИКИАТ. №2 (33).

<sup>8</sup> MariUver.ru, “V respublikah Povolzhia proshli piketi v zashitu natsionalnih yazikov,” (2012), <https://mariuver.com/2012/12/02/pikety-nac-jaz/> [В республиках Поволжья прошли пикеты в защиту национальных языков]

<sup>9</sup> Regnum.ru, (2017), <https://regnum.ru/news/society/2295707.html> [ООН просят защитить коренной народа Якутии (2017)].

Indigenous Peoples.” She also appealed to the government of the Russian Federation to accept the UN Declaration of the Rights of Indigenous Peoples.<sup>10</sup>

In this article, I provide a short overview of the Indigenous movement around the world and in Russia. I also analyze general trends and individual examples of social involvement in my homeland, the Republic of Sakha (Yakutia), explaining the evolution of people's awareness, with more attention paid to little-known information on the Sakha people's ecological and social activism. I also emphasize the importance of applying the UN-recognized term “Indigenous Peoples” to all non-Russian natives regardless of their population size, which would allow them to better protect their rights according to the Declaration on the Rights of Indigenous Peoples.

## **II. Overview of the Indigenous Movement Around the World and in the Russian Federation**

From the end of the 20th century, there has been a steep growth in global awareness of the vulnerability of Indigenous Peoples.<sup>11, 12</sup> Starting from that time, rights of Indigenous Peoples began to be considered and included in international law and in some court decisions.<sup>13, 14</sup> However, a strong movement for the recognition of the rights of Indigenous Peoples began only after the adoption of the Declaration on the Rights of Indigenous Peoples by the UN General Assembly in September, 2007.\* Since then, significant success has been achieved in some countries. In February of 2008, the Prime Minister of Australia, Kevin Rudd, apologized for the past practice of forcibly separating Indigenous families in order to place children with white families or in religious/charitable facilities. Then, in June 2008, the Prime Minister of Canada, Stephen Harper, apologized for the abuse of Indigenous Peoples in state-funded, church-governed schools in Canada. The Australian Government officially endorsed the UN Declaration on the Rights of Indigenous Peoples in April 2009. In Bolivia, changes in their constitution granted Nature the same legal rights as people in 2009. This motivated new social actions in the country to protect their environment from industrial companies' pollution.

In post-Soviet Russia, there was a rise in social activism of Indigenous Peoples as well. It occurred during a time of a huge change in ideology, both economic and political, that destroyed the communist governance system; improved relationships with Western countries; and instilled hope in building a truly democratic society in the post-

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<sup>10</sup> “United Nations Mechanisms Handling Indigenous Peoples’ Rights Must Better Identify Strengths of Mandates to Increase Effectiveness, Speakers Say in Permanent Forum,” United Nations Permanent Forum on Indigenous Issues (2016), <https://www.un.org/press/en/2016/hr5303.doc.htm>

<sup>11</sup> V.A. Vladimir Kryazkov, “Prava korennih malochislennih narodov Rossii: Metodologiya regulirovaniya,” *Gosudarstvo i Parvo*, no. 1 (1997), 18-23. [Кряжнов В.А. 1997. Права коренных малочисленных народов России: Методология регулирования. *Государство и право*. 1997, #1. с. 18-23]

<sup>12</sup> James D. Ford, “Indigenous Health and Climate Change,” *American Journal of Public Health* 102, no. 7 (2012), 1260–1266.

<sup>13</sup> Siegfried Wiessner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis,” *Harvard Human Rights Journal* 12m no. 58 (1999), 57-128.

<sup>14</sup> Peter Manus, “Sovereignty, self-determination, and environment-based cultures: the emerging voice of indigenous peoples in international law,” *Wisconsin International Law Journal* 23 (2005), 556.

\* United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations Document A/RES/61/295 (October 2007).

Soviet Republics. The words “*Glasnost*” (openness) and “*Perestroyka*” (reconstruction) were not just words. People believed in change, believed that their rights would be protected, and believed that they could benefit from land management based on free, prior and informed consent.

On the crest of these hopes and expectations, the Russian President’s decree “On urgent measures for protection of the places of residence and traditional economic activities of Indigenous Peoples of the North” was issued in April 1992. This decree outlined territories of traditional resource management occupied by Small-Numbered Indigenous Peoples under their lifetime ownership. They could use these territories for hunting, reindeer herding, fishing and for other traditional activities. In 1993, the Association of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East of the Russian Federation (RAIPON) was established, replacing the Congress of the Peoples of the North of the USSR, which was created in 1990 during the First Congress of the Peoples of the North. The purpose of this renewed organization was to defend, on both federal and regional levels,<sup>\*</sup> the interests of Indigenous Peoples of the North, Siberia and the Far East of Russia.

On June 19, 1996, the federal law “On the Basis of State Regulation of the Socio- Economic Development in the North of the Russian Federation”<sup>\*\*</sup> introduced the term “Small-Numbered Indigenous Peoples” into Russian legislation, that replaced the Soviet term “Small-Numbered People of the North” which was used before. The law defined “Small-Numbered Indigenous People” as people living on their ancestral land, following their traditional life, recognizing themselves as independent ethnic communities and whose population was less than 50,000 people.<sup>15</sup> This federal law, despite its significant gaps and shortcomings, created a legal basis for more participation of the representatives of Small-Numbered Indigenous People in the state government and more self-governance in economic and socio-cultural spheres. Thus, after adoption of this law, special quotas for SNIP representatives in government bodies were established by the formation of electoral districts with numerically small populations, national settlements were formed, territories of subsistence use were been created, subsidies and tax benefits were granted to boost traditional activities, and other positive outcomes have been experienced by the Indigenous Peoples in these areas. There were also efforts to develop native languages in order to preserve traditions and customs.<sup>16</sup> However, as the well-known Indigenous Peoples’ Rights’ defender Dmitry Berezhkov <sup>17</sup> argued, Small-Numbered Indigenous Peoples’ organizations were mostly excluded from legislative initiatives. Only the Association of Nenets people, “Yasavey” from the Nenets autonomous *okrug* (region), and Kamchatka’s regional Association of

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\* The Russian Federation has two main levels of government: the federal government and the governments of its 85 federated states (regions). M. Russell, “Russia’s constitutional structure. Federal in form, unitary in function,” *In-depth analysis., European Parliamentary Research Service* (2015), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/569035/EPRS\\_IDA\(2015\)569035\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/569035/EPRS_IDA(2015)569035_EN.pdf).

\*\* The law expired 08/22/2004.

<sup>15</sup> Federal Law, “On the bases of state regulation of socio-economic development of the North of the Russian Federation,” (1996) //Федеральный закон "Об основах государственного регулирования социально - экономического развития Севера Российской Федерации" от 19.06.1996 N 78-ФЗ (последняя редакция) (утратил силу в 2005 году).

<sup>16</sup> *Supra* note 11.

<sup>17</sup> Dmitry Berezhkov, “The study of the Indigenous peoples’ participation in decision making in Russia Federation,” Russian Association of Indigenous Peoples of the North (RAIPON) (November 2012).

Indigenous Peoples, have such rights at a regional level. RAIPON—an all-Russian umbrella organization that represents 40 regional and ethnic organizations—could not get the right to participate in the Russian policy making process, despite its federal status and all its previous attempts to obtain such rights. Despite not being able to participate directly in creating new laws, RAIPON was, however, as Murashko<sup>18</sup> notes, able to make recommendations on changes and amendments, and therefore managed to influence three important federal laws which aim to protect the rights of Russian Small-Numbered Indigenous People according to international law. These are: 1) “About guarantees of the rights of Small-Numbered Indigenous Peoples of Russian Federation,” of 1992; 2) “About general principles of organization of the Small-Numbered Indigenous Peoples' communities of the North, Siberia and the Far East of Russian Federation,” of 2000; and 3) “About territories of traditional use of the Small-Numbered Indigenous Peoples of the North, Siberia and the Far East of Russian Federation,” of 2001.

Unfortunately, as noted by many authors and as mentioned in the Release, published by the Council of the Russian Federation: “On the question of the relationship of Small-Numbered Indigenous Peoples with industrial companies,” the legislation suffered from significant contradictions and legal conflicts.<sup>19</sup> As a result, the adoption of these laws did not ensure full and effective protection of the rights of Small-Numbered Indigenous People. Moreover, these laws are not effectively implemented.<sup>20</sup>

In spite of inadequate protection, RAIPON was very active in defending rights on land issues and social and economic development on different levels, from the regional to the international. RAIPON has special consultative status with the Economic and Social Council of the United Nations (ECOSOC), participates in UN working groups on Indigenous Peoples' Issues as well as the UN Permanent Forum on Indigenous Issues, and participates on the Arctic Council as well as other bodies. International recognition doubtless helped Small-Numbered Indigenous Peoples of the North, Siberia and the Far East to better defend their rights and interests. The first RAIPON president was Yeremey Aypin, followed by Sergey Kharyuchi; vice-presidents were Pavel Sulyandziga and then Dmitriy Berezhkov. The current president is Grigory Ledkov and the current vice president is Nina Veysalova.\*

### III. Social Activism in Sakha Republic

In the Republic of Sakha (Yakutia), two main trends have characterized the Indigenous movements at the end of the 20<sup>th</sup> century: firstly, strengthening and defending the rights of Small-Numbered Northern Indigenous Peoples through the

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<sup>18</sup> Olga Murashko, “Introduction: The International Round Table on an Indigenous Parliament?” *Realities and Perspectives in Russia and the Circumpolar North*, ed. Kathrin Wessendorf (Copenhagen, Denmark: International Work Group for Indigenous Affairs, 2005), 22-27.

<sup>19</sup> Sergey Kharuchi, Committee of North and Indigenous People (2009), <http://council.gov.ru/media/files/41d44f243f298c2efb01.pdf>. [С.Н. Харючи. 2009. Создание комплексной системы законодательной защиты прав коренных малочисленных народов Севера в Российской Федерации — необходимое условие социально-экономического развития коренных народов и северных территорий. *Комитет Совета Федерации по делам Севера и малочисленных народов.*]

<sup>20</sup> James Anaya, “Country report by the UN Special Rapporteur on the rights of indigenous peoples,” United Nations Document A/ HRC/15/37/Add.5 (June 2010).

\* <http://raipon.info/about/presidium.php/>

Association of Small-Numbered Indigenous Peoples of the North of Republic of Sakha (Yakutia) (a member of the RAIPON's Coordination Council) and, secondly, ecological activism and cultural revitalization by the "large-numbered" Sakha people.

### **1) Political Activism of the Small-Numbered Indigenous Peoples of the North**

The Association of Small-Numbered Indigenous Peoples of the North of the Republic of Sakha (Yakutia), which works closely with RAIPON, was created in 1989 under the leadership of Andrey Krivoshapkin. The association represented five Small-Numbered Indigenous Peoples of the North originally residing on the territory of the Republic of Sakha (Yakutia): Yukaghirs, Evens, Evenki, Chukchi, and Dolgans. It also included Russian "Old-Livers" from the Arctic zone. The Association's leaders managed to establish constructive cooperation with Sakha government authorities and institutions of civil society in the Republic. They also proposed fundamental provisions to protect the rights of the Indigenous Peoples of the North in the first Constitution of the Republic of Sakha (Yakutia) in 1992, which were introduced into the new Constitution of the Russian Federation in 1993. The Association also helped establish conditions in the Sakha Republic, where all legal acts related to the interests of Small-Numbered Indigenous Peoples could not be accepted without the Association's direct participation and agreement.<sup>21</sup>

### **2) Ecological Activism of the Sakha (Yakut) People (1989-2017)**

Before describing social activism of the Sakha (Yakut) people, it is important to explain its context. Our Republic of Sakha (Yakutia) is very rich in natural resources. During my childhood, I heard many times our elders telling with bitter humor a legend explaining the wealth loaded in our land: "One fine time, God decided to distribute natural resources evenly around the Earth. He loaded a bag with minerals and treasure, and flew around the Earth taking handfuls of valuables from his bag and throwing them all around. When he got to where the Sakha Land is located, there was a frigid winter that unfortunately was so cold that God's hands froze. The bag slipped out of his numb fingers and all the treasure that was intended for the whole Earth was scattered all around our homeland." Indeed, likely all the minerals from the Mendeleev periodic table can be found within the territory of the Sakha Republic. This claim makes our officials proud, but ordinary citizens are troubled. It is indicated on the Sakha government website that the mineral resource potential of the Republic of Sakha (Yakutia) is: 82% for diamonds, 17% for gold, 61% for uranium, 82% for antimony, 6.2% for iron ore, 40% for coal, 28% for tin, and 8% for mercury. There are significant reserves of rare-earth elements, including silver, lead, zinc, tungsten.<sup>22</sup> Industrial mining on the territory of the Sakha Republic started in the middle of the 19<sup>th</sup> century by the Trapeznikov and Sibiryakov companies, when gold was discovered in the sand along the River Olekma.<sup>23</sup> With time, resource extraction only grew as well as did environmental problems, since tsarist and then Soviet authorities did not consider environmental protection as necessary or even important. As a result of an outrageously careless attitude toward nature, serious deterioration of the ecological situation in the

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<sup>21</sup> ASNIP website (2017), <http://yakutiakmns.org/istoriya>.

<sup>22</sup> Website of the Department of Mining, Republic of Sakha (Yakutia), <http://old.sakha.gov.ru/node/174966>.

<sup>23</sup> Michael Melancon, *Goldfields Massacre and the Crisis of the Late Tsarist State* (College Station, USA: Texas A&M University Press, 2006), 14.

Republic of Sakha occurred, which became the reason for the intensification of citizen activism. Ecological activism involved many nationalities in the Republic of Sakha (Yakutia). However, Sakha people often played a leading role as a driving force for this movement, particularly because the majority of the population living in the most polluted areas are the Sakha people. There are two waves of ecological activism in Republic of Sakha (Yakutia):

#### *a) First Wave of Social Activism*

In 1989, a Public Environmental Control Center was established in Yakutsk, Republic of Sakha (Yakutia). Members of this Control Center included scientists, Sakha intelligentsia, public ecologists, and active citizens. The Center's purpose was to study and disseminate any information about ecological problems with river watersheds within the territory of the Sakha Republic where industrial activities were conducted. This scope covered the Viliuy, Amga, Adycha, Indigirka, Kolyma, Alazeya, Aldan and Lena rivers. Following the Center's first conferences in 1990, grassroots organizations to protect those rivers were created. The most active in expressing the citizens' opinions were the organizations "Protect River Amga," "Protect Rivers Adycha and Kolyma" and the "Viliuy Committee."<sup>24</sup>

The "Viliuy Committee" united public ecologists and residents of four Viliuy *uluses* (districts), where mining activities of the diamond mining company "Almazi Russia Sakha" (ALROSA)<sup>25</sup> were being conducted. The activity of the Viliuy Committee was carried out in very difficult conditions—all mining activities and ecological problems were considered high-level state secrets and were classified. Thus, no one would disclose information about them. Leaders of the "Viliuy Committee" had to travel a lot to take part in ecological expeditions. Dissemination of the information they collected was also difficult, since there was no public internet yet and neither was there an independent media.<sup>26</sup> People in the Viliuy region were not aware of the real ecological situation of the Viliuy watershed. They had, however, already noticed a sharp decline in water quality in the Viliuy river, which was directly related to the activities of diamond-mining and to the Vilyui Hydropower plant (HPP). Mining activities had already resulted in a deterioration in their health. When information about the environmental onslaught in the Viliuy Region became accessible to the public, it immediately stirred public opinion.

We can see an increase in public attention to the environmental degradation by looking at a table on the amount of press publications related to ecology in the Republic of Sakha (Yakutia) from 1985 to 1990.<sup>27</sup>

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<sup>24</sup> Stepan Grigoriev, "Razvitie ekologicheskogo dvizhenia yakutii v kontse XX v," *Nauchnie problem gumanitarnih issledovaniy*. no. 3 (2012), 19-26. [Григорьев С.А. 2012. Развитие экологического движения Якутии в конце XX в. *Научные проблемы гуманитарных исследований*. 2012. № 3. с. 19-26].

<sup>25</sup> ALROSA (Almazi Russia Sakha) is the one of the leading diamond mining companies in the world. ALROSA's main diamond mining source "Mir" is located within the territory of the Republic of Sakha (Yakutia), which was established in 1957, <http://eng.alrosa.ru/>.

<sup>26</sup> Sofiya Bulchukey (2015), <http://sakhallife.ru/miting-yakutyane-predpochitayut-zhit-bedno-no-zdorovo/> [Булчукей С. 2015. Митинг: Якутяне предпочитают жить бедно, но здорово. Решиональная газета "СахаЛайф"/Отдел "Экология"]

<sup>27</sup> *Supra* note 24.

Amount of press publications in the Republic of Sakha (Yakutia) related to ecology (Table 1):

1985	1986	1987	1988	1989	1990
16	36	23	81	145	96

In 1986, there was an article called “Let the Viliuy River water be clean” in the Sakha official regional newspaper *Kyym*, where the author, Ivan Burtsev, argued that the mining company YakutAlmaz drained untreated water after use for diamond production into the River Viliuy, which was the only source of drinking water and was used in daily household activities for many local people. The article had a huge resonance in the Vilyui *ulus*. Following this article’s publication, a Sakha governmental commission was established. The commission found that there were no treatment facilities at YakutAlmaz at all and that, indeed, all untreated water had been dumped directly into the Viliuy River over the course of many years.<sup>28</sup>

Another news item related to the Viliuy region was information about “peaceful” underground nuclear explosions for a deep seismic sounding of the Earth’s crust\* within the territory of the Russian Federation from 1965 to 1988,<sup>29</sup> twelve of which were within the territory of the Republic of Sakha (Yakutia).<sup>30</sup> Two of these explosions (Crystal and Kraton-3) were recognized as accidental due to technological mistakes and resulted in long-term radioactive contamination of the environment.<sup>31,32,33,34</sup> In the case of Kraton-3, which exploded in 1978, a radioactive plume that contained volatile radionuclides <sup>131</sup>I, <sup>140</sup>Ba β <sup>140</sup>La and the refractory radioisotopes <sup>141</sup>Ce, <sup>106</sup>Ru, <sup>95</sup>Nb, and <sup>95</sup>Zr, as well as <sup>134</sup>Cs and <sup>137</sup>Cs, passed first over a temporary settlement where the participants of the experiment (totaling 80

<sup>28</sup> Susan Crate, “Co-option in Siberia: the case of diamonds and the Viliuy Sakha,” *Polar Geography* 26, no. 4 (418-435), 2002.

\* Deep seismic sounding of the Earth’s crust is usually conducted for oil and gas finding purposes or to study seismic situations in the zone. In the Vilyuy River area, eight explosions were planned to create a basin for a tailings dam for the nearby diamond mine, but after the kraton-3 explosion this plan was refused. Please see Nadezhda Ivantsova, “Mimiy atom pod Mimym,” Newspaper yakutia (June 1999), <http://42.ykt.ru/yakutia/n29136/19-65.htm> [Иванцова Н. 1999. "Мирный" атом под Мирным. Теперь я знаю, где водятся "атомные" олени. Газета "Якутия". 19 июня 1999].

<sup>29</sup> Valeriy Ramzaev et al., “Radioecological studies at the Kraton-3 underground nuclear explosion site in 1978–2007: A Review,” *Journal of Environmental Radioactivity* 100, no. 12 (2009), 1092–1099.

<sup>30</sup> Mikhail Kaymonov et al., “radiatsionnaya bezopasnost v Yakutii – problemi i puti reshenia,” *J. Nauka i tehnika v yakutii* 2, no. 7 (2004). [Каймонов М. В., Киселев В. В., Хохолов Ю. А.; Радиационная Безопасность Якутии – проблемы и пути решения, Научно-популярный журнал «Наука и техника в Якутии», № 2(7)]

<sup>31</sup> *Supra* note 28.

<sup>32</sup> *Supra* note 32.

<sup>33</sup> Evdokiya Burtseva et al., “Problema kompensatsii ekologicheskogo i sotsialnogo usherba v yakutii vizvannogo dobychei almazov,” *Regionalnaya ekonomika* 40 (2009), <http://cyberleninka.ru/article/n/problema-kompensatsii-ekologicheskogo-i-sotsialnogo-uscherba-v-yakutii-vyzvannogo-dobychey-almazov> [Бурцева Е.И., Кычкин В.Р., Федоров С.П., Бурцев И.С., Барашков Н.А. 2009. Проблема компенсации экологического и социального ущерба в Якутии, вызванного добычей алмазов. *Региональная экономика: теория и практика*. 2009. №40.]

<sup>34</sup> *Supra* note 29.

people)<sup>35</sup> were staying. Judging by the dead “red” forest located in the way of the radioactive plume, the radiation level in the area of about 100 hectares was approximately 1000 R/h.<sup>36</sup> Then, the radioactive cloud dispersed downwind in a northeastern direction for several hundred kilometers, covering an area of 450,000 km. It passed over the town of Aykhal, and then went to the settlements located in the basin of the Vilyui River. Drizzling rain washed off radioactivity from the clouds into the contaminated area.<sup>37</sup> The participants of the catastrophic nuclear explosion left the site without making any warnings to the local people.<sup>38</sup> The secrecy was so thick that even the government of Sakha Republic didn’t know about the possible negative consequences of these “peaceful explosions.”<sup>39</sup> Only after three years, in 1981, MinAtom (the Ministry for Atomic Energy of the Russian Federation) returned and conducted the very first cleanup operation. However, the cleanup was poorly done. As experts from the Republic of Sakha (Yakutia) discovered during their radiological investigations in 1990, the radionuclides were still migrating from the explosion’s pits into the Markha river system—a tributary of the Viliuy River.<sup>40</sup> Only after that, after eleven post-catastrophic years, MinAtom officially acknowledged the accident and classified data became available to the public.

Public outcry to this shocking discovery was so loud\* that Russia had to find ways to “smooth over” the situation by promising to finance and organize ecological projects and programs in the Viliuy region on a percentage of diamond sale profit. In 1993, a joint governmental and ALROSA financial corporation called SAPI (Sakha – Almaz ProInvest) was established. The purpose of the corporation was to create effective mechanisms for solving socio-economic and environmental problems in the eight regions of the diamond province of the Republic of Sakha (four of them located along the River Viliuy watershed). Unfortunately, these plans failed. Despite its generous funding from ALROSA’s profits, the corporation didn’t function effectively from the very beginning, and was accompanied by several scandals and fraud until it finally dissolved in 2001.<sup>41</sup> SAPI didn’t fully finance any of the rehabilitation

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<sup>35</sup> Nadezhda Ivantsova, “Mirniy atom pod Mirnym,” *Newspaper yakutia* (June 1999), <http://42.ykt.ru/yakutia/n29136/19-65.htm> [Иванцова Н. 1999. "Мирный" атом под Мирным. Теперь я знаю, где водятся "атомные" олени. Газета "Якутия". 19 июня 1999.]

<sup>36</sup> Aleksey Yablokov (2009), <http://rus-green.ru/wp-content/uploads/2013/11/A.V.-Яблоков-Чудище-Обло-Озорно-Огромно-Стозевно-И-Лайя-рассказ-эколога-об-атомной-индустрии.pdf> [Яблоков, А.В. 2009. Чудище Обло, Озорно, Огромно, Стозевно и Лайя” (рассказ эколога об атомной индустрии). Иркутская региональная общественная организация “Байкальская Экологическая Волна”, Программа по ядерной и радиационной безопасности Международной Социально-Экологического Союза, Иркутск].

<sup>37</sup> Aleksey Yablokov, “Mif o bezopasnosti i effektivnosti mirnih podzemnyh yadernih bzyvov,” The Socio-Ecological Union, Moscow (2003). [Яблоков А.В. 2003. Миф о безопасности и эффективности мирных подземных ядерных взрывов. Центр экологической политики России, программа по ядерной и радиационной безопасности Социально-экологического Союза, Москва]

<sup>38</sup> *Supra* note 33.

<sup>39</sup> *Supra* note 35.

<sup>40</sup> *Supra* note 33.

\* There was an open letter, signed by participants of the first Public Environmental Control Centre's conference in 1990 to the Chairmen of the Supreme Soviets—the USSR - Lukyanov, the RSFSR - Yeltsin, Yakutsk-Sakha SSR - Nikolaev, in which they made a number of demands—to declare the region of the Vilyui river basin as a zone of ecological disaster; create programs, address ecological, social and economical problems in the Viliuy region; estimate the damage to the Viliuy region environment and to the health of the people living along river Viliuy, and others. There were also a number of meetings and protests all around the Viliuy region with the same demands (Grigoryev, 2012).

<sup>41</sup> *Supra* note 28.

programs.<sup>42</sup> Moreover, there was no finance provided at all between 1994-1995 for environmental protection or for liquidation of ecological damage made by ALROSA during its diamond mining activities, even though SAPI was created especially for this purpose. As a result, there were not enough actions implemented to mitigate the negative environmental consequences in the Viliuy region, and compensations for socio-economic damage to local people were released only partially.<sup>43</sup>

Despite the ineffective SAPI attempt and inadequate funding, the Viliuy Committee continued its work to improve the environmental situation in the diamond province. One of the problems designated by the Viliuy Committee for special attention was the ecological situation of the Viliuy territories, where fragments of the stages of rocket carriers from the cosmodromes Baikonur, Plisetsk, and Svobodniy were discharged. Along with the fragments, rocket fuel containing the toxic chemical heptyl\* was dropped, poisoning the air, soil, and water. The territories of discharge were officially considered “uninhabited places.” However, they were used as pastures for horses and cattle along with hunting and fishing grounds, and hay and berry gathering places. Local people were not made aware of what was literally falling out of space and continued their subsistence activities in this area for many years.<sup>44</sup> In 1999, the Committee representatives together with the deputies of the Sakha State Assembly (Il Tumen) from the Vilyui region, initiated parliamentary hearings that resulted in the adoption of a program called “Improvement of the environmental situation in the diamond province for 1999-2001,” developed by the Ministry of Nature Protection of the Republic of Sakha (Yakutia).<sup>\*</sup> Giving credit to the public ecologists’ activities, ALROSA has now carried out environmental protection actions during diamond extraction, which were approved and controlled by the Ministry of Nature, Protection of the Sakha Republic.<sup>45</sup> In 2007, ALROSA started rehabilitation of the territory around the site of the catastrophic nuclear explosion.<sup>46</sup> The company now uses relatively controlled technology to undermine the rocks of kimberlitic pipes.<sup>47</sup> As a result, the ecological state of the Viliuy region has stabilized to some extent.

However, as Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples, recently noted in her statement at the Tenth Session of the Expert Mechanism on the Rights of Indigenous Peoples (2017), despite the world’s trend in adopting legislation recognizing the rights of Indigenous Peoples, that legislation, unfortunately, does not interact in any way with mining, forestry,

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<sup>42</sup> Andrey Voronov, “The same Fedot. How much does the millionaire deputy Tumusov earn in ecology?” (2010), <https://wek.ru/tot-samyj-fedot>.

<sup>43</sup> *Supra* note 33.

\* Heptil has mutagenic and carcinogenic effects. The World Health Organization recognized it as a substance of the first class of danger. It is very resistant and remains in an environment for a long time.

<sup>44</sup> *Supra* note 28.

\* Parliament Respubliki rassmotrel vopros ispolzovaniya chasti territorii Yakutii pod rayoni padeniya otdelayushihhsya chastey kosmicheskikh raket, <http://iltumen.ru/node/11089>

<sup>45</sup> Sakhamin Afanasiev, “Interview with Minister of Nature Preservation of Republic of Sakha (Yakutia)” (2017), <http://dbr-yakutia.ru/sakhamin-afanasev-my-gotovy-rabotat/> [Интервью с Министром Охраны природы Республики Саха (Якутия) Сахаминном Афанасьевым от 04/11/2017]

<sup>46</sup> *Supra* note 36.

<sup>47</sup> *Supra* note 33.

agriculture, or nature protection laws. Extractive industries, the agro-industrial complex, and infrastructure projects that encroach on the territory of Indigenous Peoples remain the main threats in the expropriation of land, forced eviction, denial of self-government and loss of culture and spiritual heritage.<sup>48</sup> Thus, even in Bolivia, where Mother Earth was proclaimed as the center of all lives and where sustainable development goals are based on the Indigenous Peoples' spiritual world view, there are severe conflicts between environmental discourse and ongoing mining of natural resources that create huge environmental damage.<sup>49</sup> In Russia, where the extraction of natural resources is the basis of the very existence of the state,<sup>50</sup> and where there is no acceptance of any international document on Indigenous rights,<sup>51</sup> land-related confrontations have become increasingly acute. The situation is aggravated by the changes that mineral mining businesses achieved in resource legislation in 2014. These laws have reduced the ability of local authorities to control and influence policies related to “Advanced Development Territories” (ADTs).<sup>52</sup>

During the beginning of the 21st century, ecological activism in the Sakha Republic gradually decreased.<sup>53</sup> Different authors explain this phenomenon differently. Grigoriev argues that environmental organizations, including the Viliuy Committee, made a transition to non-protest activities, like concerts, celebrations of Earth Day and educational campaigns, because the environmental situation in the Republic of Sakha (Yakutia) had finally stabilized.<sup>54</sup> However, Crate stresses that the setback in Viliuy Committee activism had coincided with the death of its main leader Petr Martinov, and at the same time increasing pressure from pro-diamond mining forces. Many original members of the Viliuy Committee left, while new members were not as interested in environmental activism as they were in a bureaucracy convenient to state authorities.<sup>55</sup>

The pressure on environmentalists increased when Vyacheslav Shtyrov—a former head of the ALROSA company—became president of the Sakha Republic in 2002. Shtyrov was interested in the diversification of the economy by bringing new investors into the extractive industries. Under his supervision, a petroleum industry was formed, oil-processing and gas chemical factories were planned, the construction of a cascade of hydroelectric power stations (Kankun HPP) in South Yakutia was planned, and large Russian companies like Surgutneftegaz, Norilsk Nickel, Transneft, Gazprom,

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<sup>48</sup> Victoria Tauli-Corpus, United Nations Special Rapporteur on the Rights of Indigenous Peoples at the Tenth session of the Expert Mechanism on the Rights of Indigenous Peoples, Tenth Anniversary of the United Nations Declaration on the Rights of Indigenous Peoples (2017),

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21889&LangID=E>

<sup>49</sup> James Cooper and Christine Hunefeldt, *Amazonia: Environment and the law in Amazonia: a plurilateral encounter* (Portland, USA: Sussex Academic Press, 2013), 80-85.

<sup>50</sup> Joshua Newell and Laurel Henry, “The state of environmental protection in the Russian Federation: A review of the post-Soviet era,” *Eurasian Geography and Economics* (2017).

<sup>51</sup> Anna Varfolomeeva, *Evolution of the Concept “Indigenous People” in the Soviet Union and the Russian Federation: the case study of Vepses* (Budapest, Hungary: Central European University/Nationalism Studies Program, 2012), [http://www.etd.ceu.hu/2012/varfolomeeva\\_anna.pdf](http://www.etd.ceu.hu/2012/varfolomeeva_anna.pdf)

<sup>52</sup> Dmitry Berezhkov, “New Political Realities for the Indigenous Movement in Russia” (2014) <https://arcticconsult.org/2017/05/04/2014-03-new-political-realities-for-the-indigenous-movement-in-russia/>

<sup>53</sup> Zinaida Altukhova, Interview (2006), <http://nuclearno.ru/text.asp?11085> [Алтухова З. 2006. Интервью на сайте “Гражданского Центра ядерного нераспространения”].

<sup>54</sup> *Supra* note 24.

<sup>55</sup> *Supra* note 28.

Rosatom and Russian Railways became more involved in the region.\* These plans were hampered by the positions of the Sakha environmentalists and citizens, who still remembered the ecological disasters that happened after the construction of the Viliuy Hydro Power Plant in 1965-1973, when a huge area of the taiga forest including the villages of Tuoy-Khaya, Synsyktakh, Chokchuolu, Ust-Chon, sacred religious sites, fishing and hunting locations and other culturally important places, were flooded. Some people did not want to relocate but were forced to by police. Although relocated people had been promised comfortable housing, financial help and cash compensation, they received almost nothing. Since the channel of the Viliuy reservoir was not cleaned properly, and 3.5 million cubic meters of woodlands was flooded, the reservoir became a source of phenols and other pollution to the River Viliuy. There are also a lot of negative consequences in social, biological, physical, chemical, climate and other conditions in the Viliuy area after Viliuy HPP was created.<sup>56</sup>

In the case of the Kankun HPP, a cursory overview shows that all legal formalities look like they were carried out. The documents to support the formation of Kankun HPP even included an Environmental Impact Assessment on the Timp-ton River made by the All-Russian Research Institute of Hydraulic Engineering in 2007.\* However, as it turned out, the assessment did not contain any hydrological data nor forecast potential damage that could be made by climate change. Based on these limitations and flaws, participants in the public hearing refused to accept this document.<sup>57</sup> The interests of reindeer herders were also not taken into consideration.<sup>58</sup> In response, the President of the Republic of Sakha (Yakutia) Shtyrov called environmentalists “American spies” and expressed his attitude towards public ecologists with the words “dogs bark, but the caravan is on its way,” published in state newspapers.<sup>59,60</sup> The State Committee on the Elimination of Consequences of the

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\* Yuriy Afanaskin, Interview with Shtyrov (2008), <http://expert.ru/siberia/2008/24/shtyrov/>

<sup>56</sup> Elena Shadrina (2009), “Vilyuiskiy gidrouzel: sotsialno-ekologicheskie posledstviya,” in “Konsolidirovanniy obzor: plotini i vodniy transport,” sostaviteli A.S. Martynov I S.I. Zabelin [http://solex-un.ru/sites/default/files/review/files/konsolidirovanny\\_obzor\\_plotiny\\_i\\_vodnyy\\_transport.pdf](http://solex-un.ru/sites/default/files/review/files/konsolidirovanny_obzor_plotiny_i_vodnyy_transport.pdf) [Шадрина Е. 2009. Вилуйский гидроузел: социально-экологические последствия, в сб. «Консолидированный обзор: плотины и водный транспорт», составители А.С. Мартынов и С.И. Забелин].

\* Aleksander Maygur (2007), Otsenka vozdeystviya na okruzhayushuyu sredyu v sostave proektnoy dokumentatsii na stroitelstvo Kankunskoy GES na reke Timp-ton, etap 7, kniga 2, s. 122 [Оценка воздействия на окружающую среду в составе проектной документации на строительство Канкунской ГЭС на реке Тимптон, этап 7, книга 2, стр.122], [http://www.yakutia.rushydro.ru/file/main/yakutia/company/investprojects/17376.html/Kniga\\_2.pdf](http://www.yakutia.rushydro.ru/file/main/yakutia/company/investprojects/17376.html/Kniga_2.pdf)

<sup>57</sup> Viktoriya Ligai, “Yakutskie ekologi potrebovali aktsii energetikov v kompensatsiu budushego ekologicheskogo usherba,” *Kommersant (Khabarovsk)*, no. 209 (2007) [Лигай В. 2007. Якутские экологи потребовали акций энергетиков в компенсацию будущего экологического ущерба. *Коммерсантъ (Хабаровск) № 209*].

<sup>58</sup> Anna Naykanchina, “Indigenous reindeer husbandry: The impacts of land use change and climate change on indigenous reindeer herders’ livelihoods and land management, and culturally adjusted criteria for indigenous land uses,” A study for 11th Session of the Permanent Forum on Indigenous Issues (2012), [http://reindeerherding.org/wp-content/uploads/2013/01/UNPFII-2012-Reindeer-Husbandry\\_Final23Nov.pdf](http://reindeerherding.org/wp-content/uploads/2013/01/UNPFII-2012-Reindeer-Husbandry_Final23Nov.pdf).

<sup>59</sup> Regnum.ru (January 2007), <https://regnum.ru/news/772903.html> [Шпырову терять нечего. Он должен работать, работать и еще раз работать», Обзор СМИ Якутии]

<sup>60</sup> Diana Nikolaeva (November 2011), Почему общественные экологи Якутии поддерживают партию «Справедливая Россия»// <http://www.lsn.ru/53095.html>

Accidental Underground Nuclear Explosions, and the Initialization of Radioactive Substances, which was led by the environmentalist Ivan Burtsev, was abolished. In Russia overall, environmentalists criticizing Putin's administration have been classified as opponents of the regime.<sup>61</sup> For example, the regional public organization in Irkutsk called Baykal Ecological Wave was classified as a “foreign agent” and was liquidated in 2016.<sup>62</sup> As a result of these conditions during the beginning of the 21st century, the ecological protection progress declined and started to resemble that of the Late-Soviet period.<sup>63</sup> Thus, in the Republic of Sakha (Yakutia), despite all diamond miners' previous assurances, pollution of the rivers is still ongoing.<sup>64</sup> There is no control over gold extraction companies either, despite the knowledge that gold washing is a dangerous process that also pollutes rivers.<sup>65</sup>

At the same time, political pressure increased towards Small-Numbered Indigenous Peoples' associations all over Russia. State authorities suspended the validity of RAIPON in November 2012, after three years of pressure, numerous audits with the Federal Security Service, unsuccessful attempts to create an alternative organization, and other federal efforts to diminish this important organization. RAIPON's activities were approved only after the change of its leadership to a member of the United Russia political party and, therefore, a change in the course of the association.<sup>66,67</sup> Officially, the reason for the suspension was the inadequacy of the RAIPON statute compared with Russian legislation. However, the organization had worked under its statute for over 22 years without problems. As Pavel Sulyandziga and Dmitriy Berezhev argued, the real reason for the RAIPON closure is that there is an intensification in the industrialization of northern territories. Indigenous Peoples are the last barrier in the way of state and extractive companies to mine natural resources. It is easier for the state and extractive companies to use forceful methods towards Indigenous Peoples to clear their way.<sup>68,69</sup> Sulyandziga's stance is indirectly supported by the acknowledgment made in the foreword of the publication of the Federation Council in 2009: “Intensive industrial development of the natural resources of the northern territories of the Russian Federation significantly reduced territories for

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<sup>61</sup> *Supra* note 50.

<sup>62</sup> <https://www.irk.ru/news/> website (2016), <https://www.irk.ru/news/20160204/closing/> [“Байкальская экологическая волна» заявила о ликвидации (2016)]

<sup>63</sup> Nikolay Kluev, “After-reform transformation of Russian regions' ecological transformation” (2011) /Известия Русского Географического Общества., т.141, #3, Р.р. 1-8., Издательство: Федеральное государственное унитарное предприятие “Академический научно-издательский, производственно-полиграфический и книгораспространительский центр “Наука” (Москва)

<sup>64</sup> Zinaida Altukhova, “Almazi I reki Yakutii. Ekologiya basseyna reki Viluy: promishlennoye zagryazneniye,” Yakutskiy Nauchniy Centr SO RAN (2015), <http://yakutia.com/ecology/555/>

<sup>65</sup> Sofiya Bulchukey (2015), <http://sakhallife.ru/miting-yakutyane-predpochitayut-zhit-bedno-no-zdorovo/> [Булчукей С. 2015. Митинг: Якутяне предпочитают жить бедно, но здорово. Решиональная газета “СахаЛайф”/Отдел “Экология”]

<sup>66</sup> *Supra* note 1.

<sup>67</sup> *Supra* note 52.

<sup>68</sup> Pavel Sulyandziga, Interview (2012), <https://www.novayagazeta.ru/articles/2012/11/15/52362-narod-toлько-meshaet-vpervye-ob-etom-zayavleno-otkryto> [Суляндзига П. 2012. Народ только мешает: впервые об этом заявлено открыто Министерство юстиции приостановило работу Ассоциации коренных народов Севера. Устранена последняя помеха добыче природных ресурсов]

<sup>69</sup> Dmitry Berezhev, “Why the Russian Government shuts down RAIPON – background article” (2014), <https://arcticconsult.org/2017/04/30/why-the-russian-government-shuts-down-raipon-background-article/>

traditional economic activities of the Small-Numbered Indigenous Peoples. Rivers and other water reservoirs used for traditional fisheries have lost their purpose due to environmental problems.”<sup>70</sup> I should also mention that the tone and the angle were changed in a similar Federation Council publication, but it was published later, in 2012.

These days, previous RAIPON leaders and other Indigenous rights defenders are under heavy pressure or have been dispersed all around the world. Dmitriy Berezhkov, after being arrested in Russia, lives and works in Norway; Pavel Sulyandziga requested political asylum in the United States; Rodion Sulyandziga still lives in Russia, but his Moscow-based Center for Support of Indigenous Peoples of the North is practically blocked after being officially designated as a “foreign agent.”

Unfortunately, in the beginning of the 21st century, many norms of federal laws that were supposed to protect Indigenous Peoples’ rights required detailed elaboration; decrees and laws were therefore repealed or forgotten.<sup>71,72</sup> The federal law “On the territories of the North, Siberia and the Far East of the Russian Federation” from 2001 is not implemented at the federal level yet, and none of the territories of traditional land use were recognized at the federal level. The changes made in federal laws in 2008, whereby all the hunting and fishing territories could be distributed only through auctions, allowed businesses to buy land for up to 49 years. This resulted in the loss of many traditional lands previously owned by Indigenous Peoples.<sup>73</sup>

### *b) Second Wave of Social Activism*

The second wave of citizen activism in the Republic of Sakha (Yakutia) was associated with the major ecological movement in 2008 that focused on protections for the Lena river. This movement, based entirely on volunteer labor, was carried out in an attempt to influence the construction of the Eastern Siberia-Pacific Ocean oil pipeline under the Lena River that would cross over the territory of the Republic of Sakha

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<sup>70</sup> Sergey Kharyuchi, “Sozdaniye kompleksnoy sistemi zakonodatelnoy zashiti prav korennikh malochislennikh narodov Severa v Rossiyskoy Federatsii – neobkhodimoye usloviye socialno-ekonomicheskogo razvitiya korennikh narodov i severnikh territoriy” (2009) / Izdaniye Soveta Federatsii. Voprosi vzaimootnosheniy korennikh malochislennikh narodov s promishlennimi kompaniyami (opit, praktika sitrudnichestva, dokumenti).

<sup>71</sup> *Supra* note 70.

<sup>72</sup> *Supra* note 18.

<sup>73</sup> *Supra* note 52.

(Yakutia).<sup>\*</sup> According to the Greenpeace website,<sup>\*</sup> the assessment of the environmental impact of the oil pipeline was made by a Moscow-based company that had not taken into consideration the harsh natural conditions of the Sakha Republic. In the assessment, there were no reflections on the permafrost conditions in the region, nor the extremely low temperature in the winter (below -50 degrees Celsius), the seismically active zones, or other conditions. The interests of local Small-Numbered Indigenous Peoples who traditionally used the forest, land and water resources for survival were not considered either. Sakha environmentalists listed these problems in the document as “The subject of disagreement.” However, the state-owned and largest pipeline company in the world, Transneft, has ignored the document and ignored the recommendations of parliament hearings in the State Assembly of the Sakha Republic as well. Moreover, environmentalists were not admitted to the signing of the Protocol or the public hearing. Despite numerous violations of environmental legislation, the Federal Service for Environmental, Technological, and Nuclear Supervision (Rostekhnadzor) approved the “Assessment.” Regarding this matter, as Stanitskaya reported,<sup>74</sup> environmental centers of the Sakha Republic and the Association of Evenki People jointly appealed to the Federal Court in the city of Yakutsk. The Court denied the environmentalists’ claims, leaving Rostekhnadzor’s decision in force. The environmentalists appealed to the Supreme Court of the Sakha Republic, and lost again. Citizens tried to appeal to President Putin in an open letter<sup>\*</sup> where they listed problems related to the East Siberian–Pacific Ocean (ES-PO) oil pipeline construction, and asked him to help them in the protection of the Lena River and to require Transneft to implement all environmental and regulatory requirements and to build an underwater passage in the form of a tunnel. However, the letter was ignored too. After trying all ways of restoring effective execution of the laws, protests were held in Yakutsk City and more than 20,000 signatures were collected in a petition.<sup>\*</sup> Nonetheless, the protests were also ineffective, and construction of the ES-PO was carried out without taking into account the opinions of the regional government bodies, citizens, and environmentalists. In the name of profit, Transneft made the underwater crossing of the Lena River using a cheap and fast trench method instead of the more expensive but more safe and eco-friendly tunnel method. As a result, the ES-PO oil-pipelines were constructed without guarantees of safety or without taking into account the difficult geological conditions of



picture from: <http://www.vesti.ru/doc.html?id=333450>

<sup>\*</sup> <http://www.greenpeace.org/russia/ru/news/2010/September/1108503/>

<sup>74</sup> Marina Stanitskaya, “Verkhovniy sud yakutii podtverdil zakonnost ekologicheskoi ekspertisy ‘VS-TO’” (2008), <http://www.eyge.ru/topic.php?id=8> [Станицкая М. 2008. Верховный суд Якутии подтвердил законность экологической экспертизы "ВС-ТО"].

<sup>\*</sup> <http://www.seu.ru/seu-news/81.htm>

<sup>\*</sup> SaveLena.ykt.ru (2017), <http://savelena.ykt.ru/index.php>

permafrost. At least three publicly acknowledged spills into the Lena River have occurred since the beginning of the ES-PO operation.<sup>75</sup>

Another wave of protests called “Save the Lena River” took place in 2013. This time, they were against the construction of a chemical factory that was part of the bigger development Zarechie (TOSER – priority social and economic development area). Once again, planning and development of the factory that would make methanol, ceramide and other chemicals was done without taking into account local conditions. For example, it was not considered that during construction some layers of soil would be removed, which would cause some partial permafrost melting. This could result in possible landslides and accidents with major ecological consequences. The construction of the factory would also result in environmental pollution of the Lena River and the neighboring cities and towns of Yakutsk, Pavlovsk, Haptagai, Khara and Maya. It would also affect local people’s rights to fish, hunt and collect berries on the territory that would be taken and negatively affected by the factory.

Since the Lena River is the main source of drinking water and fish to eat, there was strong resistance among locals to the plan to build a chemical factory there. People organized several protests with demands to stop construction of the factory. Lawmakers from the Republic of Sakha went to a chemical factory in the Tula region located in the eastern part of Russia and came to the conclusion that it was impossible to build such a factory on permafrost.<sup>\*\*</sup> The citizens again wrote a letter to the President of the Russian Federation, Vladimir Putin. They asked him to abandon the idea of building a chemical factory in this location due to environmental concerns. Ecologists prepared a petition to the UN and UNESCO describing possible damage to the environment and demanding a stop to the development of Zarechie.\* The same demand was voiced by Anthonina Gavrilieva at the 15<sup>th</sup> session of the Permanent Forum on the Indigenous Issues at the UN in 2016.<sup>76</sup> Due to the massive protest movement, the people of the Sakha Republic were able to achieve their goal: the plan to build the chemical factory in Megino-Khangalass area was abandoned. However, the joy of victory was short-lived. The factory will instead be built in the neighboring region of Irkutsk at the source of the Lena River.<sup>77</sup> The danger of pollution is still very high, but there are fewer ways to protect the river.

Another danger recently arose before the Indigenous Peoples of the Republic: an attempt to remove the status of Specially Protected Natural Territory (SPNT) in the Nyurba region. Since the Sakha people have a relatively large population—almost 500,000 individuals—they cannot rely on the law “About territories of traditional use...” and therefore cannot create a territory of traditional land use. Therefore, they decided to create a Specially Protected Natural Territory (SPNT) under municipal supervision to protect endangered animals and plants and to protect the natural habitat,

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<sup>75</sup> *Supra* note 1.

<sup>\*\*</sup> Yakutimedia.ru, “Parlament Yakutii: gazochemichiskiy zavod na vechnoy merzlotte stroit nevozmozhno” (2015), <http://yakutimedia.ru/news/441965/>

\*[http://yakutsk.ru/news/society/v\\_yakutske\\_proshel\\_samy\\_mnogochislenny\\_miting\\_protiv\\_toser\\_zarechie/](http://yakutsk.ru/news/society/v_yakutske_proshel_samy_mnogochislenny_miting_protiv_toser_zarechie/)

<sup>76</sup> *Supra* note 10.

<sup>77</sup> Information-analytic center RUPEC: INK vibirayet ploshadku dlya stroitelstva zavoda polimetov v Ust-Kut, <http://www.rupec.ru/news/35017/>

used for traditional activities of “Large-Numbered” Indigenous Peoples such as the Sakha. After a referendum, SPNT Markha was created in the Niurba region in 2016. The territory of the SPNT protects the Markha River from industrial development that might pollute the only source of drinking water in the area. The SPNT law states that industrial development and mining cannot take place there without prior consultations with, and approval by, the local people. However, the creation of this protected area was not agreed upon by everyone. The first vice-president of the ALROSA company, Igor Sobolev, appealed to the prosecutor's office about illegal seizure of a forest federal property. His complaint is explained by the fact that the diamond deposit Ust-Nakynskoye is located in the territory of the SPNT, which means the existence of the Markha prevents diamond mining by ALROSA. Unfortunately, regional authorities took the side of the diamond mining company. The prosecutor of the Niurba region supported Sobolev's complaint, and now is planning to cancel the decision to create this SPNT. The head of the Niurba region, who actively defended the interests of his voters by speaking out against ALROSA's plans, was placed in a detention center using questionable reasoning.<sup>78</sup> Permission to develop the Ust-Nakynskoye deposit in the SPNT Markha by ALROSA was granted in February 2017 without free, prior or informed consent by local residents.<sup>79</sup>

The attitude and position of ALROSA toward local people is further demonstrated by the corporation's reaction to recent tragic events in the Mir mine. The Mir mine is a kimberlitic pipe, on the top of an ancient volcano. Diamonds are distributed many miles down. Until 2001, diamonds were extracted from the surface by the “open method,” but after 2001 the mining operation went into underground development when miners reached the pit kimberlitic pipe through tunnels. On August 4, 2017, a tragedy occurred: the mining area where 151 people\* worked had flooded. According to the *FedPress*<sup>80</sup> a “partial flooding” of the pumping station of the main water remover #2 resulted in a “sharp deterioration of mining and geological conditions and erosion of the enclosing rocks into the quarry” and the water had already disappeared. However, this information is contradicted by local news stations that reported on a rescued miner who spent more than 30 hours in the water. If this accident had occurred at 10 am on August 4, this means that even on the evening of August 5 there was still water in the mine. This assumption is further supported by the news that on August 5, seven divers were recruited to inspect the flooded mine. The statement related to “sharp deterioration of mining and geological conditions” cannot possibly be accurate, since the first water breaks occurred on July 24 and July 29, 2017. Despite these events, the mine was not closed, nor declared to be in a state of emergency, and

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<sup>78</sup> “Yakutsk news: Glava Nyurbinskogo rayona Boris Popov: obvineniya sfabrikovani!”  
[http://yakutsk.ru/news/society/glava\\_nyurbinskogo\\_rayona\\_boris\\_popov\\_moy\\_arest\\_eto\\_fabrikatsiya/](http://yakutsk.ru/news/society/glava_nyurbinskogo_rayona_boris_popov_moy_arest_eto_fabrikatsiya/)

<sup>79</sup> “Yakutsk news: Chto I trebovalos dokazat: bez publichnikh slushaniy Nyurbinskiy rayon daet razresheniye na razrabotku Ust-Nakinskogo mestorozhdeniya,”  
[http://yakutsk.ru/news/society/chto\\_i\\_trebovalos\\_dokazat\\_bez\\_publichnykh\\_slushaniy\\_nyurbinskiy\\_rayon\\_daet\\_razreshenie\\_na\\_razrabotku/](http://yakutsk.ru/news/society/chto_i_trebovalos_dokazat_bez_publichnykh_slushaniy_nyurbinskiy_rayon_daet_razreshenie_na_razrabotku/)

\* 142 miners were rescued, while eight people remain missing (<https://meduza.io>)

<sup>80</sup> FedPress.ru (August 2017), <http://fedpress.ru/news/14/incidents/1831810> [Стала известна причина аварии на якутском руднике «Мир»].

therefore people continued to work.<sup>81</sup> Judging by the contradictory information provided, it is clear that the company's management tried to hide the scale and cause of the tragedy. Only a few days after, ALROSA officially acknowledged that the incident occurred due to a water break into the mine from the open pit.

What was the cause of the water breakout? While developing the principles of the transition to underground development of the kimberlitic deposit, Puchkov et al. noted<sup>82</sup> the need for a protective layer (ore casing) under the bottom of the quarry with a thickness of at least 85 meters. This protective layer would also invariably contain diamonds, but they could not be extracted because doing so would lead to a decrease in the thickness of the whole. It was known that vertical water-conducting cracks are formed, through which water from the bottom of the pit can penetrate into the mine and flood it. An expert on the matter, Fedor Goryunov, while arguing about the possible causes of the accident, suggested that in the pursuit of profit, a decision to mine diamonds in the protective layer was taken.<sup>83</sup> This was apparently confirmed by the words of miners explaining the causes of the accident: "Bad technical equipment, disgusting technical support. They economized and tried to take all the ore from the quarry. It got to the point that, contrary to safety precautions, we began working off the horizon 210 m (directly under the bottom of the quarry). The whole bottom of the quarry was in cracks and compromised. As a result, the bottom fell through, and the water from the quarry flooded the mine." In general, it is alleged that "all the fault lies in [ALROSA] greed."<sup>84</sup> In summary, one of the richest companies in the world, the diamond mining company ALROSA, had not only heavily polluted the area of its work, but also neglected the safety of its employees in the pursuit of profit.

A logical question arises after this tragedy: will the company engage in expensive environmental programs in their new location in Niurba, where possible mining sites are located near the single source of drinking water for the local people—the River Markha?

#### IV. Conclusions

Reading articles about social and environmental activism in Russia, I have noticed that most international observers, while acknowledging the contradiction of Russian legislation with the UN's understanding of the term "Indigenous Peoples," still accept and follow the Russian definition, excluding other "Large-Numbered" Indigenous Peoples from their analyses. Therefore, social activists and environmentalists who oppose industrial developers as well as defenders of the Indigenous rights of "Large-Numbered" Indigenous Peoples do not have significant support from the international community.

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<sup>81</sup> Bloknot.ru. (August 2017), <http://bloknot-yakutsk.ru/news/brat-propavshego-gornyaka-ya-videl-zhen-i-materey--874891>

<sup>82</sup> Lev Puchkov et al., "Printsipy perehoda na podzemnuu razraboku kimberlitovogo mestorozhdenia 'Mir'," *Journal "Gornaya promishlennost"* no. 2 (2000). [Пучков Л.А. et al. 2000. Принципы перехода на подземную разработку кимберлитового месторождения «Мир», "Горная Промышленность" №2].

<sup>83</sup> Informatcionnoye agenstvo Regnum, ChP na «Mire» svyazivayut s naznacheniyem Ivanova prezidentom ALROSA (August 2017), <https://regnum.ru/news/2307979.html>.

<sup>84</sup> SakhaToday.ru (2017), <http://sakhaday.ru/news/shahtu-mir-topilo-nedelyu-nazad-istochnik/> [«Шахты «Мир» топило неделю назад»].

Another problem is that international observers, with few exceptions, tend to cover the ecological activism of Small-Numbered Indigenous Peoples only, or study ecological movements in the western part of Russia and draw conclusions from there for the whole territory of the Russian Federation. These attempts at unification and homogenization of a multinational society could be fraught with false conclusions. As an example, Newell and Harley claim that non-governmental environmental organizations working on the ecological problems in Russia do not attract broad participation.<sup>85</sup> I argue that in the Sakha Republic, non-governmental environmental organizations have had and still have a lot of supporters despite increasing pressure from the State and its repressive bodies. This support is not accidental. Many years of industrialization and development of the northern territories, accompanied by various environmental contaminations, have posed serious threats to the health of the Sakha People and their children.<sup>86</sup> For example, before the “peaceful underground nuclear explosions” in the Viliuy basin, there were never as many cases of childhood leukemia as developed in the 1990s.<sup>87</sup> Nikolaeva argues that oncology cases in the Sakha Republic increased by 25.6% from 2001 to 2011, while in the rest of Russia, the increase was 1.6% during this same period of time.<sup>88</sup>

To address the environmental and social problems in the Viliuy region of the Sakha Republic, a comprehensive approach which combined public demands, scientific research, and regional government decrees was adopted at the end of 20<sup>th</sup> century. Unfortunately, that approach did not fully work. Although all these measures contributed to a reduction in the discharge of dirty industrial water into rivers, the ecological and social situation in the Viliuy region remains tense. The ecological status of the region has not been determined, the Viliuy Environmental Fund has practically disintegrated, no activities have been taken to eliminate the negative consequences of pollution, and socio-economic damage has been reimbursed only partially.<sup>89</sup> Recent opposition to state plans related to ES-PO have also not lived up to expectations, and the ES-PO crossing of the Lena River was built by means of a cheaper, but more dangerous trench method. The environmental activists, despite all public and republic authorities’ support, were also not able to effectively counteract the plans for building a gas chemical plant on the banks of the Lena River. These days, there is further direct threat of deprivation of the Specially Protected Status of the Marka territory in favor of diamond mining by ALROSA.

Why are the people of Sakha, despite their republic status, not able to effectively protect their rights to a healthy life and clean ecology, stipulated by the Constitutions of Russia and the Sakha Republic? What factors are needed to be present in order to effectively protect the rights of Indigenous Peoples and to protect nature—the crux of their livelihoods and their lives?

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<sup>85</sup> *Supra* note 50.

<sup>86</sup> Palmira Petrova and Natalya Borisova, “Environment Features and Human Health in the North,” *International Journal of BioMedicine* 4, no. 2 (2014), 114-116.

<sup>87</sup> *Supra* note 36.

<sup>88</sup> *Supra* note 60.

<sup>89</sup> *Supra* note 33.

As Crate argues, the key components in resolving environmental issues in Russia are: 1) a strong urban base; 2) a knowledge of and ability to take advantage of existing legislation; 3) local leadership; and 4) international contact.<sup>90</sup>

In recent environmental activism in the Sakha Republic, all points listed by Crate were present. The leaders of the movement, while living both in the village and in the city, had a strong urban base and an effective mechanism of influence through all kind of local media. Protests took place all around the Sakha Republic, attracting a large number of supporters. The most recent confrontation between environmentalists and ALROSA, concerning the Territory with Special Protective Status Markha, reached the international level when Sakha representative Antonina Gavrilyeva addressed this problem at the UNPFII session in 2017. She also appealed to the Expert Mechanism on the Rights of Indigenous Peoples. However, these appeals have unfortunately has not yet resulted in a much-needed international-level review. There have been no positive results, as unprecedented pressure on the people trying to protect the Markha territory has only increased. There is no feedback from the Expert Mechanism representatives, so the Sakha defenders can only guess what to do next.

I think that the explanation for the environmental movement's failures in the Sakha Republic—despite the existence of their republic status, the public's broad involvement, and support at many regional levels—has various reasons beyond those already known: 1) laws are not effectively implement in Russia; 2) corruption is rampant; and also 3) people try to solve urgent problems that are consequences of larger more systemic problems, rather than tackling the root causes themselves. The root of the problem lies in the fact that Indigenous Peoples are not the rightful custodians of their ancestral lands, and that they are excluded from land management decisions and from control over mining companies. In order to better protect the environment, the rights of Indigenous Peoples must be respected and protected. The most effective instrument for protecting the rights of Indigenous Peoples is the UN Declaration on the Rights of Indigenous Peoples. It shows the direction and goals that states and people have to move towards.

Currently, Russia's Indigenous Peoples ("small" and "large") keep trying to create civil society. Thus, Komi women, who are not officially recognized as Small-Numbered Indigenous Peoples (population: 256,500 individuals) organized "Indigenous Women of the Komi Republic" with the purpose of protecting the Komi language; supporting and raising the status of rural women; and assisting in the formation and development of local self-governance, among other goals.<sup>91</sup> The association of Buryat society (population: approximately 450,000 individuals) was founded in 2016.<sup>92</sup> Environmental organizations in Russia have started to unite to defend nature and to defend Indigenous Peoples' rights. As Antonina Gavrileva, Sakha representative at the

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<sup>90</sup> *Supra* note 28.

<sup>91</sup> "Korennyye zhenshiny Respubliki Komi," «Коренные женщины Республики Коми» <http://www.komian.org>

<sup>92</sup> Bato Ochirov, *Edineniye khori buryat – eto nachalo novoy obshchestvenno-politicheskoy modeli Buryatii* // Единение хори бурят – это начало новой общественно-политической модели Бурятии (2016), <http://asiarussia.ru/blogs/11332/>

UNPFII session in 2017, told me during our discussion: “I really want justice in our world. I think that our only hope and salvation is the ratification of the Declaration on the Rights of Indigenous Peoples. Indigenous rights and duties are intertwined. It is peoples' right to live on their ancestral land, and it is their duty to protect and preserve that land. Indigenous Peoples must have a prerogative in decision-making process about developing their territories and using natural resources. If they do not want it, then it should not be. This is their right!”

Overall, social activism of “Large-Numbered” Indigenous Peoples, which has risen in many aspects on the crest of the ecological protests, now may be transforming into wider civic activism. Thus, non-governmental organizations of the Sakha, Tatar, Bashkir, Chuvash and Buryat people recently appealed to the Russian government to endorse the UN Declaration on the Rights of Indigenous Peoples.

The cooperation between Russia’s “Large-Numbered” Indigenous Peoples’ NGOs and other defenders of Indigenous rights needs a new approach and further development. I have witnessed success of the resisters against gabbro-dolerite mining from the deposit Billyah, which was located on land traditionally used for fishing, hunting, and berry gathering. The mining attempts stopped after the mining company receiving an answer to a letter sent by local Evenki and Sakha communities to the Office of the UN High Commissioner for Human Rights in Geneva in 2012.

The UN Permanent Forum on Indigenous Issues, the international Indigenous community, academia, and Indigenous rights defenders should support all Indigenous Peoples in Russia (including those who are “large-numbered”) in better defending their rights by involving them in the work of different international committees, reports, reviews, and other activities dedicated to Indigenous rights’ issues.

# From Margins to Center: Untranslatability as a Decolonial Practice

Doro Wiese

## Abstract

This essay takes possible constraints, experienced by Euro-Western readers, in understanding Indigenous articulations as a point of departure. It is argued that the limitations experienced when interacting across cultures are productive since they limn and contour the limits of knowledge and challenge Euro-Western hegemonies. When working across languages, the impossibility of transferring meaning from one culture to the next is called untranslatability. Taking the literary works of Native American Renaissance writer Leslie Marmon Silko as an example, the critical scholarship on her oeuvre is taken one step further by connecting it with the seminal discussion on untranslatability currently being led in Comparative Literature. The main goal is to establish untranslatable narrative notions as an analytical object for reading literature across cultures. It is posited that narrative expressions can remain culturally specific and unappropriable when untranslatable. To read for untranslatability and to highlight it therewith means to stress the singularity of cultures. Their uniqueness continues to exist even when cultural artefacts circulate as world literature on a global literary market. To show the validity of the main idea on the productiveness of untranslatability, a close reading of Silko's novels *Ceremony* and *Almanac of the Dead* will show how the untranslatability of narrative expressions is achieved in these works.

## I. Introduction

Whoever enters the keywords "American Indians" or "Native Americans" on Google Images' search tool will inevitably encounter a multitude of images that depict noble men with feather headdresses, possibly on horses, or pretty women in flattering leather clothing. These images have little in common with the reality of American Indians. However, they have an important effect: they represent American Indians as peoples that belong to another era and who are a remainder of the past. This representation is so resoundingly successful that Euro-Western ignorance about the distinct social, political, and cultural differences of Indigenous Peoples prevail, although there are worldwide more than 370 million Indigenous persons, with 567 legally recognized tribes in the USA alone. How can this unawareness of cultural differences be alleviated when encounters with unfamiliar forms of social or cultural expression point towards the inadequacy of Euro-Western traditions of thinking and imaging? In this essay, this question is given a new and original twist. It is argued that it is precisely the encounter with untranslatable notions that can eventually provoke important insights, for instance by limning and contouring the limits of one's own knowledge. This entails non-knowledge no longer being seen as a failure, but rather as an indicator for the presence of untranslatable notions that can be discerned. It is proposed that reading fictional works of the Native American Renaissance writer Leslie Marmon Silko can give rise to encounters with untranslatable notions which this author initiates through form and style.

Focusing on the repercussions of geopolitically specific, but globally circulating, literature by the American Indian author Silko, this essay connects questions of narrativity to political agendas of social justice, Indigenous sovereignty, and cultural

autonomy as expressed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup> While the UNDRIP is first and foremost a legal and political instrument that helps to redress and prevent historical, political, and social injustices and human rights violations, it is also a declaration which highlights, strengthens, and supports Indigenous knowledge systems and forms of artistic expressions. When literary texts of Indigenous writers like Leslie Marmon Silko show that Indigenous knowledges are present within society and do matter, they trouble Euro-Western hegemony, oppose homogenizing globalization processes and display a liberatory vision by showing Indigenous persistence, resilience and creativity. Leslie Marmon Silko thereby puts into practice what the UNDRIP aims to achieve in legal terms. The presence of disturbing elements in the novels of Silko, herself of Pueblo Laguna and German ancestry, reminds readers of the survivance of American Indian nations in general and of their distinct story-telling traditions in particular. Untranslatable notions overturn what the Anishinaabe writer and scholar Gerard Vizenor has called “the static reduction of native identities.”<sup>2</sup> For this re-signification of indigeneity, literary discourse is a powerful tool. The novels of Indigenous Peoples in general and of Leslie Marmon Silko in particular are traversing the global and, as such, claim an undeniable presence of Indigenous knowledge in the world.

## II. A Broader View of Untranslatability

*The Dictionary of Untranslatables* refers to the concept of untranslatability as an indicator of the inherent dangers associated with sense-making.<sup>3</sup> Sense-making is the ongoing and fragile process of transferring meaning, which is complicated when working across languages and cultures where it is constantly threatened with the loss of meaning and coherence. However, in the act of reading fiction, readers are asked to make sense not only of the meaning of the words but also of “the use of vocabulary, syntax, semantics, characters, narration, and plot—the whole configuration of the fictional text’s chronotopical world.”<sup>4</sup> Just as with certain untranslatable words, these are areas in which the attempt at sense-making can fail and where narrative construction can create an instance of untranslatability. Lawrence Venuti, however, sees value in untranslatables as useful tools for remembering and challenging the legacy of colonial and ethnocentric violence upon which Euro-Western literature was founded.<sup>5</sup> He argues that although translations are seen as successful when they allow the reader to forget that they are reading a translation rather than the original work, this leads translators to produce accessible and easily understood works, reinforcing the economy of violence through the erasure of any cultural difference or concept that is not easily understood by the target culture. Venuti asserts that a translation that centers on the cultural difference

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<sup>1</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations Document A/RES/61/295 (October 2007).

<sup>2</sup> Gerard Vizenor, *Manifest Manners: Narratives on Postindian Survivance* (Lincoln, USA: University of Nebraska Press, 1989), 142.

<sup>3</sup> Barbara Cassins, Emily Apter, and Jacques Lezra, *Dictionary of Untranslatables: A Philosophical Lexicon* (Princeton, USA: Princeton University Press, 2014), passim.

<sup>4</sup> Doro Wiese, *The Powers of the False. Reading, Writing, Thinking Beyond Truth and Fiction* (Evanston, USA: Northwestern University Press, 2014), 6.

<sup>5</sup> Lawrence Venuti, *The Translator’s Invisibility: A History of Translation* (New York, USA: Routledge, 1995), passim; Lawrence Venuti, *The Scandals of Translation. Towards an Ethics of Difference* (London, United Kingdom: Routledge, 1998), passim; *The Translation Studies Readers*, ed. Lawrence Venuti, (London, United Kingdom: Routledge, 2000), passim.

of the original can challenge the economy of violence<sup>6</sup> and can remind readers of the heterogeneity of discourses by admitting that the translation is a translation.<sup>7</sup> Gayatri Chakravorty Spivak, in “The Politics of Translation,” posits that if translators do not focus on making the words and concepts in a translation fit neatly into the hegemonic discourse of the target culture, translations allow for “the experience of contained alterity in an unknown language spoken in a different cultural milieu.”<sup>8</sup> In this way, untranslatables can be cross-cultural points of encounter.

I would further argue that certain crucial information is hidden or distorted by Leslie Marmon Silko—herself of Laguna Pueblo and German ancestry—in her novels, leading to certain significant textual meaning being available only to those who have cultural familiarity with the relevant Indigenous belief systems and practices, such as certain oral traditions. The novel can then evoke distinct reactions depending on the reader’s ability or inability to access the hidden components of the narrative. Readers, particularly Euro-Western, non-Indigenous ones who cannot access the narrative elements that are not made available to them, are nonetheless aware that there is something there that remains inexplicable. In this way, readers are confronted with the experience of untranslatability, an experience which can destabilize and de-center Euro-Western, privileged forms of knowledge production and transmission. In contrast, readers who have a background and experience with the Indigenous worldviews used in Silko’s work may be able to gain access to those elements of the narrative strategically left unwritten by being able to fill in the missing pieces based on contextual and cultural knowledge. By further examining these narrative elements, it becomes possible to recognize them and the forms of untranslatability they may create.

The use of untranslatability within narrative structure and storytelling is especially important given the current debates regarding ideas of difference, specifically within the field of world literature. Emily Apter makes the point that the field of world literature must be made aware of the ways that it can play into the marketing of differences. In various texts, as well as in her latest piece, *Against World Literature*, she warns against “zoom[ing] over the speed bumps of untranslatability to cover ground.”<sup>9</sup> Untranslatability can be a form of resistance against the appropriative tendency of the world literature field since, as Apter argues, the language-specific element of any sort of meaning is lost when the text is translated or taken out of its original context. Apter posits that untranslatable words or concepts are a clearer instance of the approximating nature of sense-making. Sense-making is always translation and therefore always approximate, since any use of language to convey knowledge, whether that is philosophical, literary, or cultural knowledge, gives only the illusion of creating a general understanding capable of being free from contextual and linguistic specificity. The ideas put forth by Apter regarding untranslatability form part of a dynamic debate within the field of comparative literature and the problematics involved in the relationships with power. As many in the field are aware, the use of the broad category

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<sup>6</sup> *The Translator’s Invisibility*, *supra* note 5.

<sup>7</sup> *The Scandals of Translation*, *supra* note 5.

<sup>8</sup> Gayatri Chakravorty Spivak, “The Politics of Translation,” in *Destabilizing Theory: Contemporary Feminist Debates*, eds. Michele Barrett and Ann Phillips (Cambridge, United Kingdom: Polity Books, 1992), 179.

<sup>9</sup> Emily Apter, *Against World Literature: On the Politics of Untranslatability* (New York, USA: Verso Books, 2013), 3.

of world literature is an example of this power relationship, since, although it creates the illusion that the field is free from a history and practice of Eurocentrism, in reality the field still centers on Euro-Western literature and analysis. The first compilations of world literature were published at the end of the Second World War and focused on European and Judeo-Christian works. This focus, unsurprising given that most of the authors and scholars were of European origin, has changed in subsequent years when it became more common to teach comparative literature in the United States.<sup>10</sup>

Currently, as a consequence of multicultural and postcolonial analysis and critiques, the texts selected for publication in world literature anthologies are much less focused on European and settler-colonial texts. However, the field is still apprehensive of the dangers pointed out by Erich Auerbach in his famous essay “Philology and Weltliteratur,” in which homogenization is posited as a possible downfall for world literature. In his idea of homogenization, globalization has created “a single literary culture, only a few literary languages and perhaps even a single literary language.”<sup>11</sup> The idea of untranslatability is important precisely because the untranslatable resists appropriation into such a homogenized literary language and instead highlights cultural differences.

Following from Auerbach’s notion of the danger of homogenization through globalization, I suggest that attention must also be paid to narrative forms and tropes, which are also potential points of resistance to narrative structures in Euro-Western literary tradition. Varied narrative and storytelling structures broaden ideas about literature and what it means to be literary, and can be as much a consequence and signifier of situatedness of different worldviews and cultural specificity as can be words and concepts. Including narrative forms and tropes within the realm of the untranslatable seems to align with the aims of the *Dictionary of Untranslatables* to create a “political theory of community,” surpassing “the limits of discrete national languages and traditions.”<sup>12</sup> Creating space for perspectives that cannot be goes beyond the scope and bounds of language. According to this theory, untranslatables make the audience conscious of uncontainable differences, both in linguistic and cultural terms, and highlight the possibility of forming bonds through these differences and beyond the ideas of nation-states, in which non-hegemonic difference cannot be erased, reduced, appropriated, or controlled.

Narrative forms are varied and possess an untranslatable quality. For readers unfamiliar with a specific narrative form, this can accentuate the puzzle created by the text. For example, the narrative form used by Silko is vital to how readers experience her work. Her use of untranslatable narrative forms highlights the cultural traditions and advancements of American Indians, while simultaneously respecting the need to maintain certain knowledge as untranslatable to a Euro-Western audience. Silko's work expands upon the democratic project tied up with untranslatability without falling into exoticization or what Anishinabe writer and scholar Gerard Vizenor refers to as

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<sup>10</sup> *The Routledge Companion to World Literature*, eds. Theo D'haen, David Damrosch, and Djelal Kadir, (New York, USA: Routledge, 2012), passim.

<sup>11</sup> Erich Auerbach, “Philology and Weltliteratur,” trans. Maire Said and Edward Said, *The Centennial Review* 13, no. 1 (1969), 129.

<sup>12</sup> *Supra* note 3, at xv.

“portraits of dominance.”<sup>13</sup> Silko makes use of the untranslatable and makes it clear in her writing that American Indians form part of present day life, and while they have experiences, traditions, worldviews and knowledge that resist translation, and therefore appropriation, they are nevertheless present within the canon of North American literature. A closer reading of *Ceremony* and *Almanac of the Dead* by Leslie Marmon Silko illustrates how the use of storytelling narratives rooted in oral traditions can cause a sense of disorientation for Euro-Western readers.<sup>14</sup> The untranslatability of worldscapes that do not privilege self-evident Euro-Western linguistic and conceptual frameworks can simultaneously allow for the construction of Indigenous histories, which can circulate within the centered, hegemonic spaces, creating alternative worldscapes. These worldscapes make distinct Indigenous storytelling traditions visible, and thereby “manifest, practice, develop and teach” what the UNDRIP wants to protect and maintain.<sup>15</sup>

### III. Obscured Meanings in Silko's *Ceremony*

In 1996, Leslie Marmon Silko's *Ceremony* was identified as one of the four most important publications in modern American literature by members of the Modern Language Association and has received widespread critical acclaim and a worldwide readership.<sup>16</sup> Kenneth M. Roemer writes in “Silko's Arroyos as Mainstream” that the novel was able to connect with a wider spectrum of readers due to certain key global developments taking place simultaneously. The civil rights' and women's movements sparked greater dialogue on issues of social justice, a focus that reached the academy, especially in certain fields such as literary studies. In the 1970s, for example, there was much more criticism in the academy about what was considered to be part of the canon and there was an increasing openness to examine works from new or previously excluded writers. Such well-known publications as the *Library Journal*, *The Choice*, *Newsweek* and *The New York Times Book Review* spoke highly of *Ceremony* upon its release.<sup>17</sup> Perhaps this is because the novel manages to draw both from elements familiar within Euro-Western narrative forms, such as the Bildungsroman, and those from Laguna Pueblo and Navajo oral traditions and characters, in a way that created enough of a departure from the Eurocentric style to be interesting for Euro-Western readers while still allowing them to feel they could identify with the narrative style.<sup>18</sup> At the same time, its narrative about the traumatized war veteran also resonated with contemporary concerns about the effects of Post-Traumatic Stress Disorder on Vietnam veterans. While 15.2% of returning Vietnam veterans were diagnosed with mental health issues, the same statistic for minorities was much higher. This is perhaps due to the trauma of various layers of racism and additional barriers to being able to re-enter

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<sup>13</sup> Gerard Vizenor, “Fugitive Poses,” in *Fugitive Poses. Native American Indian Scenes of Absence and Presence* (Lincoln, USA: University of Nebraska Press, 1998), 152.

<sup>14</sup> Leslie Marmon Silko, *Ceremony* (New York, USA: Penguin, 1977); Leslie Marmon Silko, *Almanac of the Dead* (New York, USA: Simon & Schuster, 1991).

<sup>15</sup> *Supra* note 1, at Art. 12.

<sup>16</sup> Kenneth M. Roemer, “Silko's Arroyos as Mainstream: Processes and Implications of Canonical Identity,” in *MFS Modern Fiction Studies* 45, no. 1 (1999), 9.

<sup>17</sup> *Ibid.*, 16-17.

<sup>18</sup> *Ibid.*, 13.

civil society. As these forms of discrimination are key themes in the narrative of *Ceremony*, the book became all the more relevant at the time of its 1977 publication.

*Ceremony* distinctly manages to blend its use of traditional Indigenous storytelling tropes and archetypal characters within Euro-Western narrative forms such as the Bildungsroman. Despite this, as scholar, professor and writer Paula Gunn Allen remarks, it is very difficult to discuss *Ceremony* with most students in the classroom. The novel contains stories from the Laguna Pueblo tradition that are considered inside knowledge of the Laguna Pueblo people that are not to be transmitted to broader audiences. Rather than explaining aspects of Laguna Pueblo culture and spirituality to her students who might exoticize the latter, Gunn Allen focuses instead on the narrative form. In this way, she can deflect the appropriative and exotifying curiosity of many of her students, who are “voraciously interested in the exotic aspects of Indian ways—they usually mean by that traditional spiritual practices, understandings and beliefs... At every least opportunity, they vigorously wrest the discussion from theme, symbol, structure and plot to questions of ‘medicine,’ sacred language, rituals, and spiritual customs.”<sup>19</sup> She recognizes that those not coming from an Indigenous Navajo and Laguna Pueblo cultural heritage may treat these traditions, stories, and spiritualities “as though they were simply curios, artifacts, fetishes ... objects of interest and patronization” rather than powerful ways of conceiving the world.<sup>20</sup> David L. Moore responds to these concerns in “Rough Knowledge and Radical Understanding: Sacred Silence in American Indian Literatures,” arguing that these are different perspectives on the practice of storytelling and that while Allen focuses her analysis on cultural ownership and issues of appropriation in content, Silko emphasizes, especially in her discussion of mythopoetics, the importance of the practice of storytelling and challenges the idea of a static content, context, or use of traditional stories, arguing that they are constantly in flux.<sup>21</sup> It is possible to connect these two arguments through the discussion of untranslatability. Gunn Allen is perhaps being particularly cautious of invasive and exotifying portrayals or discussions of Laguna Pueblo culture by non-Laguna people, which could come as a consequence of Silko’s use of Laguna Pueblo mythology. But a close reading of *Ceremony* reveals that this may obscure a very strategic exposure of Indigenous myths and knowledge that deliberately form a carefully constructed yet incomplete picture. The story of Tayo offers an example. Tayo, a mixed-blood member of the Pueblo community, returns to his reservation after fighting abroad in World War II. He finds himself suffering from an unknown sickness that leads to constant vomiting and is plagued by unrelenting images of war and a feeling of unresolved grief that causes his family to seek the help of the medicine man, or traditional healer, named Old Ku’oosh. There are three important elements in the interaction between Tayo and Old Ku’oosh: first, we see Old Ku’oosh speaking to Tayo in “the old dialect,” Western Keres, which is “full of sentences that were involuted with explanations of their own origins, as if nothing the old man said were his own but all had been said before and he was only to repeat it.”<sup>22</sup> Second, Old Ku’oosh describes a place that “people said back in the old days they took the scalps and threw them down there. Tayo knew what the old

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<sup>19</sup> Paula Gunn Allen, “Special Problems in Teaching Leslie Marmon Silko’s *Ceremony*,” *American Indian Quarterly* 14, no. 4 (1990), 382.

<sup>20</sup> *Ibid.*, 383.

<sup>21</sup> David L. Moore, “Rough Knowledge and Radical Understanding: Sacred Silence in American Indian Literatures,” *American Indian Quarterly* 21, no. 4 (1997), 633-62.

<sup>22</sup> Leslie Marmon Silko, *Ceremony*, *supra* note 14, at 34.

man had come for.”<sup>23</sup> And finally, Old Ku’oosh speaks about the interconnected, interdependent nature of the world:

It took a long time to explain the fragility and intricacy because no word exists alone, and the reason for choosing each word had to be explained with a story about why it must be said this certain way. That was the responsibility that went with being human, old Ku’oosh said, the story behind each word must be told so there could be no mistake in the meaning of what had been said; and this demanded great patience and love. More than an hour went by before Ku’oosh asked him.<sup>24</sup>

In this way, Silko is able to convey the feeling of experiencing an encounter with traditional wisdom, and some of its core ideas, without revealing traditional knowledge that is not meant to be shared. Since she does not write in Western Keres, which carries age-old meaning intrinsically in its form, and she does not reveal the place spoken about by Old Ku’oosh, which may have been a sacred ritual site, and she does not explain the ways in which everything in the world is interconnected, as Old Ku’oosh did for Tayo, she does not make this knowledge available to readers. By doing this, it is clear that there are knowledges and practices that can and have been passed on, but in this context, the knowledges and practices themselves are not revealed, which creates certain strategic gaps in the narrative whose content is only available to readers who have the Indigenous knowledge necessary to fill them in. In this way, Silko centers Indigenous forms of knowledge and experience and allows for a greater understanding to be available to those who can fill in the blank spaces, namely those of the Laguna Pueblo people. This was done quite purposefully. Roemer tells us of the time that Silko, in a Flagstaff seminar in 1977, stated that a thirty-page version of her novel *Ceremony* could be understood by a Laguna Pueblo reader: “brief references to particular family names and veterans and to specific events in Laguna, Grants, and Gallup, New Mexico, would open up networks of stories, memories, and meanings.”<sup>25</sup> Roemer also recalls that Silko went on to say that readers not of Pueblo Laguna cultural origin faced a knowledge gulf “wide enough to swallow hundreds and hundreds of pages.”<sup>26</sup> The gaps created in the text, containing that undisclosed knowledge unavailable to those unable to decode its specificity, is vast and remains hidden within the text. While some might say that Silko could be seen as satisfying the curiosity of readers eager to glean the knowledge of the American Indian experience, often in the fetishizing and exoticizing way described by Gunn Allen, I posit that Silko is instead highlighting the boundaries of which knowledge can and cannot be shared outside the Laguna Pueblo communities for her Euro-Western readers. These instances of withheld knowledge in the text are visceral markers indicating that there is something there that remains hidden and unavailable to readers who do not have the Laguna Pueblo cultural knowledge, and these markers operate to demarcate a difference between the characters and author, and the reader. The limitation to textual access emphasizes the need to retain certain knowledge in order to safeguard it from the appropriation, exoticization and devaluation of the cultural production of Indigenous Peoples by European and Euro-Western

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<sup>23</sup> *Ibid.*, 35.

<sup>24</sup> *Ibid.*, 35-36.

<sup>25</sup> *Supra* note 16, at 19.

<sup>26</sup> *Ibid.*, 20.

culture. Silko's textual strategies are thereby in line with the UNDRIP, as the Declaration also stresses that Indigenous Peoples have a right "to maintain, protect, and have access in privacy to their religious and cultural sites" in order to safeguard what is sacred from (cultural and economic) appropriation.<sup>27</sup>

Even though specific knowledge remains hidden and only indicated textually, Silko does share some of the core ideas and consequences of this knowledge with her readers. Her description of how Tayo experiences this knowledge illustrates its healing potential, even in the face of massive global warfare and destruction. Through storytelling, she is showing how Indigenous knowledge is highly valuable and crucial. Tayo, for example, recovers from his suffering after a ceremony is conducted in which his connection to the human and non-human world around him is revealed to him and he comes to understand that not only does his welfare depend on these connections, but also that all of these other elements suffer when he is not well. With this understanding, he is then able to pass on the knowledge that he gains through this ceremony to the elders of his nation, meaning he not only receives knowledge but also contributes to it. Once again, we see here how information is withheld from readers who do not have access to the Laguna Pueblo traditions, since the reader does not know what the ceremony entails nor what specific knowledge is gained from it. But it is possible to understand how the act of sharing secret knowledge is yet another form of creating and strengthening community, something that occurs within the varied community memberships to which any reader of the novel may belong.

Finally, for Silko, untranslatability is used as a way to create simultaneous but distinct experiences for different readers in a way that challenges hegemonies based on Euro-Western centrality. Readers who are familiar with Laguna Pueblo storytelling and culture are invited to use this knowledge to become active participants in filling in the missing elements of the text through these traditions. For other readers, these gaps are a way to indicate the value of this hidden traditional knowledge, which not only highlights the value of traditional knowledge but makes the lack of knowledge evident to Euro-Western readers unfamiliar with these Indigenous languages, histories, sites, and mythologies. In this way, the use of this specific form of narrative structure creates differentiated accesses to Indigenous knowledge as a key element in a new practice of reading, which uses the narrative form to delineate the boundaries of Euro- and Euro-Western-centric knowledge. The use of untranslatability can create spaces in which Indigenous knowledge is valued, and brought into the center, without appropriating it. This practice also helps to break down the binary between center and margin by showing the untranslatable as part of the cultural hegemony rather than only existing in the periphery. Indigenous story telling is shown to traverse the center as it points to the presence of an untranslatable and uncontainable difference in its midst.

#### **IV. *Almanac of the Dead* and the End of the Death-Eye Dog**

*Almanac of the Dead*, a multi-generational epic chronology, spins a web of interconnecting stories that unfold over the course of the 500-year history of colonization in the US-American Southwest and Mexico. The storyline of Silko's novel creates a complex and multi-layered analysis of internal colonialism in this region. While some of the seventy or so characters fit neatly into the archetypes of good or evil,

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<sup>27</sup> *Supra* note 1, at Art. 12.

other characters are portrayed in a more nuanced and dynamic manner, trying to find their way as they struggle with complex moral dilemmas in the face of situations of precarity, homelessness, and loss. Among her characters can be found corrupt government officials and corporate businessmen, Mafiosos, drug lords and addicts, clandestine arms dealers, human traffickers, environmental activists and a television psychic. Most characters remain underdeveloped, having defined roles that rely heavily on archetypes. This form of character portrayal can be seen as an attempt to fight the use of the novel as a medium for bourgeois ambitions, social longings and legitimations. Silko uses character set-up, of central concern to narratology, to weaken the discursive genre of the novel. This has strong ideological effects since it compromises the powerful link between the Euro-Western bourgeoisie and novel writing. The novel traditionally depicts bourgeois social authority, energy and experience through the portrayal of the bourgeoisie's ability to make history and to take over space, as Edward Said has claimed.<sup>28</sup> Silko, however, centers the focus on social conditions and their limitations, and uses temporality to show that current socioeconomic conditions and forms of exploitation and inequality are inseparable from the colonial past. She delineates a five-hundred-year time period between the present day and the colonization of the Americas which she calls "the reign of the Death-Eye Dog." She uses a non-linear concept of time, portraying the storylines as interwoven strands, just as her narrative switches voices, storylines, and temporal settings to emphasize these connections and to challenge the division between past and present. The non-linear concept of time is one of the central untranslatable elements in the *Almanac of the Dead*. This clashes with Euro-Western ideas of linear time and the idea that individual subjectivity is something that is acted on, but separate from, its geographic, environmental, and temporal location.

*Almanac of the Dead*, like *Ceremony*, draws on the American Indian oral tradition. The characters, as in mythology, are used as archetypes to teach about life, and to display certain characteristics and their consequences. Mythical characters—often gods, animals, or heroic or villainous creatures—teach lessons about moral and ethical behavior or society and encourage heroic deeds. Here the lesson is how to resist and end the reign of the Death-Eye Dog. However, Silko defies archetypical ideas of a hero—there is no single hero taking action, but rather there is a process and a collection of intertwined characters that she uses to illustrate and criticize social conditions. For example, she writes about the post-colonization period of the Death-Eye Dog, when "human beings, especially the alien invaders, would become obsessed with hungers and impulses commonly seen in wild dogs,"<sup>29</sup> and would be "attracted to and excited by death and the sight of blood and suffering."<sup>30</sup> The "alien invaders" are, of course, the European colonizers, whose identity is that of the destroyers and who are opposed by those who have the vision to recognize the power of resistance.

A "Five Hundred Year Map" is found at the beginning of *Almanac of the Dead*, to help readers navigate the vast scope of the text and the various intertwined storylines spread out over the centuries. The storylines are laid out in dotted lines and characters are identified according to location. It is important to note that this map acknowledges the land as being populated (in contrast to the "settler discourse"), and includes

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<sup>28</sup> Edward Said, *Culture and Imperialism* (London, United Kingdom: Vintage, 1993).

<sup>29</sup> Leslie Marmon Silko, *Almanac of the Dead*, *supra* note 14, at 251.

<sup>30</sup> *Ibid.*, 475.

Indigenous resistance in its depiction of the American Southwest. According to the legend, the map lays out “the future of all the Americas” through “the decipherment of ancient tribal texts.” Despite this, parts of the *Almanac* presented in the text remain difficult to decipher. In the novel, the *Almanac* is described as being incomplete, with sections of it having been lost over the course of the centuries as the *Almanac*’s caretakers fled from the Spanish invasion. However, the remaining text, decoded by the drug addicted psychic Lecha was also difficult to understand. Lecha’s visionary capabilities are considerably crippled, impacting her deciphering activity, which remains unreliable and partial. The map’s legend also mentions that historical events are indicated by “arcane symbols and old narratives,” a claim that should be interpreted as irony. Once again, Silko is purposefully hiding certain parts of the sacred texts and prophecies. Even the “symbols and old narratives” are incomplete and untranslatable, being so far outside their context and frames of reference.<sup>31</sup>

The character Lecha illustrates how Silko employs specific literary conventions to allow space for the untranslatable in which historically marginalized Indigenous knowledges are centered and gaps in Euro-Western knowledge and understanding are revealed. Lecha, like all characters in *Almanac of the Dead*, is influenced by the spirit of an age that considerably limits her possibilities of action. Lecha, and her twin sister Zeta who is an arms dealer, have received part of the ancient almanac from their grandmother Yoeme. But in addition to being entrusted with the almanac, Lecha also has visions, albeit visions that are bleak and full of death: “They are all dead. The only ones you [i.e. Lecha herself] can locate are dead. Murder victims and suicides. You can’t locate the living. If you find them, they will be dead. Those who have lost their loved ones only come to you to confirm their sorrow.”<sup>32</sup> Lecha has no control over the content of her visions, however disturbing they may be, and although she is able to communicate with, and speak for, the dead, her role as a constant witness to death causes her to become weaker. As this becomes too much to bear, Lecha takes to using Demerol to dull the destructive and tragic visions, the pain of her gift of clairvoyance and the burden of the almanac. She must resist the allure of her visions if she is to avoid becoming a destroyer, those who “delight in blood” and “energies released by destruction.”<sup>33</sup>

*Almanac of the Dead* also acknowledges the histories of those who had been able to foresee the arrival of the destroyers. However, we know about them only through what remains in the oral tradition of the collective consciousness. As the character Clinton points out, “African and other tribal people had shared food and wealth in common for thousands of years before the white man Marx came along and stole their ideas for his ‘communes’ and collective farms.”<sup>34</sup> Though Marxism is regarded critically in the novel, there is a longing expressed for other ways of living collectively with special value being placed on the cooperative organization of Indigenous societies. David A. Moore puts forth the idea of “communitism” as the core ethical motive presented in *Almanac of the Dead*. This sort of communitism does not

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, 138-39.

<sup>33</sup> *Ibid.*, 336.

<sup>34</sup> *Ibid.*, 407.

involve a vanguard or individual heroism, but rather a constant consciousness of the profound connection and interdependency of all beings together with the earth and nature. As he explains, “[t]he earth is worth protecting, and humans are part of the earth”<sup>35</sup>; this extensive interconnection of all life is vital. While the characters in *Almanac of the Dead* may come across as one-dimensional and lacking development, this has been a choice to privilege the special and temporal interconnectedness that illustrates the consistent presence of Indigenous worldviews and asks non-Indigenous readers to engage with these spiritual ideas even though they may seem quite unfamiliar. In this way, untranslatability may give readers the chance to form a distinct relationship with ideas presented in the novel, such as the profound interconnectedness with the world, rather than simply identifying with a character. When readers can identify with these concepts, the novel can serve as a semiotic device evoking “words, phrases, and gestures of human solidarity”<sup>36</sup> that are crucial for realizing the rights of Indigenous individuals and collectives that are formulated in the UNDRIP. It evokes recognition and respect for “indigenous knowledge, cultures and traditional practices” that contribute, as the UNDRIP makes clear, “to sustainable and equitable development and proper management of the environment.”<sup>37</sup>

The final climax of *Almanac of the Dead* poises the world on the verge of an epic battle between the destroyers and their opponents, when Lecha and Zeta, the prison activist Barefoot Hopi, the revolutionary La Escapia, and the drug dealer Mosca, come together during the International Holistic Healer Convention in Tucson. The outcome of this final confrontation is not made clear because the actions of the destroyers and their opponents counterbalance each other. Silko uses “alternating currents of irony and crackpot occultism, pity and disgust, common sense and messianic vision” in her narration to pull readers in “only to tip them off balance, the purpose being not to make them identify but to make them think.”<sup>38</sup> She uses her narrative threads to share her vision of the strands of connection woven through time, space, beings, and with the land and environment, and she involves readers in the desire to see the end of the reign of Death Eye Dog and his seven brothers. To perch readers on the verge of this final showdown and to infect them with hope of a better world is, I would argue, the ultimate aim of the novel. It is perfectly clear that this aim can only be reached when Indigenous knowledges, worldviews, and ways of life are safeguarded, respected, welcomed, and recognized, as asked by the UNDRIP.

## V. Conclusion: Centering the Margin

I have used the examples of two novels by Leslie Marmon Silko to look at the role of making knowledge or meaning unavailable in order to create multiple and parallel narratives that exist simultaneously within the same text, as a purposeful aspect of untranslatability. Silko uses this tactic to create a moment of encounter and illustration of the existence, power, resistance and importance of Indigenous culture and knowledges, without making them available to the Euro-Western reader or providing an

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<sup>35</sup> David L. Moore, “The Ground of Ethics: Arrowboy’s Ecologic in *Almanac*,” in *Howling for Justice: New Perspectives on Leslie Marmon Silko’s ‘Almanac of the Dead,’* ed. Rebecca Tillet (Tucson, USA: University of Arizona Press, 2014), no. pag.

<sup>36</sup> Félix Guattari, *The Three Ecologies*, (London, United Kingdom: Continuum, 2008), 20.

<sup>37</sup> *Supra* note 1, at Annex.

<sup>38</sup> Meredith Tax, “Return of the Native Americans: Leslie Marmon Silko,” *Voice Literary Supplement*, (November 1999), <http://www.meredithtax.org/writers/return-native-americans-leslie-marmon-silko>.

easy roadmap to navigate that which is hidden in the text. This exposes the untranslatable elements to the reader without handing them the keys to decipher them, creating an experience where reading becomes an act of encounter with selective access to meaning. Within Euro-Western narrative traditions, this may be seen as a failure of narrative clarity; however, I argue instead that it is a means of encouraging critical reflection on different forms and availability of knowledge, which ultimately decenters Euro-Western forms of knowledge and worldviews. I see Silko using these “speed bumps of untranslatability”<sup>39</sup> to incite this reflection in an attempt to spark understanding for, and appreciation of, Indigenous worldviews, and the knowledges and healing potential that are present in these forms of knowing and being. Untranslatability is therefore an important tool for maintaining the rights of Indigenous Peoples to be “equal to all other peoples” while promoting recognition that all peoples are different, and all peoples have the right “to consider themselves different, and to be respected as such,” as stated in the Annex of the UNDRIP.<sup>40</sup>

Silko’s novels have been translated into many languages and she has a readership that spans the continents. Her novels have brought ideas of Indigenous culture and vision to a very broad audience. However, by carefully keeping critical knowledge hidden from the reader, she protects this knowledge from being appropriated or overtaken in ways historically common to the European or Euro-Western culture of consumption, while simultaneously challenging readers to be open to non-Western forms of knowledge and narration. Silko’s work illustrates James Clifford’s ideas of globalization, in that they are “the multidirectional, unrepresentable sum of material and cultural relationships linking places and people, distant and nearby” and can be important tools for weaving more nuanced and varied “cultural relationships.”<sup>41</sup> These cultural relationships are formed when encountering the untranslatable found within a familiar framework, such as the novel, where space is created for readers to examine their own relationships with the untranslatable and with difference. This offers a means to engage with ideas of breaking the margin-center binary and decentering the historically centered worldview as an act of democracy.<sup>42</sup>

In conclusion, I argue that following from the “political theory of untranslatability” as put forth in the *Dictionary of Untranslatables*,<sup>43</sup> it is also possible to assert that unassimilable and untranslatable forms of expression which can contribute to the world of ideas also include narrative forms and tropes. Untranslatability, as a political concept, can be seen in relation to how acknowledging Indigenous Peoples and their distinct worldviews and knowledge impacts on the Euro-Western-centered historical narrative. On one hand, because of their own particular sovereignty and rights with regard to autonomy and laws, and their relationship with national borders crossing their lands, Indigenous Peoples question the prioritization and legitimacy of the nation-state. Simultaneously, their very presence and survival contradicts the narrative of conquest, and in particular the narrative of the “discovery” of (supposedly uninhabited

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<sup>39</sup> *Supra* note 9, at 3.

<sup>40</sup> *Supra* note 1, at Annex.

<sup>41</sup> James Clifford, *Returns: Becoming Indigenous in the Twenty First Century* (Cambridge, USA: Harvard University Press, 2013), 6.

<sup>42</sup> See Gayatri Chakravorty Spivak, *Death of a Discipline* (New York, USA: Columbia University Press, 2003); *Supra* note 4.

<sup>43</sup> *Supra* note 3, at xv.

or unclaimed) lands by Europeans. The continuous presence, survival, and resistance of Indigenous populations also contradict the narrative that colonization happened in the past and is not part of an ongoing process. The ongoing appropriation of Indigenous lands and the concurrent human rights violations, as well as both acute and institutional racism toward Indigenous communities, are sadly still a contemporary global issue. Their resistance and fight for sovereignty makes Indigenous Peoples' humanity hard to ignore, and in this way, it fights against the tendency to push them into a state of alterity. Jody Byrd writes in *The Transits of Empire* about the ways that Indigenous Peoples are written off as "past tense presences," in order to accomplish the "derealization of the Other."<sup>44</sup> Through the visibility and presence of Indigenous Peoples, their cultures, and their knowledge, the vulnerability of the narrative of colonization is exposed. Judith Butler asserts that since a hegemonic construction relies on repetition of its own narrative in order to maintain its hegemonic position, it is therefore at risk should its own discursive assertions be challenged, contradicted, or reinterpreted.<sup>45</sup> As the colonial state relies on the idea of the "Other" to assert its identity, this "Other" becomes a point of vulnerability when it has its own narrative and its own voice and agency.

Language and literature can be useful tools in challenging the centralization of the discourse of the colonial settler state. Telling stories of the lived experiences of Indigenous Peoples, in past and present, not only speaks to the oral traditions of American Indian nations, but honors their survivance as an intrinsic act of resistance. The untranslatable elements of narratives can recognize the fallacy of the narrative in which American Indians are relegated to a distant, and therefore distanced, past.<sup>46</sup> Leslie Marmon Silko and other Indigenous writers, through the visibility and broad reach of their writing, challenge the ideas of otherness and the colonial narrative, and simultaneously challenge ideas of margin and center. In Leslie Marmon Silko's novels, for example, we see that Indigenous lives, culture, knowledge and worldviews do not exist outside society, but rather exist inside, informing and influencing and, potentially, healing it. Not only do they exist, but they matter, and they bring important knowledge, resistance, connection, and creativity that has the potential to challenge global processes of cultural and discursive homogenization.

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<sup>44</sup> Jody Byrd, *The Transits of Empire: Indigenous Critiques of Colonialism* (Minneapolis, USA: University of Minnesota Press, 2011), no pag.

<sup>45</sup> Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (New York, USA: Routledge, 1993), passim.

<sup>46</sup> *Supra* note 2, at 142.

## APPENDIX

### Note on Contributors

**Keira Anderson** grew up in the northwest corner of Connecticut in the USA. She holds a Bachelor of Arts with honors in Literature and a minor in Fine Arts from Bishop's University in Sherbrooke, Québec, Canada and a Master of Arts in Literary Studies from Trinity College in Hartford, Connecticut. Her MA thesis, titled "Paper Planes: Textual Travel and Transnational Dialogue in Selected Essays by Thomas King," is focused on the connection between narrative and sovereignty for Indigenous Peoples in the settler-colonial United States and Canada. She serves as a session chair in the "American Indian Literatures and Cultures" field of the Popular and American Culture Association's annual national conference. Keira currently conducts research for Habitat Pro Association, a Quechua non-governmental organization founded by the family of fellow ISSP alumnus Manuel Ibanez.

**Pamela Calla**, an anthropologist, is a Clinical Associate Professor at the Center for Latin American and Caribbean Studies at New York University. She is the founder of the Observatory on Racism of the Universidad de la Cordillera in La Paz, Bolivia, and of the "Red de Investigacion Accion Anti-Racista en las Americas" (RAIAR). She is the author of works on race, gender, ethnicity, interculturality and state formation in Bolivia and coeditor of *Antropologia del Estado: Dominación y prácticas contestatarias en America Latina*, as well as of the Dialectical Anthropology (September 15, 2011) issue on Reform and Revolution in South America: A Forum on Bolivia and Venezuela. She was an Associate Researcher of the "State of the State in Bolivia," a project of the Informe sobre Desarrollo Humano, 2007, United Nations Development Project and coeditor and author of *Observando el Racismo: Racismo y Regionalismo en el Proceso Constituyente Boliviano, Agenda Defensorial No 11 and 13*, Defensor del Pueblo and Universidad de la Cordillera. She received the Martin Luther King, Jr. Faculty Award (2016-2017) at New York University.

**Theresa P. Castillo** has been working globally in the fields of gender, social justice, and health equity for nearly 20 years. Her expertise includes cultural rights, sexual and reproductive health, violence prevention, and community development among vulnerable populations. Working primarily in resource-poor settings across Asia and Africa, Dr. Castillo has collaborated with various non-governmental organizations, UN agencies, and Ministries of Health to strengthen public health systems by building the local capacity. Her research has been dedicated to immigrant, refugee, and Indigenous women and girls' health issues. A strong advocate of holistic concepts of health and integrated healing, Dr. Castillo has served on several health equity committees, peer-review journal panels, and presented globally, with publications on gender integration and health disparities. Currently, she is the Director of Women and Children's Health Programs at HealthRight International and serves as an Adjunct Professor at New York University's College of Global Public Health and Bard College's Globalization and International Affairs program. Dr. Castillo received her Bachelor's degree in Psychology from the University of Chicago and her Master's and Doctoral Degree in Public Health Education from Columbia University.

**Melissa Derby** hails from the Ngāti Ranginui tribe of the eastern North Island of New Zealand. She has a particular interest in advancing Māori education; Māori

identity; the implications of Treaty of Waitangi settlements in contemporary Māori society; international human rights instruments; and the global revitalization of Indigenous epistemologies. Melissa holds a Bachelor of Arts degree from Victoria University of Wellington in Education and Māori Resource Management. She completed her Master of Arts at AUT University with first class honors, Dean's List. Currently, she is a doctoral student at the University of Canterbury and Research Analyst for the Professor of Māori Research. The title of her doctoral thesis is "Ko te kai a te rangatira he kōrero: Restoring Māori Literacy Narratives to Create Contemporary Stories of Success. She holds the Brownlie scholarship, which is awarded to the highest ranked doctoral student at the University of Canterbury.

**Vida Foubister**, M.Sc., M.A., is a journalist and sister of a Cree brother, who her family adopted from Northern Saskatchewan. She has led projects on health care quality and health information technology for the Commonwealth Fund, Robert Wood Johnson Foundation and Aspen Institute and contributed articles on patient care, medical ethics, scientific research, and health care policy and financing to publications ranging from *Reuters Health* to the *New York Academy of Sciences Magazine*. Much of her recent writing has focused on improving global health and increasing access to care among underserved populations. She currently works with the Addiction Policy Forum to advocate for better treatment for those affected by addiction, a disease that took her brother's life at the age of 25.

**Tashi Tsering Ghale-Dolpo** is an Independent Researcher, who belongs to Dolpo, one of the most remote Himalayan Indigenous communities of Nepal. He holds a Master's degree in Political Science from Tribhuvan University, Nepal. Beyond his five years of research experience, he has also worked and assisted the Ethnographic profile of Dolpo, funded by the National Foundation for Development of Indigenous Nationalities. Aside from participating in various Indigenous organizations and Indigenous movements, meetings and national level seminars, Ghale-Dolpo has also published journals, a book chapter, and op-ed articles in both English and Nepali in international and national journals. In addition, he has presented his research at various national and international conferences. He is currently raising funds for his Irrigation and Education projects in Dolpo, part of his ongoing grassroots efforts, and is also making a documentary called "Mi-Tse: Struggles of Dolpo woman," which has been selected for a national conference happening in July 2017.

**Deanne Grant** is a member of the Pawnee Nation of Oklahoma and is currently a PhD Candidate in Ethnic Studies at the University of Colorado Boulder. Her specific research interests are: Indigenous Feminisms, Critical Indigenous Studies, and Native American Women. Deanne is grounded with a Master's degree in International Studies from the University of Oregon and a Master's degree in Indigenous Governance from the University of Victoria, Canada. She has served as a circle of scholars administrator with the American Indian College Fund, a community economic development manager with the Native American Youth & Family Center, and has interned with the Tibetan Women's Association in India, Free the Children in Kenya and the Pawnee Nation College in Pawnee, Oklahoma. Deanne grew up in Stillwater, Oklahoma. She earned a Bachelor's degree in Liberal Arts from Fort Lewis College in 2004. She currently calls Gold Hill, Colorado home.

**Ingrid Johanson** has a Bachelor with Honours in International Studies and a Masters in International Human Rights Law. She has worked and studied in New York, India and Chile, gaining expertise in the areas of research, community development, advocacy, language and human rights law. In 2012, Ingrid worked at the United Nations in New York, interning at a UN-based non-governmental organisation as well as at the Permanent Mission of Iceland in the Cultural, Humanitarian and Social Affairs Third Committee. Ingrid worked alongside Patrick Dodson, prominent Australian Indigenous Rights Leader at the Nyamba Buru Yawuru organisation, while he was co-chairing the Expert Panel for Constitutional Indigenous Recognition. Ingrid has worked across many Indigenous desert and saltwater communities in Australia in the fields of community development, self-determination, and gender issues. She currently calls Arnhem Land home, managing Maningrida's Indigenous Women's Collective under Bawinanga Aboriginal Corporation, which encompasses women from over 12 Indigenous language groups.

**Rachael Ka'ai-Mahuta** is of New Zealand Māori (Ngāti Porou, Ngāi Tahu), Native Hawaiian, and Cook Island Māori descent. Rachael is a Senior Lecturer in Te Ipukarea, the National Māori Language Institute and Te Whare o Rongomaurikura, the International Centre for Language Revitalisation at the Auckland University of Technology (AUT), in Aotearoa/New Zealand. Since attaining her Doctorate in 2010, Rachael has been awarded a Te Wheke a Toi Post-Doctoral Fellowship, has completed a program on Indigenous Peoples' Rights and Policy at Columbia University, and has graduated from Te Panekiretanga o Te Reo, the Institute of Excellence in the Māori Language. Rachael's research interests reflect her background in Māori, Pacific, and Indigenous Studies and Political Studies, and include the revitalization of Indigenous languages, the Māori oral tradition, the history and politics of the Māori language, Indigenous politics (specifically the politics of Indigenous diaspora, identity and place), and Indigenous Peoples' rights.

**Tilu Linggi** is from the Mishmi Hills, the northeastern part of India, predominantly a region of the Mishmi tribe. His area of interests include international environmental law, land and forest rights, biodiversity issues, intellectual property rights law, racial discrimination, issues related to Indigenous Peoples' educational, cultural, traditional and livelihood rights and civil and criminal rights law as a part of International Human Rights Law. Currently, Tilu is pursuing his PhD at Jawaharlal Nehru University, New Delhi. After earning his Bachelor of Arts in Political Science from Madras Christian College, he earned his LL.B. from Indian Society Law College, Pune, and a LL.M. from National Law University, Assam. He was briefly engaged with the National Human Rights Commission, New Delhi, and is involved with several human rights NGOs. He was also part of OHCHR's (Geneva) Indigenous Fellowship program, 2015. He was awarded the Ram Prasad Anand Scholarship in 2014 by the Virtual Centre of International Law.

**Anthony McKnight** is an Awabakal, Gumaroi and Yuin man. Anthony is a father, husband, uncle, son, grandson, brother, cousin, nephew, friend and cultural man. Anthony is currently a lecturer in the School of Education, Faculty of Social Science at the University of Wollongong. Anthony respects Country and values the knowledge that has been taught to him from Country, Elders and teachers from the community(s). He continuously and respectfully incorporates Yuin ways of knowing and learning with a particular interest of contributing to this area to validate Yuin approaches in academia

and schools. Anthony has recently completed a PhD called “Singing Up Country in Academia: Teacher Education Academics and Preservice Teachers’ Experience with Yuin Country,” in the Faculty of Social Science at the University of Wollongong. He holds a Masters of Education (HRD) from the University of Sydney and a Bachelor of Education, Health and Physical Education from the University of Wollongong.

**Rachael Grace Patten** is a filmmaker, entrepreneur and current student at Columbia University's School of General Studies. She is majoring in Political Science with a focus on International Politics and Political Theory. Her short film, “Sumi,” played at the Cannes Film Festival Short Corner, the Cinequest Film Festival, the Los Angeles Asian Pacific Film Festival and the Lower East Side Film Festival. She was also the founder and COO of Nibblers, NYC, a gourmet chocolate company. In recent years, she has been a UNESCO judge for multimedia youth contests, as well as a student judge for Columbia University's Institute for the Study of Human Rights Essay Contest. In addition, she has been a filmmaking mentor for the Cinequest Film Festival's Picture the Possibilities and has contributed to the Hugo-award winning weebly, Journey Planet. She was born in Taipei, grew up in California, and now calls NYC home.

**Saket Suman Saurabh** teaches as Assistant Professor in Amity University Rajasthan, India. He submitted his PhD thesis in July 2017 entitled “The Writings of Rigoberta Menchu and Dayamani Barla: A Comparative Study” to the Centre for Spanish, Portuguese, Italian and Latin American Studies, Jawaharlal Nehru University, New Delhi, India. He obtained his M.Phil, M.A and B.A. degrees from the JNU. His main research areas are Latin American Literature, Indigenous Studies, Cultural Studies, Resistance Literature, Globalization and its impact on marginal societies. He has done research work in CIALC, at the National Autonomous University of Mexico (UNAM). He was a South-South Fellow 2014: Tricontinental Fellowship Programme from Asia, Africa and Latin America. He also attended ISSP at Columbia University in 2016 and a summer course at the University of Salamanca, Spain, in 2008.

**Vera Solovyeva** is currently a PhD candidate at George Mason University. Her research focuses on the impacts of, vulnerabilities from, and adaptation strategies to climate change of two Siberian native communities: Sakha and Even; and what aspects of their ecological knowledge, culture and other factors the Evens and Sakha perceive as a key to sustainable life. Additionally, Vera Solovyeva is interested in the process of how Indigenous Peoples recover lost knowledge, traditions, and rituals through the study of museum collections. In 2012-2017, she organized visits of the traditional masters’ delegations from the Republic of Sakha (Yakutia), Russia to the American Museum of Natural History in New York. In 2015-2016 she was the Andrew W. Mellon Fellow in Cultures of Conservation at the Bard Graduate Center. She also represents the Indigenous Organization “Algys” from the Republic of Sakha (Yakutia) at the United Nations Permanent Forum on Indigenous Issues.

**Elsa Stamatopoulou** joined Columbia University in 2011 after a 31-year service at the United Nations (in Vienna, Geneva and New York) with some 22 years dedicated to human rights, in addition to 8 years exclusively devoted to Indigenous Peoples’ rights. She became the first Chief of the Secretariat of the United Nations Permanent Forum on Indigenous Issues in 2003. Her academic background is in law, international law, criminal justice and political science (Athens Law School, Vienna University,

Northeastern University and the Graduate Institute of International Studies at the University of Geneva) and her research and writings cover a variety of human rights topics. Her books include *Cultural Rights in International Law*, 2007, Martinus Nijhoff Publishers (Brill); *Indigenous Peoples' Rights and Unreported Struggles: Conflict and Peace* (ed.), 2017, Columbia University Institute for the Study of Human Rights, and *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes*, (ed. with W. Littlechild), 2014, Columbia University Institute for the Study of Human Rights. She has cooperated closely with non-governmental organizations in her native Greece and around the world and has received various awards, including the Ingrid Washinawatok El Issa O'Peqtaw Metaehmoh-Flying Eagle Woman Peace, Justice and Sovereignty Award. She co-chairs the International Commission on the Chittagong Hill Tracts.

**Doro Wiese**, PhD, is a researcher at Düsseldorf University and Utrecht University. In her multifaceted research, she investigates how aesthetics is a manner of drawing people into an effective relation with the lacunae of knowledges and histories. Momentarily, she explores the *Untranslatable Worldscapes* established in the globally-circulating novels by Native American Renaissance writers. In her monograph *The Powers of the False*, 2014, Northwestern University Press, she reflects on how literature can make it possible to represent histories that are otherwise ineffable. *F – Faust*, her forthcoming book (2018, Textem), is a reflection on the contemporary conditions for resilient political action.

