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Indigenous, Aboriginal, Fugitive and Ethnic Groups Around the Globe

Edited by Liat Klain-Gabbay

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Published in London, United Kingdom







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http://dx.doi.org/10.5772/intechopen.78898
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First published in London, United Kingdom, 2019 by IntechOpen
IntechOpen is the global imprint of INTECHOPEN LIMITED, registered in England and Wales, registration number: 11086078, The Shard, 25th floor, 32 London Bridge Street
London, SE19SG – United Kingdom
Printed in Croatia

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Additional hard and PDF copies can be obtained from orders@intechopen.com

Indigenous, Aboriginal, Fugitive and Ethnic Groups Around the Globe
Edited by Liat Klain-Gabbay
p. cm.
Print ISBN 978-1-78985-431-2
Online ISBN 978-1-78985-432-9
eBook (PDF) ISBN 978-1-83881-908-8

Meet the editor

Liat Klain-Gabbay obtained a PhD in Information Science from Bar Ilan University, Israel, in 2013. Her mixed methods research focused on academic libraries in the information age. She earned a MA in East Asian studies from the Hebrew University of Jerusalem, and completed a certificate program in language and culture at Soka University, Japan. She holds a BA in East Asian Studies and Special Education from Tel-Aviv University. Dr. Klain-Gabbay earned her certificate in library and information science at Beit Berl College, Israel, and has worked for twelve years as an information specialist in the College of Management, Israel.

Contents

Preface

According to the United Nations, there are an estimated 370–500 million indigenous people in the world, spread across 90 countries. They live in all geographic regions and represent 5000 different cultures. It is very important for indigenous people to preserve their identity, way of life, culture, tradition, and language. Indigenous people, aborigines, and minorities are usually poor, suffer from malnutrition, and often lack adequate social protection and economic resources. They often are exposed to abuse and discrimination, have difficulties preserving their culture and language, work for low wages, and do not have access to good educational systems or healthcare; life expectancy of indigenous people is as much as 20 years less than that of their non-indigenous counterparts. Of course, there are differences among countries regarding indigenous peoples and their situations; some groups fare better than others.

Over five sections and nine chapters, this book explores indigenous and aboriginal life in different countries and continents. For example, Indians in the United States and fugitive black slaves in Chile in the seventeenth century.

The chapters represent different countries and exemplify the problems, ways of life, and human rights of indigenous people and other ethnic and marginalized groups. Chapters are written by authors from various disciplines and from different viewpoints, including international law, self-government, self-identity, legal status, education, and so on.

In general, we can understand that the status, educational systems, employment opportunities, and human rights of indigenous people, aborigines, ethnic groups, and minorities all over the world need to be changed. It is time to appreciate all people as human beings and not discriminate against them, their culture, their language, or their way of life. Openness and acceptance are especially important in this time of globalization, as the last several years have seen governmental changes, civilian wars, and the information revolution, all of which have led to an increase in refugees and migrants all over the world.

I would like to express my deepest gratitude to the authors that wrote and contributed such interesting chapters for this book. I would also like to thank IntechOpen for the opportunity to edit this interesting and important book.

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Section 1

Africa - Kenya, Nigeria and South Africa

Chapter 1

The Role of International Law in Protecting Land Rights of Indigenous Peoples in Nigeria and Kenya: A Comparative Perspective

Sylvanus Barnabas

Abstract

This chapter explains the role of international law in protecting land rights of indigenous peoples (IPs) in Africa. It examines selected decisions of the United Nations Human Rights Committee and human rights treaty-based Monitoring Bodies such as Committee on the Elimination of All Forms of Racial Discrimination and Committee on Economic Social and Cultural Rights on land rights of IPs. It uses the case study of Abuja, Nigeria and a comparative approach to developments in relation to IPs' land rights in Kenya in the context of some concluding observations of the human rights treaties Monitoring Bodies, the African Commission on Human and Peoples' Rights as well as the decision of African Court on Human and Peoples' Rights to illustrate the significance of international human rights treaties and the African Charter on Human and Peoples' Rights in protecting land rights of IPs in Africa. The research method is largely doctrinal, it uses a case study method and it is comparative in its approach to Nigeria and Kenya in the context of how both countries engage with international law as well as the observations and decisions of relevant international human rights bodies on both countries discussed in this chapter.

Keywords: indigenous peoples, land rights, international law, Africa, Kenya, Nigeria

1. Introduction

Globally indigenous peoples (IPs) suffer from several kinds of injustices as a result of their low numerical numbers, political marginalisation and low economic power. Perhaps it is because of their vulnerability to marginalisation and discrimination by other dominant groups and the State that the international community has chosen through the instrumentality of international human rights law to make them direct subjects of international law. However, international law is not easily enforceable within the domestic jurisdiction of some States, making it difficult for subjects of international law to enforce their rights thereunder in the domestic jurisdictions of States where they live. This raises interesting academic issues about how to enhance a viable relationship between international law and national law.

It appears that the most controversial and dominant human rights issue that pertains to IPs is the challenges they face regarding dispossession of their ancestral

lands which they often depend upon for their survival. The need to protect land rights of IPs may quite often come into conflict with the interests of the State. As this chapter will demonstrate, there are incidences where State interests may have negative impacts on land rights of IPs, in the context of the powers of the State to manage and control land through national laws as is the case in Nigeria and Kenya. (For the situation in Kenya in relation to land rights of the Ogiek peoples, see [1]). A bit more detailed information on the situation in Nigeria will be introduced later in Section 2.2 in the context of the case study in this chapter.

This chapter aims to explain the significance of international law and African regional human rights law in protecting land rights of IPs in Africa. It mainly uses the case study of Abuja, Nigeria and a comparative approach towards developments in relation to IPs' land rights in Kenya, in the context of some concluding observations of human rights treaties Monitoring Bodies, decisions of the African Commission on Human and Peoples' Rights as well as that of the African Court on Human and Peoples' Rights, to demonstrate the relevance of international and African regional law in protecting land rights of IPs in Africa. The main purpose of the comparative analysis between Nigeria and Kenya is because both countries have similar land rights issues in relation to IPs. In addition, both States are Anglophone with similar plural legal systems. Therefore, the two States are apt for such comparative study.

To achieve the above objectives, the chapter examines some decisions, concluding observations, general recommendations and decisions of the United Nations Human Rights Committee (HRC) and human rights treaty-based Monitoring Bodies such as Committee on the Elimination of All Forms of Racial Discrimination (CERD), Committee on Economic Social and Cultural Rights (CESCR), the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) on land rights of IPs. It uses the case study of Abuja, Nigeria to illustrate the significance of the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) and the African Charter on Human and Peoples' Rights 1982 (African Charter) in protecting land rights of IPs in Africa.

Following this introductory Section 1, in Section 2 some introductory details about Nigeria, Kenya and the case study of Abuja, Nigeria will be introduced, in order to provide the reader with background information to the analyses that follow in Sections 3–6, through critical examination of the decisions, observations and general recommendations of international and regional human rights Monitoring Bodies as well as the African Court and African Commission. Before examining these international human rights instruments in detail, some background information on Nigeria, the case study of Abuja, and Kenya will be introduced in Section 2.

2. Nigeria and Kenya in comparative perspective

This section is aimed at introducing the reader to Nigeria, the case study and Kenya in order to provide relevant background information to the analyses of the observations, statements and decisions of the relevant bodies discussed in this chapter, in the context of how to safeguard land rights of IPs in Africa using the relevant international human rights treaties that will be examined later in Sections 3–6. The essence of discussing the manner in which international law is treated within the domestic jurisdiction of Kenya and Nigeria, is to enable this chapter to determine what system would be better suitable for the protection of land rights of IPs within the domestic jurisdiction of African States in accordance with the provisions of the international human rights instruments discussed in this chapter.

2.1 An introduction to Nigeria

Nigeria is an African country with a population of about 100 and 70 million people. It is located in West Africa. It is a multi-ethnic and multi-religious country. Prior to British colonial rule, there were many pre-colonial African States in both northern and southern parts of the country [2, 3]. The pre-dominant mode of law in the pre-colonial era was customary law [4]. However, with the advent of colonial rule by Britain, most of the pre-existing indigenous States were brought together to form Nigeria in 1914 through the amalgamation of the Northern and Southern Protectorates of Nigeria [5]. During colonial rule, there was a gradual introduction of statutory English law which co-existed with customary law and Islamic law depending on the specific area of Nigeria [6]. With the growth of anti-colonial movements across the world, Nigeria became politically independent from colonial rule in 1960. Nigeria now has 30 States in addition to Abuja, the Federal Capital city.

Nigeria's legal system is plural, encompassing customary law, State law and Islamic law [7]. In the context of international law, it appears that the pre-existing political entities prior to British colonial administration had an engagement with international law through diplomatic relations with other African States and Europeans going back to the fourteenth century [8]. However, with the emergence of colonial rule the pre-colonial States lost their identities as they assumed the identity of the colonial Britain. Consequently, they lost the ability to engage with international law to colonial Britain [9]. However, upon attainment of political independence from Britain in 1960, Nigeria's sovereignty was restored and then became a subject of international law with obligations as such [10]. Upon independence, Nigeria informed the UN that it will accept and inherit its obligations from the United Kingdom if such international instruments are valid and applicable to Nigeria [11].

The contemporary relationship between Nigeria's national laws and international law has its origins in the Nigerian Independence Constitution 1960 which incorporated international human rights norms enshrined in the UN Charter, [12] the Universal Declaration of Human Rights (UDHR), 1948 [13] as well as the European Convention on Human Rights and Fundamental Freedoms (ECHR) [14]. Subsequent Nigerian constitutions have also succeeded in making provision for those rights [15]. Nigeria is a party to several international human rights treaties, (for some of these see, [16–19]). Currently, Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (Nigerian Constitution) incorporates these rights. Nigeria also has a domestic legislation which is a replica of the African Charter, [20] which makes its provisions directly enforceable before Nigerian courts of law. For general analyses of the impact of the African Charter on human rights litigation in Nigeria and Africa, see [21–23].

However, Section 1 (3) of the Nigerian Constitution proclaims the Constitution as supreme over any other law, so that in circumstances of conflict between the provision of the Nigerian Constitution and international law, the Nigerian Constitution shall prevail and such international law shall be void to the extent of its inconsistencies. Indeed, Section 12 (1) of the Nigerian Constitution provides that, no treaty which has been signed and ratified by Nigeria shall have the force of law in Nigeria's domestic jurisdiction unless such has been enacted as a legislation by the Nigerian legislature. The case study in this chapter will now be introduced in Section 2.2.

2.2 An introduction to the case study of Abuja, Nigeria

Abuja is the administrative capital of the Federal Republic of Nigeria, (see [24]). Abuja is specifically defined under the First Schedule to the Nigerian Federal Capital Territory Act 1976 (FCT Act) [25] (see also, [26]). Abuja is located in central Nigeria [27]. The peoples of Abuja belong to the following ethnic groups: the Gbagyi; the

Koro; the Gade; the Bassa; the Igbira; the Amwamwa; the Ajiri Afo; and Gwandara. Studies have shown that the peoples of Abuja have lived and occupied this territory prior to British colonial rule in Nigeria. (For anthropological notes on the history, culture and geographical locations of these peoples in Nigeria, see generally [28]. For more details about the peoples as IPs in international law, see [29].)

Their land rights issues began in 1976 with the compulsorily acquisition of their ancestral lands for building a capital city [30]. The Land Use Act 1978 (LUA) [31] is the principal legislation on land but it is not applicable in Abuja. Abuja is meant to be a symbolisation of the unity of Nigeria [32]. The FCT Act vests all of Abuja lands 'exclusively' in the Federal Government of Nigeria. Implying that customary land rights do not exist in Abuja. The compulsory termination of customary land rights in Abuja is backed by Section 279 (2) of the Constitution of the Federal Republic of Nigeria 1999 (Nigerian Constitution). That section provides that 'The ownership of all lands comprised in the Federal Capital Territory, Abuja shall vest in the Government of the Federal Republic of Nigeria'.

In relation to the other 36 States that make up the Nigerian Federation, the LUA makes provision for two types of occupancy rights. First is 'statutory right of occupancy' and secondly 'customary right of occupancy'. For customary rights of occupancy, the Act provides that Local Governments may grant customary rights of occupancy to land in any non-urban area to any person or organisation for agricultural, residential, and other purposes, including grazing and other customary purposes related to agricultural use in the 36 States.

Although the LUA has had a negative effect on the customary land rights of Nigerians in general [33], aspects of customary land tenure law have been accommodated within the LUA. An example is Section 24 of LUA which preserves customary law rules governing devolution of property. Similarly, Section 29 of LUA provides that the holder or occupier entitled to compensation in respect of customary land rights, if compulsorily acquired, is a community and the Governor is empowered to direct payment of compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Therefore, Nigerians who are indigenous to the 36 States of Nigeria have benefited from this statutory accommodation of customary land rights (see Section 36 of LUA). This is not the case in relation to Abuja peoples whose customary land rights are terminated by the domestic laws and Constitution of Nigeria.

The above situation in the context of customary land rights in Abuja has been confirmed as the position of the law by the decision of the Nigerian Court of Appeal (CA) in the only known case on the issue as at the time of writing. In Ona v Atenda [34] the Nigerian CA relied on the provisions of the afore-mentioned FCT Act and the Nigerian Constitution when it held that no person can be entitled to compensation for the compulsory acquisition on the basis of customary land rights, except those rights are enshrined in a statute [35]. As the FCT Act predates the LUA, the preservation of customary land rights under the LUA cannot inure in favour of Abuja peoples. It will be demonstrated later in Sections 3–6, that this development is a violation of international human rights laws. This chapter shall now introduce some background information on Kenya in Section 2.3 as a background to the comparative discussion that follow in the remainder of this chapter.

2.3 An introduction to Kenya

Like Nigeria, Kenya is also an African country. It is geographically located in East Africa. It is also a multi-ethnic and multi-religious country. It has a population of about 38 million people. Prior to British colonial rule, there were several indigenous States in existence in Kenya [36]. The pre-dominant mode of law then was also

customary law [37]. Just like Nigeria, the pre-colonial States engaged with international law through trade and diplomatic relations with other pre-colonial African and European States [36]. The emergence of colonial rule in Kenya began with the declaration of Kenya as the East Africa Protectorate on 15 June 1895 by the British [38]. Consequently, pre-colonial Kenya lost its sovereignty and identity to Britain as well as the ability to engage with international law.

The place of international law and particularly international human rights law in Kenya has not been as straight forward as it has been in Nigeria [39], as the 1963 Independence Constitution of Kenya did not make provision for international law or international human rights law in the domestic legal system of Kenya [40]. However, in 1969 a bill of rights was incorporated into the Kenya Constitution 1963 [41]. Like Nigeria, this was the influence of the UN Charter, UDHR and the ECHR [42]. It has also been argued that this development in Kenya was the result of the inclusion of international human rights norms in the Ugandan Constitution which was in turn inspired by the approach that had been adopted under the Nigerian Independence Constitution 1960 [43].

Prior to the adoption of the Constitution of the Republic of Kenya 2010 (Kenyan Constitution), Kenya's approach towards international law was dualist [43]. That is, a similar approach as discussed in the context of Section 12 (1) of the Nigerian Constitution in Section 2.1, where no international treaty can have the force of law in the domestic jurisdiction unless such has been enacted as domestic legislation. However, due to fairly recent Constitutional reforms, the Kenyan Constitution has abandoned its previous dualist approach (a similar approach under the Nigerian Constitution) towards international law [44].

Article 2 (6) of the Kenyan Constitution provides that any treaty that has been signed and ratified by Kenya shall have the force of law in Kenya. Implying that there is now no need for enacting domestic legislations to make such treaties enforceable in Kenya. This is a remarkable departure from what obtains under the current Nigerian Constitution. However, Article 2 (2) of the Kenyan Constitution affirms its supremacy over any other law just like the case with the Nigerian Constitution, implying that where there is conflict between the Kenyan Constitution and international law, the former shall prevail.

Kenya is home to several IPs such as the Ogiek and the Endorois amongst many others [45] and there has also been recent legal developments in relation to their land rights at regional and internal levels as demonstrated later in Sections 3–6. The notoriety of these cases in relation to land rights of IPs in Kenya and the decisions and observations of the relevant treaty Monitoring Bodies on the developments in Kenya, justifies the comparison with Nigeria to illustrate the significance of the international human rights instruments discussed later in this chapter, towards solving the human rights challenges that the case study introduced in Section 2.2. Indeed, since this chapter is mainly concerned about the significance of international human rights treaties in protecting land rights of IPs in Africa, this makes Kenya a good comparator with Nigeria in the context of the case study which was introduced in Section 2.2. In the remainder of this chapter, the case study of Abuja is used to illustrate the significance of international human rights treaties in the protection of land rights of IPs in the domestic jurisdiction of African States such as Nigeria and Kenya in Sections 3–6.

3. The role of the ICERD and the CERD

The idea of 'racial discrimination' in the context of the ICERD is defined under Article 1(1) of the ICERD [46] as any distinction which has the tendency to exclude, restrict or offers preferential treatment based on any of the grounds specified therein

such as: 'race, colour, descent, or national or ethnic origin', which would ordinarily prevent the enjoyment and exercise of human rights 'on an equal footing' in 'the political, economic, social, cultural or any other field of public life'. A duty is imposed upon States to ensure the equal protection and enjoyment of human rights of racial groups or individuals belonging to them just as other members of society through the enactment of relevant laws. Under Article 2 (c) of the ICERD, States are mandated to eliminate all forms of racial discrimination by taking affirmative actions.

Furthermore, under Article 5, States are required '...to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law..' in the enjoyment of the 'right to own property alone as well as in association with others' including 'economic, social and cultural rights'.

In the process of monitoring States' compliance with their commitments under ICERD, the CERD was established. Accordingly, CERD has stated that the provisions contained in the ICERD have an immediate effect [47]. Nigeria has signed and ratified the ICERD. The CERD has maintained that the provisions of the ICERD are relevant in the context of protecting the rights of IPs in general as contained in its 1997 General Recommendation No. 23 on IPs [48] (see also, [49]).

The CERD has maintained that 'a "hands-off," or "neutral" or "laissez-faire" policy is not enough' [50]. Indeed, the CERD's recommendations and official comments have made a number of States to review and amend their laws and policies which have negatively affected land rights of IPs [51]. For example, the CERD has utilised its 'Urgent Action Procedure' to encourage States to change discriminatory laws and policies. For example, New Zealand was the subject of an 'Early Warning Procedure' in 2004 in the context of New Zealand's Foreshore and Seabed Act (2004) because the law discriminated against the Māori [51]. Similarly, in March 2006, the CERD issued a similar decision against the United States (US) and stated that it must stop any further violation of the land rights of Western Shoshone [52]. Although there has been no case emanating from Africa as at the time of writing, the CERD has explained the relevance of the ICERD towards protecting land rights of IPs in Africa through Concluding Observations on the Periodic Reports submitted to it by both Nigeria and Kenya as demonstrated below.

In a 2011 Concluding Observation on Kenya [53], the CERD observed that the Kenyan Government was yet to respond positively to the decisions of the African Commission on the forced evictions of the Endorois and Ogiek from their ancestral lands without any adequate redress in contravention of Article 5 of the ICERD [54]. It then recommended that Kenya should take affirmative action in relation to the decision of the African Commission [54]. This illustrates that the ICERD's provisions are relevant in the context of safeguarding land rights of IPs in Africa.

Indeed, in a Concluding Observation on Nigeria [55], the CERD observed that Nigeria had not provided it with specific information about the list of minorities and precise figures about the ethnic composition of Nigeria to enable it assess how the ICERD's provisions are being complied with. It asked that such information should be produced to assist it in determining and identifying the groups that fall within the definition of 'racial discrimination' in accordance with Article 1 of the ICERD [56]. The CERD also raised concerns about the absence of a definition of 'racial discrimination' within Nigeria's domestic laws [57]. Another observation was that the main principles contained in the ICERD had not been incorporated into the domestic laws of Nigeria so that they could be used by litigants before the national Courts of Nigeria in order to comply with Article 2 of the ICERD [58]. The CERD was deeply concerned in relation to the provisions of the Nigerian LUA discussed in Section 2.2 and stated that its provisions were in contravention of the provisions of the ICERD [59].

Therefore, Nigeria's attention was drawn to the CERD's General Recommendation 23 on the rights of IPs and recommended that the Nigerian LUA be repealed and new legislation adopted which complies with the principles set forth in the ICERD on the exploitation and management of land [59]. The CERD also observed that the mere absence of complaints before it from Nigeria may be a consequence of the absence of appropriate legislative measures [59]. There is no evidence that Nigeria has complied with the recommendations made by the CERD as at the time of writing, as there are no documents showing this.

The constitutional and legislative termination of the customary land rights of Abuja peoples without adequate payment of compensation or resettlement is a violation of Articles 1, 2, 5 and 6 of the ICERD. The definition of racial discrimination under Article 1 of the ICERD demonstrates that Abuja peoples of Nigeria have and are being discriminated against in context of their customary land rights.

4. The role of the ICCPR and HRC

Under the substantive provisions of the ICCPR [60] the word 'peoples' is used without any specific definition as evidenced by the contents of Article 1 (1) and (2) [61]. In the specific context of protecting land rights of IPs, the ICCPR provides that all 'peoples' have the right to dispose of their wealth and natural resources and that in 'no case may a people be deprived of its own means of subsistence'. Like the ICERD, Article 26 of the ICCPR then further provides that '...all persons are entitled to equal protection under the law and prohibits discrimination on grounds of race, colour, sex, language, national or social origin, property, birth or other status'. Indeed, the ICCPR imposes obligations on States which require them to adopt legislations that give effect to its provisions. However, of particular relevance to land rights of IPs is the protection in the ICCPR accorded to 'linguistic minorities' and 'persons belonging to such minorities' of 'the right, in community with the other members of their group, to enjoy their own culture'.

The body enshrined with the responsibility of monitoring compliance with States' obligations under the ICCPR is the HRC, which is established by the ICCPR. The HRC has interpreted some provisions of the ICCPR and concluded that they serve as effective safeguards to the rights of IPs to practice their culture and to own their properties. For example, the HRC has maintained that Article 27 of the ICCPR in particular protects IPs' land rights (see [62]) as demonstrated by its decision in the case of Aerela and Nakkalajarvi v Finland. In addition to this, in its General Comment on Article 27 [63], the HRC maintains that '...culture manifests itself in many forms, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law' [64].

Indeed, Article 27 of the ICCPR provides for the rights of individual members of minority groups such as IPs to enjoy their culture but this is also complemented by the possibility that such rights can be exercisable 'in community with the other members of their group' [64]. To buttress this point, in Lubicon Lake Band v Canada, [65] the HRC was of the view that it had no problems with 'a group of individuals, who claim to be similarly affected, collectively to submit a communication', to it (see also [66]). Similarly, in Sandra Lovelace v Canada, [67] the HRC opined that a State cannot deprive a group of people of their right to practice their culture such as living and maintaining ties with reserves upon which they were born [67].

Although the ICCPR allows States to derogate from the rights guaranteed therein by State Parties, this can only happen in circumstances that endangers the very existence of the State itself. Indeed, this accommodation of the rights of States to

derogate from those rights is made subject to the proviso that such derogations must not be in conflict with a State's international law obligations and must not be done in a manner that discriminates against any person or group of persons on any of the prohibited grounds under the ICCPR.

As at the time of writing, there have been no case before the HRC emanating from Africa, but the HRC has had the opportunity to make comments on developments in Kenya through its Concluding Observation [68]. In making observations on the adoption of a new Kenya Constitution in 2010 [69], the HRC raised concerns about lack of clarity regarding Section 2 (6) of the Kenyan Constitution which makes provision to the effect that all international treaties ratified by Kenya shall become part of the laws of Kenya under the Constitution, without giving any specific clarity about the legal status of the ICCPR in that country [70]. Consequently, the HRC recommended that Kenya takes measures to ensure that the ICCPR was part of the domestic laws of Kenya [70].

In the specific context of land rights of IPs in Kenya, the HRC made references to its previous Concluding Observation [71], and noted that Kenya must adopt appropriate laws, policies and practices to safeguard IPs from being evicted from their lands without consultation and resettlement [72]. Specifically, the HRC also expressed serious concerns about the land rights of Ogiek and Endorois peoples in the context of their continuous evictions, despite their dependence on the occupation of such lands for their survival [73]. The HRC also observed that Kenya had not complied with the decision of the African Commission in relation to the land rights of the Endorois in disregard of Kenya's obligations under Articles 12, 17, 26 and 27 of the ICCPR [73]. The HRC then recommended that Kenya should take account of and respect the land rights of IPs to their ancestral lands [73].

The latest HRC Concluding Observation on Nigeria as at the time of writing was the one made in 1996 [74]. In that Concluding Observation, the HRC recommended that Nigeria should review its entire legal framework towards protecting human rights in Nigeria in line with the provision and principles set-out in the ICCPR [75]. In the particular context of protecting the rights of IPs, the HRC recommended that Nigeria should ensure it protects the rights of persons belonging to ethnic minorities and ensure that the specific provision of Article 27 of the ICCPR are fully protected and guaranteed [76].

To the extent that the provision of Section 297 (2) of the Nigerian Constitution [76], and Section 1 (3) of the FCT Act, [76] discussed in Section 2.2 provides that the entire land in Abuja, the FCT of Nigeria, belongs 'exclusively' to the Federal Government of Nigeria when compensation or resettlement of all the IPs has not been made, these constitute continuous violations of the rights of the IPs of Abuja to practice their culture both individually and in association with others as farmers, hunters and fishermen. Certainly, this situation clearly constitutes violations of Article 27 of the ICCPR, (see [77–80]). Evidence of non-payment of compensation or resettlement is the existence of a Bill on the issue currently before the Nigerian Parliament (see [81]).

5. The role of the ICESCR and the CESCR

Without any specific definition, under the ICESCR [82] the word 'peoples' is also used, without definition. It provides that all 'peoples' shall enjoy economic, cultural development and social rights as well as the right to cultural freedoms. It also provides that in no circumstances should people be denied of their means of 'subsistence'. The body that has responsibility for monitoring States' compliance with their obligations under the ICESCR is the CESR which has stated that cultural rights are intertwined with other human rights [83]. In the context of IPs, the

CESCR accepts that IPs have the right to enjoy all the rights under the UN Charter and UDHR as collectives and as individuals [84]. The CESCR has maintained that because of the expansive nature of cultural rights, and the enjoyment of such rights is linked to the enjoyment of human existence [85].

The CESCR has made it clear that Article 15 (1) of the ICESCR implies that culture encompasses modes of production of food [86]. Consequently, it has cautioned that any limitation on cultural rights must be through the adoption of the least restrictive measures whilst considering various types of restrictions [87]. In the specific context of the case study of Abuja, the termination of customary land rights in that territory is anchored on the need for a capital for the State, which is in reality a legitimate State interest. However, the complete termination of customary land rights in Abuja, in such a place that have IPs who are predominantly farmers is the most restrictive measure. This is a contravention of Articles 1 (2) and 15 (1) of the ICESCR. The least restrictive measure would seem to be that the Government may retain the necessary parts needed for developing the Capital city, whereas, the customary land rights of Abuja peoples to the villages and farm lands is accommodated through amendments to the Nigerian Constitution and the FCT Act discussed in Section 2.2.

The CESCR has indeed acknowledged the urgent need to protect the cultural rights of IPs in a special way [88]. Accordingly, it has noted that there is a linkage between IPs' and the land, territories and resources which they have historically and contemporarily occupied and acquired [89]. States are imposed with a tripartite obligation as it relates to protecting cultural rights of IPs (the obligation to respect; the obligation to protect; and the obligation to fulfil) [90]. (For the specific meaning of each of these tripartite obligations in relation to cultural rights, see [91, 92]).

The ICESCR also prohibits discrimination in the enjoyment of human rights in a similar way as the ICERD and the ICCPR [93]. The CESCR also maintains that to eliminate discrimination States should ensure that their laws do not enhance discrimination on the prohibited grounds [94]. The CESCR encourages States to give special attention to groups of individuals who have historically been victims of discrimination through removing the conditions that encourage such discrimination [94]. The CESCR has stated the 'race and colour' encompasses ethnicity of individuals and groups [95]. Obviously, Article 2 of the ICESCR has correlation in the context of Abuja peoples. The discriminatory termination of their customary land rights, when such customary land rights exist to the benefit of Nigerians of other ethnic groups indigenous to the 36 States of Nigeria [96], is a contravention of Article 2 of the ICESCR.

Although the ICESCR permits States to derogate from the rights guaranteed under it, such derogations must however be limited by law (and this includes international law) [97]. Indeed, the CESCR has used Article 27 of the Vienna Convention on the Law of Treaties 1969 [98] (which provides that a State cannot rely on its domestic law to violate its treaty obligations) to maintain that States should in such circumstance amend their laws in order not to be in violation of treaty obligation [99]. In the context of Abuja, terminating land rights of Abuja peoples through the domestic laws of Nigeria cannot justify the violation of Nigeria's treaty obligations.

As Kenya has been making constitutional and law reforms in relation to customary land rights of Kenyans, it will be interesting to examine the observations and comments of the CESCR to such law reforms in the context of Kenyan State obligations under the ICESCR. The purpose is to demonstrate the relevance of the ICESCR in protecting customary land rights issues in Africa. In one of its Concluding Observation on Kenya [100], the CESCR was impressed with the adoption of the Kenyan Constitution, wherein all international treaties signed and ratified by Kenya such as the ICESCR were made directly enforceable before Kenyan domestic courts. But the ICESCR condemned the continuous delay by Kenya towards implementing the decision of the African Commission in the case relating

to the land rights of Endorois peoples [101]. Kenya was thus encouraged to respect that decision of the African Commission and to also ratify the International Labour organisation Convention on Indigenous and Tribal Peoples 1989 (ILO 169) [102].

The CESCR also observed that there was no sufficient legislation in Kenya that seeks to tackle discrimination in line with Article 2 of the ICESCR. It then encouraged Kenya to adopt legislation that expressly prohibits discrimination in all its forms [103]. It also lamented on the continuous threat of eviction of IPs such as pastoralist communities in Kenya without adequate legal remedies [104]. Consequently, it suggested that Kenya should adopt legislations providing safeguards for the tenure right of various IPs communities in Kenya [105]. It would appear that the emphasis on legislative reforms in Kenya by the CESCR is an indication that a lot of reliance is placed upon States to put into effect the provisions of the ICESCR through the enactment and reforms of domestic laws.

This should be the position in Nigeria as well in relation to land rights of the IPs of Abuja. As at the time of writing, the last Concluding Observation on Nigeria by the ICESCR is the one made in 1998 [106], in it the CESCR merely condemned the lack of rule of law in Nigeria and noted that this was negatively impacting on the enjoyment of economic, social and cultural rights under the ICESCR [107]. In an earlier document [108], the CESCR observed that there had been numerous incidences of forced evictions of people across Nigeria from their homes [109]. It particularly lamented about the problematic issues about land and resource rights of minorities and IPs living in the oil-producing areas of Nigeria whose lands were being polluted by the exploitation of oil, and encouraged Nigeria about the need to protect the rights of Ogoni people [110]. The relevance of the African Charter in safeguarding the land rights of IPs in African will be considered in Section 6.

6. The role of the African charter in protecting land rights of IPs in Africa

All the analyses above relate to the position of the law in the context of international human rights treaties. The main objective in this section is to examine the main African human rights instrument in the context of protecting land rights of IPs in Africa. Indeed, as the African Charter has been celebrated as an international human rights instrument made by Africans for Africans, it is important to examine the relevance of its provisions to land rights of IPs in Africa and the case study of Abuja [111]. According to the Constitutive Act of the African Union (AU Constitutive Act) [112], one of the main objectives of the African Union (AU) is to encourage international cooperation amongst African States by respecting the UN international human rights norms and the African Charter. It would then appear that the AU intends to use the African Charter as the over-arching framework for the promotion and protection of human rights in Africa [113]. The African Charter has been celebrated as an instrument that uniquely maintains a balance between collective rights of peoples and individual rights [114]. It also appears the focus on collective rights under the African Charter is intended to introduce an African dimension of human rights into the international regime on human rights [115].

Like its counterparts in other continents of the world, the African Commission has expressed its views on the human rights implications of protecting or violating the land rights of IPs in the context of Africa [116]. For example, in one of its Report on IPs [117], the African Commission expressly admitted that rights to land and natural resources are very important to the existence and survival of IPs [118]. It maintained that such rights are protected under Articles 20 (right to existence), 21 (right to freely dispose of their wealth and natural resources), and 22 (right to

economic, social and cultural development) of the African Charter. Indeed, Article 14 of the African Charter which protects the right of every individual to property, is exercisable by individual members of IPs and as collectives in Africa.

In an Advisory Opinion [119] on the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the African Commission maintained that Article 21 (1) of the African Charter was similar with Articles 10, 11 (2), 28 (1) and 32 of UNDRIP [119]. The African Commission is also of the view that Articles 2 (right to the enjoyment of the rights in the African Charter without distinction of any kind including ethnic group) and 3 (right to equal protection of the law) are enjoyable by IPs [120]. Thus, the African Commission has concluded that when States do not safeguard IPs against discrimination, then they are in violation of Articles 2 and 3 of the African Charter [121]. Indeed, Article 17 (2) of the African Charter recognises the right to cultural life in community, a right that certainly inures in favour of IPs in Africa in the context of their land rights.

The African Commission is mandated to obtain guidance from the general body of international human rights law in reaching its decisions and conclusions. The African Commission invoked this mandate in the case of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (Ogoni case) [122]. In that case, the African Commission stated that the failure to involve the Ogoni people in the decision processes in the context of the exploitation of oil and gas on their traditional lands was in violation of their right to freely dispose of their natural resources and wealth as provided under the African Charter [123]. It also found that the Nigerian Government was in violation of Article 14 (right to property) of the African Charter in relation to the Ogoni peoples [124]. The African Commission emphasised the need for the general body of international human rights law to take into account the peculiar circumstances of Africa as economic, social and cultural rights as well as collective rights were essential issues in the African context [125].

In Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois case) [126], where the Endorois of Kenya claimed that they were forcibly removed from their traditional and ancestral lands, without prior consultations and payment of adequate compensation to them by the Kenyan Government, the African Commission again demonstrated its willingness to protect land rights of IPs in Africa using the African Charter [127]. The African Commission then held that Endorois' culture and traditional way of life were intrinsically linked with their ancestral lands—Lake Bogoria and the surrounding area [127]. It also found that the Endorois were unable to fully exercise their cultural and religious rights, and felt disconnected from their land and ancestors, as a result of the evictions [128]. It affirmed that were violations of the African Charter by the State of Kenya, [129] and it also maintained that land rights of Endorois peoples had been violated [130] such as their cultural rights [131] and their rights to natural resources in contravention of Article 21 of the African Charter [132].

In the most recent and perhaps the only case on the rights of indigenous peoples to be decided by a Regional Court in Africa as the time of writing—the case of the African Commission on Human and Peoples' Rights v The Republic of Kenya (Ogiek case) [133]—before the African Court, the Ogieks of the Mau Forests of Kenya, claimed that they are an indigenous minority ethnic group [134]. The Applicant alleged several instances of the violations of their land rights by the Kenyan Government [135]. In a provisional ruling, the African Court ordered the respondents to refrain from further violations of the land rights of the Ogieks until the determination of the substantive suit [136].

In its final judgement on this case [137], the African Court referred to Article 26 of UNDRIP and held that the rights enshrined therein are variable and inclusive of the rights of IPs to land as equally safeguarded under Article 14 of the African Charter [138] among other relevant provisions. It would therefore appear as

though, the African Court did not have trouble in holding that by evicting the Ogiek from their ancestral lands against their will, the respondent State (Kenya) had violated their rights to land as guaranteed by Article 14 of the African Charter and Article 26 of the UNDRIP [139].

It was the conclusion of the African Court that the Respondent State of Kenya had also in violated Article 1 of the African Charter which demands that State Parties to the Charter must protect and recognise all the freedoms and rights protected therein through the adoption of relevant legislations to bring those right into effect in their domestic jurisdiction [140]. The implication of this legally binding decision of the African Court illustrates the significance of the African Charter in protecting land right of IPs in Africa. It would therefore be legitimate to conclude on the basis of the above decision by the African Court that there is an emergent regional General Principle of International Law (GPIL) in the context of the African Charter, in which rights of IPs and in the context of this chapter, their rights to land should be respected and protected by African States. Therefore, the need for a viable relationship between international law and national is obvious if States are to be in compliance of their international human rights obligations.

7. Conclusions

This chapter has examined the role and relevance of international human rights treaties and the African Charter in protecting land rights of IPs in Africa, through a comparative study of Nigeria and Kenya. It has demonstrated that the recent decision of the African Court in the Ogiek case, illustrates that land rights of IPs are germane human rights issues in the African context and certainly come within the purview of the African Charter and the international human rights treaties examined in this chapter. This is the first legally binding judicial decision by an international court on the rights of IPs in Africa. In this context, the decision of the African Court finally lays to rest the debates about whether there are IPs in Africa. The African Court has now legally affirmed the existence of IPs in Africa by crystallising the earlier decisions of the African Commission on IPs. This also signifies that there is now an emergent general principle of international law in the context of the African Charter in which rights of IPs and in the context of this chapter land rights should be respected and protected in Africa. State Parties to the African Charter are bound by the decision of the African Court and must now put in place appropriate legislative and policy measures to ensure that IPs' land rights are effectively protected and recognised by States. Credit must be giving to the Minority Right Group International which has been at the fore-front of promoting and championing the rights of IPs and minorities in Africa for pursuing and prosecuting the Ogiek case to the point of obtaining a favourable judgement. It is hoped that with this decision, African States would begin to take the rights of minorities and IPs within their jurisdiction more seriously.

Perhaps, more efforts could be made towards ensuring a viable relationship between the national laws of African States and international human rights law. This point is buttressed by the case study of Abuja which demonstrates that the Nigerian Constitution and the Nigerian FCT Act are clearly in conflict with the three international human rights treaties and the African Charter examined in this chapter in relation to the violation of the land rights of Abuja peoples. If Nigeria must respect its international human rights obligations, it would have to amend its Constitution and the FCT Act to accommodate and recognise the land rights of Abuja peoples.

One possible avenue for Nigeria to resolve the legal challenges posed by the case study of Abuja introduced in Section 2.2, is to embark on the kind of constitutional reforms that have taken place in Kenya in relation to how the Kenyan Constitution

have departed from the previous dualist approach to international law. It would therefore seem logical to suggest that Section 12 (1) of the Nigerian Constitution ought to be amended to make all international treaties signed and ratified by Nigeria part of the laws of Nigeria. This will then easily lead to harmonisation of Nigeria's domestic laws with the international human rights treaties examined in Sections 3–5 of this chapter. The current situation wherein Nigeria has signed and ratified the three international human rights treaties discussed in Sections 3–5, but those treaties cannot have the force of law in Nigeria until they are enacted as domestic laws is obsolete. Nigeria now needs to adopt the new approach under the Kenyan Constitution 2010 in order for it to be in compliance with its international human rights treaties obligations. It is hoped that such constitutional reforms may help in resolving the legal challenges demonstrated through the case study of Abuja in Section 2.2.

In conclusion, it has to be acknowledged that the success of law or constitutional reforms in one country does not necessarily mean that such reforms could be automatically transplanted with success in another country. Nigeria has a bigger population and is more diverse ethnically than Kenya. Therefore, the differences in political orientations of the diverse ethnic groups in Nigeria may make it more cumbersome for Nigeria to adopt similar constitutional law reforms as has taken place in Kenya.

Indeed, there are always different social, political and economic circumstances in all countries that do have an influence on the development and evolution of the law. This naturally makes the transplantation of law reforms from one country to another very challenging. Despite this general reality, there is actually no known social, economic, political or legal factor or factors that should prevent Nigeria from making similar constitutional reforms, in terms of adopting a more positive approach that allows all international treaties signed and ratified by Nigeria to have the force of law within Nigeria.

Acknowledgements

The constructive feedback of Professor Susan Farran, Professor Rhona Smith, Dr. David McGrogan and editorial reviewer are hereby acknowledged. This chapter is largely gleaned from the author's PhD thesis submitted to Northumbria University in 2017 [141].

Conflict of interest

The author of this chapter declares no conflict of interest.

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Chapter 2

Stories of Milk, Honey and Bile: Representing Diasporic African Foreigner's Identities in South African Fiction

Maurice Taonezvzi Vambe

Abstract

This chapter explores representations of diasporic black African foreigners' identities in David Mutasa's novel, *Nyambo Dze Joni* (*Stories from Johannesburg*) (2000), and in *Welcome to Our Hillbrow* (1999), written by the South African author, Phaswane Mpe. The two novels expose the hypocrisy of the South African officials and masses who scapegoat African black foreigners for crimes ranging from snatching of local jobs, taking local girls and drug peddling. For most African black foreigners and some local black South African citizens, diasporic experience in the new nation is a paradoxical physical space and spiritual experience in which stories of milk, honey and bitter bile might be authorised to capture the fact of being doubled as both potential subject and citizen. Despite experiencing bare lives characterised by nervousness and precarities, most black African foreigners in Johannesburg or Joni command, recall and deploy multiple identities whenever required to confront the ugly underbelly of the physical and verbal violence of xenophobia. Thus, an irony inherent in African diasporic experiences is that most black foreigners appear to retain some semblance of humanity and organise their worlds relatively creatively, and becoming successful by immigrants' standards, in the most hostile circumstances.

Keywords: African, black, foreigners, diasporic experiences, diaspora, xenophobia, Johannesburg

1. Introduction

The ambiguity at the core of the meaning of the term diaspora is captured in the characterisation of the post-apartheid space as one redolent with stories of milk, honey and bile ([2], p. 41). The influx of migrants from different countries of the continent into Johannesburg in particular and South Africa in general are whetted by descriptions of the new South Africa as the rainbow nation whose perception of itself and the promise of an interactive conduct with African foreigners would be based on the dispersed ideology of Ubuntuism. The diasporic journeys enacted at both the physical and spiritual levels imply a crossing of physical and cultural boundaries from one African country towards an imagined South Africa, locally known as Egoli—the city/country of gold. However, when diaspora is understood as dispersal, this conjures images of marginality in the conflicted relationship between

imagined foreigner and citizen, centre and periphery. Epistemic conditions that spur such migrations involve both push and pull factors from economic collapse of modern African states due to corruption, bad governance and perennial wars.

However, the response of South African black citizens to the influx by African foreigners might not result in a "hyped celebration of multiculturality" ([5], p. 25). Most South white and black South Africans seem to feel that their own experiences have not been a smooth or unproblematic consummation of a dream from slavery to freedom. As a result, African black foreigners have experienced confusing reactive ideologies of exclusionary discourses in which the trope of homelessness is an irony whose butt is the South African masses. Nevertheless, memories of the past that is being escaped and the present that is anticipated as a greener pasture are performed unevenly by individual migrants as well as groups of migrants, showing their capacity to command, recall, assume and deploy multiple identities of one's selves as and when they are required ([13], p. 52). In other words, black African foreign immigrants might be haunted by the ambivalences of occupying their pain in new spaces. However, they often maintain ties with kinship and build strong networks with their families at home through communication and remittances. This provides an added leveraging, although a situation of ambiguous relationship might also exist between migrants and those left at home.

The crux or problematics of diaspora as a form of alienation arise when, sometimes, African foreigners expect South African citizens to understand why immigrants are in South Africa. Black foreigners might view South African citizens as being unreasonable when they show signs of not wanting to share what foreigners feel they are entitled to by virtue of having kept and fed South Africans in their countries during South African people's struggle against apartheid. At the same time, South African citizens might start to consider also as unreasonable the continued influx of African migrants whom they believe have ruined their own countries and thus have come to displace them, hardly before the citizens have enjoyed the fruits of their struggle. The mnemonic topographies of African diasporic immigrants are manifested through senses of perpetual perplexity and positive embarrassment. On one hand the country of origin is connoted as tyrannical for its perceived disregard of its citizens, now viewed as vagabonds and denizens by local citizens who appear to have little if any respect of the visitors ([5], p. 26). On the other hand, diasporic experiences are not lived by African foreigners in a similar way even by migrants from the same country, let alone, by immigrants from different African countries. Thus, the traumas of diaspora as dispersion might manifest on the body of African foreigners as a site of conflicting memories. Trauma may scatter immigrants throughout South Africa and make them appear as vermin. However, displacement triggered by home politics might also mobilise the energies of immigrants to form communities in which new identities, habits and agencies are acquired and presented as success stories. These new stories enable immigrants to keep options open in such ways that can translate economic advantages and social positions gained in one political setting into political, social and economic capital in another context.

In South Africa, foreign African immigrants—whether educated or not, rich or poor, or coming from those who have escaped poverty and those who decided to use their skills voluntary in a new context—all have been described as *Makwerekwere*. This is a derogatory term meant to allude to people without a language, considered as outsiders and whose lives might not be viewed as grievable or worth worrying about. Diaspora, thus, is not a one-size fit all for hosts and guests and among guests. In this culturally volatile context, aspirations are not always fulfilled because host communities and guests foreigners continue to live just in the neighbourhood of their dreams. In this sense, diasporic communities might be understood as strange,

incompatible and impure and thus court the calamity of *Othering*. However, othered black foreign communities might manipulate and harness the experiences of spiritual uprootment, to achieve African identities as both rooted in specific local and transcendental geographies.

2. Xenophobia and blackophobia in *Nyambo Dze Joni*

The ideological ambiguities outlined above are deftly depicted by David Mutasa's *Nyambo Dze Joni* [2] (*Stories from Johannesburg*), published in the Shona language of nearly three and a half million Zimbabwean immigrants within South Africa. In *Nyambo Dze Joni*, Tom is the main narrator who uses an epistolary form to register how Zimbabweans are despised by South African local citizens. Tom knows that he has escaped the tyrannical economic policies of Robert Mugabe in Zimbabwe. However, although he writes out of fear, he also appears to know that writing is a permanent archive of paradoxical memories and that the very act of narrating his stories is a form of cultural resistance that signatures the transgressions of physical and spiritual boundaries. In this sense, the novel demonstrates that the space of diaspora is contested as captured in the metaphorical phrase where one might tell contradictory stories of imagined milk, honey and bile.

As portrayed in the novel, in South African official narratives of the political journey from apartheid to democracy, the role of black foreigners is minimised. What appears to be hidden from public view is the fact of African pain that people of the frontline states suffered from bombardment by agents of apartheid as political punishment for supporting black South African's quest for self-determination. In other words, discourses of reconciliation occurred between black South Africans and white South Africans, and this was not extended to African foreigners many of whom also remember the gratuitous violence performed by the apartheid government on their territories. Many African foreigners also remember sheltering black and white South African freedom fighters who were fighting apartheid from the military bases provided by Tanzania, Mozambique, Zambia, Zimbabwe and Ethiopia [16].

To the black foreign immigrants' consternation, in the new South African political dispensation, African people who migrate from their countries for different reasons remain outsiders. The irony is that most white foreigners from Asia and Eastern European countries who also poured into South Africa are viewed as investors, while black Africans who are foreigners are considered as a social burden ([16], p. 68). This differential allocation of opportunities means that the humanity and dignity of black foreigners is subjected to the raw fact of violent invasive behaviour [9]. Under the government of Nelson Mandela, Thabo Mbeki, Jacob Zuma and Cyril Ramaphosa, black foreigners from Somalia, Zimbabwe, Mozambique, Nigeria and other African countries continue to be accused of taking jobs meant for black South Africans. African foreigners are viewed as throwaway people ([6], p. 211). The spirit of Ubuntu does not apply to African foreigners who are also accused of taking South African women. Violence on African foreigners occurs on the watch of South African police.

Furthermore, it appears as if the political leadership from both isles fear losing votes from South African citizens. Official voices against the persecution of African foreigners seem muted. Even the most raucous political leaders in South Africa's opposition parties such as the Economic Freedom Fighters [EFF] and Democratic Alliance [DA] rarely condemn in vociferously terms the mass murder of African foreigners or the looting of Somali-owned shops in the same way the same leaders have condemned the South African police and the ruling African National Congress for ordering the massacre of black South African workers at Marikana. Even most

of the South African women in whose name some foreigners are murdered rarely speak against xenophobia. It appears then that very few black South African people who have committed acts of collective murder of African foreigners in South Africa are not likely to be prosecuted with the same agency as might happen when a black foreigner commits a crime. *Nyambo Dze Joni* appropriates fictional space and weaves alternative narratives that comment on the failure of model of South African democracy to hold aggressors on African foreigners accountable. Fiction authorises narratives that might confer on itself the magnetic power typical of new cultural sites that might provide an early warning system about the possibility of xenophobic attacks sliding into genocide violence on African foreigners. The social prejudice against black African foreigners that fiction questions is so entrenched to a point where discourses have been invented in South Africa in which the unfortunate African foreigners are advised to go home or die here ([2], p. 8).

Put in other words, *Nyambo Dze Joni* or *Stories from Johannesburg* attempts to break from an expected conventional belief of postcolonial South Africa as a convivial rainbow nation. This metaphor is interrogated in the novel's rhetorical language that challenges the characterisation of the socio-economic problems in the new South African nation as mainly, the result of influxes of migrants from "failed" African countries such as Zimbabwe, Mozambique, Somalia, Nigeria, Kenya and Zambia. In addition, the pernicious myth which is that if one day, South Africa were to rid itself, of all black foreigners, legal or illegal, South African's problems of massive unemployment, lack of access to quality education and issues of funding the education of South African citizens would vanish.

This differential allocation of blame might explain why in *Nyambo Dze Joni* Tom's letters show how most black foreigners are marked as the pestilent *other*. This nuisant *other* is branded on black foreigners as people who have ruined their own countries and now have come to spoil the South African economy. Tom writes to Phianos that local citizens accuse foreigners of taking land away from citizens ([2], p. 27). South African citizens are depicted as aggressive when they use entitlement to being genuine South Africans to destroy black foreign businesses and rob foreigners of property such as cars. Zimbabweans in South Africa are accused by ordinary and educated South Africans of taking away jobs using what locals believe is a superior education and skills expressed through the proficient command of the English language ([2], p. 47). In addition, Mutasa's novel suggests also that a sense of fear and failure to deal with an inferiority complex seem to move the majority of local South Africans to manifest their anger through murderous acts. This means that the transition from possessing a sense of being entitled to being a South African to experiencing a sense of fear of the black foreigners is managed through visiting violence on black foreigners. First, black foreigners are described as *Makwerekwere,* meaning one who does not belong, has an incoherent language and has entered the country illegally. Secondly, black foreign males are depicted in *Nyambo Dze Joni* as embarrassing South African black males when Zimbabwean males are accused of taking away, sleeping with and even marrying South African women. In this accusation, what it is that is absent among black male South Africans that might make them not appealing to local girls is not clarified. Pinetch, drawing from the experiences of Cameroonian men in South Africa, argues that African foreigners use marriage to local South African girls and single women "as a strategy for permanent residency" ([17], p. 71). It is possible to suggest that what is violated when foreigners are made scapegoats for the certain failures of South African liberal democratic project is the right of freedom of association between foreign black men and local South African women when the charge of stealing "our" wives is invoked. This is so because these marriages are consensual and often occur within the confines of the rule of law as guaranteed in the South African Constitution.

While *Nyambo Dze Joni* depicts Hillbrow as a multicultural space, buzzing with many languages which are spoken there, such as Kiswahili, Portuguese, French, Yoruba, Chi Tonga, Chi Zulu, Chi Sutu and Chi Afrikaans, this linguistic diversity is viewed as a form of cultural impurity by some South African citizens. This fact is despite the existence of the founding national and official myth of the rainbow nation that emphasises unity in diversity and the philosophy of Ubuntu that says "I am, because you are". The rejection of black foreigners by South African citizens as depicted in *Nyambo Dze Joni* is further couched in the language of stereotypes. This language of derision is an epistemic condition for the spread of genocidal thought. The first acts of atrocities on black foreigners are enacted through the objectification of foreigners as thieves. One could suggest that the fear of the foreigner by local South Africans might actually be a perverted form of acknowledgment that the locals have an inferiority complex. The fear of the *other* can also imply that many of the locals may feel ill-equipped to survive in a cutthroat capitalist economy. This then possibly suggests that the skills possessed by some of the foreigners that are the object of demonization targets of news discourses on decolonization are more critical and relevant to the South African economy. As one critic, Phillip suggests, for the local indigenes who proclaim uncontested citizenship:

> *The mere act of killing is not enough; for if a man dies without surrender, if something within him remains unbroken to the end, then the power which destroyed him has not, after all, crushed everything. Something has escaped its reach, and it is precisely this some-thing–let us call it "dignity"–that must die if those in power are to reach the orgasmic peak of their potential domination ([18], p. 51).*

Nyambo Dze Joni reveals the ambiguity and fragility of the local citizens' identities forcing them to be aggressive towards people they view as strangers. Eze argues that the attitudes of compensating failure using the rule of power and not of law is the global basis of an "epistemology of genocide" that might constitute necessary and sufficient conditions for genocide ([4], p. 118). *Welcome to Our Hillbrow* depicts how the use massive distortion of language, that is, the use of words with intent to incite the mass killing of the racial group, is the first tool with which to harm black foreigners. However, *Welcome to Our Hillbrow* also portrays how the habit of violating black foreigners can be extended to acts that harm local black women. This slip into violence might have the unintended effect of destabilising the "desired" rainbow nation, which is then turned into what one might call, a "rain blood nation".

3. Xenophobia and blackophobia in *Welcome to Our Hillbrow*

Welcome to Our Hillbrow complicates notions of diaspora. One can be a local woman and a citizen of South Africa but still subjected to violent death if accused of being a witch. The novel tells the story of Refentse, "child of Tiragalong" ([1], p. 1), a rural village in South Africa, somewhere in the Limpopo province. This rural setting is puffed up with superstitions, and some locals have to leave the rural idiocy in favour of the city ending up travelling to Hillbrow, in Johannesburg. The title of Mpe's novel emphasises the significance of reading linguistic trace, with seam and rhizome as metaphors for anxieties of unfinished *political* transitions. The rhetorical device of trace is not its original identity because its paradox inheres in the sense that past ideologies of authoritarianism can resurface as constitutional democracy in post 1994 South Africa. In addition, a bloody apartheid culture can revive itself like a rhizome and continue to authorise its own phobias, neuroses and anxieties that get entangled into an emergent present spattered with blood of black foreigners and that of some black locals.

Welcome our Hillbrow also dramatises the fact that xenophobia is a political trace. At the same time, blackophobia is an expression of a seam that might suggest a bleeding point of contact articulated to bloody pasts. Xenophobic culture is demonstrative of seam as a metaphor that attempts to perform a wounded detachment from undying pasts, *ala* a rhizome. However, a rhizome refuses to be born anew because its efforts at detaching from its original self might be incestuous because a rhizome carries with it or survives in new contexts on characteristics derived from its originary identity. How much change and transformation a rhizome is prepared to embrace in a new environment may not necessarily change its DNA. In *Welcome to Our Hillbrow*, it appears xenophobia or afrophobia may not be sufficient terms to capture the hatred of the black foreigners by black South African citizens. Such black on black violence seem to entrench vicious psychological cultures that might appropriately be described as blackophobia. Blackophobia negatively affects black foreigners and local blacks, mostly women and not whites.

In *Welcome to Our Hillbrow*, the ideologies of blackophobia seem to be openly manufactured, trafficked, distributed by and shared among South Africa's dreaded trio of the political ruling classes, the masses and capital. Blackophobia is also depicted as some kind of arrested decoloniality that ushers forms of double dying. This view is reflect in *Welcome to Our Hillbrow* where rehearsals and simulations of physical force are performed in broad daylight, sometimes on some national television channels that justify physical immolation of people named as the *other*. Although the novel suggests that South Africa is not yet a dictatorship or a fascist state, the text reveals that totalitarian views can outlive the fall of authoritarian systems like apartheid. In the South Africa of Mpe's creative imaginary, the organisation of blackophobic violence contains what Arendt calls a "planned shapelessness" ([3], p. 522). The horrible originality of the evil of blackophobia in the South African postcolony is that it reproduces itself through the agency of local black South Africans, reminding one that former victims can change positions and become killers [10]. In such as volatile context, the ordinariness of the everyday experience of xenophobia in a constitutional neoliberal democracy is baffling as it targets black foreigners and black South African local women who are defined as "'throw-away' people'" ([6], p. 211).

3.1 Narrative of loss of political, economic power and moral authority in *Welcome to Our Hillbrow*

The opening sentence of *Welcome to Our Hillbrow* registers a disaster of national aspirations in the form of the defeat of the national soccer team. Some South Africans celebrate the defeat of the national soccer team largely composed of black players in a way that might indicate a fractured national consciousness. As the narrator puts it, "If you were still alive, Refentse, child of Tiragalong, you would be glad that Bafana Bafana lost to France in the 1998 Soccer World Cup Fiasco" ([1], p. 1). Why a native of South Africa should be "glad" about the defeat of national team is a paradox. Underneath is a grudging acknowledgment of a narrative of loss that contradicts the celebration of post 1994 South Africa's view of itself as an expression of black nationalists' political triumphalism. Tiragalong could be South Africa or a little remote village. It is a part that is coterminous with the whole and that symbolically advertises its own fictionality as an imagined community. Tiragalong might symbolise South Africa insofar as some of its local inhabitants share the frustrations of failing to beat France in 1998. At the same time, Tiragalong might not represent the sentiments of all South Africans since Tiragalong residents are embarrassed by the soccer defeat of South Africa by another foreign power. This seeming lack of a national cohesive consciousness might index the fractures in the new nation where there is no one single idea of being South African that the inhabitants of the country might accede to.

Furthermore, Tiragalong is provincial, and people appear to be known as the mother of so and so. The constant refrain of an aspired for national collective vision comes out in the insistence on collective identity that unfortunately is honed on the idea of cultural purity shared by most locals. However, since the language of soccer is not a mere detail of popular culture. This is so because in the novel, the language of ethnic particularity indexes that part of the nation has failed. Bafana Bafana's defeat is the metonymic of a brittle entry into a South Africa freed from some most visible and bizarre remnants of apartheid's ideology of separate development between local whites and local blacks. The irony of South Africa's political transition into a democracy is magnified by some "...people jubilantly singing Amabokobo ayaphumelela...in the streets, because the South African rugby team, the Springboks, [then a deeply racialized sport] had just won the Rugby World Cup" ([1], p. 22). This suggests that success belongs to the white nation in post-apartheid in South Africa. This new situation seems to undermine and incense local blacks who are imaged as voyeurs to a dream that they can only share through the absence of its materialisation.

The moral decay of Hillbrow ([1], p. 17) plays itself out most on black characters and in black communities. Hillbrow evokes a nightmarish image of a dream deferred and a monster that threatens to swallow the newfound pride of local black South Africans. When wealthy white and Indians move out of Hillbrow, local blacks claim authority over this departed cityscape in ways that restages or rehashes separate development between locals and black foreigners ([1], p. 3). The institutionalisation of poverty among black citizens of Hillbrow further reveals that the asymmetrical relations of power and powerlessness inherited from apartheid have not significantly changed. Hillbrow is a paradoxical physical, cultural and economic space in which its local and foreign black inhabitants might speak of as a place where one could create contradictory narratives of "milk and honey and bile, all brewing in the depths of our collective consciousness" ([1], p. 41). The extent to which locals or black foreigners might harness the resources in Hillbrow depends on necessary acquisition of educational and life skills that are not distributed evenly between and among local and foreign blacks. This characterisation of black on black relationships resists, partialises and revises a view shared by most South Africans and some of their political leaders which is that the release of Rolihlahla Mandela from Robben Island is a miracle in which there would be "...no violence – at least not on any large scale – as had been anticipated by cynics" ([1], p. 100).

In Welcome to Our Hillbrow, a romanticised narrative version of the Mandela era is not allowed to stabilise. A mythopoetic representation of Mandela as the African cyborg with all solutions to the social problems faced by local blacks is carnivalised through the narrative's frank acknowledgement that under Mandela's presidency, discriminatory ideas against foreigners and acts of blackophobia violence refused to die. The novel, thus, resists "solitary criticism" ([20], p. 133) of the Mandela era which was meant to create an impression that all "...ambiguity and contradiction [were] completely shut out, and the only permitted [narrative was] that between the old and the new, as if there were only bad in the past and only good in the future" ([20], p. 132). *Welcome to Our Hillbrow* criticises the characterisation of the South African political transition to selective democracy in which the citizens could deride foreign blacks and mimicked the fiction that South Africa is not part of Africa. In this reasoning formed by an irrational sense of superiority commanded by local blacks, black foreigners blacks were tagged with a new identity of "Makwerekwere [who fled] their war-torn countries to seek sanctuary here in our country" ([1], p. 18). The ideology of Blackophobia that names black foreigners as "Makwerekwere" fakes incomprehension of the culture of the immigrants from the other parts of Africa. This narrative by local blacks affects a self-assured stance of

recognisable, distinct and particularised identities whose political unconscious perform for both officials and ordinary natives of South Africa, a script of difference. While this officially sanctioned cultural performance of a unique South African identity and historical exceptionalism emphasised difference, this difference ironically represented continuity. Thus, a black South African nation was borne and projected as the natural leader of African nations. However, at the core of this new nation was also ensconced extremist views and fundamentalist mental imaginaries that resented foreign blacks. Gqola brings home this point when she argues that the new black-governed South African nation deceptively wore the cloak of "affected shock at the outbreak of large-scale violence of any sort" ([6], p. 211) even when this violence was perpetrated by the country's citizens on black foreigners and some local women, children and the old, during spats of xenophobic attacks.

Welcome to Our Hillbrow challenges ideologies of indigeneity because these views encourage black foreigners. For example, the narrative also ruptures and disrupts coercive official narratives of "new democratic rainbowism of African Renaissance" ([1], p. 26). By providing a wide range of characters who respond differently to the narrative of unfilled hopes in post-apartheid South Africa, what is preferred and registered is a commitment to a plurality views. In Hillbrow, lifelong black beggars who have fallen ill are "wheeled away in a wheel-barrow, in the direction of Hillbrow Hospital" ([1], p. 16). In addition, "Dirty children [take] turns at glue" (Mpe, 13). Lerato's mother is a notorious prostitute "who could not say no to any drop of semen found flowing aimlessly in the streets" ([1], p. 82). Gay or homosexual men are accused by some local blacks of introducing AIDS through what the local blacks view as the "bizarre sexual behaviour" of men in dark-lit corners having sex with other man ([1], p. 4). Like black foreigners, homosexuals are violently targeted. Disease is appended to homosexuals and foreign blacks. This symbolical buildup of the negative descriptions of humanity that most local citizens appear to fail to live with is calculated to enable local blacks with extremist views arrogate themselves with power to police the spaces where foreign blacks and homosexuals inhabit. Sometimes when strategies of policing black foreigners are outpaced by some ingenuity of targeted groups, local blacks would compensate their failure to control those named as incorrigible strangers by appealing to the government officials to enforce migrant laws that limited the movement of foreigners. Ordinary South African citizens in turn secure from government authorities the powers to superintend black foreign nationals, detailing where they work and how they make money and "succeed" in a context where locals feel economically outstripped ([8], p. 140). Thus, in a "tragic inversion, therefore, immigrants are held responsible for the failure of free market policies to create adequate choices of employment" ([6], p. 219).

In rural Tiragalong, values and vocabularies that contain perverted blackophobic tendencies circulate freely among locals. The local women who suffer from the heavy-handedness of locally driven patriarchal discourses are some South African female citizens. Some of these women like Refilwe's mother are named as witches merely because the rural patriarchs have the power to do so. Working with quack witchdoctors, the rule of South African rural men prescribes punishment by death to native women so accused. The mobs of Tiragalong are empowered by the silence of government officials, and these hordes feel permitted to carry out gratuitous violence on innocent South African female citizens. The banality of the process of killing local women imitates the brutal originality of apartheid's methods of vanquishing those suspected to be political opponents. A large tyre is put around the neck of Refilwe's mother by mobs under the command of rural patriarchs. Petrol is poured on her onto her, and her whole body becomes a site destruction by fire ([1], p. 3). This death is not of a black foreigner from outside South Africa, but of a native of Tiragalong, a black South African in the evil hands of her own kind.

Gratuitous acts of violence against vulnerable rural women or black foreigners are justified or explained away by intellectuals and authorities as representing the new normal in community policing [8]. In short, the fate of Refilwe's mother shows that one can be a South African citizen but perpetually marginalised, murdered and her body disposed of as if her life is not worth living or mourning. Diasporic identities that create senses of vulnerability in weak women and black foreigners are manufactured in black-controlled local communities and used to impose new forms of governmentality by those locals invested with power that is often arbitrarily used to coerce, when such situations might have benefited from community dialogue.

May [11] draws attention to the fact that physical and spiritual harms to social groups in xenophobic and genocidal situations manifest in how individuals are killed. This view is supported by Ndebele who observed that in South Africa, the ways human life is lived spectacularly after 1994 in black rural areas and urban townships encourage violent acts in which the will to "kill off the man [leaves] us with no knowledge" ([15], p. 26) of how to stop the circulation of genocidal views in the community. Sachs, another South African critic and freedom fighter, comments that discriminatory killings, either from xenophobic attacks or mass murder of black foreigners, affirm the principle that "there is nothing that the [former] apartheid rulers would like more than to convince us that because apartheid [was] ugly, the world is ugly ([20], p. 133).

The narrative of moral degeneration that makes preparation for mass assault of black foreigners possible is community-sanctioned. The idea that murder is planned from below suggests that ordinary black South African people in whose name some progressive revolutions are carried out have not psychologically been decolonized. The murder of Refilwe's mother follows a predictable sequence: exposition that a witch should be killed, justification that Refilwe's mother deserves to die because she caused the suicide death of her daughter and legitimation of murder of local women by the opinion of the "medicine men" ([1], p. 43) and "bone thrower" ([1], p. 45) who are sought to confirm the adoption of a decision to murder the woman. Later, the masses implement their evil schema in which the innocent woman is executed painfully by being locked in her hut, with blazing tyres around her neck. The intent to kill Refilwe's mother is choreographed with careful planning as soon as an ideological warrant ([4], p. 115) is created and accepted that the woman in question is a witch.

Regrettably, the ideological warrants advanced by the community to kill Refilwe's mother are baseless and unfounded because "it was only after the witch had found her punishment by necklacing, that Tiragalong was given cause to realise its mistake…." ([1], p. 45). Perpetrators of xenophobic atrocities are akin to genocidaires who act precisely through omission and commission; they do not need to reason scientifically. Once persuaded by fear rooted in superstitious stereotypes, they authorise spurious narratives that then are taken as truth and which forms the basis of actions. The wilful suspension of the rule of law in a neoliberal constitutional democracy means that South African public life is also characterised by states of exceptions in which mobs become the law, with which they pronounce death penalty on others. Thus, while the street court operated by mob injustice imposes death penalty, the unresolved judicial hiatus is that South African official courts have no provision for death penalty.

The implication to official silence against wilful violation of foreign blacks is that in a South African neoliberal democracy, the official discourse of peace, tolerance and coexistence might function to camouflage the desire to disarm defences and make the killing of foreigners acceptable. Without suggesting that all South African citizens have fascist ideas, xenophobic acts are amplified through a coded language that hints at the final solution on the question of foreign immigrants in

South Africa. When the masses warn foreign blacks to go back to their countries or die here, little or no consequences are visited on these citizens who intimidate black foreigners. The community of Tiragalong in the novel, does not understand, does not wish to understand and does not wish to live with that which they view as strange. This fear of freedom to know is rooted in the unbearableness of individual powerlessness and isolation predicated on the illogical thinking that the individual or the community might escape the feeling of its own powerlessness in comparison with the world outside oneself by destroying it. It becomes duty or work that is considered patriotic to beat with cudgels and kill using machetes any of the Makwerekwere viewed as basking in the sanctuary that Hillbrow temporarily affords ([1], p. 4).

The narrative of loss of conscience, of loss of moral values and of loss of shame in Tiragalong's brutalisation of their own is both a test and an affirmation that this community can commit more hideous crimes of harm on black foreigners with whom they share little else other than the colour, black. Morgan argues that looters and murderers find it is necessary to lose shame in order to commit atrocities. Shame generally might force humanity to reckon that humans have some notion of how it should be or ought to be, the kind of person it ought to be, and the kind of person others ought to expect people to be in terms of which human actions are shown to have failed, to be deficient or to have diminished in status. This means that when one is ashamed, one has lost face because the face one values and hopes to have has been displaced or defaced by another face, which is one that one regrets having or one that disgraces or embarrasses ([14], p. 308). Refusal to feel disgraced or embarrassed in killing another human being is precisely the condition of possibility for sustaining a campaign of verbal and physical terror perceived as indispensable when preparing to launch blackophobic attacks on some local African blacks and foreign black nationals.

3.2 Narrative of HIV, stolen jobs and despoiled South African women by Makwerekwere in *Welcome to Our Hillbrow*

In *Welcome to Our Hillbrow*, Refilwe's mother's life is imperilled by a masculine ideology that projects "women" as "entitlements of Black South Africa men" ([6], p. 218). Fascist-like ideas are not the preserve of dictators or authoritarian rulers only; ordinary people can also be mass murderers. In South Africa since the intensification of the rhetoric of entitlement among black people, it has been the ordinary people, themselves, too poor who have become enthusiastic killers of foreign blacks [10]. Stone observes that xenophobic leaders can turn people into perpetrators through a process in which the ordinary people are allowed to take advantage of opportunities for unpunished inhumanity opened to them. Ordinary South African citizens are then emboldened to commit atrocities on fellow Africans because the locals are exposed to an entirely unfamiliar feeling of unlimited power and command ([21], p. 284). Admittedly some ordinary local blacks in the South African postcolony are reluctant to kill foreigners when coerced to do so. This reflects some positive agency within some South African citizens. However, when black foreigners continue to be killed during broad day light, on the watch of the police, senior ruling class politicians and officials from opposition political parties, this reveals a "tragic inversion [in which] immigrants are held responsible for the failure of free market policies to create adequate choices of employment" ([6], p. 219).

Thus, in the epistemology of blackophobia in South Africa, homophobic language performs the function of the matchet; it contains ideological warrants which are the cues through which the black foreigner is spoken, thought of and written about as dispensable humanity or the "throw away people" ([6], p. 211). Linguistic

violence presages physical violence and might render thinkable, the rehearsal of genocidal mentality. Homophobes establish a single causal relationship between their actions in the service of their murderous purposes. The actions are then justified using historical insights to produce new narratives that have to be packaged ideologically in terms of us and them to ramp up their potential invasive acts. In addition, the determination of the human will has to be in the mix, along with social and political structures that can implement that determination. When all of those pieces are in place, genocide may well be on its way ([4], pp. 119–122).

In Tiragalong and Hillbrow which might and might not necessarily symbolise South Africa, the popular understanding is that AIDS came from "central and western parts of Africa....[and] media reports [had it that] AIDS' travel into Johannesburg was through Makwerekwere; and Hillbrow was the sanctuary in which Makwerekwere basked" ([1], p. 4). Refentse's death is casually attributed to the fact that he roamed the "whorehouses and dingy pubs of Hillbrow...with Makwerekwere women, hanging onto his arms and dazzling him with sugar-coated kisses that were sure to destroy any man, let alone an impressionable youngster like him" ([1], p. 3). Native South Africans project images of themselves as authentic, clean and pure, thereby invoking a reverse discourse of dirt and impurity that is easily ascribed to black foreigners. The repertoire of linguistic violence not only reveals how ordinary South Africans fear the story of the foreigner. Stereotypes of black foreigners as "filth" serve to prepare grounds upon which the physical violation of the black foreigners must stand justified. The doubling effect of the discourse of purity emanating from ordinary South Africans can also be said to be replicating its own divisions through the construction of myths of purity and authenticity. These myths are then used by the citizens to enable them to continuity entertaining an idea of a stable dominant discourse even at the very moment it appears to recognise the existence of the other.

The trope of South African people as pure beings used to justify policing of black foreigners is denied inherent authenticity which it seeks to monopolise for itself. The "Bizarre sexual behavior of the Hillbrowans" ([1], p. 4) was in fact "no worse than that of Tiragalong" ([1], p. 17). Tiragalongans which both are and may not represent all South Africans attempt to project their rural locality as a place of pastoral quiescence and write a story of it "with a smooth narrative current, stripped of all rough edges, devoid of any gaps" ([1], p. 60). In the novel, Cousin "insisted that people should remain in their own countries and try to sort out the problems of these respective countries, rather than fleeing them; South Africa had too many problems of its own" ([1], p. 20). The concept of bounded citizenship is narrow because it defines natives of black South Africa as the only people entitled to live in it. This view enables the accusation that black foreigners or Makwerekwere are "stretching their legs spreading like pumpkin plants filling every corner of our city and turning each patch of Hillbrow coming to take our jobs in the new democratic rainbowism of African Renaissance...." ([1], p. 26). A mythopoetic narrative of purity of the local natives over black foreigners represented as dirt actually overwrites the actual differences in each of these two groups. Fortunately, a native narrative that emphasises a unitary identity for ordinary South Africans at all times is rejected. This is so because "There would always be another story of love, betrayal, friendship, joy and pain to add to narrative granary. There would always be the need to revise, reinforce, contradict. Every act of listening, seeing, smelling, feeling, tasting is a reconfiguring of the story of our lives" ([1], p. 61).

3.3 Narratives of fear of black foreigners in *Welcome to Our Hillbrow*

Discourses of entitlement to access to South African resources circulating in black local communities arise out of "unmet basic needs" ([19], p. 98) in the era of

democracy. Particularistic and nativist identitarian assertions enable local blacks to loot foreign-owned black shops ([1], p. 22). Black male South Africans arrogate for themselves the authority of being the guardians of South African women's sexualities against foreign black men and women spoken of as prostitutes and murderers ([1], p. 123). Foreign black men are depicted as human thieves; they are accused of stealing black South African women using monies assumed to have been derived from drug-dealing. In this self-proclaimed role, local South African men silence the voice of local South African women while at the same time unwittingly confirming Makwerekwere as successful lovers and romantic caregivers to South African women ([1], p. 44).

However, *Welcome to Our Hillbrow* is relentless in deconstructing the notion that South Africa is not part of Africa. Disparate ideologies of historical exceptionalism fuelled in local black communities can be used by locals to discipline and punish African black foreigners. This is why the novel affirms a different kind of narrative of global nomadism only possible in an international context in which the idea of diaspora is asserted as the condition of possibility of migration characteristic of postmodernity. This is so because foreign blacks possess some skills that enable them to become lecturers and students at Wits, Rand Afrikaans University and Technikons in South Africa. This assertion implies that some of the black foreigners contribute positively to the South African economy. What is refuted in this acknowledgment refutes the stereotypes that most ordinary South Africans construct and use to attack black foreigners. However, it is to the credit of Mpe's dialectical imagination that surfaces the fact that in spite of positive agency, some black foreigners do drug trafficking. Some locals also are drawn into the vortex of the whirlwind of drug trafficking ([1], p. 18). A narrative that concedes that there are grey areas in the experiences of local people correctly undermines the discourses of purity insisted upon by white and black South African citizens. White criminals sell drugs, liquor and glue to street children, and white prostitutes sell their bodies to all and sundry ([1], p. 103). To ever name whites or people of Caucasian descent as drug dealers as does *Welcome to Our Hillbrow* is not the discourse that the masses and the black leadership would want to hear.

South African postcolony inherited criminal networks and syndicates run by local blacks and indirectly encouraged by some officials in the Ministry of Home Affairs. This public political structure occasionally sends out "uniformed men" who would coerce the black foreigners to give bribes in exchange for staying in the country. Some black foreign women without money bribed the officials and "bought their temporary freedom to roam the Hillbrow streets by dispensing under-waist bliss" ([1], p. 21). The stereotype of black foreign women as loose and dangerous is, thus, constructed by the very authorities who disavow it as morally reprehensible. However, the banality power and aesthetics of vulgarity [12] are further dramatised in the use of inflationary powers that local police command and often use arbitrarily to detain or deport black foreigners known to them as Makwerekwere ([1], p. 23).

Thus, in a new dispensation, the police still possess the very violent DNA that characterised apartheid methods of policing that included, among other things, a principle of divide and rule between black foreigners and native South Africans. The crimes of rape and murder committed by native South Africans are, in the grand narrative of the epistemology of xenophobia, repressed ([1], p. 23). What is rendered visible instead are stereotypical crimes attributed to black foreigners such as Nigerians and Algerians who are accused of being "drug dealers, or arms smugglers, engaged in trading weapons for their civil war-wracked countries" ([1], p. 101). However, this excessive signification of black foreigners is modified by other narratives in the novel that also insist in telling multiple stories of "AIDS and Makwerekwere and the many-sidedness of life and love in our Hillbrow and Tiragalong and everywhere" ([1], p. 95). The "many-sidedness" of lived experiences of the people of Tiragalong, Hillbrow and the rest of country is recalled

through the metaphors of vulnerability of some South Africans who were forced to seek refuge in Zambia, Zaire, Nigeria, etc. during the apartheid era. In the present historical moment of the publication of the novel, new memories of petty murders such as that of Piet by some locals abound. In direct contrast to the destructive streak of some local South Africans, Makwerekwere are portrayed as industrious people who sell vegetables in Hillbrow, thus making their experience of diaspora work to their advantage. National amnesia and forgetfulness is as much at the heart of the project of nation-building just as what is chosen to be remembered of the past. Collective forgetting can serve a narrow and populist nationalism rooted in self-delusion which is that democratic South Africa does not need the rest of Africa.

Perpetrators of xenophobic violence rely on stereotypes to dehumanise their victims. The social figuration of foreign blacks in the collective imaginaries of some local South Africans allows them to depict the social group so defined as an outsider by abstracting the human qualities of targeted groups whose different values are conveniently represented immutable. Language is thus the first tool for killing the diversity of human beings. After the objectification of humanity through stereotyping, homophobes proceed to physically annihilate those that they have marked as victims. When black foreigners are depicted as diseased, drug peddlers and stealers of women and jobs, these descriptions act as ideological warrants that provide justification to violate the black foreigners. In *Welcome to Our Hillbrow* the images the people of Tiragalong were not cleaner than everyone else ([1], p. 55).

The instrumentality of language in attempting to constrain the plurality of the newly acquired identities within the communities of foreign blacks reveals that blackophobia is planned. In stage one black foreigners in South Africa are negatively imaged as economic vultures. To facilitate the movement towards mass violence, in stage two the black foreigners are stigmatised, and in stage three, the "vermin metaphor" is used by the perpetrator. In stage four, officials weigh in and further humiliate foreigners through deportations such as that carried out under operation Fiyela, which arbitrarily hold black foreigners in camps and then send black foreigners to their original countries without anything they had worked for. In this fourth stage, those black foreigners without papers are not given time to pick and pack their belongings as they are bundled into *nyala* vehicles and headed for their home countries. In addition in this stage, moral disengagement is facilitated by the natural tendency for individuals to blame the victims. In stage five it is unfortunate but acceptable to kill foreigners since the victims are no longer viewed as human but rather vermin to be exterminated or infected tissue needing to be excised. In stage six, the path towards mass murder and impunity increases the probability of violence. It is in stage seven where the final solution is imagined as a possible way to deal, once and for all, with the menace said to be posed by the existence of black foreigners within the communities of South African citizens. In stage eight, bystanders in the form of officials from the host countries and neighbouring countries provide tacit approval for hatred, discrimination and violence, through inaction by blaming the black foreigner for escaping poverty in their countries and daring to "invade" other people's countries with a host of diseases, crimes and anything negative that can be attached on the blamed. These stages of humiliating black foreigners discussed above might be described as classification, symbolization, dehumanisation, organisation, polarisation, preparation, extermination and denial. These stages do not have to be complete, and in fact rarely are.

In a book entitled *Go Home or Die Here* [7], Thabo Mbeki then president of South Africa during the deadly 2008 xenophobic attacks on foreign blacks resident in South Africa denied that crimes against humanity were not committed by local South Africans. The basis of Mbeki's hard-nosed denial of xenophobic mentality among South Africa is manifested when he wrote that:

> *When I heard some accuse my people of xenophobia, of hatred of foreigners, I wondered what the accusers knew of my people, which I did not know....The dark days of May which have brought us here today were visited on our country by people who acted with criminal intent. What happened during these days was not inspired by a perverse nationalism, or extreme chauvinism, resulting in our communities violently expressing the hitherto unknown sentiment of mass and mindless hatred of foreigners – xenophobia ...and this I must also say – none in our society has any right to encourage or incite xenophobia by trying to explain naked criminal activity by cloaking it in the garb of xenophobia ([7], p. 4).*

In the above passage, local South Africans are described as "my people", and the killing of more than 63 foreign blacks and some few South Africans is demoted to a petty criminal act. When such defence of xenophobia come from the holders of power in the country's highest political office, this emboldens and licences ordinary South Africans to kill foreign blacks with impunity. Thus, Mbeki provided sanctioning metaphors of discursive violence that the citizens of South Africa would refine and deploy in the future whenever they justified violating black foreigners. "Criminal intent" is precisely one of the UN's 1948 definitions of genocide, and in all blackophobic attacks after 1994, critical intent and violent expressions of resentment of black foreigners are openly demonstrated by South African masses who police, harass and kill black foreigners on the watch of South African police.

4. Conclusion

The aim of this chapter was to explore the experience of diaspora as represented in two novels from South Africa. It was argued that in *Nyambo Dze Joni*, the representation of the government of Nelson Mandela, Thabo Mbeki and Jacob Zuma is not flattering because black people from other countries were and continued to be generally regarded as trespassers. And as with trespassers, black foreign life mattered little, and these people could be killed on the watch of the new black South African ruling and educated elites. This phenomenon of blackophobia was also creatively debated in *Welcome to Our Hillbrow*, a novel that shows that in the constitutional democracy of the South African postcolony; the target of fear of the *other* by ordinary and educated people in South Africa is specific and specified as the black foreigners. The novel highlighted how the language charged with stereotypes is the first war waged against black foreigners. This figurative abuse of black of foreigners through derogatory language forebodes the physical destruction of black foreigners. However, diasporic identities depicted in the two novels refuse to speak to a single identity. Even in the most hostile circumstances, black foreigners in South Africa have forged new social networks, sent their children to schools, remit some money back to their extended families in their countries, bought or build houses and made South Africa their home by working as general labourers and professionals in government and private firms. Thus, the ability to command multiple identities refutes the perceptions that link diaspora with dispossession and marginality, only.

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Section 2

America - Canada, Chile and Colombia

Chapter 3

Feeding the Roots of Cultural Identity: Indigenous Wellness in Canada

Carina Fiedeldey-Van Dijk

Abstract

While responses to native addictions and mental issues are continued priorities, the overarching focus is to recognize the diasporic status of indigenous peoples, to improve native wellness, and to establish cross-cultural identity for all Canadians. Historical culture, ways of knowing and language support strength-based approaches, alongside which relational structures—elders, families, communities, creation—play essential roles in native whole health. A comprehensive Continuum Framework guides federal, provincial, and territorial stakeholder efforts toward native wellness, supported by engaging indigenous communities. Indigenous wellness balances the physical, spiritual, emotional, and mental quadrants of whole health. Balanced well-being is enriched by (i) purpose in individuals' daily lives through education, employment, caregiving, and cultural ways of being and doing; (ii) hope for the future grounded in a sense of core identity, indigenous values, and spirit; (iii) a sense of belonging and connectedness with all relations and culture; and (iv) understanding and deriving meaning from individual, family, and community lives as part of creation and rich history. Indigenous philosophy can be understood and appreciated through the lenses of various Western theoretical approaches that are constructionist by design, whereby Canadians may get one step closer toward achieving a cross-cultural identity. This shared vision requires innovative leadership, sustained commitment, and effective partnerships.

Keywords: indigenous wellness, cultural identity, wholeness, two-eyed seeing, diversity, health

1. Introduction

Canada is marked by cultural multiplicity as a result of its rich history and accommodating immigration policies [1]. These factors result in a national identity marked by increasing human diversity, which Canadians are rightly proud of. As Canada seeks to prosper in a global economy, one should hope that its diverse character is optimally utilized to lead by example from a human rights perspective, which gives it a competitive advantage. Yet, still more can be done at home base, specifically when considering the need for deepening understanding and respect given the presence of diaspora within Canada created by tensions between its Western populations (including select country immigrants pocketed in distinct neighborhoods) and indigenous peoples (also referred to as natives). The latter group has lived in what is now Canada long before the first European settlers

arrived here and colored this country's past and continues to do so today and into the future. Hence, Canadians together need to invest more in integrated human and cultural potential and embrace our combined power as a diasporic nation from the roots up and out.

As Canada's indigenous peoples work to rebuild strong identity by revisiting their roots, it creates golden opportunities to ponder connection points and strengthen bridges in the interest of collectivistic and individualistic fusion at the same time when Canada's inhabitants become more globally mobile with sustained international contact and exponentially adopt multiple national and/or international identities also.

The presence of a diaspora associated with a country is a powerful economic and social source of knowledge and ownership. When smartly managed, it creates opportunities to connect, circulate information and create new knowledge, and to build trust and co-responsibility through confidence in the spirit of cross-cultural unison. While the discussion in this chapter focuses on Canada, highlighted implications can be inferred around the globe.

2. Intramural diaspora

Although referenced as far back as 1594, the term *diaspora* originally referred to colonies of Jews who settled in a scattered fashion outside ancient Palestine (i.e., present-day Israel) after the Babylonian exile thousands of years ago in 586 BC [2]. Diaspora effectively refers to a physical dispersion or spreading of people with a common origin, background, type, or ethos for reasons of religion or eschatology, philosophy, or politics, where the attachment to the original remains and the original ideology of nationalism or "one nation" is fraught for all practical purposes. Today the term refers to any people who were forced to or live by choice in places away from their ancestral or established homelands [3]. Often diaspora is irrevocable, so that new and creative means need to be found to address its implications effectively.

Canada's historical actions related to settler colonization as Europeans took lands from its indigenous peoples, combined with the practice of removing approximately 150,000 native children from their communities to be assimilated via residential schools between 1840 and 1996 and concerted efforts to outnumber them, render this group a diasporic culture within its national borders. The dispersion by the interventions of Europeans convinced of their superiority, and the later displacement of native families by putting large numbers of indigenous children in foster care in the 1960s (called the Sixties Scoop) by state authorities, resulted in alienation [4]. This led to distorted and sometimes romanticized memories of indigenous homeland with an understandable desire to return to what was before rather than to assimilate midair, and a wedging of heightened consciousness of past experiences. The historical events left them marginalized, and many suffered broken or different identities defined by these experiences [5].

The past actions left wounds still in process of healing no matter how many Canadian government officials and Catholic Church representatives have apologized and if government officials started to act on their duty as a principled part of the Honor of the Crown to consult with natives in any industry activities that may potentially adversely affect them. In response, the complexity of resulting feelings due to separation and banishment is expressed in variable and unique ways [6]. Yet, the ignorant and those not directly affected by diaspora still lack insight and cannot relate, so that these profound emotions become epistemic and part of the diasporic character of those negatively impacted.

In other words, indigenous peoples as a group contain all critical diasporic markings even when living within the vast geographical boundaries of Canada. These trends heighten the necessity to expand on the simple, extramural nature in which we conventionally define *diaspora*. We coin the term *intramural diaspora* for this purpose, as it has application value for multiple groups internationally also. Intramural diaspora opens the door for looking at marginalized and minority groups within a country that might otherwise fall through the cracks and allows for learning about diasporic implications specific to groups and their circumstances such as Canadian natives.

3. Indigenous peoples in Canada as a diasporic group

Canadian natives, also called indigenous peoples, are categorized into three distinctive groups of First Nations (60.0% with more than 600 bands of which some live on reserves), Métis (36.1%), and Inuit (4.0%) as recognized in the Canadian Constitution Act of 1982, Sections 25 and 35 especially [7]. According to the 2016 National Census, indigenous peoples are comparatively young in age and represent 4.9% of the total Canadian population [8]. Natives are growing in numbers for natural reasons (particularly based on fertility rate and life expectancy) and, importantly, also via self-reported identification. Indigenous peoples grow by more than four times the rate of the non-aboriginal population in Canada.

3.1 Reserves as diasporic launch

While the number of indigenous peoples living in metropolitan areas within Canada is growing due to increased mobility and acculturation, significant population growth is evident both off reserve (+49.1%) and on reserve (+12.8%) where currently 44.2% of First Nations people with registered or treaty Indian status live [8].

An Indian reserve in Canada is specified by the Indian Act (another Canadian Act of Parliament [9]) as a tract of land with a legal title that has been set apart and held in trust for exclusive Indian band use by specifically Her Majesty, the Queen of England, as the sovereign in this country as a matter of constitutional law since February 6, 1952. Long before 1876, region-specific colonial authorities with the consent of some Canadian natives informally acted on the reasoning that reserves may be a viable solution to land disputes and other cultural conflicts between the natives and European settlers and numerous treaties were signed over the years.

Today's Indian reserves are federally regulated through administrative and political structures, which continue to typically cater for non-reserve communities. Existing gaps in services and infrastructure identified through environmental audits, such as the regulation of waste disposal, water monitoring, and air pollution, are noted and a concern, as these are typically handled provincially and municipally for non-reserve communities with efficient systems in place.

Soon after indigenous peoples signed the treaties, pragmatic issues associated with reserves were born from the fact that they understood that lands and resources would be shared and that traditional practices such as food gathering and ceremonial interventions, among others, could continue undisturbed. Instead, natives were indefinitely confined or forced to develop the land into more modern agricultural practices. This issue was exacerbated by native displacement to lands on which housing was designed for nuclear family units rather than extended family systems, which forcibly disrupted social networks and broke up long-established kinship systems that regulated traditional practices.

Furthermore, natives were displaced onto lands that were generally less fertile and poorly suited for agriculture, which later became the grounds for the

government taking away lands and engaging in discriminating legislating practices. This occurred on top of marginalization from the capitalist immigrant workforce, overt racism, urban centralization of industry accompanied by its technological advances lying far away from reserves, and later cultural genocide instigated by implementing assimilation programs such as the residential schools [10]. It is no wonder that poverty with associated socioeconomic, environmental, abuse, and mental problems raised their ugly heads as a result. Conflict between natives and others in Canada originated from land and still is centered around land today.

3.2 Intramural diaspora as an opportunity for progress

The uninformed may not realize that the borders of allotted reserves are often different from original, indigenous territories, which are often larger and which house ancestry and the ceremonial sites for cultural and spiritual practices, as well as socioeconomic activities. Entry into the larger territories is vital for native wellness as a whole and specifically for maintaining roots for a strong indigenous identity. These are difficult to uphold when traditional territories are lost or inaccessible for indigenous peoples in Canada, but with resilience they survived in spite of generations of struggle, ironically thanks to segregation. This is not totally surprising as diasporic groups are known to stick together through shared experience [4, 10].

For national progression it means though that indigenous peoples' original connection to their land needs to be honored as a critical step in representing Canada cross-culturally as one nation. Advances made in this respect will signal recognition and acknowledgment of the complex relationship we have with each other through this land. Land offers sustainability, and when subsistent ways of life are lost, a collective dependence is created on governments. One-directional proposals such as abolishment of reserves (and thereby Canadian governments' obligations to indigenous peoples) or the assimilation of natives into non-aboriginal diverse society are largely uninformed suggestions for oversimplified solutions. Collaborative work with a shared goal of striving toward effective solutions includes opportunities to capitalize on diaspora. For instance, we could find commonality and unique strength between collectivistic and individualistic philosophies and ways of life and cultivate healthy roots for what it means to have *cross-cultural identity*. This term refers to a mutual embracing [11] of seemingly opposing cultural identities, the lesser known of which needs to be put under the magnifying glass and explored in verifiable ways as we will do in the next sections of this chapter.

4. Diaspora creates cultural identities

Canadians may identify as native or indigenous in two parallel and not always complementary ways. The more known and arguably expected way relies on law and state regulation [12]. The second way is more intricate to track down as it looks at long-standing family tradition and community practice as it pertains to cultural identity. This chapter gravitates toward the latter, less traveled road in the context of diaspora.

Like culture, identity is a complex concept to define precisely, as it contains both the personal self and the self in interaction or relation with others. The emphasis on either self or group may be different depending on the theory, methodology, or philosophy followed as the boundaries that each draws provide a different framework in which to describe the meaning of the concept of identity. Both culture and identity are often featured in communication, psychological, sociological, anthropological, philosophical, ecological, and related disciplines, each providing different lenses for study.

Broadly speaking, *cultural identity* has to do with shared experiences, enactments, and negotiations of social identifications by group members within particular settings [13]. The settings may include important qualities delineated by human rights, such as gender, age or generation, race, ethnicity, ethno-linguistics, nationality, social class, and disability. They may also take other contextual directions, such as (social) media, politics, environmental issues, health and healing, as well as technological advancements (think artificial intelligence) and globalization. In either event, the settings are socially constructed to show and teach group members expected ways of being and acting [14].

The different settings enable us to look at cultural identity using different approaches. When dynamic interaction and developing properties are brought into the discussion of cultural identity, an interpretive approach is at stake [15]. This line becomes more critical in nature when this discussion is contextualized in history, politics, religion, and the like [16] to help crystalize the cultural identity of a group. A third position concerns the strength of psychological and emotional attachment between group members, including cultural values, norms, customs and practices, and beliefs, which lends a social-scientific approach to cultural identity, recognizing that individual identity lies at its core [17].

Given these approaches, *cultural identity* can be defined as a fact of unwavering being by close similarity or affinity, which characterizes who or what a particular group of people is, remains, and becomes in spite of life experiences and changes. Within cultural identity lie choices and rights that are shaped over time by co-creating, reinforcing, and morphing features.

While we look at cultural identity as a single diasporic entity in this chapter, it should be noted that it is possible and plausible for individuals and groups to possess multiple cultural identities given different boundaries that can be drawn. The different cultural identities may intersect, communally adapt and evolve, and morph into hybrids. Identification with one culture may act as a support when identification with another culture is damaged. At the base though, all cultural identities contain elements of the personal and social, expressed through dynamic communicative systems.

4.1 Implications of cultural identity in the context of diaspora

Cultural identity heightens awareness and encourages reflection; it is the seeking answer to the essential question of "Who are we really?" from which also flows "How do we want to empathically live?" A willingness to stand by found answers as it defines the present and orients groups toward a sustainable future with ties to the past is intrinsically mixed into cultural identity. It is observable through specific behavioral trends, chosen lifestyles, and esthetically expressed markers. Cultural identity encompasses the total of how the group continually construes itself through multiple behavioral and societal roles, which allows for descriptions of aspects of identity, and for determining which of these aspects may be whole or broken and in need of healing.

Dysphoria of cultural proportions can be an ill-fated result from traumatic diasporic experiences. For example, indigenous cultural identity is shaped through generations inhabiting land in Canada. When a double blow occurs by taking these inhabitants away from the land *and* by taking the land away from the inhabitants, cultural identity suffered severely. Loss of any group's cultural identity can erode a sense of collective self and make communities dysfunctional. In drawing parallels with other forms of dysphoria, likely symptoms of cultural dysphoria may include any one or combined depression, suicidal tendencies, anxiety, maladaptive behaviors such as agitation, social isolation, and disgust at their own or assimilated culture. These symptoms may appear at early or late onset in the diasporic experience.

It follows that *cultural dysphoria* is the emotional distress a nation or society experiences as a result of dissonance in social and ontological expectations. In the context of diaspora, cultural dysphoria may occur with or after displacement from the geographical space of establishment or ancestry with which the group strongly identified, perpetuated by a newly assigned environment and lifestyle that do not match the original identity.

4.2 Setting the stage for dispatching diaspora

In order to channel the presence of intramural diaspora and address possible cultural dysphoria, the first step is to accept that we need (cultural) identity and cannot do without it [18]. Identity is a life-anchoring stabilizer that is forged in the social domain and that helps shape a sense of self through psychosocial processes. Description of cultural identity is a structured process whereby differences and similarities are ascertained not only through methods of contrasting and comparing but also through a synthesis of (indigenous) cultural description with (Eurocentric, Western) critical, interpretive, and social-scientific approaches.

The intramural diaspora of indigenous peoples as a minority culture within Canada is deliberately chosen as a fresco for mapping onto a theoretical platform marked by first-world, Western, and Eurocentric thinking that the majority of Canadians subscribe to. In particular, by choosing a strength-based subject matter such as native wellness descriptions, it serves as a powerful constructive springboard for discussing cultural identity in diasporic context. The objective is to open the door for fostering better blending and fusion between different worldviews so that Canada may move confidently toward a strong cross-cultural identity.

Since cultural identity is constantly evolving, it is imbued by unavoidable accuracies and inaccuracies as temporary points of attachment between what is described and who describes it, making it contextually and time-specific. Herein also lies a gem: cultural identity is never complete and should be described by multiple scholars and through different lenses. Ideally, not all scholars will be outsiders respectfully learning about another's culture, but some of them will speak effectively from within their own cultural teachings and actions, conveying the meaning and translations of their daily lived experiences in keeping with good validation practices.

When considering indigenous roots from a diasporic perspective, it is necessary to anchor ourselves in a methodology that will expose our own unique social perspectives and value systems, as these have a significant bearing on how we develop cross-cultural identity. The proposed approaches are used to guide the discussion in an attempt to further the achievement of cross-cultural identity for Canada and thereby help bridge the current diasporic divide that continues to persist in the minds of many.

4.3 Anchoring diaspora in constructionist theory

Ideally, cross-cultural identity is developed at ground level within a country, where active involvement in a process of meaning and knowledge construction can occur. In an increasingly globalized word, a representative cross-cultural identity is critical for success in productive inter-cultural relations at higher and broader levels. Hence, in this chapter Western theoretical perspectives on native wellness as rooted in indigenous culture are offered via meaning-oriented, critical, interpretive, and social-scientific approaches outlined below [13]. These approaches and the flow between them are constructionist by nature, and each can be broken down further by different underlying theories.

4.3.1 Critical approaches

Critical approaches in Western thinking set out to tackle the proverbial elephant in the room. Proponents uncover actualities that may have been missed otherwise. They pick apart, are suspicious of, or question specific assumptions or conclusions made about a culture. This is established by using critical thought to expose the possible existence of flaws or faulty claims and findings, especially when they are absolute. This careful analysis may also entail that said assertions are placed in a broader context that facilitate neutrality, which opens up the possibility of further discourse and brings about a deeper understanding of the issues at stake.

4.3.2 Interpretive approaches

Interpretive approaches call for Western thinking to shift away from the observation and measurement of facts with a subsequent drawing of conclusions (also called positivism). Here the focus is on *verstehen*, a German concept denoting an understanding of subjective human experiences. Existing or found facts are decoded and explained through recognizing that there are many, equally valid points of view to be considered and to collectively draw meaning from. Claims based on facts alone may not always be correct or provide the full picture.

4.3.3 Social-scientific approaches

Social-scientific approaches are systematic methods that aim to understand relationships by observing behavior of individuals or groups within a social environment marked by changes in time. The social environment under consideration may relate to shifts in gender role and identity, human inequality, power, politics, historical events, socioeconomics, and other factors that may be prominent characteristics in certain behaviors. These approaches look to understand social processes as outcomes of tension, usually felt between two seemingly opposing, coexisting groups.

These approaches also recognize that within the tension and mistrust, the separate cultural identities partially depend on each other to continue their existence; collectivism is understood in contrast to individualism, and the domination of Western culture enabled the marginalization of the smaller groups of indigenous peoples. Importantly, the acknowledged strain and unease existing between opposing groups also pave the way for democratic, central discourses that may facilitate cross-cultural identity.

5. Using diaspora to create cross-cultural identity

The overlay of Western theoretical approaches with indigenous descriptions of cultural identity is embedded in the concept of two-eyed seeing. The latter is an indigenous-based guide to arriving at cross-cultural identity by lacing seemingly opposing sides ascribed to different philosophies, shifting focus to bring about a unified perspective [19].

5.1 Critical race theory as a critical approach

When differential racialization or racial injustice and domination are at play in ways that may predict or determine systemic bias, critical race theory is relevant for cultural identity in the context of diaspora. In Canada where a diversity of races

abounds, race is best understood in an ethnic sense, where a substantial number of Canadian citizens and permanent residents identify with two or more ethnicities.

Bias and inequity can be counterbalanced in three different manners under critical race theory [20]. First, demonstrations and references are sought to indicate that the racialized processes are ever-changing as time passes, as contexts and circumstances change, as experiences and needs shift, and as group objectives adapt. Another valued, constructive practice acknowledged by this theory is counter-storytelling, whereby cultural experiences are legitimized as sources of knowledge that can be used to challenge other (Western, Eurocentric) forms of knowing. A third practice is to act on verbal deeds of aggression against the culture to maintain the status quo, which may range from planned to subconscious behaviors and include name-calling, stereotyping, invalidations, and similar ploys targeted at the minority group.

In the first manner under critical race theory, it is important to pay attention to the fact that indigenous peoples are culturally heterogeneous. Different nations (called tribes in the USA) and smaller clans may be distinguished based on geographical area, lineage, language, art, and music. There are multiple systems of how culture is practically expressed, even when some similarities exist in what they symbolize and represent, and how they purposefully facilitate cultural meaning.

Picking up on the second manner under critical race theory, wellness as an indigenous form of knowing is centered in family and environmental relations. The creation story, as different native groups tell it to convey meaning, underscores the belief in one's connection to land, language, ancestry, and all beings of creation. Connections unfold in various degrees of balance between spiritual, emotional, mental, and physical quadrants of well-being within individual and communal personhood [21]. This view offers a holistic understanding of wellness wherein all that is needed to live life to its fullest is available to us so that it may be possible to create a meaningful cultural identity.

The holistic view rounds out conventional Western thinking that wellness denotes a state of being associated with health and fulfillment of individual life. However, modern views of wellness, regardless of indigenous or Western cultures, tend to agree that wellness is not merely the absence of disease or infirmity but that it encompasses different aspects such as those captured by the above four quadrants.

The third manner under critical race theory provides an opportunity to make explicit that while the indigenous way of life is directed by spirit, there is nothing magical or mystical about it [22]. The spirit is placed central in life and is motivational and energizing and hence is critical to wellness and to a healthy way of being in the world. Spirit is best understood through creation stories where native knowledge is founded. Spirit creates order in relational space [23].

5.2 Postcolonial theory as a critical approach

The critical characteristics of postcolonial theory are particularly relevant after a group underwent experiences of decolonization that significantly impacted their cultural identity. This theory seeks not only to expose Eurocentrism and Western imperialism but also to point out cultural intersections, hybrids, and diasporas [24]. As inter-cultural identity offers strength in globalization and suffers strength and quintessence in each one of perhaps multiple cultural identities to which individuals may belong, postcolonial theory is concerned with those caught in between, who find themselves on the margin in conflicted and fractured states of identification, i.e., those in diasporic states.

In Canada, there is a distinct movement toward the restrengthening of cultural beliefs, traditions, and sacred knowledge in the National Native Alcohol and Drug

Abuse Program (NNADAP) and Youth Solvent Addiction Program (YSAP) treatment centers, as well as in community-based programs. This is enabled through cultural intervention practices (CIPs) such as smudging, prayer and the creation story, sweat lodge and healing ceremonies, talking circles, use of drums, pipes and shakers, use of sacred medicines, cultural language, dances and songs, and many others as appropriate to help foster the renaissance of indigenous identity [21].

The movement is guided by a national framework, which places culture central to wellness and which is used to congregate and coordinate indigenous- and Western-oriented services and treatment methods among various systems and supports [22]. The thinking that supports this movement is that when indigenous culture becomes a way of life again through reflection and internalization, native wellness is realizable and sustainable. Transference of the meaning of cultural practices rather than the ritual and rule-based aspects of customs is critical in guiding the success of the movement.

5.3 Co-cultural theory as a critical-interpretive approach

Moving on to more interpretive approaches while keeping a critical slant, one focus involves social class, cultural type, or diasporic group size, for example, when indigenous peoples as a minority group and non-aboriginal Canadians as a dominant group interact. History reveals that it matters whether cultural identity developed to be dominant or non-dominant as institutionalized power, influence, resources, and privilege are slanted toward former groups, putting latter groups at a disadvantage. It is postulated that whereas dominant groups interact from a position of passive and/or active acceptance of and guilt about the situation, minority groups display conformity with and separation from the situation at different times in interaction before integration of the two groups is possible [25].

Awareness of these prominent differences affects interactions among group members, which is the focus of co-cultural theory. The differences may be evident in hierarchies as associated with power, status, privilege, exclusivity, and assertive or even aggressive communication styles, all culminating in systemic bias in everyday life. Co-cultural theory promotes a mixing of several different factors to bring about effective communication and strong cultural identity, namely, (i) a focus on expectations and the preferred outcome to minimize ambivalence, (ii) acknowledgment of past experiences, (iii) a sharing of abilities, (iv) heeding of the situational context, (v) upfront consideration of perceived costs and rewards, and (vi) agreement on using an efficient communication approach [26].

Progressive treatment centers and communities in Canada put cultural protocols in place to combat diaspora and meet relational dynamics between (Western) program requirements and (indigenous) cultural practices. These protocols look at expectations, accountabilities, recognition, and compensation of both parties, how their skills and knowledge base may complement each other in a collaborative environment, how record keeping can be respectfully done, cultural diversity of practice, human rights and the right to choose, and how the wider community can be involved through a continuum of care and capacity building and cultural identity strengthening [23].

5.4 Cultural identity theory as a critical-interpretive approach

Cultural identity theory as another critical interpretive approach focuses on five communication and relational properties classified as avowal (affirmation of membership to others), ascription (attribution of identity by individuals and groups outside the culture under study), scope (member size and generalizability),

salience (importance and accommodation relative to other existing identities), and intensity (enforcement of cultural identity) [16].

Statistics Canada found in 2016 that indigenous peoples have grown by 42.5% over the past decade [8]. In part, this figure accounts for natural growth, while identifying as indigenous may have an economic benefit as it enables organizations to increase employment numbers for natives through equitable human resource strategies. In an era of reconciliation, negotiation, and renewal, the above figure also accounts for a growing trend in new declarations of collective Aboriginal identity on the census survey (despite sentiments to move away from this term). Under the Canadian Human Rights Act, it is not discriminatory to ask about heritage, and Canadians feel safer than ever to change their perceptions, trace their origins, and claim their identity, whereby they give meaning to who they are culturally.

5.5 Identity negotiation theory as an interpretive cultural approach

Following a purely interpretive approach pertaining to cultural identity, individuals pay attention to satisfying their own needs and that of others in constructing their self-image according to the identity negotiation theory. Perception of interpersonal dynamics is key as it helps with fitting in with what the group deems appropriate and considers as the norm. Identity is presumably formed within five polar boundaries, namely, security versus vulnerability, inclusion versus differentiation, predictability versus unpredictability, connection versus autonomy, and consistency versus change [27].

The continuums flanked by each set of boundaries remind of five primary, unified concepts that describe indigenous culture and underpin wellness [21, 28].

1. The circle, more than any other shape, is the most expressive of the indigenous worldview. The circle symbolizes energy and denotes a continuous life flow, moving out simultaneously in four directions. This is illustrative of wellness also; growth and well-being can be seen as running like a sinuous current between security and vulnerability.

2. Life on earth is fundamentally seen as centrally bonded though a caring spirit, which is in and throughout all life and creation. This bonding is inclusive, yet at the same time, the indigenous worldview that all life is motivated by spirit is differentiating as people live their lives.

3. Native beliefs that everybody is predisposed to have the desire to be respectfully harmonious and in balance with creation throughout continuous stages of life add predictability. Practical challenges to this belief in everyday life are associated with unpredictability, as hardship and discord display as imbalances.

4. All universal things (human and nature) are inclusively relational and connected as personhood, without measures of power and hierarchy. While personal autonomy is recognized in these interdependencies, respect is mutual as individual actions and decisions impact everyone.

5. Indigenous culture is virtuously voiced and transmitted through original language. Unlike other forms of life, humans have a gift of free will in fulfilling their purpose, i.e., their roles and responsibilities to all else, whereby their cultural identity may continuously unfold from a position of consistency, to that of change. The moving pattern of unfolding, growth, and change occurs primarily as a circle toward the creation and recreation of life.

Identity negotiation is viewed as a critical method for effective assimilation, implying we can rise above diaspora. We should be aware that perceived differences and similarities between the cultures often comment on the product – cultural manifestations – rather than the relational process wherein the philosophical foundations of culture rest. This notion facilitates the immersion into another group and the internalization of the meaning of their culture. It is particularly relevant if the identity with their original culture is strong to begin with and/or when conflict between the two groups abound.

5.6 Cultural contracts theory as an interpretive cultural approach

Often an emphasis on cultural practices is not sufficient for different groups to adopt a shared cultural identity, in which case an interpretive approach of co-creating an agreement may be needed, as postulated by the cultural contracts theory. A slightly more formal tactic may open up acceptance of different viewpoints and promote assimilation [29].

By better coordinating the member relationships around authority and power, rules and regulations, and a willingness to embrace equity and equality, disputes and long-standing feelings may become more negotiable. Flexible negotiation requires respect for each other, another foundational element of cultural identity [30].

For example, First Nations is a general reference to indigenous groups who are dispersed across Canada and differ significantly in customs and native languages: 614 First Nations bands consist of 11 language families broken down into 55 languages [22]. However, despite these distinctions, cultural values are commonly shared between different generations, such as the presence of spirit as a physical reality, and an animate creation that contains relations between all beings, human and other-than-human.

Cultural values are also preserved as sacred knowledge, which is kept in the indigenous peoples—wisdom keepers, elders, ceremonial practitioners, traditional doctors, sacred societies, and other cultural institutions—themselves. Knowledge is left by ancestors and rooted in patterns of meaning that emerge from different creation stories. Acquisition of indigenous knowledge is ongoing, a coming toward knowing, characterized by being first transformational in nature and second by bearing the responsibility to extend the knowledge through translation of its meaning for others [23].

This meaningful knowledge feeds all else that is derived and understood in indigenous worldview because the structure, processes, and patterns of creation are repeated in all aspects of life in the universe. Indigenous intelligence then constitutes the transformation of holistic knowledge into something that carries relational meaning and is useful in responsible and beneficiary ways. Indigenous communities assert a self-determined right to be the keepers of their knowledge, which contractually can be respected in understanding of its coming-toward-knowing character, and as a part of their cultural identity.

5.7 Communication theory of identity as a social-scientific approach

According to the communication theory of identity, communication has a prominent role in forming strong cultural identity. Communication is exercised in four localized layers of group membership: the personal level (where individuals define themselves), the enacted level (where individuals communicate their personal definition through messages), the relational level (where individuals make the personal definition mutual through social interaction), and the communal level

(where the personal identity definition is extended so it can be shared by others as a collective also and which in turn can influence individual identity at the personal level as an incessant feedback loop). Cultural identity is formed and maintained through a network of these layered enactments.

As we build and shape cultural identity through lifelong, active participation in watching, learning, and doing in continuous cycles in social and reflective ways, communication itself evolves. Both verbal and nonverbal forms of communication enable us to not only express ourselves but also to continuously negotiate learned patterns that convey our values and beliefs, attitudes and intentions, thoughts and feelings, and behaviors and expectations.

In applying this communication theory of identity as it resides within a social-scientific approach, social behavior is part of an individual group member's identity. Symbolic meaning is enabled through active involvement in social interaction whereby cultural identity is shaped. Individual group members have the right to and can choose the relevant layer in which communication is to occur at different times in forming cultural identity [31].

In individualistic cultures such as the Greek and European, "I" (self) stands firmly in opposition to "We" (others) and has evolved into modernist and post-modernist perspectives. At best, the interplay between I and We is a snapshot in time and a glimpse of the static status of self-adapting to different occasions in daily life [32]. While cultural identity is rooted in the individual according to this theory, it is also possible that the multilayered, fluid qualities of individuals make it impossible to think about a true self given that identity dynamically changes over time and in space.

In collectivistic cultures such as the African, Asian, and indigenous, the emphasis is on individuals trying to infuse themselves into the collective level and thereby minimizing their impact on the community. This manifests in the ways in which Asian civilizations root the self in tradition through discipline, restraint, and harmony. It is demonstrated by how Africans traditionally focus on the end result of the I-We connection by striving to balance it and emphasizing *ubuntu* (meaning all humanity is connected through virtues of goodness and referring to the notion of "I am because we are"). It can be seen in how indigenous peoples inclusively anchor all to spirit and creation and that the incorporation of plant, animal, mineral medicines, spiritual ceremonies and therapies, manual techniques, exercises, and native language is culturally practiced in vehicular pursuit of wellness.

Native wellness is expressed as holistic and encompassing all aspects of life. In it, an inextricable link exists between four directional quadrants, tied to generational knowledge and teachings about culture [21]. All beings—human and other-than-human—share this holistic structure through a living past and living future, with the current generation the living connection in between. While each quadrant is recognizable in human beings, animals, plants, earth and its elements, and planets and cosmos, it only has meaning in relationship to the circular whole.

1. The *spirit* (from the spiritual quadrant) gives vision and hope in kindness and caring and is central to vitality, mobility, purpose, and quality of life, as well as the overcoming of challenges, loss, and despair.

2. The *heart* (from the emotional quadrant) is nurtured by consciously living in personal, reciprocal relation to all human and other-than-human beings, as well as environmental forces (wind, thunder, water, fire, and unseen) in creation, whereby a sense of belonging is felt and hardship can be withstood.

3. The intuitive and rational *mind* (from the mental quadrant) consciously gives reason for being and becoming, giving meaning to life and experiential learning, and communicating about all aspects of it.

4. The *body* (from the physical quadrant) purposefully actualizes intentions and desires through behavior as related to spirit and culture; when strong and whole, it can overcome physical weaknesses and damage.

Hence, when indigenous people talk about their connection to mother earth and land as an example, this expression needs to be understood in a holistic sense: the land provides shelter and food but also a place of belonging and active learning with hope for the future. People were not only shaped by the land, but they were also created from the land. Land gives a sense of place and is historical; hence natives are inseparable from the land. Talk about land is a diasporic comment on cultural identity, which currently manifests in dispirited native wellness.

5.8 Identity management theory as a social-scientific approach

Identity management, as a social-scientific approach, is the final theory proposed in this chapter, which postulates that cultural identity is about competence in relations that are exercised via direct contact to the mutual satisfaction of the individuals concerned and whereby self-esteem, self-image, and self-efficacy are confirmed and individual autonomy is established. The social relations follow three steps marked by (i) strong relationship development trials for forming the sharing of identity along cultural lines, (ii) enmeshment and symbolic convergence based on shared commonality, and (iii) renegotiation of earlier enmeshments to clarify the relationship and to establish a truly interdependent and personal relationship [33].

In indigenous culture, identity is managed through the concept of wholeness. This concept signifies that all things work together interdependently through an interconnected web of parts that have meaning only in relation with the whole. Human beings are only one connective part in wholeness, along with other creatures. The circular wholeness of life is all-embracing, an entirety that incorporates time while also being timeless, which makes it complete [23]. In a Western deficit sense, wholeness is a state of being undamaged or unbroken, i.e., by not being in ill health [34]. This view can be expanded with a Western constructionist perspective where wholeness is considered a state of being complete, sound, and harmonious, synonymous with unison.

6. In conclusion: making the most of intramural diaspora

In using Western theoretical approaches to help make sense of the cultural identity of indigenous peoples as a diasporic group in Canada, a national vision is shared to change the way in which we think about each other. Fundamentally this involves having universal knowledge of the different dimensions of ourselves involving the spiritual, emotional, mental, and physical in connection with and interdependency of each other and to let a cross-cultural identity unfold and grow in the relational space that exists around us. It appears that *wellness*, in a whole and holistic sense, offers a valuable and worthy conduit in order to achieve cross-cultural identity.

Under the leadership of Canadian Prime Minister Justin Trudeau, who has become a standard bearer for internationalism in a time of major changes and

turbulence, this country celebrated its 150th anniversary after British French settlers confederated to form the Dominion of Canada in 2017. Since the 1970s previous assimilation efforts are recognized as failures, compelling Canadians to act on a decolonization agenda by seeking changes in our relationships through healing wounds caused by unequal power and low self-esteem, through consultation and dialog, and through negotiation and regaining of greater control over own affairs.

Deep-rooted inequity marked by unbalanced power relations still persists in Canada. Successful negotiations by indigenous governments occur selectively and in narrow contexts. However, in recent years some land claim agreements were reached in exchange for extracting resources from which locals may share revenue and receive other benefits. This is a good start, while the need to diversify opportunities for local economic development among indigenous peoples remains dire.

While Canadian inhabitants are proud of many accomplishments in reflection on 150 years, we tread lightly on how we wear our identity. Responses to what sets Canadians apart are comfortably rife with nostalgic symbols representing:

- Sport (ice hockey, curling, lumberjacking, and lacrosse)
- Environmental activities (portaging (carrying of a canoe between navigable waters) and moose hunting)
- Rich demonstrations of heritage (inukshuks (a structure of rough tones stacked in the form of a human figure), dream catchers (small hoops containing mesh and decorated with feathers and beads), moccasins (leather shoes with decorative beading and fur), and Pow Wows (a feasting ceremony with singing and dancing))
- Distinctive beverages (maple syrup, beaver tails (hand-stretched, deep-fried wheat-dough sweet indulgence) and Tim Hortons coffee with Timbits (mini-donuts))
- Several musicians and artists whose works are internationally acknowledged and enjoyed

Of course, these unique cultural characteristics are shifting in popularity over time too. In the same breath, Canadians take pride in diversity and stay politely away from defining ourselves on human equity grounds, but we will acknowledge scars from the recent past and point to the sharing of common values, aspirations, and dreams as we embody the spiritual, mental, physical, and emotional parts of self and culture. In preparing ourselves for being ready for the foreseeable future while other countries address their own identity crises and capitalize on their diasporas, it is imperative that Canadians, in unison, will need to be assertive in carving out a deeply distinctive voice.

Conflict of interest

There is no conflict of interest to be declared with respect to the scientific work submitted.

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Chapter 4

Cultural Conception of Space and Development in the Colombian Amazon

Ronald Fernando Quintana Arias

Abstract

With the objective of recognizing the cultural conception of space and development in the Colombian Amazon, an exploratory approach of documentary nature is developed to analyze the history of Amazonian settlement, the cosmogony-cosmology, the enrichment and/or impoverishment that generated the interaction between the indigenous and conquerors in "the creation of the new world," ecological relations, multilingualism, as well as the development of territory since a "geographic-environmental-humanistic" view, and the laws that currently protect indigenous peoples. It is concluded that the history of social relations has framed a syncretism between the visions of the populations about the world, the territory, development and economic interest, which positively and/or negatively feedback the protagonism of the ethnicities, the worldviews, the language, as well as the ways of relating to nature and therefore the indigenous perpetuity in the territory.

Keywords: history, indigenous, laws, multilingualism, nature, worldviews

1. Introduction

The study of population and settlement in the Colombian Amazon has exposed a debate on the conservation of the tropical humid forest and its inhabitants. On one hand, it exposes the native models of forest use as a reference for sustainable exploitation and on the other, the government proposes economic models of land use that claim to be sustainable in unsustainable contexts such as mining and oil extraction.

Due to the above, it is necessary to recognize the historical relationship between the indigenous and the territory from the social, ecological, political and economic transversality that allows to generate an approximation to the dynamics that have conditioned the cultural conception of space and development in the Colombian Amazon. For this purpose, the present article aimed to contemplate the cultural origin of the territory and the dynamics that have been generated until the present, through a documentary synthesis that analyzed: physical and human geography of the Amazon, basic principles of the indigenous universe, the importance of myth and science, the essentials of the old and the new, the non-places and the world of waters, the development of the territory from the humanistic environmental geographic view, indigenous

ecological relations, indigenous peoples and multilingualism, and legal norms in relation to the indigenous peoples of Colombia.

2. Physical and human geography of the Amazon

Studies that have used carbon 14 to analyze fossil records have generated a reassessment of autochthonous theses and theories of immigration across the seas to America, elucidating a continental proto-settlement, which began 40,000 years ago, from north to south (Alaska to Tierra del Fuego). In this way, the human traits extracted throughout the hemisphere correspond to dolichocephalic (Indonesia), mesocephalic (Melanesia) and brachycephalic (Mongolians), peoples from the eastern and south-eastern part of the Asian continent, sometimes well differentiated and others crossed as consequence of the interaction within the migratory flow [1–5].

It should be borne in mind that the reasons why the Central American settlements (Mayas, Toltecas and Aztecas) were the most brilliant civilizations of the new continent, is due to the fact that an absolutely continuous trajectory in the continental proto-population was not generated. The initial dynamics of migration flowed towards the east and the west, resulting in changes among migratory groups, which characterized future settlements that followed the order of the "religion of the sun" [6, 7].

Thus, the first settlers who came to Patagonia and the end of the southern cone, would return to the north, under the idea of finding better natural resources, through tributary streams and settlements on the river banks during the journey, until arriving at the net of the Orinoquia and Amazon (Tupi word that means boat destroyer) better known as Amazon. This is evidenced by the somatic foundation of the peoples of ancient Bolivia, Peru, and the entire Amazon region. Also, the phenotypic, linguistic and ethnographic variations that occurred among all settlements, were due to the environmental differences of the different stages and blood fusions of the proto-population [8].

Due to the above, relationships between geology-time, and geography-history are established. We speak of cultures with two religions that converge in their relationship with the moon, a "religion of the sun" and a "religion of water." This is evident in the dynamics of the different communities that settled in the three great Amazonian landscapes: rock outcrops, sedimentary valleys and plains (Freshwater swamp). This is likely to have been characterized by drastic climatic changes and the orientation of seasonal natural cycles, rainfalls, fishing season, and fruiting of trees; so, human geography arises from the relationship between geography and the history of natural cycles [9, 10].

Precisely, this human geography leads to discuss about the "humanization of the forest" and the social history of the seeds, due to an anthropic intervention dating back more than 10,000 years by scientific consensus [11], and also because different ethnic groups have been masked with representative symbols like "Bochica" (also known as Nemqueteba, Nemquereteba, Sadigua, Chimizapagua), which explained the origin of many of the vegetal formations that are in the zone, giving account of psychological processes of craft teaching and politics of indoctrination [12].

This is how myth turned into the explanation of origin. Death of the tree of life, abundance and biodiversity originated the Amazon River (Payabarazu) and the worlds. The ancestral serpent ("Dïïjoma," "Yakuruna," "Añiraima") was the remnant of the migratory wave of the water ethnicities [10]. But it was only from the maloca that the perception of the "shamanic world" and the networks of thought were marked [13]. The intervention of the human being was masked and the gender roles that emphasized the masculine and feminine essence were distinguished, the latter being the "fundamental of life" [14].

From this moment, a way of life was conceived. It tends to take care of the environment and aims for the reason of the human being in the nature, where the indigenous person not only looked for consumption, well-being and acquisition of material goods, but acceded to other levels of consciousness that facilitated the state of transcendence and the perspective of collective property, making the relation between health-nature-culture complete and indissoluble [15].

3. Basic principles of the indigenous universe

According to several authors [13, 14, 16–19], the indigenous universe is a living network of thought that sees everything as something more than the sum of its parts. In this sense, Gavilán-Pinto [16] talks about the fundamental principles of that universe being these: parity, complementary opposition, cosmological, community life, respect, and ritualism.

Parity constitutes the fundamental basis of unity in natural and human diversity from seeming opposites that complement each other. It is noteworthy that parity is not duality, the duality for Descartes is based on the interaction and differences between material (body) and immaterial (mind) in a particular place that he called "epiphysis." But the non-identification of that place of interaction between the material and the immaterial makes us speak of a quantum theory that would be closer to the philosophy of the indigenous peoples [16]; what Quintana [14] defines as the non-place[1] that is generated in the macro shamanistic space.

The principle of complementary opposition is based on observations of complementarity in nature (Life-Death, Day-Night, Male-Female, among others), which shows a logic that must contemplate several points of view and therefore, questioning the normality in a system, which would enrich the realities (simple or complex) from complementary perspectives [16].

The cosmological principle unites worlds, space, time, culture and history. It is an interaction of the infinite with the finite. In this way, many cultures contemplate mythical origin, enriched by cultural dynamisms, as the sense of occupying that space and relating to its environment. In this sense, Quintana [20] quotes Nimuendaju [21]

> *"(…) for the Tikuna the sky presents three subdivisions: the first one is inhabited by men similar to us; in the second live the souls of the deceased and a mythological being (Tae), whom at birth a child gives a soul; in the last live the vultures' kings (Vultur papa). Further away are the Sun (üakü), the Moon (Tawema kü) and the Stars (Êta). The earth or the intermediate world is inhabited by men and some demons; The underworld comprises the underwater region and various lands where demons and humans live with strange defects (blind, dwarf, deaf, people with-no anus)" (p. 103).*

The principle of community life is based on a reflection of personal and collective experiences (ancestral knowledge, cultural values, cosmology and practices), which makes *indigenous peoples live from real rather than abstract experiences* ([16]. p, 24), generating a new knowledge. Quintana [22] indicates that for indigenous cultures it is the body that is under construction and not the soul. So, that the management given to the body along with morality will be reflected in the diseases and the type of collective treatment of them. Thus, it can be considered that the way of living or not living in community directly influences health.

The principle of respect and rituality is the mytheme of the cultural identity of the ethnic groups. This consists in the greeting and permission of action to

[1] Space that arises between the territorialization of the body and spaces of cultural importance.

the owners or spirits of places, plants and/or animals, which has implications of remembering stories of the resource origin and the moral behavior that people must have in the community. In this sense, the mythical history of the place, plant and/or animal is vital at the time of its use, because it gives an indication of why to use it or not. It is thus that the "legitimate" use of the place, plant and/or animal at the level of ethnics or even of clans can be valid or not to the ethnic groups that use similar places and/or the same plant and/or animal for different uses [23].

In this sense, the problem of generating spaces in the western school arises, where these traditional indigenous logics could be integrated. In order to articulate them it is necessary to contemplate ethnic education as a form of environmental management that contemplates cultural syncretism and multilingualism [17].

4. The importance of myth and science: the Yakuruna and the human being

The search for evidence of the similarity between rock art and myth [24] has helped to raise and reconsider hypotheses that contribute to the establishment of cultural sequences, indispensable for the understanding of history. This makes this kind of discoveries go beyond the aesthetic, as it frames the relationship between nature and the human being as a fundamental part of cultural history [10].

Likewise, these characteristics reveal a historical temporality that accounts for indigenous developments, which lead to the reevaluation of the "need" to resort to translocation disguised as cultural loans, which make indigenous peoples look like dependent and incapacitated. This feature has covered the longest cultural genocide in history since it not only limited the extraction of "green gold" from its territories [22], but also brought contempt for the greatest of its treasures: "the Indigenous spirit," turning art (oral, handicrafts, petroglyphs, music and paintings) into weapons that endured beyond silence: in an "invisible shadow" [20].

In this way, the relationship between the snake and the human being has been a common characteristic of diverse ethnic groups of the Amazon; the "mytheme", which summons their unity through the mythical idea of a common origin ("Dïïjoma," "Yakuruna," "Añiraima"), masking in this relation the essence of the primordial sense of humanity and the demiurgic force which assigned a place not only in a geographical space but in "the universal concert" [14].

The myth characterizes the space, conditioning the first contact with nature [22], it forms part of the social structure as it generates channels of communication not only with grandparents, plants and sacred animals "owners," but with the past, present and future. Therefore, the management of the world involves relations with the beings of this world and those of the spiritual world [13], which enriches and characterizes the vision of the environment inside and outside the indigenous communities.

5. The essentials of the old and the new: their influence in the creation of the new world

Due to the European and African expansion in the American geo-historical space, the results of the ideas, feelings, beliefs, opinions and attitudes of the meeting of the three worlds were generated, forging a collective mentality reflecting the new society where they developed [25].

The mixture of Spanish chivalric, religious and mercantilist ideals, as well as the assimilation of indigenous productive systems by the invaders (Europeans and Africans), generated different "New-ethnicities" [26] characterized by the

relationship between them. This gave the natives a unifying role that led to the "indianization" of Spanish and African, as part of a system of response to subsistence through forced insertion in previously organized societies [27].

Based on the above, indigenous ethnic backgrounds are gaining importance in the conquest due to the diversity of aboriginal ethnic groups subjected to the processes of cultural transformation, variability of the mode of production-subsistence and diversity of ecosystems, which added to the irregular processes of conquest as to the times and models of penetration along with miscegenation gave rise to the "myth of the new world." The inter-ethnic turned into an inter-fecundating and complementary force, as opposed to the inter-classist dynamics that result in conflict and genocide [26].

The chivalrous ideals, the beliefs and rites characteristic of the Middle Ages, were mixed with aristocratic aspirations, mercantilist ideals and images of a world full of new worldviews, converting the loss cities, the treasures and the indigenous worlds, into the mythic forces and the impellers of the conquest. In this order of ideas, the old and the new were intertwined reproducing their essentialities, in which indigenous mythology enriched the European fixing actions and through the decisions of the leaders who modified the changes and goals of society [28–32], This stimulates the colonization of new territories and gave rise to an "antagonistic acculturation" by the transcultural dynamics [33].

This cultural hybridization made the Europeans project their treasures in the "new world." Thus, the myths of: Dorado; Metha; Xeira; Tree of Life (Wochine in the Amazon); World of waters (Yakuruna) created the stimulus that led to the conquest, which, even if they were not able to explain the indigenous myth from European mythological ideas and traditions, they projected the reality of natural resources, the beauty of landscapes and scarcely the depth of indigenous traditions.

6. Non-places and the world of waters

To talk of a non-place is to retake those spaces that only allow "to be" when the identity is contributed [34], therefore the description of the world in abstract terms serves to form an affective bond between places [35] and people "geographic actor" [36], in which the perception of territory (direct contact with space) along with its cognition (spaces where the "geographical actor" has never been present) contribute to symbolic elements [37] that will affect the conception and valuation of space [17].

In this way, a revaluation of the mechanistic notions of the idea of space under the physical notions (large, high, width, long, small) has been generated, added to the relativism of dimensions depending on the observer's point of view [38]. This enables the human being to move both in time and space, facilitating the understanding of the world, describing the here and now, placing an "all" in it through the maps [39].

According to the worldview of the "river ethnics" (the major water source depends on ethnicity), which was originated by the mythical tree that in its fall gave shape to the great basin and the worlds (earth, sky, water), characterizing in this case the Amazon as a large and diverse place in such aspects as: natural, geological, climatological, flora, fauna, water, and also in regard to the societies and cultures that occupy it. "The allocation of a territory to each group is born of the cultural need to define discontinuous entities that allows an order that avoids chaos (…) that serves to live well" ([13], p. 131); So, the allocation, as the guideline for organization and recognition of tribal territories, is related to predetermined sites of the landscape: "the mythical place of birth" [17].

In this sense, indigenous peoples territorialize their body and incorporate from their rituals, powers of essences (owners) as an integral part of the "being" (world),

converting the geographical space in which the group was born, not only into the source of ethnic identity, but into the basis of the "shamanistic macrosphere." From this, territorial associations generate networks between malocas [40] and tunnels between territories and other worlds that only the shamans know and have access to. Van der Hammen [13] reported the existence of subterranean tunnels reported to her by "Chapune," and attributed to them the displacement of fish from the Caquetá River to the middle lakes of Miritíí. This evidence the existence of "shamanistic territory" which can be understood through the maloca [17].

The maloca represents the universe in a concrete system, making it accessible and enabling actions in it. Its location is related to the myths of origin, consolidating territorial associations as a "world order" ("Dïïjoma," "Yakuruna," "Añiraima"), which in turn establishes models of social relations and spatial management for each ethnic group (mythical, ritual and human), memory (moral and political), history of the territory, source (power, defense, identity, ethnic cohesion), and life. [14].

It should be borne in mind that the Amazon has been occupied by human groups for ~10,000 years [11]. Thus, relations were established with the environment "nature," which through European contact were decimated and displaced by the extractivist mentality. In this way, the Amazon as a "pantry" was incorporated in globalization, and thus in territorial disputes of countries for which it has been a remote frontier [17].

As a result, the European legacy left a vision of territory from "scientific thinking," a mapped and delimited geographic space, which defines the sovereignty of a political power, in charge of managing, controlling and defending resources (capital territory) and Human groups that exist there, a territory that exists independently of humans, although these give it meaning [14].

From the above-mentioned characteristics, the interbreeding between indigenous peoples, Europeans and Africans, generated a cultural, social and political complexity, forming an Amazonian rural population, living from the jungle and the waters, a "forest society" of indigenous roots [41]. They gained access to public education and public services through interaction with the market and cities. Because of this, the "extractivist" mentality of European heritage took a multicultural and environmentalist turn, which encouraged the formulation of cultural and natural conservation and protection policies [42], "which in the case of Colombia is reflected in the institution of indigenous reservations in the 1980s and the 1991 Political Constitution" ([14], p. 99).

> *"(...) the presence of the State has generated a homogenization of the differences (territorial logics) camouflaged in a policy of 'national unity', whose strengthening of ethnic and cultural specificities does not take into account that the fact that ethnic groups share a 'Shamanic macrospace' implies a 'world order', where the management of territorial space is a supra-ethnic legacy of care of this great being (Planet Earth)" ([14], p. 100).*

The differences in world conceptions between indigenous and western territorial logics have led to a different recognition of the problems of cultural and natural protection and conservation by these two actors. In response to the above, [43, 44] are generated, but because they are laws that try to integrate an indigenous logic[2] and a western logic[3] in a territory characterized by armed conflict (illicit crops),

[2] It privileges a vital center over the boundary, "condenses" time, it has a vision of "home territory" (humanized space) and opposes human and nonhuman people [14].

[3] It privileges the limit to demarcate its scope, it has a linear vision of time and a vision of "territory-capital" that opposes the natural to the cultural [14].

and policies of exploitation by the government (agroindustry crops, hydrocarbons, minerals and hydroelectric dams) [14], the need to establish negotiation tables under participatory methodologies arises [45].

7. The development of the territory from the geographic-environmental-humanistic view

Geologically it could be said that the forests due to the estuaries and an atmosphere with greater amount of oxygen and carbon dioxide, came to feed the oceanic life and contributed to the formation of the continental life. Colombia being an equatorial country, its jungles are the relation with the water of: oceanic masses (Pacific, Caribbean, Atlantic), banks of clouds (glaciers, Andes), Amazonian evaporation, which together generate a zone of convergence where the rivers are born [46], "the world of water" that feeds not only the jungle slopes but all the Amazon.

The loss of the jungles [47] or the "Eco-todo" have generated a search for solutions that have not taken into account socio-historical bases or processes of devastation [48]. So, these must be seen from the glaciations, whose studies and evidence show that the jungle has not always been there and has been in other places. In other words, the jungle was transformed into savannahs, which became refuges where life had the possibility of being born, spiced, differentiated, and diversified [17].

From the previous idea, the forest can be considered as a "matrix of life," where there are trees that can live between 600 and 1000 years [49]. Each stratum generated niches where their relationships and connections have led the forest to be considered the largest organism on the planet, so human beings established a mutualism with it, generating a niche to themselves and to the planet. They converted some of its plants into channels in other worlds "Entheogens" [50], which, because of their complexity and relationship, allowed a non-scientific knowledge of the forest, which gave it a much greater sense of transcendence and mutual belonging, generating an environmental and social history of the seeds, which makes necessary the "naturist" revaluation of nature.

It should be noted that the process of European conquest, changed the way of recognizing and relating to the jungle, and altered the "vision of environment," which generated an "Andean-Amazonian" landscape, under a vision of territory as "pantry," which became over time in: Bioprospection, Bio piracy (looting of resources with State complicity and intense development of scientific exploration), transforming the jungle in a Bio business (projection of multinational business interests: policies of privatization, denationalization and loss of autonomy), which leads it to be a territory to deplete and destroy [22].

Also, in its beginnings, this European model of forest management, made invisible the relationship between plants and the soil by not taking into account that from this the different layers that make up the soil are formed. Due to this, the dynamics of felling, fire, pasture and livestock, caused that arable land was devastated by water and the wind causing erosion, which generated borders between the territories [51], reason why it can be considered that "the evolution of the forest," in agricultural systems, livestock and plantations of European and non-indigenous legacy (soils of biochar) marks the beginning of the end of it.

In this vein, the European model of forest management left behind an inheritance of an "extractive" development mentality that produces poverty and misery, which does not reinvest in the territory, perhaps because investors are not interested in ending the armed conflict, but just in the fact that these conflicts provide them with advantages that facilitate their intervention, in which "rationality" makes them superior for the fulfillment of their interests but not responsible. So, the vision of "strategic ecosystems" disconnected the sensibility and joint search for answers and

meaning, turning dead trees into spirit coffins, and the vast majority of us into the result of a devastated country whose wealth is ignored by its own people.

8. Indigenous ecological relations

The explanation of the reason for the control of the world is found in the myths of the ethnicities, and it is the maloca where this "non-place" marked the perception of the "shamanic world" and the networks of thought that generated a way of life which tended to take care of the environment, making the relationship between health, nature, and culture complete and indissoluble [14, 17].

In this sense, indigenous peoples tended to take care of the environment with a vision of sustainability, which is confirmed in some studies that indicate that for ethnic groups such as the Kasajos and Mohawks, the fact of making a decision of importance should contemplate the invocation of seven generations of ancestors to discuss the effect of this decision on the next seven generations [52], which demonstrates a cyclical movement between culture and nature through a bidirectional indigenous time relationship where the future may be behind and the past ahead [16].

This shamanic relationship, integrates for the natives the world of the natural and supernatural in a concept of environmental sustainability that was fed by the Human being-nature relationship given by the first contact established with it, which conditions the actions on it [22]. In this sense, the different "visions of nature" by indigenous peoples have emerged due to changes historically introduced long before the "discovery" (cover-up) of America. So "nature belongs to the field of culture, and cultural patterns must be taken into account to understand actions on it" ([13], p. 3).

These historical cultural changes prior to the "discovery" of America, determined a relationship between peoples and their environment through an environmental history, as well as a social history of the seeds [22]. This makes that the region where these peoples are located have an optimal spatial arrangement that maximizes ecological integrity through good use of land [53].

It is noteworthy that after more than 500 years of a colonization (re-foundation of constituted cities) [54], a neo-colonialism (mythical imaginaries with chivalric ideals accompanied by Catholic and/or Protestant missions) [55] and a republic that was crueler than the colony itself (by allowing the killings of the Arara house, rubber bands, drug trafficking and an armed conflict that not only affected the indigenous communities but also the Afro-descendants). It was only until 1991 that a constitution in Colombia gave real recognition to indigenous peoples. So, it is illogical to think that the solution to the problems of the ecological relations of the indigenous with their environment is soon to be solved, and especially if we take into account that many laws that tend towards the cultural perpetuity have other laws that are against it, defending extractive policies and control and management of resources [14].

This has led many of the multiracial people, Afro-descendant and indigenous people to deny their indigenous or African heritage and underestimate it, making the "whitening" stand out in works carried out in communities such as Quintana [9, 14, 17, 23, 45, 56]. Due to the "whitening" that the miscegenation has led to the community, it is considered that the indigenous being is a transition that will lead children to be the same as the western children, which conditioned a vision of development that does not differentiate from economic growth.

This attempt to equate equality (deserved well-being) with difference (diversity) [57] is fueled by the fact of not feeling satisfied with their aspirations and a religious encounter that contemplates the pluricultural as incompatible, and sees the different spiritualties as not converging spaces towards intercultural values.

On the other hand, if we see the convergence of intercultural values, an exclusion from pluralism camouflaged in tolerance would not be fostered. This would not mean a new "miscegenation" that tries to get the best of each culture, but the recognition of the differences that lead to respect that enriches the actors involved, allowing them to be one within the multiple.

In this sense, starting from the fact that "human being cannot be understood only with reason" ([58], p. 21), solutions for the adaptation of western human society to the processes that exist in nature could be generated [59]. But it will only be in the integration of territories (Indigenous-Western) in which eco-efficiency, biomimicry [60] and the articulation of the economic-social-natural relationship, will generate sustainable proposals outside the framework of unsustainable contexts: a "real" sustainability on a planetary scale [17].

An articulation of the economic-social-natural relationship, makes it necessary to start from the fact that the idea of nature for the indigenous people has had a process of intercultural dynamics that, for the case of Latin America, has been characterized by acculturation, deculturation and cultural integration [61], where the educational context (maloca, family, elders, educational institutions) has been mediated by religion (imposed or traditional) and/or external and/or internal economic interests. In this way, the teaching, knowledge and skills that interact from the West to another society or to itself (hybridizations, negotiations, exchanges, translations) are transcendental in the identification of the cultural heritage; and, therefore, in the understanding and actions on the world [56, 62].

The above makes necessary the understanding of aspects on world view, epistemology, ontology and axiology, which compromise the origins and dynamics of the culture in different contexts [63], generating an assimilation of science that is born of the daily knowledge, systematicity of use and cultural signification, which would increase the resistance to cultural change [64, 65].

9. Indigenous peoples and multilingualism

In today's world, there are about 6909 different languages, yet 96% of the languages that exist are spoken by only 3% of the world's population, so the way children acquire language has been a motive of fascination for both linguists and psychologists, who hold a debate between the "natural" and the "social." Those who defend the naturalist position assert that the brain is designed to learn grammatical structure and therefore language, while others affirm that language acquisition is done through education. In the middle of the debate between these two positions, a third was born that sees the process of language acquisition as the combination of nature and education [66].

To begin this journey between the "naturalistic" and "social" posture of language, the theories about how the primitive human brain reaches its present size is taken up again. On the one hand, a posture speaks of language as the device that activates brain development; and on the other, it speaks of the brain that reaches the size suitable for the use of language.

Under the above premises, the theory of the logical structure of linguistics arises [67], where it is argued that the ease with which children of all cultures learn grammar through everyday speech is a condition of cognitive development. In this way, perceptions and the need to communicate them, coupled with the child's need to question and manipulate the world, make language develop through a constant and unstructured exposition of it [68].

In spite of the above, we talk of a "critical period," which establishes the neurological guidelines for language and, therefore, those of learning any language.

Despite the discovery of the gene (FoxP2) that disrupts the normal grammatical ease [69–71], it cannot be considered responsible for the complexity of learning grammar. Because of this, language acquisition is much easier for children than for adults. In this way, babbling would be considered as a "pre-linguistic phrase," which helps to form the necessary social bonds before learning to speak.

In the case of Amazonia, religious and political powers provided changing linguistic policies to facilitate the conversion of indigenous peoples. "There are many languages in this area. A problem planted by the devil to make the conversion of the indigenous people more difficult" (Padre Nieto Polo, eighteenth century). This problematic, framed in processes of acculturation, deculturation and cultural integration [61], has been evidenced through anthropological studies and historical data that have shown that with the European and African entry, people passed from talking about more than 1200 languages to 240, which 101 are currently registered in Colombia, where 84 are alive and 17 are extinct [68].

Due to the importance of language, the colonizers used general indigenous languages (Ñeengatu and Queshua) as franca lingua for evangelization [72]. Thus, it caused a process of weakening and loss of many native languages by the cultural rejection imposed by the colonizers. This situation reached its maximum expression in the nineteenth century with monolingual nationalist policies, turning Portuguese and Spanish into the most widely spoken languages in this region and strengthening the extinction of Amazonian multilingualism.

In this sense, the 1991 Political Constitution of Colombia has tried to reverse the processes of acculturation and deculturation, recognizing the multiethnic, pluricultural and multilingual character through educational policies that propose the promotion of intercultural bilingual education, along with policies of protection, preservation and strengthening of native languages [73].

10. Legal norms and their relation with the indigenous of Colombia

The recognition of the rights of indigenous peoples has been the result of a slow process of awareness of the international community. Thus, in 1919, the International Labor Organization (ILO) took the initiative in the matter of the rights of indigenous peoples until it reached Convention No. 169 of 1989, which applies to independent countries considered indigenous by the fact of descending of populations that inhabited the country or a geographical region to which the country belongs at the time of the conquest or colonization. It has so far become the most comprehensive international legal instrument on the protection of indigenous and tribal peoples. There are also international laws that recognize the rights of indigenous peoples, such as resolution WHA30.49 of 1977 [74, 75], resolution WHA51.24 [76] and declaration of [77].

In this same way, Colombia has taken into account the indigenous peoples through the Ministry of Health (Resolution No. 10013 of September 24, 1981, [78] and Resolution 5078 of 1992), but it is considered that it actually had an advance (Article 2, 6, 7, 8, 45 (Numeral 2), 70, 246 49, 356 (clause 3), article 56 and trans. 286 and 287 [79]), which stipulate the fundamental principles that recognize the ethnic and cultural diversity of Colombia and, therefore, to the indigenous populations. It also has stipulated laws that regulate the international norm, among them the [80, 81]. Thus, within this legal and normative support for the protection of the indigenous peoples, provisions were included on: territory management, ethnic sovereignty (development models), recognition of benefits by Genetic resources and direct access to: state resources, public education services (recognition of their multilingual status), health and housing.

In this sense, the Political Constitution of 1991 establishes that the indigenous territories are of collective property with special treatment, reason why it protects the territorial and cultural integrity of these towns. Thus, the collective property of the guards and communal lands of the ethnic groups is established, giving them the character of inalienable[4], which is contradictory from the Western Colombian logic that only grants the indigenous community the territorial ownership of the superficial part of the soil, contradicting among other things the judgments of the Colombian Constitutional Court: T-254/94 [82], T-496/96 [83] and T-025/2004 [84]; The Law of Congress 1448 of 2011 [85], and the Decree Law of the Ministry of Interior 4633 of 2011 [86].

This means that, if mineral wealth is to be found, the Government will have the right to expropriate and relocate the reserve unless it is overlapped in a national park such as Macedonia[5]. In this way, any administrative act affecting Macedonia must be consulted by the ethnic authorities, ensuring the recognition of cultures and their needs for territorial use, as well as the perpetuity of long-term resources as typified by ILO agreement 169 and ratified by Act 21 of 1991 [87].

Likewise, the interaction of the actors involved (*association of indigenous cabildos*, National Parks, indigenous communities, governmental and nongovernmental entities, among others) has generated a symbolic reconfiguration of territory proposed by the Colombian State, as evidenced by [88]. It recognizes the indigenous territory as a victim of a territorial conception that did not take into account the world view and the special and collective bond that unites the indigenous people with what they call "mother earth." But this initiative will have no effect until the decree of the Ministry of Agriculture and Rural Development 1987 of September 12, 2013 [86] is repealed; decree 1464 of July 2013 [89] of the Ministry of Housing City and Territory; the bill 46 of 2011 [90] of the National Congress of the Colombian Republic and the right that gives the law of the Congress 685/2001 [91] about the mining code, which imposes the obligation to exploit minerals in indigenous mining areas and mixed mining zones.

This shows contradictions between local laws and international agreements, which have created injustices not only for indigenous peoples but also for the Republic of Colombia, which is evidenced by the non-compliance with the ONU Convention on Biological Biodiversity [92] and Decision 391 of 1996. These legitimize the importance of the origin of knowledge and the recognition of the benefits associated with genetic resources and their derived products. In this way, access to genetic resources and the compensation of those who provide them following the model of intellectual property, so that traditional indigenous knowledge has no recognition or compensation for their contribution, and therefore in the conservation of biological diversity. Sample of this is evidenced in the patents for use of Yajé (*Banisteriopsis caapi*), Copoazu (*Theobroma grandiflorum*), Curare (*Chondrodendrom tomentosum*), which were carried out despite the Convention on Biological Biodiversity [92] and decision 391 and 369 of 1992 [23, 93].

11. Final considerations

Research analysis showed that "cognitive skills are socially transmitted, socially constrained, nurtured and animated" ([94], p. 40), where sub-cultural variations and context respond to the understanding-relation-causality of the subject with the natural world [95, 96] which gave rise to traditional land use models for indigenous people.

[4] It means that it cannot be sold or transacted by the members of the indigenous community.

[5] Indigenous village located in the Amazonian Trapezium (Colombia).

It is necessary to recognize the history of origin of the cultures in which we work to interpret the territorial logics in which the population is submerged. Although it is true that cultural dynamism establishes that cultures are nourished and fed. These mechanisms of knowledge allow to generate processes to demystify ideals of whitewashing and modernity.

The territorial relationship shows that the territory is a social construction as Fals Borda states, so to speak of environmental sustainability, is to claim the category of territory as an essential support for the reproduction of culture. In order to be able to weigh the problem of the approach from multiple perspectives, the approaches must be materialized in the social, ecological, political and economic transversality that allows to join the paradigms avoiding to permeate the goals and actions executed within the population.

The homogenization of territorial logics through a "cultural and territorial protection of indigenous peoples" through parks and natural reserves superimposed on legally recognized indigenous territories, territorial planning plans mediated by policies of exploitation of agroindustry crops, hydrocarbons, minerals and hydroelectric dams, as well as the same armed conflict generated by illicit crops, could be masking a form of "neo-colonialism" camouflaged in a policy of "national unity."

This documentary review analyzes how knowledge about the cultural conception of space and development is the best tool to generate protection for native models of forest use. Likewise, it is exposed the danger of the perpetuity of indigenous peoples in the territory due to different emerging actors, which covered by extractive policies, could expropriate indigenous from their territory. In this way, even if the Colombian State recognizes as indigenous those who have traditional ancestral beliefs, a traditional language and occupy a specific territory, the extinction of indigenous languages and the loss of traditional beliefs imply a historical process that leads to the loss of indigenous rights, and therefore, to the loss of their ancestral territories. This is reinforced by interests in mining exploitation and extraction of hydrocarbons in indigenous territories. A clear example of an economic model of exploitation of natural resources that claim to be sustainable in unsustainable contexts.

Acknowledgements

Paper related to the VIVENCIAS research group, result of a Doctoral Thesis in Social Studies of the Universidad Distrital Francisco José de Caldas, directed by the PhD Fráncisco Sierra Gutiérrez in the Line of Political Power and Collective Subjects.

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Chapter 5

Runaway Freedom: Fugitive Black Slaves' Destinies in Late Colonial Chile (1760–1805)

Cristián Perucci González

Abstract

This chapter is an applied study on fugitive black slaves in late colonial Chile (1760–1805). It is based on a selection of cases, displayed in a socioeconomic scene whose labor force, free and slave tends to circulation and vagrancy. The sources provide a rich material for a reflection focused mainly on the crossroad between labor systems, racialized groups, and the links with the territory. Based on the concept of fugitive freedom, we seek to express the diversity of aspirations in those who become runaways. Furthermore, understanding the conditions of oppression that usually drives a slave to escape, fugitive freedom allows us to think about an eventual destination hoped by fugitives that can be read in a historical way.

Keywords: runaway freedom, labor, racialized group

1. Introduction: Africans and afro-descendants in late colonial Chile

Economically speaking, the Kingdom of Chile (*Reyno de Chile*) always had a marginal role among the Hispanic domains in America, but it was primal in structuring the continental administration. One of its main functions was to protect the Pacific Ocean (*Mar del Sur*) against European vessels that crossed the Magellan's Strait, mostly from British and Dutch origin. Likewise, this colony historically shared the southern border with the Mapuche people, an independent indigenous group whose resistance circumscribed the Hispanic influence toward the center and north zones of the country.

Leaving aside the importance of the city of Santiago, capital of the Kingdom, colonial Chile had eminently a rural character. Encased between the Andes Mountains and the Pacific Ocean, between the Atacama Desert to the north and the Bío-Bío River frontier to the south, its territory was relatively isolated from the other South American regions in geographical terms.

This isolation is probably related to the Chilean demographic particularities. Apparently, the percentage of black population was comparatively lower here than in other colonies. However, it is not possible to establish an accurate demographic panorama based on the data provided by the censuses of the late eighteenth and early nineteenth centuries. First of all, there are differences in the delimitation of the territory. For example, the census of 1778 is the only one that includes the province of Cuyo, located east of the Andes and the one of 1813 marginalized the most important cities, Santiago and Concepción [1]. Therefore, the numbers vary

greatly from one study to another. In addition, we cannot rely on the ways the information was collected or the ideologies behind the racial classifications used. In 1778, the population was divided into blacks, indians, half-breed (mestizos), and whites; while in 1813, there were two major groups: Spaniards-European foreigners and castes, the latter being divided into indians, half-Breed (mestizos), mulattos, and blacks [1].

However, using these same data, historians such as Domingo Amunategui Solar and Gonzalo Vial Correa counted the number of African and Afro-descendent population between 20,000 and 25,000 people for the eighteenth century in Chile [2, 3]. Both left the province of Cuyo out of their calculation, showing us that this nationalist historiography projects an idealized image of both the population and the territory. Indeed, this omission or denial has been an obstacle to knowing more about the participation of black population in the history of Chile and the way in which its presence was understood and represented. Let us clarify that it is not the African presence that traditional historiography has denied, but the variety of roles it fulfilled in society, its circumstances, its own diversity, and its intervention in the contingencies of the colonial world in which it was inserted.

Fortunately, historians such as Celia Cussen and Hugo Contreras have given new energies to the documentary study of black presence in Chile, influencing younger generations of researchers to continue exploring these subjects in all their diversities. Contreras has made important contributions to the knowledge of the black-militias (milicias de pardos), which were militia units commonly composed by free blacks between the eighteenth and nineteenth centuries in the Southern Cone. The author acknowledges that those who were part of these militias had a high degree of obedience to the Hispanic regime, because "their enlistment placed them under the eyes of the authorities as loyal to the monarchy, men of luster and good manners, distancing them away from the image of potential delinquents, bad living persons, or rebels, which were frequently expressed against them [4]." This description expresses the heterogeneity existing both in the historical experience of the African population and in the hegemonic speeches of the Hispanic colonial order, which is present in the sources preserved by the National Historical Archive of Chile, where lists of sale and transport of slaves, manumission demands, complaints of crimes and vagrancy, prohibitions, and regulations for the use of weapons and circulation in cities and in the countryside can be found. In reviewing some of these dossiers, we started thinking of several cases that could be considered opposed, in historical experience and in hegemonic discourses, to the black-militias cases: the fugitive black slaves in colonial Chile. Below, exploring some judicial sources, we will try to decipher who these fugitives were and propose an explanation of the possible relationships, interpretations, similarities, and differences between them.

2. Runaway freedom

Freedom is a broad concept in slavery studies and has a polysemous nature. It is usually used in a pragmatic sense, opposing freedom and slavery as legal conditions. Several lines of analysis can be examined through this point of view, such as social mobility, access to public offices, differences in tax contribution, among others. In this regard, freedom is usually conceived as the main goal of slaves who seek to get rid of their servile nature.

The chief strategy to achieve this goal is manumission [5]. By the end of eighteenth century, manumission was a usual practice in colonial Chile. As historian Guillermo Feliú Cruz expresses, "the slave could obtain his freedom when, with his own economies, he paid his master the value in which he had been acquired [6]."

Although these cases were in accordance with law, it rarely happened. Feliú Cruz shows that most common cases of manumission were those where the owner after his death, due to a "religious piety feeling" granted the emancipation by testament, and sometimes leave the slave "a small sum of money so that he could dedicate to some trade [6]." These types of manumission can be found all along Spanish Colonial America, and so in English North America. Research about the United States tends to be more revealing and undistorted on the motivation of masters who gave freedom to their slaves. We see that many owners freed those who were old or sick, so as not to support this burden anymore [7]. In these cases, freedom was not always something desirable.

Thus, if we keep thinking about freedom as slaves' "main goal," we must then expand its meaning both in an analytical way and, specially, as an historical concept. Freedom as a precious aim with no specific shape, as it can be deduced from Orlando Patterson's "The meaning of freedom" [8]. Freedom is the ambition of a slave formed by lack of means and material abandonment. Freedom is an unspecified dream with an important mobilizing potential. In this sense, manumission is not the only strategy to gain freedom. In some cases, escape shows as a more viable and practicable path to access it.

In 1764, in a vineyard property of María del Carmen Daniel, near Santiago, a group of black slaves decided to runaway across the Andes Mountains. This association was denounced by an unknown stranger, leading to their imprisonment. The further trial starts explaining that seven blacks and one *sambo* (mixed individual of African and American Indigenous ancestry) who were found and arrested with no resistance, and no weapons but a gun, [the sambo] did not know the others wanted to rise or cause any havoc at the plantation house (*hacienda*), he only knew they wanted to escape to see themselves free of their masters [9]."

Following the source's locution, manumission can be understood as a means to "be free," escape as a means to "see oneself free" despite legal conditions. This kind of thought reveals a general reason to break away. On the one hand, broadly speaking, this reason may be called the horrors of slavery, characterized by the masters' brutality and the shock suffered by the newcomers from Africa. Historian Marc Ferro judges that the trauma of travel was such that immediately after arriving in the Caribbean, the "new blacks" wanted to escape. The settlers who understood their situation tried to reduce the shock by adapting the slaves before putting them to work. But the anguish led them to mutilate themselves, to choke themselves, or attempt to kill their new masters. Thus, suicide or runaway were significant forms of resistance [10]. However, the horrors of slavery do not really describe possible ideas about a runaway life. And indeed, not all black slaves were mistreated. That is why, on the other hand, freedom could be seen not just as a change of status, but as an ambition of a social change, a possibility to bring destiny under control. Manumission is only one opportunity among others, and runaway could be a possibility toward it. What we are trying to say is that runaway explanations tend to think about push factors, rarely about pull factors. The slave could have had ideal reasons that forced him to leave, an imagined place where to escape. This is what we have called runaway freedom.

3. The *roads*, a fugitive way of life

Fugitive freedom always remains as an idea, an abstraction on the place (or conditions) of destiny. A conceptualization that sometimes could be very concrete, such as the fortified citadel (*quilombo*) of Palmares for the fugitive blacks of Pernambuco. The idealization and influence of this community was so great

that settlers "also wished to eliminate the lure of escape that Palmares constantly represented to the plantation slaves [11]." The slaves escaped by cause of mistreatment, but then they hit the roads toward Palmares because the quilombo appealed them. Even if colonial Chile has no particularity comparable to what is found in the northeastern Brazil, we can still try to understand what slaves were looking for in running away, especially what they envisioned as the destiny of their break. In the case of María del Carmen's slaves, one of them called Salvador confessed "that his prison is attributable to the fact that he was breaking toward Mendoza, and that the runaway mode was following and accompanying the others with no intention of offending anyone. As it was verified when the Dragoons captain and his soldiers went to apprehend them, they surrendered without the slightest resistance, not having another circumstance or motivation but seeing that his fellows and beloved blacks were leaving [9]."

Well-treated slaves wishing this kind of change in their life conditions may seem a paradox. In this particular case, the attraction exerted by fugitive freedom is not horror of slavery. Salvador makes the decision to leave after noting the collective nature of the escape. The experience of a sentimental link with a group identified as black awakens his desire to follow it. The escape resulting from a racial affinity, or from a specific affectivity with a group, opens a new perspective to understand the possibilities of a slave beyond social and spatial limits. Freedom is accordingly shaped by feelings, prejudices, beliefs, ambitions, and ideals awakened by the slave about the social and geographical situation he will find in fleeing. Normally, most slaves escaped without a plan behind them that is why they did not stay long as fugitives, either because they returned or because they were caught [12]. However, the lack of a runaway plan does not imply the absence of this ideal dimension bear by the slave when leaving his master.

Following a group of *fellows and beloved blacks* was probably not a substantial reason to escape. This collective runaway was arranged and requested by a *sambo* Balentin, who raised a kind of motto on the eventual injustices on the masters' treatment. We may think his specific purpose was to put forward a background shared between black slaves. In her study of fugitive blacks in the region of Charcas, Gutiérrez Brockington wonders if this stimulation to escape is not a theft, or some form of shelter provided to the slave [13]. Matheo, one of the plotted, indicates that "a *sambo* Romero inquired him saying that he had been running away for a long time, that for this reason, he was practical on the roads and that they could escape to the other slope [9]."

The incitement to escape is an offer to leave the slave condition, if not materially, at least psychologically. The idea of a better life is represented in being a runaway, or more precisely, to share this condition with other fellows. Some slaves turned their runaway condition into a normal situation, a way of life that goes well with this situation described as "practical on the roads." In fact, in other colonial sources, we find the term "practical on the roads" or sometimes only "practical" as a synonym of the word *baqueano*, or local guide, someone who knows the roads and acts as a guide to others. The roads are an image of an external form of life indicating circulation. For a fugitive, slave indicates relocation of habits and skills.

Yet, an important branch of Chilean historiography has devoted to study forms of displacement for Spanish Colonial times, usually under the conceptualization of vagrancy. In 1960s, Mario Góngora concluded his work *Vagabundaje y sociedad Fronteriza en Chile* asserting that in Chilean society, "born after an adventurous conquest, imbued with pastoral cattle ranching, with Indians uprooted from their land, the trend to displacement was not surprising [14]." Rural population was "not nomadic but was neither deeply rooted in the territory" observing a "intimate tendency to vagrancy in groups without statute, privileges, or organization within the

existing order such as marginal groups of half-breed, mulattos, sambos (*mestizos, mulatos, zambos*) and free blacks joined, for obvious reasons, by all kinds of criminals, slaves, and fugitive Indians [14]." Two decades later, historian Gabriel Salazar described the conformation of Chilean peasantry through the notion of *mass work*, i.e., the massification of production from an enlargement of the labor force, an historic process observed several times in the colonial period. "Colonial entrepreneurs discovered that they could quickly increase their quota of gain by massifying the exports of wheat to Peru [15]," Salazar asserts. In the eighteenth century, "a feverish logic of mass production-export reappeared again, and with it, not only the expectations of big profits and the usurious practices of great merchants, but also, and what was worse, the concept of work mass. The labor training process weakened. It was necessary an increasing number of workers with pure physical capacity [...]. From this moment, silent, gradual, but steadily, the wandering masses began to be recruited by the central economic system of the Colony. Neither the Church nor the King, nor local authorities tried to stop that recruitment, since neither their ideological schemes nor their sovereignty was designed to govern marginal groups and local labor forms [15]."

Salazar's proposal is above all an explanatory scheme, an effort to provide a conceptual guide to the formation of peasantry in rural Chile.[1] This description serves us as contextual background to what we want to refer, the existence of a considerable portion of population in motion, integrating a socioeconomic logic that enables several profiles that share a permanent externality. However, vagrants and fugitives must not be confused and so quickly assimilated. The figure of the vagabond does not describe any essentialism; it was the word used to point out alternative ways of life marginal to colonial society. Among this heterogeneous and diffuse group, moving throughout the territory, black fugitives could be conceptually incorporated.

This large-scale scheme therefore suggests two organized labor areas, the slavery and the free one. Both impose functions and behaviors on individuals. Fugitive slaves, as well as freed slaves who led a vagrant life, were able to move from one side to another. Consequently, the fugitive deterritorializes the slave zone well as it simultaneously territorializes the free zone. The outside transformed into something useful, a field where a perpetual motion life can take place and where there is no goal but to remain there, nowhere. The *roads* would be then a sensible expression of what we have called fugitive freedom, watching how they are called upon to incorporate other slaves to escape.

4. Facing Jesuit void

It is well known that Jesuits had many black slaves in their properties (*haciendas*) all along the *kingdom of Chile*. The removal of the Company members in

[1] Salazar's quotation explains one aspect of rural socioeconomics of Chile's central valley. However, his text usually forces historical processes to fit into a structural and Marxist interpretation. Precisely, work mass is not always an explanatory concept regarding the work forms found in this context. In our point of view, he tries at all costs to find a historical endeavor leading to the proletarianization of workers, and afterward, he tries to find a widespread popular and solidary emotion, constituting a historical consciousness lost after the introduction of the military dictatorship in 1973 (as an accentuation of mass alienation). Nevertheless, the most thorough study on the subject is the Alejandra Araya's work [25]. She undertakes an analysis of vagrancy as a historical product of a discourse, which associates wandering life with unproductivity and crime. We find at Araya not only a very good description of vagabond ways of life and the possible profiles, but also an interesting demonstration on how association of concepts in a discourse impact society.

1767 meant, for colonial authorities, the confiscation and occupation of their land properties and other assets, including black slaves. A secular board called *Junta de Temporalidades* was created to draw up inventories and to manage the transfers of all these possessions. In this context, the procurator (*fiscal de temporalidades*) complained to the Viceroy of the president of the Royal Court (*Real Audiencia*) of Santiago, Chile's main court at the time, for having sold a slave party to a private:

"In certain haciendas somehow distant from this Capital, there is a shortage of blacks and there are none for sale. The few that can be found are worth five hundred pesos. If VE had been warned or consulted to better say about the motives to alienate the Chilean blacks, the need for slaves that there would have determined your superior discretion to send those that are left over in Chile and use them in the haciendas that lack the competent number for work, would have multiplied their production [16]."

One of the judges (*oidor*) named Traslaviña answered "being these many [slaves] exposed not only to runaway but to death, as has already happened with these, it seems convenient to royal interests to sell and reduce to money some part of them as opportunities are provided. Because of this chance their existence is impossible despite the means taken to distribute them insured among the neighborhood, because several have been returned or because they are not suitable for the destinations gave to them or because they [neighbors] distrust and fright their runaway [16]."

The situation was not clear. Nobody had a well-defined idea about what to do with the slaves left by the Jesuits, many of whom wanted to appropriate them. The fear of escape was important among the temporal masters (the said neighbors) and administrators, chiefly because they were responsible for the slaves. This mind was almost the same held by the neighbors on the eastern side of the Andes Mountains, where, in the same year of 1768, a group of six black slaves, formerly belonging to the Company, escaped. The judge commissioned for the expulsion of the Jesuits installed in Mendoza, explained that "they fled from this city together, on the fifth day this month, and as it has been discovered by the trail, they are heading toward that city [San Juan], and because it is the duty of the royal service to restore them to their respective deposits, on the part of His Majesty (may God preserve) [...]. I request and order to be practiced and done the most lively and effective diligences to seek these slaves, giving all the necessary orders so wherever they are found, they be brought to this city, imprisoned and secured no matter what it may cost, that I will punctually satisfy for the respective depositaries everything that is impeded in these proceedings [17]."

The judge dispatched a lieutenant and 17 soldiers in search of the fugitives, who according to some neighbors, "are going straight ahead" [17]. It is interesting to examine the nimbleness of the actors aiming to recover the slaves, or even the importance of putting them under control of the colonial authorities. The civilian control of the old Jesuit belongings (*Temporalidades*) was severe and unwieldy. The Jesuit void left groups of slaves separated, and temporarily allocated among landowners, a new universe of relations and representations. The field was clear to escape.

As we said before, those runaways who declared themselves practical on the roads did not show any concrete idea about their destiny, but abstractions. However, if we look the course taken by these runaway slaves from Mendoza, we can accede to some original aspects about freedom. Six men distributed among three masters joining together to escape. More than a racial affinity, or social category, this can be seen as a shared lifetime experience. That is why the judges of *Temporalidades*

suspected that they were moving toward the site of the old Jesuit properties (*haciendas*) in San Juan.[2]

We see that escaping a temporary master is a trend. The scattered slaves of the banned Jesuits ran away on both sides of the Andes. Those who left the surrounding part of Mendoza took no great discretion so as not to get caught. Their apprehension was easy, near the city of San Juan, where the rural properties of the Jesuits were located.[3] These evidences can illuminate some conjectures behind this runaway episode: did they head to the old Jesuits' haciendas? Was there a Jesuit space, not just a territory, but a system, where nothing pushed them to escape? Are we facing an attempt to go back to a certain state of things, to become a fugitive to push toward the previous circumstances? Can we speak about coming back? If there was no plan, would at least there be a local geographical concept leading them to San Juan? The bond between these slaves was more or less clear: living in a new context of scarcity, unaccustomed to serving a particular master, uprooted and separated from each other. The emotion is shared, they undergo the same troubles, and they seek to get rid of this new atmosphere. They do not escape from an assimilated environment, they rather seek it. This shared past time drives them to escape, to return to a territory that no longer exists.

No explanation is required by the judges, although they gave much importance to this case. The punishment had to fit the great political change that meant the expulsion of the Company. That is why the official in charge, "in view of having manifested such slaves their perverse inclinations through the crime of flight, in addition to other background of uprising that influence others to equal excesses [...], I ordered to ship them with the necessary custody to the Capital of this Kingdom (*Reyno*) with their women and children those who had them [17]."

A punishment that reminds these black slaves of their new role: parts in an internal South American slave-trade detached from its Atlantic stage, where Jesuits emerge as suppliers. Black slaves are officially recognized as being under a new status, henceforth belonging to the civil control of the Hispanic colonies. As such, the only social bond that is not broken is the family. Their relocation in another region would be a means of enhancing reproduction and consolidating the slave system.

5. The return, a territorial dream

However, all the black slaves we have invoked were Spanish-speaking (*ladinos*), and from their position they were adapted to Hispanic colonial society. This situation is opposed to those of the *bozales* (recently arrived at the Americas from Africa, what Marc Ferro calls "new blacks" [10]), removed from their home and relocated at the crossroads of a new order. Before mentioning an important case of new blacks (*bozales*) runaway, it is necessary to give certain explanations about the disappearance of African traces in Chilean society. Apart from nationalist negation, the most accepted explanation is miscegenation between the lower classes. As we have already mentioned, eighteenth century economy favored the growth of a rural salaried and itinerant workforce.

[2] In 1767, there were four large Jesuit rural properties in San Juan: Puyuta, San Xavier, Guanacache, and Father Jofre's vineyard.

[3] The capture is narrated as follows: "the day they were caught, the above-mentioned [commissioner] Chagaray made use of a man named Molina, with whom these blacks had spoken and asked for horses, on whose occasion this Molina caught up with them, and kept them, so that they could easily apprehend them [17]."

Historical overall frame holds that early colonial labor forms, especially African slavery and the various figures of Indian work, led to the formation of a crude metis free laborers force. Yet, Africans continued to arrive as this group of 72 people from Senegal who crossed the Cordillera brought by a trader called Alejandro de Aranda. On their way from Mendoza, they arrived in Valparaíso to meet the *Tryal*'s captain Benito Cerreño, and to ship under his orders toward Callao on December 20th, 1804.[4] The slaves formed the biggest part of the crew. According to the declaration of Cerreño (collected by the journal of the *Perseverance*'s captain Amasa Delano).

"The crew of the ship consisted of thirty-six men, besides the persons who went as passengers. The negroes numbered twenty from 12 to 16 years; one of about 18 or 19 years old named Jose who was the man that waited upon his master Don Alexandro and who spoke Spanish well; a mulatto named Francisco, native of the province of Buenos Aires, aged about thirty-five; a smart negro named Joaquin, who had been for many years among the Spaniards, aged twenty-six, and a caulker by trade; twelve full-grown negroes, aged from 25 to 50 years, all raw and born on the coast of Senegal-whose names are as follows: Babo, and he was killed; Mure son of Babo; Matinqui, Yola, Yau, Atufal, who was killed; Diamelo, also killed; Lecbe and Nantu, both killed; and he could not recollect the names of the others (Cereno reported that at least half of the above named were killed in the battle aboard ship.) There were twenty-eight women of all ages, and nine sucking infants. All the negroes slept upon deck, as is customary in this navigation, and none wore fetters because the owner, Aranda, told him that they were all tractable [18]."

After a week of sailing, the 72 blacks released their moorings with the assistance of three Afro-descendant servants. A revolt broke out under Babo's orders. Eighteen Spaniards were killed, smashed, stabbed, their hands tied and thrown overboard.

"Cereno said that [...] they threw, in his presence, three men, alive and tied, overboard; that they told the deponent to come up, and that they would not kill him. They asked him whether there were in these seas any negro countries where they might be carried, and they answered them, no. Then they told him to carry them to Senegal, or to the neighboring islands of St. Nicholas. Cereno answered that this was impossible, on account of the great distance, the bad condition of the vessel, the want of provisions, sails and water. They told him he must carry them in any way possible that they would do and conform themselves to everything the deponent should require as to eating and drinking. After a long conference, Cereno was absolutely compelled to please them, for they threatened to kill them all if they were not, at all events, carried to Senegal [18]."

The ship continued northward. In front of the heights of Nazca, the captain was forced to change direction, "because the negroes had intimated to him that they would kill them all the moment they should perceive any city, town, or settlement on the shores [18]." The situation was gradually rising tension and despair was affecting everyone. The episodes continued "the negro Mure [...] said that his comrades had determined to kill his master, Don Alexandro Aranda, because they said could not otherwise obtain their liberty, and that he should call the mate who was sleeping, before they executed it.

"[...] Cereno said that a short time after killing Aranda, they got upon deck his German-cousin, Don Francisco Masa; and the other clerk, Don Hermenegildo, a native of Spain; the boatswain, Juan Robles; and several others; all of whom were wounded, and having stabbed them again, they threw them alive into the sea. [...] Mure told him that they had now done all, and that he might pursue his destination,

[4] In 1869, Benjamín Vicuña Mackenna devoted a few pages of his *Historia de Valparaíso* to this affair, the story of the Africans on the *Tryal*, traveling the Chilean coast between 1804 and 1805. This is also the plot that inspired Herman Melville to write his famous novel entitled *Benito Cereno* (1855).

warning him that they would kill all the Spaniards if they saw them speak, or plot anything against them.

"Before the last occurrence, they had tied the cook to throw him overboard for something he had said, and finally they spared his life at the request of the deponent. A few days afterward, the deponent agreed to draw up a paper, signed by himself and the sailors who could write, and also by the negroes Babo and Atufal, who could do it in their language, in which we obliged himself to carry them to Senegal and they agreed not to kill any more, and to return the Spaniards the ship with the cargo, once the negroes reached safety [18]."

A few days later, the American ship *Perseverance* saw the *Tryal* around Santa María Island, opposite to Talcahuano Bay. Amasa Delano, the North American captain, noticed that the *Tryal* was making suspicious maneuvers. He decided to approach the ship, while a plan was already prepared on board. He was welcomed with great happiness, greeted by the food and the water he brought with him. His account explains that "The Spanish captain, Don Bonito Cereno, had evidently lost much of his authority over the slaves, whom he appeared to fear, and whom he was unwilling in any case to oppose [...].

"Several [...] instances of unruly conduct which, to my manner of thinking, demanded immediate resistance and punishment, were thus easily winked at, and passed over. I felt willing however to make some allowance even for conduct so gross when I considered them to have been broken down with fatigue and long suffering."

"The act of the negro, who kept constantly at the elbows of Don Bonito and myself, I should, at any other time, have immediately resented; and although it excited my wonder that his commander should allow this extraordinary liberty, I did not remonstrate against it until it became troublesome to myself. I wished to have some private conversation with the captain alone, and the negro was as usual following us into the cabin, I requested the captain to send him on deck. I spoke in Spanish and the negro understood me. The captain assured me that his remaining with us would be of no disservice, that he had made him his confident and companion since he had lost so many of his officers and men. He had introduced him to me before as captain of the slaves and told me he kept them in good order.

"[...] After I had ordered my boat to be hauled up and manned, and as I was going to the side of the vessel in order to get into her, Don Bonito came to me, gave my hand a hearty squeeze, and as I thought, seemed to feel the weight of the cool treatment with which I had retaliated. He continued to hold my hand fast till I stepped off the gunwale down the side, when he let it go, and stood making me compliments. When I had seated myself in the boat, and ordered her to be shoved off, the people having their oars up on end, she fell off at the sufficient distance to leave room for the oars to drop. After they were down, the Spanish captain, to my great astonishment, leaped from the gunwale of the ship into the middle of our boat.

"As soon as he had recovered a little, he called out in so alarming manner that I could not understand him; and the Spanish sailors were then seen jumping overboard and making for our boat. These proceedings excited the wonders of us all. At this moment, one of my Portuguese sailors in the boat spoke to me and gave me to understand what Don Bonito had said. I desired the captain to come after and sit by my side, and in a calm deliberate manner relate the whole affair [18]."

Cerreño explained the set of circumstances, and he added that it was useless to take his ship with launches, because the bravery and anguish of the slaves would not have allowed it so. A battle broke out.

This kind of sociodrama serves to amplify the problems mentioned before. The experiences of Africans and Afro-descendant were diverse in the Americas, even

if they are normally immersed in atmospheres of servitude, discrimination, and alienation. On the brink, we can speak of a black condition, a forced experience, a repetitive epistemological precedent on a continental scale. These aspects help to plot a trend line and to trace the general aspects of social hierarchies in Colonial Hispanic America. Movements and associations arise and develop based on race categories, even though we must not confuse a "racial category" with a "racialized social group" [19]. In other words, it should not be confused with a label with an experience.

Escape could erase some distinctions between slaves and nonslaves, by privileging what they had in common: an origin, despite the degree of distance, and a transgressive social position. It is possible that Jesuit slaves conceived race as a principle of grouping, but their context was so particular that we must think their links to the company as a strong identity substance. So strong should have these links been that after the expulsion of the priests, the choice of the escaping was sought by the slaves. The context of the *Tryal*'s is quite different. First, the 72 Senegalese had traumatic experiences that could bound them together. Race was something in common like so many others, not necessarily more important than geographical origin, cultural traces, language, captivity, feelings of injustice, misery. However, these conditions change when they meet three blacks in the service of Spaniards, three Spanish-speaking (*ladinos*) impregnated with colonial life. In a way, this is a face-to-face of merchandise men with servant men. Why Senegalese did not think of killing these three ladinos if they were assimilated to black slaves-oppressors? Vicuña Mackenna reports that José, Francisco, and Joaquín were aware of the conspiracy that they helped to release the captives and that the latter even stabbed a member of the crew [20].

How can this affinity be explained? Discrimination existed for some centuries in Spain in legal form, due to the charters of racial purity (*limpieza de sangre*). Although at the beginning it was a mechanism of religious verification, in Iberian American colonies, this tradition becomes a system to stratify the population. Races and castes were the main object of social classification, although their definitions were rather arbitrary. The functioning of societies was determined by this doctrine. We could therefore call this complex a racial system whose axes and functions, real and abstract, were internalized by all the agents involved. These ordinary assumptions could easily be accentuated in a vessel, a limited space reproducing all kinds of differences and oppositions. In this situation, the distinctions were not so great between slaves and servants. The facts ended up in an antagonist lineup between black and Spaniard. There was no possibility to think oneself outside these categories on board. It was a specific context where race became the central element of association between different individuals. It was an ephemeral overthrow of colonial power relations.

Is the *Tryal*'s affair on escape properly speaking? Some historians of the Caribbean have studied similar dynamics arguing that in the islands of Central America "the most viable of alternatives to servitude was grand marronage—the permanent desertion of slave owners—and that in those circumstances grand marronage tended to mean maritime marronage [21]." We have the story of "Richard Haagensen, who lived in St. Croix in the 1750s, noted in an account of that island that planter families were being ruined by the running away of slaves in groups of as many as 20–25 in a single night. He instanced occasions when slaves seized boats by surprise attack and forced their crews to sail to Puerto Rico. Slaves secretly built canoes large enough to accommodate whole families, commandeered when they could not build, forced sailors to take them to Puerto Rico, and when all else failed, bravely swam out to the sea in hope of accomplishing the same objective [21]." This concept was also defined by Hilary Beckles as "the rebellious activities of those slaves who took sea in flight attempting to escape fully the geographical confines of their plantation bondage [22]." However, we know that the Senegalese on board, the *Tryal* took the decision to revolt while navigating, when the balance of forces

favored them. Inevitably, they conceived the ship as a breakout horizon. Once they have assumed control of the ship, they declare to have a geographical objective in mind, and this is when they are no longer insurgent slaves, but more specifically runaways.

6. Conclusions

In summary, it is a group of fugitive slaves who gathered around a racial category due to a particular context [22]. This case offers some aspects we will like to highlight in order to backtrack to the idea of fugitive freedom. First of all, for the first time, we see women involved within an escape. Certainly, fugitive women were less numerous than men. A study of "black women" in eighteenth century Chile states that they were basically intended for domestic service, tied to home labor as cooks, breastfeeding and child care [23]. Many of them would have sought manumission after years of work, and probably this connection to the master's house is what kept the escape as a small possibility of freedom. The Senegalese of the *Tryal*, men and women, were not quite slaves. Despite their legal status, in our point of view, they would still be captives. Trapped and deported, they are goods in transit that do not yet have a fixed destination. These fugitive women were new blacks (*bozales*) and had not yet assimilated to Hispanic American society. According to Cerreño, "The negresses of age were knowing of the revolt, and influenced the death of their master, used their influence to kill the deponent, and that during the acts of murder and before the battle aboard ship, they began to sing, and were singing a very melancholy song during the action to excite the courage of the men [18]."

They had a full role in the affair, not with weapons, not with a physically aggressive participation, but by creating an atmosphere of tension, reinforcing men through the awakening of sorrow. Thus, women motivated revolt and killings.[5] In Amasa Delano's account, gender differences did not arouse from nature but from the activities undertaken, more visible and physical in men, more immaterial and symbolic in women.

Aranda's assassination corresponds to a political action, even though hate and antipathy remained in the background. The captives had already taken command of the ship, and the master did not have any power to interfere at this point. They no longer needed him, nobody was subject to his orders anymore. Aranda represented a node, as long as he was still alive, the slaves would not have a real option to be free. The Senegalese saw no way of achieving freedom: they could be sold and thus maintain their slave condition, or maybe manumitted after years of fears and miseries. The master meant subjection, commodification, alienation, notions that faded out with his death. His murder was vital in the thoughts and strategic operations of the slaves: killing the master "to obtain liberty," and then signing a contract with the depositor of the ship to ensure a successful escape. In exchange, they guaranteed the life of the Spaniards. Cultural and linguistic differences did not matter, because no colonial legal apparatus was effective on board.

The desired destination was a place already known, the slaves' original territory, Senegal. Unlike the pan-Africanist movements of the nineteenth and twentieth

[5] The death of the master reminds us of a crime committed in Santiago in 1767, when a slave (Antonio) from Guinea killed his master. According to the analysis made by Carolina González, the responsibility also fell on the slave women who lived in the house, because they convinced Antonio to perpetrate the crime. One of them, the "negra Juana," is represented by the authorities as the rational body of this conspiracy "By contrast, Antonio as drunk and irascible, that is to say, as a person outside himself, is constituted as an irrational other [26]." These differences do not emerge during the judgment of the *Tryal*'s blacks.

centuries, where Africa was thought of as a promised land by those who were born elsewhere [24]; in this case, the 72 slaves were indeed born in Africa. In both situations, people think of a return, one toward a complete idealism and the other toward an already built territoriality. This is the clearest expression of runaway freedom, a tangible place beyond, a clear idea of what to do breaking away. Despite this, they knew that such a thing was impossible. The only alternative they could consider was to move to "any negro country." Here is a beautiful Utopia, the mere fact of being conceived as such expresses a lot of meanings. First, these slaves are aware of a reality quite different from the colonial cosmos. They know that another society is possible. They have personally experienced the Atlantic world context, so a nonwhite country would be the only way out of its transoceanic constraints. Even if it is an inexistent country, they imagine an organization favorable to them. In a certain way, the biggest aversion for them is race, the cornerstone of the system they are currently involved in. In this territory they will no longer belong to a minority in the sense of a dominated group, where they will have the same status as the others, where they will approach well-being. A "negro country" expresses a rather concrete representation of the ideal that they wish to arrive, a space where they will finally be able to achieve their dream of freedom.

The *Tryal* affair ended in the worst way possible for the Africans on board. In the port of Talcahuano, the African survivors of the sea battle were judged by the Government (*Intendencia*). The verdict condemned "the negroes, Mure, Matinqui, Alazase, Yola, Joaguin, Luis, Yau, Mapenda, and Yambaio to the common penalty of death, which shall be executed by taking them out and dragging them from the prison, at the tail of a beast of burden, as far as the gibbet, where they shall be hung until they are dead, and to the forfeiture of all their property, if they should have any, to be applied to the Royal Treasury, that the heads of the five first be cut off after they are dead, and be fixed on a pole in the square of the port of Talcahuano, and the corpses of all be burnt to ashes. The negresses shall be present at the execution if they should be in that city at the time thereof that he ought and did condemn likewise the negro Jose, servant to said Don Alexandro, and Yambaio, Francisco, Rodriguez to 10 years confinement in the place of Valdivia, to work chained, on allowance and without pay, in the work of the King, and also to attend the execution of the other criminals [18]."

It is said that Mure, son of Babo, the main leader of the revolt, uttered a few words before being hung. Terms that serve as a basis for concluding, as Vicuña Mackenna quotes "he spoke in Spanish from the docks, recognizing the sentence that condemned him to the last punishment, but alleging that what had happened was only the inevitable result of the inhuman cruelty of their captors and their absolute lack of right to go and steal free men at their homes [20]."

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Section 3

Asia - India

Chapter 6

Journey to America: South Asian Diaspora Migration to the United States (1965–2015)

John P. Williams

Abstract

This chapter examines the immigration of South Asian and Indian populations to the United States between 1820 and 2015. More specifically, this effort scrutinizes legislative changes in immigration policy enabling this group to become the second largest immigrant group after Mexicans in the United States. These changes include the following: the removal of national origin quotas, the introduction of temporary skilled worker programs, and the creation of employment-based permanent visas. Because of these policy changes, by 2015, South Asian immigrants, primarily Indians, had become the top recipients of high-skilled H-1B temporary visas and were the second-largest group of international students in the United States. All told, this study will answer the following questions: What are the origins and demographics of these emigrants who make up the South Asia diaspora? What fields of endeavor are they drawn to by their prior education and skill sets? To what geographic locations have they migrated? And how successful are they in assimilating into their new surroundings?

Keywords: assimilation, diaspora, immigration, xenophobia, sojourners, US supreme court, H-1B visa

1. Introduction

In recent years, the diversity within the Asian-American population and their varied, often contrasting, patterns of immigration and experiences have been recognized and underscored in American multi-cultural studies. While the bulk of these work have centered on Chinese, Japanese, and Korean experiences, a new group from across the Pacific has emerged. This group consists of arrivees from India numbering in the millions between 1965 and 2015 with a separate racial identity and demographic status along with two distinct advantages over their Asian brethren—with higher levels of education and income levels ([1], p. 131).

Over 31 million people of Indian birth or descent are part of the Indian diaspora spread around the globe. Their social and cultural diversity is represented in 33 major languages and some 1500 minor ones, seven major religions, and a mélange of six major ethnic groups [1]. Included in this group is more than three million

Indian Americans, or 1% of the total US population.[1] This makes foreign born Indians the second largest immigrant group after Mexicans, who account for almost 6% of the 43.3 million foreign born population ([2], p. 1).[2]

These numbers tell only half of the story. Not only are these migrants doing well, they are inclined to stay connected with their homeland through investments, philanthropy, and personal involvement. For most emigrants who have traveled from India to other parts of the world, they see it as their obligation and a welcome responsibility. The Indian diaspora has established countless highly organized, well-funded, and professionally managed outreach groups for Indian immigrants. These organizations address a broad range of issues and take on many different forms, include philanthropic projects to improve health and education in India, advocacy organizations business and professional networks, media outlets, and societies for the promotion of Indian culture, language, and religion.

Studies of Indian migrants to the United States are often relegated to the field of "third world" or "developing nations" studies. However, given the relative success of these immigrants, they must now be understood in the same context as that of early Western European, East Asian, and recent West African migrants.

Asian Indians are by far the richest and most educated ethnic group in one of the richest and most powerful nations in the world. They are disproportionately employed in high-status, high-skill professions. Their median household income is nearly twice as high as that of white households in the US, and they attain graduate and professional degrees at nearly four times higher than whites. They furnish over 10% of the labor force in computer-related and many other technical fields. These successes have also led to them to the boardrooms and executive offices of some of the most iconic US corporations, including Microsoft, Google, Adobe, PepsiCo, MasterCard, and Citibank. It can be argued they have become a model minority in America since Indian Americans have some of the lowest rates of poverty, incarceration, divorce, and reliance on public welfare in the nation ([3], p. x).

2. In the beginning

The earliest recorded Indian emigrant to the United States was from Madras, who traveled to Massachusetts in 1790. A number of Indians were brought to the United States by seafaring Captains who worked for the East India Company to serve in their households as servants. Only a trickle of other Indian merchants, seaman, travelers, and missionaries followed, amounting to a total population of less than a 1000 by 1900 ([4], p. 3). Many of these transplants were born in British-ruled in India after having either completed their military service or jumped ship in port ([5], p. 2).

By 1910, the number of Indian immigrants slowly rose to 3000, having settled on the Pacific Coast as agricultural workers. Many were Sikhs from Punjab seeking better fortunes in the West. Additional immigrants would come and work on the Western Pacific railroad and take employment in the lumber mills of Washington State ([4], p. 3).

[1] In 1907 there were less than 4000 Asian Indians living in America. The first anti-immigration law was passed in 1882, The Chinese Exclusion Act. In 1913, California passed the Alien Land law, mainly targeting Japanese immigrants, after California's attorney general also barred Indians from owning property in the state. The "Hindu invasion" as it was called contributed greatly to many stereotypes and various forms of discrimination.

[2] The United States is the third most popular destination for Indian emigrants worldwide, after the United Arab Emirates and Pakistan. Other top destinations include Saudi Arabia, Kuwait, Oman, and the United Kingdom.

With the rising numbers of Asians on the West Coast, racist attacks soon followed. White Americans would single out Chinese, Japanese, and Indians as threats to employment opportunities, land acquisition, and American culture. Organizations such as the Asiatic Exclusion League and the American Federation of Labor stepped up their attacks in the media and lobbied for laws excluding them from housing, education, and labor. Sadly, many Indians were accosted with verbal taunts where they were called "ragheads" or deemed the "Hindu Menace" ([6], p. 5).[3]

In the early twentieth century, hundreds of South Asians, mostly Sikhs but also many Muslims, came to North America from Punjab—the vast majority of them former soldiers who had served in the British colonial army in East Asia. While many Indian laborers came as "sojourners" rather than as settlers; they lived frugally, and their sole object being to return to Indian with their savings [6]. Instead of returning home to a farming economy under severe stress due to British colonial practices, they sought their fortunes in various settlements on the West Coast, between Vancouver and San Francisco.

Within a few years, many more migrants from Punjab soon followed, establishing the first Indian community in the United States while working on the Western Pacific Railroad, in lumber and construction, or as agricultural laborers. The owners of these industries valued the migrant Indian laborers because they worked long hours for lower wages (about half) than their European immigrant counterparts and showed deep appreciation for the opportunity to work and pursue the American Dream.

While Asian Indian migrants were settling on the West Coast in various jobs, other Indian migrants were settling on the East Coast. These recent transplants, a few Muslim traders from Bengal, began peddling "exotic" wares from India, such as embroidered silks, rugs, and perfumes. While many stayed on the East Coast, others moved inland to cities in the Midwest and in the Deep South. Port cities such as New York City, San Francisco, New Orleans, and Charleston were also popular destinations for many Bengali Muslim sailors who jumped British ships.

Another contingent of migrants from India included university students who came to America to study mathematics, science, engineering, medicine, and law.[4] Many Indian students came to study at the University of California at Berkeley on the West Coast and several Ivy League schools on the East Coast. However, their numbers started to decrease when both the United States and British governments started to cooperate in limiting Indian immigration. Even though the number of students migrating to America for educational purposes was stunted, Indian American immigrants still sought educational opportunities when given the chance ([7], p. 3).

3. Anti-Asian sentiment

With the rise of hostilities toward Catholics, Orthodox Christians, and Jews who had immigrated to America from eastern and southern Europe, provoking strong xenophobic and nativist hostilities, South Asians also attracted this hostility as well. Fewer than 5000 of them lived in the United States in 1920. This was largely the by-product of them being seen as competitive labor, willing to do local jobs for less pay, and partly because of rampant racism and anti-Asian sentiment.

[3] The use of "Hindu" as a pejorative label for Indian Americans has historical antecedents in the United States and Canada and can be traced to the arrival of the first wave of Indian immigrants in Washington state and later California in the early twentieth century.

[4] An excellent example of an Indian immigrant who took advantage of educational opportunities in America would be Bhimrao Ramji Ambedkar, the future Dalit icon and architect of the Indian constitution, attended Columbia University as a PhD student, in New York City between 1913 and 1916.

These sentiments were the strongest on the West Coast as Indian Americans soon became the newest Asian immigrant group to be targeted by the Asiatic Exclusion League, a San Francisco-based group that successfully pressured immigration officials to deny admission to Indian immigrants by describing "Hindus" as enslaved, effeminate, caste-ridden, and degraded ([6], p. 7). This effort by the Asiatic Exclusion League contributed greatly to xenophobic and racist attitudes directed to East Indians on the West Coast and inspired legislative initiatives to restrict their immigration. Considered the "new menace" by legislators, they were the target of the immigration restriction law of 1917 which led to an "Asiatic barred zone" and mass deportations [6].[5] It is estimated that some 1700 Indians were deported and 1400 left voluntarily.

These anti-Asian sentiments historically were rooted in the backlash associated with the Fourteenth Amendment passed shortly after the Civil War. This Amendment extended citizenship to all African Americans and to anyone born in the United States, including children of Indians and other immigrants. However, only white immigrants could become "naturalized"—granted US citizenship after migrating to the country and fulfilling a set of eligibility criteria. For the next 50 years, very few foreign-born Indian immigrants had become US citizens by exploiting ambiguities in the pseudoscientific race theories of the time, by claiming "north Indian Aryan" ethnicity and hence membership among Caucasians and "free whites." This loophole was closed for them in 1923 with the passage of the important US Supreme Court ruling.

In *United States vs. Bhaga Singh Thind (1923)*, the High Court ruled that while Indians may be Caucasian, they were not white "in the understanding of the common man," and that this prevailing view would be backed by the law. According to *The Other One Percent* authors, following the judgment the US government took away the right to naturalization from Indian Americans, and even revoked the citizenship of these who had been already naturalized. Sadly, this ruling even took away citizenship from those Indian Americans who had served in the US military ([5], p. 2).

This ruling and subsequent application greatly impacted the daily lives of many naturalized Indian American citizens. They were shut out of white-only schools, swimming pools, and barbershops. White American women who had married Indian men lost their citizenship, becoming stateless in their own country. In turn, this led to many couples not being allowed to marry due to statutes banning marriage between white people and non-white people. Congress went one step further by passing the Immigration Act of 1924, which instituted race-based quotas for immigrants and entirely banned the immigration of Indians as well. In the face of this discrimination and limited opportunities in the United States, many Indians returned to India ([5], p. 3).

After two decades, the Indian population in the United States had reached an all-time low after steady growth prior to 1924 ([4], p. 3).[6] Not only were the numbers low in relation to the general population but so was their educational attainment, as they ranked the lowest among all racial and ethnic groups. However, it would soon start to change as the US government relaxed its ban on Indian immigration to the United States and more economic opportunities opened up for them. The population

[5] While many Asian Indians were deported or left voluntarily, others immigrated to the United States illegally through Mexico.

[6] Bowing to pressures from west coast laborers who contested unlimited immigration from Asia was hurting their employment and economic opportunities, the US Congress passed exclusion laws in 1917 and 1924 which brought Indian immigration to a standstill. It was not until 1946 that Asian quotas were relaxed allowing over 6000 Indians to enter the US between 1946 and 1965.

of Indian Americans would grow steadily by a few hundred, for the next decade with many of them coming from Gujarat, India, and relocating to northern California, mobilizing their caste and kin networks. By 1960, there were over 13,000 Indian Americans in the United States, and their numbers were growing steadily.

4. Post-1965 immigration

By far, the biggest boom to increasing Asian Indian migration to the United States was the passage of the US Immigration and Nationality Act of 1965, which scrapped the old immigration system completely. This law replaced the old quota system established in the 1920s based on racial and national traits favoring the Global South and Europeans over others, with a system that gave preference to immigrants with specific, in-demand skills in the United States, as well as those who already had family members in the country or who were fleeing persecution.[7]

The passage of the Immigration and Naturalization Act of 1965 opened up the possibility for larger-scale immigration from Asia. This important legislation laid down the legal foundation for future immigration to the United States. The act was significant in two important ways: it abolished discrimination based on race and nation of origin for the purposes of admission and created three major categories—family reunification, professional skills, and refugee status ([8], p. 26). These reforms would remain the primary basis for immigration policy the next 25 years. As some critics would charge, the Emma Lazarus' mantra "Give me your tired, your poor, your huddled masses" was no longer applicable as this new immigration bill actively recruited a special population to come to America. It was replaced by the maxim "give me your brightest and best."

The change to the old immigration system was largely attributed to two forces going in the United States in the early 1960s. The first was a shift driven by progressive ideas about racial equality advanced by the US civil rights movement, which helped remove the bias in early immigration policies that favored white European immigrants. The second was largely attributed to the Cold War rivalry between the United States and the Soviet Union. The United States, to accelerate its national economic growth, sought out highly skilled workers particularly in technical fields. This in turn led to a boom for Indian immigrants who possessed many of the skills needed to fuel this growth. As the authors of *The Other One Percent* contend, the story of Asian Indian migration to the United States after 1965 is largely one of selection ([8], p. xii). Great emphasis was placed in allowing immigrants to come to America who had something to offer in way of technical skills and services that could directly benefit the American economy and help the government wage the Cold War. All told, post-1965 South Asian immigration was largely dominated by high educated and skilled professions who were able to circumvent earlier episodes of exclusion, racial hostility, and denial of citizenship shown other Asian immigrants' peasants and laborers who had immigrated earlier to the United States ([8], p. 20).

The post-1965 immigration of Indians coming from India to America is identified by three classifications. The first group called the *Early Movers* (from

[7] While major emphasis was placed in encouraging immigrants to come to America who had backgrounds and skills in high technology related to waging the Cold War, the need for more health care professionals to meet the demands of President Lyndon B. Johnson's Great Society. These demands included staffing programs such as Medicaid and Medicare with additional doctors nurses.

the mid-1960s to the late 1970s) was highly educated, with over 45% of them having acquired professional degrees in medicine, engineering, and computer science (now called STEM fields). There was greater variance in the human capital of the *Families cohorts*, beginning in 1980s to the mid-1990s, as family unification was the driving force for even higher numbers of Indians migrating to American from India. Most recent immigration from India constitutes what the authors of The Other One Percent call *The IT Generation*, a group that benefit greatly from the high demand of the information technology sector or other science and technology (STEM) fields. This group migrated in much higher numbers—at five times the rate of the Early Movers and twice the rate of The Families ([8], p. xii).

The authors of *The Other One Percent* also argue that this selection represents a form of "triple selection" that would in turn create unique population of recent Indian immigrants to the United States ([8], p. xii).[8] The first selection is the by-product of India's social hierarchies and historical discrimination selected certain groups like the Brahmins and other "high" or "dominant" castes for education, ranging from primary levels to college ([5], p. 3).[9] The second one is the rationing of the seats in higher education that created a high stakes, examination-based selection from within the already select group. Third, the US immigration system selected within this doubly selected group when it favored skills, especially skills in engineering and technology, as the basis for awarding employment and students. Ultimately, the majority of Asian Indians who came to the United States after 1965, were triple selected, which benefitted both the immigrants who were trying to improve their lot in life and the United States who needed their technical expertise. This talent pool was comprised almost wholly of men from elite castes and classes, who were only too eager to escape from a country that could not offer them enough opportunity to apply their skills. All told, the demands of the US labor market were able to tap into a ready supply of high technical and skilled candidates. Other subgroups coming to America from India included entrepreneurial spirits who started out as taxi drivers in New York or motel owners of Gujarati origins who would eventually make into the American middle class ([3], p. xiii).

Another factor contributing greatly to mass migration of highly skilled, educated, and talented Indians to America was distance. Distance kept Indians with low human capital from entering the United States illegally in very large numbers (in contrast to illegal immigrants from proximate locations like Mexico and Central America). Another key factor in this immigration was India's democracy, meaning that a vast majority of those who left did so voluntarily, unlike many other migrants from other developing countries who came as refugees or asylum seekers escaping political chaos or persecution ([3], p. xiii). These characteristics, in combination with the very high volume of skilled labor immigration after 1995, made Indian immigrants "outliers" in the degree to which higher education, especially

[8] The authors of *The Other One Percent* argue that Indian immigrants enjoyed many suitable characteristics that allowed them to be not only allowed to leave India but also suitable for admission to the United States. These characteristics include age, gender, education, religion, and language. They also note that the Indians also possessed other notable and non-observable traits as well (such as ambition, grit, and luck).

[9] The Indian government invested heavily in English-speaking, higher education in science and technology. In places such as the Indian Institutes of Technology, admissions were mostly fed by urban, English-speaking private schools, even while grossly neglecting public primary education. As a result, this system produced tens of thousands of engineers at the same time that the majority of its citizens were functionally illiterate.

in technical fields, and the US labor market played a larger role relative to other selection mechanisms of US immigration policy.[10]

All told, the factors that came together to encourage so many Indians to migrate to America center on: education (Indian-born population are three times more educated than that in the host country and nine times more educated than the home country's population), class and caste (favoring large margins of upper and dominant classes and castes in India), profession (engineering, IT, and health care), and both the region of origin (Gujarati and Punjabi in the first and second, and Telugu and Tamil in the third phase), and region of settlement (in specific metropolitan clusters in and around New York City, the San Francisco Bay Area, Chicago, Washington, D.C., Houston, and Dallas) ([3], p. xiii).

Another contributing factor to the selection of Indians and their success in America is their higher proclivity to live in married-couple households, more than any other major immigrant group. This aids in the advantage of keeping the Indian-American poverty-level low (under 5%) and family income high (the highest in the United States) ([3], p. xiii). In addition, there exists a great deal social capital among highly successful ethnic groups, such as linguistic/professional networks like Gujarati entrepreneurs in the hotel industry, Telugu and Tamil workers in IT industry, IIT engineers, Malayali nurses, Bengali academics, etc. Some low-income groups did exist, such as Punjabi taxi drivers in New York, where they did manage to create some social capital (bonding). Even in cases were kinship or linguistic affiliation was lacking, doctors and engineers of Indian descent still managed to organize and prosper by creating bridging social networks and capital ([3], p. xiv).

The rapid growth of Indian immigrant communities to the United States would have remained a hard-to-access phenomenon had it not been for the 1980 US census, which counted Asian as a separate group for the very first time ([9], p. 3).[11] In the new categorization, Indians achieved a record growth rate of 125% between 1980 and 1990, representing one of the fastest growing immigrant groups under the Asian American umbrella. The population totaled over 815,447 in 1990 ([4], p. 1). About one-third were located in the northeast, and the remaining two-thirds were situated in the South, West, and Midwest [4].

The demographic characteristics of Indians in the 1990 census held that this immigrant group was vibrant, young (28.9 years old), married (90%), some-what monied (49K), and professional. They were found to have taken up employment in the fields of science, medicine, engineering, commerce, and real estate prospectively [4]. Compare these figures to their skilled relatives who came in the 80s, who largely moved into nonprofessional fields such retail-trade, food, and service industries [4].

On the heels of the more affluent and skilled Indian immigrants came newer arrivals who possessed fewer technical and speaking skills. These more recent immigrants, living for the most part on the fringes of society, lacked English skills, basic job skills, and needed remedial education. This group was largely as unsuccessful as other Indian immigrant groups which in turn led to economic stratification with in the Indian American community [4].

[10] The Immigration Act of 1990 created a temporary visa category-known as H-1B-for skilled workers, with an annual cap of 65,000, and allowed these workers to petition for permanent resident status during their stay in the United States. Subsequent changes to this program included granting universities and research laboratories permission to issue H-1B beyond the annual limits. The annual cap changed to 195,000 in 2001, and then increased to 250,000 in 2003. These increases contributed greatly to a spike in Asian Indian immigrant to America in the next two decades. The H-1B visa program has been a hot-bed of contention and debate the last two decades at various level of government.

[11] This change was the result of intense Indian lobbying to have a separate group identity established as "Asian Indian" within the "racial" category "Asian and Pacific Islanders."

Indians who immigrated to America came from every state in India, each with own distinct language and cultural heritage. They also belong to many religious faiths including Hinduism, Islam, Sikhism, Jainism, Christianity, and Zoroastrianism. Not always hailing directly from India, many also arrived from England, Canada, South Africa, Tanzania, Fiji, Guyana, and Trinidad ([4], p. 3). More than half of immigrants from India resided in five states: California (20%), New Jersey (11%), Texas (9%), and New York and Illinois (7% each). The metropolitan areas with the most Indian immigrants were the greater New York, Chicago, San Jose, and San Francisco Areas. These four metro areas were home to one-third of Indians in the United States ([2], p. 2).

The fact that Asian Indians come from such vast social and cultural diversity in India, with 33 major languages and some 1500 minor ones, seven major religions including a mélange of six major ethnic groups finding homogeneous groups in American has led to a largely heterogeneous existence in America. The absence of homogeneity among Asian Indians is reflected in their emigration and settlement patterns not only in the United States but also the world. All told, the heterogeneity of Asian Indian culture and customs has prevented the emergence of pigeonholed Indian settlements and Indian towns in the United States ([1], p. 133).

Unlike their pre-1965 immigrant Asian Indian predecessors who were largely agricultural and unskilled laborers, post-1965 Asian Indian immigrants enjoy a common bond related to their backgrounds in education and social-economic classes. The fact that they came from mercantile and professional classes, their status of being middle-class secured afforded them to some degree homogeneity existence professionally, while living heterogeneously. While these two groups do not necessarily enjoy the same degree of socio-economic status or success, they have both sought the vestiges of the American dream as most immigrants do coming to America: a nice home, a good job, excellent schools, and safe neighborhoods. Asian Indians also cherished being a country that celebrated democratic and pluralistic ways, mores, and values.

Asian Indian immigrant groups while they have transformed themselves most in the workplace by adopting American clothes, manners, competitive work habits, and "behaving like Americans," they have on the other hand managed to remain steadfast and strengthened within the home by maintaining vestiges of their diverse ethnic culture: respective religious, social, cultural, and dietary habits. They buy ethnic goods and services needed to maintain their desired lifestyle and insulate their ethnic lifestyles within their homes and communities, away from the scrutiny of the larger society. This has in turn allowed many Asian Indian immigrants and their descendants to transmit Indian culture within their primary groups such as family, cliques of close friends, and voluntary organizations.

Another way that Asian Indian immigrants to America have maintained their cultural identity is by preserving ties to their extended families in India. This is accomplished through financial contributions and almost yearly visits. This effort serves as a duality of sorts, maintaining ties to their homeland, while also embracing America as their new homeland. The financial contributions that are made by these immigrants while although considered merger by some make a great difference in the economic status and well-being of their families back home in India.

Another important facet of keeping ties to their homeland is networking. The most powerful tool is the spread of information through word of mouth. Asia Indians, even though scattered all over the United States and quite heterogeneous in their background, keep close contact with relatives and friends by oral and written discourse by sharing common interests. This effort is promoted by a plethora of news outlets as well as modern technology. There exist several Asian Indian

newspapers (*India Abroad*), glossy monthly magazines with political, cultural, religious, and business features. In addition, local cable outlets carry cable programing from news outlets such as *TV Asia*, *Eye on Asia*, and *This is India*. In addition to having access to Old World home channels along with American ones, they also have access to Bombay and Bollywood movies and other cultural programs.

Notwithstanding the linguistic, cultural, religious, and ethnic heterogeneity among first and second generation Asian Indian immigrants since 1965, the vast majority of them share come common principles and perspectives. These include valuing immigration to America as an economic gain, saving their earnings for education and retirement, and overcoming discrimination and prejudice by tolerance and resolve instead of direct confrontation. More importantly, Asian Indians celebrate, respect, and admire their economic relative economic success and high-standing professional talents parochial.

Within the context of Asian Indian immigrants who have come to America in recent decades, their still resides some vestiges of the well-established gender roles and expectations. This is especially true when recent immigrants elect to bring older family members from India to America. Herein lays, the culprit for tensions within the family when it comes to joint and extended family obligations, which tended to be conservative, backed by female-subordination. Whereas in India, there is a strict code of conduct for men and women, in America, both men and women have undergone a metamorphous of sorts. For example, Indian women had found life in America much easier with regard to material comforts and conveniences. Not to mention better opportunities to work outside the home and make financial contributions to not only to the family, but toward their own development as well. All told, this new freedom and the opportunity to maximize economic security and family income with dignity is transcends economic, political, and cultural boundaries.

The success of Asian Indians in migrating and assimilating to America culture while maintain cultural and ethnic ties is keeping with the tradition of immigrates making the best out of their American experience. From their collective experiences abet with separating from their homeland, they continue to find ways to embrace the best that America has to offer, while maintain their cultural roots and identities as Asian Indians. Moreover, they have integrated themselves into a pluralistic society, which values competitiveness, achievement orientation, equalitarianism, and objective individualism in order to achieve success and contribute effectively into a larger society.

5. Conclusion

The emigrants of the Indian diaspora who ventured from India to America and other localities throughout the world represent an ongoing phenomenon heading in a pluralistic direction. The success of the Indian diaspora is one aspect of a complex story being moved by economic, political, and social forces largely driven by technology transfers, labor needs, and a collection of immigrants seeking a better life in foreign lands. While Indian immigrant populations in America have been largely successful in the arenas of income, educational attainment, and entrepreneurial endeavors for the last 100 years, it stands to reason that other venues of success are on the horizon. These include becoming successful political leaders, thinkers, historians, artists, writers, activists, musicians, and lawyers.

To better understand and appreciate the successes and the potentials of future endeavors, it serves well to seek answers to the following questions: what are the

motivational origins of the Indian diaspora? What efforts cultivated this success? To what degree did they meet resistance and how did they handle it? More importantly, what connections do these successful immigrants have to their former homelands, and to what extent is their success in America helping their homeland?

The story of American history is in every respect the story of immigration. The Indian diaspora that traveled to the United States between 1820 and 2015 represents another success story in the long line of successful immigration by not only Europeans, but also peoples of Asian and African descent. What makes this effort unique is not why they came, but how they came: highly educated, technically skilled, and endowed with a will to succeed making them likely candidates to enter the middle and upper classes in a relatively short period of time.

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Section 4

Australia

Chapter 7

Exploring Aboriginal Identity in Australia and Building Resilience

Clair Andersen

Abstract

This chapter will discuss the challenges faced by Aboriginal people seeking recognition of their identity as Indigenous Australians. It will explore government policies, their impact on identity formation and the ongoing impact of colonisation on education and health outcomes for Indigenous people in Australia. The issues raised will include historical and contemporary experiences as well personal values and attitudes. The strategies and programs introduced within educational settings as part of an inclusive practice regime will be highlighted. Aboriginal people have faced many challenges, and continue to do so in postcolonial times, including challenges to their identity.

Keywords: identity, health, education, resilience

1. Introduction

Sir William Deane, Governor-General, Inaugural Lingiari Lecture

> *the past is never fully gone. It is absorbed into the present and the future. The present plight, in terms of health, employment, education, living conditions and self-esteem, of so many Aborigines must be acknowledged as largely flowing from what happened in the past (....) the new diseases, the alcohol and the new pressures of living were all introduced.* ([1], p. 20)

Australia's First peoples have survived the following common experiences, invasion, dispersal from their land as well as suffering and loss due to introduced diseases. It is important for all Australians both settlers and migrants to understand the enduring relationship of Aboriginal peoples to their Land and the importance of these relationships for health and well-being.

While Silas Roberts, the first chairman of the Northern Land Council said 'when deprived of their Land, our people are like Christians without souls, wandering aimlessly, people without a purpose' [2]; Auntie Jean Carter, Community Elder, states, 'We're not disposed people. We still walk this land. We still are the owners of this land' [3].

These comments are indicative of the continuing debate around the identity of Aboriginal people and their connection to land with the ongoing impact of colonisation in Australia.

2. Who is indigenous in Australia?

The current Australian definition of Indigeneity states that an Indigenous person is one who:

- has Aboriginal or Torres Strait Islander descent
- identifies as an Aboriginal or Torres Strait Islander person
- is accepted as an Aboriginal or Torres Strait Islander by the community in which he or she lives.

This definition developed by the Commonwealth Department of Aboriginal Affairs in the 1980s [4] is widely accepted within government departments, statutory bodies and institutions, but is sometimes contested by Aboriginal groups as imposed. Many Aboriginal people find themselves with questions about their identity. Some Aboriginal people have strong knowledgeable identities. Others are unsure of their identity. Others are discovering their identity. Some are proud of their identity. Others are not. Some Aboriginal people feel caught between two worlds—white and black. People who do not know their stories and history may not be sure of their identity, this in turn impacts on how they feel about themselves and how they relate to service providers including health and education institutions.

One example is that of Bronwyn Carlson, an Illawarra woman who always knew her family had been 'touched by the tar brush' (p. 1) but was unsure about this aspersion for the first 30 years of her life. It was only while attending Wollongong University as mature-aged student that she came to appreciate what her recently-clarified Aboriginal ancestry 'meant' (p. 6), and this awakening gave her a belonging that had been sorely missed during her troubled youth. Her declarations of Indigeneity however raised new concerns by attracting opposition from White Australians, and members of the Aboriginal community. 'After what I had been through', Carlson writes, 'I did not expect to be questioned about my family, and where we hailed from, to validate my claim to Aboriginality' (p. 6). Despite obtaining a 'Confirmation of Aboriginality', and employment within the Aboriginal organisations tasked with awarding confirmation certificates, Bronwyn continues to be 'abused, slandered and libelled' (p. 10) by those who doubt her claim to Indigeneity mainly because she has a New Zealand accent [5, 46].

The power of people to say who they are, to define their own identity and to relate their history is fundamental to their existence. The right to Aboriginal identity is affirmed by the United Nations [47], which states self-identification is a fundamental right underlined in a number of human rights documents. This right to Aboriginal identity was confirmed through a high court challenge in Tasmania ([6], FCA 389).

In Australia Aboriginal people have been hostage, in the main, to images created by non-Aboriginal Australians. There are different stories, for example—1788—Aboriginal people call it the invasion and non- Aboriginal people call it British settlement. The history since 1788 has had a dramatic impact on identity.

Behrendt [7] suggests that:

> *The tensions between Indigenous Australians and the dominant culture are wrapped up in identity: how Australians see themselves, how they see others and*

> *how they want society to respect who they are… How societies deal with 'otherness' and 'sameness' will impact on their ability to allow individuals freedom from oppression and enough scope for the exercise of liberty. ([7], p. 76)*

According to Stuurman [8]

> *…We have learned that institutionalized violence is carried out in many ways. You don't need a gun to kill a man: all you have to do is deny him his self-respect and over a period of years you will kill him, you mentally castrate him. The only way to counteract this thing, this slow death, is to enthuse in Blacks, very aggressively, a sense of Aboriginality, self-awareness, a cultural and personal identity as a part of a national group, as an Aboriginal society. We see that Blacks are poverty stricken and completely defenceless as far as economic power is concerned, subject to manipulation by the white power structure, being used as cheap labour. We cannot counteract this white structure. What we can do and what we are trying to do, is instilled in the Black person a sense of self-awareness and self-respect. This is the only way we can survive nowadays.*

While Everett [9] explains that, being Aboriginal is based on spiritual-cultural beliefs which are connected to the worldly universe, and can be defined as follows:

> *'We can see Aboriginality as a philosophical set of rules that are manifested in customary cultural practices which are set within a belief in the Great Spirit which comprises our Spiritual All. Aboriginality is the recognition by peoples that they are citizens of the worldly universe. The Earth is what nurtures us all - flora, fauna, rocks, water and air - and humans. The Earth is our Earth Mother and we are all citizens of our earth Mother. That is a core within the full meaning of Aboriginality'.*

> *'It is about showing respect for all entities of the natural world as equal citizens of our Earth Mother, and as equal manifestations of the Spirit World. It is an education in doing. [Aboriginal] …education is not simply about human needs and self-interests, but wholly about sharing life-giving sustenance between people and other entities of the natural world. The doing is about living together in respect, about demonstrating respect through protecting other's interests. If, for example, we pollute our water citizen then we have failed to respect and protect it and thus the water will be impure and cause illness to the water and other citizens who need it' [10].*

3. What does it mean to be Aboriginal in Australia today?

This question was asked of Aboriginal people in the Blak Side Story project in Footscray, Victoria. Their answers are recorded on video at http://www.cake.net.au/blaksidestory/quilt.html

Further comments regarding identity include:

Aboriginal people define Aboriginality not by skin colour but by relationships.

> *'You can only be a proud Aboriginal person if you carry your own learning and cultural lifestyle with you'. Galarrwuy Yunupingu, Chairman Yothu Yindi Foundation ([11], p. 37)*

> *'To me, Aboriginality is about that shared experience, that shared culture and that shared pride'. McQuire [12], Aboriginal journalist (NIT 10/7/2008 p. 25)*

> *'For Aboriginal and Torres Strait Islander peoples it is our beliefs, our culture, and our family histories that contribute to our sense of who we are and what we mean to others. They are our source of belonging—and they anchor us and steer our course through our lives' [13], Aboriginal and Torres Strait Islander Social Justice Commissioner (SMH 25/11/2011).*
>
> *'Once we were too black and now we are too white. We reject that. Black or white, we are and always will be Aboriginal because of our unique cultural experience and identity. Aboriginality is not a question of skin colour—it is about our cultural connection to our communities and our history, a history that is alive and thriving'. Abigail Burchill, President Tarwirri Indigenous Law Students and Lawyers Association ([45], p. 4)*

Coe [14] goes on to argue that the Aboriginal child in school:

> *Is sitting on the fence between white culture and black culture, not really belonging to either...*
>
> *In going through a white school system, he (sic) has been forced to aspire towards lower middleclass values. He has been conditioned to up hold and try to keep white material values.*
>
> *He is out in a position where he is caught in a tug of two cultures. There are two pulls on this black kid: he doesn't know which way to go - to forsake his Aboriginal identity and become an imitation white?*

This leads to the place of culture and identity for Indigenous students in Australia and the ways to develop, foster and encourage educational participation and success. A crucial element is the place of, and practices around, Indigenous culture and identity within the Australian educational system. For many Indigenous students and their families there is a clash between dominant educational culture and curriculum and their own culture and identity. Not only is English not always the first (or even second) language of many Indigenous students, but for those who predominantly speak English, the cultural use and meanings of language can be very different. Indigenous ways of learning and interacting and non-Indigenous ways of learning and interacting also do not necessarily coincide. The result of such cultural differences can be an exclusion of the Indigenous student from engaging in classroom activities, even if the student is present in class. A lack of recognition of Indigenous culture and identity from the school culture and identity can result in the effective exclusion of the Indigenous student and their family from the school community.

Hopefully this is changing with the introduction of the following professional standards for graduates in Teacher Education by the Australian Institute for Teaching and School Leadership (AITSL):

1.4 Strategies for teaching Aboriginal and Torres Strait Islander students, and 2.4 Understand and respect Aboriginal and Torres Strait Islander people to promote reconciliation between Indigenous and non-Indigenous Australians [15].

4. Culture, and identity in education

The importance of the recognition of Indigenous students' culture and identity must not be overlooked. Curricula in Australian schools tend to reflect and transmit

the values and styles of non-Indigenous society, with little regard to Indigenous culture and society.

Many educators are now striving to incorporate an Indigenous perspective in their teaching plans, and although this will help to educate non-Indigenous Australians about Aboriginal ways, it will not completely address the academic success of Indigenous students. In 1987 the NAEC (National Aboriginal Education Council n.d.) identified the clash between the schooling system and the home environment as a key factor in the educational underachievement of Indigenous students. In response, the NAEC recommended the following policies for Indigenous education, which remain relevant today:

1. Education for Aboriginal people must be a process that builds on what Aboriginal people are by recognising and developing their natural potential and not by destroying their cultural heritage. Changes to the school system would enable a strong Aboriginal identity to be a positive education factor.

2. Aboriginal studies must become an integral part of the education of every Australian. It must be taught with a high degree of respect and understanding to develop an accurate knowledge of Australian history, Aboriginal cultures and lifestyles.

3. The educational services offered to both traditional and non-traditional Aboriginal people must aim for and be capable of developing and strengthening knowledge of and pride in their cultural heritage, as well as obtaining academic and technological skills required of Australians today. To ensure effective learning, the latter must be acquired in harmony with the Aboriginal person's own cultural values, identity and choice of lifestyle, whether they are residing in an urban, rural, traditional community or homeland centre.

4. To ensure the effectiveness of education services for Aboriginal people, they must play the major part in delivery of those services. This requires immediate and substantial change in policy, and implementation of new programs to train and employ Aboriginal people in the various fields of education so that they can take responsibility for implementing policies and delivering programs in Aboriginal education.

A school's engagement with Indigenous parents is also a vital part of improving the effectiveness of Indigenous education. Aboriginal parents are very aware of the importance of education for their children and all want their children to succeed. But when parents do not share the same values embodied in schooling, they are less inclined to encourage educational success. Many Aboriginal parents also lack the experience, knowledge and resources to aid their child's education, not to mention limited or negative experiences in their own schooling.

For many Indigenous people, their past experience of the education system means that 'schools were just another invention by which white Australian society sought to control their lives' and a means 'of dislocating Aboriginal children from Aboriginal culture' [16]. More importantly, schooling failed to reflect and/or include Aboriginal values and learning styles. Indigenous parents continue to express the desire for their children to be able to function in both their own culture and the wider Australian community. That is, they want their children to be educated, but not at the expense of losing their identity and their culture.

There are four principal components of the curriculum process that impact on student learning: the teacher, including the ways in which the teacher makes

decisions, instructs and transmits knowledge; the students, who are active participants in educational process; the social context within which interaction occurs; and, finally, the content of the curriculum. We need to focus on making changes within each component to influence the outcomes of schooling for Aboriginal students.

Giroux [17] states that educators need to approach learning not merely as the acquisition of knowledge but also as the production of cultural practices that offer students a sense of identity, place and hope. This approach—the integration of culture and cultural practices into teaching and learning—is central to successful education for Indigenous students. Crucial to teaching and learning is the relationship between the school, teachers and students and their communities. While Partington [18] informs us, 'at times it may be appropriate to focus on culturally instruction; at other times the elimination of racism and oppression may be an essential step in the process of education, and for some compensatory education to rectify deprived circumstances may be needed. We need to engage all approaches in the education of Aboriginal students by assuming a holistic view of the participants in the process, the situation in which learning occurs and the curriculum content which is desirable.'

As well as an approach which stresses the necessary attributes of schools in creating positive schooling outcomes for Indigenous students, literature is emerging around the importance of student identity in understanding the Indigenous experience of schooling and related success [19–21]. McDonald identifies the multilayered issues of identity Aboriginal students have to negotiate between home, school, peers and community. He also stresses the point that to develop positive self-identity, there needs to be a perceived value in school as students and an experience of school success ([21], p. 5).

While Herbert states, 'Prior to attempting to address cultural issues, it is critical to recognise the complexity of the task and the huge diversity of the cultural experience of individual Aboriginal people. The task may be daunting but there is no doubt that the need of Aboriginal and Torres Strait Islander students to maintain their cultural identity must not be overlooked.' The words of an Indigenous Education Worker highlight this issue:

> *There is also a bit of an identity crisis too, in terms of how teachers and the school system perceive Aboriginals. A lot of these mixed marriages where the Aboriginal kids are not dark, 'What are you doing in this class, you're not Aboriginal. Why do you want to do Aboriginal Studies; you should be over there doing something else.' There is a lot of misinterpretation about what it is to be Aboriginal - who is an Aboriginal? They seem to run into a lot of conflict, not only from the teachers but also from the Aboriginal kids who are dark. Unless they know the parents, or they come from that area, particularly if they move around a lot, there is a lot of conflict within themselves, like who they are, what they are. What is an Aboriginal? The school system thinks that an Aboriginal comes from the Northern Territory ([22], p. 15)*

In Australia today many Aboriginal people live in cities, towns and other urban areas away from their traditional lands. Many have maintained their 'identity' and culture through family and Aboriginal community organisations. These networks give physical and emotional support and provide a sense of security and belonging. Aboriginal community organisations have been established with a focus on meeting specific Aboriginal needs. Generally Aboriginal and Torres Strait Islander peoples are reluctant to access mainstream services, as the delivery of specialist services through Aboriginal organisations is more acceptable.

This is true within higher education settings as well where the establishment of Indigenous Support Centres have aided increased participation and success of Aboriginal and Torres Strait Islander students [23]. One such example is the Murina pathway program delivered by the Riawunna Centre at the University of Tasmania, in which students confirm their identity is welcomed and affirmed - Murina students 'have celebrated their identity in a place they never thought they could' ([24]).

5. Education is vital

For the future empowerment, self-determination and advancement of Indigenous peoples and communities education is the key. The United Nations Declaration on the Rights of Indigenous People (UNDRIP) states that through education, Indigenous people have the right to control, protect and develop Indigenous cultures and knowledge; and the right to an education without discrimination.

Aboriginal and Torres Strait Islander education in Australia is still largely dominated by western educative frameworks however this should change with the new professional standards for Teacher Education graduates.

Australia's Indigenous population is under-represented in the university system. According to the (Behrendt Review, [25]) Indigenous people comprised 2.2% of the overall population, but only 1.4% of student enrolments at university in 2010, including only 1.1% of higher degree by research enrolments. Recommendation 10 of this review (2012) states:

> *That universities adopt a whole-of-university approach to Aboriginal and Torres Strait Islander student success so that faculties and mainstream support services have primary responsibility for supporting Aboriginal and Torres Strait Islander students, backed up by Indigenous Education Units (p. 19)*

Implementing a Whole-of-University Approach to Improving Indigenous Access and Achievement ([26] pp. 3–5) identified the following seven key characteristics as necessary and could not work without each other: Acknowledgement of culture; Clear governance and accountability arrangements; Policy leadership; Processes; Capability; and Connection with communities.

Higher education can improve the lives of Aboriginal and Torres Strait Islander people:

Through universities, aspirations are raised, opportunities created and lives transformed;

The role of universities in creating social mobility is well illustrated by those who are the 'first in their family' [27];

Providing pathways into positions of greater influence will drive real improvements for Indigenous communities and the nation as a whole [28].

The literature highlights the importance of the 3 R's: respect, recognition and relationship to improve success in education for Aboriginal and Torres Strait Islander students [29, 30].

5.1 In our primary and secondary schools we need

- Caring, interested, nurturing teachers dedicated to Aboriginal Education[1].

[1] Aboriginal Education is education for Indigenous Australian students and about Indigenous Australia for all students.

- Culturally safe learning environments.
- Curriculum that is, student focused and responsive to their individual needs.
- Clear pathways to further study and career planning.
- Contact with roles models because you cannot be what you cannott see [31].

5.2 In our universities we need

An overarching Indigenous strategy with other supporting strategies linked to core areas such as Indigenous Learning and Teaching and Indigenous Research.

- Cultural programs across Whole -of -university that create a culturally safe and culturally responsive environment for all students, staff and university community.
- Designated Aboriginal and Torres Strait Islander spaces and recognition of their contribution to the institution.
- Respectful and reciprocal collaboration with Aboriginal and Torres Strait Islander people to achieve quality outcomes in Aboriginal and Torres Strait Islander higher education.
- Whole-of-university recognition of Indigenous workforce esteem factors.
- Indigenous employment performance targets for Vice Chancellors and other senior executives.
- Innovative recruitment strategies that promote the academy as a preferred career option and targets Indigenous graduates and final year graduands.
- Implementing these practices across all education sectors will enhance the wellbeing, resilience and success of Indigenous students.

5.3 The current situation

The Universities Australia *Indigenous Strategy 2017-2020* is driving and focusing effort in the sector [32]. In response, the University of Tasmania (UTAS) has developed and is implementing a Strategic Plan for Aboriginal Engagement 2017–2020 focusing on enrolment, retention and success, Indigenous knowledge and employment strategies [33]. It has also relocated the Riawunna Centre for Aboriginal Education, a place for all Aboriginal and Torres Strait Islander peoples studying at UTAS to a central position on campus, www.utas.edu.au/riawunna.

The UTAS Aboriginal Engagement strategy is guiding efforts on the participation and success of Aboriginal and Torres Strait Islander students across the University, while the Riawunna Centre in its new location is more accessible to Hobart students and with its full complement of Higher Education Officers is well placed to recruit and support students on all campuses. The formation of an Aboriginal Leadership Group comprising the Pro Vice Chancellor Indigenous Leadership and Research, the Riawunna Head of Service and the Aboriginal Higher Education Advisor along with the appointment of an Aboriginal Employment Officer sends a strong message that UTAS is serious about Aboriginal education and employment.

5.4 Closing the Gap 2018 Report

As we look back on the 10 years that the Closing the Gap framework has been in place, we can see gains being made through the concerted efforts of states and territories working together to address common goals agreed by the Council of Australian Governments in 2008:

- The annual growth rate of Supply Nation registered Indigenous businesses is an average of 12.5%.
- Aboriginal and Torres Strait Islander people, on average, are living longer and factors contributing to the gap such as death from circulatory disease (heart attack and stroke) are going down.
- Around 14,700 Aboriginal and Torres Strait Islander children are enrolled in early childhood education the year before full-time school, and there have been improvements in literacy and numeracy.
- More Aboriginal and Torres Strait Islander children are staying in school through to Year 12 [34].

While closing the employment gap is challenging, we know educational attainment opens pathways to greater economic opportunity and can make an important difference in the lives of Aboriginal and Torres Strait Islander people.

5.5 My contribution

For more than 30 years I have been actively involved in the development of policies to improve the education outcomes for First Australians and learning resources to enhance the knowledge of all students about Australia's rich history and its Indigenous peoples. One resource which has been particularly successful is the cultural safety program *Come Walk with Us*, which was recognised with a Teaching and Learning Merit Award in 2017. This program was developed collaboratively with Aboriginal community members who were keen to share their experience to enrich the understanding of future graduates. Initially it was used to underpin the health curriculum at UTAS, as a well-trained health workforce will help to secure improved health outcomes for Aboriginal and Torres Strait Islander people. The program has since been extended across several degrees at the university and is in demand from external agencies. This demand is largely the result of UTAS graduates gaining employment in the sector and recommending the program for staff development in their respective agencies, including Primary Health Tasmania, Diabetes Tasmania, Rural Health Tasmania and Population Health Tasmania.

The development of effective health care delivery for Australia's First Peoples is currently one of the underpinning strategies to improve Indigenous health outcomes. Better informed health professionals and a well-trained health workforce will help to secure and sustain health improvements for Indigenous Australians. Responding to the poor education and health of Indigenous Australians at UTAS started with a Teaching and Learning grant to develop the CWWU program and digital Health Theme Bank[2] to provide resources for staff to use in their teaching.

It is acknowledged that practitioners working with Indigenous Australians need a diverse range of skills to deliver care and prevent the development of

[2] http://www.utas.edu.au/indigenous-health-theme-bank.

chronic illness [35–37]. Learning these skills is likely to be more effective if integrated within the structure of the existing curriculum; this approach underpinned the health curriculum project of which *Come Walk With Us* is a key strategy. The program assists staff and students to gain some initial understandings to support the ongoing integration of Indigenous content across their studies at the University.

Come Walk with Us offers an introductory three -hour safe learning environment workshop with a Tasmanian Aboriginal context, described as a 'walk' through Aboriginal history in Tasmania. It is now a mandatory core part of the following courses: medicine, pharmacy, psychology, and social work, and is an elective in education and nursing.

Where CWWU is a core component of a course, an exam question is developed in consultation with the unit or course co-ordinator for inclusion in the end of semester exam to assess understanding of the impact of social determinants of health on Indigenous Australians.

At the end of each CWWU session participants are invited to complete a feedback sheet. This information provides insight on how they have responded to the session and alerts any gaps for future inclusion. The content has evolved over time in response to participant feedback and to include new significant achievements on the path to improving the health and education of Indigenous Australians. Since CWWU was first developed in 2004 it has been revised and updated every 2 years to keep content current. Following are some examples of feedback provided by participants.

Feedback from staff:

- The activity-based approach is excellent – well done – such a wonderful experience.
- A great opportunity to gain some fundamental knowledge of Aboriginal history.
- This journey dispelled some untrue stories.
- It was great to learn more about Aboriginal history in Tasmanian. Very good for increasing awareness and consideration for including Aboriginal history and knowledge in my teaching.
- Should be compulsory for every Tasmanian.
- Thanks for today's session it was great value, a lot of the stuff I understood from my own work background which I tried to reflect in my feedback but I just wanted to add that it was a really good introduction for those that have not had much exposure to Aboriginal culture and particularly Tasmanian Aboriginal history.
- This session is invaluable to a personal and intellectual understanding of the impact of: the colonisation of Tasmania on the Aboriginal people of this island; understanding NI [non-Indigenous] culture; and understanding the fluidity of ethics. It is also important for a fuller understanding of the rationale for the Australian Institute for Teaching and School Leadership [AITSL] standards.

Feedback from students:

- Thank you for demonstrating the intensity of this era in history.
- The map is powerful and thought provoking.
- The workshop has helped me to understand that I need to learn more.
- The history was related to real life stories/events – made it easier to understand. The activities made workshop interactive and interesting.
- I liked the interactive 'journey' we were able to follow and be a part of, having us take a walk in their shoes.
- High levels of interaction, lots of questions asked which promoted active listening.

Evidence points to the pivotal role of cultural identity in shaping wellbeing for Indigenous Australians and other indigenous peoples around the world, and also because stronger cultural identity appears to promote greater participation and achievement in education and training [38], it is imperative that our university courses are inclusive of Australia's Indigenous cultures and histories to enhance the successful completion of studies by Indigenous students so they can more readily provide for their families, and contribute to their communities and the broader society. The CWWU program makes an important contribution to doing this at UTAS.

All programs and services for Indigenous Australians should be based on 'cultural respect—recognition and respect of the inherent rights and traditions of Indigenous Australians which incorporates a holistic approach involving partnership, resilience building and accountability' [39]. This is the message promoted to students and staff at UTAS to try to counter the view that universities in Australia continue to be places of white habitus (Bourdieu, [40]) where race capital ensures reproduction of white privilege, whereby Indigenous needs are not addressed [41, 42].

To further address this concern my other projects have focused on the story of place, the stories of the land on which the University is situated. This work involves Aboriginal people through the formation of reference groups and has facilitated the creation of rich resources including The Orb[3] and the Aboriginal Story Map[4] which can be used as teaching resources in schools and the university as well as by the general public to enhance learning and understanding.

A current project is the *Linking of Two Bays* which aims to provide access to information about the University locations and the link with Palawa[5] places to engage students and staff with the deep history of the island of Tasmania in Australia.

The project was initiated as a Community Engagement project during 2017 with stakeholders highlighting the following:

1. The need for non-Aboriginal people to learn more about the contribution made to history by Aboriginal people in Tasmania; and

[3] The Orb, https://www.theorb.tas.gov.au/.

[4] Aboriginal Tasmania Story Map, http://www.media.utas.edu.au/general-news/all-news/online-interactive-aboriginal-story-map-launched.

[5] palawa the name of the Aboriginal people of Tasmania.

2. The importance of Aboriginal peoples to identify, record and write their own histories of self and of country. The project team comprised six members who were joined by four major Aboriginal community groups, and more than 60 people have been involved in creating the resource.

We have called this project the *Linking of Two Bays* to show the ongoing connection between Emu Bay in Burnie and Sandy Bay in Hobart. This resource will provide access to a wide audience to learn more about Tasmania's Aboriginal history. It is designed for everyone to use, residents, tourists, students and teachers. It will also continue to evolve with ongoing collaboration and development.

By intertwining historical perspectives we share that the sites are living, that there is language and a message to be heard. The voice of the land may have diminished, but signs of a transformation are evident, and a conciliation of these voices enables real listening to ancient insights and deeper participation with place.

This digital story of place project has revealed Aboriginal names, language and history of place to encourage greater understanding of the islands' deep history. It also enables UTAS to foster attachment, belonging and identity for Indigenous students [43].

6. Conclusion

Aboriginal and Torres Strait Islander higher education needs to be everybody's business, and not the sole responsibility of Aboriginal and Torres Strait Islander staff. This is now reflected in UTAS's new strategic plan, but it also needs to be the focus of attention and effort at all levels of schooling from Kindergarten to Year 12 and in all education and training institutions. Our students need to be supported and encouraged throughout their learning journey, they need to believe in the benefits of education and they need to see and hear their peoples' voices in the learning materials and have contact with their own inspiring role models.

Our current arrangements seem to be working well but we need to

- work collaboratively with schools, colleges and training providers including TAFE institutes;
- provide clear pathway and alternative entry information to students and develop relationships with key people who are best placed to do this;
- create opportunities for students to connect personally with the university through social events on campus involvement in targeted specialised programs to explore career and study options such as the tunapri[6] nursing, tunapri education and tunapri STEM[7] programs.

We also need to maintain and expand the provision of bursaries awarded at the end of year 10 for years 11 and 12 and continue financial support with scholarships for university, as these send a strong message to students and their family that we believe they can be successful.

These initiatives are needed across the nation as the population of Aboriginal and Torres Strait Islanders is young and growing each year [44, 45].

[6] tunapri is an Aboriginal Tasmanian word meaning 'to know.'

[7] STEM is Science, Technology, Engineering and Maths.

Our students need to believe they can come to university, will be supported, are welcome and will not have their identity challenged. While our governments must continue to focus effort and resources on improving education and employment outcomes for Australia's First Peoples.

Conflict of interest

I confirm there are no conflicts of interest.

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Chapter 8

Privatised Autonomy for the Noongar People of Australia: A New Model for Indigenous Self-Government

Bertus de Villiers

Abstract

The Aboriginal people of Australia have for many year sought rectification of past injustices. The absence of political structures whereby Aboriginal people can communicate their views; govern themselves in regard to their traditions and culture; and promote their interests in similar way as applies to other indigenous people in the world has been identified as a major shortcoming in the institutional arrangements in Australia. It is especially since 1992 when native title had first been recognised in Australia that Aboriginal people have attempted to utilise their land rights as a basis for a form of self-government or autonomy. The shortcoming of this approach is, however, that native title only exists in certain areas; native title is a relative weak right; and native title does not entail any self-governance rights. Recently the federal state of Western Australia broke new ground when it concluded an agreement, which has been described by some as a "treaty," with a large community of Aboriginal people in the south west of the state. This agreement, referred to as the Noongar Settlement, has the potential to serve as a model not only for other parts of Australia, but also beyond the shores of Australia. It recognises the traditional ownership of the land of the Noongar people, but then it goes on to establish for the Noongar people self-governing corporations. The corporations are not public law institutions, but in effect the powers and functions they discharge are of such a nature that they form in effect a fourth level of government. The corporations can exercise powers and functions not only in regard to aspects arising from traditional law and customs, but also in socio-economic fields such as housing, welfare, land management, conservation and tourism. The Noongar Settlement places Australia in a leading position when it comes to the holistic settlement of a land claim and the recognition of Aboriginal people.

Keywords: indigenous self-determination, non-territorial autonomy, land claim settlement, native title, fourth level of government

1. Introduction

The concept of autonomy or self-government for the Aboriginal people of Australia is, generally speaking, an ideal rather than reality. Small pockets of what can be called privatised self-management of cultural and community affairs exist

by way of Aboriginal corporations, but there is no overarching, national policy or legislative framework that allows, facilitates or encourages autonomy or self-government by Aboriginal people. This state of affairs is on the one hand because Aboriginal people have been integrated into the "mainstream" of Australian political life, but on the other hand because there has been inadequate appreciation in non-Aboriginal society for the traditional governance arrangements that has regulated the lives of Aboriginal people prior to and after white settlement. Although Australia has an advanced system of human rights protection and the country is in many respects a beacon of liberty and freedom, the aspirations of its Aboriginal people to protect and promote their traditional laws and culture; to self-govern; and to be involved in matters that affect the continued existence of their ancient culture and traditions, are poorly developed. Australia represents the classical "melting pot" political culture whereby tolerance is displayed for multi-culturalism at an individual level, but where a single political identity exists with no special treatment for indigenous, cultural or linguistic minorities at a political level [1].

Although Australia is a federation, no special arrangements are made for power-sharing, self-governing institutions or consultative processes for its indigenous people at local, state or federal levels. The non-recognition of Aboriginal people finds its origin in the opinion of the original settlers that Australia was *terra nullius* (no persons land). This contrasts to other settler-nations such as New Zealand, the USA and Canada where some form of treaty, reserved seats or special advisory bodies had been instituted for indigenous people as a form of recognition of their special rights.

Australia has however since the early 1990s been in a fundamental transformation as far as its approach to Aboriginal people is concerned. This is evidenced in three major developments: firstly, the claims for land rights of Aboriginal people was recognised for the first time in 1992 in the so called Mabo-decision and since then thousands of claims for native title have been lodged and native title has been determined over large parts of Australia; secondly, proposals are being discussed by the federal parliament to give Aboriginal people an elected "Voice" to give advices to the federal parliament and cabinet; and thirdly, several of the federal states are looking at ways to better accommodate Aboriginal people within the state, for example, in Victoria discussions are underway for a "treaty" to be entered into with Aboriginal people [2] and in the state of Western Australia the Noongar Settlement (the subject of this chapter) has been enacted by the state parliament [3].

In this chapter consideration is given to autonomy-arrangements that have been developed in Australia, with specific reference to the Noongar Settlement in the south-west of the state of Western Australia. The Settlement affects around 200,000 square kilometres of land and approximately 30,000 Noongar people. In comparison to the total landmass of Australia the size of the land the subject of the Noongar Settlement may not seem large, [4] but the Settlement is unique for the following reasons: firstly, the Settlement is geographically the largest of its kind in Australia; secondly, the Settlement is not limited to areas where native title exists; thirdly, the powers and functions of the Noongar people under the Settlement are not limited to the (limited) bundle of rights that comprise native title;[1] fourthly, the state government of Western Australia is committed to make a substantial ongoing financial contribution to the Noongar people for the extinguishment of their native title; and fifthly, complex and advanced self-governing corporations are established

[1] In general the content of native title is not a standardised set of rights, but rather the rights that can be demonstrated existed at time of settlement and the rights that continue to be exercised. These rights may include camping; hunting; fishing; control of access; protection of important sites; and resource extraction.

for the Noongar people which, albeit under private law, have the powers and functions to service the interests of the Noongar people on what can generally referred to as a form of non-territorial autonomy.

The corporations formed by the Noongar are in effect akin to a fourth level of government that provide services to the Noongar people on a personal and community basis.

This chapter provides an overview, analysis and assessment of the Noongar Settlement and concludes that the Settlement is a benchmark for indigenous self-government and autonomy not only in Australia but possibly in other countries as well.

2. Essential facts and figures about the Aboriginal people

The term "Aboriginal people" is used in this chapter for purposes of consistency, but it is acknowledged that the term does not adequately reflect the richness and diversity of the different cultures, languages and traditions that make up the Aboriginal and Torres Strait communities.[2] It may be more appropriate to speak about Aboriginal "peoples" in the plural since so many identities make up the wider indigenous community. Although the respective Aboriginal peoples share some common beliefs and practices, the peoples are also diverse with different languages, cultures; beliefs; stories; and traditional country for which they are responsible.

It is estimated that at the time of colonisation in the late eighteenth century there were around 250 indigenous languages spoken with a further 800 dialects, whereas today there are around 150, most of which are endangered [5]. Aboriginal people number around 2.6% of the population of Australia at 649,000 persons [6].[3] The median age of Aboriginal people is 23 compared to the average 38 years of age of non-Aboriginal people. Ten percentage of Aboriginal people speak an Aboriginal language at home. Each state and territory has a sizeable number of Aboriginal inhabitants:

State of residence	
NSW	216,176
QLD	186,482
WA	75,978
NT	58,248
VIC	47,788
SA	34,184
TAS	23,572
ACT	6508

The collective *political* opinion of Aboriginal people is not to be confused with their *community* identity. Political opinion often reflects an overarching political ambition or agenda, whereas community identity generally relates to the specific "country" or land from where an individual or community originates. According to

[2] There is no agreement in Australia about the appropriate way to refer to the indigenous people. Whereas the term "Aboriginal people" is most widely used, there are also other terms, for example, "First Nations" and "Indigenous People." In general, federal and state legislation and policies refer to "Aboriginal people."

[3] "2016 Census shows growing Aboriginal and Torres Strait Islander population [6]."

Aboriginal customary law a community or an individual may only speak for and is responsible to care for the country from where their apical ancestors originated.

The question whether a specific person is connected to a particular country is determined by the ancestry of a person and whether they are related to an apical ancestor that resided in the country at the time of white settlement. Extensive anthropological, birth and other historical records are often used to ascertain whether a particular person is indeed connected to a particular community and/or country. The mere fact that an Aboriginal person resides in a certain area therefore does not give them the right to "speak" for the country where they currently reside. This applies particularly to cities and towns to which Aboriginal people may have migrated but without them having the right to speak for the land where the town or city is located.

The term "Aboriginal people" therefore contains a kaleidoscope of diversity of languages, cultures, traditions, responsibilities for country; and beliefs. The political accommodation of this complexity, particular by way of some form of territorial or non-territorial autonomy, is exceedingly challenging.

3. Meaning of *autonomy* and *self-government* in the context of Australia

The Australian Constitution does not contain any reference to the terms "autonomy" or "self-government" albeit that the nation is a federation. No special arrangements were made at the time of writing the Constitution in 1901 for the rights, interests or aspirations of the Aboriginal people.[4] Although several subsequent statutes at a federal and state level deal with the interests of Aboriginal people, there is also no reference in those statutes to "self-government" or "autonomy." Whereas Australia is a signatory to the *United Nations International Declaration on the Rights of Indigenous People*,[5] none of the main political parties in Australia subscribes to the enactment of separate institutions under public law for self-government of Aboriginal people. There is also no agreement within the wider Aboriginal community as to how practical content should be given to claims for self-determination and self-government.

There are, however, useful examples of how some Aboriginal communities have been able to develop systems of limited self-government within the constraints of the legal system. In this chapter reference is made to two examples in the state of Western Australia where Aboriginal communities have developed self-governing institutions in regard to matters that impact on their daily lives; their culture, law and customs. The first is the Bidyadanga Aboriginal community which has a form of territorial autonomy over their community lands; and the second (and principal focus of this chapter) is the Noongar people which recently gained a form of

[4] No special representation was given for Aboriginal people to participate in the drafting process of the Constitution and no special rights or recognition arose from the drafting process to accommodate the unique cultures and identifies of Aboriginal people. In fact, until 1967 Aboriginal people were not included in the national census.

[5] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II, sect. A. The International Declaration was adopted by the General Assembly of the United Nations on Thursday 13 September 2007. It was adopted with 143 countries voting in favor, 11 abstaining and four voting against. Although Australia was one of only four countries who voted against the Declaration, Australia endorsed the Declaration on 3 April 2009. The Declaration is non-binding, but countries are expected to develop, promote and adjust policies in a manner that is consistent with the Declaration, but the "rights" contained therein cannot be enforced by a court of law.

non-territorial, personal autonomy in regard to a wide-range of matters that affect the laws, customs and socio-economic wellbeing of their community.

In its widest meaning autonomy and self-government for purposes of this chapter are terms used interchangeably to refer to the legal capacity of a community to discharge functions that are decentralised to its elected institutions within the context of public law.[6] The term "autonomy" is not a term of art with consistent meaning across all jurisdictions and in all circumstances [8]. The nature and extent of self-government and autonomy depend on the legal framework and factual circumstances of each sovereign nation.[7] Self-government and autonomy are terms that are widely used in politics, but poorly defined at law. It is therefore not surprising that international law shies away from references to a "right" to autonomy or self-government [9].[8]

In some instances, sovereign states have made reference to a right to internal self-government, autonomy and self-determination within their constitutions. But even in those cases the terms are used in a non-legally defined manner. A few examples of the developments in state constitutions where the right to self-determination, self-government and autonomy have been included are the Constitution of Ethiopia which recognises the right to self-determination of nationalities, including the right to secession;[9] the Constitution of South Africa which recognises the right to self-determination of "any community sharing a common cultural and language heritage";[10] the Constitution of Brazil which recognises the right of Indians to protect their rights collectively;[11] the Slovene Constitution which recognises the collective rights of the Italian and Hungarian groups to establish collective entities that could act on behalf of their members;[12] and the Constitution of Spain refers to the "right to autonomy" of nationalities and regions without defining "autonomy."[13]

International experience in federal and decentralised systems shows that it is relatively uncomplicated to use various forms of territorial autonomy, be it by way of regional or local governments, to provide indirect autonomy to communities. The Bidyadanga community of Western Australia falls within this category. The challenge, of which the solution remains elusive, is how to deal with communities of which the members have no geographical area of their "own" where they constitute a majority for purposes of regional or local government.[14] The Noongar community, also from Western Australia, falls within this category.

It is recognised by scholars and practitioners alike, that the range of options to protect the right of minorities to autonomy over matters that affect their culture,

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[6] "Autonomy" derives from Greek and means to "own" (*auto*) and "judicial" (*nomos*). While it is accepted that many associations, clubs and organisations manage themselves pursuant to civil law, the "autonomy" or "self-government" referred to in this chapter presupposes an arrangement in public law whereby a region or community corporation receives powers and functions by way of decentralisation to govern itself in accordance with laws or by-laws. See [7].

[7] Even in constitutions in which the term "autonomy" is used, the term is not necessary defined.

[8] Kymlicka highlights the absence of an international standard to autonomy of self-government for minority communities, but he acknowledges that as far as indigenous people are concerned there is a "right" to self-determination, but the content of the right is to be determined by sovereign states.

[9] a47 Constitution of Ethiopia.

[10] a235 Constitution of South Africa.

[11] a232 Constitution of Brazil.

[12] a64 Constitution of Slovenia.

[13] a2 Constitution of Spain.

[14] See for example, the recommendations of Lund for non-territorial arrangements in Europe in Organization for Security and Co-operation in Europe, [10] and the commentary by Malloy in regard to the de-territorialisation of minority interests in [11, 12].

language or religion cannot in all circumstances be solely based on territorial arrangements [13–16]. Hofmann observes as follows in regard to the practical application of non-territorial autonomy to minority groups:

> *"Generally speaking, the concepts of cultural autonomy or functional layering of public authority may be usefully applied in situations where a minority does not constitute the majority or a sizable minority of the population in a given region of a state but finds itself dispersed throughout the whole of a state. In such a situation (e.g., Hungary) [17][15] have opted for the introduction of a system endowing institutions established under public law with the power to regulate—or at least to have a most significant say in the regulation of—"cultural affairs," including, in particular, the running of public education institutions, such as Kindergardens and schools, or the management of their own cultural institutions and media, such a publically funded radio and TV broadcasting programmes. The important aspect here is the fact that minorities exercise, in the fields concerned, some kind of self-government—usually through representative bodies, the members of which are elected by and from the members of the minority concerned [18]." (author emphasis).*

Self-government and autonomy for Aboriginal people in Australia generally fall substantially short of arrangements that have been made in some other countries where the rights and aspirations indigenous people had to be accommodated. The examples set by the Bidyadanga community and the Noongar people may however provide fresh benchmarks for other Aboriginal communities to follow.

4. Land rights as an avenue to *privatised* autonomy

The advent of native title in 1992 in Australia has established a potential base whereupon Aboriginal communities who have instituted successful land claims, can develop limited non-governmental forms of self-government by way of the corporations registered pursuant to the federal *Corporations (Aboriginal and Torres Strait Islander) Act 124 of 2006* (CATSI Act).

The CATSI Act is specifically designed to provide a legal mechanism for Aboriginal people to register a corporation that can manage and control their own affairs [19].[16] Corporations under the CATSI Act are easy to establish by way of a template; the corporation must be not for profit; the members receive free legal advice; and the corporation operates under the supervision of a federal registrar of Aboriginal corporations. Federal funds are also made available to assist in the management of the corporations; to ensure transparency of activities of corporations; proper recordkeeping; and implement proper corporate governance procedures by

[15] To the example of Hungary can be added the recent developments in regard to cultural autonomy in Russia, Estonia, Kosovo, Hungary, Slovenia, Macedonia and Croatia. Malloy describes the range of mechanisms enacted in Slovenia for the purpose of protecting the rights of the two co-nations, Hungarian and Italian, as "an instructive example of how co-nation consociationalism might work." The arrangements include collective autonomy on the basis of a mix of territorial and cultural autonomy; participation in joint structures, mutual veto's in certain circumstances and special rights in regard to local self-government and care of the matters that affect their lives most intimately.

[16] Indigenous People may also incorporate organisations under other legislation, but the CATSI Act establishes a special basis for information and provides support to communities. The objectives of Corporations can be varied, including social, cultural, linguistic and/or economic objectives.

corporations.[17] Only Aboriginal people may register a corporation under the CATSI Act and the name of the corporation must include "Aboriginal" or/and a "Torres Strait."[18] Around 3000 Aboriginal corporations have been registered.

Registration of an Aboriginal corporation is open to any Aboriginal community, but for relevance of this chapter is that an Aboriginal community who has had a successful claim for native title, *must* be incorporated under the CATSI Act for the title to be held in trust by the Aboriginal corporation.[19] The native title holding-community can then use the corporation to manage their interests in regard to the land; to receive benefits; to negotiate; to undertake activities; to protect their heritage; and to do other actions that a legal entity is capable of doing in regard to their native title. The community as native title-owners therefore becomes incorporated for purposes of managing and controlling their native title rights.

All Aboriginal corporations, including the Noongar Corporations, operate within the sphere of private law; the corporation is a legal person that can sue and be sued; the corporation is liable only to its members; and the services are offered to members of the corporation wherever they reside.[20]

These corporations under the CATSI Act can be used for a form of autonomy or self-management within the sphere of private law, whereby the corporation can provide a wide range of cultural, linguistic, social and other services to its members. As is explained in more detail below, the Noongar people have established seven Aboriginal corporations under the CATSI Act to manage the native title settlement they have reached with the state government of Western Australia in a manner that bears the potential of far reaching privatised self-government.

The success of Aboriginal people to claim native title has been pivotal to their desire for self-determination in general, and autonomy in particular. Although the *United Nations International Declaration on the Rights of Indigenous People* does not prescribe what is meant by "self-determination," it is accepted that restoration of land rights and greater control over traditional lands are essential elements for self-determination. Access to land and restoration of rights in land constitute a basis whereupon other elements of self-determination such as autonomy, self-government, social justice, and reparation can be pursued [23].[21]

Aboriginal people have had a long and arduous struggle for land rights. The philosophy of the original settlers was that Australia was *terra nullius*, or no persons land, and therefore there was no need for the settlers or their successors to enter into any treaty or to reach any terms of settlement with the Aboriginal people they encountered. This view prevailed for close to two centuries after settlement. In *Milirrpum* v *Nabalco Pty Ltd* matter the question of "native title" was raised for the first time in Australia, but the court found that the Aboriginal people at the time of settlement was so uncivilised and primitive that no coherent form of proprietary

[17] See the on-line tools to assist members of Aboriginal corporations to manage their affairs under the [20].

[18] The Registrar receives annual reports from corporations; ensures compliance with the CATSI Act; and may even prosecute if there had been failure to comply with the provisions of the CATSI Act. For more information see [21].

[19] The federal *Native Title Act 1993* mandates that upon successful determination of a claim for native title, the title is held in trust by an Aboriginal corporation. See office of Registrar of Aboriginal Corporations, [22].

[20] See [7] for a brief comparison between the Aboriginal corporations in Australia and the non-governmental cultural associations that can be established under Russian law.

[21] The concept "self-determination" is fluid. In its most general application it includes political and administrative rights; powers-sharing and self-government, land rights and control over natural resources; and consultative rights. Tomaselli refers to the various facets of self-determination collectively as "composite rights."

title to land existed [24]. The court therefore continued to give effect to the opinion of the original settlers that Australia was for all practical purposes unoccupied by any society capable of entering into a treaty or agreement.

The antiquated and racist approach expressed in Milirrpum caused serious embarrassment to Australia in international fora and in its domestic relationship with Aboriginal people. There was however no appetite in the general electorate to pursue a land reform scheme to address the concerns of Aboriginal people.

The High Court of Australia ultimately broke the mould of the *terra nullius*–doctrine when in 1992 it relied on developments in international law and on advanced in anthropological research to find in the Mabo-judgement that native title continued to exist in Australia. In the Mabo decision the court accepted that the common law had to adjust by acknowledging the native title of Aboriginal communities in circumstances where "a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence [25]." Native title, in effect, continues to exist in Australia unless it had been extinguished by some act of government (for example, granting of freehold).

The essence of the judgement for purposes of this chapter was that for the first time the judiciary accepted that Aboriginal people prior to colonisation had systematic and coherent systems of laws and customs according to which they managed their society; their country; their traditions and social relationships and that those systems in some instances continue to be adhered to.[22] The Noongar settlement attempts to restore aspects of those traditional systems of government within a modern day context.

The *Native Title Act (1993)* was enacted by the federal parliament to provide a statutory base for native title to be claimed; for claims to be registered; for native title to be held by an Aboriginal corporation; and for matters associated therewith. The Native Title Act was never intended for native title to provide basis for autonomy of self-government.[23] Native title is seen as a "bundle of rights" which relate principally to the proprietary interests an Aboriginal community has in land, for example, caring of country, but not to self-government or autonomy as understood in a public law sense.

Although the advent of native title was initially widely praised by Aboriginal people, scepticism and disappointment soon set in due to the complex and adversarial process to prove native title; the opposition to native title claims by governments, pastoralists and resource companies; the limited scope of the bundle rights once determined; the lack of practical benefits that arise from native title; the inability of native title to address wider socio-economic and social justice needs; and unfulfilled reparation demands of Aboriginal people [29, 30]. Barrie comments that the "initial optimism [after Mabo] in aboriginal communities has changed to

[22] The Court [26] observed that the original settlers "were ignorant of the fact that, under pre-existing local law or custom, particular tribes or clans had established entitlements to the occupation and use of particular areas of land," but increasingly a realisation developed about the social cohesion and organisation albeit that no title to land was recognised.

[23] In Mabo the court ruled by way of obiter that native title does not deliver "sovereignty" to the claimants and hence that the rights recognised under native title do not challenge the sovereignty of the Crown in regard to the governance of Australia under the Constitution. See [27] 53 ALRJ 403 at 408. For discussion about the pre-colonial sovereignty exercised by Aboriginal people and the impact thereupon by colonisation since no treaty had been entered into and the potential remnants of such sovereignty, refer to [28].

frustration and disillusionment [31]." Kelly describes the rights gained under native title as "hollow and fragile" [32].[24]

It is accepted that the determination of a valid native title claim does not challenge the sovereignty of the Constitution and therefore does not give to the Aboriginal community a right to sovereignty, autonomy or self-government under common law over the land affected. Self-government and autonomy under public law can only be bestowed under the Constitution.

Where does this conundrum leave Aboriginal people's desire to self-govern?

The option that arguably bears the most potential for autonomy is for Aboriginal people to utilise the provisions of the CATSI Act to establish a private corporation for a specific community and for that corporation to undertake activities; develop proposals; offer programmes; make policy inputs; undertake lobbying; and deliver services that are relevant to the members of the community. Although more than 3000 Aboriginal corporations have been registered under the CATSI Act, the 7 Noongar corporations registered pursuant to the Noongar Settlement are probably the most advanced as far as self-governing potential and competencies are concerned.

The success achieved in native title may therefore provide a basis for Aboriginal communities to privatise self-government and autonomy to the community that are the native title holders. In this way autonomy of a personal rather than a territorial jurisdiction can be achieved albeit in civil law rather than public law. The sovereignty of the Constitution therefore remains unchallenged, but through private initiative supported by privatisation and agency arrangements, an Aboriginal corporation can become a *de facto* government with non-territorial jurisdiction.

5. Territorial autonomy—managing (small parcels) community land

There is no general legislative or policy scheme in Australia for Aboriginal people to become autonomous or self-governing in a manner akin to territorial arrangements in the USA, Finland and Canada with respect to reserves for indigenous people.

The state of Western Australia has, however, enacted legislation that gives Aboriginal communities at a local level the ability to self-govern in regard to matters that impact on their communal land, in regard to who accesses the land, and in regard to matters of importance to their local community. The *Aboriginal Communities Act 1979* (WA) is aimed to assist Aboriginal communities to manage and control their community land [33]. "Aboriginal community" refers to the "original inhabitants of Australia and to their descendants [34]." The question whether a person is "Aboriginal" is resolved by way of an objective and subjective test, namely that the person must be descended from the "original inhabitants of Australia" and must be "accepted as such in the community in which he lives [35]."

The Aboriginal Communities Act empowers the state government of Western Australia to declare that the Act applies to a specific community, but only if the government is satisfied that the community has a constitution under which it operates; if there is a proper consultative mechanism to ascertain the views of community members; and if there is a desire of the community to be responsible for local self-government.[25] When the government declares that the Act applies to a particular community, the proclamation also identifies the community land to

[24] Native title rights have been described as "hollow and fragile."

[25] a4(2) Aboriginal Communities Act. The government may also revoke the application of the Act to a specific community if the government is of the view that the community no longer operates within the framework of its constitution a5(2) Aboriginal Communities Act.

which the declaration applies.[26] This is, in effect and albeit only at a community level, an example of territorial self-government for an Aboriginal community.

If the Aboriginal Communities Act applies to a community, the council of the community may make by-laws similar to those of a local government in regard to the matters that falls within its competence. The community therefore has a status as "government," and not merely as a private association that organises its own cultural affairs.

The Aboriginal Communities Act does not prescribe how a community council is to be nominated or elected. It is left to the community to devise a structure that reflects their culture and customs and to request the government to recognise the constitution pursuant to the Aboriginal Communities Act. The government must, however, be satisfied that the council in effect is responsible and accountable to its community, regardless of the system of representation that is used. Decision-making within the council is by way of an absolute majority. Once a decision is made, it is submitted to the government and when it is published in the Government Gazette is becomes a formal by-law of the community.[27] The by-laws are limited to the lands of the community and persons who reside on the land or visit the land.

Some of the typical functions that fall within the powers of an Aboriginal community council in regards to its lands are: regulation of people, vehicles and animals; management of animals and vegetation; development and maintenance of infrastructure; management of community meetings; regulation of alcohol and firearms; regulating conduct; and any other matter of relevance to the decency, order and good conduct in the community.[28] The community council may also authorise the police to enter the lands of the community and to enforce the by-laws.

One of the Aboriginal communities in the state of Western Australia that has taken up the self-government option under the Aboriginal Communities Act is the Bidyadanga Aboriginal Community. The community lives in the Broome area, which is about 1600 km to the north of Perth in the Kimberley remote area of the state [36]. The community numbers around 800 persons and is considered as one of the most remote Aboriginal communities in Australia. The community comprises persons from four different language groups.[29] The community self-manages principally by way of government grants and income derived from commercial activities on their land. The council of the community comprises two persons from each language group and elections are held every 3 years.

The community enacted by-laws for self-government in 2004 [37]. The by-laws determine that all persons, Aboriginal or not, are bound by the by-laws when they enter or reside on the land of the community.[30] The community established an association which is responsible for the practical government of the land. All Aboriginal people who originate from the land may be a member of the association. The association elects a council to be responsible for the day to day government of the land.[31] The council have wide governing powers that include organising access to the land; identification of places where no access is allowed because of cultural significance; traffic and driving regulations; general conduct rules; and firearms registration and control. [32]

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[26] a6 Aboriginal Communities Act.

[27] a8 Aboriginal Communities Act.

[28] a7 Aboriginal Communities Act.

[29] Karajarri, Juwalinny, Mangala, Nyungamarta and Yulpartja Aboriginal language groupings.

[30] By-law 1(5) Bidyadanga Community By-laws. Non-Aboriginal persons may only enter the land with approval or a permit. By-law 4 Bidyadanga Community By-laws.

[31] By-law 3 Bidyadanga Community By-laws.

[32] By-laws 4–11 Bidyadanga Community By-laws.

The association formed by the community pursuant to the *Associations Incorporations Act (WA)* regulates matters such as a council; membership; meetings and the general operations of the community.[33] The objects of the association include general support of the community; provision of education and employment opportunities; assist and encourage member to promote their culture; and to seek and receive grants for its operations.[34] Membership of the association is open to any Aboriginal person who resides in the community.[35] A governing council that comprises between 5 and 10 members is responsible for the day to day management of the association. Each of the language groups must be represented by at least two persons in the council.[36] The council may appoint employees and an executive officer to undertake practical management and operational activities. The association must meet at least once per year, but special meetings may also be convened.[37]

The association operates like a local government with a territorial jurisdiction that includes cultural objectives. It provides municipal services to the community, including services such as road maintenance; landscaping; pet control and other essential services. In addition, the association has a partnership with the local school to offer culturally appropriate courses. Various other cultural activities are also on offer for the community. The association also provides home-based support services such as meals on wheels and poverty relief.

The Bidyadanga arrangement is one of only a few examples, in Australia where an Aboriginal community can self-govern on a territorial basis. The remote location of the community and the fact that the community resides on their traditional lands have contributed to the arrangement receiving government support. No similar arrangement can be pursued in urban areas since Aboriginal people live intermingled with other communities.

The experience of the Bidyadanga highlights the benefits that may arise when native title is determined and a community lives on their traditional lands. The territorial dimension does facilitate self-government since the jurisdiction of the association can be clearly defined over a certain territory; services with a territorial component can be delivered; and all individuals entering into the territory are bound by the by-laws. On the other hand, it must be noted that few Aboriginal communities reside on their traditional laws; even those who live on traditional lands may not have exclusive control over the land; many Aboriginal people have urbanised or live intermingled with the rest of the population; and as a result territorial forms of autonomy are not appropriate for the vast majority of Aboriginal people.

6. The path for the Noongar people to the Noongar settlement

6.1 Background

The Noongar people live predominantly in the south west part of the state of Western Australia. This has been the traditional land of the Noongar people but their sovereignty over the land has been highly impacted by events that, according to Mabo, extinguished native title, for example, granting of freehold land in cities;

[33] *Constitution and Rules of the Association Bidyadanga Aboriginal Community La Grange Inc*. (Constitution of the Bidyadanga community). The articles of incorporation are under review at the time of writing.

[34] r 6.1 Constitution of the Bidyadanga community.

[35] r 8 Constitution of the Bidyadanga community. The person must also be a member of one of the language groupings.

[36] r 9 Constitution of the Bidyadanga community.

[37] r 15 Constitution of the Bidyadanga community.

towns; industrial areas, farms and infrastructure development. Only relatively small pockets of native title remain in the area since on so much of native title had been extinguished.

The different communities that make up the Noongar people lodged claims for native title over different parts of the south west area. After protracted litigation and negotiation a settlement was reached whereby all the native title claims where relinquished in exchange of a package of rights and benefits for the entire area.

This settlement is the most ambitious yet in Australia and provides a benchmark not only for other Aboriginal communities in Australia but also for indigenous people and minority groups in other parties of the world. The settlement has been described as the first "treaty" between Aboriginal people and an Australian government since it aims to rectify an injustice that has been ongoing since the time of colonial settlement [3].[38] It must however be noted that the treaty-power of the Constitution falls within the ambit of the federal government, which means that the Noongar Settlement may in literature be described as a "treaty," but at law it is a native title settlement pursuant to the Native Title Act [38]. The Settlement can best be described as a statutory contract, which given the subject matter is seeks to regulate, is akin to a constitution for the Noongar people. The settlement provides for a wide spectrum of benefits, self-governance and autonomy which, according to this chapter, constitutes a form of privatised autonomy not previously seen in Australia.

6.2 Profile of the Noongar people and their land

The Noongar people comprise several sub-communities or family groups whose apical ancestors lived in the south west area at the time of arrival by the settlers. The Noongar people currently number around 30,000. The larger community comprise 14 different language groups which pursuant to the Settlement are for practical reasons organised into six sub-communities, each with an area of land for which they are responsible.[39] It is estimated that the forebears of the Noongar people had been in occupation of the area for more than 45,000 years [39].

Since the area occupied by the Noongar people is large with diverse vegetation; climate; geography and rainfall, the respective communities that make up the Noongar had different practices in regard to the land they occupied albeit that they were also related to one another and shared common customs and language that separated them from other neighbouring Aboriginal communities. Noongar communities that lived close to the ocean had as their main source of food the ocean and river and estuary systems that ran into the ocean, whereas other communities lived in semi-arid areas, while others where principally forest dwellers. Although the Noongar community was bound together by language, ancestry, customs and traditional laws, the respective groupings had their own sub-regional customs and responsibilities to the land they occupied. The association of families with a particular part of country has remained intact albeit that urbanisation, mining and agricultural developments have had a massive disruptive impact on the traditional living patterns [40].

Whereas early white settlers where of the view that Aboriginal people in general were hunter-gatherers who endlessly roamed the country without any specific

[38] H. Hobbs and G. Williams the authors conclude that the Noongar Settlement can be described as in its very nature a "classic treaty" which implies "a coming together between two nations to agree on certain things, and in doing so, finding a way forward together and recognising each other's sovereignty." (p. 23).

[39] The six communities are: Ballardong, Gnaala Karla Booja, South West Boojarah, Wagyl Kaip & Southern Noongar, Whadjuk and Yued groups.

pattern, social organisation or area where they called "home," contemporary research shows that although the communities hunted and collected to feed themselves and traversed widely, they were generally located in a certain area which they regarded as their country and for which they had responsibility. Their understanding of land ownership was not that the land belonged to them, but rather than they belonged to the land and had to take care of it.

The Noongar view of ownership or control of land is summarised in the following way:

> *"Traditional Noongar rights and interests in boodja (country) are not the same as the Western concept of land ownership. For Noongar people, to have connection to country is to have a responsibility to the land. Duties and responsibilities for country also include protecting sites of spiritual significance and family heritage. Different Noongar groups have custodial status over certain parts of the south-west. Within these areas are moort boodja or family runs. These are the areas in which Noongar family groups traditionally travel and enjoy special privileges relating to that part of our country. We consider it our traditional land owner's right to have use and access to these areas. Those who do not share rights in that part of the land should seek permission before they enter or use it. Traditional Noongar lore and custom does not dictate that custodians remain permanently within their territorial borders to be on country. Traditionally, Noongar people travelled widely and we accepted that our territories would be occupied by others during our absence [41]."*

The area affected by the Noongar settlement is about 200,000 square kilometres in size[40] and it covers the entire south-west of the State of Western Australia [43].[41] Within the area are major cities and towns, for example, Perth, Geraldton, Albany, Bunbury and Margaret River. In excess of 2 million people live in the area, of which around 30,000 are Noongar.

The challenge for policy makers and the Noongar people at the time when the settlement of the native title claims was negotiated was therefore obvious: how does one within an area that is occupied by so many non-Noongar people and where the traditional livings and customary patterns of the Noongar people had been to fundamentally been impacted upon by settlement and subsequent events, make legal, financial and practical arrangements for the Noongar people to protect and promote their language, culture, traditions and customs for purposes of a form of self-government?

6.3 Noongar native title claims

The enactment of the Native Title Act in 1993 gave rise to several native title claims being lodged in the south west area of Western Australia. The various claims sought to represent the interests of the respective family groupings that make up the Noongar people. Many of the claims were overlapping and competing with around 78 claims lodged for parts of what is now the single Noongar area.[42] This was not dissimilar to many other parts of Australia where the introduction of native title saw a scramble to lodge claims. This process took some time to settle across Australia and for claims to be combined and harmonised.

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[40] This is larger than the territory of countries such as Belgium; Ireland, Austria, Portugal, Hungary and Greece. See [42].

[41] See enclosed map of the area at Annexure 1.

[42] Ultimately the single Noongar claim was lodged to represent around 218 families, and substituting six registered and 12 unregistered claims.

In order for a native title claim to be successful, the following essential requirements must be met: the claimants bear the onus of proof to satisfy the court that they are connected to the land being claimed[43] and to the society that resided on the land at the time of settlement through shared apical ancestors [45, 46]; that they continue to hold and practice the customs and traditions of their apical ancestors [47]; and that the bundle of rights they claim continue to exist.[44] The essence is that the native title rights as claimed must have originated from a normative system which regulated the traditional observance of laws and customs at the time of British settlement. The laws and customs could have been adapted over years, but if the laws and customs had been extinguished for whatever reason, they could not be revived. The society or community that claims native title must be connected to those that occupied the area at the title of settlement and although it is accepted that changes of population and inter-group mixing may occur, the core identity of the claiming community must be capable of being traced back to the identity of the original community.[45]

The multiple claims lodged initially by various family groupings of the Noongar community, were ultimately amalgamated into what became known as the single Noongar claim. The decision to amalgamate the claims was for tactical and empirical reasons. Tactically it was thought that the likelihood of success of any native title determination with so many competing and overlapping claims would be diminished, whereas empirically there was strong research that supported a larger integrated claim for all of the Noongar people to lay claim to the entire south west region, but with acknowledgement that smaller family groupings had closer connection to certain parts of country [50].

This idea of a single claim for the Noongar people as a "society" became a key element of dispute between the Noongar and those who opposed the claim, with the Noongar contending that they were a single society, whereas the state government claiming that each of the family groupings that now purportedly make up the Noongar people, in effect had their own laws and customs and country for which to care [51].[46]

The hearing of the single Noongar claim commenced on 11 October 2005 [52]. Evidence of the Noongar witnesses and experts called on their behalf, was in essence that the Noongar people constituted a "society" that shared common belief, language and customs and that differences in dialect were not adequate to conclude that separate languages and therefore different societies existed. The Noongar witnesses, supported by experts, said that there was an ongoing spiritual and where possible physical connection to the lands of their apical ancestors, and that the laws and customs continued to be adhered to albeit in the context of contemporary society. Those who opposed the claim, most notably the state and federal governments, challenged the proposition that there had been a single Noongar society at the time of British settlement. The notion of a single Noongar identity was according to the state government a modern construct that in itself was indicative of the breakdown of Noongar traditional laws and customs rather than an affirmation thereof.

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[43] The "connection" need not be physical by the community living on the land being claimed, but it must be spiritual and the knowledge transmitted but be evidenced of the knowledge, understanding and caring of the land in question. See *Members of the* [44].

[44] For a useful overview of requirements to prove native title see [48].

[45] See for example, [49] 404 in which it is explained that once the connection had been severed, it cannot be restored.

[46] See [51] Observations on the Richtersveld litigation route followed in South Africa versus the Noongar settlement route followed in Western Australia.

Whereas it is not within the scope of this chapter to analyse in depth the nature of the Noongar native title claims, a pertinent question that arose during the litigation process was whether the respective claims groups that fell within the general category of "Noongar," could indeed be regarded as a single society of people with a shared identity and language. The linguistic expert who gave evidence for the Noongar people found that if the wordlists that were recorded by the early settlers were compared to words that have been recorded from within what is now referred to as the Noongar area, there is an adequate similarity to conclude that the respective communities that make up the Noongar claims had more in common with each other than they shared with neighbouring language communities. The Noongar people therefore had a sufficient level of distinctiveness that allowed them to be called a single society and that the language they speak predates colonisation [53].

In his judgement of 19 September 2016 Wilcox accepted the evidence of the Noongar witnesses and opinions of experts called by them and said, in summary, as follows:

> *"I have reached the conclusion that the Single Noongar applicants are correct in claiming that, in 1829, the laws and customs governing land throughout the whole claim area were those of a single community. My principal reasons for that conclusion are as follows:*
>
> i. this conclusion best accords with the information left to us by the early writers;
>
> ii. I am satisfied, on the evidence of Dr Nicholas Thieberger, an expert in Aboriginal languages, that in 1829 there was a single language throughout the whole claim area, albeit with dialectic differences between various parts of that area;
>
> iii. the evidence establishes some important customary differences between people living within the claim area and those living immediately outside it (Yamatji to the north and Wongai to the north east);
>
> iv. there is evidence of extensive interaction between people living across the claim area;
>
> v. there is no evidence of significant differences within the claim area, as regards the content of laws and customs relating to land [54]."

The judgement of Wilcox was appealed to the Full Federal Court in the matter known as *Bodney v Bennell*.[47] The appeal was successful on various grounds and remitted to a single federal court justice for reconsideration.[48] Since the single Noongar claim had not been dismissed but had been referred back for what in effect would be a re-hearing, the parties to the dispute agreed to enter into settlement negotiations.

[47] 2008 FCAFC 63.

[48] Some of the reasons of relevance to this chapter given by the Full Court for setting aside the judgement of Wilcox J was that he had not given adequate attention to expert evidence that supported the opinion of the state namely that continuing connection had been severed and there was inadequate evidence to conclude that a Noongar society or nation had existed at the time of settlement (par 123).

The negotiations, which commenced around December 2009 continued until 2016 when the *Noongar Recognition Act* and the *Noongar Land Administration Act* [55],[49] were enacted by the Parliament of the state Western Australia, together with an Indigenous Land Use Agreement for each of the six areas.[50] The agreement reached sought to strike a midway between the propositions put to the court—on the one hand the notion of a single Noongar society was accepted, but on the other hand the principle of smaller family groupings bearing responsibility for sub-regions was also endorsed.

6.4 Outline of the Noongar Settlement

A brief outline (see in depth discussion below) of the Noongar Settlement is that an integrated settlement has been entered into between the Noongar people and the state of Western Australia whereby the native title claims are surrendered in exchange for a package of rights that includes financial support; joint management of land; transfer of land and houses; cultural programmes; and heritage protection.

The Settlement is managed via seven Aboriginal Corporations of which six represent the main communities in the sub-regions and one Corporation provides general centralised services to the six corporations.

It is the proposition of this chapter that these Noongar Corporations constitute, in effect, a potential fourth level of government whereby the Noongar people can manage and control their own cultural, heritage and linguistic interests on a non-territorial basis, while at the same time entering into service agreements with state and federal authorities to act as agent for the delivery of public services in areas such as health, education, infrastructure and conservation.

The Settlement has quite correctly been described by the then Premier of Western Australia as most comprehensive statutory settlement of native title claims in Australia.[51]

7. The Noongar Settlement—the essential elements for privatised self-government

7.1 Introduction

The Noongar Settlement refers to three main legal instruments that lay the basis for the resolution of the respective Noongar claims, namely the *Noongar Recognition*

[49] Preamble item three of the Noongar Land Administration Act provides that the agreement compensates the Noongar people for the "loss, surrender, diminution, impairment and other effects" of their native title rights and interests.

[50] On 17 October 2018 the National Native Title Registrar accepted the Indigenous Land Use Agreement for registration. This followed some opposition from within the Noongar community for the settlement to be ratified and the decision of the Federal Court in *McGlade v Native Title Registrar* (2017) FCAFC 10 that the indigenous and use agreements could not be registered until consent from all affected native title groupings had been obtained. The federal parliament introduced amendments to the Native Title Act that enabled the registration of the settlement to be finalised.

[51] Premier of Western Australia, Colin Barnett, described the Noongar Settlement as "the most comprehensive native title agreement" in Australia. Western Australia *Parliamentary Debates* Legislative Assembly, 14 October 2016, 7313.

Act;[52] the *Noongar Land Administration Act* [55],[53] and an *Indigenous Land Use Agreement* registered pursuant to the *Native Title Act* for each of the six sub-regions (jointly referred to herein as Settlement).

The Settlement, according to which the Noongar people surrender native title for the entire area the subject of the agreement, includes in return a compensation package of benefits that involves a combination of recognition of traditional land ownership; annual payments by the State government to the Aboriginal communities for a future fund; the management of their cultural and traditional affairs; joint management of conservation areas; access to Crown (public) land; a housing and land package; employment and business opportunities; and support for Noongar commercial and entrepreneurial activities.[54]

The Settlement, for purposes of this chapter, comprises the following essential elements:

Firstly, the Settlement covers all lands the subject of the agreement and it is not limited to areas where native title had been claimed or determined;

Secondly, the Settlement is encased in statute and it is the outcome of negotiations rather than litigation;[55]

Thirdly, the larger Noongar region is divided into six smaller sub-regions where the Noongar families that are associated with that specific area take responsibility by way of a registered corporation to discharge the duties and functions arising from the Settlement;[56]

Fourthly, the jurisdiction of the six corporations over their respective communities is of a non-territorial nature in the sense that public services are rendered by the corporations on a community and personal basis within the sub-region, and those services do not exclude the territorial jurisdictions of local government; and

Fifthly, the corporations are a hybrid of civil and public law bodies since they are created pursuant to a statute; they offer services of a personal, community, social and economic nature; and they may act as agent to deliver services on behalf of government departments. The corporations are, in effect, a form of fourth level of government that service the interests of their members on a community basis but not to the exclusion of other governments.

7.2 Area of land covered

A unique aspect of the Settlement is that it covers the entire region, including waters and rivers, and is not limited to pockets of land where native title continues to exist. The area of land is set out in (**Figure 1**) Schedule 3 of the Noongar Settlement Act and it includes farming areas; towns, villages and cities in the area.

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[52] The Act recognises the Noongar people as the traditional owners of the south-west of the state of Western Australia.

[53] Preamble item three of the Noongar Land Administration Act provides that the agreement compensates the Noongar people for the "loss, surrender, diminution, impairment and other effects" of their native title rights and interests.

[54] For a summary of the settlement package refer to [56].

[55] It must be noted, however, that the Settlement is unlikely to have eventuated had it not been for the litigation and court actions that preceded it. It is arguably only after the parties had fully grasped the complexity and risk of litigation that they resorted to a negotiated outcome.

[56] The six communities are: Ballardong, Gnaala Karla Booja, South West Boojarah, Wagyl Kaip & Southern Noongar, Whadjuk and Yued groups.

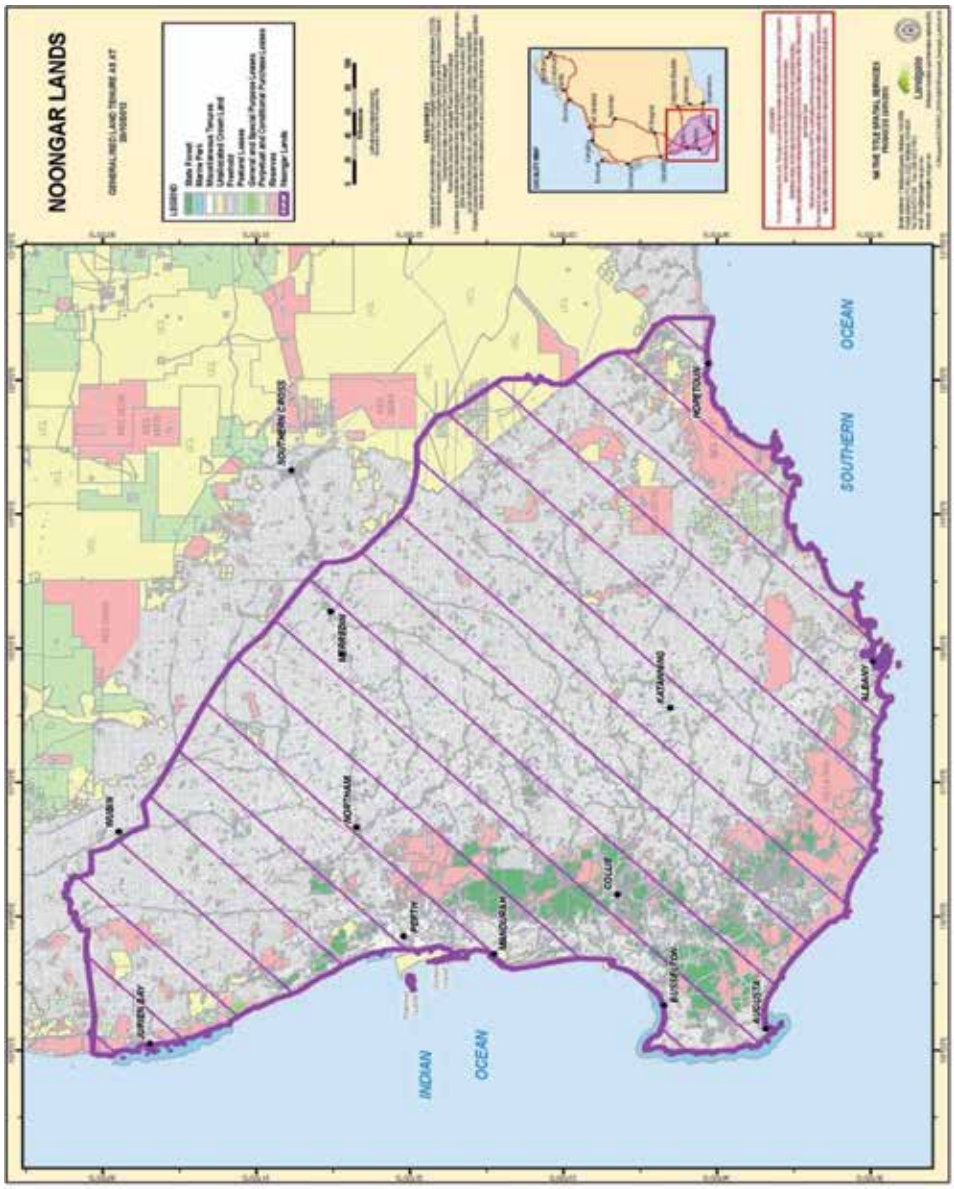

Figure 1.
Schedule 3, Noongar Recognition Act, 2016: The area subject to the Noongar Settlement.

The settlement area is divided into six sub-regions of which each is made up of the families whose apical ancestors originate from those areas.[57]

This is arguably the most reconciliatory aspect of the Settlement since it is acknowledged by law that the Noongar people used to occupy the entire area prior to British settlement; that regardless of other interventions the Noongar people continue to regard the entire area at their country; and that the powers, functions, and

[57] A Land Use Agreement (ILUA) is entered into pursuant to the *Native Title Act 1993*. The six ILUAs were registered on 17 October 2018. Jeanice Krakouer, a senior representative of the Noongar people, described the registration of the ILUAs as follows: "This is a great opportunity for the Noongar People to come together, to control our own destiny, and to build a solid future for generations to come [57]." For more information about the registration of an ILUA see [58]. See the respective ILUAs for the six areas at [59].

authorities that they discharge in regard to their customs, laws and traditions are not limited to areas where native title exists, but to the entire region on a personal and community basis. The Recognition Act acknowledges that the Noongar people are the traditional owners of the entire region, but this recognition does not conflict with the rights and interests that had been granted to other persons by way of, for example, freehold.[58] The special relationship between the Noongar people and their land is acknowledged as them having a "living cultural, spiritual, familial and social relationship with the land."[59]

The holistic approach to recognise an Aboriginal community's traditional ownership to an entire region is ground-breaking and is the first of its kind in Australia.[60]

In contrast to other successful determinations of native title whereby Aboriginal people only have jurisdiction of areas where native title had not been extinguished, the Noongar Settlement set the Noongar people and their institutions as a parallel, private authority to the state and local governments for the entire region covered by the Settlement. The full implications of the Settlement will be revealed over time, but it can be foreshadowed that in future elected governments at federal, state and local levels may be required by law, legal proceedings and by practical circumstance to negotiate with the Noongar corporations about key policy issues that affect the land, their laws, culture and customs.[61]

It is not surprising that the Settlement has been described as the first real "treaty" between an Aboriginal community and a government of Australia [3].[62] The Settlement entails in essence that two governing systems have agreed on a settlement that is reflected in a binding legal instrument that exhibits strong elements of a founding constitution for the Noongar people.

The Settlement reflects a type of federal arrangement whereby community corporations in each of the sub-regions are responsible for the management of their own cultural, social and traditional affairs, whereas matters that require cooperation are coordinated by a central services corporation for the entire region.

7.3 Legal basis of Settlement

The legal basis of the Settlement is found in three instruments namely the *Noongar Recognition Act*; the *Noongar Land Administration Act*, and an *Indigenous Land Use Agreement* registered pursuant to the *Native Title Act* for each of the six areas. The Indigenous Land Use Agreement (ILUA) for each sub-region sets out the terms of the Settlement.[63]

The Noongar Recognition Act recognises the Noongar people as the traditional owners of the land; it acknowledges the special contribution they have made and

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[58] s4 Noongar Recognition Act.

[59] s5 Noongar Recognition Act.

[60] See enclosed map of the area at Annexure 1 [60].

[61] s6 of the Noongar Recognition Act seeks to remove any potential rights that may be claimed in future other than what has been explicitly agreed to. This statutory provision may not necessarily preclude a future court to interpret the Settlement in an expansionist manner in favour of consultation, procedural and substantive rights not necessarily provided for in the Noongar Recognition Act.

[62] The authors are of the opinion that the Noongar Settlement is a "classic treaty" which implies "a coming together between two nations to agree on certain things, and in doing so, finding a way forward together and recognising each other's sovereignty." (p. 23).

[63] For sake of convenience the Ballardong ILUA (in excess of 800 pages) is used as a basis since the other five ILUAs contain similar terms and conditions. *See* [61]. The native title rights are dealt with in accordance with s 24CB(e) and s 24EB(1)(d) Native Title Act.

continue to make to the heritage, cultural identity, community and economy of the state; and it confirms that the package of measures included in the Settlement are in full and final settlement of any native title claim they may have in the region.[64] The Act also defines the region to which the Settlement applies and includes a map of the area.[65]

The Noongar Land Administration Act contains the detail of land to be transferred to the Noongar people; reserves to be created for their enjoyment; and related arrangements to ensure land management and access. These actions are termed a Land Base Strategy to reflect the holistic and all-inclusive nature of the Settlement.[66] The Act confirms that the Settlement is in full and final compensation for any claim that may arise now or in the future in respect of native title.

The ILUAs entered into for each of the six sub-regions contain the detail of the Settlement for the particular area. An ILUA is a creature of the Native Title Act to enable Aboriginal people to enter into a binding agreement with other persons about their lands and waters. An ILUA binds all persons in regard to the land and the rights affected, even persons who were not part of the agreement. An ILUA can cover any aspect of native title, including the way in which land is managed; areas that are protected; authorisation for works to take place on land; heritage protection; negotiation protocols and compensation. An ILUA is advertised for public comment and then registered by the National Native Title Tribunal to form part of the public record.

The Ballardong ILUA was registered on 17 October 2018.[67] It acknowledges that the Settlement is "unprecedented" in Australia and that the Settlement "provides a significant opportunity for the Noongar people to achieve sustainable economic, social and cultural outcomes."[68] The Settlement is clearly not only aimed at the mere establishment of a cultural club or association, but it is intended to provide a basis for self-determination; autonomy; and self-fulfilment of the Noongar People. It is also confirmed that the Settlement forms the basis for extinguishment of all native title claims and for fair and just compensation for any rights or interests forfeited. The ILUA then sets out all the details of the Settlement in a legally binding format.

The Noongar Recognition Act; the Noongar Land Administration Act, and the ILUA for each of the six sub-regions together form what could be seen as a "constitution" for the recognition and establishment of the Noongar self-determination and self-governing institutions. Whereas native title is often referred to as a "bundle of rights,"[69] the Settlement offers a holistic outcome whereby the entire Noongar community is acknowledged; where cultural, spiritual, linguistic, social and economic needs and interests are recognised; and where the rights apply to an entire region. The Settlement is as much a political, founding constitution as it is a statement of cultural recognition.

7.4 Noongar self-governing institutions

The institutional arrangements for the Noongar people reflect the nature of their linkage to the apical ancestors of the region. Although the Settlement covers the

[64] Preamble, Noongar Recognition Act.

[65] See Schedule to this Chapter.

[66] See Schedule 10, item 8 of the Ballardong ILUA.

[67] The Indigenous Land Use Agreements for the other five sub-regions were registered at the same time.

[68] See Preamble, Ballardong ILUA.

[69] Native title in effect comprises a bundle of rights such as hunting, fishing, camping, and caring for country which, depending on the circumstances of each claim group, is limited in scope as to the area to which it applies and the specific rights that form part of it. This very legalistic process leave some groups with a sense of disillusion because of the scope and/or content of their rights.

Figure 2.
The main cities and towns in the Noongar settlement area as well as the sub-regions for the six Noongar Corporations.

entire region, provision is made for six sub-regions for families who hold the closest ties to those respective areas. Each of these six sub-regions has its own institutional arrangement and the six corporations work together in a federal-type structure in a common central services corporation for the entire region. There is an element of subsidiarity in these arrangements since whatever functions cannot effectively be discharged by the sub-regional corporations can be delegated to the common central services corporation for decision-making. These arrangements reflect the historic reality that the Noongar People on the one hand shared a common language, law and customs, but on the other hand the caring of country was done at a local level (**Figure 2**).

The federal-type Central Services Corporation is responsible to coordinate the activities of the six sub-regional Noongar Corporations; to undertakes collective negotiations with federal, state and local government agencies; to initiate and coordinate major projects; to advocate on behalf of the Noongar people; to develop training and other material for leadership development; to undertake heritage protection and a heritage protocol for the entire region; to develop a cultural advice

policy; and in general to promote the interests of the Noongar People. [70] The seven Corporations are registered under the CATSI Act.

This institutional design is unique to the Settlement and has not previously been pursued in Australia.[71]

The self-governing corporations are not created by the federal or state constitutions but pursuant to a statute. The corporations do not operate within the sphere of public law but rather as corporations in civil law. Legally this may render the corporations not apt to be described as a "government," but a proper analysis of the functions and objectives of the corporations supports a proposition that in fact the corporations may be regarded as a form of "government" with jurisdiction over a wide range of matters that affect the culture, laws, social development and economic status of the Noongar people.

The membership of the six sub-regional Noongar Corporations are open to all Noongar persons who associate with a specific sub-region through their apical ancestors.[72] A person need not live in the area to be a member of the local Corporation.[73] Association with a Noongar Corporation is voluntary and there is no obligation on a Noongar person to be a member of a Corporation; to receive any benefits; to accept a service or to participate in activities of a Corporation. A member may also resign when they wish to.[74]

The Noongar Corporations are *sui generis* in character since they are, on the one hand, private entities under civil law, but on the other hand they provide services to their members that are akin to the type of services a government would provide. It is envisaged that as the Noongar Corporations develop in stature, credibility and legitimacy, that they would also become agents for local, state and federal governments to perform functions and deliver services of a governmental nature to the Noongar people in areas such as health, education and welfare.

7.5 Institutions and powers of the Noongar Corporations

The institutional arrangements of the six Noongar Corporations are the same, whereby a council comprising two to four directors are elected for each corporation by its members.[75] A maximum of two additional directors are appointed by the elected directors of each Corporation for reason of their expertise in areas such as law, finance, business or social matters. The directors are responsible for the day to day operations of the Corporation. Special meetings may be convened of members to vote on or discuss matters of importance to the community.

The federal-nature of the Noongar Corporations is reflected in the composition of the Central Corporation. Each of the sub-regional Noongar Corporations can nominate one director to serve on the Central Services Corporation. The Central Services Corporation may also nominate two additional directors for reason of their expertise in areas such as law, finance or business development. The Central Services Corporation is responsible for functions and activities that exceed the expertise of the sub-regional Corporations; or activities that are

[70] Ballardong ILUA, Schedule 10, item 4.

[71] For a detailed outline of the legal structure to manage the settlement refers to *Noongar Governance Structure Manual* (2016) by law firm [62].

[72] A membership-expression form is available for the detail of the person who wants to be admitted. In order to assist potential members, detailed anthropological reports are available to ascertain if a person is connected to a sub-region via an apical ancestors. See [63].

[73] *See* Ballardong ILUA, Schedule 2 which sets out the list of apical ancestors for the Ballardong community.

[74] For general background information about the Corporations and operations see [64].

[75] To facilitate participation the elections take place via postal vote.

of interest to all six Corporations; or that are delegated to the Central Services Corporation by the sub-regional Corporations. The composition and functions of the Central Services Corporation reflects the federal elements of subsidiary and joint rule.

The responsibility and accountability of the Noongar Corporations are at two levels: firstly, the directors are accountable to the members of the Corporation and special meetings can be called to discuss policy issues; and secondly, the Corporations fall under the general supervision of the registrar of Aboriginal corporations.

The powers and functions of the respective Corporations are set out in their founding instruments of incorporation. The six sub-regional Noongar Corporations are responsible to manage and implement the Settlement within their region.[76] This allows the sub-regional Corporations some discretion, again in a federal-type manner, to pursue projects, undertake negotiations and develop policies that are relevant to the members of their corporation. Each Corporation can decide how it wishes to discharge its functions in areas such as to promote the traditional laws, culture and customs of their community; to manage any lands that may fall within its jurisdiction; to participate joint management activities; to provide services; to cooperate with state and local governments; to advocate on behalf of their members; and to undertake any activities on behalf of its members. The respective sub-regional Noongar Corporations can therefore experiment with their powers and enter into different type of arrangements with federal, state and local governments.

The powers and functions of the Corporations are not of a constitutional nature but are exercised under civil law. The nature of some of the services provided, for example, in the socio-economic field, in management of land, in housing and employment, are however akin to governmental functions. In addition to the wide objectives of the Noongar Corporations, the individual Corporations and the Central Services Corporation may also enter into agreements or contracts with government agencies whereby a Corporation becomes an agent of a government department to provide services to the Noongar people. The respective Corporations therefore provide services that cover a wide range, from cultural and family affairs, to socio-economic and commercial activities.

This again highlights the *sui generis* character of the Noongar Corporations whereby they are incorporated in civil law, but deliver services in the public sphere akin to a government.

7.6 Elements of the Settlement

The uniqueness of the Settlement is reflected in the wide scope of outcomes that arise from it. Whereas native title settlement are usually linked to the area of native title and aspects of the bundle of rights, the Settlement deals with a broad spectrum of benefits that include socio-economic development; joint management of conservation areas; education and training; housing; advocacy; and the potential for self-government over matters that impact on the culture, traditions and laws of the Noongar people.[77]

The respective elements that make up the Settlement are unprecedented in Australia and include the following:

[76] Ballardong ILUA, item 8.1.

[77] The Noongar people "surrender" any claim to native title as part of the Settlement [65] and in exchange the benefits received pursuant to the Settlement constitute "full and final compensation." Ballardong ILUA, item 13.

7.6.1 Land access and management

The *Noongar Land Estate* is created to manage 320,000 hectares of land for purposes of cultural enjoyment; education; and related uses for the benefit of the Noongar people.[78] The purpose of the Land Estate is to enable the Noongar people to "achieve sustainable economic, social and cultural outcomes."[79] The philosophy of a Noongar Estate is linked to Land Base Strategy that reflects the practical steps to be taken to establish and further expand the land base of the Noongar people. The land forming part of the Estate is to be used exclusively to promote and develop the culture and traditions of the Noongar People. A Noongar Land Fund is also established to assist the respective communities to acquire land in their sub-regions. The state is to make available $46,850,000 over a 10 year period for the implementation of the Land Fund.[80] Adding to the Land Estate transferred to the Noongar people, the Settlement also grants access to the Noongar people to crown (public) land for purposes of cultural and traditional activities.[81]

7.6.2 Joint management of land

An important other element of the Noongar Settlement is the opportunity for the Noongar to jointly manage national parks and the conservation estate of the settlement area. These are often areas that a close to the heart of the Noongar people since the environment sought to be protected is also of unique significance to the local Noongar community. As a result of the Settlement joint bodies are formed between state agencies and respective Noongar Corporations to manage the conservation estate within the settlement area and to employ as far as possible Noongar people to work within those conservation areas.[82]

7.6.3 Housing and development programme

A number of houses (121) which are occupied by Aboriginal people, are transferred to the Noongar people together with financial support to maintain the houses. In addition, an assistance package has been put in place to help members of the Noongar community to develop business and entrepreneurial skills; and a general community development programme[83] is implemented aimed at improving the standard of living of the Noongar people.[84] In addition to these initiatives, a major capital works programme has also been launched whereby the state government funds the Noongar to establish administrative offices for the seven Noongar Corporations.[85] Aspects of the Settlement are clearly aspirational, with detail to be developed over time,[86] but at the same time the essence of the settlement is reflected namely that it is not only the cultural aspirations of the Noongar that are addressed, but the socio-economic ideals of the community as well.

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[78] Ballardong ILUA, Schedule 10, item 8.

[79] Ballardong ILUA, Schedule 10, item 8.1(b).

[80] Ballardong ILUA, Schedule 10, item 9.

[81] Ballardong ILUA, Schedule 10, item 13.

[82] Ballardong ILUA, Schedule 10, item 12.

[83] Ballardong ILUA, Schedule 10, item 17.

[84] Ballardong ILUA, Schedule 10, item 14.

[85] Ballardong ILUA, Schedule 10, item 15.

[86] See for example, the Economic Participation Framework and the Community Development (Schedule 10, items 16 and 17) which contain objectives of future initiatives and activities.

7.6.4 Heritage protection

A standard heritage protocol is set out to regulate access to Noongar lands and traditional sites of importance.[87] The protocol sets out the manner in which heritage surveys are conducted; the persons to be involved; the object of the surveys; and the possibility to review the protocol from time to time.

7.6.5 Noongar Boodja Trust

The *Noongar Boodja Trust* is established as an overarching trust to hold, manage and control all benefits that accrue from the Noongar Settlement on behalf of the Noongar people. The objects of the Trust include support of the seven Noongar Corporations; to hold and manage Noongar land; to hold and manage the Future Fund on behalf of the Noongar; to manage a land and housing fund on behalf of the Noongar; and to make investments on behalf of the Noongar people.[88] The Trust is also responsible to promote and facilitate good corporate governance of the seven Noongar Corporations and effective communication between the Noongar people and the Corporations.[89] The Trust is also responsible to oversee and manage the contributions received from government for the operations of the Trust and projects for the Noongar people. The government of Western Australia contributes A$50 million per annum for 12 years towards future funds for the Corporations. The Trust may use its income to undertake projects; initiative activities; make investments and do whatever it deems to be in the interest of the language, culture and general wellbeing of the Noongar People. In addition, the government of Western Australia also contributes A$10 million per annum to the operations funds to the operating costs of the offices of the Corporations.[90]

8. Reflection on the privatised self-government of the Noongar Corporations

The Noongar Settlement is ground-breaking in many respects. It demonstrates how a non-litigated outcome can be achieved albeit that the evidence that arose from the process of litigation facilitated the agreed-outcome; it highlights the importance of an holistic claim-settlement agreement that takes into account the total needs of the Noongar people and not just narrow cultural needs; it lays the basis for a system of autonomy whereby the Noongar people can manage their own traditional and cultural affairs, as well as becoming involved in contemporary land management, socio-economic and environmental protection initiatives; and it highlights how a statutory contract to resolve a land claim can enable the Noongar community to take responsibility for social, health, welfare, economic, and educational services that far exceed what would traditionally be understood within a bundle of native title rights.

The Noongar Settlement is in effect an agreement to self-govern. The Settlement does not however set up a parallel system that excludes the Noongar people from the Australian institutional and policy arrangements. The Settlement rather supplements the operations of existing governments. It is therefore foreseen that the respective Noongar Corporations will in future provide a wide range of services to

[87] Ballardong ILUA, Schedule 10, item 18.

[88] cl 2.3 Noongar Boodja Trust, at [66].

[89] cl 3.3 Noongar Boodja Trust.

[90] Ballardong ILUA, Schedule 10, item 5.

the Noongar people—including as agents for other government departments—in parallel and not to the exclusion of local, state and federal governments.

The Noongar Corporations are registered under civil law and do not in the realm of public law constitute "governments." They are, at law, akin to any other non-governmental association or corporation. In practice however, the nature of the Noongar Settlement and the intention of the parties to settle native title by way of an all-encompassing legally binding agreement, places the Noongar Settlement in a different category than ordinary corporations and associations. The Noongar Settlement is clearly intended and structured to provide a basis of self-government and autonomy to the Noongar people. The nature of objectives of the Noongar Settlement; the spirit underpinning the Settlement; and the sizeable contribution by the state of Western Australia to the ongoing operations and future fund of the Noongar, give rise to a *sui generis* corporation which is created under civil law but operates in the field of public law. The Noongar Corporations are not mere cultural clubs or associations. They have the legal right to access and manage public land; to jointly manage national parks; to protect their cultural heritage; to initiate socio-economic upliftment programmes; and to be consulted in regard to matters that impact on the Noongar people.

In addition to the functions bestowed on the Noongar Corporations pursuant to the Settlement, as legal entities they may also contract with government departments to become service delivery agents for specific departments. Since the Noongar Corporations speak for and on behalf of the respective Noongar communities, the ability of the Corporations to deliver and manage services to Noongar families may be far better suited than those of ordinary government departments. In areas such as health, education, tourism, land management, social services and care of the elderly, the Noongar Corporations may become essential delivery agents and policy formulating voices.

The nature of the Noongar Settlement will inevitably place the respective Noongar Corporations in an important bi-lateral relationship with the state and local governments of Western Australia. This relationship is in itself unparalleled in Australia. It is inevitable that federal, state and local governments would have to liaise and consult with the Noongar Corporations in regard to policy formulation; new legislation; the budget; and administration of policies to ensure that the interests of the Noongar people are adequately considered. Whereas at a federal level Australia continues to search for a way to establish an advisory body to reflect the views of Aboriginal people, the Noongar Settlement establishes not only a legal base for self-government, but also a forum with which future local, state and federal governments would have to negotiate and consult—typical governance by the Noongar for the Noongar.

The Noongar Corporations is, in effect, a fourth level government. As *de facto* government the Noongar Corporations exercise civil and public powers over the Noongar people by way of incorporated bodies, of which the directors are elected pursuant to the Noongar Settlement, exercising powers and functions on a non-territorial basis, in areas such as educational, health, welfare, housing, employment, tourism, and land care, but not to the exclusion of other government agencies.

9. Conclusion

The Noongar Settlement is a unique benchmark for a native title settlement in Australia. The nature and detail of the Settlement opens new ground for similar agreements in Australia and beyond. The privatised nature of the Settlement illustrates how within the constraints of three levels of government and challenges

of dispersed communities, self-government arrangements under private law can be developed with possible overflow into the public law arena. The Settlement also highlights how research undertaken as part of litigation can be positively used in settlement negotiations. Ultimately the Noongar Settlement was made possible by the research and evidence supporting the native claim by the Noongar people as the traditional owners of the land.

The Noongar Settlement is a truly *sui generis* outcome and serves as a practical example of privatised autonomy as an avenue for indigenous self-government.

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Section 5

Europe - Russia and Ukraine

Chapter 9

Legal Statute and Perspectives for Indigenous Peoples in Ukraine

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Abstract

In this chapter the specific issues of legal statute and perspectives of the development of Indigenous Peoples in Ukraine are highlighted. The situation of occupation and attempt of annexation of the Crimean peninsula as the native land of three Indigenous Peoples (Crimean Karaites, Crimean Tatars, and Krymchaks) in conditions of the ongoing interstate conflict and internal displacement are determined. The aspects of recognition of the indigenous statute in Ukrainian, Russian, and international jurisdictions for those Indigenous People will be researched, as the reparations and reconciliations for such peoples as victims of international crimes of the Soviet times.

Keywords: annexation, Crimean Karaites, Crimean Tatars, deportation, indigenous peoples, internal displacement, Krymchaks, occupation, recognitions, reparations

1. Introduction

For the last decades, three ethnic groups residing in Ukraine struggled for the recognition as Indigenous Peoples and their coherent rights—Crimean Karaites, Crimean Tatars, and Krymchaks. Crimean Tatars (CTs) are the Indigenous People (IP) residing in Crimea, deported from the peninsula by illegal acts of the Soviet government in 1944 and particularly repatriated to Crimea in 1989–2010; they have approximately 200,000 representatives in Ukraine, first of all in Crimea. Crimean Karaites (CKs) and Krymchaks are the IPs which are non-numerous peoples, having now less than 500 representatives in Ukraine, most of all in Crimea [1].

Before World War II, all state authorities that controlled Crimea recognized those three ethnic groups as peoples (nations), traditional for Crimean peninsula. At the same time, Russian authorities during the nineteenth century held the policy of discrimination of the CTs and promoted their emigration from Crimea to the third countries. Krymchaks were discriminated by the Russian authorities' practices in the framework of the anti-Semitic law and till 1917 as People with Judaism as their traditional religion. In 1941 Krymchaks were the victims of genocide (Holocaust) in Crimea during the Nazi occupation. In 1944 CTs were the victims of genocide (forced deportation) under the control of the Soviet authorities. In Soviet period since 1967, the USSR state authorities rejected the statute of CTs as separate ethnic group, they were determined as "Tatars," as the part of undetermined Tatar population of the USSR [2].

Krymchaks and CKs were recognized in independent Ukraine on the regional level as non-numerous peoples in 1992; CTs were recognized by Ukrainian State

authorities as separate ethnic group. From the end of the twentieth century, those three ethnic groups demanded from Ukraine, international structures, and world community to recognize their rights as IPs.

Issues of defense and support for the rights of the IPs of Ukraine in modern conditions are tightly united with their recognition as Indigenous Peoples, with established and real possibilities for reparation of their violated collective and individual rights, and with issues for reconciliation in conditions of the interstate conflict, ongoing in Ukraine and related to Crimea as to the native land of the IPs. Occupation and attempt of annexation of Crimea by the Russian Federation (RF) in 2014, spreading the Russian national jurisdiction, economic, social, cultural, and ethnic policy over Crimea, totally changed the situation in the peninsula for IPs and their representatives, including issues of recognition, reparation, and reconciliation. Those issues since 2014 were lightened in a few scientific researches (N. Belitzer, E. Pleshko, A. Prykhodko, E. Topalova) with a very limited attention on the aspects of changes of the IPs' legal regime in Crimea and of those changes' reflection in the international normative acts.

So the target of this research is to establish the real situation with legal regime and statute, including recognitions, reparations, and reconciliation, for IPs of Ukraine.

2. Issues of recognition, reparations, and reconciliation of the Indigenous Peoples of Ukraine

2.1 Recognition

After the political decision of the problem of the Crimean autonomy in Ukraine during 1991–1996, as experts point, the modern Ukrainian Constitution of 1996 did not relate the legal grounds of the Autonomous Republic of Crimea (ARC) to the statute of the CTs and/or of other Ukrainian IPs. At the same time, the Constitution of the ARC, 1998, did not contain any reference to the IPs or their rights, neither for the legal ground of the autonomy not to defend them on the normative level. Establishment of the official statute for the Crimean Tatar language (both as for the Russian and Ukrainian languages) was the only formal relation with CTs in this Constitution [3].

But we should recognize that social and state Ukrainian institutions provided for that period the possibility to reflect on the Constitutional level the existence of the IPs of Ukraine as the constituent elements of the multinational Ukrainian People. It made essential legal grounds for development of their statute and recognition of their rights, for establishment of the national constitutional institute of IPs.

So Art. 11 of the Ukrainian Constitution, reflected in some researches, guaranteed that the state will promote the development of ethnic, cultural, linguistic, and religious identity of all IPs of Ukraine. More, as it was established in Art. 92 of this act, the rights of IPs must be defined by the special Ukrainian law. Regarding to the part 3 of Art. 119 of the Ukrainian Constitution, the local state administrations must realize on coherent territories, for areas of the IPs' settlement, and the execution of their cultural development programs. At the same time, Ukrainian Constitution fixed in those provisions the similar guarantees for all the national minorities [3].

In independent Ukraine in 1991–2014, those IPs had some problems with realization of their rights, but those violations were caused by common problems of the development of the new post-Soviet state. Norms of Ukrainian Constitution (art. 11, 92 and 119) introduced to its text with the "IPs" term became possible due to the peculiarities of the democratic process of adoption of this act in June 1996. Alas,

Ukraine has not passed later the legislation that would specify those provisions of the Constitution.

Experts point that according to the governmental draft of the concept of the state ethnic policy of Ukraine, elaborated in 2000–2001, IPs were defined as the autochthonous ethnic community, whose ethnic descent and germination were in the boards of modern Ukrainian state, who are in minority for all-Ukrainian ethnic quantities and have no ethnic-kin state forming out of the Ukrainian territory. A number of Ukrainian Laws adopted after the Constitution ("on the Supreme Council of ARC," 1998, "on the Local State Administrations," 1999, etc.) comprised the category "IPs" but did not established additional guarantees for such subjects [2].

Also some regional normative acts of the ARC since 1998 formed special legal regime for the Crimean Tatar language in peninsula, but de facto such documents were mush declarative than practical. Not complete recognition of CTs, CKs, and Krymchaks as IPs in this period was caused by escalation of pro-Soviet policy in Crimea in 1990–1998 by Russian immigrants, initiated and supported by the RF that were resettled in Crimea by the Soviet government after World War II [2].

In 1990–2014 Ukraine was trying to preserve the interethnic conflict in Crimea, and, as researchers established, such situation caused practical impossibility for the indigenous land claims, restitution claims, and defamation claims in conditions of their repatriation and reconciliation. The central and local state bodies and municipal entities, legal enforcement structures, courts, and Ukrainian Ombudsman had the common position that all the property taken from the Crimean Tatar owners from 1944 will not be returned to former owners or their successors and will not be compensated. De facto majority of coherent land partials and buildings were transited from state property to the private property of nonindigenous users that controlled it in the late Soviet time, during the common privatization proceeding in Ukraine before 2000 [4]. It caused refusal of official recognition of IPs' rights, especially for former deported CTs.

Modern researches prove that in the independent Ukraine, representatives of the Karaites, CKs, and CTs claimed to be recognized as the IPs. The national movements of CKs and CTs have arranged their specific organizational forms. CTs created the system of Meilis as executive body elected by Qurultai as National Congress since 1991. CKs established the Ulu Beylik as the representative council that was formed by the National Congress of CKs in 2003. The claims of the CKs, CTs, and Krymchaks for their recognition as IPs grounded on such criteria, reflected in the international standards:

- Linguistic, cultural, ethnic, and religious identity of those ethnic groups
- Own traditional territory for settlement and residing in Ukraine, closely tied with those groups in economy, history, and culture
- Appearance and evolution of those groups in Ukraine as peculiar ethnoses, privation of other historic homeland, or ethnic-kin state formation abroad of Ukraine
- Indigenous self-consciousness of those ethnic groups' members [3]

More, during the first years of the twenty-first century, some normative acts devoted to the aspects of CKs and Krymchaks statute or reflecting their issues were signed on all-Ukrainian or ARC levels. The law of Ukraine "On Grounds of the State Language Policy," 2012, guaranteed, among some others, the special statute for Krymchak and Karaite languages [5]. The Cabinet of Ministers of

Ukraine (CMU) adopted Prescript No. 187-p on 2001 which was ordered to the Council of Ministers of ARC and to the Ukrainian Ministry of Justice to investigate the aspects of the realization of the rights of CKs and Krymchaks, preparing, if necessary, relevant proposals to the CMU [6]. More, in 2004 CMU assumed the state program for the Intangible Cultural Heritage Defense and Preservation, 2002–2008 (Resolution No. 1732). This program foreseen the duty of the Council of Ministers of ARC and the Ukrainian National Academy of Science for the organization of the scientific researches in the fields of the cultural heritage and history of Krymchaks and CKs [7]. Measures of preserving the Historic-Cultural Heritage of CKs and Krymchaks for 2012 were adopted by the Resolution of Verkhovna Rada of ARC No. 582-6/11 on 2011 [8].

Experts point that after the development of Russian aggression, in March 2014, the Ukrainian parliament (Verkhovna Rada of Ukraine, VRU) adopted the statement on the guarantees for the rights of the Crimean Tatar people (CTP) in Ukraine (Resolution No. 1140-VII). By this statement Ukraine declared and guaranteed the development and defense of the CTP cultural, ethnic, religious, and linguistic identity as an IP features [9]. This statement referenced in its preamble the principles and goals reflected in the first articles of the UN Charter and International Covenant on Economic, Social and Cultural Rights, in Articles 3, 11, and 15 of the Ukrainian Constitution. More, in part 4 of this statement (point 4), the support to the UN Declaration on the Rights of Indigenous Peoples (DRIP) was established [3].

By this statement Ukraine recognized "the inherent right of self-determination of the CTP in the sovereign and independent Ukrainian State" and confirmed the statue of the Mejlis and Kurultay of the CTP, as this people's representative bodies. This Parliament Act prescribed to the CMU to prepare urgently the drafts of Ukrainian laws and other normative acts, regulating the status of the IPs. The statement was prescribed to elaborate those legal drafts consulting with the Mejlis, with cooperation of the UN, OSCE, and Council of Europe, implementing the international norms and standards of IPs, minorities and human rights (HRs) [9].

Also this Parliament Act banned (in Art. 8) any endeavor to limit any civil, social, or political rights of citizens of Ukraine related to various ethnic groups residing in Crimea, such as Armenians, Bulgarians, Crimean Tatars, Germans, Greeks, Karaites, Krymchaks, Russians, and Ukrainians, including aspects of the illegal "referendum" in the peninsula. This statement may be determined as historic act, and its realization of the international level was done in the framework of the annual session of the UN Permanent Forum on Indigenous Issues (PFII) in May 2014 [3].

As it is reflected in some essays, exactly on May 13, 2014, at the PFII session, the officer of the Ukrainian Mission before the UN made the formal declaration on behalf of the Ukrainian government on the support of the DRIP by Ukraine. Such act may be determined as being in compliance with other relevant unilateral acts of states for the recognition of the DRIP role, but issued, in common, by national supreme executive bodies (Australian, Canadian, Columbian, and New Zealand governments for DRIP in 2008–2013), not by the parliaments [3].

Alas, special Ukrainian law on statute of the IPs of Ukraine in conditions of permanent Ukrainian-Russian conflict is not still adopted. Anyway the project of such law (No. 4501) was registered in VRU in 1 day with the project of statement No. 1140-VII; the project was adopted in a first reading only.

A month later, attempting to make the annexation of the Crimea, the Russian President signed Decree No. 268, 2014, "On the Actions to Rehabilitate the Armenian, Bulgarian, Greek, Crimean Tatar and German Peoples and on the State Support of their Recovery and Development" [10]. The scientists insist that this act totally disregards the issues of CTs, as deported and as IP, and provides them the similar rights with the representatives of the European nations resettled to the

Crimea during the nineteenth century. Such equalization must be determined as the policy of assimilation of the CTP and refusal in recognition and support of their indigenous rights. More, the human rights purport of this Decree is too poor and not in compliance with the international standards of the IPs' rights [4].

This Decree reflected the attitude of the Russian government on such ethnic issues, with total confidence in own competence to "rehabilitate" all Bulgarian or Armenian people, neither taking to regard the real statute of such ethnic groups as minorities nor connecting those issues with the ethnic-kin states of those European nations. More, this act reflected the declarative provisions not the certain mechanisms; any of its norms cannot be executed for preserving and renovating the CTP rights brutally violated by the Soviet regime [10].

Other acts of Russian authorities in Crimea regarding to those issues was not even finalized. This draft of "law" of the "Republic of Crimea" (RC) No. 1520/30-10 "On Some Guarantees for the Rights of Peoples, Deported without Court Order on the Ethnic Ground during 1941–1944 from the Crimean Autonomous Soviet Socialist Republic" was primarily voted by the "State Council" of RC on June 4, 2014, but did not "enter into force." This draft did not mention the IPs' issues and did not establish the illegality of Soviet deportations; it did not provide any rights or compensation mechanisms for CTs, regarding only for some Soviet-style "actions for social defense" like compensation for ticket to Crimea. This draft did not foresee any special judicial procedure for CTs [11].

For the reason of increasing of the international attention to IPs in Crimea, the Russian occupation authorities decided to implement the indigenous legislation of the RF in relation to the CKs and Krymchaks. As we pointed before, those actions of Russian authorities used to make some propaganda and political influence, as the RF did not foresee the real problem from possible behavior of some hundreds of CKs and only hundreds of Krymchaks for Russian regime in Crimea. That is why the "State Council" of the RC voted in 2014 for the "Resolution" No. 2254-6/14 "On Introducing the Offers to the Government of the RF "On the Comprising the CKs and Krymchaks to the United List of Indigenous Non-Numerous Peoples of the RF." Such act confirmed the presence in a multiethnic Crimean community the non-numerous IPs, such as CKs and Krymchaks, with special statute [12].

This "resolution" grounded itself on the historic formation of those peoples in Crimea, with the "complex and multi-layered ethnic genesis," regarded the ethnic oneness, cultural specification, and religious identity of those IPs [12]. But, as experts proved, this "resolution" stipulated the elaboration of the draft of Russian government's resolution presented officially for the public consideration in late June 2014 on the state web source, but this normative act was not adopted. Later the issue of including the CKs and Krymchaks to the Unified List of Indigenous Non-Numerous Peoples of the RF discussed some times during 2015–2019 but was not realized [13].

Later, in 2015, project No. 2680 of the statement of VRU on preserving in Ukraine the originality and cultural heritage of CKs (Karays) and Krymchaks was registered by some deputies in the Ukrainian parliament. It was supported by the relevant parliamentary committees—on aspects of culture and morality and on HRs, national minorities and ethnic relations in May 2015 but did not supported by VRU. The identical project No. 4827 was registered in VRU in 2016, also with support of relevant committees [14], but it also was not voted by the parliament.

In 2015, CMU voted for the Action Plan for the National HRs Strategy Implementation. Regarding to its art. 112, point 10, the Ukrainian Ministry of Culture, engaging NGO and foreign experts, was able to elaborate, before 2017, the draft of the Law on IPs of Ukraine. This provision of the action plan was not executed, but the alternative draft was prepared and presented by some NGO like Crimean Tatar Resource Center and Foundation on Research and Support of

the IPs of Crimea. This nongovernmental draft was investigated in 2016 by the experts via the UN EMRIP also as ODIHR OSCE annual sessions, and it got the positive summery by the Legislation Institute of VRU but was not registered in the Ukrainian parliament [15].

Steps of the RF for legitimating the attempt of annexation of Crimea were not recognized by the world community; more, those steps were recognized as dangerous for HRs and for the rights of IPs. So, the UN General Assembly (UN GA) Resolution 68/262 "Territorial integrity of Ukraine" called the subjects of international law do not recognize the changes of the status of the ARC and the city of Sevastopol falling from the so-called "referendum" in 2014, but did not mention the IP issues regarding to Crimea [16]. But in some later acts of the international organizations and bodies, CTs also were recognized as IP. Two 2014 UN OHCHR reports (April and June) on the HR situation in Ukraine pointed the information about the boycott by the "CTs as IP" of the so-called "referendum" in Crimea; also those reports reflected the cases of violence and discrimination against CTs as the IP. By such official statements, the UN OHCHR called the Russian powers in Crimean to preserve the minorities' and the IPs' rights in the peninsula, including the CTs' rights, such as the freedom not to be the victim of deportation from a native land [17].

Researches pointed on the strong statement of the Caucus of IPs on the UN PFII 13th Session against the normative manipulations of Russian authorities with ethnic relations in Crimea. Caucus pointed on the intention to avoid the confession of the statute and rights of CTs, CKs, and Krymchaks as the IPs in Crimea that made those IPs are extremely vulnerable from any discrimination or repressions from the Russian occupying powers. By this statement the Caucus of the IPs declared on the risks floating from the Russian ethnic policy in peninsula that is strongly not in compliance with the IPs well-recognized international standards such as DRIP [18].

Above mentioned explains why in May, 2014, the Caucus of IPs pointed on duty for visit of the Special Rapporteur on the Rights of IPs to Crimea for gathering the relevant data regarding the situation and problems of the IPs. More, experts pointed on Caucus' proposals to include the Crimean IPs' representatives to the deputies of the world conference of IPs that was expected in the autumn of 2014. Additionally Caucus of IPs offered to the RF to confirm the rights of the Indigenous Peoples in Crimea to save their own citizenship, to change or to get dual citizenship freely by own choice, and to travel to and from Crimea without any punishment or distinction for their individual rights [4].

Also on May 12, 2016, the European Parliament (EP) adopted special Resolution 2016/2692 (RSP) on the CTs [19] and were reminded that the entire population of CTs, an IP, was forcibly deported to other parts of the then USSR in 1944, with no right to return until 1989, whereas on November 12, 2015, the VRU adopted a resolution in which it recognized the deportation of the CTs in 1944 as genocide and established May 18 as a Day of Remembrance.

In Art. 2 of Resolution 2016/2692 (RSP), it is pointed out that the ban on the Mejlis of the CTP, which is the legitimate and recognized representative body of the IP of Crimea, will provide fertile ground for stigmatizing the CTs, further discriminating against them and violating their HRs and basic civil liberties, and is an attempt to expel them from Crimea, which is their historical motherland; it is concerned that the branding of the Mejlis as an extremist organization may lead to additional charges in accordance with provisions of the Criminal Code of the RF.

2.2 Reparations and reconciliation

We mentioned in some essays that from 1991, the Ukrainian state confirmed de facto the specific features of the CTs' politic statute and granted to this ethnos

some guarantees. The relevant Agreement on Issues Related to Restoration of the Deported Persons', National Minorities', and Peoples' Rights, must be highlighted; it was signed in Bishkek by group of the post-Soviet states in October 1992 and established common mechanisms of reparations and compensations for individuals, without relevance to their indigenous origin; this treaty was ratified by Ukraine not by the RF and lost its power before 2104 [20].

Measures taken by Ukraine were connected officially not with indigenous statute or origin of the CTP, but they grounded on a duty to aid the victims of Soviet deportation, which give them the relevant reparations. Those benefits had individual forms; they had ground on programmatic normative acts voted by CMU and ARC bodies without possibility for the CPs' representatives of structures to initiate any judicial proceeding for the recognition of their collective or individual indigenous rights. For example, such Ukrainian normative acts, devoted to CTs, as CMU Decree No. 1952, 2003, or No. 626, 2004, did not establish the transparent administrative or civil proceeding for former deported persons. Special Ukrainian law "On the Restoration of Individuals' Rights, Deported on Ethnic Ground" No 1872IV, was voted by VRU in June 2004. This act foresaw the judicial procedure of confirmation the fact of deportation for the representatives of CTP with special appellation mechanisms for refusals' cases; anyway it was banned by Ukrainian President's veto, and those proceeding did not enter to force [21].

After the Russian attempt to annex the Crimea in 2014, Ukraine voted the Law No. 1207-VII "On the Preserving the Rights and Freedoms of Citizens and on Legal Regime for the Ukrainian Temporarily Occupied Territory." This legal act in its preamble included the duty for protection and total realization of the civil, politic, cultural, and other rights of the Ukrainian citizens in Crimea, "including IPs," into the grounds of the national politics regarding the Ukrainian temporarily occupied territory [22].

So the scientists point that such legal framework of Law No. 1207-VII covers the IPs' issues for Crimea, and the coherent obligation for Ukrainian authorities to set all the possible steps for securing the constitutional and international standards of rights and freedoms in Crimea is relevant to the public duty to secure the IPs' rights. At the same time, this law points that the responsibility for HRs' violations in Crimea is relied on the RF as on occupier state and as for the relevant "norms and principles of international law." The modern doctrine allows to include the DRIP provisions to those "norms and principles" that Ukraine must execute and demand to execute regarding the situation in Crimea. So Ukraine must demand to realize in Crimea the DRIP provisions, including ban assimilation of the IPs and depriving their integrity, cultural or ethnic features, their traditional lands, territories, and resources. Also Ukraine must counteract to any attempts of the forced displacement and deportations of the IPs representatives from Crimea [23].

Experts also stress the importance of the new Law No. 1223-VII "On the Restoration of the Rights of Individuals Deported on Ethnic Grounds" that was voted in 2014. Such law also does not include the "IPs'" category; but its norms contain the term "deported peoples" and regard CTs directly. This law may be determined at the common act that covered all the illegal deportations made by the Soviet state on ethnic grounds on the modern Ukrainian territory. Articles 7–9 of Law No. 1223-VII established the procedures of recognition of the statute of the deported person for the CTP representatives.

Law No. 1223-VII contains the provisions for the real estate and other relevant properties confiscated from deportees by the Soviet state; such possessions must be returned to the deportees or to their successors in nature but only if the preserved buildings are not in private property now. In other circumstances, the deported person's his or her successors must get the financial compensation; both restitution

and compensation may be suited by such person only via 3 years after his or her recognition as deported one [24].

We discussed the practical possibility of implementation in Ukraine criminal proceedings concerning deportations of CTs on ethnic grounds, committed by the Soviet authorities in 1939–1991 [25]. This possibility has become almost confirmed, when on December 2015, the Investigation Department of the Prosecutor's Office of the ARC (which is based in Kiev now) initiated criminal proceedings under Art. 442 "Genocide" of the Criminal Code of Ukraine on the fact of deportation of the CTs.

Before the occupation of Crimea, the Security Service of Ukraine (SSU) together with the Prosecutor General's Office in 2009 started the preliminary investigation for the illegal resettlement of ethnic groups from Crimea that started in 1944. For such investigation the separate group was created in the structure of the SSU Headquarters in the ARC. Until 2010 the SSU investigators researched evidences of this Soviet deportation of the CTP from Crimean peninsula; later their activities were stopped, this SSU special group was disbanded, and all the gathered evidences in 2014 were captured by Russian invaders in Simferopol. After 2014 Russian powers in Crimea did not start any proceeding or investigation regarding to the crime of the CTs' deportation; more they declared officially that all the relevant SSU materials "are lost" [25].

Hence, this proceeding of the Prosecutor's Office of the ARC regarding the events of 1944–1989 with CTP was actually started from scratch and needs the strong support of international structures. These criminal proceedings have some judicial perspectives—as some victims of the deportation are alive and reside in Ukraine, as the huge historic data is still available. More, some witnesses and co-participants, as of the beginning of the deportation, so of the events of the Soviet counteraction to the initiative resettlement of the CTs to peninsula in 1954–1989, party—some former members of the State Security Committee (KGB) bodies live in Ukraine till now [25].

The historic investigation of those issued is the task of the Ukrainian Institute of National Remembrance regarding to the CMU Resolution No. 684, 2014. Exactly this institute is the central executive body, governing the duties under aegis of the Minister of Culture, in area of assessment "of forced deportations, of such crimes' organizers and executors and of their actions' effects for Ukraine and the World." The duty and possibility of legal enforcement investigation of the Soviet deportations were confirmed by this institute in its letter No. 01/301, 2015 [25].

We must consider the role of military personnel and commanders of the Soviet force structures, the Ministry of International Affairs, the Ministry of State Security, and the KGB of the USSR for organizing the deportation of CTP, for the detention of the deported people in non-freedom regime till 1956, and for permanent counteraction against CTs resettlement to Crimea even since 1967 when such activities of CTs became formally allowed by the Soviet legislation [26].

So there is no doctrinal doubt that the Soviet deportation of CTP from the Crimean peninsula was the international crime without temporal limits for its investigation. Now, even when Crimea is occupied, Ukrainian legal bodies have the necessary jurisdiction for such investigation and judicial proceeding. But the final legal determination of such deportation as a genocide or as other international crimes against humanity must be established in the final act of the competent court. The aid of international bodies for such investigation will be important in conditions of ongoing occupation of Crimea by the RF [26].

But not only investigating the Soviet deportation is important for reparation and reconciliation of the IPs' rights in Ukraine especially for those who become internally displaced persons from Crimea since 2014. For a long period, the Ukrainian government provided minimal assistance to internally displaced persons, many

of whom found themselves in an administrative limbo due to their uncertain legal status. Recognizing the long-term reality of internal displacement for these groups, the legislation was intended to provide better access to legal documentation and essential services to those who had fled the fighting [27].

More, the ban of Mejlis of the CTP as an "extremist organization" by the Russian authorities in Crimea and Moscow in 2016 caused the additional violations of the rights of this IP. Threats to ban the Mejlis began in October 2015, and on February 15, 2016, the de facto prosecutor of Russian-controlled "RC" Natalya Poklonskaya announced that an application had been made for the ban, with the claim being that the Mejlis was "extremist." Modern authors point of the "clear Soviet echoes" for this suit of occupier illegal prosecutor that grounded formally on "applications" from CTs structures and local institutions, including their "heads," asking to recognize the Mejlis actions as "illegal and provocation."

The act of banning the Mejlis was given by the so-called "Supreme Court" of RC on April 2016, and it was supported by the Supreme Court of the RF (SCRF) on September 2016 regarding to the appellation of the Mejlis' defenders. This totally illegal and politicized proceeding, the RF tried to determine the Mejlis as a "civic organization" that may be banned for "extremist" activities. More some "evidences" used in this proceeding were totally absurd, such as the document, presented by CTP leader Mustafa Dzhemiev in 1988, or as some Mejlis' documents issued 20 years before the occupation of Crimea by RF. The determination of the "extremism" for the Mejlis de facto was connected in this proceeding with the CTP's struggle for their indigenous rights in Ukraine [28].

During this proceeding the defense of Mejlis pointed to the SCRF duty to execute the DRIP provisions relating to the Mejlis. Even supporting the position of the "Supreme Court of the RC" to ban the Mejlis, in this case, analyzing the DRIP provisions, SCRF confirmed that DRIP is actually for Russian jurisdiction, including the Mejlis case. By this SCRF de facto recognized the IPs' rights for CTs in the DRIP framework.

Issues of violation of CTs' rights were reflected in Resolution 71/205 adopted by the UNGA on December 19, 2016 [29]. In this act the UNGA welcomed the reports of the Office of the UN High Commissioner for HRs on the human rights situation in Ukraine, of the Commissioner for HRs of the Council of Europe, of the HRs assessment mission of the Office for Democratic Institutions, and HRs (ODIHR) and the High Commissioner on National Minorities (HCNM) of the OSCE, in which they stated that violations and abuses of HRs continued to take place in Crimea and pointed to the sharp deterioration of the overall HRs' situation.

In Resolution 71/205 the UNGA pointed on the reported serious violations of rights of the Crimean residents, including CTs, such as abductions, arbitrary detentions, discrimination, enforced disappearances, extrajudicial killings, harassment, intimidation, politically motivated prosecutions, torture and ill-treatment, transfer of detainees from Crimea to the RF, violence, etc. Also the abuses of the right to peaceful assembly and of the freedoms of association, of expression, and religion or belief were lighted in this UNGA act. In Resolution 71/205 the UNGA demanded the RF to execute a set of occupying power international obligations: to stop immediately all normative and de facto abuses against Crimean residents, including arbitrary detentions, discriminatory practices and measures, torture, and inhuman or degrading treatment [29].

Issues of internal displacement from Crimea were also reflected in Resolution 72/190 adopted by the UNGA on December 19, 2017 [30]. In this act the UNGA condemned again the reported serious violations and abuses committed against the residents of Crimea, in particular extrajudicial killings, abductions, enforced disappearances, politically motivated prosecutions, discrimination, harassment,

intimidation, violence, including sexual violence, arbitrary detentions, torture and ill-treatment, in particular to extract confessions, and psychiatric internment and their transfer or deportation from Crimea to the RF, as well as reported abuses of other fundamental freedoms, including the freedoms of expression, religion, or belief and association and the right to peaceful assembly.

In this act the UNGA demanded the RF to reduce all the decisions that banned the Mejlis of the CTP and its activities as the "extremist organization," to cancel the acts banning the Mejlis' leaders to enter Crimea and to stop any other steps for limitations on the rights and possibilities of the CTP to establish and preserve own representative structures. Also in Resolution 72/190, the UNGA supported the efforts of Ukraine to maintain economic, financial, political, social, informational, cultural, and other ties with its citizens in the occupied Crimea in order to facilitate their access to democratic processes, economic opportunities, and objective information.

Some acts of the EP as of the European Union politic representative body also reflect the situation with internal displacement of the indigenous CTs and violation of their individual and collective rights in Crimea that caused such displacement. In Art. 9 of the EP resolution of February 4, 2016, on the HRs' situation in Crimea, in particular of the CTs (2016/2556 (RSP)), the impediments to CTP leaders returning to Crimea and their prosecution were deplored [31].

The resolution of EP 2016/2692 (RSP) on the CTs [19] reflected the concern of the European Union and the international community regarding the current problems for HRs in the occupied peninsula. This act pointed on the pressure over those who did not confirm the "legacy" of the Russian authorities in Crimea; it specially stressed that such so-called powers "targeted the indigenous community" of the CTs, as the majority of the CTP opposed the RF to take control over the peninsula and boycotted the so-called "referendum" in March 2014.

This EP act strongly condemned the RF, whereas CTs' institutions and organizations are increasingly branded as "extremists" and prominent members of the CT community which are, or risk, being arrested as "terrorists," whereas the abuses against CTs include abduction, forced disappearance, violence, torture, and extrajudicial killings that the de facto authorities have failed to investigate and prosecute, as well as systemic legal problems over property rights and registration.

Resolution 2016/2692 (RSP) also reflected that CTs' leaders, including Mustafa Dzhemilev and Rafat Chubarov, have previously been banned from entering Crimea and are now allowed to do so but under threat of arrest—thus sharing the same fate as numerous other members of the Mejlis and CTs' activists and displaced people, whereas more than 20,000 CTs' have had to leave occupied Crimea and move to mainland Ukraine.

By Arts. 6 and 9 of Resolution 2016/2692 (RSP), EP condemned the severe restrictions on the freedoms of expression, association, and peaceful assembly, including at traditional commemorative events such as the anniversary of the deportation of the CTs by Stalin's totalitarian Soviet regime and at cultural gatherings of the CTs; it recalled that Indigenous CTP have suffered historic injustices which led to their massive deportation by the Soviet authorities and to the dispossession of their lands and resources; regrets are the fact that discriminatory policies applied by the so-called authorities are preventing the return of these properties and resources or are being used as an instrument to buy support.

Also the Resolution of EP 2017/2596 (RSP) of March 16, 2017, on the Ukrainian prisoners in the RF and the Crimean situation should be mentioned. In its Art. 8, there underlines that the CTs, as an IP of the peninsula, and their cultural heritage seem to be prime targets for repressions: calls for unrestricted access to Crimea by international institutions and independent experts from the OSCE, the UN and the Council of Europe. In its Art. 9, the resolution reminds the Russian authorities that

despite the illegality of the annexation of Crimea, the RF is, in a de facto capacity, fully responsible for upholding the legal order in Crimea and protecting Crimean citizens from arbitrary judicial or administrative measures.

This document pointed that restrictive Russian legislation regulating political and civil rights has been extended to Crimea, which has resulted in the freedoms of assembly, expression, association, access to information, and religion being drastically curtailed, as well as credible reports of intimidation, enforced disappearances, and torture, whereas there are approximately 20,000 internally displaced persons from Crimea in other Ukrainian regions, the Mejlis of the CTP has been banned and proclaimed an extremist organization.

By Art. 10 the resolution of EP expresses strong concern over the many credible reports of cases of disappearances, torture, and systematic intimidation of local citizens opposed to the annexation of Crimea and calls on Russia to immediately cease the practices of persecution, to effectively investigate all cases of HRs' violations, including enforced disappearances, arbitrary detentions, torture and ill-treatment of detainees, and to respect the fundamental freedoms of all residents, including the freedoms of expression, religion or belief, and association and the right to peaceful assembly; calls for all disappearances and kidnappings during the period of occupation of Crimea are to be investigated immediately, including the case of Ervin Ibragimov. In its Art. 18 EP calls for the EU support for Ukrainian and CTs' media projects for Crimea as well as those initiated by the European Endowment for Democracy and Radio-Free Europe/Radio Liberty and in defense of CTs' schools and other initiatives to protect their cultural heritage [32].

EP also voted the resolution of October 5, 2017, on the cases of CTs' leaders Akhtem Chiygoz and Ilmi Umerov and the journalist Mykola Semena (2017/2869 (RSP)) [33]. In Arts. 3 and 4 of this act, the EP condemned the Russian authorities' actions in Crimea that discriminate "the Indigenous CTs," as such actions cause the infringement of CTs' property rights, also as they increase pressure over CTP in their economic, social, and political life opposing the Russian attempt of annexation of the Crimea. By this resolution EP confirmed once again that CTs' rights were gravely and brutally limited and violated after the ban of the Mejlis activities and determining this body as "extremist" "civil organization," also as after the ban for the CTs' leaders to return to Crimea.

Also the issues of violation of CTs' rights were reflected in the OSCE documents. Report of the HRs' assessment mission on Crimea, prepared by OSCE ODIHR and the OSCE HCNM in 2015 in point 178 confirmed that Russian powers in occupied Crimea limited the movement of CTs' leaders, established for them the entry bans and other nonproportional measures to prevent their travels to Ukrainian mainland and abroad. Such limitations were clearly politicized as the persons banned to enter Crimea were originating from Crimea and regarding to the RF laws adopted after 2014 theoretically were the "Russian citizens" [34].

The current HRs' situation in Crimea and the challenges faced by HRs' defenders working on and in Crimea were discussed at an expert meeting on June 14, 2018, in Kherson, Ukraine. The meeting was organized by the OSCE ODIHR in cooperation with the Mission of the President of Ukraine in the ARC. This meeting was held with 28 representatives of various civil structures, such as leading HRs' defense Crimean structures, the Mission of the President, and intergovernmental organizations. Those representatives discussed and researched the situation with HRs in peninsula, regarding to the proposals of the abovementioned report of the HRs' assessment mission, done in 2015. This will further the efforts of this mission to promote and monitor the observance of the HRs of Ukrainian citizens living in Crimea and of internally displaced persons from the peninsula, including indigenous representatives [35].

The ban of Mejlis of the CTP was watched by the International Court of Justice (ICJ) in Ukrainian claim against the RF for the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD). In this case ICJ established the special measures and demanded by its Order the RF "to refrain from maintaining or imposing limitations on the ability of the CTs community to conserve its representative institutions, including the Mejlis of the CTP." This Order was added to the preliminary decision of the ICJ handed down on April 19, 2017, acknowledging its own jurisdiction over the Ukraine vs. Russia case.

As judge of the ICJ James Crawford pointed related to this case, nothing in CERD prevents any state from national regulating the issues of establishment or development of the organizations representing any ethnic group. The states also have competence even to ban such organization in the most serious situations, but of course such measures or bans must be clearly and transparently justified. In the case Ukraine vs. Russia, those justifications are absolutely necessary regarding the historical destiny of the CTP and the essential role of the Mejlis in preserving, advancing, and protecting the CTs' rights, especially during the period of changes and disruption. So the ICJ will be able to assess the evidences from the parties of this case in that regard, pointed by this judge.

More, judge J. Crawford added in his declaration for this case that the provisional measures established by the ICJ regarding to the Mejlis issue require that Russia must refrain from maintaining that ban. At the same time, this ICJ Order did not point the aspects the volume and framework of the decisions of the Crimean bodies and SCRF regarding the provisions of the Russian law executed for. So the Order of ICJ confirmed that this ban may plausibly implicate rights under international law and of course it may not be in compliance with the domestic courts' acts [36].

More, in September 2017, some Mejlis members' representatives lodged the application to the "Supreme Court of the RC" demanding to execute the ICJ Order by making the review of Russia's ban. Some coherent individual suits were lodged soon after the Crimean "prosecutor" informed the Mejlis first deputy head, Nariman Dzhelyal, that the "prosecutors' office" seeks the "clarification" for this ban regarding the ICJ's Order. There had also been a separate application lodged by Russian lawyer Nikolai Polozov on July 18, 2017, to this issue [29]. The "Supreme Court of the RC" rejected all those application by the formal grounds. During the 2017 Mejlis of the CTP, local Mejlises of CTs and some members of Mejlis and Qurultay bodies lodged their individual application to the European Court on HRs against Russia for their rights, guaranteed by the European Convention on HRs and brutally violated by the illegal ban of Mejlis.

3. Conclusions

So we may point that since 2014, Crimean Tatars were recognized by Ukraine as Indigenous People de jure, and Crimean Karaites and Krymchaks were recognized by this state de facto. The Russian Federation, contrary to some declarations made during 2014–2015 after occupation of the Crimean peninsula, did not recognized any ethnic group of Crimea, as the Indigenous People de jure. Proceeding in the International Court of Justice in CERD case of the Ukraine vs. Russia, including demand to cancel the ban of Mejlis of Crimean Tatar People and position of the Supreme Court of Russia in Mejlis case, shows the absence of legal strategy in Russia related to Crimean Tatar issue. The Russian doctrine for traditional non-numerous Indigenous Peoples is not in compliance with Karaites and Krymchaks situation.

The key issues for reparations and reconciliation for Indigenous Peoples of Ukraine are connected with consequences of:

- The genocide started against them during World War II, including the deportation of the Crimean Tatar people (1944–1989), duty of coherent investigations, court decisions, and compensations.

- The internal displacement of representatives of Indigenous Peoples from occupied Crimea to other regions of Ukraine since 2014 that cause the duty to provide the wide set of displaced Indigenous persons' rights.

- The ban by the Russian authorities of the Mejlis of the Crimean Tatar People since 2016, coherent proceedings started in Russian jurisdiction, in the European Court on Human Rights, and in the International Court of Justice.

- The discrimination of the Indigenous Peoples in the occupied Crimea since 2014 by Russian de facto authorities is often not in compliance with the Geneva Law and international standards of human rights.

Those aspects were reflected not in Ukrainian and Russian normative acts but in some resolutions of the UN General Assembly and European Parliament devoted to situation in Crimea. The paradox of reflecting the UN Indigenous standards for Crimea more in acts of European Union than of the UN structures is an interesting phenomena for future scientific researches.

Acknowledgements

This work was done with a great support of some institutions, including the Indigenous NGO such as the Foundation of Research and Support of Indigenous Peoples of Crimea and Crimean Tatar Resource Center, with which I collaborated for the last decade. The results of my works for Indigenous Issues were kindly presented in Ukrainian parliamentary institutions such as Committee for Foreign Affairs and Legislation Institute. My research grounded on submissions, I prepared and presented for the UN Expert Mechanism of the Rights of Indigenous Peoples for Report on Recognition, Reparations, and Reconciliation and study on the Indigenous Peoples' Rights in the Context of Borders, Migration, and Displacement in 2019.

Conflict of interest

I, Borys Babin, confirm, declare, and certify that I have no any real possible affiliations relevant to any structure, entity, or organization with any financial or other material interest, including the consultancies, educational grants, employment, honoraria, membership, participation in speakers' bureaus, stock ownership, other equity interest, and/or the expert testimony or patent-licensing arrangements; also I have no any relevant, real or potential, nonfinancial interest, such as affiliations, beliefs, knowledge, personal, or professional relationships in the subject matter or materials reflected, discussed, and concluded in this work.

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Edited by Liat Klain-Gabbay

The book is a collection of papers about indigenous, aboriginal, ethnic and fugitive groups from different countries, regions and areas. The book's chapters are written by scholars from different disciplines who exemplify these groups' way of life, problems, etc. from educational aspects, governmental aspects, aspects of human rights, economic statues, legal statues etc. The chapters describe their difficulties, but also their will to preserve their culture and language, and make their life better.

Published in London, UK

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ISBN 978-1-83881-908-8