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Recognition As a Double-Edged Sword: Contending against the Homogeneity of the Indigeneity

Nisha Bhaskar*

Abstract

The term “indigenous” is not merely descriptive but shaped by structures of power, exclusion, and legal recognition. This paper interrogates how the non-recognition of local laws, customs, and traditional legal systems has produced marginalization that, paradoxically, comes to define indigeneity itself. Colonial and postcolonial legal orders have eventually displaced indigenous knowledge systems, replacing them with homogenized “mainstream” frameworks under the banner of codification, modernization, and national integration. Such processes have forced indigenous communities to reformulate their identities, rights-claims, and practices within state-sanctioned legal vocabularies stripping them of the heterogeneity. Drawing on critical studies and Third World Approaches to International Law (TWAIL), this paper explores the tension between formal recognition and epistemic erasure. It argues that mainstreaming through the process of garnering legal recognition is aimed towards homogenization and leads to marginalization resulting in erasure of the indigenous. Through references from Australia, Canada, India and Brazil, it terms “mainstreaming” of indigenous legalities as a double-edged sword offering visibility but often at the cost of assimilation. Thus, the paper vouches for the role of international law in regulating this process of homogenization in order to safeguard heterogeneity.

Keywords: *Indigenous, mainstream law, legal tradition, Australia, Canada, India and Brazil, International law.*

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Introduction¹

The category of the “indigenous” is not merely descriptive but deeply shaped by structures of power, exclusion, and legal recognition. The term “indigenous” does not simply describe a group of people who have ancestral ties to a particular land; rather, it is a category that has been produced and regulated through power. Thus, one needs to answer the questions of who and what of indigenous and indigeneity prior to defining laws for its protection. The language of law often focused on the latter part misses the semantic discourse thereby ignoring the terminologies relevant qua the indigenous. This has led the contemporary legal set-up and its law to treat indigeneity as a means for achieving the end of administration. The available statutes both at the municipal and international level discussing the rights and claims of indigenous recognize indigeneity as a status garnered by law, rather than accepting it as *sui generis*. A cursory glance at the vocabulary of the United Nations Declaration on the Rights of the Indigenous Peoples 2007 (United Nations Declaration on the Rights of the Indigenous Peoples 2007, 2007) exemplifies this assertion wherein the rights are guaranteed by virtue of the sanction of law reserving its scope and application. This approach of law qua the indigenous is resultant of the manner in which international law has evolved, i.e. unilaterally through the episteme of western legal jurisprudence. This has kept international law jurisprudence distanced from the knowledge system of indigenous peoples such that it has become complacent to municipal recognition.

Municipal recognition through state sanction in the form of laws, policies and precedents has made indigeneity visible on the international domain; however, it has also led to indigeneity being defined by the State leading to altering the very morphology of indigenous acting as a double-edged sword. Resultant of the of unilateral development of law, non-cognizance of the diversity of legal traditions due to deep roots in the English and European legal systems and continuity of colonial temperament in the post-colonial period, this form of recognition needs to be revisited. This can be achieved through an ordained revision of the existing laws making them concordant with the indigenous groups. This would safeguard indigeneity by preventing its amalgamation in the homogenous whole. Thus, it becomes imperative upon international law to set the narrative in favour of heterogeneity.

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This paper argues that indigeneity is not eroded merely through demographic decline or cultural loss, but through structured legal governance that produces homogenization under the guise of recognition. It flows in four parts for feasible understanding. The first part sets the tone by explaining the rationale for contending against homogenization. It supports this assertion by establishing how homogeneity results in marginalisation rather than curating a safe harbour for expression of indigeneity. The second part proceeds with the argument that marginalization resultant of homogeneity shapes indigeneity rather than permitting a space for independent existence and development of indigenous knowledge system and therefore indigeneity. It actualises this by indulging in a comparative analysis of four countries (Australia, Canada, Brazil and India) for understanding how laws and policies promote mainstreaming and cater to homogenization. The third part argues for the indispensability of international law for ensuring heterogeneity. It therefore begins with highlighting the fallacies existing in international legal jurisprudence that hinder the actualization of heterogeneity and thereafter highlights the available legality in the form of customary international law for developing indigenous jurisprudence. The final part discusses how semantic reservation has resulted in “mainstreaming” of indigeneity erasing the heterogeneity. It further reflects on examples from the above four countries explaining the role of legal semantics in promoting homogeneity through mainstreaming amounting to marginalization.

1. Contending against Homogeneity

Homogenization of indigenous in the mainstream has not been beneficial for either the indigenous or for the law. This paper employs the term “homogenization” to denote the reduction of diverse indigenous identities and legal traditions into administratively manageable categories. Colonialism remains the historical catalyst for this process, but its contemporary operation extends beyond formal colonial rule through laws, policies, and institutions of governance. A critical analysis of the proposed arguments in favour of homogenization helps understand their porousness to objectivity and practicality. It would be pertinent to mention at the onset that this paper does not oppose recognition per se. Rather, it opposes forms of recognition that condition indigenous identity and legal traditions upon conformity with state-created categories. The alternative proposed is not non-recognition, but pluralistic recognition that acknowledges indigenous legal traditions as autonomous normative orders while permitting engagement with state institutions without requiring assimilation. In this regard the paper discusses

the four broad contours of economy, social well-being, morality and realism for explaining its assertion.

Economy:

The first contention supporting homogenization is economic development based on its omnipotence and prudence. Though lucrative, this argument has its own limitations. A look at India and perpetual survival of its economy through the crests of global slumps explains this assertion.

Social well-being:

The second argument favouring homogenization into mainstream is reliant on social well-being of the indigenous population. One merely needs to take a cursory glance at the historical incursions and colonial invasions to understand that the depletion of the societies was more because of the contamination from outside rather than social decline within. Be it the decline of the Red-Indians in America or Pygmies of Africa or the hunter and gathers of Asia, it has been the expedition from outside invaders that have led to their decline rather than their internal deterioration.

Morality:

Further there are arguments on the threshold of morality terming indigenous practise as uncivilised and barbaric. The banning of body-piercing of the Apatani tribe in India, the Potlatch and Sun dance in Canada, Cannibalism and Witch craft justice in Papua New Guinea and so on have been justified as immoral and therefore banned under the law. However, the very premise of morality remains undefined and would vary as has been agreed by the stalwarts of moral philosophy, including Hart, Kant and Dworkin among others. Therefore, the assumption of a moral threshold becomes redundant and absurd.

Realism:

Another contention remains on behalf of positive law and contends for the prerogative of the State. However, even the positivists have reflected upon their predecessors works, for example Raz in his works and contend more on integration than imposition.

Thus, the arguments propounded in favour of homogenization can be refuted on objective grounds. Furthermore, these arguments too emanate from the jurisprudential bias for homogeneity and uniformity. They analyse the indigenous from a uniform lens catering to mainstream norms rather than accepting its knowledge system and tradition in independence. A theoretical understanding of this can be presented through Foucault's governmentality. His theory busts the myth around administrative inefficacy and its justification through government machinery. Managerial shift of law

(St-Hilaire 2021) suggests that the shift of the government is from the people to administration. This read with Gramsci's hegemony of the minority helps one understand the *raison d'être* behind homogenization. Thus, the resulted homogeneity leads to marginalisation of the indigenous community by morphing and shaping the very indigeneity rather than accepting its heterogeneity.

2. The Persistence of Colonial Logics

Marginalization resultant of homogeneity shapes indigeneity rather than permitting it the space for independent existence and development structured through a four-fold process. Firstly, there is a structural subjugation of the indigenous knowledge system and legal tradition by the mainstream law through the use of accepted and acclaimed semantics of the latter. Secondly by cognisant recognition and non-recognition by the mainstream law, the indigenous system is made to comply by the standards of mainstream law rather than having the guarantee and safeguard of developing within its own mainframe. Thirdly through documentation and instruments like schedules and notifications this structuring is ingrained and made acclaimed universal such that the very contention against it is erased. And finally, this mainstreaming amounts to homogeneity by rescinding the juridical autonomy of the indigenous population under the tutelage of uniform law. All this results in marginalization of the heterogenous either compelling them for demanding state sanction for recognizing their indigeneity or shaping their indigeneity in concordance with the homogenous whole. While one may blame the colonial period for this form of homogenization, the pattern continues even in the post-colonial period.

2.1 From Civilisation to Administration: Continuity in the Governance of Indigeneity

Colonial and postcolonial legal orders have historically displaced pluralistic normative systems, replacing them with homogenised "mainstream" frameworks under the banner of codification, modernisation, and national integration and international alingment. Such processes have forced indigenous communities to reformulate their identities, rights-claims, and practices within state-sanctioned legal vocabularies often stripping them of their relational and spiritual connections to land, kinship, and customary governance. During the colonial period this was done under the name of civilization and in the post-colonial period this has been done under the name of administration and regulation. While one can blame colonization

for disturbing or altering the indigenous population, the practice of the States, beginning with decolonization waves, has been on similar lines. The distinction drawn here is not temporal but functional. Colonisation did not simply end with formal decolonisation or political independence; rather, several techniques of governance developed during the colonial period persisted within post-colonial state structures. The transition was therefore from direct colonial administration to state-led regulation. While the justificatory vocabulary shifted from “civilisation” to “administration,” “development,” and “national integration,” the tendency to regulate indigenous identities through externally imposed legal frameworks continued across both periods. A reading of the apex court decisions from Canada, India, Brazil and Australia helps understand the assertion of mainstreaming made under this part. These countries host significant indigenous groups both in number and population with recognition of these groups through law and precedents and therefore suit well for analysing the assertion of recognition being a double-edged sword. Further, all these countries have been colonised and therefore also help understand the claim of continuity in approach for indigenous in post-colonial period. Moreover, the contrast between developed countries of Canada and Australia and the developing countries of India and Brazil help trace the unanimity in narrative between the countries who are categorically opposed in other matters of international law.

2.1.1 Canada

In *St. Catherine's Milling and Lumber case* (St. Catharines Milling and Lumber Co v. R 1888) the Supreme Court observed that, “...that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was “an interest other than that of the Province in the same”. Though an appeal was made against this order, it was of no recourse even with the dissent of Justices Strong and Gwynne. This 1887 judgment highlights that this State centric narrative has not been the result of the absence of contestation of legal ignorance of the indigenous community rather it has been a structured narrative enforced through the call for homogeneous application of law. The following judgments too have been decided with these same fallacies. In *Van der Peet* judgment (Van der Peet v. R 1996) deciding on existing aboriginal rights, the Court adjudicated that, “All aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. Any right, aboriginal or other, also carries with it the obligation to use it responsibly. The Crown must establish a regulatory regime which respects these objectives”. In a similar fervor in *Delgamuukw* (*Delgamuukw v. British Columbia* 1997)

deciding on establishment of aboriginal title, the court asserted on the fiduciary relation between the Crown and the aboriginal and further went ahead of Van der Peet to recognize it as *sui generis*, however, attached the caveat of '*compelling and substantial objectives*' which again reserved these rights within the ambit of state recognition. Again, in Mitchell (Mitchell v. Minister of National Revenue 2001) the right of Mohawk community for free cross-border trade was restricted with the assertion that their '*claimed aboriginal right did not survive the transition to non-Mohawk sovereignty*'. In the recent judgments of Tsilhqot'in Nation (Tsilhqot'in Nation v. British Columbia 2014) and Desautel (R. v. Desautel 2021) the State has adopted similar approach while adjudicating on land claims and aboriginal practises respectively. Though in the former matter the court adjudicated from a utilitarian lens, in the latter case echoing Mitchell (Mitchell v. Minister of National Revenue 2001) it asserted for recognition through Crown sovereignty. These decisions from Canada are crucial considering the colonization of the lands and the claims being brought by the First Nations. While they illustrate the recognition of the aboriginal rights, they also highlight that this recognition has been brought within the mainframe of State sanction and its feasibility sieving through the mainstream law.

2.1.2 Australia

In the 1992 Mabo judgment (Mabo v. Queensland (No. 2) 1992) deciding on the issues 'whether the Meriam people did have traditional rights and interests in the land of the Murray Islands and, if so, whether Australian law would protect those rights and interests. If native title is recognised, are Indigenous people entitled to compensation if their land is taken away?' gave a pragmatic judgment ousting the colonial doctrine of terra nullius however, what defeats their prudence is the recognition of aboriginal rights qua the common law of Australia rather than accepting it as *sui generis*. While this recognition safeguards their territorial claims against colonial dogmas, it reserves their claims within the plebian of rights guaranteed by the state rather than recognising their independent rights. Furthermore, the decision in Wik (The Wik Peoples v. The State of Queensland & Ors 1996) too brings indigeneity at cross roads with other rights therefore recognising it with a caveat. While rights are universal, they are not homogenous and further there can be no uniform and all-pervasive lexicographical ordering of the rights. Thus, though there is increasing recognition of aboriginal and indigenous rights in the country along with call for representation both socially and politically, the decision of the court keeps it tethered to state sanction. This caters to homogenization and mainstreaming rather than ensuring an individual existence. The recent decision in Yunupingu

(2025) (*Commonwealth of Australia v. Yunupingu* 2025) too augments this narrative wherein the Court adjudicating on claims for past acts observed that ‘Indigenous native title rights are “property” requiring just terms compensation if acquired by the state, rejecting arguments that the law should treat them as inherently fragile’. Reiterating *Mabo* the Court asserted in concordance with the Commonwealth’s argument that, “Native title rights and interests recognised at common law can be described as inherently fragile at common law, not because they are inherently defeasible at common law, but insofar as (before the Native Title Act) they would have been susceptible to executive extinguishment without compensation through the paramount force of an exercise of prerogative power (absent abrogation of that power by statute) and insofar as a statute authorising the grant or appropriation of a right or interest in land conveys a clear and plain intention to extinguish, rather than merely to regulate, native title rights and interests”. (*Commonwealth of Australia v. Yunupingu* 2025) This *raison* conforms to the claims from the State’s perspective rather than emanating from the rights of the aboriginals.

2.1.3 India

India hosts one of the most diverse forms of indigenous groups including the Sentinelese which have not yet come in contact with foreign entities. While the State has been prudent in ensuring the independence of cultural and social rights, the claim over use of forests remains unresolved and contested since the demarcation of forest by the British colonisers. The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) and Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) acts have however acted more as conduits for bringing the indigenous in the mainstream rather than recognising them distinct and independent. Further the constitutional mandate of garnering recognition solely through State sanction in the form of Gazettes and schedules leads reserves indigeneity to state satisfaction rather than recognition of practise. The matters related to indigeneity in India also suffer from being treated as an appendage to either social, cultural or environment rights rather than being discussed solely from the purview of distinct knowledge system. The judgments of the Supreme Court (the apex court) such as *Orissa Mining (Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests & Others* 2013) and *Wildlife First (Wildlife First & Others v. Union of India & Others* 2009) have discussed the rights of indigenous population mainly as their environment rights relying on environment jurisprudence rather than recognising the legal tradition and knowledge system catering to indigeneity.

2.1.4 Brazil

The country hosts a significant number of indigenous tribes and therefore a discussion on the legal understanding of indigeneity within the State becomes crucial. The judgments of the Supreme Court of Brazil (STF) have been cognisant of this number however the inherent semantic barriers hinder the actualization of the indigenous rights by limiting the exercise of their episteme. The decisions in Marco Temporal (Indigenous Time Limitation Act suit, 2023) and Raposa Serra (Raposa Serra do Sol Indigenous Land Case, 2009) exemplify this assertion. Though affirming Indigenous rights, the decision in Raposa Serra operates entirely within *state constitutional parameters* (Article 231) rather than recognizing pre-colonial normative territorially embedded law and therefore was brought before the Inter-American Commission on Human Rights (IACHR) (Rights 2010) however, to no recourse. Though the law has been cognisant of indigenous claims in concordance with Article 231 of its Constitution however, judgments like Guýraroká (Guýraroká Indigenous Land Case, 2014) structure this recognition within the framework of mainstream law.

The selection of these countries (Canada, Australia, India and Brazil) is not merely a choice augmenting research efficacy morphed methodology and limitations rather apposite selection. These countries ranging from developed to developing, have been both vocal for protecting the rights of the indigenous as well as actionable as can be witnessed through their policies and laws respectively. Thus, the choice of countries Philippines, Papua New Guinea, Mexico, Nigeria, Tanzania, Mali and the Island and atolls of Oceania, Micronesia, Melanesia and Polynesia hosting myriads of indigenous groups though rich in sample would not serve the purpose due to limited State involvement with their indigenous groups. Indeed, they are on the set path and the structuring is in order as witnessed through the regulatory provisions and laws being enacted however, the erosion of indigeneity is not as strident as the former group and this is the reason the paper does not include New Zealand owing to its comparatively distinct engagement with Māori legal traditions through the Treaty of Waitangi framework and evolving models of legal pluralism. The country though situated on a similar trajectory due to its experiences raises a separate set of jurisprudential questions that warrant independent examination. It is however, beyond the scope of this paper to reflect upon the rationale behind this sort of existing distinction. One can however contend that the presence of numerically more impediments in the form of large number of indigenous groups, economic dependency and the difference in the colonial approach, has resulted into slowing homogenization by obstructing the mainstreaming. This work therefore acts as the knell for

the stakeholders of international law to ensure that policies being developed in the countries where mainstreaming is yet to be structured is developed in concordance with heterogeneity. These countries are further referred under part 5 to understand how indigeneity is being homogenised by the mainstream through the structured efforts of the government, their laws, policies and instruments.

3. Role of International Law in Protecting Indigeneity

“...the subject of indigenous peoples has been ghettoized within the scholarly discourse of international law”. (Anaya 2004)

Discussing the international law issues qua indigenous people during the 1998 American Society of International Law Annual Proceedings, Prof. James Anaya identified three areas of significance, sovereignty, self-determination and role of non-state actors within international legal process for explaining the relation between international law and indigeneity. International law is indispensable for protecting against homogenization however, its jurisprudential fallacies hinder the actualization of heterogeneity. It is under the garb of sovereignty that the states claim protection against the omission of safeguard of indigenous rights. Further the jurisprudence involving subjects of international law, state succession, state responsibility safeguards the states against adjudication. This structural obstruction demands revision in order to guarantee actualization of the rights of the peoples in here the indigenous peoples. In the context of indigenous state centrism, unilateral law making, and reliance on western jurisprudence can be identified as primary areas needing focus. Though recognized as a right of the peoples to choose their state, self-determination has become modelled to mean the culmination of state formation highlighting the state centrism in international law. Realists may argue that the states remain and would remain the traditional subject of international law and therefore, this form of recognition guarantees representation; however, the recognition of international organizations and further multinational entities in the international trade regime and further in matters related to humanitarian law hint towards governmentality. State centric development of international law has not been a compulsion or jurisprudential limitation, rather a matter of choice for the stakeholders. The law making and further its compilation through the efforts of international law commission remains unilateral due to the dominance of western legal traditions and disregard of other legal traditions. Though traditional knowledge systems are praised, due to absence of similar institutional framework they remain romanticised

rather than being accepted as distinct legal traditions leading to disregard of their legal episteme.

There are two international law documents related to the rights of the indigenous peoples, The United Nations Declaration on the Rights of the Indigenous Peoples, 2007 and the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Though more elaborately than the latter, the former is non-binding making the positive international law reliant on the latter. While these documents enumerate the rights its ascertainment remains contentious under the general international law framework. The 2007 UN declaration enlists myriads of cultural, social, political and economic rights however, in absence of recognition of institutional independence their application remains doubtful. For example, the 1989 convention states in its preamble *“Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live...”*. This provision though recognizes the institutions it limits them within the State framework calling for integration thereby promoting assimilation which in turn would amount to homogenization. Furthermore 1989 convention hinders against wider application of general international law by virtue of Article 1 (3) barring the interpretation of peoples *as having any implications as regards the rights which may attach to the term under international law*. Again Article 2 connotes the government with the actualization of the rights of the indigenous peoples and thereby again limits it within the state framework. Though Article 4 ventures into guaranteeing special measures, the caveat of *general rights of citizenship* again limits its scope. Furthermore, the inclusive language of Articles 6, 7 and 8 is subjugated under the mainstream by the state centric provision of Article 9 which permits the recognition of customary practice of peoples *‘To the extent compatible with the national legal system and internationally recognised human rights’* thus making it adhere to the mainstream law. Thus, while Article 10 prefers methods of punishment other than imprisonment, the preference remains reserved to state sanctioned adjudicatory preferences by virtue of other articles calling for abiding by the national legislation. The succeeding parts on land, recruitment, social security and others too adhere to similar language enforcing state centrism and obligation to mainstream national legislation. One may justify this semantic reservation by arguing on behalf of the conventions temporal and political limitations. However, this unilateral approach continues in the later documents as evident from a reading of the non-binding 2007 convention. The language has oversimplified the identity of indigenous by calling for its integration rather than heterogenous existence.

The term indigenous under the international law has been discussed solely from the western perspective in adherence to western epistemology. TWAIL efforts are being made in this regard however they remain restricted within the academic domains. Its scholars call for semantic integration and expansion of the epistemology. Scholars such as S. James Anaya (Anaya 2004), B.S. Chimni, Antony Anghie, Taiaiake Alfred (Alfred 2005) , and Alexandra Xanthaki (Xanthaki 2007) are significant in this regard as their works have not only highlighted the existing fallacies but also contend for autonomous recognition of the indigenous within the international law jurisprudence. Anaya's work challenges the very normative structure of self-determination by highlighting its tethering to state's sovereignty rather than individual autonomy. Alexandra in her work discusses the limitations of international law documents by illustration the provisions and therefore calls for semantic and doctrinal recalibration beyond Western legal categories. Alfred's arguments too augment this call for semantic and doctrinal recalibration as it calls for epistemic shift in the international law jurisprudence. These works therefore establish that the jurisprudence ought to recognize the independence of indigenous knowledge systems and accept their exclusivity for ensuring actual protection rather than amassing the indigenous towards homogeneity.

3.1 Significance of International Law

International law like other laws cannot be bound by laws transcending from state practices of civilized nations. It needs to restructure its episteme such that it is inclusive and serves its purpose of checking on the conducts of the states. Though there remains no hierarchy in the municipal and international, international law has emerged as the platform for ensuring conducive development of municipal law. The human rights framework therefore should not be limited to the ascertained plebian of rights defined by the conventions agreed by the few rather should be inclusive and reflective of the aspirations of the peoples. Though international law cannot impose a ban on the legal practice of the states it can certainly regulate the abrogation of pre-emptory norms and mandate for *erga omnes* responsibility. This is not an adventurism call as highlighted by the vindication international environment law jurisprudence. The rights of the aboriginal can only be ascertained when the jurisprudence safeguarding them develops independently. International law provides the scope with *jus cogens* and mandate of *erga omnes* responsibility, as recognised under customary international law. Thus, the stakeholders need to exploit the same for ensuring the inherent right of the peoples and treating them as distinct individuals and groups rather

than mere state subjects. Therefore, international law needs to revisit its vocabulary and expand its epistemology to ensure inclusivity of myriads of legal traditions. The paper has been employing the term ‘indigenous’ as the broader international legal category encompassing peoples with historical continuity to pre-colonial societies, while “aboriginal” connotes its jurisdiction-specific sense, that is, municipal, particularly in countries such as Australia and Canada where it functions as a constitutional or statutory designation for certain indigenous communities. Therefore, the contention that the rights of indigenous peoples can only be ascertained when the jurisprudence safeguarding them develops independently.

4. Recognition of Indigenous Legal Traditions

Semantic revision can safeguard against “mainstreaming” of indigeneity and protect it from being engulfed by the mainstream. Furthermore, The concept of indigenous peoples remains contested, encompassing questions of historical continuity, self-identification, community affiliation, and colonial experience. These debates are relevant because the recognition of indigenous legal traditions is often contingent upon the State’s determination of indigenous identity. This is due to recognition being a double-edged sword offering visibility at the cost of assimilation. By *semantic revision*, this paper does not propose new institutional architecture but a doctrinal reorientation within existing international law. It calls for an ontological acknowledgement. It argues for interpretive recalibration of indigenous rights instruments through customary international law and *erga omnes* obligations, recognizing indigenous legal traditions as autonomous normative orders rather than derivative entitlements contingent upon state mediation. While no universally accepted definition of indigenous peoples exists, common markers include historical continuity, self-identification, distinct cultural institutions, and the preservation of normative traditions separate from the dominant society. (Gigoux 2016)

4.1 The Concept of Indigenous Peoples

The origin of the term indigenous can be traced to Thomas Brown’s *Pseudodoxia Epidemica* (1646) wherein he questioned the fallaciously established notions against presumed norms and customs through a scientific methodology. The significance of the work for the instant discussion lies in its identification of the term indigenous. While the book focuses on resolving the persistent fallacies, it sets the momentum for its semantics being described qua territory and people. Thus, instead of defining indigenous qua

their distinct culture and practice, we define indigeneity qua the state and its jurisdiction and legal system. This paper contends against this practise and calls for identification of indigeneity qua the law of the people rather than the law of the peoples and further calls for recognition of legal tradition of the indigenous people rather than legal system of the state. Such recognition must distinguish between cultural lore and legal normativity. While lore comprises the narratives, cosmologies, rituals and collective memories that sustain cultural identity, law refers to normative prescriptions that regulate conduct, allocate authority, prescribe obligations and provide mechanisms of dispute resolution within the community on a lexicographical ordering while being principally distanced. The legal description of these norms by the State constitutes a third category, wherein indigenous normative orders are translated into the vocabulary of legislation, adjudication and administration. It is this latter process of translation that often results in mainstreaming by reducing autonomous legal traditions to state-recognised cultural practices. While legal tradition recognizes the myriads of legal paradigms without a state structure, legal system needs the conformity of both state and its institutions and thus limit the scope of indigenous laws.

Legal tradition is not merely a form of curated law it is a continuous practice of transfer. Montesquieu, in *The Spirit of the Laws* (1748), insists that laws must be adapted to the *people, governmental forms, climate, religion, and customs* of a society to be just and effective (Montesquieu 1989). Developing of this comparative law authors have delved in understanding the distinctness of legal traditions and their relevance in law making. Glenn in his book 'Legal Traditions of the World' explains legal traditions by analysing their history, evolution and distinctness. (Glenn 2014) His reference highlights the distinction of civil law legal tradition, common law legal tradition, Islamic legal tradition, Hindu legal tradition, Talmudic legal tradition among others. The works of other comparative researchers including Derrett (Derrett 1968), Menski (Menski 2006), Siems (Siems 2018), M P Singh (Singh 2019) among others too shed light of the existence of legal traditions highlighting the presence of legal systems and institutions developed parallel to tradition. Glenn goes to the extent to distinct Chthonic from Aboriginal legal tradition emphasising on the distinctness of each legal tradition by recognising the exclusive approaches and process. However, the mainstreaming resultant of recognition sans hermeneutic analysis impedes this very process by non-recognition of legal knowledge system. This results in giving predominance to rule by law rather than rule of law. Rule of law ought not to be read *pari passo* to uniformity of law, rather it refers to uniform application of law. A law developed in oblivion to the legal tradition of the peoples would not only

be contrary to their rights but would also violate uniformity in application by imposing uniform law.

4.2 Towards Erasing Indigenous Identity?

This paper does not equate mere depletion or erasure of tribes as end of indigeneity, rather it argues on the lines of governance and structured actions that act as external aegis either setting in motion or propelling the process/es of erasure. A glance at the countries with diverse indigenous groups help explain this assertion. The statistics on depletion in tribal and aboriginal population is not an act of evolution or survival rather is resultant of the mainstreaming and homogenisation. Across the countries part or not of the United Nations, Indigenous populations exist in substantial numbers, ranging from small constitutional minorities as in India and Canada to constitutionally recognised and politically significant indigenous communities as in Brazil and Australia. However, their relative numerical decline or statistical invisibility as illustrated through the census data cannot be explained as a natural process of evolution or cultural exhaustion. Rather, it reflects structured governance practices such as subjective classifications, non-recognition of adjudicatory practices, lucrative mainstreaming through policies and development agendas leading to homogenization of Indigenous identities. While umbrella categories such as “Aboriginal,” “First Nations,” or “Scheduled Tribes” may enhance visibility and facilitate political mobilisation, they can simultaneously homogenise diverse communities by subsuming distinct legal traditions, governance structures, and identities within administratively manageable classifications or what Foucault refers as governmentality.

4.2.1 Australia

In Australia the government has been working with the ‘Territories Stolen Generations Redress Scheme’ to atone for the forced displacement and removal of indigenous population. This scheme shrouds the systematic acts of mainstreaming conducted in the name of children welfare resulting in stolen generations survivors. The policy highlights the structured action of the State both colonial and post-colonial in propelling homogenization through laws of protection, assimilation and later integration providing distinct recognition to the indigenous at the cost of heterogeneity. These policies therefore functioned as structured instruments of governance that dismantled Indigenous kinship systems and legal-social orders in the name of welfare, thereby propelling homogenization rather than safeguarding indigeneity.

4.2.2. Canada

The skirmishes between the indigenous and the non-indigenous are rampant in Canada as highlighted through the plenty of cases discussed above. The first impediment towards actualization of indigeneity comes from state recognition tethering indigeneity solely to state sanction. This amounts management of indigeneity through state sanction rather than recognition of cultural identity and acceptance of legal tradition. Its Constitution recognizes three distinct groups of what it terms as Aboriginal peoples, '*Indians (referred to as First Nations), Métis and Inuit*' by virtue of its Article 35. This selection is in tandem with governmentality as it leaves the non-status Indians (Daniels v. Canada (Indian Affairs and Northern Development) 2016), Metis not satisfying the Powley test (this test laid down by the Supreme Court in R v Powley (R. v. Powley 2003) sets out the criteria for recognizing Métis rights under s 35 of the *Constitution Act, 1982*. It requires claimants to demonstrate (i) the existence of a historic Métis community prior to effective European control, (ii) a contemporary Métis community with continuity to that historic community, and (iii) ancestral connection and community acceptance; thereby situating Métis rights within a state-curated evidentiary framework), and the increasing urban indigenous groups outside its purview. Furthermore, the existence of stratification in recognition induces compelled mainstreaming rather than adhering to heterogeneity.

4.2.3 India

India acts as a saturated example for understanding the harms involved in mainstreaming of the indigenous. The constitutional provisions provide categorical recognition to the indigenous communities by garnering the status of 'scheduled castes (SC)' and 'scheduled tribes (ST)'. These recognized SCs and STs are guaranteed various rights such as promotion of educational and economic interests through article 46, reservation of seats in house of people and legislative assemblies of state through articles 330 and 332 respectively, claims to public services and posts vide article 335, constitution also provides for constitution of national commission for ensuring rights efficiently vide Article 338A and affirmative action through reservation qua articles 15 and 16 of part III. However, these articles rely on the threshold of Article 341 and 342 which grants definition power exclusively to state rather than keeping it synchronous to the aspirations of the scheduled castes and tribes. The government therefore notifies and de-notifies the tribes depending on depending on criteria historically used by the state such as 'primitive traits,' geographical isolation, distinctive culture, 'shyness of contact,' and economic backwardness criteria (India 1965) that are themselves products

of colonial anthropology and administrative convenience. Furthermore, the Lokur Committee Report which prescribes these criteria recognize the challenge of '*tribes in transition*' even though they do not work towards its resolution. Moreover, article 339 along with the fifth schedule makes the right of scheduled castes and tribes incumbent on government recognition. The guaranteed affirmative action and all the provisions do not cater to the objective of ascertainment of indigenous rights, rather it aims for the SC and ST assimilation within the mainframe such that they are brought at parity with the other general category. The governance efforts therefore cater to mainstreaming rather than accepting the indigeneity independently. This is leading to homogenization which augments governmentality, however, it works against governance as it leads to marginalization of groups by compelling them to develop with the proposed parameters or if not scheduled then oblige by the tenets proposed by the government policies. India adheres to rule of law and furthermore recognizes equal protection of law through as sanctioned by article 14 and remotely by article 13. Moreover articles 51(51) (c) *foster respect for international law and treaty obligations in the dealings of organised peoples with one another*) and 253 (*Legislation for giving effect to international agreements. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body*) call for recognition of international law. Therefore, it becomes imperative upon the law makers to look beyond the reserved semantics and evolve the constitutional episteme through recognition of diverse knowledge systems rather than sieving through the administrative net for achieving administrative efficacy akin to governmentality.

4.2.4 Brazil

The significance of local groups in Brazil is not solely a cabal or syndicate but transcends from the pervasive structures of indigeneity. The legal recognition for indigenous people in Brazil is sanctioned by the both national law (Federal Constitution) and international instruments (United Nations Declaration on the Rights of Indigenous Peoples (2007), and the American Declaration on the Rights of Indigenous Peoples (2016) and the International Labor Organization Convention 169). However, instead of guaranteeing heterogeneity, these laws have propelled homogeneity with an unprecedented pace. Article 231 of the Federal Constitution, while affirming Indigenous rights to traditionally occupied lands, conditions their actualization upon demarcation, registration, and continuous occupation, thereby subordinating

lived legal traditions to bureaucratic validation. Judicial doctrines such as the *Marco Temporal* further entrench this homogenizing impulse by requiring proof of Indigenous presence as of a fixed constitutional moment, compressing diverse historical trajectories into a uniform legal test. A more apposite approach therefore, would be to assess the indigenous claims through historical continuity, customary territorial association, and evidence of displacement, rather than reducing diverse indigenous experiences to a fixed temporal threshold. This would enable recognition to remain responsive to heterogeneity by accommodating distinct historical trajectories and legal traditions instead of subjecting them to a singular juridical test. However, at this stage it becomes imperative to state that this paper does not contend for the abandonment of territorial criteria altogether, rather reckons for a gradual recalibration recognizing transfer and continuity within the indigenous legal traditions against a single temporal threshold. Legislative instruments such as Law No 6,001/1973 (the Indian Statute) conceptualize Indigenous peoples as communities “*in the process of integration*,” embedding assimilation as an explicit legal objective rather than an incidental outcome. Judicially, the Supreme Federal Tribunal’s reasoning in cases such as Petition 3,388/RR (Raposa Serra do Sol) introduced restrictive conditions including territorial fixity, exclusive usufruct, and limits on mobility that standardize indigenous land relations in accordance with constitutional property logics. Subsequent decisions, including RE 219.983 (Guayraroká), have further constrained Indigenous claims by subordinating historical displacement and forced removals to evidentiary thresholds intelligible to the State. This leads to structured mainstreaming rather than catering to indigeneity by recognizing it in both substance and procedure.

Conclusion

All this makes international law liable for revision such that it can address these persisting normative fallacies propelling homogenization. Unless international law interrogates its own epistemic foundations, recognition will continue to function as a technology of governance rather than a safeguard of heterogeneity. Therefore, it is incumbent on international law to identify the contours of indigeneity rather than becoming complacent to governmentality. The examples from the countries illustrative how the existing laws have been propelling and therefore catering to homogeneity amounting to marginalization of indigeneity. The examples from Australia, Canada, Brazil and India helps one understand the role of government statutes garnering recognition in structurally erasing heterogeneity. While

it is incumbent on international law to ensure the protection of peoples, in absence of a holistic framework and epistemic limitations it is incompatible to actualize its objective. To holster this objective international law needs to enlarge its paraphernalia such that it can amass the aspirations of the peoples by catering to their knowledge systems. Thus, international law needs to act as the sheath on the double-edged sword of recognition such that the indigeneity of the indigenous is not severed at the cost of visibility.

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